

**WE'VE TALKED THE TALK, TIME TO WALK THE WALK:
MEETING INTERNATIONAL HUMAN RIGHTS LAW
STANDARDS FOR U.S. MILITARY INVESTIGATIONS**

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I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times.¹

I. Introduction

Syria, 2014: After more than two years of watching the Assad regime commit horrendous human rights abuses against his people, the North Atlantic Treaty Organization (NATO) decides it has to act. Despite lacking United Nations (UN) Security Council authorization, NATO, along with a small coalition of supporting Arab League countries, enters Syria in January 2014, with the mission of stopping the violence against the Syrian people and apprehending President Bashar al-Assad. NATO expects the mission to be completed within a six-month timeframe. Although al-Assad is killed in an airstrike, the violence continues unabated. As a result, NATO commits more troops to ensure Syria's eventual stabilization.

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¹ THOMAS JEFFERSON, 10 THE WRITINGS OF THOMAS JEFFERSON 42–43 (Paul L. Ford ed., 10th ed. 1899).

During a combined patrol, American and British troops come under fire from a rooftop sniper. The NATO troops promptly return fire, killing the sniper along with an unrelated civilian father eating dinner in a room just below the sniper's position. The story receives continuous coverage on Al Jazeera, featuring the dead father's picture, and on various news programs and the Internet.

United States Central Command (USCENTCOM) initiates an Army Regulation (AR) 15-6 informal investigation, and the British military initiates its own separate investigation.² Each country appoints a military officer to conduct its own investigation. Both investigators gather statements from every soldier on the patrol. Both conclude the soldiers intended to shoot the sniper, a lawful target under the law of armed conflict, and classify the civilian father's death as collateral damage. Both appointing authorities approve the respective investigations.

Approximately eight months later, the deceased's next-of-kin files a lawsuit against the United Kingdom, claiming the lack of an effective investigation into the death of the father, as required by Article Two of the European Convention on Human Rights (ECHR). Ultimately, the European Court of Human Rights (ECtHR) agrees that the British troops failed to conduct an effective investigation and awards substantial monetary damages to the deceased's next-of-kin. Additionally, the UN Human Rights Committee expresses concerns regarding the inadequacy of the U.S. investigation in its concluding observations in response to the United States' periodic report.³ Several non-governmental organizations

² Telephone Interview with Lieutenant Colonel (Retired) Kurt Mieth, then-Chief, Administrative Law, Headquarters, U.S. Central Command (USCENTCOM) (Jan. 4, 2012) [hereinafter USCENTCOM Attorney Interview] (explaining that USCENTCOM invites other countries to participate in investigations that involve both countries; however, the investigations remain USCENTCOM investigations in which the USCENTCOM Commander retains exclusive appointing and final approval authority). Army Regulation (AR) 15-6 provides for two separate administrative fact-finding procedures: an "investigation" or a "board of officers." The vast majority of AR 15-6 fact-finding procedures utilized involve a single investigating officer using informal procedures and are designated "investigations." *Id.* Therefore, this article will focus exclusively on AR 15-6 investigations, as opposed to AR 15-6 boards of officers, which are "proceedings that involve more than one investigating officer or a single investigating officer using formal procedures." U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS para. 1-5 (2 Oct. 2006) [hereinafter AR 15-6]. Additionally, it is possible USCENTCOM could direct an investigation and reference the Navy JAGMAN or Air Force Instruction instead of AR 15-6; however, the scope of this article's review will be limited to AR 15-6 investigations.

³ *Universal Periodic Review*, UN PERIODIC REV., <http://www.ohchr.org/en/hrbodies/upr/>

also publicly criticize the United Kingdom and United States for their investigations into the incident.

While the above scenario may seem far-fetched to some, recent legal events suggest otherwise. International Human Rights norms are increasingly applied on the battlefield.⁴ The United States should therefore consider international human rights law standards in situations involving armed conflict, particularly because a central goal of U.S. foreign policy is the promotion of human rights.⁵ The conduct of investigations into alleged law of war violations is one area the United States is deficient in under certain international human rights norms, particularly the ECtHR's standard. Although ECtHR decisions are not binding on the United States, they bind many of our closest allies. As a leader in human rights, the United States should strive to meet international human rights law standards for investigations, such as the standards provided by the ECtHR, particularly for investigations involving alleged unlawful killings.

This article is divided into six parts. Part II details how international human rights law norms are applied increasingly on the battlefield, as occurred in a recent ECtHR case, *Al-Skeini*. It also explains why the United States should endeavor to meet these norms. Part III shows there are consequences for failing to follow international human rights law as demonstrated in the *Al-Skeini* decision. Part IV will discuss current U.S. regulations and their dual approach to investigating alleged law of war violations. Part V explains how U.S. Army Criminal Investigation Command (CID) investigations meet the ECtHR's investigatory standards, but informal AR 15-6 investigations do not. This is a problem, as often only an AR 15-6 investigation is conducted into

upr/pages/uprmain.aspx (last visited Mar. 6, 2012). The Universal Periodic Review "is a unique process which involves a review of the human rights of all 192 UN Member States every four years. . . . [It] provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfill their human rights obligations." *Id.*

⁴ Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 *ISR. L. REV.* 320, 310-48 (2007).

⁵ *Human Rights*, U.S. DEP'T OF STATE, <http://www.state.gov/j/drl/hr/index.htm> [hereinafter *Human Rights*] (last visited Mar. 6, 2012). The U.S. Department of State's website proclaims: "The protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago. Since then, a central goal of U.S. foreign policy has been the promotion of respect for human rights as embodied in the Universal Declaration of Human Rights." *Id.*

serious allegations of law of war violations. Finally, Part VI recommends how future AR 15-6 investigations might fulfill the ECtHR's investigatory standard. This could be accomplished by updating the Department of Defense Directive (DoDD) 2311.01E (Law of War) to delineate which law of war violations require expeditious reporting and provide clear standards for investigators. Part VI also recommends DoDD 2311.01E mandate a fully resourced investigative team for future ground conflicts. The sole mission of this team should be to investigate serious alleged law of war violations, such as those involving alleged unlawful killings. Investigations conducted by this team would result in better investigations overall. Implementing these two recommendations would help the administrative investigations meet the ECtHR's investigatory standard.

II. International Human Rights Law Increasingly Is Applied on the Battlefield

International human rights law is more commonly applied on the battlefield due to the application of customary international law and the extraterritorial application of international human rights treaties to military operations abroad. In its recent *Al-Skeini* decision, the ECtHR applied the ECHR to the British military because the United Kingdom was an occupying power in Iraq.⁶ Additionally, the law of armed conflict is no longer a *lex specialis* that solely and exclusively occupies the field. The emerging view, which the United States subscribed to in its Fourth Periodic Report to the UN Human Rights Committee, is that the relationship between international human rights law and the law of armed conflict is “complementary and mutually reinforcing.”⁷ As a major proponent of human rights, the United States and its military should consider international law norms and strive to meet their standard.

⁶ *Al-Skeini v. United Kingdom*, 53 Eur. Ct. H.R. 18, 41–42 (2011).

⁷ U.S. DEP'T OF STATE, FOURTH PERIODIC REPORT OF THE UNITED STATES TO THE UNITED NATIONS COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS para. 507 (Dec. 30, 2011) [hereinafter FOURTH PERIODIC REPORT], available at <http://www.state.gov/j/drl/rls/179781.htm>.

A. ECtHR Applied ECHR Extraterritorially to Military Operations Abroad

International human rights law increasingly is applied on the battlefield due to the application of customary international law, as well as the extraterritorial application of international human rights treaty law.⁸ The ECtHR is particularly active in this area of law. The ECtHR is an authority for European human rights law and rules on individual and State complaints that allege violations of rights established by the ECHR.⁹ Ratification of the ECHR is a prerequisite for joining the Council of Europe. The ECtHR's decisions are binding upon the states concerned.¹⁰

In *Al-Skeini*, the ECtHR applied the ECHR extraterritorially to British military operations in and around Basrah, Iraq in 2003.¹¹ The court then reviewed the investigations the British chain of command conducted into civilian deaths that occurred during those military operations.¹² The court determined the investigations did not meet the ECHR's standards and, therefore, awarded monetary damages to the complainants.¹³

Before to *Al-Skeini*, the ECtHR's general rule was that jurisdiction of the ECHR was primarily territorial. In *Banković*, the ECtHR held, "A state may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation, or acquiescence, unless the former is an occupying State in which it can be found to exercise

⁸ See UN H. R. COUNCIL, REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON LIBYA 188-97 (2012) [hereinafter UN HUM. RTS. REPORT]. The UN Human Rights Council (Council) investigated alleged violations of international human rights law in Libya, the circumstances of such violations, and where possible, identified those responsible. The Council referenced international customary law in determining that both the Libyan government and the anti-government *thumar* had violated international humanitarian and human rights law. The Council also examined NATO's actions in Libya and concluded that "NATO conducted a highly precise campaign with demonstrable determination to avoid civilian casualties. On limited occasions, the Commission confirmed civilian casualties and found targets that showed no evidence of military utility . . . [It] recommends further investigations." *Id.*

⁹ EUR. CT H. R., THE COURT IN BRIEF, available at http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure_en_bref_EN.pdf (last visited Mar. 6, 2012) (a European Court of Human Rights brochure).

¹⁰ *Id.*

¹¹ *Al-Skeini*, 53 Eur. Ct. H.R. at 56-62.

¹² *Id.*

¹³ *Id.*

jurisdiction in that territory, at least in certain respects.”¹⁴ The court then reviewed jurisdictional bases, other than the territorial basis, and concluded they are “exceptional and [require] special justification in the particular circumstances of each case.”¹⁵

Thus, the court emphasized the primarily territorial reach of Article One of the ECHR, while allowing for exceptional circumstances to this general rule.¹⁶ In so doing, the court highlighted the ECHR’s regional nature, stating that “the Convention is a multi-lateral treaty operating . . . in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. . . . The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.”¹⁷

However, the ECtHR’s decisions in *Issa* and *Al-Skeini* have eroded the court’s primarily territorial rule. In the *Issa* case, Turkish soldiers carrying out military operations in Iraq allegedly abused and killed Iraqi shepherds near the Turkish border.¹⁸ The primary issue in this case was whether the applicants and their deceased relatives fell within Article One of the ECHR for jurisdictional purposes. The ECtHR reiterated that “a State’s jurisdictional competence is primarily territorial,” but then stated “the concept of ‘jurisdiction’ within the meaning of Article One of the Convention is not necessarily restricted to the National territory of

¹⁴ *Banković v. Belgium* 44 Eur. Ct. H.R. SE5, 15, paras. 59–73 (2001).

¹⁵ *Id.* paras. 67–73. The European Court of Human Rights (ECtHR) held the Convention could be applied extraterritorially in the following four “exceptional” types of cases: (1) cases involving acts of diplomatic and consular agents abroad; (2) when a Contracting State exercises jurisdiction through the acquiescence of the government of that territory; (3) when a Contracting State is an occupying State and exercises all or some of the public powers normally to be exercised by the government; and (4) cases involving the use of force by a State’s agents operating outside its territory, such as when State agents take an individual into custody abroad.

¹⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. Article One of the European Convention on Human Rights (ECHR) is a jurisdictional provision that states that all parties shall “secure to everyone within their jurisdiction the rights and freedoms defined in Section One.”

¹⁷ *Banković*, 44 Eur. Ct. H.R. SE5, at 22.

¹⁸ *Issa and Others v. Turkey*, 41 Eur. Ct. H.R. 27, 3–4 (2005). This case involved Iraqi shepherds who, on April 2, 1995, were alleged to have encountered Turkish soldiers carrying out military operations in Iraq, near the Turkish border. According to the applicants, the Turkish soldiers assaulted and abused the Iraqi shepherds. Once the Turkish troops withdrew from the area, the shepherds’ bodies were found riddled with bullet wounds and severely mutilated.

the High Contracting Parties.”¹⁹ The court could “not exclude the possibility, that as a consequence of military action, the respondent State [Turkey] could be considered to have exercised, temporarily, effective overall control of a particular portion of northern Iraq.”²⁰ The court ultimately held that insufficient evidence existed to find the Turkish troops conducted operations in the area where the victims had been found. As such, the court determined the applicants’ relatives did not fall within Turkey’s jurisdiction within the meaning of Article One of the Convention.²¹ However, *Issa*’s significance was the court’s willingness to apply the Convention to individuals in a State not party to the Convention based on the Contracting State’s temporary, effective overall control of an area based on military operations.²²

In *Al-Skeini*, the ECtHR further eroded the primarily territorial rule as it applied the ECHR to British military operations in Iraq. In this case, six Iraqi families sued the United Kingdom, claiming the British failed to conduct an adequate investigation into the deaths of their family members killed by British troops operating in and around Basrah, Iraq.²³ Five of the six Iraqis were shot by British troops on patrol or died in the course of British military operations.²⁴ The British disposition of these cases was determined by a brigadier general who considered written statements from the Soldiers involved, reviewed a written report from the subordinate commanders, and consulted with a legal advisor.²⁵ The Iraqi

¹⁹ *Id.* at 16.

²⁰ *Id.*

²¹ *Id.* at 18.

²² *Id.* at 16.

²³ *Al-Skeini v. United Kingdom*, 53 Eur. Ct. H.R. 18, 15–21 (2011).

²⁴ *Id.* at 27–28. The sixth applicant, Baha Mousa, was taken by British troops to a British base in Basrah. He was beaten and died in British custody. On July 19, 2005, the unit charged seven British soldiers in connection with Mousa’s death. One of the soldiers pled guilty to the war crime of inhumane treatment. The command dropped charges against four of the seven soldiers, and a court-martial acquitted the remaining two soldiers. In May 2008, the British Secretary of State for Defence said that there would be a public inquiry into Mousa’s death. This inquiry was ongoing at the time of the *Al-Skeini* decision.

²⁵ *Id.* at 20–28. The case of the fourth applicant was sufficiently complex that the brigade commander thought it should be investigated by the Special Investigation Branch (SIB). After reviewing the report and discussing it with his legal advisor, the brigadier general decided the conduct fell within the rules of engagement. However, SIB had already begun an investigation into the case. The brigadier general and brigade commander requested SIB terminate the investigation, which SIB agreed to do. After the fourth applicant applied for judicial review, senior investigating officers within SIB decided to re-open the investigation. Upon completing the investigation, SIB reported the results to the soldier’s commanding officer. The commanding officer referred the

families claimed the British violated Article Two of the Convention by failing to adequately investigate the circumstances surrounding their relatives' deaths.²⁶

The ECtHR determined the United Kingdom was an occupying power during this time "within the meaning of Article Forty-Two of the Hague Regulations."²⁷ The ECtHR held,

In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.²⁸

The ECtHR also addressed the confusion concerning *espace juridique*, holding where one State party to the Convention occupies another State party, the occupying State is responsible for any breaches under the Convention, because to hold otherwise would create a "vacuum" of protection within that legal space.²⁹ The ECtHR clarified that that this "does not imply, *a contrario*, that jurisdiction under Article One . . . can never exist outside the territory covered by" the member states.³⁰

The *Al-Skeini* decision is not inconsistent with the court's decision in *Banković*, where the court held that "a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, *unless the former is an occupying State* in which case it can be found to exercise jurisdiction in that territory, at

case to the Army Prosecuting Authority (APA). When a senior independent counsel advised there was no realistic prospect of a conviction, the APA and Attorney General decided not to file charges.

²⁶ *Id.* at 42. Article Two of the ECHR states "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 16, art. 2.

²⁷ *Id.* at 143.

²⁸ *Id.* at 39.

²⁹ *Id.* at 41.

³⁰ *Id.*

least in certain respects.”³¹ Thus, the ECtHR’s *Issa* and *Al-Skeini* decisions allowed for extraterritorial application of the ECHR to its member States conducting military operations abroad, thereby eroding the ECHR’s “primarily territorial” rule.

B. The Law of Armed Conflict and International Human Rights Law Are Complementary and Mutually Reinforcing

A primary objective of human rights law is to protect individuals from the abuse of State power, by imposing limits “on its abuse through the mechanism of ‘rights.’”³² The relationship between the law of armed conflict and international human rights law is “frequently described as a relationship between general and specialized law, in which humanitarian law is the *lex specialis*.”³³ The concept of *lex specialis* is derived from a Roman principle of interpretation whereby an applicable specific rule displaces a more general rule (“*lex specialis derogat legi generali*”).³⁴

In the past, the United States maintained that the law of armed conflict, governed by international humanitarian law, was the appropriate

³¹ *Banković v. Belgium* 44 Eur. Ct. H.R. SE5, 60 (2007) (emphasis added); see also Marko Milanovic, *European Court Decides Al-Skeini and Al-Jedda*, EJIL TALK! (Jul. 7, 2011), <http://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/>. Marko Milanovic argues that the ECtHR

applied a *personal* model of jurisdiction to the killing of all six applicants, but it did so only *exceptionally*, because the UK exercised public powers in Iraq. . . . But, *a contrario*, had the United Kingdom not exercised such public powers, the personal model of jurisdiction would not apply. In other words, *Banković* is according to the court still perfectly correct in its result. While the power to kill is ‘authority and control’ over the individual if the State has public powers, killing is not authority and control if the State is merely firing missiles from an aircraft. Under this reasoning, drone operations in Yemen or wherever would be just as excluded from the purview of human rights treaties as under *Banković*.

Id.

³² Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT’L SECURITY J. 31, 51 (2011).

³³ Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, 90 INT’L REV. RED CROSS 501, 522 (2008).

³⁴ *Id.*

and exclusive *lex specialis* for armed conflicts.³⁵ An ongoing debate exists concerning the relationship between the law of armed conflict and human rights law;³⁶ however, the complementary approach to the law of armed conflict and human rights law has gained ground due to the weight of expert opinion and state practice, as well as decisions issued through various international bodies, such as the ECtHR.³⁷

In its Fourth Periodic Report to the Human Rights Committee, the United States discussed the relationship between the law of armed conflict and international human rights law.³⁸ The United States significantly softened its position concerning the application of international human rights law to the conduct of hostilities during armed conflict.³⁹ After discussing the principle of *lex specialis*, the Fourth Periodic Report noted that “it is important to bear in mind that international human rights law and the law of armed conflict are in many respects complementary and mutually reinforcing. These two bodies of law contain many similar protections [such as the prohibitions on torture and cruel treatment].”⁴⁰ It then argued that “determining the international law rule that applies to a particular action taken by a government in the context of an armed conflict is a fact-specific determination, which cannot be easily generalized, and raises especially complex issues in the context of non-international armed conflicts occurring within a State’s own territory.”⁴¹ Notably, the United States used key words like “complementary” and “mutually reinforcing” to describe the relationship between the law of armed conflict and international human rights law, while at the same time “presenting its *lex specialis* argument in less drastic terms than before.”⁴²

Thus, these passages suggest that the United States’ position is “there may be aspects of a State’s conduct that are, in fact, governed by human

³⁵ See, e.g., Geoffrey S. Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. INT’L HUMANITARIAN LEGAL STUD. 52 (2010).

³⁶ *Id.*

³⁷ *Id.*

³⁸ FOURTH PERIODIC REPORT, *supra* note 7, at 507.

³⁹ Marko Milanovic, *US Fourth ICCPR Report, IHRL and IHL*, EJIL: TALK! (Jan. 19, 2012), <http://www.ejiltalk.org/us-fourth-iccpr-report-ihrl-and-ihl/>.

⁴⁰ FOURTH PERIODIC REPORT, *supra* note 7, at 507.

⁴¹ *Id.*

⁴² Milanovic, *supra* note 39.

rights law, even in a state of armed conflict.”⁴³ This additional body of law can therefore supplement the law of armed conflict as “an interpretive aid to add content to undefined terms in [the law of armed conflict] . . . or to expound upon treaty obligations.”⁴⁴

The International Covenant on Civil and Political Rights (ICCPR) is a source of international human rights law and, under the complementary approach, should be considered in situations involving armed conflict. It further elaborates on the rights and freedoms detailed in the Universal Declaration of Human Rights and is administered by the UN Human Rights Committee.⁴⁵ Article Two of the ICCPR requires each State Party to “undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized” within the Covenant.⁴⁶ States in which the United States has operated militarily (Iraq and Afghanistan) or may operate in the future (Syria) are parties to the ICCPR.⁴⁷ Therefore, despite the U.S. position that the ICCPR does not apply extraterritorially, as a proponent of human rights, the United States should consider abiding by the ICCPR in states where it operates so as to set an example.⁴⁸

Therefore, international human rights law, including human rights treaties such as the ICCPR and customary international law, should be considered in armed conflict, as opposed to simply resorting to the law of armed conflict under the principle of *lex specialis*. Additionally, because the ICCPR and the ECHR share significant similarities, a State attempting to follow the ICCPR may wish to consider the ECHR and

⁴³ *United States Adjusts View on Human Rights Law in Wartime*, INTLAWGRRLS.COM, (Jan. 21, 2012) <http://www.intlawgrrls.com/2012/01/us-adjusts-view-on-human-rights-law-in.html#more>.

⁴⁴ *Id.*

⁴⁵ *Summary of ICCPR and ICESCR*, COMPASS, http://eycb.coe.int/compass/en/pdf/6_5.pdf (last visited Mar. 5, 2012).

⁴⁶ International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

⁴⁷ *Id.*

⁴⁸ Although “extraterritorially” and “complementary” are separate issues, the longstanding U.S. legal position is that the International Covenant on Civil and Political Rights (ICCPR) does not apply extraterritorially. In its Fourth Periodic Report to the Human Rights Committee, the United States restated its position that the Convention does not apply extraterritorially, but it did clarify that “the United States has not taken the position that the Covenant does not apply ‘in time of war.’ Indeed, a time of war does not suspend the operation of the Covenant to matters within its scope of application.” *See* FOURTH PERIODIC REPORT, *supra* note 7, at 506.

how the ECtHR has implemented it in its decisions, particularly as it relates to military operations conducted abroad.

One key right that both the ICCPR and the ECHR seek to protect is the right not to be arbitrarily deprived of one's life. The ICCPR guarantees a person's "inherent right to life" shall not be arbitrarily deprived.⁴⁹ Similarly, Article Two of the ECHR requires "everyone's right to life . . . be protected by law. No one shall be deprived of his life intentionally save in the execution of a court following his conviction of a crime for which this penalty is provided by law."⁵⁰ Additionally, Article Thirteen of the ECHR provides that everyone whose Convention rights and freedoms are violated "shall have an effective remedy before a national authority"⁵¹ Article Two of the ICCPR requires State Parties to "take the necessary steps . . . to adopt such laws or other measures as may be necessary to give effect to the rights recognized in" the ICCPR.⁵² Thus, both the ICCPR and the ECHR prohibit the arbitrary deprivation of life and require a State to provide a remedy when it violates an individual's rights. This is particularly relevant in determining the investigatory standard for serious law of war violations, such as unlawful killings, as will be discussed below.

C. The U.S. Government Should Strive to Meet International Human Rights Law Norms

As international human rights law increasingly is applied on the battlefield, the U.S. government should strive to meet international human rights law norms. The extraterritorial application of international human rights treaties by judicial bodies such as the ECtHR will have a considerable impact on our closest allies. The United States "has often shared common security interests and participated in [military] operations with other nations. Typically, multinational operations are performed within the structure of a coalition . . . [which] is an ad hoc arrangement between two or more nations for common action."⁵³ Since

⁴⁹ International Covenant on Civil and Political Rights, *supra* note 46, at 6.

⁵⁰ European Convention on Human Rights, *supra* note 16.

⁵¹ *Id.*

⁵² UN HUM. RTS. REPORT, *supra* note 8, at 2; *see also id.* at 189 (citing the ICCPR and Article 2's requirement that States provide an effective remedy to any person whose rights or freedoms are violated).

⁵³ JOINT CHIEFS OF STAFF, JOINT PUB. 3-16, MULTINATIONAL OPERATIONS, at vii (5 Apr. 2000).

the end of the Cold War, the United States increasingly has engaged in this “ad hoc approach to coalition-building for contingency operations,” which is only likely to increase in the future.⁵⁴ Thus, the United States will likely continue to conduct future military operations with other coalition allies (such as our NATO partners), many of which are subject to the ECtHR’s decisions.

Furthermore, according to the U.S. Department of State,

[A] central goal of U.S. foreign policy has been the promotion of respect for human rights Because the promotion of human rights is an important national interest, the United States seeks to . . . [h]old governments accountable to their obligations under universal human rights norms and international human rights instruments; [p]romote greater respect for human rights . . . ; [and] [p]romote the rule of law, seek accountability, and change cultures of impunity⁵⁵

Additionally, the Department of State submits annual reports to the U.S. Congress as required by the Foreign Assistance Act of 1961.⁵⁶ These reports review and document the human rights conditions in over 190 countries.⁵⁷ According to the Department of State, the reports are important “because we believe it is imperative for countries, including

⁵⁴ Christopher J. Bowie et al., *Future War: What Trends in America’s Post-cold War Conflicts Tell Us About Early 21st Century Warfare*, ANALYSIS CTR. PAPERS 13 (2003).

⁵⁵ *Human Rights*, *supra* note 5.

⁵⁶ This law requires the U.S. Secretary of State to

transmit to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate, ‘a full and complete report regarding the status of internationally recognized human rights, . . . [of] countries that receive assistance [from the United States] . . . and in all other foreign countries which are members of the United Nations and which are not otherwise the subject of a human rights report under this Act.’

The Foreign Assistance Act of 1966, 22 U.S.C. §§ 116(d), 502B(b) (2012).

⁵⁷ U.S. DEP’T OF STATE., 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES para. 1 (Apr. 8, 2011), *available at* <http://www.state.gov/j/drl/rls/hrrpt/2010/frontmatter/154329.htm>.

our own, to ensure that respect for human rights is an integral component of foreign policy.”⁵⁸

Since it is U.S. policy to actively work to hold other governments accountable for their obligations under universal human rights norms and international human rights instruments, the United States should strive to meet those same standards, particularly when conducting military operations with our close allies. As a major proponent of human rights, the United States should be rather circumspect about simply continuing business as usual under the *lex specialis* banner of the law of armed conflict, particularly when our close European allies, and fellow NATO members, will have to operate under a higher standard required by international human rights law. Although the United States does not agree that the ICCPR applies extraterritorially, it does concur that international human rights norms should be considered even in states of armed conflict. To be a leader on human rights and to set a proper example, the United States should strive to meet the ICCPR’s standards when conducting military operations.

III. There Are Consequences for Failing to Follow International Human Rights Law, as Demonstrated in the ECtHR’s *Al-Skeini* Case

Once the ECtHR resolved the jurisdictional issue in *Al-Skeini*, the second issue was whether the United Kingdom breached Article Two by failing to conduct a proper investigation into the circumstances surrounding each of the six deaths. The United Kingdom emphasized the challenging security operations its troops faced at the time, as well as the fact that it did not have full control over Iraq’s territory or governmental institutions.⁵⁹ The British government accepted that the first three applicants’ investigations were insufficiently independent for Article Two’s purpose as they were “carried out solely by the commanding

⁵⁸ *Id.*; see also Harrold H. Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1408 (1999) (providing an example of a theory of “transnational legal process” in which the United States seeks to encourage China to abide “by core norms of international human rights law.”). Koh explains that the United States “seeks to enforce international norms by motivating nation-states to obey international human rights law—out of a sense of internal acceptance of international law—as opposed to merely conforming to or complying with specific international legal rules when the state finds it convenient.” *Id.*

⁵⁹ *Al-Skeini v. United Kingdom*, 53 Eur. Ct. H.R. 18, 43 (2011).

officers of the soldiers alleged to be responsible.”⁶⁰ However, the government argued its military police investigators were institutionally independent of the armed forces and, therefore, its investigation into the fourth and fifth applicants’ cases complied with Article Two.⁶¹ The government also argued the investigation into the fourth applicant’s case “was reasonably prompt, in particular when regard was had to the extreme difficulty of investigating in the extra-territorial context.”⁶² Regarding the sixth applicant’s case, the United Kingdom emphasized that the applicant confirmed he did not claim that the government had violated his Convention rights given the ongoing public inquiry.⁶³

The applicants argued that security conditions in a conflict zone were not an excuse to modify Article Two’s procedural obligations under ECtHR case law.⁶⁴ They also maintained that the Royal Military Police were not independent from the military chain of command and highlighted the fact that a Special Investigation Branch (SIB) investigation was discontinued at the military chain of command’s request.⁶⁵

The ECtHR held the United Kingdom violated Article Two of the Convention by failing to conduct proper investigations into the six deaths. It found five major deficiencies with the investigations, although not every deficiency applied to each investigation. The first significant flaw was that the investigators were not operationally independent from the military chain of command.⁶⁶ The first three investigations “remained entirely within the chain of command and were limited to taking statements from the soldiers involved.”⁶⁷ The British government accepted this conclusion.⁶⁸ Regarding the investigations conducted by the SIB into the fourth and fifth applicants’ complaints, the ECtHR held that while the military police, including the SIB, had a separate chain of

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 44.

⁶⁴ *Id.*

⁶⁵ *Id.* at 45. The SIB falls within the purview of the Royal Military Police and is responsible for investigating serious crimes committed by British soldiers while on service, incidents involving contact between the military and civilians, and any special investigations tasked to it, including incidents involving civilian deaths caused by British soldiers. *Id.*

⁶⁶ *Id.* at 47.

⁶⁷ *Id.*

⁶⁸ *Id.*

command from the soldiers it was investigating, the SIB was not sufficiently independent from the chain of command. The court noted it was up to the commanding officer to decide whether to call in SIB to investigate and the investigation could be closed at the request of the military chain of command, as it was in the fourth applicant's case.⁶⁹ Additionally, the ECtHR pointed out that SIB reported to the military chain of command, not the relatively independent Army Prosecuting Authority.⁷⁰

The second major flaw was the lack of eyewitness testimony taken by independent investigators.⁷¹ The court held that in each case "eyewitness testimony was crucial."⁷² Expert and independent investigators should have questioned witnesses, particularly alleged perpetrators and Iraqi eyewitnesses, as soon as possible after each event. Every effort should have been made to identify the Iraqi eyewitnesses and "persuade them that they would not place themselves at risk by coming forward" and assure them that their statements would be acted upon in an expeditious manner.⁷³

The third major deficiency was the lengthy and unexplained delays in some of the investigations.⁷⁴ In the case of the fourth applicant's brother, approximately nine months passed before the soldier who shot the applicant's brother was questioned about the incident. This lengthy interval, "combined with the delay in having a fully independent investigator interview the other military witnesses, entailed a high risk that the evidence was contaminated and unreliable by the time the Army Prosecuting Authority" considered it. Regarding the fifth applicant's son's death, the ECtHR noted the government provided no explanation for the twenty-eight-months delay between the death and the court-martial of some of the soldiers allegedly responsible. The court found that as a result of the delay, some of the soldiers could no longer be located, which undermined the investigation's effectiveness.⁷⁵

⁶⁹ *Id.*

⁷⁰ *Id.* at 48.

⁷¹ *Id.*

⁷² *Id.* at 47.

⁷³ *Id.*

⁷⁴ *Id.* at 48.

⁷⁵ *Id.* The court-martial did not convene until September 2005. By that time, three of the seven soldiers accused of killing the fifth applicant's son had been discharged from the Army, and two were absent without leave. *Id.* at 19.

The fourth major inadequacy was that the investigation into the fifth applicant's son's death was scoped too narrowly.⁷⁶ Article Two required a broader examination given the *prima facie* evidence that the applicant's son was taken into British custody where he was mistreated and drowned. Thus, the investigation should have examined the broader issues of "State responsibility for the death, including the instructions, training and supervision given to soldiers that were undertaking tasks such as this in the aftermath of the invasion."⁷⁷

The fifth and final deficiency also related to the fifth applicant's son. The court held that the investigation should have been made accessible to the victim's family and to the general public. This case is contrasted with the sixth applicant's case where the court noted that a "full, public inquiry" was ongoing in that case and no deficiency was noted.⁷⁸

As a result of the *Al-Skeini* decision, the ECtHR awarded approximately 17,000 Euros in damages to each of the five applicants whose relatives' deaths were inadequately investigated.⁷⁹ More significantly, the decision will clearly impact the way the British conduct future investigations into alleged serious law of war violations, specifically, unlawful killings.⁸⁰ Additionally, since the investigatory standard enumerated in *Al-Skeini* applies not only to the United Kingdom but to all ECHR members, the case will also impact how other NATO allies conduct similar investigations as well.

IV. U.S. Regulations Anticipate Dual Investigations (Administrative and Criminal) into Law of War Violations, But Dual Investigations Are Not Followed in Practice

United States regulations concerning the investigation of alleged law of war violations anticipate that two investigations will be conducted, one administrative and one criminal. When the alleged law of war

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 49.

⁸⁰ Interview with Senior British Judge Advocate, Ctr. for Law and Military Operations, in Charlottesville, Va. (Jan. 27, 2012) (explaining that the British Army Provost Marshal was currently reviewing how the British conducts such investigations and considering changes to conform with the ECtHR's decision). No decision had been made as of the date of the interview. *Id.*

violation is serious or felony-level, it becomes more critical that CID conduct an investigation. However, in practice, usually only an AR 15-6 investigation is conducted.

A. DoDD 2311.01E and CJCSI 5810.01D Contemplate That CID Will Investigate Alleged Law of War Violations

Department of Defense Directive (DoDD) 2311.01E requires “all reportable incidents by or against U.S. personnel . . . [to be] reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action.”⁸¹ A reportable incident is defined as “a possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict.”⁸² Department of Defense Directive 2311.01E also requires higher authorities that receive an initial report to “request a formal investigation by the cognizant military criminal investigative organization.”⁸³

Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 5810.01D implements the DoD Law of War Program. It requires reportable incidents to be reported concurrently through combatant command and military department chains of command.⁸⁴ Additionally, CJCSI 5810.01D requires a commander, upon learning of a reportable incident, to “initiate a formal investigation in accordance with Service regulations, and . . . at the same time notify the cognizant military criminal investigative organization (MCIO),” which is then responsible for the criminal incident reporting.⁸⁵ Thus, the Instruction contemplates that two investigations, one administrative and one criminal, occur for alleged law of war violations.

Army Regulation 195-2 (Criminal Investigation Activities) requires CID to “investigat[e] suspected war crimes when a violation of [the War Crimes Act], . . . when a violation of the law of land warfare is indicated,

⁸¹ U.S. DEP’T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 4.4 (9 May 2006) (C1, 15 Nov. 2010) [hereinafter DODD 2311.01E].

⁸² *Id.* para. 3.2.

⁸³ *Id.* para. 6.5.1.

⁸⁴ CHAIRMAN JOINT CHIEFS OF STAFF, INSTR. 5810.01D, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM para. 6(f)(4)(b) (30 Apr. 2010) [hereinafter CJSI 5810.01D].

⁸⁵ *Id.*

or when otherwise directed by HQDA.”⁸⁶ This was reiterated in U.S. Army Criminal Investigation Command (USACIDC’s) Operational Memorandum 008-003 (Initiation of Reports of Investigation and Rights Advisements in Current Deployed Situation in CENTCOM AOR). It states,

CID usually investigates the felony crimes identified in AR 195-1 and the associated civilian equivalent crimes. As noted in AR 195-1[,], however, CID’s investigative purview can be adjusted to include lesser crimes if it would serve a better or overall law enforcement goal Further, the investigation of war crimes, atrocities, or terrorist allegations is within CID investigative purview.⁸⁷

Field Manual (FM) 3-19.13, *Law Enforcement Investigations*, also defines war crimes and provides instruction to the CID agent who is tasked to investigate an alleged war crime.⁸⁸

Additionally, Criminal Investigation Command Regulation (CID-R) 195-1, *Criminal Investigation Operational Procedures*, implements DoDD 2311.01E, by requiring a CID “Report of Investigation (ROI)” be initiated “when there is credible information that a crime has or may have occurred and CID has investigative authority and responsibility.”⁸⁹

Thus, if credible information exists that a law of war violation or war crime has occurred, the regulations contemplate that two investigations will be conducted. One investigation is administrative and is conducted by the command; the other is criminal and is conducted by USACIDC.

⁸⁶ U.S. DEP’T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES para. 3-3(a)(6) (6 Sept. 2011) [hereinafter AR 195-2].

⁸⁷ Memorandum from Deputy Chief of Staff of Operations for CID, to General Distribution, subject: Operational Memorandum 008-03, Initiation of Reports of Investigation (ROIs) and Rights Advisements in Current Deployed Situation in CENTCOM AOR (4 Apr. 2003). Army Regulation 195-2 consolidated AR 195-1 and AR 195-7.

⁸⁸ U.S. DEP’T OF ARMY, FIELD MANUAL 3-19.13, LAW ENFORCEMENT INVESTIGATIONS paras. 18-1 to 18-28 (10 Jan. 2005) [hereinafter FM 3-19.13].

⁸⁹ U.S. ARMY CRIMINAL INVESTIGATION COMMAND, REG. 195-1, CRIMINAL INVESTIGATION OPERATIONAL PROCEDURES para. 4-6 (6 Jan. 2012) [hereinafter CID-R 195-1].

These investigations of the same incident may occur simultaneously because they serve different purposes.⁹⁰

B. In Practice, Many Alleged Law of War Violations Are Not Investigated by CID

While DoDD 2311.01E, CJCSI 5810.01D, and AR 195-2 require that a criminal investigation into credible reports of law of war violations be conducted, criminal investigations often are not initiated in practice.⁹¹ In Iraq, CID simply lacked enough agents to investigate alleged law of war violations in locations where violations had been reported. Special Agents in Charge (SACs) also struggled with the issue of transportation. Because transportation in Iraq could be difficult, SACs never knew when an agent sent into the battlespace might be able to return. Thus, a SAC who had a limited number of CID agents assigned to him, with numerous personal protection and other missions, often choose not to send an agent to investigate law of war allegations. As a result, the AR 15-6 investigations into alleged unlawful killings (similar to situations described in the *Al-Skeini* case) may have consisted of little more than a platoon leader interviewing various squad members involved in the incident.⁹² Such an inquiry fails to meet the ECtHR's investigatory standards.

V. Although CID Investigations Satisfy the ECtHR's Investigatory Standard, AR 15-6 Investigations Do Not; This Is a Problem, Given Current Practice

Given the increasing trend of applying international human rights law to the battlefield, and given the United States striving to be an exemplary leader in human rights, future U.S. military investigations into alleged unlawful killings could be compared to the *Al-Skeini* standard. As such, a comparison of the current Army investigatory standard set forth in criminal and administrative regulations and the ECtHR's is useful.

⁹⁰ Schmitt, *supra* note 32, at 81.

⁹¹ USCENTCOM Attorney Interview, *supra* note 2.

⁹² *Id.*

This part examines the five criteria cited in *Al-Skeini* that are necessary for an effective investigation into unlawful killings. It will also examine additional investigatory steps the ECtHR has said are required in previous cases. Finally, it will demonstrate that the ECtHR criteria are more defined and precise than the standard set forth in AR 15-6. In contrast, CID's regulatory requirements generally meet the ECtHR's standard for investigations into alleged unlawful killings.

A. Independence of the Investigators

The ECtHR held investigators “must be independent and impartial,” in both law and practice, which is a factor in determining an investigation's effectiveness.⁹³ The ECtHR explained that this means “not only that there should be no hierarchical or institutional connection, but also clear independence.”⁹⁴

In *Al-Skeini*, the ECtHR held that since the United Kingdom occupied Iraq, it was “particularly important that the investigating authority was, and was seen to be, operationally independent from the chain of command.”⁹⁵ Some of the investigations into the deaths of Iraqi civilians were conducted entirely within the military chain of command and were “limited to taking statements from the soldiers involved.”⁹⁶ The ECtHR ruled this fell short of Article Two's requirements due to the investigation's lack of independence. SIB conducted the other investigations. While the SIB did have a separate chain of command, it was not “operationally independent from the military chain of command” for several reasons.⁹⁷ First, the commanding officer decided whether the SIB should be called to investigate. Second, even if the SIB initiated an investigation on its own accord, the investigation could be closed at the military chain of command's request.⁹⁸ The court held that this lack of independence violated Article Two of the ECHR, which required an independent examination into the civilians' deaths.⁹⁹

⁹³ *Nachova v. Bulgaria*, 39 Eur. Ct. H.R. 37, 17 (2004).

⁹⁴ *McKerr v. United Kingdom*, 34 Eur. Ct. H.R. 20, 24 (2002).

⁹⁵ *Al-Skeini v. United Kingdom*, 53 Eur. Ct. H.R. 18, 47 (2011).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 48.

⁹⁹ *Id.*

An investigation conducted by an investigating officer appointed pursuant to AR 15-6 would likely fail to meet the requisite independence established by the ECtHR. An appointing authority selects an AR 15-6 investigating officer based on who the appointing authority thinks is “best qualified for the duty by reason of their education, training experience, length of service, and temperament.”¹⁰⁰ Only commissioned officers, warrant officers, or Department of Army civilian employees General Schedule 13 and above may be appointed, and they must be senior to the person whose conduct is investigated.¹⁰¹ Only a general courts-martial convening authority may appoint an investigating officer in a case involving a death.¹⁰² Because the AR 15-6 investigating officer can be from within the same unit and is appointed within the military chain of command, an AR 15-6 investigation into an unlawful killing would fall short of the operational independence required by the ECtHR.¹⁰³

In contrast, while similarities exist between the SIB and CID, an investigation conducted by CID would likely withstand the ECtHR’s operational independence test. Criminal Investigation Command Regulation 195-1 states that “Investigative activity does not depend only upon the receipt of a complaint from an outside source. Complaints may be developed within CID field elements from sources, target analysis files, crime prevention surveys, criminal intelligence reports, or extracted from another ROI.”¹⁰⁴ Regarding the termination of an investigation, CID-R 195-1 states, “A decision to terminate investigative leads will be made entirely within CID channels. The decision will not be based upon directions or pressures from person(s) outside of CID.”¹⁰⁵ Therefore, since CID does not have to wait to receive a complaint to initiate an investigation, and because the decision to terminate an investigation is made entirely within CID channels, a CID investigation likely would meet the ECtHR’s standard for operational independence.

¹⁰⁰ AR 15-6, *supra* note 2, para. 2-1.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See *Al-Skeini*, 53 Eur. Ct. H.R. at 171. In *Al-Skeini*, the ECtHR held that one of the reasons why the investigations failed to meet the Convention’s standard was that “the investigation process remained entirely within the military chain of command.” *Id.*

¹⁰⁴ CID-R 195-1, *supra* note 89.

¹⁰⁵ *Id.* para. 4-10.

B. Interviewing Key Witnesses

In several decisions, including *Al-Skeini*, the ECtHR faulted investigators for failing to interview key witnesses in a timely manner or for not interviewing them at all. In *McKerr v. The United Kingdom*, the ECtHR stated that for an investigation to be effective, investigators must take “whatever reasonable steps they can to secure . . . eyewitness testimony.”¹⁰⁶

In *Güleç v. Turkey*, the court criticized the investigating officer for failing to interview key witnesses, such as the warrant officer who fired into the crowd, or a witness who was standing at the deceased’s side when the victim was hit by the round which caused his death.¹⁰⁷ The court also indicated that all investigators should interview the complainant, which the investigator failed to do in *Güleç*.¹⁰⁸ The court held that a breach of Article Two occurred due to the “lack of a thorough investigation into the circumstances of the applicant’s son’s death.”¹⁰⁹ Thus, the ECtHR likely will find fault with an investigation that fails to take all reasonable steps necessary to ensure an effective, independent investigation, to include interviewing key or relevant witnesses, including cases involving difficult security conditions.

Army Regulation 15-6 requires the investigating officer to “ascertain and consider the evidence on all sides of each issue.”¹¹⁰ Implicit in this requirement is interviewing key witnesses. If the investigating officer fails to interview any particularly relevant witnesses, the legal advisor should highlight the omission in the legal review.¹¹¹ Thus, on the issue of witness interviews, AR 15-6 administrative investigations appear to meet the ECtHR’s standard, provided the investigating officer takes all reasonable steps to interview key witnesses.

Once initiated, a CID investigation is generally required to be completed until “all logical and practical investigative leads [are]

¹⁰⁶ *McKerr v. United Kingdom*, 34 Eur. Ct. H.R. 20, 24 (2002).

¹⁰⁷ *Güleç v. Turkey*, 28 Eur. Ct. H.R. 121, 40 (1999).

¹⁰⁸ *Id.* at 41.

¹⁰⁹ *Id.*

¹¹⁰ AR 15-6, *supra* note 2, para. 1-6.

¹¹¹ *Id.* para. 2-3. Army Regulation 15-6 requires a legal review of “all cases involving serious or complex matters, such as where the incident being investigated has resulted in death or serious bodily injury, or where the findings and recommendations may result in adverse administrative action, or will be relied upon by higher headquarters.” *Id.*

exhausted.”¹¹² This requirement implies that agents will interview all critical witnesses and this language is stronger than the requirement in AR 15-6. FM 3-19.13 provides direction on how to conduct witness interviews and emphasizes the importance thereof, stating “The solution to many crimes is the direct result of leads and testimonial evidence developed through interviews and interrogations.”¹¹³ Thus, the CID investigation standards comply with the ECtHR’s investigatory standard.

C. Length of Investigation

The ECtHR has held that a “prompt and effective response by authorities in investigating the use of lethal force is essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion or tolerance of unlawful acts.”¹¹⁴ Investigations into alleged unlawful killings require “promptness and reasonable expedition.”¹¹⁵ Although the ECtHR recognized that “obstacles or difficulties [may] prevent progress,” it nevertheless reiterated the importance of conducting a “prompt and effective” investigation.¹¹⁶ Furthermore, authorities “must act of their own motion once the matter has been brought to their attention.”¹¹⁷ They cannot simply wait for the next-of-kin to file a complaint or conduct their own investigation.¹¹⁸

The appointing authority determines the amount of time allotted to an AR 15-6 investigation and is responsible for approving any delays requested by the investigating officer.¹¹⁹ The reason for any unusual delays must be included as an enclosure to the investigative report.¹²⁰ Thus, as with the scope and purpose of the investigation, the appointing

¹¹² CID-R 195-1, *supra* note 89, para. 4-3. CID-R 195-1, paragraph 4-10 enumerates certain limited situations in which a criminal investigation may be terminated prior to exhausting all investigative leads and “the CID investigative resources could be better employed on other investigations.” *Id.* para. 4-10.

¹¹³ FM 3-19.13, *supra* note 88, para. 1-63.

¹¹⁴ *Nachova v. Bulgaria*, 39 Eur. Ct. H.R. 37, 17 (2004); *see also McKerr v. United Kingdom*, 34 Eur. Ct. H.R. 20, 24.

¹¹⁵ *McKerr*, 34 Eur. Ct. H.R. at 24.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ AR 15-6, *supra* note 2, fig.2-4

¹²⁰ *Id.* para. 3-15.

authority is ultimately responsible for establishing the timeframe in which the investigation will be completed.

Once initiated, CID investigations must be “actively pursued.”¹²¹ Select investigations are monitored by the G-3, CID Headquarters “to keep the Commanding General, USACIDC and higher level Army officials fully advised of the investigative developments and ensure the expeditious completion of such investigations.”¹²² The priority that CID gives to a particular investigation depends on how it is classified.¹²³ Category I investigations take “precedence over all other investigative activities and require immediate action by all affected CID field elements.”¹²⁴ The status of Category I investigations must be provided to a case monitor on a weekly basis “until the investigation is completed or monitorship is terminated.”¹²⁵ Alleged war crimes would likely be assigned Category I monitorship status, particularly since AR 190-45, *Law Enforcement Reporting*, categorizes war crimes as Category I reportable serious incidents.¹²⁶ As Category I investigations, CID investigations into alleged unlawful killings must be conducted in an expeditious manner, as the standard set forth by the ECtHR contemplates, and established procedures should help ensure this occurs.

D. The Scope of the Investigation and the Investigation’s Findings

The ECtHR held that an investigation of an alleged unlawful killing by State agents must examine all relevant matters, even if a *prima facie* case exists that the State agents acted in accordance with their regulations.¹²⁷ Thus, the investigation’s scope is critical to its sufficiency. The investigation must ensure “strict scrutiny of all material circumstances,” not just whether the State agents or soldiers acted in accordance with their prescribed regulations.¹²⁸ Investigators should not ignore significant facts and should seek proper explanations from

¹²¹ CID-R 195-1, *supra* note 89, para. 4-3.

¹²² *Id.* para. 4-15.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ U.S. DEP’T OF ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING para. 8-2(b) (30 Mar. 2007).

¹²⁷ *Nachova v. Bulgaria*, 39 Eur. Ct. H.R. 37, 17 (2005).

¹²⁸ *Id.*

witnesses.¹²⁹ Because one of the purposes for investigating an alleged unlawful State killing is to hold State agents accountable, the ECtHR unsurprisingly has held that the findings must be “capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible.”¹³⁰ However, this requirement is “not an obligation of result, but of means,” meaning the investigators must “take whatever reasonable steps they can to secure the evidence concerning the incident.”¹³¹ Additionally, the investigation’s findings must “be based on thorough, objective, and impartial analysis of all relevant elements.”¹³²

The ECtHR requires that the scope of the investigation be broad enough to discover the underlying factual circumstances. Meanwhile, under AR 15-6, the appointing authority determines the scope of an AR 15-6 investigation. The regulation stipulates that “whether oral or written, the appointment will specify clearly the purpose and scope of the investigation . . . and the nature of the findings and recommendations required.”¹³³ Although the ECtHR has indicated that the investigation must consider and examine all relevant matters (regardless of any formal appointment memorandum or other procedural aspect), an AR 15-6 Investigating Officer “will normally not exceed the scope of the findings indicated by the appointing authority.”¹³⁴ The findings of an AR 15-6 investigation must be “necessary and sufficient to support each recommendation.”¹³⁵

In comparison, a CID investigation “will normally extend to all aspects of the case, including related offenses, lesser included offenses, attempts, conspiracies to commit the primary or lesser included offenses, and accessories after the fact.”¹³⁶ Thus, the scope of an investigation by CID may be broader and more in line with the standard set forth by the ECtHR than an AR 15-6 investigation, which can be as broad or as narrow as the appointing authority desires. Therefore, while an appointing authority could specifically limit the Investigating Officer to

¹²⁹ *Id.*

¹³⁰ *McKerr v. United Kingdom*, 34 Eur. Ct. H.R. 20, 24 (2002). This is similar to one of the CID investigation’s purposes of determining whether an offense occurred.

¹³¹ *Id.*

¹³² *Nachova*, 39 Eur. Ct. H.R. 37, 137.

¹³³ AR 15-6, *supra* note 2, para. 2-1.

¹³⁴ *Id.* para. 3-10.

¹³⁵ *Id.*

¹³⁶ CID-R 195-1, *supra* note 89, para. 4-2.

certain matters and exclude others, a CID investigator has an inherent obligation to investigate other criminal matters discovered during the course of the investigation, whether or not those matters relate to or fall within the original scope of the investigation.

E. Public Scrutiny and Next-of-Kin Involvement in the Case

Two significant aspects that the ECtHR considers when reviewing an investigation are the degree of public scrutiny the investigation received and the extent to which any next-of-kin were involved in the investigation. The court held 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.”¹³⁷ The necessity for public scrutiny touches on one of the fundamental purposes of the investigation, namely, assuring appropriate accountability of the State agents involved. The court also stated that “the degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.”¹³⁸ The next-of-kin involvement should include access to the investigation, being informed of any decision to prosecute, and the opportunity to review court documents.¹³⁹ The family of the deceased should be afforded the right to be involved in any procedure to the extent necessary to safeguard their interests.¹⁴⁰

On the other hand, the court recognized that the disclosure of investigative materials to the next-of-kin is not an absolute requirement. It held that because the “disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations,” disclosure is not an automatic right under Article Two of the ECHR.¹⁴¹

A provision of AR 15-6 specifically precludes an investigating officer from sharing the contents of the investigation with anyone, including the next-of-kin or members of the public, other than the appointing authority. It states, “No one will disclose, release, or cause to be published any part

¹³⁷ *McKerr v. United Kingdom*, 34 Eur. Ct. H.R. 20, 25 (2002).

¹³⁸ *Id.*

¹³⁹ *Id.*; *see also Gul v. Turkey*, 34 Eur. Ct. H.R. 28 (2002).

¹⁴⁰ *Id.* at 31.

¹⁴¹ *Id.* at 27.

of the report, except as required in the normal course of forwarding and staffing the report or as otherwise recognized by law or regulation, without the approval of the appointing authority.”¹⁴² Unlike the ECtHR’s standard, AR 15-6’s default standard is not to share the investigative report unless the appointing authority directs otherwise or required by law or regulation.¹⁴³

While CID-R 195-1 and AR 600-8-1, *Army Casualty Program*, address the manner in which to cooperate with next-of-kin in death investigations, neither regulation addresses working with the next-of-kin of an individual allegedly killed in violation of the law of war. Army CID will release investigations to the general public (subject to exemption) in accordance with requests pursuant to the Freedom of Information Act.¹⁴⁴

Although AR 15-6 and CID-R 195-1 would not necessarily meet the standard established by the ECtHR concerning public scrutiny of investigations into unlawful killings and next-of-kin cooperation, the DoD has implemented a comprehensive Victim-Witness Program that meets the ECtHR’s standard.¹⁴⁵

F. Investigatory Steps that Should Be Taken When Appropriate

The ECtHR has emphasized that certain investigative steps should be taken in cases involving alleged unlawful killings. These steps include preparing detailed sketch maps, conducting a reconstruction of events as

¹⁴² AR 15-6, *supra* note 2, para. 3-18(b).

¹⁴³ Another problem in practice is that much of the evidence and information contained within an AR 15-6 investigation into alleged law of war violations bears classification markings. Many recent reviews of approved investigations that were subsequently required by congressional requests for information or Freedom of Information Act requests determined that some or much of the initially classified information was actually over-classified. In any event, evidence and information bearing classification markings, unless subsequently declassified, would not be subject to public scrutiny as envisioned by the ECtHR. See USCENTCOM Attorney Interview, *supra* note 2.

¹⁴⁴ CID-R 195-1, *supra* note 89, at 27–26.

¹⁴⁵ 32 C.F.R. § 635.34 (2007); U.S. DEP’T OF DEF., DIR 1030.01, VICTIM AND WITNESS ASSISTANCE (13 Apr. 2004); U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE (3 Oct. 2011) [hereinafter AR 27-10]. The victim witness program involves multi-disciplinary participants which “include, but are not limited to, investigative and law enforcement personnel, chaplains, health care personnel, Family Advocacy/services personnel, judge advocates, and other legal personnel.” AR 27-10, *supra* note 145, para. 17-2.

well as a ballistic test and autopsy, and reviewing the planning, operational control, and guidance provided in the military operation alleged to have caused the death.

In several decisions, the ECtHR repeatedly has mentioned the importance of preparing sketch maps with detailed terrain characteristics.¹⁴⁶ The ECtHR has also discussed the importance of staging a reconstruction of events. In *Nachova and Others v. Bulgaria*, the ECtHR criticized the lack of event reconstruction.¹⁴⁷ In the absence of a reconstruction, it was impossible to verify the arresting officers' version of what transpired. In *Güleç v. Turkey*, the ECtHR held that "a reconstruction of the events would have made it possible to determine the trajectory of the bullet fragment and the position of the weapon that had fired it."¹⁴⁸ The ECtHR also criticized the investigation's failure to conduct a metallurgical analysis of the bullet fragments.¹⁴⁹

Autopsies are another key part of any death investigation according to the ECtHR.¹⁵⁰ Autopsies provide "a complete and accurate record of injury and an objective analysis of clinical findings, including the cause

¹⁴⁶ *Nachova v. Bulgaria*, 39 Eur. Ct. H.R. 37, 17 (2004). In *Nachova*, the military investigator appended a sketch map to the report, but the map only gave some of the measurements of the neighboring yards in the area where the unlawful killing allegedly took place. "The gradient and other characteristics of the terrain and the surrounding area were not described." *Id.* As a result, "relevant measures were missed." *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Güleç v. Turkey*, 28 Eur. Ct. H.R.121, 40. This case involved an incident on March 4, 1991, in which approximately 3000 people demonstrated in support of Kurdistan. When they reached the town square in Idil, Turkey, some of the demonstrators became violent, and the security forces, who were trying to disperse the crowd, called for back-up. A warrant-officer said he fired into the air, but the evidence suggests he fired shots at the crowd. In the course of events, Ahmet Güleç, a senior in high school, was killed. The court noted that

[a] reconstruction of the events would have made it possible to determine the trajectory of the bullet fragment and the position of the weapon that had fired it. Similarly a metallurgical analysis of the fragment would have made it possible to identify its maker and supplier, and consequently the type of weapon used. Furthermore, no one seems to have taken any interest in the course of the bullet which passed through Ahmet Gulec's body, following a downward trajectory, which is perfectly consistent with fire having been opened from the . . . turret.

Id.

¹⁴⁹ *Id.*

¹⁵⁰ *McKerr v. United Kingdom*, 34 Eur. Ct. H.R.20, 24.

of death.”¹⁵¹ The court has also highlighted the importance of securing forensic evidence in cases involving alleged unlawful killings.¹⁵²

In addition to completing a reconstruction of events, conducting a ballistic test, and securing forensic evidence, the ECtHR stressed the significance of examining the planning and control of the actions under investigation.¹⁵³ The court held that

in keeping with the importance of [Article Two] in a democratic society, the court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.¹⁵⁴

For example, in *Ergi v. Turkey*, the ECtHR held that even though it was determined beyond any reasonable doubt that the deceased had been killed by rounds fired by the security forces, the court also “must consider whether the security forces’ operation had been planned and conducted in such a way as to avoid or minimize, to the greatest extent possible, any risk to the lives of the villagers.”¹⁵⁵ This requirement is consistent with the ECtHR’s emphasis on the need to investigate all relevant circumstances, not just what happened on the day of the alleged unlawful killing, including the events and planning leading up to the incident. The rules of engagement, planning meetings, operational control, and any guidance issued to the soldiers should be examined as part of the overall investigation.¹⁵⁶

¹⁵¹ *Id.* But see Aziz Sheikh, *Death and Dying—A Muslim Perspective*, 91 J. ROYAL SOC’Y MED. 139 (1998) (noting the fact that the next of kin of Muslims killed during a military operation may not grant permission for an autopsy to be conducted on their loved one and that the majority of Muslim fatwas hold that autopsies are forbidden by Islamic religious belief).

¹⁵² *Id.*

¹⁵³ *McKerr*, 34 Eur. Ct. H.R. at 26.

¹⁵⁴ *McCann v. United Kingdom*, 47 Eur. Ct. H.R. 40, 26 (2008).

¹⁵⁵ *Ergi v. Turkey*, Eur. Ct. H.R. 28 (1998).

¹⁵⁶ *McCann*, 47 Eur. Ct. H.R. at 27.

Although the ECtHR's decisions detail several investigatory steps that should be taken, AR 15-6 does not specify similar requirements. Rather, the regulation simply states that "it is the duty of the investigating officer . . . to ascertain and consider the evidence on all sides of each issue, thoroughly and impartially, and to make findings and recommendations that are warranted by the facts and that comply with the instructions of the appointing authority."¹⁵⁷ It also states that "all evidence will be given such weight as circumstances warrant."¹⁵⁸ The investigating officer is responsible for seeking out and deciding which evidence is relevant to the investigation.¹⁵⁹

CID-R 195-1 refers CID agents to Field Manual 3-19.13, which directly addresses death and war crime investigations, for detailed guidance on scene and evidence processing. Given this guidance, CID-R 195-1 is more specific in its requirements and suggestions than AR 15-6, which is generic enough to cover all types of Army administrative investigations. While FM 3-19.13 does not require a sketch map with terrain characteristics, it mentions that "an investigator should know the requirements necessary to document a crime, to include notes,

¹⁵⁷ AR 15-6, *supra* note 2, para. 1-6.

¹⁵⁸ *Id.* para. 3-7.

¹⁵⁹ Army Regulation 15-6 is in the process of being updated. The unapproved draft AR 15-6 would provide the investigating officer additional guidance concerning obtaining evidence. The proposed draft language states:

The investigating officer may need to collect documentary and physical evidence such as applicable regulations, existing witness statements, accident or police reports, video/audio evidence such as UAS/Apache camera, and photographs up front. This information can save valuable time and effort. Accordingly, the investigating officer should obtain this information at the beginning of the investigation. In some cases, the information will not be readily available, so the request should be made early so the investigating officer may continue to work on other aspects of the investigation while the request is being processed. The investigating officer should, if possible and appropriate, personally inspect the location of the events being investigated and take photographs or prepare measured diagrams, if they will assist the appointing authority. The investigating officer should also determine what other organizations might be helpful during the course of the investigation (e.g., CID for polygraph or forensic assistance)

(on file with author).

photographs, and sketches.”¹⁶⁰ Chapter 6 of FM 3-19.13 provides detailed instructions on the proper way to utilize notes, photographs, and sketches. Chapter 6 further states that the investigator “must consider himself the ‘artist’ of the crime scene, because all three of these tools are necessary to successfully reconstruct the scene.”¹⁶¹ Ultimately, FM 3-19.13 encourages CID agents to use notes, photographs, and sketches to reconstruct the events as part of any death investigation. In this respect, FM 3-19.13’s guidance matches the ECtHR’s requirement for detailed sketch maps and reconstructions of the event.

The ECtHR has emphasized the importance of ballistic tests in death cases involving firearms. FM 3-19.13 also recognizes that “the solving of a crime involving firearms depends largely on how the investigator collects and preserves firearm evidence.”¹⁶² Chapter 21 of FM 3-19.13 addresses the ECtHR’s concern regarding a bullet’s trajectory and the location of a weapon, noting that “[s]olving a crime that involves firearms often depends on the scientific examination of evidence by a qualified examiner at USACIL [United States Army Criminal Investigation Laboratory].”¹⁶³ It lists the many ways a ballistic test and other examinations at the laboratory can benefit the death investigation.¹⁶⁴ The actual testing is not performed by the agents in the field, but rather by USACIL firearms examiners, who “do the identification tests at the laboratory, and give the test results to the investigator in the field.”¹⁶⁵ The various tests the laboratory can conduct, including proximity and gunshot residue tests, can greatly assist firearms cases.¹⁶⁶ By explicitly providing for the use of ballistic and other laboratory tests, CID investigations take into account the concerns of the ECtHR regarding the necessity of scientific tests where appropriate.

As with the standard established by the ECtHR, CID investigations recognize the benefits of an autopsy. A CID agent conducting a death investigation is encouraged to “set up a liaison with the pathologist who does the autopsy. Investigators must tell the pathologist the known facts of the death and the initial investigative findings before the autopsy.”¹⁶⁷

¹⁶⁰ FM 3-19.13, *supra* note 88, ch. 6.

¹⁶¹ *Id.*

¹⁶² *Id.* para. 21-1.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* para. 25-4.

¹⁶⁷ *Id.* para. 12-4.

However, conducting an autopsy for someone allegedly killed in violation of the law of war may be difficult.

CID-R Regulation 195-1 meets the ECtHR's requirement to secure all forensic evidence by emphasizing the "proper processing of crime scenes," which includes the "detection, description, collection, preservation and evaluation of physical evidence necessary for the identification and conviction of criminal offenders."¹⁶⁸ Additionally, FM 3-19.13, Chapters 5 and 6, provide details on how best to process and collect evidence at the scene. Thus, a CID investigation into a death case would address the ECtHR's concerns about securing forensic evidence.

As noted above, the ECtHR has emphasized the critical nature of examining the planning and operational control of the incident at issue. While the CID regulations do not explicitly address this particular concern, since the scope of a CID investigation extends "to all aspects of the case," the scope of the investigation can readily be broadened to cover the planning and operational control of the incident. Given the specificity with which CID regulations address the investigation of war crimes, and death cases in particular, CID investigations are much more likely to address the investigatory concerns of the ECtHR than an AR 15-6 administrative investigation.

G. Investigation Must Be Conducted Despite Difficult Security Conditions

Although an investigation of an alleged unlawful killing in violation of the law of war may occur in a dangerous area, the ECtHR has held that an effective investigation must still occur. The court ruled "neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article Two to ensure that an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces."¹⁶⁹ The ECtHR acknowledged in *Al-Skeini* the "practical problems caused to the investigatory authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region"¹⁷⁰ Given the circumstances at the

¹⁶⁸ CID-R 195-1, *supra* note 89, para. 5-11.

¹⁶⁹ *Güleç v. Turkey*, 28 Eur. Ct. H.R. 121, 41.

¹⁷⁰ *Al-Skeini v. United Kingdom*, 53 Eur. Ct. H.R. 18, 47 (2011). The ECtHR acknowledged that the deaths in *Al-Skeini* occurred in Basrah City in the aftermath of the

time the investigations were conducted, the court “consider[ed] that in circumstances such as these the procedural duty under Article Two must be applied realistically, to take account of specific problems faced by investigators.”¹⁷¹ However, in that same decision, the court reaffirmed the obligation under Article Two to take all reasonable steps “even in difficult security conditions . . . to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.”¹⁷²

Notably, AR 15-6 does not address security concerns or difficult investigatory operating conditions within the regulation. However, the appointing authority could always provide the investigating officer with an appropriate security detail if the investigating officer is required to work in a threatening security environment. In contrast, CID regulations explicitly contemplate conducting investigations in challenging environments. Thus, FM 3-19.13 explains that agents may be called upon to investigate alleged war crimes, such as unlawful killings in violation of the law of war,¹⁷³ yet FM 3-19.13 also cautions that “[a]t war crime scenes, investigators must be aware of potential environmental hazards, such as areas devastated by war that may have unexploded munitions present. Investigators must exercise due caution in moving in and around the scene and ensure that onlookers are carefully removed from the scene.”¹⁷⁴

By addressing the need to conduct investigations in challenging environments, CID regulations provide more direction than AR 15-6. Furthermore, because of this guidance, a CID investigation is much more likely than an AR 15-6 administrative investigation to meet the standard set forth by the ECtHR. However, CID investigations into such matters are not a common practice.¹⁷⁵

invasion, “during a period when crime and violence were endemic”. The Coalition forces, “including British Soldiers and military police, were the target of over a thousand violent attacks in the subsequent thirteen months.” *Id.* at 45.

¹⁷¹ *Id.*

¹⁷² *Id.* at 46.

¹⁷³ FM 3-19.13, *supra* note 88, para. 18-1.

¹⁷⁴ *Id.* at 18-22. FM 19-20, which FM 3-19.13 superseded, explicitly addressed the security threat that could confront war crime investigators. It specifically designated a “security force from the supporting unit . . . assigned to protect the investigators and witnesses when interviews must be in hostile areas.” U.S. DEP’T OF ARMY, FM 19-20, LAW ENFORCEMENT INVESTIGATIONS 256–57 (25 Nov. 1985).

¹⁷⁵ USCENCOM Attorney Interview, *supra* note 2.

VI. Recommend Future AR 15-6 Investigations Fulfill the ECtHR Standard

As demonstrated above, an investigation into an alleged unlawful killing conducted by CID in accordance with CID-R 195-1 would likely meet the ECtHR's standard. However, often only an AR 15-6 investigation is conducted into a law of war violation. Because of the preference for AR 15-6 investigations, and given the limited number of available CID agents, these administrative investigations should conform to the ECtHR's investigative standards, which embody developing human rights world norms.

Two actions should be taken to help ensure administrative investigations meet the ECtHR's standard for investigations into serious alleged law of war violations. First, as the Department of Defense Executive Agent for DoDD 2311.01E, the Army should update the Directive to provide clear guidance to the units in the field concerning investigations into alleged law of war violations.¹⁷⁶ Second, a fully resourced investigative team whose sole mission is to conduct administrative investigations into serious law of war violations should be created in future ground conflicts.

A. Recommend Updating DoDD 2311.01E

The U.S. policy articulated in DoDD 2311.01E is broad and “intentionally sets the standard low to ensure that the chain of command and other U.S. officials are fully informed as to any incidents that might possibly amount to an International Humanitarian Law violation.”¹⁷⁷ However, as a result of its broad nature, all possible or alleged law of war violations are treated the same. This risks diluting the distinction between truly serious law of war violations and relatively minor violations. For example, failing to allow a prisoner of war to smoke a cigarette is a violation of the law of armed conflict.¹⁷⁸ Provided there is “credible information” to support such an allegation, DoDD 2311.01E requires the matter be expeditiously submitted through command channels to the Combatant Commander, who in turn must report it to the

¹⁷⁶ DoDD 2311.01E, *supra* note 81.

¹⁷⁷ Schmitt, *supra* note 32, at 70.

¹⁷⁸ Geneva Convention Relative to the Treatment of Prisoners of War, art. 26, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

Chairman of the Joint Chiefs of Staff, the Secretary of the Army, and the Secretary of Defense.¹⁷⁹ If the unit addresses the situation directly and elects not to report it, the unit has violated DoDD 2311.0E. The directive risks diluting the impact and visibility of more serious law of war allegations by requiring all alleged law of war violations be reported, no matter the degree of severity of the allegation. Therefore, the directive needs to clearly outline exactly what types of alleged law of war violations (such as unlawful killings and detainee abuse) need to be reported and require a criminal investigation in addition to any administrative investigation.

Additionally, DoDD 2311.01E fails to provide specific guidance as to how to investigate alleged law of war violations. In addition to requesting a formal investigation by the cognizant MCIO, it requires Combatant Commanders to “issue directives to ensure that reportable incidents involving U.S. or enemy persons are reported promptly to appropriate authorities and are investigated thoroughly, and that the results of such investigations are promptly forwarded”¹⁸⁰ However, DoDD 2311.01E neglects to provide any guidance on how to conduct the administrative investigation or what standard to use to review it.

Chairman of the Joint Chiefs of Staff Instruction 5810.01D also does not provide any specific information on how to conduct the investigation. It requires the commander of the unit involved to perform a preliminary inquiry into the matter. If it is determined that U.S. personnel may be involved in or responsible for the reportable incident, then the commander “shall initiate a formal investigation by command investigation in accordance with Service regulations, and shall at the same time notify the cognizant MCIO.”¹⁸¹ Thus, a combatant command is free to choose which Service regulation it will use when it conducts the administrative investigation. However, there is no clear guidance on how the investigation is to be conducted or to be reviewed. This lack of regulatory guidance and standard of review would fail to meet the ECtHR’s investigatory standard for unlawful killings.

Furthermore, DoDD 2311.01E requires Combatant Commands to “provide for the central collection of reports and investigations of reportable incidents alleged to have been committed by or against

¹⁷⁹ DoDD 2311.01E, *supra* note 81, paras. 6–4 to 6–5.

¹⁸⁰ *Id.* paras. 5.11.6, 6.5.

¹⁸¹ CJCSI 5810.01D, *supra* note 84.

members of their respective Combatant Commands, or persons accompanying them.”¹⁸² The Combatant Commands are not currently following these requirements.¹⁸³ This is likely a result of the lack of clear guidance and standards contained within DoDD 2311.01E. As a result, the directive as a whole is undermined by current non-compliance.

Department of Defense Directive 2311.01E should be updated to make it more practical and helpful to units in the field. By requiring every “possible, suspected, or alleged violation of the law of war, for which there is credible information” to be reported, units are confronted with the burden of reporting minor incidents that are technically violations of the law of war, or not reporting them at all in violation of the directive.¹⁸⁴ While an inquiry must be conducted into all alleged violations of the law of war for which there is credible information, not all technical violations of the law of war should require expeditious reporting to the Secretary of Defense.

To clarify and reinforce the obligation to report, DoDD 2311.01E should provide clear instructions detailing what kinds of law of war violations should be investigated at the unit level and should be reported to the Combatant Command for recording in the central repository. It should also specifically outline the violations that require expeditious reporting through command channels to the Secretary of Defense and that require outside investigation. Allowing the units to conduct inquiries into relatively minor, albeit technical, violations of the law of war will empower them to immediately correct such violations without the additional burden of reporting to the Secretary of Defense. On the other hand, requiring a report to the combatant command and respective military department will ensure proper visibility of all alleged law of war violations for which credible information exists and will help the combatant commands maintain the central repository as required by the directive. Additionally, DoDD 2311.01E should provide a clear standard and well-defined criteria to assist the officer assigned to conduct the investigation to produce a high quality investigation capable of withstanding outside scrutiny.

¹⁸² DoDD 2311.01E, *supra* note 81, para. 5.11.3.

¹⁸³ USCENCOM Attorney Interview, *supra* note 2.

¹⁸⁴ DoDD 2311.01E, *supra* note 81, para. 3.2.

B. Recommend Resourcing a Team to Investigate Serious Law of War Violations

Department of Defense Directive 2311.01E should be updated to mandate the creation of an investigative team whose sole mission would be to conduct administrative investigations in future ground conflicts. A well-resourced investigative team would produce better quality investigations likely to meet the scrutiny of the international community, as well as the ECtHR's investigatory standard. At a minimum, this investigative team should consist of a general officer as investigating officer, a CID special agent advisor, a field grade judge advocate, a court reporter, and an interpreter.

A general officer should be appointed by the relevant combatant commander as the investigating officer for the investigative team. This general officer would ensure appropriate cooperation from units throughout the theater on investigatory and logistical matters. Additionally, the general officer would be able to adequately investigate the planning and operational control aspects of any incident under investigation to enhance the effectiveness of the investigation. Compared with a more junior investigating officer, the general officer's experience conducting investigations, as well as his military experience, would improve the overall quality of the investigation.¹⁸⁵

The appointment of a general officer as the investigating officer would help the investigations meet several of the ECtHR's criteria for an effective investigation. First, provided the appointment memorandum is

¹⁸⁵ For example, the initial investigation into the combat action at Wanat Village, Afghanistan, on July 13, 2008, conducted by Combined Joint Task Force (CJTF) 101 provided a comprehensive examination of the actual combat action. The investigating officer was a colonel appointed by the CJTF 101 Chief of Staff. A U.S. Marine Corps lieutenant general was then appointed on October 7, 2009 by the Commander of Central Command. This investigation expanded its scope beyond just the events of July 13, 2008, to include examining the decisions and actions of the commanders and staffs at the company, battalion, brigade, and joint task force/division levels. Ultimately, the Secretary of the Army appointed General Charles Campbell to review both investigations and take appropriate action with regard to the Army officers involved. General Campbell determined "the U.S. casualties did not occur as a result of deficient decisions, planning, and actions of the chain of command The U.S. casualties occurred because the enemy decided to attack the combat outpost at Wanat and battle resulted." General Charles C. Campbell, Army Regulation 15-6 Report of Investigation of Action on the Re-Investigation into the Combat Action at Wanat Village, Wygal District, Nuristan Province, Afghanistan (on file with author).

properly scoped, it would allow the investigation to examine not just the events of the day in question, but also the planning and decisions made at the battalion, brigade, and division levels. This broadened scope would more likely enable the investigation to examine the accountability of all individuals who may have been responsible, an aspect the ECtHR and the international community consider when reviewing investigations. Second, although the general officer would be a member of the military, his independence would likely not be questioned given his seniority, as well as the fact that he is outside the immediate chain of command. Third, the investigation would probably be completed in a more expeditious manner. A general officer appointed by a combatant commander would receive immediate assistance, such as priority air travel and other travel-related assistance, and as well as greater cooperation throughout theater compared with the level of cooperation a field or company grade officer appointed by a brigade or battalion commander could expect. Finally, the overall quality of investigations would likely improve given the general officer's prodigious military experience and knowledge. Since conducting investigations would be this officer's full time duty, the investigating officer would continue to gain experience conducting investigations, which would result in better quality investigations. Having one investigating officer conduct the most serious or high-visibility investigations would also ensure that an array of different investigations achieved a certain level of consistency. Therefore, the appointment of a standing general officer investigating officer by the respective combatant commander would greatly enhance the quality of investigations.

As demonstrated above, an investigation conducted in accordance with CID regulations would likely withstand international scrutiny and meet the ECtHR's investigatory standard. Although the investigating officer would operate pursuant to AR 15-6, he would benefit by having a CID agent that is in-country specifically designated as an advisor to the investigative team. This designation would ensure adequate cooperation from CID with the investigations. The agent could assist the investigating officer with any questions he may have and provide recommendations on the conduct of the investigation. This assistance would be particularly beneficial in those cases that the MCIO decides not to investigate yet that are assigned to the investigative team. It would also provide for better synchronization in cases where administrative and criminal investigations are conducted. The CID agent could also serve as a liaison between the investigative team and resources specifically available to CID, such as the USACIL. For example, if the investigating

officer determines he requires a forensics test, he could contact his CID advisor who would then immediately coordinate the test with USACIL. The CID agent would help assist with those investigatory tasks that the ECtHR has determined are necessary for a legally sufficient investigation. These could include reconstructing scenes, producing sketch maps, obtaining autopsy reports, and preserving evidence. Finally, since CID has its own separate chain of command, having a CID agent specifically designated to advise and assist the investigative team would add another independent and professional resource to the team, thereby increasing the likelihood that the investigation would be determined to be “sufficiently independent” when subjected to scrutiny.

A field grade judge advocate should also be assigned to the investigative team. This judge advocate would assist the investigating officer from the moment the investigating officer receives his appointment memorandum per case until he completes his final report. Ideally, the judge advocate would travel with the investigating officer as he conducts his interviews. The judge advocate would assist the investigating officer by ensuring the investigation is properly scoped, formulating witness questions, ensuring the investigation leads to logical endpoints, critically examining the evidence, and reviewing and providing comments to the final written report.¹⁸⁶

The investigative team should also include a court reporter. Court reporters were extremely difficult assets to obtain for investigations in Iraq and remain so in Afghanistan.¹⁸⁷ Although AR 15-6 does not require transcripts of witness interviews, given the likely attention and high-level visibility the investigations conducted by this investigative team would receive, a court reporter should be assigned to the team to transcribe interviews. While witness statements are often written or typed by the witness, a witness statement might not capture everything that was discussed during the interview. A court reporter could record everything each witness said to ensure the investigation’s exhibits and

¹⁸⁶ Major General Joseph L. Votel, Army Regulation 15-6 Report of Investigation on 8 Oct. 2010 Hostage Rescue Operation in Konar Province, Afghanistan (9 Nov. 2010) [hereinafter MG Votel, AR 15-6 Investigation] (on file with author). Major General Votel investigated a hostage rescue operation that resulted in the death of Ms. Linda Norgrove. The investigation recommended that the composition of its investigatory team “be considered as a model for future investigations of incidents that have overlap between the United States and other nations.” *Id.* Included in the team was a “well connected and serving legal officer.” *Id.*

¹⁸⁷ USCENCOM Attorney Interview, *supra* note 2.

findings were accurate. A dedicated court reporter could also help compile, prepare, and package the investigation report to save the investigating officer valuable time and help ensure a professional look to the investigation.¹⁸⁸ While those scrutinizing the investigation might disagree with the investigating officer's findings or recommendations, a court reporter's involvement would greatly reduce the possibility of disagreement concerning the substance of the witness testimony or accuracy of exhibits themselves.

The next most challenging investigatory resource to obtain after a court reporter in a contingency environment is a qualified interpreter.¹⁸⁹ While interpreters may be assigned to individual investigations, it is difficult to ensure that interpreters have accurately translated an interviewer's questions or a witness's responses.¹⁹⁰ Therefore, an accurate and qualified interpreter should be selected to be a member of the standing investigative team.

In addition to the benefits described above, a fully resourced investigative team would be able to quickly respond to events and obtain statements from witnesses who might otherwise disappear or who may no longer wish to cooperate given the lengthy amount of time investigating officers normally take to obtain witness statements. In *Al-Skeini*, the British soldiers had difficulty obtaining key witness statements in a timely manner. A lengthy period of time between the incident and the time an investigating officer is ready to take statements allows witnesses to leave the area or possibly become intimidated into not cooperating with the investigation.¹⁹¹ A standing investigative team would likely be able to obtain crucial witness statements that otherwise might have gone unrecorded.

Although standing up such an investigating team will require significant, and often scarce, resources, the team would likely save time and money in the long term. If a brigade, battalion, or company level officer conducts a single critical investigation without appropriate guidance, the outcome could necessitate an additional investigation once the original investigation has been scrutinized by next-of-kin, the press,

¹⁸⁸ See MG Votel, AR 15-6 Investigation, *supra* note 186. The investigation explained that "the provisioning of a two-person court-reporter team was invaluable to accurate testimony transcription and overall speed of the investigation." *Id.*

¹⁸⁹ USCENCOM Attorney Interview, *supra* note 2.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

Congress, or other outside agencies. A single well-resourced investigative team would produce quality AR 15-6 investigations up front, which would save time and money in the long term by avoiding the need to supplement or entirely redo deficient investigations.

VII. Conclusion

The current trend of applying international human rights law to the battlefield is likely to continue and increase in the future. At times it may be a court applying a human rights treaty to military operations extraterritorially, such as the ECtHR in *Al-Skeini*. Other times it may be a government affirmatively looking to apply sources of international human rights law like the ICCPR in a complementary and mutually beneficial manner with the *lex specialis* of the law of armed conflict. The application of human rights norms to the battlefield will have real-world consequences for States, as the British learned in *Al-Skeini*. The impact will be magnified for our NATO partners, given that they are subject to the ECtHR's jurisdiction.

While the United States is not a member of the ECtHR and takes the position that the ICCPR does not apply extraterritorially, the United States should not ignore the trend and simply argue the *lex specialis* of the law of armed conflict. As a leader in the world of human rights, the United States should welcome the challenge of applying international human rights norms to the battlefield and should set the example by meeting emerging international human rights standards.¹⁹²

One area in which the United States can work to meet these standards is military investigations into serious law of war violation allegations, such as unlawful killings. Although CID investigations meet the ECtHR's standard for such investigations, in practice, serious law of war violations are typically investigated via the procedures of AR 15-6, which do not meet the ECtHR's requirements or developing human rights world norms. Two actions would help ensure U.S. military administrative investigations meet the standard. First, DoDD 2311.01E

¹⁹² See also Koh, *supra* note 58, at 1416. Koh would likely agree that judge advocates are lawyers with "knowledge of the body politic acquire a duty not simply to observe transnational legal process, but to try to influence it . . . to try to change the feelings of that body politic to promote greater obedience with international human rights norms." *Id.*

should be updated to specify exactly what should be expeditiously reported, as well as to provide a clear standard and well-defined criteria for investigating officers. Second, an investigative team should be created and resourced to investigate serious allegations of law of war violations in future ground conflicts. By working to meet international human rights norms on the battlefield, the United States will truly be “committed to holding everyone to the same [human rights] standard, including ourselves.”¹⁹³

¹⁹³ Sec’y of State Hillary Clinton, *2009 Country Reports on Human Rights Practice* U.S. DEP’T OF STATE., Mar. 11, 2010), available at <http://www.state.gov/j/drl/rls/hrrpt/2009/frontmatter/135934.htm> (Secretary of State Clinton explaining that “Human rights are universal, but their experience is local”). This is why the United States is committed to holding everyone, including the United States, to the same human rights standard. *Id.*