

Meeting Summary

Workshop on Investigations of International Humanitarian Law Violations During Armed Conflict

Hosted by the Essex Armed Conflict and
Crisis Hub, University of Essex.

Co-hosted by Amnesty International

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Introduction

This document summarizes the key discussion points that were raised during a workshop on investigations of international humanitarian law (IHL) violations during armed conflict in July 2019. The workshop brought together a diverse group of experts from international NGOs working on conflict situations, experts in the law of armed conflict, members of UN Commissions of Inquiry, and others with relevant expertise. Given the importance of adequate and effective investigations for both accountability and prevention, the aim of the workshop was to discuss the myriad challenges associated with investigating international humanitarian law violations during and in the aftermath of armed conflict and to consider strategies to improve the quality of investigations, taking into account the available best practice. In particular, participants discussed strategies to improve civil society engagement in monitoring and assessing State-led investigations as well as the different approaches taken by NGOs to conduct their own investigations.

The workshop was divided into three sessions, the format of which included brief opening remarks followed by roundtable discussion. Session One focused on the legal standards that apply to states in relation to the conduct of their own investigations concerning alleged violations occurring in the course of armed conflict. In Session Two, participants discussed the challenges as well as the strategies and best practice relating to how NGOs and other members of civil society engage, monitor, and critique state investigations of violations committed during armed conflict. Finally, Session Three considered what NGOs and other actors should be looking for when conducting their own investigations into conflict-era violations with respect to the type of information needed to demonstrate humanitarian law violations, as well as the challenges they face in collecting such information and how these might be overcome.

Session One: Standards for state investigations

The impetus for a session focusing on the legal standards that apply to states in conducting their own investigations of humanitarian law violations stemmed from an ongoing project undertaken by colleagues at the University of Essex, and jointly led by the Geneva Academy of International Humanitarian Law and Human Rights in partnership with the ICRC to develop new international guidelines¹ for States on the investigations of IHL violations. In drafting the guidelines, a number of challenges emerged such as the lack of detail within IHL with respect to investigations, the practical and legal difficulties of transposing standards from international human rights law into armed conflict settings, and the need to create guidelines and use terminology that applies equally to both common and civil law legal systems as well as across the full range of military structures and capacities.

The guidelines include a section on external allegations of IHL violations and it was mentioned that many militaries lack a process for receiving and vetting external allegations. One participant identified this as an issue that NGOs or civil society may want to take forward in terms of suggesting processes that the military should have in place for the receipt of external allegations. Another participant raised that in the event that a military claims it cannot carry out an investigation on the ground but members of civil society or NGOs are conducting interviews and collecting witness statements, there is a compelling argument that the military should be required to make use of such information and where possible seek to corroborate it. A challenge discussed was that many militaries often rely only on the information provided by their own soldiers and do not seek to interview victims or look into other sources of information, leading to very one-sided investigations. The guidelines, it was noted, assert that the military should seek to proactively engage with persons directly or indirectly affected by an incident, as well as organizations with an interest such as civil society, NGOs, and international organizations.

During the discussion, a question was raised regarding the importance of conflict classification in determining the standards that apply to state investigations. In response, it was raised that the aforementioned guidelines will apply to any type of armed conflict and that the focus is on the 'incident,' or any event, situation, or set of circumstances that has the potential to require an investigation because it raises concern about a possible violation of IHL, regardless of whether it was an unexpected or undesired occurrence. On the matter of what types of incidents should trigger an investigation, the importance of investigating unexpected occurrences, even where there is no apparent violation, was noted, given that the investigation can reveal whether such an occurrence is reflective of a systemic problem which may lead to violations in the future.

It was also raised that the guidelines apply to criminal investigations as well as administrative investigations, which are often conducted within the military, usually by a commanding officer, and include investigations into both non-criminal acts of individuals and systemic issues. The importance of administrative investigations was noted by multiple participants, as they function to not only repress serious violations of IHL and suppress all other violations as required by the

¹ See <https://www1.essex.ac.uk/hrc/research/armed-conflict.aspx>

Geneva Conventions, but also to ensure non-repetition of non-criminal violations. These include many acts commonly associated with the most damaging outcomes, such as the failure to take precautions in attack and systemic failures in targeting procedures or proportionality assessments. It was also noted that administrative investigations, which deal with civil law matters, may carry a lower standard of proof and do not require a named perpetrator, making them a potentially more productive and effective process for civil society to engage with.

Participants also raised issues of independence and impartiality with respect to the different types of investigation that a state may carry out. It was noted that under the guidelines, there must be an independent and impartial body available to investigate all allegations of war crimes, while for administrative investigations, the authority implicated should not conduct the investigation and the seriousness of the incident should determine the level of independence and impartiality required. It was also mentioned that the guidelines adopt total parallelity between administrative and criminal investigations such that they each can take place prior to, alongside, or after the other, but that nothing that takes place in an administrative investigation should impact a criminal investigation. It was raised that an assessment phase should be required prior to launching an investigation to determine whether an investigation is needed at all and whether it should be administrative or criminal.

Independence and impartiality is another issue that commonly comes up in the context of investigations by the state. One issue that was raised is that in the context of IHL violations, it is not well established what these terms mean, as in international human rights law they are mostly raised in the context of the judicial system as opposed to at the investigation stage. Another participant mentioned that in certain cases, the same standards from human rights law applicable to investigations are often disputed as not being realistic in the context of armed conflict.² However, if the application of human rights law in a given case includes an assessment of effectiveness and feasibility that takes account of the context of armed conflict, then States will have far less objection. In considering independence and impartiality within the context of armed conflict, it was also mentioned that the role of the commander might become more important, as it will not always be feasible to have civilian law enforcement available at the conflict scene of an incident. In such cases, independence should not come at the expense of effectiveness, and the role and advance training of the commander will be critical. It was noted that the guidelines address what will be required of the commander in the context of investigations, such as securing the scene of the incident and documenting it effectively, and that this will require commanders to receive specific training. Another participant noted that if a state claims that any part of the investigation is not feasible within the context of the armed conflict, it should document this and justify why.

A final issue that some participants raised was that states, regardless of the process and structures that they have in place, tend to be independent and impartial only when they want to be, and that in the most sensitive cases, there might be less interest within the system to see an

² Reference was made to *Jaloud v. The Netherlands* (ECHR, 2014), Concurring Opinion of Joint Concurring Opinion of Judges Casadevall, Berro-Lefevre, Šikuta, Hirvelä, López Guerra, Sajó and Silvis

independent investigation. It was noted that the issue of good faith implementation would be an important issue to discuss in the second session regarding how NGOs and other civil society actors monitor and critique state investigations, but that this is separate from the question of what the standards of investigation should be in the first place.

Session 2: Engaging, monitoring and critiquing state investigations

The second session sought to examine the constraints faced by NGOs in monitoring and critiquing state-led investigations, and to examine best practice with a view to identifying strategies to strengthen NGO practice in this area. During the opening remarks, reference was made to the different strategies employed by states to avoid scrutiny of their investigations, including keeping information out of the public domain (citing privacy concerns, national security considerations or the fact of an ongoing criminal investigation); destroying archives; discrediting those making allegations; delays. States also use public relations and the media to avoid scrutiny of investigations and/or to counter calls for investigations, by arguing that only a few “bad apples” were at fault – there was no systematicity; the complexity of the conflict-context mitigates against investigations; it will lessen the morale of troops. These avoidance techniques are important challenges that civil society actors face when monitoring or engaging with state investigations.

Throughout the session, multiple participants cautioned against considering the military and the state as a monolithic unit that carries a singular agenda and practice, as the attitude with respect to carrying out investigations may be highly variable depending on the body being engaged. It was also mentioned that in many cases, given their narrow mandates, military lawyers may be more focused on criminal and administrative accountability rather than state responsibility under international law. This underscores that the latter may therefore require extra emphasis and attention. The importance of differentiating between problems of structure and process versus good faith implementation in practice, was also noted, so as to direct critiques appropriately. In this context, participants discussed where small NGOs seeking to turn their research into policy or safeguarding guidance should direct their efforts, given the multifaceted nature of the military.

The challenges associated with the extremely varied practice relating to the conduct of military investigations was also discussed. One participant identified such variances as a challenge, which made it difficult to identify the overall character of the body of practice. This, in turn, makes it difficult for NGOs seeking to provide relevant recommendations on how to adjust best practice. Also, command climate was discussed as an important factor which sent signals about the relative importance placed by the command on carrying out investigations and fact-finding within a particular operational context. One participant noted that in their experience, many ground force commanders see investigations as very useful for both fact-finding as well as record-keeping in the interest of exculpating their forces from wrongdoing. This, however, would not always be the operating command climate, and it would be relevant, though challenging for NGOs carrying out monitoring to assess the conduciveness of the command to receiving allegations and carrying out effective investigations.

The type of language used and manner in which NGOs introduce standards of effectiveness in carrying out investigations to states and militaries was identified as an important factor in the level of engagement achieved. Certain participants noted that it was useful to talk to the military about investigations from the broadest interpretation about what the term could actually mean, including assessment, record keeping and recording through to the actual conduct of the

investigation itself. Participants also noted that highlighting the ways that certain aspects of the investigation, such as systems of recording, are in the best interest of the military can lead to greater receptivity. Others cautioned that potential over-reaching with regard to presenting legal obligations of states in investigations, may be counter-productive, especially in light of the lack of actual detailed obligations in IHL. It should be recalled, however, that human rights law (particularly in respect of the conduct of investigations) has been held by some courts to apply to certain (though not all) violations occurring in the context of armed conflict.

Participants also raised that militaries generally have a strong preference for their own sources of information and assign very low probative value to external information. This is sometimes reflected in their procedures where militaries are not seeking out channels to access external sources of information or are not following up on individual civilian complaints and other direct interactions with civil society. This was suggested as one area in which civil society could have a significant impact by pushing states to develop improved systems for receiving and assessing external information and allegations. Participants also mentioned that given the amount of information being collected by NGOs during armed conflicts, they could seek more often to trigger investigations by the state, which may require a relatively low threshold of evidence. Others emphasized the importance of NGOs triggering investigations for future criminal trials, with reference to the value that NGO reports submitted to confront states before the UN or regional human rights mechanisms had in ICTY trials. It was offered as an example of best practice that NGOs try to establish connections with specific liaison officers or contact points within militaries in order to communicate externally gathered information. There may well be protection concerns, however, that may militate against sharing information, which civil society should be taking into account.

Participants also discussed issues related to the promptness, thoroughness and transparency of an investigation. It was noted that demands for promptness from the state carrying out the investigation can sometimes result in it being carried out too quickly, and that both promptness and thoroughness need to be emphasized simultaneously. Transparency was also mentioned as a challenge when militaries shield themselves against external allegations by reference to undisclosed intelligence that civil society cannot access. One suggestion for improving transparency was to remove some of the taboo surrounding investigations which creates a sense that if an investigation is being carried out, it necessarily means that the state has committed a violation. It was posited that giving attention to investigations which are carried out effectively by the state, even when they find no wrongdoing, as opposed to only publicizing incidents where the state has committed a violation may help in this regard.

One way that participants felt NGOs could improve state practice in the conduct of investigations was by advocating for better recording and monitoring processes within the military. It was discussed that as there is very little from an IHL perspective in terms of law that requires states to record what they do, this being inferred from an implicit duty to investigate, NGOs and civil society actors should emphasize not just that states need to record information about their operations, but also how and what they need to record. It was mentioned that recording and storing communications which are already taking place so that they are accessible will be

significant progress with respect to the effectiveness of investigations. Similar to earlier discussions of the language that should be used when engaging with militaries, it was raised that more rigorous recording processes can be presented as something which is, in fact, in the best interest of the military for a multitude of operational and legal reasons. Others raised the issue of recording information in a multinational coalition setting, and what information needs to be included in order to effectively capture the complexity of a more dynamic operational context. Participants discussed that recording applicable rules of engagement, targeting packages, electronic communications, and post-mission debriefs would be effective under most circumstances. Participants also noted the importance of monitoring systems alongside of recording processes to review records and reports on a regular basis and make connections to identify systemic problems. This was identified as something which many states do not do consistently or at all and should be emphasized in recommendations towards improving state practice.

A number of best practice examples were suggested regarding civil society engagement with state investigations. Participants also highlighted the need for interdisciplinary collaboration with other NGOs and members of civil society in order to bring in the expertise needed to effectively monitor state investigations. The value of forensic expertise in critiquing state processes for evidence gathering was specifically mentioned. The role that PHR, TRIAL International, and other NGOs played in the Kavumu military trial³ in the Democratic Republic of the Congo was also offered as an example of best practice of different NGOs working in collaboration to develop capacity and provide specialized knowledge within an investigation. The question was also raised as to how NGOs respond to states or other civil society actors who request access to information they have collected or gained access to. Participants noted that the informed consent of the sources of that information in the case of witness or victim statements should ultimately be the deciding factor. Finally, it was suggested that one matter for follow-up might be to collect and distribute additional examples of NGO best practice on these matters.

³ See <https://phr.org/news/landmark-kavumu-appeal/>

Session 3: Challenges and strategies in conducting external investigations

The third and final session addressed the issue of how civil society actors can carry out effective external investigations, particularly when they do not have access to information regarding the decision-making processes behind a particular incident or operation. Also considered was how can they investigate in such a way that will lead, where feasible, to positive and constructive engagement from militaries. Opening remarks highlighted the need for NGOs to first identify the proper legal framework for an investigation, as this is essential for determining the facts and legal analysis that will need to be established. It was suggested in this context that demonstrating clear violations of IHL from individual attacks will always be difficult given that evidence related to the potential crime, such as expected collateral damage or precautions taken in attack, will in most cases not be available. Thus, investigations may do better to focus on problems of process related to policies and systems within the military that may not be functioning properly. Engaging states in dialogue about flaws in their targeting processes, systems for evaluating human intelligence, or conduct of proportionality assessments for example might not indicate whether a particular act was unlawful, but it can lead to future implications of responsibility for a failure to take precautions in avoiding a foreseeable outcome.

Much of the conversation addressed the different methodologies employed by civil society actors when collecting evidence as part of an investigation into an incident. Participants identified that testimonial evidence collected from eyewitnesses and survivors, physical evidence from the scene of the incident, documentation of injuries, as well as more recently photographic and video evidence all play a role in investigations. They also identified challenges in evidence gathering related to accessing the sites of military operations or the country where the conflict is taking place, a lack expertise in different forms of information gathering and analysis, a lack of transparency from militaries, threats to witness safety, and disagreement over applicable legal norms.

A number of participants referred to the potential of open source information to overcome challenges of access due to security concerns or where a state denies access to investigators, as well as issues of witness credibility. Others mentioned that civil society initiatives providing tools and training for documenting incidents to those impacted by a conflict can be an important means of increasing the amount of information and evidence available to organizations carrying out investigations. It was noted, however, that open source information should always serve as an additional layer of evidence within an investigation and is most effective when paired with more traditional investigative techniques. While acknowledging the limitations of these techniques, participants suggested that it can in some cases give NGOs more credibility in their engagements with states if they can provide credible visual evidence of an incident supported by geospatial analysis. Although, others cautioned against the potential for this to undermine traditional investigations if states and the general public begin to demand this type of information and analysis in all cases. Participants also discussed examples where organizations have employed other technologies such as machine learning tools to gather open source material

and interactive digital platforms to present photographic and video evidence in trials or public advocacy efforts. Participants also noted that open source information can be extremely useful for establishing pattern-based evidence such as identifying and linking multiple incidents that demonstrate a wider, systemic issue. Others noted that this type of information would also be very useful in civil proceedings based on the failure to take precautions in attack. However, the capacity and expertise needed to carry out effective open source investigations was acknowledged as a challenge, particularly for smaller NGOs.

Many participants stated that collecting testimonial evidence from witnesses and victims is still a crucial part of their investigation methodology. However, issues were raised as to the negative consequences of this methodology, particularly regarding the over-documentation of certain conflicts which can result in the collection of multiple and inconsistent statements from witnesses and creates significant challenges for future criminal trials. Participants also raised that over-documentation is not only damaging to the justice process, but first and foremost is damaging to victims and witnesses themselves. It was also discussed that part of the issue of over-documentation results from a lack of collaboration amongst NGOs conducting investigations within a particular conflict and that while larger international organizations generally have strong and clear policies on how to carry out investigations, smaller NGOs tend to have more variable practices. Participants mentioned examples of initiatives for coordination and information sharing between NGOs, such as joint initiatives, establishing a coordination task force amongst NGOs working on a particular conflict, and establishing minimum standards of effective and responsible methodologies. Participants suggested a need and duty within NGOs to evaluate what has already been established through prior investigations and identify gaps that they can contribute to given their particular expertise.

Participants also raised that oftentimes, the challenges that organizations carrying out investigations face are not related to a lack of information, but that in fact, in many conflicts evidence of violations is abundant and what needs attention is what is done with this evidence after it is collected. It was suggested that part of this issue may stem from NGOs failing to identify the information that is necessary to achieve a particular mandate or outcome at the beginning of the investigation and consequently investing unnecessary time and resources into gathering and proving the information. Another challenge identified in investigations related to the conduct of hostilities is a case when the NGO has information that an incident occurred but does not have access to the intelligence which would explain the possible reasons or motives for it. Also, how should NGOs frame this information in their advocacy efforts and engagements with the state. Participants cautioned against making inferences as to why an incident happened when not all of the necessary information is available, out of concern that states may use this as an excuse to discredit the investigation and disengage from it. In this context, the lack of good will on the part of states in working towards greater transparency and releasing relevant information was discussed as a significant barrier to the effectiveness of external investigations.

Throughout the session, participants also discussed how to overcome larger disagreements between NGOs or between NGOs and the state, about legal norms, such as what constitutes direct participation in hostilities, when engaging in advocacy and critiquing the state. It was noted

that there is sometimes a perception that it is not worth investing time and resources into certain types of IHL violations for which there is significant disagreement over the legal interpretation, but in some cases, NGOs in formulating their own conclusions may just need to take a position within the legal debate and refute that of the state with facts and evidence. Others suggested demonstrating inconsistencies between state practice and the policies described in military manuals as a strategy for addressing contentious legal issues.