



A HANDBOOK ON ASSISTING

INTERNATIONAL CRIMINAL INVESTIGATIONS

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- › National cooperation and coordination
- › Joint multifunctional education and training
- › Research, studies and evaluation
- › Recruitment of Swedish civilian personnel to international peace operations
- › Funding of civil society peace projects

The Academy has a preparedness to offer good offices for conflict management initiatives, such as talks between parties to a conflict. Within its mandate, it serves as a national point of contact with international organizations, including the UN, EU, OSCE and NATO.

The Academy aims for broad international participation in its activities, and cooperates closely with partner institutions throughout the world. The Academy is named after Count Folke Bernadotte, the first official UN mediator and its establishment reflects Sweden's commitment to international peace and security.

THE SWEDISH NATIONAL DEFENCE COLLEGE'S (Försvarshögskolan) task is to contribute towards national and international security through research and development. Research is carried out in diverse, but inter-related subject areas and subsequently disseminated to other interested sectors of society both nationally and internationally. The College trains and educates military and civilian personnel in leading positions, both nationally and internationally as part of the contribution to the management of crisis situations and security issues.

The Swedish National Defence College has existed in its present form since 1997. The College's roots can be traced back as far as the establishment of the Artillery College at Marieberg in Stockholm in the 19th century. Today's College marks the latest development in a long line of military educational tradition. The Swedish National Defence College was established as a national university college on January 1, 2008, with the right to issue academic degrees.

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FOREWORD

PEACEKEEPING OFTEN TAKES PLACE in environments where war crimes and other serious violations of international law have been committed or are still being committed. It is therefore important that international actors present in these areas – whether journalists, observers, peacekeepers, NGO-staff and embassy staff – understand how they can best assist the work of international criminal courts, tribunals and transitional justice entities.

IN ORDER FOR INFORMATION provided to international courts to be useful for investigations and admissible in court, the material must be handled and processed correctly from the time of collection until its transfer to the custody of the appropriate investigative organizations. Mistakes made during this phase may not be possible to correct later and important information may not be admissible or possible to use in a trial as a result.

THIS HANDBOOK PROVIDES people who are not lawyers or investigators with the basic knowledge needed to correctly identify, gather and forward information on possible international crimes to international criminal courts and tribunals, and to understand what is expected of witnesses testifying in international criminal trials. The handbook also explains how investigations of international crimes are conducted and what type of information, obvious and less obvious, investigators need from the field. By explaining the nature of these procedures and working principles, the handbook aims also to enhance the security of the international staff in the field as well as their sources.

THE HANDBOOK IS THE RESULT of a project by the Folke Bernadotte Academy in cooperation with the Swedish National Defence College. The initiative is in line with the Swedish government's focus on human rights and contributes to Swedish and international efforts in international peace operations.


THE PROJECT TEAM CONSISTS OF Maria Nystedt, associate professor Jann K. Kleffner and associate professor Christian Axboe Nielsen. The Swedish Ministry of Foreign Affairs has funded the project. The Folke Bernadotte Academy and the Swedish National Defence College are grateful to all the experts on war crimes investigations and trials, as well as civilians and military, who have taken time to read the handbook and provide valuable comments and insights.



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Secretary-General Ban Ki-moon participates in a 10-minute friendly football match at Mandela National Stadium in Kampala, Uganda. Mr. Ban, along with Ugandan President Yoweri Kaguta Museveni, played in the match to promote War Victims Day, an observance for the victims of war crimes. *UN Photo/Evan Schneider*

First session of International Tribunal on War Crimes in Former Yugoslavia opens in the Hague (1993).
UN Photo



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LIST OF ACRONYMS AND ABBREVIATIONS

ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
OTP	Office of the Prosecutor
UN	United Nations
UNHCHR	United Nations Office of the High Commissioner on Human Rights

KEY POINTS

THE AMBITION OF THIS HANDBOOK is to provide practical guidance to lay persons who are in areas where they might receive or collect information that may assist investigations into international crimes. The guidance offered in this handbook is intended to enable lay persons to assist the professional staff of international criminal courts and tribunals, and not to transform lay persons into criminal investigators or analysts.

THE FOLLOWING PRINCIPLES are key points for such assistance:

- › Do no harm, either to yourself or to others.
- › Obey all of your own organization's security protocols and guidelines.
- › Do not make legal conclusions about the acts or events that you may witness.
- › Strive to be as objective as possible in your reporting.
- › Do not accept custody of artefacts or information that you are not qualified to handle.
- › Safety first! Do not enter into any areas that you are not absolutely certain have been searched and cleared of land mines, unexploded ordnance and booby traps.
- › Keep a record, such as a mission notebook, of what you observe and what you do.
- › Develop a system of note-taking that clearly separates facts from your own observations, comments, analyses, or issues related to the internal workings of your organization.
- › Consult with your organization or employer before submitting information to external organizations.
- › Remember that your contribution and the information you may provide can be very important.

Photo: The "Killing Fields" memorial. *UN Photo/J. Bleibtreu*


INTRODUCTION TO THE HANDBOOK

THE REASON FOR THIS HANDBOOK

Since the mid-1990s, a growing number of international criminal courts and tribunals – and, since 2002, the permanent International Criminal Court (ICC) in The Hague – have carried out large-scale investigations of crimes against humanity, genocide and war crimes. These institutions have frequently relied upon information and assistance from a variety of sources including governments, journalists, peacekeepers and employees of nongovernmental organizations (NGOs) and international organizations. Although such cooperation has proven very important, there have also been many mishaps, misunderstandings and missed opportunities. On numerous occasions, information that could potentially have been of great use to criminal cases was lost or was collected or preserved in a manner that made it unusable at trial. By anticipating and explaining potential practical hurdles, the information and guidelines provided in this handbook seek to prevent recurrences of such problems.

This handbook is designed to enable readers to assist domestic and international criminal courts and tribunals. These institutions perform the challenging work of investigating and prosecuting the most serious crimes of concern to the international community: crimes against humanity, war crimes and genocide (hereafter international crimes). Although the general public is today increasingly aware of the activities and missions of such courts and tribunals, not much is publicly known about the actual routine work of these institutions. The documentation, investigation and prosecution of international crimes are not matters of common knowledge. This handbook aims to facilitate a clearer understanding of these institutions and their work so that persons based in field operations, or who are otherwise present in areas where these crimes happen, can better cooperate with criminal investigations. Although the predominant focus will be on rendering assistance to international criminal investigations, the guidance offered will also be of use to those who are in a position to assist national criminal investigations, human rights organizations and truth and reconciliation commissions.

For various reasons, international courts and tribunals rely on others to assist in collecting and providing relevant information to them, particularly during the early stage of criminal investigations. Investigators are rarely present when crimes occur, as these organizations do not have endless resources and the numbers of investigators are limited. In the former Yugoslavia, for instance, both civilian and military observers were deployed before the International Criminal Tribunal for the Former Yugoslavia (ICTY) was created. Such observers were able to facilitate early investigations and later frequently featured as important witnesses in cases at the Tribunal. Likewise, at the ICC, the investigative teams responsible for the Democratic Republic of Congo have rarely exceeded a few dozen members in size. The ICC has therefore relied to a great extent on other organizations in order to collect information.



A symbol depicting justice at the entrance to the Peace Palace, home of the International Court of Justice (ICJ), at The Hague in the Netherlands.
UN Photo

In summary, the better the work of the partners of international criminal courts, the easier and better the work of these courts. As stated by the President of the ICC in his 2010 annual report to the United Nations Security Council, “In carrying out its functions, the Court relies on the cooperation of states, international organizations and civil society in accordance with the Rome Statute and international agreements concluded by the Court.”¹

WHO WILL USE THIS HANDBOOK?

This handbook is written for civilian or military actors deployed to conflict and post-conflict zones as part of national or multinational missions or for other reasons. Such missions can take many different forms and can commence at different stages of a conflict. These missions may constitute an element of deterrence, designed to prevent a conflict from erupting or escalating. Alternatively, readers of the handbook may be deployed as part of a multilateral treaty in which an international force and/or international organization(s) enforce an unstable peace in a region that has recently experienced conflict. Journalists and employees of corporations based in conflict and post-conflict zones will also be able to use this manual.

This handbook is written for people who are not professional investigators and who do not have monitoring and reporting of human rights abuses and international crimes as their primary activity. Full-time, professional duty as a monitor of these matters requires extensive training and has been covered in numerous other handbooks, many of which are readily available online.² This particular handbook is designed to equip anyone deployed in a conflict or post-conflict zone with the basic knowledge and skills that will allow them to be of potential assistance to international criminal courts and tribunals, and to improve the readers’ ability to interact with and aid professional human rights observers and international criminal investigators.

In all of the deployment situations described above, there is a potential that mission staff will encounter serious violations of human rights and humanitarian law. In some cases, this means that such actors will become eyewitnesses to abuses and crimes. In other cases, they will uncover traces of such crimes after the fact. In both situations, the information that they collect has potentially significant evidentiary value to those organizations whose job it is to investigate and prosecute international crimes. This manual will assist by identifying what types of information can be potentially useful to international criminal courts and tribunals and by telling readers how they can preserve and transmit this information to such institutions.

International criminal courts rely upon objective, credible and verifiable information in making decisions about which alleged crimes to investigate and which persons to investigate and eventually indict and prosecute. It is therefore essential that those who want to assist these organizations be familiar with the basics of how these courts operate. This will help to ensure that the information that observers collect in the field will be of practical use to international criminal courts and tribunals.

It is important that readers of this handbook understand that they can assist, but cannot replace, professional monitors and investigators of human rights violations

and international humanitarian law (IHL). How much readers of this handbook do on their own before handing the matter over to professional criminal investigators or human rights monitors will depend upon a number of factors. This will primarily depend on whether a formal criminal investigation has already commenced in the operational area. If this is the case, then such investigations should take priority over any activities that readers of this handbook undertake. Ultimately, the decision to cooperate with or transfer any collected information to other agencies or organizations will be taken at the management or command level in your own organization.

THE STRUCTURE OF THE HANDBOOK

After the introduction, Chapter 2 offers a quick overview of international crimes and the major institutions of international criminal justice, including an explanation of the typical structure of an international criminal court. Chapter 3 takes a look at which actors commit international crimes, while chapter 4 explains the main components of international criminal investigations. Chapter 5 presents guiding principles on information and evidence. Chapter 6 focuses on the actual collection of information and evidence, while chapter 7 discusses crime scenes and physical (forensic) evidence. Chapter 8 treats the topic of dealing with witnesses, and chapter 9 turns this topic around to look at what happens when readers of this handbook themselves become (eye)witnesses to international crimes. Finally, chapter 10 instructs on how to submit information to international criminal courts and tribunals.

A BRIEF NOTE ON THE LIMITS OF THE HANDBOOK

This handbook is not designed to make the reader into an expert on human rights or IHL. Similarly, it will not make readers into professional investigators or crime scene technicians. The handbook provides a basic introduction to all of these important topics, but it also recognizes that the users of the handbook will face many other priorities in their daily work in the field. The handbook uses plain and non-technical language. In those cases where legal terms and jargon are unavoidable, they will be explained clearly. The emphasis throughout the handbook is on practical actions that can be undertaken to assist institutions of international criminal justice, while at the same time avoiding potential areas of action that could complicate or thwart the work of professional criminal investigators.

The recommendations in this handbook are made on the assumption that readers will at all times act in full conformity with the rules and principles governing their deployment and activities in the field. **Nothing in this handbook shall be construed in such a way that it condones acts or omissions that are in breach of the mandate of a given mission and of applicable international and domestic law.** It is imperative that readers acquaint themselves with the relevant mandates, statutes and laws of the areas in which they are operating. Readers should also consult with their employers in order to receive guidance on cooperation with criminal investigations.

1. Report of the International Criminal Court for 2009/10 to the UN Security Council, 19 August 2010, www.icc-cpi.int/NR/rdonlyres/EA7DF985-4549-40EF-A0DC-814BE440655C/282599/ICC6RepEng.pdf

2. See bibliography for a partial selection.

INTERNATIONAL CRIMES AND INTERNATIONAL CRIMINAL JUSTICE

2.1 LEGAL FOUNDATIONS

International law can be found in treaties, customary international law³, general principles of law and binding resolutions of intergovernmental organizations, such as those of the UN Security Council adopted under Chapter VII of the UN Charter.⁴ The three most common categories of crimes that international tribunals are mandated to address are genocide, crimes against humanity and war crimes. All of these crimes entail violations of international law and are collectively referred to in this manual as international crimes. **It is important to note that not every violation of international law will be investigated and prosecuted.** International criminal courts and tribunals focus on prosecuting serious violations of international law.

In principle, a state is only bound by those rules of international law to which it has consented. That means that a prohibition of a given crime is only applicable if and when the state concerned has accepted that prohibition as binding upon it. An exception to this rule is that the UN Security Council can impose upon states obligations to which they have not expressed their consent, when it acts under Chapter VII of the UN Charter.

While this handbook concentrates on genocide, crimes against humanity and war crimes, it needs to be understood that international law also provides for other crimes. Some of these other crimes may also be relevant in the context in which you operate. Examples are individual acts of torture, enforced disappearances, and terrorist offences. However, **the jurisdiction of most international criminal justice mechanisms extends only to genocide, crimes against humanity and war crimes.**⁵

INTERNATIONAL TERRORISM AND TERRORIST ACTORS

TERRORIST ATTACKS HAVE BEEN an increasing concern for states and international organizations, particularly after the terrorist acts of 11 September 2001. To date, international criminal justice has not dealt extensively with international terrorism. The Rome Statute of the ICC does not provide the Court with a specific mandate to prosecute international acts of terror, though those criminal acts of terrorists that fit the statutory description of international crimes described in the Statute can be prosecuted by the ICC. Of the existing ad hoc tribunals, only the Special Tribunal for Lebanon has specifically been established to prosecute terrorist acts.

Before turning to descriptions of the different categories of international crimes, it must be emphasized that **not all instances of death, injury, deprivation or destruction in armed conflicts and other crisis situations are the results of criminal acts.** Deaths, injury and destruction may also result from the legal and legitimate actions of the parties to an armed conflict, for instance from measures to impose or maintain law and order. For this reason, any information that suggests that physical destruction or damage to persons resulted from legitimate actions is just as important as information that suggests the contrary.

2.1.1 GENOCIDE

On 9 December 1948 the United Nations Convention on the Prevention and Punishment of the Crime of Genocide was adopted. Under international law, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.

Measures imposed with intent to prevent births within the group include sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, rape can also be used as an element of genocide. For example, women might be raped with the specific intent to impregnate them with children belonging to another group. The forcible transfer of children from one group to another group can also be part of the crime of genocide.

In order for crimes to be qualified as genocide, the following two conditions have to be fulfilled:

- › Prohibited acts (e.g. killing, causing serious bodily or mental harm, etc.) were committed.
- › These prohibited acts were committed with the specific genocidal intent, that is, the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.

Acts which constitute and attempt to commit genocide, even if unsuccessful, are also punishable.

3. Customary international law consists of rules that come from general state practice accepted as law. Customary law does not have to be written and exists independent of treaty law and is in principle binding upon all states.

4. The website of the International Committee of the Red Cross provides a useful database of relevant treaties and customary international law: www.icrc.org/ihl.

5. In June 2010, the Assembly of States Parties of the ICC agreed upon amendments to the Rome Statute of the ICC that will eventually permit the ICC to prosecute the crime of aggression. However, the ICC will not have jurisdiction over this crime until 2017 at the earliest.



A UN Volunteer human rights team in Bogoro investigates the 2003 Lendu militia crimes committed against civilians in the area. Pictured here is a witness showing the skull of an alleged victim.
UN Photo/Martine Perret

It may be difficult to determine what a certain person or group of persons intended with the commission of a given act, not least because the genocidal intent has to be determined on a case-by-case basis. However, international criminal tribunals may infer such intent from evidence, including any evidence which demonstrates a consistent pattern of conduct by the alleged perpetrator. Furthermore, the existence of a genocidal plan devised by state authorities or authorities that yield power would be a strong indication of the specific intent requirement for the crime of genocide. Any information and documentation relevant to the existence of such a plan would be vital for subsequent criminal proceedings.

As stated above, genocide can only be committed against national, ethnic, racial or religious groups. These are referred to as protected groups. Other types of groups, such as political or economic groups, cannot be victims of genocide. Whether a certain group is a national, ethnic, racial or religious one will depend in large part on two factors. The first such factor is the perception of the alleged perpetrator of genocide. It is of utmost importance to determine whether the victim is perceived by the perpetrator of genocide as belonging to a national, ethnic, racial or religious group. Secondly, it is vital to consider the political, social and cultural context in which the crime of genocide has allegedly occurred or is occurring. It is therefore important to gather information about the political, social and cultural context in which alleged crimes occur.

The protected groups are generally understood as follows:

- › **National:** a group of people who are perceived to share a legal bond based on common citizenship;
- › **Ethnic:** a group whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others);
- › **Racial:** a group based on hereditary physical traits, often identified with a geographical region;
- › **Religious:** one whose members share the same religion, denomination or mode of worship.

Any information that suggests that certain groups are being or have been targeted as members of the above groups will therefore be very helpful to subsequent investigations. Bear in mind that genocide often begins with the commission of other crimes. It can evolve from discrimination against groups to attacks against the group. This typically manifests itself in laws, rules or regulations of a discriminatory nature. Information about discriminatory intent can for this reason serve as part of an early warning system that helps the international community to prevent genocide (and other crimes) before they occur.

EXAMPLE A:

A military force led by ethnic group X launches an armed attack against a town whose population consists of a majority of ethnic group Y and a minority of ethnic group X. Many civilians die during the course of the actual military operation. In the days after the town's authorities surrender, all members of ethnic group Y are rounded up and killed in the forests surrounding the town. The commander of the military force, citing policy statements by the leadership of his group, openly declares that group Y must disappear forever from this area of the country.

EXAMPLE B:

A military force led by ethnic group X launches an armed attack against a town whose population consists of a majority of ethnic group Y and a minority of ethnic group X. Many civilians die during the course of the actual military operation. In the days after the town's authorities surrender, many men of ethnic group Y are rounded up and killed in the forests surrounding the town. Later investigations reveal that these persons were killed by members of the military force without any military justification. However, the killings are shown to have been undertaken on the initiative of the local commander, whose intent was solely to weaken the strength of ethnic group Y's armed forces.

Only example A fits the conditions for genocide because the purpose of the killings was specifically to destroy a part of an ethnic group. Although members of group Y were also killed in example B, they were not killed with the specific intent to destroy the group. Example B is a crime, but it is not genocide.

2.1.2 **CRIMES AGAINST HUMANITY**

Crimes against humanity are the commission of certain serious human rights violations as part of a widespread or systematic attack directed against any civilian population.

In order for acts to be qualified as crimes against humanity, the following conditions have to be fulfilled:

- › there must be an attack;
- › the attack must be directed against any civilian population;
- › the attack must be widespread or systematic;
- › the serious human rights violation must be part of the attack;
- › the perpetrator must know of the wider context in which his or her acts occur and know that his or her acts are part of the attack.

In assessing whether there is an attack, information on the commission of acts of violence will be relevant. These acts can include the use of armed force, but also any form of mistreatment.

The attack must be directed against the civilian population, that is to say the civilian population must be the primary object of the attack. In order to determine whether this is the case a number of factors are considered, including:

- › the means and methods used in the course of the attack;
- › the status of the victims (civilians or combatants);
- › the number of victims;
- › the discriminatory nature of the attack;
- › the nature of the crimes committed during the attack;
- › any resistance to the attack.

Any information that is relevant to the above factors is potentially useful for investigations.

International law distinguishes between combatants and non-combatants, also called civilians. For a population to be considered civilian, it suffices that the population is predominantly civilian in nature, even if it does contain a small number of combatants. In other words, the presence within a population of members of resistance armed groups, or former combatants who have laid down their arms, does not as such alter its civilian nature. (This distinguishes it from cases in which armed forces have converted a civilian building for exclusive military purposes, an act that would render such a building a military target.) Furthermore, former members of the armed forces and members of the armed forces who have been captured or are otherwise outside combat are counted as civilians for the purpose of defining crimes against humanity. For example, if persons undergo systematic or widespread torture in a detention facility, it would be irrelevant whether those subjected to torture are members of the armed forces or not. Both categories of persons can fall victim to crimes against humanity.

An attack is “widespread” if it is conducted on a large scale and causes a large number of victims. There is no specific numerical threshold on what constitutes a large number of victims, and in practice the prosecutor and the judges will have to evaluate each case carefully during investigations and at trial. “Systematic” refers to the organised nature of the acts of violence. Patterns of crimes, namely the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrences. Many smaller crimes may form a larger pattern, so it is important to report all alleged crimes, regardless of their scale. The existence of a plan involving attacks can also contribute to demonstrating the systematic nature of acts of violence. The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, are all important factors that allow international and domestic criminal courts and tribunals to determine whether the attack satisfies either or both requirements of a “widespread” or “systematic” on a civilian population. Other relevant factors include:

- › the existence of a policy, political objective or ideology connected to a plan that aims to destroy, persecute or weaken a community;
- › the adoption of discriminatory measures, particularly in the form of discriminatory laws;

- › the implementation of measures that alter the demography of the current population;
- › the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
- › the preparation and use of significant public or private resources, whether military or other;
- › the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.

The most widely accepted list of those serious human rights violations that amount to crimes against humanity if committed as part of a widespread or systematic attack directed against any civilian population are the following:

- a)** murder;
- b)** extermination;
- c)** enslavement;
- d)** deportation or forcible transfer of population;
- e)** imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f)** torture;
- g)** rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- h)** persecution;
- i)** the enforced disappearance of persons;
- j)** the crime of apartheid.⁶

2.1.3 WAR CRIMES

In contrast to crimes against humanity and commonly also genocide, war crimes can occur as isolated instances, and they must occur in a period of armed conflict. There is no requirement that war crimes occur in a widespread or systematic manner.

The body of law underlying war crimes is the international law applicable in times of armed conflict, also referred to as international humanitarian law. International humanitarian law (IHL) is that part of international law that regulates the conduct of warfare with the goal of minimizing destruction and civilian casualties. The most important treaties that govern warfare are the Hague Conventions (of 1899 and 1907) and the Geneva Conventions (of 1949, with additional protocols in 1977 and 2005).

IHL applies during armed conflicts. One can distinguish between armed conflicts in which states resort to armed force against one another (international armed conflicts) and armed conflicts between governmental authorities and organised armed

6. Further information on these elements of the underlying offences can be found at www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Elements+of+Crimes.htm.

groups or between two or more organised armed groups that fight against one another (non-international armed conflicts). The latter type of armed conflict requires the armed violence to be of sufficient intensity that it is distinguishable from sporadic acts of violence and internal disturbances.

The law of armed conflicts rests upon the following fundamental principles that, if violated, can give rise to war crimes:

- › the principle of distinction, which requires parties to an armed conflict to distinguish between, on the one hand, members of the armed forces, civilians who directly participate in hostilities, and military objectives, and, on the other hand, civilians and civilian objects (e.g. houses of worship, hospitals, private residences, etc. – provided that these are not being used for military purposes). Parties to an armed conflict may only direct their attacks against members of the armed forces, civilians who directly participate in hostilities, and military objectives;
- › the principle of proportionality, which requires parties to an armed conflict not to attack a military objective if such an attack may be expected to cause collateral damage that would be excessive in relation to the concrete and direct military advantage anticipated;
- › the prohibition of employing weapons, ammunitions, material and methods of warfare of a nature to cause superfluous injury and unnecessary suffering to members of the armed forces and civilians who directly participate in hostilities;
- › the principle of protection, which requires parties to an armed conflict to treat humanely prisoners of war and other detainees, civilians and wounded, sick and shipwrecked persons, without any adverse distinction.

The large majority of war crimes can be traced back to the violation of one or more of these fundamental principles.⁷

In order for acts to amount to war crimes, they must be connected to the armed conflict, which includes active armed hostilities and a state of occupation. The existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability and decision to commit these acts, as well as in the manner and purpose for which they were committed. Factors that indicate that a given act is sufficiently connected to an armed conflict can include information that:

- › the perpetrator was a combatant;
- › the victims were non-combatants;
- › the victims were a member of the opposing party to the conflict;
- › the act could be said to have served the ultimate goal of a military campaign;
- › the act was committed as part of or in the context of the perpetrator's official duties.

2.1.4 GENERAL PRINCIPLES OF INDIVIDUAL CRIMINAL RESPONSIBILITY

Genocide, crimes against humanity and war crimes can in principle be committed by any person, whether civilian or military. At the same time, criminal responsibility for these crimes attaches to the **individual** person, not to groups, states or other collective entities. However, given the nature of the crimes, any information that indicates that the crimes occurred as a matter of policy of a given state or armed group is also relevant.

Individual criminal responsibility can manifest itself in a variety of ways, and need not mean that the individual committed the crime personally. Those who order, solicit or encourage the commission of crimes are also criminally responsible. Similarly, those individuals who facilitate or assist in the planning or the commission of a crime are also criminally responsible. In the case of genocide, those who directly and publicly incite others to commit genocide are equally responsible. Military and civilian superiors are criminally responsible if they knew or had reason to know that one or more of their subordinates were about to commit international crimes. These superior officers or officials are also responsible if they failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators of these crimes after they became aware of them.

International criminal courts and tribunals regularly focus on high level perpetrators that bear the greatest responsibility. Individual criminal responsibility attaches in principle to international crimes irrespective of the rank or level of authority that a person holds. Everyone – from the head of state to soldiers of the lowest rank – can bear criminal responsibility and can be prosecuted for international crimes.

International law also provides for a number of generic principles that govern defences, i.e. grounds that exclude or limit criminal responsibility. While international law recognizes some defences under certain circumstances, such as mental incapacity, intoxication, self-defence and duress, it in principle **rejects as a defence that a crime has been committed by a person pursuant to an order of a superior**. Every person has an individual responsibility not to carry out an illegal order.

2.2 INSTITUTIONS

The prohibition of genocide, crimes against humanity and war crimes can be enforced by a number of different institutions. First and foremost, domestic courts of either the state in which the crimes have occurred or third states may be willing and able to conduct criminal trials. In that case, such courts and other criminal justice agencies, such as the police and prosecutorial authorities, may be interested in receiving information that you have collected. At the same time, international crimes and their general context (armed conflict, widespread or systematic attacks against a civilian population, genocidal policies) often occur or result in situations in which the domestic criminal justice system of the state is non-existent or is unable or unwilling to act. This may make it impossible for domestic authorities to conduct independent and impartial investigations and legal proceedings.

7. A useful starting point in determining of what currently constitutes war crimes under customary international law is Art. 8 of the ICC Statute: www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm
For the elements of these crimes, see above (n 5).

In conflict areas, police and judicial organs are often involved in the commission of crimes. There is therefore a risk that information governmental authorities seek to obtain from you may be used to destroy evidence, intimidate victims and potential witnesses if (members of) such authorities are themselves implicated in the commission of international crimes or if they seek to shield alleged perpetrators.

Cooperation with and assistance to national authorities should therefore be approached with due caution.

International criminal courts and tribunals are a second possible forum in which international crimes are being adjudicated. They exist as courts of last resort, ensuring that perpetrators do not enjoy impunity as a consequence of the unwillingness or inability of national courts to prosecute international crimes. Such courts and tribunals may be established either on a permanent or an ad hoc basis in response to a particular situation, state or region. The International Criminal Court (ICC) is the only existing criminal court falling into the first category. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are examples of ad hoc tribunals.

A third form of criminal court and tribunal with jurisdiction over international crimes is a mixed (or hybrid internationalized) criminal court and tribunal. These mixed types combine certain features of international criminal courts and tribunals with those of domestic courts. Examples are the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, the Serious Crimes Panels established under the authority of the UN Transitional Administration in East Timor and the State Court of Bosnia and Herzegovina.

Information concerning international crimes is not only relevant for the aforementioned criminal courts and tribunals, but also for other transitional justice mechanisms. One example of these are truth commissions, such as those established in South Africa after the end of the apartheid era, in East Timor and Sierra Leone. Other such mechanisms are compensation and property claims commissions. In addition, a variety of international judicial, quasi-judicial and supervisory bodies exist for whom information on international crimes may be relevant. These bodies may include:

- › the International Court of Justice;
- › arbitration panels;
- › international and national commissions of inquiry;
- › compensation commissions;
- › human rights bodies, such as the UN Human Rights Council and its special rapporteurs and working groups;
- › the UN Human Rights Committee;
- › regional human rights courts and commissions (European, Inter-American and African).

In light of the significant variety of different bodies and institutions, it is useful to know which of the above are active or may become active in relation to a particular mission or region. Information on this should be provided to you by your organization as part of your briefing or mission packet. If you are in doubt, you should

ask your organization's legal advisor which of the above institutions are active in your area. In the case of the ICC, its website – www.icc.cpi.int – lists active areas of investigation (called “situations” by the ICC).

2.2.1 UNDERSTANDING HOW AN INTERNATIONAL CRIMINAL COURT OR TRIBUNAL OPERATES

International criminal courts vary in their composition and each of them operates according to its own regulations and procedures, as set out in the statute and rules of the courts. All of these courts are, however, similar in terms of their basic structure and contain the following components:

- › an office of the prosecutor;
- › a registry;
- › judicial chambers;
- › defence counsel;
- › office of public counsel for victims (ICC only).

It is important to understand that each of the above components has its own tasks and pursues its own objectives as part of the court's overall mission.

THE OFFICE OF THE PROSECUTOR

The office of the prosecutor (OTP) is in charge of investigating and prosecuting crimes. On the basis of the OTP's own preliminary analysis of allegations of international crimes and referrals from states and institutions such as the United Nations, the OTP at the ICC can decide to initiate formal investigations of particularly grave crimes. The ICC prosecutor can also on his or her own initiative undertake preliminary analysis of allegations of international crimes without referrals from member states. If such analysis results in the need to launch a new investigation, the prosecutor must seek the approval of the Pre-Trial Chamber in order to commence a formal investigation. At other courts, the chronological and geographical framework of potential investigations may be fixed in the statute of the court or tribunal.

The OTP collects and analyzes information that is potentially relevant for the investigation of crimes and conducts interviews with relevant witnesses and suspects. Once sufficient information has been collected to establish a well-founded suspicion that certain individuals have committed crimes, the OTP can apply to the judges of the court in order to obtain indictments and/or arrest warrants. When those accused of crimes in indictments or arrest warrants issued by the court are brought to the court to stand trial, the OTP is responsible for the identification, selection and tendering of evidence that proves the charges in the indictment. The burden of proof is therefore on the prosecutor, not the defence. Indeed, in the case of the ICC, the OTP has a statutory obligation to investigate all leads equally, regardless of whether they point towards the guilt or innocence of those persons under investigation. **It is important to understand that the collection of evidence does not stop once the trial starts, but rather typically continues until the end of the trial.**

THE REGISTRY

The registry is the administrative engine of the court. It runs the court's facilities and field offices and is responsible for matters such as finances, logistics, courtroom functions, and personnel administration. The registry is primarily responsible for victims and witnesses services, such as transporting witnesses to the court and back to their homes. Together with other organs of the court, the registry also coordinates witness protection for those witnesses whose testimony or cooperation with the court places them at risk. The registry is also typically in charge of running the detention facilities and security service of the court.

THE CHAMBERS

The chambers are the unit of the court in which the judges and their legal advisors and clerks work. Typically the judges will constitute various "trial chambers" at the pre-trial, trial and appeals stage of a case. There are no juries in international criminal courts and tribunals. Judges in a pre-trial chamber examine the results of the prosecutor's investigative work and decide whether there is enough evidence to justify issuing an indictment and/or an arrest warrant. Judges also perform a number of other tasks including the issuing of search warrants and binding orders for states to cooperate with the court.

Once a suspect is arrested, the pre-trial judge will also manage all matters related to the administrative preparation of a trial, for example the disclosure of prosecution evidence to the defence and the setting of trial dates. Before and during the trial, judges also manage the process of witness protection, including the use of in-court witness protection measures (e.g. face and voice distortion and/or the use of pseudonyms during testimony). During the trial, the judges are in charge of running the proceedings in a fair, orderly and efficient manner, and they listen to the evidence presented by the prosecution and the defence. The judges can also call any witnesses they consider relevant, even if these are not called by the prosecution or the defence. At the end of a trial, the judges write a judgment deciding upon the guilt or innocence of the accused. If the accused is pronounced guilty, the judges sentence the guilty party to a jail sentence. After a trial is complete, the appeals chamber considers appeals from the defence and/or the prosecution.

THE DEFENCE

The defence represents the rights and interests of the accused. At trial, counsel for the accused or the accused himself does not bear any burden of proof. Regardless of the nature of the crimes charged in an indictment, **every defendant is presumed innocent and has the right to a professional and effective defence counsel.** If defendants cannot pay for their own defence counsel, the court registry pays for them. In those cases where defendants admit their guilt, defence counsel will negotiate a plea agreement with the prosecution and attempt to present mitigating circumstances to the court in order to achieve a lower prison sentence.

It should be noted that at international courts and tribunals, defendants are in appropriate circumstances permitted to defend themselves, and are therefore not obliged to choose a defence counsel.

Unlike the prosecution, the registry and the chambers, those working for the defence are not employees of the court. Defence counsels are typically lawyers who practice international law professionally and have been admitted to practice at international criminal courts. Like the prosecution, the defence often relies upon investigators and analysts to gather and analyse information that is relevant to the case. The defence is entitled to receive assistance in its investigations from the OTP and the OTP must disclose all relevant material to the defence. The defence calls its own witnesses at trial.

VICTIM PARTICIPATION

In the case of the ICC, the Rome Statute provides mechanisms for the participation of victims in the judicial process. Therefore the ICC's structure includes an Office of the Public Council for Victims and a Trust Fund for Victims that are especially concerned with the legal rights of victims and the payment of reparations to victims. These functions are semi-autonomous and do not belong to any of the divisions of the court mentioned above.⁸

8. For additional information on the innovative practice of victim participation at the ICC, see www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/

WHO COMMITS VIOLATIONS OF HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW?

Perpetrators of international crimes are often thought to be mainly military officers and soldiers in war zones who for example order the shelling of areas populated predominantly by civilians or massacres of civilians, or who directly participate in mass killings themselves. However, this picture captures only a small section of potential perpetrators of violations of human rights and IHL. **Everyone can commit international crimes.** This handbook will briefly examine several categories of perpetrators based on cases that have been investigated and prosecuted at international criminal tribunals. Understanding what kinds of perpetrators exist and how they operate is an important element in being able to assist potential investigations into human rights violations and international crimes.

In addition to the state and non-state actors outlined below, it is also important to be aware of states or groups that act as proxies (agents or surrogates) for others in order to accomplish their goals. Such groups can be paramilitary in nature but can also be state actors of an allied or client state. Proxy groups typically receive financial and military support from another state. Although the sponsoring state may participate directly in the creation and initial operation of the proxy group, proxy groups can take on their own political and military objectives. Indeed, in some cases the proxy groups end up breaking completely with their original sponsors. Nevertheless, sponsors of proxy groups can in some cases be legally liable for the crimes committed by their proxies.

3.1. STATE ACTORS

States are the traditional building blocks of international society, and they continue to be the most important actors in international politics today. It is therefore not surprising that many international crimes are committed by state actors or those acting on behalf of them. At the same time, however, international criminal justice focuses on individual rather than collective responsibility. International criminal courts therefore prosecute not states but individual actors who are accused of having committed international crimes. Even if someone commits a crime in the name of a state or a group, this does not mean that the state or the group as a whole is collectively responsible in the criminal sense. Reporting, investigating and prosecuting violations committed on all sides of a conflict does not mean that all sides are necessarily equal, but rather enforces the cardinal principle of equality before the law. That is, the law protects everyone equally, but also strives to ensure that everyone can be prosecuted for crimes committed, regardless of their political or social status, gender, ethnic, racial, religious or other identity.

State actors may be military, police or civilian, and they may act alone or in groups. They typically commit their acts in furtherance of a state policy which they believe, correctly or incorrectly, can only be achieved through the commission of criminal acts. Some actors also commit crimes as an extension of their abuse of state power for personal gains.

3.1.1 CIVILIAN (POLITICAL)

In conflicts not caused by external attacks, mass abuses of human rights and violations of international law are almost inevitably the result of a severe deterioration of the political situation leading to armed conflict in internally divided states. Political parties and leaders typically play a key role in polarizing society along political, social and/or ethnic or national lines. By doing so, they create a frayed and highly antagonistic atmosphere that is conducive to violence. This can entail passing laws that institutionalize discrimination against minorities, social classes or other vulnerable groups in society. The mass media are often enlisted to spread fear and hatred of such groups, for example by turning these groups into scapegoats for the social or economic problems afflicting the society. The media may also try to convince the majority population that the minority group is planning to take over the country – typically with the assistance of outside powers.

While not all of these factors need to be in place, these are common elements that can contribute to mass abuses of human rights or the outbreak of armed conflict.⁹ Once an armed conflict commences or an abusive regime takes power, political leaders may act together with police, military and paramilitary actors in order to manage, control and/or direct campaigns of persecution and perpetrate other violations of human rights and IHL. Civilian actors typically perform an important coordinating role in furtherance of the criminal goals of a regime.

Civilian actors can belong to any branch or organ of government. They can be ministers, judges, parliamentary deputies, bureaucrats in a ministry, governors or mayors. **It has been a particularly important principle of international law since 1945 that heads of state do not enjoy immunity from prosecution if they commit massive violations of human rights or IHL.** Perpetrators can potentially be found at all levels of government, from the president or prime minister down to district governors or mayors of cities and towns. The most serious violations of IHL are often committed by those who are the farthest from the actual scene of the crime, but who possess and wield the most political power. These “most responsible” actors are typically those prosecuted by international courts and tribunals. Such actors play a key role in creating the political circumstances, the policies and strategies that lead to these types of crimes. As such, politicians and bureaucrats carry an individual criminal responsibility when they act as enablers for those perpetrators who actually commit crimes.

Political leaders can attract the attention of international criminal tribunals and courts for the crimes which they personally commit or which they order their subordinates to commit. These are referred to as *crimes of commission*.

9. For a useful and accessible outline of this argument, see Gregory H. Stanton's "The 8 Stages of Genocide", www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html

However, political actors can also incur criminal liability by failing to stop others from committing crimes. If a person has a legal duty to prevent the commission of crimes but does not do so with the specific intent of enabling or committing a criminal act, he or she commits a *crime of commission by omission*. If, on the other hand, a leadership figure fails to prevent or punish the crimes of his subordinates but did not intend to permit these crimes to occur, the leadership figure still has *command responsibility for the crimes of his subordinates*. This point is particularly useful to keep in mind as many civilian actors will insist in court that they did not know anything about human rights abuses being perpetrated while they were in office. Crimes of commission by omission are particularly difficult to prove in court and therefore often require even larger amounts of documentary evidence than other cases.

EXAMPLE:

CRIME OF COMMISSION

In an attempt to crush the opposition to a dictatorship, the minister of justice orders the officials in charge of the country's largest prison to beat and torture opposition leaders who have been arrested. In this example, the minister is directly ordering his subordinates to commit criminal conduct.

CRIME OF COMMISSION THROUGH OMISSION

The minister of justice orders mass arrests of opposition leaders. Under the law the minister is required to sign weekly funding vouchers enabling the prison warden to purchase food for prisoners. With the intent to subject the prisoners to inhuman treatment the minister fails to sign these weekly vouchers resulting in the starvation of prisoners. In this example, the minister intends to subject the prisoners to inhuman treatment by intentionally failing to discharge his duty to ensure the prison is properly funded.

CRIME OF AIDING AND ABETTING THROUGH OMISSION

The minister of justice orders mass arrests of opposition leaders. When the minister of justice visits the prison he is present among prison staff when they brutally beat and torture a prisoner – he says nothing. The warden and prison guards interpret his silence as approval and are encouraged to commit additional and more serious beatings. In this example, the minister's failure to intervene constituted tacit approval and encouragement which materially contributed to the crimes.

COMMAND RESPONSIBILITY FOR THE CRIMES OF OTHERS

The minister of justice orders mass arrests of opposition leaders. Without the knowledge of the minister, the warden of the main prison, his subordinate, orders the prison guards to beat and torture the imprisoned opposition leaders, and this goes on for months. Although the minister hears rumours of abuses and mysterious deaths at the prison, he does nothing to investigate the matter or prevent the crimes. In this example, the minister has not ordered anyone to commit criminal conduct. However, as the minister responsible for the proper management of the prison system, the minister had the effective control necessary to monitor conditions in the prisons and ensure that they were compatible with relevant international legal standards. The minister's failure to monitor, prevent and punish systematic abuses in the prison may make him criminally liable.

Civilian actors often create the political programs that provide the underlying motivation for large-scale violations of human rights and IHL. For this reason, the documents, laws and statements of such actors and the political parties they participated in form a significant element of proving the commission of crimes at international criminal courts and tribunals. By helping to establish the motivation and reasoning of actors in a conflict situation such information can make it clear whether crimes were perpetrated consciously as part of a criminal and aggressive policy. This is particularly important for cases which involve allegations of genocide, since prosecutions of genocide rest on a demonstration that the perpetrators committed acts with the intent to destroy a national, ethnic, racial or religious group, as such.

3.1.2 MILITARY

It is important to understand that warfare is not illegal as such, and that the use of military force should therefore **not** be immediately equated with the commission of human rights abuses or the violation of IHL. The focus is on ensuring that military actors obey the laws of war, in particular as set out in the Hague and Geneva conventions.¹⁰ War crimes and crimes against humanity occur when military actors violate these conventions or customary law. Traditionally speaking, the armed forces of states have been the main perpetrators of war crimes.

Just as it has become a principle of international law that heads of state do not enjoy immunity from prosecution, military officers and enlisted personnel cannot defend themselves from criminal prosecution solely based on the argument that they were merely “following orders.” Military personnel have an obligation not to commit acts that would result in violations of IHL, even if ordered to do so. Also, like civilian actors, criminal liability is not restricted to any one level of the hierarchy. From the chief of the general staff down to non-commissioned officers and enlisted military personnel, all are liable for prosecution if they are found to commit crimes. In most countries today, all officers and at least most enlisted personnel receive some basic training on the laws and rules of warfare.

Similarly to civilian actors, military actors can carry out crimes both by committing them themselves and by ordering their commission. They can also be held legally responsible for failing to prevent and punish those subordinates who commit criminal acts, if it can be demonstrated that they were aware that such crimes were being committed. For example, a corps commander can be prosecuted if it emerges that he was aware that his subordinate officers were systematically using artillery fire to shell civilian targets. Even if the commander did eventually order a stop to this practice, he had a duty to investigate properly and punish those responsible for these violations of IHL. In other words, the two types of criminal conduct seen above for civilian actors, crimes of commission and crimes of omission, apply to all actors.

10. Detailed information on the Geneva Conventions is available on the website of the International Committee of the Red Cross, www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp



Apartheid, a crime against humanity – South African police at Alexandra Township (1985). *UN Photo*

3.1.3 POLICE

Together with the military, the police constitute the monopoly of force that all states strive to maintain. Whereas the military typically protects a state against external threats, the police are responsible for handling internal security and the everyday management of law and public order. In authoritarian regimes, this usually means that the police engage in the politically motivated persecution of those who are perceived to be “internal enemies of the state.” Police structures typically include public and state security components. Depending on the constitutional structure of the state and the relevant laws on internal affairs, these two components may exist within one police organization or in two or more separate organizations. Since any state security service exists primarily to protect the state, it follows logically that state security services are likely to be involved in the commission and concealment of crimes in those cases where the civilian or military leadership of a country adopts an aggressive or criminal agenda. A number of recent cases at international criminal courts and tribunals have focused on the crimes allegedly committed by the intelligence and paramilitary branches of state security services.

In times of intense internal unrest or war, most constitutions in all types of states envisage extraordinary roles for the police. This can entail something as simple as deploying specially equipped police units to quell riots and help re-establish order, or more complex operations carried out during a state of emergency. For example, if states declare martial law, or a state of war, the police can operate for extended periods of time with extensive powers that often provide the potential for human rights violations. In times of armed conflict, the police may operate jointly with the military and/or be re-subordinated under military command. All of the observations made earlier about the potential criminal liability of military commanders apply equally to police commanders and their relationship to their subordinates. Regardless of the nature of the threat and the type of operation that the police are involved in they, like the military, have an obligation to respect human rights and IHL.

Police units can be used to commit crimes against the civilian population of occupied territories. This might include so-called “mopping up” operations to rid the rear portion of the combat zone from potential threats to the armed forces. Often the police are engaged in compiling lists of persons targeted for persecution, detention or physical elimination. Examples from recent cases of armed conflict show that the police – either together with the military or alone – have operated detention facilities in which grave human rights abuses and breaches of the Geneva Conventions have been perpetrated.

It is important to note that some countries may have non-military forces that resemble police forces. In less developed societies such as in some parts of sub-Saharan Africa, tribal guards or watchmen may carry out many of the functions that police perform elsewhere. These forces generally function to protect villages against outside attack. Commanders and members of such forces have the same obligations as members of police forces elsewhere even though they may not at first glance conform to outsiders’ expectations of a uniformed police force. It is important therefore not to commit the mistake of assuming that police or other armed forces must dress and behave in the same manner as those one is used to from home.

3.2 NON-STATE OR PARA-STATE ACTORS

Non-state or para-state actors act nominally outside the realm of official state support. These can be any armed groups that are actively engaged in an internal or international armed conflict, and which are not formally tied to an existing, internationally recognized state. As such, these actors may function independently of any internationally recognized state or may act in collusion with the interests of such states (typically neighbouring states). Non-state or para-state actors can therefore include civilian as well as military components. There is no clear benchmark in terms of what level of organization such actors have to possess. However, from the point of view of international criminal investigations, such actors will be subject to the same standards of investigation and prosecution as any of the other aforementioned actors. **The lack of official ties to states does not confer any immunity from prosecution on members of non-state or para-state actors.**

3.2.1 PARAMILITARY MOVEMENTS

The most well-known types of non-state actors in modern armed conflicts are paramilitary groups. Simply put, paramilitary groups are irregular, armed groups who do not have a professional or official status, but who carry out operations and actions that are similar to those undertaken by official military or police organs. Paramilitary groups have no set size and may operate with or without hierarchical leadership structures. They can exist for short or long periods of time. The legislation pertaining to the legality and operations of these groups is typically vague or non-existent.

Paramilitary groups may enjoy the tacit support of official state structures in their own or neighbouring countries. States may use paramilitary groups to accomplish goals that they wish to avoid being identified as supporting openly. Although state actors will provide financing, material, and logistic support for paramilitary organizations, the state will seek to conceal and contest any public links between them and paramilitary actors. In some cases, paramilitary groups are gradually transformed into official police or military units. Such reorganizations of paramilitary units can provide useful information on the links between the state and these groups.

Paramilitary groups may be rebel groups opposing the government of an existing state. Regardless of whether these groups act completely alone or enjoy explicit or covert support from other actors, they are obliged to respect international law. No actor and no group, no matter how informal it is, can exempt itself from adherence to IHL and the laws of war.

When paramilitary groups cooperate with regular armed forces, the possibility exists that the motivation and intent of these units differ, and this can result in these groups committing different crimes even when they are involved in joint operations. Neither group enjoys impunity from prosecution, however.

PARAMILITARY AND MILITARY JOINT OPERATIONS

IN THE PROVINCE OF a particular country, an army brigade and a paramilitary group carry out joint operations aimed at defeating an armed uprising by ethnic group Y against the state that is dominated by members of the ethnic group X. During the operation, both the army brigade and the paramilitary group carry out attacks against civilian residences, and many civilians are killed.

Overall, the commanders of the army brigade intend to use armed force to quell the rebels' armed resistance and are satisfied with the operation's success once the fighting ends and the leaders of the resistance are taken prisoner. By contrast, a small group of extremists in the paramilitary group declare that only the physical eradication of all members of ethnic group Y in the province will suffice. Members of the paramilitary group embark upon a campaign aimed at eliminating ethnic group Y from the province forever.

In this case, the scope of criminal activity of the army brigade and the paramilitary group differ substantially even though they were engaged in joint actions. However, the commander of the army brigade and his superior officers may be found to have failed in their duty to control or investigate the paramilitary group.

3.2.2 CORPORATIONS

In the present world, national and transnational corporations often command significant power and wealth. In many cases, the annual revenues of such corporations exceed the gross national product of a medium-sized country. As such, these corporations exert tremendous influence upon events in both developed and developing countries. Such corporations may have extensive corporate security departments which cooperate with local security forces. This may include broad mandates to use armed force independently of, or in cooperation with, governmental forces. This creates the potential for their being implicated in the commission of international crimes.

Corporations may also provide or sell arms, ammunition and other essential military materiel to groups in conflict areas. In a few cases, private security corporations formed by former soldiers or mercenaries have also rented their services (including the flying of combat sorties in aircraft or helicopters) to groups or governments involved in armed conflicts. Selling or providing weaponry or military equipment to groups or governments in conflict areas can constitute criminal activity if the seller of such items can be shown to have had knowledge that such items would be used to commit international crimes, or to have shared the intent of those who committed these crimes.

Corporations may also engage in criminal behaviour by trading illegally with states that are under international sanctions, or by trading natural resources that are illegally exploited and exported from conflict areas. Such illegal exploitation is very important, as it is typically one of the factors that fuels and prolongs armed conflict in countries that have an abundance of natural (mineral) resources.

Although the accountability and responsibility of corporations for such violations is still a relatively new area in international law, it is likely to take on enhanced importance in the years to come.

3.3 FORMS OF AUTHORITY

In any criminal case involving official actors – whether civilian, police, or military – questions will arise pertaining to the jurisdiction and powers of these actors. First in the investigation and later in the actual trial, an attempt will be made to analyze the legal authority vested in those actors suspected of having participated in the commission of crimes. This authority derives from the letter of the laws describing the function of various government agencies and offices and is a crucial component in understanding the extent of a person's potential criminal responsibility.¹¹ However, prosecutors, judges and defence attorneys realize that the actual exercise of power often diverges from the letter of the law. This is particularly the case during times of armed conflict and political unrest. **Courts therefore seek to understand who actually had the power to commit or prevent crimes. They want to know whether those who held the power described in the relevant laws were also those who in fact did exercise this power.**¹² A great many international criminal cases hinge on this distinction. In addition to documents stemming from the period under examination by the court, observers on the ground are often used to provide accounts of what actually happened. For example, an observer might be able to testify that a minister of the police who on paper commanded extensive authority was in practice treated as irrelevant by those who were supposed to report regularly to him.

FORMS OF AUTHORITY

THE PRINCIPLE OF varying forms of authority can be illustrated with a recent example from the case of Milutinović et al. at the ICTY. Along with several other former high-ranking Serbian officials, Milan Milutinović, the former President of Serbia, stood accused of murder, persecution, deportation and other inhumane acts during the armed conflict in Kosovo in 1999. On paper, Milutinović commanded extensive authority on the basis of the powers vested in his job as president. However, the evidence examined during the trial strongly suggested that the real power had been exercised not by Milutinović, but instead by the then president of the Federal Republic of Yugoslavia, Slobodan Milošević. The judges therefore decided that although Milutinović had known that crimes were being committed, he did not share the intent to commit these crimes and he did not order them, nor could he probably have prevented them from being committed. As a result, the judges acquitted Milutinović of all the charges against him.

11. The responsibility that someone possesses because of powers vested in a particular political, government, military or bureaucratic function is called *de jure* responsibility by lawyers.

12. Lawyers hence speak of *de facto* responsibility.

THE TWO ESSENTIAL COMPONENTS OF AN INTERNATIONAL CRIMINAL INVESTIGATION

When international criminal courts investigate international crimes, they focus their inquiries on two connecting levels referred to as the crime base and the leadership structure. Both of these levels are featured in the criminal indictments or arrest warrants and are combined with contextual elements that allow for the determination of whether the conflict is domestic or international in character, and the precise nature of the crimes allegedly committed. Indictments or arrest warrants commence with a brief description of the accused's position during the period of indictment and his or her alleged role in the leadership structure. Thereafter, the counts of alleged crimes are listed, followed by annexes of the specific sites where the crimes were allegedly committed. This is the crime base for the case.

International crimes can perhaps best be understood as criminal activity on a large scale in which many people are usually involved in committing or aiding and abetting the commission of the crimes. Some people – the perpetrators – will actually commit crimes directly. Many others – perhaps even a larger group of people than the perpetrators – make the crime possible. This category can include anyone from the politician who encourages ethnically motivated attacks to the construction workers who dig mass graves in order to hide the evidence of the crime. International criminal investigations aim to link all these actors together in order to understand the crimes and prosecute those most responsible.

4.1 THE CRIME BASE

In the context of criminal law, any case must begin with a demonstration that crimes have been committed. This is the primary purpose of the crime base investigation, which focuses on those circumstances and facts that pertain directly to the commission of the crime. The crime base therefore refers to the events and actors present at or near the scene of the crime. Given the scale of the crimes investigated by international criminal courts, the crime base can be very large, extending over substantial geographic areas and encompassing dozens or even hundreds of individual crime scenes. Generally speaking, though, the recent tendency in international criminal justice has been to focus on a sample of outstanding crimes that can be used to demonstrate the widespread and systematic nature of crimes. This is directly linked to the finite resources available to international criminal courts and tribunals and to the length of the criminal proceedings.

In addition to collecting information on the specific crimes committed, crime base investigations and analysis focus on determining the quantitative scale as well as the

qualitative nature of the crimes. How many and what kinds of criminal acts were committed in a given geographical area? During which time frame were the crimes committed? How many victims of these crimes were there? Where are the crime sites located, and what kinds of forensic evidence can be recovered from them? What is known about the direct perpetrators of these crimes? All of these are typical questions posed by investigators and analysts working the crime base. The demonstration of widespread and systematic violations of human rights and IHL – an essential part of triggering international investigations – depends on a thorough and objective investigation of the crime base.

Since **it is usually impossible to investigate and prosecute all alleged crimes** that have occurred in a repressive environment or an armed conflict, investigators and lawyers must make choices about which incidents to prioritize. Initial crime scene investigations provide information that assists prosecutors in making the difficult decisions on which crimes will be included in the indictments.

4.2 THE LEADERSHIP STRUCTURE (LINKAGE)

The investigation of the leadership structure is also referred to as the search for linkage evidence. As noted above, international criminal courts typically focus on those alleged to be the most responsible for committing serious violations of IHL and human rights. Those persons were often situated far away from the crime scene(s) and did not directly participate in committing the crimes. There are hence few if any readily available pieces of information that tie them together with the crimes that have been committed. Simply put, investigators and analysts must therefore work together to uncover information which can be used as evidence linking those allegedly most responsible for the commission of the crimes to the crime scene. Among other things, this involves identifying and reconstructing the key decisions, exchanges of information and orders between the persons present at the crime scene before, during, and after the commission of crimes. For political, military, and police structures, the chain-of-command must be reconstructed, with particular attention to joint structures.

Just as not all alleged crimes can be encompassed by international criminal investigations, choices must also be made during investigations about whom to prosecute. **Not all individuals who have allegedly committed crimes will face prosecution.** By carefully investigating and analyzing both the crime base and the leadership structure, the office of the prosecutor aims to indict those most responsible for the gravest crimes in a given area or conflict.

In many cases, international criminal courts and tribunals carry out financial investigations as an important part of the larger investigation into international crimes. These financial investigations can focus on a variety of topics such as the financing of the conflict, illegal resource exploitation and large-scale embezzlement of funds by autocratic regimes. For this reason, bank and other financial records can play an important role in leadership investigations.

A wall of photos at the Tuol Sleng Genocide Museum in Phnom Penh, Cambodia, the site of infamous Security Prison S-21, documents the Khmer Rouge's brutal treatment of detainees. *UN Photo/Mark Garten*



GUIDING PRINCIPLES OF OBSERVATION AND INFORMATION COLLECTION

In deciding what information to collect and how to collect it, it can be useful to begin by considering the principles that guide the work of professional human rights monitors. Their work involves observing and reporting about potential abuses of human rights. Monitoring can take place at any time and at any place, and it may take many different forms. Even in countries that enjoy long periods of peace and prosperity governmental and nongovernmental organizations undertake constant monitoring of human rights in order to ensure that the rights of all members of the population are adequately protected. In stable and democratic countries, for example, mechanisms exist to monitor the rights of various minorities, and special offices such as ombudsmen provide a check against abuses of power by government officials. In the case of societies in conflict, human rights monitoring can also occur before, during, and after a conflict has taken place. Human rights monitoring can also contribute to restoring respect for human rights after violations have been committed.

As defined by the United Nations High Commissioner for Human Rights:

“Monitoring” is a broad term describing the active collection, verification and immediate use of information to address human rights problems. Human rights monitoring includes gathering information about incidents, observing events (elections, trials, demonstrations, etc.), visiting sites such as places of detention and refugee camps, discussions with Government authorities to obtain information and to pursue remedies and other immediate follow-up.¹³

Although the above describes active collection on the part of professional monitors, collection can also be undertaken on a passive or part-time basis. Even if you are deployed as part of a mission whose primary purpose is not monitoring, circumstances may arise that put you in a position where you observe important events or obtain significant information that may be very important to subsequent investigations. In subsequent sections, this handbook will describe what kinds of information are most useful for criminal investigations.

DO NO HARM!

THE SINGLE MOST IMPORTANT principle of all activities that you undertake, including information collection, is to do no harm. Avoid taking any actions that could put you or those in the affected area, particularly civilians, in harm's way. This is particularly crucial when making decisions about whether to speak with witnesses to human rights abuses or violations of IHL, and will be dealt with in more detail later in this handbook. If in doubt, you should always consult with your colleagues and superiors.

You should also be very careful when mentioning names of persons in reports that you submit to your own organization and, in particular, to external organizations. You will most likely spend a relatively limited time in your area of deployment, but the local people will stay there permanently. If it becomes widely known that they are mentioned in your reports, this can have serious – and in the worst case, life-threatening – consequences for these people. If you are implicating someone by name in a written document or in your statements to others, be absolutely sure that you have a solid basis for your claims. You should always be able to justify and support any such claims. Again, if in doubt, consult with your superior or your organization's legal advisor.

While you observe and collect information, relevant and significant observations must be recorded systematically in writing in order to leave a record that can be used later for professional analysis and as an aid to your memory. From the point of view of later investigations and prosecutions, regular and timely recordkeeping is highly preferred. It allows for the reconstruction of events and places them in the appropriate context, by illustrating whether alleged abuses or crimes recorded took place in isolation or were part of a systematic pattern. Being a diligent observer means not only maintaining a curious and inquisitive attitude to events around you, but also the efficiency and willingness to make notes and reports on your observations. Field operations are often stressful and hectic affairs, and there will always be plenty of excuses to avoid writing down what you have seen or have been told. A few minutes spent recording exactly what happened can save you a lot of time later and provides the best guard against faulty human memory. For reasons of accuracy, it is important that you take the earliest practical opportunity in order to record your observations, and that you keep a record of information collected as you gather it. If it is worth making a mental note, it is worth recording it immediately.

Collecting information involves being an astute and objective observer. Astute observation entails educating yourself properly about the political, economic, geographic and other relevant conditions that exist in the area in which you are operating. The more you know about the basic background of the area, the better placed you will be to observe events as they unfold. Of course, you cannot become an expert on all matters, particularly if you are deployed in an area for a shorter period of time. Do, however, try to familiarize yourself with the outlines of local political geography, the basics of the region's history and economics, as well as a basic understanding of the government(s) and security forces operating in the area.

13. United Nations, *Training Manual on Human Rights Monitoring*, Professional Training Series No. 7 (New York and Geneva: United Nations, 2001), 32.

This includes learning a bit about any important local time references that may differ from the international calendar, such as important holidays, agricultural events (harvest, monsoon, etc.). Such time markers are often used by local inhabitants when explaining when significant events occurred. Given that violations of international human rights and IHL often occur as a product of ethnic and/or religious conflict, it is also advisable to familiarize yourself with basic knowledge about ethnic, religious and minority groups.

Objective observation means maintaining an open mind and healthy scepticism about the information that you receive, whether through media reports or in conversations with people in your operational area. In short, be critical and do not assume that the information you receive from others is correct or accurate. Be on guard for circular reporting, i.e. stories or information that are passed around a village or rural area until they become common knowledge. In many such communities, inhabitants may not distinguish between those events in which they themselves were participants and were affected and those events that relate solely to other people. Tribal or village elders have considerable authority and the stories that people tell will therefore often be controlled in some way by their views on important events. Others in such communities do not question the “truth” as it is told by the tribal or village elders.

You must do your best to avoid jumping to conclusions about the information that you collect, particularly if others provide you with this information. Remember that there will always be actors with a vested interest in distorting your view of the situation, and this is particularly the case in conflict areas. Question your own assumptions constantly. This applies equally to information pertaining to both alleged perpetrators and alleged victims.

All of this does not mean that you should avoid speaking to local sources or refuse to receive information from them. On the contrary, it is important to present yourself as a willing and open recipient for information from all sides. However, it does mean that you should avoid engaging in agreement with the providers of information. Explicit or even tacit agreement with sources can create the perception of bias and may have the effect that some potential sources of alternative or contradictory information will decide that it is not worth the trouble of providing you with this information.

Above all, be particularly sceptical of sensationalism, hearsay, rumours and of any information that you yourself are not in a position to verify or corroborate directly. Avoid assuming that such information is true. Unlike in most domestic jurisdictions, hearsay is admissible in international criminal courts, but judges will be able to consider its weight relative to more substantial types of evidence. The most important question you can ask when gathering information is “how does the provider of this information know this.”

Although the focus of this handbook is on violations of human rights and IHL, monitoring is a continuous process that does not begin with violations. In fact, much of the information that might be of most interest to international tribunals and courts can stem from periods long before (or even after) armed conflict or human rights

abuses take place. If you have kept detailed records of your observations from these periods, it will be a significant help to later investigations.

Good monitoring and information collection is very closely related to good impartial journalism, and it requires that you ask yourself many of the same questions that a journalist seeks to answer when reporting on important news.

- › What happened?
- › When and where did the event occur?
- › Who was involved? Who were the alleged victims? Who were the alleged perpetrators?
- › Why did the event take place?
- › What is the source of the information?

Specific additional questions that you should consider as a direct observer of armed incidents are:

- › What kinds of uniforms, vehicles and weaponry did combatants use? Were there any unique features (e.g. uniform patches or insignia, license plates, equipment, etc.) that could help to identify them?
- › What languages were spoken by combatants?
- › What official or improvised military or police facilities (barracks, bases, staging areas, civilian buildings converted for military or police use, etc.) were located in the vicinity?

This type of information is very useful for investigators. As an international observer, you may be able to provide such information more easily than victims or other local witnesses. In addition, international courts and tribunals are particularly interested in hearing from international observers present in armed conflicts precisely because they are often present in a capacity in which they are not a party to the armed conflict.

Remember always to keep an open mind in observing the situation, in order to avoid jumping to subjective or partial conclusions. **Be impartial** in your observations, and prioritize the collection of facts over any subjective or personal analysis. If you are deployed in an area in which two sides are in conflict, do not assume that only one side is capable of committing violations of human rights or IHL. This principle should not be misunderstood as a call to try to achieve an artificial balance between the alleged violations taking place on one or the other side of a conflict. Rather, impartiality stems from the recognition that in almost all conflicts, even those in which one side commits the vast majority of violations, the other side will also have committed some violations. Avoid mentally placing individuals and groups in categories as victims or perpetrators. In some cases, a victim at a given point in a war may himself or herself earlier have committed crimes, or may have gone on to commit crimes later. Human rights monitoring and criminal investigations are not about labelling one side as the absolute perpetrator and the other side as the absolute victim. Rather, they aim towards the objective reporting and investigation of alleged crimes and abuses, regardless of the identity of the perpetrators and the victims.

Note also that individual criminal responsibility is a key principle of international criminal justice. **Groups, nations or societies are not the subject of collective blame or guilt in international criminal law.**

Impartiality is a full-time obligation. Keep in mind that your own conduct and actions during a mission can directly affect your ability to be impartial. This applies to your conduct both on the job and off duty. Your behaviour, attitude and statements in public should leave no room for misinterpretation by the local media or inhabitants. If they doubt your impartiality, rightly or wrongly, this will have direct consequences on your ability to collect information. It will also taint you in the eyes of the institution to which you provide the information.

To return to the set of questions listed above, in answering them it is important to strive for **accuracy**, while simultaneously resisting the temptation to be overly precise. Those who read your reports later will benefit from accurate information, but you can harm their work if you jump to conclusions or convince yourself that you observed something more closely than you actually did. Above all, avoid the temptation to attach legal determinations to the acts that you are observing. For example, if you see police officers detaining a large group of civilians, do not immediately conclude that you are witnessing an act of illegal detention. This may, in fact, be precisely what you are witnessing, but for the sake of your own credibility and accuracy, you should confine your reporting to the observation that you saw police officers detaining a group of what appeared to be civilians at a particular place and time.

If you do feel certain that you are capable of reaching a conclusion about the events that you witnessed, make sure that any analysis or conclusion is kept separately from your observations of fact in your notebook. A good way of doing this is to adopt a note-taking convention in which all facts related to the observation of events and the collection of information is listed apart from any analysis, reflections or recommendations related to these facts. You can do this very simply by, for example, making a large margin with a vertical line on each page of your notebook. Everything that is written in this margin can be treated as commentary, while everything that is written on the remainder of the page can be considered to be mere statements of fact. (In book-style notebooks, the left and the right-hand side of each set of pages can be used in this way.) Mission notebooks structured in this manner are also easier to redact if the notebooks or portions of them later need to be used in court.

KEEPING A MISSION DIARY

BEING AN ASTUTE OBSERVER is one of the keys to being a good monitor, but if you are deployed in the field for any length of time, chances are that you will eventually start to forget things and even confuse events. One of the simplest but most effective ways of documenting your own observations while stationed in the field is to keep a mission diary. Writing something down, particularly if done immediately, is a proven way to help remembering things. In a criminal trial it also strengthens your credibility as a witness. You can also supplement your mission diary with information such as maps of the area in which you were deployed, photographs from the field, etc.

At the most basic level, a mission diary provides an outline of your daily activities. Any meetings that you had should be indicated in the diary, with a list of participants and perhaps an outline of the agenda of the meetings. A more detailed diary would also include your own minutes from the meeting. You decide how much detail you want the diary to contain, but remember, anything that you document may, in certain circumstances, potentially be subject to judicial scrutiny in a criminal trial.

In many situations in which international crimes are committed, much confusion arises about the identity of various military, police and paramilitary units. Any observations that you have on this point may be of considerable assistance to investigators. You may therefore want to make notes in your diary about the type and colour of uniforms used by various units, what kinds of shoulder patches, badges, headwear, insignia they wore, what kinds of vehicles and weaponry they employed, etc.

For reasons of your own credibility and professionalism, you should avoid using offensive or insulting language in your mission diary. This is particularly important when writing about others (including your own colleagues).

Obviously, such a mission diary may itself become a useful document or even piece of evidence for subsequent investigations and/or trials. Later in this manual, we will discuss how to deal with situations in which you yourself are interviewed as a potential witness.

COLLECTING INFORMATION AND EVIDENCE

As has been stated earlier, this handbook assumes that your primary job in the field will not involve human rights monitoring or the investigation of violations of human rights and IHL. This chapter therefore provides you with an essential understanding of information and evidence, with a view to enabling you to gather potentially relevant information that you may come upon in the course of your normal work in the field.

Information can be found in many different forms: documentation, video and audio recordings, witness statements, maps, meeting notes, forensic information, etc. All of this is, at the point of collection, raw information and its potential value for investigations of violations and human rights and IHL varies greatly.

Massive human rights violations and violations of IHL inevitably create evidence that can lead to the prosecution of those responsible. It is impossible to commit such abuses and crimes without leaving behind information that can be used to identify the victims, perpetrators and context of the crime. Those who commit such abuses and crimes are aware of this, and may therefore often go to extraordinary lengths to cover up their crimes. This may include a variety of methods such as destroying or removing documentary and physical evidence, physically intimidating and threatening potential witnesses, and obstructing access to the crime scenes and to important archives, offices and other places where documentation is stored.

For this reason, you must always assume that any information that you collect related to violations of human rights and IHL will be of interest to those who have perpetrated these violations. You must therefore anticipate that these persons may most likely attempt to prevent you from collecting any information and may also try to remove it from your possession after you have collected it. This is one of the reasons why you must store all information as securely as possible and make sure to consider your own safety first.

6.1 THE DISTINCTION BETWEEN INFORMATION AND EVIDENCE

At a basic level, it is important to avoid confusing the two separate concepts of “information” and “evidence.” The distinction between these two is very important in international criminal justice. Anyone can collect information, and much of it may be useful later for international criminal courts. Ultimately, however, only professionally trained employees of these courts are in a position to determine what information is eventually to be submitted as evidence in cases. Not all information necessarily becomes evidence, but all evidence is information.

INFORMATION OR EVIDENCE?

FIVE BINDERS OF MILITARY documents and a general's diary are recovered from a deserted military barracks in an area where many international crimes allegedly occurred. Both the binders and the diary contain much information. However, much of the information may be completely irrelevant to any investigation of these allegations. Only the information that is deemed relevant by professional investigators, analysts and lawyers will become evidence.

The determination of what information can constitute evidence rests on a determination of the relevance, credibility, accuracy and reliability of the information. The relevance of information depends on the extent to which it connects to the subjects and issues under investigation. The credibility of information refers to whether or not it is believable, a determination that requires active analysis and consideration of the overall state of information collected to date and general knowledge about the relevant subjects and issues. The accuracy of information refers to the degree of precision in the information. Generally speaking, more detailed information is desirable. Conversely, overly detailed information can lead to questions about the credibility of that information. For example, a witness may call his or her own credibility into issue if he or she makes claims that are so specific that they exceed what the witness can reasonably have known. Finally, reliability is often used as an indicator of whether a given source or provider of information has an established record of providing good information. A source with a history of furnishing investigators with relevant, credible and accurate information will be considered to be a reliable source.

IN CONSIDERING THE INFORMATION that you provide to criminal investigators, it is useful to consider the formula outlined in the Torture Reporting Handbook produced by the Human Rights Centre at the University of Essex:

“First hand + detailed + internally consistent + corroborated from several angles + demonstrating a pattern + fresh = highest standard.”¹⁴

This formula represents the highest standard, but in the real world it is often impossible to achieve. Nonetheless, it is a useful prescription to keep in mind, as it will remind you of what to strive for when reporting information.

One must not overestimate or exaggerate the quality of information. Determining what information constitutes evidence is a painstaking and time-consuming process accomplished through analysis, further investigation and thoroughly cross-checking the information with other sources. Much of the information collected by international criminal investigators never ends up being used as evidence. This does not necessarily mean that the information is bad or not useful. Rather, it results from the fact that international criminal cases will feature only the most relevant and credible evidence selected from a much broader batch of information gathered.

14. Camille Giffard, *The Torture Reporting Handbook* (Essex: The University of Essex Human Rights Centre, 2000), www.essex.ac.uk/torturehandbook/, 31.

Even if it does not become evidence, your information may provide a useful lead to investigators, enabling them to identify, locate and lawfully obtain information that actually can be used as evidence. In that sense your contribution can be very important.

It must be stressed that a determination of the potential evidentiary value of information must not rest on whether it proves the guilt of alleged perpetrators. The prosecutors of international criminal courts have an obligation to collect all relevant information on a case, regardless of whether that information may incriminate potential suspects or prove their innocence (exculpatory information). Indeed, at the ICC, the OTP operates under a strong legal obligation to investigate potentially exculpatory leads equally. All such material must be disclosed by the OTP to the defence. In determining what information you or your organization might provide to international criminal courts, you should keep this in mind.

6.2 CATEGORIES OF INFORMATION AND EVIDENCE

It is important to differentiate between direct and circumstantial evidence. Briefly put, direct evidence provides direct proof of a crime. A good example of this would be a video conclusively showing a man murdering a victim. Such evidence (colloquially referred to as “a smoking gun”) is extraordinary and rare in international criminal courts. Most evidence will instead be circumstantial. That is, bits and pieces of information that, when properly contextualized, combine to prove the commission of a crime. For example, a logbook for the attendance of prison employees may show that a given group of prison guards came to work on the day of a crime. Together with witness testimony and other information, this logbook may later combine to tell a larger story that proves that one or more of these prison guards beat or killed a person detained at that prison on that day.

Evidence used at court can generally be separated into three categories:

1. documentary evidence; 2. witness evidence; and 3. physical evidence (sometimes also called forensic evidence, and including artefacts). While international criminal courts and tribunals tend to rely heavily on documentary evidence, the testimony of witnesses and physical evidence also play an important role. Depending on the circumstances of a conflict or the nature of an investigation, the balance between the different types of evidence will shift.

The subsequent section focuses primarily on your role in gathering various categories of documentary information. Many of the same principles apply when collecting non-documentary items and artefacts. A separate section of this handbook is devoted to forensic evidence and crime scenes.

6.3 RECEIVING, HANDLING AND STORING INFORMATION AND EVIDENCE¹⁵

This section of the handbook is designed to help you receive and handle information in a way that makes it as useful as possible for potential criminal investigations and trials. The assumption here, and as stated at the outset of this handbook, is that the collection of information (in whichever form) for such investigations will not be your primary task. There may come a time when you are in a location or position to receive information with potential evidentiary value for criminal courts and tribunals, and the guidelines below should assist you in making the right decisions if such an opportunity arises. **You should not insert yourself into the role of investigator and attempt to conduct your own investigations. Doing so can endanger your safety and can make the work of professional investigators difficult or impossible.**

As regards information and physical evidence, you should take a very cautious approach. **Never accept information or evidence (weapons, ammunitions, body parts, etc.) that you are not qualified to handle and store, or which you believe might endanger your safety.**

There are essentially two ways in which you can receive information. You can collect it yourself, or someone can provide the information to you either directly or indirectly. Regardless of how you come into possession of the relevant information, it is essential that you handle and store it appropriately once you have become a custodian of this documentation or artefact. Since all information can potentially be used as evidence at a later date, it is important to apply the same standards of storage and handling to everything that you collect, particularly if you are not the originator of this information.

Of course, your handling of the documentation will be affected by the circumstances in which you are operating. It is quite understandable that you may not be able to apply the same high standards of information or artefact storage in the field that might be possible in your own country. As a general rule, you should strive to keep all information and artefacts that you collect in a secure location where they will not be damaged by weather, and where they will not become mixed up with other types of documentation or items. In brief, keep track of what you collect and store it in a separate and specially designated area, apart from other items. If the item or artefact in question is in a fragile condition, it is also a good idea to take a photograph of it at the moment you find it, in case the condition of the item or artefact deteriorates further.

All kinds of information can be potentially relevant for international criminal cases, but information has very limited use and cannot become evidence if investigators and lawyers cannot determine its source. From the point of view of evidence in a court of law, it is problematic and often counterproductive to analyse or rely upon documentation, artefacts or other forms of information whose origins cannot be determined, as they will almost certainly be inadmissible in court.

15. Colloquially the word physical or forensic *evidence* is used for artefacts recovered from crime scenes.

If and when you pass information on, these are some of the questions you will encounter and should be prepared to answer:

- › When and where was the documentation produced?
- › Who produced the document?
- › What interests are motivating the provider in giving the information to you?

As a general rule of thumb, the closer you are to the original source of the information, the better. If possible, try to avoid being in a situation where you are receiving large amounts of information that have changed hands multiple times before reaching you. Instead, make a note about this information and let professional investigators obtain it later. Only if you are certain that there will be no later opportunity for investigators to obtain this information should you take possession of large quantities of information, particularly through intermediaries. In such cases, make sure to note all the contact details of the intermediaries with whom you had contact so that you can potentially provide this to investigators.

There may come a time when you are approached and offered potentially interesting information in exchange for money. **Avoid engaging in such exchanges.** However attractive or accurate the information is that you obtain, the purchase of information can taint it. (In certain circumstances, it may still be admissible as evidence.) Such offers are also symptomatic of a situation in which it has become well-known in the area that you are gathering information and evidence.

Carefully recording the source of documentation and information received is only the first step of the process. From the moment it comes into your possession until the moment that it leaves your control, you should strive to be able to account for the whereabouts of the information at all times. This includes storing it in a safe location where it cannot be easily accessed or altered. As much as possible, the number of people who have access to this information should be limited. This helps to ensure the integrity of the information and can also lower the security risks that may be incurred by keeping such documentation.

The principle of tracking the origin and possession of information and evidence is referred to as the “chain of custody.” The goal is to establish a clear and unbroken chain of records that allows the court to reconstruct who has had what information at every point in time – from the moment the information was first provided until it is actually used in court. This helps to ensure that unauthorized persons have not had access to the information since it was collected. The primary purpose of the chain of custody is to prohibit anyone from tampering with evidence and thereby changing it and making it invalid for use in court. This is equally important for all kinds of artefacts and forensic information that stems from a crime scene and for documentary and electronic evidence, as it guards against potential forgeries or alterations to the information originally collected or provided to the court.

THE CHAIN OF CUSTODY IS NOT ONLY about recording who handles the information that is collected, but also about recording correctly what was collected. In at least one case at an international tribunal, important video evidence was thrown out of court because the number of videotapes provided to the tribunal by a police organization did not match the number of videotapes collected from the original location. Since the judges had no way of ascertaining why the number of videotapes had changed, there was a suspicion that someone might have introduced additional videotapes with false information or discarded videotapes that might prove the innocence of the accused. The judges had no choice but to discard all of the videotapes.

The chain of custody starts at the point of collection and should not be broken until the documents or other artefacts in question are presented in court. (Indeed, most of this will subsequently be archived, where the chain of custody might be preserved permanently.)

The fewer the amount of people who handle information, the better and simpler the chain of custody. For this reason, try to observe the following principles:

- › Record at the *time of collection* as clearly and succinctly as possible the circumstances under which the information was collected by you or provided to you:
 - What was collected or provided? Describe the items collected or provided as accurately as possible, paying particular attention to describing the appearance of the items and their quantity, size, weight or other key attributes such as colour and dimensions. If possible, take a photograph of it with a camera or mobile phone. (And make sure to back up copies of these photos!)
 - Who collected and/or received it?
 - Where was it collected or received?
 - When was it collected or received?
 - Your own role in receiving it: Why were you there at the scene, if you collected it yourself? What capacity were you serving in at the time of collection?
- › Limit as much as possible the number of people who handle or otherwise have access to information.
- › If actual possession of the information is transferred from one person to another person (or to another organization), this must be recorded. If possible, an itemized list of the documents transferred and bearing the date of the transfer should be signed by both the person transferring the information and by the person receiving it.
- › Store the information in a safe and secure location where it is protected both from the elements (fire, water, humidity, etc.) and from unauthorized access.

Ruins of a house left behind by military clashes,
July 2008. Manyang, Sudan. *UN Photo/Tim McKulka*



In appendix 14.1 to this handbook there is a simple information registration sheet that can be used to record the above information. This template is based on the evidence registration forms that are used by international criminal courts and tribunals. By filling out a similar form, you will greatly facilitate the work of these institutions. As a backup to this method, you should also use your mission journal or diary to record briefly what you or your colleagues have collected, or what someone has provided to you.

In general, the more details you can provide about the circumstances in which you collected information, the better. In recording the identity of the persons from whom you obtained information, make sure to provide as much information as is feasible. Ideally, you will be able to record the full name of the provider as well as contact details. This will make it possible for you or others to re-establish contact with the provider if this is needed later by you or agents of a tribunal or court. Remember, there may be important follow-up questions that need to be asked about the information. You should also provide your identity and contact details to the person(s) providing you with information. Make sure to tell the provider of the information what you intend to do with the documentation that has been provided.

The provider has entrusted you with this information, and it is important that you respect this trust and act accordingly.

Owing to the often sensitive nature of human rights and international crimes, there will be cases in which the provider of the information will not want to reveal his identity to you or others. If you encounter this situation, you need to act carefully. On the one hand, any information can be potentially useless as evidence later if its origin cannot be established. You may choose to accept the information if the provider is willing to provide it to you under a pseudonym or codename, although this is not an ideal situation, as you should ideally be able to lead international investigators back to the source. International criminal courts and tribunals do have legal mechanisms for accepting information confidentially and for protecting the confidentiality of the provider (Article 54(3)(e) of the Rome Statute, in the case of the ICC). **You should, however, avoid giving any assurances of confidentiality.** For instance, as noted above, the Rome Statute also requires that all potentially exonerating facts must be disclosed to the defence. In practice, this results in situations in which the obligation of the prosecutor to disclose information to the defence overrides whatever assurances of confidentiality the prosecutor has given. If the security of the provider of the information is assessed to be at risk, the court can order the defence to treat the identity of the source and the information provided confidentially.

In any case, these are complex issues for the relevant court or tribunal to decide, and they cannot be controlled by you once you have provided information to representatives of these institutions. Therefore, if you believe that the nature of the information is such that it will be relevant for international criminal courts, you should inform the provider of the possibility that you will hand the documentation over to such courts, and that it may be used in a public trial at such courts. Avoid providing assurances of confidentiality. If you are operating in an area in which such courts have field offices or investigators operating in the field, you should encourage the provider to approach these persons directly if they feel safe doing so.

To summarise, and to paraphrase the ICTY's "Manual on Developed Practices", proper collection of information and evidence is predicated on:

- › the chain of custody
- › preservation and conservation
- › accuracy in identification and labelling

6.4 COLLECTING DOCUMENTARY INFORMATION

Proving violations of IHL requires documents – often enormous amounts of them. From the Nuremberg trials to the present-day International Criminal Court, judges have relied extensively upon documentary evidence in reaching their verdicts. At times, documents whose provenance can be proven have considerable advantages as evidence compared to witnesses. Unlike witnesses, documents do not have faulty memories, and they are not liable to change the stories that they have to tell. Keeping in mind what was said earlier about different categories of perpetrators and modes of responsibility, documents can go a very long way towards telling the story of a conflict.

These days documents can come in many shapes and forms and do not need to be in printed form. Governments and armed forces increasingly operate with electronic systems and communications, and their electronic communications (e-mails, text messages, voicemails, telephone conversations, etc.) provide an excellent source of information for investigators. That having been said, the sheer volume of such potential sources of information dictates caution, as the information processing and analytical capacities of international tribunals and courts can also be overwhelmed by extremely large collections of documentation that are provided without any consideration to relevance. Indiscriminate collection of such documentation can also create problems for international courts and tribunals if they are provided with collections of confidential material that has been collected illicitly. If the provider of this information later decides to withdraw from cooperation with you or the OTP, the prosecutor may be in the position of possessing information that must be disclosed, but lacking the necessary permission to do so. For this reason, the OTP will most likely not accept such bulk submissions, but will instead take only potentially relevant information. You may therefore be left in possession of large quantities of sensitive or confidential information that will need to be securely disposed of or stored.

Although it may seem natural to focus collection efforts on official documentation stemming directly from those parties involved in a conflict situation, open sources should not be overlooked. The national or local media, whether free or tightly controlled, can serve as an important source of information about a large variety of crimes. This is particularly the case if such media only appear locally and are not available electronically. The experience of recent conflicts have shown that many of those later indicted for war crimes and violations of international criminal law frequently made media appearances in which they boasted about military exploits

and other operations. In a number of cases, these reports proved to be useful as evidence at court. In some cases, the media also play a direct role in the commission of crimes. Persecution, for example, is a crime often committed at least in part through the utilization of the mass media to spread hatred and discrimination against minority groups.

In some cases at international courts and tribunals, witnesses have also testified on the basis of notebooks or diaries they kept during the war in which they took detailed notes on the broadcasts of local radio or television stations. In many cases, the inflammatory broadcasts of these stations were no longer available after the war and these notebooks were therefore admissible as hearsay evidence.

Similarly, certain official documents publicly available and not marked as confidential might still be of considerable utility to investigations. This is for example the case with legal gazettes, published collection of official laws, decrees, nominations and regulations that have received wide use in international criminal courts and tribunals. If you have the capacity and ability to collect these documents, do so. Do not assume that they will be collected by others, as it may later turn out to have been a unique opportunity.

Documents showing inaction by the authorities during a period of alleged human rights abuses and violations of IHL are also of potential importance. Keep in mind that international criminal courts and tribunals can hold individual actors not only for crimes of commission, but also for crimes of omission.

Remember to also collect information that might indicate the absence of criminal conduct or information that merely provides contextual information on the political and military situation in a country.

While it is impossible to make an exhaustive list of documentation that can potentially be relevant information and possible evidence at international criminal tribunals and courts, this list provides an indication of some types of documentation that have been used previously by these institutions:

- › Official documents: orders, instructions, rulebooks, periodical reports, situation reports (“sitreps”), meeting reports (agendas, minutes, stenographic records), military orders of battle and lists of soldiers, demographic and census data, land and property records, diplomatic cable and reports
- › Official logbooks (e.g. from military units, police stations, prisons, detention facilities, etc.) pertaining to visitors, shifts of guards and duty officers, incoming and outgoing correspondence, use of official vehicles, etc.
- › Official financial and personnel records (e.g. payslips, telephone and transportation billing records, personnel dossiers, commendations, attendance records, etc.)
- › Court files and prison records (case files, investigative reports and dossiers, records pertaining to detention and release of prisoners, prisoner health records, etc.)
- › Legal gazettes
- › Maps
- › Medical records (from hospitals, psychiatric institutions, etc.)

- › Records of large businesses (e.g. records from companies that specialize in resource extraction and export, which may contribute to funding a conflict)
- › Local NGO reports
- › Photographs (of crime scenes, official events and commemorations, damaged infrastructure and significant buildings such as religious objects, government facilities, detention centres, etc.)
- › Audio–video recordings (of combat activities, official events and commemorations, media reports, newscasts, documentaries, etc.)
- › Diaries, journals and other forms of individual records, kept by private individuals or officials
- › Newspapers and other print media (also called “open sources”)
- › Records of (mobile) phone numbers, e-mail addresses, etc.

You will often be deployed in areas where you do not speak the local language(s). If this is the case, you can, in consultation with your superiors, involve your interpreter(s) in the process of document collection, as interpreters will facilitate and accelerate the process.

Keep in mind that a large amount of information is increasingly stored electronically, even in the most remote corners of the world. Be careful or avoid actually opening the files if you collect such information. You may inadvertently erase or otherwise damage electronic files if you access them in an improper way. Some files may be programmed to self-delete if the proper password is not used. Therefore, electronic equipment and storage devices should be given to technicians who possess the correct skills for storing and handling such equipment.

Documentation containing information of a personal or confidential nature – for example personnel or medical records – should of course be treated confidentially.

CRIME SCENES AND PHYSICAL INFORMATION AND EVIDENCE

In ordinary, peacetime circumstances there are appropriate authorities who conduct crime scene investigations. Access to crime scenes is strictly limited to a small group of professionals who are trained to inspect the location, identify, record and recover evidence that may help resolve the crime. Their focus is on recovering physical (forensic) evidence: latent fingerprints, footprints, hair, textile fragments, shell casings, vehicle tracks, etc. Qualified forensic medical examiners also conduct examinations of the victims, or the remains of victims. This can range in scope from examining a single murder victim to a full-scale exhumation and detailed examination of a mass grave. All of these matters require a skilled eye and a highly trained understanding of what potentially constitutes evidence. Mistakes made at the crime scene can contaminate or otherwise invalidate physical evidence.

For this reason, the traditional approach of human rights organizations to the collection and examination of physical evidence at crime scenes has been very conservative. The UNHCHR's guidelines on dealing with crime scenes is very clear: "In general, HROs [human rights officers] should leave crime scenes untouched and should not attempt to substitute themselves for the police authorities. HROs should not gather or tamper with the sort of physical evidence that would be used in a criminal investigation[.]"¹⁶

If there are any reliable local, national, or international investigative organs in your area with a capacity to investigate crime scenes, then you should contact them immediately. Your focus should be on observing what you can of the crime scene, without compromising your own safety (this may mean that you are just looking at it from a distance without entering it). If you must enter the crime scene, leave it as undisturbed as possible. You should record all your observations immediately – do not wait until later to do so. The sections that follow are designed to guide you in those cases in which you have no alternative to conducting a rudimentary crime scene investigation on your own.

With the above having been said, you may not come across a crime scene until months or years after crimes have occurred. Explicit traces of the crime may have been removed or have vanished. Bodies are usually buried for public health reasons. In such cases, you might receive information about past crime scenes from village elders or other local administrators. The following sections still apply, but there is a significantly lower risk that your actions will negatively affect the possibilities for proper investigation by international courts or tribunals.

7.1 SECURING THE CRIME SCENE

Securing the crime scene refers primarily to steps that police officers and police technicians undertake in order to preserve the crime scene as it existed at the time that the crime was first discovered.

In conflict and post-conflict areas, the first and most important aspect of securing the crime scene is to **ensure that the area is safe**. This means that qualified personnel must sweep the area for landmines, unexploded ordinance and booby traps. Experience shows that crime scenes are often preferred locations for leaving landmines and other explosives that can cause great damage to those first arriving on the scene. If your organization does not possess the capability to deal with this, **you should not undertake any examination of the crime scene until a capable partner organization has swept the area**. No matter how important the potential information is that you might uncover, you should never proceed to enter a crime scene without ensuring that the area is safe.

7.2 OBSERVING AND DOCUMENTING THE CRIME SCENE

If you know that the area is safe or if you can observe it safely from your location, there are a few simple steps that you need to undertake. First, make sure to note the date and time at which you are beginning this process, and for your own records make a list of everyone on your team who was present and involved. Note the location as accurately as possible, preferably with GPS coordinates. This will enable investigators to find the precise location later. Next, measure or gauge the perimeter of the area that you will be examining. Then using a camera and/or video recorder, make a record of all important buildings, rooms, and objects in the area, if possible. Photographs are particularly useful, as it is often also possible to take detailed photographs of a crime scene from a distance. In order to create a clear record, you should use a compass or GPS device to mark the photographs so that it is always clear which direction is north. You can do this by placing a large arrow pointing north (for example drawn or printed on a piece of white paper) in the field of the photograph. If you don't have a camera or a mobile phone with a camera, you can make a drawing indicating where in relation to each other and other marks important artefacts are located. You can use the investigative scene sketch form in appendix 14.4. Write down what you see. Use a measurement stick or printed measurement indicator in order to illustrate the size of significant objects.

If outside, look for areas where the vegetation differs noticeably from other places. Such differences may indicate recent movements of earth and help lead to (mass) graves. Vegetation is often more lush there than elsewhere. By noting the GPS coordinates of such locations, investigators can be directed to these places later.

Your emphasis at the crime scene should be on documenting how it looked when you arrived and, if at all possible, preserving its integrity. If it is safe and possible to remain at the crime scene, you should do so until the appropriate authorities can be notified.

16. United Nations Office of the High Commissioner for Human Rights, *Training Manual on Human Rights Monitoring* (New York and Geneva: United Nations, 2001), 106.

Keep in mind that to the extent that the local authorities may themselves be responsible for the crimes, it may be inappropriate or even dangerous for you to contact them. You should in any case avoid actually touching or collecting any potentially relevant physical evidence unless you are explicitly instructed to do so by your superiors. In particular, you should avoid touching or moving any bodies or body parts that may be present at the crime scene. Note what you see, take pictures, make drawings, but only as a very last resort, take things with you. **If you do take something with you, remember only to take things that you are qualified and competent to handle and store.**



Forensic anthropologists and pathologists of the United Nations Integrated Mission in Timor-Leste (UNMIT), accompanied by officers of the National Investigation Department (NID), and the National Police of Timor-Leste (PTNL), exhume human remains and evidence of possible crimes on a beach. *UN Photo/Martine Perret*

DEALING WITH WITNESSES

Dealing with witnesses introduces all of the challenges and problems that are involved in human interaction, but in this case they are even greater because they are typically exacerbated by a traumatic or politically tense situation. The experience of the international criminal tribunals have provided ample illustration of the difficulties and dangers inherent in the use of witnesses in complex international criminal proceedings. This includes cases in which witnesses withdrew their testimony or refused to testify because of threats made against them by those who supported the accused, and a small number of cases in which witnesses have actually been injured or killed in suspicious circumstances.

For this reason, the most important consideration relating to potential witnesses is to **DO NO HARM**. Regardless of how potentially valuable and interesting the information that a person may possess, you should not engage in any conduct, or ask the person to engage in any conduct that might threaten that person's safety.

While this section is designed to familiarize you with some of the main issues that are relevant for witnesses, **the presumption and recommendation is that you avoid engaging in the interview of witnesses, especially if these witnesses are victims of crimes**. Simply put, interaction with potential witnesses in major national and international criminal investigations raise an enormous array of legal, evidential, ethical, security and psychological issues. If you begin to interview witnesses without extensive training, there is a substantial risk that you can create renewed trauma for victims, inflict trauma on yourself, permanently ruin the possibility for investigators to speak to these witnesses and also have a detrimental effect on the reliability and admissibility of any potential evidence. For these reasons, such interviews should be left to investigators and to other personnel who have received the appropriate professional training. If an international criminal court or tribunal or other competent agency has already commenced a formal investigation, you should refrain from conducting any formal or informal interviews. **Focus instead on alerting professional investigators to the existence of potential witnesses, so that these investigators can conduct their own investigations.**

There may be situations in which you are approached by persons who wish to tell their stories to you. For example, if your function in the field involves community relations or work with refugees, you will likely hear many stories, some of which could be relevant for criminal investigations. In such cases, it is recommended that, unless instructed otherwise, you listen to the account that the person voluntarily wishes to tell you. Try to ensure that the person is able to provide this information in a setting in which large numbers of people are not present, so that it does not become public knowledge that this person is providing information to you. **Make it clear what your function is and explain that you are not an investigator.** This is important so that the witness will not think that he/she has been in contact with an investigator and then gets confused when the real ones show up. It can be very difficult for people to distinguish between the various international organizations, particularly if you are in rural or otherwise isolated areas.

If you are in a situation when people voluntarily approach you with information, you should restrict yourself to listening to the information provided to you. Avoid asking detailed questions, and concentrate instead on making summary notes of the substance of the person's account. These notes should not be too detailed, because this can create difficulties for investigators later if the information provided to them differs substantially from the information that you have noted. If the persons you speak to do become witnesses at a later point, the court will compare all previous interviews with that person, and differences in these interviews can damage the credibility of the witness.

You should obtain the identity of the persons with whom you have spoken if they are willing to provide it. You should also ask whether these persons would be willing to speak to others about their experiences. If, for example, many persons in a camp for refugees or displaced persons provide you with similar information about alleged crimes, then your notes and summaries of this information and your ability to facilitate contact with potential witnesses can be of considerable assistance to professional investigators. Your focus should therefore be on providing potentially relevant information to the proper investigative organ(s) so that professional investigators can initiate a formal interview process.

If working in rural areas, you can also facilitate future contacts with investigators by obtaining the contact details of the local village or community leader. Owing to this individual's standing in the community, he can direct investigators to persons possessing information. Of course, this limits any confidentiality. In practice it is often a necessary measure to ensure a good working relationship with the village leader, and you should try to make him understand that confidentiality is necessary.

Always be sceptical when you are approached by persons who characterize themselves as witnesses or by persons posing as intermediaries for witnesses. Do not assume that the information they provide is accurate, and be aware that these intermediaries may provide the same information to others as well. They may, for example, have an interest in denouncing a political opponent, or may even be using accusations to obscure their own crimes. Intermediaries may rehearse witnesses. This does not mean that you should refuse to accept information or turn away people who approach you voluntarily, but it does mean that you should not take any statements they make or documentation that they might provide at face value. Consider the motivations of the persons and witnesses who approach you. Why are they coming to talk to you? How did they learn about you, and why did they choose to approach you as opposed to someone else? Is it because they are afraid? Has someone offered them money? Who else knows that this person has gone to speak to you? You should include this information, as well as remarks on any scepticism or suspicion you have, when you forward the information to an investigative organ. As noted above, such information should be kept in a separate section in your notebook.

You should never pay witnesses for information. If absolutely necessary and authorized by your superiors, you may reimburse a witness who has voluntarily travelled to your area and approached you with information for transportation costs



Portrait of a Muslim refugee at a temporary housing facility.
UN Photo/John Isaac

and/or provide a meal. However, make sure that this is clearly documented and does not in any way constitute payment for an interview. If a witness or intermediary does require reimbursement for expenses incurred, make sure to obtain receipts for such expenditures if this is at all possible. Particularly in impoverished areas, news will spread rapidly of any kind of payment of witnesses, and you will find yourself flooded with new “witnesses.” Payment of interviews also risks compromising genuine witness interviews.

In general, avoid giving assurances to witnesses about what will occur after they speak with you. Do not under any circumstances make promises to witnesses if you are not completely sure that you can keep these promises. It can take a considerable amount of time and energy to gain the trust of potential witnesses, but that same trust can be lost forever in an instant if the wrong things are stated or done. Consider also that your interaction with a witness will have repercussions for that person’s later interaction with others interested in the information that that person possesses.

Witness interviews should be left to professional investigators and lawyers. In the case that you are voluntarily approached by witnesses you can refer to the appendix 13 for additional tips on dealing with witnesses.

BEING A WITNESS AND TESTIFYING

9.1 WHAT HAPPENS IF YOU BECOME A WITNESS

The better the state of the information that you can provide to the international criminal court or tribunal, the easier it will be to be a witness. If you have personally witnessed incidents related to alleged human rights abuses or violations of IHL, the most important thing to do is to compile an incident report. Depending on the type of organization that employs you, the organization may have a template of such a report ready for use.

It is essential to write the incident report as soon as possible after the alleged violations have taken place. Take care to distinguish between what you actually saw personally and any information that may have come to you in a second-hand manner. This includes information which you may have been exposed to before the incident and which therefore may affect your ability to be objective about the experience. In sum, in documenting your own experiences, you should adhere to the same criteria of accuracy, relevance and objectivity that you would apply to witnesses who might approach you with information about allegations of human rights abuses and violations of IHL.

Before approaching an investigative organ as a potential witness, you should remember to inform your superior and the legal advisor of your organization regarding what you are sending and to whom you should send it. Chapter 10 provides information on how to submit information to international criminal courts and tribunals.

9.2 BEING INTERVIEWED: WHAT DO YOU NEED TO KNOW?

The following is a list of important points designed to assist you if you are being interviewed by international criminal investigators about your own experiences in areas in which international crimes were allegedly committed.

- › Tell the truth.
- › Remember to distinguish clearly between what you personally observed and what you were told by others (hearsay).
- › Do not embellish or exaggerate the knowledge and information that you have.
- › If you have kept a mission diary, use it to prepare yourself for the interview and as an aid to your memory. It may also be the case that the investigators questioning you will ask for your permission to use portions of the diary as evidence. If you do have a mission diary, make that known to the investigators at an early stage, as it can facilitate the interview process. For reasons of potential disclosure and translation, it is also best if diaries or notebooks are made available sooner rather than later.

- › If challenged about your information, do not take it personally. Remember, the people who are interviewing you are trying to obtain as accurate an understanding as possible.
- › You may be interviewed several times by several different investigators representing different institutions. It is in your own interest to document the dates of these interviews. You may also wish to make journal or diary entries about these interviews as a later aid to your memory.
- › You are permitted to proofread and correct any statements that investigators obtain from you before you sign them. You are also allowed to receive a copy of your statements, unless security considerations dictate that it is best to avoid providing such copies.
- › Even if you are interviewed one or more times by international investigators, you might never testify at court. This does not mean that your information has been without use. The majority of witnesses interviewed by international investigators never testify at court, but in many cases their information provides considerable assistance to investigations.

9.3 TESTIFYING AT COURT

- › Months or years may pass between the time you are interviewed by investigators and your testimony at court.
- › Depending on the court, you may undergo a process of “witness proofing” prior to testifying. During proofing, the persons calling you to testify will go over any prior statements that you have given investigators. They may also ask you additional, new questions or show you documents or other material that is relevant to your testimony.
- › If you are testifying at an international court or tribunal, the witness services unit will take care of you once you arrive at the location of the court to testify. While your testimony lasts, you will not be permitted to communicate with those lawyers or investigators who have interviewed you. You may also not be permitted to discuss your testimony with anyone else.
- › If you, your organization or the OTP considers it necessary, it is possible to apply for in-court protective measures, such as face and voice distortion and/or the use of pseudonyms during testimony. This should be discussed with the interviewing investigators and with your employer. If you continue to work in a conflict area and are testifying in court about international crimes, you will likely need to have protective measures.
- › When answering questions in court, do not allow yourself to be drawn into an argument with the prosecution or the defence. You are there to provide the court with the information that you have, not to state your opinions or engage in arguments. Regardless of who asks you a question, address your answer to the judge(s).



Bulengo IDP camp, near Goma, DRC.
Aubrey Graham/IRIN

SUBMISSION OF INFORMATION AND EVIDENCE TO INTERNATIONAL CRIMINAL TRIBUNALS AND COURTS

As stated previously, it is imperative that you consult with your superior and your organization's legal advisor before submitting information to judicial institutions, whether these are the national institutions of the country in which you are based or international criminal institutions. In most organizations, any information collected by that organization is the property of that organization and employees are subject to obligations of confidentiality. Such matters are usually decided as a part of an organization's overall policies. A clear and thorough understanding of your employer's policy on cooperation with international criminal tribunals and courts will allow you to make proper representations to investigators, which will in turn make their job easier.

Many NGOs and other organizations and institutions sign memorandums of understanding with international criminal courts and tribunals regarding the exchange of information and other forms of cooperation. It is a good idea to find out whether such an agreement exists between your organization and any international court or tribunal that is operating in your area. Your organization's legal advisor will know whether this is the case. If no such agreement is in place and you and your colleagues are in a position to gather information that is relevant for international criminal investigations, you should raise the matter with your superiors.

All of the information and evidence that you submit to international criminal tribunals and courts will have to undergo a procedure of verification and analysis. It is important that you understand that this sceptical approach is necessary on the part of those institutions which receive information from you, and that you hence do not perceive this to be a criticism of your own work and efforts. As explained in the ICTY's *Manual on Developed Practices*:

Much of this information requires careful verification, and should not be unquestionably relied on to select cases for prosecution. Instead, institutions and agencies should be encouraged to record the details of potential witnesses, including and especially their future contact information, but should not be encouraged to attempt to take comprehensive witness statements. Rather, they should simply record in a general way the statements of potential witnesses based on their own direct experiences, and they should understand that the taking of statements is a professional process that is best left to the criminal justice system and to trained investigators.¹⁷

17. ICTY *Manual on Developed Practices*, 16.

10.1 WHERE AND HOW TO SUBMIT INFORMATION AND EVIDENCE

There are a variety of considerations that go into deciding which international criminal institutions to contact once you have collected or come into possession of information that you believe is of potential relevance for investigations. First and foremost, you need to find out whether the area and situation in which you are operating is already the subject of an international criminal investigation. (Your organization's legal advisor should know this.) If so, the relevant institution should have already started to send investigators to the area, and has perhaps also established local field offices. If this is the case, the easiest way to submit information to the institution is through these offices and investigators. Field office personnel will be able to ensure that you are put into touch with the relevant investigative staff.

If, on the other hand, there is no formal investigation initiated yet at the international level, you will need to decide whether there are local or national investigative and judicial agencies that are functioning properly enough that they are capable of carrying out independent and objective investigations. If this is the case, as it may be if the violence or abuses have been of a localized and temporary character in an otherwise stable region, then it may be most appropriate to provide the information to these instances. Remember that the ICC and similar institutions at the international level are courts of last resort. They are only designed to engage in investigations and prosecutions when the appropriate state organs are unwilling or incapable of doing so.

If there are substantial allegations of widespread human rights abuses or crimes by the local or national authorities of the country in which you are deployed, then you should refrain from submitting information to these authorities. These institutions may hide or destroy whatever information you have gathered, particularly if they themselves are suspected of misconduct. Under no circumstances should you provide information that might contain information on witnesses to such institutions. If you are in doubt about what to do, consult with your superior and your organization's legal advisor.

If you do decide to submit information to the ICC in a situation where the Court has not yet formally commenced an investigation, you can do so by contacting the following address:¹⁸

INTERNATIONAL CRIMINAL COURT

INFORMATION AND EVIDENCE UNIT

Office of the Prosecutor
Post Office Box 19519
2500 CM The Hague
The Netherlands

E-mail: otp.informationdesk@icc-cpi.int

Fax: +31 70 515 8555

18. This contact information has been obtained from the following address: www.icc-cpi.int/Menu/ICC/About+the+Court/Practical+Information/ If possible, check the contact information before submitting. Other international criminal institutions should provide similar contact information on their websites.

Having contacted the OTP at the ICC, you should discuss how and what to submit. Your communication with the OTP will ensure that you submit information that is potentially relevant to the ICC and will help you to avoid indiscriminate submission of large quantities of information.

For tribunals, courts and other institutions other than the ICC, contact details should be available on these institutions' websites.

10.2 POST-SUBMISSION RECORDKEEPING

Earlier sections of this handbook have discussed how to collect information that might be of potential relevance to international criminal courts and tribunals. It was emphasised that clear and transparent record-keeping by you greatly facilitates the work of these institutions.

In dealing with international criminal courts and tribunals, it is important to bear in mind that these institutions are just like any other organizations and institutions. Specifically, international courts and tribunals are capable of making mistakes. Investigations often take months or even years to complete, with the result that steps taken at early stages of the investigation are occasionally forgotten or duplicated. You should therefore not be surprised if international investigators approach you and request similar or identical information to that which you or your colleagues have provided at an earlier date. Should this occur, it will be very helpful if you can document what was provided earlier, when it was provided, and to whom it was provided.

International criminal courts and tribunals generally take very good care of the information that they collect. Nonetheless, for your sake and theirs, **it is highly recommendable that you retain copies of the information that you choose to provide to these institutions. Make sure that you receive a receipt for the information that you have provided and keep this for your own records.**



A wide view of the Security Council at its meeting on possible crimes against humanity committed in Libya. Council Members were briefed on the issue by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court (ICC). *UN Photo/JC McIlwaine*

CONCLUSION

The ambition of this handbook has been to provide practical guidance to lay persons who are in areas where they might receive or collect information that may assist investigations into international crimes. The guidance offered in this handbook is intended to enable lay persons to assist the professional staff of international criminal courts and tribunals, and not to transform lay persons into criminal investigators or analysts.

In conclusion, the following principles bear repeating:

- › Do no harm, either to yourself or to others.
- › Obey all of your own organization's security protocols and guidelines.
- › Do not make legal conclusions about the acts or events that you may witness.
- › Strive to be as objective as possible in your reporting.
- › Do not accept custody of artefacts or information that you are not qualified to handle.
- › Safety first! Do not enter into any areas that you are not absolutely certain have been searched and cleared of land mines, unexploded ordinance and booby traps.
- › Keep a record, such as a mission notebook, of what you observe and what you do.
- › Develop a system of note-taking that clearly separates facts from your own observations, comments, analyses, or issues related to the internal workings of your organization.
- › Consult with your organization or employer before submitting information to external organizations.
- › Remember that your contribution and the information you may provide can be very important.

Forensic anthropologists of the United Nations Integrated Mission in Timor-Leste (UNMIT), accompanied by the Timor-Leste National Investigation Department (NID), and the National Police of Timore-Leste (PTNL), work together to exhume human remains and evidence of possible crimes on a beach. *UN Photo/Martine Perret*



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APPENDICES

13.1 DEALING WITH WITNESSES

Witness interviews should be left to professional investigators and lawyers. In the case that you are voluntarily approached by witnesses you can refer to this appendix for additional tips on dealing with witnesses.

13.1.1 WITNESS SECURITY

The following are important principles when dealing with witnesses. While circumstances in the field may not allow for you to comply completely with them, you should always strive to uphold this standard and use good common sense. Always bear in mind the “do no harm” principle.

- › Use pseudonyms or codenames for witnesses in order to protect their confidentiality. Store all information related to witness identities securely.
- › Limit your contacts with witnesses. Remember, each contact may present a security risk to a witness and could also affect the witness’s credibility at trial. Particularly with local witnesses, avoid cultivating them as friends or social contacts.
- › Conduct interviews only in locations and situations that safeguard the safety and confidentiality concerns of the witness. Avoid public places, for example, conducting interviews in camps for refugees or displaced persons. By contrast, if the persons you are speaking to want to meet in the presence of others, you should respect that wish.
- › Treat witnesses separately and discretely, both to safeguard their confidentiality and to involve the contamination of one witness’s information by that of another witness.
- › **NEVER** mention the names of any witness to another witness, no matter what their relationship is or how cooperative they have been. There is no quicker way of destroying the witness’s confidence in your preservation of confidentiality than to tell the witness about other witnesses.

13.1.2 COMMUNICATING WITH THE WITNESS

- › Make sure to obtain the identity and identifying details (ID number, date of birth, name of father, address) of witnesses. Remember that in some parts of the world, people may only have one given name. If precise addresses do not exist, note the nearest named place of settlement and/or try to obtain the contact details of a village elder or community leader in the area.
- › Project a calm and disciplined demeanour. At no time should you raise your voice or otherwise antagonize the witness.
- › If the witness appears tired or becomes agitated or otherwise shows signs of stress or trauma, stop the interview.

- › Quite often people try and please the interviewer. Emphasize to the witness that it is ok if he does not know or remember something. Question the witness on how he/she knows what he does.
- › Address all questions to the person being interviewed and look at the witness, not the interpreter, during the interview. Likewise, even when the interpreter is translating the answers of the witness, your primary attention should be directed towards the witness rather than the interpreter. This helps to create a feeling of trust and interest on the part of the person being interviewed.
- › If using interpreters, try to provide them beforehand with a list of important (technical) terminology that will be essential to the conduct of the interview.
- › If operating in geographical areas that are foreign to you, try to ensure that you respect the local culture and customs in your communications and interactions with witnesses. You should receive at least some basic briefing on this as part of your deployment to a new area. Keep in mind that postures, the use of humour, facial and other physical gestures that may be considered normal in your own culture and in your organization may be perceived as odd or even offensive by the persons you are interviewing. Be particularly aware of local customs with respect to gender issues. For example, in some areas of the world it may be considered inappropriate and highly offensive for men to interview women or minors. This can even include the presence of men in the room (security personnel, interpreters, etc.).
- › In some areas of the world, particularly in rural and other isolated areas, people will not relate to the international calendar. If a witness is unable to provide you with a specific date for an event, try asking them to relate it to a particular season, holiday or feast day or agricultural event (e.g. a harvest).
- › Be careful in choosing interpreters. Past experience in conflict issues shows that infiltration of mission is most frequently accomplished through the use of interpreters and other local staff. Be aware of what information is made available to the interpreters, and avoid sharing too much information or, in particular, discussing witness interview plans with interpreters. Try to work on a “need to know basis” at all times. Ensure that all information pertaining to the interview, and in particular the identity of the persons being interviewed, is kept confidential by the interpreter.
- › Remember that local interpreters may also be at risk because of their role in witness interviews. This should be discussed with your interpreters so that any risks can be minimized.
- › Avoid asking leading questions that suggest which information you wish to obtain. You can start the interview by asking the witness to provide an overview in their own words of important events. Try to impress on the witness the need to focus on facts rather than on their own opinions or analysis of events.
- › Leave contact details for yourself and your organization (in case you are rotated out of the area) with the witness in case he/she has more information to provide you or needs your assistance.

13.1.3 DOCUMENTING ENCOUNTERS WITH WITNESSES

- › List the date, time and location of your encounter.
- › List the names of all persons present, including the interpreter(s).
- › Briefly describe the circumstances in which the encounter was initiated.
- › Summarize the information provided by the witness.
- › List any security or other concerns expressed by the witness.
- › List contact details of the witness, if possible. Consider storing this information separately from the main documentation of the encounter in order to protect the witness's security.
- › Keep in mind that illiteracy is still a widespread phenomenon in many parts of the world. Many witnesses will not be able to read or write, and they will therefore not be able to sign or read a witness statement or any other form.
- › Any statement or summary should be read back to the witness so that he/she can confirm that you have understood everything correctly.
- › Make a note of any concerns or impressions that you have after the encounter. Keep this separate from your notes on the facts of an interview and label it clearly as a note to yourself.

13.1.4 A NOTE ON WITNESSES WITH SPECIAL NEEDS

Being an eyewitness to a crime is under any circumstance a difficult experience, and it takes motivation and courage to come forth and speak about such events to outsiders. This difficulty is even greater when the witnesses are themselves victims of a crime, regardless of whether this is a single crime or a series of repeated violations. For such victim-witnesses, speaking about the abuses and crimes committed against them carries with it a very high risk of retraumatization, which is basically defined as a delayed reaction to, or reactivation of, the initial trauma. You must be aware of this risk and try to avoid exacerbating the situation. Trauma and retraumatization do not necessarily manifest themselves in a physical or visible form. Psychological or mental trauma often remains hidden in the short-term to those interacting with victims. Some specialists on victim trauma have called for a “universal presumption of trauma.” This entails assuming that every individual with whom we interact may have undergone trauma and may therefore be vulnerable to retraumatization.

For this reason, it is important that great care be taken in the course of interviews of victims. **Under no circumstances should interviews with vulnerable individuals be conducted by individuals who do not have significant prior interviewing experience or the appropriate training. You should avoid**

engaging in interviews of witnesses with special needs unless this is absolutely necessary.

Special categories of victims include victims of sexual crimes and children. (These are obviously not mutually exclusive categories.) It is very well-documented in both “normal” and conflict societies that victims of sexual crimes, who are usually overwhelmingly women, experience very high and often chronic levels of trauma after experiencing abuses. Victims of sexual violence also often face stigmatization in their own communities if it becomes publicly known that they have been sexually abused. If at all possible, avoid interviews of female victims of sexual violence by male interviewers. Keep in mind that men can also be victims of sexual violence, which is a common method of torture in war and in repressive regimes.

Children constitute a particularly vulnerable sector in any society, and they are often disproportionately affected by human rights abuses and violence during periods of armed conflict. (In the case of children who have themselves been combatants in combat zones, they occupy a double role, as they are simultaneously victims and perpetrators.) Numerous studies have also documented that children are more susceptible to long-term traumatisation than are adults. For this and other reasons, international criminal courts and tribunals have begun to employ specially trained professionals to assist in the interview of children. This can include screening by child psychologists who can assess whether the children are capable of undergoing an interview.

As noted above, special considerations may apply to contact with women and minors in some regions of the world. In some cases, such interviews will only be possible if parents or other relatives of the witness are permitted to be present. You should carefully consider the potential advantages and disadvantages involved with such interviews before conducting them.

You should also be aware of the potential impact of interviews on your own mental and physical health. Interviewing traumatised victims can also be a very stressful experience for the interviewer. In some cases, the interviewer will himself or herself need counselling afterwards. You therefore need to monitor yourself during interviews. If you are becoming stressed, depressed or aggravated, you should not continue to conduct interviews. This applies as well to interpreters.

Your goal should be to document your encounter in a manner that you or an investigator can without difficulty reconstruct the entire encounter at a later date without compromising the integrity of the information gathered. This means making clear notes listing all the details of your encounters with witnesses and a summary of what was said. You will only be able to assist international criminal investigators if they can understand and reconstruct your encounters with witnesses, and you can best do this by providing them with your records. You should strive to be as objective as possible in your documentation of the questions that were asked during the interview and of the witness's responses. Under no circumstances should you embellish or otherwise alter the information provided to you by the witness.



FORMS FOR CRIMINAL INVESTIGATIONS

PLEASE NOTE: The following forms in the attachment can be downloaded and printed in A4 size from the following website:
www.folkebernadotteacademy.se/ruleoflaw/publications

Photo: The "Killing Fields" memorial. UN Photo/John Isaac.

14.3 WITNESS INTAKE SHEET

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WITNESS INTAKE SHEET



!! WARNING !!
Do not keep this sheet in case folder; store separately in secure place.

Case No.

Section 1 – Witness Name

First name (given)	Last name (family)
--------------------	--------------------

Section 2 – Summary of Allegation (remember to obtain names of other witnesses)

Section 3 – Witness Information

Witness is:	<input type="checkbox"/> Witness knows perpetrator's name	
<input type="checkbox"/> Victim	<input type="checkbox"/> Witness is confident that he or she could recognize perpetrator again.	
<input type="checkbox"/> Eye-witness	<input type="checkbox"/> Witness is unsure of ability to recognize perpetrator again.	
<input type="checkbox"/> Hearsay witness	<input type="checkbox"/> Witness does not believe he or she could recognize perpetrator.	
Date of Birth	National ID #	Passport #
Home Address & Phone	Workplace & Phone	If Refugee – “Do you know where you are going?”
Spouse Name (include unmarried name)	Name of Children	Name and address of Parents
Contact Person Name and Address	Witness long term plans regarding residency	

Section 4 – Classification of Allegation

Geographical Classification	Classification of Allegation	
Town/Region of Incident	<input type="checkbox"/> Property Damage	<input type="checkbox"/> Murder
Date of Incident		<input type="checkbox"/> Kidnapping
Victim Classification	<input type="checkbox"/> Other	<input type="checkbox"/> Theft
<input type="checkbox"/> child		<input type="checkbox"/> Torture
<input type="checkbox"/> male		<input type="checkbox"/> Sexual Violence
<input type="checkbox"/> female		<input type="checkbox"/> Imprisonment
<input type="checkbox"/> persecuted group (specify)		<input type="checkbox"/> Ethnic Cleansing

14.4 INVESTIGATIVE SCENE SKETCH

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INVESTIGATIVE SCENE SKETCH



Indoor Investigative Scene	Outside Investigative Scene
1. Draw a box or lines to represent the walls of the room.	1. Lay two pieces of rope at the outside perimeter of the scene so that they intersect at 90 degrees and create “walls.”
2. Measure the length of two walls which intersect in a corner.	2. Draw two permanent objects such as a tree or building corner.
3. Indicate all doors and windows on sketch.	3. Measure the distance between these objects and each of the rope “walls” and record.
4. Draw & number each object. Include bodies.	4. Draw & number each object. Include bodies.
5. In the space below describe each object.	5. In the space below describe each object.
6. Record distance from each object to both walls.	6. Record distance from each object to both rope “walls.”

PEACEKEEPING OFTEN TAKES PLACE in environments where war crimes and other serious violations of international law have been committed or are still being committed. It is therefore important that international actors present in these areas – whether journalists, observers, peacekeepers or others – understand how they can best assist the work of international criminal courts, tribunals and transitional justice entities.

IN ORDER for information provided to international courts to be useful for investigations and admissible in court, the material must be handled and processed correctly from the time of collection until its transfer to the custody of the appropriate investigative organizations. Mistakes made during this phase may not be possible to correct later.



**FOLKE
BERNADOTTE
ACADEMY**

SWEDISH AGENCY FOR PEACE, SECURITY AND DEVELOPMENT

THIS HANDBOOK provides people who are not lawyers or investigators with the basic knowledge needed to correctly identify, gather and forward information on possible international crimes to international criminal courts and tribunals, and to understand what is expected of witnesses testifying in international criminal trials.

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