

EXTRA-TERRITORIAL USE OF FORCE,
CIVILIAN CASUALTIES, AND THE DUTY TO
INVESTIGATE

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INTRODUCTION

In August of 2011, the North Atlantic Treaty Organization (NATO) launched a series of airstrikes in Majer, Libya, an area in which NATO had no ground forces and over which NATO exercised no control.¹ While NATO identified the targets of the airstrikes as forces

1. Richard Norton-Taylor, *NATO Will Not Put Troops on Ground in Libya*, GUARDIAN (Aug. 24, 2011, 4:20 PM), <https://www.theguardian.com/world/2011/>

loyal to Libya's embattled leader, Colonel Muammar Qaddafi, reports from the site of the bombing alleged that a number of civilians were killed in the attack.² Despite calls from international, non-governmental, and media organizations for NATO to investigate the alleged civilian deaths, NATO declined to investigate the airstrike.³ In so doing, NATO stated that it had not received credible information of civilian casualties and that a review of its own records regarding the airstrike, including surveillance and reconnaissance footage, did not corroborate the alleged harm to civilians.⁴

Three years later, the United States launched an airstrike in Harim, Syria, an area in which the United States had no ground forces and exercised no control.⁵ The target of the strike was apparently the Khorasan group—an armed, non-state group—but allegations of civilian deaths emerged from a non-governmental organization operating in Syria.⁶ In response to these allegations, the Commander of Combined Joint Task Force Operation “Inherent Resolve” appointed an officer to investigate the allegations.⁷ A formal report was ultimately submitted by the investigating officer and released to the public.⁸

The divergent approaches taken by NATO and the United States in these apparently similar circumstances raise a number of questions. Did NATO have a duty to investigate the allegations of civilian deaths in Libya, or was it sufficient to weigh the credibility of those allegations and decline to proceed further on the basis of those findings? What prompted the United States' decision to investigate the

aug/24/nato-will-not-put-troops-ground-libya [https://perma.cc/3E44-9Z39]; see also Marc Garlasco, *NATO's Lost Lessons from Libya*, WASH. POST (June 11, 2012), https://www.washingtonpost.com/opinions/natos-lost-lessons-from-libya/2012/06/11/gJQAhhAoVV_story.html [https://perma.cc/UZY4-EVJ8] (describing airstrikes in the region, which were carried out without establishing a presence on the ground).

2. Garlasco, *supra* note 1.

3. *Id.*

4. Letter of NATO Legal Advisor Peter Olson to the Int'l Comm'n of Inquiry on Libya (Jan. 23, 2012), http://www.nato.int/nato_static/assets/pdf/pdf_2012_05/20120514_120514-NATO_1st_ICIL_response.pdf [https://perma.cc/YR3Z-6B8Z] [hereinafter Letter of NATO Legal Advisor].

5. Jacqueline Kilmas, *U.S. Airstrikes in Syria Killed Two Civilian Children*, *Central Command Reports*, WASH. TIMES (May 22, 2015), <http://www.washingtontimes.com/news/2015/may/22/centcom-us-airstrikes-syria-killed-two-civilian-ch/> [https://perma.cc/FP4Z-V2HY].

6. *Id.*

7. *Id.*

8. *Id.*

deaths alleged to have resulted from its strike in Syria? Was that decision based upon an understanding of a duty in international law? If so, which agreement or principle gives rise to that duty? If such a duty does exist, does it only apply to credible allegations or to any report of civilian casualties? What is the standard for making such credibility assessments? When investigations do take place, what does state practice reveal with respect to standards of conduct for the investigation, and how are those standards influenced by the conditions of the airstrike site? These questions are crucial to current and future operations involving the use of force and to protection of civilian populations, particularly given the increasing prevalence of military operations in areas where the attacking force lacks ground combat troops and operates exclusively outside areas of active hostilities.⁹

That the use of deadly force impacts civilians and, at times, results in civilian deaths and injuries (referred to collectively here as “civilian casualties”) is undisputed and,¹⁰ unfortunately, has become increasingly common in many parts of the world.¹¹ As the International Committee for the Red Cross (ICRC) has noted:

9. Although used in this paper as a useful descriptor, the phrase “area of active hostilities” is not a legal term-of-art but rather one developed by the U.S. government as a matter of policy. See Ryan Goodman, *Why the Laws of War Apply to Drone Strikes Outside “Areas of Active Hostilities”* (A Memo to the Human Rights Community), JUST SECURITY (Oct. 4, 2017), <https://www.justsecurity.org/45613/laws-war-apply-drone-strikes-areas-active-hostilities-a-memo-human-rights-community/> [<https://perma.cc/485M-L9HS>] (stating that this “nomenclature is not a term of international law”).

10. The need to protect civilians from the harms of conflict was recognized in even the earliest of attempts to regulate the methods of conducting warfare. See U.S. DEPT OF WAR, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, GENERAL ORDERS NO. 100 (1898) (requiring that “[c]ommanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences”); Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297 (providing that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”).

11. INT’L COMM. OF THE RED CROSS, ENHANCING PROTECTIONS FOR CIVILIANS IN ARMED CONFLICT AND OTHER SITUATIONS OF VIOLENCE (2012), <https://www.icrc.org/eng/assets/files/other/icrc-002-0956.pdf> [<https://perma.cc/585Z-GK2X>] (“Unfortunately, today’s reality shows that the civilian population and, in armed conflicts, those no longer participating in hostilities, do suffer most from the consequences of armed violence.”).

[A] host of conflicts across the world, both international and non-international, have highlighted as never before the extent to which civilians have become targets and the growing need to ensure the protection of the wounded, the sick, detainees and the *civilian population* afforded to them by the rules of international humanitarian law.¹²

In 2000, the U.N. Security Council noted its “grave concern” about harm to civilian populations because of armed conflict and highlighted the seriousness of those effects on vulnerable populations, including women and children.¹³ This statement preceded the ongoing conflict in Afghanistan, where the use of deadly force has directly resulted in the deaths of over 100,000 civilians since 2001.¹⁴ Looking at current hostilities overall, reports estimate that civilian casualties account for over ninety percent of all conflict-related deaths in contemporary armed conflicts.¹⁵

These numbers reflect the reality that civilian casualties can and should be expected to result from the use of deadly force, whether the parties are state or non-state actors and whether or not these actors are committed to protecting civilians.¹⁶ A recent report from the

12. JEAN-MARIE HENCKAERTS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xviii (1st ed. 2005).

13. S.C. Res. 1296, ¶ 8 (Apr. 19, 2000); see also U.N. Sec’y Gen., *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, ¶ 4, U.N. Doc. S/2015/453 (June 18, 2015), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_453.pdf [<https://perma.cc/XV54-522X>] (stating that “shocking levels of brutality and casual disregard for human life and dignity have come to characterize most of today’s armed conflicts . . . [c]ivilians are killed and maimed in targeted or indiscriminate attacks”).

14. NETA C. CRAWFORD, WATSON INST. FOR INT’L & PUB. AFFAIRS, WAR-RELATED DEATH, INJURY, AND DISPLACEMENT IN AFGHANISTAN AND PAKISTAN 2001–2014 17 (2015), <http://watson.brown.edu/costsofwar/files/cow/imce/papers/2015/War%20Related%20Casualties%20Afghanistan%20and%20Pakistan%202001-2014%20FIN.pdf> [<https://perma.cc/2TJA-FLCD>].

15. *Patterns in Conflict: Civilians are Now the Target*, UNICEF, <http://www.unicef.org/graca/patterns.htm> [<https://perma.cc/4CR8-9ZE2>] (last visited Feb. 6, 2018).

16. See Micah Zenko, Opinion, *Why is the U.S. Killing So Many Civilians in Syria and Iraq*, N.Y. TIMES (June 19, 2017), <https://www.nytimes.com/2017/06/19/opinion/isis-syria-iraq-civilian-casualties.html> (on file with the *Columbia Human Rights Law Review*) (reporting a significant increase in civilian casualties in Iraq and Syria notwithstanding that U.S. “military officials have repeatedly claimed that they ‘do everything possible’ to protect civilians”). The term “parties” is used in this paper in a basic sense to describe entities involved in the use of deadly force and does not reflect a conclusion about when an entity qualifies as a

U.N. Assistance Mission in Afghanistan (UNAMA) confirms that position. It indicates that both state forces and non-state armed groups have been responsible for rising civilian casualties in the long-running conflict in Afghanistan and that deaths and injuries may result from both pre-planned military actions and unplanned counter-offensive uses of force.¹⁷

That is not to say, however, that either the nature of the conflict or the identities of the parties involved are irrelevant to the issue of civilian protection during conflicts. Rather, the use of deadly force over the last fifteen years, particularly with respect to the “War on Terror,”¹⁸ has evolved in two significant ways as it concerns civilian protection. First, the geographic scope of conflicts is now largely undefined.¹⁹ This denies civilians a clear delineation of “combat zones” and has the potential to reduce the civilian population’s ability to take

“belligerent” under international law. For a discussion of belligerency, see generally Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda*, 47 TEX. INT’L L.J. 75 (2011) (noting differences between belligerents and civilian populations).

17. U.N. ASSISTANCE MISSION IN AFG. & U.N. OFFICE OF THE HIGH COMM’R, AFGHANISTAN MIDYEAR REPORT 2015: PROTECTION OF CIVILIANS IN ARMED CONFLICT, 11, 68 (2015), https://reliefweb.int/sites/reliefweb.int/files/resources/UNAMA%20Protection%20of%20Civilians%20in%20Armed%20Conflict%20Midyear%20Report%202015_FINAL_%205%20August.pdf [<https://perma.cc/R8G2-CQBP>] (noting, however, that the practice of purposefully targeting civilians was limited to the non-State actors).

18. The phrase “War on Terror” was originally coined by President George W. Bush following the terrorist attacks on September 11, 2001. See *President Bush’s Address to a Joint Session of the Congress and the Nation*, WASH. POST (Sep. 20, 2001), http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html [<https://perma.cc/Q8BH-5VA9>] (stating that “[o]ur war on terror begins with Al Qaeda, but it does not end there” and therefore “Americans should not expect one battle, but a lengthy campaign unlike any other we have ever seen”).

19. EXEC. OFFICE OF THE PRESIDENT, 2015 DAILY COMP. PRESS DOC. 9, NATIONAL SECURITY STRATEGY (Feb. 1, 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf [<https://perma.cc/N8VH-RZ7C>] (stating that, with respect to terrorism, that the United States’ “adversaries are not confined to a distinct country or region”) [hereinafter NATIONAL SECURITY STRATEGY]; Nick J. Sciuillo, *The Ghost in the Global War on Terror: Critical Perspectives and Dangerous Implications for National Security and the Law*, 3 DREXEL L. REV. 561, 568 (2011) (“The fact that the [war on terror] lacks not only a clear enemy but also a specific geographic location necessitates a war that consumes all resources and all locations to achieve its objectives.”).

its own protective measures from incidental harm.²⁰ Parties to the conflict have increasingly relied on aerial bombing²¹ which, while designed to be precise, often uses intelligence that may be inaccurate with respect to incidental harm to civilians.²² Second, the presence of non-state parties to the conflict,²³ often consisting of loosely organized groups intermingled with the civilian population, challenges even the most discriminating of military actors.²⁴ Thus, even when military operations effectively target lawful objects of attack, civilians may also unwittingly remain in the vicinity, unaware of the danger.²⁵

20. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2119 (2005) (noting that “although *jus in bello* rules of international law regulate the types of targets against which force can be used, they place no restriction on the geographic location of the use of force”).

21. See HELEN DUFFY, *THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW* 414, 442 (2d ed. 2015) (2005) (“The heavy reliance on airstrikes has been criticised as responsible for large numbers of civilian casualties.”); see also NATIONAL SECURITY STRATEGY, *supra* note 19, at 9 (stating that the United States, for instance, has shifted its counterterrorism strategy to focus on “targeted counterterrorism operations”).

22. Nicholas J. Wheeler, *Protecting Afghan Civilians from the Hell of War*, in 10 YEARS AFTER SEPTEMBER 11: A SOCIAL SCIENCE RESEARCH COUNCIL ESSAY FORUM, <http://essays.ssrc.org/10yearsafter911/protecting-afghan-civilians-from-the-hell-of-war/> [<https://perma.cc/M37W-WPBF>] (last visited Feb. 24, 2018) (“[I]t is impossible, even with the technological development of precision weapons, to avoid the inadvertent killing and harming of civilians.”); see also Ann Rogers, *Investigating the Relationship Between Drone Warfare and Civilian Casualties in Gaza*, 7 J. STRATEGIC SECURITY 94, 95 (2014), <http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1406&context=jss> (on file with the *Columbia Human Rights Law Review*) (observing the “paradoxical problem of how reliance on drones may increase, rather than decrease, civilian casualties”); Jeff McMahan, *War, Terrorism, and the ‘War on Terror,’* in “WAR ON TERROR”: THE OXFORD AMNESTY LECTURES 2006 (Christopher Miller ed., 2009) (noting that counter-terrorism operations present a unique “problem of misidentification”).

23. NATIONAL SECURITY STRATEGY, *supra* note 19, at 9 (describing, in vague terms, the notion that the non-State actors subject to direct attack are “globally oriented groups like al-Qa’ida and its affiliates, as well as a growing number of regionally focused and globally connected groups”).

24. See Frédéric Mégret, *War and the Vanishing Battlefield*, 9 LOY. U. CHI. INT’L L. REV. 131, 149 (2011) (arguing that “even theoretical civil/military distinctions make little sense. Since terrorists are not traditional soldiers but civilians fighting a professional army, they operate from civilian neighborhoods.”) (quoting LIAQUAT ALI KHAN, *A THEORY OF INTERNATIONAL TERRORISM: UNDERSTANDING ISLAMIC MILITANCY* 274 (2006)).

25. See Brian J. Foley, *Avoiding a Death Dance: Adding Steps to the International Law on the Use of Force to Improve the Search for Alternatives to Force and Prevent Likely Harms*, 29 BROOK. J. INT’L L. 129, 150 (2003) (suggesting that force could be ineffective or counterproductive if used where “terrorists are known

In such a complex and fluid environment, international law is a critical and reliable touchstone for state and non-state actors alike in crafting appropriately restrained plans for use of force.²⁶ As such, promotion of adherence to international law and accountability of parties and individuals who violate that law must be essential components of any effort to address the impact of conflict on civilians.²⁷ These two goals are inextricably linked because the absence of accountability for violations undermines the legitimacy of international law itself. As the U.N. Secretary General recently observed, failing to “ensure that those who violate the law are held accountable for their actions . . . promotes a culture of impunity within which violations flourish.”²⁸

Nonetheless, what “accountability” means in the context of civilian casualties is uncertain. As discussed below, international law definitively requires that parties investigate alleged violations of international law that involve the use of deadly force. That being said, not all inflictions of civilian casualties constitute violations of international law, which indicates that not all civilian casualties must be investigated. Similarly uncertain is the extent to which the duty to investigate applies equally to all cross-border or borderless conflicts. For instance, how does the duty apply and how should it be modified, depending on whether the party using force exercises control over the

to live among unwitting or subjugated civilians, or among civilians who share their political views”).

26. The general view is that both state and non-state parties to a conflict are bound by international law, particularly those provisions considered to be customary law. M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 730 (2008) (noting that “states’ international legal positions and governmental opinions affirm that they and non-state actors are equally bound by Common Article 3 and Protocol II,” but pointing out that the view is less dominant among non-state actors).

27. U.N. Sec’y Gen., *supra* note 13, ¶ 3 (“[P]rotecting [civilians affected by conflict] from harm and preserving their dignity, in particular by upholding international law and seeking accountability for violations, should be at the very top of the international community’s agenda.”); *see also* U.S. DEP’T OF DEF., REPORT ON ENHANCING SECURITY AND STABILITY IN AFGHANISTAN 31 (2015), http://www.defense.gov/Portals/1/Documents/pubs/June_1225_Report_Final.pdf [<https://perma.cc/Q9LK-9Z8S>] (reporting that state forces are still responsible for five percent of civilian casualties despite “targeting procedures that reinforce tactical restraint, training to apply the minimum level of force, and calling off operations when there is an assessed risk to civilians”).

28. U.N. Sec’y Gen., *supra* note 13, ¶ 7.

relevant area? To what extent is this question influenced by the presence or absence of continuous hostilities in the area?

This Article will examine the following specific questions: What does international law require with respect to a duty to investigate civilian casualties? When, if ever, does the duty to investigate arise? And how can states fulfill their duties, including in areas where there is no established state control on the ground? In so doing, the analysis will consider what obligations arise from relevant international humanitarian law (IHL) and international human rights law (IHRL) treaties, as well as those obligations arising from customary international law and state practice.²⁹ Ultimately, this Article will conclude that states have a duty to conduct at least a preliminary investigation of all allegations of civilian casualties resulting from the use of military force, although the form and substance of these inquiries and any subsequent investigation will vary widely based on the context within which military force is used.

I. IS THERE A DUTY TO INVESTIGATE CIVILIAN CASUALTIES?

A fundamental objective of the multiple and distinct bodies of international law applicable to the use of deadly force is the protection of civilians from the harmful effects of such use.³⁰ This Part will briefly examine each legal regime's relevance to civilian protections as well as the duties they enshrine concerning investigations of civilian casualties. While the Part will focus on the duties arising under IHL and IHRL, it will also briefly address the related requirements under international criminal law and laws of state responsibility.

29. See Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT'L SECURITY J. 31, 56 (2011) (noting that state practice is not a definitive source of law on this issue in that "[l]egal concerns do not motivate all [states'] investigative practices. Many reflect policy choices influenced by factors like resources, particular political perspectives, international relations, and historic experience.").

30. See INT'L COMM. OF THE RED CROSS, *supra* note 11 ("[P]rotection for the civilian population is a basic element of humanitarian law: civilians and all those not taking part in the fighting must on no account be attacked and must be spared and protected."); INT'L COMM. OF THE RED CROSS, *INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW: SIMILARITIES AND DIFFERENCES* (2003) ("Both international humanitarian law (IHL) and international human rights law (IHRL) strive to protect the lives, health and dignity of individuals, albeit from a different angle.").

A. International Humanitarian Law & the Investigation of Civilian Casualties

Protection of civilians is a fundamental goal of IHL.³¹ In the context of international and non-international armed conflicts,³² the IHL obligation to protect civilians from deadly force finds expression in Additional Protocols I and II to the Geneva Conventions, Common Article 3 of the Geneva Conventions, and the customary IHL principles of distinction, proportionality, and precautions.³³ Article 51 of Additional Protocol I (API), relating to international armed conflicts, provides that “[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations” and that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack.”³⁴ Additionally, Article 51 prohibits indiscriminate attacks or, in other words, attacks that are not directed at a specific military objective or those that use weapons incapable of being directed at a specific objective.³⁵ Article 57 of API also reflects the goal of minimizing the harmful effects of conflict on civilians, calling upon parties to “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian

31. See generally INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009) (“The protection of civilians is one of the main goals of international humanitarian law”). This principle can also be said to transcend international law insofar as it is recognized as a moral obligation of combatants. See Douglas MacArthur, Action of the Confirming Authority, Feb. 7, 1946, United States v. Yamashita (U.S. Military Comm’n, Manila, Dec. 7, 1945) in HOWARD S. LEVIE, DOCUMENTS ON PRISONERS OF WAR 297, 298 (Naval War College Press ed., 1979) (“The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being.”).

32. Whereas an “international armed conflict” is one involving two or more states, a “non-international armed conflict” is generally understood to be a conflict between state forces and non-governmental armed groups, or one between such groups. INT’L COMM. OF THE RED CROSS, HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? (2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> [<https://perma.cc/5USB-ESAL>].

33. Customary international law is comprised of two elements: state practice and *opinio juris*. CONFERENCE REPORT, INT’L LAW ASS’N, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 7 (2000).

34. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 51, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol II].

35. *Id.*

objects.”³⁶ In the context of non-international armed conflicts, Article 13 of Additional Protocol II (APII) similarly extends a “general protection against the dangers arising from military operations”³⁷ to civilians. Furthermore, Common Article 3 provides protections to persons not actively participating in hostilities.³⁸

Echoing the treaties on this subject, customary IHL provides that parties attack only combatants and do not target civilians.³⁹ This customary norm applies to both international and non-international armed conflicts and, in demonstrating *opinio juris*, is observed by states out of a sense of legal obligation.⁴⁰ In addition to state practice recognizing the obligation to protect civilians in armed conflict, this rule has received substantial endorsement from international bodies.⁴¹ For instance, the U.N. Security Council has expressed its “strong condemnation of the deliberate targeting of civilians or other protected persons in situations of armed conflict.”⁴² Further, a number of international tribunals have reinforced the centrality to IHL of the protections afforded civilians from attack.⁴³

In practice, civilian protections are “operationalized” during conflict through the principles of distinction, proportionality, and

36. *Id.* art. 57.

37. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 13, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Protocol II].

38. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 287.

39. HENCKAERTS, *supra* note 12, at 3; see also *Second Report of the Special Rapporteur on Identification of Customary International Law*, ¶¶ 21–22, 22 n.24, U.N. Doc. A/CN.4/672 (May 22, 2014) (pointing out that the development of customary international law is based on state practice and *opinio juris*, i.e. a sense of legal obligation).

40. *Second Report of the Special Rapporteur on Identification of Customary International Law*, *supra* note 39, ¶¶ 3–6; see also *North Sea Continental Shelf Cases* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, ¶ 77 (Feb. 20) (noting that the second prong for a law to be determined to be customary, *opinio juris*, requires that States “feel that they are conforming to what amounts to a legal obligation”).

41. See generally Vincent Chetail, *The Contribution of the International Court of Justice to International Humanitarian Law*, 85 INT’L REV. RED CROSS 235 (June 2003).

42. S.C. Res. 1296, *supra* note 13.

43. See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8) (referring to civilian protection as a “cardinal principle” of IHL); *Prosecutor v. Tadić*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, ¶ 100 (ICTY 1995) (noting that the first rules to be applied to non-international armed conflicts were focused on protection of civilians).

precautions.⁴⁴ Distinction concerns the duty of a party to distinguish between civilians and combatants in using force.⁴⁵ Proportionality relates to Article 57's call to "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."⁴⁶ Finally, the principle of precautions concerns a party's obligation, again enshrined in Article 57 of API, to "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."⁴⁷

In addition to its historic recognition of the importance of protecting civilians, IHL recognizes the importance of investigating incidents where hostilities harm civilians. Accountability for such incidents is vital to ensuring adherence to API and customary norms. While formal investigation and enforcement of the customs of war date back to at least the American Civil War,⁴⁸ the emphasis on investigation and accountability for IHL violations became part of

44. U.S. DEPT OF DEF., LAW OF WAR MANUAL 1082, § 5.3 (2015), <http://www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf> [<https://perma.cc/PT2H-KM5Y>] ("Many of the rules for the protection of civilians are derived from the principles of distinction and proportionality."); see also HENCKAERTS, *supra* note 12, at 6 (observing that the rule prohibiting direct attack of civilians "is sometimes expressed in other terms, in particular as the principle of distinction between combatants and non-combatants").

45. See INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW DATABASE, R. 1, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule1#Fn_90_1 [<https://perma.cc/6B8X-AQ78>] (last visited Feb. 4, 2018) (stating that parties in conflict must at all times distinguish between civilians and combatants).

46. Protocol I, *supra* note 34, art. 57; see also INT'L COMM. OF THE RED CROSS, *supra* note 45, at R. 14 ("A large number of military manuals lay down the principle of proportionality in attack.").

47. Protocol I, *supra* note 34, art. 57; see also INT'L COMM. OF THE RED CROSS, *supra* note 45, at R. 14 ("The obligation to take feasible precautions is recognized in a number of military manuals.").

48. The abuse of Union prisoners at the hands of Confederate forces was investigated by an independent commission appointed by Congress. The Confederate commander of the Andersonville prison camp, the site of particularly egregious abuses, was prosecuted and executed for his role in such abuses. U.S. SANITARY COMM'N, NARRATIVE OF PRIVATIONS AND SUFFERINGS OF UNITED STATES OFFICERS AND SOLDIERS WHILE PRISONERS OF WAR IN THE HANDS OF THE REBEL AUTHORITY (1864); ULYSSES S. GRANT, SEC'Y OF WAR, No. 23, TRIAL OF HENRY WIRZ 4 (1867), http://www.loc.gov/rr/frd/Military_Law/Wirz_trial.html [<https://perma.cc/4DBZ-5RXL>] (last visited Feb. 4, 2018).

international relations with the post-World War II war crimes tribunals.⁴⁹

The mandate to pursue and punish war crimes applies to both states and military commanders, and both state actors and military commanders are relevant to the question of investigations of civilian casualties. For states, the Geneva Conventions require state action in response to violations of IHL.⁵⁰ In general, Common Article 1 calls upon states to ensure respect for the Conventions, suggesting that states are expected to exercise an oversight role in their own forces' adherence to IHL.⁵¹ Article 146 of Geneva Convention IV places states "under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."⁵² The same Article goes on to provide that states "shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches."⁵³

Strictly interpreted, a state's duty to pursue and punish war criminals follows both "grave breaches," including willful killing, torture, and inhuman treatment,⁵⁴ and other serious violations of the Geneva Conventions.⁵⁵ Although not explicitly defined in the Conventions, these other serious violations have been interpreted to

49. See *In re Yamashita*, 327 U.S. 1, 11 (1946) ("An important incident to the conduct of war is the adoption of measures by the military commander . . . to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war.").

50. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 50, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 38, art. 146. It should be noted that the Conventions suggest that States have universal jurisdiction over war crimes and the duty to pursue and punish those responsible applies irrespective of nationality. See INT'L COMM. FOR THE RED CROSS, ADVISORY SERVICE ON INTERNATIONAL HUMANITARIAN LAW, UNIVERSAL JURISDICTION OVER WAR CRIMES (2014), <https://www.icrc.org/eng/assets/files/2014/universal-jurisdiction-icrc-eng.pdf> [<https://perma.cc/X8TN-NLLC>] (last visited Feb. 4, 2018).

51. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 38, art. 1.

52. *Id.* art. 146.

53. *Id.*

54. *Id.* art. 147.

55. See Schmitt, *supra* note 29, at 33 (discussing the distinction between "war crimes" and violations).

include targeting “the civilian population or individual civilians, [who are] not taking a direct part in hostilities,” and “launching an attack in the knowledge that such attack will cause incidental loss of civilian life, injury to civilians or damage to civilian objects which would be clearly excessive in relation to the concrete and direct military advantage.”⁵⁶ In other words, violating the principles of distinction and proportionality will likely constitute “serious violations.”⁵⁷ Not all violations of IHL constitute “war crimes,” but “grave breaches” and “serious violations” would likely meet the definition of a “war crime.”⁵⁸

In addition to the obligation placed on states with respect to violations of IHL, the doctrine of “command responsibility” provides that commanders may be held criminally responsible for their failure to prevent, repress, or punish “war crimes” committed by their subordinates.⁵⁹ API requires that states “require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of [API].”⁶⁰ This same provision goes on to require that commanders who become aware of either past or impending violations “initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.”⁶¹

An obligation to investigate alleged violations of IHL is apparent based on the state’s and commander’s duty to punish and repress violations. Even before the Geneva Conventions, for instance, one post-World War II tribunal noted that the commander’s responsibility extended to assembling the “pertinent facts” of possible

56. HENCKAERTS, *supra* note 12, at 576.

57. Alon Margalit, *The Duty to Investigate Civilian Casualties During Armed Conflict and Its Implementation in Practice*, 15 Y.B. INT’L HUMANITARIAN L. 155, 158 (2012).

58. Schmitt, *supra* note 29, at 33.

59. HENCKAERTS, *supra* note 12, at 558.

60. Protocol I, *supra* note 34, art. 87; *see also* INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 3402 (Yves Sandoz et al. eds. 1987), http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf [<https://perma.cc/3AKP-WBXX>] [hereinafter ICRC AP Commentary] (observing that the reference to “commanders” in Art. 87 “was intended to refer to all those persons who had command responsibility, from commanders at the highest level to leaders with only a few men under their command”).

61. Protocol I, *supra* note 34, art. 87.

violations by subordinates and suggested that the failure to do so could constitute a dereliction.⁶² More recently, the International Criminal Tribunal for the Former Yugoslavia recognized a mandate that commanders conduct adequate investigations of alleged violations of IHL.⁶³ The official ICRC Commentary on API's Article 87 reinforces the rule that a duty to *investigate* alleged violations of IHL can be inferred from the duty to *suppress* violations, stating that commanders "are in a position to establish or ensure the establishment of the facts, which would be the starting point for any action to suppress or punish a breach."⁶⁴ The Commentary envisions the commander acting as an "investigating magistrate."⁶⁵ Moreover, the U.N. General Assembly acknowledged the obligation to investigate possible violations of IHL in its resolution concerning remedies and reparations for violations of IHL and IHRL.⁶⁶

The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to . . . *investigate* violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law.⁶⁷

The importance of investigations has been affirmed by a number of states through the incorporation of the commander's duty to investigate violations of IHL into national legislation and military

62. United States v. List et al. (The Hostage Case), XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL 1230, 1271 (1948), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XI.pdf [<https://perma.cc/BZ73-GLF4>]. The tribunal held not only that a commander "may require adequate reports of all occurrences that come within the scope of his power" but furthermore that "if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts." *Id.*

63. Prosecutor v. Blaškić, Judgement, IT-95-14-T, ¶ 310 (ICTY 2000).

64. ICRC AP Commentary, *supra* note 60, ¶¶ 3560–62.

65. *Id.*

66. G.A. Res. 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement> [<https://perma.cc/P2R4-76RS>] [hereinafter Guidelines on the Right to a Remedy].

67. *Id.* § II.3(b) (emphasis added).

doctrine.⁶⁸ One commentator has argued that all members in the military chain of command have a role in facilitating the investigation of violations of IHL, based on the expectation that violations be reported to superiors.⁶⁹

But, in a strict sense, the duty relevant treaties impose on a state or commander to investigate violations of IHL is limited to situations involving a possible “grave breach” or “serious violation.” The Rome Statute of the International Criminal Court (ICC) limits its requirement for investigation to “war crimes,”⁷⁰ and corresponding practice of the ICC Prosecutor to investigating only “allegations of war crimes.”⁷¹ While the text of these treaties and state practice clearly supports the conclusion that there is a duty to investigate civil

68. U.S. DEP'T OF DEF., LAW OF WAR MANUAL 1082 (2015), <http://www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf> [<https://perma.cc/PT2H-KM5Y>] (citing U.S. DEP'T OF DEF., DIRECTIVE NO. 2311.01E, DOD LAW OF WAR PROGRAM 3.2 (2006) for the policy that “all reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual are reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action”); CAN. NAT'L DEF., LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS 16-10 (2001), https://www.fichl.org/fileadmin/migrated/content_uploads/Canadian_LOAC_Manual_2001_English.pdf [<https://perma.cc/ZQ55-FPK5>] (citing the Rome Statute for the International Criminal Court in support of a commander's responsibility to submit incidents of IHL violations for investigation); International Criminal Court Act 2001, c. 17, § 65 (UK) <http://www.legislation.gov.uk/ukpga/2001/17/section/65> [<https://perma.cc/76ZW-C4TD>] (providing offenses for commander's failure to submit matters for investigation).

69. See Schmitt, *supra* note 29, at 43 (“Although the article [Article 87] is framed in terms of commanders' duties, it is clear that the intent was to create a seamless system for identifying and responding to potential and possible war crimes.”); see also U.S. DEP'T OF DEF., DIRECTIVE NO. 2311.01E, DOD LAW OF WAR PROGRAM 3.2 (2006), <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf> [<https://perma.cc/CZF8-ZKUR>] (defining a “reportable incident” as “[a] possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict”).

70. See Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, art. 28, 37 I.L.M. 999, 2187 U.N.T.S. 3 (last amended 2010) (making it an offense when a “military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution”).

71. See THE OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2–3 (2015), <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf> [<https://perma.cc/8VN8-XF2K>] (noting the ICC Prosecutor's unique “gravity” standard for investigation, seemingly excluding isolated instances of civilian casualties from its investigative mandate).

casualties resulting from a state's use of force when there is information suggesting that an IHL violation has occurred,⁷² civilian casualties themselves do not constitute *prima facie* evidence of a violation of IHL.⁷³ As such, Canada, for instance, takes the perspective that "there is no positive obligation rooted in international law that Canada investigate civilian casualties that are the result of an extraterritorial use of force provided there is no information to suggest that the use of force violated the law of armed conflict (LOAC)."⁷⁴ Canada's practices pertaining to investigating civilian casualties are addressed further below.

Nonetheless, states are under an obligation to suppress "all acts contrary to the provisions of the present Convention other than . . . grave breaches."⁷⁵ Reports of civilian casualties unquestionably indicate a possible violation of IHL. Without further inquiry, a state may fail in its duty to investigate and suppress violations of IHL. One can therefore conclude that IHL requires some formal inquiry into all credible reports of civilian casualties. As one commentator has observed: "[W]ithout an investigation it is impossible to say whether IHL norms were actually violated."⁷⁶

72. See generally Margalit, *supra* note 57, at 166 ("[I]t is clear and indeed supported by state practice that under LOAC [the law of armed conflict] and general international law, there is an obligation to investigate civilian casualties when credible information suggests a LOAC violation notwithstanding it does not amount to a war crime.").

73. INT'L COMM. OF THE RED CROSS, *supra* note 45, at R. 14. The IHL Database surveys national practice confirming that not all civilian casualties reflect a violation of IHL. The database quotes Canada's Law of Armed Conflict Manual, which states that "[t]he fact that an attack on a legitimate target may cause civilian casualties or damage to civilian objects does not necessarily make the attack unlawful under the LOAC." INT'L COMM. RED CROSS, PRACTICE RELATING TO RULE 14. PROPORTIONALITY IN ATTACK, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule14 [perma.cc/CZM8-XDHG] (last visited Feb. 21, 2018).

74. E-mail from Captain Jayne M. Thompson, Office of the Judge Advocate Gen., Canadian Armed Forces, Directorate of Int'l & Operational Law, to authors (June 16, 2016, 09:47 EST) (on file with authors). Canada's practices pertaining to investigating civilian casualties are addressed in Section V.D.2 *infra*.

75. OSCAR M. UHLER ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR art. 146 (Jean Pictet ed. 1958). The ICRC Commentary has interpreted this obligation to extend to "everything which can be done by a state to avoid acts contrary to the Convention being committed or repeated." *Id.*

76. Michal Drabik, *A Duty to Investigate Incidents Involving Collateral Damage and the United States Military's Practice*, 22 MINN. J. INT'L L. ONLINE 15, 18 (2013), <http://minnjil.org/wp-content/uploads/2015/04/DRABIK-Duty-to-Investigate-MJIL-Online-Vol-22-2013.pdf> [https://perma.cc/D4P4-JCU9]. Calls for

One international tribunal, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia, concluded that the customary international law duty of a commander to investigate violations does not only arise when the commander is presented with conclusive evidence of a crime.⁷⁷ Rather, the Trial Chamber wrote, “[i]t is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.”⁷⁸

This interpretation of the duty has practical force, and there is evidence of an emerging recognition of a duty in IHL to investigate all credible reports of civilian casualties, even if only as a preliminary procedural step to prove or disprove the presence of evidence indicating that a possible violation of IHL has occurred.⁷⁹ For instance, U.S.

investigations of all claims of civilian casualties have become more common. *See* Editorial, *NATO's Duty*, N.Y. TIMES (Mar. 29, 2012) <http://www.nytimes.com/2012/03/30/opinion/natos-duty.html> (on file with the *Columbia Human Rights Law Review*) (arguing that NATO's refusal to investigate civilian casualties prevents NATO from being able to learn from them); *see also* DEF. LEGAL POLICY BD., U.S. DEP'T OF DEF., REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES 141 (2013) (recommending that commanders be required “to conduct an uncomplicated, prompt, initial fact-finding inquiry, consistent with operational conditions, in civilian casualty cases to determine the readily available facts, likely cause, and extent of U.S. or coalition force involvement”).

77. Prosecutor v. Mucic, Trial Judgement, IT-96-21-T, ¶ 393 (ICTY 1998).

78. *Id.*

79. *See, e.g.*, Press Release, U.S. Cent. Command, CJTF-OIR Completes Civilian Casualty Investigation (May 21, 2015), <http://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/885137/cjtf-oir-completes-civilian-casualty-investigation/> [<https://perma.cc/DH3A-4AF3>] (stating that the United States commander directed an investigation based on allegations of “non-combatant casualties” resulting from a U.S. airstrike); Press Release, U.S. Cent. Command, Nov 20: U.S. Air Forces Central Command Completes Iraq Civilian Casualty Investigation (Nov. 20, 2015), <http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/904017/nov-20-us-air-forces-central-command-completes-iraq-civilian-casualty-investiga/> [<https://perma.cc/8ZDC-85XT>] (indicating that an investigation was convened based on allegations of civilian casualties); *see also* John Kirby, Rear Adm., U.S. Dep't of Def., Press Briefing (Jan. 6, 2015), <http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5561> [<https://perma.cc/4EDC-CHVE>] (indicating that civilian casualties are investigated by the United States when they are deemed to be “credible”); Press Release, Ned Price, Spokesman of the Nat'l Sec. Council, Statement by NSC Spokesperson Ned Price on Reports of Civilian Deaths in Yemen (Oct. 2, 2015), <https://www.whitehouse.gov/the-press-office/2015/10/02/statement-nsc-spokesperson-ned-price-reports-civilian-deaths-yemen> [<https://perma.cc/P89A-T2F3>] (stating that the United States recognizes the

commanders have convened at least four formal investigations and hundreds of civilian casualty credibility assessments in the last three years based upon allegations of civilian casualties resulting from its ongoing aerial bombing campaign against the Islamic State of Iraq and the Levant (ISIL).⁸⁰ Similarly, “Canadian commanders order an investigation of some kind, whether administrative or criminal, in all cases of death or injury, including collateral death or injury, and even including deaths of enemy combatants.”⁸¹

The Netherlands armed forces require investigations into all civilian casualties and have a “practice of conducting a factual investigation in all cases of civilian death or serious injury” which “is based, in part, on the requirements of the European Convention on Human Rights, which the Netherlands applies, as a matter of policy, whenever its armed forces are operationally deployed.”⁸² Likewise, policies of the armed forces of the United Kingdom require that all “shooting incidents” be reported up the military chain of command through what is known as a “Serious Incident Report.”⁸³ In all such reports that indicate a possible civilian death or injury, even in the absence of evidence of a violation of IHL, military commanders must initiate a brief fact-finding “Shooting Incident Review.”⁸⁴

“importance of thoroughly investigating all credible allegations of civilian casualties” and calling for the findings to be reported publicly).

80. See, e.g., *supra* note 79; CJTF – OIR *Monthly Civilian Casualty Report*, COMBINED JOINT TASK FORCE – OPERATION INHERENT RESOLVE (June 2, 2017), <http://www.inherentresolve.mil/News/News-Releases/Article/1200895/combined-joint-task-force-operation-inherent-resolve-monthly-civilian-casualty/> [<https://perma.cc/6YPN-B7XD>] (noting that in June 2017 the total number of civilian casualty reports resulting from Operation Inherent Resolve was 440 and, following a credibility assessment, 118 of those reports were assessed to be credible). The distinction between what the U.S. military considers an investigation and what it considers a credibility assessment will be explored below.

81. See JACOB TURKEL ET AL., *THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010: SECOND REPORT* 247 (2013), http://www.hamoked.org/files/2013/1157610_eng.pdf [<https://perma.cc/T2T4-GE3V>] [hereinafter *Turkel Report*]. The *Turkel Report* was the product of an independent public commission established by the government of Israel to review the actions of the government and its military forces in enforcing a naval blockade of Gaza, in addition to examining more generally the practice of the state of Israel in reviewing complaints of IHL violations. *Id.* at 33.

82. *Id.* at 217.

83. ANTHONY PAPHITI, *SELECT COMM. ON DEF., UK ARMED FORCES PERSONNEL AND THE LEGAL FRAMEWORK FOR FUTURE OPERATIONS* (2013), <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmdfence/writev/futureops/law06.htm> [<https://perma.cc/CNT2-NW3K>].

84. *Id.*

Deciphering international norms from these practices may be both challenging and illusory given the differing equities at stake, but there is evidence that states recognize a duty to formally examine all military uses of force that cause civilian casualties, irrespective of where those casualties arise. In arriving at that conclusion, there appears to be no reason to distinguish between international and non-international armed conflicts on the question of the existence of a duty to investigate.⁸⁵ The contours of this duty under IHL and how it is fulfilled will be further explored below.

B. International Human Rights Law and Investigation of Civilian Casualties

Whereas IHL presents a nuanced analysis on the question of the existence of a duty to investigate in the case of civilian casualties, IHRL is much clearer. Like IHL, a fundamental tenet of IHRL is the protection of human life. This is evident from the cornerstone document of IHRL, the Universal Declaration of Human Rights, which provides that “everyone has the right to life, liberty, and security of person.”⁸⁶ This right has been reiterated in numerous international and regional agreements and statements.⁸⁷ Most recently, the protection of life found expression in the Draft General Comment from the

85. See Schmitt, *supra* note 29, at 48 (“Overall, it would appear defensible to assert that the requirement to investigate and prosecute war crimes attaches in both international and non-international armed conflict. Therefore, there is no basis for deviating from the scope of the relevant provisions deduced earlier.”).

86. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 3, U.N. Doc. GAOR, 3d Sess., U.N. Doc. A/RES/3/217(III) (Dec. 10, 1948) [hereinafter UDHR].

87. See, e.g., African Charter on Human and Peoples’ Rights, *adopted* June 27, 1981, art. 6, 21 I.L.M. 58, 3 (entered into force Oct. 21, 1986); American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 4, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (entered into force July 18, 1978); *American Declaration on the Rights and Duties of Man*, O.A.S. Res. XXX, 9th Int’l Conference of Am. States, art. 1, O.A.S. Official Record, OEA/Serv.L/V/II.23, doc.21 rev. 6 (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992); League of Arab States, Arab Charter on Human Rights, May 22, 2004, *reprinted in* 12 Int’l Hum. Rts. Rep. 893 (2005); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 9, Dec. 18, 1990, 2220 U.N.T.S. 3; Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, art. 6, 144 U.N.T.S. 123 (entered into force Sept. 2, 1990); [European] Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 2, Europ. T.S. No. 5, 213 U.N.T.S. 221, 6; International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 6, 999 U.N.T.S. 171, 174 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

Human Rights Committee's Special Rapporteur on the Right to Life.⁸⁸ This document described the right to life as the "supreme right from which no derogation is permitted."⁸⁹ General Comment No. 3 of the African Charter on Human and People's Rights, approved by the African Commission on Human and Peoples' Rights in 2015,⁹⁰ furthermore echoes this by stating that the right to life is "the fulcrum of all other rights," "is non-derogable, and applies to all persons at all times." It should be noted that, in the context of IHRL, the right to life is understood to protect against "arbitrary" losses of life.⁹¹

From the protections afforded in these agreements, the U.N. General Assembly has interpreted that states have a duty to investigate loss of life resulting from the use of force.⁹² The General Assembly has similarly endorsed a set of guidelines which provides the following regarding the investigation of "extra-legal executions":

There shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Governments shall maintain investigative offices and procedures to undertake such inquiries. The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death.⁹³

88. Yuval Shany & Nigel Rodley, Rapporteurs of the Human Rights Comm., *Draft General Comment No. 36, Article 6: Right to Life*, U.N. Doc CCPR/C/GC/R.36/Rev.2 (Sept. 2, 2015).

89. *Id.* ¶ 2.

90. African Comm'n on Human & Peoples' Rights, General Comment No. 3 on the African Charter on Human and Peoples' Rights on the Right to Life (Article 4), ¶ 1 (Nov. 4–18, 2015), http://www.achpr.org/files/instruments/general-comments-right-to-life/general_comment_no_3_english.pdf [<https://perma.cc/8Z4T-BQ5Q>] [hereinafter African Comm'n on Human & People's Rights].

91. *See id.* ¶ 2 ("The Charter imposes on States a responsibility to prevent arbitrary deprivations of life caused by its own agents, and to protect individuals and groups from such deprivations at the hands of others."); Shany & Rodley, *supra* note 88, ¶ 12 (stating that states must "provide strict and effective measures of monitoring and control in order to ensure that the powers granted are not misused, and do not lead to arbitrary deprivations of life").

92. *See* Guidelines on the Right to a Remedy, *supra* note 66.

93. Economic and Social Council Res. 1989/65, annex, ¶ 9 (May 24, 1989), <http://www.ohchr.org/Documents/ProfessionalInterest/executions.pdf> [<https://perma.cc/T89G-74GY>] (endorsed by the United Nations General Assembly in A/RES/44/162).

The Human Rights Committee's Draft Comment recognizes the duty to investigate, stating that "[a]n important element of the protection afforded to the right to life by the Covenant is the obligation to investigate and prosecute allegations of deprivation of life by State authorities."⁹⁴ Similarly, the African Commission has stated that the Right to Life "imposes a responsibility to investigate any killings that take place, and to hold the perpetrators accountable."⁹⁵ The Human Rights Committee has also affirmed that states may be held to have violated their responsibilities under the International Covenant on Civil and Political Rights (ICCPR) for failing to investigate derogations from its protections.⁹⁶

A number of international tribunals have had occasion to consider states' duties with respect to investigating loss of life and have concluded that IHRL requires investigation of civilian deaths. For instance, in *Velasquez-Rodriguez v. Honduras*, the Inter-American Court of Human Rights concluded that the state's failure to investigate forced disappearances constituted a breach of its IHRL obligations.⁹⁷ Similarly, the European Court of Human Rights has held that IHRL mandates the investigation of civilian deaths resulting from the state's use of force,⁹⁸ as has the African Commission on Human and Peoples'

94. Shany & Rodley, *supra* note 88, ¶ 31.

95. African Comm'n on Human & Peoples' Rights, *supra* note 90, ¶ 2.

96. Human Rights Comm. General Comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 2, CCPR/C/21/Rev.1/Add. 13 (May 26, 2004) ("There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations . . . [in] permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons."). Additionally, the Human Rights Committee has reiterated that an investigation must also be followed by steps to hold those responsible for violations accountable. *Id.* ¶ 18.

97. *Velasquez-Rodriguez v. Honduras*, ¶ 176 (Inter-Am. Ct. H.R. July 29, 1988) ("[T]he State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State [allows] the violation [to go] unpunished and the victim's full enjoyment of such rights [to life and physical integrity] is not restored as soon as possible, the State has failed to comply with its duty"); see also Fernando Felipe Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers*, 23 AM. U. INT'L L. REV. 195, 200 (2013) (interpreting the Inter-American Court of Human Rights' decision in *Velasquez-Rodriguez* to suggest that "two state obligations arise from Article 1(1) of the American Convention," one of which being the right to free and full exercise of the right to life).

98. *McCann v. United Kingdom*, App. No. 464/545, ¶ 161 (Eur. Ct. H.R. Sept. 27, 1995) ("The obligation to protect the right to life under this provision (art 2) read in conjunction with the State's general duty under Article 1 (art.2+1) of the

Rights.⁹⁹ Thus, the requirement for states to investigate civilian deaths resulting from the use of military force is clearly well-rooted in IHRL.

As such, investigations of civilian casualties and arbitrary losses of life are fundamental pillars of IHL and IHRL, but when is the duty to investigate triggered and what does fulfillment of that duty entail? Embedded within these questions are issues related to the extent to which circumstantial factors dictate the contours of the duty and how it is fulfilled. For instance, is a state's duty only triggered by a "credible" allegation of civilian casualties and, if so, how is credibility weighed? In addition, does a state's lack of effective control over the location where force was used affect the extent to which states are required to investigate or allow states to defer responsibility for investigation to another party?¹⁰⁰ These questions will be explored below.

II. WHEN IS THE DUTY TO INVESTIGATE TRIGGERED?

Neither IHL nor IHRL provide a precise threshold for when the duty to investigate arises following extra-territorial uses of force. The unconventional nature of contemporary armed conflicts, which involve the use of force and lethal targeting outside of declared areas of hostilities, further complicates defining a legal framework for when the duty to investigate civilian casualties arises. As a result of the

Convention . . . requires . . . some form of effective official investigation when individuals have been killed as result of the use of force"); see also *Ergi v. Turkey*, App. No. 23818/94, ¶ 82 (Eur. Ct. H.R. July 28, 1998) (referring to *McCann v. United Kingdom*'s conclusion that the State's duty to investigate "obligation is not confined to cases where it has been established that the killing was caused by an agent of the State").

99. See Comm'n Nat'l des Droits de l'Homme et des Libertés v. Chad, Communication 74/92, African Comm'n on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 22 (Oct. 1995) (holding that Chad had violated the Charter because "[e]ven where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders").

100. See Michael Holden, *NATO Failed to Investigate Libya Civilian Deaths: Amnesty*, REUTERS (Mar. 19, 2012), <http://www.reuters.com/article/us-libya-amnesty-nato-idUSBRE82I04Y20120319> [https://perma.cc/GRW7-7HJ3] (indicating that NATO declined to investigate civilian casualties resulting from airstrikes in Libya based on its lack of authority to operate in that country); C.J. Chivers & Eric Schmitt, *In Strikes on Libya by NATO, An Unspoken Civilian Toll*, N.Y. TIMES (Dec. 17, 2011), <http://www.nytimes.com/2011/12/18/world/africa/scores-of-unintended-casualties-in-nato-war-in-libya.html> (on file with the *Columbia Human Rights Law Review*) (reporting that NATO deferred responsibility for investigating civilian casualties in Libya to Libyan authorities).

underdeveloped nature of applicable legal standards, state practice is also inconsistent. Drawing on current state practice and the interaction between IHL and IHRL, this Part seeks to provide a framework for when the duty to investigate civilian casualties is triggered following the use of force or lethal targeting.

A. The Interplay Between IHL and IHRL for the Extra-Territorial Use of Force

As previously established, the presence of civilian casualties in an armed conflict does not in and of itself amount to a “serious violation” of IHL. Incidental collateral damage, resulting from strikes against legitimate military targets in line with the principles of proportionality, distinction, and precautions, is lawful under IHL.¹⁰¹ The duty to investigate under IHL arises whenever there is a “credible allegation” or “reasonable suspicion” that a serious violation of IHL—including an attack contravening the principles of distinction, proportionality, or precautions—may have occurred.¹⁰² The threshold and scope of the duty to investigate under IHL are the same for international and non-international conflicts.¹⁰³

The lower threshold for the duty to investigate provided by IHRL is triggered whenever a use of force leads to arbitrary deprivation of life.¹⁰⁴ This is evidenced, among other things, by affirmative use of force investigations in domestic law enforcement contexts.¹⁰⁵ In other words, under IHRL, any loss of life, whether

101. See AUST. DEF. FORCE, EXEC. SERIES ADDP 06.4, LAW OF ARMED CONFLICT, AUSTRALIAN DEFENCE FORCE, May 11, 2006 5-11 (2006), available at <http://www.defence.gov.au/adfwc/documents/doctrinelibrary/addp/addp06.4-lawofarmedconflict.pdf> [<https://perma.cc/TK8E-U87T>] (“Collateral damage may be the result of military attacks. This fact is recognised by the LOAC and, accordingly, it is not unlawful to cause such injury and damage.”)

102. Schmitt, *supra* note 29, at 83.

103. *Id.* at 82; see also Turkel Report, *supra* note 81, at 46 (exploring the diminishing relevance of the distinction between international armed conflicts and non-international conflicts for the purposes of humanitarian law); see also Sarah Cleveland, *Harmonizing Standards in Armed Conflict*, BLOG EUR. J. INT’L L. (Sept. 8, 2014), <http://www.ejiltalk.org/harmonizing-standards-in-armed-conflict/> [<https://perma.cc/Q3GS-G3YC>] (“[T]he United States, Australia, Canada, the Netherlands, the United Kingdom, and others . . . have issued guidance stating that their armed forces will apply [International Armed Conflict (IAC)] rules as a matter of policy in [Non-international Armed Conflicts (NIACs)].”).

104. See UDHR, *supra* note 86, art. 3; ICCPR, *supra* note 8, arts. 2, 6.

105. See, e.g., OFFICE OF THE INSPECTOR GEN. FOR THE N.Y.C. POLICE DEP’T, POLICE USE OF FORCE IN NEW YORK CITY: FINDINGS AND RECOMMENDATIONS ON NYPD’S POLICIES AND PRACTICES 2 (2015), <http://www.nyc.gov/html/oignypd/>

incidental to law enforcement operations or not, would give rise to a *prima facie* duty to investigate.

Precisely when circumstances trigger the duty to investigate civilian casualties, with respect to the Article 6 Right to Life under the International Covenant on Civil and Political Rights (ICCPR), depends on the interaction of IHL and IHRL in specific contexts. The International Court of Justice (ICJ) clarified the relationship between IHL and IHRL in the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*, holding that both IHL and IHRL are applicable during hostilities.¹⁰⁶ The Court explained as follows:

[T]he protection of the International Covenant of (sic) Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an *arbitrary* deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant. . . .¹⁰⁷

By accepting mutual application of IHL and IHRL, the ICJ reconciled the fundamental tension between the two—the “license” to kill an enemy combatant which may result in collateral damage under IHL and the right to life under the ICCPR—by holding that an *arbitrary* deprivation of life, for IHRL purposes, must be construed with reference to IHL, as the *lex specialis* during armed conflict. It follows therefore that an arbitrary deprivation of life in the context of an armed conflict does not include lawful killing of enemy combatants

assets/downloads/pdf/oig_nypd_use_of_force_report_-_oct_1_2015.pdf [https://perma.cc/LY6X-4984] (observing that all firearm discharges are investigated); INDEP. OFFICE FOR POLICE CONDUCT, <https://www.ipcc.gov.uk> (on file with the *Columbia Human Rights Law Review*) (last visited Feb. 18, 2018).

106. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, ¶ 25 (July 8).

107. *Id.* (first emphasis added).

or proportionate collateral damage that may result from military operations conducted in accordance with the laws of war.¹⁰⁸ The ICJ furthermore reaffirmed the mutual application of IHL and IHRL in the context of armed conflict in its 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.¹⁰⁹ Here the Court rejected the argument that the ICCPR is only applicable during peacetime and held that:

[T]he protection offered by human rights conventions does not cease in case of armed conflict . . . [and that as] regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.¹¹⁰

The U.N. Human Rights Committee (HRC) has also held that the ICCPR is applicable “in situations of armed conflict to which the rules of [IHL] are applicable. While . . . more specific rules of [IHL] may be especially relevant for the purposes of the interpretation of [certain] Covenant rights, both spheres of law are complementary, not mutually exclusive.”¹¹¹

The complementary application of IHL and IHRL is also in line with the hybrid or ‘internationalized non-international’ nature of contemporary armed conflicts and the variety of uses of force and forms of engagement these necessitate. In the context of the “Global War on Terror,” one controversial debate revolves around whether it is in fact possible to have one global non-international conflict between states and non-state actors who readily move around and permeate

108. It is noteworthy that the ICJ’s analysis reconciles the mutual application of IHL and IHRL in the specific context of the Article 6 Right to Life under the ICCPR. This does not necessarily mean that IHL is always the *lex specialis* in the context of hostilities, or that it is so with respect to other provisions of the ICCPR or IHRL generally. The ICJ leaves the door open on which legal framework is the appropriate *lex specialis* for other fundamental human rights.

109. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136 (July 9).

110. *Id.* ¶¶ 105–06. Unlike the Nuclear Weapons Advisory Opinion, the ICJ does not engage in a *lex specialis* analysis in the Wall Advisory Opinion; nor does it provide any particular technique whereby the two branches of international law can both practically be applied.

111. U.N. Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter General Comment 31].

geographic borders. The United States, for example, maintains that its counter-terrorism operations are not confined to particular geographic boundaries.¹¹² While a detailed discussion of this topic is beyond the scope of this Article, it is worth noting that it is problematic to infer that the regulation of a global non-international conflict that is not confined to geographic boundaries is nevertheless subject to the exclusive application of IHL as it relates to conventional armed conflicts between geographically defined states. A harmonized approach allowing for a mutual application of IHL and IHRL in regulating contemporary armed conflicts therefore provides a fluid legal regime that may be customized to the contexts of specific military engagements or counter-terrorism operations, with due regard to military objectives and humanitarian protection.¹¹³

A mutual application of IHL and IHRL during armed conflict, at least in the context of the right to life under the ICCPR, does not appear to raise irreconcilable issues with respect to states' substantive legal obligations. However, the procedural obligations of some states may be impacted to a greater extent in light of states' broader duties to investigate, remedy and report violations under the ICCPR and other IHRL instruments. The ICJ and HRC have also endorsed an extraterritorial application of the ICCPR. The ICJ has determined that the ICCPR is applicable in the context of foreign occupation¹¹⁴ and the HRC has established that it applies whenever a state exercises power and effective control over a person or an area.¹¹⁵ The latter therefore

112. See National Security Strategy, *supra* note 19, at 9.

113. See, e.g., Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1 (2004) (discussing the relationship between IHL and IHRL and arguing that neither IHL nor IHRL should be exclusively applied to regulating the use of force in an armed conflict—rather, relevant principles of both legal regimes should be applied to fill any gaps in the law and duly address humanitarian protection concerns).

114. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 109 (holding, *inter alia*, that the ICCPR also applied to Israel with respect to its conduct in the occupied territories of the West Bank which had been subject to Israeli occupation for 37 years); see also Case Concerning Armed Activities on the Territory of the Congo (D.R.C. v. Uganda) 2005 I.C.J. 116 (recognizing, albeit implicitly, the extraterritorial application of the ICCPR in cases of short-term occupation).

115. See General Comment 31 *supra* note 111, ¶ 10 (noting that state parties are obligated to “respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party”). Furthering this extraterritorial application, “this principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.” *Id.*

implies that even where a state may not exercise effective control over non-sovereign territory subject to extraterritorial strikes, the use of force in such cases, including lethal targeting using remotely controlled drones, would make the state subject to at least the procedural obligations of the ICCPR and the oversight authority of the HRC.

The European Court of Human Rights (ECtHR) has addressed the relationship between IHL and IHRL specifically in the context of the United Kingdom's duty to investigate violations of the right to life in Iraq following the 2003 United-States- and United-Kingdom-led invasion and subsequent temporary occupation of the country:

The Court has held that the procedural obligation under Article 2 [of the European Convention on Human Rights (ECHR)] continues to apply in difficult security conditions, including in a context of armed conflict . . . It is clear that where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and . . . concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed. Nonetheless, the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, *all reasonable steps* must be taken to ensure that an *effective, independent* investigation is conducted into alleged breaches of the right to life.¹¹⁶

The ECtHR's extraterritorial application of the duty to investigate alleged violations of the right to life therefore also supports the proposition that even where IHL, as the *lex specialis*, defines an arbitrary deprivation of life during armed conflict, states are still subject to the rest of their obligations, including the duty to investigate, prescribed by the ECHR.

The aforementioned views of the ICJ, HRC, and ECtHR all support the practical realities of contemporary armed conflicts, which increasingly involve the use of force in areas outside active hostilities. In the context of a global non-international conflict, like the "Global War on Terror," the necessity of applying IHRL extraterritorially is most prominent in situations of foreign occupation or during counter-terrorism operations that take place outside areas of active

116. Al-Skeini and Others v. United Kingdom, App. No. 55721/07, ¶ 164 (Eur. Ct. H.R. July 7, 2011) (emphasis added) (internal citations omitted).

hostilities.¹¹⁷ For example, consider the use of drones in Afghanistan and Pakistan. The United States' employment of drones in the battlefield, as air support to ground troops in Afghanistan for example, does not present any novel legal challenges. As another weapon of war, drones may be used in the battlefield as regulated by IHL. However, the regulatory lines blur when drones are used independently, outside areas of declared hostilities. For example, what happens when a high value, non-Afghan, non-Pakistani terrorist target, pursued by the United States, crosses the porous Afghanistan-Pakistan tribal belt into an area under Pakistani control where there are no active hostilities? Several possibilities may ensue: (i) The Pakistani authorities may quell the terrorist threat through domestic law enforcement or counter-terrorism mechanisms; (ii) Pakistan may solicit assistance from the United States with domestic law enforcement and counter-terrorism operations; (iii) Pakistan, unable or unwilling to neutralize the terrorist threat itself, may consent to U.S. self-defense action on its territory; or (iv) Pakistan, unable or unwilling to neutralize the terrorist threat itself, may not consent to U.S. strikes on its territory, but, facing a sufficiently imminent terrorist threat, the United States may undertake a self-defense strike against the target anyway.¹¹⁸

Irrespective of which one of the foregoing scenarios occurs, the underlying target and function of the operation do not change. In each scenario, a state party in the "Global War on Terror" uses lethal force to neutralize a high value terrorist target belonging to a non-state enemy actor outside areas of active hostilities. It follows, therefore, that the applicable regulatory framework, including when the duty to investigate is triggered, should be the same irrespective of which state ultimately captures or neutralizes the target. It would be questionable

117. Watkin, *supra* note 113, at 34.

118. See CHATHAM HOUSE, INTERNATIONAL LAW AND THE USE OF DRONES: MEETING SUMMARY OF THE INTERNATIONAL LAW DISCUSSION GROUP 6 (2010), <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/il211010drones.pdf> [<https://perma.cc/VT9W-LR25>] (reporting on a discussion led by Prof. Marry Ellen O'Connell from the Kroc Institute at the University of Notre Dame and Prof. Michael N. Schmitt from Durham University Law School); see also Press Release, The White House, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013), https://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf [<https://perma.cc/CC55-U59X>] [hereinafter U.S. Policy Standards] (stating that the United States will only use lethal force to prevent attacks against U.S. persons, when capturing the target is not possible and no other reasonable alternative exists, including the ability of the domestic government to neutralize the threat effectively)

if, all else being equal, an IHRL/law enforcement standard applies to Pakistan but an IHL/armed conflict standard governs the United States in the same context. Recognizing that this is an overly simplified example, it nevertheless underscores two important points. First, the varied nature of counter-terrorism operations may at times warrant the application of legal principles outside IHL, including the application of IHRL. Secondly, it illustrates that the appropriate set of legal principles, whether IHRL, IHL, or a combination thereof, that ultimately apply in this case depend largely on the factual circumstances of the identity and context of the target. It therefore follows that the extra-territorial use of force in self-defense outside the ambit of an armed conflict or active hostilities would require some application of IHRL.

III. STATE PRACTICE

State practice with respect to the duty to investigate civilian casualties following extraterritorial use of force is dominated by IHL. Consequently, for many states the threshold for when the duty to investigate is triggered is also rooted in IHL. The following survey of current state practice from Australia, Canada, the Netherlands, and the United States indicates as such while also revealing practical differences.¹¹⁹

A. United States

In the United States, absent any credible allegations pertaining to violations of IHL, an affirmative post-strike duty to investigate civilian casualties is not recognized as a legal obligation.¹²⁰

119. In conducting their research, the authors had greater insights into U.S. investigative practices, including access to multiple publicly disclosed reports detailing U.S. investigations. The same level of information could to be accessed for Australia, Canada, and the Netherlands. As such, the survey of state practice examines U.S. practices in the most detail with relevant parallels and comparisons drawn from Canada, Australia, and the Netherlands.

120. Interviews with Richard C. Gross, Brigadier General (retired) and former Legal Counsel to the Chairman of the Joint Chiefs of Staff, U.S. Armed Forces (Dec. 4, 2015 & Apr. 27, 2016) [hereinafter General Gross Consultation] (on file with authors); Interview with Austin Long, Assistant Professor of Sec. Policy, Columbia Uni. Sch. of Int'l & Pub. Affairs, in New York, N.Y. (Nov. 11, 2015) [hereinafter Prof. Long Consultation] (on file with authors); *see also, e.g.*, Exec. Order No. 13732, 81 Fed. Reg. 44485 (July 7, 2016) (distinguishing practices undertaken by the U.S. military based on a legal obligation imposed by IHL from those viewed as "best practices" self-imposed by "heightened policy standards," and

However, post-strike targeting assessments provide an account of “collateral damage,” the “unintentional or incidental injury or damage to persons or objects that would not be lawful military targets,”¹²¹ as part of a strike’s battle damage assessment (BDA).¹²² The scope of the BDA, which must be conducted within two hours of a strike,¹²³ is defined as “the estimate of damage composed of physical and functional damage assessment, as well as target system assessment, resulting from the application of lethal or nonlethal military force.”¹²⁴ One component of BDA’s physical damage assessment is a collateral damage assessment.¹²⁵ The purpose of BDA’s collateral damage assessment is not investigating civilian casualties *per se*, but rather for evaluating the overall effectiveness of military targeting operations and identifying process improvements.¹²⁶ Consequently, the post-strike collateral damage assessment also does not involve a preliminary examination of potential IHL violations. In the context of “no-boots on the ground” strikes, there appears to be a default presumption that collateral damage is incidental to military operations and therefore lawful under IHL.¹²⁷ However, as a matter of prudence and policy, a best practice is emerging whereby collateral damage assessments are sometimes used to investigate instances of

identifying the post-strike review and investigation of civilian casualties as the latter).

121. Joint Publication 3-60, Joint Targeting, US Joint Chiefs of Staff (Jan. 31, 2013), at II-31, II-34, D-5, http://www.cfr.org/content/publications/attachments/Joint_Chiefs_of_Staff-Joint_Targeting_31_January_2013.pdf (on file with the *Columbia Human Rights Law Review*) [hereinafter Joint Targeting Publication].

122. *Id.*

123. U.S. CENT. COMMAND, US CENTRAL COMMAND REPORT ON AFGHAN CIVILIAN DRONE-DIRECTED CASUALTIES 21 (2010) (on file with authors) (providing that BDA conducted 3.5 hours after the subject strikes was too late and against operational guidance in place which requires that it be conducted within two hours of a strike); see also General Gross Consultation, *supra* note 120 (verifying that BDA occurs immediately after a strike).

124. DEPARTMENT OF DEFENSE (DOD), DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 27 (2018), <http://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf> [<https://perma.cc/S6BH-6ERA>].

125. Joint Targeting Publication, *supra* note 121, at D-4 to D-5.

126. *Id.* at D-1.

127. Prof. Long Consultation, *supra* note 120 (noting that in light of the extensive pre-strike due diligence the U.S. undertakes to minimize and mitigate risk of civilian casualties in “no boots on the ground” contexts, including persistent surveillance of target sites/persons, there are generally no investigations conducted into civilian casualties that may nevertheless ensue).

death or serious injury to civilians where there are credible allegations of civilian casualties from other sources.¹²⁸

When allegations of civilian casualties arise, a preliminary assessment is made to determine whether the allegations are sufficiently credible to trigger an investigation.¹²⁹ Allegations may be brought forth by a variety of sources, including military authorities, private persons, civil society groups, the media, or intergovernmental organizations.¹³⁰ U.S. commanders from Iraq and Afghanistan have “expressed the importance of investigating all allegations of civilian casualties cases, regardless of source, because even allegations from questionable sources may have a basis in fact [and] [i]nvestigating all allegations, regardless of source, also greatly assists in dispelling the numerous unfounded allegations that often arise” in the context of military operations.¹³¹ Ultimately, however, whether or not an initial

128. General Gross Consultation, *supra* note 120 (noting that there are no legal standards in place from which a duty to investigate civilian casualties emerges and that, with the exception of war crimes, the decision to undertake an investigation is a policy decision of commanders directing air strikes); *see also, e.g.*, U.S. CENT. COMMAND, ARMY REGULATION 15-6 REPORT OF INVESTIGATION INTO THE CIVILIAN CASUALTIES (CIVCAS) NEAR HARIM, SYRIA, 5 NOVEMBER 2014 15, 17 (2015) (on file with authors) [hereinafter Harim Report] (BDA record established that residential buildings, other than the targets had sustained effects from strikes or secondary explosions; this information was subsequently used to corroborate allegations of civilian casualties raised by civil society).

129. Press Release, U.S. Cent. Command, Allegation of Civilian Casualties in West Mosul (Mar. 25, 2017), <http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1130282/allegation-of-civilian-casualties-in-west-mosul/> [<https://perma.cc/NK7X-F5XQ>]; *see also* Stephen J. Townsend, *Reports of Civilian Casualties in the War Against ISIS Are Vastly Inflated*, FOREIGN POL’Y (Sept. 15, 2017), <http://foreignpolicy.com/2017/09/15/reports-of-civilian-casualties-from-coalition-strikes-on-isis-are-vastly-inflated-lt-gen-townsend-cjtf-oir/> [<https://perma.cc/QXD2-XPRP>] (writing that, as it relates to airstrikes against ISIS in Iraq and Syria, the U.S. military “conduct[s] a detailed assessment of each and every allegation of possible civilian casualties”).

130. Townsend, *supra* note 129; Schmitt, *supra* note 29, at 39; *see also* Al-Skeini and Others v. United Kingdom, App. No. 55721/07, ¶ 165 (Eur. Ct. H.R. July 7, 2011) (holding that suspicious circumstances brought to the attention of U.K. military authorities were sufficient to trigger the duty to investigate, irrespective of whether the deceased’s next of kin pursued a formal complaint); *Military Assessment of the Security Challenges in the Greater Middle East Before the H. Committee on Armed Services*, 115th Cong. 12 (2017) (statement of Joseph Votel, Commander, U.S. Central Command) (on file with the *Columbia Human Rights Law Review*).

131. DEF. LEGAL POLICY BD., *supra* note 76, at 7.

inquiry or subsequent investigation is undertaken is a decision within the authority of military commanders.¹³²

Based on recent press releases and statements regarding civilian casualty reports by the U.S. military, it appears that when an initial review reveals that military forces conducted operations consistent with the location and time of civilian casualty allegations, those allegations are then reviewed as part of a preliminary inquiry. If the preliminary inquiry determines that the allegations are sufficiently credible, an administrative investigation may be conducted pursuant to Army Regulation 15-6.¹³³ If there are *prima facie* indicia of criminal activity or culpability, the U.S. Army's Criminal Investigative Division will also conduct a criminal investigation, but a 15-6 Investigation is broader in scope and in part aimed at facilitating process improvement.¹³⁴

In relation to airstrikes conducted in Iraq and Syria targeting ISIL, U.S. Central Command has stated that it "conducts thorough assessments of all allegations of civilian casualties associated with our airstrikes"¹³⁵ It is "sharing this information with the public as part of [its] commitment to transparency," but it is not clear the extent to which the inquiry itself is performed out of a sense of legal obligation under international law or as a matter of policy.¹³⁶ It is also unclear whether these assessments represent a preliminary inquiry-style

132. General Gross Consultation, *supra* note 120.

133. See DEP'T. OF THE ARMY, U.S. ARMY REGULATION 15-6: PROCEDURES FOR INVESTIGATING ARMY OFFICERS AND BOARDS OF OFFICERS 30 (2016), http://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r15_6.pdf [<https://perma.cc/J6R2-CH9P>] (noting that the credibility assessment is one of several requirements before an investigation can begin); United States Central Command, *supra* note 129; Harim Report, *supra* note 128; see also Section V.D.4 *infra* for a discussion of U.S. investigative practices including the scope of AR 15-6 investigations.

134. General Gross Consultation, *supra* note 120.

135. Terri Moon Cronk, *CENTCOM Releases Civilian Casualty Assessments*, DoD NEWS (Apr. 22, 2016), <http://www.defense.gov/News-Article-View/Article/741155/centcom-releases-civilian-casualty-assessments> [<https://perma.cc/4K3X-BEZZ>].

136. Press Release, U.S. Cent. Command, CENTCOM Releases Results of Iraq and Syria Civilian Casualty Assessments (Jan. 22, 2016), <http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/904498/jan-22-centcom-releases-results-of-iraq-and-syria-civilian-casualty-assessments/> [<https://perma.cc/246K-22Q6>] (reporting five airstrikes caused two civilian deaths and four civilian injuries). These inquiries may be undertaken as a matter of policy pursuant to Executive Order 13732, *supra* note 120, although that executive directive has not been directly referred to in the release of any such assessments.

“credibility assessment” or a more robust administrative investigation subsequently conducted in those cases, discussed below. The statement in each release that the civilian casualty allegations have been “determined to be credible” would suggest the former.

The notion of “civilian casualty assessments” is not a new one and was applied in Afghanistan and conducted by “Initial Assessment Teams” (IAT), now referred to as “Civilian Casualty Assessment Teams” (CCATs).¹³⁷ CCATs and IATs are “designed to determine the basic facts and then to validate whether or not these civilian casualties had occurred.”¹³⁸ As demonstrated in a recent incident, the findings of CCATs can serve as a preliminary inquiry for recommending a more formal investigation.¹³⁹

1. Harim, Syria (November 2014)

In the Harim Incident discussed at the outset, four days after the strike against the intended targets, the Syrian Network for Human Rights issued a report noting (i) that the strikes destroyed intended military targets, specifically an Al-Nusra Front operational center and separate ammunition depot, in addition to damaging buildings nearby; (ii) that two female children were killed, one of whom was the daughter of an Al-Nusra fighter who was also killed in the strike; (iii) that the family of the identified victim resided in a nearby building which sustained effects from the strike; and (iv) that the mother and seven-year-old brother of the identified victim also sustained critical injuries from the strike.¹⁴⁰ Upon notice of the reports of civilian

137. See Dep’t of Def., *Lashkar Gar Evidence Points to ISAF Caused Civilian Casualties*, DVIDS (Aug. 15, 2010), <https://www.dvidshub.net/news/54620/lashkar-gar-evidence-points-isaf-caused-civilian-casualties> [https://perma.cc/B4CX-3SCU]; *Briefing by General Campbell via Teleconference from Afghanistan*, DEP’T OF DEF. (Nov. 25, 2015), <https://www.defense.gov/News/Transcripts/Transcript-View/Article/631359/departments-of-defense-press-briefing-by-general-campbell-via-teleconference-fro/> [https://perma.cc/Y2MN-DU98] [hereinafter Gen. Campbell Briefing].

138. Gen. Campbell Briefing, *supra* note 137.

139. *Id.*; NATO, EXECUTIVE SUMMARY: COMBINED CIVILIAN CASUALTY (CIVCAS) ASSESSMENT OF AN AIRSTRIKE ON A MEDICAL FACILITY IN KUNDUZ CITY ON 03 OCTOBER 2015, at 2 (Nov. 27, 2015), https://shape.nato.int/resources/3/images/2015/saceur/exec_sum.pdf [https://perma.cc/W9YK-HF32] [hereinafter Kunduz Executive Summary].

140. See SYRIAN NETWORK FOR HUMAN RIGHTS, INTERNATIONAL ALLIANCE AIRSTRIKES KILL MORE CIVILIANS AND TARGET AHRAR ASH-SHAM MOVEMENT FOR THE FIRST TIME (Nov. 9, 2014), http://sn4hr.org/public_html/wp-content/pdf/english/force-in-oct-en.pdf [https://perma.cc/HVZ6-LZFP]. The second

casualties, U.S. Central Command undertook an informal fact-finding assessment to ascertain the credibility of the allegations. The 15-6 Investigation describes the preliminary fact-finding assessment as follows:

During November, 2014 United States Central Command (USCENTCOM) received reports of civilian casualties (CIVCAS) resulting from an airstrike in the vicinity of Harim City. The reports appeared to describe the November 5-6 airstrikes. The reports contained statements that confirmed the airstrikes were accurate in striking those locations. The reports stated that the strikes destroyed buildings and ammunition depots used by enemy forces, and killed known fighters, but also caused deaths and injuries to civilians, including the daughter of a known enemy fighter.

As a result of the reports of CIVCAS, a credibility assessment of the allegations was conducted by the Combined Joint Task Force – Operation Inherent Resolve (CJTF-OIR) on December 22, 2014 and completed on December 31, 2014. The assessment found some of the CIVCAS allegations to be initially credible based on the information available. Therefore, the Commander, CJTF-OIR, initiated this formal investigation.¹⁴¹

The duty to investigate was therefore triggered after the preliminary inquiry established that allegations of civilian casualties were sufficiently credible. However it is unclear from the redacted Harim Report¹⁴² whether, in the absence of allegations of civilian casualties by the Syrian Network for Human Rights, an investigation would still have taken place. Notwithstanding the absence of an affirmative post-strike duty to investigate collateral damage under U.S. practice, does the fact that the BDA, presumably conducted within the required two-hour post-strike timeframe, established that residential buildings,¹⁴³ other than those targeted, sustained effects from the strikes or from secondary explosions, create a reasonable suspicion that a violation of IHL may have occurred, therefore triggering the duty to investigate? Or does this information from the

victim was not identified. The report also included post-strike photos and video footage documenting the bodies of the dead children. *Id.* at 6.

141. Harim Report, *supra* note 128, at 4.

142. *Id.*

143. Harim Report, *supra* note 128 (indicating that buildings near the targeted sites were not abandoned).

BDA at least create a suspicion which ought to be vetted through a preliminary inquiry like the one used to vet the allegations raised by the Syrian Network for Human Rights?¹⁴⁴

The 15-6 Investigation of the Harim Incident concludes the findings of the investigation as follows:

The targets were valid military targets at the time of the strikes. The airstrikes in question were conducted in accordance with all military authorities, targeting guidance, and applicable rules of engagement. Additionally, reasonable measures were undertaken to avoid the death or injury of civilians during the strike by thoroughly reviewing the targets prior to engagement, relying on accurate assessments of the targets, and engaging the targets when the risk to non-combatants was minimized. Nonetheless, the death of any civilians is regrettable, and coalition targeting practices incorporating mitigating measures to prevent civilian casualties to the maximum extent possible based on operational requirements, the rules of engagement, and the Law of Armed Conflict will be continued.¹⁴⁵

The Harim Incident 15-6 Investigation does not provide any recommendations with respect to improving targeting practices. However, in the context of mitigating civilian casualties, it recommends “sustained [intelligence, surveillance and reconnaissance] whenever practicable based on operational requirements, to ensure no civilians are entering or exiting a facility.”¹⁴⁶

2. Al Hatra, Iraq (March 2015)

The U.S. Central Command investigation in connection with a March 13, 2015 air strike on an ISIL checkpoint near Al-Hatra, Iraq, (hereinafter the “Al-Hatra Incident”) provides additional insights into the steps U.S. forces take when assessing whether allegations of civilian casualties are sufficiently credible to warrant formal

144. See General Gross Consultation, *supra* note 120. While General Gross was not familiar with the details of the Harim Incident, he confirmed that in his experience whenever allegations of civilian casualties arose from internal or external sources, commanders generally conducted an ensuing investigation as a matter of policy. He was not sure why one was not initiated prior to the Harim Report in this case.

145. Harim Report, *supra* note 128, at 5.

146. *Id.* at 19.

investigation.¹⁴⁷ Following the strike, U.S. Central Command “received a report made by an Iraqi citizen that a coalition airstrike destroyed her vehicle on 13 March 2015, and resulted in the deaths of five civilians who she stated were passengers in her vehicle.”¹⁴⁸ A preliminary inquiry, conducted on March 19, 2015, provides that “analysis of strike footage shows the probable presence of women and children at the strike location.”¹⁴⁹ Notwithstanding the absence of corroborating open source reports of civilian casualties,¹⁵⁰ the preliminary inquiry revealed that the civilian casualty allegations were sufficiently credible to warrant further investigation.¹⁵¹

The ensuing formal 15-6 Investigation concluded that while “no positive identification can be made with reasonable certainty as to the [civilian casualties] gender or age without further forensics or on the ground investigation . . . based on the specificity and accuracy of the email claim on all other aspects that can be confirmed . . . the preponderance of the evidence supports the veracity of the CIVCAS claim.”¹⁵² With respect to targeting, the Hatra Report provides that the Non-Combatant and Civilian Casualty Cutoff Value (NCV) objective for this strike was not met due to three execution errors.¹⁵³ The substance of these errors and possible recommendations pertaining thereto are redacted. It is worth noting that the claimant in this case only sought financial compensation for her destroyed vehicle. There was no claim for compensation with respect to the civilian deaths. As in the case of the Harim Incident, it does not appear that an

147. U.S. AIR FORCES CENT. COMMAND, COMMANDER-DIRECTED INVESTIGATION (CDI) INTO CIVILIAN CASUALTIES (CIVCAS) ALLEGED TO HAVE OCCURRED ON 13 MARCH 2015 AT AN ISIL CHECKPOINT IN HATRA DISTRICT, IRAQ (June 28, 2015) (on file with authors) [hereinafter Hatra Report].

148. *Id.* at 1.

149. *Id.* at 41.

150. *Id.* at 43.

151. *Id.* at 54. The credibility determination relied on the following facts: (1) the date of the incident referred to by the claimant matched the date of the strike; (2) Weapons System Video (WSV) footage of the strike was consistent with the claimant's description of the destroyed car for which compensation was sought; (3) the claimant's description of the vehicle's occupants, including two women and three children, matched imagery analysts' assessment of possible women and children in the vehicles at the ISIL checkpoint; (4) the claimant confirmed the location of the strike and the fact that her vehicle was stopped at the ISIL checkpoint; (5) the WSV footage was consistent with the claimant's description of burning vehicles. Hatra Report, *supra* note 147, at 54.

152. *Id.* at 15. See Section III.A.2 *infra* for a discussion of the substantive investigation in connection with the Al-Hatra Incident.

153. *Id.* at 22. The NCV objective for this strike was zero.

investigation, including an informal preliminary inquiry, would have taken place following the Al-Hatra Incident notwithstanding the post-strike BDA revealing the possibility of civilian casualties.

The Harim Incident and the Al-Hatra Incident reflect that, under U.S. practice, absent *prima facie* evidence of criminal culpability,¹⁵⁴ collateral damage is presumed to be incidental to military operations and lawful under IHL. As a result, post-strike collateral damage assessments do not appear to give rise to a reasonable suspicion of an IHL violation and, notwithstanding the documentation of civilian casualties, such assessments are not conducted for the purpose of investigating civilian casualties. This also appears to be the United States' practice for drone strikes outside areas of declared hostilities. The *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities* state that "before lethal action may be taken [there must be] near certainty that non-combatants will not be injured or killed."¹⁵⁵ This implies that, to the extent that there may be collateral damage following a drone-strike, it is presumed to be minimal and incidental to counterterrorism operations.¹⁵⁶

B. Australia¹⁵⁷

Australia's defense forces have as-yet-undisclosed operation-level guidance that sets out the circumstances under which a preliminary inquiry into alleged civilian casualties must be undertaken. The purpose of the preliminary inquiry is to ensure that any credible allegation of civilian casualties is investigated to assess

154. Open source reports do not indicate that there was any *prima facie* criminal misconduct in the Harim Incident or the Al-Hatra Incident.

155. See U.S. Policy Standards, *supra* note 118 (defining a non-combatant as an individual who, under applicable international laws, may not be made the object of attack and noting that the definition "does not include an individual who is part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of national self-defense." Further, US policy makes clear that "it is not the case that all military-aged males in the vicinity of a target are deemed to be combatants.").

156. Prof. Long Consultation, *supra* note 120. It is worth noting that there is an outstanding question as to who the United States considers *not* collateral damage and on what basis this is determined. The authors have not yet obtained a definite answer to this question.

157. In collecting information about Australian state practice, the authors consulted Professor Bruce Oswald, Associate Professor and Director of the Asia Pacific Centre for Military Law at the University of Melbourne [hereinafter Prof. Oswald Consultation].

individual operational performance and determine: (1) if processes need to be remediated, (2) if disciplinary or criminal offences were committed, and (3) whether follow-up action is required. Where the preliminary inquiry discloses a reasonable suspicion of a service offence, Australia's Defense Force Investigative Service commences a criminal investigation.¹⁵⁸ In most such cases, the theater commander would also initiate a concurrent administrative investigation, or an Inquiry Officer Inquiry (IOI) pursuant to Australia's Defense (Inquiry) Regulations, to identify issues requiring remediation and to prevent recurrence.¹⁵⁹ Australia's post-strike reporting includes BDA and, while the details about the scope of the BDA doctrine are classified, if BDA indicates potential civilian casualties, the government initiates relevant reporting and investigation procedures. It therefore appears that, at a minimum, Australia undertakes a preliminary inquiry in connection with possible civilian casualty incidents solely on the basis of post-strike BDA even in the absence of external civilian casualty allegations.¹⁶⁰

1. Chora District, Afghanistan (March 2011)

On March 27, 2011, members of an Australian Defense Force (ADF) Special Operations Task Group were targeted with small arms fire and, in returning fire, shot and killed an Afghan adult man suspected to be an insurgent and mortally wounded an Afghan civilian child standing nearby.¹⁶¹ A Quick Assessment (QA), Australia's version of a preliminary inquiry, was launched shortly after the child died on April 2, 2011, at a military hospital.¹⁶² The QA occurred at the site of the incident and included chemical testing of the deceased adult's hands to confirm that he had fired a weapon.¹⁶³ While the identity of the child was quickly established by his father, the QA did not confirm the identity of the adult victim nor did it attempt to secure the body of

158. See Section V.D.1 *infra* regarding scope and substance of Australia's criminal and administrative investigations.

159. See *Id.*

160. Prof. Oswald Consultation, *supra* note 157. The Authors have not reviewed any sample preliminary inquiries from Australia as these are classified.

161. AUSTRALIAN GOVERNMENT DEPT OF DEF., INQUIRY OFFICER REPORT INTO CIVILIAN CASUALTY INCIDENT INVOLVING SOTG ON 27 MARCH 2011 IN THE VICINITY OF AFGHANISTAN 1-5 (June 7, 2011), <http://www.defence.gov.au/publications/coi/docs/RedactedIOReport27March2011CIVCAS.pdf> [<https://perma.cc/SG2P-S22C>].

162. *Id.* at 5, 8-9.

163. *Id.*

the adult victim in order to perform an autopsy.¹⁶⁴ The child's father later suggested that the adult male was the child's uncle.¹⁶⁵ Based upon the QA's confirmation of the civilian casualty, an IOI was appointed to investigate the matter further. The details of the IOI investigation are discussed under Australian investigative practices in the next section.

C. Canada¹⁶⁶

The official position of the Canadian government, as reported by a senior official, is that there is no obligation in international law to convene an investigation into reports of civilian casualties absent a suspicion of a violation of IHL.¹⁶⁷ However, administrative investigations may be triggered by reports of civilian casualties as a matter of policy in particular contexts.¹⁶⁸ For instance,

it has been the invariable practice in Afghanistan and many other theatres of operation that Canadian commanders order an investigation of some kind, whether administrative or criminal, in all cases of death or injury, including collateral death or injury, and even including deaths of enemy combatants. At least in Afghanistan the practice has been followed regardless of the intensity of hostilities.¹⁶⁹

More recently, however, Canadian commanders did not undertake an investigation following a January 2015 airstrike in ISIL-held territory in northern Iraq that gave rise to allegations of six to twenty-seven civilian casualties from allied Kurdish Peshmerga coalition forces.¹⁷⁰ Open-source data shows that a preliminary inquiry

164. *Id.* at 14.

165. *Id.* at 8–9.

166. Information on Canada's investigative triggers is based on the Turkel Report as well as the E-mail from Captain Jayne M. Thompson, *supra* notes 74, 81.

167. E-mail from Captain Jayne M. Thompson, *supra* note 74.

168. *Id.*

169. Turkel Report, *supra* note 81, at 217–18.

170. *Statement by the Canadian Armed Forces in Response to Allegations of Civilian Casualties Resulting From A January 21, 2015, Airstrike*, GOV'T OF CAN. (Sept. 4, 2015), <https://www.canada.ca/en/news/archive/2015/09/statement-canadian-armed-forces-response-allegations-civilian-casualties-resulting-january-21-2015-airstrike.html> [<https://perma.cc/W698-9CTY>]; see also Timothy Sawa, Lynette Fortune & Ghalia Bdiwe, *Up to 27 Iraqi Civilians May Have Been Killed in Canadian Airstrike, Pentagon Document Reveals*, CBC NEWS (Sept. 3, 2015, 12:00PM), <http://www.cbc.ca/news/canada/up-to-27-iraqi-civilians-may-have-been-killed-in-canadian-airstrike-pentagon-document-reveals-1.3213917> (on file with the *Columbia Human Rights Law Review*) (containing the Pentagon report detailing the CIVCAS allegations relating to the January 2015 strike).

rendered the allegations of civilian casualties not sufficiently credible to warrant further investigation. While the details of the preliminary inquiry are not publicly disclosed, Canadian officials cited a lack of corroborating accounts or evidence and the fact that the allegations of civilian casualties were based on a second-hand account as reasons to conclude that the allegations did not trigger an investigation.¹⁷¹

D. Netherlands¹⁷²

The practice of the Netherlands is the most vigilant of the states surveyed:

As a matter of practice rather than law, there is a special reporting and investigation procedure to account for uses of force and their consequences. After any use of force (whether a discharge of a warning shot or a full-scale engagement of several days' duration) has occurred, an 'After Action Report' must be submitted by the commander on location. This report is both part of the operational information provided to the Commander of the Armed Forces, and a mechanism for ensuring legal oversight and accountability for any use of force. A copy of the report is made available to the Public Prosecution Service . . . [and the] Public Prosecution Service determines as soon as possible, on the basis of this report, whether [sic] criminal investigation or fuller actual investigation is called for.¹⁷³

If an allegation of civilian casualties is received by a superior in the Ministry of Defense, the military commander may undertake a preliminary credibility assessment of the allegation prior to deciding whether to initiate an investigation.¹⁷⁴ If assessed as credible, whether reported through an "After Action Report" or otherwise, a commander must decide to either (1) initiate an internal administrative investigation if the facts raise concerns for military operations more broadly, (2) refer the matter to the public prosecutor in the event the commander suspects a criminal offense, or (3) take no further action if the use of force is determined to be justified under IHL.¹⁷⁵ Meanwhile,

171. *Id.*

172. Information on the Netherlands' investigative triggers is based on the Turkel Report, *supra* note 81, and the authors' consultation with Mr. Marten Zwanenberg, Deputy Legal Advisor, Dutch Ministry of Foreign Affairs (on file with authors) [hereinafter Zwanenberg Interview].

173. Turkel Report, *supra* note 81, at 246.

174. Zwanenberg Interview, *supra* note 172.

175. *Id.*

the public prosecutor will undertake a parallel criminal investigation if the facts support a suspicion of criminal conduct.¹⁷⁶

The comparative practices of the Netherlands, Canada, Australia, and the United States illustrate that the duty to undertake an investigation may arise at any of three points in time: (1) as soon as any lethal force is used; (2) when the use of lethal force leads to a death or serious injury; or (3) when a sufficiently credible allegation arises from post-strike reports or external sources, alleging that the use of force has resulted in the loss of life or serious injury beyond what is lawful collateral damage pursuant to IHL. The various triggers presented mirror the IHRL-IHL continuum of when the duty to investigate may arise, with the practices of the Netherlands and the United States corresponding, respectively, to either end of the continuum.

IV. INTERIM CONCLUSIONS AND RECOMMENDATIONS

A. Post-Strike Assessments and Affirmative Investigations

An important consideration in how states address civilian casualties resulting from airstrikes in areas in which the state has no ground forces is the state's duty to take affirmative steps to investigate civilian casualties, even in the absence of a claim from those residents or NGOs in the area attacked. Just as it is difficult for a state to conduct thorough and effective investigations without forces on the ground, civilians on the ground may find it difficult to raise a claim when no state forces are in the vicinity or when an airstrike is potentially attributable to more than one state.¹⁷⁷

As is already the case for some of the states surveyed, post-strike BDA reports, which many states already conduct, are a helpful tool in this context.¹⁷⁸ BDA is a tool military commanders have at their

176. *Id.*

177. See, e.g., Chris Woods, *Pentagon in Denial About Civilian Casualties of U.S. Airstrikes in Iraq and Syria*, FOREIGN POL'Y (Dec. 3, 2014), <http://foreignpolicy.com/2014/12/03/pentagon-in-denial-about-civilian-casualties-of-u-s-airstrikes-in-iraq-and-syria/> [<https://perma.cc/87XX-FPYG>] (noting that it is "often impossible to attribute responsibility" for casualties caused by airstrikes in Syria and Iraq because twelve countries are simultaneously engaged in the air war).

178. See, e.g., Joint Targeting Publication, *supra* note 121, at D-4; AUSTRALIAN DEFENSE DOCTRINE PUBLICATION 3.14, 4-12 (Feb. 2, 2009), http://www.defence.gov.au/foi/docs/disclosures/021_1112_Document_ADDP_3_14_Targeting.pdf [<https://perma.cc/36B8-AVKD>]; Letter of NATO Legal Advisor, *supra*

disposal in evaluating civilian casualties. The goal of ‘combat assessment,’ of which BDA is an element, is “the determination of the overall effectiveness of force employment during military operations” and the assessment of physical damage includes a notation of “collateral damage.”¹⁷⁹ The fact that “collateral damage is also assessed and reported during BDA” indicates that it could serve as an affirmative trigger for the duty to investigate.¹⁸⁰ Indeed, some have pointed to the BDA tool as a method for states to independently track and account for civilian casualties.¹⁸¹

When BDA, or even real-time monitoring of an airstrike, indicates incidental harm to civilians, it could be argued that a state has an affirmative duty to assess or to investigate further.¹⁸² As shown in the preceding survey of state practice, states have used after-action BDA reports to assess civilian casualty incidents, whether to corroborate external allegations or to further inquire into “self-reported” instances of civilian casualties.¹⁸³ Similarly, at the inter-governmental level, NATO uses BDA in this way during its operations

note 4, at 4 (stating that BDAs were conducted following NATO’s airstrikes in Libya in order to “determine damage and otherwise evaluate the effects of the strike”).

179. *Id.* at D-5 and GL-4.

180. *Id.*

181. See EWAN CAMERON, ET AL., TRACKING CIVILIAN CASUALTIES IN COMBAT ZONES USING CIVILIAN BATTLE DAMAGE ASSESSMENT RATIOS (2009), [http://personal.rhul.ac.uk/uhte/014/BAR_-_Civilian_Battle_Damage_Assessment_Ratios_\(PDF\).pdf](http://personal.rhul.ac.uk/uhte/014/BAR_-_Civilian_Battle_Damage_Assessment_Ratios_(PDF).pdf) [<https://perma.cc/M2RV-NJQJ>]; LARRY LEWIS, IMPROVING LETHAL ACTION: LEARNING AND ADAPTING IN U.S. COUNTERTERRORISM OPERATIONS (2014), https://www.cna.org/CAN_files/PDF/COP-2014-U-008746-FINAL.pdf [<https://perma.cc/XFV6-2MW4>] (calling for an “improved assessment process for quantifying civilian harm” including the use of intelligence and imagery); JOINT AND COALITION OPERATIONAL ANALYSIS, REDUCING AND MITIGATING CIVILIAN CASUALTIES: ENDURING LESSONS 8 (2013), www.dtic.mil/dtic/tr/fulltext/u2/a579024.pdf [<https://perma.cc/W9NW-BKG9>] (advocating that the U.S. military “pursue tools that could aid forces in reducing and mitigating CIVCAS, including . . . potential technologies for improved CIVCAS BDA”).

182. Insofar as the duty to investigate under IHL flows at least in part from the commander’s responsibility to prevent and suppress violations, the customary standard is that a commander’s responsibility is triggered when he or she “knew” or “had reason to know” of any violations. INT’L COMM. OF THE RED CROSS, *supra* note 45, at R. 153.

183. See Part II.A *supra*; *Military Assessment of the Security Challenges in the Greater Middle East: Hearing Before the H. Comm. on Armed Services*, 115th Cong. 27 (2017) (statement of General Joseph L. Votel, Commander, U.S. Central Command) [hereinafter Statement of Gen. Votel] (including testimony that the U.S. military often self-reports civilian casualties and treats such reports as “allegations” of civilian casualties).

when there are external allegations of civilian casualties or when civilian casualties are otherwise suspected, including pursuant to after-action BDA reports.¹⁸⁴

In fact, the United States' response to a recent airstrike on a home suspected of being storage facility for ISIL's finances in Mosul, Iraq, demonstrated this pattern. Prior to launching this airstrike, American surveillance indicated the presence of civilians occupying the home along with ISIL members.¹⁸⁵ After issuing a warning to the occupants of the house and observing the civilians depart the building, the United States launched an airstrike.¹⁸⁶ Despite the warning, however, a civilian re-entered the home after the weapons were released from the aircraft and was killed in the airstrike.¹⁸⁷

According to the United States, this casualty was immediately apparent through imagery to the military forces conducting the strike and surely would have been observed in the subsequent BDA.¹⁸⁸ Based on this, the United States conducted a review of the civilian casualty as is its stated practice for any report of casualties.¹⁸⁹ While it has not been released to the public and it is not clear the extent to which this "review" took the form of an administrative investigation, the procedure followed in this instance suggests a possible approach to realistically applying an affirmative duty on states to examine those civilian casualties revealed during the BDA process. Implementation of this approach would be similar to the one already utilized by the Netherlands in their requirement that units report and inquire into all uses of force resulting in a civilian casualty.

Next, assuming that some form of investigation is undertaken, we will consider what procedural criteria an investigation into civilian casualties is expected to fulfill based on formal and customary international law.

184. See Letter of NATO Legal Advisor, *supra* note 4, at 4.

185. Captain Jeff Davis, U.S. Dep't of Def., Press Briefing, Department of Defense Press Briefing by Maj. Gen. Gersten via Teleconference from Baghdad, Iraq (Apr. 26, 2016), <http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/743229/departments-of-defense-press-briefing-by-maj-gen-gersten-via-teleconference-from> [https://perma.cc/3TAZ-DFVD].

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

V. HOW TO INVESTIGATE

As with the question of when the duty to investigate is triggered, international law does not provide a practical framework for how a state fulfills its duty to investigate following extraterritorial attacks. As one IHL expert has observed, “[a]lthough it is incontrovertible, as both a matter of treaty and customary law, that an investigation must be conducted whenever a war crime may have occurred . . . little guidance exists in [IHL] proper on the nature of such investigations.”¹⁹⁰ Relative to IHL, IHRL instruments provide a more complete and methodical framework for conducting investigations for human rights violations.

In light of states’ reluctance to accept the extraterritorial application of IHRL, the influence of IHRL investigative criteria in armed conflicts remains nominal. As indicated by the *Al-Skeini* opinion,¹⁹¹ the ICJ’s advisory opinions regarding nuclear weapons,¹⁹² and the construction of a wall in the Occupied Palestinian Territory,¹⁹³ a harmonized application of IHL and IHRL in armed conflicts has enabled international law to evolve towards a uniform *jus in bello* legal framework that is reflective of the nature of contemporary “hybrid” armed conflicts. With respect to the duty to investigate, this means that

from the moment a duty to carry out an ‘effective investigation’ arises, there is no *fundamental* difference, nor should there be, between the principles for conducting an ‘effective investigation’ in a situation of an armed conflict and the principles for conducting an ‘effective investigation’ in a situation of law enforcement.¹⁹⁴

However, in practice differences may arise to the extent that investigations are conducted under different circumstances. For example, the additional security challenges of conducting investigations in the context of an active insurgency or in “no boots on the ground” situations where the target site is not accessible may alter

190. Schmitt, *supra* note 29.

191. *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07 (Eur. Ct. H.R. July 7, 2011).

192. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8).

193. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9).

194. *Turkel Report* *supra* note 81, at 115.

the substance of an effective investigation.¹⁹⁵ Against this backdrop, this Part will first consider the overarching international legal framework for how to conduct an effective investigation into civilian casualties, drawing on established IHL and IHRL principles and procedures. Then it will provide a survey of current investigative practices in Australia, Canada, the Netherlands, and the United States.

A. International Humanitarian Law Investigations

There is no single authoritative statement of the minimum requirements for an investigation of alleged IHL violations that would guide the investigation of reported civilian casualties. One of the earliest cases to consider the question of a commander's responsibility to investigate battlefield actions of subordinates provided that the commander was obliged "to require and obtain *complete* information" when investigating possible violations of the laws of war.¹⁹⁶ Similarly, the ICTY trial chamber has indicated that a commander must ensure that an investigation includes questioning of suspects or victims and the preservation of evidence,¹⁹⁷ and that a military commander is under an obligation to take active steps to conduct an "*effective* investigation."¹⁹⁸ Furthermore, according to the U.N. General Assembly, "the obligation to respect, ensure respect for and implement [IHL] . . . includes, *inter alia*, the duty to investigate violations *effectively, promptly, thoroughly and impartially* and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law."¹⁹⁹ These general

195. INT'L COMM. OF THE RED CROSS, THE USE OF FORCE IN ARMED CONFLICTS: INTERPLAY BETWEEN THE CONDUCT OF HOSTILITIES AND LAW ENFORCEMENT PARADIGMS 43 (2013), <https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf> [<https://perma.cc/JN86-DGNN>] [hereinafter INT'L COMM. OF THE RED CROSS, THE USE OF FORCE IN ARMED CONFLICTS] ("[T]he instability and insecurity in armed conflict situations can pose serious obstacles to investigations into each death, such as difficulties in gathering evidence on site or hearing witnesses.").

196. *The Hostages Trial: Trial of Wilhelm List and Others* (Case No. 47), 8 L. Rpts. of Trials of War Criminals 34, 71 (U.N. War Crimes Comm'n 1948), https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-8.pdf [<https://perma.cc/VD7F-45GF>] (emphasis added).

197. Prosecutor v. Blaskić, Case No. IT-95-14-A, Trial Judgment, ¶ 488 (ICTY Mar. 3, 2000).

198. Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶¶ 97–98 (ICTY Nov. 16, 2005) (emphasis added).

199. G.A. Res. 60/147, annex ¶ 3(b) Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International

principles were echoed in the U.N. Fact-Finding Mission on the Gaza Conflict (widely referred to as the “Goldstone Report”)²⁰⁰ and have been endorsed as reflecting IHL principles.²⁰¹ Finally, the *Turkel Report* provides that an effective criminal or non-criminal investigation is “one that is capable of identifying those responsible and committing them to justice.”²⁰²

Nonetheless, there remains no authoritative statement in IHL as to what constitutes an effective, prompt, thorough, and impartial investigation. It is also unclear the extent to which IHL allows for contextual exceptions based upon the nuance of the environment within which IHL operates. For instance, the ICTY appeals chamber has held that a commander’s responsibility to prevent and punish violations of subordinates is “dependent on the circumstances surrounding each particular situation,” and, while a commander “should be held responsible for failing to take measures that are within his material possibility,” ultimately “international law cannot oblige a superior to perform the impossible.”²⁰³ In this sense, the ICTY adopted the reasoning of the International Law Commission (ILC) in the commentary to the Draft Code of Crimes Against the Peace and Security of Mankind. There, the ILC stated that, in order for a commander to have failed his responsibility to take measures to prevent and suppress violations by subordinates, he must have had “the material possibility to take such measures” and will “not incur criminal responsibility for failing to perform an act which was impossible to perform.”²⁰⁴ This case-by-case approach in evaluating compliance with a duty is similarly shown by the lack of specificity regarding how states are to fulfill the duty to investigate violations. This approach may reflect the realities of contemporary armed conflicts and the fact that civilian casualties are often accompanied by

Human Rights and Serious Violations of International Humanitarian Law, (Mar. 21, 2006) (emphasis added) [hereinafter U.N. Guidelines].

200. Human Rights Council, Rep. of the U.N. Fact-Finding Mission on the Gaza Conflict, ¶¶ 1804–11, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009).

201. Schmitt, *supra* note 29, at 55 (“Although the report derived the principles from the work of human rights courts and bodies, similar principles surely infuse the IHL requirement to investigate.”).

202. *Turkel Report*, *supra* note 81, at 114.

203. *Prosecutor v. Blaskic*, IT-95-14-A, Judgment, ¶ 417 (ICTY July 29, 2004) (quoting *Prosecutor v. Delalic et al.*, IT-96-21-T, Judgment, ¶ 395 (ICTY Nov. 16, 1998)).

204. *Draft Code of Crimes Against the Peace and Security of Mankind, With Commentaries*, 2 Y.B. Int’l L. Comm’n 17, 26, U.N. Doc. A/CN.4/SER.A/1996/Add.1.

instability and insecurity that may complicate investigations, as opposed to reflecting a disrespect for the particulars.²⁰⁵

B. International Human Rights Law

Whereas the standard for investigations under IHL is formally undefined, various IHRL instruments have advanced specific criteria for what constitutes an effective investigation. For example, the Convention Against Torture (CAT) provides that a state must undertake a “prompt and impartial investigation” when a “reasonable ground” exists to believe that torture has been committed within its jurisdiction.²⁰⁶ Furthermore, a state is required to ensure that victims alleging torture have a “right to complain” to competent authorities.²⁰⁷ States must also take steps to “ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”²⁰⁸ Approximately twenty percent of the jurisprudence of the Committee Against Torture (CAT Committee) to date has pertained to the denial or inadequacy of investigations.²⁰⁹ The CAT Committee, the treaty body providing general guidance and oversight over states’ compliance with CAT, has consistently stated that investigations into alleged cases of torture “should be aimed at determining the nature of the reported events, the circumstances surrounding them, and the identity of whoever may have participated”²¹⁰ in inflicting torture on others.

A survey of the jurisprudence under CAT reveals certain general principles. The CAT Committee has repeatedly held that state authorities’ failure to conduct *ex-officio* investigations, in the absence of formal complaints but where there are nevertheless reasonable grounds to believe that torture may have been committed, violate the

205. See INT’L COMM. RED CROSS, USE OF FORCE IN ARMED CONFLICTS, *supra* note 195, at 49.

206. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, art. 12, 1465 U.N.T.S. 85 (entered into force June 26, 1987) (emphasis added) [hereinafter CAT].

207. *Id.* art. 13.

208. *Id.*

209. See Comm. against Torture, *Jurisprudence*, U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/CAT/Pages/Jurisprudence.aspx> [<https://perma.cc/EAB7-UAZP>] (showing tables of the CAT Committee cases revealing that twenty out of CAT Committee’s cases to date have implicated Article 12) (last visited Feb. 12, 2018).

210. Comm. against Torture, Comm’n No. 368/2008, annex, ¶ 10.7, U.N. Doc. CAT/C/47D/368/2008 (Feb. 20, 2012).

promptness prong of Article 12 of CAT.²¹¹ The CAT Committee has repeatedly highlighted the importance of prompt investigations because “unless the [torture] methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear.”²¹² Examples of cases where CAT Committee found that states had failed to commence *ex-officio* investigations where they should have been carried out include: verbal complaints of torture communicated in the presence of state officials or judicial authorities;²¹³ an appearance before a judge or prosecutor with visible injuries sustained while in detention;²¹⁴ a Deceased detainee’s body being returned to his family with visible trauma;²¹⁵ a Judge failing to document allegations and order medical examination when a complainant appeared before him in a hearing;²¹⁶ and the Government failing to act on media and civil society reports regarding torture of detainees.²¹⁷

The CAT Committee has further held that investigations initiated a month after allegations of torture are not sufficiently prompt.²¹⁸ Similarly, where initiated investigations are left pending for extended periods, they violate the promptness requirement under

211. See *infra* notes 213–17.

212. Comm. against Torture, Commc’n No. 495/2012, annex ¶ 13.2, U.N. Doc. CAT/C/53/D/495/2012 (Jan. 19, 2015); see also Comm. against Torture, Communication No. 500/2012, annex, ¶ 17.8, U.N. Doc. CAT/C/55/D/500/2012 (Oct. 14, 2015); Comm. against Torture, Commc’n No. 497/2012, annex, ¶ 8.7, U.N. Doc. CAT/C/52/D/497/2012 (June 12, 2014); Comm. against Torture, Commc’n No. 433/2010, annex, ¶ 12.5, U.N. Doc. CAT/C/48/D/433/2010 (July 10, 2012).

213. Comm. against Torture, Commc’n No. 553/2013, ¶¶ 2.6, 2.17, 7.7, CAT/C/55/D/553/2013 (Aug. 10, 2015); see also Comm. against Torture, Commc’n 353/2008, ¶¶ 2.5–2.7, CAT/C/47/D/353/2008 (Nov. 14, 2011) (finding that state failed to promptly investigate as required by CAT article 12 as “complainant’s appeal against the inaction of the District Prosecutor’s Office [had] been pending for several years”).

214. Comm. against Torture, Commc’n No. 500/2012, ¶ 17.7, U.N. Doc. CAT/C/55/D/500/2012 (Aug. 4, 2014) [hereinafter Ramirez].

215. Comm. against Torture, Commc’n No. 376/2009, ¶ 6.6, U.N. Doc. CAT/C/51/D/376/2009 (Dec. 23, 2013).

216. Comm. against Torture, Commc’n No. 477/2011, ¶ 2.2, U.N. Doc. CAT/C/52/D/477/2011 (May 19, 2014).

217. Comm. against Torture, Commc’n No. 553/2013, ¶¶ 2.11, 7.7, U.N. Doc. CAT/C/55/D/553/2013 (Aug. 10, 2015).

218. Comm. against Torture, Commc’n No. 433/2010, ¶¶ 3.3, 8.9, U.N. Doc. CAT/C/48/D/433/2010 (May 24, 2012); Comm. against Torture, Commc’n No. 497/2012, ¶¶ 8.5–8.8, U.N. Doc. CAT/C/52/D/497/2012 (May 14, 2014) (in both cases CAT Committee also criticizes failure of authorities to conduct criminal investigation).

Article 12 of CAT.²¹⁹ The CAT Committee found that investigations were not carried out thoroughly or comprehensively when there was a failure to question alleged perpetrators or complainant in connection with allegations;²²⁰ a failure to take active steps to ascertain key facts, including dates, identities of those involved, and whereabouts of victim and alleged perpetrators;²²¹ a failure to order a medical exam of a complainant;²²² a medical examination of the complainant ordered a year after allegations surfaced;²²³ a failure to question or obtain testimony from witnesses where torture victim died in police custody;²²⁴ a failure to include any other evidence aside from a forensic medical report;²²⁵ or a failure to disclose the autopsy report to the victim's family.²²⁶

With respect to the impartiality of investigations, the CAT Committee has repeatedly stated that investigations carried out by the alleged perpetrators of torturous acts or by related entities within the same chain of command are not impartial.²²⁷ In only one case surveyed

219. Ramirez, *supra* note 214, ¶¶ 14.2, 17.7; Comm. against Torture, Commc'n No. 514/2012, ¶ 8.4, U.N. Doc. CAT/C/53/D/514/2012 (Nov. 21, 2014) (eight years); Comm. against Torture, Commc'n No. 497/2012, ¶ 8.5, U.N. Doc. CAT/C/52/D/497/2012 (May 14, 2014) (2.5 years); Comm. against Torture, Commc'n No. 503/2012, ¶ 6.4, U.N. Doc. CAT/C/52/D/503/2012 (May 12, 2014) (four years); Comm. against Torture, Commc'n No. 441/2010, ¶¶ 5.5, 9.6, U.N. Doc. CAT/C/51/D/441/2010 (Nov. 5, 2013) (six months).

220. Comm. against Torture, Commc'n No. 522/2012, ¶ 7.8, U.N. Doc. CAT/C/55/D/522/2012 (Aug. 10, 2015); *see also* Committee against Torture, Commc'n No. 497/2012, ¶ 8.5, U.N. Doc. CAT/C/52/D/497/2012 (May 14, 2012) (finding no investigation was initiated).

221. Comm. against Torture, Commc'n No. 456/2011, ¶ 6.6, U.N. Doc. CAT/C/54/D/456/2011 (May 15, 2015).

222. Comm. against Torture, Commc'n No. 497/2012, ¶ 8.7, U.N. Doc. CAT/C/52/D/497/2012 (May 14, 2012).

223. Comm. against Torture, Commc'n No. 477/2011, ¶¶ 10.4–10.5, U.N. Doc. CAT/C/52/D/477/2011 (May 19, 2014).

224. Comm. against Torture, Commc'n No. 376/2009, ¶ 6.6, U.N. Doc. CAT/C/51/D/376/2009 (Nov. 8, 2013).

225. Comm. against Torture, Commc'n No. 453/2011, ¶ 7.3, U.N. Doc. CAT/C/48/D/453/2011 (May 23, 2011) (stating that while “forensic medical reports are generally important for determining whether acts of torture have taken place, they are often insufficient and need to be compared with other sources of information”).

226. Comm. against Torture, Commc'n No. 376/2009, ¶ 6.6, U.N. Doc. CAT/C/51/D/376/2009 (Nov. 8, 2013).

227. *See, e.g.*, Comm. against Torture, Commc'n No. 497/2012, ¶¶ 8.7–8.8, U.N. Doc. CAT/C/52/D/497/2012 (May 14, 2014) (investigation conducted by police officers who relied heavily on testimony of other police officers who were the alleged perpetrators but attached nominal weight to statements of complainant and his

did the CAT Committee find an investigation, though within the same chain of command as the alleged perpetrators, was sufficiently impartial because of the involvement of the office of the public prosecutor in resisting premature closure of the investigation and repeatedly sending the case back to investigators for more information.²²⁸ The CAT Committee has also held that denying a complainant's request to be medically examined by a doctor from an independent institution constituted a violation of an impartial investigation under Article 12 of CAT.²²⁹

The HRC, in providing guidance on states' general legal obligations under the ICCPR, including the duty to provide an effective remedy to victims of human rights violations, has noted that "[a]dministrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies."²³⁰ In the context of the right to life specifically however, the HRC's recent Draft General Comment 36 cautions against reliance on administrative or disciplinary investigations when the right to life is implicated and it establishes the expectation that a criminal investigation is normally required.²³¹ In general, Draft General Comment 36, which draws on HRC's jurisprudence to date, provides that investigations into alleged violations of the right to life should be rooted in ideas about justice, ensuring both that those

family); *see also* Comm. against Torture, Commc'n No. 441/2010, ¶¶ 9.4–9.5, U.N. Doc. CAT/C/51/D/441/2010 (Dec. 17, 2013) (investigation conducted within the same institution and the chain of command of the alleged perpetrators, preventing impartial investigations); Comm. against Torture, Commc'n No. 433/2010, ¶ 12.4, U.N. Doc. CAT/C/48/D/433/2010 (May 24, 2012) (investigation conducted by same institution of the alleged perpetrators and by a hierarchically superior organization).

228. This investigation was conducted by the Department of Internal Security of Kazakhstan. Comm. against Torture, Commc'n No. 495/2012, ¶¶ 13.3, 13.4, 13.5, U.N. Doc. CAT/C/53/D/495/2012 (Nov. 28, 2014).

229. U.N. Comm. against Torture, Commc'n No. 477/2011, ¶¶ 10.4, 10.6, U.N. Doc. CAT/C/52/D/477/2011 (May 19, 2014).

230. *General Comment 31*, *supra* note 111, ¶ 15.

231. Draft General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, ¶ 30 (Hum. Rts. Comm.) [hereinafter Draft General Comment 36]; *see also* Arellana v. Colombia, Commc'n No. 563/93, ¶ 8.2 (Hum. Rts. Comm. Oct. 27, 1995) (noting that "purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies"); Marcellana and Gumanoy v. Philippines, Commc'n No. 1560/2007, ¶ 7.2 (Hum. Rts. Comm. Nov. 17, 2008) ("[W]here investigations reveal violations of certain Covenant rights, States parties must ensure that those responsible are brought to justice.").

responsible are held accountable and that victims have access to redress²³² and justice,²³³ and preventing impunity.²³⁴ Draft General Comment 36 furthermore reiterates previously established norms by noting that deprivations of life must be investigated²³⁵ in an independent,²³⁶ impartial,²³⁷ prompt,²³⁸ thorough,²³⁹ effective,²⁴⁰

232. Draft General Comment 36, *supra* note 231, ¶ 31; *see also* Sathasivam v. Sri Lanka, Commc'n No.1436/2005, ¶ 7.4 (Hum. Rts. Comm. July 8, 2008) ("[T]he author indeed was able to have the denial of his citizenship application reviewed by the State party's courts"); Amirov v. Russian Federation, Commc'n No. 1447/2006, ¶ 11.2 (Hum. Rts. Comm. April 2, 2009) ("[C]riminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by article 6."); General Comment 31, *supra* note 111, ¶¶ 15, 18 ("States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights.")

233. General Comment 31, *supra* note 111, ¶¶ 15, 18; *see also* Marcellana and Gumanoy v. Philippines, Commc'n No. 1560/2007, ¶ 7.4 (Hum. Rts. Comm. Oct. 30, 2008) ("[T]he Committee concludes that the absence of investigations to establish responsibility for the kidnapping and murder of the victims amounted to a denial of justice.").

234. Draft General Comment 36, *supra* note 231, ¶ 19; *see also* Concluding Observations: Angola, ¶ 14 (Hum. Rts. Comm. Mar. 28, 2013) (describing the steps that Angola must take to prevent "arbitrary and extrajudicial killings and disappearances").

235. Draft General Comment 36, *supra* note 231, ¶ 31.

236. *Id.*; Concluding Observations: Cameroon, ¶ 15 (Hum. Rts. Comm. Aug. 4, 2010).

237. Draft General Comment 36, *supra* note 231; *see also* Concluding Observations: Bolivia, ¶ 15 (Hum. Rts. Comm. Dec. 6, 2013) ("State party should also ensure that all complaints of excessive use of force are investigated promptly, effectively and impartially . . .").

238. Draft General Comment 36, *supra* note 231; *see also* Novakovic v Serbia, Commc'n No. 1556/2007, ¶ 7.3, CCPR/C/100/D/1556/2007 (Hum. Rts. Comm. Oct. 21, 2010) (outlining the procedures for state investigation of medical malpractice offenses); International Covenant on Civil and Political Rights, Concluding Observations of the Human Rights Committee: Russia Federation, ¶ 14, U.N. Doc CCPR/C/RUS/CO/6 (Hum. Rts. Comm. Nov. 24, 2009).

239. Draft General Comment 36, *supra* note 231; *see* International Covenant on Civil and Political Rights, Concluding Observations on the Initial Report of Mauritania, ¶ 14, CCPR/C/MRT/CO/1 (Hum. Rts. Comm. Nov. 21, 2013).

240. Draft General Comment 36, *supra* note 231; *see* International Covenant on Civil and Political Rights, Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland, ¶ 8, CCPR/C/GBR/CO/7 (Hum. Rts. Comm. Aug. 17, 2015) [hereinafter United Kingdom Report].

credible,²⁴¹ and transparent²⁴² manner. Such investigations should include: commencing investigations *ex-officio* in the absence of formal complaints, exploring the potential legal responsibility of senior officials for violations committed by subordinates, conducting rigorous autopsies of victims' bodies, including targeting rationale and rules of engagement followed by security forces, disclosing the content of investigations to victims' next of kin, disclosing investigations publicly, and devising best practices and revising policies pursuant to outcomes of investigations.²⁴³

As previously noted, the U.N. General Assembly (UNGA) has also provided that investigations into human rights violations must be conducted effectively, thoroughly, promptly, and impartially.²⁴⁴ In the context of extra-judicial executions, the UNGA has furthermore added that "the purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses."²⁴⁵ A group of experts elaborated on these concepts for the United Nations to develop a model protocol for the investigation of extra-legal, arbitrary, and summary executions.²⁴⁶ This protocol specifies the procedures for investigation, including standards for processing the crime scene and evidence, and taking testimony, and identifies factors that may trigger the need for a special investigation.²⁴⁷

The most recent, sweeping pronouncement regarding the adequacy of investigations in connection with the violation of right to

241. Draft General Comment 36, *supra* note 231; see International Covenant on Civil and Political Rights, Concluding Observations of the Human Rights Committee: Israel, ¶ 9, CCPR/C/ISR/CO/3 (Hum. Rts. Comm. Sept. 3, 2010).

242. Draft General Comment 36, *supra* note 233; see United Kingdom Report, *supra* note 240.

243. Draft General Comment 36, *supra* note 231, ¶ 31.

244. See G.A. Res. 60/147, *supra* note 199; see also Economic and Social Council Res. 1989/65, *supra* note 93 (outlining the legal procedures for human rights violation investigations).

245. G.A. Res. 1989/65, Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (May 24, 1989).

246. United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary Summary Executions, U.N. Doc. E/ST/CSDHA/12 (1991), <https://www1.umn.edu/humanrts/instree/executioninvestigation-91.html> [<https://perma.cc/73G8-GTFC>] (last visited Feb. 9, 2018).

247. *Id.* In the discussion that follows regarding investigations in practice, the requirement for "crime scene" presence on the part of the investigators and the emerging trends in that regard will be of particular relevance.

life came from ECtHR's analysis in *Al-Skeini*, which addressed, *inter alia*, the flaws in the United Kingdom's command investigations during its occupation of Iraq in 2003. In *Al-Skeini*, the ECtHR found that the United Kingdom violated its procedural duty to investigate under Article 2 of the ECHR in connection with the deaths of five Iraqi nationals.²⁴⁸ With respect to the sixth civilian casualty, the claimant accepted, and the ECtHR agreed, that the United Kingdom had not violated its duty to investigate because it commenced a public inquiry.²⁴⁹

While recognizing the difficulties of conducting investigations in "circumstances of generalized violence, armed conflict, or insurgency" the ECtHR maintained that even in "difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life."²⁵⁰ For the investigation to be effective, the ECtHR emphasized that the investigation must be independent, including the absence of a "hierarchical or institutional connection" between the investigator(s) and the entity under investigation.²⁵¹ The ECtHR added that public scrutiny, promptness, and the victim's involvement are essential to conducting independent investigations.²⁵² In this context, the ECtHR held that "since the investigation process remained entirely within the military chain of command and was limited to taking statements from the soldiers involved" it was not sufficiently independent.²⁵³ The lack of independence was supported by the fact that a soldier who shot one of the victims was not questioned at the outset and that the interviews of four Iraqi witnesses were not documented for the purpose of the investigation.²⁵⁴ The ECtHR also noted that no reason was provided for the approximately year-long delay between the death of one victim from drowning and the court martial in relation thereto, by which time some of the persons involved were no longer traceable.²⁵⁵

In other relevant jurisprudence, the ECtHR has interpreted an effective investigation as requiring the taking of statements from

248. *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07, ¶ 177 (Eur. Ct. H.R. 2011).

249. *Id.* ¶ 176.

250. *Id.* ¶ 164.

251. *Id.* ¶ 167.

252. *Id.*

253. *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07, ¶ 171 (Eur. Ct. H.R. 2011).

254. *Id.* ¶ 173.

255. *Id.* ¶ 174.

victims, members of the victims' families, witnesses, and "any military personnel present during the operation."²⁵⁶ In addition, when the loss of life is at the hands of state security forces, the ECtHR has demanded that an effective investigation consider "whether the security forces had conducted the operation in a proper manner" and the "operation had been planned and conducted in such a way as to avoid or minimize, to the greatest extent possible, any risk to the lives of [civilians]."²⁵⁷

The jurisprudence of the Inter-American Court of Human Rights (IACtHR) is also relevant in shaping the scope of effective investigations. IACtHR has held that an investigation need not achieve a successful prosecution in order for it to be considered effective. In *Velazquez Rodriguez*, the IACtHR stated that "[t]he duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result."²⁵⁸ The ECtHR echoed this view in *Al-Skeini* when it noted that an "investigation must be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means."²⁵⁹

Notwithstanding the emphasis on specific criteria for fulfilling the duty to investigate violations of human rights, IHRL makes allowances for circumstantial challenges to investigations. For example, in *Al-Skeini* the ECtHR recognized the additional challenges of conducting investigations during an occupation by holding that the duty to investigate "must be applied realistically, to take account of specific problems faced by investigators"²⁶⁰ and that in Iraq "practical problems including breakdown [of] the civil infrastructure, leading, *inter alia*, to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time" posed particular challenges to the United Kingdom's ability to conduct an effective investigation.²⁶¹ Despite these

256. *Ergi v. Turkey*, App. No. 23818/94, ¶ 83 (Eur. Ct. H.R. July 28, 1998).

257. *Id.* ¶¶ 79, 84.

258. *Velasquez-Rodriguez v. Honduras*, ¶ 177 (Inter-Am. Ct. H.R. July 29, 1988).

259. *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07, ¶ 177 (Eur. Ct. H.R. July 7, 2011).

260. *Id.*

261. *Id.* ¶ 168; *see also* *Al-Skeini v. United Kingdom*, App. No. 55721/07, ¶ 177 (Eur. Ct. H.R. July 7, 2011) (noting that challenges include "the Islamic practice requiring a body to be buried within twenty-four hours and left undisturbed for forty days, the lack of pathologists and post-mortem facilities, the

obstacles, the ECtHR affirmed that promptness, public scrutiny, and victim involvement are essential elements of an effective investigation.²⁶²

C. A Uniform Investigative Framework

The foregoing analysis reveals that there are generally few gaps between the overarching principles applicable to IHL and IHRL investigations: both generally require a prompt, thorough, effective, and impartial review of allegations, although IHRL provides a more authoritative and comprehensive investigative framework. Nevertheless, questions arise as to the universality of these principles, particularly with respect to the practical implementation of uniform investigative standards when states undertake investigations in the context of armed conflict versus 'peace-time' law enforcement contexts. Given the additional challenges that may arise when conducting investigations during armed conflict, particularly in 'no boots on the ground' cases, the precise content of what constitutes a credible, effective, impartial, independent, prompt, thorough, and transparent investigation may differ as a result of the practical limitations states face when conducting investigations.

The remainder of this Article will consider how states adhere to the aforementioned principles when investigating cases of civilian casualties during armed conflict. The focus of the following analysis will be on investigations involving civilian casualties resulting from airstrikes in areas over which the attacking state does not exercise power or effective control. While this examination considers the practices of a number of states, particular attention is given to the recent practices of the United States military, due to the practical reality of the United States' experience in these types of uses of force and the availability of information made public by the United States military.

D. State Practice

In reviewing how states approach their duty to investigate civilian casualties, it is important to note that most states do not publicly release reports following investigations into civilian casualties

lack of records, problems with logistics, the climate and general working conditions").

262. *Id.* ¶ 167.

resulting from airstrikes.²⁶³ In fact, most states do not affirmatively acknowledge civilian casualties caused by their military forces,²⁶⁴ and many do not acknowledge such casualties even when complaints surface.²⁶⁵ While experts have considered the formal policies of a number of states, treatment of the actual practice of those states in conducting investigations of civilian casualties is both sparse and outdated.

This section will examine the investigative practices of four states with experience on this issue: Australia, the Netherlands, Canada, and the United States.²⁶⁶ This review will highlight that, notwithstanding a state's recognition of the source of the duty as residing in IHL, IHRL, or specific policies, they generally apply the common principles of impartiality, effectiveness, promptness, and thoroughness.²⁶⁷ As noted earlier, much of the state practice in this area is drawn from the United States, yet common approaches among

263. See generally Ruth Pollard, *Syria's Toll: Civilian Casualties from Airstrikes Prompt Calls for Transparency*, SYDNEY MORNING HERALD (Sept. 19, 2015), <http://www.smh.com.au/world/syrias-toll-civilian-casualties-from-airstrikes-prompt-calls-for-transparency-20150917-gpi5x.html> [<https://perma.cc/LMX2-2HQU>] (describing the lack of transparency in the number of casualties from anti-ISIL air strikes).

264. Editorial, *Transparency in the Drone Wars*, N.Y. TIMES, Mar. 20, 2016, at SR10.

265. See, e.g., *Syria: Russia's Shameful Failure to Acknowledge Civilian Killings*, AMNESTY INT'L (Dec. 22, 2015), <https://www.amnesty.org/en/latest/news/2015/12/syria-russias-shameful-failure-to-acknowledge-civilian-killings/> [<https://perma.cc/SBE2-CUW4>] (reporting that Russian authorities labeled claims of civilian casualties a "hoax"); Judith Duffy, *Revealed: British Government Refusing to Accept Evidence of Civilian Fatalities in UK Air Strikes*, HERALD SCOT. (Jan. 6, 2016), http://www.heraldsotland.com/news/14193998.Revealed_British_government_refusing_to_accept_evidence_of_civilian_fatalities_in_UK_air_strikes/ [<https://perma.cc/F72V-SRX2>].

266. It is beyond the scope of this Article to address whether these states should be characterized as "specially affected states" for purposes of the customary international law applicable to civilian casualty investigations. See generally *Second Report of the Special Rapporteur on Identification of Customary International Law*, *supra* note 39, at 36–37 (observing that "any assessment of international practice ought to take into account the practice of those States that are 'affected or interested to a higher degree than other states' with regard to the rule in question").

267. Sylvaine Wong, *Investigating Civilian Casualties in Armed Conflict: Comparing U.S. Military Investigations with Alternatives Under International Humanitarian and Human Rights Law*, 64 NAVAL L. REV. 111, 122 (2015) ("Adhering to the status quo that IHL norms govern investigation requirements, either as exclusive law or *lex specialis*, results in no different principles than under human rights law.").

these states to addressing reports of civilian casualties bear out, including the availability of both criminal and administrative investigative tools, established evidentiary standards, and an expectation of impartiality. In the end, despite the heavy criticisms of how states approach civilian casualties,²⁶⁸ state practice reveals efforts to improve accountability for civilian casualties amidst growing challenges.

1. Australia

The Australian Defense Forces (ADF) may conduct either criminal or administrative investigations.²⁶⁹ Commanders in the ADF “can be flexible in their selection to suit the circumstances of the particular incident or situation” and are authorized to combine inquiries as necessary for the situation being addressed.²⁷⁰

i. Criminal Investigations

The Australian Defence Force Investigative Service (ADFIS) was established following a 2006 audit concerning the ADF’s investigative capabilities.²⁷¹ The goal was to develop “a highly trained unit capable of investigating Service offences independently, impartially and to a standard that equals best practice.”²⁷² This relatively new investigative apparatus is responsible for criminal investigations of ADF personnel in connection with enforcement of the Defence Force Discipline Act (DFDA) in Australia.²⁷³ ADFIS is established as a distinct unit within the ADF and its mission is “to assist the CDF [Chief of the Defence Force] to maintain ADF discipline

268. See, e.g., Woods, *supra* note 177 and accompanying text.

269. AUSTL. GOV’T DEP’T OF DEF., ADMINISTRATIVE INQUIRIES MANUAL: APPOINTING AND CONDUCTING INQUIRIES UNDER THE DEFENCE (INQUIRY) REGULATIONS 1985 2–2 (2016) [hereinafter AIM].

270. *Id.* at 2–4.

271. SENATE STANDING COMMITTEES ON FOREIGN AFFAIRS, DEF., AND TRADE, REFORMS TO AUSTRALIA’S MILITARY JUSTICE SYSTEM: FOURTH PROGRESS REPORT, 31 (2008), https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_cce_and_Trade/Completed%20inquiries/2008-10/legmiljustice/report04/index [<https://perma.cc/W6V6-RH7N>].

272. *Defence Annual Report 2007-08*, ch. 5, § 3.2, AUSTL. DEP’T OF DEF., www.defence.gov.au/AnnualReports/07-08/vol1/online_ch5_14_s32.htm [<https://perma.cc/M7PG-A4PK>] (last visited Feb. 12, 2018).

273. AUSTL. DEF. FORCE, DEFENCE RESPONSE TO THE RECOMMENDATIONS OF THE AUDIT OF ADF INVESTIGATIVE CAPABILITY, www.defence.gov.au/publications/docs/spauditreportresponse.pdf [<https://perma.cc/RKN2-NPEF>] (last visited Feb. 12, 2018).

through the lawful, ethical and effective investigation of matters involving ADF members, independent of Service chains of command.”²⁷⁴ If there is a suspicion that an incident may involve misconduct by ADF personnel that is punishable under the DFDA, the investigation should be conducted by the ADFIS.²⁷⁵ Under the DFDA, the ADFIS has broad investigative authority consistent with general law enforcement responsibilities.²⁷⁶

The ADF incorporates the Australian Government Investigations Standards (AGIS) as the standards applicable to ADFIS investigations.²⁷⁷ AGIS identify the goal of an investigation as obtaining and recording “the best evidence available to maximise the possibility of a successful outcome for the investigation.”²⁷⁸ In achieving that result, the AGIS sets out minimum standards with respect to methodologies.²⁷⁹ The standards include offering an interpreter to non-English-speaking witnesses, preserving forensic evidence, and returning physical evidence to the lawful owner if it is no longer required or if its retention period specified in relevant legislation has expired.²⁸⁰ Additionally, the health and safety of the investigators and the public must be considered in undertaking the investigation.²⁸¹

ii. Administrative Inquiries

A criminal investigation by the ADFIS is often preceded by some fact-finding by the relevant “on-scene” ADF commander. Intended to aid a commander in the general decision-making responsibilities that are incident to command, “fact finding” refers to

274. *Id.*

275. See AUSTL. GOV'T DEPT OF DEF., GOOD DECISION-MAKING IN DEFENCE: A GUIDE FOR DECISION-MAKERS AND THOSE WHO BRIEF THEM 3–3 (2015), <http://www.defence.gov.au/Publications/Docs/GoodDecisionMakingInDefence.pdf> [<https://perma.cc/LT3X-ANTZ>] (stating that “if the intent is to treat ADF misconduct as a service offence, care should be taken in fact finding outside of the DFDA investigation process”) [hereinafter GOOD DECISION-MAKING].

276. *Defence Force Discipline Act 1982* (Cth) pt. VI (Austl.).

277. *Defence Annual Report 2007-08*, *supra* note 272.

278. AUSTL. GOV'T, AUSTRALIAN GOVERNMENT INVESTIGATIONS STANDARDS 13 (2011), <https://www.ag.gov.au/RightsAndProtections/FOI/Documents/AGIS%202011.pdf> [<https://perma.cc/ZHX6-VSTB>].

279. *Id.*

280. *Id.* at 13, 15, 17.

281. *Id.* at 13–15.

"the process of collecting information to support decision-making."²⁸² In that sense, fact-finding is the simplest form of an administrative investigation and serves as a tool for a commander to assess a situation and the appropriate next steps, including weighing whether to refer a matter to the ADFIS.²⁸³ Fact-finding is designed to be a flexible mechanism, initiated at the commander's discretion or based upon a report, and can either be conducted by the commander himself or herself or by an officer appointed by the commander.²⁸⁴ Some of the approaches available to a commander in conducting fact-finding include interviewing witnesses, obtaining and examining physical evidence, conducting site visits, and obtaining expert opinions.²⁸⁵ If intending to make an adverse finding against an individual, the fact finder must be impartial and ensure the procedural fairness of the examination.²⁸⁶

Based on the conclusions drawn from fact-finding or, in extreme cases when the seriousness of the incident is immediately apparent, without engaging in a fact-finding step, an ADF commander may pursue further investigation under the DFDA or an administrative inquiry under the Defense (Inquiry) Regulations (DIR).²⁸⁷ Investigation under the DFDA would be a criminal investigation pursued by the ADFIS, as discussed above. If the event requires additional inquiry but does not implicate the DFDA, the DIR provides for fact-finding through statutory mechanisms, finding practical expression through the Administrative Inquiries Manual (AIM).²⁸⁸ While the DIR creates five types of administrative inquiries, the most common and relevant inquiry is the Inquiry Officer Inquiry (IOI).²⁸⁹ The AIM does not direct when commanders must appoint an IOI, but it does recommend

282. GOOD DECISION-MAKING, *supra* note 275, at 3-1. The moniker of "fact-finding" has replaced the previous concept in the ADF of a "Quick Assessment." Schmitt, *supra* note 29, at 63.

283. GOOD DECISION-MAKING, *supra* note 275, at 3-2, 3-3.

284. *Id.* at 3-4.

285. *Id.* at 3-3.

286. *Id.* at 3-14.

287. *See id.* at 3-1, 3-2 (describing the possible considerations that would lead a commander to not undertake fact-finding steps).

288. *See generally* Defence (Inquiry) Regulations 1985 (Cth) (Austl.), <https://www.legislation.gov.au/Details/F2013C00477> [<https://perma.cc/EJ8U-NP67>] (describing the DIR process for fact-finding); AIM, *supra* note 269.

289. AIM, *supra* note 269, at 1-2.

one “where a matter involves the death of, or serious injury to, a civilian”²⁹⁰

Any commander can appoint an IOI and the Inquiry Officer (IO) is usually an ADF member.²⁹¹ Selection of the IO is focused on appointing “the most suitable personnel to carry out the inquiry, taking into account experience, availability [and] freedom from bias,” and consideration is expected to be given to appointing an IO from a different unit.²⁹² Much like the fact-finding phase of an inquiry, the IOI includes general guidance for how an IO should conduct the inquiry, including provisions for “site inspections,” as well providing for an “absent witness.”²⁹³ While the preference is for an IO to conduct a personal interview at the witness’s location, particularly with “key witnesses,” the AIM does also permit telephonic, e-mail, and mail interviews of witnesses.²⁹⁴ An IO can seek legal advice during the course of the inquiry and a legal review is required at the completion of the inquiry.²⁹⁵ The goal of an IOI is fact-finding for the benefit of the commander’s decision-making generally and the evidence is not intended to be used at a criminal trial.²⁹⁶ As such, IOI’s are prohibited from receiving witness testimony under oath or affirmation.²⁹⁷ The standard of proof for an IOI is that “the inquiry personnel must be satisfied of a matter on the balance of probabilities.”²⁹⁸

In both of the cases considered below, the ADF used the IOI process in its response. While there has been at least one instance in which the ADFIS was utilized in the investigation of civilian casualties, that investigation was not precipitated by an initial fact-finding process, nor has the report from that investigation been made public, limiting its usefulness to this analysis.²⁹⁹ The cases below highlight when the ADF will investigate civilian casualties and the process used by the ADF in conducting IOIs into civilian casualties.

290. *Id.* at 2–1.

291. *Id.* at 1–2.

292. *Id.* at 1–4, 3–4.

293. *Id.* at 4–9, 3A.

294. AIM, *supra* note 269, at 4–9.

295. *Id.* at 3E–2, 4B–3.

296. *Id.* at 2–2.

297. *Id.* at 4B–2.

298. *Id.* at 4–13.

299. Dan Oakes & Sam Clark, *What the Documents Reveal About Killings of Unarmed Afghans*, ABC (July 10, 2017), <http://www.abc.net.au/news/2017-07-11/unarmed-men-children-among-casualties-of-elite-forces/8424944> [perma.cc/P6UM-9NYE].

The IOI reports were ultimately made available to the public on the ADF's website.

iii. Cases

a. Chora District, Afghanistan

Based upon the 2011 QA discussed *infra* and confirmation of a civilian casualty, an IOI was appointed. The IOI interviewed the ADF witnesses in an effort to reconstruct the incident, consulted with the Defense Science Technology Organization (DTSO) regarding the chemical test performed by the QA at the site, reviewed notes from a telephone interview by the QA with the deceased child's father; and attempted to interview the family of the deceased adult with the assistance of a human rights NGO, although this effort was ultimately unsuccessful.³⁰⁰ The IO report criticized the QA team's inquiry into the status of the adult male who was killed in the incident. The QA report determined that he was an insurgent, but, on the IO's account, the available evidence was not sufficient to reach that conclusion, given the circumstances.³⁰¹ He doubted that the deceased adult could be found to be an insurgent based on what the DTSO judged to be an unreliable field chemical test.³⁰² Pointing to the absence of a weapon or shell casings at the site of the body, the IO stated that the "QA did not indicate that appropriate weight had been given to all of the evidence in making a determination as to the identity of the dead male."³⁰³ Nonetheless, given the circumstances at the time of the incident, the IO concluded that the civilian casualties were incidental harm resulting from a lawful use of force and the civilians were not unlawfully targeted.³⁰⁴

b. Afghanistan Airstrike

On April 28, 2009, ADF aircraft launched an airstrike on eight individuals, suspected to be insurgents, observed at night on a

300. AUSTRALIAN GOVERNMENT DEP'T OF DEFENCE, *supra* note 161, at 9.

301. *Id.* at 8–9.

302. *Id.*

303. *Id.* at 9–10.

304. *Id.* at 9–13.

footpad.³⁰⁵ Four individuals were killed and two were wounded.³⁰⁶ Later that morning, local Afghan residents reported to the ADF that the four individuals killed by the airstrike were farmers doing agricultural work.³⁰⁷ An IO interviewed multiple witnesses but, for “security reasons,” did not inspect the site of the airstrike or interview any local residents, despite noting that local residents would have been able to provide relevant information.³⁰⁸ Instead, the IO relied on maps, imagery, and intelligence reporting in arriving at his findings and conclusions.³⁰⁹ Although concluding that, “on the balance of probabilities” the deceased individuals were lawfully targeted, the IO did acknowledge that “it is often very difficult to determine with absolute certainty the identity and affiliation of casualties.”³¹⁰

2. Canada

As with the ADF, the Canadian Armed Forces (CAF) maintain distinct investigative processes for the handling of administrative and criminal investigations.³¹¹

a. Criminal Investigations

Criminal investigations in the CAF are conducted by the Canadian Forces National Investigation Service (CFNIS).³¹² The CFNIS investigates “serious and sensitive matters” within the CAF.³¹³ CFNIS investigators are outside the chain of command of those they are investigating and report instead to the Canadian Forces Provost Marshal.³¹⁴ CFNIS investigators’ training curriculum include a section on conducting investigations in a deployed environment as well as

305. AUSTL. DEP’T OF DEF., REPORT OF AN INQUIRY OFFICER, POSSIBLE CIVILIAN CASUALTIES FROM CLOSE AIR SUPPORT STRIKE AT [REDACTED] AFGHANISTAN ON 28 APR 09, <http://www.defence.gov.au/publications/coi/reports/28APR09%20CIVCAS%20report%20-%20redacted.pdf> [https://perma.cc/FKQ8-GVLT] (last visited Feb. 11, 2018).

306. *Id.* at 3.

307. *Id.*

308. *Id.* at 2. It is unclear if the IO’s review was preceded by a QA.

309. *Id.*

310. AUSTL. DEP’T OF DEF., *supra* note 305 at 6, 10.

311. Schmitt, *supra* note 29, at 59.

312. *The Canadian Forces National Investigation Service*, NAT’L DEF. & CAN. ARMED FORCES (Dec. 12, 2008), <http://www.forces.gc.ca/en/news/article.page?doc=the-canadian-forces-national-investigation-service/hnps1u2k> [https://perma.cc/4B3J-37YF] (last visited Feb. 11, 2018).

313. *Id.*

314. *Id.*

crime scene processing.³¹⁵ Throughout their investigations, CFNIS investigators receive advice from CAF military prosecutors.³¹⁶

b. Administrative Inquiries

The most basic of the administrative investigations within the CAF is the "Summary Investigation."³¹⁷ A Summary Investigation may be ordered whenever the commander "requires to be informed on any matter connected with his command" ³¹⁸ Before ordering a Summary Investigation, a commander is required to weigh the existence of a conflict of interest if the investigation is conducted at the command level and must also seek legal advice from a judge advocate regarding the appropriate form of investigation.³¹⁹ In addition to guarding against partiality in exercising the authority to appoint an investigator, the commander must also ensure that the selected investigator is impartial,³²⁰ is an officer, and "possess[es] knowledge of the investigative process and how to analyze evidence."³²¹

Investigators are expected to receive training from the CAF's Administrative Investigation Support Center prior to the investigation.³²² In conducting the investigation, the investigator is encouraged to consult with subject matter experts on specific issues that arise.³²³ Nonetheless, a Summary Investigation is considered informal and an investigator may not administer oaths or affirmations in receiving testimony.³²⁴

The more formal administrative option is the "Board of Inquiry" (BOI).³²⁵ The decision to convene a BOI as opposed to a Summary Investigation is generally based on the severity of the incident, however it may also come at the direction of a higher authority.³²⁶ A BOI is composed of at least two officers, and the president of the board should be senior to the highest ranking

315. *Id.*

316. *Id.*

317. Summary Investigations—General, QR&Os, c 21.01 (Can.).

318. *Id.*

319. DEPT OF NAT'L DEF. & CAN. ARMED FORCES, DEFENSE ADMINISTRATIVE ORDERS AND DIRECTIVES (DAODs) 7002-2, at ¶ 2.3 (2011).

320. *Id.* ¶ 2.9.

321. *Id.* ¶¶ 2.8, 2.20.

322. *Id.* ¶ 2.17.

323. *Id.* ¶ 2.15.

324. DEPT OF NAT'L DEF. & CAN. ARMED FORCES, *supra* note 319, ¶ 2.16.

325. Summary Investigations and Boards of Inquiry, QR&Os, c 21.06 (Can.).

326. *Id.* at 2.1, 2.2.

individual under suspicion.³²⁷ While a BOI does have the authority to administer oaths, it is generally not bound by the rules of evidence applicable in court.³²⁸ Members of the BOI receive testimony together and, as with Summary Investigation officers, may be assisted by technical advisors.³²⁹ Unlike a Summary Investigation, however, testimony before a BOI must be given under oath or affirmation.³³⁰

c. Cases

In practice, criminal and administrative investigations conducted by the CAF may overlap. For instance, following a March 6, 2015 “friendly fire” incident in Afghanistan in which one CAF member was killed and three others wounded, the government launched both a Summary Investigation and a CFNIS investigation.³³¹ In this instance, the two investigations had distinct mandates: the Summary Investigation “examined the circumstances surrounding the friendly fire incident in order to provide a clear understanding of the facts, and to identify and recommend any measures to prevent a reoccurrence,” while the CFNIS investigation looked at “whether criminality played a role in the incident and, if necessary, [would] recommend charges.”³³² CFNIS investigated a 2008 incident in which two Afghan children were killed by CAF members utilizing small arms fire.³³³ That investigation concluded that there was no suspected violation of IHL by the use of force and, based on that finding, no charges were referred nor further investigated.³³⁴

327. Powers of Boards of Inquiry, QR&Os, c 21.08 (Can.).

328. Composition of Boards of Inquiry, QR&Os, c 21.07 (Can.).

329. DEPT OF NAT'L DEF. & CAN. ARMED FORCES, DEFENSE ADMINISTRATIVE ORDERS AND DIRECTIVES (DAODs) 7002-1, at ¶¶ 2.13, 2.16 (2011).

330. Procedure, QR&Os, c 21.10 (Can.).

331. *Findings of the Friendly Fire Investigations Regarding the Death of Sergeant Doiron*, GOV'T CAN. (May 12, 2015), <http://news.gc.ca/web/article-en.do?nid=973589> [https://perma.cc/L9CB-S8ST].

332. *Id.*

333. U.N. ASSISTANCE MISSION TO AFG., ANNUAL REPORT ON PROTECTION OF CIVILIANS IN ARMED CONFLICT, 2008 (2009), <http://www.ohchr.org/Documents/Countries/ProtectionCivilians2008.pdf> [https://perma.cc/2RAL-V5L2].

334. *Id.*

3. Netherlands³³⁵

In some respects, the method used to conduct investigations within the Dutch military mirrors that of Australia and Canada, but in other ways, the Dutch approach is dramatically different. Like commanders in the ADF and CAF, Dutch commanders may initiate “internal investigations” that are “aimed at obtaining the best possible picture of the facts surrounding an incident, and determining whether there are grounds for suspecting criminal conduct.”³³⁶ This type of investigation is ordered at the discretion of the commander and appears to be an “administrative” step, though any suspicion of criminal activity that arises during an internal investigation must be referred to the Royal Military Constabulary for criminal investigation.³³⁷

The Royal Military Constabulary is a branch of the armed forces that carries out investigations of offenses under military law.³³⁸ It conducts investigations under the supervision of the District Prosecutor of the Court in Arnhem, an office falling under the direction of the civilian Public Prosecution Authority.³³⁹ These investigations may be either criminal in nature or take on a quality described as a “fuller factual investigation.”³⁴⁰ The latter is a process distinct from a commander’s “internal investigation,” but is not necessarily a criminal investigation in the absence of a reasonable suspicion of criminal conduct.³⁴¹ Much like the process in the United States, discussed below, “internal investigations” and criminal investigations may occur concurrently.

However, with respect to civilian casualties, the Netherlands’ approach is unique. As a matter of policy, the Netherlands applies the requirements of the European Convention on Human Rights when its armed forces are operationally deployed.³⁴² Based upon this, the Netherlands conducts a factual investigation for all civilian casualties and serious injuries to civilians.³⁴³ As previously discussed, this

335. Information on the Netherlands Ministry of Defense’s investigative processes is not readily available, however this information was presented to the Turkel Commission via a national report.

336. Turkel Report, *supra* note 81, at 247.

337. *Id.* at 248.

338. *Id.* at 198.

339. *Id.* at 199, 247–48.

340. *Id.* at 247–48.

341. Turkel Report, *supra* note 81, at 247–48.

342. *Id.* at 247.

343. *Id.*

practice is achieved by requiring “after action reports” from military units following any use of force by that unit.³⁴⁴ Those reports are reviewed by the public prosecutor to assess the need for further investigation by the Royal Military Constabulary.³⁴⁵

The dual role of the Dutch military and the public prosecutor in addressing civilian casualties was on display in early 2016 when reports of civilian casualties resulting from a Dutch airstrike in Iraq targeting ISIL emerged.³⁴⁶ According to the Dutch Ministry of Defense at the time, the military inquiry into the casualties would be passed on to the public prosecutor for consideration and further investigation.³⁴⁷ The Ministry of Defense indicated that, “for operational reasons, no details on the investigation will be released” and no further information has been provided on the status of either the military’s or prosecutor’s investigation.³⁴⁸

4. United States

The United States military maintains a patchwork of overlapping frameworks by which matters can be investigated by military forces and those working for the military. The mechanisms used by the United States can generally be placed into two categories: professional law enforcement, designed to prepare cases for criminal prosecution; and commander-directed administrative modalities, focused on professional accountability and institutional improvement.

a. Criminal Investigations

344. *Id.* at 246. This process is mirrored in the United Kingdom’s Ministry of Defense “Shooting Incident Review” policy, which requires submission of a “Serious Incident Report” following all “shooting incidents” and a further review if civilians may have been killed or injured and there is no indication of a violation of IHL. See Brigadier (Rtd.) Anthony Paphiti, *Written Evidence Before the United Kingdom Parliament, UK Armed Forces Personnel and the Legal Framework for Future Operations*, SELECT COMM. ON DEF. (Jan. 7, 2014), <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmdfence/writev/futureops/law06.htm> [<https://perma.cc/W2HV-D9EL>].

345. Turkel Report, *supra* note 81, at 246.

346. Janene Pieters, *Dutch F-16s Investigated in Iraq Civilian Deaths*, NL TIMES (Feb. 8, 2016), <http://www.nltimes.nl/2016/02/08/dutch-f-16s-investigated-in-iraq-civilian-deaths/> [<https://perma.cc/WU35-UXE3>].

347. *Id.*; *Netherlands Launches Probe into Civilian Deaths During Dutch Airstrikes in Iraq*, RT (Feb. 7, 2016), <https://www.rt.com/news/331673-netherlands-civilian-deaths-iraq/> [<https://perma.cc/VY9X-XWJJ>].

348. Pieters, *supra* note 346.

Criminal investigations in the United States military are conducted by entities known as Defense Criminal Investigative Organizations (DCIOs).³⁴⁹ DCIOs, composed of both civilian and military investigators depending on the organization, are independent of unit commanders and answer instead to the civilian leadership of the military services.³⁵⁰ In the case of “reportable incidents,” defined in United States military policy as “a possible, suspected, or alleged violation of the law of war for which there is credible information,” commanders are required to notify the relevant DCIO.³⁵¹ DCIO investigations are directed by policy to “provide commanders fact based, unbiased investigative findings that reflect impartiality.”³⁵²

b. Administrative Investigations

Administrative investigations are another option for U.S. commanders in investigating matters under their cognizance, and are most commonly utilized for civilian casualty investigations.³⁵³ Administrative investigations are often preceded by a “preliminary inquiry.”³⁵⁴ As previously discussed, a preliminary inquiry, much like fact finding in the ADF or Summary Investigations in the CAF, is focused on ascertaining the “magnitude of a problem,” identifying

349. U.S. DEPT OF DEF., DOD INSTRUCTION 5505.03: INITIATION OF INVESTIGATIONS BY DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS 1 (Mar. 24, 2011), <http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/550503p.pdf> [<https://perma.cc/K8J5-SZG3>] [hereinafter DOD INSTRUCTION 5505.03].

350. Military “services” in the United States refers to the Army, Navy (including the Marine Corps), and Air Force. *Organization of the Department of Defense*, SEC’Y OF DEF. (Mar. 2012), https://research.uchc.edu/wp-content/uploads/sites/1137/2015/08/DoD_Organization_March_2012.pdf [<https://perma.cc/JC9G-8QFB>].

351. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, U.S. DEPT OF DEF., CJCSI 5810.01D: IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM 2 (Apr. 30, 2010), http://www.jcs.mil/Portals/36/Documents/Library/Instructions/5810_01.pdf?ver=2016-02-05-175049-077 [<https://perma.cc/NB3V-F6YC>].

352. DOD INSTRUCTION 5505.03, *supra* note 349, at 2.

353. DEF. LEGAL POLICY BD., *supra* note 76, at 83. A “15-6” investigation is the United States Army’s administrative investigation. The title is a reference to policy’s official citation as Army Regulation (AR) 15-6. The Air Force, meanwhile, refers to its administrative investigations as “CDIs,” Commander-Directed Investigations. Although maintaining different titles, the fundamental procedures vary little.

354. U.S. ARMY REGULATION 15-6: PROCEDURES FOR INVESTIGATING ARMY OFFICERS AND BOARDS OF OFFICERS, *supra* note 133, at 31.

witnesses and preserving their testimony, and determining if a more extensive investigation is warranted.³⁵⁵ The procedures for a preliminary inquiry are less formal than an administrative investigation and, in keeping with its function as a “commander’s inquiry,”³⁵⁶ the parameters may be set by the commander appointing the inquiry officer.

Based upon its findings, a preliminary inquiry may lead to any one of the following: termination of the inquiry if the commander is satisfied that no further inquiry is needed, appointment of an IO for further administrative inquiry, or referral of the case to a DCIO for criminal investigation.³⁵⁷ In this sense, preliminary inquiries serve two functions: preserving the record, ideally close in time to an incident, for possible additional inquiry and allowing for consideration of the most appropriate investigative tool based on the evidence initially assembled.³⁵⁸ Should the preliminary inquiry lead to both the appointment of an IO as well as a request for a DCIO investigation, which has occurred in the context of civilian casualty investigations,³⁵⁹ the policies mandate that DCIO investigations maintain priority over administrative investigations.³⁶⁰

Beyond the preliminary inquiry, a commander (referred to here as the “appointing authority”) may convene an investigation through the formal appointment of a subordinate officer as the IO.³⁶¹ The IO is

355. *Id.*

356. *Id.* The “commander’s inquiry” relates to Rule for Courts-Martial 303 in the Manual for Courts-Martial, which requires that a commander conduct a “preliminary inquiry” into suspected offenses of subordinate military personnel in the unit and the inquiry should be “informal” and “gather all reasonably available evidence bearing on guilt or innocence.” U.S. DEP’T OF DEF., MANUAL FOR COURTS-MARTIAL II-19 (2012).

357. *See, e.g.*, DEP’T OF THE ARMY, CRIMINAL INVESTIGATION ACTIVITIES 8 (2009) (providing that the Army’s CID “may assume responsibility for investigating any criminal offense within the investigative authority of the Army”).

358. *See* DEF. LEGAL POLICY BD., *supra* note 76, at 70 (“An initial inquiry into civilian casualty incidents should be followed by a determination as to the extent and type of additional investigation that may be needed.”).

359. The “Bargewell Report,” produced by Major General Bargewell in June 2006, resulted from an administrative investigation appointed pursuant to AR 15-6 alongside an ongoing NCIS investigation. The report specifically addressed shortfalls in official reporting of IHL violations and training on IHL principles. The report was ultimately incorporated into the NCIS criminal report on the Haditha incident. *See* United States v. Chessani, No. 200800299, 2009 CCA Lexis 84, at *6–7 (N-M. Ct. Crim. App. 2009).

360. U.S. DEP’T OF DEF., *supra* note 349, at 2.

361. DEP’T OF THE ARMY, *supra* note 133, at 4. While AR 15-6 investigations may be labeled “informal,” that is a term-of-art in the regulation used to distinguish

required to be equal or senior in rank to the senior ranking subject of the investigation, in order to avoid senior personnel under investigation from influencing the IO.³⁶² The purpose of such an administrative investigation is “to investigate systemic (or procedural) problems or to look into matters regarding individual conduct or responsibility.”³⁶³

While service regulations identify certain essential qualifications for an IO, including maturity, objectivity, impartiality, experience, training, critical thinking, and temperament, there is no requirement that an IO have any specialized training either as an investigator or on the subject matter being investigated.³⁶⁴ That said, service policies envision the appointment of technical advisors with whom the IO may consult during the investigation.³⁶⁵ The regulations also ensure that IOs will have access to all of the evidence needed to complete the investigation.³⁶⁶ Once appointed, the IO’s responsibility is “to thoroughly and impartially ascertain and consider the evidence on all sides of each issue, to comply with the instructions of the appointing authority, to make findings that are warranted by the evidence, and, where appropriate, to make recommendations.”³⁶⁷ These policies emphasize the collection, documentation, and consideration of all evidence.³⁶⁸ In furtherance of that goal, IOs are empowered to administer oaths.³⁶⁹ In the end, IOs produce reports summarizing their investigation, the evidence, and their findings.³⁷⁰ The standard of proof for these findings is a “preponderance of the evidence.”³⁷¹ The commander receives the resulting recommendations, which may

an IO from a “board of officers” and, practically, there is no less formality in “informal” AR 15-6 investigations. *Id.* at 1 (stating that “[p]roceedings involving a single investigating officer . . . are designated administrative investigations”).

362. SEC’Y OF THE AIR FORCE, OFFICE OF THE INSPECTOR GEN., *Commander-Directed Investigation (CDI) Guide*, 10 (2016), http://www.af.mil/Portals/1/documents/ig/CDI_Guide_18-February-2016.pdf [<https://perma.cc/QD7A-WYGX>] [hereinafter CDI Guide]; DEP’T OF THE ARMY, *supra* note 133, at 2.

363. CDI Guide, *supra* note 362, at 6.

364. *Id.* at 10; DEP’T OF THE ARMY, *supra* note 133, at 13.

365. CDI Guide, *supra* note 362, at 12; DEP’T OF THE ARMY, *supra* note 133, at 13.

366. DEP’T OF THE ARMY, *supra* note 133, at 21.

367. *Id.* at 2. The Air Force policy requires that “the IO be objective, neutral, and fair.” CDI Guide, *supra* note 362, at 11.

368. DEP’T OF THE ARMY, *supra* note 133, at 2.

369. *Id.* at 20; CDI Guide, *supra* note 362, at 17.

370. DEP’T OF THE ARMY, *supra* note 133, at 15.

371. *Id.* at 24; CDI Guide, *supra* note 362, at 6 (defining the standard as “the greater weight and quality of the credible evidence”).

include such proposals as corrective action for the organization or disciplinary action for individuals involved.³⁷²

IOs are directed to consider “anything that a reasonable person would consider relevant and material to an issue” under examination and weigh the evidence’s credibility.³⁷³ This includes evidence from aircraft video and audio recordings and personal inspections of the location where events took place “if *possible* and appropriate.”³⁷⁴ “Off the record” statements, while discouraged, may be used “as help in finding additional evidence,”³⁷⁵ and documents may be used “regardless of whether the preparer of the record is available to give a statement or testify in person.”³⁷⁶ Lastly, and relevant for the conduct of investigations in the absence of boots on the ground, the range of documentary evidence that an IO is permitted to consider is broad and can include telephonic testimony and, in “unusual circumstances,” e-mail and mail communications.³⁷⁷

The commander’s legal advisor, commonly referred to as a “Staff Judge Advocate” (SJA), plays a critical role in the administrative investigation process).³⁷⁸ As observed in both AR 15-6 and the CDI Guide, the SJA plays a defined role in all three phases of an investigation: pre-appointment, investigation, and legal review.³⁷⁹ In the pre-appointment phase, the SJA advises the commander in evaluating the appropriate steps and considering what investigative options to pursue.³⁸⁰ During the investigation, the SJA advises the IO on the investigative approach and any legal issues that may arise during the investigation.³⁸¹ Post-investigation, an SJA is required to conduct a comprehensive “legal sufficiency” review of administrative

372. DEPT OF THE ARMY, *supra* note 133, at 15.

373. *Id.* at 20.

374. *Id.* at 46 (emphasis added).

375. *Id.* at 21.

376. *Id.* at 20.

377. DEPT OF THE ARMY, *supra* note 133, at 46; CDI Guide, *supra* note 362, at 16–17.

378. DEPT OF THE ARMY, *supra* note 133, at 14, 19; CDI Guide, *supra* note 362, at 11.

379. DEPT OF THE ARMY, *supra* note 133, at 14, 19; CDI Guide, *supra* note 362, at 11.

380. DEPT OF THE ARMY, *supra* note 133, at 14; CDI Guide, *supra* note 362, at 11.

381. DEPT OF THE ARMY, *supra* note 133, at 14; CDI Guide, *supra* note 362, at 11.

investigation reports and supporting evidence and serve as an advisor to the commander of any disciplinary or institutional actions.³⁸²

In recent years, the United States has had substantial opportunity to exercise its investigatory response mechanisms based on reports of civilian casualties. Some of these cases are particularly well suited to demonstrate the various investigative tools at work and their interplay. Other cases considered here demonstrate the challenges faced by investigations in areas in which the United States lacked boots on the ground, as well as the role of the BDA and third-parties in facilitating those investigations.

c. Haditha & Hamdaniyah, Iraq (November 2005)

These investigations arose from separate incidents involving the alleged unlawful killing of a number of Iraqi civilians by U.S. Marines in the cities of Haditha and Hamdaniyah in 2005.³⁸³ In both cases, the DCIO visited the sites of the killings, questioned local Iraqi residents, collected physical and forensic evidence, and pursued exhumation of all of the victims.³⁸⁴ In Haditha, local residents recounted to journalists that the Naval Criminal Investigative Service (NCIS) visited them over fifteen times, reconstructing the position and movements of individuals involved in the incident.³⁸⁵ While the Naval Criminal Investigative Service (NCIS) was only able to exhume one victim's body from the Hamdaniyah incident due to religious objections of the Haditha victims' families,³⁸⁶ the United States did perform an

382. DEPT OF THE ARMY, *supra* note 133, at 50; CDI Guide, *supra* note 362, at 11.

383. Tom Bowman, *Timeline: Investigating Haditha*, NPR (May 8, 2007, 10:02 AM), www.npr.org/templates/story/story.php?storyId=5473735 [<https://perma.cc/FLN2-HTSL>]; Jennifer Hlad, *NCIS Investigator Tells of How Hamdania Probe Took Abrupt Turn*, STARS & STRIPES (Mar. 7, 2015), <http://www.stripes.com/news/us/ncis-investigator-tells-of-how-hamdania-probe-took-abrupt-turn-1.333183> [<https://perma.cc/96PX-7PG5>].

384. Bobby Ghosh, *On Scene: Picking Up the Pieces in Haditha*, TIME (May 29, 2006), <http://content.time.com/time/world/article/0,8599,1198977,00.html> (on file with the *Columbia Human Rights Law Review*); Drew Brown, *Iraqi Farmer's Body Exhumed for Evidence*, MCCLATCHY DC (June 7, 2006, 3:00 AM), <http://www.mcclatchydc.com/latest-news/article24455791.html> [<https://perma.cc/598L-GBBG>].

385. Ghosh, *supra* note 384.

386. Brown, *supra* note 384.

autopsy on that victim and presented those results at a subsequent court-martial.³⁸⁷ Ultimately, both incidents resulted in convictions.³⁸⁸

d. Farah Province, Afghanistan (May 2009)

On May 4, 2009, United States military forces, operating alongside Afghanistan National Security Forces, employed close air support during a ground battle with Taliban forces, resulting in numerous civilian casualties.³⁸⁹ Reports of the incident were almost instantaneous. The U.S. military conducted a preliminary inquiry into the airstrike within three days of the incident.³⁹⁰ Based on the initial findings, on May 9, 2009, the commander of U.S. Central Command ordered an administrative investigation, which was completed on June 5, 2009.³⁹¹ The IO's report was not released to the public, but U.S. Central Command did release an executive summary of the report. The commander appointed a senior ranking IO from outside Afghanistan to conduct the investigation, as well as a subject-matter expert on air operations and a legal advisor.³⁹² The investigation consisted of two visits to the site of the airstrike, review of aerial video footage, multiple interviews with witnesses, and the collection of statements and

387. See Renee Montagne & John McChesney, *Death Penalty Off the Table at Marine's Trial*, NPR (Sept. 13, 2006), <http://www.npr.org/templates/story/story.php?storyId=6066525> [<https://perma.cc/LX43-6TMS>].

388. United States v. Magincalda, 2010 CCA Lexis 610 at *6 (Navy-Marine Crim. App. Aug. 26, 2010), review denied 69 M.J. 403 (C.A.A.F. 2010); Tony Perry, *Marine Convicted of Murder in 2006 Killing of Iraqi Man*, L.A. TIMES (June 17, 2015, 5:40 PM), <http://www.latimes.com/local/lanow/la-me-ln-hutchins-verdict-20150617-story.html> [<https://perma.cc/KN5J-FGQS>]; Mary Slosson, *Marine Pleads Guilty, Ending Final Haditha Trial*, REUTERS (Jan. 23, 2012, 1:45 PM), <http://www.reuters.com/article/us-marine-haditha-idUSTRE80M1U620120123> [<https://perma.cc/CES2-AWDP>].

389. Carlotta Gall & Taimoor Shah, *Afghan Villagers Describe Chaos of U.S. Strikes*, N.Y. TIMES (May 14, 2009), http://www.nytimes.com/2009/05/15/world/asia/15farah.html?_r=0 (on file with the Columbia Human Rights Law Review).

390. U.S. CENT. COMMAND, UNCLASSIFIED EXECUTIVE SUMMARY: U.S. CENTRAL COMMAND INVESTIGATION INTO CIVILIAN CASUALTIES IN FARAH PROVINCE 2 (June 18, 2009), <https://www.hsdl.org/?view&did=35748> [<https://perma.cc/2J9U-YLL6>] (last visited Feb. 12, 2018) [hereinafter Farah Executive Summary]; Jon Boone et. al., *U.S. Airstrikes Kill Dozens of Afghan Civilians*, GUARDIAN (May 6, 2009), <http://www.theguardian.com/world/2009/may/06/us-air-strikes-afghan-civilians> [<https://perma.cc/Q4JW-FHAG>] (indicating that the preliminary inquiry was triggered by recommendations from United States forces on the ground).

391. Farah Executive Summary, *supra* note 390, at 1.

392. *Id.* at 2.

documents from Afghan villagers and government officials, U.S. and Afghan forces, and NGOs.³⁹³ The investigative team also reviewed evidence of new graves in the vicinity of the airstrike following the attack in an effort to assess the total number of civilian casualties.³⁹⁴

While the report's findings validated the target of the airstrike as a lawful military objective and made no recommendation for disciplinary action, it faulted the U.S. forces involved for an insufficient consideration of possible civilian casualties.³⁹⁵ Interestingly, for purposes of evaluating the administrative investigation procedures, the report referred to a separate inquiry into the civilian casualties conducted by an NGO operating in Afghanistan as "balanced" and "thorough" and included as a recommendation the improvement of "connectivity with NGOs."³⁹⁶ In addition, the IO recommended that the U.S. forces in Afghanistan develop an investigative team, composed of a senior leader and subject matter experts, with the capability of responding within two hours to a report of civilian casualties.³⁹⁷

Furthermore, as a demonstration of how commanders use administrative investigations in the U.S. military to inform more than just disciplinary action, the commander of all United States forces in Afghanistan implemented substantial changes to military operations based in part on the findings of the Farah investigation.³⁹⁸ These changes, ordered in 2009, were focused specifically on reducing civilian casualties in Afghanistan and were accompanied by the following observation from the Commanding General: "[a]ir power contains the seeds of our own destruction if we do not use it responsibly."³⁹⁹

VI. NO BOOTS ON THE GROUND

While the examples outlined above address instances in which states had the opportunity to assemble facts and evidence on the ground, consideration of the United States' use of military force against ISIL allows for an examination of how the procedures to investigate

393. *Id.*

394. *Id.* at 11.

395. *Id.* at 10.

396. Farah Executive Summary, *supra* note 390, at 11–12.

397. *Id.* at 12.

398. Ewen MacAskill, *U.S. Commander in Afghanistan to Order Limits on Air Strikes*, GUARDIAN (June 22, 2009), <http://www.theguardian.com/world/2009/jun/22/mcchrysal-usa-afghanistan-air-attacks> [<https://perma.cc/326T-HYQE>].

399. *Id.*

civilian casualties change in the absence of ground forces at the location of the use of force.⁴⁰⁰ The U.S. military operations against ISIL have consisted almost exclusively of airstrikes without substantial U.S. combat forces present in Syria or Iraq.⁴⁰¹ As such, these airstrikes, and the United States' response to resulting civilian casualties, present a unique problem for civilian casualty investigations. As a U.S. Central Command spokesman stated, "[a] full-on investigation can be a little bit difficult because we don't have access to a lot of these places in Syria and Iraq."⁴⁰² Even critics of the United States' record on investigating civilian casualties acknowledge that "information in the war zone is fragmentary and can be difficult to verify."⁴⁰³ In the context of Syria and Iraq, the United States has acknowledged that it is "unable to investigate all reports of possible civilian casualties using traditional investigative methods, such as interviewing witnesses and examining the site" and, instead, "interviews pilots and other personnel involved in the targeting process, reviews strike and surveillance video if available, and analyzes information provided by government agencies, non-governmental reports, partner forces, and traditional and social media."⁴⁰⁴

Yet, as discussed above in regards to the Harim and al Hatra airstrikes, U.S. Central Command has in fact conducted at least two administrative investigations following reports of civilian casualties

400. Julian E. Barnes et. al., *Barack Obama Approves Airstrikes on Iraq, Airdrops Aid*, WALL ST. J. (Aug. 8, 2014), <http://www.wsj.com/articles/iraqi-militants-seize-christian-villages-1407404503> [<https://perma.cc/QS4X-KW97>]; Marty Lederman, *The War Powers Resolution and Article 51 Letters Concerning Use of Force in Syria Against ISIL and the Khorasan Group*, JUST SECURITY (Sept. 23, 2014), <https://www.justsecurity.org/15436/war-powers-resolution-article-51-letters-force-syria-isil-khorasan-group/> [<https://perma.cc/H3ZH-BBK7>].

401. Andrew Tilghman, *Dempsey Does Not Rule Out U.S. Ground Troops in Syria*, MIL. TIMES (Mar. 4, 2015), <http://www.militarytimes.com/story/military/pentagon/2015/03/04/dempsey-us-ground-troops-in-syria-is-an-option/24380755/> [<https://perma.cc/AA7S-4FMZ>]; Paul McLeary, *Pentagon: No, We Don't Actually Have U.S. Troops Fighting in Syria*, FOREIGN POL'Y (Sept. 16, 2015), <http://foreignpolicy.com/2015/09/16/pentagon-no-we-dont-actually-have-u-s-troops-fighting-in-syria/> [<https://perma.cc/99UE-Z5VZ>].

402. Bryan Schatz, *The Pentagon Says It Has Killed 20,000 ISIS Fighters—and Just 6 Civilians*, MOTHER JONES (Dec. 23, 2015), <http://www.motherjones.com/politics/2015/12/united-states-isis-bombing-civilian-deaths> [<https://perma.cc/NSK3-LPKN>].

403. Cora Currier, *Report: Hundreds of Civilians Killed by U.S.-Led Bombing of ISIS in Iraq and Syria*, INTERCEPT (Aug. 3, 2015), <https://theintercept.com/2015/08/03/report-finds-hundreds-civilians-killed-u-s-led-bombing-isis-iraq-syria/> [<https://perma.cc/J5SG-7JDT>].

404. CJTF-OIR Monthly Civilian Casualty Report, *supra* note 80.

resulting from airstrikes in Syria and Iraq.⁴⁰⁵ Both have been released to the public but neither appears to have been triggered by a suspected IHL violation. In this context, Central Command appears to rely on the “civilian casualty assessment” process distinct from the standard administrative investigation framework in the United States military. To date, there is no indication that the United States has employed a DCIO to investigate airstrikes in these types of locations.

A. Civilian Casualty Assessments

Despite its actions to expand the duty to investigate civilian casualties by acknowledging an affirmative inquiry in the context of ISIL airstrikes, the United States has taken a more limited approach to addressing civilian casualties as compared to other countries. As noted above, that approach consists of U.S. Central Command publicly releasing short lists of airstrikes in which civilian casualties have been confirmed, including brief commentary on the nature of each strike.⁴⁰⁶ In these releases, the reviews have been described as “civilian casualty assessments” and state that “[a]fter a thorough review of the facts and circumstances for each allegation, the preponderance of evidence indicates” that civilian casualties have occurred.⁴⁰⁷

Somewhere between a formal “preliminary inquiry” and no inquiry at all, this approach to examining civilian casualties would appear to simplify the process considerably, but the value of simplicity in this context is not apparent. The experience in Afghanistan with

405. See Section III.A *supra*.

406. See Dan Lamothe, *U.S. Military Changes How It Discloses Civilian Casualties in Iraq and Syria*, WASH. POST (Jan. 26, 2016), <https://www.washingtonpost.com/news/checkpoint/wp/2016/01/26/u-s-military-changes-how-it-discloses-civilian-casualties-in-iraq-and-syria/> (on file with the *Columbia Human Rights Law Review*) (noting that the United States Central Command altered its approach to the release of information regarding civilian casualties in an effort to increase transparency and keep the “public informed”).

407. See Press Release, U.S. Cent. Command, *supra* note 136; Press Release, U.S. Cent. Command, Jan 29: U.S. Central Command Releases Results of Iraq and Syria Civilian Casualty Assessments (Jan. 29, 2016), <http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/904489/jan-29-us-central-command-releases-results-of-iraq-and-syria-civilian-casualty/> [<https://perma.cc/D6WP-L6B8>] (reporting that four airstrikes caused five civilian deaths and eight civilian injuries); Press Release, U.S. Cent. Command, April 22: CENTCOM Releases Iraq and Syria Civilian Casualty Assessments (Apr. 22, 2016), <http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/904566/april-22-centcom-releases-iraq-and-syria-civilian-casualty-assessments/> [<https://perma.cc/KG6V-B328>] (reporting that nine airstrikes caused 20 civilian deaths and 11 civilian injuries).

“civilian casualty assessments” has arguably not reinforced transparency regarding what the United States believes is its, or other states’, duty in the event of civilian casualties. For instance, leaders have regularly referred to civilian casualty assessment teams (CCATs) as “investigations,” blurring the lines between what would otherwise be referred to as a preliminary inquiry and the more robust label of “investigation,” the latter generally utilized when there is a suspicion of a possible IHL or policy violation and more likely to satisfy international investigative standards.⁴⁰⁸ Nor is it particularly clear what standard governments apply in the “credibility assessment.” For example, in 2015 and 2016, both Canada and the United Kingdom declined to investigate reports of civilian casualties resulting from their militaries’ airstrikes against ISIL.⁴⁰⁹

Both states declined to investigate, relying on credibility disputes regarding the reports. However, neither government disclosed the basis for their determinations.⁴¹⁰ This detracts from the establishment of discernible norms in responding to civilian casualties. In addition, CCATs, at least sometimes, appear to step beyond their narrow purpose of confirming the existence of civilian casualties and instead draw conclusions about the circumstances of the casualties and accountability, suggesting that perhaps an assessment may be more thorough than advertised.⁴¹¹

While these may seem like problems of semantics, they serve an important signaling function regarding how states perceive their duty. Limiting the response of a state to a credibility assessment alone could indicate that the duty to address civilian casualties is fulfilled by a preliminary inquiry when there is no evidence of a violation of IHL. Conversely, in the event these assessments are more robust, failing to

408. See, e.g., Gen. Campbell Briefing, *supra* note 137 (stating that the “civilian casualty assessment team, or CCAT, also conducted an investigation”); *Department of Defense Press Briefing by Pentagon Press Secretary Peter Cook in the Pentagon Briefing Room*, DEP’T DEF. (Nov. 10, 2015), <https://www.defense.gov/DesktopModules/ArticleCS/Print.aspx?PortalId=1&ModuleId=1144&Article=628563> [<https://perma.cc/7UDV-D69H>] (using the labels “the CCAT investigation and the larger 15-6 investigation”).

409. Timothy Sawa et al., *Up to 27 Iraqi Civilians May Have Been Killed in Canadian Airstrike, Pentagon Document Reveals*, CBC NEWS (Sept. 3, 2015), <http://www.cbc.ca/news/canada/up-to-27-iraqi-civilians-may-have-been-killed-in-canadian-airstrike-pentagon-document-reveals-1.3213917> [<https://perma.cc/5L96-9MRU>]; DUFFY, *supra* note 21.

410. Sawa et al., *supra* note 409.

411. See Kunduz Executive Summary, *supra* note 139 (reporting that the CCAT made findings regarding the causes of the incident, not just whether the allegation was substantiated).

fully explain or release those assessments in relation to the airstrikes in Syria and Iraq may undersell their completeness. The absence of any analyses offered by the recent U.S. Central Command assessments and other state responses regarding the lawfulness of the airstrike in question—a critical component of any inquiry into a civilian casualty—is similarly unsatisfying to outside observers. While the absence of an ensuing administrative investigation following a civilian casualty assessment may implicitly confirm the conclusion that the airstrike in question raised no doubts as to its lawfulness, it cannot be ignored that the limited release of information concerning these assessments means that the merits of that conclusion are not subject to review outside the military.

B. Role for Independent Third Parties

Some have called for closer collaboration between the military officials conducting inquiries and investigations into civilian casualties and NGOs.⁴¹² The recent trends in state practice with respect to incorporation of information provided by NGOs is somewhat mixed. On the one hand, the United States has indicated a willingness to consider allegations of civilian casualties presented by civil society⁴¹³ and referred to findings in its own administrative investigations.⁴¹⁴ NATO has also appeared to endorse the role of NGOs in at least providing evidence for national reviews of civilian casualties.⁴¹⁵ Yet, on the other hand, some states continue to display an unwillingness to consider allegations of civilian casualties arising from outside traditional

412. See, e.g., Brendan Groves, *Civil-Military Cooperation in Civilian Casualty Investigations: Lessons Learned from the Azizabad Attack*, 65 A.F. L. REV. 1, 7 (2010) (advocating for the creation of a civilian protection “task force” incorporating NGOs into the investigation of alleged civilian casualty incidents).

413. See Rod Nordland, *U.S. Army Reopens Criminal Inquiry Into Afghan Civilians’ Deaths*, N.Y. TIMES (Aug. 24, 2015), http://www.nytimes.com/2015/08/25/world/asia/us-army-reopens-criminal-inquiry-into-afghan-civilians-deaths.html?_r=0 (on file with the *Columbia Human Rights Law Review*) (stating that the United States military reopened a criminal investigation into a series of murders of civilians); Barbara Starr, *Army Opens Criminal Investigation Into Killings of Afghan Civilians*, CNN (Nov. 7, 2013, 1:57 PM), www.cnn.com/2013/11/07/world/asia/afghanistan-criminal-probe/ [<https://perma.cc/GVS6-DQVN>] (reporting that the United States reopened an old investigation based upon information provided by the ICRC); Harim Report, *supra* note 128.

414. Harim Report, *supra* note 128; Farah Executive Summary, *supra* note 390.

415. *Letter of NATO Legal Advisor*, *supra* note 4, at 4 (stating that, in addition to surveillance and video footage, NATO also relied on “open source” reports to assess the effects of its airstrikes in Libya).

government intelligence sources, much less evidence provided by NGOs in reviewing any casualties.⁴¹⁶

Procedurally, there appear to be few barriers to the inclusion of NGO reports in civilian casualty inquiries and investigations. In terms of administrative investigations, all of the states reviewed above maintain liberal evidentiary standards that would allow for consideration of second-hand reporting of the kind that an NGO might provide, giving appropriate weight based on the credibility of the source. In the current ISIL context, in which states almost universally lack a “boots on the ground” capacity, NGO reports would seem especially crucial to ensuring fulfillment of the duty to address all civilian casualties both as an aid in triggering the necessary inquiry as well as a source of evidence in assembling the facts.

C. How to Investigate

As with the question of when the duty to investigate is triggered, international law does not provide a practical framework for how a state fulfills its duty to investigate following extraterritorial attacks. As one IHL expert has observed, “[a]lthough it is incontrovertible, as both a matter of treaty and customary law, that an investigation must be conducted whenever a war crime may have occurred . . . little guidance exists in [IHL] proper on the nature of such investigations.”⁴¹⁷

CONCLUSION

The effects of warfare on the civilian population pose a dilemma for states. While they may not be made the object of an attack, civilians inevitably feel the impact of conflict and the uses of force that accompany conflicts. This is particularly obvious in the current aerial bombing campaign targeting ISIL. By all accounts, states have engaged in painstaking efforts to limit their impacts on the civilian population in Syria and Iraq, yet civilian casualties have occurred.⁴¹⁸

Despite the apparent inevitability of civilian casualties, the examination provided in this paper demonstrates that international

416. DUFFY, *supra* note 21.

417. MICHAEL N. SCHMITT, *ESSAYS ON LAW AND WAR AT THE FAULT LINES* 630 (2012).

418. Matthew Rosenberg & Eric Schmitt, *In ISIS Strategy, U.S. Weighs Risk to Civilians*, N.Y. TIMES (Dec. 19, 2015), <http://www.nytimes.com/2015/12/20/us/politics/in-isis-strategy-us-weighs-risk-to-civilians.html> (on file with the *Columbia Human Rights Law Review*).

law, whether IHL or IHRL, demands serious inquiry into the loss of civilian life during conflict when credible information suggests that such loss has taken place. This duty is derived from the treaty obligations to suppress derogations from international norms and, as presented above, where such derogations occur, to investigate, remedy, and report violations.

In principle, both IHRL and IHL provide for a duty to investigate following a use of force that causes civilian casualties. In the context of an armed conflict, the duty to investigate under IHRL is triggered whenever the use of force results in loss of life. Under IHL, on the other hand, while the threshold for the duty to investigate textually only arises when there is a credible allegation or reasonable suspicion that a serious violation of IHL has occurred, a duty to investigate can be deduced from the fact that civilian casualties may provide indicia of a violation for which states have a duty to assemble relevant facts. The ICJ and HRC have endorsed a mutual application of IHL and IHRL, including the extraterritorial application of the ICCPR, in the context of armed conflict. Moreover, with respect to the Article 6 Right to Life under the ICCPR, the ICJ and HRC have also recognized IHL as the applicable *lex specialis* during armed conflict, such that an arbitrary deprivation of life under the ICCPR excludes lawful collateral damage resulting from military operations conducted in accordance with IHL.⁴¹⁹ However, states continue to be subject to remaining obligations under the ICCPR, including procedural obligations to investigate, remedy, and report incidents of civilian casualties to the HRC.⁴²⁰ A harmonized application of IHL and IHRL to states' extraterritorial uses of force has allowed international law to evolve toward a uniform investigative framework that is adaptable to the 'hybrid' nature of contemporary armed conflicts. This is important for determining when the duty to investigate is triggered following the extraterritorial use of force, and is particularly relevant for how effective investigations are carried out. IHRL provides a more comprehensive and methodical framework for conducting investigations compared to IHL. Further, IHRL instruments, and growing jurisprudence from human rights treaty bodies, have established that effective investigations must be prompt, thorough, impartial, independent, credible, and transparent.

419. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 25 (July 8).

420. General Comment No. 31, *supra* note 96.

The preceding survey of state practice reveals that most states operate in an IHL-only context when it comes to the extraterritorial use of force.⁴²¹ As a result of the underdeveloped practical aspects of the duty to investigate civilian casualties under IHL, state practice with respect to when a post-strike investigation is triggered or how to conduct an effective investigation varies considerably among states. Further, state practice is often influenced by the particular security situation and the level of control exercised by ground forces, if any. When investigations into civilian casualties resulting from extraterritorial uses of force have been undertaken absent suspicion of an IHL violation, it is apparent that states' investigative practices have not met the minimum thresholds of promptness, thoroughness, impartiality, independence, credibility, and transparency recognized to be critical in both IHL and IHRL. At most, these reviews have generally resembled informal preliminary inquiries. Notwithstanding variances in practice, the following general observations regarding the duty to investigate following the extraterritorial use of force are deducible from the practices of Australia, Canada, the Netherlands, and the United States, and provide a cogent foundation from which state practice may be further improved in line with the investigative requirements of international law:

1. States affirmatively produce post-strike reports following military uses of force that often, if not always, expect casualties as a result of BDA calculations, and include assessments of civilian casualties. States have utilized post-strike reports to proactively initiate civilian casualty investigations.
2. A post-strike report may either constitute a *de facto* investigation or contribute to an initial fact-finding assessment to ascertain whether the requisite threshold for an investigation is met.
3. There are no restrictions or limitations on the sources that may raise credible allegations of civilian casualties.
4. There are no restrictions or limitations on the sources or indicia that may be used to corroborate allegations of civilian casualties and states have incorporated evidence submitted by NGOs in drawing administrative conclusions.

421. However, ICJ and JRC decisions have evidenced a general movement toward harmonizing IHL and IHRL with states' extraterritorial use of force, and they have encouraged a more refined investigative framework under IHL.

5. States utilize initial informal fact-finding processes, or preliminary inquiries, to assess the credibility of civilian casualty allegations and provide the relevant commander essential information, prior to rising to a more formal administrative investigation.
6. There is no evidence that a state has concluded that civilian casualties resulting from its own extraterritorial use of force violated the IHL principles of distinction, proportionality, or precautions.

There is more similarity than difference in how states address civilian casualties resulting from their militaries' use of force. Perhaps not surprisingly in light of the application of IHL, it is rare that an investigation into civilian casualties is undertaken by criminal investigators despite the obviously robust nature of such investigations. While states have demonstrated a willingness to utilize criminal investigators when a violation of IHL is apparent from the preliminary inquiry, the vast majority of investigations are administrative. The prevalence of administrative investigations, particularly the use of "preliminary inquiries" or "civilian casualty assessments," along with the lack of public disclosure or reports inevitably calls into question the thoroughness, credibility and transparency of states' current investigative practices.

Notwithstanding those potential criticisms, state practice indicates that a norm is at least emerging that a discrete fact-finding inquiry must be conducted in the event of allegations or suspicion of civilian casualties resulting from a use of force.⁴²² Moreover, practice from the United States, Australia, Canada, and the Netherlands supports the conclusion that, while impacting the quality of the investigation, the conditions on the ground do not absolve a state from the duty to investigate and acknowledge civilian casualties.⁴²³

Nonetheless, the survey of methods to comply with the duty to investigate reveals a great deal of variability based on the circumstances as well as deference to the state. State compliance with

422. A recent example of the general acceptance of this norm is the United States Department of State's call for both Russia and Saudi Arabia to "investigate" allegations of civilian casualties resulting from airstrikes in Yemen and Syria, respectively. See John Kirby, Spokesperson, U.S. Dep't. of State, Daily Press Briefing at 9, 23 (Feb. 1, 2016), <https://2009-2017.state.gov/r/pa/prs/dpb/2016/02/251980.htm> [<https://perma.cc/3V6P-E3ED>].

423. This again puts to the side the inherent challenges in evaluating state practice and gauging *opinio juris* on an issue as policy, diplomacy, and public relations driven as incidental harm.

its duty to investigate will be measured in terms of the particular form of investigation that the state elects to conduct, the environment in which the investigation takes place, and the resulting legal regime. If the allegations giving rise to the duty to investigate pertain to individual criminal liability and relate to uses of military force in areas over which the pertinent state exercises some measure of control, the highest feasible standards of investigation will be required, whether applying IHL or IHRL. By contrast, if implications of the investigation pertain exclusively to matters of state responsibility and concern uses of force in areas lacking security or government control, the nature of the investigation can be expected to be far more flexible, mirroring the gravity and circumstances of the particular allegations.

States can reconcile their current practices with the mutual application of IHRL and IHL during armed conflicts by taking a contextual approach to when the duty to investigate is triggered and how to conduct an ensuing investigation. In particular, there is a need to clarify the role of post-strike BDA data regarding civilian casualties, as such data does not appear to affirmatively demand further investigation in the absence of allegations from other sources. These practices, it could be argued, fall short of the promptness pillar of an effective investigation under international law. States should better utilize the BDA information on civilian casualties as a source itself for triggering an investigation into possible civilian casualties, including conducting ex-officio investigations where necessary. States should therefore adopt the best practice of including estimates of civilian casualties in their post-strike BDA reports.

Post-strike BDA reports could also provide an account of the context within which a strike takes place, a profile of the intended target, and rationale for why he or she is targeted. The duty to investigate civilian casualties, under international law, will be applicable regardless of the circumstances. However, this information would help determine whether the appropriate trigger for the duty to investigate is IHRL—law enforcement function, for example targeting a ‘lone-wolf’ terrorist in a ‘no boots on the ground’ scenario outside areas of declared hostilities—or IHL—armed conflict, for example aerial strikes into areas of declared hostilities with or without boots on the ground.

Recent state practice reflects a growing effort by governments to review and acknowledge those extraterritorial uses of military force that are alleged or suspected to have caused civilian casualties. Yet, those states most affected by this question, both those using force and those within which force is used, have failed to clarify the nature and

scope of a state's response to such incidents. While states have indicated a willingness to discuss the investigation of civilian casualties as an international legal norm in the context of the actions of fellow states, they have been reluctant to distinguish between law and policy as it relates to their own practice. The answers to the questions explored in the preceding pages—whether there is a duty under international law to investigate all civilian casualties, the nature of any legal duty, and the applicable investigatory standards—would be considerably clearer and the protections afforded civilians more robust, if states pursued a path of greater transparency and definitiveness in this area.

Although a state may perceive its international relations and national security interests to be better served with amorphous, non-binding standards in responding to uses of force suspected or alleged to have inflicted civilian casualties, the absence of discrete and binding norms risks undermining civilian protections insofar as it promotes state impunity. The recognition of a legal obligation to at least administratively review all reports of civilian casualties is a compelling inference from the state and commander's responsibility to pursue facts indicating possible IHL violations. Without reviewing facts possibly indicative of an IHL violation following a use of military force, states and commanders likely lack the minimum information necessary to rule out such violations. Moreover, as proven by the incorporation of civilian casualty assessments as a regular facet of post-strike military operations, it is unlikely that the imposition of such an obligation would be unreasonably burdensome or inconsonant with the state's national policy.