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# **The Role of Human Rights NGOs in Relation to ICC Investigations**

## **Discussion Paper**

Distributed for comments to members of the NGO Coalition for the International Criminal Court during the Third Session of the ICC Assembly of States Parties

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## **About Us**

For the past quarter century, Human Rights First (the new name of Lawyers Committee for Human Rights) has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and make sure human rights laws and principles are enforced in the United States and abroad.

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## Summary

Human rights non-governmental organizations (NGOs) are often among the first to reach the scene of massive violations of human rights and humanitarian law. Traditionally, human rights NGOs documented violations, drew attention to them, and by doing so, helped to bring a halt to ongoing violations. But human rights NGOs are having to rethink their practices in light of the establishment of the International Criminal Court (ICC) and the prospect that the violations they are documenting could become the subject of a criminal prosecution before an international tribunal.

Human rights NGOs potentially have a vital role to play in relation to ICC investigations. They often have direct knowledge of violations and contacts with victim and witness communities. NGOs also may be able to document violations shortly after they occur and to compile information regarding patterns of violations. Indeed, NGOs may be the main sources of information drawing the attention of the ICC Prosecutor to situations where crimes have been committed.

There are significant limitations, however, that human rights NGOs face. Most NGOs do not employ trained criminal investigators. There may be differences in the mandates and policies of NGOs and the ICC. NGOs also may have particular concerns regarding the protection of confidential relationships or sources.

Human rights NGOs also need to be aware that their actions could actually harm an ICC investigation. By gathering multiple statements from a witness, NGOs may create difficulties for that witness when testifying in ICC proceedings. In addition, untrained collection of physical or forensic evidence could limit its value before the Court.

In light of these circumstances, human rights NGOs face numerous questions regarding their role in relation to ICC investigations. A fundamental issue for many human rights NGOs will be whether to hand information to the ICC or testify before the Court to what they have observed. However, even if NGOs do not accept such a role, they also will need to address some of the same questions. What changes might need to be made in NGO fact-gathering methodologies? What are the implications of a potential ICC investigation for the ways in which NGOs interact with witnesses, particularly as regards taking statements? What considerations now arise in relation to physical evidence? What might NGOs need to do to ensure the protection of witnesses? To what extent will NGOs be able to preserve confidentiality?

This discussion paper does not aim to resolve all of these questions; rather, it is intended to stimulate further discussion about these issues within the human rights community and between human rights NGOs and the ICC, particularly the Prosecutor and his office. While the paper discusses the role of human rights NGOs specifically, it also raises issues of relevance to other

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NGOs, including humanitarian and development organizations, as well as international agencies including the United Nations, and invites them to participate in this debate.

## NGOs in the aftermath of atrocities

The establishment of the ICC means that crimes committed after July 1, 2002 that fall under the Rome Statute of the International Criminal Court's ("Rome Statute") definitions of war crimes, crimes against humanity, and genocide could become the subject of ICC investigations. The ICC Office of the Prosecutor (OTP) is responsible for "receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court."<sup>1</sup> The Defence will carry out its own investigations once specific accused persons have been identified. But when OTP and Defence investigators begin the task of investigating a situation in which crimes under the Rome Statute may have been committed, very often others will already have been on the scene.

First on the scene may be international agencies such as the U.N. and humanitarian agencies. While their primary mandate may be to restore or maintain stability or to provide humanitarian relief, they will often be in possession of information that later proves crucial to a criminal case, and in some contexts such agencies have themselves been charged with investigating violations. For instance, MONUC, the U.N. mission in the Democratic Republic of the Congo (DRC), has been charged with documenting the massive violations of human rights in the eastern part of the DRC.<sup>2</sup> Local NGOs may also be on the scene first, for instance providing assistance to arriving refugees. In the course of providing such assistance, both U.N. agencies and NGOs may be told a lot of information by victims and witnesses.

Frequently, local and international human rights NGOs will also arrive quickly with the aim of establishing what happened and documenting the violations. Some NGOs will be on the ground already, doing other work. Others will come in specifically to investigate and document the atrocities. Human rights NGOs are likely to broadly share the goals of the ICC to combat impunity for gross violations of human rights and international humanitarian law. The human rights movement that has grown up in recent decades in almost every country of the world has developed methodologies and practices for monitoring and documenting human rights violations. Often they work in difficult and dangerous circumstances in order to collect and disseminate information with the aim of putting an end to abuses by focusing the world's attention on them. Commonly they call for accountability of perpetrators as one way of addressing the violations. In any given situation that comes before the ICC, there may be NGOs that have set out to document

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<sup>1</sup> Article 42.1 of the Rome Statute.

<sup>2</sup> The Security Council mandate of MONUC includes a human rights component, and MONUC teams have on several occasions investigated allegations of specific violations; for instance, in December 2002 a MONUC team was sent to investigate allegations that grave violations had occurred in Mambasa and the surrounding area. The team interviewed over 350 eyewitnesses. See Thirteenth report of the Secretary-General on MONUC (S/2003/211), February 21, 2003.

the situation either as a normal part of their fact-finding activities, or specifically with the objective of submitting information to the ICC.

## The positive role NGOs can play in relation to ICC investigations

NGOs are capable of providing valuable assistance to the ICC Prosecutor. They often have on-the-ground knowledge and direct contact with victims, and may have established relations of trust with victim communities and other civil society groups, including religious groups, unions and other institutions. Human rights NGOs may also be in a good position to provide a broad picture of the context in which violations take place and present a pattern of the events.

NGOs may have been able to document violations soon after their occurrence, perhaps before people scatter or evidence is lost. Indeed, NGOs are one of the main sources that draw the attention of the ICC Office of the Prosecutor (OTP) to situations where crimes under the Rome Statute may have been committed in the first place.<sup>3</sup> Already, NGOs around the world are asking how they file information with the ICC, and the ICC has received hundreds of communications from these and other civil society actors.

NGO assistance may be all the more important in the absence of State cooperation. Although States Parties to the Rome Statute are under an obligation to cooperate with the Prosecutor, and all States have a general duty under international law to cooperate in combating impunity for crimes of international concern such as those under the ICC's jurisdiction, the reality is that there are a host of factors that may prevent such cooperation, including the fact that the State itself may not control the territory in question.

The following are just some of the ways in which human rights NGOs could potentially work in relation to ICC investigations:

- Map or document patterns of violations
- Conduct forensic examinations
- Publish reports and other information on violations
- Submit information on violations to national courts or the ICC
- Provide general legal memoranda and research assistance to national courts or the ICC
- Monitor and report on national proceedings in public or submissions to the ICC
- Explain the ICC, in particular the role of the OTP, to affected communities
- Advise the OTP on communication with victims and witnesses in affected communities
- Provide the ICC with information regarding displacement of people and flows of refugees
- Identify potential witnesses and act as a channel to reach and gain trust of such individuals for the OTP
- Advise the ICC on witness protection

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<sup>3</sup> According to Article 15 of the Rome Statute and Rule 104 of the ICC Rules of Procedure and Evidence, the Prosecutor may receive and seek information from reliable sources he deems appropriate. Article 15 further provides that, if on the basis of such information the Prosecutor concludes there is a reasonable basis to proceed with an investigation, he shall request the Pre-Trial Chamber to authorize an investigation.

- Provide support to victims or witnesses – such as psychological, medical and humanitarian support – after they have been interviewed by the OTP
- Organize victims for the purpose of participation and reparations
- Provide training to lawyers who might represent victims or suspects or accused
- Act as *amicus curiae* in court proceedings

## Limitations on the role of NGOs in relation to ICC investigations

Even though human rights NGOs can make significant contributions, there are a number of important factors placing limitations on their role in relation to criminal investigations, whether by the ICC or another criminal court.

First, most human rights monitors and activists are not trained criminal investigators. And even when they do have such training, their role in documenting human rights violations is, and will remain, different from that of investigators of the ICC, or indeed of any court, whether national or international. For one thing, the OTP must build its own body of evidence, conducting its own interviews with witnesses and collecting and examining physical evidence. To support an investigation, the most useful role most NGOs may be able to play is to alert the OTP that certain violations are likely to have occurred. The OTP could then decide whether to deploy its own investigative resources.

Second, both NGOs and the Court itself have their independence and mandates to preserve. While many NGOs may wish to promote the pursuit of justice and accountability in relation to a situation where human rights violations are taking place, not all will wish to promote the prosecution of particular individuals. Some have a policy against “naming names” and view playing any direct role in criminal proceedings as outside their mandates.

Third, a particular concern for human rights NGOs is protecting confidential relationships, including the identities of sources. This has both ethical and practical dimensions. NGOs are understandably concerned about the security of the individuals with whom they interact. Often NGOs also have a long-standing presence in the area where violations take place and have a strong interest in preserving their long-term ability to protect and support victims of human rights violations. They do not want to do anything to jeopardize that function or to put their operations or any individuals at risk. International organizations may also be concerned about the implications for their reputation beyond the area in question if they do not withhold sources, and they may be worried about the effect on the human rights movement as a whole if human rights workers are unable to maintain confidentiality. Similar arguments are raised by the International Committee of the Red Cross and by journalists, among others, to back their claims to privilege and confidentiality.

Despite these constraining factors, the actions that NGOs take in the aftermath of major atrocities could well have significant consequences for a subsequent criminal investigation, even if they do not set out to play such a role. For instance, if an NGO is on the scene of a mass grave that is about to be disturbed by those with an interest in hiding its existence and has a unique opportunity to record evidence of a massacre that will otherwise disappear, the steps it takes could determine whether or not the massacre can be proved. On the other hand, if an NGO carries out in-depth interviews with individuals who turn out to be key witnesses before the

Court, or becomes involved in collecting forensic evidence without proper training, this could have a serious negative impact on any subsequent criminal investigation and, albeit wholly unintentionally, NGOs could harm a prosecution, or a defence case.

It also should be remembered that NGOs are not always able to operate freely and in many countries are vulnerable to interference in their work from official and non-official agencies. Nor are they always independent and impartial; for instance in any given conflict an NGO may be closely allied with one party to the conflict or have a particular political or other agenda. Even in the absence of bias, partisanship will be imputed. This may raise important questions about the reliability of the information they produce. In addition, a situation may be simply beyond their experience and capacity to document. Situations likely to come before the ICC will be different in scale as well as nature to other situations in which violations commonly occur.

The prospect of criminal proceedings may raise difficult and sometimes conflicting demands for NGOs. For instance, the overriding concern to protect both their staff and the people to whom they speak may sometimes appear irreconcilable with their desire to assist the ICC Prosecutor or to submit information to him.

## **Some questions that might confront NGOs doing fact-finding in a context that could come before the ICC**

### **1. What changes might NGOs need to make in their fact-gathering methodology?**

Human rights organizations around the world, large and small, international and local, document human rights violations on a daily basis. Standard human rights documentation methodologies have been developed and sets of guidelines published.<sup>4</sup>

According to Amnesty International's web site:

We search out the facts. We send experts to talk with victims, observe trials and interview local human rights activists and officials. We monitor thousands of media outlets and maintain contact with reliable sources of information all over the world. Our research is carried out by expert staff, supported by specialists in a range of fields such as international law, media and technology. We publish detailed reports. We inform the news media. We publicise our concerns in leaflets, posters, advertisements, newsletters and websites.<sup>5</sup>

Human Rights Watch's web site states:

Human Rights Watch researchers conduct fact-finding investigations into human rights abuses by governments and non-state actors in all regions of the world. We visit the site of abuses to

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<sup>4</sup> Examples of guides to human rights documentation include: *Reporting Killings as Human Rights Violations*, Human Rights Centre, University of Essex, UK, 2002; *Guidelines for the conduct of United Nations inquiries into allegations of massacres*, United Nations, 1997; *What is Monitoring*, HURIDOCS, 2001; *What is Documentation*, HURIDOCS, 2003, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations, 1999.

<sup>5</sup> Amnesty International, *Frequently asked questions*, available at: <http://web.amnesty.org/pages/aboutai-faq-eng>.

interview victims, witnesses and others. We publish our findings in dozens of books and reports every year.<sup>6</sup>

It also states: “The hallmark and pride of Human Rights Watch is the even-handedness and accuracy of our reporting.”<sup>7</sup>

The possibility of criminal proceedings before an international court raises a number of questions as regards such methodologies. For instance, what kind of information should human rights NGOs seek that they would not normally look for, and what implications might this have for their methodology? What are the implications for the content of public reports they might issue? What sort of training needs might the changed methodologies raise, and might NGOs need outside help for this? If so, where might it be provided?

Another question for human rights NGOs is, if they decide to submit information to the OTP either with a view to the ICC Prosecutor opening an investigation or in relation to a situation he is already following or investigating, what should the submission include and what form should it take? Documenting the alleged violations and how they can be characterized as crimes under the Rome Statute would seem to be basic components. Beyond that, to what extent should the NGO address matters such as the individuals to whom responsibility can be attributed and related matters such as chain of command? These questions may raise considerations of security as well as capacity. The information also should be in a form that is readily useable by the OTP. Which format – computer or otherwise – is most convenient for the OTP?

An example of an NGO fact-finding project linked specifically to investigations by an international criminal court is the Humanitarian Law Documentation Project in Kosovo, a project of the International Crisis Group in 1999. The project aimed to identify violations of international humanitarian law and record direct evidence of those violations in order to provide basic information about witnesses and crimes to the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>8</sup> In seven months, 4,700 records were accumulated from victims and witnesses and handed over to the ICTY. These comprised documented answers to a set list of questions, and not verbatim or signed statements. The information was also entered into an electronic database. The project aimed to assist the ICTY by establishing patterns of violations and providing an extensive list of witnesses whom the ICTY’s own investigators could subsequently interview in a more in-depth manner.

The Humanitarian Law Documentation Project in Kosovo serves to highlight one of the important methodological factors: the project produced data in a form the tribunal could use. For criminal investigations into violations committed on a large scale, the more systematized documentation collected by NGOs is, the more it is likely to be useful. The project is also a positive example of one that succeeded in complementing, rather than supplanting or interfering with, the role of international tribunal investigators.

For NGOs to contribute helpfully to ICC investigations, they will need guidance from the OTP on how it wishes to have information presented to it. This goes to the substance of the information as well as its format.

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<sup>6</sup> Human Rights Watch, *Some Frequently Asked Questions About Human Rights Watch*, available at: <http://www.hrw.org/about/faq/>.

<sup>7</sup> Human Rights Watch, *About HRW*, available at: <http://www.hrw.org/about/whoweare.html>.

<sup>8</sup> The project is described in *Reality Demands: Documenting Violations of International Humanitarian Law in Kosovo 1999*, International Crisis Group, 2000.

## 2. What are the implications for the ways in which NGOs interact with witnesses, particularly as regards taking statements?

NGOs documenting human rights violations will commonly speak to eyewitnesses and other individuals including local officials and community leaders, victims, and even to those who may have been involved in perpetrating the violations.

Particular questions that might arise where criminal proceedings could follow include: When conducting interviews, what should an interviewer tell people about what will happen to the information they give? What sorts of reassurances can be given, if any, concerning their protection? How can confidentiality be safeguarded if a person wishes to speak in confidence?

NGOs may need guidance in relation to these questions. Clearly, a victim or witness should be informed of the purpose for which he/she is being interviewed, and how the information conveyed in the interview will be used (for instance, for public reporting and advocacy, and/or for attempting to trigger a criminal investigation). If there is a possibility that criminal proceedings may follow, it would be important to ascertain whether a witness would be willing to cooperate with a possible investigation and prosecution. Should human rights fact-finders researching large-scale violations in the future always raise with people they interview the possibility that a criminal case could result and ask their permission to pass information to a court? It also would be important to keep track of where the witness goes, particularly in instances in which the witness is a refugee and is likely to be further displaced.

NGOs may also need guidance on how to avoid “contaminating” witnesses. For instance, if – before ICC investigators arrive – groups take detailed verbatim statements from an individual who turns out to be a key witness, this could create problems for a subsequent ICC investigation. Problems will also be caused if multiple NGOs and international organizations take statements from the same witness. In such situations, the ideal solution from the ICC’s point of view could be that a human rights organization takes only a short note of the evidence a witness could give rather than a full, signed statement in the person’s own words, obtaining the witness’s consent if it intends to forward that note to the ICC.

On the other hand, such direct personal testimonies are exactly what human rights advocates and the media look for when they are seeking to convey a story in a way that will resonate and motivate. Is it realistic, or reasonable, to expect human rights NGOs to change their methodology in situations that might potentially come before an international criminal court? It might not be obvious in the immediate aftermath of an incident that ICC proceedings might result. For instance, it may only become obvious after a period of time that a specific incident forms part of a widespread or systematic policy amounting to a crime against humanity. Even if criminal proceedings do appear to be a possibility, human rights NGOs may feel they need to carry out detailed probing of witnesses in order to obtain the information they need to report on the violation to a non-criminal forum. Nor might it be immediately obvious who would be potential key witnesses in a criminal prosecution.

In deciding what to do in the immediate aftermath of atrocities, human rights organizations may have to make difficult decisions in the absence of sufficient information. They may need to weigh the immediate benefits that can be gained from detailed and timely human rights reporting against the (often remote) prospects of ICC prosecutions. If abuses are still ongoing, or there is a strong risk of recurrence, the priority will be to put a stop to them. Detailed reports of violations, including victims’ stories and first-person testimonies, can often be the most effective and powerful way to force political decision makers to take decisive action that could save lives. If

the purpose is documenting violations for the purpose of establishing a historical record, there could also be a strong interest in collecting victims' stories and personal testimonies. On the other hand, if the main objective is to ensure that those responsible will be brought to justice, it may be best for NGOs to focus on establishing the pattern of violations and providing pointers for the ICC when it goes out to collect evidence itself, and to avoid taking detailed personal testimonies from victims and witnesses.

### 3. What considerations might arise in relation to physical evidence?

Most NGOs do not view it as their role to preserve or gather physical evidence. Nonetheless, human rights NGOs may sometimes be placed in situations in which, if they do not act appropriately, crucial evidence may be lost. In such situations, what should NGOs do if they are given original documents, photographs, tapes, computer discs or other physical evidence by others and asked to take care of them, or believe that if they do not take custody of them they will be destroyed or removed?

Issues could also arise if NGOs come across reports of the discovery of bodies, mass graves, munitions or other evidence in circumstances in which the best course of action – to inform appropriate official bodies, specialist agencies or court officials – is simply not possible. In such circumstances, what should they do to record or preserve such evidence and to document a chain of custody? What should they do if relatives are about to exhume bodies of crime victims? What should they do if, once the ICC has announced its intention to investigate openly, such evidence starts to disappear? The presence of NGOs in the immediate aftermath of atrocities may present unique opportunities as regards evidence, and the steps they take or omit to take at that point could be crucial for a criminal prosecution, whether for the ICC Prosecutor or the Defence.

### 4. What might NGOs need to do to ensure the protection of witnesses?

ICC investigations can create major security risks for vulnerable victims and witnesses, and this must always be the leading concern for human rights NGOs that become involved in a situation where the Court may investigate or is already investigating. Human rights NGOs may need guidance on what steps might be needed in order to ensure security and protection for victims and witnesses. For instance, victims and witnesses who may be put at risk as a result of proceedings before the ICC or who are concerned about security must be given accurate information regarding the protection measures the ICC can and cannot provide before, during and after the proceedings, in order that they may make informed decisions about giving evidence. It is highly likely that human rights NGOs themselves will not be able to provide protection, and the availability of protection from external agencies such as the U.N. will vary according to the circumstances. Further, security risks may extend beyond the individuals themselves to their family and associates. Lessons learned from the experience of the ICTY and International Criminal Tribunal for Rwanda (ICTR) can help.

The protection of vulnerable victims and witnesses is not only about their protection from intimidation. Human rights NGOs also need to be aware that witnesses and victims may be traumatized by the events they experienced. This may impact the evidence such witnesses or victims give, and they may require expert counseling or other treatment.

The solutions to these problems may be neither obvious nor easy, and raising awareness among human rights NGOs of the problems and some possible ways of alleviating them could be crucial for the security of victims and witnesses during both the investigation and the prosecution stages.

## 5. To what extent will NGOs be able to preserve confidentiality?

Major questions arise for NGOs in relation to confidentiality. Where human rights NGOs find themselves in possession of valuable evidence relating to crimes, what documents and other information might they find themselves being asked to disclose to the ICC, and what will they be prepared to hand over? In some instances, human rights NGOs will want to hand over information or testify and may thus wish to waive any privilege they might otherwise be afforded. In other instances, the ICC Prosecutor or the Defence may seek to discover the work product of human rights NGOs – such as witness statements, names of sources and notes.

How will NGOs react if the ICC requests that they hand over certain information, including statements taken from victims, victims' names and other research data? For international NGOs, what would be the implications for their local partners and interlocutors? In some situations, it may be difficult for NGOs to go back to sources to request consent to disclose their identity or other information to the ICC if they did not obtain such consent initially. If they agree to hand over any documentation or information to the ICC, could they seek to impose conditions on how it would be used? For instance, could they request that it be used as a basis for the Court's own investigations but not produced at trial? Could they seek assurances of confidentiality in respect of names or other sensitive information? Under Article 54.3(e) of the Rome Statute, which sets out the duties and powers of the Prosecutor with respect to investigations, the Prosecutor may “agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purposes of generating new evidence, unless the provider of the information consents.” Rule 82.2 of the ICC Rules of Procedure and Evidence further specifies that, if the Prosecutor does introduce such protected material into evidence, the Court may not order the production of additional evidence received from the same provider or summon the provider as a witness.

Another important question for NGOs to confront is whether their own staff members should give testimony as to what they personally witnessed. At the ICTY and ICTR, NGOs such as Human Rights Watch and Médecins sans Frontières have agreed to provide testimony on some occasions but have resisted on other occasions. The ICTY Appeals Chamber has given an indication of how it might view refusals by human rights organizations to testify. When journalist Jonathan Randal refused to appear before the ICTY Trial Chamber in response to a subpoena to give evidence in relation to an article he had published about an accused, the Appeals Chamber quashed the subpoena on the basis of a public interest argument and the interests of freedom of expression, noting the vital role of war correspondents in awakening the international community to the seriousness of human rights violations, and bringing to the attention of the international community the horrors and reality of conflict.<sup>9</sup> The Chamber considered that the amount of protection that should be given to war correspondents from testifying is directly proportional to the harm it may cause to the newsgathering function, and that the tribunal “will not unnecessarily hamper the work of professions that perform a public interest.”<sup>10</sup> It went on to lay out a test that should be used in balancing these interests against the interest of having all evidence before the

<sup>9</sup> *Prosecutor v. Radoslav Brđjanin*, ICTY Appeals Chamber, Decision on Interlocutory Appeal, December 11, 2002 (“Randal Decision”), paragraphs 35-37.

<sup>10</sup> *Ibid.*, paragraphs 41 and 44.

tribunal: “First, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere.”<sup>11</sup>

It seems clear that human rights organizations could make out claims to a public interest privilege similar to those accepted in relation to war correspondents. Human rights organizations have frequently been responsible for drawing the international community’s attention to serious human rights violations and may well argue that, as the ICTY Appeals Chamber accepted in the Randal Decision, they would not be able to carry out their functions effectively if they were not able to protect their sources.

That said, the scope of privilege provided for in the ICC is more extensive than that available before the ICTY and ICTR. During the drafting of the Rome Statute some NGOs urged that the ICC Rules of Procedure and Evidence should not limit the relationships within which communications are privileged from disclosure, but urged that the ICC should be able to develop its own jurisprudence and assess whether the value to the international community of protecting a confidential relationship outweighed other considerations.<sup>12</sup> This is essentially what was agreed in Rule 73. In addition to lawyer-client privilege, it recognizes a category of “communications made in the context of a class of professional or other confidential relationships” as also privileged, so long as:

- a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;
- b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and
- c) Recognition of the privilege would further the objectives of the Statute and the Rules.<sup>13</sup>

Rule 73.3 goes on to specify that the Court will have particular regard to recognizing certain professional relationships, such as those with a psychiatrist, psychologist, counselor or a member of a religious clergy, and Rule 73.4 establishes a presumption in favor of privilege for the International Committee of the Red Cross.

It remains to be seen how the ICC will interpret these provisions. While there would appear to be scope for human rights NGOs to argue for non-disclosure or non-appearance on the basis of Rule 73, the ICTY’s test set out in the Randal Decision indicates the kind of balancing act that may be applied in particular cases. It thus seems sensible for human rights NGOs doing fact-finding in the wake of mass violations to give some thought in advance as to the circumstances in which they would be willing to hand over materials or to testify before the ICC and as to whether to seek agreement with the OTP under Article 54.3(e) of the Rome Statute.

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<sup>11</sup> *Ibid*, paragraph 50.

<sup>12</sup> See, for example, Amnesty International, “The ICC: Drafting effective Rules of Procedure and Evidence concerning the trial, appeal and review,” AI Index: IOR 40/009/1999, June 1, 1999.

<sup>13</sup> Rule 73.2 of the ICC Rules of Procedure and Evidence.



## Questions for further consideration

### To the ICC Prosecutor:

- If NGOs decide to submit information to the OTP either with a view to the ICC Prosecutor opening an investigation or in relation to a situation he is already following or investigating, what should the submission include and what form should it take? To what extent should NGOs address matters such as the individuals to whom responsibility can be attributed and related matters such as chain of command? Which format – electronic or otherwise – is most convenient for the OTP?
- As soon as the OTP begins an investigation, should it designate an NGO liaison officer, with responsibility for communicating with local or international NGOs, international agencies and others that have already documented violations?
- Should the OTP make arrangements with specific NGOs that wish to assist the office in identifying and interviewing potential witnesses and obtaining other evidence or mapping the pattern of violations? If so, would this be limited to circumstances in which the OTP's own investigators are unable to gain access to a site themselves or might it be considered as an option also in circumstances where the OTP alone would be unable to mount a sufficiently broad investigation? If such arrangements would be contemplated, should this be on a case-by-case basis? Should there be agreement on a form of questionnaire in order to make sure that data is collected in a standardized form and can be readily used by the OTP? At what stage should such agreements be reached?
- Are there any particular evidentiary rules or practices the OTP might wish to make known to NGOs that are on the scene in the aftermath of incidents? Are there any practices the OTP might wish to make known relating to photography, exhumations or other matters relating to preservation of evidence?
- Does the OTP wish to make known to NGOs other ways in which it would value their assistance?
- When NGOs carry out fact-finding specifically with a view to submitting information to the ICC, are there any practices that the ICC Prosecutor might wish to discourage them from undertaking on the basis that they could harm an investigation? For instance, should the Prosecutor ask NGOs in those circumstances to avoid taking in-depth, formal statements, covering matters relating to Rome Statute crimes and the responsibility of particular individuals, from individuals who may be potential witnesses before the Court?

## To human rights NGOs:

- If human rights NGOs seek to hand information to the ICC, what changes might they need to make in their fact-gathering methodology? What kind of information should they seek that they would not normally look for? What are the implications for the content of public reports they might issue? What sort of training needs might the changed methodologies raise, and might NGOs need outside help for this? If so, where might it be provided?
- What are the implications of ICC investigations for the ways in which NGOs interact with witnesses, particularly as regards taking statements? When conducting interviews, what should an interviewer tell people about what will happen to the information they give? What sorts of reassurances can be given, if any, concerning witness protection? Should human rights fact-finders researching large-scale violations always raise with people they interview the possibility that a criminal case could result and ask for permission to pass information to a court?
- What considerations might arise in relation to physical evidence? What should NGOs do to record or preserve original documents, photographs, tapes, computer discs or other physical evidence? What should they do to document a chain of custody? What should they do if relatives are about to exhume the bodies of crime victims?
- What might NGOs need to do to ensure the protection of witnesses?
- Where human rights NGOs find themselves in possession of valuable evidence relating to crimes, what documents and other information might they find themselves being asked to disclose to the ICC, and what will they be prepared to hand over? How will NGOs react if the ICC requests that they hand over certain information, including statements taken from victims, victims' names and other research data? For international NGOs, what would be the implications for their local partners and interlocutors?
- To what extent will NGOs be able to preserve confidentiality? If they agree to hand over any documentation or information to the ICC, could they seek to impose conditions on how it would be used? For instance, could they request that it be used as a basis for the Court's own investigations but not produced at trial? Could they seek assurances of confidentiality in respect of names or other sensitive information? Could they avoid being compelled to testify?
- Is it desirable to raise awareness among the human rights community worldwide about some or all the issues discussed in this paper? Is there a need for NGOs to think collectively about methodologies and approaches in relation to how they go about fact-finding in the wake of major human atrocities now that the ICC is established? Or at the very least, is it useful to stimulate discussion and raise awareness?
- If so, what is the best way to go about it? Should an NGO (Human Rights First or another) or group of NGOs publish a subsequent paper, translate it into several languages and try to have it widely disseminated? Or would the initiative be more likely to gain wider acceptance and legitimacy if a set of principles were to be debated among NGOs and adopted, possibly by the NGO Coalition for the International Criminal Court or other NGO bodies?

- Should there be a manual for NGOs that covers issues raised, such as considerations with regard to the collection of information, confidentiality and privilege, rights and security concerns of victims and witnesses, and guidelines for providing information to the OTP?