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Humanitarian Actor's Engagement with Accountability Mechanisms in Situations of Armed Conflict: Workshop Report

Dapo Akande & Emanuela-Chiara Gillard

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Workshop overview

The *Individualisation of War* Project at the European University Institute recently hosted a workshop on humanitarian actors' engagement with accountability mechanisms in situations of armed conflict. The workshop brought together practitioners – staff from international tribunals, fact-finding bodies, UN Sanctions Committee Panels of Experts, the UN, and humanitarian organisations.

The *Individualisation of War* Project explores the tensions arising from the increased prominence of the individual in the theory and practice of armed conflict[133]. One manifestation of this process of individualisation are the endeavours to enhance accountability for violations of international humanitarian law (IHL) and international human rights law (IHRL). These include the establishment of international and national tribunals and non--judicial mechanisms such as commissions of inquiry, and the imposition of targeted sanctions. These are important measures for promoting compliance with the law and, consequently, enhancing the protection of civilians, but their implementation can give rise to tensions with humanitarian actors' activities to provide protection and assistance, often to the same civilians. Humanitarians frequently have valuable first-hand information on violations or are in direct contact with affected communities. However, the risk exists that if they share this information with accountability mechanisms – or are suspected of doing so – this may undermine their operations (and those of others) and put their staff and beneficiaries at risk. This is not a new tension, but it has become more prominent following the establishment of a number of international criminal tribunals in the 1990s.

133 For more on the background, scope and streams of *Individualisation of War* Project, see http://iow.eui.eu.

Its extent has increased further as the Security Council has imposed sanctions against groups and persons considered to have committed violations of IHL with increasing frequency.[134]

Humanitarian actors have reacted to this tension in a variety of ways. At one end of the spectrum is the International Committee of the Red Cross (ICRC) which ordinarily will not cooperate with national or international tribunals. The majority of its headquarters agreements grant its staff immunity from being called to testify before national courts[135]; and the Rules of Procedure and Evidence of the International Criminal Court (ICC) expressly note that information, documents or other evidence generated by the ICRC is not subject to disclosure, including by way of testimony.[136]

United Nations (UN) agencies, funds and programmes are in a different position, at least when it comes to the ICC. In the 2004 Negotiated Relationship Agreement between the International Criminal Court and the UN the UN has undertaken to cooperate with the ICC. This cooperation has included the provision of assistance to the Court's organs – the Prosecutor, but increasingly also the Defence – by making available documents and information generated or obtained by the UN[137]. UN staff have also been made available for interviews, and some have testified before the Court. In an effort to balance the desire – and

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134 The Consolidated United Nations Security Council Sanctions List includes numerous individuals and entities or other groups on account of violations of IHL. On this matter see for example the sanctions designation criteria concerning Mali, South Sudan and Yemen in S.C. Resolution 2374, U.N. Doc. S/RES/2374 (5 September, 2017); S.C. Resolution 2206, U.N. Doc S/RES/2206 (3 March, 2015); S.C. Resolution 2140, U.N. Doc S/RES/2140 (26 February 2014).

135 The ICRC has concluded bilateral status agreements with the majority of countries in which it is operational today, whereas in other places it is granted the same privileges and immunities on the basis of domestic legislation. The agreements are largely confidential but they are known to mirror, to a large extent, the provisions of the Vienna Convention on Diplomatic Relations and the Convention on the Privileges and Immunities of the United Nations. Some publicly available examples include the Agreement between the International Committee of the Red Cross and the Swiss Federal Council to determine the legal status of the Committee in Switzerland (1993), Part II; Australia's International Organisations (Privileges and Immunities) Act of 1963, as amended by the International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013, Australia's Select Legislative Instrument No. 237, 2013, (08 November, 2013); US International Organizations Immunities Act of 1945, as amended by Executive Order 12643 (June 23, 1988) and France's Loi n° 2003-475 du 4 Juin 2003 relative aux privilèges et immunités de la délégation du Comité International de la Croix-Rouge en France. On this issue see Debuf, Els (2016), 'Tools to do the job: The ICRC's legal status, privileges and immunities', *International Review of the Red Cross*, Volume 97, n.º 897-898, pp. 319-344, available at: https://www.icrc.org/en/international-review/article/tools-do-job-icrcs-legal-status-privileges-and-immunities [accessed 27 Sep. 17].

136 See Rules of Procedure and Evidence of the ICC, Rule 73, paragraph 4.

137 Negotiated Relationship Agreement between the ICC and the UN, Article 5 on Exchange of Information and Article 18 on Cooperation between the UN and the Prosecutor, paragraph 3.

obligation – to cooperate with the ICC with the possible adverse consequences of doing so, much of this information was, in the past, provided on condition of confidentiality and solely for the purpose of generating new evidence, in the understanding that it would not be disclosed to other organs of the Court or to third parties, without the UN's consent.

Accountability mechanisms also have tensions to address. In the case of the ICC the need to balance the protection of witnesses and other sources of information with the needs of a fair trial that respects the rights of the accused and the needs of victims came to the fore in two recent cases, where documents provided to the Prosecutor by the UN on this basis were considered to contain information that was potentially exculpatory or material to the preparation of the defence. As a result, it is not clear whether and, if so, to what extent UN agencies may continue to cooperate with the ICC in this manner.

Session 1 – What Are Accountability Mechanisms Looking for?

The first session focused on the position of accountability mechanisms, looking at the type of information that humanitarian actors may have that accountability mechanisms are interested in; and the measures they have taken to date to allay humanitarian actors' concerns about providing information.

Discussions started with three brief presentations addressing the question from the point of view of the ICC, UN sanctions panels of experts and commissions of inquiry.

A. International Criminal Courts

1. Type of information sought

Humanitarian actors are often the first responders on the ground, and investigators and prosecutors realise that they may have information that is extremely valuable to their work. It is not just information on suspected violations and their perpetrators that is of interest to criminal tribunals, but also background information that may be relevant in determining whether an armed conflict existed in a particular context at specific moment in time. Investigators might also be interested in speaking to the authors of reports in the public domain to identify the sources of information on which they relied and other useful people to contact at the local level.

Cooperation should not be considered as a one-way street; the ICC has been approached by humanitarian actors seeking guidance on the contextual elements necessary to prove a particular element of a crime and the type of information they should gather for proceedings relating to attacks against their staff.

2. Measures taken to allay concerns

Asking the staff of humanitarian organisations for information may put their operations and safety at risk, accordingly, the ICC has developed working methods that attempt to reconcile the desire to obtain information and evidence while it is still as fresh as possible in people's minds with these risks. Requests are made to humanitarian actors as a measure of last resort, if there is no one else likely to have the same information. In order to ensure consistency of approach and add a layer of protection, requests for information are addressed to humanitarian organisations' headquarters, rather than to the relevant field missions or to staff members. The information requested and the reasons why it is sought are explained clearly.

It is also essential that there be clarity as to the conditions under which information is provided, and, in particular, whether this can be done under strict confidentiality. This is important for humanitarian actors but also for others that have been asked to share relevant information, such as national intelligence services or multi-national forces such as NATO. In the past, in engaging with UN agencies, funds and programmes the ICC Prosecutor had relied extensively on the possibility foreseen under Article 54(3) ICC Statute and replicated in the 2004 ICC UN Agreement, to collect information on condition of confidentiality and solely for the purpose of generating new evidence. In the *Lubanga and Katanga and Chui* cases[138], however, the Prosecutor found that materials obtained on this basis contained information that was potentially exculpatory or material to the preparation of the defence. As the UN would not lift the conditions of confidentiality under which the information had been provided, so that it could be transmitted to the Defence, nor agreed to disclose the information to the Chambers to that the potential impact of

138 ICC, *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06, Trial Chamber I (14 March, 2012); ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) ICC-01/04-01/07 OA 8, Appeals Chamber (25 September, 2009).

their non-disclosure could be evaluated, the Trial Chamber stayed the proceedings[139]. In reaching this decision, the Trial Chamber appears to have placed particular weight on the fact that the Prosecution had relied on Article 54 (3) ICC Statute arrangements on a routine basis rather than exceptionally, and also apparently in order to obtain evidence that could potentially be used at trial, instead of using the material solely to generate new evidence, as envisaged by the provision[140]. While the difficulties were eventually resolved in these two cases, since then the Prosecutor avoids relying on this arrangement. Instead, providers of information are asked from the outset to provide information in a manner, possibly redacted, that can be shared with the Defence.

While the ICC does have a witness protection programme that could, in theory, be of relevance to staff members of humanitarian organisations who provide information[141], in practice it is very difficult to get into the programme. Frustration has been expressed about the lack of clarity, if not conflicting information received from different parts of the ICC on key modalities of the programme, including on what amounts to "entering into contact" with the ICC, the consequences thereof, and on the division of labour within the ICC in relation to the programme. Moreover, while the witness protection programme may be of assistance to *individuals* who provide information it is unlikely to provide much protection to humanitarian *organisations*.

Acknowledging the importance of developing a relationship of mutual trust and respect, the ICC has strived to establish open channels of communications that allow "both sides" to explain their needs and concerns.

Looking beyond the ICC to criminal investigations more generally, it is essential that they be carried out in a well-planned and focused manner. This is beneficial for all involved. Identifying the specific information and documents that an accountability mechanism would like to obtain from a particular humanitarian actor can reduce the risks for the latter and also build confidence in the relationship. From the perspective of the investigating body, not only can an unfocused "fishing exercise" where all available information is collected lead to a significant amount

139 See Tamara Cummings-John, "Cooperation between the United Nations and the International Criminal Court", *International Organizations Law Review,* Vol 10(1), 2013, 223.

140 See, for example, Rod Rastan, "Review of ICC Jurisprudence 2008", *Northwestern Journal of International Human Rights Law,* Vol 7, Number 2 (Summer 2009), 261, 270-276.

141 See ICC Statute, Article 68 on Protection of the victims and witnesses and their participation in the proceedings and Rules of Procedure and Evidence of the ICC, Rules 87 and 88 on protective measures.

unnecessary work, but it may also preclude it from relying upon valuable information because it was obtained improperly or because its chain of custody did not meet minimum due process standards.

B. Sanctions Panels of Experts

1. Awareness of concerns and measures taken to allay them

Humanitarian actors' engagement with UN sanctions panels of experts gives rise to additional issues, starting from the mutual lack of awareness of each other's mandates. Apart from the humanitarian expert, members of sanctions panels are unlikely to have had any previous engagement with humanitarian actors or awareness of their potential reservations about sharing information. On their side, most humanitarian actors also have extremely limited familiarity with sanctions panels and their mandate. The distrust is exacerbated by the reservations that certain humanitarian actors may have about sanctions more generally, which some view as politicising aid and further weakening fragile states.

A first step in enhancing the understanding by panels of experts of the issues and sensitivities would be for the UN Department of Political Affairs, on which they depend, to provide an introduction to this topic, together with a country-specific briefing upon their appointment to the panel. Equally important would be the sharing of experiences among current and past panels of experts. Following the positive example set by the ICC, panels of experts should systematically reach out to the headquarters of the humanitarian organisations operating in the country for which they have responsibility, explaining their mandate, operating modalities and objectives. This would also be an opportunity for humanitarians to highlight their concerns.

While in theory the experts should be able to gather information themselves, in some contexts they have extremely limited mobility and must comply with UN security rules, including those requiring them to wear blue helmets and body armour and travel with escorts. This makes it difficult for them to travel or engage with people in a discreet way or, indeed, to access areas deemed unsafe, thus increasing their reliance on information held by humanitarian actors.

On their side, however, humanitarian actors have the same reservations about engaging with panels of experts as with other accountability mechanisms. The fact panels of experts are, formally speaking, a UN body, does not automatically lead members of the UN country team to share information. This is the case even if the panels of experts have been tasked

to monitor violations committed against the same categories of people, for example, children, whom specific organisations are mandated to protect.

In fact, the risks associated with providing information can be even more marked for panels of experts than for criminal tribunals. In international criminal prosecutions, the aim is to transfer suspects from the state where the alleged crimes were committed and where humanitarians operate. However, persons listed in sanctions regimes are not removed from their environment. A listed person can remain in--country, aware of the fact that humanitarian actors operating in that same country may have provided information that led to the listing.

The risks are exacerbated by the fact panels of experts are not in a position to offer assurances to humanitarian actors as to how any information they provide will be used. There is no formal arrangement, like that in the ICC Statute, for sharing information in confidence. At best individual panel members can give their own personal assurances that the identity of sources will be protected and information will be treated confidentially. No witness protection arrangements exist.

All of this said, the reality is that in certain contexts panels of experts are the only accountability mechanism that exists and, despite the potential risks, humanitarian actors do provide them information, with the ultimate aim of putting an end to violations of IHL and IHRL.

2. Type of information sought

Sanctions panels of experts look to humanitarian actors for a wide range of information relating to violations of IHL and IHRL that they have been tasked to monitor, as well as to the identity of groups and individuals suspected of being responsible therefor. They are also likely to be interested in the adverse humanitarian impact of the sanctions – an aspect of their work which might of itself be less likely to expose humanitarian actors to risk but which cannot be separated from the other parts of their mandate.

While panels of experts also frequently need assistance to ascertain the biometrics (names and aliases, date of birth, nationality, passport number etc) of listed persons, they have not asked humanitarian actors for this type of information, because of the clear risks this could pose.

As is the case for criminal tribunals, sharing of information can be a two-way street. There have been instances when humanitarian actors have asked panels of experts for information that the latter have obtained (eg information relating to children in custody that only the panels of experts have access to) but were refused it, for the protection of the

children. If specific individuals or groups are listed on the basis of the information the children provided to the panel of experts and the names of the children became known to the perpetrators, it could put the children and their families at risk.

Session 2 – The Position of Humanitarian Actors

The second session focused on the position of humanitarian actors, looking at the reasons underlying their reservations about providing information to accountability mechanisms, and the range of approaches for reducing adverse consequences that they have adopted.

Discussions started with three brief presentations addressing the question from the point of view of the ICRC, the UN, and Save the Children (UK).

A. Reasons underlying the reservations

At the basis of humanitarian actors' reservations about cooperating with accountability mechanisms are concerns that if they provide information – or are suspected of doing so – parties the conflict whose behaviour is under scrutiny with control of the territory where they operate may impede their activities or put the security of their staff or beneficiaries at risk.

While all operational actors share this starting point, the extent of their concerns and, consequently, of their interaction with accountability mechanisms extent varies. At one end of the spectrum, the ICRC takes the position that *any* provision of information to *any* accountability mechanism may jeopardise its acceptance by parties to a conflict. This is regardless of the nature of the accountability mechanism – national or international; criminal, civil or other – or of whether it is perceived as politicised or not. As the ICRC's operations are based on acceptance by all parties to a conflict, and the understanding that it will operate in a confidential manner, it takes the position that any provision of information may risk undermining its acceptance – in a particular context and more broadly.[142]

142 ICRC Memorandum on the ICRC's Privilege of Non-disclosure of Confidential Information, *International Red Cross Review*, Vol 97, Spring/Summer 2015, 433 https://www.icrc.org/en/international--review/article/memorandum-icrcs-privilege-non-disclosure-confidential-information.

Other humanitarian actors adopt a case-by-case approach, depending on the accountability mechanism. The prime concern is not the nature of a particular mechanism, but rather whether it is perceived as politicised or somehow tainted, be it because it is considered as favouring a particular side to a conflict, or because its operating modalities to not meet minimum due process standards, in which case cooperating with it could undermine their neutrality or impartiality or the perceptions thereof.

While humanitarian actors' concerns are clear and understandable, it is less clear whether those who are in a position to impede operations are actually aware of the different positions adopted by humanitarian actors, or simply consider them all "foreigners working with the ICC". In certain contexts perceptions of humanitarian actors' impartiality, neutrality and independence are already tainted to such a degree that it is questionable whether cooperating with accountability mechanisms can in fact undermine them further.

Traditionally, human rights organisations have been considered less susceptible to the possible adverse consequences of providing information to accountability mechanisms as they tended not to have field presences and therefore were not exposed to the same risks of having their operations jeopardised or security threatened. Their principal concern was whether they would be issued entry visas. More recently, however, some organisations have established field presences and face the same security risks as humanitarian actors. Some human rights organisations are also concerned that too close proximity with accountability mechanisms may preclude them from expressing concerns about the due process standards applied or other aspects of the mechanisms' compliance with human rights.

In addition to these more operational concerns, a number of other considerations impact the nature and extent of humanitarian actors' engagement with accountability mechanisms. Some considerations relate to particular humanitarian actors' preferred approach to promoting compliance with IHL and IHRL. For example, when certain organisations have reliable information their preference will be, at least in the first instance, direct confidential dialogue with those responsible for the violations, rather than engaging with accountability mechanisms.

Other considerations relate to the fact that, for the most part, humanitarian actors are on the ground to implement programmes and not to gather information on possible violations of IHL and IHRL and on their perpetrators. This means, that even in those circumstances where they would want to cooperate, the information they have collected may not be admissible in criminal proceedings. In view of this, certain

humanitarian actors may feel that it is more effective to provide information to accountability mechanisms that have more flexible rules on admissible information than criminal tribunals, such as commissions of inquiry or fact-finding mechanisms.

Even human rights organisations, that tend to be on the ground to collect information on potential violations of IHL and IHRL, face this same problem. It is unlikely that their researchers have witnessed the perpetration of violations or have first-hand information that is admissible in criminal proceedings. At best, they could appear as "expert witnesses" on particular issues. In view of this, human rights organisations tend to engage at an earlier stage in criminal and other proceedings, when they can suggests issues that should be investigated, and possible sources to interview.

B. How have the concerns been addressed

Humanitarian actors have adopted a range of approaches to give effect to their positions on engagement with accountability mechanisms.

1. Red Cross Red Crescent Movement

In relation to the ICC, the ICRC has obtained an express recognition in Rules of Procedure and Evidence that information, documents or other evidence generated by the ICRC is not subject to disclosure, including by way of testimony.[143] This position reflects decisions on this topic by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)[144]. At national level, the majority of its headquarters agreements grant the ICRC and its staff immunity from all forms of legal process and inviolability to documents.[145] Efforts are currently afoot to ensure that states that receive ICRC documents also refrain from permitting their use in legal proceedings without the ICRC's consent.

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143 Article 73(6) ICC Rules of Procedure and Evidence 2002.

144 ICTY, *Prosecutor v Simić* (Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness) Case No. IT-95-9 (27 July 1999) paras 72-74; ICTY, *Prosecutor v Brdjanin* (Decision on Interlocutory Appeal) Case No. IT-99-36, Appeals Chamber (11 December 2002) para. 32; ICTR, *Prosecutor v Muvunyi* (Reasons for the Chamber's Decision on the Accused's Motion to Exclude Witness TQ) Case No. ICTR-2000-55 (15 July 2005) paras 14-16. On this issue see ICRC (2016). 'Memorandum – The ICRC's privilege of non-disclosure of confidential information', *International Review of the Red Cross*, Volume 97, n.º 897-898, pp. 1-12, available at: https://www.icrc.org/en/international-review/article/memorandum-icrcs-privilege-non-disclosure-confidential-information [accessed 27 Sep. 17].

145 See above n 2 (need to change this in accordance with numbering in citation).

All these arrangements foresee the possibility for the ICRC to waive its privilege in specific cases. Recently, the ICRC has done so in a national inquest relating to the abduction and murder of a staff member. Considerations that led to the waiver included the fact the proceedings related to a staff member to whom the organisation owed a duty of care, and that the majority of the relevant information was in the hands of the ICRC. Moreover it was possible to ensure that documents were shared with a limited number of people, and to make redactions. The ICRC intends to develop internal criteria to provide guidance on the circumstances in which it could consider waiving its privilege.

The disclosure of information is not the only possible way to proceed. For example, the ICC Rules of Procedure and Evidence also foresee consultations between the Prosecutor and the ICRC.[146] If, in the course of this dialogue, the Prosecutor becomes convinced that the ICRC is in possession of exculpatory information, in all likelihood, rather than insist on its disclosure, the charges relating to that specific offence may be dropped.

National Red Cross and Red Crescent Societies do not benefit from similar arrangements, even though their staff often works in situations of armed conflict, including alongside the ICRC, where similar considerations apply.

2. UN agencies, funds and programmes

The position of the UN is different. As noted earlier, UN agencies, funds and programmes are under an obligation to cooperate with the ICC and an important dimension of this cooperation is the provision of information. Over time the nature of this cooperation has become more sophisticated to take into account the needs and concerns of all sides more effectively.

All requests are channelled through the Office of Legal Affairs (OLA) at Headquarters, which acts as a go between with the relevant UN substantive office. The Office of the Prosecutor is asked to be specific in its requests, and to explain the relevance of the requested materials to its investigations. On its side, the UN strives to reply to requests within thirty working days. The UN's starting premise is that it will cooperate, but there are circumstances in which it will not do so or only provide a redacted version of a requested document. These include in response to

146 *Ibid*.

requests for information whose disclosure would endanger the safety and security of persons, or prejudice the proper conduct of UN operations and activities, or information whose disclosure would violate confidentiality (ie information received by the UN from third parties, such as NGOs).[147] It is for the substantive office to which the request is addressed to determine whether these exceptions apply.

As discussed earlier, in the past extensive use had been made of the possibility of providing information on the basis of Article 54(3) ICC Statute, but since the *Lubanga* ruling it has not been resorted to[148]. Instead, if the UN accedes to a request to share information it now does so by preparing a document that may be placed in the public domain from the outset, if necessary by making redactions.

While it should not matter whether it is the Prosecution or the Defence that requests information, there is still a lingering discomfort in providing information to the Defence, as it is perceived as enhancing the risk that those associated with defendants may take measures against those providing the information. Of course this is not necessarily the case, and, in fact, the information provided by the UN could be of an exculpatory nature.

OLA is finalising a best practice manual to guide the organisation in deciding how to agree to requests from the ICC to provide information and, if so, on what basis[149].

The position is simpler with regard to requests from accountability mechanisms that can be considered "UN bodies", like sanctions panels of experts and certain tribunals or fact-finding bodies. Usually, there will be a UN resolution requiring cooperation, as well as an underlying obligation to share information and not obstruct the course of justice.

Within this overarching framework, different UN agencies, funds and programmes have developed their own approaches and internal guidance. For example, the Office for the Coordination of Humanitarian Affairs (OCHA) will try to engage constructively with requests for information. In order to ensure consistency of approach and to avoid exposing staff in the field to pressure to cooperate all requests must go via OCHA

147 See Tamara Cumming-John, *supra*.

148 See above n 5 (need to change in accordance with numbering) and 135 (as numbered in the existing pdf file).

149 In september 2016 OLA issued the *Best Practices Manual for United Nations – International Criminal Court Cooperation*, available at: http://legal.un.org/ola/media/UN-ICC_Cooperation/Best%20Practice%20Guidance%20for%20UN-ICC%20cooperation%20-public.docx.pdf [accessed 27 Sep. 17].

Headquarters. Cooperation may undermine OCHA's ability to deliver against its core mandate if appropriate precautions are not taken. The accused may still be very powerful in their home countries with connections on the ground that may put the sources of information and their families at risk, affect the safety of staff, or undermine operations and access. Moreover, OCHA has a mandate to coordinate humanitarian actors, and some partners may not want to engage with it, should it provide information. As arrangements under Article 54(3) ICC Statute are no longer relied upon, information cannot be provided on a strictly confidential basis. This means that the staff member's identity and the content of the interview will be disclosed to the Defence. This is an additional consideration to bear in mind when deciding to accede to requests for information. In many cases even if material is redacted or summarised, the mere fact of cooperating could be problematic. At times, concerns may end up being overwhelming and requests will be turned down.

3. NGOs

A number of NGO have also elaborated internal positions and policies to ensure consistency and provide guidance to their staff on how to respond to requests for information from accountability mechanisms. Accessible and reliable witness and victim protection programmes would allay some of their concerns about cooperating, even though these may reduce the risk faced by individuals but not by the organisations employing them. Greater clarity from accountability mechanisms as to the modalities for sharing of information and as to the rules governing the use of that information once it has been provided would also have an important confidence-building role.

The provision of information is not the only way in which humanitarian actors can assist accountability mechanisms. Other, potentially less problematic, ways of doing so could be by sharing their expertise in particular fields. For example, child-protection NGOs could share their experience on age verification and age-appropriate interviewing of witnesses and training of translators.

While the adoption of internal policies on engagement with accountability mechanisms by individual organisations is an essential first step, it is unlikely to be sufficient to reduce potential negative effects. A common position setting minimum standards to be followed by as many humanitarian actors operating in a particular context as possible, is likely to have a more significant impact.

To date, this approach has only been adopted in one, particularly complex context: South Sudan, where there are a number of accountability mechanisms operating, with different mandates and all with limited access. This gives rise to an extremely challenging environment for humanitarian actors, compounded by mutual limited understanding of each other's mandates, operating modalities, and affiliations. Severe constraints on access also mean that the monitoring mechanisms frequently turn to humanitarian actors for information. Moreover, security arrangements are such that some NGOs are based in the same "humanitarian hubs" on UN Mission premises as some monitors, giving rise to formal and informal proximity, and sharing of information, including unintentionally. This has led an important number of the NGOs operating in South Sudan to adopt a common position on engagement with the various accountability mechanisms. While there is no way of monitoring compliance with it, this is nonetheless an important step in raising awareness of the concerns and how to respond to them.

International NGOs' increased reliance on national partners to implement their programmes raises an additional complexity. Possibly paradoxically, considering national staff face greater risks than international staff, in a number of contexts they indicated they want to be more outspoken and to engage with accountability mechanisms. Ways must be found of allowing this engagement in a manner that does not undermine the position adopted by the international partners. Doing so will be particularly challenging in contexts where parties to conflict are unlikely to distinguish between the various humanitarian actors.

Session 3 – The Criminal Law Dimension

The third session focused on the criminal law dimension, looking at the tensions raised by criminal proceedings, most notably, the need to balance the protection of witnesses and other sources of information with the duty to carry out fair trials that respect the rights of the accused and the needs of victims.

The session started with three presentations highlighting certain challenges that may arise during the investigation phase and in the course of national and international criminal proceedings.

A. Suspected perpetrators of violations of IHL and IHRL

Prosecutors must ensure that all exculpatory material in their possession is turned over to the Defence. Complying with this basic element of a fair

trial may give rise to difficulties when exculpatory information is provided in confidence, including by humanitarian actors.

Prosecutors involved in international criminal proceedings have developed a range of possible ways of complying with this requirement in a manner that reduces the risks for the sources of information as far as possible. Sensitive material may be provided to the judges who determine whether it should be turned over to the Defence[150]. Documents could be provided to the Defence after changes have been made to protect sources. They could be summarised or redacted; or not handed over but instead read to Defence counsel in the Prosecutor's office. Ultimately, if a Prosecutor has material that should be provided to the Defence, but is unable to find an acceptable way to share it, it might be necessary to drop the charge in question[151]. This might, on occasion, be a more effective way to maintain the credibility of the judicial system as well as the ongoing relationship between criminal tribunals and humanitarian actors.

While the Prosecution's obligation is clear, the position of humanitarian actors is far less so. What responsibility – legal, moral, or ethical – if any, does a humanitarian organisation bear if material in its possession is exculpatory? Should it proactively provide it to the Defence? Or at least not turn down requests to do so?

Although sanctions regimes are frequently described as preventive rather than punitive in nature, listing clearly impairs a person's rights in various ways. Moreover, the Security Council has consistently called upon national authorities to bring listed persons to justice including, in certain contexts, by calling upon states to exercise universal jurisdiction, while in others (the DRC and the Central African Republic), it has specifically mentioned the ICC[152]. There is thus a disconnect between the public discourse about the nature of sanctions, and the clear limitations on human rights and the criminal law consequences of listing.

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150 See Rules of Procedure and Evidence of the ICC, Rule 81 and Rules of Procedure and Evidence of the ICTY, Rule 66.

151 See for example ICC, *Prosecutor v Thomas Lubanga Dyilo* (Urgent Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008) ICC-01704-01/06, Trial Chamber I (13 June, 2008) and on appeal ICC, *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008) ICC-01/04-01/06 OA 13, Appeals Chamber (21 October, 2008).

152 See most recently S.C. Resolution 2360, U.N. Doc S/RES/2360 (21 June, 2017); S.C. Resolution 2339, U.N. Doc S/RES.2339 (27 January, 2017).

B. Witnesses

While the ICTY and ICTR had the power to compel witnesses to appear[153], there is a divergence of views as to the nature and extent of the ICC's power in this regard. Crucial to this is the interplay of two provisions of the ICC Statute. Article 64(6)(b), that gives the Trial Chamber the authority to require the attendance and testimony of witnesses by obtaining, if necessary, the assistance of states parties; and Article 93 which requires states parties to facilitate the voluntary appearance of persons as witnesses or experts before the Court. Recent ICC jurisprudence would suggest that the Court can compel an appearance, but this is to be done via national courts[154]. Inasmuch as under this system national institutions also have a role in deciding whether to compel the staff of a humanitarian organization to testify, it is be important to familiarise them with humanitarian actors' concerns and with possible ways of addressing them.

In the treatment of witness statements the ICC draws a clear distinction between disclosure to the accused and disclosure to the public[155]. To date it has not compelled the staff of international organizations to testify. If a UN staff member were to appear as a witness, the ICC would agree the modalities for this with the UN. The UN is likely to grant its consent to this under certain conditions, such as not revealing sources or demanding that the questioning by the Court not go beyond the scope of information that the UN staff member has already provided.

An alternative to the staff of humanitarian organisations appearing as witnesses is the possibility for them to provide information as "expert witnesses". This allows them to bring important information before international tribunals on the context and trends. In a recent case before the ICC, two psychiatrists/psychologists testified, one extrapolated trends on sexual violence from available data, and the other gave an overview of how such abuses could affect victims and communities; something that could also be of relevant at the sentencing or reparations phases of the proceedings. While providing information in this manner

153 Statute of the International Criminal Tribunal for the former Yugoslavia, Article 19 paragraph 2; Statute of the International Tribunal for Rwanda, Article 18 paragraph 2; ICTY Rules of Procedure and Evidence, Rule 54; ICTR Rules of Procedure and Evidence, Rule 54.

154 See *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* (Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation) ICC-01/09-01/11, Trial Chamber V (A) (17 April, 2014)

155 Rules of Procedure and Evidence of the ICC, Rule 81 and cf. Rule 87 paragraph 3.

could side step issues of admissibility, it is unlikely to address humanitarian actors' concerns about being seen as cooperating with criminal tribunals.

C. Preservation of evidence

Information provided to accountability mechanisms must be gathered and preserved in a manner that meets the standards applied by such mechanisms and which, in the case of criminal courts, are understandably high. In the past failure to do so made it impossible for tribunals to rely on valuable information.

Efforts are being made to develop software including social media applications to overcome these problems. For example, the application *EyeWitness to Atrocities*, that anyone can download, can take photos, videos and recordings and stamp them with GPS coordinates, time and date indicating precisely when the material was recorded and whether it has been edited. The information can be transmitted anonymously from a secure internet connection to a secure database owned by the project where legal experts can then examine it and decide whether it is suitable for use in courts.[156]

While such approaches can resolve some of the problems related to preservation and authenticity of evidence, they may also give rise to suspicions that all carriers of mobile telephones will use them in this manner and make it even harder for parties to an armed conflict to agree to humanitarian actors' use of telecommunications equipment.[157]

D. Victims

Humanitarian actors' engagement with accountability mechanisms also needs to be considered from the perspective of victims of violations of IHL and IHRL. In addition to the reservations related to the potential adverse impact of cooperation on humanitarian actors, another concern is that in order to provide accurate information it may be necessary to return

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156 www.eyewitnessproject.org

157 On the impact – positive and potentially adverse – of new technologies see *Professional Standards for Protection Work Carried Out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence*, (ICRC, 2013 edition), Chapter 6, "Managing sensitive protection information – Collecting information from afar: understanding the risks and advantages linked to new technologies and methodologies", 81-83.

to victims of violations to ask for additional information or for them to be interviewed – even repeatedly, as accountability mechanisms apply different standards of evidence – with the consequent risk of "re-victimisation".

Also central is the question of victims' consent to the transmission of the information they provide to humanitarian actors to accountability mechanisms. In view of the very clear risks such transmission may entail, humanitarian actors must be scrupulous in assuring themselves that the provision of consent is truly voluntary and informed. They must refrain from putting pressure on victims or beneficiaries of their programmes to agree to provide information.[158]

Conversely, victims and affected populations must not be prevented from providing information to accountability mechanisms should they wish to do so. To the extent they can, humanitarians should guide them to actors that can provide accurate advice on how to cooperate and the risks of doing so.

E. Professional privilege

Medical certificates issued by humanitarian actors that have provided medical treatment to victims of IHL and IHRL violations who want to rely on these certificates in accountability proceedings raise important issues. One relates to disclosure. Many national and international tribunals foresee the possibility of exempting communications made in the context of a professional relationship, most notably those with legal advisers or doctors from obligations of disclosure.[159] There is no common position, however, as to which party has the power to waive this professional privilege – ie whether, in the case of a medical certificate it lies with the patient or with the care-provider.

From the perspective of humanitarian actors who have provided assistance and medical certificates, disclosure in proceedings of a certificate indicating violations of IHL and IHRL could have significant adverse consequences on their capacity to continue to carry out operations – both in the context with which the medical certificate is associated and beyond. From the point of view of victims, on the other hand, the certificate could have important evidentiary value.

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158 On the question of the information providers' consent see *Professional Standards for Protection Work* (*supra*), Chapter 6, "Managing sensitive protection information – Preparing interviews and ensuring informed consent and privacy", 92-98.

159 See, for example, Rule 73(2) and (3) ICC rules of Procedure and Evidence.

The starting point of a discussion of medical certificates should be that the primary objective of medical humanitarian organisations is to provide medical assistance to people in need. This treatment also includes the provision of a medical certificate but undue emphasis should not be placed on this. The certificates provided by humanitarian organisations are unlikely to have been issued by forensic doctors, and consequently, be admissible as such in criminal proceedings. This said, collectively and anonymously are of value in identifying trends. Medical humanitarian organisations have gone to great lengths to develop ways of encoding the names of patients and health providers to protect them should their facilities be raided.

Session 4 – How Can Tensions Be Reduced?

The final session focused on additional measures that could be taken by accountability mechanisms or by humanitarian organisations, either individually or collectively, to further reduce tensions.

In the two decades since the establishment of the ICTY and ICTR, humanitarian actors' engagement with international criminal tribunals has become increasingly sophisticated and constructive. Both sides have familiarised themselves with each other's needs and constraints and, [for the most part,] have found efficient ways to co-exist. Similarly, the tensions that existed between humanitarian actors adopting different approaches to engagement with criminal tribunals, and also between operational and human rights organisations have eased, as organisations have found the way to navigate their relationship with tribunals that most suits their identity. International criminal tribunals, and the ICC in particular, and humanitarians have progressively developed policies and working methods that enable them to engage in a manner that reduces adverse consequences for both sides.

Humanitarian actors' engagement with other accountability mechanisms, and in particular with UN sanctions panels of experts, is not at the same stage of maturity and sophistication. The same process of gradual familiarisation needs to occur and consideration should be given to replicating some of the good practices developed by and in relation to international tribunals, adjusted as necessary.

A number of recommendations were made for further reducing the tensions:

Recommendations addressed to international criminal tribunals:

- The confidence-building dialogue with humanitarian actors at headquarters level should continue, and be expanded to include other relevant humanitarian organisations. Efforts should continue to be made to address areas where further clarification is needed, such as for example, the functioning of the ICC witness protection programme.
- Good investigation practices developed by the ICTY, ICTR and ICC should be continued and disseminated to other bodies carrying out similar tasks. These include asking humanitarians for information as a last resort and in a focused manner, and explaining why particular information is needed, how it will be used and with whom it will be shared.

Recommendations addressed to UN sanctions panels of experts:

- The UN Department for Political Affairs should organise an induction for members of panels of experts on engaging with humanitarian actors, and facilitate the sharing of experience in this regard among current and past panels of experts.
- Panels of experts should systematically reach out to the headquarters of the humanitarian organisations operating in the country for which they have responsibility to explain their mandate, operating modalities and objectives, and hear humanitarians' concerns.
- Panels of experts should develop common modalities on how to engage with humanitarian actors.
- Panels of experts should explore ways of providing binding assurances for humanitarian actors as to how information they share will be used and with whom it will be shared.

Recommendations relevant to all accountability mechanisms:

A significant body of good practices guiding accountability mechanisms' engagement with humanitarian actors already exists. The challenge is putting them into practice: there are limited resources for disseminating them and ensuring they are applied. Compliance should be included in conditions of services and resources should be made available to facilitate their dissemination to all relevant accountability mechanisms.

- The position of humanitarian actors before national accountability mechanisms should receive greater attention. Many of these mechanisms have the authority to compel the staff of humanitarian organisations to testify but are not necessarily aware of the concerns and risks. Efforts should be made to reach out to national bodies to bring to their attention humanitarian actors' concerns and possible ways of reducing the risks.

Recommendations addressed to humanitarian actors:

- Humanitarian actors should determine with greater clarity the reasons underlying their reservations about cooperating with accountability mechanisms. Doing so will enable them to adopt a coherent and consistent position of whether, and if so how, to share information.
- Humanitarian actors should develop internal policies regulating their engagement with the entire range of accountability mechanisms; train their staff on them; and disseminate them to the accountability mechanisms. They should include issues such as which section the organisation is responsible for receiving, reviewing and responding to requests for information; modalities for providing information; and rules on how the organisation will engage with victims whose testimony may be sought.
- Humanitarian organisations that enjoy immunity from testimony should also develop guidance on the circumstances in which they would be willing to waive it. Consideration should be given to always waiving it in proceedings relating to attacks against their staff.
- Humanitarian actors operating in a particular context should consider developing a common position on engagement with relevant accountability mechanisms.
- Consideration should be given to including the question of engagement with accountability mechanism in professional standards for humanitarian actors and to developing Inter-Agency Standing Committee guidance on this topic.

List of Participants

Dapo Akande Professor of Public International Law, University of Oxford & Co-Director, Oxford Institute for Ethics, Law and Armed Conflict & Oxford Martins Programme on Human Rights for Future Generations.

Véronique Aubert Senior Conflict & Humanitarian Policy and Research Adviser, Save the Children UK.

Giulio Bartolini Associate Professor of International Law, University of Roma Tre.

Françoise Bouchet-Saulnier Legal Director, Department of Humanitarian Law, Legal Affairs, Médecins sans Frontières.

Claudio Cordone Director of the Human Rights, Transitional Justice and Rule of Law Division of the United Nations Support Mission in Libya.

Tamara Cummings-John Legal Officer, The Office of the Legal Counsel, United Nations Office of Legal Affairs.

Federica D'Alessandra Benjamin Ferencz-Carr Center for Human Rights Policy Fellow, Harvard Kennedy School of Government.

Alvaro De Soto Senior Fellow, Ralph Bunche Institute.

Emanuela-Chiara Gillard Research Fellow, The Individualisation of War Project, European University Institute, Senior Research Fellow, Oxford Institute for Ethics, Law and Armed Conflict.

Dakshinie R. Gunaratne UN Panel of Experts, Sudan.

Lindsay Hamsik Policy and Advocacy Adviser, South Sudan NGO Forum.

Josephine Liebl Humanitarian Policy Advisor, Oxfam.

Kate Mackintosh Deputy Registrar, International Criminal Tribunal for the Former Yugoslavia.

Joanne Mariner Senior Crisis Response Adviser, Amnesty International.

Jenny McAvoy Director of Protection, InterAction.

Jonathan Prentice Director of London Office and Senior Advocacy Adviser, International Crisis Group.

Rod Rastan Legal Advisor, Office of the Prosecutor, International Criminal Court.

Ruben Reike Research Associate, The Individualization of War Project, European University Institute.

Roberto Ricci Chief, Emergency Response Section, Office of the High Commissioner for Human Rights.

James Ross Legal and Policy Director, Human Rights Watch.

Dan Saxon Assistant Professor, Department of Governance and Global Affairs, Leiden University College The Hague.

Göran Sluiter Professor of International Criminal Law, University of Amsterdam .

Rebecca Sutton PhD candidate in International Development, London School of Economics and Political Science.

Hannah Tonkin Humanitarian Affairs Officer, Policy Development and Studies Branch, Office for the Coordination of Humanitarian Affairs.

Beth Van Schaack Leah Kaplan Visiting Professor in Human Rights, Stanford Law School (2014-15), Senior Adviser, Office of Global Criminal Justice, U.S. Department of State, Professor of Law, Santa Clara University School of Law.

Sylvain Vité Legal Adviser, International Committee of the Red Cross.

Jennifer M. Welsh Professor and Chair in International Relations, European University Institute, Special Adviser to the United Nations Secretary-General Ban Ki-moon on the Responsibility to Protect.

Kristele Younes Humanitarian expert, Somalia-Eritrea Sanctions Monitoring Group 2011-2013.

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