

TOWARDS ACCOUNTABILITY: U.S. INVESTIGATIONS OF CIVILIAN  
HARM UNDER INTERNATIONAL LAW

*John Ramming Chappell\**

ABSTRACT

*Recent reporting and research by journalists and non-governmental organizations have described systemic flaws in investigations of civilian harm from U.S. military operations. New analysis has resulted in unprecedented Cabinet-level commitment to improve the Department of Defense's approach to civilian harm, a commitment that led to the development of the Civilian Harm Mitigation and Response Action Plan. This Article argues that flaws in investigations undermine accountability for civilian harm and that the Department of Defense should improve investigation practices. In light of issues with investigation procedures, this Article discusses the relationship between civilian harm and alleged war crimes and applies international legal obligations and guidelines for investigations of alleged war crimes to U.S. investigation procedures. The Article assesses possible implications for complementarity under the Rome Statute and prosecutions of U.S. persons at the International Criminal Court. The Article closes with recommendations for improvement of investigation procedures.*

---

\* Copyright © John Ramming Chappell is a joint J.D. and M.S. in Foreign Service candidate, 2023, at Georgetown University. I would like to thank Professor Jane Stromseth for her valuable feedback and support in writing this Article. I am grateful to Annie Shiel for her collaboration on a related publication and to Katie Dames for reviewing a draft of this Article. Finally, thanks to the UC Davis Journal of International Law and Policy staff for their editorial work. Any errors or oversights are mine alone.

## TABLE OF CONTENTS

I. INTRODUCTION .....	52
II. IMPUNITY IN WAR .....	55
A. The United States and Accountability .....	55
B. Investigations: The Bedrock of Accountability .....	59
III. TURNING A BLIND EYE.....	60
A. International Legal Standards for Investigations of Possible War Crimes.....	61
1. The Existence of an Obligation to Investigate.....	61
2. Civilian Harm and the Duty to Investigate.....	63
3. The Substance of the Obligation to Investigate.....	64
B. Shortfalls in U.S. Investigations of Civilian Harm .....	66
1. Obligation to Investigate .....	67
2. Thoroughness .....	69
3. Impartiality and Independence .....	71
C. Last Resort.....	72
1. The United States and the ICC: A Rocky Relationship.....	73
2. ICC Complementarity .....	74
IV. TOWARDS ACCOUNTABILITY .....	77
A. Promising Steps .....	78
B. Work to Be Done.....	80
C. Sustainable Change.....	83
V. AMERICAN ACCOUNTABILITY IN A CRUMBLING WORLD.....	84

*Inter arma enim silent lēgēs.*

For among arms, the laws are silent.

Cicero

## I. INTRODUCTION

In March 2019, Da'esh, known in English as the Islamic State in Iraq and the Levant (ISIL), made its last stand in the eastern Syrian town of Baghuz.<sup>1</sup> A U.S. military drone circled above the town, searching for military targets.<sup>2</sup>

---

<sup>1</sup> See *Islamic State Group Defeated as Final Territory Lost, US-Backed Forces Say*, BBC NEWS (Mar. 23, 2019), <https://www.bbc.com/news/world-middle-east-47678157>.

<sup>2</sup> Dave Philipps & Eric Schmitt, *How the U.S. Hid an Airstrike That Killed Dozens of Civilians in Syria*, N.Y. TIMES (Nov. 13, 2021), <https://www.nytimes.com/2021/11/13/us/us-airstrikes-civilian-deaths.html>.

On the northern banks of the Euphrates River, the drone captured images of a large crowd of women and children.<sup>3</sup>

Suddenly, a U.S. F-15E strike fighter jet “streaked across the drone’s high-definition field of vision and dropped a 500-pound bomb on the crowd, swallowing it in a shuddering blast. As the smoke cleared, a few people stumbled away in search of cover. Then a jet tracking them dropped one 2,000-pound bomb, then another, killing most of the survivors.”<sup>4</sup>

The U.S. military initially assessed that the bombing killed approximately seventy people, most of them women and children.<sup>5</sup> Later assessments estimated the death toll at eighty.<sup>6</sup> But the strike—one of the largest civilian casualty events of the campaign against Da’esh—went unacknowledged.<sup>7</sup> An Air Force lawyer flagged the incident as a potential war crime, which triggered an obligation under international humanitarian law to conduct an investigation.<sup>8</sup>

But no investigation occurred.<sup>9</sup> “The death toll was downplayed. Reports were delayed, sanitized and classified. United States-led coalition forces bulldozed the blast site. And top leaders were not notified.”<sup>10</sup> The Department of Defense did not publicly acknowledge that the strike killed civilians. The details of the Baghuz strike only became known to the public as part of a series of investigative reports by the New York Times in 2021.<sup>11</sup> After the reporting, the Department of Defense mounted an investigation that faulted flaws in the initial review of the Baghuz strike but resulted in no disciplinary measures and determined that no rules of engagement or law of war violations occurred.<sup>12</sup> A senior Department of Defense official acknowledged that the United States had “relied on faulty intelligence from Syrian partners.”<sup>13</sup> As of May 2022, the full investigation remains classified, and the Department of Defense has only released a two-page summary.<sup>14</sup> According to the New York

---

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *See id.*

<sup>9</sup> *See id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *See* Eric Schmitt & Dave Philipps, *Pentagon Faults Review of Deadly Airstrike but Finds No Wrongdoing*, N.Y. TIMES (May 17, 2022), <https://www.nytimes.com/2022/05/17/us/politics/us-airstrike-civilian-deaths.html>.

<sup>13</sup> *Id.*

<sup>14</sup> Michael X. Garret, Dep’t of Army, Executive Summary: Review of the Civilian Casualty Incident that Occurred on 18 March 2019 in Baghuz, Syria, DEP’T OF DEFENSE (May 11, 2022), <https://media.defense.gov/2022/May/17/2002999192/-1/-1/1/EXECUTIVE-SUMMARY->

Times, the Department of Defense classified all adult men killed in the strike as civilians as combatants, regardless of whether they were armed.<sup>15</sup> The Department did not provide any rationale for how it determined combatant status.<sup>16</sup>

This paper is about accountability for the deaths at Baghuz – and other civilian casualties from U.S. military operations – and U.S. compliance with the body of law designed to prevent them. Engaging with both legal and moral frameworks, this paper argues that the United States should do more to investigate civilian harm and that it is legally required to better investigate alleged war crimes.

Section I of this paper outlines why the United States has an important role in promoting accountability in war and then highlights how investigations underpin accountability. Section II discusses international legal obligations to investigate alleged war crimes, applies those obligations to U.S. investigation practices, and considers the implications of U.S. shortcomings for the jurisdiction of the International Criminal Court over U.S. persons' violations of IHL. Section III takes stock of current Department of Defense efforts related to civilian harm and recommends reforms to U.S. investigation practices. Finally, Section IV makes a case for prioritizing investigations of civilian harm and alleged war crimes.

---

INDEPENDENT-REVIEW-OF-18-MARCH-2019-CIVILIAN-CASUALTY-INCIDENT-IN-BAGHUZ-SYRIA.PDF.

<sup>15</sup> See Schmitt & Philipps, *supra* note 12.

<sup>16</sup> Although international humanitarian law requires a presumption of civilian status in carrying out attacks when the status of a possible target is in doubt, the Department of Defense Law of War Manual does not recognize the principle despite well-established international legal obligations. See Ryan Goodman, *Clear Error in the Defense Department's Law of War Manual: On Presumptions of Civilian Status*, JUST SEC. (Feb. 9, 2022), <https://www.justsecurity.org/80147/clear-error-in-the-defense-departments-law-of-war-manual-on-presumptions-of-civilian-status/>; see also DEP'T OF DEF, DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 200 (rev. 2016).

## II. IMPUNITY IN WAR

Despite progress in expanding avenues for accountability,<sup>17</sup> impunity pervades the world's conflict zones.<sup>18</sup> From Ukraine<sup>19</sup> to Afghanistan<sup>20</sup> to Syria,<sup>21</sup> affected communities and the international community alike have encountered significant barriers to justice for atrocities.

Accountability is rare for victims and survivors of wartime abuses. Despite significant strides towards justice in recent decades with the establishment and institutionalization of international and hybrid criminal courts, accountability remains the exception and impunity the rule. This is especially true when powerful states shield the perpetrators of crimes and abuses.

### A. *The United States and Accountability*

As the world's preeminent military power, the United States conducts lethal military operations around the world, most of which are authorized under the 2001 Authorization for the Use of Military Force as part of the twenty-year war on terror.<sup>22</sup> Despite efforts to reduce harm from U.S. military operations, the United States' global war has devastated many families and communities.<sup>23</sup>

U.S. military officials claim, “[N]o military in the world, works as hard as we do to avoid civilian casualties.”<sup>24</sup> But accountability for harm resulting

---

<sup>17</sup> See generally KATHERINE SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011) (discussing the rise in atrocities prosecutions in the late 20<sup>th</sup> and early 21<sup>st</sup> centuries).

<sup>18</sup> See David Miliband, *The Age of Impunity*, FOREIGN AFFS. (May 13, 2021), <https://www.foreignaffairs.com/articles/united-states/2021-05-13/age-impunity>.

<sup>19</sup> See Rick Gladstone & Farnaz Fassihi, *Why Ukraine War Crimes Trials Could Take Many Years*, N.Y. TIMES (Apr. 15, 2022), <https://www.nytimes.com/2022/04/15/world/europe/ukraine-war-crimes-trials.html>.

<sup>20</sup> See Belquis Ahmadi, Kate Bateman, & Scott Worden, *Intolerance of Atrocity Crimes in Ukraine Should Apply to Afghanistan*, U.S. INST. OF PEACE (Apr. 28, 2022), <https://www.usip.org/publications/2022/04/intolerance-atrocity-crimes-ukraine-should-apply-afghanistan>.

<sup>21</sup> See Sana Sekkarie, *Why Accountability in Foreign Courts for Syrian War Crimes Matters*, TAHRIR INST. FOR MIDDLE E. POL'Y (Nov. 24, 2020), <https://timep.org/commentary/analysis/why-accountability-in-foreign-courts-for-syrian-war-crimes-matters/>.

<sup>22</sup> STEPHANIE SAVELL, *THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE: A COMPREHENSIVE LOOK AT WHERE AND HOW IT HAS BEEN USED* (2021), [https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Costs%20of%20War\\_2001%20AUMF.pdf](https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Costs%20of%20War_2001%20AUMF.pdf).

<sup>23</sup> See Azmat Khan, *The Human Toll of America's Air Wars*, N.Y. TIMES (Dec. 19, 2021), <https://www.nytimes.com/2021/12/19/magazine/victims-airstrikes-middle-east-civilians.html>.

<sup>24</sup> *Pentagon Press Secretary John F. Kirby Holds a Press Briefing*, DEP'T OF DEFENSE (Nov. 15, 2021), <https://www.defense.gov/News/Transcripts/Transcript/Article/2844284/pentagon-press-secretary-john-f-kirby-holds-a-press-briefing/>.

from U.S. military operations is rare. A New York Times review of more than 1,300 U.S. civilian casualty credibility assessments yielded fewer than a dozen condolence payments, just a few public reports, and no finding of wrongdoing, disciplinary action, or a possible violation of the rules of engagement.<sup>25</sup> The United States has usually not made amends to communities and families recovering from civilian harm resulting from U.S. military operations.<sup>26</sup> Often, those communities and families do not even receive an acknowledgment of the harm they suffered. U.S. military personnel infrequently follow up with interviews or site visits after harming civilians. In some cases, the United States has taken steps that ensure U.S. persons can evade international accountability mechanisms.<sup>27</sup>

The United States has an especially important role to play in defeating impunity. To be sure, impunity is by no means solely, or even primarily, an American phenomenon. Russian war crimes in Ukraine<sup>28</sup> and the genocide of China's Uighur people<sup>29</sup> undoubtedly constitute wanton affronts to human dignity. Drawing moral equivalence is inappropriate. But atrocities elsewhere do not justify overlooking the serious and persistent harms of U.S. military operations – including possible war crimes. The international rule of law rests on the equal application of legal obligations to all, including the world's leading military power and lynchpin of the international system. Holding the U.S. military accountable for civilian harm and possible war crimes is important not only for victims and affected communities but also for upholding international norms.

---

<sup>25</sup> See Azmat Khan, *Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes*, N.Y. TIMES (Dec. 18, 2021), <https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html>.

<sup>26</sup> See Madison Hunke, *Making Amends: A Guide to US Law and Policy on Post-Harm Amends*, CTR. FOR CIVILIANS IN CONFLICT (Jan. 7, 2021), <https://civiliansinconflict.org/blog/making-amends-a-guide-to-us-law-and-policy-on-post-harm-amends/>.

<sup>27</sup> See, e.g., Executive Order No. 13928, 85 Fed. Reg. 36,139 (June 11, 2020) (imposing sanctions in International Criminal Court personnel in reaction to the ICC Prosecutor's investigation in Afghanistan); American Service-Members Protection Act, Pub.L. 107–206 116 Stat. 899 (2002) (authorizing the President to use “all means necessary and appropriate to bring about the release” of U.S. persons detained by the International Criminal Court).

<sup>28</sup> See Antony Blinken, Sec'y of State, *War Crimes by Russia's Forces in Ukraine* (Mar. 23, 2022), <https://www.state.gov/war-crimes-by-russias-forces-in-ukraine/> (“Today, I can announce that, based on information currently available, the U.S. government assesses that members of Russia's forces have committed war crimes in Ukraine.”); see also UN's *Bachelet Condemns 'Horrors' Faced by Ukraine's Civilians*, U.N. NEWS (Apr. 22, 2022), <https://news.un.org/en/story/2022/04/1116692> (“Russian armed forces have ‘indiscriminately shelled and bombed populated areas . . . killing civilians and wrecking hospitals, schools and other civilian infrastructure, actions that may amount to war crimes.’”).

<sup>29</sup> See Michael R. Pompeo, *Determination of the Secretary of State on Atrocities in Xinjiang*, DEP'T OF STATE (Jan. 19, 2021), <https://2017-2021.state.gov/determination-of-the-secretary-of-state-on-atrocities-in-xinjiang/index.html>.

Many scholars and activists have focused on U.S. torture practices as possible war crimes. Abuse, maltreatment, and torture at Guantanamo Bay, Cuba;<sup>30</sup> Bagram, Afghanistan;<sup>31</sup> and Abu Ghraib, Iraq<sup>32</sup> probably constituted war crimes.<sup>33</sup> Although the U.S. government has reversed course regarding torture as state policy,<sup>34</sup> few of those responsible have been held accountable for abuses.<sup>35</sup>

High-profile war crimes targeting protected persons have also occasionally drawn public attention. In 2020, President Donald Trump pardoned several individuals charged or convicted of war crimes: Blackwater private military contractors, who massacred Iraqi civilians at Baghdad's Nisour Square;<sup>36</sup> Mathew Golsteyn, who was charged with murdering an unarmed Afghan civilian;<sup>37</sup> and Clint Lorraine, who ordered soldiers to fire on unarmed civilians.<sup>38</sup> President Trump also reversed the demotion of Eddie Gallagher, who allegedly killed a prisoner and took a photograph with that prisoner's desecrated corpse.<sup>39</sup> In each instance, there has been no meaningful accountability for those crimes.

But the conversation about U.S. responsibility for possible war crimes should not end with torture or high-profile pardons. U.S. military operations after September 11, 2001 have claimed tens of thousands of civilian lives. U.S. airstrikes since 2001 have killed at least 22,679 and as many as 48,308

---

<sup>30</sup> See generally Mark P. Denbeaux, Jonathan Hafetz, Joshua Denbeaux, et al., *Guantanamo: America's Battle Lab*, SETON HALL U. SCHOOL OF L. CTR. FOR POL'Y & RSCH. (2015) (discussing torture at the U.S. detention center at Guantanamo Bay).

<sup>31</sup> See Kate Clark, "The 'Other Guantanamo' 12: Bagram closes, CIA torture revealed, US to be held to account?," AFG. ANALYSTS NETWORK (Dec. 12, 2014), <https://www.afghanistan-analysts.org/en/reports/international-engagement/the-other-guantanamo-11-bagram-closes-cia-torture-revealed-us-to-be-held-to-account/>.

<sup>32</sup> See David Luban, *Remembering Abu Ghraib (1): Torture Everywhere and the Accountability Gap*, JUST SEC. (Apr. 28, 2014), <https://www.justsecurity.org/9964/remembering-abu-ghraib-1-torture-accountability-gap/>.

<sup>33</sup> See JEAN MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INT'L L.* 315 (2005) (discussing the relevant legal standards under customary international humanitarian law).

<sup>34</sup> See Scott Shane et al., *Obama Reverses Key Bush Security Policies*, N.Y. TIMES (Jan. 22, 2009), <https://www.nytimes.com/2009/01/23/us/politics/23obama.html>.

<sup>35</sup> SIKKINK, *supra* note 17, at 198-212, see also Press Release, United Nations Office of the High Commissioner for Human Rights, "US must stop policy of impunity for the crime of torture"- UN rights expert" (Dec. 13, 2017), <https://www.ohchr.org/en/press-releases/2017/12/us-must-stop-policy-impunity-crime-torture-un-rights-expert>.

<sup>36</sup> See Falih Hassan & Jane Arraf, *Blackwater's Bullets Scarred Iraqis. Trump's Pardon Renewed the Pain.*, N.Y. TIMES (Dec. 23, 2020), <https://www.nytimes.com/2020/12/23/world/middleeast/blackwater-trump-pardon.html>.

<sup>37</sup> Dave Philipps, *Trump Clears Three Service Members in War Crimes Cases*, N.Y. TIMES (Nov. 15, 2019), <https://www.nytimes.com/2019/11/15/us/trump-pardons.html>.

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

civilians in Iraq, Syria, Afghanistan, Pakistan, Libya, Somalia, and Yemen.<sup>40</sup> Each killing of a civilian marks a devastating loss for communities and families living through armed conflict. But most of the civilian harm of the last two decades remains unaccounted for, and possible war crimes remain uninvestigated.

This paper toggles between two vocabularies: one moral and the other legal. International humanitarian law seeks to limit harm from war, but it implicitly concedes that some civilian suffering is inevitable and morally acceptable. While international humanitarian law contains important standards for limiting the effects of war, it fails—as all legal frameworks do—to encompass the full range of harms under a moral framework rooted in human dignity and the inherent worth of every person.

Therefore, this paper focuses on a spectrum of harmful acts: civilian harm, violations of international humanitarian law, and war crimes. Civilian harm, as used in this paper, comprises harm to civilian persons and objects due to the use of force—including harm permitted under international humanitarian law. The use of the civilian harm concept is based on a recognition that, even if states do not have a legal obligation to eliminate all civilian harm, they have moral responsibilities to the victims and survivors of civilian harm. Violations of international humanitarian law are all actions that breach obligations for the conduct of hostilities as outlined in the Geneva Conventions, the Hague Conventions, customary international law, and other sources of international humanitarian law. Finally, all grave violations of international humanitarian law are war crimes.<sup>41</sup> This paper focuses on the types of violations of international humanitarian law and war crimes that also involve civilian harm, although international humanitarian law violations or war crimes do not necessarily result in civilian harm as a general matter.

---

<sup>40</sup> Imogen Piper & Joe Dyke, *Tens of Thousands of Civilians Likely Killed by US in 'Forever Wars.'* AIRWARS (Sep. 6, 2021), <https://airwars.org/news-and-investigations/tens-of-thousands-of-civilians-likely-killed-by-us-in-forever-wars/>. Specifically, Airwars assesses that between 8,192 and 13,247 civilians died from U.S.-led coalition actions in the campaign against Da'esh in Iraq and Syria, most from 2014 to 2017. *US-led Coalition in Iraq & Syria*, AIRWARS (last visited May 25, 2022), <https://airwars.org/conflict/coalition-in-iraq-and-syria/>. From 2007 to 2022, U.S. forces killed between 78 and 153 civilians in Somalia. *US Forces in Somalia*, AIRWARS (last visited May 25, 2022), <https://airwars.org/conflict/us-forces-in-somalia/>. In Yemen, between 77 and 156 civilians died from U.S. military actions from 2017 to 2022. *US Forces in Yemen*, AIRWARS (last visited May 25, 2022), <https://airwars.org/conflict/us-forces-in-yemen/>. Airwars, a U.K.-based nonprofit, used publicly available information to assess civilian harm from military operations and uses ranges to represent the confidence levels of their assessments. See *Methodology*, AIRWARS, <https://airwars.org/about/methodology/> (May 25, 2022).

<sup>41</sup> See HENCKAERTS & DOSWALD-BECK, *supra* note 33, at 568.



B. *Investigations: The Bedrock of Accountability*

Accountability for possible U.S. war crimes requires improving U.S. practices, policies, and procedures for investigating civilian harm and possible war crimes committed by the U.S. armed forces.

In 1998, the French legal scholar Louis Joinet outlined the Joinet Principles for preventing impunity: the right to know about crimes and abuses, the right to justice, the right to reparations, and the right to non-recurrence of crimes or abuses.<sup>42</sup> Each of those principles is rooted in investigations of alleged crimes and abuses. Without investigations of crimes or abuses, communities cannot know the full extent of harm, which blocks the path to justice and reparation. Without investigating crimes and abuses, states and responsible parties cannot take the measures necessary to ensure their non-recurrence.

Without effective investigations of civilian harm incidents, the United States military can neither account for harm nor learn from it. Investigations of civilian harm and alleged war crimes are necessary preconditions for making crimes and abuses known, advancing justice, disbursing reparations, and changing practices and policies to prevent the recurrence of crimes and abuses. Investigations are also necessary to issue *ex gratia* payments to victims and survivors of civilian harm.<sup>43</sup> Such investigations facilitate

---

<sup>42</sup> Louis Joinet, Special Rapporteur on the Impunity of Perpetrators of Violations of Human Rights, *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Revised Final Report*, U.N. DOC. E/CN.4/SUB.2/1997/20/REV. 1 (Oct. 2, 1997).

<sup>43</sup> Although Congress authorized three million dollars annually for *ex gratia* payments to civilians who suffer harm from U.S. military operations, in 2020 the Department of Defense disbursed zero dollars from the fund. See National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1213, 133 Stat. 1629, 1629; Dep't Def., Annual Report on Civilian Casualties In Connection With United States Military Operations in 2020 15, 16 (2021), <https://media.defense.gov/2021/Aug/05/2002823939/-1/-1/0/ANNUAL-REPORT-ON-CIVILIAN-CASUALTIES-IN-CONNECTION-WITH-UNITED-STATES-MILITARY-OPERATIONS-IN-2020-FINAL.PDF>. The Department did not provide reasoning for why it did not disburse any payments in 2020, the last year for which a public report is available. See *id* at 16. By contrast, in 2019 the U.S. government paid \$1,544,116 in *ex gratia* payments. Dep't Def., Report on Ex Gratia Payments in the Event of Property Damage, Personal Injury, or Death That Was Incident To U.S. Military Operations in Foreign Countries During 2019 2 (2020), <https://media.defense.gov/2020/May/12/2002298396/-1/-1/1/REPORT-ON-EX-GRATIA-PAYMENTS-IN-THE-EVENT-OF-PROPERTY-DAMAGE-PERSONAL-INJURY-DEATH-THAT-WAS-INCIDENT-TO-U.S.-MILITARY-OPERATIONS-IN-FOREIGN-COUNTRIES-DURING-2019.PDF>. Although Congress required the establishment of a standard *ex gratia* claims process in the National Defense Authorization Act for Fiscal Year 2022, the Department of Defense has not yet implemented the claims process. See John Ramming Chappell & Ari Tolany, *Amid Civilian Harm Revelations, Defense Bill Takes Measured Steps on Oversight and Accountability*, JUST SEC. (Dec. 23, 2021), <https://www.justsecurity.org/79663/amid-civilian-harm-revelations-defense-bill-takes-measured-steps-on-oversight-and-accountability/>.

monitoring compliance with international humanitarian and human rights law. For constituencies in the United States, transparent investigations help make the human costs of war known.

A wave of civilian harm revelations in 2021 called attention to how the United States investigates civilian harm and potential war crimes.<sup>44</sup> In her investigations, New York Times journalist Azmat Khan did what U.S. military personnel did not: she conducted site visits and interviews that uncovered widespread civilian harm and failures in accountability.<sup>45</sup>

Consistent investigations of civilian harm and alleged war crimes would benefit the United States. As the United States seeks to hold human rights abusers and war criminals abroad accountable for violations, robust processes for investigating U.S. harms and violations would allow the U.S. government to seek accountability from a position of strength and consistency. Effective investigations could also set a standard for how states should look into allegations of civilian harm and alleged war crimes, reinforcing a state's soft power and international reputation. Investigating civilian harm allows militaries to learn lessons that, when implemented, can improve military efficiency and effectiveness while reducing estrangement and animosity that can contribute to radicalization.

But most importantly, investigations of civilian harm and alleged war crimes allow affected communities to start down a path to accountability. Investigations open the door to a process of making harms known, making amends, and making justice possible. For communities mourning the loss of neighbors or the destruction of livelihoods, investigations can mark the beginning of a renewal.

### III. TURNING A BLIND EYE

The United States has international legal obligations to investigate alleged war crimes, but it has not always fulfilled those obligations. Although some sources have assessed U.S. procedures to identify and assess civilian harm as “above and beyond the requirements of the law of war,”<sup>46</sup> this paper argues that the U.S. military has not consistently carried out investigations where they are warranted. U.S. failures to sufficiently investigate alleged war crimes could have significant legal consequences, possibly opening U.S. persons to the jurisdiction of the International Criminal Court.

---

<sup>44</sup> See Azmat Khan et al., *The Civilian Casualty Files*, N.Y. TIMES (Dec. 18, 2021), <https://www.nytimes.com/interactive/2021/us/civilian-casualty-files.html>.

<sup>45</sup> See Khan, *supra* note 25.

<sup>46</sup> MICHAEL J. MCNERNEY ET AL., U.S. DEP'T OF DEF. CIVILIAN CASUALTY POL'YS & PROCS. 10 (2022).

A. *International Legal Standards for Investigations of Possible War Crimes*

International law offers standards for the investigation and prosecution of alleged wrongs. Authorities agree that states must investigate alleged violations of international humanitarian law. However, the depth of international legal obligations to investigate alleged war crimes remains ambiguous.

1. The Existence of an Obligation to Investigate

The most relevant treaty obligation to investigate alleged war crimes derives from the duty of states established in the Geneva Conventions of 1949 to prosecute war crimes.<sup>47</sup> In similar terms, the four Conventions, which mostly focus on obligations for state parties engaged in international armed conflicts, require state parties to enact domestic legislation to prosecute violations, to search for individuals accused of violating the Conventions, and to either prosecute such individuals or transfer them to another state for trial.<sup>48</sup> For example, the First Geneva Convention reads, “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.”<sup>49</sup> The Convention further requires state parties to “take measures necessary for the suppression of all acts contrary to the provisions of the present Convention.”<sup>50</sup> The United States, along with nearly every state in the world, is a party to the Geneva Conventions.<sup>51</sup>

The obligations to search for possible offenders and suppress all acts contrary to IHL imply a duty to investigate allegations of violations of international humanitarian law, including war crimes.<sup>52</sup> Based on the text of and Commentaries to the Geneva Conventions, a credible allegation of war

---

<sup>47</sup> See Durward Johnson & Michael N. Schmitt, *The Duty to Investigate War Crimes*, LIEBER INST. (Dec. 22, 2020), <https://lieber.westpoint.edu/duty-investigate-war-crimes/>.

<sup>48</sup> See Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT'L SEC. J. 31, 36-37 (2011).

<sup>49</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 6 U.S.T. 3114.

<sup>50</sup> *Id.*

<sup>51</sup> *Treaties, States Parties and Commentaries: United States of America*, INT'L COMM. ON RED CROSS, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> (last visited May 25, 2022).

<sup>52</sup> See Johnson & Schmitt, *supra* note 47.

crimes,<sup>53</sup> regardless of the source, triggers an obligation to investigate.<sup>54</sup> But states are not obliged to uncover violations of IHL that have not been alleged.<sup>55</sup>

Additional Protocol I to the Geneva Conventions, which applies to non-international armed conflicts, further discusses the obligation to investigate alleged war crimes. Article 87 obligates states to require military commanders to “prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.”<sup>56</sup> The article further requires:

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>57</sup>

Based on Article 87 and its commentary, Professor Michael Schmitt concluded that “the responsibility to enforce the requirement to identify, report, and respond to violations extends throughout the chain of command” and that every member of the military must report possible IHL violations.<sup>58</sup> The United States has signed but not ratified Additional Protocol I,<sup>59</sup> meaning that, under the Vienna Convention on the Law of Treaties and as reflected in customary international law, the United States is obligated only to not take actions defeating the object and purpose of the Protocol.<sup>60</sup>

---

<sup>53</sup> Sources differ somewhat as to the necessary threshold for an allegation to trigger the duty to investigate. Based on a survey of legal principles for investigations in six countries, Israel’s Turkel Commission suggested a threshold of “reasonable suspicion.” Alon Margalit, *Some Observations on the Turkel Report and the Investigation of Wrongdoing by the Armed Forces*, EJIL: TALK! (Mar. 13, 2013), <https://www.ejiltalk.org/some-observations-on-the-turkel-report-and-the-investigation-of-wrongdoing-by-the-armed-forces/>. The European Court of Human Rights has referred to the investigation threshold as “proof of an arguable claim,” *Cyprus v. Turkey*, no. 25781/94, ¶ 132. (June 10, 2001) and a “credible assertion,” *Khashiyev & Akayeva v. Russia*, no. 57942/00 & 57945/00, ¶ 177 (Feb. 24, 2005); see also Nathalie Weizmann, *When Do Countries Have to Investigate War Crimes?*, JUST SEC. (Sep. 14, 2015), <https://www.justsecurity.org/26067/countries-investigate-war-crimes/>.

<sup>54</sup> See Schmitt, *supra* note 48, at 39

<sup>55</sup> See *id.*

<sup>56</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 87, ¶ 1, June 8, 1977, 1125 U.N.T.S. 3.

<sup>57</sup> *Id.* art 87, ¶ 3.

<sup>58</sup> See Schmitt, *supra* note 48, at 43.

<sup>59</sup> *Supra* note 56.

<sup>60</sup> Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

Nevertheless, the obligation to investigate alleged war crimes is reflected in customary international law applicable to both international and non-international armed conflicts. Customary international humanitarian law requires that states “investigate war crimes allegedly committed by their nationals or armed forces . . . and, if appropriate, prosecute the suspects.”<sup>61</sup> The customary international law obligation derives from various treaties and state practice.<sup>62</sup> The 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 restate the obligation.<sup>63</sup> ICRC guidelines express that administrative investigations should occur in circumstances where individuals may have committed non-criminal violations of international humanitarian law or when the circumstances of an incident indicate that systemic issues “are likely to have led to an incident or could lead to further incidents.”<sup>64</sup> The United States military has recognized that commanders have a duty to investigate “reports of alleged law of war violations committed by persons under their command or against persons to whom they have a legal duty to protect.”<sup>65</sup>

## 2. Civilian Harm and the Duty to Investigate

In and of itself, an allegation of civilian harm does not necessarily trigger the duty to investigate an alleged war crime. For some war crimes, though, civilian harm is an important indication that a war crime may have occurred. What is more, civilian harm may be the most likely indicator of a possible war crime to come to light. Civilian harm is part of a war crime when the harm occurred as a result of an attack that “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, [that] would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>66</sup> Such an attack would violate the fundamental international humanitarian law principle of proportionality and constitute a war crime. Civilian harm is also part of a war crime when the

---

<sup>61</sup> HENCKAERTS & DOSWALD-BECK, *supra* note 33, at 607.

<sup>62</sup> See Johnson & Schmitt, *supra* note 47.

<sup>63</sup> See G.A. Res. 60/147, 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, ¶ 5 (Dec. 16, 2005) [hereinafter “Basic Principles and Guidelines”].

<sup>64</sup> NOAM LUBEL ET AL., INT’L COMM. RED CROSS & GENEVA ACAD. INT’L HUMAN. L. & HUM. RTS., GUIDELINES ON INVESTIGATING VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW: LAW, POLICY, AND GOOD PRODUCTS 37 (2019)

<sup>65</sup> OFF. GEN. COUNS., DEP’T DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 1078 (2016).

<sup>66</sup> See HENCKAERTS & DOSWALD-BECK, *supra* note 33, at 46.

harm occurs as a result of an attack intentionally targeting civilians. Intentionally targeting civilians would violate the fundamental international humanitarian law principle of distinction.

The *mens rea* for violations of the proportionality and distinction principles remains contested among scholars and practitioners. Legal systems and traditions often approach the spectrum of *mens rea* differently from each other.<sup>67</sup> Even the meaning of “intentional” is “notoriously vague and captures situations where the defendant desires a particular outcome as well as situations where the defendant is aware of the practical certainty of the outcome but is indifferent to the result.”<sup>68</sup> While civil law jurisdictions tend to understand intent as including *dolus eventualis* – akin to the common law recklessness standard – common law jurisdictions interpret intent more narrowly.<sup>69</sup> The ICRC and some international tribunals argue that intention and recklessness are sufficient to fulfill the *mens rea* for war crimes.<sup>70</sup>

Thus, some credible allegations of civilian harm could also be credible allegations of war crimes. Particular insight into the *mens rea* of the individual or individuals who carried out or ordered an attack should not be required to meet the credibility threshold. Requiring such particular insight would result in the absurd outcome that practically no allegations of war crimes external to the alleged perpetrator’s armed forces would be credible. While an investigation should examine the *mens rea* requirements for war crimes and the military objectives sought, credible reports of civilian harm that appear to exceed legitimate military objectives should suffice to trigger the duty to investigate alleged war crimes under international humanitarian law.

### 3. The Substance of the Obligation to Investigate

International humanitarian law offers little guidance regarding the depth of commanders’ duty to investigate violations of international law.<sup>71</sup> But scholars have applied principles from other sources of international law to investigation standards, elucidating states’ duties to investigate alleged war crimes.

---

<sup>67</sup> See Brian L. Cox, *Recklessness, Intent, and War Crimes: Refining the Legal Standard and Clarifying the Role of International Criminal Tribunals as a Source of Customary International Law*, 52 GEO. J. INT’L L. 1, 9 (2020).

<sup>68</sup> Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT’L L. 79, 82 (2013).

<sup>69</sup> See *id.*, at 83.

<sup>70</sup> HENCKAERTS & DOSWALD-BECK, *supra* note 33, at 574.

<sup>71</sup> *Supra* note 64, at 9 (“While an underlying requirement for investigations can be extrapolated from international humanitarian law, this body of law has very few provisions on the specific way in which investigations should be carried out.”).

International human rights law imposes an obligation to investigate violations in compliance with four principles: independence, effectiveness, promptness, and impartiality.<sup>72</sup> Although international human rights law is separate from the *lex specialis* of international humanitarian law, its principles regarding investigations have migrated into investigations of alleged war crimes. In a 2009 report of the United Nations Fact-Finding Mission on the Gaza Conflict, the Mission reviewed Israeli investigations of both IHL and IHRL violations in accordance with those principles.<sup>73</sup> As Professors Durward Johnson and Michael Schmitt put it, “there is no basis for doubting application of these principles to war crimes investigations.”<sup>74</sup>

Building on human rights standards, the 2020 Guidelines on Investigating Violations of International Humanitarian Law—the leading source on the topic—treat effectiveness as an overarching requirement that investigations are conducted in a manner “capable of enabling a determination of whether there was a violation of international humanitarian law.”<sup>75</sup> The effectiveness requirement means “that a process must be appropriate and undertaken in good faith, with all feasible means employed to achieve its goal.”<sup>76</sup> The Guidelines specify that effectiveness rests on five principles: independence, impartiality, thoroughness, promptness, and transparency.<sup>77</sup> Those principles apply to both criminal and administrative investigations, although their application in administrative contexts may be more flexible depending on the context and severity of an incident.<sup>78</sup>

In its discussion of complementarity, the Rome Statute stipulates that the International Criminal Court may exercise jurisdiction over cases where domestic investigations of alleged atrocities are not “genuine.”<sup>79</sup> The Statute echoes the IHRL principles for investigations, finding that genuine investigations must be independent, impartial, and prompt.<sup>80</sup> While the Statute does not mention “effectiveness,” it does require that investigations be conducted in a manner consistent with an intent to bring the person concerned to justice and not undertaken for the purpose of shielding the person concerned from criminal responsibility.<sup>81</sup>

---

<sup>72</sup> See Johnson & Schmitt, *supra* note 47.

<sup>73</sup> See Human Rights Council, *Human Rights in Palestine & Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, ¶ 121, U.N. Doc. A/HRC/12/48 (Sept. 25, 2005).

<sup>74</sup> Johnson & Schmitt, *supra* note 47.

<sup>75</sup> LUBELL ET AL., *supra* note 71, at 9.

<sup>76</sup> *Id.* ¶ 30.

<sup>77</sup> See *id.* ¶ 32.

<sup>78</sup> See *id.* ¶ 34.

<sup>79</sup> Rome Statute art. 17 § (1)(a), July 17, 1998, 2187 U.N.T.S. 90.

<sup>80</sup> See *id.* art. 17(2).

<sup>81</sup> See *id.*

*B. Shortfalls in U.S. Investigations of Civilian Harm*

While the U.S. military exceeds its legal obligations with respect to civilian harm investigations in some ways,<sup>82</sup> in other ways, the United States has fallen short of its legal obligation to adequately investigate war crimes committed by U.S. armed forces.

The United States military has regularly undercounted civilian casualties from U.S. military operations in Syria, Iraq, and Afghanistan relative to credible non-governmental organizations. For example, in 2017, the UK-based NGO Airwars estimated at least 4,931 and as many as 19,623 civilian deaths from U.S. military operations,<sup>83</sup> whereas the U.S. government's congressionally mandated civilian casualties report estimated just 499 civilian deaths.<sup>84</sup> For 2020, the most recent year for which data is available, Airwars recorded between 102 and 149 civilian deaths from U.S. military operations compared to just 22 deaths in the U.S. government's report.<sup>85</sup> A 2017 New York Times investigation "found that one in five of the coalition strikes . . . identified . . . resulted in civilian death, a rate more than 31 times that acknowledged by the coalition."<sup>86</sup>

Examining U.S. military practices for civilian harm investigations helps account for dramatic discrepancies between annual U.S. government estimates of civilian casualties and the estimates of specialized NGOs. The investigation process comprises four steps: (1) Discovery or reporting of harm, whether by media, civil society organizations, or military personnel; (2) Preliminary assessment of known facts and credibility of reporting to

<sup>82</sup> For example, states are not obligated under international law to seek out allegations of war crimes. See Schmitt, *supra* note 48, at 39. The United States has taken steps to provide public avenues for members of the public to make allegations, but they are not necessarily accessible to civilians in many regions where the United States carries out military operations. See Erin Bijl and Archibald Henry, *DoD Needs to Rethink its Civilian Casualty Reporting Mechanism*, JUST SEC. (May 9, 2022), <https://www.justsecurity.org/81428/dod-needs-to-rethink-its-civilian-casualty-reporting-mechanism/>.

<sup>83</sup> See Imogen Piper & Joe Dyke, *How Many Civilians Have US Strikes Killed in 20 Years of 'Forever Wars?'*, AIRWARS (Sep. 2021), <https://docs.google.com/spreadsheets/d/1wX5x-Cb0HQSEwZ24iDjWkcMZHiaM8wJ6PU0YPd3EQg/edit#gid=293617676>. Airwars makes civilian harm assessments based on publicly available information and includes a range for each conflict it monitors to factor in the strength of evidence supporting findings of civilian harm in each instance. For more information on Airwars' methodology, see *Methodology*, AIRWARS, <https://airwars.org/about/methodology/> (last visited May 25, 2022).

<sup>84</sup> DEP'T OF DEF., ANNUAL REPORT ON CIVILIAN CASUALTIES IN CONNECTION WITH UNITED STATES MILITARY OPERATIONS 4 (2018).

<sup>85</sup> Piper & Dyke, *supra* note 83; see DEP'T OF DEF., ANNUAL REPORT ON CIVILIAN CASUALTIES IN CONNECTION WITH UNITED STATES MILITARY OPERATIONS 7-8 (2020).

<sup>86</sup> Azmat Khan & Anand Gopal, *The Uncounted*, N.Y. TIMES MAG. (Nov. 16, 2017), <https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html>.



determine if further action is needed; (3) Formal investigation, which usually takes the form of an administrative investigation consistent with Army Regulation 15-6<sup>87</sup> but may occasionally be a criminal investigation; and (4) Conclusion of the process, including actions taken based on the findings of an investigation and measures taken to remedy harms.<sup>88</sup> However, not every incident proceeds through all four steps.<sup>89</sup>

This subsection discusses issues in U.S. policies, procedures, and practices for civilian harm investigations in light of the five legal obligations discussed above: the duty to investigate alleged war crimes, and the duty to do so in compliance with the principles of effectiveness, promptness, impartiality, and independence.

### 1. Obligation to Investigate

As discussed in Section A(I), states have an obligation to investigate alleged war crimes. The United States often prematurely dismisses credible allegations of civilian harm without conducting an investigation. In cases where civilian harm credibly indicates a possible war crime, an investigation is required under international humanitarian law. Among 1,311 civilian casualty credibility assessments that the New York Times reviewed, fewer than 12 percent recommended full investigations.<sup>90</sup>

After receiving an initial report of possible civilian casualties, including alleged war crimes, the U.S. military compares the report against its records to determine whether completing a civilian casualty credibility assessment report (CCAR) is warranted.<sup>91</sup> After a CCAR concludes based on a preponderance of the evidence that an allegation is credible, a formal investigation may take place to address issues not covered in the CCAR.<sup>92</sup> However, a commander may also order a formal investigation after an initial report or preliminary assessment.<sup>93</sup>

---

<sup>87</sup> CTR. CIVILIANS IN CONFLICT & COLUM. L. SCH. HUMAN RTS. INST., *IN SEARCH OF ANSWERS: U.S. MILITARY INVESTIGATIONS AND CIVILIAN HARM* 19 (2020) [hereinafter *IN SEARCH OF ANSWERS*]. According to a 2020 report, “AR 15-6 investigative procedure has been used across operational theaters as the process of choice for investigating a range of incidents . . . .” *Id.* at 19.

<sup>88</sup> *Id.* at 12.

<sup>89</sup> *Id.*

<sup>90</sup> See Khan, *supra* note 25.

<sup>91</sup> MICHAEL J. MCNERNEY ET AL., *UNDERSTANDING CIVILIAN HARM IN RAQQA & ITS IMPLICATIONS FOR FUTURE CONFLICTS* 79–80 (2022).

<sup>92</sup> See *id.* at 80.

<sup>93</sup> See *IN SEARCH OF ANSWERS*, *supra* note 87, at 18.

The U.S. military often dismisses reports of civilian casualties that do not align with the coordinates of strikes in U.S. strike logs.<sup>94</sup> A 2017 New York Times investigation of 103 strike sites in Afghanistan, Iraq, and Syria uncovered many discrepancies in U.S. credibility assessments.<sup>95</sup> For example, Air Force analysts “said it was unlikely that the coalition had struck” a water sanitation facility in the Iraqi town of Qaiyara “because the logs recorded the nearest strike as 600 meters away.”<sup>96</sup> But the New York Times found a “video — uploaded by the coalition itself — showing a direct strike on that very facility.”<sup>97</sup> A strike against civilian infrastructure could constitute a war crime, but the U.S. military dismissed the incident as not credible.

A lack of cursory research about the location of an alleged strike can also result in the wrongful dismissal of an allegation as non-credible. Simple omissions are partly related to military personnel’s overreliance on internal sources in assessing civilian harm allegations. In 2017, DOD assessed the credibility of an allegation by Iraqi media that a coalition strike in Siha, a neighborhood in Mosul, killed thirty people, including women and children.<sup>98</sup> DOD concluded the “allegation should be treated as not having the potential to be credible” because Siha did not “correlate with known districts of West Mosul.”<sup>99</sup> A simple Google search would have shown that Siha is indeed a neighborhood in West Mosul.<sup>100</sup> When assessing the credibility of an allegation that a U.S. airstrike in Hit, Iraq killed eight people, including four children, DOD dismissed the report because they could not identify the Jerri neighborhood where the strike took place.<sup>101</sup> The New York Times reported, “Jerri neighborhood can easily be found on Wikimapia — but only if searched for in Arabic.”<sup>102</sup> In another case, local sources reported a coalition airstrike on a home in a neighborhood called al-Bab al-Gharbi – referring in Arabic to the city’s western gate.<sup>103</sup> But the credibility assessors, who likely did not understand the Arabic meaning, mistakenly searched for al-Bab and al-Gharbi as two separate areas and dismissed the allegation when they could not find

---

<sup>94</sup> *See id.* at 35.

<sup>95</sup> *See* Khan & Gopal, *supra* note 86.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *See* Azmat Khan et al., *Documents Reveal Basic Flaws in Pentagon Dismissals of Civilian Casualty Claims*, N.Y. TIMES (Jan. 6, 2022), <https://www.nytimes.com/2021/12/31/us/pentagon-airstrikes-syria-iraq.html>.

<sup>99</sup> *Id.* (quoting J. Scott O’Meara, Dept. of Def., CIVCAS Allegation Closure Report, Allegation No. 422).

<sup>100</sup> *See id.*

<sup>101</sup> *See id.*

<sup>102</sup> *Id.*

<sup>103</sup> *See id.*

the locations.<sup>104</sup> In other instances, the Pentagon dismisses cases because assessors confuse towns with the same name, as it did with Maskana and Sabha, both the names of at least two towns in Syria.<sup>105</sup>

Inconsistent and incomplete U.S. military records can contribute to such flaws in civilian harm assessments, resulting in the dismissal of credible allegations.<sup>106</sup> The U.S. military relies on internal data such as “satellite imagery, flight logs, targeting data, and communications transcriptions” to assess the credibility of allegations.<sup>107</sup> But incomplete and inaccurate datasets can cause faulty assessments of civilian harm. The U.S. military does not automatically record all records of strikes and does not archive or preserve all relevant data.<sup>108</sup> For instance, in a series of airstrikes in Qaiyara, Iraq spread over an hour-long period, the U.S. military logged only one strike.<sup>109</sup> Additionally, inconsistent nomenclature in records can cause investigators to dismiss alleged incidents as not credible.<sup>110</sup> For example, inconsistencies between terms like “strike, engagement, and munition” contributed to confusion about where and when the United States military used force in Raqqa, Syria.<sup>111</sup>

## 2. Thoroughness

The Guidelines on Investigating Violations of International Humanitarian Law stipulate that investigations must be thorough, meaning that “All feasible steps must be taken to collect, analyze, preserve, and store evidence.”<sup>112</sup> The United States military has often not fulfilled the thoroughness requirement in its investigations of civilian harm.

Studies of U.S. investigations of civilian harm have typically found them to be inconsistent.<sup>113</sup> The level of detail provided in investigations varies widely and commanders usually treat investigations as “independent events,

---

<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

<sup>106</sup> *See* IN SEARCH OF ANSWERS, *supra* note 87, at 2–3.

<sup>107</sup> *See id.* at 27.

<sup>108</sup> *See* MCNERNEY ET AL., *supra* note 46, at 84.

<sup>109</sup> *See* Khan & Gopal, *supra* note 86.

<sup>110</sup> *See* MCNERNEY ET AL., *supra* note 91, at 83.

<sup>111</sup> *See id.*

<sup>112</sup> LUBELL ET AL., *supra* note 71, at 28.

<sup>113</sup> *See* MCNERNEY ET AL., *supra* note 46, at ix; *see also* IN SEARCH OF ANSWERS, *supra* note 87, at 2 (“Overall, the research pointed to significant inconsistencies in when and how U.S. military investigations into civilian harm are conducted. In some cases, the military has carried out detailed and thorough investigations. However, in too many instances, investigations have been concluded based on incomplete or inadequate internal information, or have failed to sufficiently incorporate external evidence such as witness interviews or site visits.”).

with little relation to or learning from past investigations.”<sup>114</sup> There is little in the way of standards for investigations, which are largely conducted according to a unit’s Standard Operating Procedures or a commander’s specific orders.<sup>115</sup> Because commanders have a great deal of discretion in the investigations process, the degree to which they prioritize investigations has a significant influence on the effectiveness of the investigation.<sup>116</sup> While some branches of the U.S. armed forces have regulations with guiding standards for administrative investigations, others do not.<sup>117</sup>

The U.S. military primarily uses “operational data, intelligence reporting, overhead imagery, information from ground forces . . . [and] information submitted to DoD by members of the public.”<sup>118</sup> Relying solely on internal records without seeking out and verifying external information is often insufficient, resulting in inaccurate conclusions.<sup>119</sup>

Assessments and investigations of civilian harm are especially difficult for airstrikes or in situations where the U.S. military does not have significant ground presence. For example, if a building collapses due to a U.S. airstrike, aerial imagery would not be sufficient to indicate whether there may have been more people in the building than expected based on pre-strike assessments. Air assessments are “likely the predominant method for [battle damage assessments] in the U.S. drone campaign.”<sup>120</sup> The difficulty of accurately distinguishing civilians from combatants based on aerial imagery compounds the challenge of assessing civilian harm.<sup>121</sup> Overhead imagery is usually not sufficient to make a conclusion about civilian status, which makes it difficult to assess civilian harm from a U.S. military action or to assess whether excessive harm may have constituted a war crime.<sup>122</sup> For example, aerial imagery has at times led U.S. targeteers to conclude that individuals are combatants for placing IEDs or carrying weapons where they were actually digging irrigation channels or holding farming tools.<sup>123</sup> An internal U.S. government study indicated that initial aerial battle damage assessments failed to identify civilian casualties in nineteen out of twenty-one cases.<sup>124</sup>

---

<sup>114</sup> MCNERNEY ET AL., *supra* note 46, at ix–x.

<sup>115</sup> See IN SEARCH OF ANSWERS, *supra* note 87, at 12.

<sup>116</sup> See *id.* at 2.

<sup>117</sup> See *id.* at 17.

<sup>118</sup> See MCNERNEY ET AL., *supra* note 91, at 80.

<sup>119</sup> IN SEARCH OF ANSWERS, *supra* note 87, at 3.

<sup>120</sup> LARRY LEWIS & DIANE VAVRICHEK, RETHINKING THE DRONE WAR: NATIONAL SECURITY, LEGITIMACY & CIVILIAN CASUALTIES IN U.S. COUNTERTERRORISM OPERATIONS 13 (2017).

<sup>121</sup> See *id.* at 15–16.

<sup>122</sup> See IN SEARCH OF ANSWERS, *supra* note 87, at 29.

<sup>123</sup> See LEWIS & VAVRICHEK, *supra* note 120, at 16.

<sup>124</sup> See IN SEARCH OF ANSWERS, *supra* note 87, at 29.

Despite the shortcomings of aerial assessments, the United States does not typically conduct interviews for investigations, “severely compromising” the investigations’ effectiveness.<sup>125</sup> A 2020 study found that the U.S. military completed interviews in just 21.5 percent of incidents reviewed.<sup>126</sup> Even when an investigating officer was explicitly required to “obtain a sworn statement from civilian witnesses, only 77 [percent] of the investigations included interviews.”<sup>127</sup> Only rarely do investigating officers explain why they did not complete interviews.<sup>128</sup> A New York Times review of 1,311 civilian casualty assessment records completed between September 2014 and January 2018 identified just two cases where investigators interviewed witnesses or survivors.<sup>129</sup>

Nor do investigating officers typically carry out site visits. The absence of site visits also undermines the effectiveness of investigations. Of 228 investigations analyzed in a 2020 study, the U.S. military conducted site visits in 16 percent of cases and provided rationales for why investigators did not do so in just 5 percent of cases.<sup>130</sup>

Personnel responsible for tracking civilian harm often lack training and experience. Military personnel tasked with assessing and investigating civilian harm and alleged IHL violations often lack the necessary language skills.<sup>131</sup> Commanders often appoint investigating officers not based on particular expertise but simply because they are the “‘next man or woman’ up in the chain of command.”<sup>132</sup> For example, in Raqqa, personnel tasked with assessing civilian harm had no specialized training in civilian harm assessments or international humanitarian law beyond standard training in the DoD Law of War Manual.<sup>133</sup>

### 3. Impartiality and Independence

The Guidelines on Investigating Violations of International Humanitarian Law require that “An independent and impartial investigative authority must be available to carry out criminal investigations if there are

---

<sup>125</sup> *Id.* at 40.

<sup>126</sup> Priyanka Motaparthy, *Why the US Military Needs to Rethink How It Investigates Civilian Harm*, JUST SEC. (Feb. 13, 2020), <https://www.justsecurity.org/68648/why-the-us-military-needs-to-rethink-how-it-investigates-civilian-harm/>.

<sup>127</sup> IN SEARCH OF ANSWERS, *supra* note 87, at 41.

<sup>128</sup> *Id.* at 42.

<sup>129</sup> *See* Khan, *supra* note 25.

<sup>130</sup> IN SEARCH OF ANSWERS, *supra* note 87, at 45.

<sup>131</sup> *See id.* at 50.

<sup>132</sup> *Id.*

<sup>133</sup> *See* MCNERNEY ET AL., *supra* note 91, at 84.

reasonable grounds to believe that an individual has committed a war crime.”<sup>134</sup>

International humanitarian law does not prohibit administrative investigations by commanders of possible violations within their own units.<sup>135</sup> Nevertheless, military investigations of alleged war crimes draw criticism and contribute to perceptions of bias. In particular, some critics of military investigations allege that investigations within the chain of command implicated in the commission of possible war crimes undermine impartiality and independence, as does military culture.<sup>136</sup> While such structural factors can undermine impartiality and independence, the presence of structural factors, such as commanders investigating military operations over which they may have command responsibility, does not necessarily invalidate investigations.<sup>137</sup>

Studies of U.S. civilian harm investigations indicate that commanders’ responsibility for overseeing investigations can result in conflicts of interest that may undermine impartiality and independence. While many commanders recognize the value and importance of conducting investigations, they also may have competing incentives to avoid an investigation that may reveal systemic problems or incriminate the commanders themselves.<sup>138</sup> Although AR 15-6 recommends that a commander consider requesting an external investigator when there is a possibility of command culpability, commanders are not required to do so.<sup>139</sup>

### C. Last Resort

Flaws in U.S. government practices for investigating possible war crimes may open U.S. persons to the jurisdiction of the International Criminal Court. Although the circumstances under which ICC jurisdiction may apply are narrow, they should nevertheless cause the United States to take decisive action to bring its investigations of alleged war crimes into compliance with international humanitarian law.

---

<sup>134</sup> LUBELL ET AL., *supra* note 71, at 27.

<sup>135</sup> See Schmitt, *supra* note 48, at 43.

<sup>136</sup> Claire Simmons, *Whose Perception of Justice? Real and Perceived Challenges to Military Investigations in Armed Conflict*, 102 INT’L R. RED CROSS 807, 812–17 (2020); see also Brianna Rosen, *Tragic Mistakes: Breaking the Military Culture of Impunity*, JUST SEC. (Nov. 23, 2021), <https://www.justsecurity.org/79256/tragic-mistakes-breaking-the-military-culture-of-impunity/> (arguing that “[a] pronounced lack of accountability and of institutional learning has exacerbated this problem, producing a military culture where officials perceive their actions to be ‘righteous,’ no matter how misguided”).

<sup>137</sup> See Simmons, *supra* note 136, at 822.

<sup>138</sup> See IN SEARCH OF ANSWERS, *supra* note 87, at 25–26.

<sup>139</sup> See *id.* at 20.

### 1. The United States and the ICC: A Rocky Relationship

The United States has historically resisted the jurisdiction of the ICC over U.S. persons. While the U.S. approach to the ICC has oscillated between lukewarm in Democratic administrations and hostile in Republican ones, successive U.S. administrations have opposed the exercise of ICC jurisdiction over Americans.

The United States has declined to ratify the Rome Statute, the international agreement that formed the International Criminal Court.<sup>140</sup> Although the United States participated in the negotiation of the Rome Statute during the Clinton administration and signed the treaty,<sup>141</sup> the United States is not a state party to the agreement.<sup>142</sup> When the treaty came into force, the Bush administration opposed the International Criminal Court altogether and indicated it would not seek the advice and consent from the Senate required for ratification.<sup>143</sup> The United States also negotiated bilateral immunity agreements to shield U.S. persons from prosecution before the International Criminal Court.<sup>144</sup> In particular, Ambassador John Bolton played a leading role in undermining the International Criminal Court during the Bush administration.<sup>145</sup> Bolton reprised that role as National Security Advisor to President Donald Trump from 2018 to 2019.<sup>146</sup>

Congress, too, opposed attempts by the ICC to exercise jurisdiction over U.S. persons. During the Bush administration, Congress passed the American Service-Members Protection Act.<sup>147</sup> Nicknamed the Hague Invasion Act, the statute preemptively authorizes “all means necessary” to “protect United States military personnel and other elected and appointed officials of the

---

<sup>140</sup> U.N. Secretary-General, Letter dated May 6, 2002 from Under Secretary of State for Arms Control and International Security John R. Bolton to Kofi Annan, Secretary-General, U.N. (May 6, 2002), <https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>.

<sup>141</sup> See John B. Bellinger, Legal Advisor, United States & the International Criminal Court: Where We've Been and Where We're Going (last visited Apr. 25, 2008).

<sup>142</sup> *The States Parties to the Rome Statute*, INT'L CRIM. COURT, <https://asp.icc-cpi.int/states-parties/> (last visited May 25, 2022).

<sup>143</sup> See generally Jean Galbraith, Note, *The Bush Administration's Response to the International Criminal Court*, 21 BERKELEY J. INT'L L. 683 (2003) (discussing U.S. efforts during the Bush administration to prevent the ICC from exercising jurisdiction over U.S. persons).

<sup>144</sup> See *U.S. Bilateral Agreements Relating to ICC*, 97 AM. J. INT'L L. 200, 201 (2003).

<sup>145</sup> See Constanze Stelzenmüller, *John Bolton is Wrong to Attack International Criminal Court*, BROOKINGS INST. (Sept. 13, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/09/13/john-bolton-is-wrong-to-attack-international-criminal-court/>.

<sup>146</sup> See Alex Whiting, *Why John Bolton vs. Int'l Criminal Court 2.0 is Different from Version 1.0*, JUST SEC. (Sept. 10, 2018), <https://www.justsecurity.org/60680/international-criminal-court-john-bolton-afghanistan-torture/>.

<sup>147</sup> See American Service-Members Protection Act, Pub.L. 107–206 116 Stat. 899 (2002).

United States government against criminal prosecution by an international criminal court to which the United States is not party.”<sup>148</sup>

## 2. ICC Complementarity

Opponents of the ICC in the United States have often accused the ICC of politicization, presuming that any prosecution of U.S. persons would be unfounded and that U.S. institutions are sufficient to ensure accountability.

The Rome Statute’s complementarity principle stipulates that the International Criminal Court should operate as a venue of last resort and may only exercise jurisdiction where domestic authorities have failed to investigate or prosecute a case. Article 17 of the Rome Statute forecloses the exercise of ICC jurisdiction where “The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>149</sup>

As discussed in Section II(C) of this paper, the United States often dismisses credible allegations of civilian harm based on incomplete and inaccurate data. Therefore, the United States has not investigated all allegations of war crimes. When it does investigate, U.S. investigations practices do not always meet the effectiveness requirements established in international law.

The International Criminal Court can exercise subject-matter jurisdiction over “war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”<sup>150</sup> The Rome Statute defines war crimes to include:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.<sup>151</sup>

The United States has often launched attacks knowing that they would cause incidental loss of life or injury to civilians. In and of itself, doing so does not violate international humanitarian law – only excessive harm relative to the expected military advantage gained amounts to a violation of international humanitarian law. Whether such harm would be “clearly excessive” in relation to the military advantage anticipated is a difficult determination. U.S. attacks on civilians often stem from the United States’

---

<sup>148</sup> *See id.* § 2008.

<sup>149</sup> Rome Statute, *supra* note 79, art. 17(1)(a).

<sup>150</sup> *See id.* art. 8(1).

<sup>151</sup> *See id.* art. 8 (2)(b)(iv).



misclassification of civilians as combatants, a phenomenon exacerbated in self-defense situations, where targeting occurs more quickly.<sup>152</sup> Furthermore, the Department of Defense's Law of War Manual does not acknowledge the international legal obligation of armed forces to presume the civilian status of targets when their status is unsure, which could result in violations of international law and contribute to targeting decisions that could constitute war crimes.<sup>153</sup>

The intent requirement for war crimes also raises issues that speak to the distinction between civilian harm and alleged war crimes. In some high-profile cases, U.S. service members have intentionally targeted civilians or other protected individuals with the knowledge that they were not targetable combatants. However, civilian harm more often results from the misclassification of civilians as combatants or civilians directly participating in hostilities. The New York Times reported that misidentification accounted for “nearly three-fourths of the total civilian deaths and injuries at sites visited by the times.”<sup>154</sup> In the August 2021 U.S. airstrike in Kabul that killed aid worker Zemari Ahmadi and several members of his family, U.S. personnel misidentified Ahmadi as a combatant.<sup>155</sup> Senior military officials maintained that the strike was “righteous” until subsequent journalistic investigations indicated otherwise.<sup>156</sup> In other cases, recklessness or negligence – whether in surveying the surrounding area for civilians or in determining the civilian status of targeted individuals – could be sufficient to fulfill the *mens rea* for war crimes.

Shortcomings in U.S. investigations of civilian harm make it difficult to assess whether U.S. personnel may have committed war crimes “as part of a large-scale commission of such crimes.” However, recent reporting by the New York Times includes indications that violations of military targeting procedures have been, in some cases, consistent. For example, the secret Talon Anvil strike cell, active from 2014 to 2019, often “sidestepped safeguards and repeatedly killed civilians.”<sup>157</sup> Confirmation bias in targeting

---

<sup>152</sup> See Khan, *supra* note 25.

<sup>153</sup> See Ryan Goodman, *Clear Error in the Defense Department's Law of War Manual: On Presumptions of Civilian Status*, JUST SEC. (Feb. 9, 2022), <https://www.justsecurity.org/80147/clear-error-in-the-defense-departments-law-of-war-manual-on-presumptions-of-civilian-status/>.

<sup>154</sup> Khan, *supra* note 25.

<sup>155</sup> See Matthieu Aikins, *Times Investigation: In U.S. Drone Strike, Evidence Suggests No ISIS Bomb*, N.Y. TIMES (Sep. 10, 2021), <https://www.nytimes.com/2021/09/10/world/asia/us-air-strike-drone-kabul-afghanistan-isis.html>.

<sup>156</sup> See *id.*

<sup>157</sup> Dave Philipps, Eric Schmitt & Mark Mazzetti, *Civilian Deaths Mounted as Secret Unit Pounded ISIS*, N.Y. TIMES (Dec. 27, 2021), <https://www.nytimes.com/2021/12/12/us/civilian-deaths-war-isis.html>.

is well-documented, resulting in military personnel relying on information that confirms their preexisting assumptions and misclassifying civilians as combatants.<sup>158</sup> The New York Times also identified a number of highly concerning incidents that have gone uninvestigated by the U.S. military, including the 2017 bombing of Iraq's Tabqa Dam<sup>159</sup> and the 2019 airstrike that killed dozens of women and children in Baghuz, Syria.<sup>160</sup> It is clear from a number of independent sources that the United States military's approach to civilian harm mitigation and response has systemic flaws. But whether such violations may have amounted to war crimes requires investigations that have not occurred.

The Rome Statute establishes the International Criminal Court's jurisdiction over the nationals of state parties to the Statute and over crimes committed within the territory of state parties. The Rome Statute has 123 state parties and 31 states that have signed but not ratified the treaty.<sup>161</sup>

Because the United States has not ratified the Rome Statute, the International Criminal Court may only exercise jurisdiction over U.S. persons for alleged crimes under the Rome Statute committed in the territory of a state party. In the years since the Rome Statute entered into force, most civilian harm from U.S. military operations has occurred in the territory of Afghanistan, Iraq, and Syria.<sup>162</sup> If the United States has committed war crimes on a large scale, it is most likely that such crimes occurred in one of those countries. However, only Afghanistan is a state party to the Rome Statute, meaning that the International Criminal Court may only exercise jurisdiction over alleged war crimes by U.S. nationals committed within Afghanistan.<sup>163</sup>

When ICC prosecutor Fatou Bensouda opened a preliminary investigation into possible atrocities by all parties in Afghanistan, including the United States, the Trump administration responded with threats and obstruction. President Trump labeled the ICC's attempt to exercise jurisdiction over U.S. persons without the consent of the United States an "unusual and extraordinary threat to the national security and foreign policy of the United States."<sup>164</sup> The Trump administration went so far as to impose

---

<sup>158</sup> See *id.*

<sup>159</sup> See Dave Philipps, Azmat Khan & Eric Schmitt, *A Dam in Syria Was on a 'No-Strike' List. The U.S. Bombed It Anyway.*, N.Y. TIMES (Jan. 20, 2022), <https://www.nytimes.com/2022/01/20/us/airstrike-us-isis-dam.html>.

<sup>160</sup> Philipps & Schmitt, *supra* note 2.

<sup>161</sup> See *The States Parties to the Rome Statute*, *supra* note 142; *Rome Statute of the International Criminal Court*, U.N. Treaty Collection, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en) (last visited May 25, 2022).

<sup>162</sup> See Piper & Dyke, *supra* note 83.

<sup>163</sup> See *The States Parties to the Rome Statute*, *supra* note 142.

<sup>164</sup> Exec. Order No. 13,928 3 C.F.R. 520 (2020).

economic sanctions on Bensouda and Phakiso Mochochoko, head of the Jurisdiction, Complementarity and Cooperation Division, in response to ICC investigations of possible war crimes by U.S. personnel in Afghanistan.<sup>165</sup> In March 2020, the Afghan government requested a deferral of the investigation, claiming that domestic investigations rendered the ICC's investigation unnecessary under the complementarity principle. In September 2021, Bensouda's successor Karim Khan requested authorization to reopen investigations in Afghanistan, but he deprioritized possible crimes committed by entities other than the Taliban and Islamic State – Khorasan Province.<sup>166</sup> Thus, possible crimes committed by U.S. personnel would be excluded from the scope of the investigation. On October 31, 2022, Pre-Trial Chamber II authorized the resumption of the investigation.<sup>167</sup> Contrary to Khan's statement, the Pre-Trial Chamber emphasized that its authorization "relates to all alleged crimes and actors."<sup>168</sup>

The ICC could, in some circumstances, legitimately exercise jurisdiction over U.S. persons for possible war crimes. But instead of undermining the ICC as it has done in the past, the United States should see the possibility of the ICC exercising jurisdiction over U.S. persons as a compelling reason to take measures to ensure that ICC intervention is unnecessary when it comes to alleged war crimes associated with civilian casualties. Namely, the United States should standardize and improve its policies, practices, and procedures for investigating civilian harm to ensure that all U.S. investigations fulfill the obligation to investigate alleged war crimes under customary international law. As the United States turns to the ICC as a possible venue for litigating Russian war crimes and crimes against humanity in Ukraine, taking such actions is all the more urgent.

#### IV. TOWARDS ACCOUNTABILITY

A series of civilian harm revelations in 2021 has brought new attention to civilian harm issues. The mistaken killing of aid worker Zemari Ahmadi and several members of his family in a U.S. drone strike commanded national

---

<sup>165</sup> *International Criminal Court Officials Sanctioned by US*, BBC (Sept. 2, 2020), <https://www.bbc.com/news/world-us-canada-54003527>.

<sup>166</sup> See Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorization to resume investigations in the Situation in Afghanistan (Sept. 27, 2021), <https://www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan>.

<sup>167</sup> See ICC judges authorize Prosecution to resume investigation in Afghanistan (Oct. 31, 2022), <https://www.icc-cpi.int/news/icc-judges-authorise-prosecution-resume-investigation-afghanistan>.

<sup>168</sup> Decision pursuant to article 18(2) of the Statute authorizing the Prosecution to resume investigation, ICC-02/17-196 ¶ 58 (Oct. 31, 2022).

attention as the United States withdrew from Afghanistan. Just months later, a series of groundbreaking New York Times investigations revealed that such fatal mistakes are not isolated incidents but rather reflective of a broader pattern. The revelations have brought new attention to U.S. civilian harm issues, and they should spur significant changes in how the United States conducts investigations of civilian harm.

#### A. Promising Steps

In recent years, the confluence of congressional oversight, civil society advocacy, and journalistic investigations have drawn attention to civilian harm issues in the Pentagon. Although the substance of promised reforms remains to be seen, top Pentagon leadership has committed to overhaul how the United States handles civilian harm.

Secretary Lloyd Austin has committed to making significant changes in the U.S. military's approach to civilian harm.<sup>169</sup> On January 27, 2022, Secretary of Defense Lloyd Austin announced that the Department of Defense would create a standardized reporting process for civilian harm, establish a center of excellence focusing on civilian harm mitigation and response, and complete the Department of Defense Instruction on Minimizing and Responding to Civilian Harm in Military (DOD-I),<sup>170</sup> which Congress mandated in the National Defense Authorization Act for Fiscal Year 2020.<sup>171</sup> Secretary Austin ordered the development of a Civilian Harm Mitigation and Response Action Plan (CHMRAP) to implement his pledges. On the day of Secretary Austin's announcement, the Rand Corporation released a comprehensive review of the Pentagon's civilian harm policies, procedures, and practices,<sup>172</sup> which Congress also required in the National Defense Authorization Act for Fiscal Year 2020.<sup>173</sup>

---

<sup>169</sup> See U.S. Dep't of Def., Memorandum for Secretaries of the Military Dep'ts Chairman of the Joint Chiefs of Staff under Secretaries of Def Commanders of the Combatant Commands Gen. Counsel of the Dep't of Def. Dir. of Cost Assessment & Program Evaluation (2022), <https://media.defense.gov/2022/Jan/27/2002928875/-1/-1/1/DEPARTMENT%20OF%20DEFENSE%20RELEASES%20MEMORANDUM%20ON%20IMPROVING%20CIVILIAN%20HARM%20MITIGATION%20AND%20RESPONSE.PDF>.

<sup>170</sup> See Eric Schmitt, Charlie Savage & Azmat Khan, *Austin Orders U.S. Military to Step Up Efforts to Prevent Civilian Harm*, N.Y. TIMES (Jan. 27, 2022), <https://www.nytimes.com/2022/01/27/us/politics/us-airstrikes-rand-report.html>.

<sup>171</sup> See John Ramming Chappell & Ari Tolany, *Amid Civilian Harm Revelations, Defense Bill Takes Measured Steps on Oversight & Accountability*, JUST SEC. (Dec. 23, 2021), <https://www.justsecurity.org/79663/amid-civilian-harm-revelations-defense-bill-takes-measured-steps-on-oversight-and-accountability/>.

<sup>172</sup> See MCNERNEY ET AL., *supra* note 46, at v–viii.

<sup>173</sup> See *id.* at iii.

On August 25, 2022, the Department of Defense released the CHMRAP.<sup>174</sup> Divided into eleven objectives, the CHMRAP lays out a multi-year plan to build institutions, develop procedures, and create positions for the mitigation of and response to civilian harm. Consistent with past U.S. government statements, a footnote in the CHMRAP makes clear that “[n]othing in this plan is intended to suggest that existing DoD policies or practices are legally deficient or that the actions to be implemented pursuant to this plan are legally required, including under the law of war.”<sup>175</sup> Although several CHMRAP objectives relate to this Article, Objective 7 is most relevant. The objective aims to “Establish Department-wide procedures for assessing and investigating civilian harm resulting from operations and expand the sources of information used in assessments and investigations.”<sup>176</sup> Objective 7 discusses the establishment of Civilian Harm Assessment and Investigation Coordinator positions at operational commands, the development of Department of Defense-wide standards for investigations, and the incorporation of those standards into doctrine, trainings, and exercises, among other actions.<sup>177</sup>

After years of relative stasis on civilian harm issues in the Pentagon, Secretary Austin’s promises to overhaul the United States’ approach to civilian harm marks a high-level commitment to reform U.S. policies and practices. In the Department of Defense bureaucracy, buy-in from senior leadership is often necessary to drive substantial change. Never before has a Secretary of Defense made concrete commitments to improve civilian harm mitigation and response and laid out a specific process to do so.

---

<sup>174</sup> See DEP’T OF DEF, CIVILIAN HARM MITIGATION & RESPONSE ACTION PLAN (CHMR-AP) (Aug. 25, 2022) <https://media.defense.gov/2022/Aug/25/2003064740/-1/-1/1/CIVILIAN-HARM-MITIGATION-AND-RESPONSE-ACTION-PLAN.PDF> (hereinafter “CHMRAP”). For further analysis of the CHMRAP, see Marc Garlasco, *Defense Department Finally Prioritizes Civilians in Conflict*, LAWFARE (Aug. 29, 2022), <https://www.lawfareblog.com/defense-department-finally-prioritizes-civilians-conflict>; Dan E. Stigall, Anna Williams, *An Improved Approach To Civilian Harm Mitigation And Response: The Civilian Harm Mitigation And Response Action Plan (CHMR-AP)*, ARTICLES OF WAR (Aug. 25, 2022), <https://lieber.westpoint.edu/dod-issues-civilian-harm-mitigation-response-action-plan/>; Brian L. Cox, *Commitment to Balance Is Vitaly Important for Successful Implementation of CHMR-AP*, LAWFARE (Oct. 25, 2022), <https://www.lawfareblog.com/commitment-balance-vitaly-important-successful-implementation-chmr-ap>; Justin MacDonald & Ryan McCormick, *The U.S. DOD Civilian Harm Mitigation And Response Action Plan On Future Battlefields*, ARTICLES OF WAR (Sep. 23, 2022), <https://lieber.westpoint.edu/civilian-harm-mitigation-response-action-plan-future-battlefields/>; Geoff Corn, *Civilian Risk Mitigation: Why Context Matters*, ARTICLES OF WAR (Sep. 27, 2022), <https://lieber.westpoint.edu/civilian-risk-mitigation-why-context-matters/>.

<sup>175</sup> CHMRAP, *supra* note 174, at 3.

<sup>176</sup> *Id.*, at 20.

<sup>177</sup> *See id.*

Alongside commitments to change how the United States addresses civilian harm, an overall decline in U.S. lethal strikes during the Biden administration warrants mention. Although President Biden has shown no sign of ending the global war on terror, he has downsized it.<sup>178</sup> For scholars who see international humanitarian law compliance as a barrier to ending wars,<sup>179</sup> the marked reduction in drone strikes under President Biden, along with his withdrawal from Afghanistan—bungled as it was—should give cause for hope.

### B. *Work to Be Done*

Secretary Austin has indicated his commitment to improving U.S. civilian harm practices and procedures. Public commitment to concrete improvements at the cabinet level is unprecedented, as is the release of the CHMRAP. However, the success or failure of Secretary Austin's plans depends in large part on how the Department of Defense implements them.

Some of the measures that Secretary Austin has promised could make significant headway toward improving U.S. investigations of civilian harm and alleged war crimes. The creation of a center of excellence and implementation of a DOD-I on civilian harm could remedy inconsistencies in U.S. military procedures and practices regarding investigations of civilian harm. Similarly, the standardization of reporting processes may reduce the number of erroneously dismissed cases and improve the effectiveness of investigations. Centralizing expertise in the center of excellence could also facilitate learning and improving procedures over time.

The center of excellence should establish a single program responsible for tracking and storing data related to civilian harm. A central repository collecting data from commanders would facilitate investigations and ensure that information is as consistent and complete as reasonably possible. Leveraging technology could automate manual processes and simplify accessing data at a later date. Objective 6 of the CHMRAP addresses data management and data integration for civilian harm reporting and investigations.<sup>180</sup>

The U.S. military should also increase its use of external, open-source data. Excessive reliance on internal information in the civilian harm

---

<sup>178</sup> See Joe Dyke & Imogen Piper, *Airwars: Biden Dramatically Decreased Global Airstrikes in 2021*, RESPONSIBLE STATECRAFT (Dec. 24, 2021), <https://responsiblestatecraft.org/2021/12/24/how-do-the-forever-wars-look-under-president-biden/>.

<sup>179</sup> See, e.g., SAMUEL MOYN, *HUMANE: HOW THE UNITED STATES ABANDONED PEACE & REINVENTED WAR* (2021) (arguing that the United States' efforts to reduce harm from its military operations, particularly through its lethal drone strikes, have undermined efforts to end U.S. wars altogether).

<sup>180</sup> See CHMRAP, *supra* note 174, at 17.

assessment and investigation processes blinds the U.S. military to crucial open-source information that contributes to the findings of impartial NGOs. Instituting standard procedures guiding the use and verification of open-source information would resolve many problems in current civilian harm credibility assessments. The CHMRAP lists identifying, receiving, and compiling open-source data among the responsibilities of new Civilian Harm Assessment and Investigation Coordinators.<sup>181</sup>

The Department of Defense should invest in specialized training in civilian harm assessment and investigation to increase consistency across the U.S. military. The center of excellence could either deploy specialized personnel to assess and investigate civilian harm and alleged war crimes or provide guidance to improve practices and procedures in the field. Local language skills must be a mandatory qualification for civilian harm assessments to avoid mistakes in the comprehension of allegations and locations of strikes. Objective 7 of the CHMRAP discusses the incorporation of best practices into trainings.<sup>182</sup>

The United States military should standardize practices for site visits. With the United States increasingly engaged in “over-the-horizon” operations, civilian casualty investigations will increasingly rely on aerial imagery. But site visits are especially valuable to understand the aftermath of military operations. For example, interviews with families and witnesses can help uncover information that may not be apparent from remote analysis. Granted, site visits come with risks: they can expose U.S. armed forces to attacks by adversaries. Security risks can require the U.S. military to expend significant resources to ensure security.<sup>183</sup> Nevertheless, creating a standard framework for determining when site visits and interviews take place would improve significantly on the status quo, in which site visits and interviews occur on an ad hoc basis. Where local conditions preclude site visits, online interviews may be possible in some instances. While the CHMRAP mentions site visits and standardization of investigation processes, it does not specifically state whether standards for site visits will be incorporated into new investigation processes.<sup>184</sup>

In reviewing U.S. policies, practices, and procedures for civilian harm, the Department of Defense should look both forward and back.<sup>185</sup> In a congressional hearing on April 6, 2022, Congresswoman Sara Jacobs asked

---

<sup>181</sup> See *id.* at 21.

<sup>182</sup> See *id.* at 20–23.

<sup>183</sup> See MCNERNEY ET AL., *supra* note 91, at 82.

<sup>184</sup> See, e.g., CHMRAP, *supra* note 174, at 22.

<sup>185</sup> See Annie Shiel & John Ramming Chappell, *DoD Can't Move Forward on Civilian Casualties Without Looking Back*, JUST SEC. (Apr. 19, 2022), <https://www.justsecurity.org/81167/dod-cant-move-forward-on-civilian-casualties-without-looking-back/>.

Secretary Lloyd Austin whether the Department of Defense plans to “revisit cases that were likely prematurely dismissed as a result of faulty initial assessments.”<sup>186</sup> Secretary Austin responded, “At this point we don’t have an intent to re-litigate cases.”<sup>187</sup> However, the Secretary’s response is misleading. Only in very rare cases has litigation around alleged war crimes taken place. Congresswoman Jacobs’ question instead focused on reports of civilian harm that the Department of Defense dismissed as not credible, meaning that the U.S. military did not complete an administrative investigation of the allegations. The United States owes it to victims and survivors to review cases that the Department of Defense wrongly dismissed to acknowledge harms and make amends. While such reviews may require significant resources, the cost pales in comparison to the lives devastated by American bullets and bombs. Unfortunately, the Department of Defense has made clear that its implementation of the CHMRAP “will not include reinvestigating past incidents, even those that were erroneously dismissed.”<sup>188</sup>

The United States needs to reckon with twenty years of civilian harm from its post-9/11 wars. Australia’s Afghanistan Inquiry report could offer a model for the United States. Released in 2020, the Brereton Report investigated alleged war crimes by the Australian Defense Force in Afghanistan from 2005 to 2016.<sup>189</sup> The United States government should consider a retrospective effort of similar scope and ambition to ensure that the U.S. military adequately investigates the legacy of civilian harm from the global war on terror and effectively incorporates lessons learned.

Finally, the CHMRAP and DOD-I should not mark the end of Department of Defense efforts to limit civilian harm. Rather, the current review should open an iterative process of tracking, investigating, and learning that continually builds on itself. As new issues come to light, the Pentagon should remain flexible and responsive to continuously incorporate improvements and solutions. The authors of the CHMRAP agree that the CHMRAP should contribute to a “virtuous cycle that permits continuous

---

<sup>186</sup> See *Fiscal Year 2023 Defense Budget Request: Hearing Before the H. Armed Services Comm.*, 117th CONG. (2022) (statement of Rep. Sara Jacobs, Member, H. Armed Services Comm.).

<sup>187</sup> *Id.*

<sup>188</sup> Lara Seligman, *Pentagon’s new civilian casualty plan won’t include reopening past cases*, POLITICO (Oct. 20, 2022), <https://www.politico.com/news/2022/10/20/pentagon-wont-reopen-past-cases-of-civilian-deaths-00062737>.

<sup>189</sup> See INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENSE FORCE AFGHANISTAN INQUIRY REPORT (2020), <https://afghanistandinquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>.



improvement,”<sup>190</sup> but its long-term success in doing so will depend on successful institutionalization of practices.

### C. Sustainable Change

The practices, procedures, and policies regarding the use of lethal force need an overhaul that will outlast this administration. The legal authorities for the global war on terror remain active, and successive administrations have taken steps to expand the use of the president’s commander in chief powers in hostilities. Too often, incremental progress on civilian harm issues has fallen by the wayside with changes in leadership.<sup>191</sup>

The Department of Defense needs a permanent office tasked with civilian harm issues. Such an office would help ameliorate the consistency and standardization issues that plague U.S. assessments and investigations, and it could shift the structural issues that leave civilian harm issues unaccounted for except in cases of a public scandal. The center of excellence mandated in Secretary Austin’s directive and the CHMRAP, if properly staffed and resourced, could function as a permanent body within the Department of Defense to push for continual improvements and sustained prioritization of civilian harm issues.<sup>192</sup> At the State Department, the Bureau for Democracy, Human Rights, and Labor has shifted bureaucratic dynamics by functioning as a constant proponent of human rights considerations.<sup>193</sup> An analogous entity in the Department of Defense could ensure that civilian harm issues are factored into the Pentagon’s decision-making at every stage, from providing security assistance to partner militaries to drafting new rules of engagement.

To ensure its effectiveness, the center of excellence will likely need a congressional mandate to reinforce and codify Secretary Austin’s directive. A well-funded, sufficiently empowered center of excellence will require express authorizations and appropriations to outlast the initiatives of a single presidency. Congressional oversight could ensure that the center of excellence remains effective and appropriately resourced.<sup>194</sup>

---

<sup>190</sup> Dan E. Stigall & Anna Williams, *An Improved Approach To Civilian Harm Mitigation And Response: The Civilian Harm Mitigation And Response Action Plan (CHMR-AP)*, ARTICLES OF WAR (Aug. 25, 2022), <https://lieber.westpoint.edu/dod-issues-civilian-harm-mitigation-response-action-plan/>.

<sup>191</sup> Sarah Holewinski Yager, *Lost Innocents*, FOREIGN AFFS. (Jan. 25, 2022), <https://www.foreignaffairs.com/articles/united-states/2022-01-25/lost-innocents>.

<sup>192</sup> See DEP’T OF DEF., *supra* note 169.

<sup>193</sup> See Margaret E. McGuinness, *Human Rights Reporting as Human Rights Governance*, 59 COL. J. TRANSNAT’L L. 368, 388–391 (2021).

<sup>194</sup> See Luke Hartig, *A Big Step Forward or Running in Place?: The Pentagon’s New Policy on Civilian Casualties*, JUST SEC. (Feb. 8, 2022), <https://www.justsecurity.org/80131/a-big-step-forward-or-running-in-place-the-pentagons-new-policy-on-civilian-casualties/> (“And a

## V. AMERICAN ACCOUNTABILITY IN A CRUMBLING WORLD

Russia appears to have committed war crimes on a large scale in Ukraine as part of its war of aggression. As the Russian military withdrew from Bucha, Ukraine in April 2022, Russian soldiers appear to have massacred civilians.<sup>195</sup> Early reports indicated that torture, extrajudicial executions, war crimes, and other atrocities have been widespread. The United Nations reported at least 4,031 civilian deaths in just the first three months of Russia's invasion.<sup>196</sup> In September 2022, the first report of the United Nations-appointed Independent International Commission of Inquiry on Ukraine described Russian war crimes including executions, sexual violence, and indiscriminate attacks on civilian populations.<sup>197</sup>

Meanwhile, the United States has created procedures—flawed and incomplete as they may be—to mitigate and respond to civilian harm. The Secretary of Defense has committed to overhaul those procedures. In the face of horrible atrocities committed by other states, why should the United States improve investigations of civilian harm and alleged war crimes by its own military?

While the United States can apply pressure and exercise leverage to attempt to hold other states accountable for violations of human rights and international humanitarian law, the mechanisms that make accountability possible for those abuses are mostly out of U.S. control. While the United States can support or obstruct accountability, it can only do so much alone. But accountability for U.S. civilian harm and war crimes lies well within the authority and ability of the U.S. government. Past efforts to reduce civilian harm have resulted in significant cuts to rates of civilian harm.<sup>198</sup> Likewise, the U.S. military has shown that it is capable of investigating civilian harm if it dedicates sufficient resources and attention to doing so.<sup>199</sup> Turning inward and working to improve U.S. practices and policies would bolster the credibility of U.S. efforts to push other countries to comply with international humanitarian law and improve accountability.

---

DOD-led review, absent interagency or congressional oversight, is simply unlikely to produce sustained change.”).

<sup>195</sup> See Cara Anna, *War Crimes Watch: A Devastating Walk Through Bucha's Horror*, ASSOCIATED PRESS (Apr. 10, 2022), <https://apnews.com/article/russia-ukraine-europe-war-crimes-7791e247ce7087ddd64a2bbdcc5b888>

<sup>196</sup> *More than 4,000 Civilians Killed in Ukraine: UN*, AL JAZEERA (May 27, 2022), <https://www.aljazeera.com/news/2022/5/27/un-says-more-than-4000-civilians-killed-in-ukraine-so-far>.

<sup>197</sup> See *War Crimes Have Been Committed In Ukraine Conflict*, Top UN Human Rights Inquiry Reveals, U.N. (Sept. 23, 2022), <https://news.un.org/en/story/2022/09/1127691>,

<sup>198</sup> Yager, *supra* note 191.

<sup>199</sup> See IN SEARCH OF ANSWERS, *supra* note 87, at 1.

Investigations of civilian harm and alleged war crimes would also benefit the United States. As the United States competes with Russia and China, it does so on both geopolitical and moral terrain. Committing to consistently improve itself when it comes to civilian harm and international humanitarian law would strengthen the moral standing of the United States and strengthen its claim to defend the rules-based international order at a challenging time. With a great deal of strategic competition manifesting in the moral and institutional realms, a commitment to promoting accountability in war would be a boon for U.S. soft power. Better assessing the consequences of U.S. military operations would facilitate learning from past mistakes to improve military efficiency and effectiveness. As the United States seeks to deemphasize the war on terror in its foreign policy, decreasing civilian harm as much as possible would reduce the animosities that can fuel radicalization.<sup>200</sup>

For U.S. voters, understanding the human costs of war overseas helps assess whether U.S. foreign policy is working as it should. Nearly three-quarters of Americans believe – correctly – that the U.S. government underestimates the number of civilian casualties from military operations abroad.<sup>201</sup> Effective investigations of civilian harm and alleged war crimes would contribute to a fuller understanding of how American uses of lethal force harm communities overseas, informing broader decisions about war and peace.

Finally, thousands of civilian survivors and grieving families are waiting for recognition and amends that will not come without investigations of harm done. Twenty years of the American war on terror, waged around the world, have left countless communities grieving the loss of those killed in American airstrikes. American bullets and bombs have devastated families across the world who seek justice, whether in the form of acknowledgment, ex gratia payments, or other amends. The United States has a moral responsibility to ensure that there is accountability for civilian harm and violations of international humanitarian law.

---

<sup>200</sup> See generally Luke N. Condra & Jacob N. Shapiro, *Who Takes the Blame? The Strategic Effects of Collateral Damage*, 56 AM. J. POL. SCI. 167 (2012) (concluding that “Coalition killings of civilians predict higher levels of insurgent violence and insurgent killings predict less violence in subsequent periods.”); see also Sudarsan Raghavan, *In Yemen, US Airstrikes Breed Anger, and Sympathy for Al Qaeda*, WASH. POST (May 29, 2012), [https://www.washingtonpost.com/world/middle\\_east/in-yemen-us-airstrikes-breed-anger-and-sympathy-for-al-qaeda/2012/05/29/gJQAUmK10U\\_story.html](https://www.washingtonpost.com/world/middle_east/in-yemen-us-airstrikes-breed-anger-and-sympathy-for-al-qaeda/2012/05/29/gJQAUmK10U_story.html).

<sup>201</sup> See Taylor Orth, *Democrats are More Likely than Republicans to Trust Government Statistics*, YOUNG (Apr. 12, 2022, 11:15AM), <https://today.yougov.com/topics/politics/articles-reports/2022/04/12/democrats-more-likely-trust-government-statistics>.