

**GUIDELINES ON INVESTIGATING VIOLATIONS OF  
INTERNATIONAL HUMANITARIAN LAW AND PRACTICAL  
MECHANISMS FOR ACCOUNTABILITY—TODAY AND  
BEYOND\***

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## I. Introduction

Thank you. It is a pleasure to be here today. I have not been in this auditorium in a few years, but I have been a regular guest of various events for The Judge Advocate General's Legal Center and School and the University of Virginia over the years. Special thanks to Brigadier General Berger, Lieutenant General Pedo, Sergeant Major Martinez, Colonel McGarry, Mr. Borch, Lieutenant Colonel Marchese, Major Medici, and I am sure there was a lot of other people who had a lot to do with organizing this. It is a really great and timely topic.

Today, I am going to talk about accountability for war crimes, where we are today, and where we are going. Before I do that, I would like to give a few disclaimers because of questions like, "Why is the humanitarian lawyer talking about the battlefield?" and "What experience would I have to be able to speak to that?" I think it is really important to give you a little bit about where I am coming from professionally and personally.

I am here in my capacity as the Chair of the Lieber Society. I do not know if there are any members of the American Society of International

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Law here, but it is a great society. I know Gary Solis has been a member, as well as Geoff Corn, and Rachel VanLandingham is one of my executive committee members right now. It is really a great community of active duty and reservist Service members, academics, students, Europeans, Americans, and other nationalities. It is a group of people who love the law of armed conflict (LOAC), so it has been a privilege to serve in that capacity.

That being said, I am a lawyer for the International Committee of the Red Cross (ICRC), and I have been for ten years. I am sure you have read about the ICRC because you have memorized the Geneva Conventions, but has anyone had a chance to work with the ICRC in the field or elsewhere? There are a few in the room, but I hope at some point in your careers you will be deployed and you will run into us somewhere in the field. We are really everywhere you do not want to be; Afghanistan, Iraq, and Yemen are our biggest offices. We tend to be in the areas of conflict and other places where there is violence, but we are also in capital cities (e.g., Washington D.C.), where we are able to have a dialogue with authorities on higher-level topics.

The ICRC is mandated by the Geneva Conventions to provide assistance and protection to those affected by armed conflict.<sup>3</sup> And that is not just civilians; we are also mandated to visit prisoners of war<sup>4</sup> and we take it upon ourselves to be concerned about what happens to those military members who are affected by armed conflict.<sup>5</sup> I think we really try to have all the different aspects and perspectives in mind when we are working. On the ground, we go unprotected and unarmed into these places and work with local communities. We only go somewhere if we are accepted by all

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<sup>3</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 9, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 9, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 9, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 10, Aug. 12, 1949, 6 U.S.T. 3516; 75 U.N.T.S. 287.

<sup>4</sup> Geneva Convention Relative to the Protection of Prisoners of War, *supra* note 3.

<sup>5</sup> INT'L COMM. OF THE RED CROSS, THE ICRC: ITS MISSION AND WORK 3 (2009) ("Since it was founded in 1863, the [International Committee of the Red Cross (ICRC)] has been working to protect and assist the victims of armed conflict and other situations of violence. It initially focused on wounded soldiers but over time it extended its activities to cover all victims of these events."); *ICRC Relations with Armed Forces*, INT'L COMM. OF THE RED CROSS, <https://www.icrc.org/en/doc/what-we-do/building-respect-ihl/dialogue-weapon-bearers/armed-forces/overview-armed-forces.htm> (last visited June 17, 2021).

the parties, which means we have to talk to everyone—not just the state authorities, but also non-state actors.<sup>6</sup> Sometimes that puts us into a bit of a tricky position, but we have found that by having a bilateral and confidential dialogue, we are able to access most places.

That is a brief the history of the organization for which I work. Interestingly enough, one of the big things ICRC is known for is that we do not testify in any kind of international criminal proceeding.<sup>7</sup> We have a special rule, rule 73 in the International Criminal Court (ICC), that explicitly grants us immunity from any kind of testimony or having to be brought before that court to provide evidence.<sup>8</sup> It is always interesting when I hear people talking about international criminal law, because it is kind of a tricky area for us and it can make us a little squeamish because we obviously support these processes and believe in them, but we also have to keep our distance in some respect.

From a personal level, I am a sister and sister-in-law to two U.S. Navy Sailors, so I really appreciate the military perspective. I have shared an office for six of my ten years at the ICRC with three different Judge Advocate General's Corps colonels. Our interns have become judge advocates. I was trying to count today, and I think I have had four interns that have become judge advocates, so I am fully invested in the idea that you all serve as a conscience of the military.

Again, I really appreciate being here today to share my thoughts. I do not think we are always going to agree necessarily, but I think we all have the same objective in mind. We are coming from different places, but we all want to get to the same objective of having the best outcome you can have in a war that protects civilians. But, obviously, we have different, other objectives that we have to work around as well.

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<sup>6</sup> *Id.* at 4 (“To be able to carry out its mission effectively, the ICRC needs to have the trust of all States, parties [meaning all entities (*de jure* or *de facto*) having obligations] and people involved in a conflict or other situation of violence.”).

<sup>7</sup> See, e.g., Prosecutor v. Simić, Case No. IT-95-9, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, ¶¶ 45–80 (Int’l Crim. Trib. for the Former Yugoslavia July 27, 1999) (providing an overview of the ICRC’s international mandate, to include its confidentiality interest).

<sup>8</sup> INT’L CRIM. CT. R.P. & EVID. 73(4).

I am going to break today's session into three parts. They are not of equal lengths, but I think they are of equal importance. The first is where we are today with respect to accountability. We have talked a lot today about history and where we have been, but I am going to talk about where we are now, the mechanisms we have and can use now, and, to some extent, how effective they are, though I will leave it to Professor Nachbar to discuss the efficacy and how successful we have been. The second part that I will discuss will be grouped as aspects that I might suggest should change. Professor Corn's entire presentation was my second point, so I will be able to skip through that session quickly. I might add a couple of thoughts, but I would not even try to compete with that. Finally, I will end with why accountability matters and provide some empirical evidence on that aspect.

## II. Where We Are Today

You have already heard from the experts on the International Military Tribunal (IMT), so I am going to set all of that to the side and look at some of the other processes. Even though we do have some tribunals that are sort of the successors to the IMT and, to some extent, the International Criminal Tribunal for the former Yugoslavia and others, I really want to look at things that are a bit more functional and that can be used going forward. I am going to look at some of the practical mechanisms, not just the formal tribunals that we have talked about so far today.

I am going to quickly touch on investigations, reparations, amends, the International Humanitarian Fact-Finding Commission, and domestic and international accountability mechanisms that are not tribunals. This discussion will not be comprehensive, but in the time I have I will hopefully give you a picture of what is out there, much of which will be familiar to you. I am really only going to focus on LOAC mechanisms. I am not going to talk about anything related to human rights, the European Court, or the Human Rights Committee.

### A. Investigations

We will start with investigations, which is where you should always begin when discussing accountability. Investigations in armed conflict are complex. We heard a little bit from Geoff, who talked about some of his work, and from Gary, who talked about what it is like to investigate a war crime. Certainly in Nuremberg they faced some of the challenges that we

still see today of not just the legal complexity of having to figure out what the law is going to be—this is obviously a bit more specific to when you are outside your own territory in a conflict—but also the logistics of how you are going to collect the evidence, get to the witnesses, and get the translators to talk to the witnesses. I think these are incredibly difficult and becoming more difficult as we become more remote, whether it be because of drone technology, cyber, or something else. In many cases, we are starting to remove ourselves from the battlefield. How do we continue to have investigations when the logistics become quite overwhelming?

Law of armed conflict investigations must take place.<sup>9</sup> The United States has one of the most sophisticated systems and if anybody were going to get it right, I would hope that it would be you all. Judge advocates are the center of that, which means that we are relying on you to be able to carry out these investigations, begin these processes, and get accountability off to a good start. The 1949 Geneva Conventions state that the high contracting parties must provide effective penal sanctions.<sup>10</sup> While there is a mandate in the Geneva Conventions to do this, there are not many details.

To provide some meat to the bones on what constitutes an effective investigation, the ICRC and the Geneva Academy of International Humanitarian Law and Human Rights, of which I am an alumnus, have carried out in the last few years a series of expert consultations, and they published in 2019 the *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice*.<sup>11</sup> It is a great resource, and it has every aspect you could imagine of how an investigation in LOAC should look.

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<sup>9</sup> GENEVA ACAD. OF INT'L HUMANITARIAN L. & HUM. RTS. & INT'L COMM. OF THE RED CROSS, GUIDELINES ON INVESTIGATING VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW: LAW, POLICY, AND GOOD PRACTICE para. 119 (2019).

<sup>10</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 3, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *supra* note 3, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; Geneva Convention Relative to the Protection of Prisoners of War, *supra* note 3, 6 U.S.T. at 3418, 75 U.N.T.S. at 236; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 3, 6 U.S.T. at 3616–18, 75 U.N.T.S. at 386–88.

<sup>11</sup> GENEVA ACAD. OF INT'L HUMANITARIAN L. & HUM. RTS. & INT'L COMM. OF THE RED CROSS, *supra* note 9.

Based on my limited time, I picked one topic, efficacy of investigations, to give you a taste of what the guidelines considered. The guidelines found that in order for an investigation to be effective and to lead to appropriate accountability under international law, the following guidelines should be considered:

- “Military operations should be recorded at the earliest possible time. The scope of recording may depend on the feasibility of doing so in the circumstances,” but there should be some record.<sup>12</sup>
- “A commander present at the scene of an incident should take all feasible steps to ensure the securing and preservation of relevant information and evidence if more appropriate authorities are not available.”<sup>13</sup>
- “Any incident must be promptly reported by a commander to the competent authority for assessment.”<sup>14</sup>
- “An internal process should be in place for persons other than a commander to report incidents through the chain of command or to corresponding law enforcement agencies where they exist. Individuals must be free to make such reports without fear of retribution.”<sup>15</sup>
- “Accessible and effective processes for receiving external allegations of an incident should be provided for.”<sup>16</sup> Especially in contexts like Afghanistan or Yemen, where there might be ongoing strikes or detention taking place, those civilian populations should have some mechanism to be able to report any allegations that they may have.
- “Internal reports or externally received allegations related to an incident should be passed on to the appropriate authority for an assessment of the action to be taken in response.”<sup>17</sup>

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<sup>12</sup> *Id.* at 16.

<sup>13</sup> *Id.* at 18.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 21.

<sup>16</sup> *Id.* at 22.

<sup>17</sup> *Id.* at 23.

I think these are the basic building blocks that you all know. I am sure that this is standard fare, but, of course, what is on paper is not always what happens in practice. I think that we can all agree that these are agreeable guidelines.

I would like to share a recent example of how these investigations can help and why the efficacy of investigations matter. I think that this can help to concretize the concepts so that it is not just a list of what you should do but rather how investigations can help us change. In the United States, there has been an absence of a standardized tool for civilians to report civilian harm to the U.S. military.<sup>18</sup> In 2018, we saw that Congress passed in the National Defense Authorization Act for Fiscal Year 2019 a provision for the “development of publicly available means, including an Internet-based mechanism, for the submittal to the United States Government of allegations of civilian casualties resulting from United States military operations.”<sup>19</sup> I think there is a recognition not only on how you all carry out investigations but also that the aspect of the external reporting is becoming recognized as being an important element, especially in the extraterritorial conflicts we see today.

Again, if it is remote and you do not have your own troops on the ground to collect that evidence, it still must be investigated. How are you going to do that? You have to develop mechanisms to reach out to the local population. The United States has become very good at this and is still getting better. This is not something that you all lack, but it is something that is clearly being more emphasized over time, and I think that is very important to recognize.

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<sup>18</sup> See, e.g., MARLA KEENAN & JONATHAN TRACY, *CTR. FOR CIVILIANS IN CONFLICT, UNITED STATES MILITARY COMPENSATION TO CIVILIANS IN ARMED CONFLICT* (2010).

<sup>19</sup> John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 936(b)(3), 132 Stat. 1635, 1939 (2018). Responsive to this requirement, the Under Secretary of Defense for Policy published a report to describe the progress on the required policy and the Department of Defense’s implementation efforts, U.S. DEP’T OF DEF., *REPORT ON CIVILIAN CASUALTY POLICY* (2019), and the Deputy Under Secretary of Defense (Policy) has coordinated to create a Department of Defense Instruction, Memorandum from Deputy Under Sec’y of Def. (Pol’y) to Sec’y of the Mil. Dep’ts et al., subject: Development of a DoD Instruction on Minimizing and Responding to Civilian Harm in Military Operations (31 Jan. 2020).

## B. Reparations and Amends

Investigations are a starting point, and they should always lead to something—maybe a conclusion that nothing needs to happen, or maybe an action needs to be taken in one direction or another, depending on where the evidence takes you. Prosecution may be one of those outcomes, but another one that has become more common over time is the idea of reparations and amends.

Some of you may know already that reparations are a legal remedy that are normally owed from one state to another (i.e., it is not something that individuals normally utilize).<sup>20</sup> Under human rights law, a state might owe reparations to its own citizens, but, generally in the LOAC, we are talking about reparations that are owed from state to state. You could have reparations for a violation of the LOAC but that is going to be a bit high-level without addressing individual need. These investigations often will not prove necessarily that any war crime or international humanitarian law (IHL) violation was committed, so reparations are not relevant anymore.

How else can accountability take place if it was just a mistake or if it was not a mistake and was completely lawful but civilians were killed or civilian property was destroyed (i.e., if the incidental harm was proportionate and every other step was taken)? One thing that we see is that we still might need accountability. Even if you can say that something was perfectly lawful, you still might need to make some kind of amends. Amends can take many forms, but it can have an important role in reconciliation and post-conflict recovery. It is important to take into account when you are going through these investigations that there are these different avenues, one of which might be that, though nobody was at fault, we still need to show that we are accountable for what we do. It could be a simple apology but, more often than not, it takes the form of payment.<sup>21</sup>

Being that amends are policy decisions, you might not be required to make the payment, but you might have the option to do so. There is a U.S. policy on this under Army Regulation 27-20, paragraph 10-11, which

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<sup>20</sup> *E.g.*, G.A. Res. 60/147, at 5 (Mar. 21, 2006) (describing each state's duty to "[p]rovide effective remedies to victims, including reparation, as described [in the resolution].").

<sup>21</sup> Madison Hunke, *Making Amends: A Guide to US Law and Policy on Post-Harm Amends*, CTR. FOR CIVILIANS IN CONFLICT (Jan. 7, 2021), <https://civiliansinconflict.org/blog/making-amends-a-guide-to-us-law-and-policy-on-post-harm-amends>.

authorizes the use of solatia payments.<sup>22</sup> We often call them “ex gratia” payments in the ICRC, but I think the U.S. term has been “solatia.” These have been used quite liberally in Afghanistan and, I am sure, in other countries, as well.<sup>23</sup> In a study of these payments that were made in Afghanistan that was carried out by the Center for the Protection of Civilians in Armed Conflict found that the forces who actually paid out these solatia payments (or were somehow involved in them) were strongly in favor of them afterward.<sup>24</sup> They saw that they had positive effects: they built popular support and helped to build relationships with local leaders, both of which helped them to do other things that were imperative to their mission. Again, it was not that they thought they had done anything wrong, but they saw the importance in showing that they would be accountable for making people whole for any damage they suffered, and that had a really positive impact not only on the civilians but also on the troops and their mission as well.

### C. Domestic Prosecutions and the International Criminal Court

Investigations might go in another direction if you find out something has happened—maybe there has been an IHL violation or there has been a war crime committed, which is certainly the theme of today’s conference. Here, we start to think about what we are going to do to hold people individually liable and what our options are.

We have talked about the international tribunals in the form of the IMT. Obviously, there were a number of tribunals that have followed that were ad hoc tribunals: the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and many other iterations. I think that sometimes we forget that domestic prosecutions have played an even greater role than these tribunals, as important as they have been. Domestic prosecutions can be of one’s own citizens, but it can also be the prosecution of contractors

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<sup>22</sup> U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 10-11 (11 May 2016) (“Payment of solatia in accordance with local custom as an expression of sympathy toward a victim or his or her Family is common in some overseas commands.”).

<sup>23</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-07-699, MILITARY OPERATIONS: THE DEPARTMENT OF DEFENSE’S USE OF SOLATIA AND CONDOLENCE PAYMENTS IN IRAQ AND AFGHANISTAN 1–2 (2007) (“From fiscal years 2003 to 2006, DOD has reported about \$1.9 million in solatia payments and more than \$29 million in condolence payments to Iraqi and Afghan civilians who are killed, injured, or incur property damage as a result of U.S. or coalition forces’ actions during combat.”).

<sup>24</sup> KEENAN & TRACY, *supra* note 18.

you have employed, troops of partnered forces, troops of enemy forces, or possibly individuals who have committed war crimes who have no connection to your military or your state under the so-called universal jurisdiction,<sup>25</sup> which we have heard a little bit about today.

However, experience shows us how difficult the path toward holding individuals accountable outside of one's own territory can be. It is easy enough for the United States to use the Uniform Code of Military Justice to prosecute its own troops, but when we start looking at enemy forces you encounter abroad, you start to deal with not only legal challenges (e.g., jurisdiction), but also logistical challenges of getting them to a place where you can actually prosecute them. This can make it difficult to hold accountable those persons who have committed war crimes.

If we look at what happened after World War II and compare it to Syria today and we think about what we saw with the IMT, we see a lot of similar atrocities, such as the use of torture, arbitrary detentions, chemical weapons, and aerial bombardments against civilian populations,<sup>26</sup> but we do not see the world coming together and creating a tribunal for Syria. There are many reasons that we can debate on why that is, but it is clearly not happening. What other options might we have if we cannot count on an ad hoc tribunal for Syria to see the same accountability that we saw with the IMT and subsequent proceedings?

Starting in 2013, the Swiss actually led a campaign to have Syria referred to the ICC.<sup>27</sup> Of course, while Syria is not party to the Rome Statute, the charges could still be referred through the United Nations Security Council.<sup>28</sup> But, in 2014, Russia and China vetoed any referral of charges to the ICC with respect to Syria.<sup>29</sup> What other options might there be if the Security Council will not refer the case of Syria to the ICC? I imagine it

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<sup>25</sup> Beth Van Schaack, *National Courts Step Up: Syrian Cases Proceeding in Domestic Courts* (2019) (manuscript at 2), <https://ssrn.com/abstract=3327676>.

<sup>26</sup> Julian Borger, *Call for Special Tribunal to Investigate War Crimes and Mass Atrocities in Syria*, *GUARDIAN* (Mar. 17, 2015), <https://www.theguardian.com/world/2015/mar/17/call-for-special-tribunal-to-investigate-war-crimes-and-mass-atrocities-in-syria>.

<sup>27</sup> Letter from Thomas Grüber, Ambassador, to Mohammad Masood Khan, President, United Nations Sec. Council (Jan. 14, 2013), <https://www.news.admin.ch/newsd/message/attachments/29293.pdf>.

<sup>28</sup> Rome Statute of the International Criminal Court art. 13(b), July 17, 1998, 2187 U.N.T.S. 90.

<sup>29</sup> U.N. SCOR, 69th Sess., 7180th mtg. at 4, U.N. Doc. S/PV.7180 (May 22, 2014).

will be just as difficult to get an ad hoc tribunal. Not only would there be the same political barriers, but you would also have to pay to create a new tribunal, so you would have an additional burden. At least with the ICC you have an existing infrastructure, so we can imagine that an ad hoc tribunal is not anywhere in the near future because there is just not the political will to get that through the Security Council.

What about the General Assembly? Could they create something? There has actually been one tribunal created by the General Assembly rather than the Security Council, and that was in Sierra Leone.<sup>30</sup> But that was done with the consent of Sierra Leone.<sup>31</sup> I do not imagine that Syria would necessarily be open to consenting to having a tribunal to try the government's and other groups' potential war crimes on its own territory.<sup>32</sup>

You would also need a compliant host state to do a hybrid tribunal. We talked a little bit about those earlier, as well, where you would have international judges on local Syrian courts or Syrian judges on international courts, whatever type of combination would make sense in the case of Syria. But, again, without the compliant host state, it is unlikely that you would see any success there.

#### D. International Humanitarian Fact-Finding Commission

Without the hybrid tribunal option, we are left with another possible option: the International Humanitarian Fact-Finding Commission (IHFFC). Article 90 of Additional Protocol I created a permanent body in Geneva that is mandated to investigate grave breaches or serious violations of IHL.<sup>33</sup> It is only applicable in international armed conflicts and if both states are party to Additional Protocol I, and they need to make a declaration in advance

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<sup>30</sup> “The [General Assembly] has been involved in the creation of prior *ad hoc* tribunals (such as the Special Court for Sierra Leone (SCSL)), but always with the involvement and consent of the target state.” Beth Van Schaack, *Options for Accountability in Syria*, JUST SEC. (May 22, 2014), <https://www.justsecurity.org/10736/options-accountability-syria>.

<sup>31</sup> Permanent Rep. of Sierra Leone to the U.N., Letter dated Aug. 10, 2000 from the Permanent Rep. of Sierra Leone to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2000/786, annex (Aug. 10, 2000).

<sup>32</sup> See generally Van Schaack, *supra* note 30.

<sup>33</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 90, June 8, 1977, 1125 U.N.T.S. 3.

that they both accept its jurisdiction.<sup>34</sup> You can make ad hoc requests later, so it does not preclude jurisdiction, but it is not going to be automatically applicable unless you have that declaration. Again, this seems like a very unlikely scenario in Syria.

The IHFFC was used most recently in 2017, when the Organization for Security and Co-operation in Europe asked the IHFFC to carry out a forensics inquiry after several of its employees were killed in the bombing of Eastern Ukraine.<sup>35</sup> That is one example of an ad hoc use of that body. The IHFFC also recently offered its services in Armenia and Azerbaijan for the Nagorny-Karabakh conflict.<sup>36</sup> As far as I am aware, this did not lead anywhere.

Again, the IHFFC exists and could be requested, but it is very unlikely, especially when the other states involved (e.g., the United States, Israel, Turkey) are not party to Additional Protocol I. Russia actually is, but I am also not really imagining Russia is going to do that either. That mechanism exists but would be very hard in a case like Syria.

#### E. Using Domestic Law to Prosecute War Criminals

What we are left with is going to be some kind of mix of domestic and transnational prosecutions. Many states have created some sort of universal jurisdiction for war crimes so that they can prosecute things that have taken place entirely outside of their jurisdiction,<sup>37</sup> but those can be difficult to find the evidence or witnesses for because they are so far removed from the issue. There has been some progress made in cooperation between states. I think of INTERPOL and Europol as one example, but there have been other special prosecutorial units dedicated just to investigating these types of international crimes—not just war crimes, but crimes of terrorism and crimes against humanity—and states have started to create joint

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<sup>34</sup> *Id.* art. 90(2); CLAUDE PILLOUD ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 para. 3617 (Yves Sandoz et al. eds., 1987).

<sup>35</sup> *The Independent Humanitarian Fact-Finding Commission: Has the 'Sleeping Beauty' Awoken?*, HUMANITARIAN L. & POL'Y (Jan. 9, 2014), <https://blogs.icrc.org/law-and-policy/2018/01/09/the-independent-humanitarian-fact-finding-commission-has-the-sleeping-beauty-awoken>.

<sup>36</sup> *News from the IHFFC*, INT'L HUMANITARIAN FACT-FINDING COMM'N, <https://www.ihffc.org/index.asp?Language=EN&page=news> (last visited June 18, 2021).

<sup>37</sup> Van Schaack, *supra* note 25.

investigative teams to pool their resources to try to prosecute some of these.<sup>38</sup>

We have now seen, especially in Europe, some successful prosecutions, particularly for war crimes of ISIS.<sup>39</sup> Again, it is always easier to get the non-state actor than the state actor, I think, but there have been a few. Even in that case, you see a focus on lesser-known war crimes (e.g., desecration of a corpse rather than the murder of the person that the corpse used to be), because the evidence and the difficulty in proving the “greater” crime proves impossible but they are able to get them on a “lesser” war crime.<sup>40</sup>

That is a brief overview of some of the things that exist today and, again, a lot of it does not look great for cases like Syria. But there is some small movement and some small successes that we can be really happy about.

### III. What Needs to Change Before “Battlefield Next”?

My next section is what needs to change, and I generally have three points. First, we have to figure out how to create accountability for the great powers. The IMT is really the last time that we see great power state actors brought before a tribunal. The subsequent tribunals tended to be poorer or less powerful states. In a conflict between Russia, the United States, and China, it would be incredibly difficult to see anything happen at an international level if it needed to happen. But you can have successful domestic prosecutions in your own state.

Second, we need to be clear about why war crimes are different. That was Geoff’s entire presentation.<sup>41</sup> The only thing I would add is that we are starting to see more and more, not just from the United States, that instead of war crimes, it is material support for terrorism.<sup>42</sup> There is a reason that war crimes are supposed to be special and that they are supposed to be designated differently and have different mechanisms for accountability

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<sup>38</sup> *Id.* at 3–4.

<sup>39</sup> *Id.* at 2–3.

<sup>40</sup> *Id.* at 5.

<sup>41</sup> See generally Geoffrey S. Corn, *Individual Criminal Responsibility for War Crimes*, 229 MIL. L. REV. 191 (2021) (discussing the charging and prosecution of war crimes).

<sup>42</sup> See generally James G. Vanzant, *No Crime Without Law: War Crimes, Material Support for Terrorism, and the Ex Post Facto Principle*, 59 DEPAUL L. REV. 1053 (2010) (analyzing material support for terrorism under domestic and international lenses).

than terrorism.<sup>43</sup> It is a different ballgame, so we do not want to rely overly on that as a fallback every time. We really need to find a way to focus in on the war crimes, and I think Geoff had some great suggestions for how that might happen with the Uniform Code of Military Justice, but this is a global phenomenon.

Third, we need to take advantage of technologies as we go forward to hold perpetrators accountable (e.g., the use of remote technology to gather evidence). As I am running out of time, I am going to skip the rest of this section to focus on my last point: Why does accountability matter?

#### IV. Why Accountability Matters

I would argue that accountability is not only important because it enhances not only the international legal order and rule of law at a local level but also because it has practical implications for the development of the rules of LOAC, for customary law, and for adjustments in future conduct on the battlefield (e.g., standard operating procedures, reduction of the total harm to civilians), and it can create progress toward post-conflict reconciliation.

On the development of rules, the ICRC has been collecting success stories of IHL compliance in a project called “IHL in Action.”<sup>44</sup> One example that I found was the civilian casualty tracking cell that was created in 2008 within the NATO-led International Security Assistance Force to collect data on civilian casualties.<sup>45</sup> This mechanism resulted in the issuance of new tactical directives and guidelines by the International Security Assistance Force and NATO to mitigate civilian casualties.<sup>46</sup> As a result, civilian casualty rates actually dropped.<sup>47</sup> Creating some sort of accountability mechanism, even if it is not for an IHL violation or you are not looking to prosecute, knowing what is happening and what impact it has on a local population, and finding a way to reduce the impact on the

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<sup>43</sup> See Corn, *supra* note 41, at 197–98.

<sup>44</sup> *About the Project*, IHL IN ACTION, <https://ihl-in-action.icrc.org/about> (last visited June 18, 2021).

<sup>45</sup> *Afghanistan, Implementation of a Civilian Casualty Tracking Cell*, IHL IN ACTION, <https://ihl-in-action.icrc.org/case-study/afghanistan-implementation-civilian-casualty-tracking-cell> (last visited June 18, 2021).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

civilian population so that you can have new practices developed, as was the case in that particular example, is helpful.

If we go back to solatia payments as another example, it is a lot of good practice that we see, but in order to develop a new rule, especially a new customary rule of LOAC, we do not need just practice. We need *opinio juris*, the expression by states that they believe they are doing it out of a sense of legal obligation.<sup>48</sup> I do not think that we see that with solatia payments. I think it is a good practice, but we are not seeing it move to a rule. Maybe, eventually, we will start to see states say they think that they are legally obligated to do that, and we could see the development of a new customary rule. Again, I think it is important to think about accountability because it could lead to new rules that seek to enhance civilian protection.

Finally, I will end with a focus on the importance of accountability on the impact to the civilian population because, as lawyers, we tend to talk about accountability in terms of the law (e.g., legality, procedural guarantees, and due process, which are all important, of course). We also have to remember that it can have real-life consequences for people on the ground. We should not just seek to avoid LOAC violations because they are illegal but also because of the impact that they can have on the affected population.

With that in mind, the ICRC has launched a separate empirical study from the one I mentioned a moment ago to determine what the measurable impacts of IHL violations can be on a given population and to try to quantify both the human and economic costs of such violations. This will be slowly published online. It is not all up yet, but the first report that came out was on displacement in armed conflict.<sup>49</sup> The study demonstrated that while displacement will always be an inevitable feature of war, LOAC violations exacerbated displacement and, more importantly, were a leading cause in preventing returns, even once the conflict or the violence had ended.<sup>50</sup> People are less likely to return when LOAC violations have been committed due primarily to the fear created by intentional violations versus incidental

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<sup>48</sup> *Opinio Juris Sive Necessitatis*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The principle that for conduct or a practice to become a rule of customary international law, it must be shown that countries believe that international law (rather than moral obligation) mandates the conduct or practice.").

<sup>49</sup> INT'L COMM. OF THE RED CROSS, DISPLACEMENT IN TIMES OF ARMED CONFLICT: HOW INTERNATIONAL HUMANITARIAN LAW PROTECTS IN WAR, AND WHY IT MATTERS (2020).

<sup>50</sup> *Id.* at 5–6.

harm.<sup>51</sup> Extensive damage to property that often resulted from unlawful conduct of hostilities (e.g., a lack of precautions or distinction) also exacerbated this.<sup>52</sup> The ICRC's empirical studies show that where mere hostilities occur, where people are dying and property is being destroyed, displacement was likely to be short-term,<sup>53</sup> whereas in cases where intentional IHL violations that were not held accountable, displacement was likely to be long-term or permanent.<sup>54</sup>

#### V. Conclusion

What we can conclude from this is that if not only the perpetrators know they will be held accountable, but the civilian population knows that the perpetrators will be held accountable, you can see that, at least in the case of displacement, you will make an impact and lessen the long-term consequence of displacement. I imagine that some of the future studies that they plan to do will demonstrate similar data that this applies to other kinds of violations, as well.

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<sup>51</sup> *Id.* 38–39.

<sup>52</sup> *Id.* at 31.

<sup>53</sup> *Id.* at 38.

<sup>54</sup> *Id.*