THE INAUGURAL MAJOR GENERAL JOHN L. FUGH SYMPOSIUM ON LAW AND MILITARY OPERATIONS

INVESTIGATING MILITARY OPERATIONS: ADDED VALUE OR ADDED HYPE?

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I. Introduction and Symposium Construct

On May 17, 2011, the Center for Law and Military Operations at The Judge Advocate General's Legal Center and School (TJAGLCS) hosted the inaugural Major General John L. Fugh Symposium on Law and Military Operations (Symposium).[1] The Symposium examined the trend towards the externally imposed and mandated investigation, analysis, and reporting on, of operations conducted by a nation's armed forces ("third-party investigations").[2]

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[1] The Inaugural Major General Fugh Symposium on Law and Military Operations, Investigating Military Operations: Added Value or Added Hype, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia (May 17, 2011). The Fugh Symposium commemorates the name and memory of Major General John L. Fugh, who died in May 2010. General Fugh was the first Chinese-American general officer in the U.S. Army and served as the Judge Advocate General of the Army between 1991 and 1993. Prior to that, he served in a wide variety of assignments, including the Military Assistance Advisory Group for China, Legal Advisor to the Ballistic Missile Defense Office, Staff Judge Advocate for the Third Armored Division, Legal Advisor to the Assistant Secretary of Defense for Manpower and Reserve Affairs and Chief of Army Litigation. After retirement, MG Fugh held high-level executive positions in the defense industry and was a member of the "Group of 100," a non-partisan organization of Chinese-American leaders chartered to foster a positive dialogue and build relationships between China and the United States.

[2] For ease of reference, this article utilizes the term "third-party investigations" to identify an investigation into the conduct of military forces that is not carried out via the military's own internal investigation process.

This article summarizes the Symposium's dominant themes and is structured as follows. Part II discusses the multi-faceted nature of third-party investigations. Part III considers the genesis of an investigation and its associated mandates. Part IV focuses on investigation methodology, with Part V discussing the Symposium's views on whether third-party investigations deliver "added value or added hype." Part VI analyzes the second-order effects that investigations can produce. Section VII briefly articulates seven investigation challenges identified by the Symposium participants. Finally, Part VIII presents some of the Symposium's conclusions.

The Symposium centered around the conduct of international, national, and non-governmental organization (NGO) investigations such as the United Nations' (UN) "Goldstone Commission" into Israel's 2006 Operation CAST LEAD in the Gaza Strip; the International Independent Investigation Commission's (IIIC) investigation into, and indictments stemming from, the assassination of Prime Minister Rafik Hariri of Lebanon; the activities of the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR); and NGO investigations into the use of landmines and cluster munitions and their contribution toward the Mine Ban Treaty[3] and Convention on Cluster Munitions.[4]

Forty-eight experts from around the globe participated in the Symposium, to include members of the American, Israeli, Canadian, German, and British armed forces; academics from noted American institutions; representatives from the Departments of Defense, State, and Justice; and NGO members. Five panelists spoke of their personal involvement in, and perception of, third-party investigations.[5]

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[3] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 26 U.N.T.S. 5.

[4] Convention on Cluster Munitions, May 30, 2008, 26 U.N.T.S. 6.

[5] Bonnie Docherty, a lecturer at Harvard Law School and senior researcher at Human Rights Watch (HRW), spoke on HRW's field work into the use of cluster munitions in warfare. Beth van Schaack, professor at Santa Clara Law School, spoke on her involvement as the Legal Advisor for the Documentation Center of Cambodia investigating the Khmer Rouge's abuses. Colonel Sharon Afek, Deputy Military Advocate General (MAG), Israeli Defense Force (IDF), spoke on the IDF's experience of being the subject of international investigations. Professor Larry Johnson, Columbia Law School and former Assistant Secretary-General for Legal Affairs at the United Nations, spoke on the UN's Charter-based mandate to conduct international investigations and the UN Secretary General's role in the process. Finally, Ambassador Stephen Rapp, U.S. Ambassador-at-Large for War Crimes Issues, shared his experiences and thoughts on this

The Fugh Symposium's intent was to debate the *realpolitik* behind third-party investigations in order to understand whether they do, in fact, add value, or simply add to the "hype" surrounding a high profile event, and what second (or third) order effects flow from them. The panelists did this by juxtaposing theoretical academic issues within the pragmatic context of real world investigations. Similarly, the varied backgrounds and experience of the Symposium delegates ensured that the debate was factually based, searching in its direction and pragmatic in its conclusions. Taken together, the presentations and the debate added to the understanding, empathy and respect that the panelists and delegates felt for their fellow Symposium attendees - notwithstanding whether the attendee wore a uniform or a suit, represented an NGO or a government, or were, historically, viewed as being "on the other side" of the debate.

II. Investigations: Ubiquitous and Multi-Faceted (and Messy)

As night follows day, whenever a military operation hits the headlines (typically for the reason that "something" appears to have gone wrong), the cry for an independent and impartial investigation quickly follows. It is an increasingly loud cry. Understanding the rationale behind the cry often will depend upon from where it emanates. Anecdotally and historically, to misquote Nelson Mandela, where you stood in relation to the call for such an investigation depended upon where you sat in your day job. If it was an NGO chair, you were in favor. If it was a military chair, you were not. In essence, third-party investigations were typically viewed as a zero sum game by both sides to the debate.

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subject, borne from his personal involvement in a number of international criminal tribunals, including the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda. Professor Geoffrey Corn, a former U.S. Army Judge Advocate and current professor at South Texas College of Law, moderated the panels. Notwithstanding their professional affiliations, unless indicated otherwise, the Symposium panelists and attendees spoke on their own behalf, and their views do not necessarily reflect the views of the organizations with whom they are affiliated. Additionally, the use of the term "panelist" in the prose is intentional and is done for purposes of non-atrribution.

Few would deny that third-party investigations are becoming increasingly common. Wherever you stand (or sit), and whether you are primarily driven either by the requirement to accomplish the military mission, or to protect the humanitarian interests that are affected by military operations, it is critical to understand the role that such investigations play, the primary issues that they involve, and the second order effects they produce.

There is no better place to start than with the scene-setting words of Professor Beth van Schaack, who explained:

> I think that we just have to accept at this point in time that there will be multiple investigations into any major incident, right? Information is just too ubiquitous, everybody's got a helmet cam; there's Wikileaks; there's journalists embedded; there's NGOs crawling around. So, it will be inevitable that you may have an NGO investigation. You may have national/territorial state investigations, but you've also got universal jurisdiction, so you may have other national states opening investigations. The UN or the Security Council may appoint a body or a special rapporteur; you may have an official commission of experts that gets appointed through the UN. And they are all operating under different standards, different evidentiary rules. How are all these going to work together and reach any sort of conclusion? It's going to be messy. I think we have to accept it's going to be messy.[6]

The messiness inherent in multiple, overlapping investigations can easily rise to the level of chaos, partly because no two investigations are alike. Even the nomenclature used to describe investigations invites confusion: investigations are conducted under the auspices of Panels of Experts, Panels of Enquiry, International Independent Fact-Finding Missions, Commissions of Enquiry (sometimes "International," sometimes not), Criminal Tribunals, not to mention plain old Army

[6] Although the Fugh Symposium was conducted under the non-attribution policy applicable to most events at TJAGLCS, the author is grateful to the panelists for agreeing to a select number of exceptions to the policy.

Regulation 15-6 investigations[7] and common military (or civilian) criminal law investigations. These different forms of investigations compete on the same, crowded, investigation playing field, often resulting in multiple investigations of the same incident. Notwithstanding these differences, the Symposium's dominant themes provide a structured format within which to consider this subject.

III. A Responsibility to Investigate, an Investigatory Response, or Individual Self Interest?: The Genesis of an Investigation and its Associated Mandate

Typically, it is the facts of a situation, or perhaps, more accurately, the *perceived* facts, that will generate the calls for an investigation. In circumstances where there is an alleged violation of international humanitarian law (IHL), the definitive view of one of the panelists (which did not provoke dissent) was that the requirement for an investigation was a legal *duty*, not simply a moral *responsibility*. Not only was that duty implicitly prescribed in the Geneva Conventions,[8] but it also was viewed by the panelist as constituting customary international law. In such circumstances, the focus of the debate has moved largely on from "whether" to investigate, to "by whom" and "how" the investigation should be conducted. In addressing the second question, the panelists' starting assumption was that the duty suggests the requirement is for an internal, rather than a third-party, investigation. However, before "by whom" and "how" (or "how many") questions are assessed, it is important to fully understand the considerations that factor into the "whether" to investigate question. Doing so helps recognize that even if the duty is fulfilled by way of an effective military investigation, it is naïve to believe that this will abate the call for other third-party investigations.

In addition to those circumstances for which an internal duty to investigate exists, the Symposium highlighted a number of other factors that may provoke the call for a third-party investigation. For instance, NGOs often will conduct investigations in order to highlight a particular

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[7] U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS 13 (2 Oct. 2006).

[8] *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 75 U.N.T.S. 3. All four Geneva Conventions, as well as Additional Protocol 1 to the Geneva Conventions, have similar provisions.

humanitarian cause, as well as to document violations of the law. The Human Rights Watch (HRW) investigations into the use of cluster munitions provided just such an example. While the use of cluster munitions, especially in populated areas, raises *jus in bello* concerns from some audiences, few would argue that the use of cluster munitions is, *per se*, a crime or violation of *jus in bello*, whether under customary international law, or (prior to the 2008 Convention on Cluster Munitions[9]) by virtue of any treaty obligation. It would nevertheless be perfectly logical that an organization such as Human Rights Watch (HRW), with its focus on the protection of civilians during armed conflict (rather than the effectiveness of a specific military operation), would wish to study and publicize the use of such munitions, and the impact that they have on the civilian population during and after a conflict situation. A number of Symposium participants credited HRW investigation reports from countries such as Afghanistan, Iraq, Lebanon, Israel and Georgia on raising awareness about cluster munitions and helping to change laws and policies at the national and international level that govern their use.[10]

Other third-party investigations are driven by the national policy and law of the country *doing* the investigating. Those investigations can be internally or externally focused. The investigations conducted by the Documentation Center of Cambodia in Cambodia (DC-Cam) are an example of the latter. The DC-Cam had its genesis in the Cambodian Genocide Justice Act, a U.S. Act of Congress.[11] That legislation spelled out U.S. policy "to collect, or assist appropriate organizations and individuals to collect relevant data on crimes of genocide committed in

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[9] *Supra* note 4. *See also* Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, *Convention on Cluster Munitions*, May 30, 2008, CCM/77, *available at* http://www.unhcr.org/refworld/docid/4843e59c2.html (last visited July 20, 2012).

[10] It was noted that the concerns reflected in HRW investigations and reports for a comprehensive cluster munitions ban, the removal of a "self destruct" exception, remedial measures, clearance requirements, and victim assistance were reflected in the Convention on Cluster Munitions. The victim-centered approach adopted by HRW had been reflected in over a decade of reporting and civilian victim testimony, with the reported testimonies being supplemented at the preparatory and negotiating conferences by civilians who were able to give first-hand accounts. Although not discussed during the Symposium, the influence that such a cumulative depth of investigatory reporting brings should not be underestimated. As such, in order to generate the positive benefit that multiple investigations were viewed as providing, armed forces may wish to consider whether to address, on a report by report basis, any perceived inaccuracies or institutional bias that third-party investigation reporting generated.

[11] Cambodian Genocide Justice Act, 22 U.S.C. § 2656, pt. D, secs. §§ 571–574 (2006).

Cambodia."[12] Although constituted under U.S. domestic legislation, the nature of DC-Cam's investigations required it to be cognizant of international crimes, as well as the sort of evidence needed to prove them.[13]

Domestic legislation and policy also drive *internal* third-party investigations, where state appointed non-military bodies investigate allegations of violations of the law by its own armed forces. The public enquiries conducted in the United Kingdom about the conduct of its armed forces in Iraq are demonstrative of that phenomenon.[14] Those enquiries augmented the more routine process, whereby a military investigation would be used to investigate allegations about improper or illegal military conduct.

Sometimes, the call for an external third-party investigation emanates from the nation most closely connected to the incident being investigated. The United Nations' Commission of Inquiry into the death of Prime Minister Benazir Bhutto of Pakistan came at Pakistan's request. Such a call may follow an earlier domestic investigation, particularly when an interested party views the earlier investigation as being flawed or inadequate.[15] The International Independent Investigation Commission into the death of Lebanese Prime Minister Rafik Hariri (the Hariri

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[12] Central to this mandated task was a process to document crimes committed as a part of that genocide and to share that evidence with any domestic or international tribunal that had jurisdiction over those crimes. The Documentation Center of Cambodia in Cambodia (DC-Cam) other roles relate to legacy recording issues, victim trauma and mental health advocacy, educational and outreach work (including legal training on the procedures and outcomes of the Extraordinary Chambers in the Courts of Cambodia (ECCC) and rule of law principles at large), and the recording of interviews with certain people who, although involved in the genocide, fall below the prosecution's threshold for bearing the greatest responsibility for it (the latter role suggests a truth commission element to DC-Cam's investigatory remit).

[13] *E.g.,* Evidence tending to prove the specific intent of the crime of genocide. This element was of particular interest in Cambodia due to the nature of the genocide being political, rather than, necessarily, national, ethnical, racial, or religious in nature. Similarly, and importantly for the investigatory mandates of third-party investigations, war crimes charges require, amongst other matters, the existence of an armed conflict and a nexus between the act in question and the armed conflict.

[14] E.g., The Aitken Report. An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004, Jan. 25, 2008 and the subsequent report by Sir William Gage, Baha Mousa Public Enquiry Report, HC 1452-1 (Sept. 9, 2011).

[15] Lebanon's initial investigation into the death of Prime Minister Rafik Hariri had been viewed by a United Nations-led review of its findings as being "seriously flawed." *See* http://www.un.org/apps/news/story.asp?NewsID=20690&Cr=leban&Cr1. Please provide a copy of this news story.

Investigation) exemplifies such a view, demonstrating the possibility for variations even among this particular type of investigation. The call for the Commission came from the Lebanese Government and was reinforced by a concurrent United Nations Security Council (UNSC) Chapter VII resolution.[16] Sometimes the request for external engagement may appear less than sincere. Some commentators question Sri Lanka's call for investigations in the wake of the 2008-09 campaign against the Liberation Tigers of Tamil Elam in this respect. In that case, the "joint" statement of the President of Sri Lanka and the United Nations Secretary General speaks volumes about the accountability process needed to address allegations of IHL and human rights law violations in that campaign.. As Professor Johnson wryly pointed out during the symposium, it was a joint statement that will "go down in the annals of joint statements for saying nothing jointly."[17]

The mandate given to various United Nations bodies often will have an investigatory element to them. Professor Johnson's thoughtful analysis of UN bodies, and their mandates, included those that emanated from the UNSC, the Human Rights Council (HRC), and its predecessor, the Commission on Human Rights. The Chapter VII basis for a Security Council-mandated investigation can provide enhanced powers and legitimacy to the investigatory bodies created. Both the ICTY and the ICTR were investigatory and prosecution tribunals created by UNSC Chapter VII resolutions. For example, those mandates provided the tribunals' respective prosecutors the power to order countries to turn over documents or individuals to the court. Those orders are seen as having the force of law behind them. Both these tribunals had a pure IHL mandate, dealing as they were with allegations of serious violations of that body of law. Human Rights Council/Commission-mandated investigations have included inquiries into events in Sudan, Gaza, Libya, and Cote d'Ivoire.[18] Not surprisingly, the mandates in these cases have human rights law elements to them; the latter two exclusively so. Hybrid versions of these UN-created tribunals and commissions also exist,

[16] S.C. Res 1664, U.N. Doc. S/RES/1664 (Mar. 29. 2006).

[17] U.N. Secretary General, Joint Statement by UN Secretary-General and the Government of Sri Lanka, U.N. Doc. SG/2151 (May 26, 2009), *available at* http://www.un.org/News/Press/docs/2009/sg2151.doc.htm.

[18] The Human Rights Council-mandated investigation into allegations of serious abuses and violations of human rights in Cote d'Ivoire, Libya and Sudan should not be confused with the separate Security Council referrals to the International Criminal Court relating to these countries.

whereby the investigation is conducted in accordance with an agreement between a specific State and the UN.[19]

In some circumstances, it is the United Nations Secretary General himself who will establish a fact-finding or investigative mission. That role is provided for in the UN Charter.[20] Indeed, one panelist suggested, in a lighthearted manner, that this may be the only substantive job that the Secretary General has under the UN Charter—his other roles being no more than would be performed by the Chief Administrative Officer of any large international organization! Although undoubtedly having the power to mandate such an investigation, and having historically done so, it is now more likely that the Secretary General's decision to call for an investigation would likely be buttressed by a General Assembly or, preferably, UNSC Chapter VII mandate. Given that a Chapter VII mandate will, by its nature, likely relate to situations that the Security Council views as threats to international peace and security, that fact underscores the importance the international community places upon such investigations.

In other circumstances, it is a United Nations Special Representative (UNSR) or Special Rapporteur who will *call* for an investigation into a specific incident or systemic situation. The recent call by the UNSR for Children and Armed Conflict to review the precautions necessary to prevent children from becoming casualties in Afghanistan is a case in point. However, whether those calls actually translate into a UN-sponsored investigation is not a foregone conclusion.

Of course, no current discussion about third-party investigations could fail to consider, in some detail, the Goldstone Commission's Report,[21] its mandate (rooted in both IHL and human rights law), findings, and fallout. One of the issues raised in that context, but which has implications beyond the confines of that specific investigation, was

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[19] *E.g.*, The ECCC was borne out of an agreement between the UN (General Assembly) and the Royal Government of Cambodia. *See* G.A. Res 52/135, ¶ 16, U.N. Doc. A/RES/52/132 (Dec. 12, 1997).

[20] U.N. Charter art. 99, *available at* http://www.un.org/en/documents/charter/chapter15.shtml ("The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.").

[21] *See, e.g.*, Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009).

Israel's capacity to conduct its own investigation. Investigating the adequacy of a state investigation is a familiar concept to those who follow European Court of Human Rights (ECtHR) jurisprudence. Notwithstanding the possibility of such an investigation, the general consensus during the symposium was that this line of investigation went beyond the Goldstone Commission's mandate.

IV. Methodology, Investigatory Protocols, and Standards of Investigation—A Minimum or Minimal Acceptability?

Assuming that there is, indeed, a duty to investigate, it would be logical to further assume that that duty has to be discharged against certain agreed standards. The Symposium debate made clear that the standards applicable to investigations, rather than the duty to investigate itself, are more problematic to identify and agree upon. The argument historically has been divided between an IHL and a human rights law basis for investigations. That divide, though, is becoming less clear-cut and more theoretical. The reality is that investigations, such as those conducted by the office of the prosecutor at the Special Court for Sierra Leone, often require both IHL and human rights jurisprudence to be considered. To blithely surmise that the military is concerned with IHL, and human rights organizations with human rights law, clearly ignores that reality.

For instance, the recent development ofECtHR jurisprudence has demonstrated the increasing impact that human rights principles can have on military forces. The nature of coalition operations means that forces outside the legal jurisdiction of a particular human rights convention also may be impacted by those principles. This will increasingly require forces to understand, contemplate, and operationalize their plans with more than just a passing nod to human rights principles. Similarly, some human rights organizations are mandated to specifically consider IHL and human rights law considerations in their field investigations. Indeed, one panelist suggested that, in light of the current comingling of IHL and human right law, willfully ignoring one camp was tantamount to essentially forum-shopping for the most favorable legal regime, with the rule of law largely suffering as a result.

What seems to unite the IHL and human rights camps is their commitment to the duty to investigate. The Symposium heard how Operation CAST LEAD resulted in the IDF receiving and examining

more than 400 allegations of IHL breaches, with the investigations lasting considerably longer than the three-week Operation. As panelist Colonel Afek pointed out, that level of investigatory commitment, coupled with being on the receiving end of another party's investigation, consumes many resources.

It is all too easy for investigations, from whatever source, to be disparaged by generic criticisms about their inadequate and opaque methodology. Some NGOs publish their methodology.[22] Bonnie Docherty's explanation of HRW's field mission methodology provided interesting detail and transparency in this respect.[23] That methodology was, in part, driven by HRW's investigatory focus—i.e., the analysis of the effects of armed conflict on civilians (which, among other factors, involves an IHL compliance assessment). Human Rights Watch researchers refer to the process that they undertake as "Humanitarian Battle Damage Assessment (BDA)." By way of comparison, Ms. Docherty suggested that the U.S. Department of Defense's BDA definition[24] indicates that a military investigation is more focused on establishing the (military) effectiveness of a specific military operation by looking at the enemy's post-strike capabilities.[25]

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[22] *See, e.g.*, *Human Rights Watch* publishes its research methodology on its website. Human Rights Watch, *Our Research Methodology*, *available at* http://www.hrw.org/node/75141.

[23] The integrity of HRW's investigations was demonstrated by a detailed discussion of their attributes: the personnel used (two-to-three person teams with IHL, human rights and relevant military experience, as well as country-specific experts); types of evidence collected (physical, testimonial and documentary), and from whom; and measures taken to minimize evidence loss. The important role that the military plays in providing a complete picture for the HRW investigation was also highlighted. The military can provide, for instance, first-hand explanations of why targets and weapon systems were chosen, and of what precautions were or were not taken. That information will often illuminate military specific factors, perhaps relating to enemy force capabilities, which would otherwise not be readily apparent to the external investigating team. These may help explain certain actions that otherwise appear perplexing, at best, or controversial, at worst. In addition to talking to uniformed personnel, HRW interviews government officials, journalists, other NGOs and civilians witnesses, amongst others, in order to understand the details of, and rationale behind, what happened.

[24] JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (8 Nov 2010) (as amended through 15 Feb. 2012) (defining "battle damage assessment" as "the estimate of damage resulting from the application of lethal or nonlethal military force. Battle damage assessment is composed of physical damage assessment, functional damage assessment, and target system assessment").

[25] The ability to reduce the negative effects of armed conflict on civilians does, of course, enhance military effectiveness. As such, it is important to note that when an untoward

Although the panel accepted that some NGOs[26] gathered reliable and important information during their investigations, others did not appear to adhere to any recognized standards in their methodology or the conduct of their investigations and reporting. This caused particular difficulties when their reports called for criminal prosecutions, but the evidence produced did not meet the requisite standards that would support issuing a criminal indictment. Of course, not all military investigations would meet an international credibility litmus test, either. Even as one considers the possibility of agreed upon standards for third-party investigations, the question of whether it is possible to point to such widely held standards for worldwide military investigations is left unanswered.

In relation to military methodology, the Symposium heard that the IDF investigatory process follows a policy-mandated process to examine allegations. The process utilizes a "field"[27] investigation and a subsequent (or in some cases a contemporaneous) criminal investigation. That investigation will prompt a decision to close a case, issue an indictment or commence with administrative disciplinary procedures. The assessment of the field investigation routinely accountsfor any other relevant information relating to the incident under examination, including information received from third parties. Other members of the Symposium expressed the view that third-party and military investigations should be used to supplement, and not replace, one another. It was noted that the manner in which these respective investigations record, present and release material can often display a certain institutional bias (whether unwittingly or not). As such, when looked at in totality, the value generated by separate, multiple investigations was greater than the sum of their parts.

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incident has occurred, the focus of a military investigation will typically be upon establishing facts, determining whether or not IHL and rules of engagement have been complied with, and making recommendations about how best to avoid such an incident in the future. In such a case, a military Battle Damage Assessment may, or may not, *also* be conducted. For completeness, a complementary (or sometimes inbuilt) military investigation is often conducted in order to inform and assist the management of any post-incident claims process.

[26] *E.g.* B'tselem, *available at* http://www.btselem.org (last visited July 20, 2012). B'tselem is also known as the Israeli Information Center for Human Rights in the Occupied Territories.

[27] Also known as a "command" investigation.

Notwithstanding that a national investigation might incorporate allegations and information reported through other investigative vehicles, the IDF position remains that IHL provides their own investigators with an exclusive framework for conducting (including the duty to conduct) investigations of alleged violations of the law by its own forces. That framework is supplemented by certain tenets of international criminal law. This allows a state to not only hold accountable, and prosecute, those who have crossed "red lines," but also facilitates a learning process that can be used to enhance the conduct and efficacy of its application of military force.

Given that not only the IDF, but also many military forces around the world regularly conduct such investigations, it is necessary to ask whether these investigations can ever be viewed as being impartial, fair, and effective in their own right. And even if they are, would that obviate the need or impetus for investigations by outside organizations? The IDF position[28] is that their internal authorities are not only willing and able to perform such investigations, but also that the functional independence of their Military Advocate General (who in his professional capacity is answerable only to the Israeli Attorney General and the oversight of the Israel Supreme Court), their Military Police Criminal Investigations Division and the military courts safeguard the effectiveness of that process.[29] That process as used in the IDF investigations into Operation CAST LEAD, panelist Colonel Afek pointed out, did not make the IDF's investigatory authorities the most popular element of the IDF. That in itself is, perhaps, a good indicator of the diligence with which those authorities performed their duties.

Of note, and a further check and balance, the Symposium was informed by a panelist that whenever an IDF investigation into an alleged IHL violation is closed without an indictment being issued, the complainant is provided with a summary of the investigation's findings

[28] Given that the Fugh Symposium had an Israeli Military Advocate as a member of one of its panels, it was inevitable that many of the examples and comments centered on IDF practice. Although many other nations have internal (to the military) investigatory policy and legal requirements, the practice of those other nations was not specifically discussed during the Fugh Symposium.

[29] Following the three-week IDF Operation CAST LEAD, the IDF military investigatory bodies considered in excess of 400 allegations (including those made in NGO reports and media reports) of wrongdoing. That process resulted in fifty-two criminal investigations and, at the time of the Fugh Symposium, three criminal indictments. Israeli Defense Force, www.idf.il (providing further details).

and the grounds for the decision not to pursue criminal charges. This facilitates the complainant's ability to approach the Attorney General, and thereafter the Israel Supreme Court (which typically will review the entire investigation against recognized legal standards) with such requests as they deem appropriate. That review can, and has, resulted in investigations being re-opened and / or indictments to be filed or amended.[30]

Third-party investigations that are launched with the intent of promoting accountability (via a judicial mechanism) will need to contemplate the mandate and procedures of those bodies that have jurisdiction to try cases related to the incident. For example, the DC-Cam's investigations recognized that the ECCC would be prosecuting only high level officials, not foot soldiers. To that end, its investigatory terms of reference and methodology were necessarily slanted towards proving the different forms of responsibility for relevant offences, including, for instance, concepts of superior or command responsibility and joint criminal enterprise. Interestingly, the DC-Cam experience revealed that, although evidence collection will normally become increasingly hard with the passage of time, in some instances, the reverse is true. Cambodia is a case in point. Information that would have been hidden or classified earlier may be revealed with the passage of time; witnesses become more willing to speak when it is clear that the previous government will not return; mass graves are discovered; and journalists, academics, and historians have had more time to process an often substantial volume of raw material and evidence. This produces a clearer picture of events than may initially have been the case.

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[30] *See, e.g.*, HCJ 7195/08 Abu Rahme v. Military Advocate General (Isr.) [2009], *available at* http://elyon1.court.gov.il/files_eng/08/950/071/r09/08071950.r09.pdf. The case related to the close-range rubber-bullet shooting of a violent protester after he had been detained. Following a criminal investigation, the Military Advocate General (MAG) decided to prosecute the soldier who committed the shooting and his battalion commander for "conduct unbecoming." The petitioners (the victim and several Israeli NGOs) argued this offense did not adequately reflect the gravity of the alleged act. In a precedential ruling, the Israel Supreme Court accepted the petition, and in spite of the long-standing tradition of deference to prosecutorial discretion and the high threshold for judicial review thereof, ordered the MAG to re-file the indictment under more serious charges of the Military Justice Law.

V. Investigations: Added Value or Added Hype?

One question that arose throughout the discussion was that of whether third-party investigations add value, or just add hype. The almost inevitable conclusion: both.

Proponents of the position that investigations add value cite the likelihood that, in the fog of war, multiple investigatory sources will help "triangulate" the available evidence into a reliable conclusion. A multiplicity of investigations produces multiple voices and multiple sets of eyes which, in turn, add to the clarity of the picture being painted. One participant suggested that non-military investigating bodies, and NGOs in particular, may have better access to many civilian and "enemy" witnesses than a military investigation team. It was also suggested that the former are more likely to have the individual skill sets and cultural understanding required to produce effective witness statements from civilian witnesses and victims. On the other hand, military investigators will almost certainly have better access to classified information along with internal military information necessary for an informed assessment of considerations such as military necessity.

That is not to say that "the more the merrier" approach wins the day. The Symposium produced considerable agreement that a multiplicity of investigations could add to the confusion (with a "he said, she said" debate ensuing), undermine witness testimony (where multiple statements had been provided by individuals to different investigative bodies operating under different legal mandates[31]) or produce self-perpetuating factual claims that are not only unsubstantiated, but are also riddled with errors. After-the-fact attempts to correct those errors are akin to attempting to "un-ring" a bell.

Third-party investigations are also viewed as a way of ensuring or, more modestly, promoting accountability. Although the Symposium heard that the nature and success of the way by which the IDF is held to account by the Israel Supreme Court, it also was suggested that this may be a function of the Court's geographic proximity to the areas in which

[31] Witnesses (who may well be uneasy about giving evidence in open court, or who are simply baffled by the legal process they are a part of) can all too easily find themselves confronted, often in cross-examination, by multiple prior statements. In the absence of those witnesses being able to explain the differing auspices under which the multiple statements were given, it is not inconceivable that they may find their credibility, and the veracity of their testimony, being openly challenged in court.

IDF operations tend to be conducted. However, where the conflict occurs outside such a judicial body's investigatory jurisdiction, or where it does not exercise its powers in a comprehensive manner, third-party investigations may have comparative advantages.

Again, different perspectives can lead to different conclusions. Clearly, for those advocating for a particular cause, any responsible public investigation that supports that cause will benefit their campaign. That does not necessarily mean that the "other side" of the debate will not be able to benefit from such an investigation. Holding the military to account in relation to their IHL obligations may highlight, for example, how military effectiveness can be enhanced through improvements to the post-attack battle damage assessment process. Even where the initiation, conduct, and findings of an investigation are viewed as little more than political "state bashing," the state being "bashed" may be able to benefit positively from the report, whether by enhancing its own post-incident procedures in order to be able to counter such attacks, or by using a flawed investigation as evidence of the failings of the current lack of standards as part of its own campaign for better regulation and conformity to international standards for future reports.[32]

That said, simply by dint of repetition, criticism of a state's internal military investigation process can undermine the utility of this process in promoting accountability. If otherwise demonstrably effective military investigations are routinely castigated for politically motivated reasons, the military's and, potentially, the national legal system's credibility and role in upholding that public accountability can be undermined. In this respect, the point was well made during the Symposium that it was somewhat ironic that the more open and accountable a state is, the easier target it can become for critical comment. Those who use a state's openness as a means for criticizing the state's own processes have the potential to encourage a less open and transparent approach to investigations. Indeed, that approach becomes even more appealing when one considers the effectiveness of states that neither allow investigations by others, nor conduct them internally, in escaping criticism for egregious transgressions.

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[32] Following the Goldstone Commission's Report, the United Nations General Assembly adopted a resolution. G.A. Res 64/254, U.N. Doc. A/RES//64/254 (Mar. 25, 2010) (calling on both Israel and Palestine to conduct investigations that are independent, credible, and in conformity with international standards into allegations of serious violations of IHL and human rights law).

Clearly, the efficacy of a third-party investigation can be materially affected by the willingness of the nation being investigated to cooperate with the investigators.[33] A manifest unwillingness to cooperate can play into the hands of those who would seek to demonstrate a lack of accountability, and, inevitably, lend itself to conspiracy theory conjecture. Where state cooperation is not forthcoming, effective investigatory reporting should detail the attempts that were made to obtain information and appropriately caveat the basis upon which any conclusions were reached.

To cooperate or not to cooperate? That may be the question, but the answer is rarely easy to reach. The decision may be influenced by a variety of factors, from the state's perceived benefit of participating, to resource concerns. A government's decision may be driven by ideology (a rejection of the legitimacy of the investigating body, for instance), or a belief that the report will be biased against them, no matter what they do. Whatever the view, it will almost inevitably be influenced by the state's examination of the genesis, mandate, terms of reference, composition,[34] and independence that the third-party investigation brings with it.

The utility of a third-party investigation may go beyond an accountability or advocacy role. It may also become an independent resource to gather and preserve historical information for educational and reconciliation purposes. Their role in documenting the role and conduct of low level offenders may be of particular importance when relevant criminal tribunals are only mandated to prosecute those who bear the greatest responsibility for serious violations of IHL and human rights law. The value of that story-telling, or history-writing, will depend upon its completeness, the way in which it is told, and who is doing the telling. Some symposium participants were concerned about the increasing expectation that an international criminal tribunal will naturally perform a history-telling role. Trials traditionally have a very limited and specific purpose: answering the specific question of guilt or innocence of individuals for specific criminal acts, and it may not be appropriate, or

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[33] *E.g.*, By virtue of a refusal to provide requested information, or a denial of access to the *locus* in question.

[34] A view expressed during the Symposium was that if international fact-finding commissions and tribunals are going to be used to sit in judgment on the decisions of military commanders in complex operational environments, there must be some confidence that those sitting in judgment have the requisite background, not only in the law, but also in the operational art aspect critical to understanding why a commander may have reached a certain judgment.

serve the interests of justice, for trials to expand into broader efforts to collect and record historical information. Whether NGO field teams or military 15-6[35] investigations are more or less likely to record the full story is also open to debate. However, the Symposium debate appeared to endorse the contention that there is cumulative value in conducting alternative methods of investigation in order to provide a broader narrative to historical events.

The manner and timing in which the investigation report, or even the pre-report, is released is a further factor to consider in assessing the utility, veracity or efficacy of third-party investigations. The approach taken in this respect may well be driven by the underlying aims of those who have conducted or instigated the investigation.[36] If the objective of the investigation is to raise public awareness or to further policy advocacy during a specific armed conflict, real-time press releases and media commentary may be the best method. Advocacy directed at policymaking bodies may use long-term, in-depth published reports that have a more analytical content to them and are often replete with recommendations to warring parties, the international community and other third-party interlocutors. If the aims are understood, the methodology and timing of the information's release can be better targeted.

Finally, it was noted that some "third-party" investigations may, in reality, be nothing more than an element of the information operations campaign that one side to a conflict uses to undermine the morale, international community standing, and credibility of its adversary. No doubt, in such a case, any assessment of the investigation's tendency to add value (to the side promulgating it) will be directly proportional to the hype it produces.

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[35] *See supra* note 7.

[36] *E.g.*, To condemn, to deter, to promote accountability, to advocate for change (whether legal or otherwise).

VI. Second-Order Effects and Beyond

Quite apart from the immediate issues being looked at by third-party investigations, the potential for these investigations to generate second-order effects, and beyond, is clear. While some of those effects have been dealt with previously, others merit discussion.

Complementarity principle issues abound.[37] If an independent, or secondary, investigation reaches different conclusions to that which a state's investigation reached, does that automatically imply that the state's investigation should be viewed as not credible? Should a demonstrably competent military investigation and prosecution, under International Criminal Court (ICC) complementarity principles, prevent the ICC Office of the Prosecutor asserting his jurisdiction? Although it is probably too early in the ICC's jurisprudential history to form a definitive opinion on how the Court would respond to such investigations, two cases are worthy of note in terms of its practice to date. The (ongoing) *Lubanga* trial suggests that even where a nation's effective investigation, and indeed prosecution, is being conducted, the ICC's Prosecutor may choose to undertake his own investigations and prosecutions when a domestic investigation (and, in the case of *Lubanga*, prosecution) does not conform with the investigation and prosecution priorities of the ICC Prosecutor.[38]

The International Criminal Court Office of the Prosecutor demonstrated a different ICC complementarity approach in respect to certain Darfur-related cases. At first blush, it appeared that the Sudanese Government was proactively pursuing cases—by way of creating special trial chambers, appointing a special prosecutor, and referring to its various dossiers under investigation. However, the Office of the Prosecutor appeared to conclude that the Sudanese Government's actions were, at best, ineffective in holding those who were alleged to have committed the most serious of offenses to account or, at worst, were

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[37] *See, e.g.*, MOHAMED M. EL ZAHEIDY, THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW (BRILL 2008).

[38] The *Prosecutor v Thomas Lubanga Dyilo* is an ICC case focusing on the enlistment, conscription and use of child soldiers. Prosecutor v. Thomas Dyilo, Case No. ICC-01/04-01/06, Sentence (July 10, 2012), *available at* http://en.wikipedia.org/wiki/International_Criminal_Court_investigation_in_the_Democratic_Republic_of_the_Congo#The_Prosecutor_v._Thomas_Lubanga_Dyilo.

simply a smoke screen designed to keep the ICC at bay.[39] The corollary to its practice in Darfur, however, is the leeway the ICC has given to the Colombian *Fiscalia* to deal domestically with certain cases (notwithstanding the perception among some observers that the Colombian military is an organization that operates apart from the normal state oversight structure).[40]

The specter of ICC involvement in domestic cases is one that may loom large in the minds of those charged with the domestic requirement to investigate. Given the lack of ICC precedent to indicate how much leeway the ICC's Prosecutor will give to states to conduct their own investigations, it is not inconceivable that the potential for ICC involvement will affect the manner in which domestic investigations are conducted. It may be that the prospect of an ICC investigation alone will cause a trend towards more effective domestic investigations and a reduced need for the ICC (which in itself is one of the purposes of the complementarity principle). This could manifest itself in positive (open, diligent, and expeditious investigations) and negative (high profile, resource intensive, investigations and proceedings which are all smoke, and no fire) ways. It also may play on the minds of those charged (or who charge themselves) with conducting external investigations, or who are involved as experts, witnesses, or advisors to such investigations. Perhaps, however, if the concept of positive complementarity is one that should be promoted, a more efficient use of third-party assets would be to work with and build the capacity of those nations that do not have effective investigation and prosecutorial capabilities in the first instance.

Remaining in the realm of the ICC, but conceivably in the context of national, universal or extraterritorial jurisdiction prosecutions,[41] the Symposium considered the extent to which the ICC, and other international investigations, should be cognizant of the unpredictable results of the release of an indictment or critical investigation. Reports and indictments affect not only those implicated in the report or named on a charge sheet, but also the organizations and personnel who are engaged in ongoing developmental activities in a country involved. The ICC's indictment of sitting Sudanese President Omar Hassan Ahmad al

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[39] Press Release, UN Dep't of Public Information (June 8, 2011). *See* http://www.un.org/News/Press/docs//2011/sc10274.doc.htm.

[40] For a discussion of this issue, see http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/colombia/colombia?lan=en-GB.

[41] *E.g.*, A Belgian or Spanish indictment of an alleged despotic head of state.

Bashir (and its negative impact upon the work of the United Nations Mission in Sudan and other international organizations),[42] or the ICTY indictment of the (then) Prime Minister of Kosovo, Ramush Haradinaj,[43] are cases in point. Although a prosecutor inevitably would be cognizant of the potential impact, the view was expressed that the nature of a prosecutor's job (and in the case of the ICC, his United Nations Security Council mandate) was to identify crimes and suspects, investigate their circumstances, issue indictments, and prosecute cases. In fulfilling that role, a prosecutor might simply accept the consequences that follow, rather than concern himself with the developmental or complementarity effects that flow from that process.

The second order effects produced by an external "fact finding" investigation, as opposed to an external criminal investigation (by the ICC or another international criminal tribunal), also deserve consideration. Understanding which body (or bodies) of law is being applied by the fact finding investigation will be of particular importance in performing a comparative analysis of the efficacy of a concurrent or prior domestic investigation. In addition to the previously described problems that multiple conflicting accounts can give rise to, when an international investigation delivers headline-grabbing conclusions that appear to differ from the state's own account, the credibility of the latter's investigation and investigative mechanisms can sometimes erroneously or unwittingly be undermined. In moderating this element of the debate, Professor Corn made the point that (especially where a human rights-based investigation is at odds with one based on IHL) it is possible to erode the axiomatic understanding and principle that:

> [R]easonable doesn't always mean right. Under IHL, you can be reasonable and wrong. You can hit the wrong target, but you could have done it reasonably, where you have considered all the intelligence and information that you have. Instead, one is left with the sense that it is easy to look backwards, and, in retrospect, say, well, this is

[42] Prosecutor v Omar Hassan Ahmad al Bashir, Case No. ICC-02/05-01/09, Indictment (Mar. 4, 2009onth day, year). The ICC arrest warrants for crimes against humanity, war crimes and genocide. Further details available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109.

[43] Prosecutor v. Haradinaj et al., Case No. IT-04-84, Trial Judgement (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008), *available at* http://www.icty.org/case/haradinaj/4.

> what happened in any event. What are you going to do about that?" He went on to posit that sometimes the perfectly valid response to such a question would be, "We're not going to do anything about it, because we based our actions upon reasonable judgments [in accordance with the relevant law].[44]

The distinction between fact-finding missions and investigations that directly or indirectly lead to criminal prosecutions was itself a topic of debate. Fact-finding investigations conducted by otherwise reputable organizations can have a hugely detrimental, and unjustifiable, impact upon the individuals and organizations that are criticized.[45] This is particularly true when sometimes abstract legal distinctions,like the one referred to above, are not adequately understood by those who read the investigation's report. In view of this, an enduring theme of the Symposium, from the panelists and audience alike, was the need for international investigations to operate within an understood and transparent "regulatory" framework. Whether this is a realistic possibility is another matter, and, as has already been suggested, perhaps we must simply accept that "it's going to be messy." Unfortunately, for those who are denied justice as a result, that mess may be impossible to clean up.

VII. Challenges

The Symposium presentations and debate highlighted a number of challenges that need to be addressed. That said, the "need" is only there if one is willing to accept that third-party investigations are here to stay and/or that accountability for wrongdoing, or transparency generally, is a goal worth pursuing.

A. Political Agendas

There was widespread feeling that the validity of a third-party investigation is undermined if the investigators are suspected of having a political agenda. That suspicion alone, even without an obvious

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[44] *See generally supra* note 1.

[45] The example was given of IDF soldiers and officers who, as a result of a "fact-finding" investigation were subjected to verbal and written (graffiti and Internet) abuse branding them (without the due process of criminal proceedings) traitors and war criminals.

manifestation of such an agenda, is likely to frustrate the achievement of the goal.

B. Common Challenges

The relationship between third-party investigations and concurrent or consecutive military or criminal investigation at a technical level was a recurring theme throughout the Symposium. Some difficulties can afflict both processes. The harsh reality of conducting an investigation in a conflict or non-permissive environment is a case in point. The difficulties involved in obtaining access to the scene of an incident, whether it is during a conflict, or post-conflict, when the control over the location is disputed, should not be underestimated. That lack of access makes the crime scene susceptible to manipulation by other interested parties and makes disproving the impressions created by that manipulation extremely difficult, if not impossible. The difficulties of gathering physical evidence, obtaining timely autopsies, the re-creation of a crime scene, and conducting door-to-door inquiries, to name but a few, all affect the veracity and timeliness of an investigation. Physical accessibility apart, conflict situations have the very real capacity to produce both inadvertently one-sided or incorrect accounts[46] and deliberately untruthful witness testimony,[47] even assuming that relevant witnesses can, in fact, be identified and located in the first place.[48] These problems are compounded by the fact that there are few agreed upon third-party investigation standards on issues such as what constitutes corroborating evidence, what evidence should be considered definitive, or what standard of reliability and relevance should be used to determine what should go in, and what should be left out, of the investigation report.

[46] *E.g.*, The Symposium heard of one instance where a witness had testified that he thought he had come under aerial attack by planes, when it was known to the investigators that the attack in question had been launched from the ground.

[47] Third-party investigations will rarely have the inherent jurisdictional or procedural capacity to penalize those who may provide knowingly untruthful testimony.

[48] It is worth noting that third-party (often NGO) assistance in identifying and tracing witnesses, and taking their statements, was acknowledged as being able to enhance the efficacy of a military investigation.

C. Classified Information

Even if information is available, it may be classified and therefore not releasable. One of the Symposium participants made the point that much of the intelligence used in, for example, targeting decisions will fall into this category and, as a result, that it would be naïve to believe that any nation or coalition would be willing to undermine its security by routinely disclosing such information in order to either participate in or respond to a third-party investigation.

D. It's the Economics, Stupid

In the conflict environment, the diversion of scarce resources that will be needed to engage properly with a third-party investigation may not be viewed by commanders, with their focus on mission accomplishment, as good economics. That view may be more strongly held when the threat environment puts those resources at very real risk of death or injury, or when the rationale for the third-party investigation is itself disputed.

E. The International Threshold

No recognized, widely acceptable set of circumstances exists to help make a determination of whether any particular call for an investigation is justified. Identifying the litmus test or threshold circumstances indicative of the need for a third-party investigation would assist in legitimizing those investigations that pass the test, and vice versa. For instance, during the discussion on complementarity, the Symposium heard that HRW was more likely to call for an *international* investigation when the military force involved was being reluctant to aid them in their own investigative efforts. But one is forced to wonder why a state should necessarily be pressured into cooperating with an investigation that it believes will criticize it in any event? More fundamentally, a state that fails to employ its own legal system to investigate a threshold incident should be less than surprised to see that investigatory requirement being undertaken by others. Pre-existing investigations, whether military or otherwise, may also indicate whether additional investigations are of

nugatory benefit. The "Flotilla Incident,"[49] which spawned at least five investigations, was provided as an example of a case where motivations other than the desire for an unvarnished account may have contributed to the initiation of so many investigations. One possible threshold level suggested during the Symposium was when a necessity arises to investigate, and gather evidence of, serious violations of IHL, including crimes against humanity. A consecutive task may be that of ensuring that there was accountability for such crimes. But whether that would, of necessity, require an international lead or involvement would clearly depend upon the capacity and will of the national authority concerned.

F. Fact or Fiction?

The consequences when the investigation is flawed, and its findings are erroneous, are of particular concern. Third-party investigations often will have substantial legal and political effects and will carry much weight in shaping opinions. It was noted that other reputable bodies may use previous investigations as a factual source of information for future reports, with each repetitive telling, erroneous or truthful, increasing the perceived credibility of those claims. The impact on individual soldiers, commanders and their families who are implicated in this way can be profound. After-the-fact attempts to redress the balance of such an investigation's credibility are resource intensive and often of limited utility, particularly when the initial public interest in the incident has waned.

G. Jurisdictional Principles and Priorities

Where overlapping investigatory mandates arise, the suggestion was made that, in the absence of a bad faith or resource driven failure to properly investigate, priority should be given to national investigations. This is particularly relevant when such a national investigation is for the purposes of criminal prosecution. Symposium participants also raised concerns about the removal of evidence by competing investigations, or the taking of evidence, or confessions, without following domestic due

[49] A military operation by Israel against six ships of the "Gaza Freedom Flotilla" on May 31, 2010, in *international waters* of the Mediterranean Sea. *Q&A: The Gaza Freedom Flotilla*, GUARDIAN, *available at* http://www.guardian.co.uk/world/2010/may/31/q-a-gaza-freedom-flotilla (last visited July 30, 2012).

process requirements. Where third-party investigations allege criminal conduct, the methodology utilized by them for collecting,[50] securing, or accepting evidence, or discharging or meeting a burden of proof, must be properly documented and understood.[51] The ability to assess the relevant legal regime is, at a minimum, vital to accurately interpreting an investigation's findings. Potential conflicts between investigations need to be identified and addressed at an early stage.[52] In the first instance, there should be an enhanced dialogue between national authorities and international authorities that claim a mandate to investigate in order to reduce the capacity for conflict between them. There was also a recognition that investigators needed to be properly trained to spot problem issues and to think ahead about the potential future use of their work.

VIII. Conclusion

Ambassador Rapp concluded the Symposium by explaining:

> Fundamentally, what this comes down to, relates to, what the world began to do in 1993, and which in itself hearkens back to Nuremburg: holding people accountable, regardless of station, putting on fair trials in which those individuals are provided with an adequate defense and in which their responsibility for the most serious crimes in the world are proven, beyond a reasonable doubt, by disinterested judges. All of this has

[50] *E.g.*, It was suggested, during the Symposium discussion, that some witnesses who gave evidence to the United Nation's Fact Finding Mission on the (2008–2009) Gaza Conflict (more commonly referred to as "the Goldstone Commission") were questioned by the Mission in the presence of Hamas activists. Clearly, if true, that in itself would give rise to evidence credibility concerns. In any event, more generically, it reinforces the wisdom of establishing and publishing transparent investigative methodologies and protocols, and of applying them in practice.

[51] *E.g.*, Investigations that record statements from U.S. military personnel would be well advised to consider the terms of the Uniform Code of Military Justice (UCMJ). UCMJ art. 31(b) (2012) (relating to the prohibition of compulsory self-incrimination). A further non-criminal procedure example was given of the evidentiary considerations that the Center for Justice and Accountability utilized—and its relationship with the U.S. Department of Justice. *See* www.cja.org (last visited Aug. 13, 2012).

[52] The terms of reference for the Hariri Commission included, amongst other matters, jurisdictional priorities between the tribunal and Lebanese national courts, the Lebanese/ international composition of the tribunal's trial and appeal chambers, and the appointment of the prosecutor.

> created an enormous expectation for justice elsewhere. It has also raised questions, like Jackson[53] did at Nuremburg, when he famously said, "If we pass these defendants a poisoned chalice, we might have to bring it to our own lips as well. We have to hold everyone to the same standards that we hold ourselves to." We have a great expectation that, in all situations, there needs to be justice. We are rightly proud of what we do at the national level when we hold our own people to account. Where it is not done, the expectation is that the international community now needs to be involved in order to find the facts and hold people to account, the belief being that where that is done, you can deter people from committing atrocities. Not everybody. You can discourage some. Persuade some to leave and not be [named] on a charge sheet. You can convince some people not to behave in the way that others have done. And, in doing so, we can begin to protect people, and that in the end is what all this is about.[54]

In isolation, it would be hard to fault the logic of that rationale. However, what the Fugh Symposium debate demonstrated was that the increasing trend towards the use of third-party investigations has other issues driving it, as well as second order effects flowing from it. Any one investigation must be considered in the light of those issues or effects, and that can be done by assessing an investigation's terms of reference, mandate and the legal construct within which the investigation was situated; the comprehensiveness of the evidence upon which the findings were based; and the motivation behind those who have commissioned, or are conducting, the investigation.

The general feeling of those on the receiving end of an external investigation can be summed up (in the words of one panelist) as being "like running a marathon; they hurt a lot, and you think they will never end." Of course, taking the analogy one step further, enduring the event is not without its benefits. If a nation's armed forces take note of, for

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[53] Robert Houghwout Jackson, Chief U.S. Prosecutor, Nuremberg Trials (Feb. 13, 1892–Oct. 9, 1954).

[54] Ambassador Stephen Rapp, U.S. Ambassador-at-Large for War Crimes Issues, shared his experiences and thoughts on this subject, borne from his personal involvement in a number of international criminal tribunals, including the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda.

instance, calls for improved targeting methodology that will enhance military effectiveness and minimize the risk of civilian casualties, the second order effects of the investigation may be beneficial to both states and third-party investigative interveners. Sometimes it takes an outsider to see the wood for the trees. That said, seeing the wood is one thing; determining the best way through it is quite another. Calling for "things to be done better" is easy. Determining how that should be done is less so.

One of the "doing things better" themes that emerged from the Symposium related to the dearth of any over-arching guidelines, regulations, or agreement that might govern the construct and conduct of third-party investigations.[55] That dearth was in stark contrast to the importance that such investigations are playing in shaping world affairs and international public opinion. The construct of that guidance, regulation, or agreement, if there is to be any, should guard against the filling of a vacuum by simply transplanting standards from one regime to another. The fear expressed during the Symposium was that the discernible move to do just this, in the form of incorporating human rights principles into military investigations, has the potential, when combined with *opinio juris*, to evolve (perhaps stealthily) into customary legal norms. That potential suggests that a state-led codification of investigation standards, even if only in a soft law instrument, is something that should be explored to ensure that the views of all interested parties are properly reflected.

Notwithstanding that there might be a need for a best-practice, consumer's guide to third-party investigations, an additional question must be asked. Is there the political will for states to get together to agree, or at least think about, best practices, and reach some form of consensus on, and the releasing of, a declaration on the conduct of, for instance, investigations of war crimes or allegations of IHL violations? Given the increasing trend towards the calls for and use of third-party investigations in recent years, and their willingness to investigate investigators, one wonders how long it will be before that possibility is itself investigated and implemented.

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[55] *But see* The United Nations High Commissioner on Human Rights' standard conditions for a commission of inquiry's terms of reference. These standardized terms were used as a framework for the terms of reference for the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan. They are_*available at* http://www.kic.org/en/about-kic.html (last visit July 30, 2012).