The Internationalization of Post-Conflict Justice
Rewriting the rules for humanitarians

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Preface
This paper emerges from research conducted towards completion of the MSc in International Humanitarian Affairs at the University of York’s Post-war Reconstruction and Development Unit (PRDU).

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Based in Washington D.C., Liz recently made the transition into the humanitarian sector following a career within the private-sector and the British Army. Liz has a strong interest in the protection of civilians in conflict situations.
Abstract

In 2002 the International Criminal Court came into existence, introducing a forum to prosecute the most serious breaches of international humanitarian law and international human rights law. Although ostensibly a positive step in protecting populations from the brutality of perpetrators, the establishment of this new court has raised wider questions about the role of humanitarians within the judicial process. Humanitarian workers are often well-positioned to give evidence at these trials, however the associated consequences have been the subject of significant debate.

Humanitarian organizations frequently refer to the optimization of humanitarian space, which maximizes their freedom of action to assist affected populations, while also ensuring the security of their own personnel. Some organizations and commentators maintain that this is inextricably linked to the core principle of neutrality, however others argue humanitarians must become more pragmatic if they are to best protect victims from atrocities. This working paper explores the impact of the internationalization of post-conflict justice on humanitarian operations and the relevance of the neutrality principle in the context of conflict today.

Introduction

In the aftermath of conflict, a process of reconstruction and normalization will almost always be necessary, focussed on establishing sustainable governance and economic mechanisms, and reducing reliance on external actors. Although this period of transition will usually look to the future, states may also seek to hold individuals to account for their actions during the conflict, especially where atrocities have occurred. While post-conflict justice is, in the first instance, a domestic matter for the country concerned, the severity of potential crimes and the absence of robust judicial institutions within a particular state could result in such crimes being considered before international courts or tribunals. Judicial processes, whether national or international, can present a dilemma for humanitarian actors, who may be called upon as key witnesses to the alleged atrocities. Where a crisis remains ongoing, associates of an individual being brought to justice may continue to have influence in the granting of humanitarian access or determining the security of humanitarian workers.

This paper will critically examine two hypotheses. The first hypothesis contends that the international justice system has had a negative impact on the security of humanitarian workers, predominantly because the judicial process has drawn humanitarians into a highly political arena. The second hypotheses builds on the first, arguing that the increased insecurity for humanitarian ac-
tors associated with the international justice system reinforces existing arguments for strict neutrality in humanitarian action as the most effective means by which to maximize the operating space of humanitarian organizations.

The paper will first outline the changing landscape of post-conflict justice, including the establishment of the International Criminal Court (ICC) and other institutional developments. An assessment is made of the extent to which these developments have had an impact on the primacy of state sovereignty within the international system. Brief consideration is also given to how the demands placed on the international justice systems have developed as the nature of conflict has changed in the post-Cold War era. Second, the paper turns its focus to the role of humanitarian actors within the international judicial process, in particular the expectation that humanitarians will give evidence to the ICC regarding any atrocities they have witnessed. The third section explores the dilemma faced by humanitarians in the context of how giving evidence impacts their ability to serve affected populations during crises, drawing on the operational experiences of Médecins sans Frontières (MSF) in Sudan and Uganda and an examination of the case of the International Committee of the Red Cross (ICRC). Finally, consideration is given to whether the international system should be more ambitious in its aspirations for post-conflict justice and embrace broader ideas of transformative justice.

**The Changing Landscape of Post-Conflict Justice**

The Rome Statute of the International Criminal Court (ICC) was adopted by 120 states on 17 July 1998. When the Statute came into force on 1 July 2002, ‘for the first time in the history of humankind, States decided to accept the jurisdiction of a permanent international criminal court for the prosecution of the perpetrators of the most serious crimes committed in their territories or by their nationals’ (ICC 2015a: 1). Operating under the principle of complementarity, the ICC does not replace national justice systems, rather states remain responsible for exercising criminal jurisdiction over citizens who commit international crimes. The ICC does however create a mechanism for intervention ‘where a State is unable or unwilling genuinely to carry out the investigation and prosecute the perpetrators’ (ibid.).

The core purpose of the ICC is to ‘help put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, and thus to contribute to the prevention of such crimes’ (ibid.). The Rome Statute sets out the scope of the ICC as ‘a permanent international court established to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression’ (ibid.: 3).

Prior to the Rome Statute, ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) had been established. The ICC is similar in that it is independent from any state or the UN and holds an ex-
clusively judicial mandate, however it differs in that it is a permanent autonomous court. The ICC, which tries individuals, must also be distinguished from the International Court of Justice, which is the principal UN judicial body for the settlement of disputes between states (ibid.: 4).

To some commentators, the establishment of a permanent international court represented a turning point because it significantly increased the expectation that all actors operating within conflict zones, including humanitarians, have a role to play in speaking out regarding atrocities and bringing perpetrators to justice. This was a particularly significant development for humanitarians, as it would inevitably draw them into the political sphere and undermine their ability to demonstrate neutrality. The establishment of the ICC also focussed attention on the question of state primacy and whether it could be justified when a state clearly violated its obligation to protect citizens.

**Changing notions of state sovereignty**

For centuries the nation state has been the building block of the international system. Respect for the sanctity of the nation state is widely viewed as fundamental to the protection of the interests of smaller states, which is recognized in Article 2(7) of the UN Charter (UN 1945). As the nature of conflict has changed, however, there has been greater acknowledgement that state sovereignty can present significant obstacles in the protection of civilians both during and in the aftermath of conflict. With increasing recognition of moral obligations that transcend national boundaries, the ICC represents the institutionalization of an approach that places the prosecution of crimes under international humanitarian law (IHHL) and international human rights law (IHRL) ahead of national sovereignty.

Over the past decade, there have been calls for the right to sovereignty and non-intervention to become conditional upon respect for certain universal shared values. For some, holding states to account against these values is essential to bringing justice to affected populations, allowing the world to see that violations are not tolerated by the international community and helping prevent future atrocities. Parallels can be drawn with the ‘Responsibility to Protect’ (R2P) norm, which evolved over the same period as the ICC. R2P is based on a three-phase escalation approach that sets out the international community’s obligations to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Similarly, in establishing a justice system that transcends the boundaries of nation states, the international community has acknowledged that some rights hold ‘universal jurisdiction’.

Although the introduction of the ICC and the R2P norm do attach an element of conditionality to sovereignty, outlining thresholds that states must comply with to earn their entitlement to non-intervention, some commentators maintain that in reality little has changed. Broomhall (2004: 5) argues that ‘the institution of sovereignty, at least in areas relevant to international criminal law, is in no danger either of being replaced or of its importance being radically diminished in the foreseeable future’. If sovereignty remains an underpinning concept within international relations, there are inevitable questions about
whether the international community can realistically expect the ICC to bring a paradigm shift in how post-conflict justice is administered. Furthermore, the international justice system risks creating a hierarchy in the severity of atrocities, based on whether a referral to the ICC has been made. Atmar highlights that ‘while Rwanda and Yugoslavia ‘qualify’ for war-crimes tribunals, Afghanistan does not’ (2001: 2). Arguably this adds a highly political dimension to human suffering, which must be explored within the wider context of post-conflict reconstruction today.

Transitional justice in the context of ‘new wars’

The ICC represents the institutional dimensions of the international justice system, however it is important to also establish the objectives of that system as a component of post-conflict normalization. The term ‘transitional justice’ was introduced by Teitel to ‘account for the self-conscious construction of a distinctive conception of justice associated with periods of radical political change following past oppressive rule’ (2014: 2). This concept reflects the changing nature of conflict since the end of the Cold War, with a rise in ‘new wars’ combining war, organized crime and large-scale violations of human rights (Kaldor 1999).

Unlike most preceding wars, centred on nation states acting either alone or within coalitions, recent conflicts have typically involved an expanded cast list. Private actors are increasingly involved, ‘both as perpetrators – e.g. paramilitaries, warlords, and military contractors – and as victims, as we see the ever greater toll borne by civilians in contemporary conflict’ (Teitel 2014: 3). Furthermore, ‘the involvement of transnational NGOs and global civil society more broadly illustrates the wider politics of transitional justice’ (ibid.: 5). Although trials are the best known aspect of post-conflict justice, transitional justice has broader reach. Duki highlights other instruments that can be employed, including truth seeking, reparations and reforms. He argues that con-
textual factors must be taken into account when determining the best solution for that situation, indeed ‘demands for criminal trials might spark a renewed outbreak of hostilities or lead to the overthrow of a newly installed government’ (2007: 709). The international community is therefore faced with a complex landscape as it seeks to help states stabilize in the aftermath of ‘new wars’.

**New players in contemporary conflict**

A significant limitation of the ICC is that its jurisdiction is restricted to where the accused is a national of a state party to the Rome Statute and the alleged crime took place on the territory of a signatory to the treaty. Under the Additional Protocols, IHL now extends beyond international conflict between nations states to include intrastate conflicts. With the rise of non-state actors, however, maintaining the relevance of the ICC remains an ongoing challenge, especially given the Court’s recent confirmation that the extremist group Islamic State of Iraq and Syria (ISIS) sits outside of its remit. The ICC Prosecutor, Fasou Bensouda, confirmed in April 2015 that ‘the atrocities allegedly committed by ISIS undoubtedly constitute serious crimes of concern to the international community and threaten the peace, security and well-being of the region, and the world’ (ICC 2015b). Nevertheless, he continues by stating that ‘Syria and Iraq are not Parties to the Rome Statute, the founding treaty of the International Criminal Court … therefore, the Court has no territorial jurisdiction over crimes committed on their soil’ (ibid.).

Bensouda, the ICC Prosecutor, does outline the potential to ‘exercise personal jurisdiction over alleged perpetrators who are nationals of a State Party, even where territorial jurisdiction is absent’. Specific reference is made to foreign fighters from countries that are signatories of the Rome Statute, such as Tunisia, Jordan, France, the United Kingdom, Germany, Belgium, the Netherlands and Australia (ibid.). Nevertheless, Bensouda emphasizes that because the key actors within ISIS are Iraqi and Syrian nationals, ‘the prospects of my Office investigating and prosecuting those most responsible, within the leadership of ISIS, appear limited’ (ibid.).

Bensouda’s subsequent comments highlight a key issue relevant to most current conflicts: that is, ‘under the Rome Statute, the primary responsibility for the investigation and prosecution of perpetrators of mass crimes rests, in the first instance, with the national authorities’ (ibid.). This is problematic when conflicts occur within states that are either not signatories to the Rome Statute or where at least one of the belligerents is not a state. Bensouda clearly articulates his commitment to bringing justice to the victims of atrocities, stating, ‘I remain profoundly concerned by this situation and I want to emphasise our collective duty as a global community to respond to the plight of victims whose rights and dignity have been violated’ (ibid.). In reality, it is extremely difficult to see how the changing dynamics of conflict will be accommodated within the existing legal framework of the Rome Statute. Furthermore these unpredictable actors, with negligible respect for IHL and IHRL, present a significant challenge for humanitarian organizations operating within conflict zones.
‘Témoignage’ – Humanitarians as Witnesses

As the nature of conflict changes, the expectations of humanitarians appear to increasingly extend beyond the delivery of material aid. Indeed many commentators and practitioners contend that humanitarian actors have an instrumental role to play in the delivery of transitional justice in the aftermath of conflicts and the accountability of humanitarians to affected populations extends beyond the relief operation itself. Teitel (2014: 7) argues that ‘the justification for war, especially where humanitarian justice considerations are prominent, sets the stage for higher expectations of humanitarianism, both in relation to how war is waged and in the responsibilities of the victors post-conflict’. This generates fundamental questions regarding the responsibilities of humanitarians within post-conflict justice, especially regarding their role as witnesses to atrocities. In exploring these questions, however, the impact on the delivery of emergency aid must also be considered, as many humanitarians regard this as their core role.

Because humanitarian workers are frequently present in the field alongside the victims of atrocities, ‘they thus have the capacity to sound the alarm, and their statutes often assert this witnessing role’ (Dubrulle 1999: 17). MSF openly emphasize their commitment to ‘témoignage’, which translates as ‘to witness’ (MSF 2015). For many organizations, however, this role severely compromises their neutrality. Dubrulle acknowledges that ‘by engaging in the fight for justice, humanitarians find themselves becoming entangled in politics. Human rights, justice, democracy – these are quintessentially political issues’ (1999: 17). Nevertheless, she does not believe this excuses humanitarian actors from such responsibilities, instead arguing that ‘humanitarianism and justice must necessarily go together’. She emphasizes ‘there is no infringement of humanitarian principles here because testimony and witnessing is an integral part of what being humanitarian means’ (ibid.: 18).

Raising a critical, and often overlooked, point regarding organizations that choose not to speak out, Dubrulle reasons that ‘alternatively, remaining silent would amount to complicity with the abuser – again, a political act?’ (ibid.). For many commentators, this scenario became a reality following the Rwanda genocide, when ‘many organisations were shamed by the consequences of delivering ostensibly ‘neutral’ and ‘impartial’ assistance into the refugee camps of Goma, where they found themselves directly assisting the perpetrators of genocide’ (Collinson 2012: 8).

Dubrulle (1999: 18) does accept the potential impact that giving evidence could have on access to those in need, emphasizing ‘we must be careful lest this role of bearing witness in so visible a way rebounds, denying us access to victims in some future humanitarian crisis’. In assessing the most appropriate course of action, organizations therefore have to consider the potential impact of their decisions on the ‘humanitarian space’.

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The Debate around ‘Humanitarian Space’

The concept of ‘humanitarian space’ has numerous interpretations encompassing political, military and legal dimensions. In the context of this analysis, the term is used to represent a space within which IHL is fully respected and the safety of humanitarian workers is guaranteed. To fully understand the impact of an international justice system on the ‘humanitarian space’, it is important to first acknowledge the changing basis for humanitarianism.

Moving beyond traditional and human rights approaches

The traditional humanitarian approach, with its roots in the work of Henry Dunant, is based upon the core principles of neutrality, impartiality and independence. These principles have for decades underpinned the work of many humanitarian organizations. Most strongly associated with the ICRC, the traditional approach is centred on the premise that humanitarians have the best chance of accessing those in need if they are entirely neutral in any conflict. As the nature of conflict changes, bringing an increase in human rights violations and disregard for IHL, many argue that the principles underpinning humanitarian action must also shift accordingly.

In contrast to the traditional, principled-based approach to humanitarian action, there is growing support, amongst both academics and practitioners, for the idea that providing material aid during a crisis cannot be considered an end in itself. Instead, many argue in favour of a rights-based approach to humanitarianism that places the securing of basic human rights at the centre of an organization’s work. While traditional humanitarian approaches seek to address the symptoms of human rights violations, the rights-based approach considers the exposure of human rights abuses as both a requirement in itself and a means to an end in addressing the root causes of atrocities. Stroun (1997) highlights the associated difficulties faced by humanitarian actors in the context of international justice:

…on the one hand they want the international community to show more firmness in ensuring respect for international humanitarian law; but on the other they are obliged to keep a certain distance from international courts in order to preserve their ability to work in the field while a conflict is going on.

Although adopting an approach based on law can result in organizations setting aside core principles in an attempt to better protect affected populations, speaking out against one or more parties to a conflict may be viewed as a highly political act at odds with the traditional humanitarian commitment to neutrality. It is important therefore that the theories underpinning humanitarian action do not lose sight of the impact on those individuals they seek to serve.

Any assessment of the impact of post-conflict justice on the ‘humanitarian space’ must consider the perspective of the affected population. As community involvement becomes more prevalent within humanitarian programming,
building capacity and delivering more accountability to affected populations, the administration of post-conflict justice should be no exception. The affected community is often best placed to judge the impact of particular interventions and although decisions regarding giving evidence may be taken at the headquarters level within organizations, community-level views should not be disregarded. For example, while the population may collectively support the principle that individuals be held responsible for their crimes, they may face more immediate challenges to their welfare. Efforts to optimize the ‘humanitarian space’ must always consider whether the overall outcome best serves those in need.

**Shrinking space?**

The prevailing view within the humanitarian community is that the ‘humanitarian space’ is shrinking and this is having a negative impact on both the safety and operational effectiveness of humanitarian workers. Collinson insists there is a lack of evidence to support this assumption and many variables must be taken into account when assessing the security of humanitarian workers. Although data supports arguments that attacks are increasing, this should not be viewed in isolation. A comprehensive study in 2006 concluded that ‘while the absolute number of violent incidents against aid workers nearly doubled between 1997 and 2005, the overall increase in the frequency of incidents was explained primarily by an increase in the overall number of aid workers in conflict-affected contexts’ (Stoddard, Harmer and DiDomenico quoted in Collinson 2012: 9).

Collinson argues that any credible explanation must also take account of the fact that many more organizations are attempting to operate in dangerous places compared to the past (ibid.). Furthermore, the nature of the work has also qualitatively changed, and whereas humanitarian activities may previously have occurred on the margins of conflict, today ‘humanitarian action is very
often at the centre of conflicts and of international concern’ (Donini et al. 2008: 4). It is therefore necessary to explore in more detail the causal relationship between security and neutrality.

Organizations committed to more traditional humanitarian approaches consider there to be a direct relationship between the security of humanitarian workers and neutrality in a conflict context. Collinson, however, dismisses the critical nature of neutrality, arguing ‘the discourse of ‘shrinking’ humanitarian space, to which the solution is simply greater adherence to principles, is not borne out by the evidence’ (Collinson 2012: 1). Although organizations such as the ICRC remain entrenched in their position that neutrality is central to maximising the humanitarian space, commentators such as Slim insist that some interpretations of the relationship between politics and humanitarian action have been oversimplified. He asserts that ‘the politicization of humanitarianism’ is not an outrage in itself. Ethics and politics are not opposites’ (Slim 2003: 1). If this is the case and the causal relationship between politics and ‘shrinking humanitarian space’ is in question, there is value in focussing more closely on the wider outcome. Consideration should be given to whether a particular humanitarian intervention is actually serving the affected population, rather than whether that intervention aligns with political ‘sides’ in a conflict. Collinson sums this up succinctly, ‘practically speaking, whatever the duties imposed by international law, it is humanitarian organisations’ persuasive power and relevance on the ground that matter most in the end’ (Collinson 2012: 2).

Claims of a direct relationship between neutrality and the security of humanitarian workers therefore grossly oversimplify an extremely complex situation. Collinson holds that ‘a more pertinent question is how the humanitarian aid industry is positioned or prepared to respond to belligerents’ disregard for or rejection of humanitarian laws or principles, including indiscriminate and extreme violence against civilians and aid workers’ (ibid.: 10). Collinson draws particular attention to how humanitarian organizations have become preoccupied with ‘maintaining or expanding agency space, rather than humanitarian space’ (ibid.: 11). She continues, ‘strategies and mechanisms that might be effective for protecting aid agencies do not necessarily protect civilians in the same context’ (ibid.). Furthermore there are moral questions associated with strategies that increase capacity through greater reliance on local staff, who in turn become targets themselves.

Attacks on ICRC staff and blatant disregard of IHL and IHRL by groups such as ISIS illustrate that strict neutrality offers no guarantee of protection for affected populations or humanitarian workers. Indeed, ‘paradoxically, by sweeping many of the critical dilemmas and challenges the system faces under a collective rug of ill-defined principles, humanitarian actors are making it even more difficult to live up to these principles in practice’ (ibid.: 23). Collinson emphasizes that although this does not mean humanitarian concerns should be subordinated to political imperatives, ‘it does require developing a framework for a principled and strategic engagement with politics that promotes a wider understanding of humanitarian space, beyond agency ac-
The reality is that in making judgements about the most appropriate humanitarian action in a particular context, the principle of humanity often has the greatest relevance.

**Non-state actors and humanitarian space**

A further challenge associated with securing humanitarian space is that it relies on a ‘deal’ between humanitarian actors and belligerents ‘that would grant them access and ensure their safety’ (Collinson 2012: 3). In an increasingly complex international environment, with a cast list that extends far beyond just nation states, the ability to make such deals has become more difficult. These non-state actors frequently demonstrate complete disregard for IHL and IHRL, indeed a recent UN report highlights how ISIS are using this as a deliberate tactic in Syria. The report asserts that ‘by publicising its brutality, the so-called ISIS seeks to convey its authority over its areas of control, to show its strength to attract recruits, and to threaten any individuals, groups or States that challenge its ideology’ (UN 2014: 2). The UN report details how the group have systematically targeted individuals specifically protected under the Geneva Conventions and blocked the provision of humanitarian aid, which ‘reinforces the dependence of civilians on the services it controls’ (ibid.: 5).

While the UN sets out robust recommendations in this case, the stark reality is that although these crimes are clearly prosecutable under international law, this does little to immediately assist affected populations or those seeking to protect them. As the global political situation evolves, it also calls into question whether an international justice system even exists, especially with so many actors that have chosen to sit outside of that system. Insecurity may be increasing for civilians and humanitarians alike, however there is no indication that maintaining strict neutrality would change this situation when faced with groups such as ISIS. This is especially so given that the perpetrators of violence rarely have the knowledge or inclination to distinguish between the positions of different humanitarian organizations, as experienced by MSF in Sudan and Uganda.

**The price for speaking out – MSF experience in Sudan and Uganda**

The correlation between participation in post-conflict justice and the safety of humanitarian workers has been the subject of debate amongst commentators and academics, yet it is the experience of practitioners in the field that most effectively highlights the operational implications.

In March 2005, the UN Security Council referred the situation in Darfur to the ICC (UN 2005). In their annual report for that year, MSF highlighted a shift in the operating environment within Sudan, including ‘a significant increase in targeted attacks against aid workers including MSF staff, making land travel and logistical assistance close to impossible’ (MSF 2005: 5). This pattern continued in the years that followed. In March 2009, the ICC issued an indictment for the arrest of President Omar Hassan al-Bashir for crimes against humanity committed in Darfur (Pflanz 2009a). The next day the Sudanese government expelled ten international humanitarian NGOs working
in Darfur (Pflanz 2009b), drastically reducing the humanitarian capacity in the region. Regardless of whether those agencies had played a role in the ICC decision to issue an indictment, events in Sudan are evidence of the consequences when humanitarian organizations are perceived as key actors in the administration of justice.

For decades the people of northern Uganda have been subject to a brutal conflict between government forces and rebel groups, including the Lord’s Resistance Army (LRA). Early in 2005 as part of investigations into violations committed by the LRA, the ICC contacted humanitarian agencies as a source of information about the violations. Although the UN Office for Coordination of Humanitarian Affairs (OCHA) actively cooperated with the ICC, other organizations operating locally became concerned regarding the consequences of a perception that they were no longer a neutral actor. These concerns proved well-founded, with MSF reporting violent ambushes against civilian and humanitarian vehicles at the end of 2005, which led to the suspension of MSF international staff travelling to the camps in northern Uganda for almost three months. MSF emphasized in their annual report for that year that ‘killings of aid workers and civilians compelled MSF in November to call on all armed groups to respect the safety of civilians and their freedom of movement, as well as the independence and safety of humanitarian aid workers’ (MSF 2005: 51).

Macintosh (2005: 30) contends that these events in Uganda ‘remind us that the people being brought to justice may well be part of the same group granting us access or guaranteeing our security’. She reasons that ‘on a pragmatic level, and sometimes on a principled one, humanitarian organisations are feeling the need to put some distance between themselves and the agents of international justice’ (ibid.). The examples of Sudan and Uganda both indicate a link between the administration of justice in an international context and insecurity of humanitarian workers, however the extent to which this risk can be reduced through neutrality is more open to debate.

The International Committee of the Red Cross – a special case?

Throughout the past century, the unique status of the ICRC has been recognized, including during the implementation of the ICC. The ICRC’s right not to testify acknowledges the centrality of the core principles within their mandate and the importance of maintaining confidentiality regarding what has been witnessed. The special status of the ICRC has its technical basis in the concept of ‘legal personality’ within international law. Rona (2004) explains how ‘the recognition of organizations in international law generally stems from their association with State structures’. Organizations that have no constituent state participation, such as NGOs, ‘do not possess international legal personality despite their international scope of operations’. Unlike other organizations with no state component, the ICRC does have international legal personality.

Several sources in international law recognize the ICRC’s right to refrain from providing evidence, including ‘The ICC Rules of Procedure and Evidence’
and the ‘Decision of the ICTY’. Rona highlights, ‘the extraordinary treatment accorded to the ICRC reflects the appreciation of States for its unique status and role in the world’ (ibid.). The ICTY Decision summarizes the reasoning behind the testimony policy, highlighting the importance of the privilege to withhold confidential information to the ICRC mandate. Their ability to fulfil that mandate relies upon ‘the willingness of warring parties to grant the ICRC access to the victims of such conflict…[which] depends upon the ICRC’s adherence to its principles of impartiality and neutrality, and rule of confidentiality…’ (ibid.). One aspect that should not be misunderstood is the level of ICRC support for administration of post-conflict justice, indeed the ICRC fully supports the existence of a mechanism to address violations of IHL.

Although the unique position of the ICRC is not in question, the consequences are more open to debate. High profile attacks on ICRC and UN staff in Iraq in 2003 indicate that despite their special status, the ICRC is not immune to attacks on its personnel (Collinson 2012: 16). Furthermore, the morality of the ICRC position in Rwanda has also been criticized, in that it failed to shine a light on the scale of atrocities being committed. While the organisation may have achieved its palliative and remedial objectives, its unwillingness to speak out on human rights violations may have prolonged the suffering for affected populations. It is therefore worthwhile exploring the options open to humanitarian organizations seeking to balance the competing demands placed upon them within conflict zones.

Room for Compromise?

A humanitarian organization’s decision regarding their participation in post-conflict justice often aligns closely with their position on the ‘humanitarian approach’ spectrum. Organizations emphasizing the importance of principles in securing the humanitarian space are more likely to avoid actively engaging in post-conflict justice. At the other end of the spectrum, organizations with a
rights-based approach are likely to exercise their duty to bear witness to any atrocities encountered, in the interests of bringing perpetrators to justice and preventing recurrence.

The ‘protection egg’ was introduced by Slim (2003: 43) to illustrate three different types of protection activity: responsive, remedial and environment-building. Slim explains, ‘this model uses the shape of an egg to think strategically about the different spheres of action in which protection needs to be addressed and the different types of activities required to meet protection needs’ (ibid.: 42). Decisions by organizations on whether to give evidence are likely to be influenced by their protection priorities. The reality is that short-term responsive actions may well be incompatible with longer-term environment-building actions. This is reinforced by Stroun (1997), who makes an important distinction between the respective goals of humanitarian action and post-conflict justice. Humanitarian action is designed to have immediate impact and is focussed on the victims, ‘either by taking direct measures to relieve suffering or … establishing a dialogue with the protagonists to convince them that they should change their behaviour and respect international law’. In contrast, the judicial approach takes a long-term view and is focussed on the combatants. Stroun contends that the humanitarian role can be fulfilled only by ‘humanitarian action which is independent and neutral, and… accepted by the very people committing the offences…combatants must be convinced that attacking humanitarian workers is a serious crime which will be prosecuted’ (ibid.).

Seeking a more pragmatic approach, Macintosh (2005: 31) highlights the options for humanitarian organizations seeking to mitigate the risks associated with giving evidence. She insists ‘it should be possible to arrange some degree of confidentiality, so that only the defendant knows the name of the witness and the humanitarian organisation’. Such measures have been used to protect humanitarian organizations and their staff in the international tribunals in Yugoslavia, Rwanda and Sierra Leone.

Humanitarian organizations are unlikely to be forced to give evidence, therefore the decision will largely rest on their own interpretation of whether such action is in keeping with their values. Organizations must however remain focused on the needs of affected populations rather than more abstract interpretations of the humanitarian space. Macintosh (ibid.: 30) highlights ‘how reluctance to cooperate could appear to the victims…it may be hard to explain to the people we are feeding and treating why we refuse to stand up and talk about the crimes we have seen committed against them’. She is clear that the long-term benefits of post-conflict justice should not be overlooked, emphasizing ‘legitimate concerns about the problems the ICC may pose for humanitarian operations should not blind us to its potential to improve the situation for the people we try to help, both directly and through the protection of humanitarian assistance’ (ibid.: 31).

On a practical level, there is certainly opportunity for the humanitarian community to collectively educate the ICC on the operational issues associated with giving evidence. Nevertheless in spite of extensive intellectual discussion
on this topic, humanitarian organizations on the ground continue to make pragmatic judgements about how best to respond in specific situations, especially when operating in multiple conflict zones.

**Raising the bar from transitional to transformative justice**

As humanitarian organizations reflect upon their role within post-conflict justice, they should look beyond restorative justice and also consider the contribution they could make to alternative approaches that may better serve the long-term needs of affected populations. The internationalization of post-conflict justice and implementation of the R2P norm both raise important questions regarding the increasing moral commitment to people rather than states. This is supported by Teitel (2014: 4), who argues ‘the relevant questions are now considered to be part of a broader international commitment to human security’. Although the ICC model is largely based upon restorative justice principles, many commentators argue that the needs of affected populations are best addressed long-term by a more transformational approach to post-conflict justice. That is, rather than just treating the symptoms of conflict, the focus should be on addressing the causes of conflict.

Transformative justice encompasses social, political, cultural, economic and environmental aspects. This more holistic approach can help address the root causes of atrocities, rather than just punish those who have committed crimes. In a recent panel discussion, the Deputy Secretary-General to the United Nations emphasized the importance of timely justice in post-conflict situations. He goes beyond traditional ideas of transitional justice, instead emphasizing that ‘transformative justice requires broader institutional reforms that dismantle the structures that allowed abuses in the first place’ (UN 2015). He continues, ‘for reparations to be transformative, they have to go beyond monetary compensation. Land restitution is important, coupled with access to credit and skills development’ (ibid.). Such an approach is particularly relevant for NGOs whose remit extends beyond emergency aid operations into longer term development partnerships with local civil society.

In his ‘Expanded Framework for Peacebuilding’, Lederach (2005: 144) emphasizes that a truly transformational approach is based upon identifying root causes, setting out a vision and driving the social change necessary to realize that vision for the future. He introduces the concept of ‘justpeace’, ‘an orientation toward conflict transformation characterized by approaches that reduce violence and destructive cycles of human interaction and at the same time increase justice in any human relationship’ (2005: 182). Mertus (2011: 1338) echoes this view, arguing ‘law plays a central role in civil society. Civil society cannot flourish where there are inadequate legal assurances of their ability to operate autonomously from government’. Furthermore, she identifies humanitarian and development organizations as one of a number of entities that make up ‘transnational civil society’. A further benefit of the transformative approach is that it maintains focus on affected populations, rather than on the perpetrators of crimes, as is often the case within more traditional justice systems. Humanitarian organizations, working in partnership with affected pop-
ulations, local civil society and development colleagues, undoubtedly have an important role to play in creating the conditions for transformative justice. Humanitarians should therefore be proactive in identifying how they could contribute to the full spectrum of approaches to achieving justice, rather than just focussing on giving evidence at trials.

Conclusion

At the turn of the century, the ICC was heralded as a beacon in the new era of international justice, providing a high-profile arena within which individuals would be held to account for their actions. Two hypotheses were introduced at the beginning of this working paper. Firstly, the international justice system has had a negative impact on the security of humanitarian workers, predominately because the judicial process has drawn humanitarians into a highly political arena. The intervening period has undoubtedly witnessed increased insecurity for humanitarian workers and the experiences of MSF in Sudan and Uganda illustrate how to some extent this is attributable to the internationalization of post-conflict justice. The data should not however be considered in isolation, as the increase in deaths is to some extent attributable to an increase in the overall number of aid workers and the growing number of organizations attempting to work in dangerous places than was previously the case.

The second hypothesis asserts that the increased insecurity for humanitarian workers associated with the international justice system reinforces existing arguments for strict neutrality in humanitarian action, as the most effective means by which to maximize the operating space of humanitarian organizations. The evidence examined here suggests that the importance of maintaining strict neutrality is open to interpretation. The reality is that many different factors influence the security of both humanitarian personnel and
affected populations. As well as the increasing number of conflicts taking place within states that are not signatories to the Rome Statute, there is a growing number of armed non-state actors demonstrating complete disregard for IHL and IHRL. Such actors are unlikely to either recognize or respect the neutrality of humanitarian organizations.

The fact remains that for as long as humanitarians are operating within conflict zones, they will be faced with difficult decisions. The importance attributed to strict neutrality, meanwhile, continues to depend upon the lens through which individual organizations view their approach. Organizations delivering responsive action will attach a higher priority to accessing affected populations, therefore will likely view neutrality as central to their operational effectiveness. For organizations also focussed on remedial and environment-building action, there is stronger evidence supporting the need to move away from strict neutrality and promote wider actions or behaviours to achieve longer-term goals. Indeed, in rigorously adhering to the principle of neutrality, organizations could inadvertently fail to adequately protect affected populations.

It is essential that each humanitarian organization fully considers the options that best serve the specific population over the short, medium and long term, while also managing the risks for their own staff. Humanitarian principles have a role in this assessment, but each situation must be considered on a case-by-case basis.
Bibliography


Mission Statement
The PRDU links theory and practice for the enablement and development of war-affected societies.

The Unit’s work focuses on three core areas:

**Conceptualisation:**
Facilitating the development of a vision for reconstruction with participatory needs assessment, context analysis and strategy development.

**Institution Development and Transformation:**
Supporting the development of human resources, appropriate administrative systems and institutional responses in the transition from crisis management to long-term development programmes.

**Participatory Evaluation:**
Promoting people-centred evaluation of progressive goals and strategies and the dissemination of good practice.