

Prosecuting International Crimes Series: Investigation Policy and Principles of Cooperation and Collaboration

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Prosecuting international crimes: expert meeting on the collaboration between national prosecuting authorities and non-governmental organizations

This article follows the first one concerning definitions of legal concepts and frameworks regarding the investigation of international crimes. As it is a joint publication, the same version can be found in French and Spanish on Quid Justitiae.

Part II: Investigation policy and principles of cooperation and collaboration

The principle of ‘do no harm’

In any gathering information process, special attention should be given to the safety, dignity and wellbeing of the victims and witnesses but also to any CSA staff members[1]. The principle of “do no harm” is the most important one when collecting information or evidence. It applies to any person involved in the investigation of international crimes including victims, witnesses, intermediaries, local communities, unofficial investigators and colleagues[2]. While being safe and keeping others safe, it also aims to preserve any information encountered. Therefore, preparing for documentation in practice means including the principle of “do no harm” at all levels. It has to be respected and taken into

consideration in order to prevent and minimize any unintended negative effects that could arise while collecting and documenting information[3].

It involves mitigating harm regarding threats, risks and vulnerabilities by assessing the risks and putting in place measures to counter them, coordinating efforts as much as possible with other groups; respecting confidentiality and understanding its limitations; and referring victims and witnesses to the appropriate services[4]. Setting up safety and security measures is also part of the considerations that are linked to the “do no harm” principle and should underpin any decision or action taken by practitioners throughout the documentation process (such as planning activities, approaching victims and witnesses, recording, transporting, storing information or referrals)[5].

The implementation of a code of conduct principles is particularly essential when working with victims and witnesses of conflict and atrocity-related sexual violence. It implies working according to a victim-centred approach, not exhibiting judgemental behaviour, never blaming a victim, treating all victims with dignity and respect and especially always prioritising the safety of the victims and witnesses over the evidence[6]. When investigating egregious violations against children in situations of armed conflict, the chief guiding principle is the best interest of the child in the implementation of monitoring and reporting mechanisms and in all other aspects, as well as response and prevention activities. The key principles of non-discrimination, accuracy, objectivity and neutrality and ethical considerations regarding the principles of “do no harm” must be applied. However, in addition, humanity, sensitivity to local customs and culture while paying attention to safety and security, and gender considerations need to be taken into account. Also, any participation of children in the investigation process should be meaningful, both as victims and as agents of protection themselves[7].

Impartiality, neutrality and independence

Any CSA involved in a physical operation of investigation within a State must bear in mind the necessity for independence, impartiality and neutrality since they cannot be seen to provide support to any side in a conflict or post-conflict justice context[8]. Demonstrating impartiality during the documentation process means also managing expectations regarding the use of the information collected in court or the possibility of future reparations[9].

Courts and prosecutors must also operate impartially and independently. Therefore, the national judicial system must not be subject to political bias or control such as charges being brought against State officials or high-level political figures; and the judiciary must not reflect external influence or political, ethical or religious bias[10].

An informed consent and respect for confidentiality

An informed consent from all victims and witnesses is required before taking actions involving them including interviews, external examinations, taking of photographs, recording their information, referring them to any appropriate support services or sharing information and contact details with third parties[11]. Any request from prosecutors to provide them with witness statements and any information

that could identify the victims can be problematic. Indeed, revealing sources can have consequences in terms of resource, operational and security implications for CSAs actors, both local and international [12]. The principle of confidentiality implies also the requirement to protect any information gathered in order to build trusting relationships with witnesses and victims while explaining to them the limits of this principle. Therefore, for any documentation process, everyone involved should understand and apply the agreed confidentiality measures initially established[13].

Assessing threats, risks or vulnerabilities and providing appropriate support

Assessing risks, threats and vulnerabilities should be one of the major concerns during investigation planning and during later phases of any investigation[14], moreover when information gathering is related to conflict-related sexual and gender-based violence either against men and boys or women and girls[15]. Any investigation plan should build in real and potential security threats to investigators, to other members of the investigation team, to victims and witnesses as well as to alleged perpetrators, including their immediate family and community[16]. It is extremely important to recognize and prevent the risk of re-traumatization that implies to be familiar with the signs of trauma and to use a careful approach while interviewing victims and witnesses[17]. Therefore, any documentation process should assess risks and vulnerabilities of victims and witnesses in order to provide appropriate support and assistance by identifying the services needed, such as health, psychological, legal and economic assistance[18].

Taking safety and security measures

Effective cooperation includes appropriate safety and security measures for staff members of CSAs during an investigation where there is no local or political support for the prosecution[19]. Investigations can also lead to major security risks for vulnerable victims and witnesses, their families and associates. These risks should be taken into account by CSAs as a decisive factor before investigators get in contact with victims, especially if they are unable to provide the levels of protection that the circumstances require, depending on the availability of protection that is offered by external agencies such as the United Nations[20].

NGOs cooperation with prosecutors and other relevant national authorities can endanger staff members since human rights advocates or defenders could be seen as a threat or danger at a local level because of their assumed involvement in investigation of international crimes. Due to the particular sensitivity of the area, it is essential to provide protection and/or training on best security practices to first-responders who may need assistance or provide them with protection mechanisms before they engage in any information collection. However, it is necessary to establish a comprehensive security plan in a situation country with specific security protocols according to the local context and potential dangers[21].

Capacity building

It is crucial to invest in developing guidelines for evidence collection, for information sharing and for security consultancy[22]. First-responders may not be trained in evidentiary requirements, so they need basic information about admissibility and probative value such as information about the chain of custody, categories of evidence or technical tips in evidence collection[23]. Consequently, NPAs need to share information with NGOs involved in evidence gathering in the field, while developing channels of constant communication during the process of documentation. Furthermore, first-responders should understand the legal, ethical and security ramifications of sharing and submitting information to courts and prosecutors. They have to make informed decisions when engaging in this process since there might be no possibility of adjustments when gathering evidence afterwards. A suggested solution would be to create or designate an intermediate entity playing the role of an "anonymizer" in the process of submitting information demonstrating flexibility in contexts of potential dangers affiliated with the risk of disclosure but also educate first responders about potential ramifications of information sharing[24].

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References

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3. *Handbook on Civil Society Documentation*, pp. 21-23.
4. Ibid., pp. 92-103.
5. Ibid., p. 105.
6. Ibid.
7. *Field Manual – MRM on grave violation against children in armed conflict*, pp. 12-13; *Guidelines – MRM on grave violations against children in situations of armed conflict*, p. 9: Accuracy, reliability and timeliness of information can be insured by establishing a system of analysis and verification.
8. *Cooperation between CSAs and judicial mechanisms in the prosecution of CRSV,* p. 10; *International Protocol on the documentation of sexual violence in conflict*, p. 138; *Guidelines – MRM on grave violations against children in situations of armed conflict*, p. 5.
9. *Handbook on Civil Society Documentation*, p. 36.
10. *Cooperation between CSAs and judicial mechanisms in the prosecution of CRSV*, p. 13.

11. *Handbook on Civil Society* Documentation, p. 24: A proper and informed consent implies an explicit confirmation from the person providing information about serious human rights violations about: “the purpose and content of the data collection exercise; the meaning of confidentiality and how it applies, or not, to the information they provide; the procedures that will be followed – including that the information may need to be disclosed in the future and for what reasons; the risks and benefits of participating; and the identity of the unofficial investigator and the groups s/he represents, as well the means of contacting the investigator at a later stage”; s. also *International Protocol on the documentation of sexual violence in conflict*, 2014, p. 45.
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