



Civil Society and Information Collection for International Accountability Bodies

Introduction	1
Role for unofficial investigators may vary depending on institution.....	2
<i>IIMM</i>	2
<i>ICC</i>	3
<i>ICJ</i>	3
Collecting information requires high standards and preparation	4
<i>Training and Preparation</i>	4
<i>Standard of Proof and Strictest Best Practice</i>	4
Organizations collecting information take on responsibilities, duty of care.....	5
<i>Duty of care to victims, witnesses and survivors</i>	5
<i>Duty of care to individuals collecting information</i>	6
<i>Duty to protect the integrity of evidence</i>	6
Value to be added regardless of information collection.....	7
Publicly available resources	7

Introduction

Information collected by organizations on serious violations of international law can be used for multiple purposes, including: to provide context or leads for investigators; as support for submissions to human rights and treaty complaint bodies; as evidence in international or domestic legal proceedings; and to set a foundation for truth-telling or other reconciliation mechanisms. This brief provides considerations for civil society organizations (**CSOs**) potentially engaging in information collection regarding serious violations of international law against the Rohingya for use in criminal justice proceedings.

At its heart, CSOs engaging in information collection must ‘do no harm:’ they must take responsibility for the risks to those providing information, to the information itself, and to those collecting information.

A non-exhaustive overview, this brief focuses on information collection that may be compiled for eventual use by the Independent Investigative Mechanism for Myanmar (**IIMM**) or used in matters before the International Criminal Court (**ICC**) or the International Court of Justice (**ICJ**). While this brief focuses on engagement with international judicial bodies, the guidance provided in collecting information is also relevant where members seek to provide assistance to domestic prosecutors under universal jurisdiction. It does not address broader information collection for human rights bodies.

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It should not be taken to reflect the views or positions of all members.

The brief uses the term ‘**information collection**’ to include: taking statements from or conducting interviews with victims and witnesses; documenting field work including creating maps of incidents or conducting surveys with relevant individuals; creating photographs, audio-visual, or audio records during an organization’s work; or receiving or obtaining physical or forensic material. The brief also uses the term ‘**unofficial**’¹ investigators to distinguish between civil society actors from staff ‘officially’ investigating for the IIMM, ICC, or ICJ.

Role for unofficial investigators may vary depending on institution

There is growing recognition of the role that unofficial investigators can play in collecting information to assist domestic and international accountability efforts.² This is because unofficial investigators may, through their on-going interventions, have existing relationships with violation-affected populations, a strong understanding of the underlying cultural and political context, and more timely access to information than international bodies. This is additionally important where states and other powerful actors refuse to cooperate with official investigations.

If information is collected to provide to an accountability mechanism, the role of unofficial investigators may vary. This is because the act of collecting information may vary because of the purpose of collecting information and the manner in which the information may be used (for example, for providing *context* compared to providing *eye-witness testimony*).

IIMM

The IIMM is not a court itself.³ Instead, it was mandated by the UN Human Rights Council to collect and preserve information that may be used as evidence of international crimes in order to facilitate prosecutions and trials of individual perpetrators by competent judicial authorities. Its Terms of Reference states that it may collect information “on serious international crimes and violations of international law committed in Myanmar since 2011.”⁴

Because the information may be used in future court processes, it is necessary that the IIMM collect information that both may establish the commission of international crimes as well as information linking *specific people* to the events that have occurred. If the information is used as evidence in court processes, these processes may take place in domestic courts (for example, under the exercise of universal jurisdiction) or in international courts (for example, the ICC or ICJ.)

The IIMM’s mandate explicitly builds the possibility for the mechanism to proactively “cooperate with relevant... non-governmental organizations, as appropriate and necessary for the implementation of

¹ This distinction is adopted from the Public International Law and Policy Group’s 2016 *Handbook on Civil Society Documentation of Serious Human Rights Violations: Principles & Best Practices*, upon which this brief relies in part. Available: https://www.vu.nl/nl/Images/PILPG_Handbook_on_Civil_Society_Documentation_of_Serious_Human_Rights_Violations_Sept_2016_tcm289-785328.pdf.

² For example, see: Brianne McGonigle Leyh, 2017, “Changing Landscapes in Documentation Efforts: Civil Society Documentation Of Serious Human Rights Violations,” *Utrecht Journal of International and European Law*, 33 (84): 44-58, <http://www.utrechtjournal.org/articles/10.5334/ujel.365/>; and Jessica C Levy and Paul R Williams, 2020, “Documentation For Accountability,” *Case Western Reserve Journal of International Law* 52 (1): 451-465, <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=2579&context=ijl>.

³ For more information, see: IIMM Website, “IIMM Process,” <https://iimm.un.org/iimm-process/>.

⁴ United Nations, General Assembly, “Annex: Independent Investigative Mechanism for Myanmar Terms of Reference,” *Letter dated 16 January 2019 from the Secretary-General Addressed to the President of the General Assembly*, <https://undocs.org/en/A/73/716>, [3].

its mandate.”⁵ A helpful reference point is the practice of the International, Impartial, and Independent Mechanism on Syria, which established working “frameworks” with individual and groups of CSOs.⁶ This permits CSOs to share information with the IIM, while the IIM provides feedback to CSOs.

CSOs with a specific focus and expertise—for example on children or survivors of sexual violence—may be able to also provide valuable input to the Mechanism, by sharing their work on specific types of crimes or particular impacts on types of victims and survivors. As ever, and especially in these contexts, the ‘do no harm’ principle is paramount.

ICC

The ICC’s Office of the Prosecutor (**OTP**) is investigating individual criminal responsibility for crimes committed “at least in part” in the territory of Bangladesh. This is because Bangladesh ratified the *Rome Statute*, the ICC’s founding treaty, and the ICC has jurisdiction over crimes committed on the territory of its members. Myanmar is not a signatory to the *Rome Statute* and therefore the ICC cannot investigate crimes committed solely on the territory of Myanmar.

In the application for opening an investigation, the ICC Prosecutor focused on crimes committed by *state actors*—and particularly by Myanmar’s military, the Tatmadaw, and other security forces—against the Rohingya since 2016. However, if matters proceed in the ICC, cases will focus on the *individual* criminal responsibility, rather than the *state*—much like cases that may come from information collected by the IIMM.

The Court’s judges authorized the Prosecutor to investigate the crimes of persecution on grounds of ethnicity and/or religion against the Rohingya population and deportation across the Myanmar-Bangladesh border. These alleged violations of international law may amount to crimes against humanity. The judges also gave the Prosecutor permission to investigate any other crimes in the Court’s jurisdiction—including future crimes—that are “sufficiently linked” to the Court’s decision, provided they took place after the *Rome Statute* entered into force in Bangladesh or in another ICC member.⁷

CSOs may provide information to the OTP at any time.⁸ There is no specific format for communications; while, in theory, the OTP will respond to indicate receipt of information, in practice the Office may not have the capacity. There is no guarantee the OTP will take this information into consideration. Under Article 44 of the *Rome Statute*, the Court can ask for assistance from CSOs, but such assistance, if provided, is not funded by the Court or the OTP.

If the investigation leads to criminal proceedings, CSOs can ask the court for permission to provide legal analysis in formal submissions called *amicus curiae*, or ‘friend of the Court’ briefs.

ICJ

Unlike the IIMM and ICC, the ICJ focuses on the responsibility of the *State* of Myanmar rather than the responsibility of *individuals*. This is because the ICJ adjudicates disputes between states—in this

⁵ Ibid [41].

⁶ See: United Nations, General Assembly, *Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, <https://undocs.org/en/A/74/699>, Section III (B).

⁷ See: ICC Press Release, 2019, “ICC Judges Authorise Opening of an Investigation into the Situation in Bangladesh/Myanmar,” 14 November, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>.

⁸ For more information, see: ICC Website, “Civil Society and the ICC,” <https://www.icc-cpi.int/get-involved/Pages/ngos.aspx>.

instance, The Gambia alleging that Myanmar military's atrocities against the Rohingya amount to violations of the *Genocide Convention*, to which both states are parties.

CSOs may only provide information or assistance directly to the ICJ with the Court's permission.⁹ While under Article 50 of the *Statute of the International Court of Justice* the Court is permitted to call on CSOs to serve as experts, this is very rarely done.¹⁰

However, parties to a dispute—in this matter The Gambia and Myanmar—**may include information from CSOs in their 'memorials,' or written arguments.**

Collecting information requires high standards and preparation

It is difficult to collect information that can be used in court proceedings. This difficulty is increased by the complexity inherent in serious violations of international law. Moreover, it is made more challenging by the need to ensure that the methodology to collect information meets the standards and processes required by the IIMM, ICC, and ICJ.

Nevertheless, if a CSO chooses to collect information, sharing that information with the IIMM, ICC, or ICJ may be used to guide further investigations or, in some instances, as evidence in court.

Training and Preparation

To minimize the risks of collecting information, it is important to be trained in information collection and management, as relates to these legal processes. There are several guides and handbooks publicly available to support those who collect information relating to serious human rights violations for intended use in legal proceedings, including those listed at the end of this document.

However, these guides cannot substitute for professional training. **If a CSO intends its information to primarily be used by one of these bodies, it may be preferable to seek out specific directions from the IIMM, ICC, or ICJ if possible.** That way, an organization can be sure that the standards of collection and presentation of information are met. Nevertheless, it must be stressed that these bodies **do not provide compensation for the work done by CSOs and may be unable to provide any assistance in protecting the safety of those collecting information or those who provide information.** This is very important to consider before seeking specific directions and in deciding whether to engage with such bodies outright.

Standard of Proof and Strictest Best Practice

The IIMM, ICC, and ICJ have different standards of proof, based on the aim of the legal proceedings. This affects what kind of information is useful and the processes used to collect the information.

The highest 'standard of proof'—or clarity, certainty, and amount of evidence necessary for a court to find that individuals have committed serious violations of international law—is 'beyond a reasonable doubt.' This is the standard of proof for criminal trials in international and domestic courts and will be used by the ICC and criminal matters that come from evidence collected by the IIMM.

⁹ For more information, see ICJ Website: "Frequently Asked Questions," <https://www.icj-cij.org/en/frequently-asked-questions>.

¹⁰ James Gerard Devaney, 2014, "The Law And Practice Of Fact-Finding Before The International Court Of Justice," LLD, European University Institute, https://cadmus.eui.eu/bitstream/handle/1814/33884/2014_Devaney.pdf?sequence=1&isAllowed=y, 34.

Therefore, **to ensure that information collected can be used for *any* mechanism, it is important to strive for this highest standard.** This means using and following any guidance found in the above resources diligently, paying careful attention to detail and process, and refraining if collecting the information could potentially harm the victims, witnesses, or the collector, or otherwise compromise the integrity of the information. ‘Compromising the integrity of the information’ can mean making the information appear unreliable and therefore not useful for evidence before a court—this will be discussed below.

Organizations collecting information take on responsibilities, duty of care

Duty of care to victims, witnesses, and survivors

Human rights activists and CSOs have an obligation to ‘do no harm’ to victims, witnesses, survivors and others they interact with in the course of their work. There are acute risks that can emerge when collecting information relating to grave violations of international law, which should be given serious consideration and avoided.

Maintaining a duty of care towards victims, witnesses, survivors, and other involved in information/evidence collection includes:

- **Keeping confidential the identity of witnesses, victims, survivors, and others at risk and ensuring the information collected can be stored securely to minimize the risk of reprisals.** If an organization intends the information to be used by a court, it is also important to **maintain the ability as far as possible, to trace the information to an information provider** should it be requested from the ICJ, ICC, or a court using information from the IIMM. Because of this, ensuring confidentiality requires considerable resources and planning, and may include having a process to **anonymize information for storage.**
- **Preventing or minimizing the risk of re-traumatization** in recounting what victims, survivors, or witnesses have experienced. Anyone conducting interviews should have necessary **training for working with particularly vulnerable individuals** including minors and survivors of sexual violence or torture. Interviewers should also be aware of the number of times a survivor or witness has already been interviewed and should factor this into the decision to proceed with an interview. In all cases, interviewers should **stop an interview where the individual shows signs of emotional distress.** It may be necessary to **refer the individual** to additional legal, medical, psychosocial, material, or security assistance.¹¹
- **Ensuring informed consent** for any information collection *before* the collection takes place, and to **allow the individual to withdraw that consent at any time**, including after the information has been collected; ‘informed consent’ means ensuring the individual understands who your organization is, why the information is being collected, how the information may be used, and any risks that may occur from the interaction. This also means **explaining that if information is provided to a court, it may be disclosed to the defense.**
- **Managing expectations of those from whom information is collected.** Because there are multiple reasons for which the information may be used, it is important not to assume that the information will be used in the legal proceedings as ‘evidence.’ Instead, it is important to **emphasize that accountability (including prosecutions of specific individuals) takes a long time, and there is no guarantee that specific perpetrators will ever face justice.**

¹¹ Public International Law & Policy Group, 2016, “Handbook On Civil Society Documentation Of Serious Human Rights Violations: Principles & Best Practices,” https://www.vu.nl/nl/images/PILPG_Handbook_on_Civil_Society_Documentation_of_Serious_Human_Rights_Violations_Sept_2016_tcm289-785328.pdf, 30.

Nevertheless, their information is valuable to help establish the truth of the violations that were committed. Equally important is explaining the implications when the information collected is used in legal proceedings – this may mean being called as a witness to testify in a courtroom, even years after providing information.

- **Maintaining connections with communities and individuals affected by the violations at issue**, particularly if court proceedings do emerge based on the testimony collected. It is important that any CSO collecting information do its best to update those who have provided information, regardless of the process to which the CSO submits its findings.

Duty of care to individuals collecting information

Where an organization engages in information collection, it also bears responsibility for the possible risks to the individuals working under its name. This includes:

- **Understanding local laws** and ensuring that individuals collecting information under an organization's name do not violate these laws;
- **Undertaking to protect the physical safety of unofficial investigators**, not only 'at the scene,' but also protecting from any potential reprisal following the collecting of information—this is particularly important if also using the skills of local interpreters; and
- **Ensuring psychological support for unofficial investigators** to address any secondary trauma experienced.

Duty to protect the integrity of evidence

All investigators should consider the risk of unintentionally tainting possible evidence that may cause it to be unreliable or unusable in legal proceedings. Notably, rushed, poorly planned, or unsafe information collection can actually harm accountability efforts. Preventing this requires:

- **Understanding the ways in which different types of information should be collected in order to be used as evidence.** For example, with interviews, statements, or surveys it is important to **avoid leading questions or asking an interviewee directly to identify suspects**. Instead, interviews or surveys should include open-ended questions and refrain from delving into too much detail. 'Who,' 'what,' 'where,' 'when,' and 'why do you think' provides enough information for official investigators to decide whether the individual would be useful to contact again. Furthermore, digital evidence such as photos in social media posts, **it is necessary to download its metadata for identification of its location and time taken**. Further information is provided below in the publicly available resources.
- **Being aware of the number of times a victim or witness has provided a statement.** In addition to re-traumatization, multiple organizations taking statements from one survivor or witness raises the possibility of receiving conflicting statements. Depending on the information the individual is providing and the mechanism that will be using that information, the differences between one statement and the next may cause the statement to be seen as not credible, and therefore not useful. Remember also that if an individual's statement is to be used in a court, an 'official' investigator will almost always need to contact that person again. This increases the number of times that individual will have to recount the same events.
- **Ensuring the 'chain of custody' of any information collected.** A 'chain of custody', which refers to the ability to trace, in detail, how the information was collected, who has handled it since, and precisely how it has been passed to the court, is vital to the usability of information in a court matter. Without this, the credibility of the information may be seriously compromised.

Value to be added regardless of information collection

If an organization chooses not to engage in information collection, coordination between the CSOs and various accountability bodies can still **inform and enable** 'official' information collection. For example, accountability bodies may have to access specific types of information or victims and witnesses only through the knowledge of, and consultation with, CSOs that understand invaluable background and contextual information—especially in relation to the Rohingya and broader Myanmar diaspora. CSOs can also advise on culturally or linguistically appropriate approaches to information collection, based on the context.

Aside from official or unofficial information collection, CSOs have a valuable role to play in centering the needs and interests of survivors for each of these bodies. For example, the ICC's Trust Fund for Victims (**TFV**) is mandated to provide assistance to victims of alleged crimes once an ICC investigation has been opened.¹² CSOs can advocate with or on behalf of survivors to the TFV regarding what programs should be funded to best meet survivors' needs. CSOs can also proactively advise any outreach programs conducted by the IIMM, ICC, and ICJ on how to contact survivors, what information survivors need, and facilitating survivors' access to the bodies. Finally, CSOs can support these bodies through publicly advocating for state cooperation with these bodies, including signature/ratification of the *Rome Statute*.

Publicly available resources

Below is a general list of publicly available resources that may be useful in deciding whether, and how, a CSO engages in information collection. Links were current at time of publication.

- **Overview for investigations specifically for international criminal accountability**

Basic Investigative Standards for First Responders to International Crimes, Global Rights Compliance (2019) <https://www.globalrightscompliance.com/en/publications/basic-investigative-standards-bis-for-first-responders-to-international-crimes>

- **Overview of unofficial investigations more generally (including templates)**

Handbook on Civil Society Documentation of Serious Human Rights Violations: Principles & Best Practices, Public International Law and Policy Group (2016)
https://www.vu.nl/nl/Images/PILPG_Handbook_on_Civil_Society_Documentation_of_Serious_Human_Rights_Violations_Sept_2016_tcm289-785328.pdf

- **On understanding international crimes in relation to investigation**

Marie Nystedt (Ed.), Christian Axboe Nielsen, Jann F. Kleffner, *A Handbook On Assisting International Criminal Investigations*, The Folke Bernadotte Academy (2011)
<https://fba.se/contentassets/6f4962727ea34af5940fa8c448f3d30f/handbook-on-assisting-international-criminal-investigations.pdf>

- **On creating a library for documentation**

HURIDOCs Resource Library, <https://huridocs.org/resource-library/>

¹² For further information, see: ICC Website, "Trust Fund for Victims," <https://www.icc-cpi.int/tfv>.



- **On collecting or creating eye-witness video**

Video as Evidence Field Guide, WITNESS (2016), <https://vae.witness.org/video-as-evidence-field-guide/>

- **On verifying digital information**

Craig Silverman and Merrill Perlman, *Verification Handbook* (2014)
<http://verificationhandbook.com/>

- **Related specifically to survivors of sexual violence**

International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practice on The Documentation of Sexual Violence as a Crime under International Law, UK Foreign and Commonwealth Office (2014)
<https://www.refworld.org/docid/53f2fed34.html>