

## Article

### **A Duty to Investigate Incidents Involving Collateral Damage and the United States Military's Practice**

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#### **ABSTRACT**

It is generally believed that states do not have an obligation to investigate incidents involving collateral damage absent a suspicion that a grave breach of International Humanitarian Law (“IHL”) has occurred. This paper argues that, although there is no affirmative investigative duty expressed in any IHL treaty, a general duty to investigate is clearly implied by two requirements contained in IHL treaties: the duty to examine every incident that amounts to a grave breach and the duty to punish offenders who violate IHL provisions. As applied to the U.S. military, while this general investigative duty may at times prove troublesome, compliance does not seem impossible. First, the depth and the quality of the obligatory investigations are contextual and vary according to the conditions at the time of the inquiry. Second, since a number of the U.S. military's own regulations require commanders to gather and analyze data about the consequences of each attack, a duty to investigate does not impose an extra burden but

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merely restates preexisting obligations. If the U.S. military regulations were followed then all potential violations of the principle of proportionality would be reported and investigated by the U.S. military. Whether or not those rules actually are followed, however, is unknown because the U.S. military does not disclose this information. Since IHL does not require investigations to be conducted publically or demand their results released, the U.S. military elects to hide its investigative activities, keeping the public unaware of what it actually does.

### I. INTRODUCTION

International Humanitarian Law (“IHL”) does not impose a strict ban on killing civilians during military strikes.<sup>1</sup> Instead, it applies the utilitarian “principle of proportionality” which weighs the number of civilian casualties inflicted by each attack against the vague concept of “military advantage.”<sup>2</sup> Consequently, in accordance with that theory, “proportionality” should be determined anew for each attack.<sup>3</sup> In practice,

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1. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51 (5)(b), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (describing the principle of proportionality), available at <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>.

2. *Id.* Judith G. Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 392 n.4 (1993) (“The term “proportionality” does not appear in these provisions; rather, the word “excessive” is used in relation to civilian casualties.”); see also Bernard L. Brown, *The Proportionality Principle in Humanitarian Law of Warfare: Recent Efforts at Codification*, 10 CORNELL INT'L L. J. 134, 141 (1976) (“Whether an action satisfies the proportionality test will depend on which interpretation of “military advantage” is used for analytical purposes.”).

3. Aaron Schwabach, *NATO's War in Kosovo and the Final Report to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia*, 9 TUL. J. INT'L & COMP. L. 167, 184 (2001). *But see* Lieutenant Colonel William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 106–07 (1982) (claiming it is unlikely that the standard for measuring military advantage is the military advantage derived from an attack on a single military objective); Noam Neuman, *Applying The Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality*, 7 Y.B. INT'L HUMANITARIAN L. 79, 100 (2004) (concluding that military advantage is measured relative to the whole campaign from which an attack is a part). For the debate on whether an “attack” constitutes action against several military objectives or a single military objective see, for example, ICRC Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), ¶ 2209,

however, the “non-excessiveness” of collateral damage is in most cases a default assumption.

Because the Fourth Geneva Convention (“GC IV”) and the First Additional Protocol (“AP I”) expressly require state-parties to provide effective penal sanctions for those committing or ordering others to commit grave breaches,<sup>4</sup> it is generally believed that states do not have an obligation to investigate incidents involving collateral damage absent a suspicion that a grave breach of IHL has actually occurred.<sup>5</sup> This paper disagrees with this general view. This paper argues that, although a duty to investigate all strikes resulting in

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June 8, 1977 [hereinafter ICRC AP I Commentary], *available at* <http://www.icrc.org/ihl.nsf/WebList?ReadForm&id=470&t=com> (commenting on the language used gave rise to differences in opinion); ANN VAN WYNEN THOMAS & A. J. THOMAS JR., LEGAL LIMITS ON THE USE OF CHEMICAL AND BIOLOGICAL WEAPONS 195–96 (S. Methodist Univ. Press 1970) (discussing this aspect of proportionality in relation to chemical and biological weapons); Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81, 96 (2006) (explaining that the army applies the cumulative concept of proportionality); Gardam, *supra* note 2, at 407 (1993); Brown, *supra* note 2, at 140 (explaining that “military advantage” can be construed on a case-by-case or on a cumulative basis); Tom J. Farer, *The Laws of War 25 Years After Nuremberg*, 39 INT’L CONCILIATION 1, 16–17 (1971) (highlighting the different approaches to proportionality including the case-by-case, “tactical,” or cumulative bases); W. Hays Parks, *Air War and the Law of War*, 32 A. F. L. REV. 1, 173–74 (1990) (discussing there is no agreement as to how the concept of proportionality will generally be applied); CARR CENTER FOR HUMAN RIGHTS POLICY, HARVARD UNIVERSITY, UNDERSTANDING COLLATERAL DAMAGE, 1, 10 (2002) (explaining that the disagreements over the concept of military advantage), *available at* <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/ WebJuneReport.pdf>.

4. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 75 U.N.T.S 287 [hereinafter GC IV], *available at* <http://www.icrc.org/ihl.nsf/FULL/380?OpenDocument>; AP I, *supra* note 1, art. 85(1).

5. See Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT’L SEC. J. 31, 39 (2011) (“The articles [of the Geneva Conventions] impose no obligation to conduct investigations to uncover IHL violations.”); *id.* at 43 (“Although the article [AP I, art. 87] is framed in terms of commanders’ duties, it is clear that the intent was to create a seamless system for identifying and responding to potential and possible war crimes.”); *id.* at 79 (“Every allegation of a war crime need not be investigated. The requirement to investigate applies only where such allegations appear credible.”). In addition, the U.S. military procedures demand that “[a]ll military and U.S. civilian employees, contractor personnel, and subcontractors . . . report . . . through their chain of command” all “possible, suspected, or alleged violation[s] of the law of war, for which there is credible information . . .” DEP’T OF DEFENSE, DIRECTIVE 2311.0E, DOD LAW OF WAR PROGRAM, ¶¶ 3.2, 6.3 (May 9, 2006) [hereinafter DODD 3211.01E] (incorporating change 1, November 15, 2010), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>.

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civilian losses is not explicitly required by any IHL treaty, a general duty to investigate is implied through the requirement to investigate every incident that amounts to a grave breach. In addition, this paper maintains that the duty to investigate is further confirmed by a state's obligation to punish offenders of IHL provisions. For an act to be subject to punishment, it must be found to have been a violation of law. Therefore, states must evaluate all strikes involving collateral damage because without an investigation it is impossible to say whether IHL norms were actually violated.

This paper focuses on the U.S. military when analyzing whether in practice it is possible to comply with a heightened investigative duty.<sup>6</sup> It concludes that due to the U.S.'s unmatched technological advancement and an over decade-long involvement in large-scale hostilities, the U.S. military is prepared to carry out a heightened investigative duty better than any other armed force in the world. First, the depth and the quality of the obligatory investigations are contextual and vary in accordance with the conditions at the time of the inquiry.<sup>7</sup> Second, since a number of the U.S. military's own regulations require commanders to gather and analyze data about the consequences of each attack, a duty to investigate does not impose any extra burden but merely restates already existing obligations.<sup>8</sup>

Finally, this paper addresses whether the U.S. military actually adheres to existing regulations. Since IHL does not require transparency of either investigations or their findings,<sup>9</sup> the U.S. military is given an opportunity to hide its investigative activities. With virtually no relevant data available to the public, the question of the U.S. military's compliance with a general duty to investigate is simply impossible to address. The final part of this paper highlights that problem and calls for greater transparency of U.S. military's ex post strike inquiries. It argues that a move away from secrecy could prove beneficial for the U.S. military and

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6. This paper does not suggest that the U.S. military is in any way representative of armed forces in other states nor does this paper seek to make any generalizations. The U.S. is merely a prominent player in world military activity.

7. Schmitt, *supra* note 5, at 72.

8. Schmitt, *supra* note 5, at 70; *see generally* DoDD 3211.01E, *supra* note 5.

9. Schmitt, *supra* note 5, at 81 ("Investigations need not be conducted publically or their results released.").

that such a move is indispensable for a duty to investigate to have any practical meaning.

#### 1. DUTY TO INVESTIGATE UNDER INTERNATIONAL HUMANITARIAN LAW

Under the current state of IHL, there is no express requirement placing states under a duty to investigate all strikes resulting in civilian losses.<sup>10</sup> States do, however, have to examine those strikes which include the most serious violations of IHL because the Convention (IV) Relative to the Protection of Civilian Persons in Time of War (“GC IV”) and the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (“AP I”) obligate state-parties to prevent grave breaches of their provisions and to prosecute those who commit them.<sup>11</sup> The United Nations General Assembly and the Security Council has explicitly affirmed the existence of the duty to investigate any such violations.<sup>12</sup>

Attacks aimed at civilian populations or launched knowing they will cause excessive collateral damage constitute grave breaches of the Protocol,<sup>13</sup> and there is no doubt that states are compelled to investigate and punish such breaches.<sup>14</sup> Indeed,

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10. AP I, *supra* note 1, art. 85(1); GC IV, *supra* 4, art. 146. These provisions are explicit only about the duty to investigate grave breaches; the same duty concerning non-grave breaches, while not explicitly mentioned by any of those documents, can, however, be deduced from articles 1 and 146 of GC IV as well as from articles 1 and 87(3) of AP I. Furthermore, since IHL creates an obligation to penalize all kinds of breaches and not only those which qualify as grave, *see infra* Part 1.1, the argument that non-grave breaches are not covered by the duty to investigate is misplaced, for it implies that the drafters wished to create a system allowing for inflicting punishment without prior proper investigation of the matter in question. Such intention is, however, clearly rejected by article 146 of GC IV which states that “the accused persons shall benefit by safeguards of proper trial and defence.” GC IV, *supra* note 4, art. 146.

11. GC IV, *supra* note 4, art. 146; AP I, *supra* note 1, art. 85(1).

12. *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations for Intentional Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, at 5 ¶ 4, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) [hereinafter Basic Principles]; *see generally* S.C. Res. 1296 ¶ 17, U.N. Doc. S/RES/1296 (Apr. 19, 2000) (reaffirming its condemnation of grave breaches in armed conflict); S.C. Res. 1265, ¶ 6, U.N. Doc. S/RES/1265 (Sept. 17, 1999) (explaining the responsibility of states to prosecute those responsible for grave breaches).

13. *See* AP I, *supra* note 1, art. 85(3)(a)–(b).

14. *See* GC IV, *supra* note 4, art. 146

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“[i]n order to discharge the obligation to prosecute those who commit grave breaches, a state must ipso facto conduct credible investigations that could, if warranted, lead to prosecutions.”<sup>15</sup> Yet, if that is the case, a duty to investigate is not limited only to incidents involving grave breaches. States must investigate all incidents to determine whether a grave breach occurred.

Since IHL is concerned with the relative excessiveness rather than absolute extensiveness of civilian injuries,<sup>16</sup> proportionality of the attack cannot be proven merely by demonstrating a small amount of collateral damage in an absolute sense occurred. Similarly, the fact that certain precautions were taken does not imply that implementing additional safeguards would be infeasible.<sup>17</sup> Just because some military installations were destroyed does not prove that they actually constituted the primary target of the strike. In other words, no assault is above suspicion until it is positively verified; therefore each and every case involving incidental civilian damages has to be checked to determine its legality.<sup>18</sup>

In order to effectuate such vague legal standards, one must interpret them in conformity with the spirit of the broader regulations to which they belong.<sup>19</sup> Primary purposes of IHL is to protect innocent civilians and other persons not taking an active part in hostilities and to ensure respect for their human dignity under the dreadful conditions of armed conflict.<sup>20</sup> The

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15. Brendan Groves, *Civil–Military Cooperation in Civilian Casualty Investigations: Lessons Learned From the Azizabad Attack*, 65 A. F. L. REV. 1, 41 (2010).

16. See AP I, *supra* note 1, art. 57(2)(a)(iii); see also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J., Reports of Judgments, Advisory Opinions and Orders, 226, 266 ¶ 105(2)(E) (July 8, 1996), available at <http://www.icj-cij.org/doCKET/files/95/7495.pdf>; Michael N. Schmitt, *Fault Lines in the Law of Attack*, in TESTING THE BOUNDARIES OF INTERNATIONAL AND HUMANITARIAN LAW 277, 294, (Susan Breau & Agnieszka Jachec–Neale, eds., British Inst. of Int'l & Comparative Law 2006). The International Court of Justice indirectly confirmed that from a legal point of view incidental damages do not have any independent value themselves, but only in relation to a particular situation (i.e., the concrete and direct military advantage anticipated). See Schmitt, *supra* note 16, at 294 n.61.

17. See AP I, *supra* note 1, art. 57(2)(a)(ii).

18. *Id.*, art. 51(2), 57(2)(a)(i).

19. See Antonio Cassese, *On Some Merits of the Israeli Judgment on Targeted Killings*, 5 J. INT'L CRIM. JUST. 339, 345 (2007).

20. Prosecutor v. Delalic, Case No. IT–96–21–T, Judgment, ¶ 200 (Nov. 16, 1998) (describing how the Geneva Convention provisions seek to guarantee basic human rights to those taking no part in armed conflict), available at <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>; see also Prosecutor v. Furundzija, Case No. IT–95–17/1–T, Judgment, ¶ 183 (Dec. 10,

requirement of running ex post investigations of the consequences of attacks is a means to achieve those objectives. By increasing the probability of detecting violations and of punishing people responsible for those violations, a duty to investigate is aimed at deterring potential wrongdoers, thus enhancing the security of civilian populations.<sup>21</sup> As a result, an obligation to conduct ex post strike inquiries is “fully warranted by the very spirit and demands of international humanitarian law. . . .”<sup>22</sup>

### 1.1 Obligation to Penalize All Breaches

Article 146 of GC IV also applies to breaches of AP I.<sup>23</sup> Consequently, it can be read in the following way: “[e]ach High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention [and AP I] other than the grave breaches.”<sup>24</sup> In accordance with this obligation, states should take preventive measures both to familiarize their soldiers with IHL and to deter them from violating it.<sup>25</sup>

As the Conventions and the Protocol only explicitly require states to impose penal sanctions “on conduct defined . . . as ‘grave breaches,’”<sup>26</sup> one may initially conclude that non-grave breaches do not have to be penalized. Careful reading of these documents, however, suggests otherwise.

The terms “repression” and “suppression” as used in the Geneva Conventions and Protocol encompass the obligation to impose punishment in the context of both grave or non-grave breaches.<sup>27</sup> As the International Committee of the Red Cross (“ICRC”), commenting on states’ obligations to suppress non-grave breaches of GC IV<sup>28</sup> and AP I,<sup>29</sup> observed “[t]he term

1998) (discussing violations of human dignity in the context of rape), *available at* <http://www.icty.org/x/cases/mucic/tjug/en/cel-tj981116e.pdf>,

21. Cassese, *supra* note 19, at 345.

22. *Id.*

23. AP I, *supra* note 1, art. 85(1).

24. See GC IV, *supra* note 4, art. 146.

25. See International Committee of the Red Cross [ICRC], *Commentary on the Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, art. 146 [hereinafter ICRC GC IV Commentary], *available at* <http://www.icrc.org/ihl.nsf/WebList?ReadForm&id=380&t=com>.

26. ICRC AP I Commentary, *supra* note 3, ¶ 3589.

27. Thomas J. Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977*, 103 MIL. L. REV. 3, 27 (1984).

28. GC IV, *supra* note 4, art. 146.

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'suppress' . . . means putting an end to such conduct; depending on its gravity and the circumstances, such conduct can and should lead to administrative, disciplinary or even penal sanctions."<sup>30</sup> Consequently, the ICRC argues that "[t]he Contracting Parties who have taken measures to repress the various grave breaches . . . should at least insert in their legislation a general clause providing for the punishment of other breaches."<sup>31</sup>

Moreover, the obligation to penalize non-grave breaches can also be deduced from article 87(3) of AP I. According to that regulation, signatories "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 th[e] Protocol, to initiate . . . where appropriate . . . disciplinary or penal action against violators thereof."<sup>32</sup> That provision is not limited to grave breaches, and as such it implies that states must enable military commanders to initiate disciplinary or penal action against their subordinates for violating any provisions of the AP I and/or GC IV.

The duty to penalize non-grave breaches may also be derived from the fact that both GC IV and AP I require state-parties to "respect and to ensure respect" for their provisions in all circumstances.<sup>33</sup> Indeed, in light of the purposes and spirit of GC IV regulations, a state not providing for punishment of non-grave breaches, "calls into serious question its good faith compliance with its treaty obligations."<sup>34</sup> Analysis of the travaux préparatoires of Common Article I shows that "[t]he 'ensure respect' clause was meant to emphasize the duty of all States to enforce humanitarian norms at the domestic level."<sup>35</sup>

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29. AP I, *supra* note 1, art. 86.

30. ICRC AP I Commentary, *supra* note 3, ¶ 3402.

31. ICRC GC IV Commentary, *supra* note 25, art. 146; *see also* Murphy, *supra* note 27, at 29 (suggesting that parties have an obligation to use "administrative or penal sanctions" to punish simple breaches); Schmitt, *supra* note 5, at 37 (arguing that non-grave breaches should be addressed by national penal legislation).

32. AP I, *supra* note 1, art. 87(3).

33. AP I, *supra* note 1, art. 1; GC IV, *supra* note 4, art. 1.

34. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 570 (1995).

35. Jaume Saura, *Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations*, 58 HASTINGS L.J. 479, 493 (2007); *see also* Frits Kalshoven, *The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit*, 2



Enforcement of IHL requires a state to not only spread knowledge of that law,<sup>36</sup> but also to provide sufficient authority to punish violators of IHL provisions. Coercive measures are necessary because a law which can be broken at no cost is at serious risk of not being followed.<sup>37</sup> IHL is not an exception. Accordingly, the ICRC report on IHL violations stated that “[m]ere awareness of IHL or favourable attitudes towards it are not sufficient to produce a direct impact on the behaviour of the combatants.”<sup>38</sup> It went on to conclude that “[i]f the combatants are to respect IHL, the rules must be translated into specific mechanisms and care must be taken to ensure that practical means are set in place to make this respect effective.”<sup>39</sup>

Once collateral damage has occurred, enforcement of IHL means punishing those whose culpable deeds or omissions contributed to the occurrence.<sup>40</sup> This is true when it was possible to take more precautions to avoid or minimize collateral damage. In situations in which civilian losses occurred because of the omission of precautions, the punishment of those who failed to take those precautions is the only remaining way of ensuring respect for the law.

While penalization of non-grave breaches is obligatory,

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Y.B. INT'L HUMANITARIAN L. 3, 3–23 (1999).

36. Murphy, *supra* note 27, at 38.

37. See, e.g., Gary LaFree and Laura Dugan, *Research on Terrorism and Countering Terrorism*, 38 CRIME & JUST. 413, 421–22 (discussing rational actor perspectives and concluding that punishment can be used to deter unwanted behavior because people acting in their own self-interest weigh likelihood and severity of punishment before deciding whether to engage in prohibited conduct).

38. Daniel Muñoz-Rojas & Jean-Jacques Frésard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, 853 INT'L REV. RED CROSS 189, 200 (2004).

39. *Id.* at 203; see also Robert T. Mounts et al., *Panel II: War Crimes and Other Human Rights Violations in the Former Yugoslavia*, 16 WHITTIER L. REV. 387, 425 (1995) (“The international community must have an effective system for punishment for the same reasons every civilized society punishes criminals: (1) to vindicate the rights of victims; (2) to express our outrage; (3) to deter crime by others; (4) to protect our members from these criminals while they are confined; and (5) to rehabilitate individuals who have lost their way.”).

40. See Kenneth J. Keith, *Rights and Responsibilities: Protecting the Victims of Armed Conflict*, 48 DUKE L.J. 1081, 1120 (“Methods of enforcing the law of war that operate after the event include criminal prosecutions by national courts of the parties, third countries, military tribunals, and international tribunals; disciplinary processes; national or international inquiries; mediation processes; and civil proceedings in national or international courts.”).

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there is no requirement that the punishment be in form of penal sanctions (as required for grave breaches).<sup>41</sup> States may subject people committing such violations to merely administrative or disciplinary sanctions.<sup>42</sup> Either way, “appropriate disciplinary action (including prosecution) within the military justice system or prosecution by the civilian courts”<sup>43</sup> is always necessary.

Principles of the rule of law also support investigating non-grave breaches. A state governed by the rule of law may only inflict punishment after an investigation and a decision as to culpability by an appropriate adjudicative body.<sup>44</sup> GC IV finds it useful to state that “the accused persons shall [always] benefit by safeguards of proper trial and defence.”<sup>45</sup> Consequently, since a trial which lacks a factual investigation is never proper, states do have a duty to investigate all breaches of the GC IV and AP I.<sup>46</sup>

## 2. IS INVESTIGATING POSSIBLE?

Article 146 of GC IV provides that “the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.”<sup>47</sup> Unfortunately, while the above mentioned provisions provide certain insight into judicial proceedings, they do not specify the exact scope of the duty to investigate.<sup>48</sup> However, ex ante precautions, including verification of the target, are subject to the standard of feasibility because collecting data during ongoing hostilities can be difficult.<sup>49</sup> So, having in mind the logic of IHL, it appears justified to assume that the same feasibility standard applies to ex post investigations because they face a similar level of difficulty.

Analysis of AP I’s travaux préparatoire reveals that the

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41. See GC IV, *supra* note 4, art. 146.

42. *Id.*

43. Schmitt, *supra* note 5, at 81.

44. See generally Basic Principles, *supra* note 12, art. 3 (discussing a state’s duty to thoroughly investigate alleged breaches of IHL and then take action against those responsible when such action would be appropriate).

45. GC IV, *supra* note 4, art. 146.

46. See Basic Principles, *supra* note 12, art. 3.

47. GC IV, *supra* note 4, art. 146.

48. See *id.*

49. AP 1, *supra* note 1, art. 57(2)(i)–(ii).

word “feasible” is meant to be synonymous with “practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations.”<sup>50</sup> Thus, appropriateness of each “investigation must always be judged contextually.”<sup>51</sup> One must determine, for instance, what means were at the investigator’s disposal at the time of investigation,<sup>52</sup> whether there were any known witnesses of the incident, and how difficult it would have been to question the witnesses. Similarly, one should consider who had control over the area in which the incident took place and whether under the circumstances it was possible to conduct an in-the-field examination of the facts.<sup>53</sup>

At any given time, the authority capable of conducting an investigation could have other obligations to perform, most notably being engaged in an ongoing military conflict.<sup>54</sup> So, it may appear that “devoting resources toward [conducting collateral damage investigations] while combat is underway could undermine more pressing operational objectives.”<sup>55</sup> However, the U.S. military is instructive in this regard. The U.S. military’s own regulations require commanders to examine the results of every attack.<sup>56</sup> Therefore, since the U.S. military itself imposes such an obligation on its commanders, the task of gathering data on the battlefields likely would not be so disruptive and difficult as to impede the military’s other goals and responsibilities. In fact, as will be presented below,

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50. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, 4th session, 42d mtg., at 241, CDDH/SR.42 (May 27, 1977) [hereinafter *Official Records VI*] (documenting the opinion of the United States); *id.* at 226 (showing that the definition supported by Germany was identical to that of the United States); *see also* Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Oct. 10, 1980, 1342 U.N.T.S. 168 (adopting an almost identical interpretation).

51. Schmitt, *supra* note 5, at 80.

52. The means at an investigator’s disposal are crucial in examining the context of an investigation. For example, as the AP I’s travaux préparatoire indicate, during the discussion on the meaning of “feasibility” the following reservation was made: “[a]s the capability of Parties to a conflict to make distinction will depend upon the means and methods available to each Party generally or in particular situations, this article does not require a Party to undertake to do something which is not within its means or methods or its capability.” *Official Records VI*, *supra* note 50, at 228.

53. *See* Schmitt, *supra* note 5, at 54.

54. *Id.* at 55.

55. UNDERSTANDING COLLATERAL DAMAGE, *supra* note 3, at 2.

56. *See infra* notes 66–79 and accompanying text.

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the U.S. military, having an interest in certain information for its own purposes,<sup>57</sup> collects such data on an everyday basis. Indeed, “[a]s difficult as it can be to gain an accurate and complete picture of what occurs on the battlefield, it can be and is done routinely.”<sup>58</sup>

2.1 Duty to Investigate under U.S. Military Regulations

U.S. military regulations require reporting and investigating incidents that involve potential abuses of IHL, including wrongfully caused collateral damage. The U.S. military procedures demand that “[a]ll military and U.S. civilian employees, contractor personnel, and subcontractors . . . report . . . through their chain of command” all “possible, suspected, or alleged violation[s] of the law of war, for which there is credible information.”<sup>59</sup> The U.S. Army Operational Law Handbook urges soldiers not to hesitate to report any incidents which arouse their suspicion; the Handbook’s prescription is simple—“when in doubt, report.”<sup>60</sup>

As soon as the commander of any unit receives information about a possible breach of IHL he “shall immediately report the incident through the applicable operational command and Military Department.”<sup>61</sup> Moreover, if the information which he obtained suggests that a reportable incident might have been committed by his command personnel, the commander is obliged to conduct a preliminary inquiry into the charges or suspected offenses;<sup>62</sup> “[t]he inquiry should gather all reasonably

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57. See, e.g., JOINT CHIEFS OF STAFF, JOINT PUB. 2–01.1, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR INTELLIGENCE SUPPORT TO TARGETING ¶ 3 at VI–4 (2003) [hereinafter Joint Pub. 2–01.1]; UNITED STATES AIR FORCE, PAMPHLET 14–210, U.S.A.F INTELLIGENCE TARGETING GUIDE, ¶ 9.1.1 (1998) [hereinafter AF PAM].

58. Victor M. Hansen, *Developing Empirical Methodologies to Study Law of War Violations*, 16 WILLAMETTE J. INT’L L. & DISP. RESOL. 342, 358 (2008).

59. DODD 2311.01E, *supra* note 5, ¶¶ 3.2, 6.3 (applying a reporting duty to military operations other than war concerning conduct that would constitute a violation of the law of war if it occurred during an armed conflict).

60. International and Operational Law Department, The Judge Advocate GEN.’S Legal CTR. & SCH., U.S. Army, JA 422, OPERATIONAL LAW HANDBOOK ch. 2, § XVI, ¶ C, at 33 (2008) [hereinafter JA 422], *available at* [http://www.au.af.mil/au/awc/awcgate/law/oplaw\\_hdbk.pdf](http://www.au.af.mil/au/awc/awcgate/law/oplaw_hdbk.pdf). [http://www.au.af.mil/au/awc/awcgate/law/oplaw\\_hdbk.pdf](http://www.au.af.mil/au/awc/awcgate/law/oplaw_hdbk.pdf) (last accessed Sept. 24, 2012).

61. DODD 2311.01E, *supra* note 5, ¶ 6.4.

62. MANUAL FOR COURTS–MARTIAL, UNITED STATES, R.C.M. 303 (2008) [hereinafter MCM], *available at* <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf>; see CHAIRMAN OF JOINT CHIEFS OF STAFF, INSTR. 5810.01D, IMPLEMENTATION OF THE DODD LAW OF

available evidence bearing on guilt or innocence and any evidence relating to aggravation, extenuation, or mitigation.”<sup>63</sup>

Once an allegation that U.S. personnel may be involved in or responsible for a reportable incident is confirmed, the commander “shall initiate a formal investigation . . . and . . . notify the cognizant military criminal investigative organization.”<sup>64</sup> According to the U.S. Department of Defense “[a]ll reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual are reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action.”<sup>65</sup>

### 2.1.1 Duty to Collect Data

In order to conduct a thorough investigation, a sufficient amount of information has to be collected and analyzed. The U.S. Joint Publication 2–01.1, for instance, orders a Battle Damage Assessment<sup>66</sup> (BDA) cell to be formed in every Combatant Command.<sup>67</sup> A BDA is responsible for collecting information about each strike<sup>68</sup> and evaluating any physical damage caused to the target.<sup>69</sup> Specifically, within the scope of its duties a BDA cell evaluates the weapon’s efficiency, which necessarily includes unintended damage caused to people or objects other than the target,<sup>70</sup> gauges the effectiveness of the

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WAR PROGRAM ¶ 6(f), at 5–4 (30 Apr. 2010) [hereinafter JCSI 5810.01D], available at [http://www.dtic.mil/cjcs\\_directives/cdata/unlimit/5810\\_01.pdf](http://www.dtic.mil/cjcs_directives/cdata/unlimit/5810_01.pdf).

63. MCM, *supra* note 62, R.C.M. 303.

64. JCSI 5810.01D, *supra* note 62, ¶ 6(f)(4)(e)(2).

65. *Id.* ¶ 4(d).

66. See JOINT CHIEFS OF STAFF, JOINT PUB. 3–60, JOINT TARGETING glossary, pt. II, at GL–5 (13 Apr. 2007) [hereinafter JOINT PUB. 3–60], available at [http://www.bits.de/NRANEU/others/jp-doctrine/jp3\\_60\(07\)](http://www.bits.de/NRANEU/others/jp-doctrine/jp3_60(07)) (“[Battle Damage Assessment (BDA) is] the estimate of damage resulting from the application of lethal or nonlethal military force.”).

67. 10 U.S.C. § 161 (2011) (“The term ‘unified combatant command’ means a military command which has broad, continuing missions and which is composed of forces from two or more military departments.”); JOINT PUB. 2–01.1, *supra* note 57, app. E, ¶ 4(c)(2)(a), at E–9.

68. JOINT PUB. 2–01.1, *supra* note 57, app. E, ¶¶ 2, 3(a)(1)–(2), at E–2.

69. See JOINT PUB. 3–60, *supra* note 66, glossary, pt. II, at GL–11 for a definition of physical damage assessment.

70. See Ronald A. Thompson, Presentation at National Defense Industrial Association’s Testing and Training Conference (Aug. 20, 2002), available at <http://www.dtic.mil/ndia/2002training/thompson.pdf> (explaining that a weapon’s precision and delivery accuracy (including precision and ballistic error concerns) constitute integral parts of a Munitions Effectiveness Assessment).

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munitions used,<sup>71</sup> and “[c]onduct[s] preliminary collateral damage inquiries to determine details due to a potential violation of [IHL].”<sup>72</sup> During combat, all assessments should be completed within a specified, relatively short time limit and reported at the “operational immediate.”<sup>73</sup>

The U.S. Air Force Intelligence Targeting Guide<sup>74</sup> acknowledges the fact that the effectiveness of an air campaign as a whole hinges on a proper evaluation of individual strikes<sup>75</sup> and requires each attack to be subject to an effectiveness assessment.<sup>76</sup> Such an assessment is to be performed at all levels of the joint force<sup>77</sup> and must contain a “timely and accurate estimate of damage [including that which is inflicted on the civilian population]<sup>78</sup> resulting from the application of military force, either lethal or non-lethal, against a predetermined objective.”<sup>79</sup>

*2.1.2 How Does It Look in Practice?*

Based on the aforementioned principles and procedures, the U.S. military should routinely “use internal investigations as a means of evaluating the effectiveness of [its] mission[s].”<sup>80</sup> Yet, many authors, as well as humanitarian activists and organizations, are convinced that ex post strike, collateral damage inquiries are not given due attention by the U.S. military.<sup>81</sup> While on certain occasions that viewpoint has been

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71. See generally JOINT PUB. 2–01.1, *supra* note 57, ch. VI, ¶ 3, at VI–4.

72. *Id.* app. E, ¶ 4(d)(2)(j), at E–11.

73. *Id.* app. E, ¶ 4(i)(6), at E–15.

74. AF PAM. 14–210, *supra* note 57.

75. See *id.* ¶ 9.1.

76. See *id.* ¶ 9.1.1.

77. *Id.* ¶ 9.3.

78. *Cf. id.* ¶ 7.1, 9.4.

79. *Id.* ¶ 9.4.

80. See Amichai Cohen, *The Principle of Proportionality in the Context of Operation Cast Lead: Institutional Perspectives*, 35 RUTGERS L. REC. 23, 34 (2009).

81. See, e.g., Groves, *supra* note 15, at 33 (“The military invests tremendous energy in preventing civilian deaths, but it does not always exert similar energy in responding to them when they occur.”); Mark Benjamin, *When Is an Accidental Civilian Death not an Accident?* SALON (Jul. 30, 2007), [http://mobile.salon.com/news/feature/2007/07/30/collateral\\_damage/index.html](http://mobile.salon.com/news/feature/2007/07/30/collateral_damage/index.html) (“The military is supposed to go back and review an airstrike using aerial footage and, when possible, conduct an inspection by troops on the ground. But thorough postmortems are rare.”) *available at* [http://mobile.salon.com/news/feature/2007/07/30/collateral\\_damage/index.html](http://mobile.salon.com/news/feature/2007/07/30/collateral_damage/index.html) (last accessed Sept. 24, 2012); UNDERSTANDING COLLATERAL DAMAGE, *supra*

confirmed by U.S. servicemen,<sup>82</sup> the secrecy which generally surrounds these activities renders impossible any meaningful assessment of the military's compliance with a duty to investigate.<sup>83</sup>

The U.S. military, being concerned with its reputation, displays a level of distrust of anybody attempting to probe into its actions or the conduct of its personnel. It expends considerable effort "to prevent outsiders from gathering any information that can potentially put it in a bad light."<sup>84</sup> Therefore, since IHL does not require investigations to be conducted publically or even demand their results to be released,<sup>85</sup> the U.S. military prefers to keep a low profile and conducts its inquiries behind closed doors.<sup>86</sup> By doing so, it keeps the public unaware of both potential IHL violations related to attacks and how any potential IHL violations are handled. Furthermore, the secrecy of the U.S. military makes it impossible to even verify whether collateral damage investigations are actually conducted.

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note 3, at 23 ("Military institutions, and specifically the U.S. military, have been reluctant to accept [accounting for civilian deaths] as a mission essential task.").

82. See, e.g., Edward Epstein, Success in Afghan War Hard to Gauge / U.S. reluctance to produce body counts makes proving enemy's destruction difficult, SAN FRANCISCO CHRON., Mar. 23, 2002, at A1, available at <http://www.sfgate.com/news/article/Success-in-Afghan-war-hard-to-gauge-U-S-2861604.php> ("Gen. Tommy Franks [commander of the Afghanistan operation] said Monday at Bagram Air Base. 'You know we don't do body counts.'") (last accessed Sept. 24, 2012).

83. Indeed it is virtually impossible for an outsider to actually know what exactly the military does. The task of figuring that out is truly daunting because even members of the military often make contradictory statements. Jeffrey Gettleman, *For Iraqis in Harm's Way, \$5,000 and 'I'm Sorry'*, N.Y. TIMES, Mar. 17, 2004, at A1, available at <http://www.nytimes.com/2004/03/17/world/for-iraqis-in-harm-s-way-5000-and-i-m-sorry.html> ("We do keep records of innocent civilians who are killed accidentally by coalition force soldiers," said Brig. Gen. Mark Hertling, assistant commander for the First Armored Division, which patrols Baghdad. "And, in fact, in every one of those innocent death situations, we conduct internal investigations to determine what happened."). On other occasions, however, they bluntly admit that no information about civilian damages is actually being collected. See, e.g., Epstein, *supra* note 82. Similarly, in one moment they persuade the public of the impossibility of providing accurate assessments of civilian casualties in insecure areas, UNDERSTANDING COLLATERAL DAMAGE, *supra* note 3, at 2, only to later admit that not accounting for civilian death results in fact from nothing else but.

84. See Hansen, *supra* note 58, at 358.

85. Schmitt, *supra* note 5, at 81.

86. Groves, *supra* note 15, at 34.

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Such lack of transparency has aroused a suspicion that the U.S. military tries to conceal its crimes and shield its personnel from accountability.<sup>87</sup> Politicians and the military need to justify war to the public at large.<sup>88</sup> Consequently, the Pentagon has an obvious interest in hiding any information that may distort an image of its military waging a just war.<sup>89</sup> Such a claim, while impossible to verify, is not without merits. Once people begin to doubt whether a war is being conducted in a humane way, their support is indeed likely to “erode or even reverse itself rapidly, no matter how worthy the political objective.”<sup>90</sup>

Aware of that fact, the U.S. government has consistently affirmed its broader commitment to comply with all of its international obligations.<sup>91</sup> Yet such good will and probity have not always been shared by U.S. troops. In a number of cases,

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87. *E.g.*, Q&A: *U.S. Targeted Killings and International Law*, HUMAN RIGHTS WATCH (Dec. 19, 2011), <http://www.hrw.org/news/2011/12/19/q-us-targeted-killings-and-international-law> (“The U.S. military has provided inadequate or inaccurate information regarding incidents in which large numbers of civilian casualties were reported, particularly aerial attacks involving U.S. ground forces. In a number of cases U.S. forces had immediately claimed, before there could be any serious investigation of the incident, that all those killed were . . . combatants. Only after information gathered on the ground by local and international human rights organizations and journalists was presented to U.S. authorities did the Defense Department conduct more credible investigations.”); *see generally* Groves, *supra* note 15, at 10 (describing the Azizabad attack); Melissa Epstein Mills, *Brass-Collar Crime: A Corporate Model for Command Responsibility*, 47 WILLAMETTE L.REV. 25, 39 (2010) (discussing the Haditha incident).

88. *See* A JUST RESPONSE: *THE NATION* ON TERRORISM, DEMOCRACY, AND SEPTEMBER 11, 2001 205–207 (Katrina vanden Huevel ed., 2002); Steven W. Becker, *Mirror, Mirror on the Wall*, 37 VAL. U. L. REV. 563, 567 (2003) (citing Stephen J. Hedges, *U.S. Pays PR Guru to Make Its Points*, CHI. TRIB., May 12, 2002 at 1C); Michael Massing, Editorial, *Uncle Ben Goes to War*, *THE NATION* (Dec. 2, 2001), available at <http://www.thenation.com/article/uncle-ben-goes-war>.

89. *See, e.g.*, Becker, *supra* note 88, at 569–570 (“[T]he Pentagon . . . almost always prevented media access to the facts in order to conceal . . . ‘collateral damage.’ . . . Because the Pentagon controlled access to Afghanistan, no one could assess the extent of the ‘collateral damage.’”); Lesley Wexler, *The Vietnamization of the Long War on Terror: An Ongoing Lesson in International Humanitarian Law Non-Compliance*, 30 B.U. INT'L L.J. 575, 592 (“During Vietnam, the military believed negative media coverage contributed to the U.S. defeat and, in response, it has since reduced independent media access to conflicts.”).

90. Groves, *supra* note 15, at 21 (quoting W. MICHAEL REISMAN & CHRIS T. ANTONIOU, *THE LAWS OF WAR* (1994)).

91. Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SECURITY J. 283, 318 (2011).



for instance, “U.S. forces had immediately claimed, before there could be any serious investigation of the incident, that all those killed were . . . combatants.”<sup>92</sup> In addition, only around one-half of the U.S. servicemen surveyed by the Mental Health Advisory Team expressed readiness to report a fellow soldier or Marine for injuring or killing an innocent noncombatant.<sup>93</sup>

It is not inconceivable, therefore, that some U.S. military personnel, fearing harm to their unit, career, or personal standing, fail on certain occasions to investigate incidents thoroughly enough.<sup>94</sup> Consequently, both the U.S. domestic public and the international community should be skeptical about taking U.S. government assurances of its military’s conformity with IHL on the basis of faith.<sup>95</sup> Indeed, even the U.S. itself adheres to the “trust but verify” policy according to which it never accepts “[a]ssurances offered by other states accused of transgressing international standards . . . in the absence of sufficient information upon the basis of which some form of verification is feasible.”<sup>96</sup>

Of course, some aspects of greater transparency of military ex post attack investigations may prove problematic.<sup>97</sup> For instance, disclosure of certain data relevant in the context of investigation, such as information on sources of intelligence, may not be possible without compromising national security. What also appears troublesome is the fact that in recent conflicts “[t]he United States has relied [ever more] heavily on the CIA to perform combat-type functions.”<sup>98</sup> As Philip Alston

92. HUMAN RIGHTS WATCH, *supra* note 87; *see also, e.g.*, AFGHANISTAN INDEPENDENT HUMAN RIGHTS COMMISSION (AIHRC), FROM HOPE TO FEAR: AN AFGHAN PERSPECTIVE ON OPERATIONS OF PRO-GOVERNMENT FORCES IN AFGHANISTAN (Dec. 2008), *available at* <http://www.unhcr.org/refworld/docid/4a03f60e2.html>.

93. MENTAL HEALTH ADVISORY TEAM IV, OFFICE OF THE SURGEON MULTINATIONAL FORCE-IRAQ & OFFICE OF THE SURGEON GENERAL UNITED STATES ARMY MEDICAL COMMAND, FINAL REPORT ON OPERATION IRAQI FREEDOM 05-07 36 (17 Dec. 2006), *available at* <http://i.a.cnn.net/cnn/2007/images/05/04/mhat.iv.report.pdf>.

94. Mills, *supra* note 87, at 43.

95. Alston, *supra* note 91, at 317.

96. *Id.*

97. Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to the General Assembly, Addendum, *Study on Targeted Killings*, Hum. Rts Council, ¶ 27, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (authored by Philip Alston).

98. *See, e.g.*, Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 134; *see also* Robert Chesney, *Military Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J.

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aply remarked, “[i]t is clearly paradoxical to be seeking transparency and encouraging information sharing from agents whose very existence is premised on secrecy and absolute discretion.”<sup>99</sup> Due to the fact that many CIA operations do not even officially take place,<sup>100</sup> it is hard to expect open inquiries into their details.

Despite those difficulties, however, there are also very tangible benefits which the U.S. military is likely to reap from greater transparency of its after-strike investigations. First of all, secret inquiries conducted in isolation from injured communities have great potential for damaging the U.S.’s reputation among those communities. Community members, excluded from any insight into conducted inquiries, are likely to perceive the U.S. military as an imposed and illegitimate authority which is not respectful of the local population.<sup>101</sup> By contrast, greater transparency for people affected by a strike will “generally enhance [the U.S. military’s] counterinsurgency operations.”<sup>102</sup>

In addition, scrutiny from the outside increases pressure to have military operations conducted properly in the first place. Therefore, greater transparency of the U.S. military’s investigative activities, and the resulting proper military action, is likely to win broader domestic and international support for any given military operation.<sup>103</sup> Furthermore, by increasing openness with the world and renouncing secrecy, the U.S. military will take the wind out of the sails of at least some critics of Washington’s security policy. Finally, in adopting transparency as a guiding principle of its armed forces, the U.S.

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NAT’L SEC. L. & POLY 539, 581–82 (2012); Bruce Zagaris, *International Enforcement Law Trends for 2010 and Beyond: Can the Cops Keep up with the Criminals?*, 34 SUFFOLK TRANSNAT’L L. REV. 1, 60–61 (2011); Jane Mayer, *The Predator War: What are the Risks of the C.I.A.’s Covert Drone Program*, THE NEW YORKER, Oct. 6, 2009, available at [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer).

99. Alston, *supra* note 91, at 316.

100. See, e.g., Zagaris, *supra* note 98, at 60.

101. See Groves, *supra* note 15, at 34. In modern warfare, the value of legitimacy cannot be overstated; it “has become the currency of power.” *Id.* (citing DAVID KENNEDY, *OF WAR AND LAW* 45 (2006)).

102. Schmitt, *supra* note 5, at 21; see also DEP’T OF THE ARMY HEADQUARTERS & MARINE CORPS COMBAT DEV. COMMAND HEADQUARTERS, COUNTERINSURGENCY 5–10, FM 3–24, MCQP 3–33.5 (2006) (“Constructive and transparent information enhances understanding and support for continuing operations against the insurgency.”).

103. Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1424 (2008).

will not only become more credible as a promoter of democracy because it will be giving information to the public,<sup>104</sup> but it will also put itself in a more comfortable position vis-à-vis states that it alleges conduct covert, illegal activities.

In the near future, hopefully the U.S. military will find the above mentioned incentives sufficient to change its policy. Because a lack of transparency invites abuse,<sup>105</sup> at least a modest turn away from secrecy is necessary. Counting on due diligence, good faith and unconditional adherence to law on the part of servicemen acting in secrecy has not played out in practice,<sup>106</sup> and such trust undercuts accountability.<sup>107</sup> A duty to investigate is not a duty for its own sake; it is supposed to serve justice and enhance respect for law by punishing violators and providing victims with potential grounds for due compensation. As long as both the inquiries and their results are kept secret, none of the above objectives are satisfied. That is not to say that a duty to investigate should be abandoned; to the contrary, it is to call the U.S. military—and in fact all other militaries of the world which follow similarly secretive policies—to focus more on the spirit rather than the letter of the duty to investigate.

## II. SUMMARY

This paper argued that states have the obligation to investigate incidents involving civilian damages beyond those incidents which involve a grave breach of IHL. Applying the principle of proportionality, each incident requires an individualized assessment. In addition, GC IV and AP I also

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104. See, e.g., Alston, *supra* note 91, at 308 (“Transparency has been considered to be an indispensable element in promoting morality in government and popular legitimacy in almost all variants of democratic theory.”); Vincent–Joel Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801, 864 (2005) (“Multilateral cooperation on the suppression of terrorist activities should disseminate democratic ideals and promote human rights, while also calling into question processes and policies lacking transparency or legitimacy within our own societies.”); see also Mark A. Chinen, *Secrecy and Democratic Decisions*, 27 QUINNIPIAC L. REV. 1, (2009); David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010).

105. Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 46 (2008).

106. See, e.g., Mills, *supra* note 87.

107. Alston, *supra* note 91, at 299–300.

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suggest that states are required to investigate civilian damages. Specifically, the duty of states to protect against suppression, the duty of commanders to punish all breaches of GC IV and AP I, the duty of states to ensure respect of the provisions of GC IV and AP I, and basic notions of the rule of law support this understanding.

Moreover, this paper showed that due to contextualization of the applicable standard of diligence, proper collection of information about civilian losses is flexible and possible even in times of hostilities. Focusing on the U.S. armed forces, this paper acknowledged that a duty to investigate may at times prove troublesome for military personnel; however, it is possible. It also discussed how such a requirement would likely not be too cumbersome as the U.S. military's own regulations already require investigation. Finally, the paper raised concerns about the lack of transparency in the U.S. military's investigative activities and how that lack of transparency undercuts accountability, one aim of investigation.