Strategic Documentation of Violence against Healthcare: Towards a Methodology for Accountability

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Abstract
The valuable efforts that have arisen in recent years to document attacks against healthcare workers and infrastructure during armed conflicts have brought this issue to the forefront of the policy agendas of many health, public health, humanitarian and human rights organizations. However, although professionals and

activists have highlighted the importance of accountability in deterring these attacks, considerations of international criminal responsibility in data-gathering efforts remain underexplored. This paper suggests an approach that could direct further accountability efforts for organizations interested in engaging in documentation. Such non-governmental organizations should aim to gather not only information about the nature of the attack but also data that help establish specific characteristics about the victim, the intent of the attacker and the patterns of violence. Additionally, these efforts to document attacks on healthcare workers, facilities and patients should involve a systematic, rigorous and demonstrable methodology.

Introduction

Healthcare workers and institutions provide essential lifesaving aid, especially during humanitarian crises. Yet, during armed conflicts, attacks on health facilities endanger the lives of those providing essential healthcare, as well as those in need of care. In May 2013, The International Committee of the Red Cross published a report analyzing 921 violent incidents affecting healthcare (i.e., attacks and other violent acts perpetrated against healthcare personnel, infrastructure and vehicles) during armed conflict and other emergencies in 22 countries over the course of 2012 (ICRC 2013). Among those incidents, 60% of the people directly affected were healthcare staff (doctors, nurses and paramedics). More recently, Physicians for Human Rights documented 224 attacks on 175 separate medical facilities and the deaths of 599 medical personnel in Syria that occurred since the beginning of the country's civil war through December 2014 (PHR 2015). A recent United Nations General Assembly resolution acknowledged the severity of the problem by "*[s]trongly condemn[ing]* all attacks on medical and health personnel, their means of transport and equipment, as well as hospitals and other medical facilities" and "urg[ing] States to develop effective measures to prevent and address violence against such personnel" (UNGA 2014).

In light of the prevalence and gravity of these incidents – many of which could violate international criminal law – human rights professionals and activists have highlighted the need for greater accountability, in particular, to deter perpetrators from undertaking such attacks in the future (CPHHR 2014; HRW 2013; Rubenstein and Bittle 2010). Various non-governmental organizations (NGOs) have engaged in extensive documentation efforts of attacks against civilian and military medical personnel, medical transports and medical facilities, as well as against inpatient populations. Their efforts have been integral to raising awareness about these incidents, improving the security of medical personnel operating in conflict zones and enhancing the ability of affected populations to receive medical care.

However, the systematic integration of considerations of legal liability under international criminal law into data-gathering efforts by health, public health, humanitarian and human rights organizations concerning attacks on healthcare remains underexplored, especially in the public health and medical literature. This article aims to help fill this gap by assessing the role that evidence collected by NGOs can have in international criminal investigations at the International Criminal Court (ICC) and by examining the importance of well-designed methodologies that are informed by relevant legal and evidentiary standards.

Before proceeding, it is worth acknowledging that although NGOs or their local partners active in conflict zones may have access to information on incidents that could qualify as international crimes – either from victims and witnesses, or through documentation for internal or organizational purposes – they might choose not to make such information or documentation available for criminal investigations. It is each individual or organization's choice – based on factors such as the organization's mandate, as well considerations of field worker security and access to beneficiaries – whether to gather this information in a form that may be later used by an international court as evidence or as information leading to the gathering of evidence. This paper advocates neither for nor against evidence gathering for the purpose of legal accountability by NGOs, and indeed recognizes that such activities may have adverse implications for NGOs' abilities to provide humanitarian and medical services. For instance, a belief among local actors that an NGO might submit information to a judicial body could detrimentally affect perceptions of its neutrality and independence, access to the populations it seeks to serve and the security of its staff. In 2009, Sudan's government expelled 13 international NGOs from Darfur on suspicion of cooperating with the Office of the Prosecutor at the ICC in its investigation of international crimes allegedly committed in the region. To preserve its neutrality, avoid the risk of jeopardizing access and respect the confidentiality of beneficiaries, the International Committee of the Red Cross (ICRC) does not, as a rule, provide information to international courts and tribunals. In cases where the ICRC might choose to submit information to the ICC, special rules of evidence apply. Specifically, Article 73(4) of the Rules of Procedure and Evidence to the ICC grants the ICRC the right to nondisclosure of its information, and Article 7(6) establishes special consultative procedures for circumstances where the Court determines that ICRC "information, documents or other evidence are of great importance for a particular case."

NGOs can enter into confidentiality agreements with the prosecutor of the ICC who would shield information from further disclosure. However, this might limit the prosecutor's ability to use the information in proceedings before the ICC because the Rome Statute imposes obligations on the prosecutor to disclose certain kinds of information to Defence Counsel as well as Chambers to protect the rights of the accused (Whiting 2009).

Not all rigorous documentation efforts carry the kind of risks experienced by NGOs in Darfur, and many organizations continue to provide information about serious crimes to the Court. The work of many organizations with human rights mandates – Human Rights Watch, for example – is inherently dedicated to reporting on and seeking accountability for such crimes. Furthermore, healthcare workers and institutions themselves could serve an important function in advancing international criminal investigations, as they have special protection under the Rome Statute and international humanitarian law, and the nature of their work gives them access to those who may have been the victims of international crimes. In the ICRC's 2013 report, 422 of the 921 healthcare attack incidences (46%) were reported to the ICRC by "medical personnel, administrative and support staff and victims – who had been identified by the various ICRC delegations as pertinent and reliable sources of information" (ICRC 2013).

If healthcare personnel or organizations wish to submit information to a judicial body, the usefulness of the information would be enhanced if gathered with a view to the legal framework in which the information will be evaluated (Boutruche 2011). The information-gathering process can be shaped by the elements that are necessary to prove for

a prosecution to be successful. Given the link between law and data collection, this article highlights some aspects of the Rome Statute and the ICC's investigative process that may guide healthcare organizations or personnel wishing to gather information for submission to the ICC. Although prosecutions for international crimes may also take place before ad hoc tribunals or national courts, which may define international crimes differently than the ICC, the Rome Statute and the ICC's investigative process nonetheless serve as a useful reference for NGOs gathering information on international crimes.

Use of third-party evidence by the ICC

NGOs seeking to gather information in a way that can be useful to the ICC should be cognizant of how, and at what stage of its proceedings, the Court might use the information. ICC jurisprudence distinguishes between "direct evidence" and "indirect evidence" and has established that "direct evidence" – generated by the investigations team of the ICC under the ethical and legal guidelines of the Rome Statute and the Court's jurisprudence – has a higher probative value than indirect evidence, which encompasses "hearsay evidence, reports of international and non-governmental organizations (NGOs), as well as reports from national agencies, domestic intelligence services and the media" (ICC 2012b).

The role played by evidence collected by NGOs varies depending on the stage of the proceedings. High-quality NGO documentation can be useful to the prosecutor prior to the opening of an ICC investigation. Article 15(1) of the Rome Statute allows the prosecutor to initiate investigations "on the basis of information on crimes within the jurisdiction of the Court." The Court has established procedures for receiving communications from individuals or organizations under Article 15; by the end of 2013, it had received and analyzed over 10,000 such communications. Article 15(2) requires the prosecutor to "analyze the seriousness of the information received," and for that purpose, allows him or her to "seek additional information," including from "non-governmental organizations or other reliable sources that he or she deems appropriate." Article 15(3) provides that if the prosecutor concludes there is a "reasonable basis to proceed with an investigation," he or she must request authorization to do so from the Court's Pre-Trial Chamber and must submit to the Pre-Trial Chamber "any supporting material collected." (ICC 1998) In short, information or evidence collected by NGOs can assist the prosecutor in making an assessment about whether an investigation is warranted and in persuading the Court to authorize the investigation.

During subsequent phases, the Rome Statute imposes progressively higher standards of proof, and evidence gathered by NGOs appears to play a correspondingly less significant role. The standard required for the issuance of an arrest warrant or a summons to appear before the Court is "reasonable grounds to believe." Thus, in the case against President Omar Hassan Ahmad Al Bashir of Sudan, the prosecutor successfully sought an arrest warrant, relying, in part, on evidence gathered by NGOs (ICC 2009). In her separate and partly dissenting opinion on the issuance of the warrant, Judge Anita Usacka cited a Physicians for Human Rights report on Darfur to establish facts and corroborate statements made by witnesses (ICC 2013b).

For the Pre-Trial Chamber to confirm charges after the defendant has been detained, the standard is "substantial grounds to believe." This higher standard may make it more difficult for the prosecutor to rely on evidence collected by NGOs. At the confirmation of charges stage in the case of former President Laurent Gbagbo of Côte d'Ivoire, the Pre-Trial Chamber adjourned the hearing, criticizing the prosecutor for "rel[ying] heavily on NGO reports and press

articles with regard to key elements of the case" (ICC 2013a).

For the Trial Chamber to convict the accused, at the trial stage, the standard is that of proof "beyond reasonable doubt" (ICC 1998). Evidence – including evidence collected by NGOs – must meet three criteria for admissibility, namely, that the Chamber must deem the evidence to: "(1) be relevant to the case; (2) have probative value; and (3) be sufficiently relevant and probative as to outweigh any prejudicial effect its admission may cause" (ICC 2012a). At the trial of Jean-Pierre Bemba Gombo for crimes he allegedly committed in the Central African Republic, the Trial Chamber allowed the prosecutor to introduce reports produced by the International Federation for Human Rights and Amnesty International, as, the Chamber held, the reports met all three criteria required for admissibility of evidence (ICC 2012a).

The Court's treatment of NGO-gathered information at different phases can help guide both the kind of information that medical personnel or organizations gather and how it is gathered. An attack on medical personnel or facilities – being civilian objects that are usually undefended and are involved in humanitarian assistance – can be a war crime under Article 8 of the Rome Statute. Establishing criminal responsibility involves proving both that the incident occurred and other elements, including the civilian nature of the person or object attacked and the attacker's intent. For instance, if a belligerent launches an attack directed at a command and control center, but instead hits a hospital, this attack may not constitute a war crime. This is because, despite the attack inadvertently hitting the hospital, which is a civilian object, the attack was directed at a legitimate military objective. Although NGOs are more likely to have access to victims and witnesses, as opposed to the attackers themselves, information that could be acquired through witness statements, documentation and/or physical evidence could be relevant to establishing critical elements of the attack. For example, after the bombing of a hospital, information provided by a patient indicating that the hospital had not been used for military purposes could corroborate that the hospital had not lost its status as a protected object and thus would not constitute a lawful military target.

Attacks on healthcare workers or facilities may also amount to crimes against humanity if they can be shown to be part of a widespread or systematic attack directed against any civilian population, or genocide if part of a campaign intended to destroy, in whole or in part, a national, ethnical, racial or religious group. Regarding crimes against humanity, information demonstrating that a similar pattern of attack occurred in different locations – for example, several hospitals in different cities attacked in a similar manner – could be indicative that the attack was widespread and/or systematic. Regarding genocide, evidence that attackers spared individuals who were not part of a targeted national, ethnical, racial or religious group could support a finding of genocidal intent.

Documentation that an attack against healthcare has occurred, then, need not be the end of the data-gathering process. Rather, NGOs and medical workers may be in a position to gather additional information to indicate the kinds of violations that may have occurred. The importance of examining the attack within a broader context, and potentially a pattern of incidents, points to the need for more systematic data-gathering processes that document the situation as a whole rather than isolated incidents.

Documentation for legal accountability

In developing a methodology for assessing the documentation gathered, NGOs documenting attacks on medical workers or facilities may consider adopting an internal standard of proof for deciding which

incidents to report. An internal standard of proof would permit an organization to develop its own rigorous protocol that can be systematically implemented within the organization. As previously noted, the ICC's standards of proof become stricter as a case proceeds, and NGOs should be aware that even when they have adopted an internal methodological standard for verification and validation of information, it might not align with the standards set out in the Rome Statute. Even when internal standards formally match those found in the Rome Statute, the Court may interpret that standard differently (Wilkinson 2014). Nevertheless, both the quality of the information and the way that it is collected are critical to its usefulness and value to a judicial body. NGO reports should also include acknowledgment of any possible methodological limitations, incomplete data sets and sources of bias.

The types of information that prosecutors could use to prove the elements of the crimes can be divided into four categories: (1) witness statements (including eyewitnesses, as well as hearsay accounts); (2) documentary information (including hospital records and maps, as well as photographs and/or videos acquired by or produced by the data gathering team); (3) physical evidence (such as shell casings, fingerprints and hair follicles); and (4) electronic data (including emails, electronic word documents, data mining of social media, crowdsourcing and remote sensing imagery) (Nystedt 2011).

For witness statements, a credible interview methodology entails using skilled interviewers who do not ask leading questions during interviews; do not offer money or services to interviewees in exchange for information; and assess the credibility of the interviewee, including the consideration of any underlying motivations that the interviewee may have to be untruthful. For documentary and physical evidence, it is important for data gatherers to note when, where and by whom the documents or physical evidence were acquired and, as the information changes hands, to document the chain of custody (Boutruche 2011). Similarly, with respect to digital data, it is important to be able to demonstrate that the chain of custody has been maintained through proper data collection, transfer, handling and storage (Human Rights Center 2014).

In any event, NGOs gathering these types of information should be aware that their activities are not a substitute for an investigation carried out by a prosecutor and that there is potential for mishandling of information that could interfere with a later investigation. NGOs undertaking these efforts and that lack sufficient expertise on staff may wish to seek outside expert guidance. The adoption of a clear internal documentation of the process used to collect, organize and analyze the gathered information is important for demonstrating the credibility of the information. Additionally, during international criminal trials, expert testimony from individuals involved in the data collection can help establish that information-gathering efforts adhered to credible methodological procedures.

Conclusion

NGOs can play an important role in documenting and analyzing attacks on medical infrastructure. Health practitioners associated with NGOs may have been witnesses to (or victims of) an attack, or they may have privileged access to the scene of a crime or victims and/or witnesses. The usefulness of such documentation for prosecutors will be enhanced by the application of a rigorous and demonstrable methodology when acquiring and storing data. By documenting in a transparent manner, and with an understanding of the role third-party evidence can play in supporting the work of the ICC, NGOs working in the field of healthcare can contribute to international justice processes.

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