

RESPONDING TO INSTANCES OF CIVILIAN HARM IN COALITION OPERATIONS: A MILITARY LAWYER'S PERSPECTIVE

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Prevention of, and responding to, civilian harm is a crucial requirement for any modern military force. New Zealand and like-minded partners view such actions as a military priority. During a deployment to Combined Joint Task Force – Operation Inherent Resolve (CJTF-OIR), the author was a legal advisor to the command headquarters, which included advising on allegations of civilian harm. Military legal advisors in a deployed operational context play an important role in addressing concerns relating to civilian harm, both pre- and post-incident. CJTF-OIR has adopted a recently declassified process for responding to allegations of civilian casualties caused by the Coalition, which outlines a robust mechanism to determine the credibility of any civilian harm allegations. That said, the nature of military operations in a coalition force raises complex question of international law concerning legal compliance, and the apportionment of responsibility. Such challenges are not insurmountable, and military coalitions are capable of effective investigations into civilian harm allegations which comply with international legal obligations.

I INTRODUCTION

New Zealand, and like-minded partner nations, take allegations of civilian harm seriously. In the New Zealand context, this is indicated in the adoption of *Defence Force Order 35*, which outlines the procedures by which the New Zealand Defence Force (NZDF) responds to allegations of civilian harm caused during operations.¹ To the NZDF, prevention and mitigation of civilian harm is a crucial aspect of compliance with the law of armed conflict (LOAC). It is also important to respond to any actual

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¹ *Defence Force Order 35: New Zealand Defence Force Response to Civilian Harm* (New Zealand Defence Force, Wellington, 2020).

civilian harm which does occur in a timely and unbiased manner, to ensure that the appropriate investigations and follow-up action can occur.

Perhaps now, more than ever, the wider public and academic community have access to more information on civilian casualty allegations levelled against military forces. Major military missions such as Combined Joint Task Force – Operation Inherent Resolve (CJTF-OIR) have begun proactively promulgating information relating to civilian casualty allegations,² and organisations such as the New York Times are increasingly accessing information pertaining to civilian harm through information access laws.³ Furthermore, allegations of civilian casualties, through both deliberate targeting and disproportionate strikes, continue to dominate headlines in relation to wars in Ukraine and Gaza. The issue of civilian harm arising in armed conflict remains a grim reality of modern warfare, and a topic about which the global public is increasingly concerned. It is, therefore, timely to explore how military forces can investigate allegations of civilian harm arising from combat operations, in order to punish perpetrators, understand mitigations against civilian harm that can be put in place, and ensure compliance with LOAC's most crucial principles.

In 2021–2022, I was deployed to the Middle East as a legal advisor to CJTF-OIR – the United States-led Coalition to counter the Islamic State (ISIS). This role involved advising on allegations of civilian casualties (termed "CIVCAS" in the relevant orders). Through the use of the United States' Freedom of Information Act (FOIA),⁴ the New York Times obtained over 1,000 documents relating to Coalition investigations of alleged civilian casualty incidents. These documents, published online, formed part of a piece of journalistic investigation entitled "The Civilian Casualty Files", which aimed to shed light on alleged civilian casualties caused in the fight against ISIS.⁵

My contribution to this special edition of the New Zealand Journal of Public and International Law draws on my personal experiences of advising on civilian casualty allegations within a multinational coalition in a modern armed conflict environment. It will also draw on declassified examples posted to the New York Times' website as part of the "The Civilian Casualty Files" project. It aims to explore the nature of civilian casualty investigations from a military perspective. Military investigations into civilian harm remain a contentious topic, with many alleging that the armed forces cannot appropriately investigate or regulate themselves, largely due to a lack of independence.⁶ The

2 For example, pursuant to the United States Freedom of Information Act 5 USC § 552.

3 Azmat Khan and others "The Civilian Casualty Files" (18 December 2021) The New York Times <www.nytimes.com/interactive/2021/us/civilian-casualty-files.html>.

4 Freedom of Information Act, above n 2. All civilian casualty related reports from CJTF-OIR referenced in this article were declassified and released to the New York Times pursuant to the Freedom of Information Act. They are available at <www.nytimes.com>.

5 Khan and others, above n 3.

6 *Draft Principles Governing the Administration of Justice through Military Tribunals* UN Doc E/CN.4/2006/58 (13 January 2006), principle 9; Elizabeth Santalla Vargas "Military or Civilian Jurisdiction for International

matter is complicated further in multinational military forces, wherein each troop-contributing nation has different international and municipal legal obligations. Several of these issues will be identified throughout this article, but to pose an answer to all falls beyond the current article's scope. However, such issues remain important and worthy of further analysis elsewhere.

This contribution is divided into seven substantive parts. Following this introductory part, Part II provides context to CJTF-OIR and the extent of the allegations of civilian casualties which have arisen from the operation. Following that, Part III discusses the role that a legal advisor has in the prevention of and response to civilian casualties within a coalition framework. Part IV then outlines the international law governing response to civilian harm, of which all military legal advisors need be cognisant, and Part V discusses the manner in which CJTF-OIR addresses civilian casualty allegations with its area of operations. Part VI will then assess the CJTF-OIR processes for assessing civilian casualty allegations against the international legal standards. It will be suggested that, although the processes are generally robust, there are areas in which they can be improved. Part VII will then address the challenges that face a legal advisor assessing civilian harm in a multinational force. It will be argued that differing legal obligations and understandings, often on issues as *prima facie* straightforward as the definition of "civilian", pose practical challenges to the coalition lawyer. Finally, Part VIII will argue that assessing which international legal persons are responsible for civilian harm is inherently complicated in the context of a multinational force. It will be concluded that there is a need for increased research to enable greater certainty of law in what is a crucial and contemporary issue area.

II COMBINED JOINT TASK FORCE – OPERATION INHERENT RESOLVE

A Background

CJTF-OIR is a coalition of military forces aimed at countering the threat posed by ISIS. Established in 2014 and led by the United States, numerous States have contributed militarily to ensure the defeat of ISIS. CJTF-OIR operates in Iraq with the invitation and consent of the Iraqi

Crimes? An Approach from Self-Interest in Accountability of Armed Forces in International Law" in Morten Bergsmo and Tianying Song (eds) *Military Self-Interest in Accountability for Core International Crimes* (2nd ed, Torkel Opsahl, Brussels, 2018) 397 at 398; Huw Bennett "The Baha Mousa Tragedy: British Army Detention and Interrogation from Iraq to Afghanistan" (2014) 16 BJPIR 211 at 216.

Government.⁷ The basis for operations in Syria – where NZDF forces do not operate⁸ – is less clear.⁹ The Syrian regime has not invited the United States-led Coalition to operate within its territory. However, the United States has expressed its view that its campaign in Syria is a lawful exercise of collective self-defence against ISIS in defence of Iraq and CJTF-OIR nations.¹⁰

The role of New Zealand legal advisors posted to CJTF-OIR include advising commanders on issues relating to LOAC and human rights law compliance, as well as advising on investigations into civilian casualty allegations. Consistent with Government of New Zealand policy, the role was not linked to targeting operations¹¹ – lawyers from other Coalition nations provided advice to commanders undertaking kinetic attacks. This meant that there was a degree of impartiality and independence built into the civilian casualty allegation review process, and enabled NZDF to contribute effectively to the promotion of LOAC and human rights law compliance. On the international plane, New Zealand has often expressed concern for the protection of civilians in conflict situations.¹² The NZDF's involvement in Operation Inherent Resolve, through offering legal advisors on civilian casualty and LOAC violation allegations is a real-world manifestation of these statements. It also helps to ensure that the Coalition complies with the requirements of customary international law pertaining to ensuring legal advisors are available to advise on the application of LOAC.¹³

7 *Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council* UN Doc S/2014/691 (22 September 2014); *Cabinet Minute of Decision CAB-20-MIN-0097* (23 March 2020) (released by the Minister of Foreign Affairs and the Minister of Defence <defence.govt.nz>) at [4.1].

8 *Cabinet Paper: Proposal to Make an Ongoing Contribution to the Defeat-ISIS Coalition CAB-20-SUB-0097* (2020) (released by the Minister of Foreign Affairs and the Minister of Defence <defence.govt.nz>) at [31], n 5.

9 Oren Gross "Unresolved Legal Questions Concerning Operation Inherent Resolve" (2017) 52 TILJ 221.

10 For a discussion of the use of force against non-State actors as it applies to ISIS in Syria, see Michael P Scharf, Milena Sterio and Paul R Williams *The Syrian Conflict's Impact on International Law* (Cambridge University Press, 2020) at 29–58; Gross, above n 9, at 240–253.

11 *Cabinet Paper: Proposal to Make an Ongoing Contribution to the Defeat-ISIS Coalition*, above n 8, at [31], n 5.

12 Marnie Lloyd "Law That Happens 'Out There': Aotearoa New Zealand's Interaction with International Humanitarian Law and International Criminal Law" in An Hertogen and Anna Hood (eds) *International Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2021) 259 at 275.

13 In support of the notion that customary international law requires legal advisors to be available to military commanders, see Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (Cambridge University Press & International Committee of the Red Cross, Cambridge, 2005) vol 1, rule 141 and related practice. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protections of victims of international armed conflict 1125 UNTS 3 (opened for signature 8 June 1977, entered into force 7 December 1978) [Additional Protocol I], art 82, also requires legal advisors to be available

B CJTF-OIR and Allegations of Civilian Casualties

As of 9 November 2024, some 14,886 Coalition strikes had been undertaken against ISIS in Iraq, and another 19,904 in Syria. This has resulted in ISIS losing almost all of the territory it held at the height of its so-called Caliphate.¹⁴ Inevitably, this has led to allegations and instances of civilian casualties. The number of civilian casualties is unclear. Airwars, a "not-for-profit transparency watchdog which tracks, assesses, archives and investigates civilian harm claims resulting primarily from explosive weapons use in conflict-affected nations",¹⁵ has tracked and documented allegations of civilian harm. The tables following are adapted from the data compiled by Airwars, and are current as of 9 November 2024:¹⁶

Locally Reported Civilian Casualties Caused by CJTF-OIR and Airwars Assessment	
Locally Reported Civilian Deaths	19,188–29,786
Assessed as confirmed ¹⁷ or fair ¹⁸	8,220–13,299
Assessed as contested ¹⁹	78,74–12,580
Assessed as weak ²⁰	2,391–2,815
Discounted ²¹	698–1,087
Civilian Injuries	5,899–9,128
Civilian Casualties Confirmed by CJTF-OIR as Attributable to the Coalition	
Deaths	1,437
Injuries	351

to commanders. However, as the situation in Iraq does not amount to an international armed conflict, the provision is not applicable as a treaty obligation.

14 Airwars "US-led Coalition in Iraq & Syria" (9 November 2024) Airwars <airwars.org>.

15 Airwars "Who We Are" (6 December 2022) Airwars <airwars.org>.

16 Airwars, above n 14.

17 An allegation is "confirmed" where "[a] specific belligerent has accepted responsibility for civilian harm."

18 An allegation is "fair" where it is "[r]eported by two or more credible sources, with likely or confirmed near actions by a belligerent."

19 An allegation is "contested" where there are "[c]ompeting claims of responsibility e.g. multiple belligerents, or casualties also attributed to ground forces."

20 An allegation is "weak" where it is a "[s]ingle source claim, though sometimes featuring significant information."

21 An allegation is "discounted" where "[t]hose killed were combatants, or other parties most likely responsible."

The potential for civilian harm is an "unfortunate reality of armed conflict", particularly where it is increasingly fought in cities and other areas inhabited by civilians.²² To meet the obligations imposed by LOAC and international human rights law (IHRL) on troop-contributing nations, it is crucial that multinational forces have in place mechanisms to investigate allegations of civilian harm. In addition to ensuring accountability and transparency, reviewing civilian harm enables the identification of issues and ensures that mistakes which result in civilian harm are identified and addressed.

III THE ROLE OF A MILITARY LEGAL ADVISOR IN PREVENTING AND RESPONDING TO CIVILIAN CASUALTIES

A Introduction

The role of a military lawyer is one that is not well-examined in academic scholarship. The military lawyer may be described as "specialist general counsel", and advises command on a range of legal fields. The most crucial role is that which the lawyer plays in armed conflict. The importance of LOAC to military legal advisors has long been understood within the profession of arms. Writing in 1980, a United States Air Force lawyer wrote:²³

... there is one area in which every judge advocate should be an international lawyer. It is a most important area. It is the law of armed conflict. To the extend [sic] that judge advocates are not conversant with the basic principles and concepts of the law of armed conflict, to that extent the Air Force is less prepared for armed conflict.

Through the implementation of international law, the military legal advisor plays an essential role in preventing and responding to civilian casualties. This role begins before the start of any military deployment, through the delivery of various forms of training and assisting with drafting of orders and rules of engagement (ROE). Once deployed, further briefings across the ranks and advice to command regarding targeting operations go a significant way to ensuring compliance with the principles of distinction, proportionality, and precautions in attack. Finally, in instances where civilian harm is alleged to have occurred, the legal advisor will play a key role in ensuring any investigations undertaken are thorough and impartial. If criminal proceedings are to follow, the legal advisor will also likely be heavily involved in the process.

²² *Defence Force Order 35*, above n 1, at [1.01.b.].

²³ Richard J Erickson "Readiness, Discipline and the International Lawyer" (1980) 9 JAG Reporter 53 at 54.

B Prevention of Civilian Casualties Pre-Deployment

1 LOAC training

The role of a legal advisor in preventing civilian casualties begins before any military operation is commenced. Before members of the Armed Forces complete their initial service training, they will generally receive a brief on LOAC from a legal advisor. In New Zealand, they must also pass an assessment on the basic principles of LOAC before they graduate.

Throughout a service member's career, they also receive LOAC training commensurate with their rank, trade and mission requirements. For example, in their trade training medical personnel receive specific instruction on the application of the Geneva Conventions to medical personnel and the wounded. Those undertaking relevant command promotion courses also receive detailed instruction in LOAC and international criminal law as it applies to those with command authority.

During the various LOAC courses delivered to members of the Armed Forces, the importance of minimising civilian harm through the application of distinction, proportionality, and precautions in attack is emphasised. So, too, are the consequences of failing to do so. This emphasis is painted not only from a humanitarian perspective, but also through the discussion of reputational risk and practical legal effects.

2 Development of Rules of Engagement

Although not required under LOAC, it is increasingly rare for an Armed Force to deploy without ROE having been issued. ROE "are directives issued by the highest level of military command which specify the circumstances and manner under which force will be used in execution of the mission."²⁴ They do not find a basis in any multinational treaty which has a bearing on LOAC.²⁵ They are of great significance, however, when one considers the rules relating to civilian casualties. ROE can, and often do, set limits on what force may be used. This may include setting a maximum threshold of civilian harm that can be approved by a commander, to a level below that which would still be considered proportionate under a pure LOAC approach.

The fact that a military action breaches ROE does not necessarily mean it was a violation of LOAC or international criminal law. ROE are orders, issued by command, the disobedience of which is a military offence.²⁶ Although a violation of ROE is not in all cases a breach of LOAC, a violation of LOAC will in all cases violate ROE. ROE cannot authorise means and methods of warfare which

24 *Manual of Armed Forces Law* (2nd ed, New Zealand Defence Force, Defence Manual 69, 2017) vol 4: Law of Armed Conflict at [2.5.1].

25 Gary D Solis *The Law of Armed Conflict: International Humanitarian Law in War* (3rd ed, Cambridge University Press, Cambridge, 2022) at 367.

26 *United States v McMonagle* 34 MJ 852 (ACMR 1992) at 870.

LOAC does not permit, and any ROE which purport to do so are manifestly unlawful insofar as they do.²⁷

Thus, ROE are a significant mediator of force on operations. The content of ROE is generally driven by a range of factors, including the law, operational requirements, and national policy. They are, therefore, a command-driven document. In New Zealand, they are approved by the Government for any particular mission.²⁸ All requests for ROE must consider the effect of LOAC, and they will not be approved if they do not pass a legal review.²⁹ Through involvement in the drafting of ROE, legal advisors have significant scope to set the circumstances in which force will be employed, and the impacts that military operations may have on civilians within the area of operations.

3 *Pre-Deployment Training*

Before any member of the Armed Forces is deployed operationally, they normally undertake specialist training, called pre-deployment training. A crucial component of any pre-deployment training is the series of legal briefs which must be attended by those due to deploy. During such briefs, LOAC refreshers are undertaken, and those set to deploy have the opportunity to ask a legal advisor whatever questions they may have on the applicable laws, regardless of their rank or role. Furthermore, operational specific ROE are briefed, and understanding of them is confirmed.

In addition to LOAC and ROE training, specific briefs are given concerning civilian casualties. *Defence Force Order 35* emphasises that "pre-deployment training on civilian harm, tailored to the environmental and cultural context of the upcoming deployment" is essential to assist in ensuring an appropriate response to civilian harm.³⁰ Such pre-deployment training also includes modules on relevant response procedures for addressing responses to civilian harm.³¹

Rather than being merely theoretical, pre-deployment training may include practical, scenario-based exercises, wherein service members are required to make snap decisions regarding distinction, proportionality, and direct participation in hostilities. Those scenarios are observed by the legal advisors directing the training, and who provide debriefs for the benefit of the student and any observers.

²⁷ Solis, above n 25, at 372.

²⁸ *Manual of Armed Forces Law*, above n 24, at [2.5.1].

²⁹ At [2.5.4]–[2.5.5].

³⁰ *Defence Force Order 35*, above n 1, at [2.5.4]–[2.5.5].

³¹ At [3.01.c(3)].

C Prevention of Civilian Casualties on Deployment

1 Briefings

Further to the briefings undertaken on pre-deployment training, in-theatre briefings on LOAC and ROE are not uncommon. On Operation Inherent Resolve, legal advisors delivered regular briefs on these topics. Ongoing training was delivered to ensure that if force were to be used, it was used in accordance with the law, and in a manner which mitigated the risk of civilian harm.

Further to delivering training to Coalition members, a legal advisor may become involved in assisting with training local partnered forces. CJTF-OIR's mission is to advise, assist and enable partnered forces until such time as they can independently defeat ISIS. This includes enabling military operations which are in compliance with LOAC and IHRL. Training on LOAC goes some way to ensuring that the forces which the Coalition supports will operate in a legally compliant manner with a mitigated risk of civilian harm resulting. Aside from the humanitarian considerations driving training partner forces in LOAC, such training also mitigates the risk of Coalition complicity in any internationally wrongful acts that may occur. Such training is also in line with NZDF policy, which requires that in multinational operations NZDF:³²

where practicable, ensure local forces trained by NZDF are competent to respond to reports of civilian harm after the withdrawal of NZDF personnel, including addressing medical needs, management of the dead, missing persons, and clearing explosive remnants of war[.]

2 Targeting

Where adversary forces or objectives are being targeted, a legal advisor will be involved in the decision-making process. This is not a role that the NZDF legal advisor undertook on CJTF-OIR, but rather was filled by other Coalition nations. That legal advisors have a role in the targeting process is consistent with Additional Protocol I, which states:³³

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

Although Additional Protocol I applies only in international armed conflicts, State practice "does not indicate that any distinction is made between advice on international humanitarian law applicable in international armed conflicts and that applicable in non-international armed conflicts."³⁴ Thus, Coalition members take the requirement to have legal advisors present and available seriously. The

³² At [2.03.b(4)].

³³ Additional Protocol I, above n 13, art 82.

³⁴ Henckaerts and Doswald-Beck, above n 13, rule 141.

importance of legal advice in the targeting process is evident in a range of military doctrinal sources. For example, United States doctrine emphasises that due to the complexity of international law involved in targeting operations, a legal advisor "must be immediately available and should be consulted at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations", and emphasises the importance of early involvement of a legal advisor in the planning process.³⁵ Furthermore, Australian doctrine states that "legal advisors will be involved at the appropriate states of the targeting process to assist commanders and their staff to execute their mission in accordance with the law."³⁶

Through being involved in the targeting process, legal advisors play a key role in the mitigation of the risk of civilian casualties from operations. That said, a legal advisor is exactly that – an advisor. Whether any particular strike is undertaken is ultimately a decision for command. However, the ease with which the modern commander can access legal advice is a significant mitigation against LOAC violations and civilian harm. It is rare for a commander from a Coalition-aligned military force to disregard or ignore their lawyers. Unsurprisingly, the advice offered to a commander will cover core concepts of LOAC, in particular distinction, proportionality, and the requirement to take precautions in attack. The presumption of civilian status in cases of ambiguity is routinely emphasised. Through the delivery of timely, accurate and thorough legal advice in a deployed context, military legal advisors play a significant role in the prevention of civilian casualties. Where civilian casualties in the course of a particular military operation are anticipated, a legal advisor's guidance goes a significant way to ensuring that any incidental civilian harm is proportionate, and otherwise complies with LOAC and ROE.

D Responding to Civilian Casualties

1 Investigations

LOAC demands that civilian casualty allegations are investigated. That demand, too, is echoed in IHRL, and for those troop-contributing nations that are parties to the European Convention on Human Rights, it is an obligation that is enforceable through the European human rights system. Legal advisors play a crucial role in ensuring these investigative requirements are met. This includes advising on whether a particular allegation meets the threshold for investigation, whether allegations are credible or not, and whether any particular incident of civilian harm complies with LOAC or ROE. Advising on civilian casualty allegations within a multinational force is not a simple task. Aside from the ordinary evidential issues that arise when considering any standard of proof within any legal field, the matter is complicated by different legal obligations, understandings and politics.

35 United States Joint Chiefs of Staff *Joint Targeting* (Joint Publication 3-60, 2013), appendix A, at [9].

36 Australian Defence Force *Doctrine Publication 314: Targeting* (Australian Defence Force, Canberra, 2009) at [3.33].

2 Prosecutions

Finally, where the cause of civilian harm is the violation of LOAC, or an offence against the State's military law, it is likely that the prosecution will occur through the State's military justice system. Within that system, a military lawyer is likely to be prosecuting counsel, and in some jurisdictions (although not New Zealand), defence counsel. Although New Zealand has not yet had to prosecute a member of its Armed Forces for violations of LOAC or ROE causing civilian harm, examples from partner forces show a predisposition for prosecutions within the military justice system.³⁷ The prosecution of LOAC violations within the military justice system is a point of some controversy, such that to address them in detail here falls outside the scope of the current article. Regardless of arguments for or against such an exercise of military jurisdiction, it appears to be a reality that common law States that have prosecuted their own service members for offences amounting to violations of international law or unlawful civilian harm on operations have preferred to exercise military jurisdiction, rather than rely on the ordinary criminal courts. In fulfilling the role of prosecutorial – and in some instances defence – counsel, military lawyers have a crucial role in ensuring accountability for civilian harm incidents, and, where they act as defence counsel, that those accused of causing civilian harm receive a fair trial for their alleged unlawful actions.

Regardless of what role a legal advisor plays in the prevention or response to civilian harm, it is crucial that they have a detailed understanding of the law governing the investigation of civilian casualty allegations. International law is not silent on the subject, and it is an area which, as is discussed below, involves the intersection of numerous different areas of law.

IV THE INTERNATIONAL LAW GOVERNING CIVILIAN CASUALTY INVESTIGATIONS

A The Obligation to Investigate Civilian Harm

States are under an obligation to investigate civilian harm incidents that amount to allegations of war crimes.³⁸ Such an obligation stems from a variety of sources. Parties to the Geneva Conventions are under an obligation to "respect and ensure respect" for LOAC.³⁹ Although the Conventions

37 See for example *United States v Calley* 48 CMR 19 (CMA 1973); *Brown v R* (1994) 5 CMAR 280; *R v Brocklebank* (1996) 5 CMAR 390; *R v Boland* (1995) 5 CMAR 316; *R v Seward* (1996) 5 CMAR 435; *R v Matchee* 2004 CM 14 (Can); *R v Semrau* 2010 CM 4010 (Can); *Re Civilian Casualty Court Martial* (2011) 259 FLR 208; *R v Payne* Court Martial UK, 30 April 2007; *R v Blackman* [2014] EWCA Crim 1029, [2014] 2 Cr App R 18.

38 Alon Margalit "The Duty to Investigate Civilian Casualties During Armed Conflict and Its Implementation in Practice" (2012) 15 YIHL 155 at 157.

39 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31 (opened for signature 12 August 1949, entered into force 21 October 1950) [Geneva Convention I], art 1; art 1 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 75 UNTS 85 (opened for signature 12 August 1949, entered into force 21 October 1950) [Geneva Convention II], art 1 Geneva Convention Relative to the

provide a degree of latitude as to how this is to be achieved,⁴⁰ parties are required to search for, and prosecute or extradite to a willing State, alleged perpetrators of grave breaches of the Conventions. Other breaches of the Conventions are to be suppressed.⁴¹ In the ICRC's 2021 *Commentary on the Third Geneva Convention* (the most recent of the updated ICRC commentaries), it was stated that the obligation imposed to investigate must be done in a reasonable time, and in a manner compatible with the purposes of the Convention.⁴² The International Court of Justice, in the *Obligation to Prosecute or Extradite* case, reached a similar conclusion, albeit whilst applying the Convention against Torture.⁴³

The Geneva Conventions have a focus on investigations which lead to a criminal prosecution. They imply that a State should take steps to investigate and collect evidence that may be used in future criminal proceedings,⁴⁴ and impose an absolute obligation to prosecute an alleged perpetrator of a grave violation absent a request for extradition.⁴⁵ Thus, LOAC is relatively unambiguous that where there is credible information suggesting that civilian casualties were caused due to a prima facie war crime or grave violation, the State concerned is compelled to open an investigation of a criminal nature.⁴⁶

Arguably, there is also an allegation to investigate civilian casualties which are breaches of LOAC but which do not amount to grave violations or war crimes.⁴⁷ Proponents of such a view argue that

Treatment of Prisoners of War 75 UNTS 135 (opened for signature 12 August 1949, entered into force 21 October 1950) [Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950) [Geneva Convention IV], art 1.

40 Knut Dörmann and others *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War* (Cambridge University Press & International Committee of the Red Cross, Cambridge, 2021) at [179].

41 Geneva Convention I, above n 39, art 49; Geneva Convention II, above n 39, art 50; Geneva Convention III, above n 39, art 129; Geneva Convention IV, above n 39, art 146. See also Additional Protocol I, above n 13, art 85.

42 Dörmann and others, above n 40, at [5134].

43 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgment)* [2012] ICJ Rep 422 at [114]; discussing Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987), art 7(1).

44 Dörmann and others, above n 40, at [5136].

45 At [5146]; Henckaerts and Doswald-Beck, above n 13, rule 158.

46 Margalit, above n 38, at 157.

47 At 161.

the Conventions, which require States to "ensure respect" for LOAC,⁴⁸ imposes such a duty.⁴⁹ There is State practice in support of this perspective. The Supreme Court of Israel opined in the *Targeted Killings* case that after an attack on a civilian suspected of partaking in hostilities, an investigation must be undertaken regarding the precision of the identification of the target, and the circumstances of the attack.⁵⁰ That same Court, in *Adalah*, stated:⁵¹

We believe that we must emphasize yet again – and the State has not disputed this – that when there is a suspected deviation from the proper norms of behavior, even if there is no reason for a criminal trial, the investigating entities must conduct an examination of the incident with the appropriate tools for that purpose, in order to deter the same kind of harm in the future, to instill an educational message in the fighting forces, to maintain the legal and moral criteria, and to demonstrate the importance of maintaining the rule of law.

Such an approach is appropriate. Whilst criminal accountability for war crimes is important, it is not the only aspect of ensuring LOAC compliance. Most international law textbooks treat the topics of LOAC and international criminal law as related, but separate.⁵² Regardless of issues of international criminal responsibility, State responsibility may still arise from allegations falling short of the threshold for prosecution.⁵³ From a practical military perspective, such an approach is logical. It is supported in practice by *Defence Force Order 35*, which requires the reporting of *all* civilian harm.⁵⁴

However, LOAC does not impose an obligation on States to investigate all civilian casualty allegations.⁵⁵ Civilian casualties are not unlawful where the attack undertaken is proportionate, or where the civilian was directly participating in hostilities. Civilian casualties do occur in armed conflicts, and with warfare increasingly being fought in urban environments, this is an unfortunate

48 Geneva Convention I, above n 39, art 1; Geneva Convention II, above n 39, art 1; Geneva Convention III, above n 39, art 1; Geneva Convention IV, above n 39, art 1.

49 Margalit, above n 38, at 161.

50 HCJ 769/02 *Public Committee against Torture in Israel v Government of Israel* (2006) 145 ILR 429 (Isr SC) at [40].

51 HCJ 3292/07 *Adalah v Attorney General* SC Israel, 8 December 2011 at [19].

52 See for example Kevin Riordan "The Law of Armed Conflict" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) 911; Treasa Dunworth and Claire McGeorge "International Criminal Law" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) 821.

53 Dunworth and McGeorge, above n 52, at 847.

54 *Defence Force Order 35*, above n 1, at [3.04.c].

55 Margalit, above n 38, at 168.

reality that is likely to continue. That does not, of course, excuse non-compliance with LOAC. Summing up the point, rather bluntly, Newton stated:⁵⁶

...while the expectation of full compliance with applicable legal norms is non-negotiable, commanders and politicians should be alert to quash any expectation that armed conflict can be conducted with no expectation of civilian casualties.

Thus, LOAC imposes an obligation on States to investigate civilian casualties which are grave violations of the Geneva Conventions, or otherwise violations of international criminal law. Although less explicitly stated, there is also an obligation to investigate civilian harm which breaches LOAC, but falls short of a grave violation or criminal offence. Any investigations into violations need to be sufficient to enable prosecution should that become required. Other than this requirement, LOAC is largely silent on the manner in which the investigation should be carried out, and the standards which should apply. Some assistance in the appropriate standards may be drawn from international human rights law (IHRL), in particular the jurisprudence of the European Court of Human Rights (ECtHR).

B Human Rights Law Standards

It is now generally accepted that IHRL continues to apply to some degree during an armed conflict. The exact scope to which IHRL applies is beyond the scope of the current paper. For present purposes, it is sufficient to note that the standards imposed by IHRL into the investigation of civilian harm offers some assistance in determining the appropriate nature of the investigation within a LOAC paradigm. For those troop-contributing nations party to the ECHR, the investigative requirements imposed by IHRL will still apply in an armed conflict situation. That said, the practical difficulties which may prevent a fully effective investigation being undertaken will be considered in any relevant enforcement action.⁵⁷

The ECtHR has held there should be a form of effective and official investigation where individuals are killed by State agents employing force.⁵⁸ The right to life imposes a duty to put in place effective criminal law sanctions, and requires that there is an effective official investigation where an individual receives life-threatening injuries in suspicious circumstances.⁵⁹ The exact form that the investigation should take is not set by law, and may vary depending on the circumstances.⁶⁰ However, investigations "must be capable of leading to the establishment of the facts and, where

56 Michael Newton "The Legal Interoperability of the Laws of Armed Conflict" in Robin Geiß and Heike Krieger (eds) *The "Legal Pluriverse" Surrounding Multinational Military Operations* (Oxford University Press, 2020) 70 at 76.

57 *Hanan v Germany* (2021) 73 EHRR 24 at [204].

58 *McCann v United Kingdom* (1996) 21 EHRR 97 at [161].

59 *Tunç v Turkey* [2016] Inquest LR 1 (ECtHR) at [171].

60 *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 at [165].

appropriate, the identification and punishment of those responsible."⁶¹ Furthermore, where a suspicious death is caused by State agents, particularly stringent scrutiny should be applied.⁶²

For an investigation into alleged unlawful killings to be effective, it must be independent. This means there should be practical independence from the agents involved in the killing, and also a lack of hierarchical or institutional connection.⁶³ Absolute independence is not required – what is required is that investigations "are sufficiently independent of the persons and structures whose responsibility is to be engaged."⁶⁴ Relevantly for present purposes, an investigation will not be independent where the investigators are potential suspects,⁶⁵ colleagues of persons subject to investigation,⁶⁶ or where a relationship of a hierarchical nature exists.⁶⁷

An investigation must also be sufficiently adequate to determine whether the force used was lawful and, if required, ensuring prosecution of those responsible.⁶⁸ It must also be sufficiently timely and prompt.⁶⁹ Public scrutiny should also be possible. Although not all aspects of the proceedings need be made public,⁷⁰ public scrutiny is important to permit oversight and ensure that cover-ups have not occurred. Where an investigation is into a fatality, the victim's next of kin should be involved throughout the process.⁷¹

V THE CIVILIAN CASUALTY ALLEGATION INVESTIGATIVE PROCESS ON OPERATION INHERENT RESOLVE

A Introduction

With those criteria in mind, the CJTF-OIR civilian casualty investigative process shall now be outlined. The *CJTF-OIR Policy* is, for all intents and purposes, a military order. It is issued by CJTF-OIR's Chief of Staff – a United States Brigadier-General, and passed in accordance with authority and

61 *Tunç*, above n 59, at [172].

62 *Da Silva v United Kingdom* (2016) 63 EHRR 12 at [234].

63 *At* [232].

64 *Tunç*, above n 59, at [223].

65 *Bektaş v Turkey* ECHR 10036/03, 20 April 2010 at [66].

66 *Ramsahai v Netherlands* (2008) 46 EHRR 43 at [335]–[341].

67 *Şandru v Romania* ECHR 22465/03, 8 December 2009 at [247].

68 *Ramsahai*, above n 66, at [324]; *Da Silva*, above n 62, at [243]; *Jaloud v Netherlands* (2015) 60 EHRR 29 at [186].

69 *Da Silva*, above n 62, at [237].

70 *Ramsahai*, above n 66, at [353].

71 *Al-Skeini*, above n 60, at [167].

direction given by CJTF-OIR's higher headquarters – United States Central Command (CENTCOM).⁷² That the *Policy* is a directive promulgated by a United States officer, and under the authority of CENTCOM, immediately raises a pragmatic issue concerning compliance and the ability of command to compel non-United States troop-contributing nations to comply with the *CJTF-OIR Policy*. Whilst the issues of command and control in a Coalition operation are often complex, issues of non-compliance with the *CJTF-OIR Policy* by other Coalition partners do not, in reality, arise. In my experience, compliance with important command directives stemming from CENTCOM and concerning LOAC and IHL compliance were universal across the Coalition.

B The Purpose of Civilian Casualty Investigations

Preventing and responding to allegations of civilian casualties is essential to ensure compliance with LOAC. The importance of investigating civilian casualty incidents, and the rationale for so-doing, are stated within the *CJTF-OIR Policy*'s purpose section:⁷³

Preventing and mitigating CIVCAS is a CJTF-OIR priority. Both credible and not credible CIVCAS allegations can harm the relationship between Coalition forces, the civilian population, and host-nation governments, and can negatively impact national and international opinion. The incidence of CIVCAS can also temper or completely blunt the benefits of counterterrorism efforts. The procedures outlined in this policy will facilitate mission success by ensuring the CIVCAS response process across the CJTF-OIR [combined joint operations area] is uniform, unbiased, transparent, and can expeditiously meet national and international obligations.

The processes enacted in the *CJTF-OIR Policy* enable an assessment of whether an allegation of civilian harm made to the Coalition is credible or not credible. An allegation is deemed credible where it is determined "based on all reasonably available information, that it is more likely than not that a civilian was killed or injured as a result of Coalition action."⁷⁴ Conversely, an allegation is deemed to be not credible if it is determined "based on all reasonably available information, that there is insufficient information to corroborate the allegation."⁷⁵ In effect, the determination as to whether allegations of civilian casualties are credible is based upon the balance of probabilities standard (or on a "preponderance of the evidence", as the standard is referred to by United States attorneys).

As CJTF-OIR falls under the command of CENTCOM, it has adopted credibility as the preferred terminology. This terminology, however, is not universally applied across the United States commands. United States Africa Command (AFRICOM), for example, employs the terminology

⁷² *CJTF-OIR Policy for Reporting and Responding to Civilian Casualty Incidents* (United States Department of Defense, Camp Arifjan, Kuwait, 9 May 2018) at [1] and enclosure 2.

⁷³ At [1.a.].

⁷⁴ At [2.c.(4)].

⁷⁵ At [2.c.(4)].

"substantiated/unsubstantiated".⁷⁶ Whilst this test still based on a balance of probabilities standard, the difference in terminology is noteworthy. A potential issue with the language employed by CENTCOM, and by extension CJTF-OIR, is that phrasing "credible/not credible" may be seen as making a judgment on the reputability of the source, rather than the evidence that the source has provided. A not credible determination does not conclusively rule out the possibility that civilian harm did, in fact, occur. A credibility assessment applies the evidence which is available at the relevant time, and, just as cases within any area of law, errors may be made. The "substantiated/unsubstantiated" language used in AFRICOM's civilian casualty procedures makes it more evident that a finding is not necessarily a finding on the source's credibility, and more accurately captures what is determined in the civilian casualty investigative process required by the *CJTF-OIR Policy*.

Beyond assessing an allegation as credible, the *CJTF-OIR Policy* "will not assess collateral issues, culpability, or criminal liability of a unit or service member."⁷⁷ In cases where service members from multiple States are involved in an incident which leads to civilian harm, the process will also not assess or apportion responsibility to States for their role in any internationally wrongful acts that may have caused the harm.⁷⁸ As such, an investigation under the *CJTF-OIR Policy* is akin to a screening form of investigation. In an active combat environment, a "full autopsy of every civilian death is obviously impossible under all circumstances."⁷⁹ The process followed by CJTF-OIR allows for an assessment of credibility of a civilian casualty allegation, the rapid recognition of any lessons to be learned, and an assessment of compliance with LOAC and ROE. Where there is an indication of non-compliance with LOAC, or criminal offending, those matters can be subject to another investigation which contains within it the full range of protections afforded to accused persons. Although the *CJTF-OIR Policy* specifically empowers United States commanders to order an additional investigation where one is required,⁸⁰ the ordering of such investigations would fall within the inherent powers of command that a military commander has by virtue of their appointment.⁸¹

76 Peter C Combe II "Civilian Casualties: Practical Application of the Law of Prevention and Response" [2021] Army Lawyer 38 at 40.

77 *CJTF-OIR Policy*, above n 72, at [2.c.(6)].

78 In a coalition environment *Draft Articles on Responsibility of States for Internationally Wrongful Acts* [2001] vol 2, pt 2 YILC 31 [*ARSIWA*], arts 16 and 17, are the most relevant rules pertaining to shared State responsibility. However, their application in coalition military operations is an underexplored area.

79 Newton, above n 56, at 86.

80 *CJTF-OIR Policy*, above n 72, at [2.d.].

81 As to the nature of the powers of military command in New Zealand, see generally *R v Froggatt* (1992) 1 NZCMAR 168.

C The Receipt of an Allegation

Regardless of the source of an alleged civilian casualty incident, CJTF-OIR undertook to investigate it. This is also supported by the information released to, and published by, the New York Times. For example, *Allegation 1189* concerned an allegation that Coalition forces killed three civilians and injured a further nine in strikes in Albu Kamal, Syria on 29 July 2017, whilst targeting members of ISIS. CJTF-OIR became aware of the allegation through various pro-Syrian and anti-Coalition Twitter profiles.⁸² A Coalition investigation into the allegation determined that the allegation was credible.⁸³ Furthermore, in *Allegation 321*, both pro-ISIS social media accounts and Airwars reported civilian casualties caused by the Coalition. In determining that it was credible that two civilians were killed and 15 more injured, CJTF-OIR considered the information circulated by the pro-ISIS social media accounts.⁸⁴ Likewise, *Allegation 664* determined it was credible that 10 civilians were killed in a Coalition strike. The allegation, made by Airwars, was largely based upon reports from an ISIS media agency.⁸⁵

More typically, however, allegations are made either by NGOs, or are self-reported. Unsurprisingly, the International Committee of the Red Cross (ICRC) has been an important entity in monitoring the conflict in Iraq and Syria, and made allegations of civilian harm which were investigated by the Coalition.⁸⁶ Airwars, too, has documented numerous instances of alleged civilian deaths and injuries, and maintains a publicly accessible database detailing those allegations.⁸⁷ Furthermore, a range of other actors have reported upon allegations of which CJTF-OIR has subsequently undertaken investigations, including the United Nations,⁸⁸ Human Rights Watch,⁸⁹ traditional media outlets,⁹⁰ and social media sites.⁹¹

⁸² *CIVCAS Credibility Assessment Report: Allegation 1189 (Albu Kamal, Syria, 29 July 2017)* CJTF-OIR, 31 August 2017 at [2.c].

⁸³ At [6].

⁸⁴ *CIVCAS Allegation Closure Report: Allegation 321 (Mosul, Iraq)* CJTF-OIR, 28 September 2017 at [3.e].

⁸⁵ *CIVCAS Allegation Closure Report: Allegation 664 (Mosul, Iraq)* CJTF-OIR, 31 August 2017 at [2.a].

⁸⁶ See for example *CIVCAS Credibility Assessment Report: Allegation 1112 (Al Jadida, Iraq, 13 March 2017)* CJTF-OIR, 22 December 2017.

⁸⁷ Airwars, above n 14.

⁸⁸ *CIVCAS Allegation Closure Report: Allegation 474 (Anbar, Iraq, 13 May 2017)* CJTF-OIR, 29 May 2017.

⁸⁹ *Initial Assessment: Allegation 446 (Risalah, Iraq, 22 February 2017)* CJTF-OIR, 8 May 2017.

⁹⁰ *CIVCAS Allegation Closure Report: Allegation 436 (Mosul, Iraq, 21 January 2017)* CJTF-OIR, 25 May 2017.

⁹¹ *CIVCAS Allegation Closure Report: Allegation 507 (Mosul, Iraq, 14 December 2016)* CJTF-OIR, 22 July 2017.

Instances of self-reported allegations are also not uncommon. Military orders often compel members of the armed forces to report instances of suspected non-compliance with LOAC and civilian harm caused by operations. Indicatively, *Defence Force Order 35* states "[i]t is a mandatory requirement for all NZDF personnel to report all civilian harm, *regardless of source*, to the relevant [Senior National Officer] or equivalent, as soon as practical."⁹² This requirement is mirrored in the *CJTF-OIR Policy*, which states "[e]very unit operating in the [combined joint operations area] has a duty to report all actual or alleged CIVCAS incidents to the CJTF-OIR CIVCAS Cell...".⁹³ As indicated by the documents released to the New York Times, instances of self-reporting occur regularly.⁹⁴ Such allegations are investigated as thoroughly and impartially as if they were raised by an entity external to the Coalition.

D First Impression Report

Where an allegation is made to the Coalition, a first impression report is created to provide situational awareness of the allegation.⁹⁵ However, even where there is not sufficient information, that does not necessarily mean that the Coalition will not investigate further. Where a reputable source makes an allegation of civilian harm which is not initially borne out by the information available, it is not uncommon for further information to be requested from the source. Indicatively, in *Allegation 1472* insufficient information as to the time, location and details of the alleged civilian casualty incident was provided to CJTF-OIR to enable a credibility assessment to be undertaken. A request for additional information was made to Airwars, the allegation ultimately being closed when additional

92 *Defence Force Order 35*, above n 1, at [3.04.c].

93 *CJTF-OIR Policy*, above n 72, at [2].

94 *CIVCAS Credibility Assessment Report: CIVCAS Serial 036/16 (29 November 2016)* CJTF-OIR, 29 November 2017; *Initial Assessment: Allegation 220 (Manbij, Syria, 31 July 2016)* CJTF-OIR, 1 September 2016; *CIVCAS Allegation Closure Report: Allegation 325 (Ar Raqqa, Syria, 3 February 2017)* CJTF-OIR, 30 May 2017; *CIVCAS Credibility Assessment Report: Allegation 347 (Bab Sinjar, Iraq, 19 February 2017)* CJTF-OIR, 27 April 2017; *Initial Assessment: Allegation 1162 (Syria, 29 July 2017)*; *CIVCAS Allegation Closure Report: Allegation 1164 (Syria, 29 July 2017)* CJTF-OIR, 15 September 2017; *CIVCAS Credibility Assessment Report: Allegation 1199 (Al Anbar, Iraq, 5 August 2017)* CJTF-OIR, 17 October 2017; *CIVCAS Allegation Closure Report: Allegation 1213 (Raqqa, Syria, 13 August 2017)* CJTF-OIR, February 2018; *CIVCAS Allegation Closure Report: Allegation 1216 (13 August 2017)* CJTF-OIR, 28 September 2017; *CIVCAS Allegation Closure Report: Allegation 1227 (Raqqa, Syria, 17 August 2017)* CJTF-OIR, February 2018; *CIVCAS Allegation Closure Report: Allegation 1239 (Syria, 20 August 2017)* CJTF-OIR, 28 September 2017; *CIVCAS Allegation Closure Report: Allegation 1264 (Raqqa, Syria, 15 August 2017)* CJTF-OIR, 15 September 2017; *CIVCAS Allegation Closure Report: Allegation 1559 (As Suwar, Syria, 22 September 2017)* CJTF-OIR, 5 January 2018; *CIVCAS Credibility Assessment Report: Allegation 1794 (Baghouz, Syria, 2 November 2017)* CJTF-OIR, 20 November 2017; *CIVCAS Allegation Closure Report: Allegation 1818 (Hajin, Syria, 13 December 2017)* CJTF-OIR, February 2018; *CIVCAS Allegation Closure Report: Allegation 1990 (Karanij, Syria, 9 January 2018)* CJTF-OIR, February 2018.

95 *CJTF-OIR Policy*, above n 72, at [2.a.(2)].

information was not provided.⁹⁶ CJTF-OIR, of course, has no powers to compel any NGO or external entity to provide information. Whilst withholding of information by NGOs is not generally an issue, it is imperative that information-sharing should be encouraged to the greatest degree possible, whilst maintaining any necessary security and confidentiality concerns that the NGO's sources may have. To do so allows the greatest ability of the investigator to address the allegations thoroughly.⁹⁷

E The Initial Assessment

Once a first impression report is made, an initial assessment is undertaken by the Coalition. The purpose of the initial assessment is to determine whether an additional inquiry is needed, and this process involves searching for Coalition military strikes which potentially corroborate with the allegation in terms of date, time and location.⁹⁸

The initial assessment can recommend to command that the allegation is closed where:⁹⁹

- (a) no potentially corroborating CJTF-OIR strikes are identified;
- (b) the allegation provides insufficient information to identify a location or date; or
- (c) the only correlating strikes are host-nation or partner force strikes.

As is evident, the scope at which the investigation may be closed at this stage is rather narrow. A wide timeframe is often considered. Thus, in closing several allegations at the initial assessment stage, CJTF-OIR has first conducted a search for relevant strikes within a 48,¹⁰⁰ or 72,¹⁰¹ hour time period of the alleged civilian casualty incident. In other instances, a survey of all potentially corroborating

96 *CIVCAS Cell Initial Assessment: Allegation 1472 (Mosul, Iraq, 12–15 May 2017)* CJTF-OIR, 24 November 2017 at 3.

97 See also the comments in *Prisoners of War, Eritrea's Claim 17 (Eritrea v Ethiopia) (Partial Award)* (2003) 135 ILR 199 (Eritrea–Ethiopia Claims Commission) at [51]–[53].

98 *CJTF-OIR Policy*, above n 72, at [2.b].

99 At [2.b.(1)].

100 *CIVCAS Cell Initial Assessment: Allegation 1359 (Al Barouda, Syria, 22 April 2017)* CJTF-OIR, 16 November 2017.

101 *CIVCAS Cell Initial Assessment: Allegation 987 (Raqqqa, Syria, 10–12 March 2017)* CJTF-OIR, 9 September 2017.

strikes will reveal none within a close proximity of the alleged civilian casualty incident.¹⁰² In others still, the allegation made was too vague for a meaningful review to be undertaken by the Coalition.¹⁰³

Occasionally, an initial assessment will reveal that there are no potentially corroborating strikes, and that other entities operating in Iraq or Syria are instead responsible. In *Allegation 666*, for example, it was alleged that one civilian was killed on an unknown date between 4 and 6 October 2016, at the Al Sisassah bridge in Syria. A review of CJTF-OIR strikes and military activities in Syria revealed no potentially corroborating strikes, and it was concluded that "[i]t is highly likely that the strike was from either Russian or [Syrian] Regime forces due to their activity and interests in Dayr Az Zawr."¹⁰⁴

F CIVCAS Credibility Assessment Report

If an allegation does not fall within the narrow scope of matters to be closed off at the initial assessment phase, a CIVCAS Credibility Assessment Report (CCAR) will be undertaken. A CCAR is tasked to the unit which undertook the military action which resulted in the alleged civilian casualties.¹⁰⁵ The member assigned to complete the CCAR must not have had a decision-making or advisory role in the actions which led to the alleged civilian casualty incident.¹⁰⁶

The purpose of the CCAR is to determine whether the allegation is credible or not credible.¹⁰⁷ The purpose of the CCAR is not, however, to apportion responsibility. As stated in the *Policy*:¹⁰⁸

The CCAR is limited to findings of credibility and causation. The CCAR will not assess collateral issues, culpability, or criminal liability of a unit or service member.

Despite the fact that the CCAR will not assess other issues, it is within the discretion of the legal advisor who reviews the report to recommend further action and investigation be taken, if the need so arises. This includes more in-depth inquiries under other regimes, with the intent of determining culpability or other issues if there are indications of non-compliance with the law. In particular,

102 *CIVCAS Cell Initial Assessment: Allegation 673 (Raqqqa, Syria, 15–16 October 2016)* CJTF-OIR, 19 June 2017; *CIVCAS Cell Initial Assessment: Allegation 919 (Raqqqa, Syria, 20–22 February 2017)* CJTF-OIR, 17 August 2017; *CIVCAS Cell Initial Assessment: Allegation 1110 (Anbar, Iraq, 4 June 2017)* CJTF-OIR, 8 July 2017.

103 *CIVCAS Cell Initial Assessment: Allegation 838 (Mosul, Iraq, 14–16 January 2017)* CJTF-OIR, 5 September 2017.

104 *CIVCAS Cell Initial Assessment: Allegation 666 (Deir Ez-Zawr, Syria, 4–6 October 2016)* CJTF-OIR, 17 June 2017 at 3.

105 *CJTF-OIR Policy*, above n 72, at [2.c.(1)].

106 At [2.c.(2)].

107 At [2.c.(4)].

108 At [2.c.(6)].

assessing compliance with CJTF-OIR's ROE and LOAC are a component of the legal review which is to be included before the relevant general officer closes the allegation,¹⁰⁹ and the general officer responsible for closure of the allegation may direct further investigations to determine other issues,¹¹⁰ including pertaining to culpability. Furthermore, it is unlikely that commanders would be limited from ordering any other form of investigation. Military commanders generally have command discretion to order actions and investigations into violations of the law.¹¹¹

An important function of a CCAR is to identify and recommend changes that can be made to mitigate the risk of civilian casualties in future operations. In a piece concerning the role of legal advisors in the civilian casualty investigation process, Combe describes the purpose of these recommendations as follows:¹¹²

These recommendations will most often focus on the conduct or execution of a strike or operation and can include recommendations to modify or implement new strike Standard Operating Procedures or Tactics, Techniques, and Procedures. These recommendations might also identify gaps in a command's target development and vetting process, or internal strike cell operations.

G Conclusion

The *CJTF-OIR Policy* details an involved, multi-stage investigation into civilian casualty allegations. All allegations, regardless of the source, are investigated, with a goal of determining their credibility. Further investigations into responsibility and compliance with LOAC and ROE can also be directed if the need so arises. In this sense, the CJTF-OIR investigative process is akin to a screening investigation, which determines the credibility of an allegation and make necessary recommendations for further inquiries if required.

The question remains as to how compliant the *CJTF-OIR Policy* is with the international law governing civilian casualty investigations. As such, a comparison of the *Policy* with the standards imposed by LOAC and ROE falls for consideration.

VI THE CJTF-OIR POLICY AND INTERNATIONAL STANDARDS

A The Civilian Casualty Allegations to be Investigated

As previously identified, LOAC imposes an obligation to investigate civilian casualties where such casualties are caused in violation of LOAC, regardless of whether they are grave breaches or

¹⁰⁹ At [2.c.(9)].

¹¹⁰ At [2.c.(10)].

¹¹¹ Newton, above n 56, at 84.

¹¹² Combe II, above n 76, at 41.

not.¹¹³ The practice adopted by CJTF-OIR exceeds this required standard, in that all civilian casualty allegations are subject to some form of investigative process. Whilst a civilian casualty allegation may not proceed far where not supported by evidence, all allegations received are at least considered in the first instance. Furthermore, even if a credible civilian casualty allegation was caused in an attack that is in full compliance with LOAC and ROE, a CCAR will ultimately still be undertaken.

Adopting this wider scope of investigation has merit for several reasons. It means that an allegation is being thoroughly investigated before it is determined whether LOAC and ROE were complied with. As such, the investigator will have the full body of evidence available to them, decisions made are more likely to be robust and supported by the entirety of the available evidence. Furthermore, this approach allows for lessons to be learned and possible future mitigations to be put in place to minimise proportionate civilian harm. It also permits more accurate tracking and reporting of civilian harm instances in the operational deployed environment.

B Independence

There is a question as to whether the degree of independence afforded by the *CJTF-OIR Policy* is sufficient. The investigation is undertaken by an individual from the unit concerned.¹¹⁴ The ECtHR has recognised that an investigator should be free from a hierarchical or institutional connection,¹¹⁵ which is not required by the *CJTF-OIR Policy*. Although the investigator is not permitted to have been involved in the matter under investigation themselves, they are still likely to be comrades of those being investigated, which may fall short of the standards imposed by IHRL.¹¹⁶ Although a degree of latitude must be afforded in an armed conflict situation,¹¹⁷ so close a connection may raise issues as to how independent an investigation is in reality.

It is here, once again, that a military legal advisor plays a significant role, even more so when they are a member of a different troop-contributing nation. A legal advisor from a nation not contributing to targeting operations, for example, will not likely be an immediate colleague of those involved in the civilian harm incident. Although this offers some mitigation of the risks posed to independence, future multinational coalitions could look to mitigate these risks further. A civilian casualty investigative cell, removed from the chain of command, is a matter worthy of consideration. In particular, if such a cell were to have within it service members of multiple troop-contributing nations, the ability to avoid conflicts of interest and enhance independence would be heightened.

¹¹³ Margalit, above n 38, at 161.

¹¹⁴ *CJTF-OIR Policy*, above n 72, at [2.c(1)].

¹¹⁵ *Da Silva*, above n 62, at [232].

¹¹⁶ *Ramsahai*, above n 66, at [335]–[341].

¹¹⁷ *Hanan*, above n 57, at [204].

It is worth noting that many scholars have concerns that the Armed Forces cannot be independent when it comes to investigating LOAC breaches, as they have an inherent self-interest in covering-up such conduct. Although the anecdotal evidence of a military officer is not the most convincing rebuttal, my experiences with commanders from multiple nations to date is that this is not the case. Members of the Armed Forces, including commanders, appreciate the importance of investigations that are thorough and capable of determining whether LOAC has been breached. Service members generally remain motivated by the same humanitarian concerns as underpin civil society at large.

C Criminal Prosecutions

Investigations under the *CJTF-OIR Policy* are not designed to find criminal fault. Further investigation may be instigated if it becomes apparent that criminal offending is an issue. As it is impractical to expect a full criminal investigation to be undertaken into every allegation (bearing in mind lawful civilian casualties are also investigated), it is reasonable that investigations are not of a criminal nature by default. This is particularly so given the dynamic nature of armed conflict and the realities of operating within a hostile environment.

However, even where the investigative process is not criminal in nature, consideration should be given to incorporating some criminal protections, such as the right against self-incrimination. Failure to do so may result in evidence admissibility issues in a subsequent criminal investigation. *R v Soldiers A & C*, a decision of the Northern Ireland Crown Court, was a ruling on the admissibility of evidence against two soldiers on a charge of murder of a member of the Irish Republican Army in 1972. During the investigation into the killing, Soldiers A and C were ordered to make statements, without having been administered a caution or being given the opportunity to seek independent legal advice. The Court stated that it is "beyond dispute" that the statements would be inadmissible in a criminal trial "because they were ordered rather than volunteered and because no caution was issued by the person taking them."¹¹⁸ A similar result was reached in a case before the Northern Ireland Queen's Bench Division. *Re Duddy's Application* was a judicial review into the decision not to prosecute a soldier for his alleged role in the killing of 13 civilians in Derry on 30 January 1972, on what has become known as "Bloody Sunday". The Court noted that evidence given to a government inquiry into Bloody Sunday could not be admitted due to assurances it would not be used in criminal proceedings,¹¹⁹ and stated that "soldiers accused of serious criminal offences are entitled to no more, but no less, than other defendants."¹²⁰ The Court emphasised that statements given under order are involuntary, and cannot subsequently be admitted in evidence.¹²¹

¹¹⁸ *R v Soldiers A & C* [2021] NICC 3 at [28].

¹¹⁹ *Re Duddy's Application for Judicial Review* [2022] NIQB 23 at [51].

¹²⁰ At [82].

¹²¹ At [98]–[101].

To prevent issues such as those which have arisen in Northern Ireland's prosecutions from arising in relation to similar criminal prosecutions in the context of an armed conflict, the rights of a service member implicated in a civilian casualty incident should be more readily considered. Consideration should be given to affording to those implicated the customary caution, as would apply in their home State. As an investigation should not jeopardise the possibility of criminal prosecutions,¹²² implementing these measures would avoid situations which have arisen in contemporary prosecutions where similar errors were made.

D Public Visibility and Access of Next-of-Kin

Summaries of the findings of investigations under the *CJTF-OIR Policy* are released publicly on the CJTF-OIR website. They follow a fairly standard form. For example, a 2002 release contains the following account of a credible allegation:¹²³

Mar. 27, 2017, near Sarmada, Syria, via Airwars report. Coalition aircraft conducted a strike on Al Qaida-Syria terrorists in a vehicle. Regrettably, three civilians were unintentionally killed and two others unintentionally wounded due to their proximity to the strike.

Not all details of an investigation need be released.¹²⁴ Indeed, there is good reason not to do so in many cases of armed conflict. However, consideration should be given to more detail being released into the public domain. As investigations into civilian harm involve "nothing less than public confidence in the State's monopoly on the use of force",¹²⁵ there is scope to argue that all information which is not of a classified or sensitive nature should be released. Furthermore, unless there is a good reason not to do so, orders regulating investigations into civilian harm incidents should be made publicly available, as is *Defence Force Order 35*. This empowers understanding of the orders under which the military is operating, and the nature of investigations.

Whilst there are multiple States with varying political and military interests in a multinational coalition, ensuring as much information concerning the investigative process and the outcome of any particular investigations are promulgated goes a significant way towards increasing the credibility of any outcomes, and both the coalition and troop-contributing nations, in the eyes of the global public. The same result cannot so readily be achieved where the orders governing investigations are not available. Furthermore, publication of more detailed information concerning the outcomes of investigations, along with the relevant governing orders, will enable family members to more readily understand and contribute to the investigative process. Such involvement is an important aspect of

¹²² *Ramsahai*, above n 66, at [324]; *Da Silva*, above n 62, at [243]; *Jaloud*, above n 68, at [186].

¹²³ CJTF-OIR Public Affairs Office "Combined Joint Task Force – Operation Inherent Resolve Civilian Casualty Assessment" (3 October 2022) Operation Inherent Resolve <inherentresolve.mil> at 2.

¹²⁴ *Ramsahai*, above n 66, at [353].

¹²⁵ *Da Silva*, above n 62, at [232].

any investigation.¹²⁶ Naturally, some elements of reports may need to be withheld or otherwise redacted before public release, as with any documentation released under laws governing access to official information. However, the release of historic documents and the historic *CJTF-OIR Policy* to the New York Times shows that such a release is indeed feasible in principle.

VII CHALLENGES OF CIVILIAN CASUALTY RESPONSE IN A MULTINATIONAL FORCE

A Introduction

In addition to ensuring that any civilian casualty investigation complies with international law, the role of a lawyer advising on civilian harm allegedly caused by a multinational coalition is further complicated by the realities of coalition operations. Different troop-contributing nations will often have different legal obligations, as well as understandings of, and caveats to, the mission's ROE. All States in a multinational coalition will be operating under the same baseline legal obligations, as they are all States Party to the four core Geneva Conventions and the Charter of the United Nations. However, many States will additionally be subject to treaties such as the Additional Protocols to the Geneva Conventions which apply to the same situation.¹²⁷ Furthermore, the Conventional Weapons Convention and various Protocols to it have differing degrees of State signatories,¹²⁸ which means some States are significantly more constrained in their choice of means of warfare than others contributing to the same global mission.¹²⁹

In addition to differing legal obligations as between troop-contributing nations, the varying obligations and issues of command and control also make the apportionment of responsibility for civilian harm – whether to the coalition, troop-contributing nations, or to commanders – significantly more complex as compared to States acting alone. This part, therefore, shall explore the impacts of different understandings of LOAC and ROE, as well as the laws of responsibility, as they apply to civilian harm caused by a coalition. To address these issues in full, much less to provide any resolution to them, falls beyond the scope of the current paper. Rather, the purpose of this part is to highlight areas of which the coalition legal advisor will be aware in their work, and to highlight points for consideration in future multinational missions.

¹²⁶ *Al-Skeini*, above n 60, at [167].

¹²⁷ Robin Geiß, Heike Krieger and Henning Lahmann "Introduction: The History of Multinational Military Operations and Contemporary Legal Challenges" in Robin Geiß and Heike Krieger (eds) *The "Legal Pluriverse" Surrounding Multinational Military Operations* (Oxford University Press, Oxford, 2020) 1 at 20.

¹²⁸ Convention on Prohibitions or Restriction on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects 1342 UNTS 137 (opened for signature 10 October 1980, entered into force 2 December 1983).

¹²⁹ Vicki McConachie "Coalition Operations: A Compromise or an Accommodation" (2008) 38 *Isr YB Hum Rts* 169 at 170.

B Different Legal Obligations and Understandings

As already highlighted, troop-contributing nations to a multinational force will have different legal obligations, and in many cases different understandings of the same Conventions or principles of customary international law which apply to them all. This has potential impact on legal advisors advising on alleged civilian casualty incidents in several ways.

Troop-contributing nations may not always agree on principles as fundamental as the definition of "civilian". Although Geneva Convention IV's aim is to provide protections to civilians in armed conflict, the Convention does not contain a definition of what "civilian" means. The definition that is most widely accepted as a matter of customary international law is that civilians "are persons who are not members of the armed forces."¹³⁰ This definition is widely supported by State practice. It is, for example, largely adopted in the military manuals and orders of New Zealand and several of its close partners.¹³¹ The United States, however, takes a different approach. The *US Law of War Manual* states:¹³²

This manual generally uses "civilian" to mean a member of the civilian population, *i.e.*, a person who is neither part of nor associated with an armed force *or group*, *nor otherwise engaged in hostilities*.

The *United States Law of War Manual* further outlines the concept of "mixed cases", stating that certain individuals do not fall tidily within the combatant/civilian dichotomy. Among the examples given are "unprivileged belligerents",¹³³ who are stated to be "generally subject to the liabilities of both combatant and civilian status", and to include "private persons engaging in hostilities."¹³⁴ The concept of "engaging in hostilities" includes membership of a non-State armed group.¹³⁵

130 Henckaerts and Doswald-Beck, above n 13, rule 5; see also Additional Protocol I, above n 13; *Prosecutor v Bemba Gombo (Decision Pursuant to Article (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* ICC Pre Trial Chamber II ICC-01/05-01/08, 15 June 2009 at [78]; *Prosecutor v Blaškić (Judgment)* (2000) 122 ILR 1 (ICTY Trial Chamber) at [180].

131 *Manual of Armed Forces Law*, above n 24, at [6.4.1] (citations omitted); *Defence Force Order 35*, above n 1, Preliminary Provisions, Annex A, definition of "civilian"; *Law of Armed Conflict* (Australian Defence Force, Australian Defence Doctrine Publication 064, 2006) at [9.14]; *Law of Armed Conflict at the Operational and Tactical Levels* (Canadian Office of the Judge Advocate General, Joint Doctrine Manual B-G-005-104/FP-021, 2001) at [424]; *The Joint Service Manual of the Law of Armed Conflict* (United Kingdom Ministry of Defence, Joint Service Publication 383, 2004) at [5.3.1].

132 *Law of War Manual* (United States Department of Defence, 2015) at [4.8.1.4] (emphasis added).

133 At [4.2.3].

134 At [4.2.3.3].

135 At [4.18.4.1].

The narrowed definition of civilian and the concept of unprivileged belligerents have largely been rejected as a matter of customary international law.¹³⁶ However, as Operation Inherent Resolve is a United States-led coalition, the *CJTF-OIR Policy* defines civilian in a similar vein to United States practice, stating that "civilians" are:¹³⁷

Persons who are not combatants (members of military/security forces) or *members of an organized armed group of a party to an armed conflict*. Civilians may lose their protection against attack for such time as they take direct part in hostilities, but they regain such protection when they stop engaging in direct participation in hostilities, or if they become *hors de combat* (i.e., wounded, sick, detained, or surrendering), and thereby are no longer actively participating in hostilities.

For a coalition lawyer advising on allegations of civilian harm, being aware of these differences in terminology is essential, and the varying definitions may have impacts on the actions a particular troop-contributing nation is required to take under their own domestic orders. If the *CJTF-OIR Policy* were to adopt the definition of "civilian" as it is commonly accepted in customary international law, the scope of investigations would be significantly wider. Where States adopting the strict customary international law definition of civilian also consider members of an organised armed group to be undertaking continuous participation in hostilities,¹³⁸ the practical outcome as to the legality of them being targeted is likely to be the same.¹³⁹ However, given that the exact circumstances in which a civilian is directly participating in hostilities remains a matter of some controversy, legal advisors from different troop-contributing nations may arrive at different conclusions when considering the same allegations of civilian harm.

As part of the review process under the *CJTF-OIR Policy*, a legal advisor must comment on whether the strike which allegedly caused civilian casualties was compliant with LOAC. As States have different legal obligations, and indeed understandings of the same obligation, the answer to this question will often be dependent on which States were actually involved in the alleged civilian harm. McConachie identified a range of treaties where coalition forces have run into issues of

¹³⁶ Riordan, above n 52, at 936; *Public Committee against Torture*, above n 50, at [26]; *Manual of Armed Forces Law*, above n 24, at [6.5.3]; *Law of Armed Conflict at the Operational and Tactical Levels*, above n 131, at [318].

¹³⁷ *CJTF-OIR Policy*, above n 72, Enclosure 3, definition of "civilians" (emphasis added).

¹³⁸ *Manual of Armed Forces Law*, above n 24, at [6.5.26] states "[m]embers of an organised armed group may, in some circumstances, be regarded as being involved in continuous direct participation in hostilities. The fact that a person is acting under effective command and control, and is subject to some form of discipline, is a strong indication that the person is taking a direct part in hostilities, even if the person is not actually fighting at that particular point in time. Where New Zealand considers that membership of an armed group constitutes direct participation in hostilities, members of the NZDF will be advised of that fact in orders".

¹³⁹ *Law of War Manual*, above n 132, at [5.8.2.1].

interoperability in the past.¹⁴⁰ Whilst these gaps are occasionally closed by customary international law, this is not always the case. One of the key conventions which continues to cause interoperability issues is Additional Protocol I. The United States is not a party to the Protocol, as it did not wish to be bound by certain of its provisions. It does, however, accept certain provisions of the Protocol as being reflective of customary international law. Prior to the terror attacks of 11 September 2001, McConachie argues, there "seemed to be a degree of certainty" as to what provisions the United States viewed as not forming part of customary international law, but such certainty has fallen away in subsequent practice.¹⁴¹ Furthermore, where State A is a party to a treaty prohibiting a certain type of weapon, and State B is not, the legality of State A and B undertaking the same strike may turn on what weapon system is to be used.

A lawyer deployed by their nation remains subject to their State's laws and legal obligations. It is, however, crucial to understand how the legal advisors of partner forces approach matters.¹⁴² In a coalition deployment, it is possible that a legal advisor from a nation which takes a relatively conservative approach to LOAC, such as New Zealand, will reach a different outcome when looking at the same scenario as a colleague whose State takes a more permissive approach to targeting, or adopts wider definitions of direct participation in hostilities. Of course, whether any particular attack which leads to civilian casualties complied with LOAC must be determined in accordance with the international law applicable to the States involved in causing the civilian harm. Even in such cases, there is merit to an external, and more conservative voice, being provided to the commanders and legal advisors of the States involved.

C Rules of Engagement

In addition to LOAC obligations being different between troop-contributing nations, the ROE under which individual States contributing to a coalition may be subject to national caveats. ROE may restrict the use of force that can be used to a level that is less than that permitted under LOAC,¹⁴³ but may never authorise a use of force beyond what is permitted by the issuing State's LOAC obligations.¹⁴⁴ Within a multinational military operation, the soldiers of different troop-contributing nations, conducting the same mission and the same task, may be operating under vastly different orders and regulations issued by their national commanders. Practically speaking, the differing views concerning what amounts to a lawful use of force in self-defence has a significant role in the application of ROE. A State adopting a wider view on what amounts to self-defence may launch an

¹⁴⁰ McConachie, above n 129, at 171.

¹⁴¹ At 172.

¹⁴² Phillip C Maxwell "Reflections on Multi-National Interoperability from the IIHL" [2019] *Army Lawyer* 34.

¹⁴³ *Manual of Armed Forces Law*, above n 24, at [2.5.3].

¹⁴⁴ Solis, above n 25, at 372.

attack defensively, whereas a State with a narrower view may need to conduct an assessment as to whether the ROE for an offensive strike are met.¹⁴⁵

Although efforts are made in Coalition forces to adopt a common ROE between States contributing to a Coalition force,¹⁴⁶ such agreement cannot always be reached. Where an overarching set of ROE are issued for the Coalition, most troop-contributing nations will still, to some extent, use national caveats to limit the actions that their forces can undertake. Such national caveats are governed in part by the international and national laws applicable to the individual troop-contributing nations, as well as their political interests.¹⁴⁷ National caveats are crucial to ensuring that a State complies with their own legal obligations, as they remain responsible for the conduct of their forces posted to a multinational Coalition.¹⁴⁸ In any particular mission, it is common for there to be "red cards" played, where a particular mission allocated to a troop-contributing nation is vetoed if it goes against their national caveats or LOAC obligations.¹⁴⁹

As the *CJTF-OIR Policy* requires a legal advisor to address whether ROE have been complied with,¹⁵⁰ this is of practical impact. The ROE for CJTF-OIR, and most documents pertaining to New Zealand's position in relation to them, remain classified. However, in broad terms, a legal advisor from New Zealand, for example, bound by New Zealand's perspective on international law, may have a different understanding of the scope of the Coalition's ROE than the legal advisor of a troop-contributing nation with a more permissive interpretation of the law. This may result in divergent view within the Coalition as to whether a particular civilian casualty allegation complied with ROE. Furthermore, it is feasible that a strike by State A will comply with the coalition's ROE overall, but not with caveats that State A itself has imposed on its own troops. Thus, while the coalition's ROE may be complied with generally, a service member of State A may nonetheless have breached the limitations imposed upon them by their own nation. Maintaining awareness of this, and recognising where one's own national caveats or ROE prohibit advising on the legality of a matter, is of critical importance to a legal advisor in a Coalition environment. As will be seen in Part VIII, these factors, and the nature of command and control within a multinational force, can lead to difficulties with the allocation of responsibility for causing civilian harm.

145 Jochen Katze and Maral Kashgar "Legal Challenges in Multinational Military Operations: The Role of National Caveats" in *The "Legal Pluriverse" Surrounding Multinational Military Operations* (Oxford University Press, Oxford, 2020) 393 at 398.

146 Solis, above n 25, at 375.

147 Katze and Kashgar, above n 145, at 393.

148 At 394.

149 McConachie, above n 129, at 181–182.

150 *CJTF-OIR Policy*, above n 72, at [2.c(9)].

VIII RESPONSIBILITY FOR CIVILIAN HARM IN A COALITION FORCE

A Introduction

As has already been discussed, an investigation under the *CJTF-OIR Policy* is not designed to make rulings on responsibility of any particular State or individual. A finding of credibility is, in essence, a determination that the Coalition is responsible for the casualties inflicted. However, the consequences of that finding, in particular if it were to be coupled with a finding of noncompliance with LOAC, are more complex than may first appear. As this Part seeks to demonstrate, the issues of command and control, along with differing legal obligations held by troop-contributing nations, mean that the allocation of responsibility is not a simple task, and one that could pose issues should a claim ever be made by a person affected by the military action in question. Such issues arise whether one considers the culpability of the coalition, any particular State, or individuals within the force.

B The Responsibility of the Coalition

Under the *CJTF-OIR Policy*, the information which is released into the public domain does not state which nations' forces were involved in an alleged civilian casualty incident – it simply states that the Coalition caused civilian casualties in the event that the allegation is found to be credible.

However, insofar as CJTF-OIR and similar coalitions are concerned, this finding is of limited legal effect, as coalitions often do not itself have international legal personality. Crawford states:¹⁵¹

A subject of international law is an entity possessing international rights and obligations and having the capacity (1) to maintain its rights by bringing international claims; and (2) to be responsible for its breaches of obligation by being subjected to such claims.

CJTF-OIR, in and of itself, does not meet this threshold for international personhood, and is not, in and of itself, a subject of international law. It does not meet the definition, identified in the work of the International Law Commission, as being "established by a treaty or other instrument governed by international law and possessing its own international legal personality."¹⁵² In the *Certain Phosphate Lands* case, the International Court of Justice noted that a joint authority to which Australia, New Zealand and the United Kingdom contributed "did not have an international legal personality distinct

¹⁵¹ James Crawford *Brownlie's Principles of Public International Law* (9th ed, Oxford University Press, Oxford, 2019) at 105 (footnotes omitted). See also *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174 at 179, where the Court held that the United Nations had international legal personality as it was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane."

¹⁵² *Draft Articles on the Responsibility of International Organizations* [2011] vol 2, pt 2 YILC 46, art 2(a).

from those of the States" that contributed to it.¹⁵³ Similarly, in a claim brought against the United States for the conduct of the Force Commander of the Allied Powers of Japan, the Court of Claims stated:¹⁵⁴

The Allied Powers, of course, was not a body politic. It was an association of sovereign states. Any action taken by the Supreme Commander for the Allied Powers was taken on behalf of the association, of course; but it was also taken on behalf of each one of the Allied Powers. Any action taken by him was taken as the agent of the United States of America, as the agent of Great Britain, and as the agent of China and of Russia. Whatever use there may have been of plaintiff's vessel by the Allied Powers, it was a use by all of them. The Supreme Commander was acting as an agent for each of them.

As the *Anglo-Chinese Shipping Co* case implies (although does not decide), in a joint military command, the commanding officer often acts on behalf of all States. In the modern political climate, that must be caveated by the manner in which ROE and national caveats limit the Armed Forces of a troop-contributing nation undertaking particular actions. States may be jointly liable for an internationally wrongful act where they have acted in concert,¹⁵⁵ but CJTF-OIR itself is not responsible on the international plane, as it does not bear international legal personality. It does not exercise any functions of its own accord, and is in fact a subordinate command to CENTCOM.

The position may be different where a multinational force is operating under the auspices of an international organisation, such as the United Nations or NATO. In such cases, the organisation itself has international personality, and is able to bear international responsibility. Stating that CJTF-OIR is responsible is largely a legal nullity. Furthermore, it does not give an appropriate avenue for a survivor or next of kin to pursue reparation against any legal entity, as it does not identify any States which are involved.

C State Responsibility

The fact that a coalition itself may not have international legal personality in its own right does not stop the apportionment of State responsibility to its troop-contributing nations. It is trite law that every internationally wrongful act of a State gives rise to its international responsibility.¹⁵⁶ However, more significant in a multinational military force such as CJTF-OIR become issues of complicity and control. Due to differing LOAC and IHRL obligations, as well as national caveats and State specific ROE, various States will be contributing different levels of support to a coalition.

¹⁵³ *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240 at [47].

¹⁵⁴ *Anglo Chinese Shipping Co v United States* 127 F Supp 553 (Ct Cl 1955) at 556.

¹⁵⁵ André Nollkaemper and others "Guiding Principles on Shared Responsibility in International Law" (2020) 31 EJIL 15.

¹⁵⁶ *ARSIWA*, above n 78, art 1.

Even where a State is not directly involved in the application of kinetic force, issues of compliance with relevant legal regimes may still arise. Some States may elect to have "boots on the ground", with troops fighting on the front lines. Others may offer air support, intelligence and surveillance, logistical support, or legal advisors. Some still will simply offer overflight and refuelling. The range of support varying involvement offered in a multinational force to the overall effects created by the Coalition gives rise to a range of complex considerations concerning State responsibility.

Within the International Law Commission's *State Responsibility Articles*, two articles have relevance for the joint responsibility of troop-contributing nations. Article 16, which concerns aid or assistance in an internationally wrongful act, states:¹⁵⁷

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.

Amongst the various articles contained within the *State Responsibility Articles*, article 16 is the least explored. It is, however, the most pertinent for further exploration for military legal advisors and those interested in the subject of shared responsibility multinational operations. Within a multinational coalition, where various entities provide differing levels of support, article 16 raises important issues which have not been fully resolved. Does State A, which provides State B with intelligence as to the status of a person, aid or assist in the commission of the targeting of the individual? What of State C, which provides a legal advisor who advises State B's commander? What, too, of a State which simply allows overflight and offers refuelling opportunities? Some States, too, may arguably enable State B to undertake its actions simply by fulfilling other roles within the multinational force which enable State B to free its own resources to conduct an attack. Given the multiple ways in which States contribute to multinational forces, the scope of article 16 is a matter of particular importance to a military lawyer where an allegation of unlawful civilian casualties is made. It is, therefore, an area in which further research from military lawyers, academics and civil society is crucial.

Article 17 concerns direction and control over internationally wrongful acts, and states:¹⁵⁸

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.

¹⁵⁷ Article 16.

¹⁵⁸ Article 17.

Although art 17 might seem to be an outlier in its application, it arguably has significant relevance to a mission such as CJTF-OIR. In its letter to the United Nations concerning ISIS, Iraq noted that it had "requested the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent."¹⁵⁹ CJTF-OIR was a subordinate headquarters to CENTCOM, a United States headquarters, and the majority of those in command roles are United States service members. This may raise questions as to how much non-United States troop-contributing nations can be said to be at the direction and control of the United States during CJTF-OIR.

There are, therefore, important questions to be answered as to how art 17 applies in modern military operations. The matter is complicated by a range of factors, including national caveats to the mission's ROE, and the requirement for members of a State's Armed Forces to comply with their own national laws and international obligations. For example, domestic law and caveats to ROE may require service personnel to refuse to comply with any order of a superior foreign officer that conflict with their own laws. The domestic laws of a troop-contributing nation may limit the extent to which its forces are required to comply with the instructions of superiors of a foreign State. In the United States' case of *New*, the District Court of Columbia stated, in the context of a United Nations deployment to Macedonia:¹⁶⁰

To the extent that United Nations officers on the mission to Macedonia exercise any power "under the laws of the United States," a dubious proposition, they do so only under a temporary arrangement limited in both scope and duration. Their power to direct U.S. forces is entirely subject to the "terms and conditions" defined by the President under the [United Nations Participation Act], pursuant to his determination of what is "consistent with the national interest." 22 U.S.C. § 287d-1.

In an earlier court decision in a related series of litigation, the Army Court of Criminal Appeals affirmed a finding that the President and United States commanders retained command authority over United States forces, regardless of the fact that operational control of the forces was exercised by non-United States commanders, and stated that the United States "military chain-of-command remained inviolate."¹⁶¹ As is indicated by the *New* line of cases, it is unlikely that a modern State will ever fully relinquish command and control to another force. As such, the scope of application of art 17 may be limited. *Anglo-Chinese Shipping Co*, which stated that the commander of Allied Forces in Japan acted for all troop-contributing nations,¹⁶² may require reconsideration in the modern context. The nature of Coalition warfare raises issues pertaining to complicity and control, insofar as it concerns State responsibility, the resolution of which falls beyond the scope of the present piece. That said, they are

¹⁵⁹ *Letter from the Permanent Representative of Iraq*, above n 7, at 2.

¹⁶⁰ *United States, ex rel New v Rumsfeld* 350 F Supp 2d 80 (DDC 2004) at 98.

¹⁶¹ *United States v New* 50 MJ 729 (Army Ct Crim App 1999) at 737–738.

¹⁶² *Anglo Chinese Shipping*, above n 154, at 556.

matters of crucial importance to the military lawyer, the academic, and humanity at large. It remains an area which is in need of further study so that the parameters of State responsibility in the context of partnered military operations can be fully understood.

D Command Responsibility

As a matter of customary international law, a commander will generally be liable for the conduct of their subordinates where they fail to take all necessary and reasonable measures to prevent, repress or punish crimes being committed by those under their control.

Command responsibility, being built on *de jure* or *de facto* command authority, has complications in a coalition context. The laws of command responsibility will hold a commander liable for conduct of subordinates, whether they are *de facto* subordinates or subordinates as a matter of law. In this regard, there are significant questions as to the application of command responsibility. Taking command *de jure*, there will often be occasions in a coalition environment where the commander will not have *de jure* command authority. In this regard, the *New* decisions from the United States are of significant relevance, in that they correctly suggest that command authority in a multinational force is subject to the consent of the State of nationality,¹⁶³ and that the command authority of home State commanders "remain[s] inviolate."¹⁶⁴ Therefore, the domestic arrangements of a troop-contributing nation may limit the *de jure* ability of a foreign commander to command their troops. Furthermore, as a matter of both military and international criminal law, a soldier must not obey manifestly unlawful orders. In a coalition environment, a commander of State A, which has prohibited a certain weapon system, may find difficulties in enforcing that order against a soldier from State B, which has not. For the soldiers of State A, use of the weapon system may be manifestly unlawful inherently, whereas for State B's forces, while under the command of a State A commander, the use is lawful provided it complies with LOAC. The fact that States can, and indeed frequently do, impose national caveats on ROE may also limit the ability of a coalition commander, both *de jure* and *de facto*, to control forces placed under them. This, too, is a matter which is not extensively addressed in the international legal literature.

Furthermore, a coalition commander's ability to punish conduct will be limited. The vastly different obligations that various troop-contributing nations will be under raises questions concerning what is, or is not, an unlawful order. For example, whilst a member of the NZDF cannot lawfully use anti-personnel landmines, an order to do so would not be unlawful for their colleagues from a State not party to the relevant prohibitions. Domestic law is also likely to have an impact on the manner in which foreign forces can control their forces. For example, the United States Constitution and other laws place limits on the ability of their forces to serve under foreign commanders – operational and

¹⁶³ *New v Rumseld*, above n 160, at 98.

¹⁶⁴ *United States v New*, above n 161, at 737–738.

tactical control is generally permissible, but there is a requirement for a United States commander to exercise actual command.¹⁶⁵ Furthermore, as Dunlap states:¹⁶⁶

Historically, each coalition partner is responsible for disciplining its troops in accordance with domestic military and criminal law. This authority does not rest with the coalition commander, but with the national commanders of the coalition partners. However, every coalition commander has a strong interest in unit welfare and discipline, and should make sure that discipline is carried out to avoid adverse operational effects.

If the troops of contributing forces are not clearly or entirely placed at the disposal of the commanding general, there may be questions of the commander's *de jure* ability to control forces. In particular, although the commander may be *de facto* in charge of the force, they may *de jure* have very little authority over the forces underneath them. The impact of national caveats, different LOAC obligations and the command and control arrangements imposed by domestic law of troop-contributing nations, and how that impacts on command responsibility in an organised multinational force, does not appear to have been considered in detail in jurisprudence or academia. It is an area worth consideration, particularly as coalition warfare is the main manner in which modern States prefer to operate.

IX CONCLUSION

In any multinational military coalition which wishes to ensure support from troop-contributing nations and, more importantly, the population within the area of operations, prevention of civilian harm is essential. Despite the fact that it is an unfortunate reality that civilian harm does occur,¹⁶⁷ a timely and adequate response to civilian casualties is crucial to ensure that LOAC compliance is achieved and maintained, in particular through identifying and incorporating lessons learnt.

That said, within a multinational military force, responding to allegations and actual instances of civilian harm is an area of difficulty. Acknowledgement of civilian harm, where it does indeed occur, is crucial. Such acknowledgement requires that there is a process by which it can be investigated. Within a multinational force, where there are several differing political goals and legal obligations, this is inherently more difficult than in the increasingly rare situation of a State acting alone. Processes, such as that in the *CJTF-OIR Policy*, go some way to ensuring a robust investigation. In particular, the wide scope of matters that are investigated, and the general obligation imposed on legal advisors by the *Policy* to comment upon compliance with LOAC and ROE in the military activity under investigation, are essential in ensuring coalition compliance with the laws governing warfare.

¹⁶⁵ Charles Dunlap "Legal Issues in Coalition Warfare: A US Perspective" (2006) 82 ILS 221 at 224.

¹⁶⁶ At 225.

¹⁶⁷ *Defence Force Order 35*, at [1.01.b]; Newton, above n 56, at 76.

That said, there are areas in which the *CJTF-OIR Policy*'s framework could be improved for future coalition operations. In particular, as international law requires independence of investigations into civilian harm,¹⁶⁸ the establishment of specific multinational civilian casualty investigative cells is a matter which could be considered. Furthermore, the incorporation of basic criminal protections into the early stages of an investigation into a civilian harm incident will likely mitigate against the risks of evidence admissibility issues which have been seen in relation to Northern Irish prosecution attempts in recent years.¹⁶⁹ Likewise, increasing the degree of information that is released to the public, beyond that which is required to remain strictly confidential, will ensure greater compliance with the requirement that the public at large, and in particular the next-of-kin of any casualties, can be involved in the civilian casualty response process.¹⁷⁰

Responding to civilian casualty incidents in the context of a multinational force is, at times, a complicated matter. This is driven by the fact that troop-contributing nations have different legal obligations, and at times different understandings of the same obligations.¹⁷¹ Such differences may run as deep as the definition of core concepts, such as the definition of "civilian" and the understanding of direct participation in hostilities. These issues, along with those of the degree of command and control that a State is willing to forfeit to coalition command, also pose significant, and as of yet largely unanswered, questions in the field of international and criminal responsibility.

Coalition forces are by no means a novelty, but the manner in which international law applies to them – whether that concerns civilian casualty allegations or LOAC obligations more widely – is not a well-understood area. There is a need for increased dialogue between military forces, civil society and academia on these issues, so that the common goal of mitigating the harms of war on those protected can be achieved in a coalition context, that context currently being – and likely remaining – the most common paradigm of warfare in the current global environment.

168 *Ramsahai*, above n 66, at [335]–[341]; *Da Silva*, above n 62, at [232].

169 For the issues where basic criminal protections are not afforded see *Soldiers A & C*, above n 118, at [28]; *Re Duddy's Application*, above n 119, at [51].

170 *Al-Skeini*, above n 60, at [167].

171 *McConachie*, above n 129, at 170.