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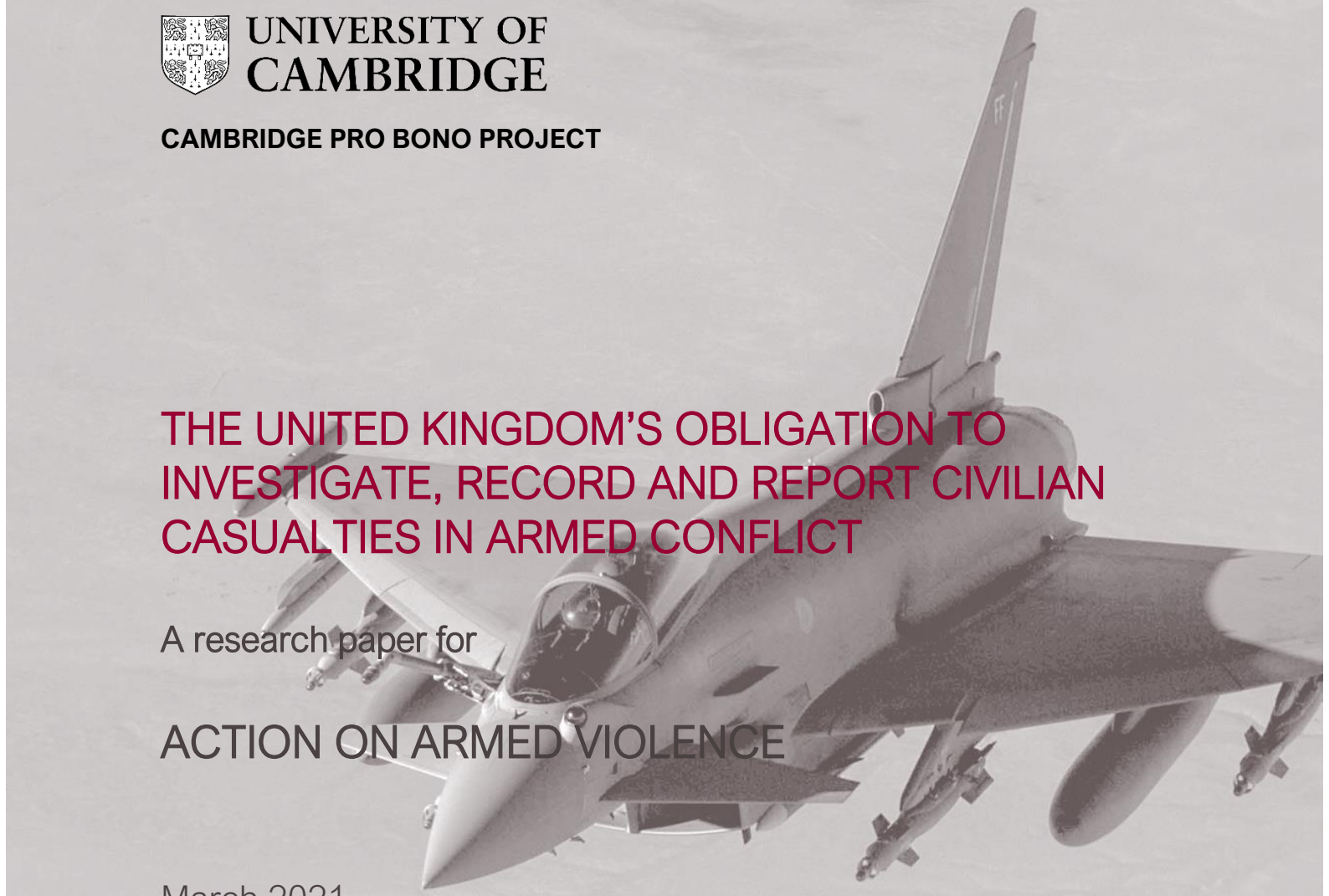

THE UNITED KINGDOM'S OBLIGATION TO INVESTIGATE, RECORD AND REPORT CIVILIAN CASUALTIES IN ARMED CONFLICT

A research paper for

ACTION ON ARMED VIOLENCE

March 2021

(Revised October 2021)

Cover image: A British Typhoon flies over Iraq in 2015

Source (public domain): U.S. Air Force Staff Sgt. Corey Hook - https://www.dvidshub.net/image/2342887/340th-ears-refuels-british-and-aussie-fighters#.VoVdE_mLSUk

Contributors

Cambridge Pro Bono Project – Project Managers:

Katja Achermann
PhD Candidate, Law, University of Cambridge

Matthew Psycharis
PhD Candidate, Law, University of Cambridge

Thomas Martial
LLM, University of Cambridge

Faculty Supervisors:

Professor Alison Young
Sir David Williams Professor of Public Law, University of Cambridge

Dr Andrew Sanger
University Lecturer in International Law, University of Cambridge

Cambridge Pro Bono Project – Executive Committee:

Dr Eleanor Brown
PhD, Criminology, University of Cambridge

Student Researchers:

Henna Bhandal

Rebecca Brown

Maxime Cuypers

Mudra Kashyap

So Yeon Kim

Tereza Milošová

Sanskriti Sanghi

Mary Tzoannou

ABOUT THE CPP

ABOUT

This research report addresses certain legal issues relating to the United Kingdom Government's obligation to investigate, record, and report civilian casualties in armed conflict, against the backdrop of civilian casualty reports arising out of its military action in the recent Syrian conflict.

This report has been authored by members of the Cambridge Pro Bono Project ('**CPP**'), an initiative run out of the Faculty of Law at the University of Cambridge. The CPP is established to provide independent academic research on legal issues of public importance by drawing on the expertise of the researchers who study and work at the Faculty.

This research report is provided to Action on Armed Violence ('**AOAV**') so that it might inform their work in this area. However, it is not supplied on the basis of a client-practitioner relationship, or on some other client-advisor relationship. This document, and the CPP's communications with AOAV, are not given as legal advice. The CPP remains an independent academic team and reserves the right to collaborate with other groups or persons working in this area, and to supply its research findings to those persons or groups.

METHODOLOGY

The CPP investigated the existence and rationale of an obligation to record civilian casualties through the lens of United Kingdom public law, international humanitarian law, and international human rights law. The CPP reviewed what it considered to be all relevant international instruments and domestic obligations providing for, requiring, or affected by, the obligation to record civilian casualties in the context of extraterritorial air strikes.

To produce the report, the CPP recruited a cohort of legal researchers, supervised by doctoral researchers at the University of Cambridge. Production of the final report was reviewed by senior members of the Faculty, expert in UK public law and international law.

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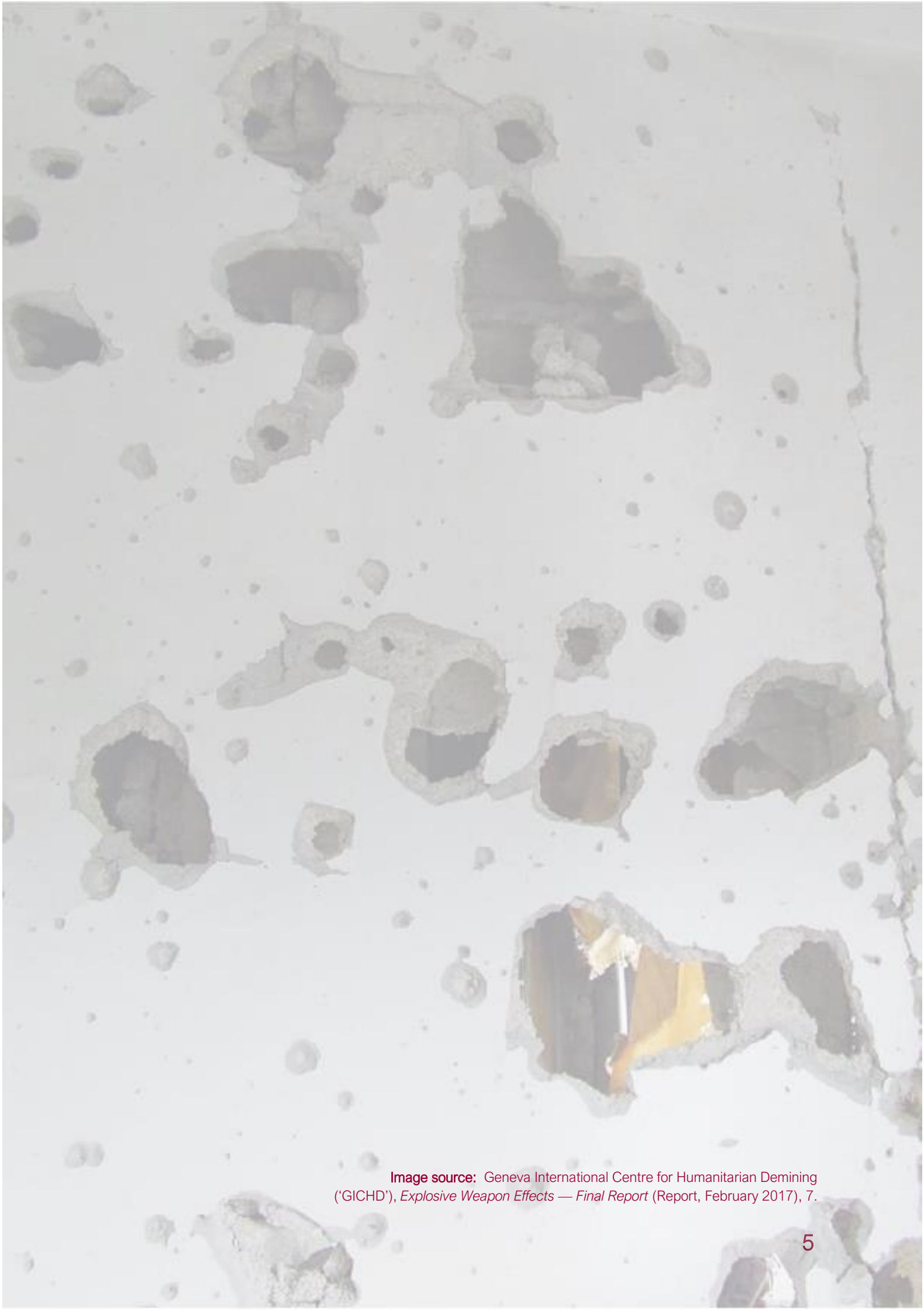

Image source: Geneva International Centre for Humanitarian Demining ('GICHD'), *Explosive Weapon Effects — Final Report* (Report, February 2017), 7.

EXECUTIVE SUMMARY

The United Kingdom's obligation to record civilian casualties in armed conflict

The use of airborne explosive weapons by the United Kingdom ('**UK**') in recent armed conflicts has created a risk that civilians might be the victims or unintended targets of the UK's air strikes. This is because the use of airborne explosive weapons, by virtue of their operational characteristics and largely indiscriminate area-effects once detonated, has been documented to have a greater potential to cause civilian death and injury than other conventional weapons.[1] The use of these weapons, in certain circumstances, may also be unlawful under international law.

This report is written for Action on Armed Violence ('**AOAV**') in the context of the UK's recent involvement in the Syrian conflict. Over the course of that conflict, since 2014, it is claimed by the UK Government that some 1,700 British air strikes have only caused one known civilian death. However, this figure is disputed by various non-governmental organisations ('**NGOs**') and also by Coalition personnel.[2] It is claimed that the Government's recording and reporting practices are inadequate, and that it is obliged to do more. However, the Government considers it is under no legally enforceable obligation to do so.[3] The first step in bridging this gulf is therefore to understand, more clearly, what the UK and its government's legal responsibilities are. That is the purpose of this report.

While the report is written in the context of the Syrian conflict, it also reaches conclusions on the law more generally and the findings of the report apply to all conflicts in which the UK is engaged.

Image: Coalition air strike in Kobani. **Source:** Getty, published in The Independent (26 November 2015) <https://www.independent.co.uk/news/uk/politics/syria-air-strikes-debate-bombing-isis-is-a-knee-jerk-reaction-to-paris-attacks-and-would-hit-a6750246.html>

[1] Geneva International Centre for Humanitarian Demining ('**GICHD**'), *Explosive Weapon Effects — Final Report* (Report, February 2017).

[2] Jonathan Beale, 'Islamic State: US military says RAF airstrikes may have killed civilians' (BBC News Online, 16 March 2020) <https://www.bbc.co.uk/news/uk-51900898> accessed 1 October 2021.

[3] Joint Committee on Human Rights, The Government's Policy on the Use of Drones for Targeted Killing — Second Report of Session 2015-16 (HL Paper 141, HC Report 574, 2016), 73 [5.35].

The UK's Responsibility under Domestic Public Law

The UK takes a 'dualist' approach to international law. This means that international treaty obligations (including international human rights and humanitarian law) are not legally enforceable in UK courts unless incorporated into UK domestic law. This is usually done by legislation, passed by Parliament.

While many treaty obligations relating to the requirement to investigate, record, and report civilian casualties are not directly incorporated into UK law, this does not mean that UK law is silent on the issue. Far from it.

The **constitutional principle of 'accountability'** is central to UK democratic practice. At the very least, it is understood to incorporate a strong political convention to gather data on the activity of departments (including the Ministry of Defence ('**MOD**')), and to report that data to Parliament and the public. The more important the issue, the stronger the assumption that effective recording and reporting will take place.

At its highest, the principle of accountability is understood to give rise to a legally enforceable constitutional 'standard'. While ordinarily this standard is enforced politically or through Parliament's own procedures, recent case-law from the UK Supreme Court[4] suggests that Ministerial or Government behaviour which falls so short of this standard that it unduly impedes the constitutional principle of accountability, might be reviewable in court. That is, a failure by the Government to record and report deaths accurately could, possibly, and in the extreme, leave it exposed to a claim in the UK courts.

Precisely how far this standard mandates a data-gathering process which is conformant with international obligations on civilian casualty reporting is not clear; but the absence of any such recording process, in a way that significantly impedes Parliamentary oversight, may potentially be seen to fall short of the standard, in a manner that might be legally actionable.

Further, the UK's treaty obligations, coupled with Ministerial statements or policies committing the UK to a certain standard of civilian casualty reporting, might also create rights for judicial review, should such statements and commitments give rise to an enforceable **legitimate expectation** to record and report which is not, in the event, met by appropriate Government action. Past practice might also establish an expectation.

The duty to investigate, record, and report civilian casualties is also recognised in **customary international law**. Relevantly, customary law is sometimes taken to

[4] *R (on the application of Miller) v Cherry* [2019] UKSC 41.

be **incorporated into the English common law** and might be relied upon in court. The issue of civilian casualty reporting is yet to be directly tested in court, in this way, though recent cases suggest there is some hope that the duty might be recognised by the common law (however the standard of investigation that the common law would require is not yet clear).

Beyond this, certain rights under the ***European Convention on Human Rights*** (‘**ECHR**’), largely incorporated in the UK through the ***Human Rights Act 1998***, might be actionable if breached. Though this may be limited by the degree to which the *Human Rights Act* and the ECHR have extra-territorial effect. It is still contested whether air strikes bring potential human rights violations within the jurisdiction of the Act and the ECHR. While the recent *Overseas Operations (Service Personnel and Veterans) Act 2021* does apply certain time-bars to particular human rights claims or domestic civil claims, importantly it does not eschew government responsibility to investigate, record and report civilian deaths.

The constitutional principle of accountability, the doctrine of legitimate expectations, the common law and the *Human Rights Act*, do not say exactly what the substance of the UK’s obligation to investigate, record, and report is. They simply raise the legal fact, or possibility, of some standard or responsibility.

It is here that the UK’s *international* obligations help give content to the domestic standard. For example, the UK’s treaty obligations might help tell us how to assess whether the domestic principle of accountability is engaged, or what its discharge might require. They might also help define the contours of any common law duty. In this way, these international obligations do not determine the answer to the domestic legal problem, but they do give colour and context to the problem, if not being directly enforceable under UK domestic law. (Though the UK’s treaty obligations do certainly give rise to binding obligations, and may give rise to State responsibility, in the *international* arena.) With this context in mind, relevant international obligations are considered below.

The UK's Obligations under International Humanitarian Law ('IHL')

IHL encompasses treaties and customary international law that govern conduct during armed conflict. It is sometimes called 'the law of war'. Regardless of the specific modalities under which the obligation is to be carried out under the Geneva Conventions of 1949 and Additional Protocols I and II of 1977, a duty to investigate and record civilian casualties exists in IHL[5] and is binding on the UK in its conduct of armed conflict. This obligation stems from:

(a) Elements of the obligation to record civilian casualties in legal instruments and customary international law:

i. the provisions of **Geneva Conventions of 1949** ('**Geneva Conventions**') and **Additional Protocols I and II of 1977** ('**AP I**' and '**AP II**') relating to the search for, and identification of, the missing and the dead;

ii. **customary international humanitarian law** ('**customary IHL**') which similarly articulates rules relating to the search for, and identification of, the missing and the dead, applicable regardless of the international or non-international nature of an armed conflict;

iii. the **UK's Joint Service Manual of the Law of Armed Conflict** ('**UK LOAC Manual**'), which reflects the UK's practice and references the principles of Geneva Convention IV, AP I, and AP II applicable to the UK's military operations;

(b) **IHL rules protecting civilians against the conduct of hostilities**, specifically the prohibition on directing attacks against civilians, the prohibition of indiscriminate attacks, the prohibition of disproportionate attacks, as well as the obligation to take feasible precautions to prevent or mitigate civilian casualties. Importantly, civilian casualty records and accounts inform *ex ante* and *ex post* assessments of likely and actual civilian casualties, which are essential to the performance of proportionality assessments in an attack, and specifically in relation to the prohibition of disproportionate attacks and the obligation to take feasible precautions; and

(c) the **obligation to investigate violations of IHL and war crimes**, as part of the duty to repress grave breaches and suppress all other violations of IHL, which requires that civilian casualties be accurately recorded and tracked in order to identify potential violations of IHL, trigger investigations, and facilitate their conduct.

[5] Susan Breau and Marie Aronsson, 'Drone Attacks, International Law, and the Recording of Civilian Casualties of Armed Conflict' (2012) 35 Suffolk Transnat'l L Rev 284.

The UK's Obligations under International Human Rights Law ('IHRL')

Under International Human Rights Law, States are obliged to investigate and, by implication, to record, civilian casualties falling within their (territorial or extraterritorial) jurisdiction. This obligation is engaged irrespective of whether such casualties occur in, or outside of, the context of an international or non-international armed conflict.

The obligation to investigate and thus to record civilian casualties is principally based on the right to life, the right to security of the person and the prohibition of cruel, inhuman or degrading treatment. In addition, the right to family life and the protection of the family unit, the right to freedom of religion and belief, the right to an effective remedy, as well as the foundational principle and right to human dignity, further support the finding of such an obligation under the above-mentioned rights.

The obligation to report, or to publicly disclose, the recorded number of civilian casualties occurring within the jurisdiction of, and being attributable to the use of force by, the UK, by contrast, is primarily based on the right to freedom of expression and the right to freely seek and receive information. It is generally acknowledged that information regarding (potential) violations of human rights or humanitarian law is subject to a high presumption of disclosure and, in any event, may not be withheld on national security grounds in a manner that would prevent accountability for violations or deprive a victim of access to an effective remedy.

All of these rights are recognised in international and regional human rights treaties—in particular, the International Covenant on Civil and Political Rights and the European Convention on Human Rights—ratified by the UK. Crucially, these human rights apply to State actions in instances of use of force outside an international or non-international armed conflict and continue to apply in the context of international and non-international armed conflicts, alongside international humanitarian law as the *lex specialis*.

It is important to emphasise that while the freedom of expression is applicable 'regardless of frontiers', other human rights obligations arguably extend extraterritorially where States are engaged in certain forms of military action beyond their own borders. Furthermore, although the right to freedom of expression may be subject to restrictions on national security grounds, any such restriction is subject to very strict conditions. There is a generally acknowledged high presumption of disclosure of information on potential violations of human rights or humanitarian law committed by State agents.

Evaluation of the UK's Compliance with these Standards

It is not for this report to evaluate whether the UK's current practice falls short of the constitutional principle of accountability (that is a claim that might be tested in court), or whether the UK has complied fully with its obligations under international law. Detailed recommendations have already been made by AOAV.[6]

The UK's main partner in the Syrian campaign, the United States ('**US**'), has implemented a more extensive civilian casualty recording system. And, at least in the context of the Iraq War, the UK's recording practices were deemed insufficient by the Chilcot Inquiry. It is not clear to the CPP Team that the UK's recording practices have changed substantively since then, when it was concluded that:[7]

> *'greater efforts should have been made [by the UK] in the post-conflict period to determine the number of civilian casualties and the broader effects of military operations on civilians. More time was devoted to the question of which department should have responsibility for the issue of civilian casualties than it was to efforts to determine the actual number'*

Likewise, a 2018 All-Party Parliamentary Group report described the UK's civilian casualty recording and reporting practices as '**not fit for purpose**'.[8] Our CPP report does not disturb these claims.

What this report does show, is that far from these matters being confined to the realm of international legal enforceability, or mere domestic guidelines and manuals, the UK's commitments, against the backdrop of the nation's constitution, have potentially created binding political and legal obligations at home. A repeated failure to discharge these might leave the Government exposed to claims in UK courts and international fora; whether in respect of past conflicts or in the nation's future conduct of armed conflict.

Cambridge Pro Bono Project
University of Cambridge

October 2021

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[6] Action on Armed Violence, 'AOAV recommendations to Ministry of Defence on development and implementation of effective casualty recording policies and processes' (25 February 2020) <https://aoav.org.uk/2020/aoav-recommendations-to-ministry-of-defence-on-development-and-implementation-of-effective-casualty-recording-policies-and-processes/> accessed 1 October 2021.

[7] The Iraq Inquiry (Sir John Chilcot, Chair), *The Report of the Iraq Inquiry — Executive Summary* (HC Report 264, 2016), 128.

[8] All-Party Parliamentary Group on Drones Inquiry (Professor Michael Clarke, Chair), *Report — Concluding its Inquiry into The UK's Use of Armed Drones: Working with Partners* (APPG, July 2018), 13.

PART A. THE PROBLEM

Blurred understandings of responsibility

PART A. OVERVIEW

Part A of this research paper looks at the British Government's treatment of its obligations to track civilian harm, and to record and report civilian casualties; in particular, the Government's own understanding of its obligation to record civilian casualties accurately (or whether it considers it is under any binding obligation at all). The differences between harm tracking, casualty recording and reporting are also discussed in this Part.

Several recent reports produced for Parliamentary Committees and Inquiries are useful departure points: the 2016 Report into the Iraq War ('**the Chilcot Report**'), the Joint Committee on Human Rights' 2016 report on drone strikes, and the All-Party Parliamentary Group's 2018 report on drone strikes. In evidence before the 2016 Joint Committee, the Government stated that the only accountability it faced, with respect to civilian casualties, was political (not legal).

However, the reports of the Chilcot Inquiry, the 2016 Joint Committee and 2018 All-Party Parliamentary Group all note deficiencies in the Government's recording and reporting practices and make the observation that the Government is under a more heightened obligation to record such deaths than the Government itself claims. At the very least, the reports conclude that there is a strong political 'responsibility' to account for the civilian dead, which mandates better practice. However, contrary to the Government's position, it was also suggested by the Joint Committee in its 2016 report that *legal* scrutiny might apply to the conduct of drone strikes, though this claim was not elaborated in the report.

This disparity in views must now be evaluated.

It is the task of this Part of the report to survey the UK's experience in past conflicts, before, in the next Part, considering the legal position under UK law, with respect to the Government's recording and reporting obligations.

Image: the clock tower roundabout in central Raqqa (October 2017), source: BBC News (online) <https://www.bbc.co.uk/news/world-middle-east-27838034> accessed 1 October 2021.

WHAT IS CIVILIAN HARM, AND HOW IS IT MONITORED?

The documentation of civilian harm arising from armed violence can be done through two distinct approaches: civilian harm tracking or casualty recording.[9] The UN Armed Violence Prevention Programme defines armed violence as 'the intentional use of physical force, threatened or actual, with arms, against oneself, another person, group, community or State that results in loss, injury, death and / or psychosocial harm to an individual or individuals and that can undermine a community's, country's or region's security and development achievements and prospects'.[10]

Civilian harm tracking and casualty recording are not mutually exclusive. They both seek to account for civilian deaths, but inform different actors which may adopt measures to address the harm done to civilians. For the purposes of this report, the CPP adopts the following definitions:

- Civilian harm tracking is an internal process through which a party to a conflict systematically documents the effects of its military operations on civilians, including death, injury, damage to property.[11] The goal of civilian harm tracking is to improve the quality of military operations in order to reduce and investigate the harm done to civilians.[12]
- Casualty recording is an attempt to document every individual killed or injured in armed violence in a comprehensive, systematic and continuous manner and can be carried out by civil society, intergovernmental organisations or State actors. The goal is to establish a full and transparent account of individual casualties and the incidents in which they occur.[13]
- Civilian casualty reporting is the transmission or publication of information on an incident involving civilian casualties. An incident can be defined as an event or

[9] Aniseh Bassiri Tabrizi, Amanda Brydon and Ewan Lawson, 'The UK Strategy on Protection of Civilians – Insights for the Review Process' (September 2019), RUSI Whitehall Report 2-19, 15.

[10] UNGA, 'Promoting development through the reduction and prevention of armed violence' (5 August 2009) UN Doc A /64/228, para 5.

[11] Center for Civilians in Conflict (CIVIC), 'Examining Civilian Harm Tracking and Casualty Recording in Afghanistan' (19 May 2014) 1 <https://civiliansinconflict.org/wp-content/uploads/2017/09/CCCERP_4_page_FINAL_May_19.pdf> accessed 1 October 2021.

[12] Marla B Keenan and Alexander W Beadle, 'Operationalizing Protection of Civilians in NATO Operations' (2015) 4(1) Stability: International Journal of Security and Development, Article 55, 13.

[13] Action on Armed Violence and Oxford Research Group, 'Casualty Recording: Assessing State and United Nations Practices' (April 2014) 2 <http://www.everycasualty.org/downloads/ec/pdf/AOAV-ORG-ECSummaryOnUN.pdf> accessed 1 October 2021; Center for Civilians in Conflict (CIVIC), 'Examining Civilian Harm Tracking and Casualty Recording in Afghanistan' (19 May 2014) 1 <https://civiliansinconflict.org/wp-content/uploads/2017/09/CCCERP_4_page_FINAL_May_19.pdf> accessed 1 October 2021.

situation that may warrant an investigation, either due to the likely violation of international humanitarian law ('IHL') and international human rights law ('IHRL') or to prevent the occurrence of violations in the future.[14] The transmission of information may be triggered by 'either direct observation, the receipt of information from subordinates or through recording processes, or external allegations'.[15]

For the purposes of this report, the CPP will consider civilian harm tracking and casualty recording as relating to civilian casualties only. Therefore, the **obligation to record civilian casualties** discussed in this report covers simultaneously **civilian casualty *tracking*** and ***recording***. Furthermore, the CPP understands 'casualty' or 'casualties' to cover only individual deaths resulting from armed violence, specifically extraterritorial air strikes. Finally, civilian casualty tracking and recording processes must be distinguished from estimates or sampling methods, which are not based on the individual documentation of each casualty.[16]

THE IRAQ WAR

It is generally understood that it is incumbent on the Government, at least as a matter of good policy (if not legal obligation), to record and report civilian casualties when possible. The importance of this practice was highlighted by the UK's experience in the Iraq War.

In the 2016 *Report into the Iraq War* ('**the Chilcot Report**'), the Inquiry 'considere[d] that [the] Government has a responsibility to make every reasonable effort to understand the likely and actual effects of its military actions on civilians' (emphasis added). However, despite this responsibility, the Inquiry found that '[t]he MOD made only a broad estimate of direct civilian casualties arising from an attack on Iraq, based on previous operations'.

It was found by the Inquiry that 'greater efforts should have been made'.[17]

The details of the particular efforts to estimate casualties are detailed further in the Inquiry's report.[18] In summary, the Inquiry found that:

[14] Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Guidance on Casualty Recording' (New York and Geneva, 2019) iii [hereinafter OHCHR Guidance on Casualty Recording].

[15] See International Committee of the Red Cross (ICRC), 'Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice' (Geneva, 2019) para 46.

[16] OHCHR Guidance on Casualty Recording (n 14) 19–20.

[17] The Iraq Inquiry (Sir John Chilcot, Chair), *The Report of the Iraq Inquiry — Volume XII* (HC Report 265-XII, 2016) 170.

[18] *Ibid*, 176ff.

> *The Government continued to face pressure in Parliament to provide estimates of the numbers of Iraqi citizens who had died during the conflict. The Government's line remained that the UK had no means of ascertaining the number of Iraqi … civilians who had been killed during the conflict.*[19]
>
> [emphasis added]

However, that position was rejected, in part, in the findings of the Inquiry. In 2004, the Minister of State for the Armed Forces stated that, '[w]e have no means of ascertaining the numbers of military or civilian lives lost during the conflict in Iraq to date'.[20] However, the Inquiry found that an FCO official reported, later that year, that:

> *notwithstanding [the Minister of State's] answer, records are kept of all significant incidents involving UK forces. A significant incident would include … a soldier wounding or killing a civilian. At present, this information is not collated, although [Permanent Joint Headquarters] accept that it could be.*[21]

Indicative of the limitations in the Government's recording practices, was another exchange recounted in the Inquiry's report. In response to a Parliamentary question, in February 2004 a member of Government stated that 'since the end of major combat operations 37 alleged fatalities had been reported by British units of which 18 have been the subject of investigations'. The Inquiry said that this was the 'first public statement, of which the Inquiry is aware, of the number of civilians killed by UK forces in Iraq'.

However, the Inquiry further noted that, in the same month, the Iraq Body Count Project ('IBC') (an NGO) reported that 'the number of non-combatant civilian deaths in Iraq … as a result of the US/UK-led invasion … might have [now] passed 10,000'.[22] The Inquiry found that the IBC, founded in 2003 by UK and US-based volunteers, had proved itself

[19] *Ibid*, 186 [82].

[20] *Ibid*, 180 [51].

[21] *Ibid*, 186 [85].

[22] *Ibid*, 189 [101]–[102].

capable of maintaining reasonably accurate records and estimates of civilian casualties during the conflict.[23]

In concluding its findings, the Inquiry found that:

> *greater efforts should have been made [by the UK Government] in the post-conflict period to determine the number of civilian casualties and the broader effects of military operations on civilians. More time was devoted to the question of which department should have responsibility for the issue of civilian casualties than it was to efforts to determine the actual number.*[24]
>
> [emphasis added]

In concluding on these matters, the Inquiry also made the following findings:

> A trial monitoring exercise initiated by No.10 in November 2004 was not completed.
>
> … The Government was aware of several reports and studies (the Iraqi Ministry of Health in October 2004, the *Lancet* studies in October 2004 and October 2006, and the [IBC] dossier in July 2005) which suggested that coalition forces were responsible for more civilian deaths than were the insurgents.
>
> Those reports did not trigger any work within the Government either to determine the number of civilian casualties or to reassess its military or civilian effort.
>
> …
>
> The Inquiry has considered the question of whether a Government should, in the future, do more to maintain a fuller understanding of the human cost of any conflict in which it is engaged.
>
> …
>
> [However] The Government did not consider that it had a legal obligation to count civilian casualties … The Inquiry considers that a Government has a responsibility to make every reasonable effort to identify and understand the likely and actual effects of its military actions on civilians.
>
> …

[23] *Ibid*, 214ff.

[24] As reported in: The Iraq Inquiry (Sir John Chilcot, Chair), *The Report of the Iraq Inquiry — Executive Summary* (HC Report 264, 2016) 128.

> The Government should be ready to work with others, in particular NGOs and academic institutions, to develop such assessments and estimates over time.[25]
>
> [emphasis added]

It is clear from the Chilcot Report that the UK Government has a political responsibility to record civilian casualties. It was made plain in the Chilcot Report that mere incidental recording of casualties, or deliberate under-recording, is not sufficient to discharge this responsibility.

However, the question remains as to the correctness of the Government's position that it was under no legal obligation to record civilian casualties. That question was left open by the Inquiry (and it was likely not within the remit of the Committee of the Privy Council to say much on the point — theirs was a tribunal of fact).

DRONE STRIKES AND COUNTER-TERRORISM OPERATIONS

The issues of legal accountability for targeted killings, more generally, was considered by the Joint Committee on Human Rights in 2015–16.

While the question of civilian casualties was only incidental to the report, the Joint Committee did consider the question of legal accountability for the Government's conduct of drone strikes more generally.

It was observed by the Joint Committee that there exists a form of political accountability over the consequences of drone strikes, which 'involves scrutiny of ministers' actions as part of the democratic process, conducted by fellow parliamentarians'.[26] However, the Joint Committee also considered 'whether there is also a role, alongside such political accountability, for any form of legal accountability: that is, accountability through the courts, for example by … civil law proceedings where appropriate'.[27]

In evidence before the Joint Committee, the Government said that such matters were non-justiciable: 'that is, a matter on which the courts have no jurisdiction to enter, because of the extreme sensitivity of the issues it would require the court to consider in order to adjudicate on the claim'.[28]

It was also submitted by Government that:

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[25] The Iraq Inquiry (Sir John Chilcot, Chair), *The Report of the Iraq Inquiry — Volume XII* (HC Report 265-XII, 2016) 218–219.

[26] Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing — Second Report of Session 2015-16* (HL Paper 141, HC Report 574, 2016) 73 [5.31].

[27] *Ibid*, 73 [5.31].

[28] *Ibid*, 73 [5.35].

> *the use of military force in the exercise of the inherent right of self-defence is within the Government's discretionary powers under the Royal Prerogative, and invokes the importance of the Government being able to act effectively and decisively to protect the country.*[29]

However, the Joint Committee concluded that:

> *being slow to review the exercise of such powers and deferential to discretionary assessments based on intelligence or other sensitive considerations is qualitatively different from refusing to consider altogether any questions which arise about the legality of Government action which has a serious effect on fundamental rights. Political accountability is not a substitute for legal accountability: both are necessary*
>
> *...*
>
> *We agree with the Government about the importance of political accountability, and ask the Government to reconsider its apparent position that there should be no accountability through the courts for any action taken pursuant to its policy of using lethal force.*[30]
>
> [Emphasis added]

THE SYRIAN CONFLICT

It is not apparent to the CPP that the Government's approach to the recording of civilian casualties, or its understanding of its obligations under domestic public law, have

[29] *Ibid*, 73 [5.34].

[30] *Ibid*, 74 [5.37]–[5.38].

changed, substantively, since the publication of the Chilcot Report and the 2016 Joint Committee Report.

The MOD's position is that over the course of Operation Shader, British military activity has led to the known death of one civilian.[31]

On 8 January 2018, in response to a question by a Member of Parliament about 'the number of civilian casualties in Syria as a result of UK air strikes', the Ministry of Defence responded that:

> *In carrying out air strikes, expert analysts routinely examine data from every UK strike to assess its effect … We co-operate fully with NGOs such as Airwars, who provide evidence they gather of civilian casualties. After detailed work on each case, we have been able to discount RAF involvement in any civilian casualties as a result of any of the strikes that have been brought to our attention.*[32]

However, as with the experience in the Iraq War, there appears to exist a disparity between the Government's position on the number of civilian casualties arising out of its operations, and that of concerned NGOs. For example, the NGO 'Airwars' has estimated that, in respect of the battles of Mosul and Raqqa alone, at least 2,600 civilians 'and possibly many more' were killed by Coalition air strikes.[33] The Coalition admitted 367 civilian fatalities in those two battles, though the UK Government admitted none arising out of the RAF's involvement.[34]

In research published by AOAV, it is said that 'RAF strikes in Iraq and Syria have killed and injured an estimated 4,315 enemies between September 2014 and January 2019', but that 'the UK government also claims to have killed just one civilian'. In contrast, AOAV report, '[t]he United States has acknowledged more than 1,000 civilian casualties [arising

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[31] One civilian casualty was admitted in 2018: BBC, 'Syria war: MoD admits civilian died in RAF strike on Islamic State' (BBC News Online, 2 May 2018) <http://www.bbc.co.uk/news/uk-43977394> 1 October 2021.

[32] Syria: Military Intervention: Written question – 120695, UK Parliament Website: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-12-20/120695/> accessed 1 October 2021.

[33] Airwars, *Credibility Gap: United Kingdom Civilian Harm Assessments for the Battles of Mosul and Raqqa* (Report, 2018) 41.

[34] *Ibid*, 41.

from its air strikes over the similar timeframe] – though this is still thought to be lower than those assessed by civilian casualty monitors'.[35]

Amnesty International made similar findings of under-investigation by Coalition forces in its report of the battle of Raqqa:

> *During its field investigation in Raqqa, Amnesty International delegates visited dozens of Coalition strike sites in every district in the city and spoke to more than 100 residents who had survived or witnessed Coalition strikes. None of them had been interviewed or contacted by Coalition forces' investigators, neither in Raqqa nor while they were in camps for displaced persons prior to their return to the city; nor were any of them aware of any Coalition investigators having visited any strike sites anywhere in the city or having interviewed survivors or witnesses of other strikes. Such shortcomings in the investigation methodology appear to be a significant contributing factor to its dismissal of almost all the reports of civilian fatalities and casualties.*[36]
>
> [Emphasis added]

Anecdotal evidence appears to support Amnesty International's claim. In March 2020, in a special report on the Syrian air strikes, the BBC reported that:

> *[BBC reporters] had spoken to several senior US officers within the Coalition.*
>
> *A number have confirmed the UK, along with other Coalition partners, had been alerted or 'flagged'*

[35] Action on Armed Violence, 'RAF claims 4,315 enemies killed and injured in Syria and Iraq, with just one civilian casualty' (AOAV, 7 March 2019) <https://aoav.org.uk/2019/raf-claims-4315-enemies-killed-and-injured-in-syria-and-iraq-with-just-one-civilian-casualty/> accessed 1 October 2021.

[36] Amnesty International, *'War of Annihilation': Devastating Toll on Civilians, Raqqa – Syria* (Report, 2018) 54–55.

incidents in which airstrikes may have led to civilian harm.

On each occasion the RAF concluded there was no such evidence.

But one senior US officer told the BBC the RAF was 'looking for certainty' of allegations of civilian harm, often when there was none.[37]

The BBC further reported that '[t]he MOD has not visited a single site in Iraq or Syria to investigate allegations of civilian casualties from the ground'.[38]

These reports are consistent with the findings of the All-Party Parliamentary Group on Drones Inquiry's report, published in July 2018. The Group, chaired by Professor Michael Clarke, described the UK's civilian casualty recording and reporting practices as 'not fit for purpose', and observed:

One of the most frequently raised concerns in submissions to the Inquiry was the lack of transparency concerning civilian casualties. The UK has conducted more than 1,700 strikes in Iraq and Syria with only one confirmed civilian casualty. Likewise, only one UK strike reportedly caused civilian harm in Afghanistan. Despite questions from Members of the APPG and others, civil society and the media, the Government will not disclose further information on the grounds that 'disclosure would, or would be likely to, prejudice the capability, effectiveness or security of the armed forces'. This lack of transparency raises serious concerns about the

[37] Jonathan Beale, 'Islamic State: US military says RAF airstrikes may have killed civilians' (BBC News Online, 16 March 2020) <https://www.bbc.co.uk/news/uk-51900898> accessed 1 October 2021.

[38] *Ibid*.

> *process of investigation and mechanisms of identifying civilian casualties.*[39]
>
> [Emphasis added]

The All-Party Parliamentary Group considered modelling evidence conducted by the UN in Afghanistan, and by the US in the current Iraq-Syria conflict, which 'showed one civilian killed in every five to ten [strikes], and in every 40 strikes, respectively'.[40] This would suggest a higher figure than the one civilian casualty claimed.

However, the report noted that 'UK procedures for assessing civilian casualties in Afghanistan and in Iraq-Syria have not been disclosed [to the All-Party Parliamentary Group]. MOD Minister of State, Earl Howe has assured that all allegations of civilian casualties are taken "very seriously"'.[41]

In October 2020, the Parliamentary Joint Committee on Human Rights released its report in respect of the Overseas Operations (Service Personnel and Veterans) Bill.[42] The Act, as later passed, is considered in further detail in Part B, below. In substance, the Act is directed to the problem of historical claims against UK service personnel, or repeated investigations of historical conduct. Relevant to the issue of the adequacy of the UK's investigation practices, the Joint Committee observed that:[43]

> *the inadequacy of [past] investigations [is] not … addressed by the Bill. Furthermore, the Bill does nothing to address the issue of repeat investigations which causes distress to both alleged victims and alleged perpetrators. It is therefore difficult to reconcile the contents of the Bill with its stated objective.*
>
> *The MoD must, as a priority, establish an independent, skilled and properly funded service for*

[39] All-Party Parliamentary Group on Drones Inquiry (Professor Michael Clarke, Chair), *Report — Concluding its Inquiry into The UK's Use of Armed Drones: Working with Partners* (APPG, July 2018) 13.

[40] *Ibid*.

[41] *Ibid*, 53.

[42] Parliamentary Joint Committee on Human Rights, *Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill* (Ninth Report of Session 2019–21, 21 October 2020).

[43] *Ibid*, [35]–[36].

> *investigations. Investigations must be robust, take place promptly and be sufficiently independent and of high quality so that there is no longer any need for repeated or protracted investigations.*

While the Joint Committee's remarks deal with the more limited issue of investigations of alleged crimes or conduct giving rise to civil claims, they speak to the same general problem that hinders effective civilian casualty investigation, recording and reporting. In this respect, in evidence before the Joint Committee, Mark Goodwin-Hudson (former British Army Officer and NATO Civilian Casualty Investigation and Mitigation Team lead in Afghanistan), said:[44]

> *What we need … is the ability to conduct accurate and timely investigations in theatre as the best means to stop this spiralling of reinvestigation*

[44] *Ibid*, [29].

CONCLUSION: THE PROBLEM

From the above consideration of the reports produced by relevant NGOs, and the position of the British Government in relation to its conduct of armed conflict and its role in civilian casualties, it is patent that there remains a gulf between NGO-reported civilian casualty figures and anecdotal reports from the ground, and the official Government figures.

Unless it is considered that the NGO figures are inaccurate by many orders of magnitude, it may reasonably be inferred, as AOAV and Amnesty International have done, that there are deficiencies in the UK's civilian casualty investigation, recording and reporting systems and/or methodology for ascribing or verifying deaths. This was also the conclusion reached by the Chilcot Inquiry in their 2016 final report,[45] by the 2018 All-Party Group Inquiry,[46] and the Joint Committee on Human Rights in 2020.

It has been stated by the Chilcot Inquiry that the Government is under some political 'responsibility' to record more accurately (though it is not clear on the face of the Inquiry's report what the boundaries of this 'responsibly' are), and the Parliamentary Joint Committee in 2016 went a step further to suggest that *legal* scrutiny might even apply — though this comment was made generally about the use of lethal force, not specifically civilian recording and reporting obligations.

The question becomes, to what degree is the Government obliged as a matter of **political convention, and under law**, to record such civilian casualty figures accurately; or, otherwise stated, to what extent is the Government correct in its position that it is under no such reviewable or enforceable legal obligation to investigate, record and report? What might compel the Government to 'do more'?

It is this problem which is evaluated by the CPP in the remainder of this report.

[45] The Iraq Inquiry (Sir John Chilcot, Chair), *The Report of the Iraq Inquiry — Volume XII* (HC Report 265-XII, 2016) 218–219.

[46] All-Party Parliamentary Group on Drones Inquiry (Professor Michael Clarke, Chair), *Report — Concluding its Inquiry into The UK's Use of Armed Drones: Working with Partners* (APPG, July 2018) 13.

PART B. UNDERSTANDING RESPONSIBILITY

The United Kingdom's responsibility under domestic public law

PART B. OVERVIEW

The UK takes a 'dualist' approach to international law. This means that international treaty obligations (including international human rights and humanitarian law, the 'law of armed conflict') are not enforceable in UK courts unless incorporated into UK domestic law. This is typically done by legislation, passed by Parliament. While many treaty-based obligations relating to the requirement to record and report civilian casualties are not directly incorporated into UK law, this does not mean that UK law is silent on the issue.

This part of the CPP's report examines how principles of UK public law operate to require the Government to endeavour to investigate, record, and report civilian casualties.

The 'responsibility' of the Government to record more accurately than it presently does, identified in the Chilcot Report but not elaborated therein, may, in the CPP's view, find a basis in at least **three sources** of domestic law / political practice:

(a) the British constitution, and in particular, the **principle of accountability**;

(b) the duty not to frustrate **legitimate expectations**, enforced through **judicial review**; and

(c) customary international law, to the extent it is incorporated into the British **common law**.

First, the **principle of accountability** sets a constitutional standard, which requires that, for the proper functioning of democracy and to ensure responsible government, Ministers must be held to account by Parliament. This requires Ministers to collect, and then share, a degree of information about the activity of departments (including the MOD) with Parliament and the public (subject to necessary considerations of security and secrecy). While ordinarily this standard is enforced politically (as a convention), recent case law from the Supreme Court suggests that Ministerial or Government behaviour which falls so short of this standard that it unduly impedes the constitutional principle of accountability, might be reviewable in court.

Precisely how far this minimum standard mandates a data-gathering process which is conformant with international obligations on civilian casualty recording is not clear; but the absence of *any* such recording process, in a protracted conflict, is likely to be seen to fall short of the standard, in a manner that might be subject to legal challenge.

Image: View of fighting in Kobane. **Source:** EPA, published on BBC News (Online), 'Battle for Kobane: Key Events' (25 June 2015) < https://www.bbc.co.uk/news/world-middle-east-29688108>

Second, the UK's treaty obligations, coupled with Ministerial statements or policies concerning civilian casualty recording and reporting (the UK's treaty obligations are dealt with in greater detail in Parts C and D of this paper), may also create a basis for judicial review, should such statements and treaty-based commitments engender a **legitimate expectation** to record and report which is not, in the event, met by appropriate Government action.

Third, the duty to investigate, record, and report civilian casualties is also recognised in **customary international humanitarian law**. Customary law is sometimes taken to be incorporated into the British common law and may be examined in the courts on that basis. It may also influence the development of other common law duties or principles. The issue is yet to be directly tested in court, but there may be a basis to argue that the duty to track, record and report civilian casualties might be recognised in the common law (though the standard of investigation that the common law would require is not clear).

While, on balance, the avenues for legal action are limited in the UK, at its weakest, it can be said there is a strong political convention in favour of investigating, recording and reporting in-line with international standards; and at its highest, there may exist a legal claim against the Secretary of State for Defence (or appropriate Government respondent) should the MOD fail to do so (though such a claim would turn on its facts).

MINISTERIAL RESPONSIBILITY AND THE CONSTITUTIONAL PRINCIPLE OF ACCOUNTABILITY

Ministerial responsibility and accountability to Parliament has long been considered a constitutional convention.[47] There can be little doubt about its place in the UK's constitution, however setting out its content is helpful, here, in understanding civilian casualty investigation, recording and reporting obligations.

Accountability is viewed as a fundamental doctrine of the constitution,[48] as it regulates the ability for Parliament to scrutinise Government action in a system which reserves much constitutional enforcement to the political arena,[49] and is central to the operation of 'responsible government'.[50]

The convention is reflected in the *Ministerial Code of Conduct* (2019),[51] which states that: 'Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and agencies'. The MOD is one such department, and the responsible Minister is the Secretary of State for Defence.

The Ministerial Code thus reflects the dual elements of the doctrine: that **ministers give account for their actions**, and that **these actions are scrutinised**.

This entails that Ministers provide accurate information to Parliament, so that their actions are in fact capable of being scrutinised; and second, that the Minister take responsibility for breaches or other unlawful conduct, and remedy the error.[52]

The convention is taken seriously, politically. The Windrush scandal, for example, resulted in Amber Rudd's resignation, on the basis of misleading Parliament regarding targets for deportation.

In 2009, the House of Commons Public Administration Select Committee reported on 'Good Government': i.e. what makes a good government; what principles underly this goal; whether the UK government met this aim; and how the UK's processes could be improved.[53] Sir Christopher Kelly, for example, viewed transparency and accountability

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[47] See, e.g., Geoffrey Marshall, *Constitutional Conventions* (Clarendon Press 1985) 61–66.

[48] See, e.g., Public Administration Select Committee, *The Ministerial Code: Improving the Rule Book* (HC 2000–2001, 235) para 33.

[49] Jeffrey Jowell and Colm O'Cinneide, *The Changing Constitution* (9th edn, OUP 2019) 337.

[50] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, OUP 2017) 402.

[51] Ministerial Code of Conduct (2019), s 1.3(b).

[52] Elliott and Thomas (n 50).

[53] House of Commons, Public Administration Select Committee, *Good Government* (HC 2008–09, 97-I) 5.

as fundamental principles.[54] Similarly, the Committee on Standards in Public Life has advised on ministerial and departmental standards to ensure compliance with principles of good governance (it established seven such principles in 1995, and monitors compliance with these).[55] Relevantly, the principles enumerated by the Committee include 'accountability', along the terms above.

Several resolutions, both in the House of Commons and the House of Lords, have formalised the convention:

> *Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments … it is of paramount importance that ministers give accurate and truthful information to Parliament … [M]inisters should be as open as possible with Parliament, refusing to provide information only when disclosure would not be in the public interest, which should be decided in accordance with relevant statute.*[56]

The House of Lords noted that this resolution 'set out clearly and unambiguously for all to see what the standards were and the standards against which Ministers were prepared to be judged'.[57]

Similarly, the Scott Inquiry found that even where a minister is ignorant of acts or omissions, there is an obligation to be honest with Parliament and to be forthcoming with information about the incident.[58] These findings were adopted and reflected in the Code of Conduct.

Of course, these requirements appear to impose more an obligation of candour, rather than clearly articulate a minimum standard of *information-gathering*, and information-sharing, required to discharge Ministerial responsibility — i.e. it is not clear from the

[54] Oral evidence taken before the Public Administration Select Committee on 10 February 2009 (HC, 2008–09, 242–i) Q 6, in *ibid*, 44.

[55] Committee on Standards in Public Life, 'The 7 principles of public life' (1995); wording revised in January 2013.

[56] HC Deb 19 March 1997, vol 292, col 1046.

[57] HL Deb 20 March 1997, vol 579, col 1055.

[58] Sir Richard Scott, *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* (1996).

general understanding of the convention, to what degree the MOD must set-about gathering information on civilian casualties in order that they, and the Secretary of State for Defence, be adequately held to account; nor, once gathered, how much of that information is to be shared. That is not to say, however, that such minimum standards are not to be found in the law or political practice.

Regarding the sharing of information *that it already possesses* (e.g. existing data on civilian 'incidents', like that mentioned in the Chilcot Report), 'transparency' is a fundamental element of both good governance and ministerial responsibility. This applies even in sensitive areas of government action.

For example, in the decision of *Corderoy and Ahmed v Information Commissioner, Attorney General's Office and Cabinet Office*[59] the Tribunal found that the security exception under the *Freedom of Information Act 2000* could not of itself permit an absolute ban on the disclosure of national security information, including the legal advice with respect to targeted drone killings of British nationals participating in ISIS in Syria. This, of course, is not a statement of general principle (it is just one example of the application of the *FOI Act*); but it does demonstrate the degree to which the public interest may, in certain instances, operate against strict secrecy. In the *Corderoy* Tribunal's view, s 23 did not permit an exclusion of this type of 'secret' information, because:

> *the interest of the security bodies in such information is shared by Parliament and the public because it relates and is confined to the legality of Government policy, and so … such information falls obviously within the qualified exemptions in sections 35 and 42 as being legal advice on the formulation of Government policy.*[60]

Here, there is considerable public interest in ensuring the UK is complying with its international human rights and international humanitarian law obligations.

Regarding the degree to which the MOD *must actually gather information* on civilian casualties, in order that it be capable of being held to account at some minimum level necessary to ensure that democratic principles and responsible government are upheld, the law also gives some guidance.

[59] [2017] UKUT 495 (AAC).

[60] *Ibid*, [62].

While, the orthodox view is that courts cannot enforce constitutional conventions (including the convention of accountability),[61] the convention nonetheless expresses a constitutional standard with which the executive must be expected to comply. Parliament has a democratic duty to enforce this convention: its role is to remain active in holding '[M]inisters responsible for the way in which they steer the ship of state'.[62] There is no single mechanism by which accountability is enforced;[63] rather, there are several such processes, including questions to Ministers, debates in Parliament, and the work of Parliamentary select committees.

However, the recent decision of the Supreme Court in *R (on the application of Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41 ('Miller No 2') (which concerned an exercise of the prerogative power to prorogue Parliament), on one view, suggests that 'accountability' not only exists as a *political* convention (out of the courts' reach), but also as a *legal* constitutional principle. In the latter incarnation, the courts may police the boundaries of Government action, if that action goes so far as to frustrate basic principles of the constitution — including the principle of accountability to Parliament.[64]

This is so, not because the political convention is justiciable itself, but because the convention is evidence of underlying constitutional principles, legal values or practices, which inform the legal question of whether Ministers have overstepped their powers. In this respect, Professor Mark Elliott has said:

> *there is no reason why this constitutional principle [of accountability] cannot both underpin a constitutional convention — and thus institutionalise a required mode of political behaviour — while also serving as a constitutional standard to be applied when lawfulness*

[61] See, e.g., *R (Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583.

[62] Matthew Flinders, 'MPs and Icebergs: Parliament and Delegated Governance' (2004) 57 Parliamentary Affairs 767, 778.

[63] Elliott and Thomas (n 50) 410.

[64] Controversy still surrounds aspects of the decision. While the orthodox view appears to be that the Court was not enforcing a political convention, but rather was policing the boundaries of a legal power, some have gone one step further, and suggested that particularly severe transgressions of constitutional conventions might be justiciable: Paul Yowell, 'Is Miller (No 2) the UK's Bush v Gore?', *U.K. Constitutional Law Blog* (7 October 2019) <https://ukconstitutionallaw.org/> accessed 1 October 2021; Steven Spadijer, 'Miller No 2: Orthodoxy as Heresy, Heresy as Orthodoxy', *U.K. Constitutional Law Blog* (7 October 2019) <https://ukconstitutionallaw.org/> accessed 1 October 2021; Qinhao Zhu, 'Changing the Constitution in the Guise of Preserving It', *International Journal of Constitutional Law Blog* (18 October 2019) <http://www.iconnectblog.com/2019/10/changing-the-constitution-in-the-guise-of-preserving-it> accessed 1 October 2021.

> *of executive action by reference to the scope of its legal powers. This does not amount to judicial enforcement of a constitutional convention.*[65]
>
> [Emphasis added]

Moreover, the mere fact that the subject-matter of the controversy is 'political' also ought not to bar examination. In giving the judgment of the Court in *Miller No 2*, Lady Hale and Lord Reed held that:

> *[courts] have the responsibility of upholding the values and principles of our constitution and making them effective … The courts cannot shirk that responsibility merely on the ground that the question raised is political in tone or context.*[66]

Applied to the context of the MOD's casualty recording activity, and the behaviour of its responsible Minister according to his Ministerial prerogative,[67] the relevant 'executive action' under scrutiny, is the decision to not record civilian casualties more accurately and/or a failure to put in place systems to do so. The action might also be a decision to not disclose such information to Parliament if such information is already held, or to withhold information received through strategic partners. Of course, it is not suggested that a failure to put in place better recording systems is, of itself, unlawful or unconstitutional. But that a failure to do so might, if taken far enough, and judged according to the importance of the matter, be taken to be in conflict with the principle of accountability and the minimum constitutional standard which is required. On one interpretation of *Miller No 2,* that failure may be examined in court.

In the event, it may take something quite dramatic to enliven a claim on the basis of this constitutional standard, recognised in *Miller No 2* — e.g. a drawn-out conflict, where little or no reporting on casualties or compliance with international standards makes it near

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[65] Mark Elliott, 'The Supreme Court's judgment in Cherry/Miller (No 2): A new approach to constitutional adjudication?', *Public Law for Everyone* (24 September 2019) <https://publiclawforeveryone.com/2019/09/24/the-supreme-courts-judgment-in-cherry-miller-no-2-a-new-approach-to-constitutional-adjudication/> accessed 1 October 2021.

[66] *R (on the application of Miller) v Cherry* [2019] UKSC 41 [39].

[67] Of which the organization of the civil service falls, along with a broad range of other executive competences: House of Commons — Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (HC Report 422, 2004) 5–8.

impossible for Parliament to carry out its functions of oversight effectively. The question remains highly contentious, and this may be particularly so, in what has traditionally been considered the judicially 'forbidden area' of national security.[68]

ARE MATTERS OF SECURITY BEYOND THE VIEW OF THE COURTS?

It is generally accepted that simply because the recording of civilian casualties is related to issues of security, this nexus to matters of security does not make it necessarily non-justiciable (i.e. a controversy the court cannot decide on). Nor are matters of security themselves necessarily beyond the review of the courts.[69] Indeed, in the wake of *Miller (No 2)*, it has even been suggested by commentators that a Government decision to deploy the armed forces in armed conflict, in an exercise of the Prerogative which circumvents any Parliamentary accountability, might fall within the remit of the courts.[70]

Neither is the MOD, in particular, to be considered immune from review. Indicative of the courts' approach, in *Privacy International*, Lord Carnwath (with whom Lady Hale and Lord Kerr agreed) emphasised 'the ultimate safeguard of judicial review remains essential if the rule of law is to be maintained'.[71] It is now well accepted that availability of judicial review, subject to standards of deference and non-justiciability of a small set of matters, is essential to the UK's constitution.

To give a past example, judicial review against the MOD has involved examining the decisions of the MOD's employment tribunal,[72] the decision of the Disciplinary Tribunal,[73] and discrimination against Nepalese survivors in ex gratia compensation payments.[74]

More relevantly, judicial review proceedings have also been brought against the Secretary of State for Defence. *The Queen (on the application of Al-Sweady and Others) v The Secretary of State for the Defence* concerned alleged breaches of the *European Convention on Human Rights* by British soldiers in Iraq. The Court not only examined the quality of investigation into these alleged acts of abuse by the Royal Military

[68] *R (on application of Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44 [50], [53].

[69] *Ibid*, and discussion of the *GCHQ Case* therein.

[70] Tanzil Chowdhury, 'Miller (No 2), the Principle-isation of Ministerial Accountability and Military Deployments', *U.K. Constitutional Law Blog* (24 October 2019) <https://ukconstitutionallaw.org/> accessed 1 October 2021.

[71] [2019] UKSC 22 [126].

[72] *R (on the application of Manson) v Ministry of Defence* [2005] EWHC 427 (Admin).

[73] *R v Ministry of Defence Police Ex p Byrne* [1994] 3 WLUK 228.

[74] *R (on the application of Gurung) v Ministry of Defence* [2002] EWHC 2463 (Admin).

Police, but also criticised the manner of investigation and the senior officer that headed it.[75] There is precedent for judicial review of the MOD's investigation practices.

CONCLUSION — ACCOUNTABILITY

The principle of accountability sets some basic constitutional standard by which the MOD, through its responsible Minister, must conduct its affairs; and at its highest, the principle may supply a basis for judicial review, if the breach is so severe that it undermines the values and principles of the constitution.

LEGITIMATE EXPECTATIONS AND JUDICIAL REVIEW

SUMMARY: There is a further means by which the courts might review the conduct of the MOD and its responsible Minister, regarding the failure to accurately record data on civilian casualties. This is through judicial review of breach of legitimate expectations, or some other reviewable duty (perhaps found in customary international law, as incorporated).

The basis for judicial review is that the Government, through its Ministers, makes commitments. Sometimes, these are in the form of statements of policy or patterns of past practice; other times, these are in the form of ratifying a treaty, or on other occasions, those commitments are converted into legal duties through an Act of Parliament. If the Government makes a commitment of sufficient substance, such that it gives rise to a legitimate expectation that the Government would act in a certain way, then a failure to act in that way might be a ground of judicial review. This is the doctrine of 'legitimate expectations'. (The doctrine is far from settled, and its scope is the subject of debate). Relatedly, if the Government acts outside of its powers as conferred by statute, or other sources of law, then that conduct might also be reviewable by the courts.

In the case of the obligation to record civilian deaths, one such source of commitments are public statements by Ministers; another are official government documents, including the UK LOAC Manual; and another still is the UK's international obligations and customary international law (though not every international obligation creates actionable rights domestically in the UK). Each of these sources will be considered in detail, in the section below. However, to summarise here, there is some suggestion in the UK cases that the UK's treaty obligations (i.e. under IHL and IHRL instruments), coupled with other statements and policy documents, might be sufficient to form a basis for judicial review of breach of a legitimate expectation. That is, by failing to record civilian casualties as international instruments require, in a manner inconsistent with the UK Government's

[75] [2009] EWHC 2387 (Admin) 7, 45–60.

stated commitments and policies, some public law wrong may have been committed by the Government. Of course, the case will turn on its particular facts and no further assessment of the merits can be made here.

For a claim to be made, a proper applicant must also be identified. This is usually a person with a sufficient interest in the relevant Government action. It is conceivable that a Member of Parliament, whose Parliamentary function of holding the Government to account has been undermined by the relevant Government action, could be such an applicant (i.e. their constitutional rights and duties are impacted by the Minister's conduct). NGOs or other third parties might also be permitted to intervene in the litigation. In litigations concerning a matter 'in the public interest', standing may not require that the applicant's rights have been directly affected, provided they still have an interest in the controversy (and perhaps also a track-record of interest in the subject-matter). Given the clear public interest in understanding how the UK's armed forces contribute to civilian deaths, there might be some basis for public interest litigation, assuming some ground for review is identified as below.

SOFT STATEMENTS AND LEGITIMATE EXPECTATIONS

In *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* ('Abbasi') the Court of Appeal held that policy statements may give rise to a legitimate expectation:

> *The expectation is not that the policy or practice will necessarily remain unchanged, or, if unchanged, that it will not be overridden by other policy considerations. However, so long as it remains unchanged, the subject is entitled to have it properly taken into account in considering his individual case.*[76]

This depends, however, on an examination of the policy statement. In *Abbasi*, policy statements in the *British Yearbook of International Law* and a Parliamentary Answer were deemed sufficient to give rise to a legitimate expectation that the British Government would consider a request for consular or diplomatic assistance to the applicant

[76] [2002] EWCA Civ 1598 [82].

(Mr Abbasi). Importantly, when assessing the scope of the expectation, and the degree to which it constrained Government action, the Court emphasised that:

> *[the] Secretary of State must be free to give full weight to foreign policy considerations, which are not justiciable. However, that does not mean the whole process is immune from judicial scrutiny. The citizen's legitimate expectation is that his request will be 'considered', and that in that consideration all relevant factors will be thrown into the balance.*[77]

In the context of the MOD's reporting on civilian casualties, the legitimate expectation might be to record such casualties in conformance with international obligations and standards and/or in accordance with Ministerial or other Government statements of commitment to do so.

If this basis of review is to be established, there are, however, certain conditions which must be met. Factors which influence the existence of a legitimate expectation are summarised below.

A CLEAR AND UNAMBIGUOUS STATEMENT

On a fair reading, the statement must be clear, unambiguous and devoid of relevant qualification.[78] In cases where the statement was unclear or equivocal, [79] no enforceable expectation was found.[80]

FORMALITY OF THE STATEMENT

In *R (on the application of Campaign to Protect Rural England) v Herefordshire Council*, the Queen's Bench further explained which statements of policy are likely to give rise to legitimate expectations:

[77] [2003] QB 1397 (CA) [99].

[78] See, e.g., *Paponette v AG of Trinidad and Tobago* [2012] 1 AC 1.

[79] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 [60]–[61].

[80] *R (on the application of Page) v Darlington BC* [2018] EWHC 1818 (Admin) [47].

Formal declarations of policy or procedure issued after appropriate public consultation or pursuant to particular statutory provisions may readily be seen as giving rise to a legitimate expectation; conversely, a less formal document that merely purports to give guidance or advice may less readily be interpreted as giving rise to one.[81]

TARGET AUDIENCE OF THE STATEMENT

To succeed in a claim for legitimate expectations, the claimant must demonstrate that the policy statement or assurance was directed at the claimant. In certain cases, a promise made to the general public will be sufficient to give rise to a legitimate expectation.[82]

MAKER OF THE STATEMENT

Normally, the maker of the statement relied upon must also be the defendant in the judicial review proceedings. However, the Government is typically considered a 'single entity'. Hence, assurances made by one Minister or a Government department (i.e. by the MOD in a policy document) could be binding on another ministry.[83]

Even if a legitimate expectation is deemed to arise, the court may choose to uphold the original decision of the decision-maker. The court must undertake a balancing exercise, evaluating the impact of upholding the expectation and whether the change of policy was fair (though the precise nature of this balancing exercise remains contentious).[84]

Courts tend to give deference to the decision of public authorities.[85] This is particularly so in the so-called 'forbidden areas' of national security; though, as noted above, matters of security are not necessarily beyond the remit of the courts.[86]

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[81] [2019] EWHC 3458 (Admin) [23].

[82] *R v Education Secretary Ex p Begbie* [2000] 1 WLR 1115, 1133; *R (Stamford Chamber of Trade and Commerce) v Secretary of State for Communities and Local Government* [2009] EWHC 1126 (Admin) 84.

[83] *R (BAPIO Action Ltd and another) v Secretary of State for the Home Department* [2008] 1 AC 1003 (HL) 34, 60.

[84] *R (on the application of Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 [68]; *R (Bath) v North Somerset Council* [2008] EWHC 630 (Admin) (QBD) 40.

[85] *R v Education Secretary Ex p Begbie* [2000] 1 WLR 1115, 1130; *Staff Side of Police Negotiating Board v Secretary of State for the Home Department* [2008] EWHC 1173 (Admin) 52; *R (on the application of Majed) v Camden LBC* [2009] EWCA Civ 1029.

[86] *R (on application of Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44 [50], [53]; and discussion of *GCHQ Case* therein.

GOVERNMENT'S PUBLIC COMMITMENTS REGARDING CASUALTY RECORDING AND REPORTING

What, then, are the UK's stated commitments regarding casualty recording and reporting?

To the knowledge of the CPP, there are no statements by the MOD specifically expressing a desire to adhere to international investigation, recording and reporting principles protecting civilians. However, the Foreign and Commonwealth Office has published a report on the implementation of IHL at the domestic level, which emphasises the **UK's commitment to its IHL obligations**.[87] And the general UK Government website acknowledges the role of the MOD in the UK's IHL obligations.[88] While references are made to other specific principles of IHL, recording and reporting principles are not discussed.

The **UK LOAC Manual incorporates aspects of IHL** (where such principles of IHL are understood to give rise to an implied duty to investigate and record civilian deaths). These IHL norms, and the UK LOAC Manual, are discussed in further detail in Part C below. Save to say, here, that to the extent that the Manual (which is an official document of the British Government) can be said to embody a commitment to identify the dead and/or investigate deaths, it might be said to contribute to a legitimate expectation that such activities actually be carried out. Of course, substantial operational leeway is likely to be read into the Manual, so any expectation must be qualified by the discretion afforded to the military.

Softer statements pertaining to the importance of adhering to IHL have also been made by various Members of Parliament, especially during the debate on 'International Humanitarian Law: Protecting Civilians in Conflict'. While parliamentary privilege means these are unlikely to give rise to any expectation *vis-a-vis* Government action, they are worth briefly listing, as they show the importance of principles of accountability, and are politically relevant (recall that 'accountability' is enforced just as much through the ordinary democratic process as it is through the courts). For example, in the 'Protecting Civilians in Conflict' debate, Mark Field (Minister for Asia and the Pacific at the time) and John Howell (a continuing Conservative MP) observed the violations of IHL in recent conflicts and emphasised the importance of reform. In the same debate, while made in the context of using mobile phones to collect evidence of individual breaches of IHL,

[87] 'Voluntary Report on the Implementation of International Humanitarian Law at Domestic Level' (*Foreign and Commonwealth Office*, 29 November 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/784696/Voluntary_Report_on_the_Implementation_of_International_Humanitarian_Law_at_Domestic_Level.pdf> accessed 1 October 2021.

[88] 'The UK and international humanitarian law 2018' (*Gov.uk*, 29 November 2019) <https://www.gov.uk/government/publications/international-humanitarian-law-and-the-uk-government/uk-and-international-humanitarian-law-2018> accessed 1 October 2021.

Andrew Mitchell (a continuing Conservative MP) implicitly emphasised the importance of recording and reporting principles.[89]

When debating the Armed Forces Bill in 2016, Lord Hodgson of Astley Abbotts recognised the importance of 'accountability and transparency' in the UK's 'military activities in the Middle East'. Such good practices ensure the maintenance of domestic and international support for the UK. He commended the UK's current practice on 'civilian casualties and disclosure of relevant information', but suggested that additional information is required on civilian casualties that the UK is indirectly responsible for.[90] Tom Brake (Lib Dem) also identified the importance of 'transparency and accountability in the use of drones'.[91] And, in the context of the Iraq War, as the Chilcot Inquiry noted in 2003–2004:

> *The Government continued to face pressure in Parliament to provide estimates of the numbers of Iraqi citizens who had died during the conflict.*[92]

Despite the strong political support for general adherence to IHL, and more specifically, a strong interest by Parliament for greater information about specific breaches of IHL, there are no strong endorsements of international recording and reporting principles from relevant Ministers. Nonetheless, recent statements concerning the importance of accountability and protecting civilians, implicitly endorse civilian casualty investigation, recording and reporting principles and may be *politically persuasive*.

They remain politically persuasive only because the soft statements made by the Minister and MPs above are unlikely to go so far as to generate a legitimate expectation regarding the UK's obligation to comply with international recording and reporting principles. First, statements made during such debates are normally inadmissible in court due to the doctrine of parliamentary privilege. Second, statements made, or positions of policy expressed, in Parliament can be changed at any time in the absence of supporting publication; and cannot usually give rise to legitimate expectations.[93]

[89] HC Deb 18 June 2019, vol 662, cols 28–43 WH.

[90] HL Deb 03 March 2016, vol 769, col 199–200.

[91] HC Deb 18 June 2019, vol 662, cols 34 WH.

[92] The Iraq Inquiry (Sir John Chilcot, Chair), *The Report of the Iraq Inquiry — Volume XII* (HC Report 265-XII, 2016) 186 [82].

[93] See, e.g., *Lucas MP & Others v Security Service & Others* [2015] UKIPTrib 14_79-CH.

However, an unequivocal promise made by a Minister in Parliament, which was supported by an official publication (like the UK LOAC Manual), has previously been held to generate a legitimate expectation. Furthermore, it is possible that such a legitimate expectation could not be extinguished by 'an unadvertised change in practice'.[94] Hence, *if* clear statements are made about international recording and reporting principles by Ministers in Parliament, and are supported by publications, then this may give rise to a legitimate expectation. (Whether that expectation, if found to exist, would be a 'procedural' or 'substantive' expectation is a separate, and more nuanced matter. In this analysis, however, not much turns on the result). While recent cases have highlighted that patterns of past practice might also provide a basis for a legitimate expectation (e.g. if the Government always consults on certain issues, then an abrupt failure to consult on one occasion may be reviewable), given the UK's poor track record of civilian casualty recording, such past practice does not seem relevant here.[95]

The CPP understands that a process of public consultation has been undertaken by the MOD regarding civilian casualty recording and reporting, among other things. In light of the above, should such work yield papers or policies by the MOD, accompanied by commitments or policy statements by relevant Government Ministers, then these (with the UK LOAC Manual) might go some way towards giving rise to a legitimate expectation that the policy would be adhered to. Further evidence of the UK's commitment to investigate might rest in the UK's treaty obligations and in sources of international law, which are considered below, and then in greater detail in Part C.[96]

Criminal conduct: to the extent that a suspected crime has occurred, then the *International Criminal Court Act 2001* would apply; but the existence of this Act might also be taken as some evidence of a commitment to investigate and report deaths more generally. *(Note, October 2021: see addendum at p. 43 below).*

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[94] *R (on the application of Save Britain's Heritage) v Secretary of State for Communities and Local Government* [2018] EWCA Civ 2137 [43]–[44].

[95] *R (Heathrow Hub) v Secretary of State for Transport* [2020] EWCA Civ 213; *R (Article 39) v Secretary of State for Education* [2020] EWCA Civ 1577; and *R (MP) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1634. While these cases concerned procedural expectations, there is some suggestion in *obiter* that past practice might also support substantive legitimate expectations. In the present analysis, not much turns on this (not least because it seems unlikely that the Government's past practice in respect of civilian casualty monitoring would rise so high as to establish an expectation of monitoring, in the first place).

[96] In limited circumstances, legislation might also require Ministers to consider international obligations or existing 'policy' on the topic when making their decisions. In this way, the legislation offers a route by which the international commitment or government policy is expressly or impliedly a necessary factor in the Minister's decision-making, and a decision inconsistent with those commitments or policies may frustrate expectations. However, no such relevant legislation appears to exist for civilian casualty reporting, in this case. For the general point, see, e.g., *R (on the application of Friends of the Earth Ltd and others) (Respondents) v Heathrow Airport Ltd (Appellant)* [2020] UKSC 52.

THE UK'S TREATY COMMITMENTS

In *Behluli v Secretary of State for the Home Department* the Court of Appeal asserted that ratification of a treaty does not give rise to a legitimate expectation that the UK would comply with the resulting international obligations,[97] rejecting the reasoning adopted in the Australian decision of *Minister of Immigration and Ethnic Affairs v Teoh*.[98]

However, in *R v Secretary of State for the Home Department Ex p Ahmed and Patel*, Lord Woold MR and Hobhouse LJ suggested in *obiter* that entering into a treaty does give rise to a legitimate expectation on the part of the general public that the resulting international obligations would be complied with.[99] While the rule in Ahmed has since been followed, there remains uncertainty whether the treaty obligations give rise to expectations limited to procedural matters only, or whether they confer a substantive benefit.[100]

In *R v Secretary of State for the Home Department Ex p Akhbari* it was held that unincorporated international obligations (i.e. treaties that are yet to be implemented by UK legislation) do not give rise to legitimate expectations when clear statutory indication is given to the contrary.[101] Additionally, when an explicit policy statement had been made, entering into a treaty would not give rise to a legitimate expectation that was inconsistent with the policy statement.[102]

Lord Bingham CJ in the Divisional Court in *R v DPP Ex p Kebilene* declined to apply *Ahmed and Patel*, observing that the ratification in question happened several decades ago when ratification was assumed to have no practical or legal effect.[103] And while *Ahmed and Patel* was referred to in *Abassi*, the Court of Appeal did not clearly endorse that reasoning.[104] For these reasons, the current law on the effect of treaty obligations on legitimate expectations is unsettled. In overview, it might be argued that the UK's various treaty obligations have engendered some legitimate expectation that they be complied with; or at the very least, would lend factual support to a judicial review application made on another basis.

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[97] [1998] EWCA Civ 788.

[98] (1995) 183 CLR 273.

[99] [1998] EWHC Admin 453, 583, 592A.

[100] *Thomas v Baptiste* [2002] 2 AC 1 [37]; cf *Musaj v Secretary of State for the Home Department* 2004 SLT 623 [21].

[101] [1999] 10 WLUK 271.

[102] *R v Secretary of State for the Home Department Ex p Patel (Idris Ibrahim)* [1998] 7 WLUK 616.

[103] *R v DPP Ex p Kebilene* [1999] 10 WLUK 906.

[104] [2003] QB 1397 (CA) [86].

CUSTOMARY INTERNATIONAL LAW – ANOTHER BASIS?

Customary international law may be given legal effect in domestic law, or may be held to be 'incorporated' into domestic law. In *R v Jones (Margaret)* Lord Bingham tentatively characterised customary international law as a source of domestic common law, provided that it is not inconsistent with UK constitutional principles.[105] This view was further endorsed and explained more fully by Lord Mance in *obiter* statements in *Keyu v Foreign Secretary*,[106] and then applied by the High Court and the Court of Appeal in *R (Freedom and Justice Party) v Foreign Secretary*.[107] Customary international law will only be taken to be incorporated, where its incorporation would not conflict with UK constitutional law.

Importantly, customary international law is understood to contain some requirement to investigate, record and report civilian casualties. (The content of this customary law is discussed in further detail in Part C below, which deals with IHL.) However, whether or not this international customary norm translates to an actionable obligation in the UK courts (i.e. constitutes a cause of action' if the UK fails to record and report) is an open and untested question.

To the extent that any customary rules concern civilian casualty recording and reporting, or principles of IHL more generally, it is difficult to see how these would be incompatible with domestic British understandings of accountability. However, the Supreme Court commented in the recent case of *Keyu* that the courts would adopt a cautious approach in identifying customary norms within the domestic common law.[108] In *Keyu*, which concerned potentially unlawful killings of Malaysians by British personnel, it was recognised that customary international law may contain an obligation to investigate such crimes; but that Parliament had dealt specifically with the issue in passing legislation dealing with such investigations.[109] Accordingly, it was reasoned that it would be inappropriate for the common law, and customary law, to venture into what Parliament had specifically dealt with. Parliament had already 'covered the field'.

However, in the case of an obligation to investigate killings more generally (i.e. lawful killings by the RAF; or killings less than a war crime), it is not clear if Parliament has similarly 'covered the field' by legislation; and so, unlike *Keyu*, it may be that there is room for the incorporation of the international customary norm *vis-à-vis* a more general duty to record and report civilian casualties. To the CPP's knowledge, the issue is yet to be fully

[105] [2006] UKHL 16.

[106] [2015] UKSC 69.

[107] [2016] EWHC 2016 (Admin).

[108] [2015] UKSC 69 [117]–[121], [144]–[151], [268]–[270].

[109] *Ibid*, [117], [151].

tested in court. However, some hope is given by the *obiter* of Lord Kerr in *Keyu*, who said in relation to the Malay killings:

> *[Without the intervening statute] [i]f there was a duty to investigate under customary international law, which was current at the time that the deaths occurred, it seems to me that there would be a strong argument that such a duty should find expression in the common law.*[110]

In a similar way, even if the common law were unwilling to recognise a duty directly corresponding to the international norm, then it can still be said that customary international law may pattern the development of the common law. That is, the existence of an international obligation may steer a domestic court towards recognising that the common law demands a similar or related obligation to that which exists at the international level. Recent Supreme Court authority has stressed this point, observing that 'development of the common law is not immune from nor does it disavow external influence'.[111] In this way, even if a court were unwilling to find the customary rule *directly* incorporated, the existence of the customary rule might still found some basis for a *common law argument*. While such an argument, on the topic of the investigation of casualties, is as yet untested in court, it does not seem to us inarguable that the common law might, in the full context of the UK's international obligations, develop to include some bare duty to investigate (in particular, when coupled with constitutional principles such as 'accountability').

In the result, it appears that the customary international norm to investigate civilian deaths is (at the very least) likely to assist any claim based on the constitutional principle of accountability and/or a claim on legitimate expectations (even if it is not determinative); and at the highest, it might support an independent basis of review. It may provide such an independent basis, because (as above) customary international law may, in some instances, be directly enforced through the common law. But it might also provide a basis from which to claim, because customary international law may influence the development of the common law, such that there is a recognised common law obligation to investigate developed by the courts. In both usages, however, the case is yet to be argued.

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[110] *Ibid*, [270].

[111] See *Elgizouli (Appellant) v Secretary of State for the Home Department (Respondent)* [2020] UKSC 10, [107]. See also [107]–[124] of same, for more general discussion of the point.

***Addendum (October 2021)*: The Overseas Operations (Service Personnel and Veterans) Act 2021**

In April 2021, the *Overseas Operations (Service Personnel and Veterans) Act* was passed. That Act provides for two main things.

- A **statutory presumption against criminal prosecution** of service personnel (former or current), for alleged offences committed more than five years ago, in the course of duty outside the UK. There is a requirement that the Attorney-General's consent be obtained for any prosecution brought more than five years after the event. The prosecutor must also take the likely impact of the prosecution, on the service person, into account.

- A **statutory bar on bringing civil claims** relating to events outside the UK (including claims under the *Human Rights Act 1998*) **more than six years after the event**. In deciding whether to extend the ordinary three-year limitation for civil claims (up to the maximum limit of six years), the court must also take into account the likely impact that civil proceedings would have on the service person, as well as the effect that the passage of time would have on that service person's capacity to give evidence.

Government guidance on the Act explains that its provisions seek to 'provide stronger protections for service personnel and veterans facing the threat of legal proceedings in relation to events which occurred on historical overseas operations'; and in respect of civil claims, that 'they will not be called upon many years after operations have ended to give evidence about potentially traumatic events relevant to a claim.'[112] The Act was, in part, the product of the MOD's 'Public Consultation on Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom', which concluded in late 2019.[113]

In its passage through Parliament, the Act was subject to several amendments. Concern had existed that a blanket application of the presumption against prosecution might work against the UK's obligations to investigate and prosecute war crimes.[114] Subsequent amendments meant that the Act, as passed, now includes a category of exempt offences (to which the presumption against prosecution does *not* apply), including war crimes, crimes against humanity, genocide and torture.

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[112] Ministry of Defence, *Guidance: Overseas Operations (Service Personnel and Veterans) Act 2021* (2 July 2021).

[113] Ministry of Defence, *Public Consultation on Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom: Ministry of Defence Analysis and Response* (2020), at <https://www.gov.uk/government/consultations/legal-protections-for-armed-forces-personnel-and-veterans-serving-in-operations-outside-the-united-kingdom>.

[114] See, e.g., The Law Society, Overseas Operations (Service Personnel and Veterans) Act (14 May 2021), at <https://www.lawsociety.org.uk/en/topics/human-rights/overseas-operations-service-personnel-and-veterans-act>; and Parliamentary Joint Committee on Human Rights, *Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill* (Ninth Report of Session 2019–21, 21 October 2020), 22ff.

Earlier drafts had also provided that the Secretary of State had a duty to consider derogating from the *European Convention on Human Rights* prior to any conflict. This, too, was seen to cut against the UK's international obligations.[115] Subsequent drafts removed the duty.

What is the Act's effect on the UK's duty, under domestic public law, to investigate, record and report civilian casualties?

The Act likely does not modify the government's constitutional duty to give an account of its conduct to Parliament. Neither should it be seen to blunt any legitimate expectation that government investigate, record and report civilian casualties (at least, within the six-year period). These public law duties are something quite separate from the limited time-bars that the Act applies to a discrete class of claims.

Relevant to this report, **the Act does not seek to eschew government responsibility** (or that of its agents) for acts done in overseas operations; neither does it seek any derogation from international norms (under IHL and human rights law) which require a timely investigation, recording and reporting of civilian deaths. The Act simply applies certain time bars to certain claims. These bars might be seen to blunt access to justice, in certain cases,[116] but they ought not be seen to modify Ministerial or government responsibility. Indeed, it is **arguable that the limited timeframe in which claims can now be brought might, as a matter of policy, further push towards the need for a timely and efficient method of recording potential claims, crimes or violations of international law**. This view was expressed in evidence before the Parliamentary Joint Committee on Human Rights, where Mark Goodwin-Hudson (former British Army Officer and NATO Civilian Casualty Investigation and Mitigation Team lead in Afghanistan), observed:[117]

What we need instead of the presumption against prosecution … is the ability to conduct accurate and timely investigations in theatre as the best means to stop this spiralling of reinvestigation and to understand and address the allegations against our soldiers.

It was the Joint Committee's conclusion that:[118]

Investigations will still be required, despite this legislation. And the [past] inadequacy of those investigations will not be addressed by the Act … The MoD must, as a priority, establish an independent, skilled and properly funded service for investigations.

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[115] Parliamentary Joint Committee on Human Rights, *Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill* (Ninth Report of Session 2019–21, 21 October 2020), 40ff.

[116] The Law Society, Overseas Operations (Service Personnel and Veterans) Act (14 May 2021), at <https://www.lawsociety.org.uk/en/topics/human-rights/overseas-operations-service-personnel-and-veterans-act>.

[117] Parliamentary Joint Committee on Human Rights, *Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill* (Ninth Report of Session 2019–21, 21 October 2020), 16 [29].

[118] *Ibid*, 17 [35]–[36].

CONCLUSION — THE RISK OF A CLAIM BEING BROUGHT AGAINST THE UK GOVERNMENT

The UK's need to investigate, record and report civilian casualties can be given effect through several avenues in domestic law.

First, the **constitutional principle of accountability** might constitute an actionable basis for review of the Government; though the circumstances in which the principle would be so offended are likely to be extreme. The usual mode of accountability remains political.

Second, entering into treaties may give rise to **legitimate expectations;** but the contrasting authorities suggest this may be a weak ground for judicial review.

Third, any investigation, recording and reporting principles that form part of **customary international** law might be enforceable in domestic law, though this is untested. Those principles may also help develop the common law towards recognition of a similar duty.

Fourth, it might also be argued that certain rights under the **Human Rights Act 1998** (e.g. the right to life or the prohibition of torture) are engaged by a failure to adhere to international principles regarding civilian casualty recording; though principles of extra-territoriality might apply to block the claim. Time bars might also limit the time in which such a claim could be brought, in respect of historical conduct.

Even if these legal standards may not rise so high as to found a legal action, they exist as strong normative guides that ought to, under a full appreciation of UK public law and constitutional values, push towards better casualty investigation, recording and reporting practices.

Of course, to say that the common law and the constitution likely recognise *some* duty on the UK to investigate, record and report casualties in domestic law, says little about what those obligations actually are. Is it some bare obligation, or is it more substantive? How is it discharged? A detailed examination of the UK's obligations under treaty and customary international law is required, as this gives the question colour and context; and such obligations are likely to be legally relevant in any claim in court.

The next sections of this report consider more fully the UK's relevant **international obligations**. These are important for two reasons:

(a) to understand how, at the level of the international legal system, different rules and standards operate on the UK (and whether the UK is meeting these); and

(b) to understand how these obligations, at the international level, might in turn inform the scope of the UK's obligations under domestic law to be accountable for its actions and/or the scope and content of any expectation it might have engendered by entering into the relevant treaties.

PART C. THE UNITED KINGDOM'S OBLIGATIONS UNDER INTERNATIONAL HUMANITARIAN LAW

PART C. OVERVIEW

International humanitarian law ('**IHL**') imposes an obligation on the UK to record civilian casualties arising out of its conduct during armed conflict.[119] This obligation stems from:

(a) Elements of the obligation to record civilian casualties in legal instruments and customary international law:

1. the **Geneva Conventions of 1949** ('**Geneva Conventions**') and **Additional Protocols I and II of 1977** ('**AP I**' and '**AP II**');
2. **customary international humanitarian law** ('**customary IHL**');
3. the **UK's Joint Service Manual of the Law of Armed Conflict** ('**UK LOAC Manual**'), which reflects the UK's practice and references the principles of Geneva Convention IV, AP I, and AP II applicable to the UK's military operations;

(b) **IHL rules protecting civilians against the conduct of hostilities**, specifically the prohibition on directing attacks against civilians, indiscriminate attacks, and disproportionate attacks, as well as the obligation to take feasible precautions to prevent or mitigate civilian casualties. *Ex ante* and *ex post* assessments of likely and actual civilian casualties are essential to the performance of proportionality assessments in the context of the prohibition of disproportionate attacks and the obligation to take feasible precautions; and

(c) the **obligation to investigate violations of IHL and war crimes** as part of the duty to repress grave breaches and suppress all other violations of IHL, which requires that civilian casualties be accurately recorded and tracked in order to identify potential violations of IHL, trigger investigations and facilitate their conduct.

The purpose of this Part of the research paper is to highlight that, regardless of the specific modalities under which the obligation is to be carried out under the Geneva Conventions, AP I and AP II, a duty to record civilian casualties exists in IHL and is binding on the UK in its conduct of military operations. This obligation is also crucial to monitoring, ascertaining and ensuring compliance with IHL rules protecting civilians against the conduct of hostilities as well as facilitating the investigation of violations of IHL.

Image: Satellite image of Syrian countryside. **Source:** DigitalGlobe, Quickbird.

[119] See Susan Breau and Marie Aronsson, 'Drone Attacks, International Law, and the Recording of Civilian Casualties of Armed Conflict' (2012) 35 Suffolk Transnational Law Review 284.

ELEMENTS OF THE OBLIGATION TO RECORD CIVILIAN CASUALTIES IN LEGAL INSTRUMENTS AND CUSTOMARY INTERNATIONAL LAW

Elements of the obligation to record civilian casualties can be found in IHL treaties, customary IHL, and the UK LOAC Manual. This obligation stems from the provisions relating to the search for, and identification of, the missing and the dead, contained in the following treaties:

- Geneva Convention IV ('GC IV');
- Additional Protocol I ('AP I'); and
- Additional Protocol II ('AP II').

Like GC IV, AP I, and AP II, customary IHL provides for extensive obligations to search for the missing and the dead, record information on the missing, and identify the dead. These obligations are informed by the overarching right of families to know the fate of their relatives. The UK LOAC Manual, which references the principles of GC IV, AP I, and AP II, incorporates elements of the obligation to record civilian casualties into UK practice. The performance of these obligations necessarily entails that States accurately record civilian casualties.

Table 1 — Sources of IHL relating to the obligation to record civilian casualties

IHL obligations on which the obligation to record civilian casualties is based	GC IV	AP I	AP II	Customary IHL	UK LOAC Manual
Searching for the missing		Art 33(1)		ICRC Rule 117	Para 7.38
Recording information on the missing		Art 33(1)			Para 7.38
Searching for and recovering the dead	Art 16	Art 33	Art 13	ICRC Rule 112	Para 7.38.1
Identifying and burying the dead		Arts 33(4) and 34		ICRC Rules 113–116	Paras 7.35–7.36, 7.38.1, 15.29.1

THE GENEVA CONVENTIONS AND ADDITIONAL PROTOCOLS

The four Geneva Conventions of 1949, ratified by the UK on 23 September 1957, establish a detailed regime for several categories of protected persons in international armed conflict.[120] While Geneva Conventions I, II, and III are dedicated to military personnel, GC IV deals specifically with civilians.[121]

All four Conventions provide for an obligation to record casualties. Geneva Conventions I, II, and III contain clear and extensive provisions relating to recording the identity of combatants.[122] The obligation to record *civilian* casualties takes root in GC IV. It is reinforced by AP I and AP II, applicable respectively to international and non-international armed conflicts, which were both ratified by the UK on 28 January 1998.[123] Importantly, as both Additional Protocols oblige parties engaged in a conflict to search for the dead, the obligation to record civilian casualties applies regardless of the international or non-international nature of the armed conflict. The following analysis will focus on the provisions applicable to civilian casualties caused by military operations. Thus, any recording obligations relating to civilian casualties *during occupation* or *in detention* are not covered by this report.[124]

Geneva Convention IV, 'relative to the Protection of Civilian Persons in Time of War', of 1949

The UK is bound by GC IV, which establishes the basis of the obligation to record civilian casualties. Article 16 GC IV provides:

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[120] See 'Treaties, States Parties and Commentaries' (ICRC) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=GB> accessed 1 October 2021.

[121] See Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 4 [hereinafter GC IV].

[122] See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, arts 15–17 [hereinafter GC I]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85, arts 18–21 [hereinafter GC II]; Geneva Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, arts 120–121 [hereinafter GC III].

[123] 'Treaties, States Parties and Commentaries' (ICRC) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=GB> accessed 1 October 2021.

[124] See generally Susan Breau and Rachel Joyce, 'Discussion Paper: The Legal Obligation to Record Civilian Casualties of Armed Conflict' (*Oxford Research Group*, June 2011) <https://www.files.ethz.ch/isn/138979/1st%20legal%20report%20formatted%20FINAL.pdf> accessed 1 October 2021.

> *The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.*
>
> *As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.*[125]
>
> [Emphasis added]

Article 16 thus requires that the parties to an international armed conflict facilitate the search for civilians 'killed and wounded' during the conflict. Specific obligations relating to the search for the missing and the dead, as well their identification, contained in AP I and AP II contribute to reinforcing the obligation to record civilian casualties.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ('Additional Protocol I') of 1977

AP I imposes obligations with respect to missing persons (Article 33), the dead (Article 33), and their remains (Article 34), and contributes to strengthening the obligation to record civilian casualties in international armed conflict. This obligation is guided by the right of the families to know the fate of their relatives.[126] Article 32 AP I provides:

> *In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in*

[125] GC IV, art 16.

[126] According to the ICRC, 'family' should not be limited to blood relations and legal ties and should be understood to include personal and emotional ties. See Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987) para 1215 [hereinafter ICRC Commentary to AP I]. See also UNSC, 'Protection of civilians in armed conflict – Report of the Secretary-General' (3 May 2021) UN Doc S/2021/423, para 14 [hereinafter 2021 Report on the Protection of Civilians in Armed Conflict]

> *this Protocol shall be prompted mainly by the right of families to know the fate of their relatives.*[127]
>
> [Emphasis added]

The recording obligation of Article 33 AP I concerns two categories of persons: those who have been reported missing and those who have been killed in battlefield areas. Article 33 AP I provides:

> 1. As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall **search for the persons who have been reported missing** by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches.
>
> 2. In order to facilitate the gathering of information pursuant to the preceding paragraph, each Party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this Protocol:
>
> …
>
> (b) to the **fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information** concerning such persons if they have died in other circumstances as a result of hostilities or occupation.
>
> …
>
> 3. Information concerning persons reported missing pursuant to paragraph 1 and requests for such information shall be transmitted either directly or through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross or national Red Cross (Red Crescent, Red Lion and Sun) Societies. Where the information is not transmitted through the International Committee of the Red Cross and its Central Tracing Agency, each Party to the conflict shall ensure that such information is also supplied to the Central Tracing Agency.
>
> 4. The Parties to the conflict shall endeavour to agree on arrangements for **teams to search for, identify and recover the dead from battlefield areas**, including arrangements, if appropriate, for such teams to be accompanied by personnel of the adverse Party while carrying out these missions in areas controlled by the adverse Party. Personnel of such teams shall be respected and protected while exclusively carrying out these duties.[128] [Emphasis added]

With respect to persons reported missing, Article 33(1) AP I requires that parties to a conflict search for, and record information relating to, the missing. This search obligation concerns both combatants from whom there has been no news and civilians in occupied

[127] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3, art 32 [hereinafter AP I].

[128] AP I, art 33.

or enemy territory.[129] A missing person under Article 33 can be defined as: 'a person whose whereabouts are unknown to his/her relatives and/or who, on the basis of reliable information, has been reported missing in accordance with the national legislation in connection with an international or non-international armed conflict'.[130] The possibility of conducting searches must be examined in the immediate aftermath of a military operation, and at regular intervals before the end of 'active hostilities', which marks the latest point in time from which searches must be initiated.[131]

The practicability and cost of the search may vary depending on the conditions prevailing at the time the search is conducted.[132] However, the United Nations ('UN') Security Council has stressed the importance of searching for the missing in armed conflict in Resolution 2474 (2019), which '[called] upon parties to armed conflict to take all appropriate measures, to actively search for persons reported missing, to enable the return of their remains, and to account for persons reported missing without adverse distinction and to put in place appropriate channels enabling response and communication with families on the search process'.[133]

With respect to persons killed in combat areas, Article 33(4) AP I requires that parties to a conflict search for, identify, and recover the dead from battlefields. The performance of this obligation is of paramount importance to confirm the identity of individuals targeted or killed in military operations, including air strikes. The search, identification and recovery of the dead fulfils two humanitarian objectives: (i) informing the family of the deceased once the body has been identified, especially when a person has been reported missing; and (ii) ensuring a decent burial.[134] As battlefields in contemporary conflicts are less clearly defined and often overlap with civilian populated areas, the obligation to search, identify, and recover the dead, should be complied with regardless of the presumed combatant or civilian status of the deceased.[135]

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[129] ICRC Commentary to AP I (n 126) para 1229.

[130] ICRC, 'Guiding Principles / Model Law on the Missing: Principles for legislating the situation of persons missing as a result of armed conflict or internal violence : measures to prevent persons from going missing and to protect the rights and interests of the missing and their families' (Geneva, 28 February 2009) art 2(1) <https://www.icrc.org/en/document/guiding-principles-model-law-missing-model-law> accessed 1 October 2021.

[131] ICRC Commentary to AP I (n 126) para 1237.

[132] *Ibid*, para 1234.

[133] UNSC Res 2474 (11 June 2019) UN Doc S/RES/2474, para 2.

[134] ICRC Commentary to AP I (n 126) paras 1269, 1281.

[135] See Mark Lattimer, 'The Duty in International Law to Investigate Civilian Deaths in Armed Conflict' in Mark Lattimer and Philippe Sands (eds), *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War* (Hart Publishing 2018) 48–49.

Article 34 AP I, which requires that remains and gravesites of 'persons not nationals of the country in which they have died as the result of hostilities' be respected and marked, clarifies that the obligation to record civilian casualties applies to all civilians, regardless of their nationality.[136] This provision concerns, in particular, civilian deaths directly caused by air strikes, either as a result of the direct targeting of civilians or as incidental or collateral damage during an attack on combatants and military objectives.[137]

In light of the above, AP I, which applies to international armed conflicts, reinforces, and clarifies the extent of, the obligation to record civilian casualties. With respect to non-international armed conflicts, elements of the obligation to record civilian casualties can be found in AP II.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ('Additional Protocol II') of 1977

The recording obligation incumbent on parties to an armed conflict under AP II is succinctly stated in Article 8, which imposes an obligation to search for the dead in non-international armed conflicts. This obligation applies to all civilians and is again linked to the family's right to be informed of the fate of their missing relatives. [138] Article 8 AP II provides:

> *Whenever circumstances permit, and particularly after an engagement, all possible measure shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.*[139]

[136] AP I, art 34: '1. The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be respected, maintained and marked as provided for in Article 130 of the Fourth Convention, where their remains or gravesites would not receive more favourable consideration under the Conventions and this Protocol.'.

[137] ICRC Commentary to AP I (n 126) para 1305.

[138] ICRC Commentary to AP I (n 126) paras 4653, 4657.

[139] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3, art 8 [hereinafter AP II].

As both AP I and AP II require that parties to a conflict search for the dead, the obligation to record civilian casualties applies irrespective of the international or non-international character of the armed conflict. As such, civilian casualties should be systematically recorded and tracked during military operations.

CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

In addition to the Geneva Conventions and their Additional Protocols, the obligation to record civilian casualties is reflected in customary IHL, and specifically Rules 112–117 ('**Customary Rules**') of the International Committee of the Red Cross ('**ICRC**') study on customary IHL.[140] Customary IHL applies equally to international and non-international armed conflicts.

Similarly to treaty law, customary IHL requires that parties to a conflict search for the dead after an engagement. Customary Rule 112 states:

> *Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction.*[141]

Customary Rule 112 applies without distinction to all combatants and civilians, regardless of whether or not they have directly participated in hostilities. It imposes an obligation of means, which includes permitting the search for and recovery of deceased combatants and civilians by humanitarian organisations.[142]

Customary Rules 113, 114, and 115 impose obligations relating to the remains of the deceased, premised on the search for, collection of, and identification of the dead by parties to a conflict.[143] Such obligations can only be fulfilled if accurate records of civilian casualties are maintained.[144] These Customary Rules state:

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[140] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (CUP 2005) [hereinafter ICRC Customary International Law Study].

[141] *Ibid*, 406.

[142] *Ibid*, 407–408.

[143] *Ibid*, 409–417.

[144] *Ibid*, 426.

Rule 113. Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited.

Rule 114. Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them.[145]

Rule 115. The dead must be disposed of in a respectful manner and their graves respected and properly maintained.

Customary Rule 116 articulates an explicit obligation to identify the dead and record all information relating to them, the performance of which demands that parties to a conflict use their best efforts and all available means.[146] Customary Rule 116 states:

> *With a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves.*[147]

Lastly, the obligation to identify and keep records of the dead is complemented by Customary Rule 117 which requires that parties to a conflict account for missing persons, in accordance with the right of families to know the fate of their missing relatives.[148] Customary Rule 117 states:

> *Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate.*[149]

Like the obligation to record and identify the dead, the obligation to account for the missing is an obligation of means, requiring that parties to a conflict use their best efforts in the identification and accounting process, which includes facilitating the search for the

[145] It should be noted that the ICRC does not consider Customary Rule 114 to apply in non-international armed conflicts. *Ibid*, 413–414.

[146] *Ibid*, 419.

[147] *Ibid*, 417.

[148] *Ibid*, 423, 426.

[149] *Ibid*, 421.

missing. However, providing to the family the information which is available is an obligation of result.[150]

Taken together, Customary Rules 112–117 impose an obligation on the UK to record civilian casualties regardless of the characterisation of the armed conflict as international or non-international.

THE UK'S JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ('UK LOAC MANUAL')

The UK LOAC Manual reflects the UK's 'practice' in relation to the obligation to identify and record the dead and search for the missing. It references the principles of Geneva Convention IV, AP I, and AP II applicable to the UK's military operations, and thus incorporates elements of the obligation to record civilian casualties.

In the case of international armed conflicts, the UK LOAC Manual incorporates Article 33 AP I's obligation to search for the missing and the dead, which includes deceased civilians. The UK LOAC Manual requires that the dead be searched for, identified and recovered from battlefields.[151] Furthermore, the UK LOAC Manual calls for the burial of the dead, to the extent possible, in individual graves, unless special circumstances such as hygiene or religion require that they be cremated; and graves must be respected, properly maintained and marked so that they may be found.[152] The UK LOAC Manual also mandates that graves registration services be officially established at the outbreak of hostilities.[153] The UK LOAC Manual thus contemplates a capacity to record and identify the dead.

In the case of non-international armed conflicts, the UK LOAC Manual succinctly states that '[t]he dead must not be despoiled or ill-treated and must be decently disposed of', which entails that civilian casualties must be accounted for.[154]

In addition to being reflected in the UK LOAC Manual, the obligation to record civilian casualties was expressed and recognised in UN Security Council Resolution 2474 (2019), which received unanimous support within the Security Council.[155] As such, Resolution 2474 (2019) underscores the UK's acknowledgment of

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[150] *Ibid*, 426.

[151] Ministry of Defence, 'Joint Service Manual of the Law of Armed Conflict' (JSP 383, 2004) para 7.38.1 [hereinafter UK LOAC Manual].

[152] *Ibid*, paras 7.35-7.36

[153] *Ibid*, para 7.36

[154] *Ibid*, para 15.29.1.

[155] United Nations, 'Highlights of Security Council Practice' (*United Nations*, 2019) <https://www.un.org/securitycouncil/content/highlights-2019-interactive> accessed 1 October 2021.

the importance of actively searching and accounting for persons reported missing, and, most importantly, 'identify[ing] [the dead], including by recording all available information'. [156] Through its express recognition of the need to record information on the dead in armed conflict, Resolution 2474 (2019) embodies a consensus on the need for civilian casualty recording and its integration into State military operations and practice.[157] Accordingly, civilian casualty recording must systematically form part of the UK's practice during armed conflict and be consistently performed during military operations.

[156] In Resolution 2474 (2019) the UN Security Council '*Calls* upon parties to armed conflict to take all appropriate measures, to actively search for persons reported missing ... and to account for persons reported missing' and '*Urges* parties to armed conflict to search for and recover the dead as a result of armed conflict, identify them, including by recording all available information'. UNSC Res 2474 (11 June 2019) UN Doc S/RES/2474, paras 2, 8. See also Human Rights Council, 'Situation of human rights in the Syrian Arab Republic' (14 July 2020) UN Doc A/HRC/44/L.10.

[157] UNSC Res 2474 (11 June 2019) UN Doc S/RES/2474, paras 2, 8.

Civilian casualty recording and tracking is an essential component of ensuring the protection of civilians during armed conflict, as well as compliance with IHL rules protecting civilians against the conduct of hostilities. Military operations, including air strikes, must comply with four main obligations:[158]

- the prohibition on **directing attacks against civilians** and civilian objects, which requires that parties to a conflict observe the principle of distinction and direct attacks against lawful targets only.
- the prohibition of **indiscriminate attacks**, which prohibits attacks that strike without distinction civilians or civilian objects and combatants or military objectives. Indiscriminate attacks may also result from the use of explosive weapons in densely populated areas.[159]
- the prohibition of **disproportionate attacks**, which prohibits attacks expected to cause excessive incidental civilian casualties in relation to the concrete and direct military advantage anticipated.
- the obligation to **take all feasible precautions** in attack and against the effects of attacks to avoid or minimise civilian casualties, which requires that parties to an armed conflict exercise 'constant care' to spare the civilian population.

Ex ante and *ex post* assessments of likely and actual civilian casualties are essential to the performance of proportionality assessments in the context of the prohibition of disproportionate attacks and obligation to take feasible precautions. Accurately recording and tracking civilian casualties allows parties to a conflict to understand the effects of their military operations, improve their targeting decisions, refine proportionality assessments, and take adequate precautions to protect civilians against the effect of attacks. As such, the obligation to record civilian casualties is essential to monitoring, ascertaining, and ensuring compliance with the rules of IHL protecting civilians against the conduct of hostilities.

[158] United Nations Office for the Coordination of Humanitarian Affairs (OCHA), 'Reducing the humanitarian impact of the use of explosive weapons in populated areas' (New York, August 2017) 14–17 [hereinafter OCHA Report on the Humanitarian Impact of Explosive Weapons]. See also UK LOAC Manual (n 151) para 12.26.

[159] Laurent Gisel, 'The Use of Explosive Weapons in Densely Populated Areas and the Prohibition of Indiscriminate Attacks' in Edoardo Greppi and Gian Luca Beruto (eds), *Conduct of Hostilities: The Practice, the Law and the Future* (International Institute of Humanitarian Law, 2015) 111; OCHA Report on the Humanitarian Impact of Explosive Weapons (n 158) 15. See generally Geneva International Centre for Humanitarian Demining (GICHD), 'Explosive Weapon Effects — Final Report' (Geneva, February 2017).

As one of the main concerns of IHL, the protection of civilians against the effects of hostilities is achieved by imposing several rules which must be observed by parties to a conflict in the conduct of military operations: [160]

- the prohibition on directing attacks against civilians or civilian objects;
- the prohibition of indiscriminate attacks;
- the prohibition of disproportionate attacks; and
- the obligation to take all feasible precautions in attack and against the effects of attacks.

Full compliance with the rules of IHL by parties to a conflict is necessary to ensure the protection of civilians. Civilian casualty recording plays an essential role in monitoring, ascertaining, and ensuring compliance with IHL. According to the UN Office for the Coordination of Humanitarian Affairs ('OCHA'), recording civilian casualties 'can clarify the causes of harm to civilians as well as the actions needed to end such harm and prevent its recurrence'.[161] In the specific context of the conflict in Afghanistan, the NATO-led International Security Assistance Force ('ISAF') Civilian Casualty Tracking Cell and the United Nations Assistance Mission in Afghanistan ('UNAMA') Human Rights Unit's casualty recording system have indeed shown that civilian casualty recording and tracking improves the understanding of the impact of a conflict on civilians and shapes operational practices with the aim of reducing casualties.[162]

Therefore, an obligation to record civilian casualties is a necessary component of ensuring the protection of civilians during armed conflicts, as well as compliance with the four main obligations governing the conduct of military operations.

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[160] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 78; ICRC, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (Geneva, 2009) 4 ('The protection of civilians is one of the main goals of international humanitarian law'); OCHA Report on the Humanitarian Impact of Explosive Weapons (n 158) 14–17. See also AP I, arts 48, 51, 57; UK LOAC Manual (n 151) para 12.26.

[161] OCHA Report on the Humanitarian Impact of Explosive Weapons (n 158) 55. See also UNSC, 'Report of the Secretary-General on the protection of civilians in armed conflict' (22 May 2012) UN Doc S/2012/376, para 28.

[162] See Center for Civilians in Conflict (CIVIC), 'Examining Civilian Harm Tracking and Casualty Recording in Afghanistan' (19 May 2014) 2–3 <https://civiliansinconflict.org/wp-content/uploads/2017/09/CCCERP_4_page_FINAL_May_19.pdf> accessed 1 October 2021. See generally UNAMA, 'Reports on the Protection of Civilians in Armed Conflict' <https://unama.unmissions.org/protection-of-civilians-reports> accessed 1 October 2021.

THE PROHIBITION ON DIRECTING ATTACKS AGAINST CIVILIANS AND CIVILIAN OBJECTS

The prohibition on directing attacks against civilians and civilian objects flows from the principle of distinction which applies as a customary rule of IHL to both international and non-international armed conflicts.[163] According to this principle, codified in Article 48 AP I, parties to a conflict must distinguish between, on the one hand, civilians and civilian objects, which cannot be the object of an attack, and on the other hand, combatants and military objectives, which constitute legitimate targets.[164] Article 48 AP I provides:

> *In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.*[165]

The 2018 All-Party Parliamentary Group expressed its concern over uncertainties surrounding the strict observance of the principle of distinction in UK military operations:

> *There is concern that the UK and its partners are adopting an overly expansive approach to determine who is a lawful target. In the absence of any information on the test UK armed forces apply when targeting members of ISIL, it is impossible to determine if the targeting process is lawful. The need for clarity is made more urgent by the*

[163] See Customary Rules 1 and 7 in ICRC Customary International Law Study (n 140) 3–8, 25–29.

[164] Marco Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) para 8.288.

[165] AP I, art 48.

acknowledgement of only one civilian casualty by the UK in its conflict in Iraq and Syria.[166]

The All-Party Parliamentary Group's concern over the disproportionately low number of recorded civilian casualties highlights the importance of the standards and definitions used in target identification. If civilian casualties are indeed recorded but misidentified as combatants due to an 'overly expansive approach' which blurs the distinction between civilians and combatants, compliance with the principle of distinction may not be accurately monitored. Notably, operational experience has shown that target misidentification[167] has contributed to a significant proportion of civilian casualties.[168] Lessons learned from US military operations have shown that air strikes relying primarily on airborne target identification and post-strike assessments by unmanned aerial vehicles ('UAVs' or 'drones') carry a significant risk of target misidentification.[169] In this context, an 'overly expansive approach' to target identification has the potential to significantly increase the likelihood of misidentification and result in a higher number of civilian casualties. This is of particular concern in light of IHL's requirement that '[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian'.[170]

Understanding the approach to the standards and definitions used for target identification is fundamental to ascertain the lawfulness of the targeting process, from initial target identification, to proportionality assessments (see below, 'The Prohibition of Disproportionate Attacks') and post air strike civilian casualty assessments.[171] It is therefore paramount that the UK clarify the standards and definitions used in targeting decisions, and that they be disclosed and available for public scrutiny.[172] Compliance

[166] All-Party Parliamentary Group on Drones Inquiry (Professor Michael Clarke, Chair), *Report — Concluding its Inquiry into the UK's Use of Armed Drones: Working with Partners* (APPG, July 2018) 13.

[167] Misidentification can, for example, be caused by 'misinterpretation of actions or characteristics' or 'guilt by association'. Larry Lewis and Diane Vavrichek, *Rethinking the Drone War* (Marine Corps University Press 2016) 16.

[168] *Ibid*, 15–16.

[169] Ibid, 17–18.

[170] AP I, art 50(1).

[171] Sarah Holewinski and others, 'Civilian Impact of Drone: Unexamined Costs, Unanswered Questions' (Center for Civilians in Conflict (CIVIC) and Columbia Law School Human Rights Clinic, 2012) 32 <https://civiliansinconflict.org/wp-content/uploads/2017/09/The_Civilian_Impact_of_Drones_w_cover.pdf> accessed 1 October 2021; Lewis and Vavrichek (n 167) 18; Christopher D Kolenda and others, 'The Strategic Cost of Civilian Harm – Applying Lessons from Afghanistan to Current and Future Conflicts' (Open Society Foundations, June 2016) 19 <https://www.opensocietyfoundations.org/uploads/1168173f-13f9-4abf-9808-8a5ec0a9e4e2/strategic-costs-civilian-harm-20160622.pdf> accessed 1 October 2021.

[172] See Lewis and Vavrichek (n 167) 54; Columbia Law School Human Rights Clinic, 'Counting Drone Strike Deaths' (October 2012) 35 <https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/COLUMBIACountingDronesFinal.pdf> accessed 1 October 2021.

with these standards and definitions, the principle of distinction, and the prohibition on directing attacks against civilians and civilian objects can only be monitored if civilian casualties are accurately recorded and tracked. The obligation to record civilian casualties thus plays a fundamental role in ascertaining, improving and facilitating compliance with IHL and the principle of distinction.

THE PROHIBITION OF INDISCRIMINATE ATTACKS

Indiscriminate attacks do not distinguish between combatants and military objectives, and civilians and civilian objects. No intent to strike the civilian population is required for an indiscriminate attack to occur. However, intentional violations of the prohibition of indiscriminate attacks are criminalised under Article 85(3)(b) AP I and Article 8(2)(b)(iv) of the Rome Statute.[173]

Indiscriminate attacks are prohibited under IHL treaties and customary IHL. The prohibition therefore applies to both international and non-international armed conflicts.[174] Five types of indiscriminate attacks are specified by IHL:

- attacks which are not directed at a specific military objective;[175]
- attacks which employ a method or means of warfare which cannot be directed at a specific military objective;[176]
- attacks which employ a method or means of combat the effects of which cannot be limited as required by IHL;[177]
- area bombardments which treat 'as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects';[178] and
- disproportionate attacks, i.e. attacks 'which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.[179]

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[173] AP I, art 85; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 8(2)(b)(iv).

[174] AP I, art 51(4); ICRC Customary International Law Study (n 140) Rules 11–13.

[175] AP I, art 51(4)(a); ICRC Customary International Law Study (n 140) Rule 12.

[176] AP I, art 51(4)(b); ICRC Customary International Law Study (n 140) Rule 12.

[177] AP I, art 51(4)(c); ICRC Customary International Law Study (n 140) Rule 12.

[178] AP I, art 51(5)(a); ICRC Customary International Law Study (n 140) Rule 13.

[179] AP I, art 51(5)(b); ICRC Customary International Law Study (n 140) Rule 14.

IHL prohibits inherently indiscriminate weapons, but also those which, in a particular context, will have indiscriminate effects.[180] The use of explosive weapons, and particularly those with wide-area effects, in civilian populated areas constitutes a circumstance in which such weapons may have indiscriminate effects.[181] The UN Secretary General's 2021 Report on the Protection of Civilians in Armed Conflict indeed notes that "[w]hen explosive weapons were used in populated areas in 2020, a total of 88 per cent of those killed and injured were civilians, compared with 16 per cent in other areas".[182] Thus, military operations, such as air strikes which fire explosive weapons in civilian populated areas, especially those that are densely populated, may violate the prohibition of indiscriminate attacks.[183]

The effect of explosive weapons in civilian populated areas may also be more difficult to anticipate. Pre-strike surveillance may not accurately reflect the civilian presence in the vicinity of a target, such as transient civilians passing by or civilians located inside a building, especially when conducted through UAVs, with no boots on the ground.[184] For example, aerial surveillance is unlikely to reveal civilians that are homebound, sick, injured, or sheltering in the bottom floors or basement of a building.[185]

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[180] ICRC Customary International Law Study (n 140) Rule 71; ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (Report 31IC/11/5.1.2, Geneva, October 2011) 41 [hereinafter Challenges of Contemporary Armed Conflicts].

[181] ICRC, 'Explosive Weapons in Populated Areas: Humanitarian, Legal, Technical and Military Aspects' (Expert Meeting, Chavannes-de-Bogis, 24–25 February 2015) 1,15–16 [hereinafter ICRC 2015 Expert Meeting on Explosive Weapons in Populated Areas]; 2021 Report on the Protection of Civilians in Armed Conflict (n 126) para 10. See also Permanent Representative of Ireland to the United Nations, 'Joint Statement on Explosive Weapons in Populated Areas' (UNGA First Committee, New York, 25 October 2018) <https://www.dfa.ie/media/dfa/ourrolepolicies/peaceandsecurity/Joint-Statement-on-EWIPA-delivered-by-Amb-Byrne-Nason.pdf> accessed 1 October 2021; Permanent Representative of Ireland to the United Nations, 'Joint Statement on Explosive Weapons in Populated Areas' (UNGA First Committee, New York, 24 October 2019) <http://www.article36.org/wp-content/uploads/2019/10/UNGA74-joint-statement-on-explosive-weapons-in-populated-areas.pdf> accessed 1 October 2021.

[182] 2021 Report on the Protection of Civilians in Armed Conflict (n 126) para 10.

[183] OCHA Report on the Humanitarian Impact of Explosive Weapons (n 158) 15; ICRC 2015 Expert Meeting on Explosive Weapons in Populated Areas (n 181) 26.

[184] Sahr Muhammedally, 'Minimizing civilian harm in populated areas: Lessons from examining ISAF and AMISOM policies' (2016) 98(1) International Review of the Red Cross 225, 244; Lucy Fisher, 'Civilians need protection from British drones' *The Times* (16 August 2019) <https://www.thetimes.co.uk/article/civilians-need-protection-from-british-drones-7ltshjfrk> accessed 1 October 2021; NATO, 'Protection of Civilians: Allied Command Operations Handbook' (2020) 22 (stating engaging and sharing information with actors that have been operating on the ground "can enhance understanding of the needs, dependencies, vulnerabilities and resiliencies of the population").

[185] Holewinski and others (n 171) 32; 'Department of Defense News Briefing on the Findings of an Investigation into a March 17 Coalition Air Strike in West Mosul' (US Department of Defense, 25 May 2017) <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/1194694/department-of-defense-news-briefing-on-the-findings-of-an-investigation-into-a/> accessed 1 October 2021 [hereinafter Findings

It is therefore essential that civilian casualties be tracked and recorded accurately to determine the effects of the weapons used in military operations, particularly in civilian populated areas.[186] Importantly, a full and accurate account of civilian casualties, established through on-site inspections, is crucial to understanding the impact of an air strike involving explosive weapons and monitoring compliance with the prohibition of indiscriminate attacks.[187] As will be discussed below, understanding the impact of weapons on civilians is also crucial in the context of proportionality assessments.

THE PROHIBITION OF DISPROPORTIONATE ATTACKS

Military operations which target combatants and military objectives must respect the principle of proportionality. This principle expressed in Article 51(5)(b) AP I prohibits attacks which 'may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.[188] As a rule of customary IHL, the prohibition of disproportionate attacks applies to both international and non-international armed conflicts.[189] The intentional violation of this prohibition is criminalised under Article 85(3)(b) AP I and Article 8(2)(b)(iv) of the Rome Statute.[190]

Proportionality in military operations has two main functions: (i) it forms part of the precautions which must be taken prior to an attack under Article 57(2)(a)–(b) AP I and customary IHL;[191] and (ii) its violation amounts to an indiscriminate attack under Article 51(5)(b) AP I.[192] The proportionality assessment is thus made *ex ante*, while the effects of an attack can only be known *ex post*.[193] As such, the data gathered after an

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of the March 2017 Mosul Air Strike Investigation]; NATO, 'Protection of Civilians: Allied Command Operations Handbook' (2020) 21–22.

[186] Gisel (n 159) 111; NATO, 'Protection of Civilians: Allied Command Operations Handbook' (2020) 22 (noting that without information from post-strike assessments "local forces and coalition lacked comprehensive capacity to adjust tactics to reduce civilian harm"). See also Muhammedally (n 184) 245.

[187] Muhammedally (n 184) 245.

[188] AP I, art 51(5)(b); ICRC Customary International Law Study (n 140) Rule 14.

[189] ICRC Customary International Law Study (n 140) Rule 14 ('Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.').

[190] AP I, art 85(3)(b); Rome Statute, art 8(2)(b)(iv).

[191] AP I, art 57(2)(a)–(b); ICRC Customary International Law Study (n 140) Rule 15.

[192] AP I, art 51(5)(b).

[193] Sassòli (n 153) para 8.322.

attack plays an essential role in determining whether an attack was in fact proportionate as well as informing subsequent *ex ante* assessments of proportionality.[194]

The outcome of the proportionality assessment is thus determined by the information available to the attacker at the time of planning and launching an attack.[195] Such information comprises 'collateral damage estimations' ('CDEs'), which allow military commanders to anticipate and mitigate incidental civilian casualties.[196] A proportionality assessment must therefore take into account:

- civilian casualties or injuries and damage to civilian objects directly caused by the attack;[197]
- indirect and reasonably foreseeable incidental harm to civilians and civilian objects caused by the attack.[198] The proportionality assessment must consider 'reverberating' or 'knock-on' effects, which are not immediate consequences of the attack.[199] In the case of explosive weapons and air strikes, these reverberating effects include civilian casualties resulting from damage to civilian objects, such as buildings or civilian infrastructure (e.g. hospitals or schools), and civilian casualties caused by explosive remnants of war (i.e. unexploded munitions which can kill civilians years after the end of hostilities);[200] and
- the anticipated concrete and direct military advantage which must be 'substantial and relatively close in time' rather than hypothetical or only manifesting in the long term.[201]

As the effects of an attack are only known *ex post*, the accuracy of CDEs can only be confirmed by recording and tracking civilian casualties in the aftermath of an attack.

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[194] *Prosecutor v Galić* (Trial Judgement and Opinion) IT-98-29-T (5 December 2003) para 58 ('in determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack').

[195] *Ibid*. See also Emanuela-Chiara Gillard, 'Proportionality in the Conduct of Hostilities – The Incidental Harm Side of the Assessment' (Chatham House, December 2018) para 54 <https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incidental-harm-gillard-final.pdf> accessed 1 October 2021.

[196] NATO, 'Allied Joint Doctrine for Joint Targeting' (NATO Standardization Office, 8 April 2016) AJP-3.9 paras 0122–0123 [hereinafter NATO Targeting Doctrine].

[197] OCHA Report on the Humanitarian Impact of Explosive Weapons (n 158) 15.

[198] *Ibid*; Isabel Robinson and Ellen Nohle, 'Proportionality and precautions in attack: The reverberating effects of using explosive weapons in populated areas' (2016) 98(1) International Review of the Red Cross 107, 132.

[199] ICRC 2015 Expert Meeting on Explosive Weapons in Populated Areas (n 181) 21.

[200] *Ibid*; Gisel (n 159) 105; Robinson and Nohle (n 198) 122; OCHA Report on the Humanitarian Impact of Explosive Weapons (n 158) 11, 15.

[201] ICRC Commentary to AP I (n 126) para 2209.

Civilian casualty recording and tracking is thus crucial to ensuring compliance with the principle of proportionality in several ways:

- With respect to the immediate effects of an attack, such as an air strike, civilian casualty recording and tracking allows military commanders to determine the accuracy of a proportionality assessment and the extent of the incidental damage caused by explosive weapons in order to refine proportionality assessments and CDEs for future attacks.[202] Recording and tracking civilian casualties may also enable armed forces to uncover potential violations of IHL in the aftermath of an attack.[203]
- With respect to the reverberating effects of an attack, civilian casualty recording and tracking informs the reasonable foreseeability of these effects. Past experience and knowledge gained from each attack, including air strikes, will enable attackers to understand the exact impact of explosive weapons in civilian populated areas and refine their proportionality assessments to limit indirect civilian casualties in the future.[204] Notably, the UN Secretary-General's 2019 Report on the Protection of Civilians in Armed Conflict stresses the need to take into account, in proportionality assessments, any damage to civilian objects resulting from previous attacks.[205]
- With respect to the anticipated military advantage, recording and tracking civilian casualties in Battle Damage Assessments ('**BDAs**') allows attackers to accurately weigh the military advantage gained from an attack against civilian casualty accounts and recalibrate their proportionality assessments accordingly.[206]

Notably, civilian casualty recording and tracking has been identified, in the UN Secretary-General's 2019 Report on the Protection of Civilians in Armed Conflict, as a means of improving proportionality assessments. This report also emphasised the need for BDAs to systematically integrate casualty recording and tracking procedures.[207]

In practice, Collateral Damage Assessments ('**CDAs**') conducted alongside or integrated within BDAs have been recognised by the United States and the European Union's Military Committee ('**EUMC**') (in the context of European Union-led military operations)

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[202] Gillard (n 195) para 171.

[203] *Ibid*, para 174.

[204] *Ibid*, paras 172, 175; ICRC 2015 Expert Meeting on Explosive Weapons in Populated Areas (n 181) 22.

[205] UNSC, 'Protection of civilians in armed conflict – Report of the Secretary-General' (7 May 2019) UN Doc S/2019/373, para 56 [hereinafter 2019 Report on the Protection of Civilians in Armed Conflict].

[206] NATO Targeting Doctrine (n 196) para 0209; Gillard (n 195) para 173; Centre for Civilians in Conflict and Columbia Law School Human Rights Institute, 'In Search of Answers: U.S. Military Investigations and Civilian Harm' (2020) 43–44 <https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/in_search_of_answers_report_-_us_military_investigations_and_civilian_harm.pdf> accessed 1 October 2021 [hereinafter U.S. Military Investigations and Civilian Harm].

[207] 2019 Report on the Protection of Civilians in Armed Conflict (n 205) para 56.

as a means of assessing the effect of military operations on the civilian population.[208] CDAs have also been shown to facilitate 'operational and institutional learning' to prevent and minimise civilian casualties in future operations.[209] As such, the EUMC requires that CDAs occur continuously and immediately after the occurrence of collateral damage incidents to accurately determine the number of civilian casualties.[210]

Importantly, the UN Secretary-General's 2019 and 2020 Reports on the Protection of Civilians in Armed Conflict, as well as US military operational experience, recognise on-site investigations and witness interviews as crucial to establishing a complete record of civilian casualties in the aftermath of air strikes.[211] Practice has shown that civilians located inside buildings may be overlooked by pre-air strike aerial surveillance and that damage to, or destruction of, these buildings may cause incidental civilian casualties unaccounted for by post-air strike aerial surveillance and BDAs.[212]

Civilian casualty recording and tracking thus plays an essential role in facilitating civilian casualty mitigation, as well as monitoring and ascertaining compliance with the principle of proportionality.

THE OBLIGATION TO TAKE ALL FEASIBLE PRECAUTIONS IN ATTACK AND AGAINST THE EFFECTS OF ATTACKS

Even if an attack complies with the principles of distinction and proportionality, IHL imposes on attackers an obligation to take all feasible precautions to avoid or minimise civilian casualties. This obligation is expressly stated in Article 57 AP I, and applies, as a rule of customary IHL, to both international and non-international armed conflicts.[213]

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[208] US Joint Chiefs of Staff, 'Joint Targeting – Joint Publication 3-60' (31 January 2013) Appendix D, at D–5 <https://www.justsecurity.org/wp-content/uploads/2015/06/Joint_Chiefs-Joint_Targeting_20130131.pdf> accessed 1 October 2021; European Union Military Committee, 'Avoiding and Minimizing Collateral Damage in EU-Led Military Operations Concept' (Council of the European Union 2016) paras 49–50 <http://data.consilium.europa.eu/doc/document/ST-5785-2016-INIT/en/pdf> accessed 1 October 2021. See also OCHA Report on the Humanitarian Impact of Explosive Weapons (n 158) 62–63.

[209] *Ibid*.

[210] European Union Military Committee (n 208) 49–50.

[211] Kolenda and others (n 171) 22; 2019 Report on the Protection of Civilians in Armed Conflict (n 205) para 56; U.S. Military Investigations and Civilian Harm (n 206) 44; UNSC, 'Protection of civilians in armed conflict – Report of the Secretary-General' (6 May 2020) UN Doc S/2020/366, para 60 [hereinafter 2020 Report on the Protection of Civilians in Armed Conflict]. See also Department of the Army, 'Site Exploitation' (Army Techniques Publication July 2015) ATP 3-90.15, for a detailed explanation of US practice relating to evidence gathering and on-site investigations.

[212] Holewinski and others (n 171) 32; Kolenda and others (n 171) 22 (indicating that in 19 out of 21 cases, ground-led investigations uncovered civilian casualties overlooked by aerial BDAs). See, e.g., 'US air strike on IS killed 105 civilians in Iraq's Mosul' BBC News (25 May 2017) <https://www.bbc.com/news/world-middle-east-40051640> accessed 1 October 2021.

[213] ICRC Customary International Law Study (n 140) Rules 15–21.

Article 57(1) AP I provides that 'constant care shall be taken to spare the civilian population, civilians and civilian objects'.[214] This duty to exercise 'constant care' to protect the civilian population entails an investigation of incidents in which civilians were killed, and, by implication, the recording and tracking of civilian casualties.[215] The duty to exercise constant care is operationalised through Article 57(2) AP I, which sets out the precautions that must be taken in attack.[216] Feasible precautions include:

- verifying, under Article 57(2)(a)(i) AP I, that the objectives to be attacked are neither civilians nor civilian objects, and that the attack respects the principle of proportionality;
- choosing, under Article 57(2)(a)(ii) AP I, means (i.e. weapons) and methods (i.e. tactics) that will avoid or minimise civilian casualties;
- refraining from launching attacks which would violate the principle of proportionality (Article 57(2)(a)(iii) AP I);
- cancelling attacks when it becomes apparent that they are not directed towards military targets or that they would violate the principle of proportionality (Article 57(2)(b) AP I); and
- targeting military objectives which may be expected to cause the least danger to civilian lives and to civilian objects, when a choice is possible between several military objectives in order to obtain a similar military advantage (Article 57(3) AP I).

Notably, Article 57(2)(a)(i) and (ii) AP I, impose respectively that 'everything feasible' be done to verify objectives and that 'all feasible' precautions be taken.[217] Although these provisions appear to require a high degree of caution and care from attackers, the measures that must be taken are limited to those deemed 'feasible', which may vary in light of military and humanitarian considerations, the urgency of the attack, and the proximity of civilians.[218] Furthermore, the practical realities of armed conflict pose several

[214] AP I, art 57(1).

[215] Amy L Tan, 'The Duty to Investigate Alleged Violations of International Humanitarian Law: Outdated Deference to an Intentional Accountability Problem' (2016) 49 NYU Journal of International Law and Politics 181, 205. See also Amichai Cohen and Yuval Shany, 'Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts' (2014) 14 Yearbook of International Humanitarian Law 37.

[216] See also ICTY, 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia' (1999) para 28 <https://www.icty.org/sid/10052> accessed 1 October 2021 ('There is a duty to 'take all practicable precautions in the choice of methods and means of warfare with a view to avoiding or, in any event to minimizing incidental civilian casualties or civilian property damage.').

[217] AP I, art 57(2)(a)(i)–(ii).

[218] See the UK's Reservation to AP I where 'feasibility' has been interpreted as meaning 'practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations'. 'Treaties, States Parties and Commentaries' (ICRC) <https://ihl-

challenges to monitoring compliance with the obligation to take all feasible precautions. For instance, the inherent secrecy surrounding the planning and decision-making process of military commanders prevents any independent or external assessment of the possibility and practicability of alternative precautions at the time of the attack.[219] It is therefore important to ensure that records of this decision-making process and of feasible precautions be maintained and made publicly available, or accessible through a review procedure or mechanism, to encourage compliance with the obligations of Article 57 AP I.[220] Data on operational planning is especially important in the context of air strikes, often conducted in areas where a lack of ground control prevents on-site inspections, and where UAVs may be the immediate, most obvious, and only means of assessing civilian casualties, despite the inaccurate accounts that they may yield.[221]

The assessment of feasible precautions is also inherently linked to the intelligence available at the time of an attack. The importance of information gathering was highlighted in the *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*.[222] The Report concluded that 'an effective intelligence gathering system to collect and evaluate information concerning potential targets' is central to the performance of the obligation to take feasible precautions.[223]

Furthermore, information gathering is essential to improving an attacker's ability to estimate direct and indirect incidental or collateral damage.[224] Robust mechanisms that accurately record and track civilian casualties must therefore be established to ascertain compliance with the obligation to take feasible precautions and avoid or minimise instances of civilian harm.[225] With regard to the scope of the information required, the

databases.icrc.org/ihl/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument> accessed 1 October 2021. See also Julie Gaudreau, 'The reservations to the Protocols additional to the Geneva Conventions for the protection of war victims' (2003) 849 International Review of the Red Cross 143.

[219] Sassòli (n 164) para 8.333.

[220] See *ibid*.

[221] See International Committee of the Red Cross (ICRC), 'Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice' (Geneva, 2019) para 139 [hereinafter ICRC Investigation Guidelines].

[222] ICTY, 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia' (n 216) para 29.

[223] *Ibid*.

[224] Gillard (n 195) para 167.

[225] See 2021 Report on the Protection of Civilians in Armed Conflict (n 126) para 14.

need for reliable and accurate recording and tracking mechanisms demands that all information relating to potential civilian casualties be gathered.[226]

Intelligence gained from analysing incidental harm caused by military operations, such as air strikes in civilian-populated areas, is crucial to operational and institutional learning efforts.[227] The reliability of proportionality assessments is affected by knowledge gained from operational experience, and the failure to accurately record and track civilian casualties may lead to inadequate precautions being taken to minimise harm caused to civilians. Therefore, recording and tracking civilian casualties is essential to monitoring, ascertaining, and ensuring compliance with IHL and the obligation to exercise constant care and take all feasible precautions to protect civilians.[228]

[226] Christof Heyns and others, 'The International Law Framework Regulating the Use of Armed Drones' (2016) 65 ICLQ 791, 814.

[227] See Lesley Wexler, 'International Humanitarian Law Transparency' (2013–2014) 23 Journal of Transnational Law and Policy 93, 114; Challenges of Contemporary Armed Conflicts (n 180) 52–53; Gillard (n 195) para 171; European Union Military Committee (n 208) para 50.

[228] See 2021 Report on the Protection of Civilians in Armed Conflict (n 126) para 14.

THE OBLIGATION TO INVESTIGATE VIOLATIONS OF IHL AND WAR CRIMES

Civilian casualty recording and tracking facilitates, and is an essential component of, the UK's compliance with its obligation to investigate violations of IHL and war crimes. The UK is under an obligation to:

- respect and ensure respect for IHL (Common Article 1 of the Geneva Conventions and Customary Rule 139);
- repress grave breaches of IHL and investigate war crimes (Article 146 GC IV, Articles 85 and 86(1) AP I, and Customary Rule 158); and
- suppress all other violations of IHL (Article 146 GC IV and Article 86(1) AP I).

Accurately recording and tracking civilian casualties is necessary to ensure that the UK complies with its obligation to respect IHL. The data gained from recording civilian casualties will allow the UK to determine whether potential violations of IHL have been committed, and it may trigger its duty to repress grave breaches and suppress all other violations of IHL. This duty, in turn, entails a duty to investigate the lawfulness of actions taken during armed conflict. Accurate records and accounts of civilian casualties are needed to establish the facts of an incident and conduct a thorough investigation.

The 2016 Report on the Protection of Civilians in Armed Conflicts identified several recommendations aimed at improving compliance with international law and accountability for violations.[229] Notably, the UN Secretary-General called on States to '[s]upport the development of mechanisms to systematically collect and analyse information and strengthen the reporting on the protection of civilians in armed conflict' and '[i]nvestigate and prosecute allegations of serious violations of international humanitarian, human rights and refugee law'.[230] In doing so, the Secretary-General highlighted the fundamental relationship between collecting information on civilian casualties and the successful investigation and prosecutions of violations of IHL.

IHL treaties and customary IHL impose on parties to a conflict an obligation to *respect and ensure respect* for IHL. Under Common Article 1 of the Geneva Conventions and Article 1 AP I, the 'High Contracting Parties [have undertaken] to respect and to ensure respect for' IHL by their armed forces.[231] As a rule of customary IHL, this obligation

[229] UNSC, 'Report of the Secretary-General on the protection of civilians in armed conflict' (13 May 2016) UN Doc S/2016/447, para 66.

[230] *Ibid*.

[231] GC I, art 1; GC II, art 1; GC III, art 1; GC IV, art 1; AP I, art 1.

applies to both international and non-international armed conflicts. Customary Rule 139 provides that:

> *[e]ach party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control.*[232]

The failure to respect and ensure respect for IHL can give rise to State responsibility, which may place the responsible State under an obligation to ensure the cessation, non-repetition, and reparation of a violation.[233] Importantly, under international law, States are responsible for the actions of their armed forces, and any violations of IHL committed by the latter are attributable to the former.[234]

In addition to the general obligation to respect and ensure respect for IHL, IHL imposes a duty to ***repress*** **grave breaches** and ***suppress*** **all other violations** of IHL affecting civilians.[235] This duty is expressly stated in GC IV and AP I:

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[232] ICRC Customary International Law Study (n 140) 495.

[233] See ICRC Investigation Guidelines (n 221) paras 21–25; International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries' (2001) UN Doc A/56/10, arts 30–31; *Armed Activities on The Territory of The Congo* (*Democratic Republic of The Congo v Uganda*) (Judgment) [2005] ICJ Rep 168, paras 255–259.

[234] International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries' (2001) UN Doc A/56/10, art 4; AP I, art 91; ICRC Customary International Law Study (n 140) Rule 149. See also GC IV, art 148.

[235] Jean S Pictet (ed), *Commentary on the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross, 1958) 593–594. *Repression* concerns violations of IHL criminalised under IHL treaties and customary IHL. Such violations constitute war crimes, which are defined as 'grave breaches' of IHL and 'other serious violations' of the laws and customs of war in international and non-international armed conflicts pursuant to Article 8(a)–(b), (e) of the Rome Statute. When State armed forces are suspected of war crimes, a criminal investigation is mandatory under Article 146 GC IV and Customary Rule 158. Domestically, this investigation may lead to individual criminal responsibility in UK law under the *International Criminal Court Act 2001*. In the event that the International Criminal Court exercises jurisdiction over the matter pursuant to Article 17 of the Rome Statute, States Parties still remain under an obligation to 'cooperate fully with the Court in its investigation and prosecution'. *Suppression* is broader than the duty to repress grave breaches and seeks to ensure the cessation and prevention of violations of IHL. Suppression thus refers to all other measures taken in response to non-criminal violations of IHL. Aside from criminal investigations, these measures may include administrative measures, such as administrative investigations and sanctions. Rome Statute, arts 8, 17, 86; International Criminal Court Act 2001, p 5; ICRC Customary International Law Study (n 140) Rule 158 ('States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.'); ICRC Investigation Guidelines (n 221) para 16.

- Article 146 GC IV provides that the ' High Contracting Parties' must, under their domestic law, punish 'grave breaches' of the Geneva Conventions, investigate and prosecute persons alleged to have committed or ordered the commission of these grave breaches, and 'take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in [Article 147 GC IV]'.[236]
- Article 85 AP I requires that parties to the Protocol repress breaches and grave breaches of AP I. Additionally, Article 86(1) AP I imposes a duty to 'repress grave breaches and take measures necessary to suppress all other breaches of the Conventions or of this Protocol', arising both from acts and omissions.[237]

Neither AP II nor Common Article 3, which guarantees a minimum level of protection to 'persons taking no active part in the hostilities' (such as civilians) in non-international armed conflicts, make any mention of a duty to investigate.[238] However, GC IV and AP I's obligation to suppress 'all acts contrary to the provisions of [GC IV]' and 'all other breaches, of the Conventions' covers violations of Common Article 3.[239] As such, when it comes to investigating violations of IHL, no difference should be made between international and non-international armed conflicts.[240] Accordingly, both the duty to repress grave breaches and suppress all other violations of IHL entail an obligation to investigate civilian casualties, irrespective of the nature of the armed conflict.[241]

The repression and suppression of grave breaches and all other violations of IHL is operationalised through military commanders.[242] They must proactively investigate

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[236] *Ibid*, 590. See GC IV, art 147, which defines grave breaches as 'those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'.

[237] ICRC Commentary to AP I (n 126) para 1005.

[238] See GC IV, art 3.

[239] Second Report of the Public Commission to Examine the Maritime Incident of 31 May 2010 (the Turkel Commission), 'Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law' (February 2013) 79–80, para 27 [hereinafter Second Report of the Turkel Commission]; Lattimer (n 135) 54.

[240] *Ibid*.

[241] Lattimer (n 135) 53–54; Second Report of the Turkel Commission (n 239) 79–80, para 27. See generally ICRC Investigation Guidelines (n 221).

[242] The performance of this duty is supported by the doctrine of command responsibility (Article 28 of the Rome Statute, Article 86 AP I and Customary Rule 153). According to this doctrine, commanders and superiors at every level of the chain of command are criminally liable for failing to carry out their duty of repression and suppression when they knew or should have known that forces or subordinates under their

possible violations of IHL as their authority places them 'in a position to establish or ensure the establishment of the facts'.[243] Fact-finding constitutes the 'starting point for any action to suppress or punish a breach'.[244] Accordingly, the establishment of an accurate record of civilian casualties is necessary to determine whether an incident calls for an investigation and whether a violation of IHL has been committed.[245] It may also facilitate the confirmation or denial of internal reports or external allegations of violations of IHL during military operations and can serve as evidence in investigations.[246]

In spite of the operational challenges of armed conflicts, military commanders must strive to ensure that investigations are conducted on the basis of accurate information, especially with respect to civilian casualty records and accounts.[247] This includes ensuring that civilian casualty information be gathered through ground-led inspections and investigations. The UN Secretary-General's 2019 and 2020 Reports on the Protection of Civilians in Armed Conflict as well as US military operational experience indeed reveal that accurate civilian casualty accounts cannot be established by relying solely on aerial assessments.[248] Furthermore, records of operational planning to review

effective authority and control committed war crimes. AP I, art 87(1) (requiring that the High Contracting Parties and parties to a conflict impose on military commanders a duty to prevent, suppress, and report to competent authorities all violations of IHL committed by persons under their command or control); Rome Statute, art 28; AP I, art 86; ICRC Commentary to AP I (n 126) paras 3554–3555; ICRC Customary International Law Study (n 140) Rule 153; William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2016) 612; Yoram Dinstein, 'Command Responsibility', *Max Planck Encyclopedia of Public International Law* (September 2015) para 18 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e273> accessed 1 October 2021.

[243] ICRC Commentary to AP I (n 126) para 3560; Michael N Schmitt, 'Investigating violations of international law in armed conflict' (2011) 2 Harvard National Security Journal 31, 41; Lattimer (n 135) 53.

[244] ICRC Commentary to AP I (n 126) para 3560; Lattimer (n 135) 59.

[245] See ICRC Investigation Guidelines (n 221) paras 69, 71.

[246] *Ibid*, para 71. Such was the case of the ISAF Civilian Casualty Tracking Cell, which was created out of a need to address and verify allegations of ISAF-caused civilian casualties. Jennifer Keene, 'Civilian Harm Tracking: Analysis of ISAF Efforts in Afghanistan' (Center for Civilians in Conflict (CIVIC), 2014) 2.

[247] 2019 Report on the Protection of Civilians in Armed Conflict (n 205) para 56; 2020 Report on the Protection of Civilians in Armed Conflict (n 211) para 60. See ICRC Investigation Guidelines (n 221) para 139 (stating that in some situations, UAVs may provide the only means of assessing the impact of air strikes).

[248] See Kolenda and others (n 171) 22; 2019 Report on the Protection of Civilians in Armed Conflict (n 1205) para 56; 2020 Report on the Protection of Civilians in Armed Conflict (n 211) para 60; U.S. Military Investigations and Civilian Harm (n 206) 43–44. For instance, a 2017 ground-led investigation by the US Department of Defense into a Coalition air strike targeting two ISIS snipers sheltered in a building in Mosul revealed that the air strike had caused between 105 and 146 civilian casualties. In this instance, pre-air strike surveillance had failed to reveal 101 civilians sheltering in the bottom floors of the building. These civilians died in the collapse of the building after the explosion from the air strike ignited a hidden stock of explosives. In addition to these unforeseen casualties, 4 civilians were killed in a neighbouring structure and 36 civilians remained unaccounted for. On site-investigations were thus crucial to establishing a

the decision-making process, in addition to information acquired through aerial assessments and on-site inspections, are crucial to an investigation.[249]

In light of the foregoing, thorough investigations of violations of IHL are facilitated by civilian casualty recording and tracking.[250] Accurate civilian casualty accounts are essential to monitoring, ascertaining, and ensuring compliance with the duty to repress and suppress grave breaches and violations of IHL.

CONCLUSION — IHL AND THE DUTY TO RECORD

Obligations relating to the search for, and identification of, the missing and the dead, resulting from IHL treaties and customary IHL, constitute the foundational elements of the obligation to record civilian casualties. Civilian casualty recording and tracking is necessary from an operational perspective to monitor, ascertain, and ensure that IHL is complied with during military operations. Although military practices show that civilian casualty recording is increasingly integrated into military operations, the lack of transparency in military planning, coupled with inaccurate casualty accounts, hampers the ability to review a State's compliance with IHL.

Without accurate civilian casualty recording and tracking processes, the ability to investigate incidents likely to amount to violations of IHL and war crimes is restricted. The inability to conduct a complete and thorough investigation into civilian casualties may result in a failure to repress grave breaches of IHL or suppress other violations of IHL. In turn, such a failure may give rise to State responsibility under international law. The implementation of a robust and accurate civilian casualty recording and tracking process is necessary to allow parties to a conflict to review the legality of their military operations and ensure compliance with IHL.

complete record of the civilian casualties caused by the air strike. Findings of the March 2017 Mosul Air Strike Investigation (n 185).

[249] See ICRC Investigation Guidelines (n 221) para 139.

[250] *Ibid*, 138–139.

PART D. THE UNITED KINGDOM'S OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

PART D. OVERVIEW

Under International Human Rights Law States are obliged to investigate and, by implication, to record, civilian casualties falling within their (territorial or extraterritorial) jurisdiction. This obligation is engaged irrespective of whether such casualties occur in, or outside of, the context of an international or non-international armed conflict.

The obligation to investigate and thus to record civilian casualties is principally based on the right to life, the right to security of the person and the prohibition of cruel, inhuman or degrading treatment. In addition, the right to family life and the protection of the family unit, the right to freedom of religion and belief, the right to an effective remedy, as well as the foundational principle and right to human dignity, further support the finding of such an obligation under the above-mentioned rights.

The obligation to report, or to publicly disclose, the recorded number of civilian casualties occurring within the jurisdiction of, and being attributable to the use of force by, the UK, by contrast, is primarily based on the right to freedom of expression and the right to freely seek and receive information. It is generally acknowledged that information regarding (potential) violations of human rights or humanitarian law is subject to a high presumption of disclosure, and, in any event, may not be withheld on national security grounds in a manner that would prevent accountability for violations or deprive a victim of access to an effective remedy.

All of these rights are recognised in international and regional human rights treaties—in particular, the International Covenant on Civil and Political Rights and the European Convention on Human Rights—ratified by the UK. Crucially, these human rights apply to State actions in instances of use of force outside an international or non-international armed conflict and continue to apply in the context of international and non-international armed conflicts, alongside international humanitarian law as the *lex specialis* (considered in Part C above).

Image: The Euphrates River near Manbij, Syria. **Source:** Ivor Prickett for The New York Times (3 August 2018) <https://www.nytimes.com/2018/08/03/world/middleeast/syria-euphrates-river-war.html>

It is important to emphasise that while the freedom of expression is applicable 'regardless of frontiers', other human rights obligations arguably extend extraterritorially where States are engaged in certain forms of military action beyond their own borders. Furthermore, although the right to freedom of expression may be subject to restrictions on national security grounds, any such restriction is subject to very strict conditions. There is a generally acknowledged high presumption of disclosure of information on potential violations of human rights or humanitarian law committed by State agents.

INTERNATIONAL HUMAN RIGHTS LAW — SOME PRELIMINARY ISSUES

This Part of the research paper examines whether States have an obligation to record and publicly report civilian casualties under international human rights law ('IHRL'). It answers this question for uses of force attributable to a State taking place in the context of international and non-international armed conflicts as well as in instances of a use of force outside of the context of an armed conflict (for instance, a drone strike against alleged terrorists in Pakistan). This part will first consider three preliminary questions:

- How does IHRL relate to international humanitarian law ('IHL'), and does it apply in a conflict alongside IHL? This is important to understand how the law discussed in this Part works alongside the law identified in Part C.
- Do human rights apply extraterritorially? That is, are the UK's obligations under IHRL restricted to conduct taking place within the UK?
- Under which circumstances can human rights be derogated from or limited?

After dealing with these preliminary issues, this Part will go on to consider the various human rights obligations incumbent on the UK, and to what extent these give rise to a binding obligation to accurately record and publicly report civilian deaths that arise out of the UK's military activity.

RELATIONSHIP BETWEEN IHRL AND IHL

IHRL protects individuals at all times, in peace and international and non-international armed conflicts alike. In contrast to IHL, IHRL accordingly also applies to situations involving a use of armed force by the UK outside the context of an international or non-international armed conflict. Importantly, however, IHRL continues to apply alongside IHL to the UK in its conduct of armed conflict.

In case of inconsistencies among the applicable IHL and IHRL obligations, the more specific provision—in the context of armed conflict, this is usually the IHL rule—will prevail. Otherwise, the rules of IHL or IHRL have to both be taken into account when interpreting provisions.

It has by now become accepted that IHRL applies not only in peace time but also in situations of armed conflict.[251] Reiterating what it had already held in the *Threat or Use*

[251] Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd edn, CUP 2018) 649 et seq.; Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP 2011), 5; Derek Jinks, 'International Human Rights Law in Time of Armed Conflict' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 656 et seq.; Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (CUP 2015) 82 et seq.; Sandesh

of Nuclear Weapons advisory opinion,[252] the International Court of Justice ('ICJ') — the UN's principal judicial organ[253] — accordingly held in its *Construction of a Wall* advisory opinion that:

> *the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.*[254]

The precise relationship between IHL and IHRL has therefore been the subject of much discussion. In this regard, the ICJ opined that:

> *there are … three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.*[255]

For present purposes, the third category—rights which are matters of both IHRL and IHL—is particularly pertinent. Both IHL and IHRL contain, explicitly or implicitly, provisions on the recording, investigation, and public reporting or disclosure of civilian casualties. In such situations, two approaches may define the relationship amongst the applicable rules.

Sivakumaran, 'International Humanitarian Law' in Daniel Moeckli, Sangeeta Sha and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, OUP 2018) 503.

[252] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 para 25.

[253] See Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 (UN Charter) art 92.

[254] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 106; this was later again reiterated in *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) [2005] ICJ Rep 168, para 216.

[255] *Wall* (n 254) para 106.

The first is the *lex specialis* principle. According to the *lex specialis* principle, the more specific rule takes precedence over the more general rule.[256] To the extent that there are any inconsistencies between the general and the specific rule, the latter modifies the former. Concerning the right to life (which we are primarily concerned with here, regarding civilian casualty recording), the ICJ accordingly observed that:

> *[i]n principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.*[257]

The second approach to resolving inconsistencies is that, pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties, when interpreting a treaty '[t]here shall be taken into account, together with the context … [a]ny relevant rules of international law applicable in the relations between the parties'. IHL must, on this account, be considered when interpreting IHRL norms in armed conflicts and *vice versa*.

In the following elaborations reference is thus made to IHL in order to clarify the scope and content of various human rights.

The question of which legal regime applies to air and drone strikes outside 'areas of active hostilities' is, in contrast, much more controversial.[258] Undisputedly, outside the context of armed conflict, such strikes are governed by IHRL standards.[259] However, the existence and the (territorial) scope of an armed conflict where fought against alleged terrorists ('non-State armed groups') is highly contentious. For, to the extent that IHL

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[256] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,* Report of the Study Group of the International Law Commission UN Doc A/CN.4/L.682 (4 April 2006) paras 56–122; Hans-Joachim Heintze, 'On the Relationship between Human Rights Law Protection and International Humanitarian Law' (2004) 86 International Review of the Red Cross 789, 796; Marko Milanović, 'The Lost Origins of *Lex Specialis*: Rethinking the Relationship between Human Rights and International Humanitarian Law' in Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016) 78 et seq.

[257] *Nuclear Weapons* (n 252) para 25.

[258] For a brief overview of the debate, see Philip Alston, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings' (28 May 2010) UN Doc A/HRC/14/24/Add.6, paras 28 et seq.

[259] Jelena Pejic, 'Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications' (2014) 96 International Review of the Red Cross 67, 74.

governs such strikes, it may—if not displace—redefine the content of IHRL, which in general imposes much stricter conditions on the use of lethal force.

An in-depth discussion of this, as of yet, unsettled question lies beyond the scope and purpose of this research paper. Irrespective of the legality or illegality of such a use of lethal force under the respective regimes, the present research paper is exclusively concerned with the obligations to record and publicly report civilian casualties. As such obligations—as argued in the previous part and this part—may find a legal basis in both IHL and IHRL, the outcome of applying one but not necessarily the other is comparable for relevant purposes. This is particularly so since, as emphasised by Monika Hakimi, 'the standard in human rights law for using lethal force is itself highly context-dependent'.[260]

DEROGATIONS FROM AND LIMITATIONS TO RIGHTS UNDER IHRL

This context-dependency is partly due to the possibility to derogate from or limit some human rights. Derogations from certain human rights are permitted in situations of public emergency threatening the life of a nation. However, the particularly relevant right to life (with the duty to investigate civilian death as its procedural leg) and the prohibition of torture and cruel, inhuman, or degrading treatment may not be derogated from. Derogations must be distinguished from limitations. Certain human rights may lawfully be limited, if such limitation:

- is prescribed by law;
- pursues a legitimate aim; and
- is necessary in a democratic society.

States are permitted to derogate from certain obligations incurred under human rights treaties if forced to by a state of 'public emergency which threatens the life of the nation'.[261] The European Court of Human Rights ('**ECtHR**') has defined 'public emergency' under Article 15 ECHR as 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed'.[262] Armed conflicts—particularly outside the

[260] Monica Hakimi, 'Three Half-Truths on U.S. Lethal Operations and Policy Constraints' (25 September 2017) Just Security <https://www.justsecurity.org/45315/half-truths-u-s-lethal-operations-policy-constraints/> accessed 1 October 2021. See also Monica Hakimi, 'A Functional Approach to Targeting and Detention' (2012) 110 Michigan Law Review 1365, 1381.

[261] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 4(1); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 15(1) [hereinafter ECHR].

[262] *Lawless v Ireland* (1979–80) 1 EHRR 15, para 28.

national territory of an engaged State—do not inherently constitute such a public emergency allowing for a derogation.[263] Accordingly, so far no State has derogated from the ECHR in respect of its overseas military operations. Moreover, any derogations would have to be strictly limited to what is 'required by the exigencies of the situation'[264] and be consistent with other obligations under international law. This means, in particular, that States cannot use such derogations to violate IHL.

Importantly, however, neither the right to life nor the prohibition of torture and cruel, inhuman, or degrading treatment—on which an obligation to investigate and, by implication, to record civilian casualties may be based—can be derogated from.[265] Accordingly, a failure to adequately record civilian casualties cannot be justified with reference to a derogation.

Derogations must be distinguished from *limitations* of particular rights. While some rights—such as the right not to be tortured[266]—are absolute and cannot be limited, most are not. Such limitations are typically subject to a tripartite test to ensure that they are in conformity with human rights. Limitations to rights must, cumulatively:

1. be prescribed by law;
2. pursue a legitimate aim; and
3. be necessary in a democratic society.[267]

A failure to adequately record and publicly report the number of civilian casualties resulting from the UK's use of force should primarily be qualified as an omission rather than an intended limitation of any of the rights on which it may be based. As a potential limitation on national security grounds may, in particular, be invoked with regard to the public reporting or disclosure of the number of civilian casualties, the legality of such a limitation will be discussed in more detail below, in the section on the freedom of expression and the right to access information. Importantly, the passing of the Overseas

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[263] General Comment No. 29: Article 4: Derogations During a State of Emergency (31 August 2001) UN Doc HRI/GEN/1/Rev.9 (Vol I) 234, para 3.

[264] ICCPR, art 4(1); ECHR, art 15(1).

[265] ICCPR, art 4(2); ECHR, art 15(2), which, however, excludes 'deaths resulting from lawful acts of war' from the exception. See also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 2(2), which explicitly states that '[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture'.

[266] *Ireland v United Kingdom* App. No. 5310/71 (ECtHR, 18 January 1978) para 163; *Chahal v United Kingdom* [GC] App. No. 22414/93 (ECtHR, 15 November 1996) para 96; *Al-Adsani v United Kingdom* [GC] App. No. 35763/97 (ECtHR, 21 November 2001) para 59.

[267] See, e.g., ECHR, art 10(2); ICCPR, art 12(3); Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III) (UDHR) art 29(2).

Operations Act does not change this assessment. As noted in the Addendum above, the Act does not modify the government's obligation—either under domestic public law or under IHRL—to investigate, record and report civilian casualties. While Parliament may theoretically legislate to detach the protections under the Human Rights Act from the relevant corresponding provisions of the ECHR, this would not affect the responsibility of the UK under the Convention. The UK would thus remain responsible under IHRL, with victims being able to seek redress in international fora, including the ECtHR.

EXTRATERRITORIALITY IN IHRL

A State's human rights obligations extend extraterritorially, as the killing of civilians by air strikes brings these civilians into the jurisdiction of the State carrying out such strikes — though the law on this point remains contested. Accordingly, it could be, for example, validly claimed that IHRL applies to the UK's use of force in Syria or Iraq. Importantly, however, the ECtHR has recently affirmed that a State has an obligation to investigate under Article 2 ECHR in respect of a death which has occurred outside its territorial jurisdiction where there are 'special features'. Such 'special features' include allegations of war crimes having been committed which a State is under an obligation under IHL to investigate.

Pursuant to Article 1 ECHR, the State parties 'shall secure to everyone within their jurisdiction the rights and freedoms' defined in the Convention. Article 2(1) ICCPR similarly maintains that a State party undertakes 'to respect and to ensure to all individuals within its territory *and* subject to its jurisdiction the rights' recognised in the Covenant. As jurisdiction is primarily territorially defined, and air strikes are, at least in the case of the UK, usually carried out on or against the territory of another State, the question arises whether IHRL applies outside the territory—or, 'extraterritorially'—to such strikes. While the US[268] and Israel[269] reject the extraterritorial application of human rights obligations, it has by now become generally accepted that human rights do indeed apply extraterritorially under certain circumstances.

[268] See Beth Van Schaack, 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change' (2014) 90 International Law Studies 20. But see under the Obama Administration: Harold Hongju Koh, *Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights* (19 October 2010) United States Department of State Office of the Legal Adviser, 49 <http://www.justsecurity.org/wp-content/uploads/2014/03/state-department-iccpr-memo.pdf> accessed 1 October 2021.

[269] Michael J Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99(1) American Journal of International Law 119, 130.

In *Al-Skeini v UK*,[270] the ECtHR decided that although human rights are primarily territorial, there are 'a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries'.[271] In its case law, the Court distinguishes between the spatial and the personal model of extraterritoriality:

- Pursuant to the **spatial model**, extraterritorial human rights obligations arise, 'when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control over an area outside that national territory'.[272]
- Jurisdiction under the **personal model** arises, if a State's agents operating outside its territory use force and thereby bring an individual under their control.[273] The paradigmatic example for such use of force bringing an individual under control is the extraterritorial detention of individuals.[274]

Whether air strikes bring individuals under the control, and thus jurisdiction, of the State carrying out the respective strike is controversial. In *Banković and Others v Belgium and Others*, the ECtHR decided that NATO's aerial bombing of the Serbian Radio-Television headquarters in Belgrade would not establish a jurisdictional link sufficient for NATO's Member States to incur human rights obligations.[275] The Court has, however, since changed its stance. In *Pad and Others v Turkey* the ECtHR decided that the bombing by a Turkish helicopter in North-West Iran which killed seven Iranian men would be sufficient to establish Turkish jurisdiction over those killed.[276] Similarly, in *Jaloud v the Netherlands* the Court decided that the Netherlands were exercising jurisdiction over an Iraqi civilian killed by the Netherlands Royal Army as he passed through a military checkpoint.[277] In

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[270] A case concerning the deaths of six close relatives of the applicants in Al-Basrah, Southern Iraq, in 2003 while the UK was an occupying power. Three of the victims were shot dead or shot and fatally wounded by British soldiers; one was shot and fatally wounded during an exchange of fire between a British patrol and an unknown gunman; one was beaten by British soldiers and then forced into a river, where he drowned; and one died at a British military base, with 93 injuries identified on his body.

[271] *Al-Skeini and Others v United Kingdom* [GC] App. No. 55721/07 (ECtHR, 7 July 2011) para 132.

[272] *Ibid*, para 138. See also *Loizidou v Turkey* App. No. 15318/89 (ECtHR, 18 December 1996) para 52; *Wall* (n 254) paras 108–111 and *Armed Activities* (n 254) para 216 (on human rights obligations in occupied territories).

[273] *Ibid*, para 136. See also *Öcalan v Turkey* App. No. 46221/99 (ECtHR, 12 March 2003) para 91; *Issa and Others v Turkey* App. No. 31821/96 (ECtHR, 16 November 2004); *Al-Sadoon and Mufdhi v United Kingdom* App. No. 61498/08 (ECtHR, 30 June 2009) paras 86–89; *Medvedyev and Others v France* [GC] App. No. 3394/03 (ECtHR, 29 March 2010) para 67.

[274] *Ibid*.

[275] *Banković and Others v Belgium and Others* [GC] App. No. 52207/99 (ECtHR, 12 December 2001) para 82.

[276] *Pad and Others v Turkey* App. No. 60167/00 (ECtHR, 28 June 2007) para 54.

[277] *Jaloud v The Netherlands* [GC] App. No. 47708/08 (ECtHR, 20 November 2014) paras 140 et seq.

Georgia v Russia (II), the Court recently returned to its stance in *Banković*.[278] This has, however, been heavily criticised by commentators.[279]

It is, however, important to emphasise that the Court's finding in *Georgia v Russia (II)* only pertained to the substantive aspects of the right to life provided for in Article 2. With regard to the procedural obligation to investigate deaths occurring outside the territory under the effective control of a State, the Court has recently found that a jurisdictional link may also be established by 'special features'.[280] Such 'special features' include the allegation that a State has committed war crimes, which it is under an obligation under IHL or domestic law to investigate. Additionally, the Court emphasised that the State accused of having committed war crimes will be in the best position to adequately and effectively carry out such an investigation as the relevant military personnel will usually be on its territory or under its effective control.[281] These 'special features' would justify an obligation to investigate deaths, even where they occur outside the territory under the effective control of a State. The threshold for establishing jurisdiction is thus arguably lower for procedural obligations, such as the obligation to investigate under Article 2 ECHR with which the precent report is concerned, than for substantive obligations under international human rights law.

For the remainder of this Part of the research paper, it will be assumed that jurisdiction does apply as a result of air strikes, in particular as regards the presently pertinent procedural obligation to investigate deaths resulting from a State's use of force.

RELEVANT RIGHTS AND TREATIES

The following human rights recognised in international and regional human rights treaties ratified by the UK as well as in customary international law may give rise to an obligation to investigate, and by extension to record and to accurately publicly disclose or report civilian casualties:

- Right to Life
- Prohibition of Cruel, Inhuman or Degrading Treatment
- Right to Security of the Person

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[278] *Georgia v Russia (II)* [GC] App. No. 38263/08 (ECtHR, 21 January 2021) para 126.

[279] See Marko Milanović, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos' (EJIL:Talk! 25 January 2021) <https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/> accessed 1 October 2021.

[280] *Georgia v Russia (II)* (n 278) para 330; *Hanan v Germany* App. No. 4871/16 (ECtHR, 16 February 2021) paras 137 et seq.; see also *Güzelyurtlu and Others v Cyprus and Turkey* App. No. 36925/07 (ECtHR, 29 January 2019) para 178.

[281] *Ibid*, para 331.

- Right to Freedom of Expression
- Non-Discrimination
- Human Dignity
- Right to be Recognised before the Law
- Right to Family Life
- Protection of Family Unity
- Freedom of Religion and Belief
- Right to an Effective Remedy
- Right to Truth

The remainder of the research paper gives an overview of the relevant human rights. The next section will analyse in more detail how these human rights may give rise to the obligation to record civilian casualties in armed conflict. The final section will subsequently argue that the right to freedom of expression and the right to access information in particular may oblige States to publicly disclose the number of civilian casualties attributable to their uses of force.

Table 2 — Source of human rights relating to the obligation to record civilian casualties

Right *(example text from UDHR)*[282]	UDHR	ICCPR	ICESCR	CAT	ECHR
Dignity 'All human beings are born free and equal in dignity and rights'	preamble[283] Art 1	preamble[284]	preamble	preamble[285]	preamble[286]
Non-Discrimination 'Everyone is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind'	Art 2	Art 2(1)	Art 2(2)	–	Art 14
Right to Life 'Everyone has the right to life, liberty and security of persons'	Art 3	Art 6	–	–	Art 2
Prohibition of Cruel, Inhuman or Degrading Treatment	Art 5	Art 7	–	Art 16[287] Art 12[288]	Art 3

[282] With the exception of the right to truth, see citation below.

[283] 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world … [w]hereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms …'

[284] 'Recognising that these rights derive from the inherent dignity of the human person … Recognising that these rights derive form the inherent dignity of the human person … Considering the obligation of States under the Charter of the United Nations to Promote universal respect for, and observance of, human rights and freedoms …'

[285] 'Recognising that those rights derive from the inherent dignity of the human person, Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms … Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.'

[286] 'Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings.'

[287] 'Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture … when such acts are committed by or at the instigation of or with the consent or acquiescence of public official or other person acting in an official capacity.'

[288] Read in conjunction with CAT, art 16(1): 'Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, where there is reasonable ground to believe that an act of [cruel, inhuman or degrading treatment or punishment] has been committed in any territory under its jurisdiction.'

Right *(example text from UDHR)*[282]	UDHR	ICCPR	ICESCR	CAT	ECHR
'No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment'				Art 13[289] Art 14[290]	
Right to Security of the Person 'Everyone has the right to liberty and security of person'	Art 3	Art 9(1)	–	–	Art 5
Recognition before the Law 'Everyone has the right to recognition everywhere as a person before the law'	Art 6	Art 16	–	–	–
Right to an Effective Remedy 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'	Art 8	Art 2(3)(a)	–	–	Art 13
Right to Family Life 'No one shall be subject to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks'	Art 12	Art 18	–	–	Art 8
Family Unity	Art 16(3)	Art 23	Art 10	–	–

[289] Read in conjunction with CAT, art 16(1): 'Each State Party shall ensure that any individual who alleges he has been subject to [cruel, inhuman or degrading treatment or punishment] in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.'

[290] Read in conjunction with CAT, art 16(1): 'Each State Party shall ensure in its legal system that the victim of an act of [cruel, inhuman or degrading treatment or punishment] obtains redress and has an enforceable right to fair and adequate compensation …'

Right *(example text from UDHR)*[282]	UDHR	ICCPR	ICESCR	CAT	ECHR
'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State'					
Freedom of Religion and Belief 'Everyone has the right to freedom of thought, conscience and religion'	Art 18	Art 18	–	–	Art 9
Freedom of Opinion and Expression 'Everyone has the right to freedom of opinion and expression; this right includes the freedom to … receive and impart information … regardless of frontiers'	Art 19	Art 19	–	–	Art 10
Right to Truth 'right to know the truth vis-à-vis gross human rights violations and serious crimes under international law'[291]	–	–	–	–	–

***** NOTE ON TREATY NAMES AND THE UK'S RATIFICATIONS

Universal Declaration of Human Rights ('UDHR')

The UDHR was adopted by the UN General Assembly on 10 December 1948. As a declaration of the UN General Assembly, the UDHR is not binding on the Member States. However, most of its provisions were given treaty status in the ICCPR and the International Covenant on Economic, Social and Cultural Rights

[291] The right to the truth is explicitly codified in API, art 32 and thus originates in IHL. In IHRL, the right to the truth has been cited in relation to combating impunity, the rights of internally displaced persons to know the fate of relatives, and in the context of the remedies and reparation for serious human rights violations, see Office of the UN High Commissioner for Human Rights, *Promotion and Protection of Human Rights: Study on the Right to the Truth* (8 February 2006) UN Doc E/CN.4/2006/91, para 4. While not being explicitly recognized in the UDHR, ICCPR, ICESCR, CAT or the ECHR, the right to the truth is explicitly enshrined in the preamble and art 24(2) of the International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3.

('ICESCR') and are, by now, considered to be binding as customary international law[292] or as fundamental principles.[293] It does, moreover, provide an interpretative guide to the rights contained in the UN Charter ('UNC'), which is binding on all Member States.

International Covenant on Civil and Political Rights 1966 ('ICCPR') and International Covenant on Economic, Social and Cultural Rights 1996 ('ICESCR')

The ICCPR and ICESCR implement many of the provisions of the UDHR into binding treaty law. The UK signed the ICCPR and the ICESCR on 16 September 1968 and ratified them on 20 May 1967.

UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 ('CAT')

The CAT is an international human rights law treaty aimed at preventing torture and other cruel, inhumane or degrading treatment or punishment. The UK ratified the CAT on 8 December 1988.

European Convention for the Protection of Human Rights and Fundamental Freedom 1950 ('ECHR')

The UK was one of the first members of the Council of Europe to sign the ECHR on 4 November 1950 and to ratify it on 8 March 1951. The Convention came into full effect on 3 September 1953. The *Human Rights Act 1998* allows the rights guaranteed by the ECHR to be enforced by domestic courts in the UK.

In detail — THE OBLIGATION TO RECORD CIVILIAN CASUALTIES

IHRL arguably recognises a State's obligation to investigate, and by implication, to record, civilian casualties to which a jurisdictional link can be established. These obligations apply both in context of an international or non-international armed conflict and outside designated areas of armed conflict. This obligation is primarily based on the following rights:

- The procedural component of the **right to life** as well as the **right to security of the person**, which obliges States to investigate deaths caused by a use of force within their jurisdiction.
- The prohibition of **cruel, inhuman or degrading** treatment, as well as the **right to the protection of family life and unity**, which also mandate an investigation into deaths

[292] Hilary Charlesworth, 'Universal Declaration of Human Rights (1948)', *Max Planck Encyclopedia of Public International Law* (February 2008) para 16 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e887?rskey=AzaeP8&result=1&prd=OPIL> accessed 1 October 2021.

[293] *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*United States of America v Iran*) [1980] ICJ Rep 3, para 91.

caused by a use of force. The prolonged uncertainty about the fate of a loved one constitutes prohibited cruel, inhuman or degrading treatment.

- The obligation under both IHRL and IHL to conduct *ex ante* and *ex post* **proportionality assessments** of military operations, which require (historical) casualty data, as well as the **right to an effective remedy** against human rights violations. Both of these rights further reinforce States' obligation to investigate and record civilian casualties.
- **Human dignity**, of which the obligation to record civilian casualties is a precept, the **right to be recognised as a person before the law** and the **right to freedom of religion and belief**.

RIGHT TO LIFE

Overview

The right—and correspondingly the obligation—to an effective investigation of deaths is the procedural manifestation of the right to life. It was first recognised in cases involving the lethal use of force by State agents.[294] The main purpose of such an investigation is to establish whether a State's use of force was justified in a given instance and to ensure accountability of State agents for deaths occurring under their responsibility in violation of the right to life.[295]

Investigations into deaths at the hand of State agents are further necessary to:

- provide information to relatives about the fate of their loved ones;
- make reparations to victims;
- suppress further violations of IHRL and, in the context of armed conflicts, IHL;
- deter future violations from the rules of IHRL and IHL.[296]

Although the content of the obligation varies according to the circumstances, these procedural obligations deriving from the right to life continue to apply in armed conflict.[297]

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[294] *McCann and Others v United Kingdom* (1995) 21 EHRR 97.

[295] *Ahmet Özkan and Others v Turkey* App. No. 21689/93 (ECtHR, 6 April 2004) para 310.

[296] Mark Lattimer, 'The Duty to Investigate Civilian Deaths in Armed Conflict: Looking Beyond Criminal Investigations' (*EJIL! Talk*, 22 October 2018) <https://www.ejiltalk.org/the-duty-to-investigate-civilian-deaths-in-armed-conflict-looking-beyond-criminal-investigations/> accessed 1 October 2021.

[297] *Ergi v Turkey* App. No. 40/1993/435/514 (28 July 1998), *Isayeva v Russia* App. No. 57950/00 (ECtHR, 24 February 2005), *Al-Skeini and Others v United Kingdom* App. No. 55721/07 (ECtHR, 7 July 2011) as cited in Mark Lattimer, 'The Duty in International Law to Investigate Civilian Deaths in Armed Conflict' in Mark Lattimer and Philippe Sands (eds), *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War* (Hart Publishing 2018) 61.

As there is no distinction between civilians and combatants in IHRL, the right to life obliges States to take all necessary and reasonable precautions when they use force to prevent any kind of casualties—civilian or otherwise.[298] As Philip Alston has observed, under IHRL 'the intentional use of lethal force in the context of an armed conflict is prohibited unless strictly necessary. In other words, killing must be a last resort, even in times of war'.[299] The principle of proportionality which applies to any use of force in IHRL further requires an assessment of the choice of means and methods of attack as well as measures to minimise the deprivation of life.

However, in the context of an armed conflict, the determination of whether the deprivation of life was arbitrary must be made by reference to IHL.[300] Accordingly, while the countering of terrorist activities may be considered a legitimate aim justifying a deprivation of life, care must be taken to spare the lives of the civilian population.[301] Therefore, in order to determine whether a particular use of lethal force violated an individual's right to life, it is necessary to conduct an investigation into the deaths caused by such a use of force which must include the accurate recording of the number of civilian casualties.

The Obligation to Investigate and Record Civilian Casualties

The ECtHR has fleshed-out the duty to accurately investigate and record (civilian) casualties in armed conflict derived from the right to life in a number of cases.[302] In *Ahmet Özkan & Others v Turkey* the Court reiterated that the right to life read in conjunction with the obligation of the State to effectively and practically secure this right requires by implication the need for an official investigation when individuals have been killed as a result of a use of force.[303] Pursuant to the ECtHR, the purpose of such an investigation is two-fold. On the one hand, an effective investigation should lead to 'a determination of whether the force used in such cases was or was not justified in the circumstances'.[304]

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[298] *Ahmet Özkan* (n 295) para 312.

[299] Philip Alston, 'Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Mission to Sri Lanka' (27 March 2006) UN Doc E/CN.4/2006/53/Add.5, para 29; Office of the High Commissioner for Human Rights, 'International Legal Protection of Human Rights in Armed Conflict' (2011) 66 <https://www.ohchr.org/documents/publications/hr_in_armed_conflict.pdf> accessed 1 October 2021.

[300] Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2015) 2 Harvard National Security Journal 31, 54.

[301] *Isayeva v Russia* (n 297) para 200.

[302] See in particular *Cyprus v Turkey* [GC] App. No. 25781/94 (ECtHR, 10 May 2001), paras 132–134, where the Court provided an overview of the obligations of the State in regulating the use of lethal force by its officials as established by a number of earlier decisions. The ECtHR held that despite a lack of evidence of having been unlawfully killed, missing persons who prior to disappearing were last in the State's custody in life-threatening circumstances were owed the duty of investigation by the respective State.

[303] *Ahmet Özkan* (n 295) para 312.

[304] *Ibid*.

On the other hand, it must contribute to the identification and punishment of those responsible where such a use of force was not justified.

However, the obligation to investigate is one of means rather than result. It requires authorities to undertake all reasonable steps to secure evidence concerning an incident resulting in a suspected violation of the right to life.[305] This included the collection of eyewitness testimony, forensic evidence and, where appropriate, an autopsy. Any deficiency in the investigation undermines the ability to hold accountable those responsible in case of a violation of the right to life, falling foul of the standard of the ECHR.[306] In *Varnava and Others v Turkey* the Court accordingly observed that States would have to disclose 'crucial documents':

> *in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities. This would also extend to the provision of medical assistance to the wounded; where combatants have died, or succumbed to wounds, the need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide information about the identity and fate of those concerned, or permit bodies such as the ICRC to do so.*[307]
>
> [Emphasis added]

Although this excerpt pertains to combatants, it must *a fortiori* extend to civilian casualties.[308]

The strong implication of these elaborations of the law is an obligation to record casualties, identify the individuals affected, their status under IHL and the circumstances

[305] *Ibid*, para 312.

[306] *Ibid*.

[307] *Varnava and Others v Turkey* [GC] App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009) para 185.

[308] As argued by Gloria Gaggioli, 'A legal approach to investigations of arbitrary deprivations of life in armed conflicts: The need for a dynamic understanding of the interplay between IHL and HRL' (*Questions of International Law*, 28 February 2017) <http://www.qil-qdi.org/legal-approach-investigations-arbitrary-deprivations-life-armed-conflicts-need-dynamic-understanding-interplay-ihl-hrl/> accessed 1 October 2021.

of their death. This is not least warranted by the necessity to adhere to the 'rule of law and to [prevent] appearances of … tolerance of unlawful acts'.[309]

The Required Standard of Investigation — Dismissal of 'Fog of War' Arguments

The UN Special Rapporteur for extrajudicial, summary or arbitrary executions observed in connection with the right to life under Article 6 ICCPR that:

> *[i]t is undeniable that during armed conflicts circumstances will sometimes impede investigations. Such circumstances will never discharge the obligation to investigate — this would eviscerate the non-derogable character of the right to life — but they may affect the modalities or particulars of the investigation. In addition to being fully responsible for the conduct of their agents, in relation to the acts of private actors States are also held to a standard of due diligence in armed conflicts as well as peace. On a case-by-case basis a State might utilise less effective measures of investigation in response to concrete constraints. For example, when hostile forces control the scene of a shooting, conducting an autopsy may prove impossible. Regardless of the circumstance, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality.*[310]
>
> [Emphasis added]

So-called 'fog of war' arguments against an obligation to investigate casualties and, by implication, record civilian deaths in armed conflict are thus categorically dismissed by the UN Special Rapporteur. However, the obligation to investigate remains contextual. As Schmitt observes, in the context of an armed conflict, 'the nature and scope of the IHL

[309] *Ahmet Özkan* (n 295) para 313.

[310] Philip Alston, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions – Extrajudicial, Summary or Arbitrary Executions* (8 March 2006) UN Doc E/CN.4/2006/53, para 36.

requirement to investigate will shape the analogous obligation in human rights law'.[311] Moreover, the ability to conduct human rights-driven investigations may—depending on the concrete circumstances on the ground—be less robust in the context of an armed conflict than in peacetime.[312] Nonetheless, the underlying principles of the human rights obligation to investigate civilian casualties—independence, effectiveness, promptness and impartiality—apply equally during armed conflict.[313]

Referring to its decision in *Cyprus v Turkey*, the ECtHR accordingly observed in *Ahmet Özkan and Others v Turkey* that:

> *[i]t is mindful … of the fact that loss of life is a tragic and frequent occurrence in the security situation in south-east Turkey. However neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into the deaths arising out of clashes involving security forces, the more so in cases such as the present where the circumstances are in many respects unclear.* [314]

For these reasons, the practical difficulties and confusion associated with combat situations in armed conflict cannot excuse any failure to comply with human rights obligations, including the obligation to investigate, and by extension, to record (civilian) casualties. This is especially so since it is such investigation and casualty recording which provide essential information necessary for proportionality assessments to be carried out under both IHL and IHRL.[315] However, as noted above, this does not mean that a sliding-

[311] Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2015) 2 Harvard National Security Journal 31, 54.

[312] *Ibid*, 54.

[313] Lattimer (n 297) 62.

[314] *Ahmet Özkan* (n 295) para 319; most recently reaffirmed in *Georgia v Russia (II)* (n 278) para 326, citing *Jaloud* (n 277) para 166.

[315] *Al-Skeini* (n 297) para 94, where the Court argued that 'the country's conditions, no matter how difficult, do not release a State … from its obligations … [W]hen the State conducts or tolerates actions leading to extra-judicial executions, not investigating them adequately and not punishing those responsible, as appropriate, it breaches the duties to respect rights … and to ensure their free and full exercise, both by the alleged victim and by his or her next of kin, it does not allow society to learn what happened, and it produces the conditions of impunity for this type of facts to happen once again'.

scale of standards of investigation does not apply; neither does it mean that the law is not sensitive to the genuine operational constraints of combatants.

Indicative of the standard of investigation required in the context of an armed conflict, the ECtHR in *Isayeva v Russia* stipulated that Russia's domestic investigation was insufficient as the exact number of casualties remained open. However, as the Court continued, evidence before it suggested that the casualty figures were 'significantly higher' than the domestic investigation by Russia would have led the public to belief.[316]

In *Cyprus v Turkey* the Court observed that:

> *[t]here is no indication of any records having been kept of either the identities of those or the dates or location of their detention. From a humanitarian point of view, this failing cannot be excused with reference either to the fighting which took place at the relevant time or to the overall confused and tense state of affairs. Seen in terms of Art. 5 of the [ECHR], the absence of such information has made it impossible to allay the concerns of the relatives of the missing persons about the latter's fate. Notwithstanding the impossibility of naming those who were taken into custody, the respondent State should have made other inquiries with a view to accounting for their disappearances.*[317]

While this observation of the Court was made with regard to the disappearance of detainees, it holds equally true for instances of civilian casualties by air or other military strikes. Breau and Joyce accordingly argue that:

[316] *Isayeva v Russia* (n 297) para 197. See also *Isayeva, Yusupova and Bazayeva v Russia* App. Nos. 57947/00, 57948/00 and 57949/00 (ECtHR, 24 February 2005) paras 222–223, emphasising the obligation to identify those responsible for exposing civilians to harm, the Court observed that '[n]othing has been done to clarify the total absence of coordination between the public announcements of a "safe exit" for civilians and the apparent lack of any considerations to this effect by the military in planning and executing their mission. In the light of these omissions alone it is difficult to imagine how the investigation could be described as efficient'.

[317] *Cyprus v Turkey* (n 302) para 148.

the easiest way for the State to adhere to obligations would be to systematically investigate deaths as well as disappearances, record the identity of the dead, make this information publicly available, and treat the deceased with dignity by properly disposing of the body in accordance to the family's wishes … Turkey's investigative duties, as inferred by the Court, included searching for the dead. Logically, once searched for and found, this would include a mechanism of recording the identities of dead.[318]

The Duty to Conduct Ex Ante and Ex Post Proportionality Assessments

The ECtHR has held that responsibility under the right to life may be engaged where States 'fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life'.[319]

The ECtHR's analysis of the proportionality of an attack proceeds in two steps. In a first step, the Court examines whether the means of an attack were proportionate to its ends. In a second step, it analyses whether the ends can be justified by the collective defence of society and its laws.[320] In *Isayeva v Russia*, the Court accordingly recognised that the primary aim of the operation of the agents and security forces must be to protect lives from unlawful violence, and the operation's design which prioritised the killing of insurgents over the protection of the residents was impermissible.[321] These decisions highlight the centrality of the obligation to protect civilian lives even in armed conflicts. The right to life requires an extensive assessment to be made by the States '*ex ante'* or before a particular strike. This *ex ante* assessment must be carried out with a view to being able to prove *ex post* in a potential Court case that it met the threshold of the Convention. These two distinct temporal components of the proportionality assessment

[318] Susan Breau and Rachel Joyce, 'Discussion Paper: The Legal Obligation to Record Civilian Casualties of Armed Conflict' (*Oxford Research Group*, June 2011) <https://www.files.ethz.ch/isn/138979/1st%20legal%20report%20formatted%20FINAL.pdf> accessed 1 October 2021.

[319] *Ergi v Turkey* (n 297) para 79.

[320] William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16(4) European Journal of International Law 741, 764.

[321] *Isayeva v Russia* (n 297) para 191, as cited in Abresch (n 320) 741.

— *ex ante* and *ex post* — are also evident in the following excerpt from the ECtHR's *Isayeva v Russia* judgment. The Court complained that '[n]o plan of the operation, no copies of orders, records, log-book entries or evaluation of the results of the military operation have been submitted and, in particular, no information has been submitted to explain what was done to assess and prevent possible harm to civilians'.[322]

Under IHRL, the scope or extent of the obligation to make a proportionality assessment is similar to that under IHL, discussed in Part C of the research paper.

The *ex ante* proportionality assessment deriving from the right to life requires States to ensure as complete knowledge as possible about a planned attack and the danger it poses to the civilian population.[323] Detailed records of civilian casualties caused by the various means and methods of warfare employed are thus essential to conduct an adequate *ex ante* proportionality assessment. For this reason, compliance with this obligation also depends on an effective investigation into civilian deaths.

Such an *ex ante* proportionality assessment must itself be carefully recorded and records of it maintained, in order for courts to ascertain whether the principle of proportionality was transgressed in an *ex post* assessment. In its recent decision in *Jaloud v Netherlands* the ECtHR linked the proportionality assessment to the obligation to investigate, noting '[i]t follows that no domestic investigation can meet the standards of Article 2 of the [ECHR] if it does not determine whether the use of lethal force by agents of the State went no further than the circumstances demanded'.[324]

Advances in forensic and information technology are continuously providing new means to assist recording of casualties of armed conflict, thus progressively diminishing practical and financial obstacles to the undertaking of proportionality assessments. The potential of cooperation with humanitarian organisations and NGOs might also alleviate some of the practical difficulties of conducting an investigation on the ground.

PROHIBITION OF CRUEL, INHUMAN OR DEGRADING TREATMENT

The UN Human Rights Committee found that the severe and often prolonged periods of mental anguish suffered by a disappeared person's family members owing to the uncertainty of the fate of their loved one amounts to a violation of the prohibition of cruel, inhuman or degrading treatment.[325] Similarly, the ECtHR held that withholding information from the families of persons detained by security forces, or silence in the case of persons

[322] *Isayeva v Russia* (n 297) para 182. See also *Isayeva, Yusupova and Bazayeva v Russia* (n 316) para 199.

[323] *Ergi v Turkey* (n 297) para 79, as cited in Abresch (n 320) 741.

[324] *Jaloud* (n 277) para 199.

[325] *María del Carmen Almeida de Quinteros et al. v Uruguay* Communication No. 107/1981 (UN Human Rights Committee, 21 July 1983) UN Doc CCPR/C/OP/2 at 138 (1990).

that have gone missing during armed conflict, attained a degree of severity that amounted to inhuman treatment.[326] Prolonged uncertainty about the fate of a loved one having gone missing in an armed conflict may thus amount to a violation of the prohibition of cruel, inhuman or degrading treatment.

The Commission on Human Rights therefore called upon 'States which are parties to an armed conflict to take immediate steps to determine the identity and the fate of persons reported missing in connection with the armed conflict'.[327] The prohibition of cruel, inhuman or degrading treatment accordingly obliges parties to a conflict to adequately record, seriously investigate, and provide relatives with information on the casualties presumably attributable to them. Importantly, the violation of this procedural duty, derived from the prohibition of cruel, inhuman or degrading treatment, stems from 'official indifference in face of [relatives'] acute anxiety to know the fate of their close family members'[328] rather than the factual disappearance of the respective person. It is the 'acute anxiety' and 'ordeal' suffered by relatives which—in cases of prolonged uncertainty due to official indifference—attain a level of severity that constitutes a breach of the prohibition of cruel, inhuman or degrading treatment. A violation of this prohibition thereby depends 'on the existence of special factors which give the suffering of the person concerned a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation'.[329] Such 'special factors' include:[330]

- Proximity of family tie;
- Particular circumstances of the relationship;
- Extent to which the family member witnessed the events in question;
- Involvement of the family member in the attempts to obtain information about the disappeared person;
- The way in which the authorities responded to those enquiries.

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[326] *Kurt v Turkey* App. No. 15/1997/799/1002 (ECtHR, 25 May 1998) para 134; *Timurtas v Turkey* App. No. 23531/94 (ECtHR, 13 June 2000) para 98; *Cyprus v Turkey* (n 302); *Orhan v Turkey* App. No. 25656/94 (ECtHR, 18 June 2002); *Varnava and Others v Turkey* (n 293); *Er and Others v Turkey* App. No. 23016/04 (ECtHR, 31 July 2012); *Meryem Çelik and Others v Turkey* App. No. 3598/03 ECtHR, 16 April 2013); *Pitsayeva and Others v Russia* App. Nos. 53036/08, 61785/08, 8594/09, 24708/09, 30327/09, 36965/09, 61258/09, 63608/09, 67322/09, 4334/10, 4345/10, 11873/10, 25515/10, 30592/10, 32797/10, 33944/10, 36141/10, 52446/10, 62244/10 and 66420/10 (ECtHR, 9 January 2014).

[327] Commission on Human Rights Res. 2002/60 (25 April 2002) UN Doc E/CN.4/RES/2002/60, para 4.

[328] *Varnava and Others v Turkey* (n 307) para 202; *Cyprus v Turkey* (n 302) para 156.

[329] *Cyprus v Turkey* (n 302) para 156.

[330] *Ibid*.

Compliance with the procedural obligations under the prohibition of cruel, inhuman or degrading treatment thus requires States to record, investigate and provide relatives with information on the fate of a loved one gone missing, also in the context of a use of lethal force in armed conflicts.

RIGHT TO SECURITY OF THE PERSON

While jurisprudence on the right to security of the person is sparse, the investigative duty entailed in the right to security of the person—as stipulated by Article 9(1) ICCPR and Article 5(1) ECHR—mirrors duties to investigate provided for by the right to life and the prohibition of cruel, inhuman or degrading treatment.[331]

HUMAN DIGNITY, AND THE RIGHT TO BE RECOGNISED AS A PERSON BEFORE THE LAW, TO FREEDOM OF RELIGION AND BELIEF AND TO FAMILY LIFE AND PROTECTION OF THE FAMILY UNITY

'Human dignity is one of the most pervasive and fundamental ideas in the entire corpus of international human rights law'.[332] Most IHRL instruments make a generic reference to human dignity as a foundational principle of, and source for, human rights before articulating a more explicit manifestation of human dignity in their substantive provisions.[333] Conceived as a source for specific human rights, each human right contributes to delineate and protect one or another facet of human dignity. As such, human dignity can first and foremost be understood as an ontological claim about the inherently and equally morally valuable status of human beings.[334] This recognition of the inherent and equal moral worth of human beings is the lowest common denominator among peoples and is, as such, most widely invoked as a foundation of, and justification

[331] S Joseph/M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, OUP 2013) 343; William Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 228.

[332] PG Carozza, 'Human Dignity' in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 345.

[333] *Ibid*. See also Catherine Dupré, 'Human Dignity in Europe: A Foundational Constitutional Principle' (2013) 10 *European Public Law* 319, 324; Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655, 669; UNGA Res 41/120 (1986) UN Doc A/RES/41/120, on setting international standards in the field of human rights pursuant to which UN bodies in developing international human rights instruments should bear in mind that such instruments 'be of fundamental character and derive from the inherent dignity and worth of the human person'.

[334] Carozza (n 332) 345.

for, human rights.[335] The ECtHR accordingly noted that the respect for human dignity is '[t]he very essence of the Convention'.[336]

As observed by the Oxford Research Group, although culturally variable, 'treatment of the dead with dignity is an extremely prevalent notion world-wide'.[337] The notion of treating casualties of armed conflict with dignity also permeates IHL. The Geneva Conventions and their Additional Protocols may therefore help to fill the concept of human dignity in IHRL with normative content as regards civilian casualties in the context of armed conflicts.

Accordingly, dignified treatment of civilian casualties arguably includes:

- Preventing civilians from falling into the category of missing persons as this would deny them their **right to be recognised as a person before the law**. The right to be recognised as a person before the law expresses the right and the capacity of each human being to be the bearer of rights and obligations under the law.[338] It is 'intended to ensure that every person is a subject, and not an object, of the law' and is thus a direct corollary of human dignity.[339]
- The **protection of the right to family life and family unity**. In the context of armed conflicts, this is particularly evident from Section III of AP I which introduces minimal standards for the dignified treatment of missing and dead persons. Its introductory provision, Article 32—pursuant to which Section III's implementation 'shall be prompted mainly by the right of families to know the fate of their relative'—stipulates the fundamental principle underlying that section.
- In conjunction with the **right to freedom of religion and belief,** the disposal of bodies of the dead in accordance with their wishes and religious views as well as the respect for, and the maintenance and marking of, burial sites.[340]

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[335] Catherine Dupré, 'Unlocking Human Dignity: Towards a Theory for the 21st Century' (2009) 2 European Human Rights Law Review 190, 201.

[336] *Pretty v United Kingdom* App. No. 2346/02 (ECtHR, 29 April 2002) para 65. See also Roger Brownsword, 'Human Dignity from a Legal Perspective' in Marcus Düwell and others (eds), *The Cambridge Handbook on Human Dignity* (CUP 2014) 1; Jean-Paul Costa, 'Human Dignity in the European Court of Human Rights' in Christopher McCrudden (ed), *Understanding Human Dignity* (OUP 2013) 394.

[337] Breau and Joyce (n 318) 16.

[338] Working Group on Enforced or Involuntary Disappearances, *General Comment on the Right to Recognition as a Person before the Law in the Context of Enforced Disappearances* (OHCHR, 2011) <https://www.ohchr.org/Documents/Issues/Disappearances/GCRecognition.pdf> accessed 1 October 2021.

[339] Nihal Jayawickrama, *The Judicial Application of Human Rights Law – National, Regional and International Jurisprudence* (2nd edn, CUP 2017) 643.

[340] Arcot Krishnaswami (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), 'Study of Discrimination in the Matter of Religious Rights and Practices' (14 October 1959) UN Doc E/CN.4/Sub.2/200/Rev.1, 38. See also *X v Federal Republic of Germany* App.

These rights further support the finding of an obligation to investigate and record civilian casualties, occurring both in and outside the context of armed conflicts. A dignified treatment of the dead, in line with the right to be recognised as a person before the law, to family life and family unity and to freedom of religion and belief, should include the recording of their deaths and an investigation into the circumstances thereof.

THE RIGHT TO AN EFFECTIVE REMEDY

The duty to investigate and record civilian casualties is also closely linked to the right to an effective remedy. In order to properly provide for a right to a remedy, a State must take various positive steps in response to credible allegations of human rights violations. In *Kaya v Turkey*, the ECtHR observed that:

> *where relatives have an arguable claim that the victim has been unlawfully killed by agents of the State, the notion of an effective remedy for the purpose of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedures … Seen in these terms the requirements of Article 13 are broader than a Contracting State's procedural obligation under Article 2 to conduct an effective investigation.*[341]

For this reason, the obligation to record and investigate civilian deaths in armed conflict may also be derived from the right to an effective remedy.[342] This has, most recently,

No. 8741/79 (European Commission of Human Rights, 10 March 1981), although the Commission denied that the prohibition of scattering ashes on one's land after death constituted a violation of the right to freedom of religion, the Commission acknowledged that the disposal of the dead did engage the right to freedom of religion and belief; Council of the European Union, 'EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief' (24 June 2013) para 41 <https://www.consilium.europa.eu/-uedocs/cms_data/docs/pressdata/EN/foraff/137585.pdf> accessed 1 October 2021; this right is also recognised in IHL, see GC IV, art 130 and API, art 34(1).

[341] *Kaya v Turkey* App. No. 22535/93 (ECtHR, 28 March 2000) para 107.

[342] See also 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147, para 3(b).

been confirmed by a resolution of the UN Human Rights Council on the situation in Myanmar. In relation to the 'mass and systematic human rights violations and abuses' having taken place there, the Council called upon Myanmar to 'recognise and address the needs of victims and survivors and their right to effective remedy, including by prompt, effective and independent casualty recording'.[343]

In detail — THE OBLIGATION TO PUBLICLY REPORT THE NUMBER OF CIVILIAN CASUALTIES

RIGHT TO FREEDOM OF EXPRESSION AND TO ACCESS INFORMATION

Closely connected to the right to an effective remedy, and a precondition for a meaningful exercise thereof, is the right to access information on an alleged human rights violation. Pursuant to Article 10 ECHR, '[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. These rights and freedoms are also enshrined in Article 19 UDHR and Article 19(2) ICCPR. As such, global and regional human rights standards not only secure the right to freely impart information but—and crucially for present purposes—also the right to freely seek and receive it. The right to access information constitutes an integral part of the right to freedom of expression.[344] This section accordingly argues that the right to access information, as the 'passive limb' of the right to freedom of expression, may constitute a legal basis for obliging the UK government to truthfully, accurately, and publicly report the number of civilian casualties caused by its use of force.

The right to access information can be addressed from a collective perspective as well as from an individual perspective. From a collective perspective, the right to access information encompasses the right of society as a whole to have access to information of

[343] UN Human Rights Council, 'Situation of Human Rights in Myanmar' (30 March 2020) UN Doc A/HRC/43/L.23, para 5.

[344] See Frank La Rue, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (4 September 2013) UN Doc A/68/362, para 2 [hereinafter FoE Report].

public interest from a variety of sources.[345] Public authorities[346]—including the military—represent the public and must therefore act in its interest, fulfilling the public good.[347] Core requirements for democratic governance, including transparency, the accountability of public authorities for their decisions and actions, or the promotion of participatory decision-making processes essentially depend on the public's adequate access to information.[348]

Particularly as it regards instances of (alleged) violations of human rights or humanitarian law by security forces and the military, a 'culture of secrecy' justified with reference to national security may erode public trust in these institutions. The denial of access to or the provision of false information often constitutes one of the main obstacles to the clarification of responsibilities, preventing adequate outside control. This may not only result in a further erosion of public trust in security forces and the military, but also

[345] *Ibid*, para 19; importantly, with reference to the UN Guiding Principles on Business and Human Rights ('Ruggie Principles'), the Tshwane Principles note that 'business enterprises within the national security sector, including private military and security companies, have the responsibility to disclose information in respect of situations, activities, or conduct that may reasonably be expected to have an impact on the enjoyment of human rights', see *The Global Principles on National Security and the Right to Information (Tshwane Principles)* (12 June 2013) principle 1(b) <https://www.justiceinitiative.org/publications/tshwane-principles-national-security-and-right-information-overview-15-points> accessed 1 October 2021 [hereinafter Tshwane Principles]. The Tshwane Principles are primarily concerned with the relationship between national security and the right to access information. Albeit drafted by a broad coalition of non-governmental and civil society organisations in collaboration with academic centres, the document was described by the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression Frank La Rues as 'key tool for States to ensure that national laws and practices regarding the withholding of information on national security grounds fully comply with international human rights standards', see FoE Report (n 344) para 65. The Tshwane Principles are, moreover, supported by the Parliamentary Assembly of the Council of Europe, see 'The Assembly supports the Global Principles and calls on the competent authorities of all member States of the Council of Europe to take them into account in modernising their legislation and practice concerning access to information', see Parliamentary Assembly of the Council of Europe, 'National Security and Access to Information' Resolution 1954 (2 October 2013) para 8.

[346] The Tshwane Principles define 'public authorities' as 'all bodies within the executive, legislative, and judicial branches at all levels of government, constitutional and statutory authorities, including security sector authorities; and non-state bodies that are owned or controlled by government or that serve as agents of the government. 'Public authorities' also include private or other entities that perform public functions or services or operate with substantial public funds or benefits, but only in regard to the performance of those functions, provision of services, or use of public funds or benefits', see Tshwane Principles (n 345) Definitions. See also General Comment No. 34 Article 19: Freedoms of Opinion and Expression (12 September 2011) UN Doc CCPR/C/GC/34, para 7.

[347] FoE Report (n 344) para 20; importantly and as emphasized by the Tshwane Principles, no public authority—including the armed forces, police, other security agencies or any of their component offices—may be exempted from disclosure requirements. See Tshwane Principles (n 345) principle 5(a). See also William Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 451.

[348] *Ibid*, para 3. See also 'The Johannesburg Principles on National Security, Freedom of Expression and Access to Information' (November 1996) preamble <https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf> accessed 1 October 2021 [hereinafter Johannesburg Principles].

constitute a barrier to the broader promotion of justice and reparation.[349] Consequently, there is a strong public interest in the disclosure of some types of information on the decisions and actions of public authorities.

From an individual perspective, the right to request and receive information of public interest and information concerning oneself frequently enables the exercise of other human rights and freedoms.[350] As argued above, in the context of alleged human rights violations the meaningful exercise of such rights as due process, fair trial guarantees, and access to an effective remedy essentially depend on, and require access to, information regarding the circumstances of a particular human rights violation.[351] The right to access information on human rights violations can accordingly also be conceptualised as one element of remedy and reparations for victims and their family members.[352] Particularly in cases of disappearances, the violation continues and only ceases once the disappeared person's next of kin are able to ascertain the facts and determine the fate of the affected relative. Accordingly, a State's refusal to provide information or the provision of false information constitute additional human rights violations.[353]

In accordance with the notion that information on human rights and their potential violation are of public interest, the UN General Assembly has adopted a resolution expressly providing for access to information on human rights in general.[354] Pursuant to Article 6 of the 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms' annexed to this resolution:

> *Everyone has the right, individually and in association with others:*
>
> *To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how*

[349] *Ibid*, para 57.

[350] Frank La Rue, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (16 May 2011) UN Doc A/HRC/17/27, para 22, arguing that the right to freedom of expression, including in particular the right to access information, are often conceptualized as 'enabler[s] of other rights'.

[351] FoE Report (n 344) para 39.

[352] *Ibid*, para 40.

[353] *Ibid*.

[354] See UNGA Res 53/144 (9 December 1998) UN Doc A/RES/43/144.

> *those rights and freedoms are given effect in domestic legislative, judicial or administrative systems …*[355]

The elucidation of past and present human rights violations, in particular, 'often requires the disclosure of information held by a multitude of State entities'.[356] Especially where serious human rights violations are alleged, the collective and the individual dimensions of the right to access information oblige States to inform not only the victims and their families but also society as a whole on the circumstances of such violations. Information relating to alleged serious violations of human rights or humanitarian law is thus clearly of public interest and must be disclosed.[357] As emphasised by the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression:

> *[t]he overriding public interest in the disclosure of information concerning serious violations of human rights and humanitarian law, in addition to the obligation of States to take proactive measures to ensure the preservation and dissemination of such information, is generally acknowledged.*[358]

The Tshwane Principles likewise provide that:

> *[t]here is an overriding public interest in disclosure of information regarding gross violations of human rights or serious violations of international humanitarian law … Such information may not be withheld on national security grounds in any circumstances.*[359]

[355] *Ibid*.

[356] FoE Report (n 344) para 5.

[357] *Ibid,* para 37.

[358] *Ibid*. See also General Comment No. 34 (n 346) para 19; Tshwane Principles (n 345) principle 10(A).

[359] Tshwane Principles (n 345) principle 10(A)(1).

However, other violations of human rights also engage a high presumption of disclosure. In this regard, the Tshwane Principles stipulate that:

> *Information regarding other violations of human rights or humanitarian law is subject to a high presumption of disclosure, and in any event may not be withheld on national security grounds in a manner that would prevent accountability for violations or deprive a victim of access to an effective remedy … Where the existence of violations is contested or suspected rather than already established, [the principle establishing categories of information with a high presumption or overriding interest in favour of disclosure] applies to information that, taken on its own or in conjunction with other information, would shed light on the truth about the alleged violations.*[360]

As evident from these quotations, the obligation to investigate stemming from the right to life and to security of the person as well as from the prohibition of cruel, inhuman or degrading treatment, discussed above, is intimately linked to the right to access information. Reluctance or an outright refusal by the authorities to carry out their duty to investigate the facts of an alleged human rights violation adequately may prevent individual persons and society as a whole from accessing information on that violation.[361] The Tshwane Principles' list of information to be disclosed on alleged human rights violations is thereby indicative of the extent of States' obligation to investigate. This list namely includes, but is not limited to:

> (a) a full description of, and any recording showing, the acts and omissions that constitute the violations, as well as the dates and circumstances in which they occurred, and, where applicable, the location of any missing persons or mortal remains.
>
> (b) the identities of all victims [subject to privacy considerations] and aggregate and otherwise anonymous data concerning their number and characteristics that could be relevant in safeguarding human rights.
>
> (c) the names of the agencies and individuals who perpetrated or were otherwise responsible for the violations, and more generally of any security sector units present at the time of, or otherwise

[360] Tshwane Principles (n 345) principle 10(A)(2) and (4).

[361] FoE Report (n 344) para 23.

> implicated in, the violations, as well as their superiors and commanders, and information concerning the extent of their command and control.
>
> *(d) Information on the causes of the violations and the failure to prevent them.*[362]
> [emphasis added]

With regard to the right to liberty and security of the person, the prevention of torture and other ill-treatment, and the right to life, the Tshwane Principles list further information which is covered by the high presumption in favour of disclosure. This *inter alia* includes, without limitation, 'information regarding any other deprivation of life for which a State is responsible, including the identity of the person or persons killed, the circumstances of their death, and the location of their remains' subject to privacy considerations.[363]

This list of information to be disclosed on an alleged human rights violation supports the argument that States are obliged to investigate, record, and publicly report the number of civilian casualties resulting from their use of force. The disclosure of the number of casualties and the characteristic 'civilian' is thereby 'relevant in safeguarding human rights', allowing for a determination of whether the use of force pursued a legitimate aim and was necessary and proportionate. The public disclosure of accurate numbers of civilian casualties is also supported by principle 10(D) of the Tshwane Principles. This principle requires the State to publish information on the decision to use military force, including any information that may demonstrate that a fact stated as part of the public rationale for such a use of force was erroneous.[364]

Based on these considerations, there is an overarching notion that the disclosure of all information in the possession of the State, in particular as it relates to instances of violations of human rights or IHL, is in the public interest. The principle of maximum disclosure should thus guide national authorities in their implementation of the right to access information. Accordingly, '[a]ll information held by public bodies should be subject to disclosure and this presumption may be overcome only in very limited circumstances'.[365] Pursuant to the Joint Declaration of the Special Rapporteurs and Representatives on the Right to Freedom of Expression of the UN, the Organization of American States and the Organization for Security and Cooperation in Europe, States are

[362] Tshwane Principles (n 345) principle 10(A).

[363] Tshwane Principles (n 345) principle 10(B).

[364] Tshwane Principles (n 345) principle 10(D).

[365] *Joint Declaration by the Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Cooperation in Europe Representative on Freedom of the Media and the Organization of American States Special Rapporteur on Freedom of Expression* (1999 and 2004) UN Doc E/CN.4/2000/63, annex II <https://undocs.org/E/CN.4/2000/63> accessed 1 October 2021.

not only obliged to accede to individual requests for information, but rather to proactively publish widely and disseminate information in the public's interest.[366]

The scope for restrictions of the right to access information is thereby strictly limited.

As emphasised in Article 10(2) ECHR and Article 19(3) ICCPR, the protection of the right to freedom of expression and, therefore, the right to access information 'carries with it special duties and responsibilities'.[367] Both articles accordingly provide limited grounds for restriction, of which the protection of national security is presently the most pertinent. No restriction on the right to access information may be imposed on the ground of national security unless the government can demonstrate that the restriction is prescribed by law and is proportionate and necessary in a democratic society to protect a legitimate, specified and substantiated national security interest.[368]

Crucially, according to the Johannesburg Principles, '[a]ny restriction on the free flow of information may not be of such a nature as to thwart the purposes of human rights and humanitarian law'.[369] Invoking national security as justification for derogating from the right to access information is:

> *not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.*[370]

The public authority seeking to withhold information thereby bears the burden of proof in demonstrating that a derogation from the right to access information is compatible with IHRL.[371] Importantly, and as emphasised above, (alleged) violations of human rights

[366] *Ibid*.

[367] ICCPR, art 19(2); ECHR, art 10(2).

[368] Other factors favouring disclosures are *inter alia* whether the relevant information can reasonably be expected to (a) promote open discussion of public affairs; (b) enhance the government's accountability; or (c) contribute to positive and informed debate on important issues or matters of serious interest. Embarrassment, a loss of confidence in the government or officials, or the weakening of a political party or ideology are not relevant to the decision to disclose information, see Tshwane Principles (n 345) principle 3. See also Johannesburg Principles (n 348) principle 2(a).

[369] Johannesburg Principles (n 348) principle 19.

[370] Johannesburg Principles (n 348) principle 2(a).

[371] Tshwane Principles (n 345) principle 4(a).

committed by State agents are subject to a 'high presumption of disclosure and, in any event, may not be withheld on national security grounds in a manner that would prevent accountability, or deprive a victim of access to an effective remedy'.[372] Information should especially not be withheld if it may reveal, or help establish accountability for, violations of human rights or international humanitarian law.[373]

To conclude, the number of civilian casualties should be accurately recorded and subsequently publicly disclosed. Public access to information on the number of civilian casualties attributable to a use of force by the UK may not only be considered as information on the UK's compliance with IHRL and IHL standards in this regard, subject to a high presumption of disclosure. The public disclosure of inaccurate numbers of civilian casualties may also prevent accountability of the UK for its use of force, at least potentially in violation of IHRL and IHL standards, hampering victims' access to justice and eroding the public's trust in vital national security institutions.

THE RIGHT TO TRUTH

The right to the truth is closely linked to the right to access information. As the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression Frank La Rue observed, 'at the national level, the right to truth can be characterised as the right to know, to be informed or to freedom of information'.[374] The right to the truth has further been considered to be engaged in connection with the State's duty to conduct effective investigations into serious violations of human rights and the right to an effective juridical remedy as well as the right to family.[375]

The right to the truth recognised under IHRL finds its historical roots in the right of families to know the fate of their relatives established in Article 32 AP I.[376] It has primarily been relied on in the aftermath of gross violations of IHRL and serious violations of IHL, which typically require a pattern of sustained conduct or similarly largescale violations. Elaborating the scope and substance of the right to truth in this context, the UN Commission on Human Rights adopted an *Updated Set of Principles for the Protection*

[372] FoE Report (n 344) para 66(b); Tshwane Principles (n 345) principle 10(A).

[373] Thswane Principles (n 345) principle 3.

[374] Frank La Rue, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (4 September 2013) UN Doc A/68/362, para 14.

[375] Office of the UN High Commissioner for Human Rights, 'Promotion and Protection of Human Rights: Study on the Right to the Truth' (8 February 2006) UN Doc E/CN.4/2006/91, para 25.

[376] *Ibid*, para 5. See also *Association "21 December 1989" and Others v Romania* App. No. 33810/07 (ECtHR, 24 May 2011) para 135, noting in the context of the killing of protestors by State agents that 'there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests'.

and Promotion of Human Rights Through Action to Combat Impunity.[377] Principle 4 stipulates that '[i]rrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim's fate'. Similarly, the *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* adopted by the UN General Assembly provides that:

> *States [including the UK] should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines … Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimisation and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.*[378]

The right to the truth thus implies not only an obligation to investigate the immediate circumstances of a gross human rights violation. It also encompasses the clarification of the general context, the policies and the institutional failures and decisions that enabled the occurrence of such violation. Beyond this, the realisation of the right to the truth may require the disclosure of information on violations in order to restore confidence in public authorities and to ensure their non-repetition.[379]

On the one hand, the right to the truth may arguably underpin the obligation of States to record and investigate civilian casualties of the use of force within their jurisdiction. On

[377] Commission on Human Rights, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity' (8 February 2005) UN Doc E/CN.4/2005/102/Add.1.

[378] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (21 March 2006) UN Doc A/RES/60/147, para 24.

[379] FoE Report (n 344) para 30.

the other hand, the right to the truth may also support the proposition that States are required to make such records and the findings of investigations into civilian casualties publicly available. This facet of making information on human rights violations publicly available links the right to the truth to freedom of expression, discussed above. The right to seek information as a core component of the right to freedom of expression is an instrumental right to effectively realise the right to the truth.[380]

CONCLUSION — IHRL AND THE DUTY TO RECORD AND PUBLICLY DISCLOSE THE NUMBER OF CIVILIAN CASUALTIES

By virtue of a series of overlapping and binding treaty obligations, the UK is firmly obliged under IHRL to investigate and record civilian casualties both in and outside the context of an armed conflict, and to make the findings of investigations and these records publicly available. Not least as an incident of the right to life and the prohibition of cruel, inhuman and degrading treatment as well as the freedom of expression, these obligations also permit the investigation of potential breaches of IHRL.

The standard of investigation required is sensitive to operational constraints; but genuine efforts to investigate might be achieved through the use of technology, as well as informants on the grounds and cooperation with strategic allies, NGOs, and other humanitarian organisations. Importantly, IHRL makes it clear that an investigation following the use of force may not be reduced to a 'mere formality'. The public disclosure of the accurate numbers of civilian casualties attributable to a use of force by the UK is primarily mandated by the right to access information. It is essential to hold armed forces accountable for potential violations of their obligations under IHRL and to enable victims to meaningfully exercise their rights, particularly the right to an effective remedy.

[380] Office of the UN High Commissioner for Human Rights (n 375) para 43.