

Prosecuting International Crimes Series: Documenting Information

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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 and the second one related to investigation policy and principles of cooperation and collaboration. As it is a joint publication, the same version can be found in French and Spanish on Quid Justitiae.

Part III: Documenting information

When documenting information, it is necessary to define an investigation plan and to build a strong and multi-disciplinary investigation team (A), in order to gather information and evidence (B), before getting to the analysis stage (C).

A. Developing an investigation plan

When developing an investigation plan, first, preliminary research needs to be done in order to draw up a written investigation plan containing general considerations prioritising those crimes in the information gathering before commencing in-depth research and analysis[1]. As well, at this initial

juncture risks should be assessed over a broad spectrum, with victims and witnesses, with unofficial investigators or in respect to the security of the information[2]. Afterwards, on the basis of the risk assessment, adequate security measures should be planned and prepared in order to minimize the risks initially identified[3]. It is also essential to determine the trustworthiness of other actors such as local authorities and police personnel or other actors working in the same area, but also of the team members including interpreters and intermediaries, as well as victims and witnesses[4]. Given the importance of the information gathering, building trust is extremely important to a successful cooperation.

Another major concern is the training and accountability of team members who should have, wherever possible, an appropriate level of skills and training in gathering information and of the elements of international crimes[5]. When working with children, unofficial investigators should have specific training related to their vulnerabilities and capabilities, age-appropriate techniques, and interaction with traumatized minors[6].

With respect to interpreters, it is necessary to keep in mind that a successful documentation process depends heavily on the interpreters' ability to facilitate communication, while guidelines for interpretation should be followed during interviews[7]. They should be psychologically prepared for what they may be confronted with, have a cultural sensitivity and knowledge of local culture and communities[8].

The composition of the team is particularly important when documenting sexual and gender-based violence crimes since a well-composed team can help victims and witnesses to feel more secure[9]. They will be more likely to open up and discuss their experiences with persons of the same gender, age or nationality, especially when investigating conflict-related sexual and gender-based violence against men and boys. This should be taken into account during the composition of the investigation team that should reflect diversity by including investigators, analysts, prosecutors, interpreters, translators, and senior managers[10]. Also, criteria need to be taken into account such as background, gender, age, nationality, ethnicity, religion, language or skills[11]. It is necessary to use interpreters as they often play a key role in information gathering by being part of the practitioner's team; therefore, they need to be appropriately trained not only in interpretation but also in working with survivors/victims/witnesses of sexual violence, and where relevant, with children[12]. When gathering information, it is necessary to identify victims and witnesses, which implies reaching out through intermediaries. They play a central role in information gathering since they could help practitioners to identify and liaise with members of a community, overcome cultural and social barriers, identify and make contact with potential victims and other witnesses[13]. Even though they can be very effective community interlocutors, care should be given to ensure their impartiality[14].

Finally, it is important to plan and prepare in detail since logistics of documentation must be assured in order to not miss opportunities and compromise the information and evidence collection. Several steps should be taken related to logistics of documentation such as knowing the area, mapping landmarks, being self-sufficient, carrying basic equipment, determining the methods of communication with other

team members, how sources will be protected and ensuring appropriate funding for the information-gathering exercise[15]. Egregious violations investigation policies should expressly prioritise conflict-related sexual and gender-based violence against men and boys and other sexual and gender identities, otherwise there is a risk of them being missed, ignored or not given enough attention[16].

B. Information and evidence collection

A major component in collecting information and evidence about international crimes is to provide assistance when this kind of information may be encountered without the immediately available presence of a professional investigative authority so that there is a danger that the information or evidence might be damaged or lost. In these kinds of situations, first-responders should follow specific protocols during the documentation process in order to preserve the information or evidence found and to enhance their probative value[17]. Other principles, performance-based and practical responsibilities may include rules on how to manage funds, staff, and resources; principles on information sharing; good governance and internal complaints mechanisms[18].

According to the case law of national and international courts and tribunals, victims and witnesses statements are the privileged evidence in cases of sexual violence[19]. This is why it is particularly important to define standards in conducting interviews with victims and witnesses, the priority always being the principle of “do no harm” and the principle of avoiding re-traumatisation. For instance, there are specific interview strategies and techniques related to sexual violence in conflict[20]and to conflict-related sexual and gender-based violence against men and boys[21]. Documenting information from victims and witnesses needs to follow these specific guidelines on how to conduct such an interview and what kind of questions should be asked[22].

Documenting information on psychological injury is a sensitive area and has to be handled carefully. The Istanbul Protocol provides guidelines on common elements that need to be taken into account when making observations on the psychological status of the victim during the interview[23].

While documenting sexual and gender-based violence, the purpose is to minimize harm to victims, witnesses and any individual affected by the investigation while maximizing the probative and potential evidentiary value of the information[24]. It is particularly difficult to gather information about such crimes as they are often underreported, as little evidence is available and as collecting information depends heavily on accounts of victims and witnesses. CSAs such as health service providers, social workers and humanitarian or human rights workers play an important role in the collection of information as first-responders operating during the ordinary course of their activities in the field or on specific missions, even though the documentation process should be lead by trained experts on these matters whenever it is possible[25].

Due to the extreme vulnerability of minors, the principle of “do no harm” should guide all aspects of the process of gathering information. Any interview or interaction should be kept at a minimum because of the high risk of re-traumatization and causing mental distress. Interviewing young children and minors

that have been victims of sexual and gender-based violence should generally be avoided. As a result, other ways to document such cases should be pursued or the focus should be in finding someone specifically trained in dealing with such victims. When documenting evidence from a minor, the parents, a guardian or a person of trust must be present at any time during the process. When older minors express concerns or are presenting lesser traumas, unofficial investigators may interact with such minors if it is necessary and within the established principles of carrying out an investigation, while always keeping in mind the principle of the best interest of the child[26].

Documentary information can pertain to several categories of information and evidence[27]. It includes hard copy documentation, which could take various forms such as state or corporate documents, letters written by governments, minutes of corporate or state officials' meetings, financial records, medical reports, maps, printed images, logbooks or diaries[28]. Digital information is also part of documentary evidence and embodies different forms such as metadata, audio and video recorded testimony, digital photography, video documentation, email and networked communication, text messages or SMS communication; and posts on social media or news broadcasting platforms[29]. Production of photographic and video images have to follow specific indications in order to guarantee their probative value[30]. There are also specific guidelines on documenting and recording a crime scene[31].

More specifically, open source information raises the concern of reliability. Open source information can be defined as publicly available information, whether digital or analog, available online or on other materials, without the need to seek a warrant or employ other coercive or illegal measures, notably through social media such as Facebook, Twitter or YouTube[32]. Therefore, in creating standards, reliability should be the base consideration while keeping in mind that this particular matter should be assessed within the context or regarding other evidence and information available, whilst taking account of several factors affecting reliability including provenance, purpose, context and internal/external marks of reliability[33]. In addition to the investigation policy and general principles related above[34], specific principles should be considered about open source information such as preservation of information, verification and authentication procedures, transparency of methods in information gathering, respect for legality in the relevant jurisdiction, or consideration of objectivity and the equality of arms by including both incriminating and exonerating materials[35].

Medical examinations of victims and any other forensic investigations require appropriate infrastructures as well as professionals with relevant expertise and should be conducted only with the consent of victims while taking into account any confidentiality and security concerns[36]. With respect to forensic information[37], documenting physical injury is a delicate matter for unofficial investigators. Preferably, a medical doctor should do this but a confidentiality relationship exists between a doctor and a patient so the information cannot be shared. It can also be done by a forensic examiner for the purpose of evidence and information collection that could be used for further investigations or in court proceedings. Therefore, in the absence of an official doctor or forensic examiner or investigator to lead a medical examination, unofficial investigators should only make observations about visible injuries by

only looking at the survivor[38].

When possible, only professionally trained experts should handle forensic information, as they will have the required equipment and expertise. Evidence and information related to physical injury needs to be properly collected, handled, packaged, labeled and placed in safe-keeping to prevent contamination, tampering or loss of information since such samples or objects are particularly delicate (for instance, bodily fluids such as blood or semen, hair, fibers, etc.). Therefore, unofficial investigators should only take an inventory of the clothing of the victim that may be a source of significant information for investigators. Clothing should be removed item by item and folded minimally, then placed into a plastic or paper bag to prevent any contamination from the environment around[39].

More particularly, in regards to the gathering of forensic information of sexual and gender-based violence, it is important to provide appropriate care to victims after an informed consent and in accordance with the “do no harm” principle. Given the physical and psychologically vulnerable state of victims of those crimes and the important risk of trauma and of re-traumatization in the investigation process, any first-responder should immediately refer them to medical and psychosocial professionals. Therefore, the collection of physical and forensic information of sexual and gender-based violence crimes should be left to professional medical personnel while the unofficial investigators should only stick to taking photographs of the crime scene or other objects with the victim’s informed consent and refrain from collecting samples of organic forensic material[40].

C. Analysing evidence and information

Analysing evidence and information is important while building a case. On a technical level, practitioners such as unofficial investigators documenting international crimes should demonstrate basic evidence analysis skills and knowledge of organizing, evaluating and strengthening the information collected. More specifically, and especially with respect to sexual violence, analysing evidence and information involves going through a checklist with multiple stages. First of all, it is necessary to evaluate the information collected for credibility and validity. Credibility refers to the source of the information and its trustworthiness whereas validity refers to the information being accurate and reflecting the truth. When documenting testimony in general but especially sexual violence, unofficial investigators will be the ones primarily engaged in evaluating the testimonial information, while determining the reliability of other types of information may need more expert forensic skills. Once the evaluation process is done, any kind of information, either testimonial, physical, documentary or digital could potentially be classified according to an evidence analysis grid identifying the information as: undefined, average, important, unreliable, corroborating. Whenever possible, evidence collected could also be identified as inculpatory or exculpatory and supportive of, or contradicting, other information collected[41].

Next, any piece of information should be analysed according to the elements of crimes in question. Practitioners gathering information about international crimes must keep in mind that to establish a crime or violation under international human rights law, international humanitarian law or international

criminal law, every element of the crime or violation must be satisfied. This implies an examination of the global context, situations and events before identifying unlawful acts potentially falling within them and which ones could be proven, if necessary[42]. As such, a rudimentary knowledge of such elements of such crimes or violations is necessary. It is essential to establish the elements of underlying crimes. For instance, if the main potential objective is to establish sexual violence as a crime against humanity, the elements of both rape and crimes against humanity need to be proven. These legal elements must be supported with different types of evidence, testimonial, documentary, physical or digital, to see if the information collected can be used as means of proof.

After evaluating the information and establishing the elements of the crimes, it is necessary to strengthen the initial information collected by gathering additional information such as finding corroborating evidence and collecting contextual information to provide explanations and background elements. Then patterns can be established with the help of triggered questions, searchable databases, statistical analysis and crime mapping[43]. Searching for typologies is helpful in determining if the crimes or violations were isolated incidents or whether they share similarities related to the profile of the victims, the profile of the perpetrators, the methods by which the crimes were committed, geographical areas and time periods in which they were committed[44].

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References

1. Ibid., pp. 6-9; s. al. p. 15.
2. *Handbook on Civil Society Documentation*, pp. 37-43.
3. Ibid., pp. 43-45.
4. Ibid., pp. 45-48.
5. Ibid., pp. 48-49.
6. Ibid., p. 49; s. also *International Protocol on the documentation of sexual violence in conflict*, pp. 29-30.
7. *Handbook on Civil Society Documentation*, pp. 52-53.
8. Ibid., pp. 49-51; s. also *International Protocol on the documentation of sexual violence in conflict,* pp. 38-39.
9. Ibid., pp. 111-112.

10. Ibid., pp. 49-55: specific guidelines regarding interpreters and intermediaries; *Guidelines – MRM on grave violations against children in armed conflict*, pp. 10-15: the monitoring and reporting mechanism on crimes against children in armed conflicts presents some specificity regarding the actors responsible for implementing it. At the country level, the actors are the Special Representatives of the Secretary general-in-country and Resident coordinators; the country task force for monitoring and reporting co-chairs; UNICEF, peacekeeping and political missions and other UN entities; international and local NGOs, national governments that are central to the MRM at all levels, the donor community providing adequate resources. At the global levels, multiple stakeholders are involved such as the UN Secretary general; Special representative of the Secretary-general on Children and armed conflict; UNICEF; DPKO and DPA, UN agencies; International non-government organisations; Security Council; Group of Friends of Children and armed conflict.

11. *Guidelines CRSGBV against men and boys*, p. 5 and pp. 10-11; *Handbook on Civil society documentation*, p. 48: training and accountability of team members requires an appropriate level of skills to document violations according to the basic standards detailed by the Handbook (unofficial investigators, interviewers, interpreters, analysts, support staff, etc.); pp. 49-55: specific guidelines regarding interpreters and intermediaries; p. 55-59 – Logistics of documentation: ensure necessary equipment and expertise since it is important to be prepared when arriving at a crime scene to gather information.

12. *International Protocol on the documentation of sexual violence in conflict*, pp. 134-135.

13. Ibid., p. 131; pp. 133-134: on some risks in using intermediaries and why a checklist needs to be respected before engaging with them.

14. *Handbook on Civil Society* Documentation, pp. 53-55.

15. *Handbook on Civil Society Documentation*, pp. 56-59.

16. *Investigating CRSGBV against men and boys*, p. 5; s. p. 4 for the definition of the investigation policies at micro and macro levels.

17. *Field Guide for Civil Society Documentation*, pt. 2.

18. *International Protocol on the documentation of sexual violence in conflict*, p. 138.

19. *Means of proof of SGBV crimes*, pp. 23-38: means of proof of rape; pp. 40-56 : means of proof of sexual slavery ; pp. 58-66 : means of proof of enforced prostitution ; pp. 70-78 : means of proof of forced pregnancy ; pp. 80- 86 : means of proof of enforced sterilisation ; pp. 88-96 : means of proof of other forms of sexual violence of comparable gravity ; pp. 98-104 : means of proof of genocide by imposing measures intended to prevent births within a group.

20. *International Protocol on the documentation of sexual violence in conflict*, pp. 161-186.

21. *Investigating CRSGBV against men and boys,* pp. 12-14*.*

22. *Handbook on Civil Society Documentation*, pp. 96-108: *Field guide for Civil Society Documentation*, pt. 6: testimonial information.

23. Ibid., pp. 108-110; United Nations Office of the High Commissioner for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*(hereinafter, Istanbul Protocol), HR/P/PT/8/Rev.1 (2004), §§ 240, 275, 291.
24. *Handbook on Civil Society Documentation*, p. 111.
25. Ibid., pp. 110-115; s. also *International Protocol on the documentation of sexual violence in conflict*, p. 109: on how to conduct an interview with victims of SGBV.
26. *Handbook on Civil Society Documentation*, pp. 115-116.
27. *International Protocol on the Documentation of sexual violence in conflict*, p. 65.
28. *Handbook on Civil Society Documentation,* p. 60; p. 61 explains how the information can be used against perpetrators and how to enhance its probative value; p. 62 details the elements considered by judges while examining a piece of documentary information: origin, content, corroboration, truthfulness, voluntariness and reliability; s. also *Field guide for Civil Society Documentation*, pt. 4: documentary information.
29. *Handbook on Civil Society Documentation*, pp. 69-75.
30. Ibid., pp. 75-79; *Field guide for Civil Society Documentation*, pt. 16: photographic or moving images.
31. Ibid., pp. 79-84; *Field guide for Civil Society Documentation*, pt. 14: security measures related to a crime scene.
32. *Using Open Source Information*, p. 7; s. also pp. 7-8 for more details and definitions.
33. Ibid., p. 5.
34. As detailed above, pp. 7-11.
35. *Using Open Source Information*, pp. 8-12 for details and other principles applying to open source information; s. p. 13 for specific recommendations.
36. *Investigating CRSGBV against men and boys,* p. 14.
37. Ibid., p. 84; s. al. *Field guide for Civil Society Documentation*, pt. 5: physical and forensic information.
38. Ibid., pp. 85-86; p. 86 on which kind of external physical injuries can be noted and what actions an unofficial investigator may take.
39. Ibid., pp. 87-88; *Field guide for Civil Society Documentation*, pt. 17: on documenting physical injury.
40. *Handbook on Civil Society Documentation*, p. 88; pp. 89-92 on how to collect information and evidence from human bodies; pp. 92-96 on how to collect and preserve information on artefacts, meaning any human made objects relevant for the information gathering, such as weapons, firearms, clothing, etc.
41. Ibid., p. 215.
42. *International Protocol on the documentation of sexual violence in conflict*, p. 213.

43. Ibid., p. 224.
44. Ibid.