

From law to policy and practice – collaborative research amidst a pandemic: the creation of the Bournemouth Protocol on Mass Grave Protection and Investigation

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Abstract

How can mass graves be protected to safeguard truth and justice for survivors? This was the question motivating the research project to produce international protection and investigative standards for mass graves, which resulted in the creation of the Bournemouth Protocol on Mass Grave Protection and Investigation. The research was premised upon broad and inclusive stakeholder consultation to ensure suitability, completeness and sustainability of project outcomes as well as to generate acceptance, endorsement and implementation. To realise the project we used a combination of desk-based research, round-table discussion with expert-participants from a variety of disciplines and cultural backgrounds and anonymous external consultation.

In this paper, we reflect on the methods and processes used for the purpose of international standard setting based on legal norms. We discuss the choices made along the way in facilitating this cross-disciplinary, international, inclusive and collaborative project. In doing so, we explore the function of the research process in light of the need to ensure that the Protocol reflects the different and possibly conflicting needs and sensitivities of survivors vis-à-vis the demands of criminal justice, capacity, resources and scientifically robust practices. We outline the challenges experienced and anticipated in evaluating approaches, agreeing definitions, identifying commonalities, negotiating differences and adapting to Covid-19 as part of the process of translating legal norms into policy and practice for achieving effective impact.

1. Introduction

Mass graves are sites of unimaginable human loss and cruelty. For families of the missing, the need to know where their loved ones are, to understand what happened to them and to have their bodies returned to them for respectful mourning can be overwhelming. Mass graves also contain evidence that is likely to be instrumental not only for the identification and repatriation of remains, but also for fulfilling families' rights to truth and justice. The effective protection and investigation of mass graves is therefore essential for families, investigative and prosecutorial bodies nationally and internationally, and for societies seeking to come to terms with a troubled and violent past.

Yet while there are a number of best practice approaches available amongst various actors in the field, the standard of investigations can be variable, with the result that the rights of families to truth and justice are not consistently met. Until December of 2020, there were no universal or common standards. The aim of our project was to respond to this gap.

On 10th December 2020, marking human rights day, the International Protocol on Mass Grave Protection and Investigation (the 'Protocol') went live. It defines international standards to ensure that mass graves are effectively protected and investigated to standards that are lawful, effective and respectful. Grounded in international law, the Protocol charts the various stages of mass grave exhumation, from discovery and safe reporting of the site, to its investigation, the identification and return of human remains to families and avenues for justice, including the use of mass grave evidence in various proceedings. It was produced with the input of forensic and legal experts from a range of organisations, including the International Commission for Missing Persons, the International Criminal Court, the International Committee of the Red Cross, the UN and Interpol, and has already gone in to use in a number of investigation scenarios globally.¹

In this contribution, we describe the methodology and processes adopted for the purpose of developing the Protocol, and the reasoning behind the methods chosen.

¹ For more information, and for the Protocol itself, see [Mass grave protection for truth and justice | Bournemouth University](#).

Mass grave protection and investigation are complex issues, and they posed specific challenges in our consideration of how best to approach the development of the Protocol. In line with Blackburn's truism that '[r]eflection must take off from where we stand'², from the outset, the starting point of the project was the need of families for truth and justice. In order to achieve these goals, however, a multiplicity of needs and interests must converge, which may not be consistent with one another, compatible or readily reconcilable, but at the same time they are interdependent in their practical realisation: a thorough, impartial and expert legal process, for example, is likely to be instrumental in the determination of truth needs for families, while a successful investigation and prosecution relies upon community access to the site, as well as witness testimony.

In addition, the multiple actors involved with the mass grave investigation process emanate from a wide range of legal and scientific disciplines, each with their own rules and standards of professional practice. They must work together and coordinate their activities for a common goal, whilst simultaneously maintaining communication channels with victims' families and affected communities. And finally, the types of mass graves of concern to the project were associated with conflict and/or gross human rights violations, thereby engaging potentially different branches of international law.

The problem of mass grave protection and investigation is therefore a real-life question with far-ranging implications. It is both global and multidisciplinary in nature, necessitating an approach which would enable the production of an instrument capable of practical application in diverse contexts, meaningful for all engaged disciplines, compatible with several legal contexts and which did not lose sight of the very real plight and needs of families of the missing.

A clear and considered methodology for the project was therefore essential in order, firstly, to ensure that all of these complex factors and interrelationships could be properly examined and reflected in the Protocol, and secondly, to ensure that the resulting

² Simon Blackburn, *Truth: A Guide for the Perplexed* (Penguin 2006) 129.

instrument could be seen as a credible tool both practically and intellectually, capable of fulfilling its purpose effectively and in full.

Our contribution reflects the way in which these methodological challenges were addressed. It begins with a description of how the particular methodology was identified and developed, before going on to consider how the methodology was applied in practice. We include particular reflections on how the methodology for the project had to be adapted in the light of the Covid pandemic, including the unanticipated adoption of virtual methods to facilitate expert engagement. Attention is also paid to the process of selecting experts to participate in the production of a practical tool, the use of round-tables as collaborative spaces for exploration, exchange and explanation and some thoughts on lessons learned. The second author of this contribution joined the project at the practical application stage. As a result, reflections on the development of the methodology are those of the first author alone.

2. The starting point: determining the methods

My wish to develop an instrument that reflected the interests and approaches of all actors engaged in mass grave recovery, which would serve as a practical tool for the many disciplines involved and which was firmly grounded in law meant that a very specific, tailored methodology for the project would be required. Seeking to advance both theory and practice with a view to ‘producing knowledge to inform and direct social change’³ pointed to the need for a combined methods approach⁴: (1) a more theoretical, doctrinal approach to identify the legal bases for both protection and investigation, together with an exploration of existing relevant academic and practitioner materials; and (2) a multidisciplinary, qualitative approach that would enable me to draw on the knowledge, expertise and practical experience of the various professions engaged.

³ Alan Clarke, ‘Research and the Policy-making Process’ in: Nigel Gilbert (ed), *Researching Social Life* (2nd edn, Sage 2001) 30.

⁴ Not to be confused with mixed methods which is understood to comprise both qualitative and quantitative methods (see for example John Creswell, ‘Mixed-Method Research: Introduction and Application’ In Gregory Cizek (ed) *Handbook of Educational Policy* (Academic Press 1999).

2.1 Desk-based, doctrinal research

With the realisation of the needs of families to truth and justice as the starting point of the project, it was essential that the legal underpinnings for both protection and investigative practice be drawn out in order to underscore the duty to act, and to do so effectively and lawfully. To this end, my particular focus was on the rights of victims and their families, the responsibilities of States and individual criminal accountability. In light of the potential application of international human rights law, international humanitarian law and international criminal law to a mass grave scenario, my intention was to clarify existing legal rights and responsibilities in the mass grave context across all three legal fields. I hoped to do this by mapping provisions to each specific stage of mass grave investigation, identifying areas of commonality, and hence providing, to the extent possible, a unification of legal provisions for the purpose of the investigation. This attempt at unification was important to the project and its victim focus: for victims and their families, the question of whether loss of life or serious harm arose in the context of human rights, humanitarian or international criminal law does not change the nature of the harm they have suffered or their need for remediation. As Bassiouni writes, as far as governing legal regimes are concerned, '[s]uch distinctions are of little significance to victims in their quest for redress'.⁵ In order to achieve this, I chose a traditional legal research method⁶ as a means of ensuring the detailed analytical rigour necessary for distilling relevant state duties as international norms derived from the corpus of the various branches of international law.⁷

Whilst doctrinal research provides the researcher with the foundational basis upon which to analyse the law in its context, the method does not offer practical tools for finding solutions for the protection and guaranteeing of legal rights and duties. To answer the research question posed, it was therefore important to go beyond this doctrinal research approach, with a view towards policy and practice. Whilst there are methodological approaches such

⁵ Cherif Bassiouni, 'International Recognition of Victims' Rights', (2006) 6 HRLR 203, 205.

⁶ See for example, Mark van Hoecke 'Legal Doctrine: Which Method(s) for What Kind of Discipline' in Mark van Hoecke (ed) *Methodologies of Legal Research* (Hart 2013).

⁷ For example, Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Longman, 2007); Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press 2007) and Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock, *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2008)

as the New Haven School method⁸ (both a problem-revealing and problem-solving approach that is attractive for its interdisciplinary focus and the scrutiny it allows of state policies, methods, approaches and procedures by examining their application to societal problems⁹) the question posed here, I felt, required an element of empirical research through engagement with expert practitioners, including leading judges, prosecutors, investigators, forensic scientists and victim specialists. This, I felt, would enable the Protocol to be both academically sound as well as practically operational and cognisant of varying real world contexts, without replicating what was already in existence.

2.2 Expert consultation

The project therefore required a multi-disciplinary inquiry akin to empirical-legal research and in particular, the gaining of knowledge by recourse to direct experience, to inform and guide the content of the Protocol to ensure it reflected best practice in relation to the investigation of mass graves and the dignified, respectful, indiscriminate and lawful handling of human remains. Since a purely law-driven methodology would only reach so far, I turned to the social sciences to facilitate the necessary engagement with practitioners as expert participants in the project in order to elicit information on the practical ramifications of the protection and investigation process.¹⁰ Participatory research denotes a large spectrum of research practice typically designed to generate knowledge and understanding whilst maintaining a pragmatic but equitable approach.¹¹ With any such research project, such as the one designed here, there is interaction with practitioners at various stages of the project and in an iterative way. In that sense the participatory research could provide an umbrella classification for the project, but the engagement with expert-participants, I felt, had to be

⁸ Michael Reisman *et al* 'The New Haven School: A Brief Introduction' (2007) 32 *Yale Journal of International Law* 575.

⁹ Steven Ratner and Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93(2) *American Journal of International Law* 291.

¹⁰ A helpful starting point for such qualitative research is Catherine Cassell and Gillian Symon (eds), *Essential Guide to Qualitative Methods in Organizational Research* (Sage 2004). See also Russell Bernard, *Research Methods in Anthropology: Qualitative and Quantitative Approaches* (2nd edn Alta Mira Press 1995)

¹¹ For an appraisal see Andrea Cornwall and Rachel Jewkes 'What is Participatory Research?' (1995) 41(12) *Social Science & Medicine* 1667. There is, however, very little literature on the application of such an approach to law.

very focused and directed.¹² Furthermore, this second step of seeking the views of experts presented a clear logistical challenge of access and feasibility for me as the researcher.

After contemplating the benefits of conducting face-to-face interviews¹³ and following the review of other standard setting projects (such as the Belfast Guidelines on Amnesty, and the Nuremberg Principles on Cooperation between Civil Society Actors and Judicial Mechanisms in the Prosecution of Conflict-Related Sexual Violence) I was persuaded that the more suitable method for this project was collaboration and exchange through a combination of expert participant round-tables, together with a broader round of expert consultation during the drafting process.¹⁴ This combination, I hoped, coupled with rigorous analysis¹⁵, would facilitate the multi-disciplinary, international and inclusive approach necessary to ensure the Protocol took into account the different and possibly conflicting needs and sensitivities of survivors vis-à-vis the demands of criminal justice, capacity, resources and scientifically robust practices.

In opting to conduct round tables with expert participants, I was conscious that I would likely be engaging with very busy professionals, who had competing workloads and priorities. Round tables presented an opportunity for me to bring experts together, away from their places of work (and hence with less competing distractions) to focus in depth, for a determined period of time, on a single issue with a group of other experts. I also hoped that in opting for a highly collaborative approach to the development of the Protocol, I would generate a sense of ownership, which would assist with content, impact, and subsequent application of the Protocol in real-world contexts.

¹² And thus not necessarily compatible with a 'bottom-up' approach typically associated with participatory research.

¹³ As a researcher, I am familiar with interviewing which formed part of my PhD and a funded project. For an introduction to interviewing see Steinar Kvale, *InterViews: An Introduction to Qualitative Research Interviewing* (Sage 1996).

¹⁴ These round-tables arguably have some commonality with what is known as focus group research but here it was embedded in an iterative process which included also consultation. An appraisal of focus group research is beyond the scope of this paper; for an introduction to focus group research see, for example, Catherine Cassell and Gillian Symon (eds), *Essential Guide to Qualitative Methods in Organizational Research* (Sage 2004) and Pamela Kidd and March Parshall, 'Getting the Focus and the Group: Enhancing Analytical Rigor in Focus Group Research' (2000) 10 *Qualitative Health Research* 293.

¹⁵ See infra on analysis mode employed.

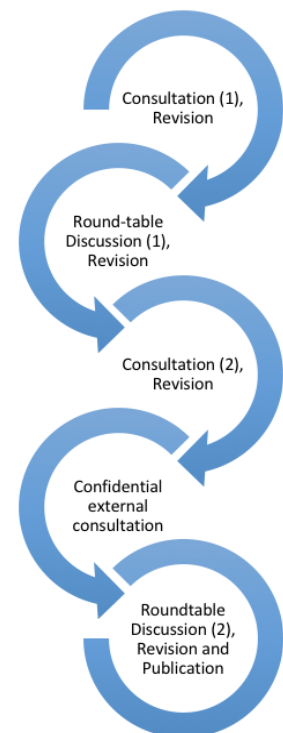
For all those reasons, my selected methodology comprised:

- a desk-based review of legal provisions, academic and practitioner materials, and the production of an initial document for consultation;
- a collaborative round-table event for expert participants, based on the initial consultation document;
- revision of the document in light of the input of expert participants;
- external consultation and review of the revised draft by a second group of expert practitioners and academics;
- revision of the document in line with the views and comments received;
- the conduct of a second collaborative round-table event, with our expert participants;
- revision and finalisation of the Protocol.

Figure 1, taken from the funding application for the project, illustrates this iterative process.

With the specific aims of the Protocol in mind, I was conscious of both the advantages and limitations of the Protocol being produced from within an Academic institution, and developed the project, including the anticipated practical delivery of the methodology, accordingly. Most notably, the independence of the project lay in its academic anchorage, and I felt this was crucial to the perceived legitimacy of the resulting Protocol. In particular, the document does not endorse an activist or particular institutional stance, whether that be human rights activism, advocacy or ‘forensic humanitarianism’.¹⁶ Such an academic anchorage is not

trivial, for academic mandates are empowering and liberating, as well as limiting. Academia has an advantage of public acceptance, since, as Hannah Arendt put it ‘nowhere do we hear



¹⁶ See, for example, Claire Moon, ‘Human rights, human remains: forensic humanitarianism and the human rights of the dead’ (2014) 65 *International Social Science Journal* 215-6.

of any attempt by the universities at seizing power'. Yet, she continues, '[v]ery unwelcome truths have emerged from the universities.'¹⁷ We can sometimes say what others cannot.

But the Protocol could not be achieved without practitioners, and the project methodology was predicated on my great confidence in the theoretical contribution which practitioners would make. In order to better enable access to expert practitioners and to enhance the prospect of real-world application, I sought a project partner from beyond academia with international reach, professional expertise and global respect.

I reached out to the International Commission on Missing Persons, an intergovernmental organisation that has extensively supported States to investigate mass graves. The ICMP is a key policy maker, state advisor and capacity builder in the field, and so constituted an ideal project partner for the creation of a new protection and investigation tool.

Finally, I felt that the project, and I, would benefit from the input and support of a Steering Group during the production of the Protocol. The composition of this steering group was also influenced by methodological input, with one steering group member having prior expertise in producing guidelines and brokering consensus.

3. Practical Application of the Methods

Following the award of funding and through the recruitment of Author 2 the reflections from now are that of a duo (we/us i.e. Author 1 and Author 2).

In the previous section, we indicate how and why the methodology for the production of the Protocol was chosen. In this section, we describe how the methodology operated in practice. We include, where relevant, our reflections on what we felt went well, what less so, and what we might do differently next time around. We have also incorporated any lessons learned from previous projects which influenced our decisions and actions during

¹⁷ Hannah Arendt, *Politics and Truth*, Originally published in *The New Yorker*, February 25, 1967, and reprinted with minor changes in *Between Past and Future* (1968) and *The Portable Hannah Arendt* edited by Peter Baier (2000) and *Truth: Engagements Across Philosophical Traditions* edited by Medina and Wood (2005), at 310.

the course of producing the Protocol in so far as they relate to the practical application of the methodology. Finally, we reflect on the need to switch to virtual methods during the course of the project and the impact that this had on the project itself, as the Covid pandemic made the prospect of face-to-face meetings impossible.

3.1 Desk-based research: unifying legal provisions and selecting a focus and format

In preparation for our first attempt to create a document akin to legally-based guidelines (we called it a briefing document at this stage) we consulted, reviewed and critically analysed a wealth of materials with a view to ensuring the legal cohesion and underpinnings of the Protocol, to avoid duplication of existing materials and to identify with greater precision the appropriate focus for our work.¹⁸ The desk-based research brought together, and enabled us to compare and contrast the wider issues relating to mass grave protection based on a systematic, critical review of:

- *legal provisions* including applicable treaties in the fields of international human rights law, international humanitarian law and international criminal law, customary international humanitarian and human rights law, as well as domestic protection efforts (such as contained in Bosnian and Iraqi legislation) to identify and compare existing legal standards and requirements;
- *academic literature* relevant to mass grave protection, investigations and the effect on survivors from the disciplines of forensic science, law, securitisation studies, transitional justice and psycho-social research, in order to capture current debate and discussion;
- *procedures and best practices* relating to mass graves, their protection and investigation, missing persons and disaster victim identification, as employed by the international criminal tribunals, fact-finding missions across the world, the International Committee of the Red Cross, Interpol and various expert forensic organisations. This included reaching out to a number of forensic organisations to access their standards and practice manuals, and we had multiple conversations with practitioners across the world, in order to fully

¹⁸ A sample of the materials reviewed now feature in Appendix A of the Protocol. The project has explicit recourse to the 2016 Minnesota Protocol on the Investigation of Potentially Unlawful Death, which served as a benchmark for us in the conduct of our project.

appreciate operational efforts to date regarding mass grave investigations, including their successes and shortfalls in meeting stakeholder needs or legal requirements.

3.2 The development of a Briefing Document

Having collated and analysed a plethora of materials, in the summer of 2019 we began drafting the briefing document for the first round-table event, scheduled for October of that year. Our first consideration was how best to present that material for our target audience: a multidisciplinary, mostly practitioner, expert-readership.

Structurally, through our careful review of existing materials, a chronological approach emerged whereby the Protocol would reflect the various stages or phases that mass grave protection and investigation would require in order to fulfil family truth-seeking and the pursuit of justice (which we understood in a broad sense to encompass reparative and retributive elements).

The intended multidisciplinary audience for the Protocol presented a challenge in terms of the content of the Protocol and how material should be presented. While we needed the Protocol to have a firm legal basis, we were mindful that our intended audience were not all lawyers, and it was essential to us and the future practical application of the Protocol that the document should be accessible for all engaged disciplines. We decided that each of the chronological sections would start with as clear a statement of the law as possible in order to outline the rights of victims and societies and to map them against corresponding state duties. Once the legal basis was set out for each section the practical aspects of how to implement those norms was spelled out in a manner that was readable for all, using non-legalistic language. We then ended each stage with a 'Reference and further Reading' section.

Chronology of processes, as will be discussed below in relation to analysis, ended up serving us well as our thematic analytical structure. Furthermore, through this choice of structure and content we began the development of a novel and unique way of creating standards by frontloading the legal norms for each chronological step in the process, allowing the relevant practice-related elements to follow on from that legal basis. This approach was a

departure from the other standard setting examples we had reviewed, and we were keen to see how it would be received by experts at the first round table event.

Finally, we were mindful that the Protocol was intended for use by busy practitioners who were likely to be working in difficult and potentially chaotic situations, and so accessibility, readability and easy navigation were key considerations for the adopted format and design. Our mantra was simply to convey maximum content in minimum space and time using footnotes sparingly.¹⁹ Naturally the various materials which we had reviewed offered us an insight into how best to present the material. In the end, the briefing document was modelled on research briefings regularly prepared by the UK Parliamentary Office of Science and Technology (known as Parliamentary POST notes)²⁰ and also echoed the layout of the Minnesota Protocol on the Investigation of Potentially Unlawful Death,²¹ a set of scientifically and internationally accepted investigative minimum standards. Importantly, the Protocol neither duplicates nor replaces this or other such existing documents on principles and good practice.

3.3 *Selecting participants*

To produce a document with both multidisciplinary and global applicability, our choice of expert participants for the round tables was important: not only in order to inform the content of the Protocol, but also to ensure credibility of the resulting document, and so improve its chances of impact. From the outset, therefore, we established clear criteria for the expert-participants in terms of affiliation, field of expertise and representation.²² The following selection criteria were employed:²³

¹⁹ In the final Protocol, the use of footnotes is more extensive than we had hoped for, this is however due to the fact that we omitted the further reading sections in the final output, instead limiting our cross-referencing in Appendix 1 to hyperlinked relevant guidelines, principles, handbooks, good practice manuals and protocols.

²⁰ The process of developing POST notes is described here: [How to write a policy briefing - POST \(parliament.uk\)](https://www.parliament.uk) accessed 14 June 2021.

²¹ United Nations Office of the High Commissioner for Human Rights (2016), *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* <https://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf> accessed 14 June 2021.

²² Sara Arber, 'Designing Samples' in: Nigel Gilbert (ed) *Researching Social Life* (Sage 2005).

²³ The Belfast Amnesty Project served also as a methodological model and operated with 18 expert-participants (University of Ulster, 'The Belfast Guidelines on Amnesty and accountability', 2013, available at https://www.ulster.ac.uk/__data/assets/pdf_file/0005/57839/TheBelfastGuidelinesFINAL_000.pdf accessed 13 March 2021).

- *Geographical Representation*: to reflect different world regions and cultures in which mass graves following gross human rights violations have occurred.
- *Disciplinary Expertise*: to bring together leading experts from the fields of forensic science, investigators, judges, prosecutors, security personnel/police, civil society and victim representatives and academics, reflecting both domestic and international experiences of mass grave protection and investigation, expertise in human rights, humanitarian and/or criminal law, transitional justice and securitisation studies.
- *Practice/Professional Expertise*: to solicit diverse views from those affected notably survivor groups, as well as NGOs and IOs mandated to work with human rights violations resulting in mass graves and representing victims' interests. Significantly, while victims and their families are the intended beneficiaries of the Protocol, they are not its target audience. The Protocol itself is necessarily legally and scientifically technical in nature. Input from survivor representative groups, however, was important to ensure that all stages of the investigative process, as reflected in the Protocol, retained survivor awareness, including in relation to family interactions and communication strategies.

In addition, based upon experience with a previous project, it was clear that continuity of participants between the two round tables was important, in order to ensure a consistency of approach. Invitations to engage with the project were therefore addressed to individuals rather than organisations, and involvement at the outset was premised on a commitment to the project for its duration. If, for example, (as happened during the course of this project) an expert left one organisation and began working for another then (subject to the agreement of their new employer) they would stay involved with the project, rather than being replaced by an individual from within their previous employer organisation.²⁴

We sought to keep the group of expert participants to a workable size of 20. Through purposive sampling in line with selection criteria, a list of potential participants was drawn up, based in part on an existing network, known actors in the field, research and

²⁴ The original organisation in this case retained representation within the project, since other members of the expert participant group were employed by it, ensuring the continued buy-in of the organisation to the Protocol.

recommendations from them. The list evolved in line with the criteria above with each acceptance or rejection, as new permutations arose and the need for aspects of disciplinary and geographical representation changed. On reflection, we had not anticipated how time-consuming the process would be.²⁵

3.4 Round-table 1²⁶

Having formed our expert participant group, we were confident that we would have the necessary knowledge and breadth of experience in the room to inform the development of the Protocol. Our next challenge was to consider how we could ensure that the full ambit of knowledge that we would need was teased out during the round table. We were conscious that in any group of individuals, some will naturally be more forthcoming than others, and in the case of our expert participants, a number of practitioners knew each other well from working on mass graves together in the past. It was essential to the success of the project that each and every participant's voice and experiences were clearly heard and considered, since these would guide the development of the Protocol and ensure practical usability.

Spread over two days, we chose to structure the round table into thematic sessions, mapped against the Briefing Document, which would enable us to focus on specific areas of individual expertise. Each expert was invited to share their experience with the group in a short presentation on the given theme, and this would then be followed by a group discussion. This ensured that all participants were heard during the round table event, and their thoughts discussed openly by the group.

To further facilitate engagement and input from all our participants, we paid particular attention to the role of the academic moderator, and her role to privilege all. Finally, we encouraged a candid and open approach amongst participants. For the purpose of the event, we applied the Chatham House Rule:

*"When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed."*²⁷

²⁵ The process took nearly 3 months in total.

²⁶ The first roundtable was held in-person on 23-24 October 2019 at Bournemouth in the UK.

With a number of different organisations represented at the round table event, each organisation with its own mission and agenda, the importance of project independence – the ‘academic independence’ we had hoped would envelope the development of the Protocol – emerged in practice by virtue of holding the event at an academic institution. We sought to reinforce that independent stance with an introductory message urging the exploration of the subject matter from a point of mutual curiosity and impartiality, a desire for an increased understanding and the improvement of practice, reflected and anchored in turn in law.

Finally, on reflection, and something not explicitly contemplated from the outset, was the need to gain all expert participants’ trust in us both personally and professionally, in order to elicit open and frank information, including examples of when things had not gone as well as they might have hoped.²⁸ Naturally, careful communication of the schedule, updates and planning aspects were communicated ahead of the event, but until the experts actually arrived and engaged with us, the round table environment, other participants and the topic, they too were taking a gamble with their time. It was important to us as the project team to repay and strengthen that initial willingness to participate and the commit to the project, and the reason why we planned the event in great detail and with care.

3.5 Definitions and Scope

In light of the need for the group of experts to work together towards a singular goal, it was important for us to determine a common basis of understanding at the outset, including the intended scope of the project.²⁹ In order to delineate the scope of the Protocol, a set of definitions had to be agreed; definitions that were flexible and yet clear enough for comprehensive standard setting in light of the applicable law, that reflected socio-political,

²⁷ Chatham House, ‘Chatham House Rule’ <https://www.chathamhouse.org/about-us/chatham-house-rule> accessed 14 June 2021.

²⁸ Charles Hardy, ‘Trust and the Virtual Organization’, 1995 May-June, *Harvard Business Review* 40, noting at 44 ‘virtuality requires trust to make it work: Technology on its own is not enough’. On the role of trust in research, see J. David Lewis and Andrew J. Weigert ‘The Social Dynamics of Trust: Theoretical and Empirical Research, 1985 – 2012’, 2012, 91:1 *Social Forces*, 25–31; Sirkka Jarvenpaa and Dorothy Leidner ‘Communication and Trust in global virtual teams’ (1999) 10 *Organisational Science*, 791.

²⁹ This need to establish a shared or common language between disciplines is recognised, for example, in Robert Cryer, Tamara Hervey and Bal Sokhi-Bulley, *Research Methodologies in EU and International Law* (Hart 2011) 76-77.

cultural and religious variety and were scientifically robust. Our aim was to keep the amount of definitions to a minimum, concentrating solely on core terms as a basis for the content of the output.

The following definition of mass grave is used in the Protocol:

‘a site or defined area containing a multitude (more than one) of buried, submerged or surface scattered human remains (including skeletonised, commingled and fragmented remains), where the circumstances surrounding the death and/or the body-disposal method warrant an investigation as to their lawfulness’.

This definition is the product of detailed and lengthy debate and discussion between experts from multiple disciplines. The definition was finally found to have meaning for all participants, irrespective of discipline, and it has since been recognised by the UN Special Rapporteur in her report on the subject.³⁰

In addition to the need for definitions in the document, we needed to establish clear limits for the Protocol itself. Mass graves can arise for a number of reasons, including through conflict, human rights abuses, migration, natural and man-made disaster. There was strong feeling amongst participants that the Protocol should encompass a broad array of contexts, although support for which contexts should be covered varied between participants.

In order that it did not become overly broad or unwieldy, we opted (reluctantly) to confine the contextual remit of the Protocol to mass graves arising in the context of gross human rights abuses and conflict, both internal and international. This means that, *sensu stricto*, mass graves that arise as a result of migration are not included, unless they occur as an aspect of enforced disappearance. Their governance is often complicated by the use of the sea as a migratory route. Although, of course, deserving of dignified treatment and protection through a comprehensive, non-discriminatory human rights framework, are not afforded the full legal attention of the Protocol. Nor are mass graves that occur as a result of

³⁰ UNGA, Report of the Special Rapporteur on ‘Human rights standards and possible steps towards the respectful and lawful handling of mass graves’ (12 October 2020) UN Doc A/75/47919, para 12.

disasters, unless the burial method is legally dubious. The decision to exclude these potential sites from the ambit of the Protocol was not an easy one, but it felt necessary for us to contain the project within boundaries that were practically workable for us, as well as to avoid the production of a document which, by seeking to apply to all possible contexts simply became abstract and unusable for practitioners. That said, whilst the contexts and legal spheres may be different to that addressed in the Protocol, the protection and investigative standards are still relevant to the extent that there is clear consensus among the practitioners: 'The quality of investigation and due process guarantees remain the same.'³¹

3.6 *Progressing the Protocol: Analysing the data and the Consultation processes*

In the months following roundtable 1, in light of the presentations and discussions that had taken place, we reviewed and revised the briefing document, which now took the form of the draft Protocol. Where specific thematic areas required development or potential gaps had been identified, we engaged directly with individual expert participants, based upon their expertise, in order to develop aspects of the Protocol in line with the suggestions made.

The chronological structure of the briefing document ended up serving as our template for the analysis of the data generated both through the engagement with experts at the roundtable and the consultation process. And in a sense, structuring into themes and aspects of the entire mass grave process from discovery to commemoration facilitated thematic analysis.³²

Thematic analysis aims to identify, analyse and report recurring themes from within the data set³³ without necessarily being tied to a theoretical framework.³⁴ Whilst being a

³¹ Hugh Tuller and Mercedes Salado Puerto 'Forensic Science International' (2017) 279 *Forensic Science International* 219, 225. An alternative would have been to limit the context from the outset but the limitation coming from within the project also confirms this as a further area for research and thus a research agenda for the authors.

³² See, for example, Richard Boyatzis, *Transforming Qualitative Information. Thematic Analysis and Code Development* (Sage 1998) and Nigel King, 'Using Templates in the Thematic Analysis of Text' in: Catherine Cassell and Gillian Symon (eds), *Essential Guide to Qualitative Methods in Organizational Research* (Sage 2004b).

³³ Thematic analysis in this sense is very close to grounded theory, but without the theoretical commitments grounded theory demands: namely the generation of one theory at the end of the process (Virginia Braun and

‘foundational method for qualitative analysis’,³⁵ it is also a method in its own right, offering great flexibility: its findings are usually easily accessible to readers as it summarises a large body of data into a manageable size without losing the richness of the data,³⁶ something that suited a multi-disciplinary project such as ours, and hopefully appeals to a multi-disciplinary audience. Thematic analysis is also considered a useful tool in generating unanticipated themes and knowledge which can inform policy changes.³⁷ Themes can be generated inductively from the data or deductively from a theory or previously-designed theoretical framework.³⁸ Moreover, themes can be discovered at a semantic and explicit level or at a more latent and interpretive level depending on the research questions and epistemological stance.

So what did that mean for us and the development of the Protocol? We repeatedly examined the notes from the round-tables to see where points raised by the experts added to the development of clear guidelines, and how they related to the legal provisions, practice and existing literature. Through this process, a high-level synthesis was achieved.

We organised and categorised our data in light of our themes and revisited the themes themselves (for example we merged two different themes into a section on Justice, but separated out a section on Commemoration). This analysis allowed us to collaboratively fine-tune the precise structure and content of the Protocol.

Such analysis inevitably required us to make a number of judgment calls: much discussion and care went into the final presentation of the Protocol, ensuring that individual contributions, from all experts, whether during the round-tables or the consultation phase, were weighed according to the individual’s expertise as well as relevance for the research question. In practical terms this meant, for example, the comments of a judge on admissibility rules would be deemed more valuable and could potentially take precedent over statements on the same topic made by a forensic practitioner.

Victoria Clarke, ‘Using Thematic Analysis in Psychology’ (2006) 3 *Qualitative Research in Psychology* 77 and Anselm Strauss and Juliet Corbin, *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* (Sage 1990)).

³⁴ Braun and Clarke (ibid).

³⁵ Ibid 78.

³⁶ Boyatzis (n 39).

³⁷ Braun and Clarke (n 40) 78.

³⁸ Boyatzis (n 39).

We also took care to safeguard the quality and credibility of the Protocol through *clear and transparent* processes at all times, safeguarded through an audit trail of clearly backed up versions of the progressing Protocol so we could revisit any former iteration if needed. At the end of the analysis, we were confident that our collection of information was accurate, complete *and credible* ³⁹ Having two researchers work in tandem, negotiating each insertion, edition or deletion from the Protocol together, was essential, and where doubt remained, we sought the advice of specific experts to double-check the exact wording of the content to be included. This was particularly important for Appendix 2 and the roles and expertise identified within.

The analysis and consultation phase coincided with the period when the global pandemic emerged, resulting in various lockdowns, caring duties, home schooling, shielding activities and so on.⁴⁰ Having both school-aged children, we nonetheless persevered with both. For the consultation, in total we contacted 45 experts from various disciplines who were unconnected to the project to ask for their thoughts on the draft Protocol. The experts were again identified on the basis of their disciplinary expertise or academic/practitioner specialism, and we sought once more to ensure a broad geographical range of experiences were reflected in the review process. The purpose of the review was to enable us to test the accuracy, completeness and practical usability of the draft Protocol beyond our initial group of participants. In order to enable reviewers to give their feedback freely, we invited them to provide comments on a confidential, unattributed basis.

These reviews took a number of months to come back to us, mostly with contrite apologies as Covid-19 derailed most peoples' working practices. The comments received were, however, priceless in progressing the research output and, as so often, the generosity shown in time, thought and consideration was humbling.

³⁹ This essentially indicated data-saturation. See, for example, Clive Seale, 'Quality in Qualitative Research' in: Clive Seale and others (eds), *Qualitative Research Practice* (Sage 2004); Braun and Clarke (n 144) and Jennifer Fereday and Eimear Muir-Cochrane, 'Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development' (2006) 5(1) *International Journal of Qualitative Methods* 1.

⁴⁰ For more on navigating the impact of the pandemic on research methods, see, for example, 'Adapting Research Methodologies in the Covid-19 Pandemic: Resources for researchers', University of Washington, 2020 <https://earthlab.uw.edu/wp-content/uploads/sites/26/2020/07/uts-adapting-research-methodologies-covid-19-pandemic-resources-researchers.pdf> accessed 13 June 2021; Anna Playle 'Reimagining creative research methods and collaborative relationships in the context of Covid-19' blog of the British Educational Research Association, 14 April 2021.

Technology enabled us to work on the text through screensharing function, google docs share, and, as and when the internet was in too high-a-demand by other household users, the phone.

The delays did, however, mean that we sought a no-cost extension from our funder, which was granted within a few days of requesting it, thus safeguarding our ability to adapt the second round table.

3.7 Round-table 2⁴¹

By the beginning of June it became apparent that running a physical event amidst a pandemic was not going to be feasible. Drawing on teaching and learning expertise of conducting lectures and seminars for students online that had been gained in the preceding months, our plans for round-table 2 converged on a virtual event, housed on the Microsoft Teams platform (as the IT-supported platform of the institution). The virtual meeting was held over two days, and we proceeded on the basis that experts could 'join' by topic of interest, rather than attending the whole event, in order to ease additional pressures on their time commitments imposed by the pandemic, as well as any strain or fatigue that very lengthy virtual meetings might threaten.

By that time in the pandemic, all participants were very familiar with meetings held virtually, and so the proposal for a virtual round-table was readily accepted, and presented no significant technological difficulties. We limited each session to 45 minutes, building in sufficient breaks to enable participants to step away from their screens. Whilst virtual platforms have the advantage of not requiring the arrangement of catering and room bookings, a reliable team of support was nonetheless important to the event: we had a designated team member to liaise between the expert and the institutional IT support, and a notetaker (we did not record proceedings to allow open discussion).

For those unable to attend, and to ensure expert engagement was not curtailed or limited by time zones, internet connectivity, caring duties and other commitment, we offered

⁴¹ Held on 9-10 September 2020.

follow-up in the weeks immediately after the virtual event resulting in a number of repeat-email exchanges with a handful of individuals.

In practice, holding the first round-table in person, and the establishment of trust and goodwill that the event had given us, proved to be crucial to the success of the second round-table event. Expert participants willingly engaged with the event, and although there was an option to attend on a theme-by-theme basis, a number of participants joined us for the full period. In one case, due to time zone differentials, a participant attended both days in what was, for them, the early hours of the morning.

The point of the second round-table was to examine, discuss and agree the various sections of the revised draft Protocol, which incorporated the thoughts of our 45 external expert reviewers (as far as they were relevant and fell within the remit of the project). We also aimed to discuss next steps for the Protocol, including impact and dissemination. In order to guide discussion, we had specific questions prepared for each section, and we opened the event with a clear exposition of broad points we hoped to address:

- I. Have we covered all major points in the Protocol?
- II. Have we portrayed them accurately from the perspective of your discipline?
- III. And above all: is the Protocol a practicable and helpful tool?

The technology facilitated working with text on screen remarkably well and we were able to progress and finalise a number of points, including the exact wording of parts of the document and the flow-diagrams contained in the appendices. To be clear, we would have rather engaged with our experts in-persons but felt that, to progress and conclude the project, the use of an online platform such as Teams was a meaningful substitute. As always, professional and personal circumstances dictate what works best for individuals. While for some the technology made participation easier (due to reduced travelling and ease of scheduling) for others technology remains a poor substitute for face-to-face discussion.

3.8 Reporting results

In addition to producing an instrument that was multidisciplinary, anchored in legal norms and accurate in terms of content, our aim was to ensure that the Protocol was also

practicable for a diverse audience. Accessibility of the Protocol was a key concern for us in its design, so that we could create a visually clear tool that would help stakeholders navigate the law, scientific and societal aspects of mass grave investigation and protection efforts. Engagement with expert practitioners for the purpose of developing the Protocol effectively enabled us to test our written approach, including the presentation of materials.

Our initial decision to adopt a chronological style for the Protocol was endorsed by our participants, and so the finalised document includes sections on: (A) the discovery and safe reporting of mass graves; (B) their Protection; (C) Investigation of the site; (D) Identification of human remains; (E) the return of human remains to families; (F) Justice related aspects of the process and, finally, (G) Commemoration. Each section of the Protocol leads with a statement of applicable legal norms (we retained colour-coding for ease of readability) and is followed by an explanation of different steps (in non-legalistic language), actors and considerations relating to the stage indicated.

Mindful of the need to produce a document that did not appear overly lengthy or unwieldy, we chose to incorporate into the document a list of ‘Overarching Operating Principles’; standards of practice that should inform the conduct of the mass grave operation in its totality, applying at all stages and to all engaged actors. These were front-loaded in the document, avoiding the need for their repetition at each written stage of the Protocol. The overarching principles that we chose to incorporate comprise the following: (1) Do no harm; (2) the need to ensure the Physical and Emotional Safety of all actors; (3) Independence and Impartiality of approach; (4) Confidentiality and respect of personal details and identifying materials; (5) Transparency of process; (6) Communication with families, communities and the media; and (7) the need to Manage Expectations. These principles, in turn, were identified following a thorough review of a number of different standard-setting instruments, including the Minnesota Protocol, Basic Investigative Standards for First Responders to International Crimes,⁴² the UN’s Guiding Principles for the Search for Disappeared Persons⁴³ and the Principles on Cooperation between Civil Society Actors and

⁴² Global Rights Compliance (2016), ‘Basic Investigative Standards for first Responders to International Crimes’, <https://www.globalrightscompliance.com/uploads/2a712b82b7363354be0b3b5011d71795.pdf> accessed 13 March 2021.

⁴³ United Nations Committee on Enforced Disappearance, Guiding Principles for the search for disappeared persons (8 May 2019) UN Doc CED/C/7.

Judicial Mechanisms in the Prosecution of Conflict-Related Sexual Violence.⁴⁴ The overarching principles were tailored to the subject matter and refined through discussion with the expert participants in order to ensure that they were realistic, as opposed to aspirational, in practical terms.

A further addition to the final version of Protocol, on the recommendation of expert-participants, was a number of Appendices comprising the most relevant Guidelines, Principles, Handbooks, Good Practice Manuals and Protocols for further reading, with easy-to-access URLs; definitions of core mass grave investigative staff; flowcharts on mass grave-related processes and a checklist for office planning.

Finally, our inability to hold an in-person second round-table event meant that we had budgetary savings, and we were able to utilise these to further enhance the potential reach and usability of the Protocol. Eleven translated versions of the instrument have been prepared, to reach as many areas of the world as possible. Our expert participants guided us once again – this time on the choice of languages for translations. In addition, an English audio version has been produced to further aid accessibility and to serve as a model for future translation into spoken languages only.

4. Concluding thoughts: Influencing future practice and policy

The Protocol is geared towards practical operationalisation, to assist those acting on behalf of civil society, international organisations, state authorities and victims groups to effectively deal with mass graves resulting from widespread human rights violations and conflict. Central to the project is the need to ensure that survivors' rights are respected and justice mechanisms are supported. Individual and societal impacts are progressed through the invaluable contributions of expert participants, who, in turn, are instrumental in advancing the rights of survivors through their work in advocacy, policy development, policy implementation or courts of law. To that end, the Protocol has been endorsed and

⁴⁴ Author 2, (2017), accessed 13 March 2021.

commended for the standards it sets to help strengthen mass grave protection and preservation as part of a human rights framework for a respectful and lawful practice.⁴⁵

The research process to develop the Protocol was motivated by the overarching research question: *How can mass graves be protected to safeguard truth and justice for survivors?* The notions of protection and safeguarding point to core practices involving a variety of stakeholders, thus warranting the multidisciplinary, inclusive, international and collaborative methodological approach adopted. While we had obviously not originally envisaged a migration to a virtual approach for the second round-table event, in practice this proceeded relatively smoothly, and was helped considerably, we feel, by the fact that we had been able to hold build a good rapport with participants with an in-person event for the first round-table event.

In the above we have traced our journey of how we approached the research question methodologically, seeking to find answers both in the law and in practice; answers that, due to the research process, have integrity, legitimacy and validity. This, we believe, is safeguarded by good research design, choice and application of method as well as rigorous analysis. At all times, however, we were convinced of the project's anchorage in law as its primary disciplinary home.

Through our approach and the decisions made along the way, we have also made a contribution to how Protocols or Guidelines can be presented and meaningfully tailored to the requirements of stakeholders, thus developing a unique style in marrying disparate laws, policy and practice. The outcome is a set of standards designed to safeguard the respectful and lawful investigation and protection of mass graves.

⁴⁵ UNGA, Report of the Special Rapporteur on 'Human rights standards and possible steps towards the respectful and lawful handling of mass graves' (12 October 2020) UN Doc A/75/47919, 65.