

THE DUTY TO INVESTIGATE ALLEGED  
VIOLATIONS OF INTERNATIONAL  
HUMANITARIAN LAW: OUTDATED  
DEFERENCE TO AN INTENTIONAL  
ACCOUNTABILITY PROBLEM

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## I. INTRODUCTION

### A. *The Strike on Médecins Sans Frontières in Kunduz, Afghanistan*

[W]e are determined to ensure this investigation is both thorough and transparent. The fact that we're even doing this press conference today is unusual, but as Secretary Carter has said, we are committed to ensuring full accountability on this incident.

—Brigadier General Wilson Shoffner,  
November 25, 2015<sup>1</sup>

In August 2011, *Médecins Sans Frontières* (MSF) opened the Kunduz Trauma Center in northeastern Afghanistan.<sup>2</sup> Situated in the area described as the Taliban's and al Qaeda's "last stand,"<sup>3</sup> the Kunduz center provided "high-quality, free surgi-

1. Press Briefing, U.S. Dep't of Def., Department of Defense Press Briefing by General Campbell via Teleconference From Afghanistan (Nov. 25, 2015), <http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/631359/department-of-defense-press-briefing-by-general-campbell-via-teleconference-fro>.

2. MÉDECINS SANS FRONTIÈRES, INITIAL MSF INTERNAL REVIEW: ATTACK ON KUNDUZ TRAUMA CENTRE, AFGHANISTAN 2 (2015), [http://kunduz.msf.org/pdf/20151030\\_kunduz\\_review\\_EN.pdf](http://kunduz.msf.org/pdf/20151030_kunduz_review_EN.pdf) [hereinafter MSF INTERNAL REVIEW].

3. Jon Lee Anderson, *The Fall of Kunduz*, THE NEW YORKER (Oct. 6, 2015), <http://www.newyorker.com/news/news-desk/the-fall-of-kunduz>.

cal care to victims of general trauma like traffic accidents, as well as those presenting with conflict-related injuries such as from bomb blasts or gunshots.”<sup>4</sup> Though the Taliban surrendered Kunduz nearly ten years earlier, at the time the center was established the security situation was still precarious, with Taliban presence growing in the countryside and the specter of NATO drawdown on the horizon.<sup>5</sup> In 2013, the German-led NATO forces holding the city, with the support of 2,500 U.S. troops, handed off security in Kunduz to Afghan government forces.<sup>6</sup> As NATO and U.S. troops left, Taliban fighters rapidly began surrounding Kunduz.<sup>7</sup> Kunduz capitulated to the Taliban on September 28, 2015.<sup>8</sup> Following the fall of the city, the Taliban “roared around the streets in pickups, celebrating their victory; freed hundreds of prisoners, including many militants; and declared Sharia law. Executions and abductions were also reported.”<sup>9</sup> This successful assault made Kunduz “the first major city in Afghanistan to come under Taliban control since 2001.”<sup>10</sup>

By September 29th, the trauma center increased the number of beds from 92 to 110, working at capacity, to cope with the unprecedented rise in admissions and the “130 patients spread throughout the wards, in the corridors and even in offices.”<sup>11</sup> Due to the heightened level of hostilities in Kunduz, MSF reaffirmed its location by “emailing its GPS coordinates to [the] U.S. Department of Defense, [the] Afghan Ministry of Interior and Defense, . . . [the] U.S. Army in Kabul,” and the United Nations.<sup>12</sup> MSF operated in Kunduz on the basis of an agreement with “all parties to the conflict to respect the neu-

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4. MSF INTERNAL REVIEW, *supra* note 2, at 2.

5. See Anderson, *supra* note 3.

6. *Id.*

7. See generally Joseph Goldstein, *A Taliban Prize, Won in a Few Hours After Years of Strategy*, N.Y. TIMES (Sept. 30, 2015), <http://www.nytimes.com/2015/10/01/world/a-taliban-prize-won-in-a-few-hours-after-years-of-strategy.html>.

8. Anderson, *supra* note 3.

9. *Id.*

10. Sune Engel Rasmussen & Emma Graham-Harrison, *Taliban Widen Offensive as NATO Special Forces Join Fight for Kunduz*, GUARDIAN (Sept. 30, 2015), <http://www.theguardian.com/world/2015/sep/30/taliban-widen-offensive-as-afghan-army-fails-to-retake-kunduz>.

11. MSF INTERNAL REVIEW, *supra* note 2, at 5.

12. *Id.*

trality of [its] medical facility.”<sup>13</sup> The provisions of the agreement included protections provided under international humanitarian law (IHL) such as a guarantee to MSF that it had the “right to treat all wounded and sick [patients] without discrimination” and that it was protected from harassment.<sup>14</sup> It also stipulated that no weapons were allowed at the center, a provision with which MSF complied.<sup>15</sup>

On October 1st, Afghan government forces regained control over Kunduz, with the assistance of the U.S. air and ground forces.<sup>16</sup> In the early morning hours of October 3rd, U.S. airstrikes on the MSF hospital began.<sup>17</sup> According to the MSF internal review, the strike first hit the ICU—shrapnel and the ensuing fire killed MSF staff and the critical patients to whom they were attending.<sup>18</sup> “Immobile patients in the ICU burned in their beds.”<sup>19</sup> The airstrikes then continued from east to west, destroying more of the hospital building and other departments.<sup>20</sup> As noted in the MSF report:

One MSF staff member described a patient in a wheelchair attempting to escape from the inpatient department when he was killed by shrapnel from a blast. An MSF doctor suffered a traumatic amputation to the leg in one of the blasts. He was later operated on by the MSF team on a make-shift operating table on an office desk where he died. Other MSF staff describe seeing people running while on fire and then falling unconscious on the ground. One

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13. *Id.* at 3 (explaining that agreements were reached with “the health authorities of both the government of Afghanistan and health authorities affiliated with the relevant armed opposition groups,” and that commitments to respect the facility’s neutrality were “discussed and endorsed by the militaries involved in the conflict . . . as well as the military command structures of armed opposition groups.”).

14. *Id.*

15. *Id.*; see also Matthieu Aikins, *Doctors with Enemies: Did Afghan Forces Target the M.S.F. Hospital*, N.Y. TIMES MAG. (May 17, 2016), <http://mobile.nytimes.com/2016/05/22/magazine/doctors-with-enemies-did-afghan-forces-target-the-msf-hospital.html> (confirming MSF’s strictly enforced no weapons policy).

16. Anderson, *supra* note 3.

17. MSF INTERNAL REVIEW, *supra* note 2, at 7.

18. *Id.* at 9.

19. *Id.*

20. *Id.*

MSF staff was decapitated by shrapnel in the air-strikes.<sup>21</sup>

At the time of the attack, there were 105 patients, 140 MSF national staff, 9 MSF international staff, and 1 International Committee of the Red Cross (ICRC) delegate in the hospital compound.<sup>22</sup> Of the MSF staff, eighty were on duty in the hospital at the time of the strike.<sup>23</sup> The strikes continued for one hour and fifteen minutes, ending around 3:00 A.M.<sup>24</sup> The death toll amounted to at least forty-two people—fourteen staff members, twenty-four patients, and four relatives of patients.<sup>25</sup>

In the aftermath of the strikes, a traumatized MSF began its own investigation and called for an independent investigation by the International Humanitarian Fact-Finding Commission (IHFFC), stating it “cannot rely only on the ongoing internal investigations by parties to the conflict.”<sup>26</sup> The IHFFC prepared itself for a potential mission and offered its services to the governments of the United States and Afghanistan, but as of November 2016 has not received a mandate.<sup>27</sup> General John F. Campbell, commander of U.S. forces in Afghanistan, announced the opening of a formal inquiry into the attack known as a 15-6 investigation and stated “[the United States is] going to do everything [it] can in this case to be open and transparent.”<sup>28</sup> General Campbell emphasized the importance

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21. *Id.* at 10.

22. *Id.* at 7.

23. *Id.*

24. *Id.*

25. See Rod Nordland, *Doctors Without Borders Raises Death Toll in Kunduz Strike to 42*, N.Y. TIMES (Dec. 12, 2015), <http://www.nytimes.com/2015/12/13/world/asia/doctors-without-borders-raises-death-toll-in-kunduz-strike-to-42.html>.

26. Press Release, Médecins Sans Frontières, *MSF Kunduz Attack: IHFFC Awaits US, Afghanistan Consent to Proceed with Independent Investigation* (Oct. 14, 2015), <http://www.msf.org/article/msf-kunduz-attack-ihffc-awaits-us-afghanistan-consent-proceed-independent-investigation>.

27. News Archive, INT’L HUMANITARIAN FACT-FINDING COMM’N, <http://www.ihffc.org/index.asp?page=news&mode=newsarchive> (last visited Nov. 6, 2016).

28. Press Release, U.S. Dep’t of Def., *Department of Defense Press Briefing by Gen. Campbell in the Pentagon Briefing Room* (Oct. 5, 2015), <http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/621848/departement-of-defense-press-briefing-by-gen-campbell-in-the-pentagon-briefing-r>. This statement was issued after a previous statement stated

of independence and impartiality, though the results of the 15-6 investigation were required to be sent up the chain of command for review before findings were released.<sup>29</sup> NATO and the Afghan-partnered Combined Civilian Casualty Assessment Team also conducted an investigation into the strike on the MSF facility, as did the Government of Afghanistan.<sup>30</sup> The U.N. Assistance Mission to Afghanistan in coordination with the U.N. Office of the High Commissioner for Human Rights conducted an investigation as well, recommending that international military forces conduct an “independent, impartial, prompt, transparent and effective investigation [whose findings] be made public.”<sup>31</sup> Lastly, a number of journalists investigated and reported what happened in Kunduz.<sup>32</sup>

The findings of the U.S. military’s 15-6 investigation were released on April 29, 2016.<sup>33</sup> Army General Joseph Votel delivered the press briefing at the release of the report, announcing that: “The investigation concluded that certain personnel

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that the U.S. military had been targeting individuals who were “threatening force” and that the hospital may have been collateral damage. Alissa J. Rubin, *Airstrike Hits Doctors Without Borders Hospital in Afghanistan*, N.Y. TIMES, Oct. 3, 2015, at A1.

29. Rubin, *supra* note 28.

30. Press Release, NATO, Update On the Investigations Into the Strike in Kunduz (Oct. 24, 2015), <http://www.rs.nato.int/article/press-releases/update-on-the-investigations-into-the-strike-in-kunduz.html>.

31. U.N. Assistance Mission in Afg. & U.N. Office of the High Comm’r for Human Rights, *AFGHANISTAN, HUMAN RIGHTS, AND PROTECTION OF CIVILIANS IN ARMED CONFLICT: SPECIAL REPORT ON KUNDUZ PROVINCE*, at 12 (Dec. 2015), [https://unama.unmissions.org/sites/default/files/special\\_report\\_on\\_kunduz\\_province\\_12\\_december\\_2015.pdf](https://unama.unmissions.org/sites/default/files/special_report_on_kunduz_province_12_december_2015.pdf).

32. See e.g., May Jeong, *Death from the Sky: Searching for Ground Truth in the Kunduz Hospital Bombing*, THE INTERCEPT (Apr. 28, 2016, 2:36 PM), <https://theintercept.com/2016/04/28/searching-for-ground-truth-in-the-kunduz-hospital-bombing/>; Spencer Ackerman & Sune Engel Rasmussen, *Kunduz Hospital Attack: MSF’s Questions Remain as U.S. Military Seeks No Charges*, GUARDIAN (Apr. 29, 2016), <http://www.theguardian.com/us-news/2016/apr/29/kunduz-hospital-attack-msf-us-military-charges>; Aikins, *supra* note 15.

33. See DEP’T OF DEF., *INVESTIGATION REPORT OF THE AIRSTRIKE ON THE MÉDECINS SANS FRONTIÈRES/DOCTORS WITHOUT BORDERS TRAUMA CENTER IN KUNDUZ, AFGHANISTAN ON 3 OCTOBER 2015* (2016), [https://www6.centcom.mil/FOIA\\_RR\\_Files/5%20USC%20552\(a\)\(2\)\(D\)Records/2.%20AR%2015-6%20Investigations/2015/Airstrike%20on%20the%20MSF%20Trauma%20Center%20in%20Kunduz%20Afghanistan%20-%203%20Oct%202015/01.%20AR%2015-6%20Inv%20Rpt-Doctors%20Without%20Borders,%203%20Oct%2015\\_CLEAR.pdf](https://www6.centcom.mil/FOIA_RR_Files/5%20USC%20552(a)(2)(D)Records/2.%20AR%2015-6%20Investigations/2015/Airstrike%20on%20the%20MSF%20Trauma%20Center%20in%20Kunduz%20Afghanistan%20-%203%20Oct%202015/01.%20AR%2015-6%20Inv%20Rpt-Doctors%20Without%20Borders,%203%20Oct%2015_CLEAR.pdf).

failed to comply with the rules of engagement in the law of armed conflict. However, the investigation did not conclude that these failures amounted to a war crime.”<sup>34</sup> According to General Votel, the acts did not amount to war crimes because “[t]he label ‘war crimes’ is typically reserved for intentional acts—intentionally targeting civilians or intentionally targeting protected objects.”<sup>35</sup> This finding was contested by human rights experts like John Sifton, who claimed the report was “simply wrong as a matter of law” in this regard.<sup>36</sup> Senior U.S. government and Central Command representatives, including General Votel, spoke with MSF officials to express their condolences over two dozen times.<sup>37</sup> Prior to the release of the report, in March 2016, Commander John W. Nicholson traveled to Kunduz to apologize to victims and offer condolence payments ranging from \$3,000 to \$6,000 to those affected.<sup>38</sup> General Votel stated that these efforts ultimately reached 170 individuals and families.<sup>39</sup> However, as reported by the *Guardian*, some of the families who lost loved ones did not even know an investigation was ongoing, nor did they find solace in it once they learned that fact.<sup>40</sup>

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34. Press Briefing, DEP’T OF DEF., Department of Defense Press Briefing by Army General Joseph Votel, Commander, U.S. Central Command (April 29, 2016), <http://www.defense.gov/News/Transcripts/Transcript-View/Article/746686/department-of-defense-press-briefing-by-army-general-joseph-votel-commander-us> [hereinafter General Votel Press Briefing].

35. *Id.*

36. Ackerman & Rasmussen, *supra* note 32.

37. General Votel Press Briefing, *supra* note 34.

38. *Id.*; Ackerman & Rasmussen, *supra* note 32.

39. General Votel Press Briefing, *supra* note 34 (noting that in addition to condolence payments, the Department of Defense approved the use of \$5.7 million for the building of a comparable medical facility).

40. Ackerman & Rasmussen, *supra* note 32 (“Like others in Kunduz the *Guardian* spoke to, Samiullah Nazar, 19, whose father, Baynazar, died while on the operating table at the hospital, had not heard of the US army report prior to its release. Informed of it, he said he had low expectations. For his family, who had lost its sole breadwinner, apologies and explanations would do little to assuage the hardship of the future, he said. The family received \$6,000 in condolence payments from the US army for the death of Baynazar. Injured victims received \$3,000. ‘There’s no one left to make money for the family,’ Samiullah said. ‘We want the US to give us more financial aid.’ He was dismayed to hear the responsible soldiers would only be reprimanded.”).

## B. Overview

In addition to being a tragedy in its own right, the strike on the MSF trauma facility in Kunduz is emblematic of a greater dynamic: the disintegration of respect for IHL,<sup>41</sup> the loss of faith by humanitarian actors in States' commitments to protecting civilians,<sup>42</sup> and the growing number of fact-finding entities in the investigations field.<sup>43</sup> Between 2014 and 2015, the "number of threats or attacks on medical facilities in Afghanistan" reported to the ICRC increased by fifty percent.<sup>44</sup> Many of these threats and attacks went unnoticed by the international community at large, even as they chipped away at one of the core values of IHL—protection of civilians.<sup>45</sup> These trends provide the context for considering the response to Kunduz, and more generally evaluating the investigative responses to alleged violations of IHL, which is the central issue of this note.

The response to the Kunduz attack illustrates the importance of impartial and independent investigations to fulfilling

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41. See e.g., Clár Ní Chonghaile, *Impunity in Conflict Has Cast a Dark Shadow Over Aid Work in 2015*, GUARDIAN (Dec. 28, 2015), <http://www.theguardian.com/global-development/2015/dec/28/impunity-conflict-cast-dark-shadow-over-aid-humanitarian-work-in-2015> (quoting scholar Stuart Gordon: "A golden age of humanitarianism . . . has never really existed. There have always been phenomenal challenges. I just think the challenges this decade are probably more severe and they come from the politics of cooption by the west and the politics of rejection from conservative Islamic groups in a limited number of countries . . . but that number is growing.").

42. See e.g., Meghan Sullivan, *Why Doctors Without Borders is Skipping the World Humanitarian Summit*, NPR (May 20, 2016), <http://www.npr.org/sections/goatsandsoda/2016/05/20/478829752/why-doctors-without-borders-is-skipping-the-world-humanitarian-summit> (discussing the decision by MSF to pull out of the World Humanitarian Summit, and quoting MSF's Executive Director Jason Cone: "Putting states on the same level as non-governmental organizations and U.N. agencies minimizes the responsibilities of states. It lets governments off the hook for their obligations.").

43. Rob Grace & Claude Bruderlein, *Building Effective Monitoring, Reporting, and Fact-Finding Mechanisms*, (Harvard Univ. Program on Humanitarian Policy & Conflict Research, Working Paper, Apr. 12, 2012), <http://ssrn.com/abstract=2038854> (explaining that since the end of the Cold War, the international community's drive to bolster accountability to international law and the protection of civilians during armed conflict has led to growing interest in human rights and a multitude of monitoring, reporting, and fact-finding mechanisms).

44. Jeong, *supra* note 32.

45. *Id.*

victims' conception of accountability, as well as the U.S. military's public adherence to transparency as part of its strategy to avoid alienating local populations. The various accounts of what happened in the days following the strike also demonstrate the notion that "truth is the first victim of war,"<sup>46</sup> and highlights the need for an impartial, independent public accounting of the facts. Lastly, the Kunduz attack raises a number of interrelated questions. Namely, when must a State investigate allegations of IHL violations and how must it do so to fulfill its international legal obligations? How do these investigations meet or miss the expectations of victims for accountability? What might investigations into alleged IHL violations mean for the armed forces and for victims and survivors? How are the investigators themselves held accountable for their decisions, including whether to launch a formal investigation at all? What role does and should international human rights law (IHRL) play in these investigations?

These questions animate the primary argument of this Note: that the obligation to investigate alleged violations of IHL through an IHL framework will produce investigations that are highly deferential to States, creating significant accountability problems. As such, any advocacy around IHL investigations for serious violations must push for the inclusion of human rights perspectives, primarily to protect victims' interests and ultimately to reduce human suffering during armed conflict. This Note will proceed in five parts. First, it will

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46. This language is taken from the U.K. law of war manual. Joint Doctrine & Concepts Center, Ministry of Defence of the United Kingdom, *MINISTRY OF DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT*, 2004, Joint Serv. Pub. 383, at 417 (UK) ("Propaganda and counterpropaganda often result in a distortion of facts and statistics. Allegations of war crimes and atrocities are often found, on investigation, to be untrue or exaggerated. An independent fact-finding mission or inquiry can play an important part in establishing the facts, so that appropriate steps to rectify the situation can be taken by an international body."). Though the authors of the U.S. law of war manual consulted the U.K. version, the U.S. manual does not contain the same colorful language. However, it imports the same concept. *OFFICE OF THE GEN. COUNSEL, DEP'T OF DEF., DEP'T OF DEF. LAW OF WAR MANUAL 17* (updated May 2016) [hereinafter *U.S. LAW OF WAR MANUAL*] ("During war, information is often limited and unreliable. The uncertainty of information in war results from the chaotic nature of combat and from the opposing sides' efforts to deceive one another, which generally is not prohibited by the law of war.").

consider the origins of the notion of war crimes to provide historical context to a highly deferential interpretation of State obligations to investigate (Part II). Though war crimes form only a subset of violations of IHL, how the concept developed is illustrative of how traditional deference to the State in public international law affected the law. Part III will consider the international law from which the duty to investigate alleged IHL violations derives and what this law indicates about how investigations should be conducted. Part IV will provide a critique of the IHL interpretation of State obligations. Part V will offer a potential remedy to the problems with the IHL interpretation, by suggesting how IHRL standards should be incorporated into investigations. Part VI will consider how States, and in particular the United States, carry out these obligations, discerning what triggers an investigation and highlighting the lack of accountability around this decision. In conclusion, this Note calls for integrating IHRL into all aspects of IHL investigations to better support victims and promote respect for IHL's protective mandate, getting closer to achieving the promise of law of war treaties to "reduce unnecessary suffering and destruction"<sup>47</sup> in accordance with "the principle of humanity."<sup>48</sup>

## II. THE CENTRALITY OF THE SOVEREIGN IN IHL: WAR CRIMES

Historically, States conducted the investigation and prosecution of war crimes, and often carried these out as a political choice, not as a legal obligation.<sup>49</sup> Some of the reasons for

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47. U.S. LAW OF WAR MANUAL, *supra* note 46, at 17.

48. *Id.*

49. See Antonio Cassese, *On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. OF INT'L. L. 2, 5 (1998) ("The obligation of states to prosecute and punish persons accused of serious violations of international humanitarian law through their respective *national* jurisdictions arises out of their treaty obligations . . . . [However], [i]n situations of armed conflict abroad, a state is generally reluctant to prosecute its own personnel, especially when it is on the 'winning side.' In such cases, a state may also be disinclined to prosecute enemy personnel because such legal actions carry the risk of exposing war crimes committed by the state's own personnel. As for crimes committed in an armed conflict in which a state has not participated, both political and diplomatic considerations and the frequent difficulty of collecting evidence normally induce state authorities to refrain from prosecuting foreigners."); GERRY J. SIMPSON, LAW, WAR AND CRIME: WAR CRIMES, TRIALS AND THE

prosecuting war crimes have to do with creating a mutually beneficial system of reciprocity with opposing forces, minimizing alienation of local populations to facilitate a restoration of peace (i.e., winning hearts and minds), controlling troops and strengthening the military's systems of control and authority, and maintaining public support for a war.<sup>50</sup> Though international institutions like the International Criminal Court (ICC) provide some gap-filling, the primary accountability mechanism for war crimes occurs at a national level, as it is the responsibility of States to fulfill their legal obligations.<sup>51</sup> At the same time, however, one cannot ignore the contribution of international developments to the modern conception of war crimes, and how international legal norms contributed to the

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REINVENTION OF INTERNATIONAL LAW 11 (2007) (arguing that war crimes trials are political “not because they lack a foundation of law or because they are the crude product of political forces but because war crimes law is saturated with conversations about what it means to engage in politics or law.”).

50. See, e.g., U.S. LAW OF WAR MANUAL, *supra* note 46, at 15 (citing the main purposes of the law of war to be preventing unnecessary suffering, providing fundamental protections to those who fall into the hands of the enemy, “facilitating the restoration of peace,” assisting commanders in maintaining discipline, and preserving the “professionalism and humanity of combatants.”); Sean Watts, *Reciprocity and the Law of War*, 50 HARVARD INT’L L. J. 365, 365 (2009) (“The principle of reciprocity has long been foundational to international law and the law of war specifically.”); Shai Dothan, *Deterring War Crimes*, 40 N.C.J. INT’L L. & COM. REG. 739, 747-48 (2015) (noting war crimes prosecutions “can potentially improve military discipline, promote the chances of peace and increase the legitimacy of the state in world public opinion.”); Dick Jackson, *Reporting and Investigation of Possible, Suspected, or Alleged Violations of the Law of War*, ARMY LAWYER 95, 98 (June 2010) (discussing the importance of reporting for maintaining discipline within the armed forces and garnering local support for operations).

51. See JOHN CERONE, *The Nature of International Criminal Law and Implications for Investigations*, in FORENSIC ARCHAEOLOGY AND HUMAN RIGHTS VIOLATIONS 24, 30–31 (Roxana Ferllini ed., 2007) (explaining that when a grave breach occurs, international law requires “all States Parties . . . to criminalize such conduct under their domestic law, to seek out the perpetrators, and to bring them to justice through prosecution or extradition.”); Int’l Criminal Court [ICC], *Understanding the International Criminal Court*, at 4, <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (explaining that the ICC was not intended to replace national criminal justice systems, and rather would only act on the basis of complementarity when a state “does not, cannot or is unwilling to genuinely do so.”) [hereinafter *Understanding the ICC*].

concept's substantive contours, political associations, and concomitant legal obligations.<sup>52</sup>

War crimes provide an interesting case study of national legal norms that became internationalized, and through that process are infused with other features of the international legal architecture (i.e., human rights norms) that must be subsequently incorporated at the national level. Though this study considers other violations of IHL that do not amount to war crimes, examining the origins of the legal definition of war crimes offers useful insight into the centrality of sovereign rights in the IHL framework. This section will highlight the strong precedent for State-led war crimes investigations and prosecutions. It will show that these investigations and prosecutions have incorporated international norms, and it will demonstrate some benefits of focusing on improving State capacity and practice, instead of on promulgating international accountability mechanisms.<sup>53</sup>

### A. *Definition of War Crimes*

War crimes are defined as criminal violations of IHL that endanger protected persons (e.g., civilians, prisoners of war, and the wounded and sick) or objects (e.g., civilian objects or infrastructure), or that breach important values.<sup>54</sup> Though perhaps this is clear from the term itself, to be considered a

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52. SIMPSON, *supra* note 49, at 54–57 (describing the development of war crimes law to encompass three trends in international law—the personalization of international law through the concept of individual criminal responsibility, the emergence of IHRL, and the demise of sovereignty).

53. Many of these international mechanisms are subject to critique of victor's justice as was the case of the International Military Tribunal (IMT), International Criminal Tribunal for the former Yugoslavia (ICTY), and International Criminal Tribunal for Rwanda (ICTR) and unequal, anti-African application in the case of the ICC, providing further reason to focus on how to improve national mechanisms.

54. CERONE, *supra* note 51, at 34 (“War crimes’ are essentially criminal violations of IHL (i.e., violations of those norms of IHL which are deemed to give rise to individual criminal responsibility).”). Though some military manuals identify any violation of the laws of war as a war crime, the manner in which violations are prosecuted indicates that typically only serious violations are charged. The ICRC customary international law study notes that violations are considered serious if they endanger protected persons or objects or if they breach important values. 1 INT’L COMM. OF THE RED CROSS [ICRC], ICRC CUSTOMARY INTERNATIONAL HUMANITARIAN LAW STUDY, Rule 156: Definition of War Crimes (2005) [hereinafter ICRC CIHL Study].

war crime there must also be a nexus between the criminal behavior and armed conflict.<sup>55</sup> War crimes can be committed by anyone, either military personnel or civilians, during international armed conflict (IAC) and non-international armed conflict (NIAC).<sup>56</sup>

There is no authoritative and legally binding list of actions that constitute a war crime, though a number of treaties provide insight.<sup>57</sup> However, “most war crimes involve death, injury, destruction, or unlawful taking of property.”<sup>58</sup> Beginning with the 1949 Geneva Conventions (Geneva Conventions)<sup>59</sup> and the First Additional Protocol of 1977 (Additional Protocol I),<sup>60</sup> these treaties define a sub-category of war crimes as “grave breaches.” These are crimes against protected persons or protected objects, and include “willful killing, torture or inhuman treatment . . . extensive destruction and appropriation of property, not justified by military necessity and carried out un-

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55. Antonio Cassese, *The Nexus Requirement for War Crimes*, 10 J. INT’L CRIM. JUSTICE 1395, 1404 (2012).

56. ICRC CIHL Study, *supra* note 54, Rule 156.

57. ANTONIO CASSESE, ET AL., CASSESE’S INTERNATIONAL CRIMINAL LAW 65-66 (Antonio Cassese et al. eds., 3d ed. 2013).

58. Nathalie Weizmann, *When Do Countries Have to Investigate War Crimes?*, JUST SECURITY (Sept. 14, 2015, 3:51 PM), <https://www.justsecurity.org/26067/countries-investigate-war-crimes/>.

59. As described by Steven Ratner, the list of grave breaches from all four conventions is as follows: “willful killing; torture or inhuman treatment (including medical experiments); willfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or civilian to serve in the forces of the hostile power; willfully depriving a prisoner of war or protected civilian of the rights of a fair and regular trial; unlawful deportation or transfer of a protected civilian; unlawful confinement of a protected civilian; and taking of hostages.” Steven R. Ratner, *War Crimes, Categories Of*, CRIMES OF WAR PROJECT, <http://www.crimesofwar.org/a-z-guide/war-crimes-categories-of/> (last visited Oct. 30, 2016).

60. War crimes enumerated in Additional Protocol I are: “certain medical experimentation; making civilians and nondefended localities the object or inevitable victims of attack; the perfidious use of the Red Cross or Red Crescent emblem; transfer of an occupying power of parts of its population to occupied territory; unjustifiable delays in repatriation of POWs; apartheid; attack on historic monuments; and depriving protected persons of a fair trial.” *Id.*

lawfully and wantonly.”<sup>61</sup> Grave breaches are subject to the universal jurisdiction of all States Parties to the Geneva Conventions and Additional Protocol I.<sup>62</sup> These acts must be committed within the context of an international armed conflict, though developments in customary international law suggest that grave breaches may also be perpetrated in non-international armed conflict.<sup>63</sup> In the case of non-international armed conflict, the same violations are prohibited and serious violations of Article 3 common to the Geneva Conventions (Common Article 3) are considered war crimes.<sup>64</sup> These include acts committed against persons no longer taking active part in hostilities, such as “violence to life and person . . . ; committing outrages upon personal dignity . . . ; taking of hostages, [and] the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.”<sup>65</sup>

The most comprehensive enumeration of war crimes may be found in Article 8 of the Rome Statute establishing the ICC.<sup>66</sup> These include intentionally directing attacks against the civilian population as such or against individuals not taking direct part in hostilities, intentionally directing attacks against civilian objects, or intentionally directing attacks against personnel, installations, material, etc. involved in humanitarian assistance.<sup>67</sup> Lastly, customary IHL provides for other war crimes that may be committed in international and non-international armed conflict, including “slavery, collective punish-

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61. CASSESE ET AL., *supra* note 57, at 72; Rome Statute of the International Criminal Court art. 8(2)(a)(i)–(iv), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

62. CASSESE ET AL., *supra* note 57, at 65.

63. *Id.* at 71.

64. ICRC CIHL Study, *supra* note 54, Rule 156.

65. *Id.*

66. See CERONE, *supra* note 51, at 34; Robert Kolb, *International Humanitarian Law and its Implementation by the Court*, in THE LEGAL REGIME OF THE ICC: ESSAYS IN HONOUR OF PROF. I.P. BLISHCHENKO 1015, 1016 (José Doria, et al. eds., 2009) (describing Article 8 as an offspring of the merger between the law of IAC and NIAC and as “the most elaborate and comprehensive provision ever drafted as an attempt to capture in a list the most variegated types of violations of the laws of customs of war.”).

67. Rome Statute, *supra* note 61, art. 8(2)(b)(i)–(iii). For CIL in an IAC See Article 8(2)(b) and in a NIAC see art. 8(2)(e).

ments, and launching indiscriminate attacks resulting in loss of life or injury to civilians.”<sup>68</sup>

The subjective element, or *mens rea*, of the crime depends on the international rule prohibiting the conduct. International law and courts interpreting it have preferred willfulness, knowledge, and gross negligence when applying the *mens rea* requirement.<sup>69</sup> In the case of grave breaches of the Third Geneva Convention, for instance, the treaty refers to “willful killing [of prisoners of war], torture or inhuman treatment, including biological experiments.”<sup>70</sup> “Willful” denotes criminal intent, “namely the intention to bring about the consequences of the act prohibited by the international rule.”<sup>71</sup> This language applies to a number of provisions throughout the Geneva Conventions and Additional Protocol I. For other acts, “knowledge” is required as a condition of criminal liability. For instance as stated in Additional Protocol I Article 85(3)(b), it is a war crime to “launch[ ] an indiscriminate attack affecting the civilian population or civilian objects” if the actor had “knowledge that such an attack would cause excessive loss of life, injury to civilians or damage to civilian objects.”<sup>72</sup> In the context of this provision, “knowledge” must be interpreted to mean “predictability of the likely consequences of the action,” or recklessness (i.e., *dolus eventualis* from the civil law).<sup>73</sup> Lastly, for some limited categories of war crimes, gross or culpable negligence (*culpa gravis*) may be sufficient, meaning, “the author of the crime, although aware of the risk involved in his conduct, is nevertheless convinced that the prohibited

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68. Nathalie Weizmann, *When Do Countries Have to Investigate War Crimes?*, JUST SECURITY, (Sept. 14, 2015, 3:51 PM), <https://www.justsecurity.org/26067/countries-investigate-war-crimes/>.

69. CASSESE, *supra* note 57, at 75–76.

70. Geneva Convention Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

71. CASSESE, *supra* note 57, at 75.

72. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict art. 85(3)(c), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

73. CASSESE, *supra* note 57, at 76; see also ANTONIO CASSESE, *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* 302 (2009) (noting that *dolus eventualis* is used in the civil law system to describe a “lesser form of intent” and that in the context of international criminal law, international tribunals have conflated recklessness and *dolus eventualis*).

consequence will not occur.”<sup>74</sup> This is applicable to cases of command responsibility.<sup>75</sup> When the international rules do not contain an explicit or implicit subjective element, courts frequently look to the intent requirements used by other legal systems of the world for the underlying offense (e.g., rape, murder, torture, etc.).<sup>76</sup>

### B. *The Origins of War Crimes*

While the past half-century has generated a more comprehensive definition, war crimes were first simply defined as “violations of the laws of warfare committed by combatants in international armed conflict.”<sup>77</sup> The notion of war crimes, which emerged in the second half of the nineteenth century out of codification of customary laws of warfare and a number of exemplary trials held after the American Civil War, has always been an exceptional concept that compelled States to seek individual accountability for acts committed during armed conflict.<sup>78</sup> During this period, low-ranking servicemen were most likely to be brought to trial and punished for violations of the laws of war, primarily by their own national authorities after the end of hostilities.<sup>79</sup>

Following World War II, with the rapid development of IHRL and international criminal law, and further codification of IHL in the form of the Geneva Conventions, a dramatic deviation from the State-based system for prosecuting war crimes commenced.<sup>80</sup> In its place emerged an international system. As Antonio Cassese explained, “[t]he exceptional character of war (a pathological occurrence in international dealings, leading to utterly inhuman behaviour) warranted this deviation from traditional law (which granted to any individual in an official capacity immunity from prosecution by foreign States).”<sup>81</sup> The Nuremberg and Tokyo trials compromised the protections of the sovereign, crystallizing the notion

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74. CASSESE, *supra* note 57, at 76.

75. *Id.*

76. *Id.*

77. *Id.* at 63.

78. *Id.*

79. *Id.* at 64.

80. Edoardo Greppi, *The Evolution of Individual Criminal Responsibility under International Law*, 835 INT’L REV. OF THE RED CROSS 531 (1999).

81. CASSESE, *supra* note 57, at 63-64.

that leaders could be held individually criminally responsible by internationally constituted judiciaries. Prior to the Nuremberg and Tokyo trials “senior State officials had never been held personally responsible for their wrongdoings. Until that time, only States and low-ranking servicemen accused of misconduct during international wars could be called to account by other States.”<sup>82</sup> These newly devised international war crimes trials were largely criticized as being overly political and an exercise in victor’s justice<sup>83</sup>—a salient critique today considering when and how allegations of war crimes are investigated, though for different reasons.

The Geneva Conventions marked a great advance in terms of substantive law governing conflict, identifying certain crimes as “grave breaches,” and of enforcement, introducing the principle of universal jurisdiction for such breaches.<sup>84</sup> The Additional Protocols were established following the Geneva Conventions in 1977, with Additional Protocol I expanding the list of grave breaches.<sup>85</sup> “[L]ater on, as the ICTY Appeals Chamber authoritatively held in *Tadić*, the notion of war crimes was gradually extended to serious violations of IHL governing non-international armed conflict.”<sup>86</sup>

Consequently, conduct that used to primarily concern individual States became a concern for the international community. This is consistent with the founding ideas of IHL—that how States address the brutalities of war will have direct impact on peaceful resolution of conflict and the creation of a durable peace, and that this should be the concern of all States engaged in conflict. As such, the development of norms around war crimes demonstrates how a domestic norm can rise to the level of an international norm, at which point it is influenced by other developments in international law, and then entrusted to be enforced by the State.

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82. *Id.* at 64.

83. Kristen Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 EUR. J. INT’L L. 1085, 1090, 1100 (2011).

84. CASSESE, *supra* note 57, at 72.

85. AP I, *supra* note 72, arts. 11, 85.

86. CASSESE, *supra* note 57, at 65 (internal citations omitted).

### III. SOURCES OF IHL SUPPORTING THE DUTY TO INVESTIGATE

#### A. *The Obligation to Investigate Alleged War Crimes Deriving from IHL Treaties*

The obligation to investigate alleged war crimes is essential to a State's obligation to respect, protect and fulfill IHL and IHRL. This duty furthers accountability efforts and also preserves victims' right to a remedy.<sup>87</sup> It is also essential to the complementarity of the international criminal justice system, which relies primarily on States to effectively fulfill their fact-finding obligations.<sup>88</sup> Just as there are multiple sources that inform the definition of war crimes in international law, contemporary understanding of the duty to investigate war crimes derives from various sources of international law as well.<sup>89</sup> The

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87. See Amichai Cohen & Yuval Shany, *Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts*, in 14 Y.B. OF INT'L HUMANITARIAN L., 37, 39 (M.N. Schmitt & L. Arimatsu eds., 2011) ("Arguably, a robust system of military investigations and prosecutions may prevent future violations (inter alia, through generating deterrence and removing repeat offenders from the battlefield), and punish those who have committed them in the past."); Cohen & Shany, *supra* note 87, at 48 ("[T]he duty to investigate all IHL violations may be independently supported by the need to satisfy victims and afford them with remedies.").

88. See *e.g.*, Understanding the ICC, *supra* note 51.

89. As will be discussed, the duty to investigate is influenced by treaties, international jurisprudence, and soft law. See, *e.g.*, Rome Statute, *supra* note 61, arts. 8, 17; American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 9 I.L.M. 673 (entered into force July 18, 1978); International Covenant on Civil and Political Rights art. 3, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 E.T.S. 5; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GCII]; GC III, *supra* note 70; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12., 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]; *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. 589 (2011) (addressing whether the United Kingdom adequately performed an investigation into the deaths of five Iraqi civilians killed in 2003); G.A. Res. 147, ¶¶ 3–4, 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).

foundation of this duty may be found in IHL treaties, though the scope of the duty has been greatly influenced by IHRL.

Under IHL, “there is little question that States must investigate serious allegations of war crimes committed by individuals subject to their jurisdiction with a view to ascertaining the criminal responsibility of the suspected perpetrators.”<sup>90</sup> This duty is implied in the Geneva Conventions and Additional Protocol I as well as in customary international law.<sup>91</sup> That the duty is implicit comes as little surprise, since under international law it is considered the responsibility of State Parties to implement any treaty to which they are Party in their domestic systems, and the Geneva Conventions contain provisions requiring effective penal sanctions for individuals that commit grave breaches of the Conventions.<sup>92</sup> Logic requires some investigation be conducted before sanctions are applied. This section will first examine, however, the explicit obligations outlined in the Geneva Conventions and Additional Protocol I. Secondly, it will consider what is substantively and procedurally implied about the duty to investigate beyond what is stated explicitly in the treaties and, lastly, what guidance may be

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90. Cohen & Shany, *supra* note 87, at 37, 41.

91. See generally Michael Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT'L SEC. J. 31 (2011) (discussing the IHL framework for investigations as established by treaty and customary international law).

92. See e.g., Vienna Convention on the Law of Treaties art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (requiring under the doctrine of *pacta sunt servanda* that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”); GC IV, *supra* note 89, art. 146 (“The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article [describing grave breaches]. Each High Contracting Party shall be 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. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a ‘prima facie’ case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.”).

found in customary international law about the IHL duty to investigate.

### 1. *Explicit Obligations in the Geneva Conventions*

The Geneva Conventions requires States to pursue prosecution for violations of its substantive norms.<sup>93</sup> The articles in each of the four treaties comprising the Geneva Conventions are nearly identical. Therefore the language from the Fourth Geneva Convention is illustrative of the norms of all four:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party *shall be 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. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.<sup>94</sup>

In sum, States undertake three primary obligations: “(1) to enact the domestic legislation necessary to prosecute potential offenders; (2) to search for those accused of violating the Conventions; and (3) to either prosecute such individuals or turn them over to another State for trial.”<sup>95</sup> The duty to investigate is the logical outcome of the second paragraph’s requirement that States search for persons alleged to have com-

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93. See GC I, *supra* note 89, art. 49; GC II, *supra* note 89, art. 50; GC III, *supra* note 70, art. 129; GC IV, *supra* note 89, art. 146.

94. See Schmitt, *supra* note 91, at 36–37 (citing GC IV, *supra* note 89, art. 146 (emphasis added)).

95. Schmitt, *supra* note 91, at 37.

mitted, or who have ordered others to commit, grave breaches.<sup>96</sup> The ICRC official *Commentary* explains this obligation applies to nationals of the State Party and members of enemy forces.<sup>97</sup> Note that in practice, some States have expanded the scope of this duty, requiring that *any* reportable incidents be investigated whether they were committed by a national of the State Party, members of enemy forces, or others (e.g., members of non-state armed groups).<sup>98</sup> Whether this is a universally accepted obligation is up for debate.<sup>99</sup>

## 2. *Explicit Obligations in Additional Protocol I*

The Additional Protocol I to the Geneva Conventions further elaborates States' obligations to investigate breaches.<sup>100</sup> It does so in a substantive and procedural way. While noting additional violations that constitute grave breaches and requiring that States cooperate in criminal investigations, Article 87 of Additional Protocol I also provides guidance on how States should implement the duty to investigate:

*Article 87—Duty of commanders*

The High Contracting Parties and the Parties to the conflict *shall 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,*

96. *See id.* at 38.

97. *Id.* (citing 1 INT'L COMM. OF THE RED CROSS [ICRC], COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK ARMED FORCES IN THE FIELD 365–66 (Jean Pictet ed. 1952); 3 INT'L COMM. OF THE RED CROSS [ICRC], COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 623 (Jean Pictet ed. 1960); 4 INT'L COMM. OF THE RED CROSS [ICRC], COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 592–93 (Jean Pictet ed. 1952)).

98. *See e.g.*, U.S. LAW OF WAR MANUAL, *supra* note 46, at 1073 (“DoD policy has required the reporting of possible, suspected, or alleged violations 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 armed conflict (‘reportable incidents’).”).

99. *See generally* Gregory Raymond Bart, *Special Operations Forces and Responsibility for Surrogates’ War Crimes*, 5 HARV. NAT’L SEC. J. 513 (2014) (arguing that Special Operations Forces do not have a legal obligation under the law of armed conflict to investigate alleged IHL violations committed by U.S. surrogates or to intervene to prevent them).

100. *See generally* AP I, *supra* note 72. Additional Protocol II does not reference a duty to investigate alleged war crimes.

*to suppress and report to competent authorities breaches of the Conventions and of this Protocol.*

In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

The High Contracting Parties and Parties to the conflict *shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to 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.*<sup>101</sup>

Article 87 underscores that it is the armed forces, in particular military commanders, which must prevent violations of the Geneva Conventions and Additional Protocols.<sup>102</sup> Though legal advisers may be attached to the unit, their participation in operations “does not relieve the commander of the responsibility for enforcing IHL,” though they are able to delegate tasks to military police and legal advisers.<sup>103</sup> The primacy of the command structure is important in understanding the role that these rules play in conflict.<sup>104</sup> They serve not only to prevent harm to civilians during armed conflict, but also may be used as a tool to promote law and order within the armed forces.<sup>105</sup> Commanders must “react[ ] to violations that occur in their presence or come to their immediate attention, . . . [and] create[ ] a ‘command climate’ that fosters preventing

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101. *Id.* art. 87.

102. Schmitt, *supra* note 91, at 41.

103. *Id.* at 42.

104. *Id.* (“The responsibilities [of different branches of government] are complementary, with commanders expected to exercise whatever authority has been vested in them *within the implementation, enforcement, and disciplinary structure of their armed forces and government.*” (emphasis added)).

105. *See id.*; U.S. LAW OF WAR MANUAL, *supra* note 46, at 15 (citing some of the main purposes of the law of war to be preventing unnecessary suffering and assisting commanders in maintaining discipline).

and reporting violations.”<sup>106</sup> Creating such an environment is an exercise of the command structure.

Ultimate responsibility for implementation still falls upon the State Party. States are therefore charged with ensuring that the duties to investigate and prosecute extend through the chain of command, and that judicial and disciplinary bodies are empowered to fulfill their roles.<sup>107</sup> Inherent in this proscription is a legacy of respect for state sovereignty and reliance on States Parties to suppress IHL violations and investigate and punish those who breach the laws of armed conflict.

### 3. *Beyond Grave Breaches: General Substantive and Procedural Obligations Implied by the IHL Treaty Regime*

Alongside the explicit obligations outlined in the Geneva Conventions and Additional Protocol I, these treaties also create a general duty to investigate and prosecute all violations of the Conventions, not just violations considered to be grave breaches or war crimes.<sup>108</sup> This duty derives from the text of the treaties and principles found throughout the treaties. In addition to providing a basis for the substantive duty to investigate, the logic of this framework also sets out a procedural requirement of transparency. This understanding of the scope of obligations broadens the duty to investigate significantly and creates space to argue for greater transparency. This may be relevant, for instance, in a case of civilian casualties that result from an action that does not trigger individual criminal responsibility, such as a suspected failure to take feasible precautions in an attack, as was the case in the Kunduz strike.<sup>109</sup>

Arguably, the general obligations contained in the Geneva Conventions and Additional Protocol I to ensure respect for IHL implies a duty to investigate beyond the grave breaches regime.<sup>110</sup> Firstly, a close reading of the Geneva Conventions and Additional Protocol I reveals a broad duty to in-

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106. Schmitt, *supra* note 91, at 41.

107. *Id.* at 42.

108. See Cohen & Shany, *supra* note 87; Alon Margalit, *The Duty to Investigate Civilian Casualties During Armed Conflict and Its Implementation in Practice*, in 15 Y.B. OF INT'L HUMANITARIAN L. 155, 167–72 (T. D. Gill et al. eds., 2012).

109. Margalit, *supra* note 108, at 156.

110. See generally Cohen & Shany, *supra* note 87; Margalit, *supra* note 108.

investigate, going beyond grave breaches themselves.<sup>111</sup> Specifically, the following language, contained in all four grave breaches provisions of the Geneva Conventions and in Article 86(1) of the Additional Protocol I, suggests a broad obligation vis-à-vis suppression:<sup>112</sup>

Each High Contracting Party shall take measures necessary for the *suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.*<sup>113</sup>

The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and *take measures necessary to suppress all other breaches*, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.<sup>114</sup>

These Articles introduce a general obligation to take measures necessary for suppression of other violations of the Geneva Conventions and Additional Protocol I, which encompasses more than just grave breaches.<sup>115</sup> Secondly, this interpretation is supported by the drafting history. The Pictet Commentary to the Geneva Conventions clarifies that the drafters did not intend for the grave breaches regime to limit the general duty to investigate and prosecute.<sup>116</sup> This broad reading of the types of violations of IHL that would merit investigation and prosecution has been confirmed by developments in international criminal law.<sup>117</sup>

This expansive reading is also supported by three principles embodied in the Geneva Conventions and Additional Protocols, namely “(1) the general duty to ensure respect for the

111. See Cohen & Shany, *supra* note 87, at 42.

112. *Id.*

113. GC I, *supra* note 89, art. 49 (emphasis added); GC II, *supra* note 89, art. 50 (emphasis added); GC III, *supra* note 70, art. 129 (emphasis added); GC IV, *supra* note 89, art. 146 (emphasis added).

114. AP I, *supra* note 72, art. 86(1) (emphasis added).

115. See Cohen & Shany, *supra* note 87, at 42.

116. See *id.* at 42 (noting that the Pictet Commentary finds that the Conventions call for the suppression of *all* acts contrary to the provision of the Conventions).

117. *Id.* at 43. Specifically, the ICTY, the ICTR, the Special Court for Sierra Leone, and the ICC all had mandates to investigate and prosecute violations of the laws and customs of war in addition to those found in the grave breaches regime of the Geneva Conventions. *Id.*

[Geneva] Conventions, (2) the command responsibility doctrine, and (3) the precautionary obligations of the parties to the conflict.”<sup>118</sup> This results from the internal logic of IHL. Regarding the first two principles, in order to ensure respect for the Geneva Conventions, and for a commander to fulfill his or her responsibility to do so, investigations must be conducted to see if there have been breaches.<sup>119</sup> This suggests it would be prudent, and necessary to fulfilling States’ legal obligations, for the armed forces to implement policies that provide for a broad duty to investigate and authorize commanders to do so.<sup>120</sup> Thirdly, the principle of taking precautions to reduce civilian casualties in military operations, which is articulated in IHL, also contributes to a broad understanding of the duty to investigate.<sup>121</sup> These precautionary principles are articulated in Article 57 of the Additional Protocol I, which requires that “constant care shall be taken to spare the civilian population, civilians and civilian objects,”<sup>122</sup> including by doing everything feasible to verify that objectives to be attacked are actual military objectives.<sup>123</sup> “Constant care” should include investigation into past incidents of harm to civilians to ensure that parties are accurately assessing the proportionality of their actions and the means of warfare employed.<sup>124</sup> In this way, “monitoring the effects of military actions through investigation of possible violations arguably constitutes a ‘feasible precaution’ against excessive harm.”<sup>125</sup>

In addition to the substantive duty to investigate beyond grave breaches derived from customary IHL, the system’s logic also provides clues as to a procedural requirement—transparency. Transparency of investigations may be derived from the logic of the international humanitarian legal system.<sup>126</sup> “It is an indispensable element in making sense of (and giving

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118. *Id.* at 44.

119. *See id.* at 46.

120. *See id.*

121. *Id.*

122. AP I, *supra* note 72, art. 57(1).

123. *Id.* art. 57(2)(a)(ii).

124. *See* Cohen & Shany, *supra* note 87, at 47.

125. *Id.*

126. *See* Philip Alston, *IHL, Transparency, and the Heyns’ UN Drones Report*, JUST SECURITY (Oct. 23, 2013, 4:15 PM), <https://www.justsecurity.org/2420/ihl-transparency-heyns-report/>.

content to) the clearly acknowledged pillars of [IHL] that require investigation of grave breaches and other violations and the prosecution of those implicated. Without a degree of transparency, none of these obligations could be acted upon.”<sup>127</sup> The obligation to investigate, punish, and prosecute is not meaningful without accountability, which may only be achieved through a certain degree of transparency.<sup>128</sup> There is no way for the international community to verify the legality of a targeting decision, for instance, without some level of disclosure.<sup>129</sup>

### B. *The Duty to Investigate in Customary IHL*

In addition to obligations arising from the Geneva Conventions and Additional Protocol I, the duty to investigate alleged war crimes has arguably also become a customary norm that applies during international and non-international armed conflict.<sup>130</sup> Under Rule 158 of the ICRC Customary IHL study’s Rule 158:

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127. *Id.*

128. *Id.* (“Transparency and accountability in the context of armed conflict or other situations that raise security concerns may not be easy. States may have tactical or security reasons not to disclose criteria for selecting specific targets (e.g. public release of intelligence source information could cause harm to the source). But without disclosure of the legal rationale as well as the bases for the selection of specific targets (consistent with genuine security needs), States are operating in an accountability vacuum.”).

129. *Id.* (“It is not possible for the international community to verify the legality of a killing, to confirm the authenticity or otherwise of intelligence relied upon, or to ensure that unlawful targeted killings do not result in impunity. The fact that there is no one-size-fits-all formula for such disclosure does not absolve States of the need to adopt explicit policies.”).

130. ICRC CIHL Study, *supra* note 54, Rule 158 (stating that Rule 158, which calls for the investigations of alleged war crimes, has been established as a rule of customary international law through State practice and *opinio juris* applicable in both international and non-international armed conflicts through State practice). The obligation to investigate and prosecute allegations of war crimes in non-international armed conflict is supported by the jurisprudence of international criminal tribunals. In *Tadić*, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia found that “(i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.” *Prosecutor v. Tadić*, Case No. IT-94-

States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.<sup>131</sup>

The norm's status as customary is important because it broadens the application of the duty to States not party to the relevant treaties. Additionally, because of how the customary IHL standard was developed, it also creates space for the importation of legal norms from other areas of international law, such as IHRL and the law of state responsibility. These regimes have a more victim-centric, reparative perspective that lend a different mode of analysis to the IHL duty to investigate.

Though there are some major detractors of the position that this norm constitutes customary IHL, the duty to investigate war crimes is prevalent in treaties and State practice.<sup>132</sup> For instance, the duty to investigate possible war crimes can be found in the Genocide Convention, Hague Cultural Property Convention and its Second Protocol, Torture Convention,

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1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 111–27 (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995). As noted by Schmitt, this caveat is important, as sweeping application of the law of international armed conflict to non-international armed conflict would be of concern to States that seek to maintain sovereign control over internal conflict. Schmitt, *supra* note 91, at 48. This is a concern for the United States, for instance, which has disputed the validity of the ICRC's methodology in establishing rules of customary IHL. See generally John B. Bellinger, III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study, Customary International Humanitarian Law*, 89 INT'L REV. OF THE RED CROSS 443, 445 (June 2007). However, Schmitt notes that such concern does not manifest in the case of a duty to investigate and prosecute. This is likely because Schmitt sees the duty as articulated in IHL to give great discretion to States regarding implementation. Schmitt, *supra* note 91, at 48.

131. ICRC CIHL Study, *supra* note 54, Rule 158.

132. See generally Bellinger & Haynes, *supra* note 130; Jeroen. C. van den Boogaard, *Fighting by the Principles: Principles as a Source of International Humanitarian Law*, in ARMED CONFLICT AND INTERNATIONAL LAW: IN SEARCH OF A HUMAN FACE 3, 16 (Mariëlle Matthee et al. eds., 2013) (commenting on the difficulty of establishing customary international law and explaining that when examining military manuals, as the ICRC has done in its study, a military manual may indicate what a State regards as lawful behavior or may express no opinion at all, "but merely restate the treaty obligations of states").

Chemical Weapons Convention, Amended Landmines Protocol, and Convention on Landmines.<sup>133</sup> Additionally, numerous military manuals set forth the duty to investigate grave breaches and war crimes and prosecute suspects.<sup>134</sup> “Most States implement the obligation to investigate and prosecute by providing jurisdiction for such crimes in their national legislation.”<sup>135</sup>

The ICRC also notes that organs of the United Nations have repeatedly emphasized this rule. In particular, in 2005 the General Assembly adopted the *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Basic Principles).<sup>136</sup> The resolution provides that:

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 . . . [i]nvestigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law.<sup>137</sup>

This is the most robust definition of the scope of the duty to investigate allegations of war crimes proposed thus far, which is to be expected considering the Basic Principles draw from IHL and IHRL, and IHRL has much stronger provisions for investigations. However, there are a number of countries that

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133. ICRC CIHL Study, *supra* note 54, Rule 158, n.210 (citing to Genocide Convention, Article VI; Hague Convention for the Protection of Cultural Property, Article 28; Second Protocol to the Hague Convention for the Protection of Cultural Property, Articles 15–17; Convention against Torture, Article 7; Chemical Weapons Convention, Article VII(1); Amended Protocol II to the Convention on Certain Conventional Weapons, Article 14; Ottawa Convention, Article 9).

134. ICRC CIHL Study, *supra* note 54, Rule 158, n.212 (citing among others to the military manuals of Australia, Cameroon, Canada, Colombia, Ecuador, Germany, Italy, the Netherlands, Switzerland, the United Kingdom, and the United States).

135. ICRC CIHL Study, *supra* note 54, Rule 158, n.213 (citing among others to the practice of Algeria, Germany, Italy, South Africa, the United Kingdom, and the United States).

136. G.A. Res. 147, *supra* note 89, ¶ 22(b).

137. *Id.* annex II, ¶ 3.

object to these pronouncements serving as evidence of custom, such as the United States.<sup>138</sup> Moreover, during the drafting process of the Basic Principles, the original intention of the drafters was only to address the right to a remedy and reparation under IHRL.<sup>139</sup> This view did not predominate, as during the negotiations it became widely felt that the Basic Principles were primarily “victim oriented and predicated on social and human solidarity.”<sup>140</sup> Therefore, they were not intended to reflect the differences between IHRL and IHL violations. However, there was an acknowledgement that while these two legal regimes provided complementary protections for victims, they did not do so “necessarily in the same manner or using the same terminology.”<sup>141</sup>

The ICRC also points to principles from the International Law Commission’s *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (Draft Articles on State Responsibility) as reinforcing the duty to investigate alleged violations of IHL. The Draft Articles on States Responsibility provide that a State that violates IHL must make full reparations for the loss or injury that it caused, and that reparation includes satisfaction, which encompasses “acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.”<sup>142</sup> The commentary states that “[m]any possibilities exist, including due inquiry into the causes of an accident re-

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138. Bellinger & Haynes, *supra* note 130, at 445 (stating that the “United States . . . is troubled by the extent to which the Study relies on non-binding resolutions of the General Assembly, given that States may lend their support to a particular resolution, or determine not to break consensus in regard to such a resolution, for reasons having nothing to do with a belief that the propositions in it reflect customary international law”).

139. Theo van Boven, *The United Nations 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*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, 2010, at 2, [http://legal.un.org/avl/pdf/ha/ga\\_60-147/ga\\_60-147\\_e.pdf](http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf).

140. *Id.*

141. *Id.*

142. Int’l Law Comm’n, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 56 U.N. GAOR Supp. No. 10, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. OF INT’L L. COMM’N art. 37, U.N. Doc. A/CN.4/SER.A/2001/Add.1 [hereinafter *Draft Articles on State Responsibility*].

sulting in harm or injury.”<sup>143</sup> Nevertheless, the Draft Articles on State Responsibility are secondary rules rather than primary rules, and therefore not a primary basis of the IHL architecture.

#### IV. THE HIGHLY DEFERENTIAL IHL STANDARDS FOR INVESTIGATIONS

The existence of a duty to investigate allegations of war crimes and other violations of IHL is, therefore, fairly well established in different sources of IHL.<sup>144</sup> As the discussion in Section III illustrated, this duty arguably extends beyond the grave breaches regime, and as such ranges from the duty to investigate war crimes to serious violations of IHL, though some scholars disagree as discussed below. However, while the duty has been established, the standard governing these investigations is not well developed.<sup>145</sup> As a result, IHL allows for great discretion on the part of States in fulfilling their duties, the bounds of which will be discussed in this section first in terms of the Geneva Conventions and secondly in terms of Additional Protocol I. Vague standards and a high degree of deference raise immediate accountability concerns.

The Geneva Conventions contain no affirmative duty to uncover IHL violations.<sup>146</sup> The duty to investigate is triggered only when an allegation has been made.<sup>147</sup> However, not all allegations will trigger the duty—only allegations that meet a certain evidentiary threshold trigger an investigation.<sup>148</sup> This is nowhere in the text, but may be inferred from the absence of a requirement to prosecute or extradite if there is no *prima facie* case of a violation in the Geneva Conventions.<sup>149</sup> The conse-

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143. Margalit, *supra* note 108, 162–63 (citing commentary to the Draft Articles on State Responsibility).

144. See GC I, *supra* note 89, art. 49; GC II, *supra* note 89, art. 50; GC III, *supra* note 70, art. 129; GC IV, *supra* note 89, art. 146.

145. Schmitt, *supra* note 91, at 39 (“In particular, it sets no standards for the nature of the investigation that has to be conducted into possible war crimes.”). This ambiguity expressed by Schmitt extends to other violations of IHL as well.

146. *Id.*

147. *Id.*

148. *Id.* (explaining that “not every allegation requires an investigation; only those sufficiently credible to reasonably merit one do”).

149. *Id.*

quence of this for States is that they wield significant discretion within IHL to determine when an investigation into allegations should occur. As noted by Sean Watts, this was purposeful on the part of the treaty drafters:

[T]here is very little evidence in the Geneva Conventions that States have consented to a high degree of international input in respect of investigating and prosecuting war crimes. Of course, the Geneva Conventions do establish at least one clear duty to investigate and prosecute, and that is in the case of the grave breaches regime; but again the particulars surrounding the implementation of that duty have been left to States to determine.<sup>150</sup>

The high degree of deference to States in the Geneva Conventions was, therefore, by design. This was in keeping with the tradition of the international legal order, which at that time was only just starting to allow the reach of law to go beyond the hard shell of sovereignty.<sup>151</sup>

Under the Geneva Conventions, once a violation has occurred, it is also not clear which type of incident would trigger an investigation. Schmitt claims that the duty to investigate attaches only to violations of IHL that constitute war crimes.<sup>152</sup> However, as argued by Alon Margalit, the duty to investigate can also be read to include situations where there have been civilian casualties but no evidence of the requisite *mens rea* to constitute a war crime.<sup>153</sup> This author agrees with Margalit, as this analysis seems to be a logical extension of the treaty's object and purpose, which includes civilian protection during armed conflict.<sup>154</sup> Therefore, the Geneva Conventions appear to require, at a minimum, that the duty to investigate applies

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150. Sean Watts, Professor of Law at Creighton University, Remarks at the Chatham House, International Law Programme Meeting: Accountability for Violations of the Laws of Armed Conflict: A Duty to Investigate and Prosecute?, 6 (July 5, 2012), <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/050712summary.pdf>.

151. See CERONE, *supra* note 51, at 26 (describing the evolution of international criminal law as significant in crystallizing the principle that violations of certain norms could entail individual responsibility, instead of just state responsibility).

152. Schmitt, *supra* note 91, at 38.

153. See Margalit, *supra* note 108, at 166.

154. *Id.* at 156.

to all violations of IHL that rise to the level of a war crime, but not only to these instances.<sup>155</sup> Once the duty is triggered, the requirement to investigate possible war crimes and prosecute those responsible is not limited to the direct perpetrators, but also to those who ordered the offenses under the doctrine of command responsibility.<sup>156</sup>

Additional Protocol I provides only slightly more guidance regarding the criteria for an investigation into alleged war crimes, and in particular emphasizes the importance of the military command structure. This structure, with the commander in charge, bears responsibility for the identification, reporting of, and response to violations of IHL, and is complementary to the roles of judiciary and disciplinary bodies when it comes to enforcement matters.<sup>157</sup> Commanders have a special role to play here, and are named specifically in Additional Protocol I as responsible for ensuring that any allegations of war crimes are investigated.<sup>158</sup> This complements an assumed system of military self-policing.<sup>159</sup> There is no prohibition on commanders investigating possible violations within their own units or committed by others under their control.<sup>160</sup> Lastly, the attachment of legal advisers to the unit does not relieve the duty of the commander to investigate.<sup>161</sup>

In sum, the treaties that set out the framework for IHL offer minimal guidance when it comes to the triggers for and criteria of an investigation, and this leaves much of the decision making over those matters to States. Before moving onto a more fulsome critique of this framework, however, it must be acknowledged that the logic of the treaty structure and the contributions of customary IHL support the notion that transparency should be a component of investigations and that investigations should contribute to remedy and reparation to victims of such violations and to other States.<sup>162</sup> However, as

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155. See Schmitt, *supra* note 91, at 39.

156. *Id.*

157. *Id.* at 42.

158. *Id.* at 43.

159. *Id.*

160. *Id.*

161. *Id.*

162. See *infra* Sections III.A.3 and III.B; see generally Alston, *supra* note 126; G.A. Res. 147, *supra* note 89; Draft Articles on State Responsibility, *supra* note 142.

these are not set out as treaty obligations or derived from jurisprudence, these principles hold less persuasive power in the realm of IHL.

## V. IMPROVING ACCOUNTABILITY: THE APPLICATION OF IHRL STANDARDS

### A. *Critique of the IHL Framework for Investigations*

Despite IHL's emphasis on the protection of civilians during armed conflict, the lack of robust standards for reporting and investigations once a potential violation has occurred is problematic from an accountability perspective. There are two areas in which this becomes pronounced: (1) the importance of the command structure in reporting and investigating suspected violations, and (2) the determination of the level of transparency for the investigations. A lack of an international oversight mechanism to ensure additional accountability to victims and the international community exacerbates these problems.

Entrusting investigations within the chain of command creates a twofold concern. Firstly, this structure relies on subordinates to report incidents that may warrant attention for further investigation. Higher ups must then conduct that investigation. For this process to be successful, a climate of IHL compliance must be created.<sup>163</sup> However, historical examples indicate this is not always successful. For instance, the Peers Inquiry, which was established after the My Lai massacre of 1968, identified nine factors that led to the breakdown in the U.S. military's reporting and investigation system in response to the events at My Lai.<sup>164</sup> These factors included "lack of proper training, attitude toward the Vietnamese, permissive attitude, psychological factors, organizational problems, nature of the enemy, plans and orders, attitude of government officials and leaders, and leadership."<sup>165</sup> Though the U.S. military has changed since 1968, serious violations of the law of armed conflict in the last decade show that cultural problems per-

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163. See generally, Robert Rielly, *The Inclination for War Crimes*, MILITARY R., May–June 2009, at 17 (emphasizing the importance of leadership and culture in preventing war crimes, using the My Lai massacre as a case study).

164. *Id.* at 18.

165. *Id.* at 19.

sist.<sup>166</sup> “The most significant lesson these latest incidents in Iraq have taught us is that war crimes can still happen, even in a professional, disciplined military. Commanders have to remain vigilant and realize it could indeed happen in their units.”<sup>167</sup>

Secondly, when investigations are conducted, the fact that individuals in the chain of command may conduct them raises concerns about the independence of such investigations. In practice, States address this issue by locating most investigations into *prima facie* allegations of war crimes outside the chain of command.<sup>168</sup> However, this protection does not reach the preliminary fact-finding assessments and administrative investigations that determine whether a criminal investigation goes forward and whether something qualifies *prima facie* as a war crime.<sup>169</sup> In this context, leadership is required.<sup>170</sup> As demonstrated by the Peers Inquiry, the type of leadership required to bring forth wrongdoing is not guaranteed.<sup>171</sup>

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166. As explained by Lieutenant Colonel Robert Rielly, U.S. Army, Retired: “Most leaders believe it would never happen in their unit, yet one story after another concerning American Soldiers and Marines who allegedly participated in war crimes has been in the news. Abu Ghraib, Haditha, Hamandiya, and Mahmudiya are now part of military history.” *Id.* at 18.

167. *Id.* at 23.

168. Cohen & Shany, *supra* note 87, at 74 (noting that some militaries have been increasingly sensitive to reviewing investigation practices and that this has led to investigations conducted by individuals and institutions outside the chain of command, with greater civilian involvement and judicial scrutiny).

169. Turkel Commission, ISRAEL’S MECHANISMS FOR EXAMINING AND INVESTIGATING COMPLAINTS AND CLAIMS OF VIOLATIONS OF THE LAWS OF ARMED CONFLICT ACCORDING TO INTERNATIONAL LAW 255–56 (Feb. 2013) [hereinafter Turkel Report].

170. Rielly, *supra* note 163, at 22–23.

171. *Id.* This issue is dramatically rendered in a dialogue between Lance Corporal Rodriguez and Charlie Company’s Chaplain in Phil Klay’s novel *Redeployment*:

“You think Lieutenant Colonel Fehr will ever become Colonel Fehr if he tells higher, ‘Hey, we think we did some war crimes?’” It wasn’t a question I wanted to answer. Eventually, looking at my feet, feeling childish, I said, “I suppose not.” “And he’s the one who decides if there’s something worth investigating. Look, you know how I feel about that man, but he’s handling Charlie Company about as well as anybody could.”

Phil Klay, REDEPLOYMENT 144 (2014).

Among the My Lai massacre's principal causes is the fact that a cohesive unit's values and norms tolerated committing these crimes and also ensured loyalty to the group rather than to the institution, thus condoning silence about the crimes. In the case of My Lai and some recent incidents, it took the courage of individuals outside the organization to report what happened, because no one inside the unit did. Cohesion was too strong.<sup>172</sup>

This is just as relevant in current situations of armed conflict, for U.S. and other States' armed forces, as it was then.

Further, without specific transparency obligations and structures beyond criminal investigations, States may argue for standards that are favorable to their interests and diffuse systems that leave significant discretion to commanders and privilege operational concerns.<sup>173</sup> More likely than not, this arrangement will favor an abundance of precaution on the part of States in disclosing potentially sensitive information, leading to a legitimacy problem for the armed forces and frustration for the public, victims, and other members of the armed forces.<sup>174</sup> In his role as Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston described this problem in his report on his Mission to the United States:

[T]he opacity of the military justice system reduces confidence in the Government's commitment to public accountability for illegal conduct. It is remarkably difficult for the U.S. public, victims' families, or even commanders to obtain up-to-date information on the status of cases, the schedule of upcoming hearings, or even judgments and pleadings. This lack of transparency is, in part, a side-effect of the decentralized character of the system, in which commanders around the world are given the authority to

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172. Rielly, *supra* note 163, at 22-23.

173. Cf. Alston, *IHL, Transparency, and the Heyns' UN Drones Report*, *supra* note 126 (discussing the accountability vacuum created by a lack of public transparency in the context of drone strikes and the tendency for governments to maintain as much secrecy as possible and then "shield behind the justification that national security prevents any disclosure.").

174. *Id.*

conduct preliminary investigations and act as “convening authorities” to initiate courts martial.<sup>175</sup>

As this observation illustrates, overbroad discretion to individual chains of command has tended to create situations of information silos and a lack of transparency.

The lack of transparency required in the law about the substance of investigations carries over into disclosing how investigations are actually conducted. This issue is particularly problematic when determining what types of events trigger different kinds of investigations. Though DOD Directive 2311.01E includes a broad definition of what should be reported, discussed further below, it provides no guidance on how investigations should be conducted and what merits a full report.<sup>176</sup> Each branch of the U.S. armed forces has its own reporting requirements for alleged violations of IHL.<sup>177</sup>

However, the specific considerations of what has triggered reporting and how that information was assessed in the field is typically not publicly available or accessible.<sup>178</sup> While DOD Directive 2311.01E requires Combatant Commands to “‘provide for the central collection of reports and investigations of reportable incidents alleged to have been committed by or against members of their respective Combatant Commands, or persons accompanying them.’” The Combatant Commands are

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175. Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions) *Rep. on Mission to the U.S.*, U.N. Doc. A/HRC/11/2/Add.5, ¶ 49 (May 28, 2009) (internal citations omitted).

176. DEP’T OF DEF., DIRECTIVE 2311.01E (May 9, 2006) (stating that reports must be submitted for possible, suspected or alleged violations of IHL for which there is credible information); Colin Cusack, *We’ve Talked the Talk, Time to Walk the Walk: Meeting International Human Rights Law Standards for U.S. Military Investigations*, 217 MIL. L. REV. 48, 83 (2013) (the directive “neglects to provide any guidance on how to conduct the administrative investigation [most often used for alleged IHL violations] or what standard to use to review it”).

177. U.S. LAW OF WAR MANUAL, *supra* note 46, at 1073.

178. Sean Watts, *supra* note 150, at 5, 9. These deliberations do happen, however. As explained by Sean Watts, “The appropriate legal standard required to initiate an investigation is ‘credible information of a suspected law of war violation’. Since ‘credible information’ leaves considerable room for interpretation, the process of initiating an investigation is very much Command-driven, as it is the CO who has the power to determine what constitutes ‘credible evidence’ in a given situation.” *Id.* at 4–5.

not currently following these requirements.”<sup>179</sup> Moreover, detailed information about how many preliminary fact-finding assessments are actually conducted in practice in different theaters, and how decisions are made regarding the pursuit of further investigation, is not publicly available.<sup>180</sup> This makes it difficult to publicly determine the propriety and timeliness of these investigations.

The transparency problem is exacerbated by the lack of effective accountability measures for victims throughout the investigation. Though the transparency norm is suggested by soft law as discussed above, without provisions requiring transparency for victims, access to the truth is not guaranteed. Two dynamics flow from this: (1) investigations may be kept totally confidential; and (2) engagement with victims will happen on an ad hoc basis. As an example of the first point, the type of investigations typically used by the U.S. army into IHL violations “specifically precludes an investigating officer from sharing the contents of the investigation with anyone, including the next-of-kin or members of the public, other than the appointing authority.”<sup>181</sup> This means that the findings of an investigative report may not be released unless “the appointing authority directs otherwise or [it is] required by law or regulation.”<sup>182</sup> To the second point, though some communities or affected populations are better situated to advocate for the truth surrounding investigations, many are not and as a result lack access to information about the process and substance of

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179. Cusack, *supra* note 176, at 83–84 (quoting DEP’T OF DEF., DIRECTIVE 2311.01E).

180. *See, e.g.*, Jackson, *supra* note 50, at 97 (confirming that the U.S. Army has a practice of reporting incidents that might be serious, and should consider the severity of the incident, the potential for adverse publicity, and the potential consequences of the incident); Cusack, *supra* note 176, at 83 (explaining that Chairman of the Joint Chiefs of Staff Instruction 5810.01D requires the commander of a unit to perform a preliminary inquiry into alleged IHL violations, but provides no guidance on how the investigation is to be conducted or to be reviewed); Sean Watts, *Domestic Investigation of Suspected Law of Armed Conflict Violations: United States Procedures, Policies, and Practices*, in 14 Y.B. OF INT’L HUMANITARIAN L. 85, 96 (2012) (describing the process of preliminary stages of fact-finding as “operational debriefings, ‘hot washes,’ or after-action reviews . . . [that] are conducted after nearly every military operation . . . to capture tactical, technical and operational lessons,” which could trigger the requirement to report).

181. Cusack, *supra* note 176, at 74.

182. *Id.* at 75.

investigations.<sup>183</sup> These politics around access to information were borne out even in the high profile Kunduz investigation, where it was reported that the U.S. military met with MSF and the Afghan government to keep them updated,<sup>184</sup> but many family members of those affected were not aware of the U.S. investigation until the report was released.<sup>185</sup>

Moreover, there is no international mechanism that provides compliance oversight, and attempts to create one have floundered. The only permanent, treaty-based international accountability mechanism with specific competence in IHL is

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183. The politics of victimhood and which groups are considered “legitimate,” and to what end, are immensely complex. However, suffice it to say that following the experience of atrocities, certain groups are better situated to advocate for their rights relative to others. This disparity results from a number of factors, ranging from attributes attendant to the victims themselves such as gender, race, nationality, wealth, etc., to attributes attendant to the crime and the perpetrator. See, e.g., Kieran McEvoy & Kristen McConachie, *Victimology in Transitional Justice: Victimhood, Innocence and Hierarchy*, 9 EUR. J. CRIMINOLOGY 527 (discussing the political and social construction of victimhood); Margaret Urban Walker, *Gender and Violence in Focus*, in THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS 18 (Ruth Rubio-Marín ed., 2009) (describing the process through which serious crimes can lead certain victims to more exposure to harm and marginalization, and that these consequences are gendered).

184. General Votel Press Briefing, *supra* note 34 (“I’d also like to highlight that we have made it a priority to engage with Doctors Without Borders and the Afghan government to keep them updated and to offer our support where we can.”).

185. Ackerman & Rasmussen, *supra* note 32 (noting that many in Kunduz had not heard of the U.S. investigation’s report until its release). General Votel also explained that condolence payments were provided to those affected, but these typically are not known to also include explanations. General Votel Press Briefing, *supra* note 34. Further, the process for condolence payments is quite opaque. See Danielle Moylan, *How Much for Your Child? Afghan Condolence Payments Draw Scrutiny*, NEWSWEEK, April 9, 2016, <http://www.newsweek.com/2016/04/22/afghanistan-condolence-payments-kunduz-doctors-without-borders-airstrike-us-446017.html> (describing victims’ frustrations about the condolence payments offered following the Kunduz strike and the lack of transparency around the investigation and the condolence process). Victims’ confusion about how to receive condolence payments and what they mean also appears in other theaters of operation. Cora Currier, *Hearts, Minds and Dollars: Condolence Payments in the Drone Strike Age*, PROPUBLICA (June 3, 2016, 10:15 AM), <https://www.propublica.org/article/hearts-minds-and-dollars-condolence-payments-in-the-drone-strike-age> (“For the local Iraqi population, there was often a lack of awareness about such payments and confusion about how to receive them.”).

the IHFFC.<sup>186</sup> The IHFFC was officially constituted in 1991 as a permanent international body whose main purpose is to investigate allegations of grave breaches and serious violations of IHL.<sup>187</sup> However, an enquiry may only be initiated at the request of a State Party that has accepted the competence of the IHFFC and requires the consent of the parties to the conflict.<sup>188</sup> This hobbled structure resulted from a bifurcation of negotiations “at the 1977 Plenary Meeting of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which created the IHFFC.”<sup>189</sup> One group supported a strong commission and the other feared “intolerable encroachment on the sovereignty of states.”<sup>190</sup> The result is that the IHFFC is largely dependent on State action. As noted by Charles Garraway, an IHFFC Commissioner, “States created the [IHFFC]. Only States can decide whether this child of the 1970s will be allowed to reach adulthood.”<sup>191</sup>

Additionally, the ICRC and the Swiss government have urged States Parties to the Geneva Conventions to adopt their proposed IHL compliance initiative.<sup>192</sup> At the outset of this initiative in 2012, the initiative’s goal was to enhance respect for IHL by developing stronger international mechanisms.<sup>193</sup> By December 2015, after nearly four years of extensive consultation, States were unable to reach agreement on a new mechanism proposed by the ICRC and Switzerland to strengthen compliance with IHL. Unable to gain traction for a mechanism, the ICRC-Swiss initiative put forth the concept of holding an annual meeting of States Parties to the Geneva Conven-

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186. Int’l Humanitarian Fact-Finding Comm’n [IHFFC], *Compilation of Procedural Rules According to Article 90 of the First Protocol Additional to the Geneva Conventions*, at 6 (2014), [http://www.ihffc.org/Images/ihffc-brochure-2014-\(a5-cmyk-en\).pdf](http://www.ihffc.org/Images/ihffc-brochure-2014-(a5-cmyk-en).pdf).

187. *Id.* at 5.

188. *Id.* at 9.

189. Grace & Bruderlein, *supra* note 43, at 4.

190. *Id.* (quoting the ICRC Commentary on the Additional Protocols).

191. Charles Garraway, *The International Humanitarian Fact-Finding Commission*, 34 COMMONWEALTH L. BULL. 813, 816 (2008).

192. Int’l Comm. of the Red Cross [ICRC], *Strengthening Compliance with International Humanitarian Law: The Work of the ICRC and the Swiss Government* (June 3, 2016), <https://www.icrc.org/en/document/strengthening-compliance-international-humanitarian-law-ihl-work-icrc-and-swiss-government>.

193. *Id.*

tions in which they could share best practices and technical expertise.<sup>194</sup> Rather than agreeing to this meeting, “States agreed to launch an inter-governmental process to find ways to enhance the implementation of IHL.”<sup>195</sup> Thus, given the resistance of States to an international accountability mechanism, it is important for advocates to pressure States to improve their own investigation processes.

### B. *The Human Rights Approach to Investigations*

In addition to the problems related to the centrality of the chain of command to investigation, the lack of transparency, and the lack of accountability, IHL simply fails to provide much guidance in terms of what investigators should do to comply with international law. In contrast, IHRL jurisprudence has derived four principles that are required for states to fulfill their duty to investigate: (1) independence and impartiality, (2) effectiveness, (3) promptness, and (4) transparency.<sup>196</sup> Some of these features, such as transparency, are

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194. Int’l Comm. of the Red Cross [ICRC], 32nd Int’l Conference of the Red Cross and the Red Crescent, *Strengthening Compliance with International Humanitarian Law: Concluding Report*, at 14, ICRC Doc. 32IC/15/19/2 (Oct. 2015), [http://rcrcconference.org/wp-content/uploads/sites/3/2015/04/32IC-Concluding-report-on-Strengthening-Compliance-with-IHL\\_EN.pdf](http://rcrcconference.org/wp-content/uploads/sites/3/2015/04/32IC-Concluding-report-on-Strengthening-Compliance-with-IHL_EN.pdf) (prepared in conjunction with the Swiss Fed. Dep’t of Foreign Affairs) (describing an IHL compliance system in which a central component would be a regular Meeting of States to examine IHL issues).

195. In essence, the States agreed to set up another meeting. Press Release, Int’l Comm. Of the Red Cross, No Agreement by States on Mechanism to Strengthen Compliance with Rules of War (Dec. 10, 2015), <https://www.icrc.org/en/document/no-agreement-states-mechanism-strengthen-compliance-rules-war>.

196. These elements are widely accepted as the requirements of an effective investigation. See, e.g., G.A. Res. 147, *supra* note 89, ¶ 3(b); Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories: Rep. of the U.N. Fact-Finding Mission on the Gaza Conflict, ¶ 1814, U.N. Doc. A/HRC/12/48 (2009) (acknowledging that investigations must be governed by “universal principles of independence, effectiveness, promptness and impartiality”); Turkel Report, *supra* note 169, at 137–38 (recognizing these principles as key to an effective investigation); see also Cohen & Shany, *supra* note 87, at 61–64 (discussing European Court of Human Rights jurisprudence on the duty to investigate under IHRL and identifying effectiveness, independence, promptness, and transparency); Schmitt, *supra* note 91, at 55 (offering that these features derive from IHRL, but may also be found in IHL). The European Court of Human Rights is the international human rights court established by the European Convention on

integrated into the IHL investigations regime. However, they are more robustly articulated in the context of IHRL.

Courts have found that in order for an investigation to be considered independent and impartial, there must be “a lack of hierarchical or institutional connection” between the individuals or bodies performing the investigation and those being investigated.<sup>197</sup> As explained by the European Court of Human Rights (ECtHR) in its hallmark *Al-Skeini v. United Kingdom* decision, this obligation is not fulfilled merely by the lack of hierarchical or institutional connection, as there must also be practical independence.<sup>198</sup> In the case of the United Kingdom, this meant that for any investigation into acts allegedly committed by British soldiers, “it was particularly important that the investigating authority was, and was seen to be, operationally independent of the military chain of command.”<sup>199</sup> Although it is not prohibited, “as an empirical matter, subjecting allegations of violations to military jurisdiction often leads to impunity.”<sup>200</sup> This is even more contentious when the investigation turns to policy questions, as opposed to specific incidents, which could potentially implicate high-ranking officials.<sup>201</sup> Moreover, when investigations are not completed in

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Human Rights and is a leader in development of human rights jurisprudence. See MICHAEL D. GOLDBERGER, *A PEOPLE’S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS 2* (2009).

197. *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. 589, 657 (2011).

198. *Id.*

199. *Id.*

200. Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions) *Rep. on Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, ¶ 36, U.N. Doc. E/CN.4/2006/53 (Mar. 8, 2006).

201. See *Al-Skeini*, 53 Eur. H.R. Rep. at 656, 659 (noting that investigations should consider “not only the actions of the State agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question” and “the instructions, training and supervision given to soldiers”); see e.g., *U.S. Must Investigate Alleged War Crimes*, HUMAN RIGHTS WATCH (May 8, 2001), <https://www.hrw.org/news/2001/05/08/us-must-investigate-alleged-war-crimes> (suggesting, for example, that investigations into allegation of possible war crimes by U.S. troops during the Vietnam War would have to consider U.S. military policies, orders and practices that were determined at senior policy levels).

an independent and impartial way, it undermines the legitimacy of the investigation and public trust.<sup>202</sup>

Investigations into violations must also be effective and prompt. The effectiveness criteria set out by the ECtHR, recognizes that “[t]his is not an obligation of result, but of means” requiring authorities to take all reasonable steps to collect evidence.<sup>203</sup> In *Al-Skeini*, this included at least interviewing key witnesses and the complainant.<sup>204</sup> After an alleged violation has occurred, it must be investigated as soon as possible and be conducted expeditiously.<sup>205</sup> The complexity of the case and the difficulty in obtaining evidence, which is especially relevant to situations of armed conflict, will be considered in the assessment of the standard of timeliness.<sup>206</sup>

Lastly, investigations must permit some degree of transparency, to protect the rights of victims and ensure accountability through public scrutiny. Though the ECtHR acknowledges that different levels of public scrutiny might be required depending on the scenario, “in all cases . . . next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.”<sup>207</sup> Victims have a right to the truth, even if it is not absolute during armed conflict.<sup>208</sup> When States fail to explain the legal ratio-

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202. See e.g., Ackerman & Rasmussen, *supra* note 32 (highlighting MSF’s unease that the investigation into Kunduz was “performed by the same U.S. military that ‘committed the attack’”).

203. *Al-Skeini*, 53 Eur. H.R. Rep. at 657.

204. Cusack, *supra* note 176, at 70 (referencing *Al-Skeini*, 53 Eur. H.R. Rep. 589).

205. *Al-Skeini*, 53 Eur. H.R. Rep. at 657 (“A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”).

206. *Id.* at 656.

207. Cusack, *supra* note 176, at 74 (citing *McKerr v. United Kingdom*, 34 Eur. Ct. H.R. 20, 25 (2002)).

208. See G.A. Res. 147, *supra* note 89, ¶22(b) (satisfaction should include “[v]erification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations”); Cusack, *supra* note 176, at 75.

nale and factual bases for the selection of certain targets, they operate in an accountability vacuum.<sup>209</sup> Furthermore, as noted by Philip Alston, without transparency, the international community has little information to assess whether a State is abiding by its obligations under international law:

It is not possible for the international community to verify the legality of a killing, to confirm the authenticity or otherwise of intelligence relied upon, or to ensure that unlawful targeted killings do not result in impunity. The fact that there is no one-size-fits-all formula for such disclosure does not absolve States of the need to adopt explicit policies.<sup>210</sup>

Transparency therefore serves the interests of victims as well as the international legal order.

### C. *The Lex Specialis Applicabile to IHL Investigations*

With its vague standards and lack of oversight mechanism, the framework created by IHL for investigations into allegations of IHL violations leaves great discretion to States, creating an accountability problem. Most scholars agree that IHRL and IHL apply concurrently during times of armed conflict, though disagreement remains about how these two bodies of law jointly regulate conflict and protection.<sup>211</sup> IHRL provides a necessary supplement to develop general principles and flesh out a concrete set of practices that militaries are expected to follow.<sup>212</sup> Moreover, recalling the work of Thomas Franck on treaty compliance, supplementing IHL with IHRL standards could potentially bolster the legitimacy of the investigation norm. Legitimacy of a norm is influenced by the norm's "determinacy, symbolic validation, coherence, and adherence (to

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209. Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Addendum: Study on Targeted Killings*, ¶ 3, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010).

210. *Id.* ¶ 92.

211. Schmitt, *supra* note 91, at 52.

212. See Cusack, *supra* note 176, at 50 (arguing for the application of IHRL to situations involving armed conflict); Cohen & Shany, *supra* note 87, at 59 (arguing for the consideration of IHRL standards for investigations in situations of armed conflict because they are "more developed," have substantive proximity to IHL norms, and doctrinally may be applied concurrently with IHL).

a normative hierarchy).”<sup>213</sup> The more these features are present in a rule, the greater the rule appears to exert a compliance pull on States.<sup>214</sup> The determinacy factor is most pertinent to this analysis, since it measures “the ability of the text to convey a clear message, to appear transparent in the sense that one can see through the language to the meaning.”<sup>215</sup> Rules with clear meanings have “a better chance than those that do not regulate the conduct of those to whom the rule is addressed or exert a compliance pull on their policymaking process.”<sup>216</sup> Thus, from a legal and policy perspective, it makes sense to consider how IHRL and IHL interact to clarify the duty to investigate alleged violations of IHL.

Three models have been used to determine how IHL and IHRL relate to each other: the Displacement Model, the Complementarity Model, and the Conflict Resolution Model.<sup>217</sup> Under the Displacement Model, IHL displaces IHRL as it is the *lex specialis*—the law governing the specific subject matter—and IHRL is the *lex generalis*—the law governing general matters.<sup>218</sup> The United States has historically adopted the Displacement Model.<sup>219</sup>

The Complementarity Model provides that both bodies of law may be applied and interpreted in concert with each other. When one body of law has gaps, the other may fill those gaps.<sup>220</sup> This model is based on the idea that IHL and IHRL have complementary purposes to protect human life and dignity, and may therefore be interpreted in a complementary way.<sup>221</sup> The weakness of this approach is that in the event of

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213. Thomas Franck, *Legitimacy in the International System*, 82 AM. J. INT’L L. 705, 712 (1988). Franck explains that compliance pull captures the capacity of a rule to exert pressure on States to comply. Franck argues this idea is closely linked to the rule’s inherent legitimacy, which he evaluates by considering the rule’s determinacy, symbolic validation, coherence and adherence. *Id.* at 712–13.

214. *Id.*

215. *Id.* at 713.

216. *Id.*

217. See generally Oona A. Hathaway, et al., *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883, 1894 (2012).

218. *Id.* at 1894, 1903 n.64.

219. *Id.* at 1896.

220. *Id.* at 1897.

221. *Id.*

true conflict between IHL and IHRL, the model does not offer guidance.<sup>222</sup> Further, it may also require too much compromise, diluting “both bodies of law to force them into a relationship of interpretation.”<sup>223</sup> Moreover, it does not answer the question of whether a “silence” in IHL was purposeful or whether it should be “filled” by IHRL.<sup>224</sup>

The Conflict Resolution Model provides that IHL and IHRL apply continuously as they would under the Complementarity Model, but that when IHL and IHRL are in conflict there are three possible decision rules for deciding which law to apply.<sup>225</sup> The Conflict Resolution Model is best illustrated by Oona Hathaway et al.’s decision tree provided in Figure 1.<sup>226</sup>

Specific to this inquiry, Hathaway et al. describe that legal rules are either in “relationships of interpretation,” where they may be applied in conjunction with one another, or “relationships of conflict,” where a decision maker must select a rule to resolve the conflict between them.<sup>227</sup> Both rules have the benefit of simplicity, but do not go far enough to capture how IHL or IHRL may be better suited to regulate certain situations.<sup>228</sup>

Hence, the final decision rule is the rule of specificity, which recognizes the different capabilities of IHL and IHRL and provides a more adaptable lens to situations of armed conflict. This rule provides that when there is a relationship of conflict “between the two bodies of law, the law more specifically tailored to the situation prevails.”<sup>229</sup> In order to determine which rule is more specific on an issue, Hathaway et al. advise examining: (1) the wording and content of the norms

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222. *Id.* at 1901 (explaining that the model is “grounded in the assumption that conflicts between the two systems of law are always reconcilable through complementary interpretation,” which is not always the case).

223. *Id.* at 1902.

224. This would be another example of a true conflict, as silence may be interpreted as purposeful or not. See generally Martin Ris, *Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties*, 14 B.C. INT’L & COMP. L. R. 111 (1991) (discussing the different schools of thought regarding treaty interpretation in the face of textual silence).

225. Hathaway, *supra* note 217, at 1906.

226. *Id.* at 1905.

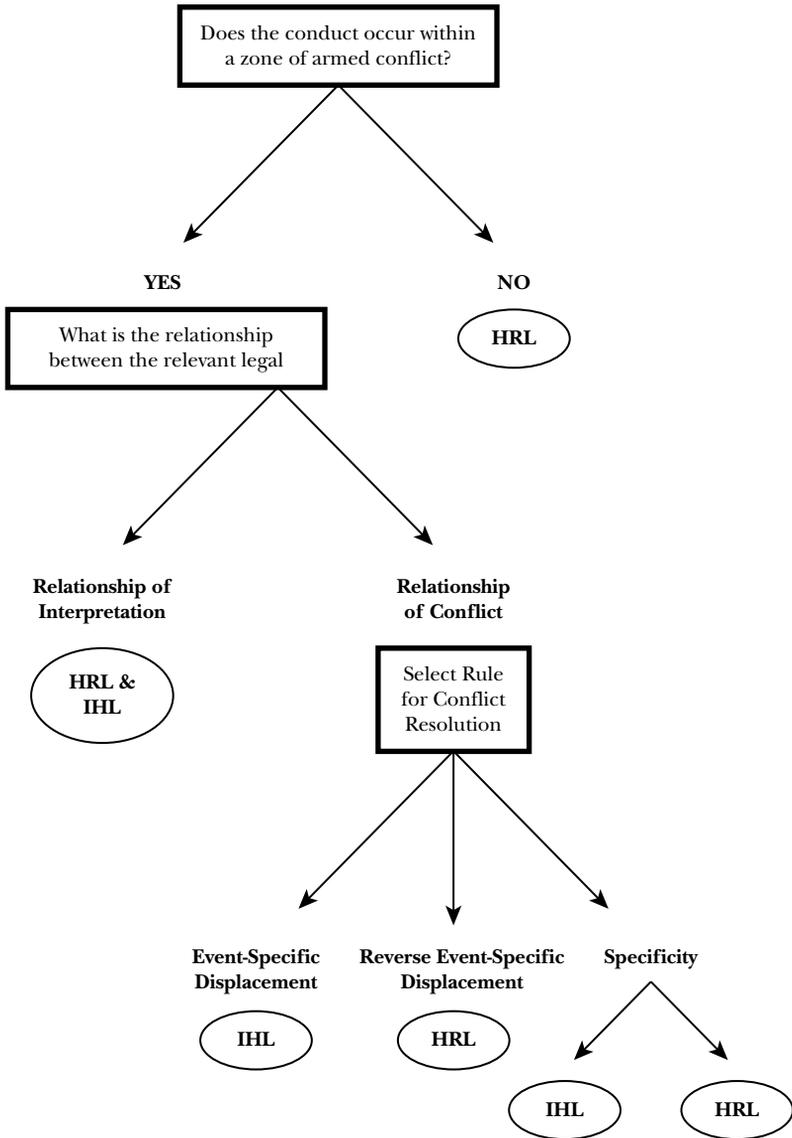
227. *Id.* at 1903.

228. *Id.* at 1908, 1910.

229. *Id.* at 1910.

themselves; (2) the nature of the norms in question; (3) whether a State exercises effective control; (4) expressions of intent by parties to relevant treaties; and (5) State practice.

FIGURE 1: OONA HATHAWAY ET AL.'S CONFLICT RESOLUTION MODEL



Most authors agree that IHL and IHRL apply during times of armed conflict, and that IHL, as the *lex specialis*, would greatly influence the parameters of any investigations into alleged IHL violations.<sup>230</sup> However, there are some detractors. For instance, Sean Watts, who teaches at the U.S. Military Academy at West Point, emphatically resists the notion that IHRL standards have binding effect on IHL investigations.<sup>231</sup> As he explains, “the evidence that States have prescribed for themselves details concerning the processes of investigation through international law is thin.”<sup>232</sup> Watts points to the lack of State support for the IHFFC and that the provisions establishing the IHFFC itself provide that it can only be activated on the basis of State consent, suggesting States would also be unlikely to support IHRL encroachment on investigations.<sup>233</sup> While this is true, it neglects to acknowledge the human rights obligations to which many States have willingly consented.<sup>234</sup>

Other scholars have formulated more progressive perspectives on the application of IHRL standards. Though Schmitt does not believe IHRL sets the standard for an IHL investigation, he agrees that the four principles of independence, effectiveness, promptness and impartiality that are hallmarks of IHRL investigations are pertinent to judging the adequacy of investigations into war crimes.<sup>235</sup> However, he believes that since IHL is the *lex specialis*, compliance with these norms is determined by reference to IHL and the practical limitations of armed conflict.<sup>236</sup> Margalit echoes the same four

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230. See generally Cohen & Shany, *supra* note 87, at 59; Cusack, *supra* note 176, at 52; Jean-Marie Henckaerts, *Concurrent Application of International Human Rights Law and International Humanitarian law: Victims in Search of a Forum*, 1 HUMAN RIGHTS & INTERNATIONAL LEGAL DISCOURSE 95, 99 (2007).

231. Watts, *supra* note 180, at 104.

232. *Id.*

233. *Id.*

234. See Henckaerts, *supra* note 230, 100–04 (describing the following universal and regional human rights instruments: The International Convention on the Elimination of All Forms of Racial Discrimination, The International Covenant on Civil and Political Rights, The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, The European Convention for the Protection of Human Rights and Fundamental Freedoms, The American Declaration of the Rights and Duties of Man, The American Convention on Human Rights, and The African Charter on Human and Peoples’ Rights).

235. See generally Schmitt, *supra* note 91.

236. *Id.*

principles, and also acknowledges that the presence of an armed conflict will limit an investigation.<sup>237</sup> Cohen & Shany develop this further, concluding that IHL provides general principles for investigations, and that IHRL should be considered to flesh out the norms of investigation.<sup>238</sup> When there is parallel applicability, the more developed rules of IHRL should complement IHL.<sup>239</sup>

#### D. *Interim Conclusions*

In sum, IHL standards for investigations are highly deferential to States and this is expressed in large part through their vagueness about the criteria that should govern investigations into alleged IHL violations. This creates an accountability problem. Due to the importance of the command structure in reporting and investigating suspected violations, the quality and independence of the investigations relies heavily on the culture within that chain of command. Further, without specific transparency obligations, States may act with impunity and feel justified in not disclosing the substance and procedure of their investigations. Without the opportunity for public scrutiny and review, a major accountability pillar disappears, in addition to the victims' opportunity to learn the truth. These problems are exacerbated by the lack of a universal accountability mechanism and continued State reluctance to support meaningful compliance initiatives. The IHRL framework provides an effective response to some of these concerns, emphasizing the importance of independence and impartiality, effectiveness, promptness, and transparency to investigations. Using the Complementarity Model for determining the *lex specialis* to apply to investigations during situations of armed conflict imports these norms into IHL investigations, while also potentially strengthening the compliance pull of the duty to investigate by giving the norm greater determinacy.

### VI. STATE PRACTICE

Thus, in theory, States should be applying IHL and IHRL concurrently during armed conflict, and where IHRL can pro-

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237. See generally Margalit, *supra* note 108.

238. Cohen & Shany, *supra* note 87, at 59.

239. *Id.*

vide more specific and robust guidance it should influence the conduct of an investigation. This suggests that investigations should be independent and impartial, effective, prompt, and transparent. However, dual application of IHL and IHRL is still lacking, as seen from current global State practice. Against this backdrop, this section will review the different approaches to and categories of investigations into alleged IHL violations, highlighting U.S. practice.

#### A. *The Continental Approach v. the Common Law Approach*

States have clustered around two approaches to the obligation to investigate alleged IHL violations, each of which has implications for the standard of independence and impartiality. These are the continental approach and the common law approach.<sup>240</sup>

Under the continental approach, States separate the entity doing the investigation from the military chain of command, whereas the common law approach grants investigatory power to the military itself.<sup>241</sup> This structure of investigation has direct consequences on the issue of independence and impartiality.<sup>242</sup> In the continental approach, the conflict of interest created by the military being both “potential law-breaker and law-enforcer” is addressed in three ways.<sup>243</sup> In Germany, France, and the Netherlands, for example, “prosecutions of crimes committed by military personnel is carried out by civilian prosecutors” and ordinary criminal procedure controls.<sup>244</sup> In Belgium, which has a military prosecutor for military offenses, the military prosecutor typically operates completely separated from the chain of command.<sup>245</sup> Lastly, in Denmark and Poland, military prosecutors report to civilian officials.<sup>246</sup> These three methods insulate the investigators from potential influence of those whom they are investigating.

In contrast, under the common law approach, the military takes on primary responsibility for investigations and prosecu-

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240. *Id.* at 66–70.

241. *Id.* at 41.

242. *Id.* at 66–67.

243. *Id.* at 66.

244. *Id.*

245. *Id.*

246. *Id.*

tions, consistent with the emphasis in the treaty language on the importance of the commander's role.<sup>247</sup> Following several notable and public violations of IHL and IHRL by certain common law States, there has been a "tendency to detach investigations of military operations from the military chain of command."<sup>248</sup> This has meant a greater reliance on military police investigations as opposed to traditional investigations orchestrated by unit commanders on the ground.<sup>249</sup>

However, in the case of the United States, which also adopts a common law approach, this trend has not held. The United States still prioritizes internal, military command-focused processes, even though it has the option of conducting other kinds of investigations.<sup>250</sup> One of these investigations contemplated by the Department of Defense is a criminal investigation, such as one carried out by Army Criminal Investigation Command (CID).<sup>251</sup> These investigations are more likely to be independent, since "CID does not have to wait to receive a complaint to initiate an investigation, and because the decision to terminate an investigation is made entirely within CID channels."<sup>252</sup> However, in practice, the United States usually favors traditional command driven administrative investigations.<sup>253</sup> These processes are focused largely on efficiency and necessity, and as tools to ensure good order and discipline in order to fulfill the military objective, "rather than as a means to justice . . . or even international legal compliance."<sup>254</sup> U.S. investigations are largely subject to the needs of military commanders.<sup>255</sup> As noted by Dick Johnson, Special Assistant to the Judge Advocate General for Law of War Matters, one of the primary reasons investigations are important for military commanders is to reinforce command responsibility

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247. *Id.* at 67.

248. *Id.* at 67–70 (citing to Canadian forces killing civilians in Somalia, Australia's public shaming by its own Parliament regarding its military system of investigations, and the United Kingdom's extensive jurisprudential involvement in assessing its military investigations).

249. *Id.* at 67.

250. Watts, *supra* note 180, at 104.

251. Cusack, *supra* note 176, at 69.

252. *Id.*

253. *Id.* at 67.

254. Watts, *supra* note 180, at 104.

255. Jackson, *supra* note 50, at 98.

and fulfill the strategic objectives of counterinsurgency operations that require popular support and legitimacy:

You cannot win popular support by killing over twice as many civilians as insurgents in one's day engagement, and then attempting to lay the blame at the feet of that same population and their leaders . . . The strategic effect of failing to properly report and investigate law of war violations can be catastrophic for the mission.<sup>256</sup>

Though these are important operational concerns, conducting investigations like this does not seem to meet the standards of independence and impartiality, effectiveness, promptness, and transparency

The lack of effective investigations by these standards has occurred despite the fact that the U.S. government has implemented high-level reporting and investigative mandates. As previously mentioned, DOD Directive 2311.01E, provides:

It is DoD policy that:

4.1. Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.

. . . .

4.4. 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.

4.5. All reportable incidents are reported through command channels for ultimate transmission to appropriate U.S. Agencies, allied governments, or other appropriate authorities. Once it has been determined that U.S. persons are not involved in a reportable incident, an additional U.S. investigation shall be continued only at the direction of the appropriate Combatant Commander. The on-scene commanders shall ensure that measures are taken to preserve evi-

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256. *Id.*

dence of reportable incidents pending transfer to U.S., allied, or other appropriate authorities.<sup>257</sup>

However, as discussed in section V.A, reporting requirements are enforceable only by virtue of reporting or leaks of failed reporting.<sup>258</sup> Otherwise, failures to report go unnoticed, unless the incident is attention grabbing enough to garner significant media attention. Moreover, even investigations conducted outside of command influence eventually return to military command channels for decisions on disposition, publication, and prosecution.<sup>259</sup> This presents major problems from an independence and transparency perspective.<sup>260</sup>

### B. *Fact-Finding Assessments*

Prior to conducting criminal investigations or post-attack review, States undertake the preliminary step of the initial fact-finding assessment.<sup>261</sup> Not every death on the battlefield amounts to a war crime.<sup>262</sup> Though regrettable, the death or injury of combatants, civilians directly participating in hostilities, and collateral civilian casualties that are proportionate is permissible under IHL. The death of an individual is, therefore, not a *prima facie* prohibited act under IHL. However, if there is any reasonable suspicion that an unlawful act has occurred, an investigation will immediately be triggered.<sup>263</sup> This is carried out through an initial fact-finding assessment in response to reports of allegations of IHL violations.<sup>264</sup>

In the United States, preliminary investigations are conducted in response to possible, suspected or alleged violations of IHL “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 armed conflict (a ‘reportable incident’).”<sup>265</sup> A commander is re-

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257. DEP’T OF DEF., DIRECTIVE 2311.01E, *supra* note 176, at 2. This directive was released following the revelation of abuses at the Abu Ghraib detention facilities.

258. Watts, *supra* note 180, at 104.

259. *Id.*

260. *Id.* at 86, 104.

261. See Turkel Report, *supra* note 169, at 102.

262. See *infra* Section III.A.3.

263. Turkel Report, *supra* note 169, at 102.

264. Schmitt, *supra* note 91, at 59.

265. U.S. LAW OF WAR MANUAL, *supra* note 46, at 1071.

quired to report these and transmit them through command channels, “for ultimate transmission to appropriate U.S. agencies, allied governments, or other authorities.”<sup>266</sup> However, there is little guidance with respect to what is considered a “credible” allegation. Though there are several possible definitions of credible allegations, all of these have the following provisions in common: “[T]hey require a preliminary review of the facts available, consideration of the ‘totality of the circumstances,’ and application of a rule of reasonable suspicion to the reporting requirement.”<sup>267</sup>

A commander and his judge advocate typically conduct a “credibility review” through a commander’s inquiry (i.e., Rule for Court-Martial 303).<sup>268</sup> This consists of an informal preliminary inquiry of all reasonably available evidence by the commander or his designee.<sup>269</sup> In more complex cases, commanders are advised to seek assistance of law enforcement personnel.<sup>270</sup> Where there is doubt, commanders are advised to report the incident.<sup>271</sup> However, in the case of less serious violations of the law of war, such as, mutilation of an enemy corpse, failure to collect and bury the dead, or theft of detainee property, reporting may not be required “depending on the severity of the incident, the potential for adverse publicity, or the potential consequences of the incident.”<sup>272</sup> The outcomes of these initial assessments by the U.S. military are generally not available to the public. Moreover, reporting requirements vary by command and are not easily accessible, though advocacy organizations like the ACLU have managed through Freedom of Information Act requests to gain some insight into reporting procedures.<sup>273</sup>

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266. Jackson, *supra* note 50, at 96 (quoting DEP’T OF DEF., DIRECTIVE 2311.01E, *supra* note 176, at 2) (internal quotations omitted).

267. *Id.* at 99.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 102.

273. See e.g., U.S. CRIM. INVESTIGATION COMMAND, DEP’T OF THE ARMY, *Operational Memorandum 008-03, Initiation of Reports of Investigation (ROIs) and Rights Advisements in Current Deployed Situation in CENTCOM AOR* (Apr. 4, 2003), <https://www.aclu.org/files/projects/foiasearch/pdf/DODDOACID009362.pdf>.

C. *Criminal Investigations and Post-Attack  
Administrative Reviews*

If an initial assessment determines that further investigation is required, a State must then carry out a criminal or administrative investigation.<sup>274</sup> However, there is no clear threshold that triggers the duty to conduct criminal or administrative investigations.<sup>275</sup>

Nevertheless, State practice indicates that criminal investigations are opened when there is “reasonable suspicion” or “reason to believe” a criminal offense has been committed.<sup>276</sup> They are carried out in cases of serious allegations in order to “find the perpetrators and collect evidence for judicial proceedings.”<sup>277</sup> These investigations are complex and must abide by the rules of evidence and due process for a criminal proceeding.<sup>278</sup> Therefore, they are often conducted by an investigative body outside of the chain of command.<sup>279</sup>

In the United States, a criminal investigation is generally opened for *prima facie* violations, though the specific criteria on which Military Criminal Investigative Organization (MCIO) commanders determine whether to proceed is not publicly available.<sup>280</sup> These investigations may be compelled by “a notification or request from a commander, the request of the Department of Defense Inspector-General, or on [the MCIO’s] own initiative.”<sup>281</sup> In the case of particularly grave or complex cases, commanders typically conduct quick preliminary inquiries and forward the matter.<sup>282</sup> However, as noted previously, despite this distinction, it has been U.S. practice to use administrative investigations instead of criminal ones, in part because of resource constraints.<sup>283</sup> For example, in Iraq the Army Criminal Investigation Command

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274. See Margalit, *supra* note 108, at 173–75.

275. Turkel Report, *supra* note 169, at 255–56.

276. *Id.*

277. Margalit, *supra* note 108, at 173.

278. *Id.*

279. *Id.*

280. Turkel Report, *supra* note 169, at 256.

281. *Id.*

282. *Id.* at 257, 259 (“Though MCIO investigations are conducted by members of the armed forces, they have separate reporting chains, usually to the Chief of Staff and Secretary of the relevant service.”).

283. Cusack, *supra* note 176, at 67.

“simply lacked enough agents to investigate alleged law of war violations in locations where violations had been reported. Special Agents in Charge (SACs) also struggled with the issue of transportation. Because transportation in Iraq could be difficult, SACs never knew when an agent sent into the battlespace might be able to return. Thus, a SAC who had a limited number of CID agents assigned to him, with numerous personal protection and other missions, often [chose] not to send an agent to investigate law of war allegations.”<sup>284</sup>

For cases that do not implicate criminal responsibility, post-attack administrative reviews are often deemed sufficient, though they could lead to further investigations.<sup>285</sup> Examples of a post-attack review include administrative investigations for the purpose of paying compensation to injured civilians and the AR 15-6 investigation conducted in Kunduz.<sup>286</sup> Though State practice does not indicate a requirement for who conducts these investigations, they are typically carried out by commanders, military legal advisers, civilian experts, or members of the military police.<sup>287</sup> These reviews are less resource intensive and are not bound by rules of evidence or burdens of proof, nor do they aim to assign individual criminal responsibility.<sup>288</sup> The scope of review will depend on the seriousness of civilian damage, the complexity of the matter, and the practical limitations of investigations in the field.<sup>289</sup>

The U.S. military relies heavily on post-attack reviews such as the AR 15-6 investigations.<sup>290</sup> Even in cases that should have triggered a criminal investigation, because of resource constraints the United States utilized the administrative review mechanism. In Iraq, this meant that “AR 15-6 investigations into alleged unlawful killings (similar to situations described in the Al-Skeini case) may have consisted of little more than a platoon leader interviewing various squad members involved

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284. *Id.*

285. *See* Margalit, *supra* note 108, at 176.

286. *Id.*

287. *Id.* at 175–76.

288. *Id.* at 176.

289. *Id.*

290. Cusack, *supra* note 176, at 67.

in the incident.”<sup>291</sup> This fails to meet the standards for independence and impartiality.<sup>292</sup> The U.S. Army recently released a new guide on AR 15-6 investigations, providing more guidance to investigating officers, some further insight into the investigations process, and potentially more standardization of process.<sup>293</sup> However, even with the revisions the AR 15-6 present accountability problems. For instance, once the investigation is completed, the findings are returned to the approval authority for legal review.<sup>294</sup> This means the process lacks operational independence. When there is an adverse outcome for a subject of an investigation, that individual may request a reconsideration of the finding.<sup>295</sup> In the event there is no adverse outcome, however, it does not appear to be the case that anyone can appeal that decision.<sup>296</sup> The reliance on these types of investigations is troubling from an accountability perspective.

## VII. CONCLUSION

The release of the AR 15-6 investigation into the strike on the MSF facilities in Kunduz was accompanied by a press release, explaining that:

[T]his tragic incident was caused by a combination of human errors, compounded by process and equipment failures. Fatigue and high operational tempo also contributed to the incident. These factors contributed to the “fog of war,” which is the uncertainty often encountered during combat operations. The investigation found that this combination of factors caused both the ground force commander and the air crew to believe mistakenly that the air crew was

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291. *Id.*

292. *Id.* at 67–68.

293. See generally DEP’T OF THE ARMY, ARMY REG. 15-6: PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS (Apr. 1, 2016), <http://armypubs.army.mil/Search/ePubsSearch/ePubsSearchDownloadPage.aspx?docID=0902c85180010373>.

294. *Id.* at 14.

295. *Id.* at 19.

296. *Id.* (stating that the right to reconsideration rests with a “subject, suspect, or respondent (such as an officer against whom an adverse finding was made)” but making no mention of others, such as victims and their families, having a right to request reconsideration).

firing on the intended target, an insurgent-controlled site approximately 400 meters away from the MSF Trauma Center.<sup>297</sup>

MSF responded to the release of the report with dismay. It acknowledged the U.S. military's efforts to conduct an investigation into the incident, but restated that it "cannot be satisfied solely with a military investigation into the Kunduz attack" and reiterated its request for an independent and impartial investigation by the IHFFC.<sup>298</sup> Notably, however, a number of reactions to the Kunduz report have been positive, highlighting its extraordinary transparency and candid admission that U.S. forces violated the law of armed conflict,<sup>299</sup> though, other observers joined MSF's critique after the report, in particular on the legal analysis and question of criminality, even the Kunduz investigation reveals the gap between the IHL framework as set out in this note and its interpretation by States.

Further, despite the procedural soundness of the investigation from a U.S. legal perspective and U.S. interpretation of IHL, a sense of dissatisfaction remains. So too does a lingering sense that meaningful accountability is still lacking, even though administrative action was taken against individuals involved and condolence payments were provided to families of the victims. This is likely related to the fact that the IHL framework, especially as interpreted by the United States, is not responsive to notions of justice, truth-telling, victim participation, and other core tenets of accountability that are part of IHRL investigations. Although this interpretation is justifiable through an IHL analysis of States' obligations, it is myopic in

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297. Press Release, U.S. CENTRAL COMMAND, CENTCOM Releases Investigation into Airstrike on Doctors Without Borders Trauma Center (Apr. 29, 2016), <http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/904574/april-29-centcom-releases-investigation-into-airstrike-on-doctors-without-borde/>.

298. Press Release, Médecins Sans Frontières, Kunduz: Initial Reaction to Public Release of U.S. military investigative report on the attack on MSF trauma hospital (Apr. 29, 2016), <http://www.msf.org/en/article/kunduz-initial-reaction-public-release-us-military-investigative-report-attack-msf-trauma>.

299. Joshua Andresen, *Transparency, Review, and Relief: The Far-Reaching Implications of the Kunduz Report*, JUST SECURITY (May 13, 2016, 3:41 PM), <https://www.justsecurity.org/31056/transparency-kunduz-report/>; Adil Ahmad Haque, *What the Kunduz Report Gets Right (and Wrong)*, JUST SECURITY (May 10, 2016, 10:00 AM), <https://www.justsecurity.org/30986/kunduz-report-and-wrong/>.

its neglect of IHRL and fails to meet the demands of individuals affected by armed conflict. With the increasing application of IHRL to situations of armed conflict and the continuing outrage about apparent impunity for striking medical facilities and schools during armed conflict, this position may soon become untenable from the perspective of public opinion. Perhaps if the language and practice of human rights had been incorporated more in this investigation, there would be greater sense a step had been taken toward justice.

This tension, caused by the sense of frustration over accountability questions in contrast with the satisfaction of a procedurally sound investigation, underscores the need for greater application of international human rights standards to IHL investigations at all levels, from preliminary fact-finding assessment through criminal investigations. This should be a goal for human rights activists as well as military strategists. Not only because it is the correct interpretation of the law that honors the origins of IHL and IHRL and would better fulfill States' human rights obligations, but also because this would support the military objective of furthering a war-fighting strategy that relies on support of local populations and continued legitimacy. States must take their international obligations seriously, especially as these obligations embody norms intended to protect civilians and aid workers when they are at their most vulnerable. It would be deeply shameful for states to abandon the humanity the norms represent and the people they were meant to protect.