

Finding a Middle Ground? International Humanitarian Aid Organizations, Information Sharing, and the Pursuit of International Justice

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ABSTRACT

International humanitarian aid organizations have a duty to provide protection and assistance to displaced persons and other vulnerable groups worldwide. In doing so, they collect personal and often highly sensitive information that may be of interest to international justice institutions investigating violations of international human rights and humanitarian law. The question arises whether humanitarian organizations can—or should—share information with these institutions? Is it possible to find a middle ground that balances the rights, duties, and priorities of those involved? This article examines four issues that affect information sharing between humanitarian organizations and international justice institutions: (1) the right to privacy and justice; (2) mandate requirements; (3) policy requirements; and (4) organizational culture. The article is based on an extensive literature review and interviews with twenty-eight current or former staff members at humanitarian organizations, international tribunals, and United Nations mechanisms and commissions of inquiry.

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Accountability restores victims' dignity and acknowledges their rights. . . . To further broader accountability—as a key tool towards prevention—victims and affected communities must be *enabled* to take their rightful position in society—one from which they will be able to hold to account those in power, in the future. . . . This requires a more comprehensive effort from all of us to advocate for, design and support complementary local, national and international accountability processes—processes that resonate with concerned populations and contribute to their sense of justice and dignity.¹

---Michelle Bachelet, UN High Commissioner for Human Rights

I. INTRODUCTION

According to the United Nations High Commissioner for Refugees (UNHCR), as of mid-2020, more than eighty-two million persons worldwide had been displaced due to natural disasters, war crimes, and widespread human rights abuses.² At the same time, investigators with international justice institutions, including international criminal courts, United Nations (UN) commissions of inquiry, and national war crimes units, have faced COVID-19 travel restrictions, denial of entry by national authorities, and funding issues that have prevented them from gaining access to displaced persons to gather evidence for future prosecutions. Given this situation, can humanitarian organizations play a more active role in assisting international justice institutions in gathering information about potential serious international crimes?

To answer this question, we studied the mandates and information-sharing policies of three leading humanitarian organizations: the International Committee of the Red Cross (ICRC), the United Nations High Commissioner for Refugees (UNHCR), and the International Organization of Migration (IOM).³ We selected these three organizations because of their access to large numbers of displaced persons and other vulnerable groups, many of whom may wish to pursue accountability for human rights abuses they may have suffered or witnessed.

To better understand the challenges these humanitarian organizations face in sharing information with international justice institutions, we con-

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1. UN High Commissioner for Human Rights, *The Role of UN-Created Accountability Mechanisms in the Global Fight Against Impunity: What's Next?* (Jan. 20, 2021), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26671&LangID=E>.
 2. See UNHCR, *Forced Displacement Passes 80 Million by Mid-2020 as COVID-19 Tests Refugee Protection Globally* (Dec. 9, 2020), <https://www.unhcr.org/en-us/news/press/2020/12/5fcf94a04/forced-displacement-passes-80-million-mid-2020-covid-19-tests-refugee-protection.html>.
 3. The literature review included guidelines and policies on information sharing, privacy, and data collection, as well as articles on justice and privacy obligations to beneficiaries; mandates of humanitarian organizations; guidance on the collection and analysis potential evidence in tribunals; and the mandates of UN investigatory mechanisms, commissions of inquiry, and other UN bodies.

ducted interviews with twenty-eight current or former staff members at humanitarian organizations, international tribunals, and UN mechanisms and commissions of inquiry. Using a semi-structured questionnaire, we asked our respondents whether, and under what conditions, humanitarian organizations might be able to share information about potential crimes with judicial and UN fact-finding institutions.⁴ This article identifies both the challenges and opportunities for improving information sharing between humanitarian organizations and international justice institutions.

By grounding this article in a review of scholarly articles and interviews with a relatively small number of individuals, we run the risk of formulating general conclusions from a limited data set. But our aim is not to provide an overarching theory of information sharing between international humanitarian and justice institution but to put forth several initiatives that could be undertaken to improve information sharing while still protecting the privacy and safety of vulnerable groups, such as refugees, forcibly displaced persons, and migrants generally. Further research will still be necessary for a more comprehensive view of how to overcome and mitigate these challenges.

II. BACKGROUND

The creation of international humanitarian aid organizations dates to the establishment of the ICRC in 1863. While the objectives of the ICRC have evolved over time, its primary mission “has been to ensure protection and assistance for victims of armed conflict and strife” and to serve as a guardian of the Geneva Conventions that regulates the legal standards of humanitarian treatment in war.⁵ During World War II, the ICRC and the League of Red Cross Societies worked together to ship relief supplies to prisoners of war (POWs) and civilians, visited POWs, and facilitated prisoner exchanges between warring factions. Today, the ICRC works in more than one hundred

4. It is important to note that the level of care organizations take to keep information private also applied to our interviews. While we quote respondents directly, we have also, in some cases, paraphrased quotes and anonymized sources.

5. See International Committee of the Red Cross (ICRC), *History of the ICRC*, <https://www.icrc.org/en/document/history-icrc>; see also ICRC, *THE ICRC: ITS MISSION AND WORK* 6–7 (2009), https://www.icrc.org/en/doc/assets/files/other/icrc_002_0963.pdf [hereinafter *ICRC: ITS MISSION AND WORK*]. International humanitarian law expressly confers certain rights on the ICRC, such as that of visiting prisoners of war or civilian internees and providing them with relief supplies, and that of operating the Central Tracking Agency (see Geneva Convention Relative to the Treatment of Prisoners of War arts. 73, 123, 126, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 76, 109, 137, 140, 143, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287). In addition, international humanitarian law recognizes the ICRC’s right of initiative in the event of armed conflict, whether international or non-international (see art. 3 common to the four Geneva Conventions).

countries and is privy to information about the treatment of POWs and civilians during armed conflicts. This information has been of interest to international courts and other justice institutions.⁶

In 1950, the UN established the UNHCR to assist millions of European refugees who had fled or lost their homes due to armed conflict. Today, the agency has a workforce of several thousand staff stationed in over 150 countries and collects personal identifiable information and other data from refugees for resettlement purposes.⁷ The data frequently include the individual's name, address, family and close associates, date and place of birth, country of origin, ethnic origin, religion, educational qualifications, profession or vocation, health status, and identity or travel documents in their possession.⁸

Massive displacement during the Second World War led to the creation of the Provisional Intergovernmental Committee for the Movement of Migrants from Europe (PICMME) in 1951. Its purpose was to help European governments identify resettlement countries for more than ten million people uprooted by the war. Over the years, the organization has gone through a succession of name changes from PICMME to the Intergovernmental Committee for European Migration in 1952, to the Intergovernmental Committee for Migration in 1980, and finally to the International Organization for Migration (IOM) in 1989. In 2016, IOM became an UN-affiliated agency of 174 member states that works in more than one hundred countries and maintains a workforce of several thousand staff.⁹

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6. See Prosecutor v. Simic et al., Case No. IT-95–9, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness (Int'l Crim. Trib. for the former Yugoslavia July 27, 1999).
 7. "Personal data" includes "[a]ny data related to an individual who can be identified from that data[,] from that data and other information[,] or by means reasonably likely to be used related to that data." UNHCR, POLICY ON THE PROTECTION OF PERSONAL DATA OF PERSONS OF CONCERN TO UNHCR 11 (2015), <https://www.refworld.org/docid/55643c1d4.html> [hereinafter UNHCR, POLICY ON THE PROTECTION OF PERSONAL DATA]. In addition, the EU General Data Protection Regulation (GDPR) defines "sensitive data" as personal information that may reveal "racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data . . . data concerning health or data concerning a natural person's sex life or sexual orientation." See GDPR, Regulation of the European Parliament on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free movement of such Data, and Repealing Directive 95/46/EC, 2016/679/EU (Apr. 27, 2016), art. 9.
 8. See UNHCR, *UNHCR Guidelines on the Sharing of Information on Individual Cases: Confidentiality Guidelines* (2001) <https://cms.emergency.unhcr.org/documents/11982/52542/Confidentiality+Guidelines/360dac54-bbf5-456f-9094-9e53faa65185> [hereinafter *UNHCR Confidentiality Guidelines*]; UNHCR, *Model Agreement on the Sharing of Personal Data with Governments in the Context of Hand-over of the Refugee Status Determination Process 2* (n.d.); UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), PROCEDURAL STANDARDS FOR REFUGEE STATUS DETERMINATION UNDER UNHCR'S MANDATE (2020), <https://www.unhcr.org/4317223c9.pdf>; UNHCR, POLICY ON THE PROTECTION OF PERSONAL DATA OF PERSONS, *supra* note 7, at 11.
 9. See International Organization of Migration, *IOM History*, <https://www.iom.int/iom-history>.

Today, IOM provides humanitarian and development assistance to millions of beneficiaries worldwide. While holding distinct mandates, IOM and UNHCR often work closely together. For example, IOM and UNHCR are the lead international organizations assisting hundreds of thousands of Rohingya who fled the 2017 genocide in Myanmar and are now living in refugee camps in Bangladesh.¹⁰ Also, prior to the departure of the United States from Afghanistan in August 2021, UNHCR and IOM collaborated to support the Afghan government in the voluntary return, repatriation, and reintegration of Afghan refugees. Today, both organizations continue to work together to meet the needs of newly displaced Afghans.¹¹

Under the framework of IOM Data Protection Principles, IOM collects detailed personal information from displaced and other migrant populations. This biographical data includes biometric information (fingerprints, iris scans, DNA samples, etc.); medical and personal records; identity documents; and information about violations of human rights.¹² IOM also operates the Displacement Tracking Matrix, which provides de-personalized individual and aggregate information on the “mobility, vulnerabilities, and needs of displaced and mobile populations that enables decision makers and responders to provide these populations with better context specific information.”¹³ Similar to the ICRC and UNHCR, IOM’s data could potentially assist international justice institutions in their investigations of serious international crimes. For instance, one respondent noted that humanitarian workers in Rohingya refugee camps in Bangladesh spend a considerable amount of time documenting the accounts of refugees who had suffered or witnessed atrocity crimes. This information was used to assist these refugees in accessing humanitarian services.¹⁴

Much like the surge of international humanitarian organizations following the Second World War, the world witnessed unprecedented growth in the pursuit of international justice and accountability following the Cold War in the mid-1990s. In May of 1993, the UN Security Council authorized the creation of the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague, Netherlands, followed a year later by the establishment of the *ad hoc* International Criminal Tribunal for Rwanda in Arusha, Tanzania. Soon thereafter, the United Nations and local governments established a new set of judicial institutions known as *hybrid* or *mixed* courts. Unlike the *ad hoc* tribunals, the hybrid courts—except for the Extraordinary

10. See United Nations, *Top UN Court Orders Myanmar to Protect Rohingya From Genocide*, UN NEWS (Jan. 23, 2020), <https://news.un.org/en/story/2020/01/1055841>.

11. See UNHCR, *Afghanistan Emergency*, <https://www.unhcr.org/afghanistan-emergency.html>.

12. INTERNATIONAL ORGANIZATION FOR MIGRATION (IOM), IOM DATA PROTECTION MANUAL 14 (2010).

13. International Organization on Migration, *Displacement Tracking Matrix*, <https://dtm.iom.int/>.

14. Skype Interview with Anonymous One (Oct. 2020).

African Chambers and the Special Tribunal for Lebanon—are located in the countries where the crimes actually occurred. Since 1999, seven hybrid tribunals have been created.¹⁵ Meanwhile, since 1992, the United Nations has established more than fifty international commissions of inquiry and mechanisms, as well as fact-finding missions, to investigate atrocity crimes, preserve potential evidence, and promote accountability.¹⁶

In 1998, 120 nations met in Rome to finalize a multinational treaty to establish the International Criminal Court (ICC). The ICC came into force in July 2002 and, as of November 2021, has opened thirty cases and was pursuing fifteen investigations worldwide.¹⁷ More recently, more than a dozen national war crimes units—also referred to as specialized prosecution units—have been created across the world. Many units, especially in Europe and North America, were established in response to massive migration flows from conflict zones and employ a “no-safe-haven approach” for those migrants suspected of committing serious international crimes.¹⁸ Many of these units have used evidence gathered through information sharing with national asylum authorities to successfully prosecute serious international crimes.¹⁹ Some units pursue suspects under the legal principle of universal jurisdiction, which gives states the authority to use their own judiciaries to try an accused person for certain crimes regardless of where the crime was committed.²⁰

Humanitarian organizations have repositories of both personal and de-personalized information that are of interest to war crimes and human rights investigators. In theory, these organizations also have ethical obligations: if crimes go unpunished, especially due to a perceived unwillingness of international actors to overcome hurdles to information sharing, the system

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15. See ERIC STOVER, VICTOR PESKIN & ALEXA KOENIG, HIDING IN PLAIN SIGHT: THE PURSUIT OF WAR CRIMINALS FROM NUREMBERG TO THE WAR ON TERROR 141–332 (2016).
 16. See OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR), COMMISSIONS OF INQUIRY AND FACT-FINDING MISSIONS ON INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: GUIDANCE AND PRACTICE 3–5 (2015).
 17. See International Criminal Court, <https://www.icc-cpi.int/>.
 18. See Elise Baker et al., *Joining Forces: National War Crimes Units and the Pursuit of International Justice*, 42 HUM. RTS. Q. 594, 596 (2020).
 19. See *id.*, at 615; *Refugees as Potential Witnesses of International Crimes, Guidelines for Social Workers and Care Providers in Germany*, INT’L NUREMBERG PRINCIPLES ACAD. 8–9 (2019); As an example of how this information can lead to justice, one trial that recently began in Germany in the Higher Regional Court in Koblenz against Anwar Raslan and Eyad al-Gharib for crimes against humanity is using documents collected inside of Syria as evidence linking Raslan to those crimes. The prosecutor also used the investigations, victim interviews, and document collection of Syrian activist organizations to amass enough lead evidence for the indictment against Raslan. Ben Hubbard, *Germany Takes Rare Step in Putting Syrian Officers on Trial in Torture Case*, N.Y. TIMES (Apr. 23, 2020), <https://www.nytimes.com/2020/04/23/world/middleeast/syria-germany-war-crimes-trial.html>.
 20. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 788 (1988).

of international justice that rejects impunity can be undermined.²¹ At the same time, humanitarian organizations involved in crisis response have a responsibility to adhere to humanitarian principles and maintain neutrality by upholding privacy and confidentiality.²² With this in mind, we now turn to a more detailed examination of the information being collected by humanitarian organizations, as well as the key challenges, considerations, and opportunities that contour a conceivable middle-ground for sharing such information with international justice institutions.

III. DISCUSSION

A. Information Collection

Before analyzing the challenges and opportunities presented by information sharing between humanitarian organizations and international justice institutions, this section examines the information collection procedures that inform such an analysis. We first explore the procedures the ICRC, UNHCR, and IOM use to collect, preserve, and analyze personal data and other information from displaced persons and other vulnerable groups. We further assess the extent to which these humanitarian organizations share information with outside entities and the procedures these organizations follow. Finally, we provide an overview of the kinds of information international justice institutions wish to obtain from these humanitarian organizations.

1. *International Humanitarian Organizations*

Humanitarian organizations collect primary data in pursuit of fulfilling their mandates to protect and assist people in need. Primary data includes biographical and personally identifiable information, as well as accounts of violations of serious international crimes. For example, ICRC delegates regularly interview POWs and other detainees about their treatment in prison, which may include reports of torture or ill-treatment. This information is reported to the authorities with the expectation that the abuses will immediately cease and those responsible will be held accountable. For its part, the UNHCR collects information, including accounts of torture and persecution, from refugees²³ to determine whether the individual can be granted

21. Frederik Harhoff, *Securing Criminal Evidence in Armed Conflicts Abroad*, 58 MIL. L. & L. WAR REV. 2, 3, 5 (2020).

22. *UNHCR Confidentiality Guidelines*, *supra* note 8, ¶ 11.

23. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *UNHCR RESETTLEMENT HANDBOOK 84* (July 2011); UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *PROCEDURAL STANDARDS FOR REFUGEE STATUS DETERMINATION UNDER UNHCR'S MANDATE 153* (2020).

refugee status.²⁴ This information may be collected by the UNHCR or by an “implementing partner” such as a local relief agency or nongovernmental organization. Moreover, the nature of the humanitarian crisis—whether it be a natural disaster, armed conflict, or infectious disease outbreak—will often influence how humanitarian organizations and other UN bodies interact with each other. For example, one of the authors, Sarah Craggs, who has served in multiple humanitarian settings from 2007 to 2020, notes that in-country representatives will regularly attend meetings held by a central coordinating entity, known as the Humanitarian Country Team, which is supported by the UN Office of the Coordination of Humanitarian Affairs.

Similarly, when the UN Office of the High Commissioner for Human Rights (OHCHR) is present in a country, it is common for agency staff to meet with humanitarian organizations to better understand the current human rights situation. For example, if OHCHR is investigating human trafficking cases during a crisis, it may share information with UNHCR, IOM, and others through a mechanism known as the Global Protection Cluster with the aim of coordinating victim protection services.²⁵ In addition, several humanitarian organizations have collaborated to develop an integrated, system-wide Gender-based Violence Information Management System²⁶ and a Child Protection Information Management System to store case-related data for management purposes.²⁷ As such, successive caseworkers within the protection cluster did not have to replicate the data collection and were able to avoid re-traumatization of survivors through excessive re-interviewing.²⁸

Despite such examples of effective coordination, risks remain. In 2015, UNHCR developed a set of principles and guidelines for the protection of personal data and the conditions to share data with governments and outside organizations.²⁹ Despite this policy, Human Rights Watch (HRW) criticized UNHCR in June 2021 for improperly collecting and sharing personal information collected from Rohingya refugees with the Bangladesh authorities. This same information was later shared with the Myanmar authorities to verify individuals for possible repatriation.³⁰ According to HRW, “the agency did not

24. UNHCR RESETTLEMENT HANDBOOK, *supra* note 23, at 84; PROCEDURAL STANDARDS FOR REFUGEE STATUS DETERMINATION UNDER UNHCR’S MANDATE, *supra* note 23, at 166.

25. UNHCR RESETTLEMENT HANDBOOK, *supra* note 23, at 27.

26. More information about the system can be found at the Gender-based Violence Information Management System website: <https://www.gbvim.com/>.

27. See *Child Protection Information Management System: 2018 Child Protection Case Management Information and Data Analysis*, RELIEFWEB (Feb. 2, 2020), <https://reliefweb.int/report/jordan/child-protection-information-management-system-2018-child-protection-case-management>.

28. *Id.*

29. See UNHCR, *Guidance on the Protection of Personal Data of Persons of Concern to UNHCR*, REFworld (23 Aug 2018), <https://www.refworld.org/docid/5b360f4d4.html>.

30. Human Rights Watch, *UN Shared Rohingya Data Without Informed Consent* (June 15, 2021), <https://www.hrw.org/news/2021/06/15/un-shared-rohingya-data-without-informed-consent>.

conduct a full data impact assessment, as its policies require, and in some cases failed to obtain refugees' informed consent to share their data with Myanmar, the country they had fled."³¹ UNHCR denied any wrongdoing or policy violations and maintained that refugees were asked to consent to their data being shared with the government of Myanmar by the government of Bangladesh to establish the right of return. However, twenty-three of twenty-four Rohingya refugees interviewed by HRW "said they were never informed the data would be used for anything beyond establishing aid access."³² This incident underscores the complexity of the operating environment for humanitarian organizations, as well as the challenges these groups face when obtaining informed consent from crisis-affected populations.

2. *International Justice Institutions*

Investigators—whether with a tribunal or a UN mechanism or commission of inquiry—seek a wide variety of testimonial, documentary, and, in some cases, physical evidence to build case files.³³ One of the challenges court investigators face is gathering and analyzing evidence years after a crime took place. In response to this challenge, many UN commissions and mechanisms store and preserve information in real-time, or shortly after an incident, to share with judicial institutions in the future.³⁴ As a result, UN commissions and mechanisms may not "know where the avenues of justice or accountability may lie . . . [but must nevertheless] be ready for those opportunities when they present themselves."³⁵

Within this time-sensitive context, there are several types of information investigators would like to obtain from humanitarian organizations. First, investigators are often unable to collect information due to access restrictions and timing. Several respondents stressed that their ability to build cases would be severely hampered without the assistance of third parties, such as humanitarian organizations. Brenda J. Hollis, a former ICTY prosecutor and currently the International Co-Prosecutor of the Extraordinary Chambers in the Courts of Cambodia, noted that one primary advantage humanitarian

31. *See id.*

32. See Kate Hodal, *UN put Rohingya "at risk" by sharing data without consent, says rights group*, THE GUARDIAN (June 15, 2021), <https://www.theguardian.com/global-development/2021/jun/15/un-put-rohingya-at-risk-by-sharing-data-without-consent-says-rights-group>. While HRW acknowledges that its sample size is small, it believes those collecting the data may have (1) failed to ask refugees if they wished that the Bangladesh government share the data with the Myanmar authorities; (2) it was stated in a way that the refugees misunderstood the question; or (3) refugees felt uncomfortable saying no to the question.

33. See Interview via Microsoft Teams with Mayuri Anupindi, Legal Officer, Sun Kim, Legal Officer, and Christopher Conrad Santora, Senior Legal Officer, Independent Investigative Mechanism for Myanmar (Sept. 9, 2020) (Santora) [hereinafter IIMM].

34. *Id.* (Santora).

35. *Id.* (Santora).

organizations have over criminal justice institutions is that they “are often on the ground during the conflict [or] immediately thereafter” and therefore have access to testimonial evidence “when people’s memories are fresher.”³⁶ Of particular interest, says Hollis, is the fact that an aid worker may have “traveled throughout [a] conflict area, and [seen] the same sorts of things being committed by the same groups. . . against the same types of people. That’s very relevant in terms of crimes against humanity, genocide, and war crimes.”³⁷ At the same time, investigators are often unable to access certain countries or regions because of travel restrictions. This was especially the case during the COVID-19 pandemic. For example, Independent Investigative Mechanism for Myanmar (IIMM) respondents stressed how helpful it would have been for humanitarian organizations based in Bangladesh to have shared information given the travel restriction imposed during the pandemic.³⁸

Second, prosecutors and investigators generally build cases by triangulating testimonial, documentary, and physical evidence. In doing so, they must be familiar with the alleged crimes or violations, the elements of the crimes, the alleged perpetrator, and under which theory of liability should they be charged.³⁹ In international criminal law cases, practitioners often pursue both “crime-base evidence” and “linkage evidence.”⁴⁰ The former encompasses information, including the “who, what, where, and when,” of alleged crimes upon which charges will be based.⁴¹ Linkage evidence is information that connects the alleged perpetrator with the crime.⁴² When focusing on an alleged perpetrator, court investigators are also required to gather both inculpatory and exculpatory evidence.⁴³ As Prosecutor Hollis explained, “you’re gathering evidence so you can make decisions. You don’t make your decisions and then gather the evidence that fits it.”⁴⁴

While evidence is typically based upon proving the elements of the crime, aggregate information that could illustrate larger trends and reflect a broader context, such as ethnic cleansing or forced sterilization, is still useful. Several respondents stressed that humanitarian organizations could be particularly helpful by providing investigators with information that addresses

36. Interview via Zoom with Brenda J. Hollis, Reserve Int’l Co-Prosecutor for the Extraordinary Chambers in the Courts of Cambodia (Sept. 16, 2020).

37. *Id.*

38. Interview with IIMM, *supra* note 33.

39. See ROBERT CRYER, DARRYL ROBINSON & SERGEY VASILIEV, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 361 (4th ed. 2019).

40. *Id.*

41. *Id.*

42. See OHCHR WHO’S RESPONSIBLE? ATTRIBUTING INDIVIDUAL RESPONSIBILITY FOR VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW IN UNITED NATIONS COMMISSIONS OF INQUIRY, FACT-FINDING MISSIONS AND OTHER INVESTIGATIONS (2018), <https://ohchr.org/Documents/Publications/AttributingIndividualResponsibility.pdf>.

43. Interview with IIMM, *supra* note 33; Interview with Brenda J. Hollis, *supra* note 36.

44. *Id.*

the chapeau or contextual elements of alleged crimes, such as genocide or crimes against humanity.⁴⁵ This information could include demographic information,⁴⁶ as well as data on the movement of people in aggregate that humanitarian organizations, such as IOM and UNHCR, collect regularly. Taken together, this information could serve as evidence that supports key elements of large-scale international crimes. For example, depersonalized data from IOM's Data Tracking Matrix on scalable migration trends of specific populations, combined with open-source investigations, could serve as documentary evidence of serious international crimes, such as forcible transfer or deportation, and be shared without putting survivors or IOM staff at risk.

Third, investigators often approach humanitarian organizations and human rights organizations to obtain contact information of survivors and possible witnesses to atrocity crimes.⁴⁷ This information is critical, especially for court investigators who may not be able to commence an investigation until years after the crime was committed.⁴⁸ According to Jarrod Noble, an investigator with the ICC's Office of the Prosecutor, if there is a blanket ban on disclosing contact information to international justice institutions, investigators "will never be able to find witnesses because [they are] reliant on these agencies to know [who] these people [are]."⁴⁹ Instead, if humanitarian organizations seek and obtain consent from individuals to share their contact information with international justice institutions, then investigators will be able to follow up with potential witnesses.⁵⁰ As Noble noted, "[I]nitially, [investigators] just want to be able to confirm that someone was in a certain location, within a certain country, at a certain time."⁵¹

Fourth, while valuable, investigators should be wary of relying solely on digital open-source information,⁵² which is defined as "[p]ublicly available information that anyone can lawfully obtain by request, purchase, or

45. See Interview with IIMM, *supra* note 33; Interview via Skype with Matevz Pezdirc, Head of Network Secretariat, Genocide Network (Sept. 21, 2020); see also Guénaél Mettraux, *Chapeau or Contextual Elements*, in INTERNATIONAL CRIMES: LAW AND PRACTICE: VOLUME II: CRIMES AGAINST HUMANITY 194 (2020).

46. Interview via Zoom with Hanny Megally, Commissioner, the Independent International Commission of Inquiry on the Syrian Arab Republic (Sept. 10, 2020); Interview with IIMM, *supra* note 33.

47. See Interview via Microsoft Teams with Cristina Ribeiro, Investigations Coordinator, Office of the Prosecutor, International Criminal Court and Jarrod Noble, Investigator, Office of the Prosecutor, International Criminal Court Interview (Feb. 9, 2021); Interview with IIMM, *supra* note 33 (Santora); Interview with Brenda J. Hollis, *supra* note 36; Interview with Hanny Megally, *supra* note 46.

48. Interview with Cristina Ribeiro and Jarrod Noble, *supra* note 47. Investigators expect that most individuals interacting frequently with the aid agency staff are more likely to be victims and crime-based witnesses, since many perpetrators try to keep a low profile and may not interact with aid agencies.

49. *Id.* (Noble).

50. *Id.* (Noble); Interview with Hanny Megally, *supra* note 46.

51. Interview with Cristina Ribeiro and Jarrod Noble, *supra* note 47 (Noble).

52. Interview with Hanny Megally *supra* note 46.

observation.⁵³ Indeed, none of our respondents viewed open-source information as a replacement for information that humanitarian organizations can provide. In addition, the need to authenticate and verify open-source information⁵⁴ is especially important as digital information can be misleading, manipulated, or falsified.⁵⁵ Enhanced coordination and cooperation between humanitarian organizations and international justice institutions has the potential to make the process of obtaining and verifying digital information more efficient and effective.

Finally, international justice institutions have their own strict requirements for evidence gathering, preservation, and analysis and cannot rely solely on the information provided by third parties, such as humanitarian organizations.⁵⁶ Many respondents viewed information sharing between humanitarian organizations and international justice institutions not as a panacea, but as a tool that can be used to make the process of building case files more efficient and less burdensome on victims and witnesses.

B. Key Considerations, Challenges, and Opportunities for Information Sharing

Humanitarian organizations and international justice institutions share the same goal of ameliorating the harm caused by serious international crimes. However, the purpose of information collection, and how the use of that information is perceived, may not always align. While humanitarian organizations collect information from beneficiaries to provide them with protection and material assistance, this approach may not address their desire for justice and accountability.

The mandates of humanitarian organizations are focused on the present and future assistance of beneficiaries. Conversely, international justice institutions are backward-looking with the aim of documenting past events and preparing evidence for trial. Several respondents suggested that this perceived mismatch of mandates, and the resulting data protection policies, often resulted in confusion and friction that inhibited the potential for coordination and cooperation. However, they also emphasized that, with the necessary safeguards, humanitarian organizations could meet the needs of their beneficiaries without impairing the pursuit of international justice. Based on our interviews, we have grouped these challenges and opportunities into four overarching categories: (1) the right to privacy and

53. United States National Security Agency, Intelligence Community Directive No. 301, at 8 (July 11, 2006), <https://fas.org/irp/dni/icd/icd-301.pdf>.

54. Interview with Brenda J. Hollis, *supra* note 36.

55. Interview with IIMM, *supra* note 33.

56. *Id.*; Interview with Cristina Ribeiro and Jarrod Noble, *supra* note 47.

justice; (2) mandate requirements; (3) policy requirements and gaps; and (4) organizational culture.

1. *The Right to Privacy and Justice*

Under international human rights law, all persons have a right to privacy.⁵⁷ In the context of international crimes, privacy is also closely related to protection. Private information should never reach third parties, including national prosecuting authorities, who would use it in violation of international human rights.⁵⁸ For example, UNHCR and IOM's data protection policies conform to a strict adherence to international rules surrounding the privacy and protection of individuals, especially migrants, displaced persons, and refugees.⁵⁹ The agencies preserve the protection and privacy of beneficiaries by adhering to the principle of *non-refoulement*, which "is also intended to prevent a refugee from being exposed to persecution through contact with the authorities of his or her country of origin and to prevent family members and/or associates who still remain in the country of origin being placed at risk."⁶⁰ Thus, UNHCR and IOM data policies instruct staff to guard information closely to prevent prosecuting authorities from accessing it. Given the joint nature of the work between the two agencies in the area of resettlement, there also exists bilateral data-sharing agreements to ensure the highest level of data protection.⁶¹

While acknowledging the risks, many respondents believed it was possible to maintain privacy and protection without impairing an individual's right to justice.⁶² Christopher Santora, from IIMM, framed pursuing accountability as an opportunity. In his experience, many victim-witnesses want their stories shared with prosecuting authorities, and "they should be given the

57. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., art. 17, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976); *see also* UNHCR Confidentiality Guidelines, *supra* note 8, ¶ 9 (applying the right to privacy to data processing in migration contexts).

58. Interview via Microsoft Teams with Christine Adam, Division Head, Institutional Law and Programme Support, Office of Legal Affairs, International Organization for Migration (Sept. 15, 2020) [hereinafter Interview with Christine Adam]; UNHCR Representation in Japan, UNHCR Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information 1 (Mar. 31., 2005), <https://www.refworld.org/docid/42b9190e4.html> [hereinafter, UNHCR Advisory Opinion on the Rules of Confidentiality].

59. *Guidance on the Protection of Personal Data*, *supra* note 29; International Organization for Migration, *IOM Data Protection Manual*, IOM PUBLICATIONS PLATFORM (Oct. 7, 2015), <https://publications.iom.int/books/iom-data-protection-manual>.

60. UNHCR Advisory Opinion on the Rules of Confidentiality, *supra* note 58, ¶ 6.

61. *Guidance on the Protection of Personal Data*, *supra* note 29, ¶ 4.2.2.

62. Interview with Cristina Ribeiro and Jarrod Noble, *supra* note 47; Interview with IIMM, *supra* note 33; Interview via Zoom with David Kaye, former UN Special Rapporteur for the Right to Freedom and Expression (Sept. 25, 2020) [hereinafter Interview with David Kaye]; Interview with Christine Adam, *supra* note 58.

opportunity to have that.”⁶³ Andreas Kleiser and Adnan Rizvic of the International Commission on Missing Persons (ICMP) noted that the vast majority of victim-witnesses with whom they work want justice. In many cases, it is the reason they agree to be interviewed in the first place. According to Kleiser and Rizvic, justice is the “next logical step” for many victims. “They want to find their loved one’s body. Once the body is found, they want the perpetrator identified. They want justice.”⁶⁴

Many respondents with international justice institutions expressed a desire for humanitarian organizations to work with them to find a way to balance the right to privacy and the right to justice. Jarrod Noble of the ICC elaborated on the consequences of absolute privacy: if a victim or witness is “hidden under a cloud of privacy restrictions, that means no one can find [them]. And therefore [they] never get . . . a day in court.”⁶⁵ Matevz Pezdirc, head of the Genocide Network Secretariat, also noted that “humanitarian agencies need to ask themselves ‘whether perpetrators should go unpunished’ or be held accountable [for] their crimes?”⁶⁶ This tension raises the question as to whether or not humanitarian organizations have an obligation to ask beneficiaries if they wish to have their contact information shared with international justice institutions.

Focusing on informed consent procedures and policies would seemingly be a solution to this tension between the rights to privacy and justice. But consent can be a highly nuanced process for all concerned. It can also be context-specific. Christine Adam, the Division Head of the Institutional Law and Programme Support in the Office of Legal Affairs at IOM, explained that there are situations where a “migrant might not want to give consent, cannot give consent, or cannot be reached to give consent.”⁶⁷ For example, individuals may feel unsafe (i.e., if in a detention facility or camp setting) or that assistance is conditional to their consent.⁶⁸ Moreover, NGOs may provide sensitive and confidential information to international justice institutions without obtaining the consent of the individual who provided it. This may cause a problem later, since the prosecution may be obliged to disclose the substance of the information—and possibly the identity of the source—to defense counsel or judges without the consent of the primary source, especially if the information is exculpatory.⁶⁹

63. Interview with IIMM, *supra* note 33 (Santora).

64. Interview via Microsoft Teams with Andreas Kleiser, Director for Policy and Cooperation, and Adnan Rizvic, Director of Data Systems and Coordination, International Commission for Missing Persons (Feb. 8, 2021) [hereinafter Interview with ICMP].

65. Interview with Cristina Ribeiro and Jarrod Noble, *supra* note 47 (Noble).

66. Interview with Matevz Pezdirc, *supra* note 45.

67. Interview with Christine Adam, *supra* note 58.

68. See Human Rights Watch, *supra* note 30.

69. Interview with Brenda J. Hollis, *supra* note 36; see, e.g., INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, ICTY MANUAL ON DEVELOPED PRACTICES ¶¶ 46, 53 (2009), https://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf [hereinafter ICTY MANUAL ON DEVELOPED PRACTICES]. Under the ICTY Rules of Procedure and

Even if informed consent is obtained, the scope of an individual's consent is often difficult to define and may change over time.⁷⁰ As Christopher Santora of the IIMM noted, every interviewee needs to “understand what you mean by ‘consent to use and share’” with a third party.⁷¹ UNHCR and IOM policies require agency personnel to provide beneficiaries with information that covers all data processing activities, especially if data may be shared with a third party.⁷² Kleiser also felt that blanket or general requests for consent to share with a third party are not ideal because ambiguity can damage the trust of those being interviewed, especially if they “are suspicious of vague questions. They trust you when you're precise and when you can be held accountable for what you do with their data.”⁷³ In order to avoid this situation, ICMP provides family members of the missing with a range of choices available to them on how they may want their DNA data used. In addition, respondents from both humanitarian organizations and criminal justice institutions emphasized that informed consent is not eternal, and that it should be renewed with the passage of time.⁷⁴ A witness may provide consent one day, but ten years later, when the case is finally prosecuted, their personal situation may have changed. They may no longer wish to participate, and this change in circumstances must be respected.⁷⁵

In addition to re-traumatization, repeat interviewing can also lead to witness fatigue and memory distortion.⁷⁶ It is important that organizations ask themselves whether it is absolutely necessary to approach a victim for an interview before actually doing so.⁷⁷ This step requires organizations to consider whether there is another place to get the information and whether the organization's work is adding value to and improving the victim's life. OHCHR official Francesca Marotta shared that their investigators take steps during interview preparation to find out whether a victim has been interviewed before and, if so, whether the information to be obtained is critical and/or could have a negative impact on the victim. If so, investigators will make an effort to rely on existing records and avoid subjecting the victim

Evidence, consent must be given on a witness-by-witness or document-by-document basis for information to be given to the defense, a judge, or used as evidence. The ICTY allowed organizations to give information as lead information that could be restricted in its use and redacted. Names were treated as confidential and protective measures were a precondition to providing the information.

70. Interview via Zoom with Francesca Marotta, Chief, Methodology, Education, and Training Section, OHCHR (Nov. 10, 2020).
71. Interview with IIMM, *supra* note 33 (Santora).
72. *Guidance on the Protection of Personal Data of Persons of Concern to UNHCR*, *supra* note 29, ¶ 3.2.6.
73. Interview with ICMP, *supra* note 64 (Kleiser).
74. *Id.*; Interview with Cristina Ribeiro and Jarrod Noble, *supra* note 47 (Ribeiro).
75. Interview with IIMM, *supra* note 33 (Santora).
76. See RICHARD J. McNALLY, REMEMBERING TRAUMA 51–52 (2003).
77. See Draft Code of Conduct for Documenting Conflict-Related Sexual Violence (The Murad Code) (June 2020), ¶ 5.6.

to possible re-traumatization.⁷⁸ However, avoiding repeat interviews can be challenging if organizations with different mandates are collecting very distinctive types of information. As Kleiser noted, “to some extent, [repeat interviewing] cannot be avoided.”⁷⁹ This dilemma underscores why inter-agency cooperation and sharing of information are so important.

Another potential solution to avoiding repeat interviews could be to broaden consent requests. Thomas Lynch, Senior Adviser to the Prosecutor at the International Criminal Court and former Director of the Office of Evidence Management at the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL (UNITAD), noted that getting specific consent for future criminal investigations could be as straightforward as adding language stating that information could be used for “UN accountability purposes.”⁸⁰ In his experience, most individuals want the information they provided to be used for such purposes. He also noted that obtaining consent at the outset allows investigators to access information in the future. UNITAD has also considered a policy that would require its staff to return to the individual to ask for consent to pass the information along to a criminal justice institution.⁸¹ UNHCR, much like IOM, also has a policy that beneficiaries fully appreciate and understand the “circumstances, risks, and benefits” of sharing their data.⁸²

An alternative to broader requests for consent could be to narrow and further specify the consent procedures followed at the time information is first collected. Individuals could be asked for their consent to share limited contact and demographic information with specific entities, such as the ICC and UN commissions of inquiry and mechanisms.⁸³ Humanitarian organizations would only need to share minimal information with criminal justice institutions while still facilitating contact between investigators and survivors and witnesses of mass violence. Jarrod Noble at the ICC underscored that they do not need every detail on an individual from other agencies or immigration organizations. Being given depersonalized information such as where that person was located, at what time, and what their employment was, would be immensely helpful, especially if it could be paired with an individual’s contact information so the ICC could follow up. As such, the

78. Interview with Francesca Marotta, *supra* note 70.

79. Interview with ICMP, *supra* note 64 (Kleiser).

80. Interview with Thomas Lynch, Senior Adviser to the Prosecutor at the International Criminal Court and former Director of the Office of Evidence Management at the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL (Nov. 12, 2020) [hereinafter Interview with Thomas Lynch].

81. *Id.*

82. *Guidance on the Protection of Personal Data of Persons of Concern to UNHCR*, *supra* note 29, ¶ 3.2.6.

83. See Interview with Cristina Ribeiro and Jarrod Noble, *supra* note 47 (stating that consent would have to be renewed over time) (Ribeiro).

ICC could “locate [individuals], meet them, and be able to possibly take a version [of events] from them, and that allows them to seek justice.”⁸⁴

Similar to ICMP’s practice of offering individuals specific choices on how they would want their data used in the future, humanitarian organizations could inquire if individuals wish to share information, including contact data, and, if so, with whom and under what circumstances.⁸⁵ This approach would also give individuals more control over what information is shared and still make it possible for investigators to locate them in the future.⁸⁶ Another option would be that humanitarian organizations offer a leaflet to beneficiaries that contains contact information for relevant international justice institutions.⁸⁷ This approach would empower those who want to share their experiences with written guidance on how to do so. It also mirrors ICMP’s policy of providing families of the missing with an “information sheet that they can keep so they know where to contact [ICMP] if they want to exercise their data-subject rights of correction, amendment, and withdrawal of data.”⁸⁸

2. Mandate Requirements

The ICRC, IOM, and UNHCR have clear, constitutionally derived mandates to support and safeguard their operations and beneficiaries. However, the question remains as to whether a pragmatic approach to information sharing with international justice institutions is already in place, or could be enacted, so as not to compromise each agency’s mandate and mission. This question came to the fore in 1999 when the ICTY ruled in *Prosecutor v. Simić et al.* that ICRC had special international immunity from being compelled to provide evidence or witnesses, which was justified based on its mandate.⁸⁹ The ruling

84. *Id.* (Noble).

85. Interview with ICMP, *supra* note 64.

86. Interview with Brenda J. Hollis, *supra* note 36. The ICTY guidelines provide similar guidance:

[I]nstitutions and agencies should be encouraged to record the details of potential witnesses, including and especially their future contact information, but should be encouraged not 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. It is good practice to issue guidelines to outside agencies regarding proper practices.

ICTY MANUAL ON DEVELOPED PRACTICES, *supra* note 69, ¶ 23.

87. Interview via Zoom with Amady Ba, Head of International Cooperation, Rod Rastan, Legal Adviser, and Pascal Turlan, Judicial Cooperation Adviser, Cooperation Division, Office of the Prosecutor of the International Criminal Court (Feb. 1, 2021) [hereinafter Zoom Interview with Amady Ba, Rod Rastan, and Pascal Turlan].

88. Interview with ICMP, *supra* note 64.

89. See *Prosecutor v. Simić et al.*, Case No. IT-95-9, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, (Int’l Crim. Trib. For the Former Yugoslavia July 27, 1999) (codification of *Simić* into the ICC Rules of Evidence); Interview via Zoom with Gabor Rona, Former Legal Adviser and Head of Policy for the International Committee of the Red Cross (16 Sept. 2020) [hereinafter Interview with Gabor Rona].

in the *Simić* case was later codified in the ICC Rules of Evidence. The ICRC argued, and the court agreed, that the organization's need to remain neutral in order to provide medical services and aid to individuals, particularly in armed conflicts, warranted absolute immunity from involvement in international criminal proceedings.⁹⁰ Similarly, UN organizations and their staff enjoy functional immunity from being summoned to court due to provisions in founding documents and international agreements.⁹¹ As IOM's Christine Adam noted, "IOM enjoys privileges and immunities as part of the UN and this includes functional immunity from national jurisdiction."⁹² Thus, UN staff who are requested and wish to give evidence require waivers of immunity. In order to share information in a formal way, headquarters must approve such a waiver, which they will only do if the request does not endanger their mandate and mission.

Many humanitarian organizations can only provide humanitarian assistance and services with the permission of a state—and should an agency run afoul of state authorities, they run the risk of being expelled or barred from entry.⁹³ Hernán Reyes, a former ICRC physician, and staff member, provided an example of the risks sharing information could pose. In Uruguay during the 1980s, someone at the ICRC made public an internal report, which was against ICRC confidentiality rules. In response, the Uruguayan authorities prohibited ICRC staff, including medical doctors, from working in the country for four years.⁹⁴

IOM, UNHCR, and the ICRC will not share information if doing so endangers staff or access to beneficiaries. For example, when asked to provide information to a criminal justice institution, IOM will take into consideration several factors, including—but not limited to—the protection of beneficiaries and staff, upholding the agency's mandate, and safeguarding operations and legal status.⁹⁵ To even be suspected of sharing information with international

90. *Id.*

91. See THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS 8–11 (August Reinisch ed., 2013) (discussing the complexity of functional immunity considering recent court decisions).

92. See *id.*; Interview with Christine Adam, *supra* note 58.

93. See *Guidance on the Protection of Personal Data*, *supra* note 29, § 9.2.5 (emphasis omitted)

UNHCR needs to ensure that transferring personal data does not negatively impact (i) the safety and security of UNHCR personnel and/or personnel of Implementing Partners; and/or (ii) the effective functioning of an UNHCR operation or compromise UNHCR's mandate, for example due to the loss of the climate of trust and confidence between UNHCR and persons of concern or the loss of the perception of UNHCR as an independent, humanitarian and non-political organization.

One respondent stated that their organization had been continuously pressured by a host government to divulge information or risk being imprisoned for obstruction of justice.

94. Interview via Zoom with Hernán Reyes, former physician with the International Committee of the Red Cross (Sept. 18, 2020) [hereinafter Interview with Hernán Reyes].

95. Interview with Christine Adam, *supra* note 58.

justice institutions, such as the ICC, could endanger an agency's staff and beneficiaries because human rights violating countries, or their allies, may feel threatened. To this end, the UN published a 2016 broad guidance directing its agencies to take care "to avoid any visible connection between UN presences in the field and the [International Criminal] Court."⁹⁶

Despite this guidance, humanitarian agencies still maintain some flexibility in their operations. For example, the ICRC receives its mandate from the Geneva Conventions and is therefore guaranteed some degree of protection from states under international humanitarian law.⁹⁷ Similarly, UNHCR, as the guardian of the 1951 Refugee Convention, can empower agency staff to defy, to some degree, the demands of the states in which they operate. In addition, governments cooperating with the OHCHR know that public advocacy is part of their mandate, and therefore, the organization may have a more contentious—or, conversely, a more open—relationship with the host government than UNHCR or IOM.

"Confidentiality," as former ICRC policy adviser Pascal Daudin explained, "is a tool to get the confidence of the parties in order to get a license to operate" in a given country or region.⁹⁸ While the ICRC will reveal information if it "feels maintaining confidentiality [is] no longer in the interest of detainees and going public [is] in the interest of detainees," in former ICRC advisor Gabor Rona's recollection, the organization has never gone public with confidential information.⁹⁹ However, as the guardian of the Geneva Conventions, ICRC does have a vested interest in seeing that justice is pursued. As Gabor Rona noted:

when the ICRC does its fact-finding, it does so not just to put it in a vault, but to provide the information to the parties to the armed conflict [as well as] detaining authorities in situations of detention and to political leaders responsible for the prosecutions of armed conflict, and to leadership in non-state armed groups. And

96. U.N. BEST PRACTICES MANUAL FOR UNITED NATIONS—INTERNATIONAL CRIMINAL COURT COOPERATION 7–8 (2016), https://legal.un.org/ola/media/UN-ICC_Cooperation/Best%20Practice%20Guidance%20for%20UN-ICC%20cooperation%20-public.docx.pdf [hereinafter U.N.-ICC BEST PRACTICES].

97. See ICRC: ITS MISSION AND WORK, *supra* note 5, at 6–7. International humanitarian law expressly coffers certain right on the ICRC, such as that of visiting prisoners of war or civilian internees and providing them with relief supplies, and that of operating the Central Tracking Agency (see Geneva Convention Relative to the Treatment of Prisoners of War arts. 73, 123, 126, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 76, 109, 137, 140, 143, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287). In addition, international humanitarian law recognizes the ICRC's right of initiative in the event of armed conflict, whether international or non-international (see art. 3, common to the four Geneva Conventions.)

98. Interview via Zoom with Pascal Daudin, former Senior Policy Advisor with the International Committee of the Red Cross (Sept. 2, 2020) [hereinafter Interview with Pascal Daudin].

99. Interview with Gabor Rona, *supra* note 89.

the purpose of that information is so that they will then ameliorate the conditions that the ICRC found to be in violation of [international humanitarian law].¹⁰⁰

Despite the desire to see justice obtained, it is unlikely that the ICRC would waive its immunity under the ICC Rules of Evidence, as it is wary of the possibility that even a partial waiver could create a precedent that would undermine that immunity or otherwise jeopardize ICRC's reputation for confidentiality. As Gabor Rona, former Legal Advisor in the Legal Division of the ICRC, explained, "if we cooperate in this case today, no matter how good the explanation is . . . for creating the exception for our confidentiality policy, it will adversely affect our ability to maintain access and have the influence we want to have tomorrow in a different context."¹⁰¹

Even sharing information with UN mechanisms that keep sources confidential, such as the IIMM or the IIIM, might not overcome the perceived risks. Rona noted that sharing information with these institutions would cause organizations to walk "a fine line," creating a risk that confidentiality would legally have been waived, even if that was not the intended result.¹⁰² Sharing information and waiving confidentiality can place organizations in a difficult position that may outweigh any potential benefits of sharing information. From ICRC's perspective, its mandate requires strict confidentiality that overrides any desire that the organization might have to seek accountability. This concern is not limited to the ICRC. If agencies are perceived to be providing information to international justice institutions, they risk setting the precedent that they will always be willing to share.¹⁰³

Nevertheless, several respondents suggested that strict adherence to rigid information sharing protocols by humanitarian organizations could be a real impediment to effective prosecutions and favored a more balanced approach. Former ICRC adviser Pascal Daudin mentioned that strict adherence to broad restrictions on information sharing could make humanitarian agencies prisoners of their own operational standards and put their immediate concerns above "people's larger needs, including the possible pursuit of justice."¹⁰⁴ Independent International Commission of Inquiry on the Syrian Arab Republic (Syria COI) Commissioner Hanny Megally noted that humanitarian organizations

tend to hide behind the fear that, if they seem to be cooperating with a human rights investigation, that jeopardizes their work. . . . But it may actually be more helpful for advocacy, or for pressure on the authorities, at that [earlier point in time].¹⁰⁵

100. *Id.*

101. *Id.*

102. Interview with Gabor Rona, *supra* note 89.

103. Interview with Christine Adam, *supra* note 58.

104. Interview with Pascal Daudin, *supra* note 98.

105. Interview with Hanny Megally, *supra* note 46.

In effect, humanitarian organizations might—for manifold reasons—be interpreting what is allowed under their mandates too narrowly when there may be opportunities for sharing information with international justice institutions. In this regard, the UN has stated that UNHCR should “naturally be the [ICC’s] interlocutor of *first resort*” because of its proximity to important information.¹⁰⁶

Given these tensions, one approach could be for humanitarian organizations to use a balancing test like that set out in an ICTY decision that addressed the privilege of war correspondents after journalist Jonathan Randal refused to testify.¹⁰⁷ In the court’s ruling, Judge David Hunt underscored that information or evidence from journalists should only be sought if it addresses a core issue in a case and if it cannot be reasonably found elsewhere.¹⁰⁸ After all, he argued, “law is society’s balance between a lot of very important rights,” and absolute privileges are not the ideal.¹⁰⁹ A similar balancing test for international humanitarian organizations would allow for the recognition of beneficiaries’ privacy rights, the need for accountability, and a respect for organizational mandates.

Pooling data in a similar manner to the protection clusters mentioned earlier could also serve as a model for anonymizing information sharing between humanitarian organizations and international justice institutions. According to Ben Hayes, a scholar who has conducted data protection impact statements for the ICRC, UNHCR, and other organizations, pooling data between agencies can “lower data protection risks by significantly reducing the amount of data that is collected and stored,” and decrease the possibility that it can be traced back to a single aid agency.¹¹⁰ For example, ICMP runs an Information Data Management System (IDMS), which serves as a centralized depository of information about missing persons.¹¹¹ The system

106. U.N.-ICC BEST PRACTICES, *supra* note 96, at 7–8.

107. See, e.g., Emily Ann Berman, *In Pursuit of Accountability: The Red Cross, War Correspondents, and Evidentiary Privileges in International Criminal Tribunals*, 80 N.Y.U. L. REV. 241 (2005) (arguing “that Red Cross delegates and war correspondents are more similarly situated than it initially might seem” and using a “comparison of the two as a case study to illustrate that conferring absolute privilege on the Red Cross is unnecessary in the pursuit of humanitarian accountability.”)

108. Prosecutor v. Brdjanin, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, ¶¶ 48-55, 114-23 (Int’l Crim. Trib. Yugoslavia, Appeals Chamber, Dec. 11, 2002), [hereinafter Brdjanin, Interlocutory Appeal].

109. *Id.* ¶¶ 58–61, 114–23.

110. Ben Hayes, *Migration and Data Protection: Doing No Harm in an Age of Mass Displacement, Mass Surveillance, and “Big Data,”* 99 INT’L REV. RED CROSS 179, 200–01 (2017), [cambridge.org/core/journals/international-review-of-the-red-cross/article/migration-and-data-protection-doing-no-harm-in-an-age-of-mass-displacement-mass-surveillance-and-big-data/316305BCAE2D9EF828246E2B97C108E7](https://www.cambridge.org/core/journals/international-review-of-the-red-cross/article/migration-and-data-protection-doing-no-harm-in-an-age-of-mass-displacement-mass-surveillance-and-big-data/316305BCAE2D9EF828246E2B97C108E7).

111. International Commission on Missing Persons, *Databases and Data Processing Systems*, ICMP, <https://www.icmp.int/what-we-do/technical-assistance/databases-and-data-processing-systems-include-elimination-databases/>.

provides a means for ICMP staff to enter anonymized genetic information from relatives into a database to track and identify missing persons.¹¹² It also allows family members to enter information into the database to either register them as missing or to see if they have been found.¹¹³ Individual users can also use the system to report mass graves.¹¹⁴ ICMP respondent Adnan Rizvic described how the system could be used to track crime scene DNA and locate mass graves.¹¹⁵ IDMS, he said, has worked very well “not . . . only as a software solution [but] rather like a glue that connects all the pieces of the puzzle in . . . one nice picture.”¹¹⁶ This data consolidation and information-sharing model benefits not only ICMP staff but also relatives of the missing, judicial and UN investigators, and law enforcement. Similarly, IOM has been working with Microsoft Research to develop a new, cutting-edge synthetic dataset on human trafficking. The dataset represents the largest collection of primary human trafficking case data ever made available to the public, while enabling strong privacy guarantees that preserve the anonymity and safety of trafficking survivors.¹¹⁷ Information of this sort could be of value to international criminal justice efforts and serve as an innovate model—a “middle ground”—for secure information sharing between humanitarian organizations and international justice institutions.

3. Policy Requirements and Caps

Humanitarian organizations need to set clear rules and guidelines for information sharing. For example, IOM has a clear rule that it will not share individual data, but it does share publicly available aggregated data on internal displacement and population mobility on its websites and through the humanitarian data exchange platform.¹¹⁸ This aggregate data may reveal the number of people (gender, border crossing, citizenship, etc.) who crossed a national border within a specific time period.¹¹⁹ Similarly, data from the shared Gender-based Violence Information Management System and the Child Protection Information Management System used by humanitarian agencies

112. *Id.*

113. *Id.*

114. *Id.*

115. Interview with ICMP, *supra* note 64 (Rizvic & Kleiser); see Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-T, Decision on the Accused’s Motion for Binding Order to International Commission for Missing Persons 1 (Int’l Crim. Trib. for the Former Yugoslavia, Mar. 4, 2013).

116. Interview with ICMP, *supra* note 64 (Rizvic).

117. See Harry Cook, *IOM-Microsoft Collaboration Enables Release of Largest Public Dataset to Bolster Fight Against Human Trafficking*, IOM (Sept. 23, 2021), <https://www.iom.int/news/iom-microsoft-collaboration-enables-release-largest-public-dataset-bolster-fight-against-human-trafficking>.

118. See *Displacement Tracking Matrix*, *supra* note 13.

119. CLAUS FOLDEN, MARINA MANKE & THOMAS MORTENSEN, SHARING DATA: WHERE TO START 26 (2007).

can be anonymized for external reporting purposes.¹²⁰ For its part, UNHCR has strict policies, insisting on “privacy by design and by default.”¹²¹ In each field office, the agency has “Data Protection Advisors” to ensure that there are “no loopholes” and that no information “fall[s] through the cracks.”¹²² UNHCR also has very specific policies for disclosure, especially for sharing individual case information and for sharing with tribunals.¹²³ Additionally, the OHCHR Monitoring Manual outlines mission-specific monitoring guidelines and requires all staff to be trained in these practices.¹²⁴

However, some respondents felt that such strict principles and procedures could potentially harm beneficiaries in some cases. For example, an anonymous respondent working for an international humanitarian organization recounted a time when the organization refused to release the medical records of an individual seeking a pension and medical treatment for sequelae of torture, which were necessary for the individual’s application, as the organization’s medical file was the only way he could prove that he had been tortured. On another occasion, the same organization refused to release information that would exonerate an individual in court proceedings. The organization had evidence that a certain individual could not have been present at the time he was being accused of having perpetrated an act of torture, but the organization refused to share this information with the court, denying it access to the interview notes even though it could have helped the accused’s case.¹²⁵

Several respondents noted that, despite strict information protection policies, ad hoc sharing by staff still occurs and may be an outgrowth of the desire to achieve justice and accountability for past crimes. One respondent reported confidentially sharing statistical information with “different investigators of different courts when they needed it to corroborate certain ongoing investigations that they were undertaking.”¹²⁶ Igor Cvetkovski, an expert on transitional justice and land and property restitution, explained that strict data policies do not prevent agency personnel from reporting crimes or other violations of human rights to OHCHR or other fact-finding

120. Interview with Anonymous One, *supra* note 14.

121. *Guidance on the Protection of Personal Data*, *supra* note 29, ¶ 6.4.

122. Interview via Zoom with Volker Turk, UN Assistant Secretary General for Strategic Coordination and former Assistant High Commissioner for Protection at UNHCR (Oct. 28, 2020) [hereinafter Zoom Interview with Volker Turk].

123. See *Guidance on the Protection of Personal Data*, *supra* note 29, § 9.2.2; *Guidelines on the Sharing of Information on Individual Cases*, *supra* note 8, ¶¶ 14–23 (individual case information), ¶¶ 53–54 (for sharing with tribunals); UNHCR, POLICY ON THE PROTECTION OF PERSONAL DATA OF PERSONS, *supra* note 7, at 39 (for tribunals); see generally Astri Suhrke et al., *The Kosovo Refugee Crisis*, UNHCR EVALUATION AND POLICY ANALYSIS UNIT (2000) (an example of tribunal data sharing).

124. UNITED NATIONS, TRAINING MANUAL ON HUMAN RIGHTS MONITORING (2001).

125. Interview with Anonymous Two (Sept. 2020).

126. Interview with Anonymous Three (Oct. 2020).

bodies.¹²⁷ For example, another respondent noted that certain UN agencies had an informal arrangement with the ICTY that allowed their investigators access to certain archives “to start the investigative process” so long as the investigators did not reveal the person or organization that provided the information.¹²⁸

ICC investigator Jarrod Noble noted that “on the ground there is—and always will be—a lot more cooperation. But [for] some of these entities, it’s the headquarters. It’s the procedures. That’s what slices [it] up. . . . Obviously, we have to follow certain protocols when we interact with relevant agencies. So that’s sometimes the sticking point.”¹²⁹ According to Megally, informal meetings provide opportunities for humanitarian organizations to confirm certain information without sharing it per se. For example, Megally shared an anecdote of when he was able to ask an ICRC staff member to confirm the information on conditions of detainee confinement. The person confirmed what Megally and his team had already suspected. Thus, there is a way for the ICRC to confirm information without directly divulging it. Communicating in this informal way helped establish a fact necessary for an investigation without jeopardizing beneficiaries.¹³⁰

Despite the efficiency and flexibility of ad hoc sharing, a lack of clear policies can cause problems for investigators. Brenda Hollis, for example, described an incident where a critical document disappeared:

There was one piece of evidence that we would have loved to have had in the *Taylor* case [at the Special Court for Sierra Leone], and it was a letter that was incriminating [for the accused]. We had a copy of it, but the person who had [the original] had been in the UN at the time and . . . just basically took it as a souvenir of their time, and we could never get it from them. And that person would have also been there to talk about the circumstances for the letter. It wasn’t critical to our case, but it would have been very helpful showing knowledge, intent, that sort of thing.¹³¹

Hollis noted that she had encountered similar situations in her decades-long career as a prosecutor: “It happens because there are no SOPs [Standard Operating Procedures]. And people aren’t [always] bound by . . . SOPs . . . when they go out into the field.”¹³²

Christine Adam emphasized the importance of balancing the risks of sharing information in a manner that avoids undermining an organization’s

127. Interview via Zoom with Igor Cvetkovski, former Head of Land Property and Reparation Department, IOM (16 Sept. 2020).

128. Microsoft Teams Interview with Anonymous Four (Oct. 2020).

129. Zoom Interview with Cristina Ribeiro and Jarrod Noble, *supra* note 47 (Noble).

130. Zoom Interview with Hanny Megally, *supra* note 46.

131. Zoom Interview with Brenda J. Hollis, *supra* note 36.

132. *Id.*

mandate.¹³³ This balance could take different forms depending on the circumstances. Humanitarian organizations, for example, are well positioned to brief investigative teams on security conditions in conflict zones. As former UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression David Kaye noted, “a lot of these organizations have [a] really detailed understanding of security situations in different parts of the world. If they know that . . . an investigative group from the ICC, for example, is interested in that space, there should be a process for them to proactively share information.”¹³⁴ This process would not restrict organizations from dictating the conditions by which they would share information.

Memorandums of Understanding (MOUs) can also offer balance by setting out conditions that respect each entity’s mandate and mission while still allowing for a certain degree of prearranged flexibility.¹³⁵ For example, a humanitarian organization could implement an internal policy or MOU whereby the organization provides a court with answers to written questions instead of sending a staff member to testify in person.¹³⁶ However, Francesca Marotta noted that, in OCHCR’s experience, formal agreements on information sharing, such as MOUs, may introduce a level of rigidity that makes information gathering ironclad and more time consuming, especially when the investigation is time-sensitive.¹³⁷ Still, MOUs have their merits. If properly thought out, they can help all parties plan how, and what, information will be shared. Unlike broad organizational policies, MOUs can be flexible tools tailored to fit a specific partnership, at a specific point in time, while still providing some legal protection. However, MOUs need to be updated and tailored as conditions change and evolve to be effective.

4. Organizational Culture

Organizational culture and inter-agency politics can often present significant barriers to effective cooperation—between and within—humanitarian organizations and criminal justice institutions. Within the context of the UN, for example, several respondents noted a culture of secrecy and bureaucracy. As Megally noted, “the [UN] system doesn’t, in any automatic way, create the environment for [these] conversations.”¹³⁸ Former UN Special Rapporteur David Kaye echoed this assessment: “the reporting structure within

133. Microsoft Teams Interview with Christine Adam, *supra* note 58.

134. Zoom Interview with David Kaye, *supra* note 62.

135. Rob Grace & Claude Bruderlein et al., *Developing Norms of Professional Practice in the Domain of Monitoring, Reporting, and Fact-Finding*, in *THE TRANSFORMATION OF HUMAN RIGHTS FACT-FINDING* 525, 525 (Philip Alston & Sarah Knuckey, 2016).

136. Microsoft Teams Interview with Christine Adam, *supra* note 58.

137. Zoom Interview with Francesca Marotta, *supra* note 70.

138. Zoom Interview with Hanny Megally, *supra* note 46.

the [UN] contribute[s] to a reluctance to share information.”¹³⁹ Some of the difficulty may come from the fact that many documents are stored in archives that are difficult to access. “To access information,” former Director of the Office of Evidence Management at UNITAD, Thomas Lynch, noted, “a current staffer may have to go and find the archived information. This may require locating the archives, contacting former staff members who were part of the information collection process, and then also ensuring that the organization remains comfortable with what may have been produced years earlier.”¹⁴⁰ Furthermore, UN agencies have limited resources, and may view archival research as a costly distraction.¹⁴¹ But Lynch also suggested that a claim of lack of resources can often be a convenient cover for any evidence preservation and information sharing modality that clearly needs repair.¹⁴²

Humanitarian organizations may also become territorial over their own information because of the intense competition for funding their operations. Igor Cvetkovski noted that “we have created an unnecessary hurdle and problems because . . . the organization depends on funding to be able to [function]. So, they will adopt their behavior in accordance with the donors.”¹⁴³ Some organizations perceive information sharing as a threat to their financial security, which suggests that donors also have a role in improving cooperation between international humanitarian aid organizations and justice institutions.

Several respondents suggested that if UN agencies functioned more cooperatively, it would create greater opportunities for information sharing. Francesca Marotta noted that OHCHR has improved inter-agency interactions through training seminars, including an annual course on human rights and humanitarian work that includes a discussion of information sharing. According to Marotta, these courses have improved the general understanding of how agencies work, what their mandates are, and what they can and cannot do: “The more you know about your interlocutors and counterparts and understand the differences, the better you can work together.”¹⁴⁴

While the process of information sharing between humanitarian organizations and international justice institutions is complex and often gives rise to legal and ethical dilemmas, many respondents were optimistic that a better and more secure means of cooperating could be achieved with proper consultation and due diligence. In the concluding section, we turn to some recommendations on how to achieve this goal.

139. Zoom Interview with David Kaye, *supra* note 62.

140. Zoom Interview with Thomas Lynch, *supra* note 80.

141. Interview via Zoom with Bill Wiley, Founder and Executive Director of the Commission for International Justice and Accountability (Jan. 27, 2021); Interview with Amady Ba, Rod Rastan, & Pascal Turlan, *supra* note 87.

142. Interview with Thomas Lynch, *supra* note 80.

143. Interview with Igor Cvetkovski, *supra* note 127.

144. Interview with Francesca Marotta, *supra* note 70.

IV. CONCLUSION

Since the thawing of the Cold War in the 1990s, there has been a surge in the growth of international and national justice institutions. At the same time, humanitarian organizations have struggled to respond to ever-escalating, conflict-related crises and forced displacement of tens of millions of people worldwide.¹⁴⁵ Many—if not most—of those displaced have lost family members, homes, and livelihoods and may wish to obtain justice and retribution for their losses. The need to aid survivors of human rights abuses and seek justice has led to increased consideration of how humanitarian organizations and justice institutions can work together to protect the privacy of refugees, displaced persons, and migrants while, at the same time, sharing information of potential violations of international criminal and humanitarian law for future prosecutions.

The vast majority of our respondents believe a middle ground exists, and that it should be based on building improved coordination, cooperation, and collaboration.¹⁴⁶ Our respondents recognized that the rights of privacy and justice are not necessarily mutually exclusive, but they also emphasized that personal information sharing must follow a strict “Do No Harm” model and be collected and shared in a transparent manner that adheres to strict ethical and legal norms of informed consent.¹⁴⁷ The challenge is finding a balance that prioritizes the protection of humanitarian beneficiaries with the right to pursue justice and accountability. To this end, we have singled out four overarching issues that need to be addressed.

First, international justice institutions and humanitarian organizations should come together in face-to-face meetings and workshops to develop strategies to improve information sharing while protecting the personal data of beneficiaries. Establishing an open and trusted rapport, discussing differences, discovering mutual connection points, and building strong bi- and multilateral relationships between entities will help encourage greater coordination and collaboration. Humanitarian organizations and international justice institutions should continue to explore how depersonalized documentary evidence can be shared in a safe manner. This could include, for example, presentations by international humanitarian organizations on forms of depersonalized data that could assist investigations of serious international crimes.

Second, international justice institutions and humanitarian organizations should undertake an assessment, followed by a series of pilot initiatives, to

145. DEVELOPMENT INITIATIVES, GLOBAL HUMANITARIAN ASSISTANCE PAPER 2020, at ch. 1, (2020), <https://devinit.org/resources/global-humanitarian-assistance-report-2020/people-and-crisis/>.

146. Interview with Brenda J. Hollis, *supra* note 36.

147. See Hayes, *supra* note 110, at 196. Hayes also recommends that “data subjects should be informed as to how their data is being used, with whom it will be shared and for what purposes, and the consent should be recorded.” *Id.*

clarify and streamline informed consent procedures.¹⁴⁸ These assessments should include a detailed examination of organizational consent procedures, survivors' understanding of consent as well as their wishes to pursue justice, and the production of practical tools to pilot in field operations (e.g. pamphlets, apps).

Third, international justice institutions and humanitarian organizations should consider developing a protocol to define data sharing opportunities, parameters, and safeguarding procedures. The protocol should be developed in cooperation with survivor organizations to promote data safety through aggregation, and reduce the possibility of retraumatizing victims through repeat interviews. Indeed, pooling information "can actually lower data protection risks by significantly reducing the amount of data that is collected and stored."¹⁴⁹ Finally, staff exchanges between humanitarian organizations and international justice institutions should be implemented to promote understanding and dialogue. Moreover, foundations and other donors should support these efforts, including information storage and staff training.

Humanitarian organizations face a myriad of challenges and manifold opportunities in sharing information with international justice institutions. However, there is much still to learn and discuss before finding a middle ground. Further research is necessary for a more comprehensive view of how this process can be improved so that one human right is not placed as preceding over another. The rights to protection, assistance, privacy, and justice go hand in hand.

148. Interview with Cristina Ribeiro and Jarrod Noble, *supra* note 47 (Noble).

149. See Hayes, *supra* note 110, at 200–01.