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Note for humanitarian organizations on cooperation with international tribunals

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Humanitarian organizations are in a privileged position to observe what happens in war. Perhaps with the exception of war correspondents — “embedded” or otherwise — no other individuals from outside the conflict area get to see what goes on in its midst. Medical humanitarian organizations will often be exposed through their work to the detail of violence committed against civilians; but all humanitarian organizations operational in conflict are likely to witness the brutal effects of the fighting.

It is not surprising then that as tribunals — international or otherwise — are set up to try atrocities committed during a war, those tasked with bringing the perpetrators to justice turn to humanitarian organizations to see what evidence they can offer. For many such organizations, and the people they employ who may have personally witnessed atrocities, the question of whether or not to cooperate with prosecutions is fraught. On the one hand, many support, and even promote, the establishment of war crimes tribunals and the bringing of war criminals to justice, all the more so if they themselves have had contact with the victims of these crimes. On the other hand, and from a more organizational perspective, they worry about compromising neutrality, forfeiting access to victims and putting themselves and their staff at risk.

This article sets out the legal tools available to humanitarian organizations to control any cooperation with international tribunals. It addresses such questions as: can humanitarian organizations be forced to testify? Can they hand over information on a confidential basis? And if they do give evidence, can this be kept out of the public domain?

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Can humanitarian organizations be forced to testify before international tribunals?

International tribunals (and mixed tribunals, such as the Special Court in Sierra Leone) all have the formal power to compel witnesses to attend proceedings and give evidence. This is seen as necessary to enable the courts to function, and so is known as an “inherent power”, but it is also specifically provided for in the statutes and rules of evidence and procedure of the courts.¹ However, one obvious feature of an international tribunal is that it is not part of the usual apparatus of a State, and therefore has no police force to enforce any orders for attendance it may issue. Different courts deal with this problem in different ways.

The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda

The ICTY and ICTR were established by the UN Security Council under Chapter VII of the UN Charter, which authorizes the Security Council to decide measures to be taken by member States to maintain or restore international peace and security. In practical terms, this means that all States are under an obligation to cooperate with these International Tribunals, and to assist them in all stages of the proceedings. This is reflected in the Tribunals’ Statutes, which provide that States “shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber”.² Therefore, if either the ICTR or ICTY issues a subpoena or order for attendance, they can call upon the State in whose territory the person concerned is present to execute the order. Should the State fail to comply, such failure can be referred to the Security Council for further action.³ In the

¹ Rule 54 of the Rules of Procedure and Evidence respectively of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL); Article 64(6) of the Statute of the International Criminal Court (ICC).

² Article 29 of the ICTY Statute reads: “Cooperation and judicial assistance – 1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (a) the identification and location of persons; (b) *the taking of testimony and the production of evidence*; (c) the service of documents; (d) the arrest or detention of persons; (e) the surrender or the transfer of the accused to the International Tribunal.” (Emphasis added.) The same text appears as Article 28 of the ICTR Statute.

³ See Rule 7*bis* of the ICTY and ICTR Rules of Procedure and Evidence: “Non-compliance with Obligations: (A) In addition to cases to which Rule 11, Rule 13, Rule 59 or Rule 61 applies, where a Trial Chamber or a permanent Judge is satisfied that a State has failed to comply with an obligation under Article 29 of the Statute

case of the ICTY, NATO troops present on the territory of Bosnia and Herzegovina (SFOR) and, to a lesser extent, Kosovo (KFOR) have also been called upon to carry out requests from the Court that the State was unwilling or unable to execute itself. These instances have tended to relate to the arrest of suspects and the seizure of evidence, however, rather than the forcible transfer of witnesses.⁴

The International Criminal Court

The International Criminal Court is based upon a treaty, which States decide to ratify and be bound by its provisions or not. Naturally enough, States Parties are obliged to cooperate with requests from the court. However, while this obligation is stated in general terms in the Statute of the Court,⁵ a subsequent more detailed list of requests with which States Parties must comply does not include orders for witnesses to attend, but rather refers to “[f]acilitating the voluntary appearance of persons as witnesses or experts before the Court”.⁶ There might therefore be some dispute over the obligation of States Parties to enforce an order to testify that is issued against the wishes of a witness.

States that are not a party to the treaty are not obliged to cooperate with requests, although if they renege on an earlier agreement to do so their non-cooperation may be referred either to the Assembly of States Parties or, where the prosecution was initiated by the Security Council, to that body for further action.⁷

which relates to any proceedings before that Chamber or Judge, the Chamber or Judge may advise the President, who shall report the matter to the Security Council. (B) If the Prosecutor satisfies the President that a State has failed to comply with an obligation under Article 29 of the Statute in respect of a request by the Prosecutor under Rule 8, Rule 39 or Rule 40, the President shall notify the Security Council thereof.” See also ICTY, *Prosecutor v. Blaskic* (IT-95-14-AR 108 bis), Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, paras. 33-37.

⁴ SFOR have arrested over two dozen indictees in Bosnia-Herzegovina, including, for example, Naser Oric (IT-03-68), Radovan Stankovic (IT-96-23/2), Radomir Kovac (IT-96-23&23/1). KFOR arrested three indictees in February 2003: Haradin Bala, Isak Musliu and Agim Murtezi (IT-03-066).

⁵ Article 86 of the Rome Statute of the International Criminal Court, 17 July 1998 (hereinafter “ICC Statute”).

⁶ Article 93(1)(e) of the ICC Statute.

⁷ Article 87(5) of the ICC Statute: “(a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis. (b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.”

Mixed national-international tribunals and the example of the Special Court for Sierra Leone

Mixed national-international tribunals are courts such as those established in East Timor or Sierra Leone (and soon to be established in Cambodia), which operate on national territory but apply international law or a mix of international and national law, and are composed of mixed panels of national and international judges. They may also be referred to as internationalized domestic tribunals. The availability of enforcement powers to each of these courts will vary according to their constitutive documents, but the main difference will be between enforcement of orders within the State in which the tribunal operates and enforcement abroad. In general, the host State will have a cooperation agreement with the internationalized tribunal dealing with these issues.

In the agreement establishing the Special Court for Sierra Leone, for example, the government of Sierra Leone commits itself to general cooperation with the Court,⁸ and the implementing legislation provides that orders issued by the Court shall have the same force or effect as an order issued by a domestic court.⁹ It is conceivable then that Sierra Leonean police might be asked to detain a member of a humanitarian organization operating in the territory in order to bring that person to testify before the Court. Clearly however, this jurisdiction does not extend to humanitarian workers outside the country. There is no obligation on other States to comply with an order of the Special Court; execution of any such order will depend on agreements between the Registry of the Special Court and the foreign State involved, and this will tend to be true for any internationalized tribunal. And while States may be persuaded to hand over accused persons to such a court, it is less likely that they would want to detain a witness, especially one from a humanitarian organization. It is hard to imagine the French government, for example, arresting a member of *Médecins sans Frontières* in order to transport her or him to Sierra Leone to testify upon an order of the Special Court.

⁸ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002, Article 17: "Cooperation with the Special Court: 1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation. 2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to: (a) Identification and location of persons; (b) Service of documents; (c) Arrest or detention of persons; (d) Transfer of an indictee to the Court."

⁹ The Special Court Agreement, 2002, (Ratification) Act, 2002, Article 20.

For this reason, the Special Court is unlikely to make any such order. No court wants to look ridiculous.

But behind the practical question of whether any such order could be enforced is the legal issue of whether such an order may be made in the first place: can a court order members of humanitarian organizations to testify?

This question arose before the ICTY in 1999 with regard to a staff member of the International Committee of the Red Cross (ICRC). The ICRC has its own special status amongst humanitarian organizations, flowing from its mandate under the Geneva Conventions, which the ICTY found to include a right, in judicial proceedings, not to disclose information relating to its activities.¹⁰ In other words, the ICRC cannot be ordered to testify. This principle was largely accepted by the drafters of the Rules of Procedure and Evidence at the ICC, who included information gained by ICRC employees in the course of their work in their definition of privileged information not subject to disclosure under Rule 73.¹¹

¹⁰ ICTY, *Prosecutor v. Simic et al.* (IT-95-9), Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999 (hereinafter “ICRC Decision”), paras. 72-74. The Court found that the ICRC could discharge its mandate only if it could maintain its practice of not testifying before courts. As the work of the ICRC in the promotion and verification of respect for international humanitarian law and in the provision of assistance to victims of conflict is mandated by the Geneva Conventions, States parties to those Conventions were taken to have accepted this practice. The widespread ratification of the Conventions, along with the practice of a considerable number of States to respect the ICRC’s confidential manner of working, was found to have created a right for the ICRC not to testify under customary international law. For a discussion of this decision see Stéphane Jeannot, “Recognition of the ICRC’s long-standing rule of confidentiality”, *International Review of the Red Cross*, No. 838, June 2000, pp. 403-425; and for the ICRC’s position more generally see Gabor Rona, “The ICRC’s privilege not to testify: Confidentiality in action”, *International Review of the Red Cross*, No. 845, March 2002, pp. 207-219.

¹¹ Rule 73 entitled “Privileged communications and information” includes the following paragraphs: “4. The Court shall regard as privileged, and consequently not subject to disclosure, including by way of testimony of any present or past official or employee of the International Committee of the Red Cross (ICRC), any information, documents or other evidence which it came into the possession of in the course, or as a consequence, of the performance by ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement, unless: (a) After consultations undertaken pursuant to sub-rule 6, ICRC does not object in writing to such disclosure, or otherwise has waived this privilege; or (b) Such information, documents or other evidence is contained in public statements and documents of ICRC. 5. Nothing in sub-rule 4 shall affect the admissibility of the same evidence obtained from a source other than ICRC and its officials or employees when such evidence has also been acquired by this source independently of ICRC and its officials or employees. 6. If the Court determines that ICRC information, documents or other evidence are of great importance for a particular case, consultations shall be held between the Court and ICRC in order to seek to resolve the matter by cooperative means, bearing in mind the circumstances of the case, the relevance of the evidence sought, whether the evidence could be obtained from a source other than ICRC, the interests of justice and of victims, and the performance of the Court’s and ICRC’s functions.”

The position of other humanitarian entities is clearly different but has not been examined by an international court; the aforementioned ICRC ruling emphasized the *sui generis* nature of the organization and was based largely on the ICRC's "hallmark" practice of working in strictest confidence.¹² A recent decision of the ICTY with respect to war correspondents, however, offers some significant clues as to how international courts might deal with requests to compel members of other humanitarian organizations to testify.¹³

In January 2002, a Trial Chamber of the ICTY issued a subpoena to Jonathan Randal, former journalist with the *Washington Post*, to appear in court. Randal had published an interview with a Bosnian Serb politician during the war in which the latter had allegedly stated that non-Serb residents of Bosnian Serb territory should be moved out of the area to create an "ethnically clean space". The politician, Radislav Brdjanin, was later on trial for crimes based on ethnic cleansing, and the Prosecutor wanted Randal to substantiate the details in his interview. Randal challenged the subpoena, and the matter went into appeal.

The Appeals Chamber quashed the subpoena. It first established that there was a public interest in the work of war correspondents "because vigorous investigation and reporting by war correspondents enables citizens of the international community to receive vital information from the war zones".¹⁴ It then found that compelling war correspondents to testify in a war crimes tribunal would adversely affect their ability to carry out their work, because if it is known they can be subpoenaed (if they are perceived as potential witnesses for the prosecution rather than independent observers) people will be less willing to talk to them, they may be denied access to conflict areas, and they may become the target of hostilities themselves.¹⁵ Balancing the public interest in the work of war correspondents against the public interest in having all relevant evidence available to the Court, the Chamber then ruled that a war correspondent may only be subpoenaed if the evidence he or she can give is of direct and important value in determining a core issue in the case, and if this evidence cannot reasonably be obtained elsewhere.¹⁶

¹² ICRC Decision, paras. 73-74.

¹³ ICTY, *Prosecutor v. Brdjanin & Talic* (IT-99-36-AR73.9), Decision on Interlocutory Appeal, 11 December 2002 (hereinafter "Randal Decision").

¹⁴ Randal Decision, para. 38.

¹⁵ Randal Decision, para. 42-43.

¹⁶ Randal Decision, para. 50.

These arguments have immediate resonance for humanitarian organizations. If there is a public interest in receiving information from a war zone, there is an arguably even greater public interest in the victims of conflicts receiving food, shelter and medical treatment from humanitarian players. The limitations on the work of war correspondents which the court found would result from being forced to testify are exactly those problems that humanitarian organizations anticipate — loss of perceived neutrality, leading to lack of access and security threats. Humanitarian organizations must be able to claim at least the qualified privilege afforded to war correspondents by the ICTY Appeals Chamber — namely that they will only be forced to testify against their will if the evidence they can give is key to the case and no other source of this evidence can reasonably be found.

The Randal Decision did not concern the protection of confidential sources; the interview had already been published in the *Washington Post*. Interestingly, the court found this to be irrelevant. This finding is useful for organizations that may have spoken out about atrocities they witnessed in the course of their work but are reluctant to repeat the testimony in a court setting. In the words of the court:

“To publish the information obtained from an interview is one thing (...) but to testify against the interviewed person on the basis of that interview is quite another. The consequences for the interviewed persons are much worse in the latter case, as they may be found guilty in a war crimes trial and deprived of their liberty.”¹⁷

In other words, the privilege afforded to war correspondents is not based on the fact that they would be forced to reveal information that they would otherwise have kept confidential (such as the identity of sources), but rather that the presentation of information in the context of a trial may jeopardize their perceived impartiality. “In order to do their jobs effectively”, said the court, “war correspondents must be perceived as *independent observers* rather than as potential witnesses for the prosecution.”¹⁸ Applying this logic to the case of a humanitarian organization, a privilege may be claimed on the basis of the importance to the organization of being seen to be neutral, rather than because the organization would not normally speak out about events its employees have witnessed.¹⁹

¹⁷ Randal Decision, para. 43.

¹⁸ Randal Decision, para. 42 (emphasis added).

¹⁹ This sets the decision apart from the ICTY's ruling regarding the ICRC, which was based in large part on the ICRC's tradition of confidentiality.

Simply put, you can issue a press release and a report about violence against civilians without sacrificing the right to refuse to testify about those events in court (except where the evidence concerned is key evidence and you are the only source).

The members of the ICTY Appeals Chamber also constitute the Appeals Chamber of the ICTR,²⁰ and the Special Court for Sierra Leone is guided by the rulings of the ICTY Appeals Chamber,²¹ so the Randal Decision has a clear authority in all three of these courts. In addition, as the only ruling of an international court on this issue so far, it is likely to be persuasive in cases before the ICC and other international or internationalized criminal courts. Although national jurisdictions tend to have established rules on journalistic privilege, the ICTY's decision in the Randal case may also be of some influence at the national level if the particular case of war correspondents is under consideration.

Where the information sought is confidential in nature — such as personal medical data — international courts and tribunals are likely to grant an absolute privilege, as in national jurisdictions. The existence of this type of professional privilege is recognized in the Rules of Procedure and Evidence of the ICC. These accord absolute privilege to communications between a person and his or her legal counsel, as well as to “communications made in the context of a class of professional or other confidential relationships” where these communications:

- a) ... 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.”²²

The rule goes on to encourage the court to recognize as privileged communications between a person and his or her doctor, psychiatrist, psychologist, counsellor and member of the clergy.

²⁰ Statute of the ICTR, Article 13(4).

²¹ Statute of the Special Court for Sierra Leone, Article 20(3): “The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.”

²² Rule 73, “Privileged communications and information”.

Can humanitarian organizations hand information to the court on a confidential basis?

The ICTY, the ICTR, the Special Court for Sierra Leone and the ICC all have a provision under which information can be given on a confidential basis to the Prosecutor (in the ICTY and the ICC the rule may also apply to the Defence), and cannot be produced in court without the consent of the information provider.²³ This rule is designed to encourage States, for example, to share intelligence information that could help investigations while still retaining control over how that information was used. Humanitarian organizations have also confidentially handed over information to the Prosecutor of the Yugoslavia and Rwanda Tribunals under the rule: it offers a way to help with the trial of international criminals without damaging the neutral image of the organization.

There have been some criticisms of the rule, suggesting that the defendant's right to a fair trial is compromised if the Prosecution is able to keep significant information secret. Two points should be noted in this regard: first, if the material is to be used in evidence it must be disclosed to the defence under the same rule.²⁴ Secondly, if the information is exculpatory in nature, so that it might be useful in the preparation of the defence, there is an overriding duty of disclosure on the Prosecution.²⁵ This duty overrides the guarantees of confidentiality given to the information provider under Rule 70, so the protection offered by the rule is not watertight from the provider's point of view.

The ICTY, ICTR and the Special Court for Sierra Leone

At the ICTY, the ICTR and the Special Court for Sierra Leone this rule appears as Rule 70 of the Rules of Procedure and Evidence, and the text is largely similar for all three courts. Rule 70 of the Rules of Procedure and Evidence of the ICTY, entitled "Matters not Subject to Disclosure", reads in relevant part as follows:

"(B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been

²³ Rule 70 of the Rules of Procedure and Evidence of the ICTY, ICTR and SCSL; Article 54 of the Statute and Rule 82 of the Rules of Procedure and Evidence of the ICC.

²⁴ See para. (B) of Rule 70 at the ICTY, ICTR and SCSL and para. (4) of Rule 82 at the ICC, cited below.

²⁵ Rule 68 at all three courts, entitled "Disclosure of exculpatory evidence", provides that the Prosecutor is under a duty to disclose evidence ("material" at the ICTY) "which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of Prosecution evidence".

used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

- (C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance. A Trial Chamber may not use its power to order the attendance of witnesses or to require production of documents in order to compel the production of such additional evidence.
- (D) If the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber may not compel that witness to answer any question relating to the information or its origin, if the witness declines to answer on grounds of confidentiality.
- (E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to the limitations contained in paragraphs (C) and (D).
- (F) The Trial Chamber may order upon an application by the accused or defence counsel that, in the interests of justice, the provisions of this Rule shall apply *mutatis mutandis* to specific information in the possession of the accused.
- (G) Nothing in paragraph (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."

There are minor differences in the texts at the ICTR and SCSL; the major difference is that neither court includes paragraph (F) applying the rule to confidential information given to the Defence.

In these courts, should the Prosecutor — or whichever party receives the information — decide that the information would be really useful as evidence, it can ask the information provider for permission to produce the information in court. The rule then provides further protection: first of all the court is barred from ordering the information provider to provide more evidence. This

is important because, for example, once the defence knows that humanitarian organization X was operating in the territory in question and has some information relevant to the case, they might wish to apply to the court for an order that the organization produce other relevant information, or that it provide a particular witness (e.g. the country manager in a particular period). Rule 70 prevents the court from making such an order. Second, if a witness presented by the information provider gives evidence in court, that witness may refuse to answer certain questions on the grounds of confidentiality. The information provider decides what is confidential. So if a humanitarian worker is describing atrocities witnessed and the defence starts to ask about security procedures, or other internal mechanisms the organization wishes to keep confidential, the witness can refuse to answer that question. Often the court will allow a representative of the organization to be present to advise on such questions.

For practical purposes, a few points should be noted to take full advantage of this rule. First of all, it is wise to clearly mark any information provided under Rule 70 as “confidential”, or to record the fact that there was an agreement to provide the information on a confidential basis. ICTY jurisprudence has shown that judges will look at whether information really was provided on a confidential basis, although their enquiry is unlikely to go any further. The ICTY Appeals Chamber has held that: “such enquiry must be of a very limited nature; it only extends to an examination of whether the information was in fact provided on a confidential basis (...). This is an objective test.”²⁶

It may be questioned whether information can be provided on a confidential basis when, judged objectively, it is clearly not confidential. For example, an organization may have published a report on denial of access to food aid during a conflict, which would help the Prosecutor establish who was in control of a particular area at that time. The organization might try to protect itself from being forced to testify on the contents of the report by seeking to give it to the Prosecutor under Rule 70, despite the fact that the report was public when issued. The case mentioned above suggests that were this to be challenged in court, the judges could look at whether the report was objectively confidential, since this could form part of an assessment of whether it was “in fact provided on a confidential basis”, and if they decided against then protection under Rule 70 would not be available.

²⁶ ICTY, *Prosecutor v. Milosevic* (IT-02-54-AR108 bis & AR73), Public version of the confidential decision on the interpretation and application of Rule 70, 23 October 2002 (hereinafter “Milosevic Decision”), para. 29.

The ICC

The ICC has a rule which at first glance seems very similar to Rule 70; it appears in part in the Rome Statute, as Article 54, and more fully in the Rules of Procedure and Evidence as Rule 82. Paragraph 3 of Article 54, entitled “Duties and powers of the Prosecutor with respect to investigations”, reads in its relevant part as follows:

“3. The Prosecutor may: (...) (e) 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 purpose of generating new evidence, unless the provider of the information consents.”

Similarly Rule 82, entitled “Restrictions on disclosure of material and information protected under article 54, paragraph 3 (e)” reads:

- “1. Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3 (e), the Prosecutor may not subsequently introduce such material or information into evidence without the prior consent of the provider of the material or information and adequate prior disclosure to the accused.
2. If the Prosecutor introduces material or information protected under article 54, paragraph 3 (e), into evidence, a Chamber may not order the production of additional evidence received from the provider of the initial material or information, nor may a Chamber for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.
3. If the Prosecutor calls a witness to introduce in evidence any material or information which has been protected under article 54, paragraph 3 (e), a Chamber may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on grounds of confidentiality.
4. The right of the accused to challenge evidence which has been protected under article 54, paragraph 3 (e), shall remain unaffected subject only to the limitations contained in sub-rules 2 and 3.
5. A Chamber dealing with the matter may order, upon application by the defence, that, in the interests of justice, material or information in the possession of the accused, which has been provided to the accused under the same conditions as set forth in article 54, paragraph 3 (e), and which is to be introduced into evidence, shall be subject *mutatis mutandis* to sub-rules 1, 2 and 3.”

Read together, these provisions provide the same protection for confidential information that Rule 70 offers, but the type of information for which this protection can be claimed is significantly different. Most importantly for organizations wishing to make use of these provisions, it does not appear to be possible to claim protection for information handed over to be used in evidence. Rather the provisions apply only to “documents or information that the Prosecutor [or possibly the defence²⁷] obtains on the condition of confidentiality *and solely for the purpose of generating new evidence*” (emphasis added).²⁸

The ICC provisions, therefore, only cover material given for lead purposes. While it is possible to present a potential witness to the prosecution at the ICTY on the understanding that consent is required for this witness to give evidence, and that if the witness does give evidence, he or she can decline to answer questions on the grounds of confidentiality and no further evidence from the providing organization can be ordered, it seems that this will not work at the ICC, as the provision of a potential witness to the prosecution is clearly not intended only to generate further evidence but is rather a possible piece of evidence itself.

In fact, this same argument had been made at the ICTY to deny protection to information not necessarily provided for lead purposes only, as the wording of Rule 70 is somewhat confusing. Before the Appeals Chamber there confirmed that the only criterion for information to fall within Rule 70 was that it be provided on a confidential basis, and that the intention behind the provision of the information was irrelevant,²⁹ there were a number of decisions that denied the formal protection of Rule 70 but imposed similar conditions on testimony under the court’s general power to protect victims and witnesses.³⁰ These may offer some guidance on how the ICC will proceed with evidence provided by humanitarian organizations which does not meet the Article 54 criteria: if it follows the ICTY model, the Court may grant protections similar to those provided under Rule 82 if requested by the providing organization, even though it is not obliged to under the terms of the Statute and Rules.

²⁷ See para. 5 of Rule 82.

²⁸ ICC Statute, Article 54(3)(e).

²⁹ Milosevic Decision, paras. 20, 25. As mentioned above, the ICTY Appeals Chamber decisions have authority in the ICTR and the Special Court for Sierra Leone.

³⁰ See for example ICTY, *Prosecutor v. Blaskic* (IT-95-14-T), Decisions of 12 and 13 May 1999.

Whatever position the Court takes once trials commence, humanitarian organizations should be wary of seeking to rely on Article 54 and Rule 82 in the same way that they may have relied on Rule 70 at the other courts.

Can evidence given by humanitarian organizations be kept out of the public domain?

All international courts have rules providing for the protection of victims and witnesses.³¹ During testimony, this can include keeping the name and other information that would identify the person or organization testifying confidential so that it is removed from public records of the trial and not spoken in open court; hiding their face from the public (with screens in court and image distortion on video records); and distorting their voice. More rarely, the court may either cut transmission of all or part of the witness testimony to the public or close the court to public view and keep the entire record confidential.

Neither the prosecution nor the defence can promise a witness that these measures will be put in place. They can apply on the witness's behalf to the judges, but it is the judges who decide. A good argument, if possible backed up by evidence of the negative consequences of any publicity, must be presented to the court, which will weigh the arguments of the witness against the accused's right to a fair and public trial.³² In practice, however, international courts have been disposed to grant protection to members of humanitarian organizations wishing to testify, some of whom have done so under a pseudonym.³³

Whatever protection is granted to a witness, his or her identity and the content of the testimony will almost certainly be communicated to the accused so that they can properly prepare their defence. There was a case early on at the ICTY in which a fully confidential witness was allowed,³⁴ but

³¹ ICTY Statute, Article 22, Rule 75; ICTR Statute, Article 21, Rule 75; ICC Statute, Articles 64(6)(e), Rule 87; SCSL Statute, Article 16(4), Rule 75.

³² The accused has a right to a fair and public trial under international human rights law, confirmed in the Statutes of the ICC (Article 67), ICTY (Article 21), ICTR (Article 20) and SCSL (Article 17). This is also seen as a general safeguard against mistakes in or misuse of judicial systems. Measures to disguise the identity of witnesses are an exception to this principle, and must be proportionate.

³³ See for example the closed sessions ordered in ICTY, *Prosecutor v. Blaskic* (IT-95-14-T), Decisions of 12 and 13 May 1999.

³⁴ ICTY, *Prosecutor v. Tadic* (IT-94-1-T), Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995.

this practice has been discontinued. It is still theoretically possible under the rules of all the courts considered here, but the level of risk to the witness would have to be so high to outweigh the rights of the accused that it is unlikely in all but the most exceptional circumstances.

The accused will, however, be limited in terms of whom they can disclose the protected identity to. The usual formula, ordered by the court, bars the defence from disclosing the identity of protected witnesses beyond that disclosure necessary for the proper preparation of the defence. While clearly necessary to respect the rights of the defence, this can cause problems for humanitarian organizations, particularly in situations where they are still operational in a territory at the time of the trial. Defendant A is told that a World Food Programme (WFP) worker, for example, will testify that troops under Defendant A's command burnt down a village and looted a WFP distribution centre in March 2002. It is legitimate for the defence to investigate whether the WFP worker was indeed working in the area at that time and on what he or she may be basing his or her observation that the troops were under Defendant A's command. The defence might ask the troops in the area what sort of contact they had with the WFP worker and when. It may be possible for the defence not to mention why they are asking the questions — to keep confidential that the WFP worker is to testify — but it may also not be. In that case, the military in the area now know that the WFP is to bear witness against their leader(s) in court. It is not hard to imagine that this could cause some difficulty for WFP operations.

In short, although it may be possible to keep evidence given by humanitarian organizations out of the public domain, it is unlikely to be possible to keep it entirely secret.

Conclusion

For humanitarian organizations, the question of cooperation with international criminal courts is a complex one. While the primary purpose of most organizations is to provide life-saving services to populations in need, if those populations are subject to violent attacks many see the value of helping to bring the attackers to justice. Public cooperation with an international court, however, may compromise the organizations' abilities to provide those life-saving services. In determining how to resolve this dilemma — to decide which service is more important to the victims and whether it is possible to do both — organizations should be aware of a number of legal tools that can be used to maintain control over any cooperation with the courts and to minimize potential negative effects.

All international courts to date have a provision allowing humanitarian agencies to hand over information on a confidential basis to the Prosecutor, and at the ICTY and the ICC this can also apply to the defence. Such information will only be released to the other party and used in court if the providing organization later consents. Humanitarian organizations that decide to testify or produce other evidence in court can always ask the judges to keep their identity hidden from the public, though not from the defence, and courts so far have been willing to grant such requests on the basis of the risks public testimony would entail for future operations.

Legally, the Randal Decision suggests that humanitarian workers too can avoid being compelled to testify against their will, unless their evidence would be key to the case and could not reasonably be obtained elsewhere. In deciding on the Randal case the ICTY had to balance considerations very similar to those faced by humanitarian workers who have witnessed atrocities, and the criteria the ICTY Appeals Chamber came up with probably reflect the circumstances in which humanitarian organizations themselves might consider it worth bearing witness in court.