Background documents
Exploring strategies for transnational litigation: the case of Iraq

International Round Table
6 November 2018

Access to Justice for Victims of Coalition airstrikes in Iraq

The right to truth and the duty to investigate
On November 6, 2018, the Nuhanovic Foundation and the War Reparations Centre of the University of Amsterdam organized a round table on Access to Justice for Victims of Coalition airstrikes in Iraq - The right to truth and the duty to investigate. This reader comprises the agenda of the meeting, and articles and reports that are relevant to the question of how these rights can be guaranteed. The documents are part of a special database of reports, articles and case law developed by students of the University of Amsterdam and can be found here http://www.nuhanovicfoundation.org/.

Amsterdam
November 2018
Round table
November 6 2018
Law Faculty of the University of Amsterdam
Valckeniersstraat 65-67, 1018 XE Amsterdam
13.00 – 18.00
Room REC JKB.05

Access to Justice for Victims
of Coalition airstrikes in Iraq
- The right to truth and the duty to investigate

Participants

1. Andreas Schüller, ECCHR – Update Sigonella case and similar situations
2. Maike Awater, Airwars – Update facts and advocacy
3. Eva Huson, Journalist – Update relevant facts on the ground Iraq
4. Natasa Nedeski, UvA – Shared State responsibility
5. Wilbert van der Zeijden, PAX – Tensions transparency & State security
6. Jannie Schippers, Journalist – Role media (Skype)
7. Lauren Gould, UU – Remote Warfare
8. Brechtje Vossenberg, Prakken d’Oliviera
9. Frank van Vliet, Nuhanovic Foundation
10. Kate Clark, War Reparations Centre & ACIL
11. Hope Rikkelman, War Reparations Centre

Moderators

12. Frederiek de Vlaming, War Reparations Centre, UvA & Nuhanovic Foundation
13. Liesbeth Zegveld, Prakken d’Oliviera – Representative in the Ahmed & Yosef case

Dinner 19.00
Café de Roeter
Roetersstraat 192, Amsterdam
Documents


3. Beslissing op bezwaar d.d. 23 aug 2018, Wob-verzoek


5. Refusal by The Netherlands Defence Ministry to identify specific civilian harm events impedes natural justice, and runs counter to actions by other Coalition allies, Airswars, 2018. (NL/ENG)

6. War of Annihilation: Devastating Toll upon Civilians in Raqqa - Syria, Amnesty International report, June 2018

7. The right to the truth in international law: The significance of Strasbourg’s contributions, Alice M. Panepinto, 2017

8. Reparations for the Victims of Conflict in Iraq. Ceasefire, Clara Sandoval and Miriam Puttick, November 2017


10. Responsibility in Connection with the Conduct of Military Partners, Bérénice Boutin, Research Paper Series, Asser Institute, 2018
Resolution adopted by the General Assembly on 16 December 2005

[on the report of the Third Committee (A/60/509/Add.1)]

60/147. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

The General Assembly,

Guided by the Charter of the United Nations, the Universal Declaration of Human Rights,¹ the International Covenants on Human Rights,² other relevant human rights instruments and the Vienna Declaration and Programme of Action,³

Affirming the importance of addressing the question of remedies and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law in a systematic and thorough way at the national and international levels,

Recognizing that, in honouring the victims’ right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms international law in the field,

Recalling the adoption of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law by the Commission on Human Rights in its resolution 2005/35 of 19 April 2005⁴ and by the Economic and Social Council in its resolution 2005/30 of 25 July 2005, in which the Council recommended to the General Assembly that it adopt the Basic Principles and Guidelines,

1. Adopts the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law annexed to the present resolution;

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¹ Resolution 217 A (III).
² Resolution 2200 A (XXI), annex.
³ A/CONF.157/24 (Part I), chap. III.
2. **Recommends** that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general;

3. **Requests** the Secretary-General to take steps to ensure the widest possible dissemination of the Basic Principles and Guidelines in all the official languages of the United Nations, including by transmitting them to Governments and intergovernmental and non-governmental organizations and by including the Basic Principles and Guidelines in the United Nations publication entitled *Human Rights: A Compilation of International Instruments*.

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**Annex**

**Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law**

**Preamble**

_The General Assembly,_

**Recalling** the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular article 8 of the Universal Declaration of Human Rights,¹ article 2 of the International Covenant on Civil and Political Rights,² article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination,⁵ article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁶ and article 39 of the Convention on the Rights of the Child,⁷ and of international humanitarian law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV),⁸ article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977,⁹ and articles 68 and 75 of the Rome Statute of the International Criminal Court,¹⁰

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¹ Resolution 2106 A (XX), annex.
³ Ibid., vol. 1577, No. 27531.
Recalling the provisions providing a right to a remedy for victims of violations of international human rights found in regional conventions, in particular article 7 of the African Charter on Human and Peoples’ Rights,11 article 25 of the American Convention on Human Rights,12 and article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms,13

Recalling the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power emanating from the deliberations of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and General Assembly resolution 40/34 of 29 November 1985 by which the Assembly adopted the text recommended by the Congress,

Reaffirming the principles enunciated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including that victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected, and that the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged, together with the expeditious development of appropriate rights and remedies for victims,

Noting that the Rome Statute of the International Criminal Court requires the establishment of “principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation”, requires the Assembly of States Parties to establish a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, and mandates the Court “to protect the safety, physical and psychological well-being, dignity and privacy of victims” and to permit the participation of victims at all “stages of the proceedings determined to be appropriate by the Court”,

Affirming that the Basic Principles and Guidelines contained herein are directed at gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity,

Emphasizing that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms,

Recalling that international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with international obligations of States and the requirements of national law or as provided for in the applicable statutes of international judicial organs, and that the duty to prosecute reinforces the international legal obligations to be carried out in accordance with national legal requirements and procedures and supports the concept of complementarity,

12 Ibid., vol. 1144, No. 17955.
13 Ibid., vol. 213, No. 2889.
Noting that contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively,

Recognizing that, in honouring the victims’ right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law,

Convinced that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity at large, in accordance with the following Basic Principles and Guidelines,

Adopts the following Basic Principles and Guidelines:

I. Obligation to respect, ensure respect for and implement international human rights law and international humanitarian law

1. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from:

   (a) Treaties to which a State is a party;

   (b) Customary international law;

   (c) The domestic law of each State.

2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:

   (a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;

   (b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;

   (c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below;

   (d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.

II. Scope of the obligation

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

   (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;

   (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and

(d) Provide effective remedies to victims, including reparation, as described below.

III. Gross violations of international human rights law and serious violations of international humanitarian law that constitute crimes under international law

4. In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

5. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

IV. Statutes of limitations

6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

V. Victims of gross violations of international human rights law and serious violations of international humanitarian law

8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.
9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

VI. Treatment of victims

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. Victims’ right to remedies

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law:

(a) Equal and effective access to justice;
(b) Adequate, effective and prompt reparation for harm suffered;
(c) Access to relevant information concerning violations and reparation mechanisms.

VIII. Access to justice

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

(a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;
(b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;
(c) Provide proper assistance to victims seeking access to justice;
(d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.
14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

IX. Reparation for harm suffered

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.

17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

19. **Restitution** should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.

20. **Compensation** should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

   (a) Physical or mental harm;

   (b) Lost opportunities, including employment, education and social benefits;

   (c) Material damages and loss of earnings, including loss of earning potential;

   (d) Moral damage;
(e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

21. Rehabilitation should include medical and psychological care as well as legal and social services.

22. Satisfaction should include, where applicable, any or all of the following:

(a) Effective measures aimed at the cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;

(c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;

(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;

(e) Public apology, including acknowledgement of the facts and acceptance of responsibility;

(f) Judicial and administrative sanctions against persons liable for the violations;

(g) Commemorations and tributes to the victims;

(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

23. Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:

(a) Ensuring effective civilian control of military and security forces;

(b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;

(c) Strengthening the independence of the judiciary;

(d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;

(e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;

(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;

(g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
(h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

X. Access to relevant information concerning violations and reparation mechanisms

24. States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

XI. Non-discrimination

25. The application and interpretation of these Basic Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception.

XII. Non-derogation

26. Nothing in these Basic Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it is understood that the present Basic Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. It is further understood that these Basic Principles and Guidelines are without prejudice to special rules of international law.

XIII. Rights of others

27. Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process.
The Global Principles on National Security and the Right to Information
(Tshwane Principles)

These Global Principles on National Security and the Right to Information, launched on June 12, 2013, were drafted by 22 groups over a two year period, in a process that involved consulting more than 500 experts from over 70 countries around the world. The drafting process culminated at a meeting in Tshwane, South Africa, which gave them their name.
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Introduction

These Principles were developed in order to provide guidance to those engaged in drafting, revising, or implementing laws or provisions relating to the state’s authority to withhold information on national security grounds or to punish the disclosure of such information.

They are based on international (including regional) and national law, standards, good practices, and the writings of experts.

They address national security—rather than all grounds for withholding information. All other public grounds for restricting access should at least meet these standards.

These Principles were drafted by 22 organizations and academic centres (listed in the Annex) in consultation with more than 500 experts from more than 70 countries at 14 meetings held around the world, facilitated by the Open Society Justice Initiative, and in consultation with the four special rapporteurs on freedom of expression and/or media freedom and the special rapporteur on counter-terrorism and human rights:

- Frank LaRue, the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression,
- Ben Emmerson, the UN Special Rapporteur on Counter-Terrorism and Human Rights,
- Pansy Tlakula, the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information,
- Catalina Botero, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, and
- Dunja Mijatovic, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media.
Background and Rationale

National security and the public’s right to know are often viewed as pulling in opposite directions. While there is at times a tension between a government’s desire to keep information secret on national security grounds and the public’s right to information held by public authorities, a clear-eyed review of recent history suggests that legitimate national security interests are, in practice, best protected when the public is well informed about the state’s activities, including those undertaken to protect national security.

Access to information, by enabling public scrutiny of state action, not only safeguards against abuse by public officials but also permits the public to play a role in determining the policies of the state and thereby forms a crucial component of genuine national security, democratic participation, and sound policy formulation. In order to protect the full exercise of human rights, in certain circumstances it may be necessary to keep information secret to protect legitimate national security interests.

Striking the right balance is made all the more challenging by the fact that courts in many countries demonstrate the least independence and greatest deference to the claims of government when national security is invoked. This deference is reinforced by provisions in the security laws of many countries that trigger exceptions to the right to information as well as to ordinary rules of evidence and rights of the accused upon a minimal showing, or even the mere assertion by the government, of a national security risk. A government’s over-invocation of national security concerns can seriously undermine the main institutional safeguards against government abuse: independence of the courts, the rule of law, legislative oversight, media freedom, and open government.

These Principles respond to the above-described longstanding challenges as well as to the fact that, in recent years, a significant number of states around the world have embarked on adopting or revising classification regimes and related laws. This trend in turn has been sparked by several developments. Perhaps most significant has been the rapid adoption of access to information laws since the fall of the Berlin Wall, with the result that, as of the date that these Principles were issued, more than 5.2 billion people in 95 countries around the world enjoy the right of access to information—at least in law, if not in practice. People in these countries are—often for the first time—grappling with the question of whether and under what circumstances information may be kept secret. Other developments contributing to an increase in proposed secrecy legislation have been government responses to terrorism or the threat of terrorism, and an interest in having secrecy regulated by law in the context of democratic transitions.
Preamble

The organizations and individuals involved in drafting the present Principles:

Recalling that access to information held by the state is a right of every person, and therefore that this right should be protected by laws drafted with precision, and with narrowly drawn exceptions, and for oversight of the right by independent courts, parliamentary oversight bodies, and other independent institutions;

Recognizing that states can have a legitimate interest in withholding certain information, including on grounds of national security, and emphasizing that striking the appropriate balance between the disclosure and withholding of information is vital to a democratic society and essential for its security, progress, development, and welfare, and the full enjoyment of human rights and fundamental freedoms;

Affirming that it is imperative, if people are to be able to monitor the conduct of their government and to participate fully in a democratic society, that they have access to information held by public authorities, including information that relates to national security;

Noting that these Principles are based on international law and standards relating to the public’s right of access to information held by public authorities and other human rights, evolving state practice (as reflected, inter alia, in judgments of international and national courts and tribunals), the general principles of law recognized by the community of nations, and the writings of experts;

Bearing in mind relevant provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples’ Rights, the American Convention on Human Rights, the European Convention on Human Rights, and the Council of Europe Convention on Access to Official Documents;


Noting that there are international principles—such as those included in the Model Law on Access to Information in Africa, the UN Guiding Principles on Business and Human Rights (“Ruggie Principles”), the Arms Trade Treaty, the OECD Guidelines for Multinational Enterprises, and the Montreux Document on pertinent international legal obligations and good practices for states related to operations of private military and security companies during armed conflict—that recognize the critical importance of access to information from, or in relation to, business enterprises in certain circumstances; and that some expressly address the need for private military and security companies operating within the national security sector to make certain information public;

Noting that these Principles do not address substantive standards for intelligence collection, management of personal data, or intelligence sharing, which are addressed by the “good practices on legal and institutional frameworks for intelligence services and their oversight” issued in 2010 by Martin Scheinin, then the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, at the request of the UN Human Rights Council;

Recognizing the importance of effective intelligence sharing among states, as called for by UN Security Council Resolution 1373;
Further recognizing that barriers to public and independent oversight created in the name of national security increase the risk that illegal, corrupt, and fraudulent conduct may occur and may not be uncovered; and that violations of privacy and other individual rights often occur under the cloak of national security secrecy;

Concerned by the costs to national security of over-classification, including the hindering of information-sharing among government agencies and allies, the inability to protect legitimate secrets, the inability to find important information amidst the clutter, repetitive collection of information by multiple agencies, and the overburdening of security managers;

Emphasizing that the Principles focus on the public’s right to information, and that they address the rights to information of detainees, victims of human rights violations, and others with heightened claims to information only to the extent that those rights are closely linked with the public’s right to information;

Acknowledging that certain information that should not be withheld on national security grounds may potentially nonetheless be withheld on various other grounds recognized in international law—including, e.g., international relations, fairness of judicial proceedings, rights of litigants, and personal privacy—subject always to the principle that information may only be withheld where the public interest in maintaining the information’s secrecy clearly outweighs the public interest in access to information;

Desiring to provide practical guidance to governments, legislative and regulatory bodies, public authorities, drafters of legislation, the courts, other oversight bodies, and civil society concerning some of the most challenging issues at the intersection of national security and the right to information, especially those that involve respect for human rights and democratic accountability;

Endeavouring to elaborate Principles that are of universal value and applicability;

Recognizing that states face widely varying challenges in balancing public interests in disclosure and the need for secrecy to protect legitimate national security interests, and that, while the Principles are universal, their application in practice may respond to local realities, including diverse legal systems;

Recommend that appropriate bodies at the national, regional, and international levels undertake steps to disseminate and discuss these Principles, and endorse, adopt, and/or implement them to the extent possible, with a view to achieving progressively the full realization of the right to information as set forth in Principle 1.
Definitions

In these Principles, unless the context otherwise requires:

“**Business enterprise within the national security sector**” means a juristic person that carries on or has carried on any trade or business in the national security sector, but only in such capacity; either as a contractor or supplier of services, facilities, personnel, or products including, but not limited to, armaments, equipment, and intelligence. This includes private military and security companies (PMSCs). It does not include juristic persons organized as non-profits or as non-governmental organizations.

“**Independent**” means institutionally, financially, and operationally free from the influence, guidance, or control of the executive, including all security sector authorities.

“**Information**” means any original or copy of documentary material irrespective of its physical characteristics, and any other tangible or intangible material, regardless of the form or medium in which it is held. It includes, but is not limited to, records, correspondence, facts, opinion, advice, memoranda, data, statistics, books, drawings, plans, maps, diagrams, photographs, audio or visual records, documents, emails, logbooks, samples, models, and data held in any electronic form.

“**Information of public interest**” refers to information that is of concern or benefit to the public, not merely of individual interest and whose disclosure is “in the interest of the public,” for instance, because it is useful for public understanding of government activities.

“**Legitimate national security interest**” refers to an interest the genuine purpose and primary impact of which is to protect national security, consistent with international and
national law. (Categories of information whose withholding may be necessary to protect a legitimate national security interest are set forth in Principle 9.) A national security interest is not legitimate if its real purpose or primary impact is to protect an interest unrelated to national security, such as protection of government or officials from embarrassment or exposure of wrongdoing; concealment of information about human rights violations, any other violation of law, or the functioning of public institutions; strengthening or perpetuating a particular political interest, party, or ideology; or suppression of lawful protests.

“National security” is not defined in these Principles. Principle 2 includes a recommendation that “national security” should be defined precisely in national law, in a manner consistent with the needs of a democratic society.

“Public authorities” include all bodies within the executive, legislative, and judicial branches at all levels of government, constitutional and statutory authorities, including security sector authorities; and non-state bodies that are owned or controlled by government or that serve as agents of the government. “Public authorities” also include private or other entities that perform public functions or services or operate with substantial public funds or benefits, but only in regard to the performance of those functions, provision of services, or use of public funds or benefits.

“Public personnel” or “public servant” refers to current and former public employees, contractors, and sub-contractors of public authorities, including in the security sector. “Public personnel” or “public servant” also include persons employed by non-state bodies that are owned or controlled by the government or that serve as agents of the government; and employees of private or other entities that perform public functions or services or operate with substantial public funds or benefits, but only in regard to the performance of those functions, provision of services, or use of public funds or benefits.

“Sanction,” when used as a noun, refers to any form of penalty or detriment, including criminal, civil and administrative measures. When used as a verb, “sanction” means to bring into effect such form of penalty or detriment.

“Security sector” is defined to encompass: (i) security providers, including but not limited to the armed forces, police and other law enforcement bodies, paramilitary forces, and intelligence and security services (both military and civilian); and (ii) all executive bodies, departments, and ministries responsible for the coordination, control, and oversight of security providers.
Part I: General Principles

Principle 1: Right to Information

(a) Everyone has the right to seek, receive, use, and impart information held by or on behalf of public authorities, or to which public authorities are entitled by law to have access.

(b) International principles also recognize that business enterprises within the national security sector, including private military and security companies, have the responsibility to disclose information in respect of situations, activities, or conduct that may reasonably be expected to have an impact on the enjoyment of human rights.

(c) Those with an obligation to disclose information, consistent with Principles 1(a) and 1(b), must make information available on request, subject only to limited exceptions prescribed by law and necessary to prevent specific, identifiable harm to legitimate interests, including national security.

(d) Only public authorities whose specific responsibilities include protecting national security may assert national security as a ground for withholding information.

(e) Any assertion by a business enterprise of national security to justify withholding information must be explicitly authorized or confirmed by a public authority tasked with protecting national security.

Note: The government, and only the government, bears ultimate responsibility for national security, and thus only the government may assert that information must not be released if it would harm national security.
Public authorities also have an affirmative obligation to publish proactively certain information of public interest.

**Principle 2: Application of these Principles**

(a) These Principles apply to the exercise of the right of access to information as identified in Principle 1 where the government asserts or confirms that the release of such information could cause harm to national security.

(b) Given that national security is one of the weightiest public grounds for restricting information, when public authorities assert other public grounds for restricting access—including international relations, public order, public health and safety, law enforcement, future provision of free and open advice, effective policy formulation, and economic interests of the state—they must at least meet the standards for imposing restrictions on the right of access to information set forth in these Principles as relevant.

(c) It is good practice for national security, where used to limit the right to information, to be defined precisely in a country’s legal framework in a manner consistent with a democratic society.

**Principle 3: Requirements for Restricting the Right to Information on National Security Grounds**

No restriction on the right to information on national security grounds may be imposed unless the government can demonstrate that: (1) the restriction (a) is prescribed by law and (b) is necessary in a democratic society (c) to protect a legitimate national security interest; and (2) the law provides for adequate safeguards against abuse, including prompt, full, accessible, and effective scrutiny of the validity of the restriction by an independent oversight authority and full review by the courts.

(a) *Prescribed by law.* The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to understand what information may be withheld, what should be disclosed, and what actions concerning the information are subject to sanction.
(b) Necessary in a democratic society.

(i) Disclosure of the information must pose a real and identifiable risk of significant harm to a legitimate national security interest.

(ii) The risk of harm from disclosure must outweigh the overall public interest in disclosure.

(iii) The restriction must comply with the principle of proportionality and must be the least restrictive means available to protect against the harm.

(iv) The restriction must not impair the very essence of the right to information.

(c) Protection of a legitimate national security interest. The narrow categories of information that may be withheld on national security grounds should be set forth clearly in law.

Notes: See definition of “legitimate national security interest” in the Definitions section, above. Principle 3(b) is all the more important if national security is not defined clearly in law as recommended in Principle 2.

“Public interest” is not defined in these Principles. A list of categories of especially high public interest that should be published proactively and should never be withheld is set forth in Principle 10. A list of categories of wrongdoing that are of high interest to the public, and that public servants should and may disclose without fear of retaliation, is set forth in Principle 37.

In balancing the risk of harm against the public interest in disclosure, account should be taken of the possibility of mitigating any harm from disclosure, including through means that require the reasonable expenditure of funds. Following is an illustrative list of factors to be considered in deciding whether the public interest in disclosure outweighs the risk of harm:

- factors favoring disclosure: disclosure could reasonably be expected to (a) promote open discussion of public affairs, (b) enhance the government’s accountability, (c) contribute to positive and informed debate on important issues or matters of serious interest, (d) promote effective oversight of expenditure of public funds, (e) reveal the reasons for a government decision, (f) contribute to protection of the environment, (g) reveal threats to public health or safety, or (h) reveal, or help establish accountability for, violations of human rights or international humanitarian law.
• factors favoring non-disclosure: disclosure would likely pose a real and identifiable risk of harm to a legitimate national security interest;

• factors that are irrelevant: disclosure could reasonably be expected to (a) cause embarrassment to, or a loss of confidence in, the government or an official, or (b) weaken a political party or ideology.

The fact that disclosure could cause harm to a country’s economy would be relevant in determining whether information should be withheld on that ground, but not on national security grounds.

Principle 4: Burden on Public Authority to Establish Legitimacy of Any Restriction

(a) The burden of demonstrating the legitimacy of any restriction rests with the public authority seeking to withhold information.

(b) The right to information should be interpreted and applied broadly, and any restrictions should be interpreted narrowly.

(c) In discharging this burden, it is not sufficient for a public authority simply to assert that there is a risk of harm; the authority is under a duty to provide specific, substantive reasons to support its assertions.

Note: Any person who seeks access to information should have a fair opportunity to challenge the asserted basis for a risk assessment before an administrative as well as a judicial authority, consistent with Principles 26 and 27.

(d) In no case may the mere assertion, such as the issuing of a certificate by a minister or other official to the effect that disclosure would cause harm to national security, be deemed to be conclusive concerning the point for which it is made.
Principle 5: No Exemption for Any Public Authority

(a) No public authority—including the judiciary, the legislature, oversight institutions, intelligence agencies, the armed forces, police, other security agencies, the offices of the head of state and government, and any component offices of the foregoing—may be exempted from disclosure requirements.

(b) Information may not be withheld on national security grounds simply on the basis that it was generated by, or shared with, a foreign state or inter-governmental body, or a particular public authority or unit within an authority.

Note: Concerning information generated by a foreign state or inter-governmental body, see Principle 9(a)(v).

Principle 6: Access to Information by Oversight Bodies

All oversight, ombuds, and appeal bodies, including courts and tribunals, should have access to all information, including national security information, regardless of classification level, relevant to their ability to discharge their responsibilities.

Note: This Principle is expanded upon in Principle 32. It does not address disclosure to the public by oversight bodies. Oversight bodies should maintain the secrecy of all information that has been legitimately classified according to these Principles, as set forth in Principle 35.

Principle 7: Resources

States should devote adequate resources and take other necessary steps, such as the issuance of regulations and proper management of archives, to ensure that these Principles are observed in practice.
Principle 8: States of Emergency

In a time of public emergency which threatens the life of the nation and the existence of which is officially and lawfully proclaimed in accordance with both national and international law, a state may derogate from its obligations regarding the right to seek, receive, and impart information only to the extent strictly required by the exigencies of the situation and only when and for so long as the derogation is consistent with the state’s other obligations under international law, and does not involve discrimination of any kind.

Note: Certain aspects of the right to seek, receive, and impart information and ideas are so fundamental to the enjoyment of non-derogable rights that they should always be fully respected even in times of public emergency. As a non-exhaustive example, some or all of the information in Principle 10 would be of this character.
Part II: Information that May Be Withheld on National Security Grounds, and Information that Should Be Disclosed

Principle 9: Information that Legitimately May Be Withheld

(a) Public authorities may restrict the public’s right of access to information on national security grounds, but only if such restrictions comply with all of the other provisions of these Principles, the information is held by a public authority, and the information falls within one of the following categories:

(i) Information about on-going defense plans, operations, and capabilities for the length of time that the information is of operational utility.

   Note: The phrase “for the length of time that the information is of operational utility” is meant to require disclosure of information once the information no longer reveals anything that could be used by enemies to understand the state’s readiness, capacity, or plans.

(ii) Information about the production, capabilities, or use of weapons systems and other military systems, including communications systems.

   Note: Such information includes technological data and inventions, and information about production, capabilities, or use. Information about budget lines concerning weapons and other military systems should be made available to the public.
Principles 10C(3) & 10F. It is good practice for states to maintain and publish a control list of weapons, as encouraged by the Arms Trade Treaty as to conventional weapons. It is also good practice to publish information about weapons, equipment, and troop numbers.

(iii) Information about specific measures to safeguard the territory of the state, critical infrastructure, or critical national institutions (institutions essentielles) against threats or use of force or sabotage, the effectiveness of which depend upon secrecy;

Note: “Critical infrastructure” refers to strategic resources, assets, and systems, whether physical or virtual, so vital to the state that destruction or incapacity of such resources, assets, or systems would have a debilitating impact on national security.

(iv) Information pertaining to, or derived from, the operations, sources, and methods of intelligence services, insofar as they concern national security matters; and

(v) Information concerning national security matters that was supplied by a foreign state or inter-governmental body with an express expectation of confidentiality; and other diplomatic communications insofar as they concern national security matters.

Note: It is good practice for such expectations to be recorded in writing.

Note: To the extent that particular information concerning terrorism, and counter-terrorism measures, is covered by one of the above categories, the public’s right of access to such information may be subject to restrictions on national security grounds in accordance with this and other provisions of the Principles. At the same time, some information concerning terrorism or counterterrorism measures may be of particularly high public interest: see e.g., Principles 10A, 10B, and 10H(1).

(b) It is good practice for national law to set forth an exclusive list of categories of information that are at least as narrowly drawn as the above categories.

(c) A state may add a category of information to the above list of categories, but only if the category is specifically identified and narrowly defined and preservation of the information’s secrecy is necessary to protect a legitimate national security interest that is set forth in law, as suggested in Principle 2(c). In proposing the category, the state should explain how disclosure of information in the category would harm national security.
Principle 10: Categories of Information with a High Presumption or Overriding Interest in Favor of Disclosure

Some categories of information, including those listed below, are of particularly high public interest given their special significance to the process of democratic oversight and the rule of law. Accordingly, there is a very strong presumption, and in some cases an overriding imperative, that such information should be public and proactively disclosed.

Information in the following categories should enjoy at least a high presumption in favor of disclosure, and may be withheld on national security grounds only in the most exceptional circumstances and in a manner consistent with the other principles, only for a strictly limited period of time, only pursuant to law and only if there is no reasonable means by which to limit the harm that would be associated with disclosure. For certain subcategories of information, specified below as inherently subject to an overriding public interest in disclosure, withholding on grounds of national security can never be justified.

A. Violations of International Human Rights and Humanitarian Law

(1) There is an overriding public interest in disclosure of information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the rights to personal liberty and security. Such information may not be withheld on national security grounds in any circumstances.

(2) Information regarding other violations of human rights or humanitarian law is subject to a high presumption of disclosure, and in any event may not be withheld on national security grounds in a manner that would prevent accountability for the violations or deprive a victim of access to an effective remedy.

(3) When a state is undergoing a process of transitional justice during which the state is especially required to ensure truth, justice, reparation, and guarantees of non-recurrence, there is an overriding public interest in disclosure to society as a whole of information regarding human rights violations committed under the past regime. A successor government should immediately protect and preserve the
integrity of, and release without delay, any records that contain such information that were concealed by a prior government.

Note: See Principle 21(c) regarding the duty to search for or reconstruct information about human rights violations.

(4) Where the existence of violations is contested or suspected rather than already established, this Principle applies to information that, taken on its own or in conjunction with other information, would shed light on the truth about the alleged violations.

(5) This Principle applies to information about violations that have occurred or are occurring, and applies regardless of whether the violations were committed by the state that holds the information or others.

(6) Information regarding violations covered by this Principle includes, without limitation, the following:

(a) A full description of, and any records showing, the acts or omissions that constitute the violations, as well as the dates and circumstances in which they occurred, and, where applicable, the location of any missing persons or mortal remains.

(b) The identities of all victims, so long as consistent with the privacy and other rights of the victims, their relatives, and witnesses; and aggregate and otherwise anonymous data concerning their number and characteristics that could be relevant in safeguarding human rights.

Note: The names and other personal data of victims, their relatives and witnesses may be withheld from disclosure to the general public to the extent necessary to prevent further harm to them, if the persons concerned or, in the case of deceased persons, their family members, expressly and voluntarily request withholding, or withholding is otherwise manifestly consistent with the person’s own wishes or the particular needs of vulnerable groups. Concerning victims of sexual violence, their express consent to disclosure of their names and other personal data should be required. Child victims (under age 18) should not be identified to the general public. This Principle should be interpreted, however, bearing in mind the reality that various governments have, at various times, shielded human rights violations from public view by invoking the right to privacy, including of the very individuals whose rights are being or have been grossly violated, without regard to the true wishes of
(c) The names of the agencies and individuals who perpetrated or were otherwise responsible for the violations, and more generally of any security sector units present at the time of, or otherwise implicated in, the violations, as well as their superiors and commanders, and information concerning the extent of their command and control.

(d) Information on the causes of the violations and the failure to prevent them.

B. Safeguards for the Right to Liberty and Security of Person, the Prevention of Torture and Other Ill-treatment, and the Right to Life

Information covered by this Principle includes:

(1) Laws and regulations that authorize the deprivation of life of a person by the state, and laws and regulations concerning deprivation of liberty, including those that address the grounds, procedures, transfers, treatment, or conditions of detention of affected persons, including interrogation methods. There is an overriding public interest in disclosure of such laws and regulations.

Notes: “Laws and regulations,” as used throughout Principle 10, include all primary or delegated legislation, statutes, regulations, and ordinances, as well as decrees or executive orders issued by a president, prime minister, minister or other public authority, and judicial orders, that have the force of law. “Laws and regulations” also include any rules or interpretations of law that are regarded as authoritative by executive officials.

Deprivation of liberty includes any form of arrest, detention, imprisonment, or internment.

(2) The location of all places where persons are deprived of their liberty operated by or on behalf of the state as well as the identity of, and charges against, or reasons for the detention of, all persons deprived of their liberty, including during armed conflict.

(3) Information regarding the death in custody of any person, and information regarding any other deprivation of life for which a state is responsible, including the identity of the person or persons killed, the circumstances of their death, and the location of their remains.
Note: In no circumstances may information be withheld on national security grounds that would result in the secret detention of a person, or the establishment and operation of secret places of detention, or secret executions. Nor are there any circumstances in which the fate or whereabouts of anyone deprived of liberty by, or with the authorization, support, or acquiescence of, the state may be concealed from, or otherwise denied to, the person’s family members or others with a legitimate interest in the person’s welfare.

The names and other personal data of persons who have been deprived of liberty, who have died in custody, or whose deaths have been caused by state agents, may be withheld from disclosure to the general public to the extent necessary to protect the right to privacy if the persons concerned, or their family members in the case of deceased persons, expressly and voluntarily request withholding, and if the withholding is otherwise consistent with human rights. The identities of children who are being deprived of liberty should not be made available to the general public. These caveats, however, should not preclude publication of aggregate or otherwise anonymous data.

C. Structures and Powers of Government

Information covered by this Principle includes, without limitation, the following:

(1) The existence of all military, police, security, and intelligence authorities, and sub-units.

(2) The laws and regulations applicable to those authorities and their oversight bodies and internal accountability mechanisms, and the names of the officials who head such authorities.

(3) Information needed for evaluating and controlling the expenditure of public funds, including the gross overall budgets, major line items, and basic expenditure information for such authorities.

(4) The existence and terms of concluded bilateral and multilateral agreements, and other major international commitments by the state on national security matters.
D. Decisions to Use Military Force or Acquire Weapons of Mass Destruction

(1) Information covered by this Principle includes information relevant to a decision to commit combat troops or take other military action, including confirmation of the fact of taking such action, its general size and scope, and an explanation of the rationale for it, as well as any information that demonstrates that a fact stated as part of the public rationale was mistaken.

*Note: The reference to an action's “general” size and scope recognizes that it should generally be possible to satisfy the high public interest in having access to information relevant to the decision to commit combat troops without revealing all of the details of the operational aspects of the military action in question (see Principle 9).*

(2) The possession or acquisition of nuclear weapons, or other weapons of mass destruction, by a state, albeit not necessarily details about their manufacture or operational capabilities, is a matter of overriding public interest and should not be kept secret.

*Note: This sub-principle should not be read to endorse, in any way, the acquisition of such weapons.*

E. Surveillance

(1) The overall legal framework concerning surveillance of all kinds, as well as the procedures to be followed for authorizing surveillance, selecting targets of surveillance, and using, sharing, storing, and destroying intercepted material, should be accessible to the public.

*Note: This information includes: (a) the laws governing all forms of surveillance, both covert and overt, including indirect surveillance such as profiling and data-mining, and the types of surveillance measures that may be used; (b) the permissible objectives of surveillance; (c) the threshold of suspicion required to initiate or continue surveillance; (d) limitations on the duration of surveillance measures; (e) procedures for authorizing and reviewing the use of such measures; (f) the types of personal data that may be collected and/or processed for national security purposes; and (g) the criteria that apply to the use, retention, deletion, and transfer of these data.*
(2) The public should also have access to information about entities authorized to
conduct surveillance, and statistics about the use of such surveillance.

*Note: This information includes the identity of each government entity granted specific
authorization to conduct particular surveillance each year; the number of surveillance
authorizations granted each year to each such entity; the best information available
concerning the number of individuals and the number of communications subject to sur-
veillance each year; and whether any surveillance was conducted without specific autho-
ration and if so, by which government entity.*

The right of the public to be informed does not necessarily extend to the fact, or opera-
tional details, of surveillance conducted pursuant to law and consistent with human
rights obligations. Such information may be withheld from the public and those subject
to surveillance at least until the period of surveillance has been concluded.

(3) In addition, the public should be fully informed of the fact of any illegal surveil-
lance. Information about such surveillance should be disclosed to the maximum
extent without violating the privacy rights of those who were subject to surveillance.

(4) These Principles address the right of the public to access information and are with-
out prejudice to the additional substantive and procedural rights of individuals who
have been, or believe that they may have been, subject to surveillance.

*Note: It is good practice for public authorities to be required to notify persons who have
been subjected to covert surveillance (providing, at a minimum, information on the type
of measure that was used, the dates, and the body responsible for authorizing the surveil-
lance measure) insofar as this can be done without jeopardizing on-going operations or
sources and methods.*

(5) The high presumptions in favor of disclosure recognized by this Principle do not
apply in respect of information that relates solely to surveillance of the activities of
foreign governments.

*Note: Information obtained through covert surveillance, including of the activities of
foreign governments, should be subject to disclosure in the circumstances identified in
Principle 10A.*
F. **Financial Information**

Information covered by this Principle includes information sufficient to enable the public to understand security sector finances, as well as the rules that govern security sector finances. Such information should include but is not limited to:

1. Departmental and agency budgets with headline items;
2. End-of-year financial statements with headline items;
3. Financial management rules and control mechanisms;
4. Procurement rules; and
5. Reports made by supreme audit institutions and other bodies responsible for reviewing financial aspects of the security sector, including summaries of any sections of such reports that are classified.

G. **Accountability Concerning Constitutional and Statutory Violations and Other Abuses of Power**

This Principle includes information concerning the existence, character, and scale of constitutional or statutory violations and other abuses of power by public authorities or personnel.

H. **Public Health, Public Safety, or the Environment**

Information covered by this Principle includes:

1. In the event of any imminent or actual threat to public health, public safety, or the environment, all information that could enable the public to understand or take measures to prevent or mitigate harm arising from that threat, whether the threat is due to natural causes or human activities, including by actions of the state or by actions of private companies.

2. Other information, updated regularly, on natural resource exploitation, pollution and emission inventories, environmental impacts of proposed or existing large public works or resource extractions, and risk assessment and management plans for especially hazardous facilities.
Part III.A: Rules Regarding Classification and Declassification of Information

Principle 11: Duty to State Reasons for Classifying Information

(a) Whether or not a state has a formal classification process, public authorities are obliged to state reasons for classifying information.

Note: “Classification” is the process by which records that contain sensitive information are reviewed and given a mark to indicate who may have access and how the record is to be handled. It is good practice to institute a formal system of classification, in order to reduce arbitrariness and excessive withholding.

(b) The reasons should indicate the narrow category of information, corresponding to one of the categories listed in Principle 9, to which the information belongs, and describe the harm that could result from disclosure, including its level of seriousness and degree of likelihood.

(c) Classification levels, if used, should correspond to the levels and likelihood of harm identified in the justification.

(d) When information is classified, (i) a protective marking should be affixed to the record indicating the level, if any, and maximum duration of classification, and (ii)
a statement should be included justifying the need to classify at that level and for that period.

Note: Providing a statement justifying each classification decision is encouraged because it makes officials pay attention to the specific harm that would result from disclosure, and because it facilitates the process of declassification and disclosure. Paragraph-by-paragraph marking further facilitates consistency in disclosure of unclassified portions of documents.

Principle 12: Public Access to Classification Rules

(a) The public should have the opportunity to comment on the procedures and standards governing classification prior to their becoming effective.

(b) The public should have access to the written procedures and standards governing classification.

Principle 13: Authority to Classify

(a) Only officials specifically authorized or designated, as defined by law, may classify information. If an undesignated official believes that information should be classified, the information may be deemed classified for a brief and expressly defined period of time until a designated official has reviewed the recommendation for classification.

Note: In the absence of legal provisions controlling the authority to classify, it is good practice to at least specify such delegation authority in a regulation.

(b) The identity of the person responsible for a classification decision should be traceable or indicated on the document, unless compelling reasons exist to withhold the identity, so as to ensure accountability.

(c) Those officials designated by law should assign original classification authority to the smallest number of senior subordinates that is administratively efficient.

Note: It is a good practice to publish information about the number of people who have authority to classify, and the number of people who have access to classified information.
Principle 14: Facilitating Internal Challenges to Classification

Public personnel, including those affiliated with the security sector, who believe that information has been improperly classified may challenge the classification of the information.

*Note: Security sector personnel are flagged as deserving of special encouragement to challenge classification given the heightened cultures of secrecy in security agencies, the fact that most countries have not established or designated an independent body to receive complaints from security personnel, and disclosure of security information often results in higher penalties than does disclosure of other information.*

Principle 15: Duty to Preserve, Manage, and Maintain National Security Information

(a) Public authorities have a duty to preserve, manage, and maintain information according to international standards. Information may be exempted from preservation, management, and maintenance only according to law.

(b) Information should be maintained properly. Filing systems should be consistent, transparent (without revealing legitimately classified information), and comprehensive, so that specific requests for access will locate all relevant information even if the information is not disclosed.

(c) Each public body should create and make public, and periodically review and update, a detailed and accurate list of the classified records it holds, save for those exceptional documents, if any, whose very existence may legitimately be withheld in accordance with Principle 19.

*Note: It is good practice to update such lists annually.*

Principle 16: Time Limits for Period of Classification

(a) Information may be withheld on national security grounds for only as long as necessary to protect a legitimate national security interest. Decisions to withhold information should be reviewed periodically in order to ensure that this Principle is met.

*Note: It is good practice for review to be required by statute at least every five years. Several countries require review after shorter periods.*

(b) The classifier should specify the date, conditions, or event on which the classification shall lapse.

*Note: It is good practice that this time limit, or specification of conditions or event on which classification lapses, is subjected to periodic review.*

(c) No information may remain classified indefinitely. The presumptive maximum period of classification on national security grounds should be established by law.

(d) Information may be withheld beyond the presumptive deadline only in exceptional circumstances, pursuant to a new decision to withhold, made by another decision-maker, and setting an amended deadline.

Principle 17: Declassification Procedures

(a) National legislation should identify government responsibility to coordinate, oversee, and implement government declassification activities, including consolidating and regularly updating declassification guidance.

(b) Procedures should be put in place to identify classified information of public interest for priority declassification. If information of public interest, including information that falls into categories listed in Principle 10, is classified due to exceptional sensitivity, it should be declassified as rapidly as possible.

(c) National legislation should establish procedures for *en bloc* (bulk and/or sampling) declassification.
(d) National legislation should identify fixed periods for automatic declassification for different categories of classified information. To minimize the burden of declassification, records should be automatically declassified without review wherever possible.

(e) National legislation should set out an accessible and public procedure for requesting declassification of documents.

(f) Declassified documents, including those declassified by courts, tribunals or other oversight, ombuds, or appeal bodies, should be proactively disclosed or otherwise made publicly accessible (for instance, through harmonization with legislation on national archives or access to information or both).

Note: This Principle is without prejudice to the proviso regarding other grounds for withholding set forth in preambular paragraph 15.

Note: Additional good practices include the following:

• regular consideration of the use of new technologies in the processes of declassification;
  and

• regular consultation with persons with professional expertise concerning the process for establishing declassification priorities, including both automatic and en bloc declassification.
Part III.B: Rules Regarding Handling of Requests for Information

Principle 18: Duty to Consider Request Even If Information Has Been Classified

The fact that information has been classified is not decisive in determining how to respond to a request for that information. Rather, the public authority that holds the information should consider the request according to these Principles.

Principle 19: Duty to Confirm or Deny

(a) Upon receipt of a request for information, a public authority should confirm or deny whether it holds the requested information.

(b) If a jurisdiction allows for the possibility that, in extraordinary circumstances, the very existence or non-existence of particular information may be classified in accordance with Principle 3, then any refusal to confirm or deny the existence of information in response to a particular request should be based upon a showing that mere confirmation or denial of the existence of the information would pose a risk of harm to a distinct information category designated in a national law or regulation as requiring such exceptional treatment.
Principle 20: Duty to State Reasons for Denial in Writing

(a) If a public authority denies a request for information, in whole or in part, it should set forth in writing specific reasons for doing so, consistent with Principles 3 and 9, within the period of time specified in law for responding to information requests.

*Note: See Principle 25 for the requirement that the time in which a response must be given should be set forth in law.*

(b) The authority should also provide the requester with sufficient information concerning the official(s) who authorized non-disclosure and the process for doing so, unless to do so would itself disclose classified information, and of avenues for appeal, to allow for an examination of the authority’s adherence to the law.

Principle 21: Duty to Recover or Reconstruct Missing Information

(a) When a public authority is unable to locate information responsive to a request, and records containing that information should have been maintained, collected, or produced, the authority should make reasonable efforts to recover or reconstruct the missing information for potential disclosure to the requester.

*Note: This Principle applies to information that cannot be located for any reason, for instance because it was never collected, was destroyed, or is untraceable.*

(b) A representative of the public authority should be required to indicate under oath and within a reasonable and statutorily specified time all of the procedures undertaken to try to recover or reconstruct the information in such a way that such procedures may be subject to judicial review.

*Note: When information that is required by law to be maintained cannot be found, the matter should be referred to police or administrative authorities for investigation. The outcome of the investigation should be made public.*
(c) The duty to recover or reconstruct information is particularly strong (i) when the information concerns alleged gross or systematic human rights violations, and/or (ii) during a transition to a democratic form of government from a government characterized by widespread human rights violations.

**Principle 22: Duty to Disclose Parts of Documents**

Exemptions from disclosure apply only to specific information and not to whole documents or other records. Only specific information for which the validity of a restriction has been demonstrated (“exempt information”) may be withheld. Where a record contains both exempt and non-exempt information, public authorities have an obligation to sever and disclose the non-exempt information.

**Principle 23: Duty to Identify Information Withheld**

A public authority that holds information that it refuses to release should identify such information with as much specificity as possible. At the least, the authority should disclose the amount of information it refuses to disclose, for instance by estimating the number of pages.

**Principle 24: Duty to Provide Information in Available Formats**

Public authorities should provide information in the format preferred by the requester to the extent possible.

*Note: This includes, for example, the obligation of public authorities to take appropriate measures to provide information to persons with disabilities in accessible formats and technologies in a timely manner and without additional cost, in accordance with the UN Convention on People with Disabilities.*
Principle 25: Time Limits for Responding to Information Requests

(a) Time limits for responding to requests, including on the merits, internal review, decision by an independent body if available, and judicial review should be established by law and should be as short as practicably possible.

Note: It is considered best practice, in keeping with the requirements set forth in most access to information laws, to prescribe twenty working days or less as the time period in which a substantive response must be given. Where time limits for responding to requests are not set forth in law, the time limit should be no more than 30 days for a standard request. Laws may provide for different time limits in order to take account of different volumes and levels of complexity and sensitivity of documents.

(b) Expedited time limits should apply where there is a demonstrated need for the information on an urgent basis, such as where the information is necessary to safeguard the life or liberty of a person.

Principle 26: Right to Review of Decision Withholding Information

(a) A requester has the right to a speedy and low-cost review by an independent authority of a refusal to disclose information, or of matters related to the request.

Note: A refusal may include an implicit or silent refusal. Matters subject to a review by an independent authority include fees, timelines, and format.

(b) The independent authority should have the competence and resources necessary to ensure an effective review, including full access to all relevant information, even if classified.

(c) A person should be entitled to obtain independent and effective review of all relevant issues by a competent court or tribunal.

(d) Where a court makes a ruling that withholding information is warranted, it should make publicly available fact-specific reasons and its legal analysis in writing, except in extraordinary circumstances, and consistent with Principle 3.
Part IV: Judicial Aspects of National Security and Right to Information

Principle 27: General Judicial Oversight Principle

(a) Invocations of national security may not be relied upon to undermine the fundamental right to a fair trial by a competent, independent, and impartial tribunal established by law.

(b) Where a public authority seeks to withhold information on the ground of national security in any legal proceeding, a court should have the power to examine the information in determining whether the information may be withheld. A court should not ordinarily dismiss a challenge without examining the information.

Note: In keeping with Principle 4(d), the court should not rely on summaries or affidavits that merely assert a need for secrecy without providing an evidentiary basis for the assertion.

(c) The court should ensure that a person seeking access can, to the maximum extent possible, know and challenge the case advanced by the government for withholding the information.

(d) A court should adjudicate the legality and propriety of a public authority’s claim and may compel disclosure or order appropriate relief in the event of partial or full non-disclosure, including the dismissal of charges in criminal proceedings.
(e) The court should independently assess whether the public authority has properly invoked any basis for non-disclosure; the fact of classification should not be conclusive as to the request for non-disclosure of information. Similarly, the court should assess the nature of any harm claimed by the public authority, its likelihood of occurrence, and the public interest in disclosure, in accordance with the standards defined in Principle 3.

Principle 28: Public Access to Judicial Processes

(a) Invocation of national security may not be relied upon to undermine the fundamental right of the public to access judicial processes.

(b) Court judgments—setting forth all of a court’s orders and including the essential findings, evidence and legal reasoning—should be made public, except where the interest of children under eighteen otherwise requires.

Notes: International law permits no derogation on national security grounds from the obligation to pronounce judgments publicly.

Records of juvenile court proceedings should not be made public. Records of other judicial proceedings involving children should ordinarily redact the names and other identifying information of children under the age of eighteen.

(c) The public’s right of access to justice should include prompt public access to (i) judicial reasoning, (ii) information about the existence and progress of cases, (iii) written arguments submitted to the court, (iv) court hearings and trials, and (v) evidence in court proceedings that forms the basis of a conviction, unless a derogation of this is justified in accordance with these Principles.

Note: International law concerning fair trial requirements allows courts to exclude all or part of the public from a hearing for reasons of national security in a democratic society, as well as morals, public order, the interest of the private lives of the parties, or to avoid prejudice to the interests of justice, provided that such restrictions are in all cases necessary and proportionate.

(d) The public should have an opportunity to contest any claim asserted by the public authority that a restriction on public access to judicial processes is strictly necessary on national security grounds.
(e) Where a court makes a ruling as to whether a restriction on open access to judicial processes is warranted, it should make publicly available fact-specific reasons and its legal analysis in writing, except in extraordinary circumstances, consistent with Principle 3.

Notes: This Principle is not intended to modify a state’s existing law regarding preliminary procedures to which the public does not ordinarily have access. It applies only when the court process would otherwise allow public access and the attempt to deny that access is based on a claim of national security.

The public’s right of access to court proceedings and materials derives from the significance of access to promoting (i) the actual and perceived fairness and impartiality of judicial proceedings; (ii) the proper and more honest conduct of the parties; and (iii) the enhanced accuracy of public comment.

Principle 29: Party Access to Information in Criminal Proceedings

(a) The court may not prohibit a defendant from attending his or her trial on national security grounds.

(b) In no case should a conviction or deprivation of liberty be based on evidence that the accused has not had an opportunity to review and refute.

(c) In the interests of justice, a public authority should disclose to the defendant and the defendant’s counsel the charges against a person and any information necessary to ensure a fair trial, regardless of whether the information is classified, consistent with Principles 3-6, 10, 27 and 28, including a consideration of the public interests.

(d) Where the public authority declines to disclose information necessary to ensure a fair trial, the court should stay or dismiss the charges.

Note: The public authorities should not rely on information to their benefit when claiming secrecy, although they may decide to keep the information secret and suffer the consequences.
Note: Principles 29 and 30 are included in these Principles concerning public access to information in light of the fact that judicial review, and related disclosures in the context of judicial oversight, are often important means for public disclosure of information.

Principle 30: Party Access to Information in Civil Cases

(a) All claims of withholding of information by a public authority in a civil case should be reviewed in a manner consistent with Principles 3-6, 10, 27 and 28, including a consideration of the public interests.

(b) Victims of human rights violations have a right to an effective remedy and reparation, including public disclosure of abuses suffered. Public authorities should not withhold information material to their claims in a manner inconsistent with this right.

(c) The public also has the right to information concerning gross human rights violations and serious violations of international humanitarian law.
Part V: Bodies that Oversee the Security Sector

Principle 31: Establishment of Independent Oversight Bodies

States should establish, if they have not already done so, independent oversight bodies to oversee security sector entities, including their operations, regulations, policies, finances, and administration. Such oversight bodies should be institutionally, operationally, and financially independent from the institutions they are mandated to oversee.

Principle 32: Unrestricted Access to Information Necessary for Fulfillment of Mandate

(a) Independent oversight bodies should have legally guaranteed access to all information necessary for the fulfillment of their mandates. There should be no restrictions on this access, regardless of the information’s level of classification or confidentiality, upon satisfaction of reasonable security access requirements.

(b) Information to which oversight bodies should have access includes, but is not limited to:

(i) all records, technologies, and systems in the possession of security sector authorities, regardless of form or medium and whether or not they were created by that authority;
(ii) physical locations, objects, and facilities; and

(iii) information held by persons whom overseers deem to be relevant for their oversight functions.

(c) Any obligation of public personnel to maintain secrecy or confidentiality should not prevent them from providing information to oversight institutions. The provision of such information should not be considered a breach of any law or contract imposing such obligations.

**Principle 33: Powers, Resources and Procedures Necessary to Ensure Access to Information**

(a) Independent oversight bodies should have adequate legal powers in order to be able to access and interpret any relevant information that they deem necessary to fulfill their mandates.

(i) At a minimum, these powers should include the right to question current and former members of the executive branch and employees and contractors of public authorities, request and inspect relevant records, and inspect physical locations and facilities.

(ii) Independent oversight bodies should also be given the powers to subpoena such persons and records and hear testimony under oath or affirmation from persons deemed to possess information that is relevant to the fulfillment of their mandates, with the full cooperation of law enforcement agencies, where required.

(b) Independent oversight bodies, in handling information and compelling testimony, should take account of, *inter alia*, relevant privacy laws as well as protections against self-incrimination and other requirements of due process of law.

(c) Independent oversight bodies should have access to the necessary financial, technological, and human resources to enable them to identify, access, and analyze information that is relevant to the effective performance of their functions.

(d) The law should require security sector institutions to afford independent oversight bodies the cooperation they need to access and interpret the information required for the fulfillment of their functions.
(e) The law should require security sector institutions to make proactive and timely disclosures to independent oversight bodies of specific categories of information that overseers have determined are necessary for the fulfillment of their mandates. Such information should include, but not be limited to, possible violations of the law and human rights standards.

Principle 34: Transparency of Independent Oversight Bodies

A. Applicability of Access to Information Laws

Laws regulating the fulfillment of the public right to access information held by public authorities should apply to security sector oversight bodies.

B. Reporting

(1) Independent oversight bodies should be legally required to produce periodic reports and to make these reports publicly available. These reports should include, at a minimum, information on the oversight body itself, including its mandate, membership, budget, performance, and activities.

Note: These reports should also include information about the mandate, structure, budget, and general activities of any security sector institution that does not, itself, make such information publicly available.

(2) Independent oversight bodies should also provide public versions of their reports relating to thematic and case-specific studies and investigations, and should provide as much information as possible concerning matters of public interest, including in respect of those areas listed in Principle 10.

(3) In their public reporting, independent oversight bodies should respect the rights of all individuals concerned, including their right to privacy.

(4) Independent oversight institutions should give the institutions subject to their oversight the opportunity to review, in a timely manner, any reports which are to be
made public in order to allow them to raise concerns about the inclusion of material that may be classified. The final decision regarding what should be published should rest with the oversight body itself.

C. Outreach and Accessibility

(1) The legal basis for oversight bodies, including their mandates and powers, should be publicly available and easily accessible.

(2) Independent oversight bodies should create mechanisms and facilities for people who are illiterate, speak minority languages, or are visually or aurally impaired to access information about their work.

(3) Independent oversight bodies should provide a range of freely available mechanisms through which the public, including persons in geographically remote locations, may be facilitated in making contact with them and, in the case of complaints handling bodies, file complaints or register concerns.

(4) Independent oversight bodies should have mechanisms that can effectively preserve the confidentiality of the complaints and the anonymity of the complainant.

Principle 35: Measures to Protect Information Handled by Security Sector Oversight Bodies

(a) The law should require independent oversight bodies to implement all necessary measures to protect information in their possession.

(b) Legislatures should have the power to decide whether (i) members of legislative oversight committees, and (ii) heads and members of independent, non-legislative oversight bodies should be subject to security vetting prior to their appointment.

(c) Where security vetting is required, it should be conducted (i) in a timely manner, (ii) in accordance with established principles, (iii) free from political bias or motivation, and (iv) whenever possible, by an institution that is not subject to oversight by the body whose members/staff are being vetted.
(d) Subject to the Principles in Parts VI and VII, members or staff of independent oversight bodies who disclose classified or otherwise confidential material outside of the body’s ordinary reporting mechanisms should be subject to appropriate administrative, civil, or criminal proceedings.

Principle 36: Authority of the Legislature to Make Information Public

The legislature should have the power to disclose any information to the public, including information which the executive branch claims the right to withhold on national security grounds, if it deems it appropriate to do so according to procedures that it should establish.
Part VI: Public Interest Disclosures by Public Personnel

Principle 37: Categories of Wrongdoing

Disclosure by public personnel of information, regardless of its classification, which shows wrongdoing that falls into one of the following categories should be considered to be a “protected disclosure” if it complies with the conditions set forth in Principles 38–40. A protected disclosure may pertain to wrongdoing that has occurred, is occurring, or is likely to occur.

(a) criminal offenses;
(b) human rights violations;
(c) international humanitarian law violations;
(d) corruption;
(e) dangers to public health and safety;
(f) dangers to the environment;
(g) abuse of public office;
(h) miscarriages of justice;
(i) mismanagement or waste of resources;
(j) retaliation for disclosure of any of the above listed categories of wrongdoing; and
(k) deliberate concealment of any matter falling into one of the above categories.
Principle 38: Grounds, Motivation, and Proof for Disclosures of Information Showing Wrongdoing

(a) The law should protect from retaliation, as defined in Principle 41, public personnel who make disclosures of information showing wrongdoing, regardless of whether the information is classified or otherwise confidential, so long as, at the time of the disclosure:

   (i) the person making the disclosure had reasonable grounds to believe that the information disclosed tends to show wrongdoing that falls within one of the categories set out in Principle 37; and

   (ii) the disclosure complies with the conditions set forth in Principles 38-40.

(b) The motivation for a protected disclosure is irrelevant except where the disclosure is proven to be knowingly untrue.

(c) A person making a protected disclosure should not be required to produce supporting evidence or bear the burden of proof in relation to the disclosure.

Principle 39: Procedures for Making and Responding to Protected Disclosures Internally or to Oversight Bodies

A. Internal Disclosures

The law should require public authorities to establish internal procedures and designate persons to receive protected disclosures.

B. Disclosures to Independent Oversight Bodies

(i) States should also establish or identify independent bodies to receive and investigate protected disclosures. Such bodies should be institutionally and operationally independent from the security sector and other authorities from which disclosures may be made, including the executive branch.
(2) Public personnel should be authorized to make protected disclosures to independent oversight bodies or to another body competent to investigate the matter without first having to make the disclosure internally.

(3) The law should guarantee that independent oversight bodies have access to all relevant information and afford them the necessary investigatory powers to ensure this access. Such powers should include subpoena powers and the power to require that testimony is given under oath or affirmation.

C. Obligations of Internal Bodies and Independent Oversight Bodies Receiving Disclosures

If a person makes a protected disclosure, as defined in Principle 37, internally or to an independent oversight body, the body receiving the disclosure should be obliged to:

(a) investigate the alleged wrongdoing and take prompt measures with a view to resolving the matters in a legally-specified period of time, or, after having consulted the person who made the disclosure, to refer it to a body that is authorized and competent to investigate;

(2) protect the identity of public personnel who seek to make confidential submissions; anonymous submissions should be considered on their merits;

(3) protect the information disclosed and the fact that a disclosure has been made except to the extent that further disclosure of the information is necessary to remedy the wrongdoing; and

(4) notify the person making the disclosure of the progress and completion of an investigation and, as far as possible, the steps taken or recommendations made.

Principle 40: Protection of Public Disclosures

The law should protect from retaliation, as defined in Principle 41, disclosures to the public of information concerning wrongdoing as defined in Principle 37, if the disclosure meets the following criteria:
(a) (1) The person made a disclosure of the same or substantially similar information internally and/or to an independent oversight body and:

(i) the body to which the disclosure was made refused or failed to investigate the disclosure effectively, in accordance with applicable international standards; or

(ii) the person did not receive a reasonable and appropriate outcome within a reasonable and legally-defined period of time.

OR

(2) The person reasonably believed that there was a significant risk that making the disclosure internally and/or to an independent oversight body would have resulted in the destruction or concealment of evidence, interference with a witness, or retaliation against the person or a third party;

OR

(3) There was no established internal body or independent oversight body to which a disclosure could have been made;

OR

(4) The disclosure related to an act or omission that constituted a serious and imminent risk of danger to the life, health, and safety of persons, or to the environment.

AND

(b) The person making the disclosure only disclosed the amount of information that was reasonably necessary to bring to light the wrongdoing;

Note: If, in the process of disclosing information showing wrongdoing, a person also discloses documents that are not relevant to showing wrongdoing, the person should nonetheless be protected from retaliation unless the harm from disclosure outweighs any public interest in disclosure.

AND

(c) The person making the disclosure reasonably believed that the public interest in having the information revealed outweighed any harm to the public interest that would result from disclosure.
Note: The “reasonably believed” test is a mixed objective-subjective test. The person must actually have held the belief (subjectively), and it must have been reasonable for him or her to have done so (objectively). If contested, the person may need to defend the reasonableness of his or her belief and it is ultimately for an independent court or tribunal to determine whether this test has been satisfied so as to qualify the disclosure for protection.

Principle 41: Protection against Retaliation for Making Disclosures of Information Showing Wrongdoing

A. Immunity from Civil and Criminal Liability for Protected Disclosures

A person who has made a disclosure, in accordance with Principles 37-40, should not be subject to:

(1) Criminal proceedings, including but not limited to prosecution for the disclosure of classified or otherwise confidential information; or

(2) Civil proceedings related to the disclosure of classified or otherwise confidential information, including but not limited to attempts to claim damages and defamation proceedings.

B. Prohibition of Other Forms of Retaliation

(1) The law should prohibit retaliation against any person who has made, is suspected to have made, or may make a disclosure in accordance with Principles 37-40.

(2) Prohibited forms of retaliation include, but are not limited to, the following:

(a) Administrative measures or punishments, including but not limited to: letters of reprimand, retaliatory investigations, demotion, transfer, reassignment of duties, failure to promote, termination of employment, actions likely or intended to damage a person’s reputation, or suspension or revocation of a security clearance;

(b) Physical or emotional harm or harassment; or

(c) Threats of any of the above.
C. Investigation of Retaliation by an Independent Oversight Body and Judicial Authorities

(1) Any person should have the right to report to an independent oversight body and/or to a judicial authority any measure of retaliation, or the threat of retaliation, in relation to protected disclosures.

(2) Independent oversight bodies should be required to investigate a reported retaliation or threat of retaliation. Such bodies should also have the ability to launch investigations in the absence of a report of retaliation.

(3) Independent oversight bodies should be given the powers and resources to investigate effectively any claimed retaliation, including the powers to subpoena persons and records and hear testimony under oath or affirmation.

(4) Independent oversight bodies should make every effort to ensure that proceedings concerning asserted retaliation are fair and in accordance with due process standards.

(5) Independent oversight bodies should have the authority to require the public authority concerned to take remedial or restorative measures, including but not limited to reinstatement; reassignment; and/or the payment of legal fees, other reasonable costs, back pay and related benefits, travel expenses, and/or compensatory damages.

(6) Independent oversight bodies should also have the authority to enjoin a public authority from taking retaliatory measures.

(7) Such bodies should complete their investigation into reported retaliation within a reasonable and legally-defined period of time.

(8) Such bodies should notify relevant persons of at least the completion of an investigation and, as far as possible, the steps taken or recommendations made;
(9) Persons may also appeal a determination that actions in response to the disclosure do not constitute retaliation, or the remedial or restorative measures, of the independent oversight body to a judicial authority.

D. Burden of Proof

If a public authority takes any action adverse to any person, the authority bears the burden of demonstrating that the action was unrelated to the disclosure.

E. No Waiver of Rights and Remedies

The rights and remedies provided for under Principles 37–40 may not be waived or limited by any agreement, policy, form or condition of employment, including by any pre-dispute arbitration agreement. Any attempt to waive or limit these rights and remedies should be considered void.

Principle 42: Encouraging and Facilitating Protected Disclosures
States should encourage public officials to make protected disclosures. In order to facilitate such disclosures, states should require all public authorities to issue guidelines that give effect to Principles 37–42.

Note: Such guidelines should provide, at a minimum: (1) advice regarding the rights and/or responsibilities to disclose wrongdoing; (2) the types of information that should or may be disclosed; (3) required procedures for making such disclosures; and (4) protections provided for by law.

Principle 43: Public Interest Defence for Public Personnel

(a) Whenever public personnel may be subject to criminal or civil proceedings, or administrative sanctions, relating to their having made a disclosure of information not otherwise protected under these Principles, the law should provide a public interest defense if the public interest in disclosure of the information in question outweighs the public interest in non-disclosure.
Note: This Principle applies to all disclosures of information that are not already protected, either because the information does not fall into one of the categories outlined in Principle 37 or the disclosure contains information that falls into one of the categories outlined in Principle 37 but was not made in accordance with the procedures outlined in Principles 38–40.

(b) In deciding whether the public interest in disclosure outweighs the public interest in non-disclosure, prosecutorial and judicial authorities should consider:

(i) whether the extent of the disclosure was reasonably necessary to disclose the information of public interest;

(ii) the extent and risk of harm to the public interest caused by the disclosure;

(iii) whether the person had reasonable grounds to believe that the disclosure would be in the public interest;

(iv) whether the person attempted to make a protected disclosure through internal procedures and/or to an independent oversight body, and/or to the public, in compliance with the procedures outlined in Principles 38–40; and

(v) the existence of exigent circumstances justifying the disclosure.

Note: Any law providing criminal penalties for the unauthorized disclosure of information should be consistent with Principle 46(b). This Principle is not intended to limit any freedom of expression rights already available to public personnel or any of the protections granted under Principles 37–42 or 46.
Part VII: Limits on Measures to Sanction or Restrain the Disclosure of Information to the Public

Principle 44: Protection against Penalties for Good Faith, Reasonable Disclosure by Information Officers

Persons with responsibility for responding to requests for information from the public should not be sanctioned for releasing information that they reasonably and in good faith believed could be disclosed pursuant to law.

Principle 45: Penalties for Destruction of, or Refusal to Disclose, Information

(a) Public personnel should be subject to penalties for wilfully destroying or tampering with information with the intent to deny the public access to it.

(b) If a court or independent body has ordered information to be disclosed, and the information is not disclosed within a reasonable time, the official and/or public authority responsible for the non-disclosure should be subject to appropriate sanctions, unless an appeal is filed in accordance with procedures set forth in law.
Principle 46: Limitations on Criminal Penalties for the Disclosure of Information by Public Personnel

(a) The public disclosure by public personnel of information, even if not protected by Part VI, should not be subject to criminal penalties, although it may be subject to administrative sanctions, such as loss of security clearance or even job termination.

(b) If the law nevertheless imposes criminal penalties for the unauthorized disclosure of information to the public or to persons with the intent that the information will be made public the following conditions should apply:

(i) Criminal penalties should apply only to the disclosure of narrow categories of information that are clearly set forth in law;

Note: If national law provides for categories of information the disclosure of which could be subject to criminal penalties they should be similar to the following in terms of specificity and impact on national security: technological data about nuclear weapons; intelligence sources, codes and methods; diplomatic codes; identities of covert agents; and intellectual property in which the government has an ownership interest and knowledge of which could harm national security.

(ii) The disclosure should pose a real and identifiable risk of causing significant harm;

(iii) Any criminal penalty, as set forth in law and as applied, should be proportional to the harm caused; and

(iv) The person should be able to raise the public interest defence, as outlined in Principle 43.

Principle 47: Protection against Sanctions for the Possession and Dissemination of Classified Information by Persons Who Are Not Public Personnel

(a) A person who is not a public servant may not be sanctioned for the receipt, possession, or disclosure to the public of classified information.

(b) A person who is not a public servant may not be subject to charges for conspiracy or other crimes based on the fact of having sought and obtained the information.
Note: This Principle intends to prevent the criminal prosecution for the acquisition or reproduction of the information. However, this Principle is not intended to preclude the prosecution of a person for other crimes, such as burglary or blackmail, committed in the course of seeking or obtaining the information.

Note: Third party disclosures operate as an important corrective for pervasive over-classification.

Principle 48: Protection of Sources

No person who is not a public servant should be compelled to reveal a confidential source or unpublished materials in an investigation concerning unauthorized disclosure of information to the press or public.

Note: This Principle refers only to investigations concerning unauthorized disclosure of information, not to other crimes.

Principle 49: Prior Restraint

(a) Prior restraints against publication in the interest of protecting national security should be prohibited.

Note: Prior restraints are orders by judicial or other state bodies banning the publication of specific material already in the possession of a person who is not a public servant.

(b) If information has been made generally available to the public, by whatever means, whether or not lawful, any effort to try to stop further publication of the information in the form in which it already is in the public domain is presumptively invalid.

Note: “Generally available” is understood to mean that the information has been sufficiently widely disseminated that there are no practical measures that could be taken that would keep the information secret.
Part VIII: Concluding principle

Principle 50: Relation of these Principles to Other Standards

Nothing in these Principles should be interpreted as restricting or limiting any right to information recognized under international, regional or national law or standards, or any provisions of national or international law that would provide greater protection for disclosures of information by public personnel or others.
Annex A: Partner Organizations

The following 22 organizations contributed substantially to the drafting of the Principles, and are committed to working to disseminate, publicize, and help implement them. After the name of each organization is the city, if any, in which it is headquartered and the country or region in which it works. Organizations that undertake substantial work in three or more regions are listed as “global.”

- Africa Freedom of Information Centre (Kampala/Africa);
- African Policing Civilian Oversight Forum (APCOF) (Cape Town/Africa)
- Alianza Regional por la Libre Expresión e Información (Americas)
- Amnesty International (London/global);
- Article 19, the Global Campaign for Free Expression (London/global);
- Asian Forum for Human Rights and Development (Forum Asia) (Bangkok/Asia);
- Center for National Security Studies (Washington, D.C./Americas);
- Central European University (Budapest/Europe);
- Centre for Applied Legal Studies (CALS), Wits University (Johannesburg/South Africa);

2. In addition, Aidan Wills and Benjamin Buckland, of the Geneva Centre for Democratic Control of the Armed Forces (DCAF) but not affiliated with any of the partner organizations, also made especially significant contributions to Part V. on Oversight Bodies and Part VI. on Public Interest Disclosures, as well as to the Principles as a whole.
• Centre for European Constitutionalization and Security (CECS), University of Copenhagen (Copenhagen/ Europe);
• Centre for Human Rights, University of Pretoria (Pretoria/ Africa);
• Centre for Law & Democracy (Halifax/ global);
• Centre for Peace and Development Initiatives (Islamabad/ Pakistan);
• Centre for Studies on Freedom of Expression and Access to Information (CELE), Palermo University School of Law (Buenos Aires/ Argentina);
• Commonwealth Human Rights Initiative (New Delhi/ Commonwealth);
• Egyptian Initiative for Personal Rights (Cairo/ Egypt);
• Institute for Defence, Security and Peace Studies (Jakarta/ Indonesia);
• Institute for Security Studies (Pretoria/ Africa);
• International Commission of Jurists (Geneva/ global);
• National Security Archive (Washington DC/ global);
• Open Democracy Advice Centre (Cape Town/ Southern Africa); and
• Open Society Justice Initiative (New York/ global).
“The Principles are a major contribution to the right of access to information and the right to truth concerning human rights violations, and I believe they should be adopted by the Human Rights Council. All states should reflect these Principles in their interpretations of national security law.”

Frank La Rue, United Nations Special Rapporteur on the Right to Freedom of Opinion and Expression

“My office welcomes the Tshwane Principles as the appropriate balance to ensure state capacity to protect security and the protection of individual freedoms.”

Catalina Botero, OAS Special Rapporteur on Freedom of Expression and Access to Information

“These Global Principles could not have come at a more opportune time.”

Pansy Tlakula, Special Rapporteur on Freedom of Expression and Access to Information in Africa

“The Assembly supports the Global Principles and calls on the competent authorities of all member States of the Council of Europe to take them into account in modernising their legislation and practice concerning access to information.”

Resolution of the Parliamentary Assembly of the Council of Europe, October 2, 2013
Geachte heer Ahmed en mevrouw Yosef,

Bij brief van 11 december 2017 heeft u een bezwaarschrift ingediend tegen het besluit van 21 november 2017, met kenmerk BS2017034650. Hierin is u, in reactie op uw Wob-verzoek van 11 september 2017, medegedeeld dat er, op grond van artikel 10, eerste lid, aanhef en onder b, van de Wob (veiligheid van de Staat) en artikel 10, tweede lid, aanhef en onder a, van de Wob (betrekkingen met andere staten), geen informatie over eventuele deelname van de Nederlandse krijgsmacht aan een tweetal luchtaanvallen op 26 januari 2015 openbaar zal worden gemaakt.

In uw bezwaarschrift heeft u, onder andere, aangegeven dat uw Wob-verzoek niet is gericht op de operationele inzet van de Nederlandse krijgsmacht in de strijd tegen IS gedurende de gehele missie in Irak, maar alleen ziet op hun mogelijke betrokkenheid bij de twee luchtaanvallen op 26 januari 2015. Het Wob-verzoek heeft daarnaast niet alleen betrekking op mogelijke betrokkenheid van Nederlandse zijde, maar tevens op mogelijke wetenschap van betrokkenheid van (andere landen) van de internationale coalitie. Ook ziet het Wob-verzoek niet alleen op formele documenten zoals verzocht door RTL, maar tevens op vormen van informele communicatie.

Uw bezwaarschrift is ter behandeling voorgelegd aan de commissie advisering bezwaarschriften Defensie (de commissie). De commissie heeft naar aanleiding van het bezwaarschrift aan mij een advies uitgebracht. Dit advies is als bijlage bij deze beslissing op bezwaar gevoegd.

Het advies, alsmede de daaraan ten grondslag liggende motivering, hebben mijn instemming. Uw bezwaar is ongegrond. Voor een nadere motivering van de beslissing verwijst ik u naar het advies, dat hier als ingelast moet worden beschouwd.
Tot slot wil ik opmerken dat de afdoening van uw bezwaarschrift te lang op zich heeft laten wachten. Ik bied u hiervoor mijn verontschuldigingen aan.

Hoogachtend,

DE MINISTER VAN DEFENSIE

[Signature]

drs. A.Th.B. Bijleveld-Schouten

Bijlagen:
- advies commissie advisering bezwaarschrijven Defensie d.d. 19 juni 2018;
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Ministerie van Defensie
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In afschrift aan:

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  Postbus 20701
  2500 ES Den Haag

- DOSCO, DienstenCentrum Juridische Dienstverlening
  MPC 55 A
  Postbus 90004
  3509 AA Utrecht
Geachte heer Ahmed en mevrouw Yosef,

Bij brief van 24 januari 2018 heeft u een bezwaarschrift ingediend tegen de brief van 15 december 2017, met kenmerk BS/2017035673. In deze brief van 15 december 2017 is u medegedeeld dat de Wet bescherming persoonsgegevens (hierna: Wbp) is bedoeld om uitvoering te geven aan artikel 10 van de Grondwet en dat uw verzoek niet overeen komt met dit doel. Op grond van de Wbp kon derhalve niet aan uw verzoek tegemoet worden gekomen.

In uw bezwaarschrift heeft u, onder andere, aangegeven dat u meent dat er wel een beoordeling op grond van de Wbp dient te worden gemaakt en tevens verzocht om u, conform artikel 35 van de Wbp, bij de beslissing op bezwaar alsnog inzicht te verstrekken in de door mijn ministerie te betreffende verwerkte gegevens.

Uw bezwaarschrift is ter behandeling voorgelegd aan de commissie advisering bezwaarschriften Defensie (de commissie). De commissie heeft naar aanleiding van het bezwaarschrift aan mij een advies uitgebracht. Dit advies is als bijlage bij deze beslissing op bezwaar gevoegd.

Het advies, alsmede de daaraan ten grondslag liggende motivering, hebben mijn instemming. Uw bezwaar is gegrond. Voor een nadere motivering van de beslissing verwijs ik u naar het advies, dat hier als ingelast moet worden beschouwd. Daarbij overleg ik nog het navolgende. Per 25 mei 2018 is de Algemene verordening gegevensverwerking (hierna: AVG) in werking getreden. Omdat er niet is voorzien in overgangsrecht en de Wbp is ingetrokken, is uw bezwaar tegen afwijzing van uw verzoek tevens beoordeeld op grond van de AVG. Aangezien de commissie mij heeft geadviseerd geheel tegemoet te komen aan uw verzoek, zie ik geen aanleiding om hier op grond van de AVG anders over te oordelen. Bij deze beslissing op bezwaar zijn twee overzichten gevoegd, waarin een overzicht van de verwerkte persoonsgegevens is opgenomen. Daarbij zijn bij deze beslissing op bezwaar ook de betreffende documenten gevoegd waarin uw persoonsgegevens zijn verwerkt. Ik heb uw verzoek verwerkt tot de datum van binnenkomst van uw verzoek op grond van de Wbp, te weten 13 september 2017.
Tot slot wil ik opmerken dat de afdoening van uw bezwaarschrift te lang op zich heeft laten wachten. Ik bied u hiervoor mijn verontschuldigingen aan.

Hoogachtend,

DE MINISTER VAN DEFENSIE

drs. A.Th.B. Bijleveld-Schouten

Bijlagen:
- advies commissie advisering bezwaarschriften Defensie d.d. 19 juni 2018;
- verslag van de hoorzitting, gehouden op 14 maart 2018;
- overzicht verwerkte persoonsgegevens van de heer M.M. Ahmed;
- overzicht verwerkte persoonsgegevens van mevrouw E.M. Yosef;
- uw informatieverzoek van 20 juli 2017;
- uw verzoek om informatie van 11 september 2017

Verzendlijst

In afschrift aan:

- Directie Juridische Zaken
  MPC 58B
  Postbus 20701
  2500 ES Den Haag

- DOSCO, DienstenCentrum Juridische Dienstverlening
  MPC 55 A
  Postbus 90004
  3509 AA Utrecht

Ministerie van Defensie
Bestuursstaf

Datum
23 AUG. 2018
Onze referentie
2018064134
COMMISSIE ADVISERING BEZWAARSCHRIFTEN DEFENSIE

Advies


1. Achtergronden

1.1 Bij brief van 20 juli 2017 hebben bezwaarden een verzoek om informatie ingediend. Het verzoek ziet op informatie over luchtaanvallen in Irak die door de internationale coalitie zijn uitgevoerd in januari 2015. Bezwaarden willen, meer specifiek, weten of Nederlandse F-16’s betrokken waren bij een tweetal luchtaanvallen op 26 januari 2015 op twee taxi’s die onderweg waren van Mosul richting Bagdad.

1.2 Bij brief van 28 augustus 2017 heeft de Secretaris-Generaal bezwaarden geïnformeerd dat het beantwoorden van de in de brief van 20 juli 2017 gestelde vragen niet mogelijk is, daar dit de eenheid van de coalitie zou doorbreken.

1.3 Bij brief van 11 september 2017 hebben bezwaarden, op basis van artikel 3 van de Wet openbaarheid van bestuur (hierna: Wob) en artikel 35 van de Wet bescherming persoonsgegevens (hierna: Wbp) een verzoek om informatie ingediend. Het verzoek ziet op de volgende informatie: alle informatie die ziet op de inzet van de Nederlandse F-16’s bij de luchtaanvallen op 26 januari 2015, alle informatie die ziet op betrokkenheid van het Ministerie van Defensie en/of andere Nederlandse ministeries bij de genoemde luchtaanvallen en alle informatie die ziet op de wetenschap die het Ministerie van Defensie heeft (gehad) over de luchtaanvallen en eventuele betrokkenheid van de coalitiepartners bij deze luchtaanvallen.

1.4 Bij beslissing van 21 november 2017 is besloten op het Wob-verzoek van 11 september 2017 (hierna: het bestreden besluit I). In deze beslissing is verwezen naar een besluit van 19 juni 2015. In dat besluit is medegedeeld dat er, op grond van artikel 10, eerste lid, onder b, van de Wob (veiligheid van de Staat) en artikel 10, tweede lid, onder a, van de Wob (betrekkingen met andere staten), informatie over deelname van de Nederlandse krijgsmacht aan de strijd tegen ISIS in Irak over de periode van 24 september 2014 en 6 februari 2015 wordt geweigerd. Op grond van dezelfde overwegingen is de gevraagde informatie in onderhavige zaak geweigerd. In het besluit van 21 november 2017 is voorts aangegeven dat de gevraagde informatie ook valt binnen de in het besluit van 19 juni 2015 genoemde periode, waardoor de eventueel aanwezige documenten met betrekking tot het gevraagde derhalve ook zouden zijn meegenomen in de beoordeling van dat besluit.

1.5 Bij brief van 11 december 2017 is bezwaar gemaakt tegen het besluit van 21 november 2017. In dit bezwaarschrift is onder meer gesteld dat op het verzoek, gebaseerd op artikel 35 van de Wbp, nog geen besluit is genomen. Daarnaast gaat volgens bezwaarden de vergelijking met het besluit van 19 juni 2015 niet op. De bezwaargronden worden onder de punten 6 en 7 verder besproken.

1.6 Bij brief van 15 december 2017 is besloten op het Wbp-verzoek van 11 september 2017 (hierna: het bestreden besluit II). In het bestreden besluit II is aangegeven dat het verzoek, zoals gedaan in de brief van 11 september 2017, niet overeenkomt met het doel, zoals gesteld in de Memorie van Toelichting van de Wbp en in de aanhef van de Wbp.

1.8
De bezwaren zijn op de hoorzitting op 14 maart 2018 om 12.00 uur behandeld. Naast de gemachtigde van bezwaarden, de heer mr. T. de Boer, was op de hoorzitting namens het bevoegd gezag de heer mr. A. Eberharder (hierna: verweerder) aanwezig. Van deze hoorzitting is een verslag gemaakt, dat aan dit advies is gehecht.

2. **De van toepassing zijnde regelgeving**
- Algemene wet bestuursrecht (Awb);
- Wet openbaarheid van bestuur (Wob);
- Wet bescherming persoonsgegevens (Wbp).

3. **Samenstelling commissie en secretaris**
Ingevolge art. 7 van het Instellingsbesluit commissie advisering bezwaarschriften Defensie (Stcrtr. 1999, 130) luidt de samenstelling van de commissie als volgt:
- Brigade-Generaal b.d. mr. J.P. Spijker MA, voorzitter;
- mr. A.J. van Heusden, senior juridisch bestuurlijk adviseur, Directie Juridische Zaken, commissielid;

Secretaris:

4. **Ten aanzien van de ontvankelijkheid**

5. **Juridisch kader**

**Grondwet**

**Artikel 10**
1. Ieder heeft, behoudens bij of krachtens de wet te stellen beperkingen, recht op eerbiediging van zijn persoonlijke levenssfeer.
2. De wet stelt regels ter bescherming van de persoonlijke levenssfeer in verband met het vastleggen en verstrekken van persoonsgegevens.
3. De wet stelt regels inzake de aanspraken van personen op kennisneming van over hen vastgelegde gegevens en van het gebruik dat daarvan wordt gemaakt, alsmede op verbetering van zodanige gegevens.

**Artikel 110**
De overheid betracht bij de uitvoering van haar taak openbaarheid volgens regels bij de wet te stellen.

**Wet openbaarheid van bestuur**

**Artikel 3**
1. Een ieder kan een verzoek om informatie neergelegd in documenten over een bestuurlijke aangelegenheid richten tot een bestuursorgaan of een onder verantwoordelijkheid van een bestuursorgaan werkzaam instelling, dienst of bedrijf.
2. De verzoeker vermeldt bij zijn verzoek de bestuurlijke aangelegenheid of het daarop betrekking hebendoen document, waarover hij informatie wenst te ontvangen.
3. De verzoeker behoeft bij zijn verzoek geen belang te stellen.
4. Indien een verzoek te algemeen geformuleerd is, verzoekt het bestuursorgaan de verzoeker zo spoedig mogelijk om zijn verzoek te preciseren en is het hem daarbij behulpzaam.
5. Een verzoek om informatie wordt ingewilligd met inachtneming van het bepaalde in de artikelen 10 en 11.

**Artikel 10**

1. Het verstrekken van informatie ingevolge deze wet blijft achterwege voor zover dit:
   a. de eenheid van de Kroon in gevaar zou kunnen brengen;
   b. de veiligheid van de Staat zou kunnen schaden;
   c. bedrijfs- en fabricagegegevens betreft, die door natuurlijke personen of rechtspersonen vertrouwelijk aan de overheid zijn meegedeeld;
   d. persoonsgegevens betreft als bedoeld in paragraaf 2 van hoofdstuk 2 van de Wet bescherming persoonsgegevens, tenzij de verstrekking kennelijk geen inbreuk op de persoonlijke levenssfeer maakt.

2. Het verstrekken van informatie ingevolge deze wet blijft eveneens achterwege voor zover het belang daarvan niet opweegt tegen de volgende belangen:
   a. de betrekkingen van Nederland met andere staten en met internationale organisaties;
   b. de economische of financiële belangen van de Staat, de andere publiekrechtelijke lichamen of de
   c. de opsporing en vervolging van strafbare feiten;
   d. inspectie, controle en toezicht door bestuursorganen;
   e. de eerbiediging van de persoonlijke levenssfeer;
   f. het belang, dat de geadresseerde erbij heeft als eerste kennis te kunnen nemen van de informatie;
   g. het voorkomen van onevenredige bevoordeling of benadeling van bij de aangelegenheid betrokken natuurlijke personen of rechtspersonen dan wel van derden.

3. Het tweede lid, aanhef en onder e, is niet van toepassing voor zover de betrokken persoon heeft ingestemd met openbaarmaking in artikel 1a, onder c en d, bedoelde bestuursorganen;

**Wet bescherming persoonsgegevens**

**Artikel 35**


2. Indien zodanige gegevens worden verwerkt, bevat de mededeling een volledig overzicht daarvan in begrijpelijke vorm, een omschrijving van het doel of de doeleinden van de verwerking, de categorieën van gegevens waarop de verwerking betrekking heeft en de ontvangers of categorieën van ontvangers, alsmede de beschikbare informatie over de herkomst van de gegevens.

3. Voordat een verantwoordelijke een mededeling doet als bedoeld in het eerste lid, waartegen een derde naar verwachtingen bedenkingen zal hebben, stelt hij die derde in de gelegenheid zijn zienswijze naar voren te brengen indien de mededeling bevat die hem betreft, tenzij dit onmogelijk blijft of een onevenredige inspanning kost.

4. Desgevraagd doet de verantwoordelijke mededelingen omtrent de logica die ten grondslag ligt aan de geautomatiseerde verwerking van hem betreffende gegevens.

6. **De gronden van bezwaar tegen bestreden besluit I**

6.1. In het besluit zijn de namen van de bezwaarmakers niet terug te vinden. Het verzoek is expliciet ingediend namens de heer Ahmed en mevrouw Yosef. Dat het bestreden besluit I niet op naam van bezwaarden is gesteld en niet aan hen is gericht geeft blijk van een onzorgvuldige voorbereiding. Daar komt bij dat bezwaarden ook een beroep hebben gedaan op de Wbp en hebben verzocht om hun aanvraag mede op die grond te beoordelen. Dit betreft dus de verwerking van persoonsgegevens naar aanleiding van de luchtaanvallen of voorafgaand aan de luchtaanvallen.

6.2. Er is ten onrechte verwezen naar het besluit van 19 juni 2015 van RTL nieuws. Het verzoek is niet gericht op de operationele inzet van de Nederlandse krijgsmacht in de strijd tegen IS gedurende de gehele missie in Irak, maar ziet enkel op de mogelijke betrokkenheid bij de twee luchtaanvallen op 26 januari 2015.

Daarnaast heeft het verzoek niet alleen betrekking op mogelijke betrokkenheid van Nederlandse zijde, maar tevens op mogelijke wetenschap van betrokkenheid van (andere landen) van de internationale coalitie. Het verzoek ziet daarbij niet alleen op formele documenten zoals verzocht door RTL, maar tevens op enige vorm van informele communicatie. Uit deze elementen volgt dat van de Minister een andere afweging wordt gevraagd dan aan de orde is bij het verzoek van RTL. In het
bestreden besluit I wordt echter integraal verwezen naar de onderbouwing in de zaak van RTL op pagina 2: "Hieronder nogmaals mijn overwegingen ten aanzien van deze documenten". Nu bezwaarden geen partij zijn in de zaak van RTL en geen kennis hebben kunnen nemen van deze overwegingen, is de integrale verwijzing onzorgvuldig en in strijd met de plicht het besluit te voorzien van een deugdelijke motivering.

6.3. Verweerder dient duidelijk te maken waarom bij deze twee specifieke luchtaanvallen bij openbaarmaking van de informatie sprake zou zijn van strijd met het belang van de staatsveiligheid en de betrekkingen met andere staten. Er is aantoonaar sprake van burgerslachtoffers bij de genoemde luchtaanvallen. Familieleden van bezwaarden zijn omgekomen bij de bombardementen en bezwaarden zijn zelf gewond geraakt. Dit maakt de afweging of informatie over dit specifieke bombardement openbaar moet worden gemaakt anders dan bij het RTL-verzoek, waarbij hierop geen beroep is gedaan.

Het is van openbaar belang dat duidelijk wordt welke afwegingen zijn gemaakt voorafgaand aan de luchtaanvallen en hoe het mogelijk is geweest dat deze slachtoffers zijn gevallen. Het zou ook rechtstreeks ingaan tegen de ratio van artikel 110 Grondwet en de Wob als slachtoffers van dergelijke bombardementen moeten gissen naar het hoe en waarom. Het is van publiek belang dat wanneer er burgerslachtoffers vallen bij bombardementen er ook toegang bestaat tot deze bronnen. Anders is niet te controleren of door Nederland en de andere coalitielanden wordt gehandeld in overeenstemming met het internationaal oorlogsrecht en internationale mensenrechtenverdragen. Dit maakt dat er een andere afweging gemaakt dient te worden op grond van de Wob: hieruit volgt dat de staatsveiligheid en de internationale betrekkingen – voor zover deze belangen hier in het geding zijn – het afleggen tegen het belang van openbaarheid.

6.4. De angst dat represailles zouden voortkomen uit het delen van deze informatie is ongefundeerd. Alle betrokken partijen weten dat Nederland en de andere coalitiepartijen verantwoordelijk zijn voor de luchtaanvallen en dat deze op IS zijn gericht. Als informatie wordt gedeeld over deze specifieke luchtaanvallen en hieruit blijkt dat de aanval inderdaad op IS was gericht en dat Nederland hierbij betrokken was, is dat al bekende informatie die niet tot een hoger dreigingsniveau leidt. Voor de onschuldige mensen die ook getroffen zijn door het bombardement – en die niets met IS te maken hebben - zou het echter duidelijk maken of de dood van hun naasten een ongeluk was, het gevolg was van onzorgvuldigheid en of een partij daar mogelijk juridische verantwoordelijkheid voor draagt. Dit laatste kan wellicht in strijd zijn met een belang van de betrokken partijen, maar niet in strijd met de staatsveiligheid of betrekkingen met andere staten.

6.5. Het ministerie miskent voorts dat openbaarmaking niet volledig hoeft te zijn en dat ook delen kunnen worden weggelakt. Het integraal weigeren van informatie verhoudt zich niet tot de verplichtingen uit de Wob om per document en per deel van een document na te gaan of de stukken al dan niet kunnen worden verstrekt.


7. **De beoordeling van het bestreden besluit I en het bezwaar**

7.1. **Inleidende opmerking van de commissie**

De commissie heeft, na kennisname van het bestreden besluit I, tijdens de hoorzitting vragen gesteld aan verweerder, aangezien dit besluit volgens de commissie enkel gelezen zou kunnen worden als een verwijzing naar een eerdere besluit, te weten een besluit van 19 juni 2015.

De commissie meende dat gesteld zou kunnen worden dat de woorden op bladzijde drie van het bestreden besluit, in de eerste alinea, ‘bovengenoemde rapportages besluit ik niet openbaar [te maken]’ deel lijken uit te maken van een set aan overwegingen behorende bij een eerdere besluit van 19 juni 2015 inzake RTL. Op pagina twee van het bestreden besluit staat ‘hieronder nogmaals mijn overwegingen ten aanzien van deze documenten.’ Dit is ook opgenomen in het bezwaarschrift. De
commissie is van mening, na een toelichting van verweerder hierop, dat in het bestreden besluit I geïmpliceerd is dat het verzoek van bezwaarden op dezelfde gronden wordt afgewezen als in het besluit van 19 juni 2015. De commissie is van mening dat duidelijker in het bestreden besluit I had moeten worden opgenomen dat er afwijzend werd besloten om informatie te verstrekken over de twee luchtaanvallen. De commissie is, met de door verweerder gegeven toelichting, van mening dat, nu duidelijkheid is verschuld inzake de plaats c.q. de betekenis van het eerder genoemde (RTL) besluit in het bestreden besluit I, dat dit gebrek hiermee is geregeld, en kan worden gepasseerd met verwijzing naar artikel 6:22 van de Awb.

7.2. Achtergrond

7.3. De beoordeling van de bezwaargronden
7.3.1. De commissie meent dat het bestreden besluit I aan bezwaarden had behoren te worden gericht. De door verweerder gegeven verklaring ter hoorzitting dat, aangezien mevrouw mr. L. Zegveld het aanspreekpunt was in de procedure en een ieder een Wob-verzoek mag indienen, de geadresseerde in dit niet van belang is, getuigt naar de mening van de commissie van een onjuiste rechtsovertrekking. De commissie meent wel, aangezien het besluit is verzonden naar hun gemachtigde, dat bezwaarden kennis hebben kunnen nemen van het bestreden besluit en bezwaarden door deze omissie niet zijn benadeeld. Dit gebrek in het bestreden besluit I kan worden gepasseerd met een verwijzing naar artikel 6:22 van de Awb. Het bezwaar wordt op dit punt ongegrond geacht.

7.3.2. Ter hoorzitting heeft de commissie aan gemachtigde van bezwaarden gevraagd wat verstaan dient te worden onder ‘informele communicatie’. Gemachtigde heeft toegelicht dat er gedacht kan worden aan notities en documenten waarin feitelijkheden zijn opgenomen. In het verzoek van RTL van 6 februari 2015 is verzocht om after-action-reports, interne memoranda en missierapporten. Onderliggend aan deze documenten kan volgens bezwaarden nog uitsluiting hebben plaatsgevonden tussen de verschillende betrokkenen, waarbij feitelijke informatie kan zijn uitgegeven of onder de Wob valt. Er wordt verzocht om alle informatie met betrekking tot de twee in het verzoek genoemde luchtaanvallen die zijn uitgegeven door partners uit de coalitie. Verweerder heeft onder hoorzitting aangegeven dat de achterliggende vraag in het Wob-verzoek is opgewekt als een verzoek om informatie met betrekking tot deze luchtaanvallen; inclusief de beantwoording van de vraag wie verantwoordelijk draagt voor deze aanvallen. Verweerder heeft tevens toegelicht geen onderscheid te maken tussen de verschillende – “formele” dan wel “informele” - documenten. Er is beoordeeld of informatie aangaande de luchtaanvallen openbaar gemaakt kon worden; de commissie concludeert dat ook dat het bestreden besluit I ziet op alle onderliggende informatie. De commissie heeft geconstateerd dat bij het besluit van RTL van 19 juni 2015, net als bij onderhavige besluit, alle informatie is geweigerd op grond van artikel 10, eerste lid, onder b en artikel 10, tweede lid, onder a, van de Wob. Verweerder heeft in het bestreden besluit aangegeven dat de inhoud van het verzoek onder het eerdere verzoek van RTL viel. Het door bezwaarden aangedragen argument dat bezwaarden geen party zijn in de zaak van RTL en geen kennis hebben kunnen nemen van deze overwegingen, kan de commissie niet volgen. De overwegingen in de zaak van RTL zijn immers integraal in het bestreden besluit I opgenomen; dus hoewel bezwaarden geen partij waren in de zaak van RTL, hebben bezwaarden wel kennis kunnen nemen van deze overwegingen. Het bezwaar wordt op dit punt ongegrond geacht.

7.3.3. De commissie heeft geconstateerd dat verweerder in het bestreden besluit I heeft verwezen naar de uitspraak van de rechtbank Midden-Nederland van 16 december 2016 met ECLI:NL:RBMNE:2016:6546, en dan met name r.o. 7.2., waarin de rechtbank overweegt:
De rechtbank heeft de IM’s ingezien en geconstateerd dat daarin per IM beknopt maar gedetailleerd (onder meer) de volgende informatie is neergelegd: datum van de aanval, gedetailleerde doellocatie, soort wapeninzet, hoeveelheid ingezette wapens, aantal en soort vlucht, tijdstip van de aanval en afloop van de missie. Naar het oordeel van de rechtbank heeft verweerder zich terecht op het standpunt gesteld dat de IM’s daarmee inzicht geven in operationele activiteiten van Nederland en zijn F-16 vliegers en mogelijk ook van de coalitiepartners. Verweerder heeft zich in redelijkheid op het standpunt kunnen stellen dat de informatie uit de IM’s herleid kan worden tot specifieke doelen en dat hieruit kan worden afgeleid welke doelen door Nederland, of de coalitiepartners, zijn aangevallen. Verweerder heeft terecht opgemerkt dat openbaarmaking van deze documenten risico’s en gevaar kunnen opleveren voor de Nederlandse militairen en de Nederlandse samenleving. Verweerder heeft hierbij het gewelddadij karakter van de vijand van belang kunnen achtten, die met regelmaat geweld toepast in de landen van de coalitie en militairen en het thuisfront bedreigt, zoals bijvoorbeeld ook is gehouden uit verschillende recente aanslagen in de landen om ons heen. In de IM’s wordt bovendien melding gemaakt van vijandelijke slachtoffers ten gevolge van handelingen van Nederlandse vliegers en verweerder heeft toegelicht dat het verstrekken van deze gegevens Nederland nadrukkelijk en afzonderlijk van de coalitie in verband brengt met gesneuvelde vijandelijke strijders. Dergelijke berichten kunnen de aandacht van de tegenstander specifiek op Nederlandse doelen richten. Daarnaast heeft verweerder gemotiveerd gesteld dat door openbaarmaking van de IM’s de gewenste en overeengekomen eenheid in de coalitie doorbroken zou kunnen worden, hetgeen tot stroeveere contacten met de coalitiepartners zou kunnen leiden. Ook dit standpunt komt de rechtbank niet onredelijk voor.’

De commissie heeft daarnaast kennis genomen van de uitspraak in hoger beroep in bovenstaande zaak. De Afdeling bestuursrechtpraak van de Raad van State (hierna: AbRvS) heeft in de uitspraak van 18 april 2018, met kenmerk ECLI:NL:RVS:2018:1255, in rechtsoverweging 4.1. en 4.2. overwogen:

‘Voor toepassing van de weigeringsgrond van artikel 10, tweede lid, onder a, van de Wob is het niet noodzakelijk dat men een verslechtering van de goede betrekkingen als zodanig met andere landen of met internationale organisaties voorziet. Voldoende is dat men als gevolg van het verschaffen van informatie ingevolge de wet, voorziet dat het internationale contact op bepaalde punten stroover zal gaan lopen, met bijvoorbeeld als gevolg dat het onderhouden van diplomatieke betrekkingen, of het voeren van bilateraal overleg met landen of internationale organisaties, moeilijker zou gaan verlopen dan voorheen, of dat men in die landen of internationale organisaties minder geneigd zou zijn tot het verstrekken van bepaalde gegevens dan voorheen, aldus de Memorie van Toelichting bij het voorstel voor de Wob (TK 1986-1987, 19 859, nr. 3, p. 34).

Na met toepassing van artikel 8:29 van de Awb kennis te hebben genomen van de interne memoranda en de beelden stelt de Afdeling vast dat de informatie in de interne memoranda gedetailleerde informatie betreft over lopende operaties en inzicht geeft in deze operaties. De informatie betreft gegevens over wapensystemen, aanvallen, doelen, tijdstippen, afloop van acties, slachtoffers en betrokken coalitiepartners. Uit de informatie kan worden afgeleid welke doelen zijn geraakt, wanneer welke coalitieleden actief zijn en of slachtoffers zijn gemaakt. De informatie over betrokkenheid van Nederland bij specifieke aanvallen kan leiden tot een versterking van de bedreiging van Nederland. De minister heeft het openbaar maken van deze informatie aan kunnen merken als een gevaar voor de veiligheid van de staat. In dat geval dient de minister openbaarmaking van de informatie te weigeren.

Ook heeft de minister gelet op de aard van de informatie terecht aangenomen dat het openbaar maken daarvan bij een lopende missie de relatie met andere staten en internationale organisaties kan schaden. De minister heeft in redelijkheid aan de weigerings ten grondslag kunnen leggen dat het belang bij de openbaarmaking van de interne memoranda en het materiaal niet opweegt tegen het belang bij de betrekkingen met andere staten en internationale organisaties.

De minister heeft zelfstandig aan de hand van de hem bekende feiten en omstandigheden beoordeeld of openbaarmaking van de verzochte informatie kan geschieden. Bij zijn beoordeling is de minister niet gebonden aan de praktijk van openbaarmaking van de coalitiepartners. De door andere landen openbaar gemaakte informatie is voorts niet vergelijkbaar met de gedetailleerde informatie die in de interne memoranda is vervat.’

Verweerder heeft zowel in het bestreden besluit als ter hoorzitting aangegeven dat de hierboven genoemde overwegingen nog onverkort van toepassing zijn, daar Nederland nog steeds actief is in de strijd tegen IS. De door bezwaarden geopperde afweging van de staatsveiligheid en de
internationale betrekkingen tegen het belang van openbaarheid is door verweerder wel degelijk gemaakt; deze afweging heeft echter niet geleden tot de uitkomst die bezwaarden graag hadden gezien. Defensie heeft overwogen dat de staatsveiligheid, mede door de continuërende inzet, nog steeds onverminderd in het geding is. Dat IS verzwaait is, zoals bezwaarden ter hoorzitting hebben aangevoerd, kan wellicht juist zijn, maakt dit maakt zeker niet dat het belang van de staatsveiligheid daarmee ondergeschikt wordt geacht aan het belang van openbaarheid.


Daar waar bezwaarden betogen dat het van openbaar belang is dat duidelijk wordt welke afwegingen zijn gemaakt voorafgaand aan de luchtaanvallen en hoe het mogelijk is geweest dat deze slachtoffers zijn gevallen merkt de commissie het volgende op.

Anders dan bezwaarden menen bepaalt de toepassing van het toetsingskader van de Wob of openbaar gemaakt kan worden bij welke aanvallen Nederland betrokken is. De belangen van betrokkenen, zoals in casu, worden in de afweging betrokken. Daar waar bezwaarden door de verwijzing naar artikel 110 Grondwet mogelijk het oog hebben op de verantwoording aan het Parlement over en de 'democratische controle' op de inzet van de krijgsmacht meent de commissie dat deze is voorbehouden is aan de Staten-Generaal. De inzet van de krijgsmacht wordt – waar noodzakelijk onder geheimhouding – besproken in de daarvoor bestemde commissies dan wel in de plenaire vergaderingen. De commissie is van oordeel dat het recht op informatie dat in de Wob is geregeld, niet is bedoeld om dit doel te dienen. De beantwoording van de vraag of in bepaalde omstandigheden door Nederland respectievelijk Nederlanders in strijd is gehandeld met het (humanitair) oorlogsrecht c.q. mensenrechtenverdragen geschiedt in de daartoe geïntegreerd procedures en niet in de context van een verzoek op grond van de Wob. Deze bezwaargrond treft geen doel.

7.3.4.

Ten aanzien van het al dan niet gefundeerd zijn van het vermoeden dat er represailles zouden kunnen voortkomen uit het openbaar maken van de gevraagde informatie verwijst de commissie vooraleerst naar het onder 7.3.3. besprokene. De commissie hecht er daarbij aan te benadrukken dat de door bezwaarden gestelde verminderde dreiging wel degelijk is meegewogen in het bestreden besluit I, zoals ook ter hoorzitting door verweerder bevestigd. Hoewel bezwaarden menen dat de opvatting van verweerder om geen informatie te verstrekken over welke coalitielanden zijn betrokken bij een bepaalde luchtaanval, eerder leidt tot minder draagvlak in de regio en tot meer gevaar, daar op deze manier minder draagvlak in de regio waar de aanvallen plaatsvinden wordt gecreëerd, is de commissie van mening dat verweerder wel degelijk voldoende heeft beargumenteerd dat het openbaar maken van specifieke informatie over operationele inzet leidt tot een verhoogde dreiging.

In de brief van 28 augustus 2017, in antwoord op het informatieverzoek van bezwaarden van 20 juli 2017, schrijft verweerder: 'openbaarmaking van gedetailleerde informatie over de operationele inzet van de Nederlandse krijgsmacht in de strijd tegen ISIS levert, zeker gelet op het karakter van die organisatie, een wezenlijk veiligheidssrisico op voor de Nederlandse militairen en voor de nationale veiligheid in het algemeen.' In het bestreden besluit I herhaalt verweerder deze opmerking deels: 'Openbaarmaking van deze gedetailleerde informatie over de operationele inzet van de Nederlandse krijgsmacht in de strijd tegen ISIS levert een wezenlijk veiligheidsrisico op, hetgeen de kans vergroot op specifieke represailles richting individuele landen van de coalitie, waaronder Nederland.' Daarnaast heeft verweerder in het bestreden besluit I verwezen naar de uitspraak van de rechtbank Midden-Nederland van 6 december 2016, met kenmerk ECLI:NL:RBMN:6546. In deze uitspraak heeft de rechtbank ook geconcludeerd dat, indien deze specifieke documenten openbaar gemaakt worden, dit 'risico's en gevaar kunnen opleveren voor de Nederlandse militairen en de Nederlandse samenleving. Verweerder heeft hierbij het gewelddadige karakter van de vijand van belang kunnen achtten, die met regelmaat geweld toepast in de landen van de coalitie en militairen en het thuisfront
bedreigd, zoals bijvoorbeeld ook is gebleken uit verschillende recente aanslagen in de landen om ons heen.’

Daar de openbaarmaking van deze documenten kunnen leiden tot veiligheidsrisico’s en gevaar voor de Nederlandse samenleving in het algemeen en Nederlandse militairen in het bijzonder, zodat de veiligheid van de staat in het geding is, is de commissie, met verweerder, van mening dat aan dit belang meer gewicht mag worden toegekend dan het belang van bezwaarden. Het bezwaar is op dit punt ongegrond.

7.3.5.
Waar het gaat om de door bezwaarde bepleite gedeeltelijke openbaarmaking van merkt de commissie op dat de betreffende documenten in compacte vorm gedetailleerde informatie bevat die inzicht geeft in werkwijze, patroon en overige kenmerken van de onderhavige missies, waaruit op relatief eenvoudige wijze is te achterhalen wie van de coalitiepartners op welk moment – al dan niet in enig verband van samenwerking – aan missies heeft deelgenomen. Dat is vooral het geval indien slechts enkele gegevens worden verstrekt. Verweerder is derhalve terecht niet tot gedeeltelijke verstrekking van de betreffende documenten zoals interne memoranda, after action reports en missierapporten overgegaan.

Daar waar in dat verband de inzet van bondgenoten aan de orde is heeft de ABVvS in de uitspraak van 18 april 2018, met kenmerk ECLI:NL:RVS:2018:1255, overwogen:

‘Ook heeft de minister gelet op de aard van de informatie terecht aangenomen dat het openbaar maken daarvan bij een lopende missie de relatie met andere staten en internationale organisaties kan schaden. De minister heeft in redelijkheid aan de weigering ten grondslag kunnen leggen dat het belang bij de openbaarmaking van de interne memoranda en het materiaal niet opweegt tegen het belang bij de betrekkingen met andere staten en internationale organisaties.’

De commissie acht het bezwaar op dit punt ongegrond.

7.3.6.
De commissie heeft kennis genomen van de uitspraak van de ABvS van 17 februari 2010, waarin in rechtsovertreding 2.6.6. is overwogen:

‘Openbaarmaking van de voorbereidende notities heeft de minister geweigerd op grond van artikel 10, tweede lid, aanhef en onder a, van de Wob. Blijkens de geschiedenis van de totstandkoming van deze bepaling (Kamerstukken II, 1986/87, 19 859, nr. 3, blz. 34) is het voor de toepassing van deze bepaling niet noodzakelijk dat men een verslechtering van de goede betrekkingen als zodanig met andere landen of met internationale organisaties voorziet. Voldoende is dat men als gevolg van het verschenen van informatie op grond van de wet, voorziet dat het internationale contact op bepaalde punten steroever zal gaan lopen, met als gevolg bijvoorbeeld dat het onderhouden van diplomatieke betrekkingen, of het voeren van bilateraal overleg met landen of internationale organisaties, moeilijker zal gaan dan voorheen. Naar het oordeel van de Afdeling moet de beoordeling of dit het geval is en zo ja, of het belang zwaarder weegt dan het belang van openbaarheid, worden verricht naar het moment waarop het verzoek om informatie wordt beslist. Voorts is daarbij van belang of de inhoud van de informatie algemeen bekend is of het moment waarop het verzoek wordt beslist. Anders dan de minister heeft betoogd, is niet bepalend dat de informatie in deze vorm niet eerder bekend is geworden.’

Verweerder heeft, in het bestreden besluit 1, hier een overweging aan gewijld onder het kopje ‘Tot slot’, te weten: ‘In uw reactie van 21 september jl. heeft u aangegeven dat er sprake is van een tijdsverloop van tweeënhalf jaar tussen uw verzoek en het eerdere verzoek, en dat met dit tijdsverloop een andere afweging gemaakt zou kunnen worden met betrekking tot de openbaarheid. Zoals hierboven beschreven, maak ik geen andere afweging omdat de overwegingen met betrekking tot de veiligheid van de Staat en de betrekkingen met andere landen ook op dit moment nog steeds actueel en valide zijn.’ Verweerder heeft tijdens de hoorzitting ook aangegeven dat de overwegingen uit 2015 ten tijde van het bestreden besluit I nog steeds actueel en valide zijn, aangezien de coalitie nog steeds ter plekke aanwezig is. Daarnaast heeft verweerder in het bestreden besluit I aangegeven: ‘momenteel worden ter plaatse ongeveer 155 Nederlandse militairen ingezet voor de training en Advise & Assist van Iraakse strijdkrachten, inclusief de Peshmerga. Dit zal worden voorzien voor de duur van een jaar. Daarnaast heeft het kabinet besloten tot hernieuwde inzet van vier Nederlandse F-16’s in Irak en Oost-Syrië vanaf 1 januari tot en met 31 december 2018.’ De
commissie meent dan ook dat het tijdsverloop in deze procedure niet de rol speelt die bezwaarden daar aan toekennen. Het bezwaar wordt op dit punt ongegrond geacht.

8. **Aangaande het bestreden besluit II**

Verweerder heeft kort voor de hoorzitting aangaande het bestreden besluit II van 15 december 2017 aangegeven dat dit besluit geen stand kan houden. Het bezwaarschrift heeft geleid tot een volledige heroverweging. Verweerder is voornemens om bezwaarden, middels een mededeling, zoals bedoeld in artikel 35 van de Wbp, een volledig overzicht te verstrekken van de door verweerder verwerkte gegevens die zien op bezwaarden. Verweerder komt aldus volledig tegemoet aan bezwaarden. Het komt de commissie dan ook als niet zinvol voor om de grondgen van bezwaar tegen bestreden besluit II nog te behandelen, daar verweerder voornemens is om volledig tegemoet te komen aan bezwaarden. Het bezwaar wordt dan ook gegrond geacht.

9. **Advies**

Op grond van de vorenstaande overwegingen adviseert de commissie de minister van Defensie het bezwaar aangaande het bestreden besluit **ongegrond** te verklaren en het bezwaar aangaande het bestreden besluit II **gegrond** te verklaren. De commissie adviseert tevens het verzoek om een bijdrage in de kosten van rechtsbijstand te honoreren op de voet van het daaromtrent bepaalde in het Besluit proceskosten bestuursrecht.

Er is aanleiding een proceskostenvergoeding toe te kennen ter waarde van 2 punten. 1 punt voor het indienen van een bezwaarschrift en 1 punt voor het verschijnen ter hoorzitting. Hierbij wordt wegingsfactor 1 toegepast. Derhalve worden in totaal 2 punten toegekend, hetgeen neerkomt op het een bedrag van € 1002,-.

Utrecht, 19 juni 2018,

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mr. J.P. Spijk
voorzitter

mr. M. Looijs
secretaris

Aanwezigen:
- Brigadegeneraal b.d. de heer mr. J.P. Spijk MA, voorzitter;
- de heer mr. A.J. van Heusden, senior juridisch bestuurlijk adviseur, Directie Juridische Zaken, commissielid;
- de heer mr. M. Looijis, behandelaar bezwaar en beroep, Dienstencentrum Juridische Dienstverlening, secretaris;
- de heer mr. T. de Boer (namens mevrouw mr. L. Zegveld), werkzaam bij Prakken d'Oliviera, gemachtigde;
- de heer mr. A. Eberharter namens het Ministerie van Defensie, verweerder.

De voorzitter heet iedereen welkom, introduceert de commissie en secretaris en legt kort de procedure uit.

De voorzitter staat allereerst stil bij het Wbp besluit van 15 december 2017 (JDV nummer 4545335). De voorzitter refereert aan een e-mailbericht van 21 september 2017 waarin is aangegeven aan gemachtigde dat het Wbp-verzoek niet zal worden behandeld door de Directie Communicatie, maar door een ander team. Dit is ook gebeurd en heeft geresulteerd in het besluit van 15 december 2017. De voorzitter geeft aan dat kort voor de hoorzitting onder de aandacht van de commissie is gebracht dat dit besluit zal worden ingetrokken en zal worden vervangen door een ander besluit. De voorzitter vraagt of gemachtigde dan nog behoefte heeft aan de behandeling van zijn bezwaar. De gemachtigde geeft aan dat er nog wel een belang is voor de afhandeling van het bezwaar; het bezwaar zal tijdens de hoorzitting niet verder worden besproken. De gemachtigde geeft aan dat dit dan wel een beslissing op bezwaar is waar hetgeen in het bezwaarschrift wordt gesteld in overweging wordt genomen; de voorzitter geeft aan dat inderdaad het geval is; het bezwaar zal dan het dictum gegrond krijgen.

De voorzitter geeft gemachtigde het woord om het bezwaar tegen het Wob-besluit van 21 november 2017 toe te lichten. Gemachtigde geeft aan dat het belangrijkste punt uit het bezwaarschrift is dat Nederland weinig transparant is in vergelijking met de andere landen uit de coalitie. In het bestreden besluit is aangegeven dat Nederland geen mogelijkheid heeft om meer openheid te bieden omdat dit de coalitie in gevaar zou brengen. Gemachtigde heeft gekeken op de website van Australië; hier wordt informatie prijs gegeven waar Australië bij betrokken is en waar door Australië is gebombardeerd. Dit zijn ook handelingen in het kader van de coalitie. Gelet hierop valt niet in te zien hoe het prijsgeven van meer informatie door Nederland kan leiden tot verslechtering van de verhoudingen met de coalitiepartners. Gemachtigde wil dit juist omdraaien: op het moment dat coalitiepartners heel veel openheid bieden over specifieke aanvallen en of hierbij burgerslachtoffers zijn gevallen, dit doet Australië bijvoorbeeld ook, en Nederland doet dit niet, dan zou er juist sprake zijn van verstoorde relaties met coalitiepartners. De voorzitter vraagt of Australië ook informatie geeft over burgerslachtoffers van aanvallen van andere coalitiepartners of gaat dit slechts over slachtoffers van de Australische inzet? Gemachtigde geeft aan dat het slechts om slachtoffers gaat waarbij Australië betrokken is.
Gemachtigde geeft aan dat de vraag in het Wob-verzoek heel concreet is. Er zijn twee aanvallen uitgevoerd, waarbij burgerslachtoffers zijn gevallen; dit zijn de cliënten van gemachtigde. Deze cliënten hebben familieleden verloren. Cliënten willen weten wie hierbij betrokken waren. Gemachtigde weet dat Nederland in die periode aanvallen uitvoerde. De vraag is dan ook heel simpel: in hoeverre is Nederland betrokken bij die twee aanvallen? Hoe zijn de belangen afgewogen. De voorzitter geeft aan dat de vraag drieledig is: Is Nederland direct betrokken bij de aanval, middels F-16's, is Nederland indirect betrokken bij de aanval bijvoorbeeld middels samenwerking met de coalitiepartners en is er nog een overige wetenschap van Nederland. Gemachtigde licht vervolgens toe dat er een belang is om de informatie te verkrijgen: stel dat dit op Nederlands grondgebied gebeurd zou zijn, of bij bijvoorbeeld de ramp met de MH-17, dan willen de slachtoffers ook graag weten wie hier bij betrokken zijn geweest. Dit openbaar belang moet opvieren tegen de belangen, genoemd in het bestreden besluit. Ook de democratische controleerbaarheid is belangrijk; op dit moment is niet duidelijk waar Nederland nou precies bij betrokken is. De voorzitter vraagt hoe die democratische controleerbaarheid gezien moet worden in het licht van de Wob. De democratische controleerbaarheid is toch voorbehouden aan het parlement. Dit ziet toe op de inzet van de Krijgsmacht en kan onder geheimhouding besproken worden in de daarvoor bestemde commissies. De gemachtigde geeft aan dat in het publieke debat duidelijk moet zijn wat er precies is gebeurd bij de aanvallen en of dat in verhouding staat. Dit is niet alleen voorbehouden aan Kamerleden, maar ook aan Nederlandse burgers. De voorzitter vraagt zich af of deze afweging een plaats moet hebben in onderliggende discussie in relatie tot de Wet openbaarheid van bestuur. Gemachtigde geeft aan dat de Wet openbaarheid van bestuur burgers juist de mogelijkheid biedt om meer openheid te krijgen over bestuurlijk handelen.

Gemachtigde refereert aan in het bestreden besluit genoemde uitspraken. Er is verwezen naar een eerdere uitspraak van de rechtbank (Midden-Nederland, inzake het verzoek van RTL). Er is een groot verschil met deze zaak. Er is een tijdsverloop van twee/drie jaar; IS is (nagenoeg) verslagen. De gevaren die destijds speelden zijn een stuk minder groot geworden en moeten op een andere manier worden afgewogen.

Verweerder geeft aan dat de achterliggende vraag in het verzoek is om aan te geven wie verantwoordelijk is voor de aanvallen. Deze vraag is niet gemist door verweerder, maar de afweging is gemaakt of deze vraag door Defensie kan worden beantwoord. Defensie voelt zich niet vrij om deze vraag te beantwoorden, hoewel het begrip er wel is dat dit van belang is voor de bezwaarden. Die discussie is gevoerd, maar Defensie houdt vast aan de gekozen lijn. Ook in het verband met het feit dat er nog Defensiemedewerkers actief zijn. Ook de geografische locatie van Nederland, ten opzichte van meer open landen zoals de VS en Australië, is wellicht meegenomen in deze afweging. Het is een nationale afweging van Nederland. Gemachtigde vraagt of het delen van informatie op grond van de Wob een verhoogd gevaar voor Nederland oplevert. De voorzitter vraagt vervolgens of verweerder dit kan duiden aan de hand van de getrapt vraagstelling. Verweerder geeft aan dat de eenheid van de coalitie van een zeer groot belang is. Defensie wil niet dat een derde land informatie over de betrokkenheid van Nederland openbaart; zo zal Defensie ook geen informatie over derde-landen openbaren. Dit kan relaties onder druk zetten, indien dit wel zou gebeuren.

De voorzitter maakt een formele punt ten aanzien van het besluit van 21 november 2017. Dit besluit zou gelezen kunnen worden als een verwijzing naar een eerder besluit. De voorzitter vraagt zich af of er daadwerkelijk een besluit aan de orde is. Gezegd zou kunnen worden dat de woorden op bladzijde drie van het bestreden besluit, in de eerste alinea, 'bovengenoemde rapportages besluit ik niet openbaar [te maken]' deel lijken uit te maken van een set aan overwegingen behorende bij een eerder besluit van 6 februari 2015 inzake RTL is genomen. Op pagina twee van het bestreden besluit staat 'hieronder nogmaals mijn overwegingen ten aanzien van deze documenten.' Dit staat ook in het bezwaar. De betrokkenen noch het kantoor worden in het bestreden besluit genoemd. Onderen zouden ook kunnen beargumenteren, aldus de voorzitter, dat hierin impliciet ligt besloten dat het verzoek op dezelfde gronden wordt afgewezen. Het afgewezen verzoek ziet op twee concreet geduide missies; de vraag van de voorzitter is op welke gronden dit verzoek dan is gewelddadig. Verweerder geeft aan dat de verwijzing komt doordat een collega een e-mailcontact heeft gehad met mevrouw Zegveld over dat eerdere besluit en daarnaar heeft verwezen en dat daarom wellicht de betrokkenen niet zijn benoemd. De voorzitter vraagt of dit besluit wel is toegespitst op de vraagstelling. Dit had volgens de voorzitter scherper in het besluit kunnen staan; de vraag rest dan ook nog of Nederland geen informatie wil vrijgeven over de twee in het verzoek genoemde aanvallen. Verweerder geeft aan dat dit het geval is. Het verzoek is
Gemachtigde geeft aan dat IS in de loop der jaren is verzwakt en dus minder mogelijkheden heeft terug te slaan. De geografische locatie maakt volgens gemachtigde niet veel uit, aangezien coalitiepartners die net als Nederland bij Europa horen, wel meer informatie geven. Nederland loopt achteraan bij het verstrekken van informatie. Gemachtigde ziet niet hoe het verstrekken van informatie over een specifieke aanval kan leiden tot meer gevaar. De voorzitter vraagt verweerder hoe de verminderte dreiging gewogen wordt ten aanzien van een aantal jaren geleden. Verweerder geeft aan geen veiligheidsexpert te zijn en hierover slechts kan speculeren; vanuit veiligheidshoek is hierop echter wel gewezen. Gemachtigde ziet deze causale relatie niet; dit wordt in het bestreden besluit volgens gemachtigde slechts gesteld, niet onderbouwd. Het niet transparant zijn over de inzet leidt eerder tot minder draagvlak in de regio en tot meer gevaar, daar er op deze manier minder draagvlak in de regio waar de aanvallen plaatsvinden wordt gecreëerd. De voorzitter concludeert, mede verweerder beluisterend, dat verweerder dezelfde afweging heeft gemaakt, maar dat de uitkomst anders is. Verweerder geeft aan dat allerhande procedures zijn opgetuigd om onschuldige (burger)slachtoffers te voorkomen; mocht er wel iets fout zijn gegaan dan hebben burgers bij Centcom hun ingang. Gemachtigde geeft aan dat bezwaarden dit geprobeerd hebben, maar geen antwoorden hebben gekregen. De voorzitter geeft aan dit niet in de stukken te hebben gezien. Gemachtigde geeft aan dat hem bekend is dat bezwaarden dit hebben geprobeerd om te achterhalen wie verantwoordelijk was voor deze aanvallen, maar dat hen dit niet gelukt is.

De voorzitter vraagt aan verweerder waarom de namen van de verzoekers niet genoemd werden in het primaire besluit en waarom het primaire besluit gericht is aan mevrouw Zegveld. Verweerder geeft aan dat het een gebruikelijke handelswijze is, daar er in de meeste gevallen wordt gecommuniceerd met een advocaat of gemachtigde en aangezien iedereen een web-verzoek kan indienen, de indiener wordt beschouwd als gesprekspartner en dat daarom het besluit ook aan de gemachtigde wordt gericht. Daarnaast is verweerder voorzichtig met het gebruik van persoonsgegevens, aangezien besluiten worden gepubliceerd op www.overheid.nl. De voorzitter concludeert dat in formele zin de verzoekers de indieneren zijn. Verweerder geeft nogmaals aan dat iedereen een Wob-verzoek kan indienen en dat het voor verweerder niet van belang is wie er achter een gemachtigde/advocaat staan. De voorzitter geeft aan hier bij stil te staan in het advies.

De voorzitter verwijst naar bladzijde vier van het bezwaarschrift. Hierin geeft gemachtigde aan dat het verzoek niet alleen ziet op formele documenten, maar ook op enige vorm van informele communicatie. De voorzitter vraagt gemachtigde aan welke informatie dan gedacht kan worden, in relatie tot de Wob. Gemachtigde verwijst naar notities, feitelijkheden. Er zijn After action reports, interne memoranda, Missie rapporten. Onderliggend aan deze documenten kan nog worden gekeken of er hebben plaatsgevonden tussen de verschillende betrokkenen, waarbij feitelijke informatie kan zijn uitgewisseld die onder de Wob valt. Alle informatie met betrekking tot de twee in het verzoek genoemde luchtvaarten tussen de partners uit de coalitie. Verweerder heeft de achterliggende vraag in het Wob-verzoek gezien als: geef ons informatie met betrekking tot deze luchtvaarten en wie is hier verantwoordelijk voor. Verweerder maakt dan geen onderscheid tussen de verschillende documenten. Er wordt dan beoordeeld of informatie aangaande de luchtvaarten openbaar gemaakt kan worden; naar het soort document wordt dan niet gekomen. Het bestreden besluit ziet dus op alle informatie, zo wat de voorzitter samen. Dit zal dan ook in het advies worden meegenomen. Gemachtigde geeft aan dat, normaal gesproken, er bij een Wob-besluit wordt opgesomd welke stukken zijn aangetroffen en welke stukken worden verstrekt. Dat is bij onderliggend besluit niet gebeurd; dit vindt gemachtigde een groot gebrek aan het besluit. Nu kan bezwaarde niet reageren op bepaalde documenten die zouden zijn geweigerd en volgens bezwaarde toch openbaar gemaakt moeten worden. Verweerder geeft aan dat in het besluit is opgenomen dat ‘zouden er stukken zijn.’ Er is dus echt een slag om de arm gehouden. Indien in het besluit zou zijn opgenomen dat er bepaalde stukken zijn aangetroffen betreffende de twee luchtvaarten, maar dat deze niet zouden worden verstrekt, dan hebben bezwaarden alsnog hun antwoord. Gemachtigde geeft aan het te betreuren dat Nederland geen enkele rekenschap wil geven over de
eventuele betrokkenheid bij de twee luchtaanvallen. De voorzitter geeft aan hierbij stil te staan bij het advies.

Gemachte vraagt aan de commissie waarom niet wordt gesproken over het Wbp-besluit. De voorzitter geeft aan dat het ministerie heeft aangegeven een nieuw besluit te nemen en dat de commissie hierbij 'buiten' het ministerie staat en hierop geen invloed kan uitoefenen.

De voorzitter deelt mee dat een verslag van de hoorzitting zal worden opgesteld en aan bezwaarde zal worden toegezonden. Niets meer aan de orde zijnde, sluit de voorzitter de mondelinge behandeling van het bezwaarschrift.

Utrecht, 19 juni 2018.

DE SECRETARIS,

Mr. M. Looijs
Overzicht verwerkte persoonsgegevens van de heer M.M. Ahmed

1. Informatieverzoek van 20 juli 2017 (bijgevoegd)


2. Computersysteem X-Postweb


3. Wob- en Wbp-verzoek 11 september 2017 (bijgevoegd)

Overzicht verwerkte persoonsgegevens van mevrouw E.M. Yosef

1. Informatieverzoek van 20 juli 2017 (bijgevoegd)


2. Computersysteem X-Postweb


3. Wob- en Wbp-verzoek 11 september 2017 (bijgevoegd)

Netherlands airstrikes in Iraq and Syria: Towards improved transparency and public accountability

About Airwars

Airwars is a non-aligned, not for profit group based in Europe and the Middle East, which monitors international airstrikes against Daesh and other elements in both Iraq and Syria. We also track and assess all known allegations of civilian deaths from Russian and Coalition strikes – and publish our findings in an accessible, open-source database. Funding is primarily via the Joseph Rowntree Charitable Trust and the Open Society Foundation.

Airwars has swiftly become a trusted resource for information on the war against Daesh, widely cited by international journalists and researchers. All declared strikes by Coalition members and Russia are cross-referenced by us against known claims of civilian casualties – allowing journalists and researchers to engage locally with their governments on transparency and accountability issues.

We maintain fair contacts with many militaries participating in the anti-Daesh war. And we have engaged with governments – both publicly and privately – on civilian casualty concerns. Airwars has also assisted journalists and researchers in many nations including the Netherlands, the UK, Canada, Australia, the United States and Denmark.

The Netherlands anti-Daesh campaign: transparency concerns

The present parliamentary debate on possible airstrikes in Syria also represents an opportunity after 16 months of airstrikes to assess Ministerie van Defensie reporting of anti-Daesh actions so far; to compare such reporting with that of close allies; and for MPs to consider how transparency and public accountability for Dutch military actions might be improved moving forward.

As Committee Members will know, the Netherlands began military operations against so-called Islamic State on October 7th 2014. According to the Ministerie van Defensie, to early February 2016 Dutch F-16s had released more than 1,300 bombs, missiles and cannon shells against Daesh targets.¹ According to our analysis, this makes the Netherlands the fourth most active partner in the military campaign - after the United States, the UK and France.

¹ Written statement from senior Ministerie van Defensie spokesperson to Airwars, February 3rd 2016
Despite being an advanced democracy with membership both of the European Union and NATO, the Netherlands has also been one of the least transparent partners in the 12-member Coalition - a situation which has further deteriorated over time. It is an uncomfortable fact that Saudi Arabia and the UAE have on occasion issued more information on their anti-Daesh air campaigns than has the Netherlands.2

Transparency is important, because according to the Coalition each nation is individually liable for the civilians it kills or injures. And in the increasingly chaotic skies of Iraq or Syria – with hundreds of aircraft from more than a dozen nations now bombing – civilians on the ground deserve to know who is responsible when errors occur. Already the Coalition, the Assad regime and Russia have bombed the same Syrian cities on the same day – a significant challenge when attributing responsibility for civilian deaths.

Yet the Netherlands has always refused to state either where or when its aircraft bomb in Iraq, citing ‘operational security’ concerns. Beginning in October 2014 the Ministerie van Defensie would instead report weekly on the number of bombs and missiles dropped in Iraq – a metric which is nevertheless useful in determining operational tempo.3

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2 Saudi Arabia along with Jordan and the UAE have on occasion issued detailed press releases relating to particular missions and targets in Syria. See for example the following official UAE release [in Arabic] detailing an airstrike on Daesh oil pipelines http://www.wam.ae/ar/news/emirates-international/1395277583379.html

Until October 21\textsuperscript{st} 2014 the US-led Coalition also disclosed the dates on which Dutch aircraft bombed – until such reporting ceased following pressure from unnamed allies. So for example, on October 11\textsuperscript{th} 2014, the Coalition states in its daily report that “the Kingdom of the Netherlands participated in these airstrikes.”\textsuperscript{4}

From June 2015 the Netherlands Defence Ministry ceased reporting even the number of munitions released each week, from now on noting only that more than 10, 15 or 20 ‘missions’ might have taken place. Media requests to restore the weekly reporting of munitions dropped were refused.

Other nations in the Coalition have not felt bound by such restrictions, with the UK, US, Canada and France all regularly reporting where and when their own aircraft strike. In the view of Airwars, this is vital if nations are to be held publicly accountable for their actions.

**Disclosure by others and weapon releases**

On only two occasions have the locations and dates of Dutch airstrikes in Iraq been revealed – on neither occasion by the Netherlands itself. Following a strike on Fallujah on July 25\textsuperscript{th} 2015, France later reported it had carried out the mission with Dutch assistance: “Cette mission fut réalisée conjointement avec des avions américains et hollandais.”\textsuperscript{5}

And in September 2015, Airwars in collaboration with RTL Netherlands was able to show that according to a declassified CENTCOM document, Dutch aircraft had been implicated in a possible civilian casualty incident ten months earlier. This problem event was never publicly disclosed by the government.\textsuperscript{6}

Dutch aircraft were suspected of killing two civilians in an incident on the morning of December 26th 2014. According to the [CENTCOM] document, “while conducting dynamic coalition airstrikes on ISIL fighters and technical vehicles NLD F-16AM [ie a Dutch F-16] may have unintentionally struck two unidentified persons on motorcycles who entered the target area during the strikes.” These claims of civilian deaths were deemed serious enough to trigger a rare formal investigation into the event. This


\textsuperscript{5} ‘Chammal : Point de situation au 31 juillet 2015,’ Ministère de la Défense, July 31\textsuperscript{st} 2015, at http://www.defense.gouv.fr/operations/irak-syrie/actualites/chammal-point-de-situation-au-31-juillet-2015

later concluded that there was not enough evidence to indicate civilian fatalities, though neither CENTCOM nor the Dutch military has published that report.

There are also transparency issues relating to the use of particular munitions in Iraq. Responding to media requests, Ministry spokespeople have routinely referred to “weapons released” while refusing to give a more detailed breakdown of the types of munitions used. Such information is particularly helpful when determining the actual tempo of Dutch strikes - as well as the potential risk to civilians on the ground. As we note elsewhere, such information is routinely published by close allies including the UK and Canada.

As an example, Belgium has now confirmed that while its aircraft released 1,005 weapons in Iraq between October 2014 and July 2015, some 641 of these were in fact 20mm cannon shells – likely to have been released in a small number of events.

We understand that the Netherlands has also used cannon shells in Iraq – which may significantly skew public estimates of Dutch airstrikes (since the general assumption has been that ‘weapons released’ has referred only to bombs and missiles.)

The use of cannon shells in Iraq by the Netherlands was confirmed by the Ministry to Airwars in January 2016. The declassified CENTCOM document obtained in September 2015 also appears to make reference to cannon shells: “No CIVCAS found due to the Dutch using ball ammo rather than HE [high explosive] round,” the report notes. However at present the Ministerie van Defensie refuses to release more detailed figures of which weapons it has released.

**Operational security and Daesh propaganda**

The Ministerie van Defensie has consistently argued that most information relating to the Dutch air war in Iraq must be publicly withheld on blanket grounds of ‘operational security’. However, recent comments to NOS indicate there are broader issues involved. A spokesperson told the publication that such information is in fact withheld for ‘political and tactical reasons’. "As you know, IS is a very active propagandist on social media, and they will not pass up the chance to attribute attacks and civilian deaths to the Netherlands. We will not give them that chance."

While this argument may appear compelling, it does not appear to be supported by facts on the ground. A key role for Airwars is to track all alleged civilian casualty incidents from

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Coalition and other international strikes, in both Iraq and Syria. This includes monitoring a number of outlets which are close to the terrorist organisation Daesh.

In our experience, there are relatively few examples of so-called Islamic State in the Middle East targeting individual Coalition members for propaganda purposes, in relation to particular airstrikes. Claims tend to focus more often on what they term the ‘Crusader aggressors.’

Cases in which Daesh fabricates civilian casualty incidents are also relatively rare. Such false claims are also sometimes challenged by local networks in both Syria and Iraq. Shortly after the recent Paris atrocities for example, assertions appeared on social media that French aircraft had bombed a Mosul primary school. That fabrication was quickly traced back to Daesh by local journalists and activists, and was widely dismissed as false.  

Most Daesh propaganda regarding airstrikes is instead created after actual events. Film crews are sent to reported strike locations, to local hospitals and morgues, and to speak with apparent eyewitnesses. Slickly-produced packages are then fed into social media, where they can often have significant reach and impact. Too often, the Coalition allows these powerful propaganda claims by Daesh to go uncontested, effectively ceding much of social media to the enemy.

In the view of Airwars, the Netherlands government has yet to make a compelling case justifying its withholding of data on propaganda grounds. Indeed we would argue the opposite: that there is much to be gained by being open and honest about airstrikes (and errors), while facing down terror propagandists.

**Recommendations**

The act of waging war rightly places onerous responsibilities upon all combatants. It is surely right not only that nations are held accountable for their military actions – but that they are also seen to be held accountable for those actions. At present, an Iraqi or Syrian civilian has no means of knowing whether they have potentially been affected by a Dutch airstrike.

At Airwars, we believe that significantly more information on the Netherlands air war against Daesh can and should routinely be made public, without the incurring of additional operational or national security risks.

We therefore urge the Ministerie van Defensie to adopt Coalition best practice (as already amply demonstrated by close allies Canada and the UK), and to report in a timely fashion both where and when Dutch airstrikes are carried out.

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A comparative study of Coalition partners

Among the twelve members of the international Coalition carrying out airstrikes against Daesh in Iraq and Syria, almost all have adopted a more transparent approach to conflict reporting than the Netherlands.

Canada, the United States, the United Kingdom and France all routinely issue detailed information on the dates, locations and general targets of their airstrikes, along with breakdowns of munitions used. Such information is vital when determining which nation of many might have been responsible for any particular alleged event.

Other allies such as Denmark and Belgium – which began from a relatively low transparency base – have subsequently adopted a more open approach to reporting military actions in Iraq, in turn enhancing their public accountability.

The following case studies illustrate how some of the Netherlands’ closest allies also present information relating to the war against Daesh. These offer clear examples of how the Netherlands might better be held more publicly accountable for its military actions in the Middle East.

10 All data supplied by the Coalition and individual Coalition members. Where nations such as the Netherlands present their data as munitions released (rather than as airstrikes), we have used Coalition-wide averages of three weapon releases per airstrike to allow for comparative analysis.
Canada

As our transparency assessment chart indicates, Canada has consistently been the most publicly accountable member of the Coalition, with no apparent impact either on military or homeland security. As a matter of routine, Canadian Armed Forces (CAF) report on the location, target and date of all airstrikes conducted in both Iraq and Syria. For example, the following recent entry was posted by CAF on the same day of the strike:

On 3 February 2016, while taking part in coalition operations in support of Iraqi security forces, two CF-18 Hornets successfully struck an ISIL fighting position, an ISIL ammunition cache, and an ISIL vehicle in three separate airstrikes conducted south of Mosul using precision guided munitions.

The Canadians have identified in a timely manner not only the region bombed but also the targets struck. Should there have been an alleged civilian casualty incident that day, such information would have been enough publicly to determine whether Canadian aircraft were – or were not – potentially involved in any alleged incident.

Canada has also proactively engaged, challenging potential propaganda narratives relating to its airstrikes. On January 14th 2016, Daesh-controlled media in Iraq claimed that two Coalition ‘friendly fire’ incidents had led to casualties among Iraqi forces, at Tikrit and Udeim. The only known Coalition partner to have carried out airstrikes in the vicinity of Tikrit that day was Canada, which had targeted ‘an ISIL fighting position.’

Airwars listed the alleged incidents in its public data, while making clear that based on available reports they were most likely a Daesh propaganda exercise. A Canadian Armed Forces spokesman then contacted Airwars with an on the record rebuttal of Daesh claims, which also made clear that Canadian aircraft had struck only at legitimate targets that day.

The Canadian Armed Forces (CAF) has no indications to suggest that friendly forces were harmed or killed as a result of the airstrike by CF-18 Hornets northeast of Tikrit on January 14, 2016. The CAF is aware that ISIL distributes videos and images with the deliberate intent of spreading misinformation in pursuing their objectives. As such, it is important to question the credibility of any such products distributed by ISIL. This airstrike eliminated an ISIL fighting position, reducing the threat posed by ISIL to civilians and members of the Iraqi security forces. The CAF remains committed to supporting Iraqi security forces in order to bolster their efforts to fight ISIL and defend their country.

Airwars has since included the above Canadian statement in its incident report.

United Kingdom

Second only to Canada in terms of transparency, the UK publishes regular updates on its air operations in both Iraq and Syria. The dates, locations and targets of British strikes are given along with munitions deployed, as this recent example illustrates:

On Monday 1 February, two Tornados flew reconnaissance and close air support for the Kurdish peshmerga in northern Iraq. Near Kisik Junction, they used a Brimstone missile and three Paveways to attack three rocket launchers and a Daesh vehicle, then over Qayyarah, a further Brimstone and Paveway destroyed an ammunition truck and a mortar position. Typhoons operated in the area of Ramadi, where they conducted successful attacks on three terrorist strongpoints.\(^\text{12}\)

The UK MoD routinely issues extensive additional data relating to its military campaign. Recent Freedom of Information requests have seen the Ministry provide data on the number of airstrikes; the numbers and variants of weapons released; and a breakdown of operations by manned and remotely piloted aircraft.\(^\text{13}\) It is worth noting that all such data is instead withheld by the Ministrie van Defensie on grounds of ‘operational security.’

The UK has also been robust in defending itself publicly against what it views as unwarranted casualty claims. In December 2016, analysis by Airwars flagged up eight alleged civilian fatality incidents in Mosul and Ramadi, on days where the UK had also confirmed carrying out airstrikes on those cities.

Following engagement by media and parliamentarians, the MoD conducted a review. This concluded that no British aircraft had participated in any of the alleged events. As Defence Secretary Michael Fallon recently told MPs: ‘‘RAF aircraft were not involved.’\(^\text{14}\)

The British government’s public engagement on the issue of alleged civilian casualties – and its ongoing public commitment to transparency and accountability for UK military actions – has been generally well-received.

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\(^\text{13}\) See for example ‘FOIA response FOI2016/00034 to Drone Wars UK’, UK Ministry of Defence, February 1\(^\text{st}\) 2016, archived at https://dronewarsuk.files.wordpress.com/2016/02/20160201-foi00034_mr_cole.pdf

Belgium

As Committee Members will know the Belgian and Dutch militaries maintain a close working relationship in the war against Daesh, with Belgian F-16s expected to relieve Dutch aircraft and crews in summer 2016. Belgium’s own approach to transparency and accountability has been somewhat mixed, although Airwars is encouraged by recent developments.

Belgian aircraft initially conducted combat missions between October 2014 and July 2015. During this time almost no operational details were released. As we noted in an earlier transparency audit, “After reporting an initial airstrike on October 5th 2014, and another on November 3rd, Belgium made no public statements on its ongoing operations until April 24th 2015. Even then it reported only an overall tally of targets and sorties.”

Following the conclusion of military operations, Belgium has been far more forthcoming. The slide below is from an official Belgian presentation offering significant detail on the campaign, including videos of airstrikes. The Defence Ministry has also now provided data on the number and type of weapons used, with encouraging signs that Belgium may be considering a more transparent approach to reporting airstrikes when the mission resumes in July 2015.

Part of an official Belgian summary of recent air operations in Iraq


De weigering van het Ministerie van Defensie om specifieke burgerslachtofferincidenten te identificeren belemmert het natuurlijk verloop van de rechtsgang en staat haaks op de acties van Coalitie-bondgenoten.
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Het rapport stelt dat in een van de vier incidenten burgerslachtoffers zijn gevallen; ‘zeer waarschijnlijk’ waren in een tweede; en ‘mogelijk’ in een derde. Dit maakt Nederland het vierde land (naast de Verenigde Staten, Australië en het Verenigd Koninkrijk) dat publiekelijk stelt burgerslachtoffers te maken als gevolg van acties tegen de zogenaamde Islamitische Staat.

Echter, hoewel het Ministerie van Defensie toegeeft verantwoordelijk te zijn voor het doden of verwonden van burgers in tot wel drie luchtaanvallen, weigert het nog steeds om de data en locaties van deze incidenten te delen, of zelfs het aantal burgerslachtoffers te noemen. Volgens het Ministerie is dit omwille van operationele veiligheid.

De Nederlandse weigering om de data en locaties van deze drie gebeurtenissen vrij te geven staat lijnrecht tegenover de publieke transparantie van menig ander Coalitie-lid in de afgelopen jaren. Dit gebrek aan transparante verslaglegging van Nederlands handelen in Coalitie-verband betekent ook dat Nederlandse toestellen in theorie betrokken kunnen zijn geweest bij meer dan 220 mogelijke burgerslachtofferincidenten van de Coalitie in de periode van 21 maanden waarin Nederland sorties uitvoerde.

Morele en militaire gronden voor openbaarmaking

Het Openbaar Ministerie concludeerde in de voortgangsrapportage dat er geen reden was voor een vervolgonderzoek naar de vier onderzochte luchtaanvallen, het Internationaal Humanitair Recht (IHL) werd niet geschonden. Echter, de meeste slachtoffers van de Coalities strijd tegen ISIS vallen juist binnen dit juridische kader. Daarom vragen we het Ministerie van Defensie informatie beschikbaar te stellen die het mogelijk maakt niet alleen juridisch maar breder te kunnen monitoren en analyseren of en hoeveel burgerdoden er vallen bij Nederlandse inzet.

Dit is om meerdere redenen een belangrijk verzoek. Ten eerste hebben Nederlandse burgers het recht om te weten wat er in hun naam gedaan wordt.

Daarnaast blokkeert de regering het natuurlijke proces van de rechtsgang voor Irakezen die getroffen zijn door Nederlandse luchtaanvallen. Zonder het vrijgeven van de data en locaties van deze bombardementen kunnen Irakese burgers niet de juiste autoriteiten verantwoordelijk houden voor dood, verwonding of schade binnen hun familie of gemeenschap.

Als Airwars de afgelopen jaren aan het Ministerie van Defensie vroeg waarom zulke basale maar tegelijkertijd essentiële informatie niet publiek wordt verstrekt, stelde een woordvoerder dat Defensie de data en locaties van deze luchtaanvallen niet vrijgaf voor redenen van nationale en operationele veiligheid.


In september 2015 heeft Airwars samen met RTL en andere internationale nieuwsorganisaties, via een gedeclareerd CENTCOM-document aangetoond dat Nederlandse toestellen mogelijk betrokken waren bij een burgerslachtofferincident op 26 december 2014. Een vervolgonderzoek concludeerde echter dat “after reviewing all available evidence, the allegations of civilian casualties from Coalition airstrikes in these instances were unfounded.”

Airwars is zich niet bewust van enige implicaties voor operationele of nationale veiligheid als gevolg van het vrijgeven van de datum van een mogelijk Nederlands burgerslachtofferincident door CENTCOM.

Sterker nog, publieke transparantie voor militaire acties kan significante strategische en tactische voordelen met zich meebrengen. Het onderscheidt niet alleen de acties van Coalitie-leden van de luchtaanvallen van andere strijderende partijen zoals Rusland, het toont ook het verschil tussen Nederlandse luchtaanvallen en die van onze bondgenoten.

**Mogelijke ‘matches’ met 21 burgerslachtofferincidenten**

De afwezigheid van specifieke informatie over de drie incidenten verbindt Nederland in theorie met honderden mogelijke gevallen in Irak.

Zo betreft de eerste luchtaanval die is onderzocht door het OM een aanval op een zogenoemde Vehicle Borne IED-fabriek. Voor de periode tussen oktober 2014 en juli 2016, heeft Airwars 21 mogelijke burgerslachtofferincidenten geïdentificeerd waarbij de Coalitie ook op dezelfde datum in de nabije omgeving luchtaanvallen op VBIED-fabrieken heeft gemeld.

In een specifiek geval in Hawija op 3 juni 2015 zijn volgens verslagen tot wel 70 burgers gedood, inclusief 26 kinderen en 22 vrouwen, 100 burgers raakten gewond. In een artikel van Reuters werd het incident omschreven als een ‘nucleaire explosie.’

De Coalitie rapporteerde toentertijd voor 2-3 juni dat “Near Al Huwayjah, one airstrike struck an ISIL VBIED facility.”

Volgens lokale bronnen veroorzaakte de zware Coalitie-luchtaanval een tweede explosie van een voorraad TNT-explosieven nadat de fabriek was geraakt – vergelijkbaar met de Nederlandse luchtaanval: ‘In de IED-fabriek bleken later veel meer explosieven te

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Airwars is op de hoogte van speculatie onder journalisten over de mogelijke betrokkenheid van Nederland bij deze gebeurtenis in Hawija – een van de grootste burgerslachtofferincidenten in het vroege stadium van de oorlog tegen ISIS.

Luitenant-generaal Hesterman van de Coalition stelde toentertijd bijvoorbeeld dat dat een “fairly small weapon” was gebruikt tijdens de aanval – dit refereert mogelijk naar de 250 pond GBU-39 Small Diameter Bomb die alleen wordt gebruikt door Nederland en de VS in de strijd tegen ISIS.²

Het Ministerie van Defensie bevestigde in het weekoverzicht Defensie-operaties dat tussen 1 en 8 juni 2015 Nederlandse F-16’s ‘12 missies boven Irak’ vlogen en ‘meerdere doelen van terreurorganisatie ISIS’ bombardeerden.³

Als Nederlandse toestellen verantwoordelijk waren voor de gebeurtenis in Hawija, dan is het publieke belang om informatie vrij te geven evident, zowel vanuit Iraakse als Nederlands perspectief. Het is aan het Ministerie van Defensie om te verklaren hoe een incident zoals dit heeft kunnen plaatsvinden en te verklaren welke veiligheidsmaatregelen vervolgens zijn ingevoerd om herhaling te voorkomen. Als Nederlandse F-16’s niet betrokken waren bij dit incident, dan doet het Ministerie van Defensie er verstandig aan dit publiekelijk bespreekbaar te maken om zo Nederlandse piloten vrij te pleiten en te voorkomen dat in de toekomst onduidelijkheid bestaat over hun betrokkenheid.

Voor de andere twee onderzochte gebeurtenissen in Irak geldt hetzelfde: zonder de locaties en data van de onderzochte luchtaanvallen is het onmogelijk om de 1.800 munities die zijn afgeschoten door Nederlandse F-16’s te linken aan specifiek burgerslachtofferincidenten, waardoor publieke verantwoording achterwege blijft en waarheidsvinding voor slachtoffers wordt belemmerd.⁴

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Publieke transparantie van andere Coalitie-bondgenoten

Nederland is niet het eerste Coalitie-lid dat toegeeft burgers te hebben gedood of verwond. Australië, de VS en het Verenigd Koninkrijk gingen Nederland al voor in publiekelijk erkennen dat burgers zijn gedood of verwond in anti-ISIS luchtaanvallen in Irak of Syrië. Echter, alledrie deze landen hebben expliciet alle incidenten waarbij hun toestellen betrokken waren geïdentificeerd – zonder enige waarnembare gevolgen voor operationele of nationale veiligheid.

In maart 2017, gaven bijvoorbeeld de Verenigde Staten toe dat Amerikaanse luchtaanvallen een huis in de al Jadida-buurt van oost-Mosul hadden geraakt. Dit resulteerde in de dood van minstens 105 burgers. Het Pentagon stelde dat op 17 maart kort na 8:00 uur een Amerikaanse straaljager een vijfhonderdponder gooide op twee ISIS-strijders die zich op het dak van het huis hadden gepositioneerd. Tientallen burgers waren op dat moment aan het schuilen in de kelder en kwamen om het leven toen het huis instortte. Tot op de dag van vandaag is dit het grootste burgerslachtofferincident van de ruim honderd incidenten waar de VS verantwoordelijkheid voor hebben genomen. Airwars is niet op de hoogte van individuele piloten, analisten of andere militairen die op enige manier zijn aangevallen als vergelding voor dit incident. De bereidheid van de Verenigde Staten om toe te geven dat het burgerslachtoffers maakt en de specifieke incidenten te identificeren wordt alom geprezen als een teken van verantwoordelijkheid.

Op 29 maart 2018 erkende Australië voor de derde keer verantwoordelijk te zijn voor burgerslachtoffers en bevestigde dat twee burgers waren gedood en twee kinderen verwond in de strijd om Mosul. De Australian Defence Force (ADF) kwam zelf naar buiten met het incident nadat het zorgvuldig de eigen rol in de gebeurtenis had onderzocht. Oorspronkelijk was er alleen een overlevende van de luchtaanval die claimde dat er een burgerslachtoffer was gevallen en was er onduidelijkheid over de precieze datum van het incident. In eigen land werd de erkenning over het algemeen goed ontvangen – en ondanks dat de Australische luchtmacht qua inzet vergelijkbaar is met de Nederlandse werd er geen poging gedaan om specifieke piloten te beschuldigen. Daarnaast concludeerde de ADF niet dat de nationale of operationele veiligheid in het geding kwam doordat de locatie en datum van de incidenten gedeeld waren. “This is the behaviour of a mature and responsible military”, stelde Airwars-directeur Chris Woods als reactie op de Australische regering die verantwoordelijkheid nam voor het burgerslachtofferincident.


Dit soort publieke transparantie verhoudt zich niet alleen tot de landen die hebben toegegeven burgerslachtoffers te maken. Over de gehele duur van de oorlog tegen ISIS zijn specifieke beschuldigingen onderzocht en publiekelijk besproken door het Verenigd Koninkrijk; Frankrijk; België; Denemarken; Canada en Jordanië. Geen van deze Coalitiegenoten vond het kennelijk bezwaarlijk om openbaar in te gaan op specifieke incidenten vanwege te vrezen gevolgen voor de operationele of nationale veiligheid.
De manier waarop de Nederlandse regering burgerslachtoffers onderzoekt en toegeeft staat in schril contrast met de voorbeelden van onze bondgenoten. De weigering van Nederland om de data en locaties van de vier luchtaanvallen die zijn onderzocht vrij te geven maakt externe controle van de bevindingen onmogelijk.

Bovendien, de onwilligheid van de regering om details over de onderzochte luchtaanvallen te publiceren staat haaks op recente verbeteringen in de publieke transparantie van Nederland. Sinds de hernieuwde missie in januari wordt de locatie van de dichtstbijzijnde grote nederzetting tot een luchtaanval genoemd in het weekoverzicht Defensie-operaties. Dit biedt meer mogelijkheden voor het onderzoeken van Nederlandse acties en publieke claims van burgerslachtoffers.

Individuele verantwoordelijkheid voor transparantie


Het verschil tussen de 883 doden toegegeven door de Coalitie en de conservatieve minimale schatting van Airwars van 6.259 burgers kan worden verklaard door de manier waarop de Coalitie deze zaken beoordeelt – niet door het ontbreken van ‘voldoende bewijs’ zoals in de voortgangsrapportage wordt gesteld.

Een recent onderzoek door ons ‘military advocacy’-team concludeerde dat voor incidenten die zijn gemonitord door Airwars en plaatsvonden voor oktober 2016, voor meer dan zestig procent nog moet worden verwerkt door de Coalitie. Voor de incidenten die wel al zijn beoordeeld toont de Coalitie een sterke vooringenomenheid als het gaat om intern-gerapporteerde incidenten, in het bijzonder als het gaat om luchtaanvallen op open terrein (bijvoorbeeld op

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voertuigen). Daarnaast heeft het onderzoek van de New York Times duidelijk gemaakt dat er alleen incidenten binnen een straal van vijftig meter rond de inslag beoordeeld worden en wordt de locatie van luchtaanval vaak niet vastgelegd.

Het is belangrijk om te benadrukken dat de plicht om burgerslachtoffers te onderzoeken volledig bij Nederland ligt – en niet bij de Coalitie als geheel. Al in 2015 stelde de Human Rights Council van de Verenigde Naties dat alle landen die in Irak en Syrië luchtaanvallen uitvoeren ‘are under an obligation to conduct prompt, independent and impartial fact-finding inquiries in any case where there is a plausible indication that civilian casualties have been sustained’ en dat het cruciaal is de resultaten openbaar te maken.⁹

Herstelbetaling en restitutie

De Minister van Defensie informeerde het parlement dat ze tijdens de ministeriële bijeenkomsten de mogelijkheid heeft geopperd van een centraal meldpunt voor nabestaanden en slachtoffers van luchtaanvallen. Na vier jaar van strijd bestaat een dergelijk meldpunt nog niet. Volgens de Coalitie is elk lid van de groep landen individueel verantwoordelijk voor de burgers die het doodt of verwondt – dit geldt ook voor compensatie of ex gratia betalingen.

Op dit moment kiest het Ministerie van Defensie ervoor om cruciale informatie over de locaties en data van de vier onderzochte luchtaanvallen achter te houden – dit terwijl in de meeste gevallen burgerslachtoffers zeer aannemelijk zijn. Dit maakt het voor nabestaanden van de Irakezen en Syriërs die slachtoffer werden van bombardementen door de Nederlanders onmogelijk om te weten in welke gevallen Nederlandse toestellen verantwoordelijk waren.

Airwars roept daarom de regering op om de locatie en data van de vier onderzochte luchtaanvallen vrij te geven – en daarmee het goede voorbeeld van de Britse en Australische gevallen te nemen. Daarnaast roept Airwars het Ministerie van Defensie op om alle data en locaties van luchtaanvallen in Irak en Syrië tussen 2014 en 2016 te verstrekken – zodat deze acties kunnen worden gecheckt met de burgerslachtoffercridents die al zijn gerapporteerd (dit is al mogelijk voor de meeste Coalitie-bondgenoten.)

Luchtaanvallen blijven een van de hoofdoorzaken voor burgerslachtoffers op het slagveld en geen enkel land ontkomt hier aan. De Nederlandse regering moet initiatief nemen en verantwoording afleggen voor haar daden. Schaamte is geen excuus voor inactie.

Refusal by The Netherlands Defence Ministry to identify specific civilian harm events impedes natural justice, and runs counter to actions by other Coalition allies.
Context

On April 13th 2018, findings of a Public Prosecution Service assessment were presented to Parliament through a progress report on Dutch involvement in the anti-ISIS Coalition. The investigation concluded that while no breach of International Humanitarian Law had occurred, for the first time it was officially conceded that Dutch aircraft had caused civilian harm, in Iraq between October 5th 2014 and July 4th 2016. Until then the Netherlands had denied all such claims.

The report states that civilian casualties did occur in at least one of four investigated cases; was “very likely” in a second case; and “possibly” occurred in a third. This admission means that The Netherlands is the fourth nation (alongside the United States, Australia and the United Kingdom) publicly to concede civilian harm from its actions against so-called Islamic State.

However, while the Defence Ministry admits responsibility for killing or injuring civilians in up to three airstrikes, it continues to refuse to identify the dates and locations of these events, or even the number of civilians harmed, citing operational security reasons.

The refusal of the Netherlands to disclose the dates and locations of these three events runs counter to the public transparency evidenced by many other Coalition allies in recent years – and also continues (in theory) to implicate Dutch aircraft in any of more than 220 alleged Coalition civilian casualty events in Iraq during a 21 month time window.

1 “Voortgangsrapportage Nederlandse bijdrage in de strijd tegen ISIS”, April 13th 2018, at www.tweedekamer.nl/downloads/document?id=0cae62e3-b505-42f2-bfe3-5c8f60e4cf46&title=Voortgangsrapportage%20Nederlandse%20bijdrage%20in%20de%20strijd%20tegen%20ISIS.docx
Moral and military grounds for disclosure

The Dutch Public Prosecutor’s Office concluded in its report that there was no reason for a criminal investigation into any of the four investigated strikes, since no breach of International Humanitarian Law (IHL) had taken place. However, with most reported battlefield casualties in the Coalition’s war against ISIS likely occurring within the framework of IHL, we urge the Defence Ministry to tackle the wider issue of civilian harm. Dutch citizens are also entitled to know what is being done in their name.

More importantly, the government is obstructing the natural process of justice for Iraqis affected by these Dutch airstrikes. Without the disclosure of airstrike dates and locations, Iraqi civilians are unable to hold to account those who harmed their loved ones. When asked why such basic but vital information was not made public, a spokesperson told Airwars that the Defence Ministry would not release locations and dates of these strikes for reasons of national and operational security.

While these are legitimate concerns, numerous Coalition allies have shown that sharing the locations and dates of strikes has not led to increased operational or national security concerns. Airwars has asked the Defence Ministry on multiple occasions to demonstrate the claimed impact of improved transparency on the security of the Netherlands and its military – but the Ministry has failed to make a constructive statement on the issue.

In September 2015, in conjunction with RTL and other international news organisations, Airwars revealed via a declassified CENTCOM document that Dutch aircraft had been implicated in a possible civilian casualty event on December 26th 2014 – though a subsequent assessment had concluded that “after reviewing all available evidence, the allegations of civilian casualties from Coalition airstrikes in these instances were unfounded.” Airwars is unaware of any operational or national security implications of CENTCOM having publicly revealed the date of an alleged Dutch civilian harm event.

In fact, public transparency on military actions can bring significant strategic and tactical benefits. Not only does it help to distinguish the actions of Coalition members from other belligerents such as Russia, it also separates Dutch strikes from those of its allies.

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The absence of specific information on these three Dutch casualty events theoretically connects the Netherlands to hundreds of alleged cases in Iraq.

For example, the first strike assessed by the Public Prosecution Service concerned an attack on a so-called Vehicle Borne IED factory. For the period between October 2014 and July 2016, Airwars has identified 21 alleged civilian casualty incidents, where the Coalition had also reported airstrikes on VBIED factories in the vicinity on those same dates.

This includes one specific incident in Hawija on June 3rd, 2015, in which as many as 70 civilians, including 26 children and 22 women, were alleged killed and up to a hundred more injured. The effects of that incident were likened by Reuters at the time to a 'nuclear explosion.' The Coalition noted at the time for June 2nd-3rd 2015 that “Near Al Huwayjah, one airstrike struck an ISIL VBIED facility.”

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3 ‘Air strike in north Iraq killed dozens, including civilians, residents say’, Reuters, June 4th 2015, at uk.reuters.com/article/uk-mideast-crisis/air-strike-in-north-iraq-killed-dozens-including-civilians-residents-say-idUKKBN0OK27A20150604

According to local sources, the massive Coalition airstrike detonated a large supply of TNT explosives after the facility was struck – similar to the Dutch strike in which “The IED factory turned out to have more explosives than previously known” and secondary explosions “very likely” harmed civilians.

Airwars is aware of significant private speculation by Dutch journalists as to whether The Netherlands was responsible for the Hawija event – one of the worst casualty incidents of the early war against ISIS.

The Coalition’s Lt. Gen. Hesterman had noted at the time for example that a “fairly small weapon” had been used in the attack – potentially referring to the 250lb GBU-39 Small Diameter Bomb – which is only used by the Dutch and US in the fight against ISIS.\(^5\)

The Dutch Defence Ministry also confirmed in its weekly report that between June 1st-8th, “Dutch F-16s flew 12 missions above Iraq. They bombed several ISIS targets.”\(^6\)

If Dutch aircraft were responsible for the Hawija event, there is a public interest imperative not only in this information being made public, but also in the Defence Ministry outlining how such an incident occurred – and what safeguards were put in place for future actions. If Dutch aircraft were not responsible, then the Defence Ministry has a duty to clear the names of its pilots, who may be assumed by some to be linked to Hawija unless proven otherwise.

Similar concerns apply to the other two events in Iraq in which civilian harm from Dutch actions likely occurred. Without the locations and dates of the four assessed strikes, it is impossible to link any of the 1,800 munitions fired by Dutch F-16s to a specific civilian casualty incident.\(^7\)

**Transparency of process by other Coalition allies**

The Netherlands is not the first Coalition member to concede to killing or injuring civilians. The Australian, US and UK militaries have joined the Netherlands in publicly admitting that civilians were killed and injured in anti-ISIS strikes in Iraq or Syria. However, all three countries have explicitly identified all incidents in which their aircraft were involved – with no discernible impact either on operational or national security.

In March 2017, the US admitted for example that its airstrikes had targeted a house in the al Jadida neighborhood of east Mosul which resulted in the killing of at least 105 civilians. The Pentagon stated that an American jet had dropped a 500lb bomb shortly after 8am on March 17th, targeting two ISIS fighters positioned on the roof of the house. Unfortunately, dozens of civilians were sheltering in the basement below and died when the house then collapsed. The Jadida incident is still the highest confirmed civilian casualty event of over a hundred incidents the US has explicitly admitted responsibility for. Airwars is unaware of any individual pilots, operators or analysts


being targeted or blamed. Indeed, the willingness of the United States to concede civilian harm in specific events has been widely welcomed as the sign of a mature and responsible military.

On March 29th 2018, Australia for the third time admitted responsibility for civilian harm, confirming that it had killed two civilians and injured two children during the battle for Mosul. The Australian Defence Force pro-actively came forward with the incident, after it scrutinized its own role in the event. The incident originally had only a single survivor claim and a fairly vague date attached. This admission by the ADF was generally well received domestically – and despite the Australian air force being of similar size to that of The Netherlands, there was no attempt to single out pilots for blame – nor any claim by ADF that by revealing the date and location of the events, that national or operational security had in any way been compromised. “This is the behaviour of a mature and responsible military”, Airwars director Chris Woods told local media with regard to the admission of responsibility by Australia.

On May 2nd, the UK joined the US, Australia and the Netherlands in admitting civilian harm. The UK Defence Ministry pro-actively reported the incident to parliament, detailing that an RAF Reaper drone had “unintentionally killed” one civilian on March 26th in the Euphrates Valley.

Such public transparency is not confined only to those nations which have conceded civilian harm. Over the duration of the war against ISIS, specific civilian harm allegations have been investigated and publicly commented upon by the United Kingdom; France; Belgium; Denmark; Canada and Jordan. In each case, these close allies of The Netherlands felt able to engage publicly on civilian harm issues without apparent fear of operational or national security blowback.

The way in which the Dutch government investigates and concedes civilian harm is a far cry from the examples set by its allies. The refusal of the Netherlands to release the dates and locations for the four strikes that have been assessed makes any external scrutiny of the findings impossible.

Moreover, the reluctance of the Netherlands to publish strike details of the assessed incidents sits at odds with recent broader improvements in levels of Dutch public transparency. Since the renewal of the mission in January, the Netherlands has started including the location of the nearest large settlement to a strike in its weekly updates, making it more possible for Dutch actions to be cross referenced against public claims.

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Individual responsibility for transparency

The progress report presented to Parliament recently made additional mention of the meetings of ministers of Coalition countries in Rome and Kuwait, during which the Netherlands “drew attention to the necessary caution – and transparency – of deployment of air-based weapons”. During these meetings, the minister also spoke on the discrepancy between the number of civilians casualties confirmed by the Coalition, and the tallies reported by the New York Times and Airwars.

The gap between the 883 deaths conceded by the Coalition and Airwars’ conservative minimum estimate of 6,259 civilians is due to the way the Coalition assesses these cases – not the lack of “sufficient evidence” as the Dutch progress report stated.

A recent review by our military advocacy team found that for Airwars-monitored events that occurred before October 2016, over sixty percent has yet to be processed by the Coalition. In the incidents that have been assessed, the Coalition exhibits a strong bias towards internally reported events – in particular those out in the open (eg on vehicles). Moreover, the New York Times investigation made clear that the Coalition’s civilian casualty monitoring team applies a locational assessment radius of just 50m and often does not record the locations of delivered munitions.9

It is important to stress that the onus for investigating civilian harm lies fully at the door of the Dutch – not at the Coalition as a whole. Already in 2015, the UN’s Human Rights Council emphasized that all states conducting strikes in Iraq and Syria “are under an obligation to conduct prompt, independent and impartial fact-finding inquiries in any case where there is a plausible indication that civilian casualties have been sustained” and crucially, “to make public the results.”10

<table>
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<tr>
<th>Transparency of action by active Coalition member</th>
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<td><strong>Frequency of reports</strong></td>
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<td>UK</td>
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Airwars.org, May 2018

Reparations and restitution
The Defence Minister informed Parliament that during the ministerial meetings she had brought up the issue of a central contact point for civilians harmed by Coalition airstrikes or their relatives. However, this does not exist in any form after almost four years of fighting. According to the Coalition, each member of the alliance remains individually responsible for the civilians it kills or injures – and this includes making any compensation or solatia payments.

Presently, the Defence Ministry chooses to withhold crucial information on the location and dates of four investigated strikes – where civilian harm appears likely in most events. This makes it impossible for the relatives of those Iraqis who fell victim to bombardments by the Netherlands to know in which events Dutch aircraft have been implicated.

Airwars is therefore calling on the government to commit to releasing the location and dates of the four assessed airstrikes – taking the recent Australian and British cases as examples of good practice. In addition, Airwars calls on the Defence Ministry to release the dates and locations of all historical Dutch airstrikes in Iraq and Syria between 2014 and 2016 – so that its actions can be cross checked against the public record (just as is already possible for most Coalition allies.)

Airstrikes remain one of the main causes of civilian harm on the battlefield – and no nation’s aircraft are immune from such potential casualties. The Dutch government must step forward and take full public responsibility for its actions. Embarrassment is not an excuse for inaction.
“WAR OF ANNIHILATION”

DEVASTATING TOLL ON CIVILIANS, RAQQA – SYRIA
Amnesty International is a global movement of more than 7 million people who campaign for a world where human rights are enjoyed by all.

Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and public donations.
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"WAR OF ANNIHILATION"
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The four-month military operation to oust the armed group calling itself Islamic State (IS) from Raqqa, the Syrian city which IS had declared its capital, killed hundreds of civilians, injured many more and destroyed much of the city. During the course of the operation, from June to October 2017, homes, private and public buildings and infrastructure were reduced to rubble or damaged beyond repair.

Residents were trapped, as fighting raged in Raqqa’s streets between IS militants and Kurdish-led Syrian Democratic Forces (SDF) fighters, and US-led Coalition’s air and artillery strikes rocked the city. With escape routes mined by IS and the group’s snipers shooting at those trying to flee, civilians fled from place to place within the city, desperately seeking refuge or escape. Some were killed in their homes; some in the very places where they had sought refuge, and others as they tried to flee.

Shortly before the military campaign, US Defense Secretary James Mattis promised a “war of annihilation” against IS, signalling an increase in intensity in the US-led Coalition’s military campaign against the group. The impact on civilians was devastating.

Amnesty International researchers travelled to Raqqa in February 2018 and spent two weeks visiting 42 locations of strikes and interviewing 112 witnesses and survivors. The organisation analysed satellite imagery and reviewed other publicly available material. This report documents the experiences of four families whose cases are emblematic of wider patterns.

The Aswad were a family of traders who had worked all their lives to construct a building in Raqqa. Some family members stayed in Raqqa when the military operation began in order to protect their property, seeking shelter from the shelling in the basement of their building. On the evening of 28 June 2017, the building was destroyed by a Coalition air strike, killing eight people, most of them children. Mohammed Othman Aswad, the only survivor, told Amnesty International: “I was sitting on an empty oil tin by the basement door chatting to Abu Mahmoud who was crouching next to me. His wife and [five] children were down in the basement with my brother Jamal… The strike came out of the blue.”

Mohammed’s youngest brother, Ammar, who had previously fled the city, was killed as he stepped on a mine laid by IS when he returned to Raqqa to try to recover the bodies days later.

The Hashish family lost 18 members. Nine were killed in a Coalition air strike, seven were killed as they tried to flee via a road which had been mined by IS, and two others were killed by a mortar seemingly launched by the SDF.
“Those who stayed died and those who tried to run away died. We couldn’t afford to pay the smugglers: we were trapped,” Munira Hashish told Amnesty International. She and several of her children survived the air strike and the mines and eventually managed to escape “by walking over the blood of those who were blown up as they tried to flee ahead of us,” she said.

The smugglers – often IS members themselves – knew how to avoid the group’s snipers and mines. They charged several hundreds of US dollars per person to guide civilians out of Raqqa. The price increased as the military operation progressed and IS stepped up efforts to prevent civilians from leaving the city. Unable to afford the smugglers’ fees, Munira and her family attempted to leave on their own, despite the danger. She told Amnesty International:

We had tried to escape the city but couldn’t manage it. About five days after ‘Eid’ [30 June/1 July 2017] we tried to flee across the river but Daesh [Arabic acronym for IS] caught us. They beat the men very badly and detained me and the other women in a house for a day before they let us go…

In mid-July, after her husband and brother-in-law were killed in a mortar strike, Munira and her family again tried to flee. Unbeknown to them, the road they took was mined. Mohammed, 12, one of the children injured in the explosion, told Amnesty International:

We walked softly, softly, trying not to make any noise so that if Daesh were lurking around they would not hear us… when we got a point very close to the main road the street we were walking on was blocked by a small earth mound; we had to walk on it to pass, and when we did, the explosion happened.

Seven were killed and the rest were injured. Most of the dead and injured were women and children. The survivors had no option but to return home. A few days later a Coalition air strike destroyed their home, killing nine members of the family, mostly women and children.

The case of the Badran family perhaps best illustrates the ordeal civilians endured in Raqqa during the military campaign. Thirty-nine family members and 10 neighbours were killed in four separate Coalition strikes as they fled from place to place, desperately trying to avoid rapidly shifting front lines and being killed and injured in the very places where they sought shelter. Rasha Badran, one of the survivors, told Amnesty International:
We thought the forces who came to evict Daesh would know their business and would target Daesh and leave the civilians alone. We were naïve. By the time we realised how dangerous it had become everywhere, it was too late; we were trapped.

As the Badrans moved from neighbourhood to neighbourhood to escape the fighting, shelling and air bombardments, they came under fire from both Coalition aircraft and IS snipers, who were trying to keep civilians in areas under IS control to serve as human shields.

Moving undetected was virtually impossible for such a large group, among whom were relatives injured in an earlier strike who had to be carried. On 18 July 2017, while attempting a desperate escape from a neighbourhood under attack, nine men from the family were killed in two separate Coalition strikes. They had just succeeded in moving the women and children to another location and were on their way to join them.

A month later, remaining family members attempted to flee, only to be fired on by IS gunmen, who killed the doctor who had been providing medical care to the injured family members. The group had no choice but to turn back to the place they were escaping from. Two days later, on 20 August 2017, Coalition forces simultaneously bombed the two neighbouring houses in which the family were staying. These air strikes killed 30 Badran family members, mostly women and children. Among the dead was Rasha Badran’s one-year-old daughter, Tulip. Rasha told Amnesty International:

… Almost everybody was killed. Only I, my husband and his brother and cousin survived. The strike happened at about 7pm. I fainted and when I regained consciousness I heard my husband’s cousin, Mohammed, calling out. I could neither move nor speak. Then my husband and his brother found me. My husband was the most seriously injured (of the survivors) – he had a head wound and blood was pouring from his ears. It was dark and we could not see anything. We called out but nobody else answered; nobody moved. It was completely silent except for the planes circling above. We hid in the rubble until the morning because the planes were circling overhead. In the morning, we found Tulip’s body; our baby was dead. We buried her near there, by a tree.

The four surviving members of the Badran family kept moving from place to place, still trying to find a way to get out of the city. A month later, the four were attempting another escape from an IS-controlled area when a Coalition strike killed Rasha’s brother-in-law and cousin. It took Rasha and her husband another two weeks and several other failed attempts before they were finally able to leave the city. They were the only two who made it out alive.

In the early hours of 12 October 2017 a blitz of Coalition air strikes destroyed much of Harat al-Badu, the last neighbourhood under IS control as the battle for Raqqa came to an end. Among the civilians killed in the bombardments were Mohammed Fayad and 15 members of his family and neighbours. Coalition air strikes destroyed his house and his brother-in-law’s house across a narrow street. Mohammed Fayad, a man in his 80s known as Abu Saif, had refused to leave the home where he had lived for 50 years when the Raqqa military campaign began. His daughters and other relatives stayed with him. As Coalition air bombardments shook the neighbourhood during the night of 11-12 October 2017, terrified neighbours sought shelter with the Fayad family. Among them were Ali Habib and his family. He told Amnesty International:

I was sitting on a chair holding my little boy and the women were sitting on the floor, huddled together… I felt the roof of the house collapse on me. I could not move and my little boy was not next to me anymore… I called my wife, my mother, my daughter, but nobody answered… I realised that everybody was dead. Then my boy, Mohammed, called out and that gave me the strength to free myself from the rubble and go to him. He had been thrown some 10m away by the explosion. We were both injured.

Later that day the SDF and the Coalition agreed a ceasefire with IS, under the terms of which IS fighters were allowed safe passage out of the city. As part of the deal, a convoy of buses arranged by the SDF took IS fighters and their families out of the city to areas east of Raqqa that were still under IS control.

To date, the Coalition has not explained why it continued to launch strikes which killed so many civilians while a deal granting IS fighters impunity and safe passage out of the city was being considered and negotiated. Many survivors of Coalition strikes interviewed by Amnesty International asked why Coalition forces needed to destroy an entire city and kill so many civilians with bombardments supposedly targeting IS fighters – only to then allow IS fighters to leave the city unharmed.

The “patterns of life” – or daily routines – adopted by civilians struggling to survive amidst a high-intensity urban conflict were not particular to Raqqa and had had long been observed in other conflicts in other countries. Civilians crowded into homes and shelters, seeking safety in numbers, moving from place to place in search of shelter, emerging suddenly from buildings after prolonged hibernation, moving around front line

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areas to look for food/water. Civilians had to make fateful decisions on where to move for safety in an information blackout; they were not informed about evolving patterns of fighting because – without telephone, internet or other means of communication – they were in the dark about events unfolding around. The Coalition needed to be mindful of each of these factors affecting civilian behaviour.

In all the cases detailed in this report, Coalition forces launched air strikes on buildings full of civilians using wide-area effect munitions, which could be expected to destroy the buildings. In all four cases, the civilians killed and injured in the attacks, including many women and children, had been staying in the buildings for long periods prior to the strikes. Had Coalition forces conducted rigorous surveillance prior to the strikes, they would have been aware of their presence. Amnesty International found no information indicating that IS fighters were present in the buildings when they were hit and survivors and witnesses to these strikes were not aware of IS fighters in the vicinity of the houses at the time of the strikes. Even had IS fighters been present, it would not have justified the targeting of these civilian dwellings with munitions expected to cause such extensive destruction.

Entire neighbourhoods in Raqqa are damaged beyond repair. © Amnesty International

The Coalition has so far refused to even acknowledge the scale of harm caused to civilians by the military campaign. At the height of the Raqqa battle, in September 2017, outgoing Coalition commander, Lieutenant General Stephen Townsend, wrote that “...there has never been a more precise air campaign in the history of armed conflict”. However, this precise air campaign killed hundreds of civilians. At the same time, US Marines’ activities described by Army Sergeant Major John Wayne Troxell (senior enlisted adviser to the Chairman of the Joint Chiefs of Staff), suggests that the Coalition operation was far from precise: “In five months they fired 30,000 artillery rounds on ISIS targets… They fired more rounds in five months in Raqqa, Syria, than any other Marine artillery battalion, or any Marine or Army battalion, since the Vietnam War.”

Given that standard artillery shells fired from an M777 howitzer have an average margin of error of over 100m, launching so many of these shells into a city where civilians were trapped in every neighbourhood posed an unacceptable risk to civilians. Yet despite incontrovertible evidence of civilian casualties and wholesale destruction in Raqqa, and the high level of civilian casualties, the Coalition narrative remains unchanged.

The international Coalition to defeat IS in Iraq and Syria was formed in 2014. Named “Operation Inherent Resolve”, it sought to present itself as an international Coalition with broad-based support from nations and institutions around the world. But the military action it took in Raqqa against IS was an overwhelmingly US
military affair. Under the command of a US General, US forces fired 100% of the artillery into Raqqa and carried out over 90% of the air strikes. British and French forces were the only other Coalition members to strike Raqqa from the air. The SDF provided the ground troops needed to push into the city on foot and were partly responsible for locating targets for Coalition air and artillery strikes. The percentage of the Coalition air and artillery strikes that were carried out based on SDF co-ordinates is unclear, as is the extent to which Coalition forces verified targets identified by the SDF.

Eight months after military operation ended, most of the city’s residents remain displaced and those who have returned are living in dire conditions among the mountains of rubble and the stench of dead bodies trapped beneath, facing the threat of mines/improvised explosive devices (IEDs) and unexploded ordnance. Virtually every resident of Raqqa who spoke to Amnesty International asked why those who could spend so much for a costly military campaign to destroy the city cannot provide the relief so desperately needed in its aftermath, including the heavy-lifting equipment needed to clear the rubble and recover the bodies and clear the IEDs.

Amnesty International calls on the Coalition and its member states to acknowledge publicly the scale and gravity of the loss of civilian lives and destruction of property and livelihoods which resulted from its strikes in Raqqa. The Coalition should also make public the information necessary to investigate responsibility for civilian losses during the military operation, including dates, times, and exact location of strikes, which forces carried them out, as well as weapons used and intended targets. Amnesty International also calls on the Coalition to disclose the measures it took to verify targets were in fact military objectives, whether civilians were present in the vicinity, and the precautions taken to minimise harm. The Coalition should also conduct an urgent review of the procedures via which it assesses allegations of civilian casualties, particularly the reasons so many cases are deemed "non-credible" and therefore do not warrant further investigation.

Furthermore, the Coalition should urgently establish an independent, impartial mechanism to effectively and promptly investigate credible reports of violations of international humanitarian law, make the findings public and put in place the necessary mechanisms to provide prompt and full reparation to victims and families of victims of violations and to allocate adequate budgetary resources. Amnesty International also calls on the Coalition to establish a mechanism ensuring that lessons are learned and that strikes in ongoing Coalition military operations in Syria are carried out in full compliance with the rules of international humanitarian law, as well as provide resources for clearing mines and unexploded ordnance, and ensure displaced civilians have access to humanitarian assistance. Where there is admissible evidence that individual members of Coalition forces are responsible for war crimes, ensure they are prosecuted in a fair trial without recourse to the death penalty.
2. BACKGROUND

Raqqa was the first large Syrian city and provincial capital to fall to armed opposition groups during the crisis and subsequent conflict which engulfed the country since 2011. In early March 2013 armed groups, including the Islamist groups Ahrar al-Sham and Jabhat al-Nusra, expelled government forces from the city. By July 2013 the IS had established a powerful presence in the city and by that year’s end it had taken full control, following a power struggle with other armed groups. Raqa became a magnet for aspiring jihadists and served as IS’s de facto capital for its so-called “caliphate”, as the group went on to gain control of great swathes of Syria and Iraq in 2014. The city remained under IS control until the joint Coalition-SDF military campaign to oust IS.

The international Coalition to defeat IS in Iraq and Syria was formed in 2014. Named “Operation Inherent Resolve”, it described its mission as: “In conjunction with partner forces Combined Joint Task Force – Operation Inherent Resolve (CJTF-OIR) defeats ISIS in designated areas of Iraq and Syria and sets conditions for follow-on operations to increase regional stability.” The joint CJTF-SDF military operation to oust IS from Raqa began on 6 June 2017 and was declared completed on 17 October 2017.

The SDF is a local militia established in October 2015 and includes Arab and other elements but is dominated by Kurdish Yekîneyên Parastina Gel forces (YPG, People’s Protection Units). The SDF announced Operation Euphrates Wrath to oust IS from Raqa and its surrounding areas on 6 November 2016. During the following six months, the SDF and Coalition forces captured several towns and villages around Raqa, and on 6 June 2017 launched the offensive on Raqa city.

Amnesty International visited north-eastern Syria in July/August 2017 to investigate conduct of hostilities during the battle and the measures taken by the parties to the conflict – the US-led Coalition, its local partner the SDF and their adversary, IS – to protect civilians in compliance with their legal obligations. On 24 August 2017 Amnesty published a report which raised serious concerns about the US-led Coalition’s extensive use of artillery and air strikes in Raqa and the lawfulness of some of these strikes. In particular, it raised questions about the process by which SDF forces provided target co-ordinates for air and artillery strikes subsequently carried out by the US-led Coalition, as well as SDF and Coalition forces’ choice of weapons for fighting in the city. The SDF used US-made, unguided mortars, which are unable to discriminate between civilians and combatants in a populated urban environment, in much the same way as the unguided artillery used by US forces. Another key concern was the large net explosive weight of munitions used in air strikes, which ensured that civilians in the vicinity of intended targets would be killed and maimed.

Immediately following the report’s publication, the UN Special Advisor on Syria called for a pause in fighting for civilians to allow civilians out of the city. The Coalition initially dismissed Amnesty International’s findings.

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1 Islamic State (IS) is also known as Islamic State in Iraq and Syria (ISIS) and sometimes Islamic State in the Levant (ISIL). It is also referred to by its Arabic acronym, Daesh.
5 Ibid. It was not the first time that Coalition military leadership refused to take seriously Amnesty International’s concerns about its conduct of hostilities during the war with IS. In response to Amnesty’s research detailing failure to protect civilians during the battle for west Mosul (at any cost: The civilian catastrophe in West Mosul – Iraq (Index: MDE 14/6610/2017), 11 July 2017, and available at https://www.amnesty.org/en/latest/campaigns/201707at-any-cost-civilian-catastrophe-in-west-mosul-iraq/), both Lieutenant General Stephen Townsend and his British Deputy, Major General Rupert Jones, accused Amnesty of “not understanding the realities of war”. The British General went as far as calling Amnesty International “naive and deeply irresponsible” for raising concerns about protection of
In the weeks after the publication of the report, however, the Coalition did appear to accept one of its key findings. Among the recommendations that Amnesty International made in the report was that the Coalition widen its investigation of alleged civilian casualty incidents to include site visits and interviews with witnesses. In its September 2017 civilian casualty report, for the first time, CJTF-OIR stated that “Investigations include interviewing witnesses and examining the site where possible.” However, Amnesty International is not aware of any cases where Coalition investigators have visited the sites of strike location and/or interviewed witnesses.

Amnesty International’s August 2017 report also detailed IS abuses against civilians during the battle for Raqqa, particularly IS’s use of civilians as human shields as the conflict got underway and the group redoubled efforts to prevent residents from leaving the city. IS laid mines/IEDs to slow advancing SDF forces and to render exit routes impassable, set up checkpoints around the city to prevent residents from leaving, and its snipers shot and deliberately killed civilians who tried to escape. As the SDF captured neighbourhoods and front lines shifted within the city, IS forced residents to move deeper into areas which remained under its control.

Women walking in rubble-strewn street past destroyed buildings in Raqqa. © Amnesty International

IS’s disregard for the most basic rules of international humanitarian law was flagrant. It trapped civilians in their neighbourhoods and used them as cover for military operations. IS entered residents’ homes by force and used them to conceal their movements and as firing positions against SDF lines. IS dress code, imposed on civilians and IS fighters alike, made it even more difficult for SDF and Coalition forces to distinguish between them.


IEDs locally produced by IS are mostly victim-activated and broadly fulfil the function of anti-personnel mines – and are thus banned under international law. In this report, they are referred to as mines and/or IEDs.

The term “sniper” in this report refers to IS fighters who targeted people from concealed positions, even though the exact type of rifle used is unknown.

“WAR OF ANNihilation”
DEVASTATING TOLL ON CIVILIANS, RAQQA – SYRIA
Amnesty International

11
Civilian residents of Raqqa desperate to get their families to safety resorted to paying smugglers, who knew which streets were mined and where snipers were located, to guide them out the city or, as the battle progressed, out of neighbourhoods still under IS control. These smugglers, mostly IS members, charged up to several hundreds of US dollars per person, which many families simply could not afford. Many of those who were unable to pay smugglers and who tried to flee by themselves were killed and injured by mines/IEDs.

Amnesty International’s field investigation carried out in Raqqa after the end of the military operation confirmed the concerns raised in its previous report. The four emblematic cases detailed in this report illustrate a wider pattern, which manifested itself throughout the military operation, as the Coalition neglected to address concerns about civilian casualties raised at the outset. That neglect has continued, with the Coalition failing to adequately investigate and provide reparation, and to provide humanitarian assistance commensurate with the scale of destruction caused.
3. METHODOLOGY

This report is based on field research carried out between 5 and 16 February 2018 in Raqqa, where Amnesty International visited 42 sites of air strikes, artillery and mortar strikes, as well as the places where IS-laid mines/IEDs killed and injured civilians. By the time Amnesty International visited, all neighbourhoods of Raqqa were accessible, though certain roads and buildings could not be accessed due to the possible presence of mines/IEDs. Amnesty researchers visited every neighbourhood in Raqqa and spent considerable time in the neighbourhoods featured in this report, namely the Jezra intersection, Dara’iya, Nazlet al-Shehade, Harat al-Sakhani, al-Fardous and Harat al-Badu.

Two Amnesty International researchers interviewed 112 civilian residents of Raqqa. Several survivors, witnesses and relatives of victims were interviewed separately for each case. Most of the interviews were conducted in Raqqa and some in other locations in northern Syria, including Tabqa. All the interviews were carried out in Arabic by Amnesty International staff, in private, without the presence of any authorities or other parties. When participants were willing, Amnesty International made audio-visual recordings of parts of the interviews. Most did not agree to be filmed for fear of future repercussions. The names of some of the witnesses cited in this report have been changed for their safety.

Amnesty International also interviewed medical and humanitarian personnel operating in Raqqa and elsewhere in north-eastern Syria, members of the military and security forces and the Raqqa Civil Council, international military and security experts and journalists operating in and around Raqqa. The organisation reviewed and verified open-source written and audio-visual material from a variety of sources, including Coalition member states, and obtained and conducted expert analysis of satellite images of several locations in and around Raqqa city taken on different dates before and since the beginning of the Raqqa military operation.

Amnesty International recorded the co-ordinates of each strike covered in this report. Visiting and analysing the scenes of events, coupled with survivors’ and witnesses’ accounts, enabled Amnesty International to attribute incidents to air strikes, artillery or mortar strikes or IS-laid mines/IEDs. In some instances, remnants of munitions found at the scene of a strike and analysed by military experts provided additional information as to which party would have carried it out.9

9 The presence of widespread unexploded ordnance and mines/IEDs in Raqqa made it too dangerous in most case to search for munitions’ fragments in the rubble of bombed buildings.
4. CIVILIANS UNDER FIRE

“If you stayed you died and if you tried to escape you died.”
Munira Hashish, air strike and mines survivor

Coalition forces officials repeatedly stated their intention to minimise harm to civilians when carrying out attacks on IS, in compliance with their obligations under international humanitarian law (IHL). That appears to have been the case for many of the strikes, including some investigated by Amnesty International, in Raqqa. However, for other Coalition attacks, including those detailed in this report, there is a strong prima facie evidence that they violated international humanitarian law and therefore were unlawful. It is impossible to determine conclusively how many strikes were unlawful without further information which only the Coalition can provide. To date, the Coalition has not made public the information necessary to make that determination. Amnesty International has requested the information from the Coalition and was awaiting a response at the time of writing.

Field research, including site investigations and interviews with survivors and witnesses, carried out by Amnesty International in Raqqa in a number of cases indicates that Coalition forces failed to take all feasible precautions to minimise harm to civilians, and, in some instances, appear to have launched strikes which were likely to cause excessive civilian harm or which failed to distinguish between military targets and civilians, in violation of the principles of distinction and proportionality. Disproportionate attacks and indiscriminate attacks that kill or injure civilians constitute war crimes.

Urban combat in residential areas presents inherent challenges. These challenges were exacerbated in Raqqa by IS’s determination to operate amongst the civilian population and to use civilians as human shields. By the time the Raqqa military campaign got underway, IS’s operational tactics had been documented extensively, including during the military campaign in Mosul (Iraq) which presented similar challenges and was reaching its closing stages as the military operation in Raqqa began. Coalition forces failed to take into account sufficiently the fact that large numbers of civilians were present in every neighbourhood of the city as fighting got under way in those areas.

Furthermore, the “patterns of life” – or daily routines – adopted by civilians struggling to survive while a high-intensity urban conflict raged around them, were not particular to Raqqa. These patterns of life had long been observed in other conflicts. They included crowding into homes and shelters, seeking safety in numbers, moving from place to place in search of safety, emerging suddenly from buildings after prolonged

10 “In accordance with the law of armed conflict, the Coalition strikes only valid military targets after considering the principles of military necessity, humanity, proportionality, and distinction”, Lieutenant General Stephen J. Townsend, CJTF-OIR Commanding General, writing in Foreign Policy, 15 September 2017, available at http://foreignpolicy.com/2017/09/15/reports-of-civilian-casualties-from-coalition-strikes-on-isis-are-vastly-inflated-lt-gen-townsend-cjtf-oir/
11 For more detailed information on the provisions of international humanitarian law (IHL) relevant to this report, see the Legal Framework section, below.
12 Necessary information would include, notably, exact strike locations, weapons used and targeting considerations. In its Strike Releases, the Coalition states that: “CJTF-OIR does not report the number or type of aircraft employed in a strike, the number of munitions dropped in each strike, or the number of individual munition impact points against a target.” Moreover, its definition of what constitutes a strike makes it impossible to know the number of strikes carried out: “… a single aircraft delivering a single weapon against a lone ISIS vehicle is one strike, but so is multiple aircraft delivering dozens of weapons against a group of ISIS-held buildings and weapon systems in a compound…” See CJTF-OIR Strike Releases, available at http://www.inherentresolve.mil/News/Strike-Releases/ SDF forces for their part have not reported at all on the strikes they carried out.
hibernation, moving around front line areas to look for food/water, and sometimes refusing to leave for fear of losing property and/or for fear of danger in flight.

In each of the four cases detailed in this report, Coalition forces launched air strikes on buildings full of civilians using precision munitions with a wide-area effect, which could be expected to destroy them entirely. In each of the cases, the civilians killed and injured in the attacks, many of whom were women and children, had been staying in the buildings for long periods prior to the strikes. Coalition forces would have been aware of their presence had they conducted rigorous surveillance prior to the strikes.

Amnesty International did not discover information indicating that IS fighters were present in the buildings at the time they were hit. All but one of the targeted buildings were single-storey houses surrounded by taller buildings, offering neither strategic vantage points for IS snipers, nor particular protection for IS fighters, compared to taller, sturdier buildings in the areas. Although they could not definitively rule it out, survivors of these strikes were not aware of IS fighters in the vicinity of the houses before they were struck. Even had IS fighters been present, this would neither explain nor justify the targeting of these civilian building with munitions expected to destroy them entirely.

The Coalition’s failure to consider adequately the presence of civilians in the city when selecting targets became evident at an early stage of the operation. On 2 July 2017, Lieutenant General Stephen J. Townsend, the US commander of the Coalition force leading the operation, stated: “...we shoot every boat we find. If you want to get out of Raqqa right now, you’ve got to build a poncho raft”,13 an erroneous assumption that every boat carried IS fighters and weapons, whereas at that time civilians trying to escape the city had few options but to cross the river by boat (the bridges having by then been destroyed by Coalition strikes).14

Coalition forces also made extensive use of munitions which have a wide-area effect or which cannot be precisely aimed at specific targets located in populated civilian areas. This is notably the case for artillery rounds, which have a margin of error of up to 50m, even when fitted with precision guidance systems.15 In fact, most of the artillery shells used by Coalition forces in Raqqa were unguided, with a much wider margin of error of over 100m. In residential areas where buildings are no more than a few metres apart, such inaccuracies are virtually certain to cost civilian lives. By their own admission, US forces fired tens of thousands of artillery rounds into the city.16 Marines brag about burning out their howitzer barrels, having fired so many rounds in such a short period of time.17 Though this particular report focuses on civilian victims of air strikes, Amnesty International previously documented civilian casualties of Coalition artillery strikes in Raqqa in an earlier report,18 as well as their use of indiscriminate strikes, notably with white phosphorous in June 2017.19

15 For example, M1156 guiding kits fitted to 155mm artillery rounds, reduce the Circular Error Probable (CEP) to 30-50m, irrespective of the range. However, most of the 155mm artillery rounds used in Raqqa were unguided, with a CEP of as much as 200-300m, when fired from their maximum range. See “How to read the Army’s budget request for more precision ordinance”, in The New York Times Magazine, 1 May 2018, available at https://www.nytimes.com/2018/05/01/magazine/army-artillery-budget-howitzer.html and “XM1156 precision guidance kit heads to Afghanistan” in DefenseMediaNetwork, 26 April 2013, available at https://www.defensemedianetwork.com/stories/xm1156-155mm-precision-guidance-kit-heads-to-afghanistan/
16 Also see weapons’ section on page 51.
18 Ibid
ASWAD FAMILY

NINE CIVILIANS KILLED – EIGHT IN AN AIR STRIKE AND ONE KILLED BY A MINE/IED WHILE TRYING TO REACH SURVIVORS

“We kept thinking ‘In a couple of days it’ll all be over; the SDF will come for us today or tomorrow.’”

Mohammed Othman Aswad who survived the Coalition attack on 8 June 2017

Jamal Othman Aswad was one of four brothers from the low-income district west of the Jezra intersection on the western outskirts of Raqqa city. By the time the Coalition began its campaign to wrest Raqqa from the IS, he was 41 years old and had become a successful trader. In 1990, he and his brothers – Ammar, Mohammed and Khaled (of whom only the latter two survived) – had established a business selling food and household goods. They ran a shop on the busy main road west of the Jezra intersection selling everything from infant milk powder to flat-screen TVs.

The brothers dreamt of constructing their own building and by 2010 – after working together for 20 years – they were able to begin work on a plot opposite the old family home. Construction took a year and cost the brothers’ life savings of some USD60,000. Initially they planned to sell some of the 12 apartments and invest profits in the business but when the crisis and subsequent conflict in Syria began, business slowed and they struggled to finish the interior work. They sold only one of the apartments, on the fourth floor, to a family who fitted it out but then moved away from the city.

Unable to complete the internal work on the building, Jamal, Mohammed and Khaled continued to live in rented accommodation elsewhere in the city with their wives and children. The youngest brother, Ammar, lived with their mother in the old family home across the street from the unfinished building. The brothers used the ground floor of the building and the cellar as a warehouse for their goods. With four storeys, the block was one of very few tall buildings in a predominantly one- and two-storey neighbourhood. It also had a cellar; something the older, traditional one-storey houses (usually referred to locally as “Arabic houses”) lacked. Shortly after Coalition forces and the local SDF launched the military operation to oust IS from Raqqa on 6 June 2017, the area became a battleground. The Aswad’s cellar became a shelter for the family and some of their neighbours.

WHITE PHOSPHOROUS SHELLING

At the beginning of the military operation, before the shelling started, Coalition airplanes dropped leaflets on the Jezra intersection area warning residents to distance themselves from IS fighters and leave the city, a difficult and risky endeavor given IS’s proven track record of targeting civilians who attempted to leave cities under its control.

On 8 June 2017 Coalition forces fired white phosphorus artillery projectiles above Jezra, seemingly to create a smokescreen through which SDF ground troops could move into the area. Amnesty International verified videos of the event which were published online and showed burning elements coming into contact with civilian houses. White phosphorous-impregnated fragments rained down on the area around the Aswad’s building and shop.

Mohammed, one of the Aswad brothers who survived the attack, told Amnesty International:

“We had been in the basement from 8 June, after the first attack in the area – a white phosphorous bombardment which set my neighbour’s food warehouse on fire, as well as another neighbour’s

...
shoe shop on the corner of the main road. During the days, we would spend most of the time in the cellar but we would go in and out between the basement and our old family home across the road, to use the bathroom and kitchen. We had to, as there were no such facilities in the cellar.\textsuperscript{25}

As the battle was approaching, the two youngest brothers, Khaled and Ammar, left the area. Both men paid IS-affiliated smugglers in order to leave, as this was the only way out. Jamal and Mohammed also took precautions, sending their mother and their wives and children to safety in Manbij.\textsuperscript{26} They decided to stay on to safeguard their business and the building they had worked so hard to construct. They knew that if they left, IS fighters would steal their property and likely make use of the building, putting it at risk of coalition strikes.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{images.png}
\caption{Amal Othman, 13, and her brothers Ammar, 8 and Mahmoud, 17; and Jamal Aswad, 41 – four of the eight victims killed in a Coalition air strike on 28 June 2017 in Raqqa. © Private}
\end{figure}

\textsuperscript{25} Interview with Mohammed Aswad, Raqqa, 7 and 8 February 2018.
\textsuperscript{26} A city 140km north-west of Raqqa which had been previously recaptured from IS and was under the control of the SDF.
As Jamal and Mohammed took shelter from the shelling in the cellar, they were joined by neighbours, who were unable to leave the city and felt vulnerable in their less sturdy homes.

Umm Ibrahim, a 38-year-old widowed mother of two, who lived a few streets south-west of the Aswad building, told Amnesty International:

I spent several nights in the Aswad’s cellar with my children. Daesh and the Kurds were fighting each other over our heads and my children were so scared but our home is an Arabic house, which provides no protection from bullets, let alone from mortars and missiles. We felt safer in the cellar and also safer being together with other people. After several days we went back home to change our clothes. Some of my neighbours said that the Kurds had got closer and we could try to run to them. We went with them and managed to reach them safely.

IS fighters were in the area at the time, though not in the immediate vicinity of the Aswad’s building. According to neighbours, IS fighters were mostly staying in and around the Taqua mosque, a few blocks north-east of the Aswads’ building. Well aware that IS fighters could enter houses at will and commandeer buildings to use as sniper positions, the Aswad brothers had taken counter-measures. As Mohammed told Amnesty International:

Daesh did not come here to our street, but if they had it would have been impossible for them to go up to the roof or to enter the building at all without our knowledge. We had locked all doors and blocked access to the two staircases going up from the ground floor with table tops and pallets. We were going in and out of the cellar all day and after sunset we stayed down in the cellar.

As the building was new and facilities had not yet been installed, those sheltering in the basement would go across the road to the Aswad’s old family house to cook and use the toilet. As Mohammed told Amnesty International:

We slept in the basement for around 20 days, from 15 Ramadan [10 June 2017] until the air strike occurred. We slept there every night, even during Eid. Someone brought us bread. We kept thinking ‘In a couple of days it'll all be over; the SDF will come for us today or tomorrow.’ In all that time the building was never hit.

The day before Eid there were five or six other families in the basement with us, then most of them left. Only Abu Mahmoud stayed with his wife and children. I told Abu Mahmoud that he and his family should try to leave as well but he said ‘what will be with you will be with me’. I stayed to protect our home and livelihood; our shop was closed and we had stored all the merchandise in the building and in our old family home. Abu Mahmoud thought we would all be safe in the cellar.

We spent much of the time in the basement during the day, but going in and out between the basement and our old house across the small road, to use the bathroom and kitchen. We were sure that the warplane would have photographed our street and would know our movements, as we went to and from between the building and the old house across the street, and would have known that we were civilians, families with children. During Eid the shelling had stopped. We thought that that was the end of it.

THE AIR STRIKE

Mohammed was by the entrance to the cellar when the air strike occurred. It was around 7.30pm on “the fourth day of Eid” (28 June 2017), he told Amnesty International:

We were about to have dinner. I know the time because my brother Jamal who was down in the basement had just asked how long before sunset, when he could break his fast. Ramadan was over but Jamal was fasting that day to make up for a day when he had not been able to fast due to shelling in the neighbourhood. I was sitting on an empty oil tin by the basement door chatting to Abu Mahmoud who was crouching next to me. His wife and children were down in the basement with Jamal. When the sun went down we would shut the door and not leave the basement until the morning. The strike came suddenly.

I lost consciousness for a while. When I came around it was dark and I discovered I was wounded in my back and my leg. Maybe it was 9pm, I don’t know.

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27 Interview with Umm Ibrahim, Raqqa, 13 February 2018.
The four-storey building was destroyed, the interior structures had given way and the floors were piled on top of one another.

I went to shelter in our old family home across the road until daylight. In the early morning I went to the collapsed building. I could see my friend’s son, Mahmoud, lying under the debris; he was alive but was trapped from the waist down under a large collapsed column. I could hear my brother Jamal and Abu Mahmoud’s daughter, Amal, crying out for help but could not see them. I tried to help Mahmoud but the column was too heavy. I went to look for help; I went to get Abu Mahmoud’s brothers from another area and we came back. Mahmoud asked for water and we gave him some. We still could not move the rubble, so I went to ask for help from Daesh near the mosque but they refused and called us ‘murtaddin’ [apostates]. Finally, I went to the SDF (at their front line position), I went to them with my hands raised but they shouted and shot around (not at) me and told me ‘you are Daesh’.

Then they held me for two days and in that time I did not know what had happened to my brother Jamal and to Mahmoud and Amal. I knew the others were dead because there was no sound coming from them. The SDF eventually took me to a field hospital in Salhabiyeh where I had the shrapnel taken out of my back and leg, and then they took me to an SDF military intelligence base in Hawi al-Hawa. When they released me [Saturday 1 July 10pm], I went back to the building and found it further collapsed in such a way that it completely obstructed any entry point to the basement. There was no more any sign of life from Mahmoud or from my brother Jamal or anyone else. I left the area and then managed to leave Raqqa.
Satellite images showing the Aswad family’s building before and after it was destroyed in a Coalition air strike which killed eight civilians, five of them children, on 28 June 2017.
SLOW DEATH UNDER THE RUBBLE

In the meantime, the children’s uncles kept going back to the scene of the strike. One of them, Taha Mohammed Othman, told Amnesty International:

The first thing that I saw when I went to the collapsed building was my brother – Mohammed Mahmoud Othman [50]. He was dead. Then I saw his son, 17-year-old Mahmoud, trapped under a pillar. We tried but we couldn't drag the pillar off him. Then I saw his 12-year-old brother Anas, who was dead. I couldn't see their sister Amal, 13, but I could hear her. My brother's wife Fatima was in there as well. I didn’t see her but later we dug out her body and buried her.28

The uncles remained at the scene until the evening, trying to rescue the survivors trapped under the rubble in the cellar. However hard they tried, without digging equipment it was impossible. They went home and made the perilous return the following day despite shelling and mortar fire, but they still could not get them out. All the while the SDF and IS were shelling each other's positions.

On the Thursday [29 June 2017], three of them were alive under the rubble – Jamal, Amal and Mahmoud. We could only see Mahmoud and we could hear the voices of the other two. Mahmoud kept asking, 'Where’s my Dad? Where’s my sister? Help me, I want water.' Amal was also crying for help, although we couldn't see her. We stayed until the shelling became too close.

On the Friday it was difficult to come straight away. There were heavy clashes where we lived. IS kept telling us to move to different places (in the Old City). We asked IS for help to rescue the survivors in the basement but they refused and called us apostates. When we finally made it back to the basement on Friday they were all dead.

Those killed by the air strike are as follows:

1. Jamal Othman Aswad
2. Mohammed Othman (Abu Mahmoud)
3. Fatima (Mohammed Othman [Abu Mahmoud]'s wife)
4. Mahmoud, 17
5. Amal, 13
6. Ahmed, 14
7. Anas, 12
8. Ammar, eight

Mohammed Othman’s children (with his deceased first wife):

Mohammed Aswad told Amnesty International:

The children who died were good kids. Their father would often speak of them. He said they were all hard workers. Mahmoud was into computers and was good with electronics. He worked in a pharmacy and tried to save money because he wanted to buy a motorcycle. Ahmed was 14 and he loved cars. He worked in a sweet shop. Amal was only 13 but she helped out a lot with the housework after her mother had died two years previously. Anas was 12. He had an old bicycle and he wanted a new one. The youngest to die was eight-year-old Ammar.

THE MINE/IED

SDF forces prevented residents from returning to Raqqa until some weeks after military operations were finally completed on 17 October. In early November Jamal Othman Aswad’s two brothers, Mohammed and Khaled, managed to return to their neighbourhood to recover the bodies of those killed in the air strike which had destroyed their building four months earlier. They hired a bulldozer to remove the rubble of the destroyed building and found Jamal's body. This came as a shock; the brothers had been under the impression that Jamal had been rescued and they had been searching for him, in vain, in hospitals in areas under SDF control.

The brothers had also been searching for their younger brother, Ammar, who had sought refuge in Manbij but had managed to return to Raqqa immediately after the strike. He made the perilous journey with the help of an SDF recruit he knew from Raqqa who told him that their building had been destroyed and that his

28 Interview with Taha Mohammed Othman, Raqqa, 8 February 2018.
relatives were under the rubble. After embarking on his journey back to Raqqa, Ammar disappeared and his brothers presumed that he had been detained by the SDF. Mohammed told Amnesty International:

We had heard rumours that Jamal was in hospital and that Ammar was in prison. Before coming back to Raqqa we had looked for Jamal in all the hospitals – in Tal Abyad, Qamishli, Kobane and Manbij – and we had also asked the SDF about Ammar, but we had received no information about either. We didn’t know they were both dead.

We didn’t know that Ammar was dead until five months after he died, until we found his body on a street near our home, only 50 or 60m away. We identified him by his clothes and by his wedding ring, which was broken on the inside. He was wearing the same black jalabiyeh that his wife remembered him wearing when he left Manbij [on his journey back to Raqqa]. His beard was short, as he’d been in Manbij, and not in an area under Daesh control where men were forced to grow long beards. We later learned from the SDF that Ammar had been killed when he had stepped on a mine and that an SDF soldier who was with him lost a leg in the same explosion.

We came back to search for Jamal and Ammar. We thought we would find them alive, not dead. All the time, Ammar was lying dead on the next street. We didn’t realise that Jamal was dead until we removed all the rubble from the basement. That’s when we found his body, along with the bodies of Abu Mahmoud and his family.

LOOTING

Mohammed and Jamal Aswad had chosen to stay in Raqqa to protect their livelihood. They knew that, were they to leave, their merchandise would likely be stolen by IS fighters. It turned out their fears were well-founded, though the properties were seemingly looted after the SDF forces took control of the area. Mohammed Aswad told Amnesty International:

When we came back the Arabic house [the family house across the road from the apartment building] had been looted and all the merchandise that we kept there was gone. We had stored the merchandise in two places – half in the tall building and half in the Arab house – so that if one place was hit we would not lose everything. But everything was gone; tins of cooking oil, barrels of petrol, baby milk powder, plasma TVs, everything.

Looting of whatever had not been destroyed by the bombardments and the fighting seems to have been routine throughout Raqqa and beyond, in the areas recaptured from IS. Most of the Raqqa residents Amnesty International interviewed reported that their properties – homes as well as businesses – were looted. They blamed SDF members both for looting and allowing others to loot. 29

MUNITION FRAGMENTS AND COALITION STRIKES REPORTING

Amnesty delegates visited the scene of the strike with Aswad family members who brought fragments of two munitions which they claimed to have recovered from the rubble of the destroyed building. One was part of the motor of an AGM-114 Hellfire missile, manufactured by Alliant Techsystems in Virginia, United States. The other was a fin from a US-designed Joint Direct Attack Munition (JDAM), a GPS-guided air-delivered bomb. 30

Coalition reports of the strikes they launched do not contain the necessary details about the exact date, time, and location of the strikes launched. Such lack of transparency makes it impossible to establish whether/which one of the strikes listed in their reports matches the strike on the Aswad building.

29 See additional information on page 59.
30 Amnesty International’s researchers photographed the fragments, which were identified by military experts based on serial numbers and other data visible on the fragments. See photographs on page 23.
“WAR OF ANNihilation”
DEvASTATING TOLL ON CIVILIANS, RAQQA – SYRIA
Amnesty International

Fragment of the motor of a US-made AGM-114 Hellfire missile recovered among the ruins of the Aswad family building, destroyed in a Coalition strike which killed eight civilians on 28 June 2017. © Amnesty International

Fragment of a fin from a US-designed Joint Direct Attack Munition (JDAM), a GPS-guided air-delivered bomb, recovered among the ruins of the Aswad family building, destroyed in a Coalition strike which killed eight civilians on 28 June 2017. © Amnesty International
CJTF-OIR reported carrying out a total of 17 strikes on Raqqah on 28 June 2017. It released the following information about strikes in Raqqah on 28 June 2017:

Near Raqqah, 13 strikes engaged nine ISIS tactical units, destroyed 10 fighting positions, two vehicles, a UAS, and suppressed an ISIS tactical unit.31

On June 28, near Raqqah, Syria, four strikes engaged four ISIS tactical units.32

Two of the strikes were carried out by British aircrafts according to the British Ministry of Defence, which issued the following information about its activities in Raqqah on 28 June 2017:

Two Tornado flights operated over Raqqah. At the north-western end of the city, at least 1 suicide bomber was known to be waiting inside a Daesh held building, waiting for an opportunity to attack the SDF as they closed in. The building and the terrorists inside were struck with a Paveway IV. A second such weapon demolished a building in the east, from where heavy fire had been directed at the SDF. This successful strike allowed the SDF to resume their advance.33

The information released by the French Defence Ministry is vaguer in terms of time and fails to provide information above specific days. The French concede, however, that their aircraft also bombed Raqqah during the week in question:

This week, Operation Chammal aircraft flew 31 sorties including 29 armed reconnaissance or ground support (close air support), as well as two intelligence gathering sorties. Nineteen strikes were carried out by French planes in Iraq and Syria. Most of them were carried out during the battles of Mosul and Raqqah. These strikes targeted groups of Daesh fighters. The other strikes were carried out in Syria and targeted areas jihadi fighters used for supply and regrouping.34

34 Armée Française – Operations Militaires – Thursday 29 June 2017, available at (Translated from the following original text: “Cette semaine, les aéronefs de l’opération Chammal ont réalisé 31 sorties aériennes dont 29 de reconnaissance aérienne ou d’appui au sol (CAS) et 2 de recueil de renseignements. 19 frappes ont été réalisées par les avions français en Irak et en Syrie. La majeure partie d’entre elles ont été réalisées dans le cadre des batailles de Mossoul et de Raqqah. Ces frappes visaient des groupes de combattants de Daech. Les autres frappes ont été réalisées en Syrie et ont visé des zones de regroupement et de ravitaillements utilisées par les combattants djihadistes.”)
HASHISH FAMILY

NINE KILLED IN AN AIR STRIKE, SEVEN KILLED BY MINES, AND TWO-FAMILY MEMBERS AND A NEIGHBOUR’S CHILD KILLED IN MORTAR STRIKES

“It was when they (the Coalition plane) saw us that they struck. The strike occurred straight after we re-entered the house.”

Munira Hashish, air strike and mines survivor

Munira Hashish, a mother of nine in her early 40s, lost 18 members of her family in three separate incidents in July and August 2017. Nine were killed in a Coalition air strike, seven were killed as they tried to flee via a road which IS had mined, and two others were killed by mortars launched by the SDF, which also killed the neighbours’ two-year-old child. “Those who stayed died and those who tried to run away died. We couldn’t afford to pay the smugglers; we were trapped,” she told Amnesty International. She and some of her children survived the air strike and the mines and eventually managed to escape “by walking over the blood of those who were blown up as they tried to flee ahead of us,” she said.

Munira and her family lived in Dara’iya, a low-income neighbourhood in western Raqqa. The family was not well off; Munira’s husband, Hussein Ibrahim Hashish, supported the family as best he could by selling vegetables out of a cart. Other family members worked in the building trade as casual labourers.

Dara’iya is close to the Jezra intersection (see Aswad case), to the south-east. The shelling started roughly at the same time in both areas, in the days following the start of the military operation (on 6 June 2017). Munira told Amnesty International that those who could, left at that time, but fleeing was difficult, dangerous and expensive. “Smugglers charged SYP 200,000 per person [around USD390] and we could not afford it. Many of our neighbours were in the same situation. They too were trapped. Some tried to leave without paying the smugglers and they were shot by Daesh or got blown up by the mines that Daesh had laid.”

Despite the dangers, Munira and her family also attempted to leave. She told Amnesty International:

“We had tried to escape the city but couldn’t manage it. About five days after Eid we tried to flee across the river but Daesh caught us. They beat the men very badly and detained me and the other women in a house for a day before they let us go. Thank God they [IS] didn’t know my sister’s son was with the SDF or they would have killed us all. We would have made more attempts but we were afraid of them and we were afraid of the mines [IEDs].”

MORTARS RAINING DOWN

Munira’s family came under attack several times from multiple sides. First a volley of mortars struck the neighbourhood around Munira’s brother’s house in July 2017, killing her husband, Hussein Ibrahim Hashish, and her brother-in-law, Ibrahim Issa Antar, both in their 40s, as well as their neighbours’ two-year-old son, Ali Hassan Nafa. As Munira explained: “My husband was a humble man who sold vegetables with a pushcart. He and Ibrahim were outside my brother’s [Hassan] house; they were leaning against the wall talking when they were killed.” Amnesty International visited the scene on three occasions where several neighbours confirmed the description of the incident. As the two men were killed, another mortar struck a

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25 Interview with Munira Hashish, Raqqa, 10 February 2018.
26 Most residents who had fled Raqqa told Amnesty International that they had crossed the Euphrates River in small boats – exposing themselves to the risk of being caught by IS militiants and being bombed by Coalition planes which frequently targeted those crossing the river. The rural areas south of the river were still controlled by IS but control was less tight in those rural areas than in the city itself. From there people travelled west through fields and small country lanes and could more easily sneak across the frontlines into areas which had already been recaptured by the SDF.
27 The witnesses and survivors that Amnesty International interviewed in this case were unable to recall the precise dates of the incidents detailed in this report. Their time references were split between events occurring either during or after Ramadan 2017 (Ramadan in Syria in 2017 ran from 27 May to 25 June). Inability to recall precise dates is common to civilians who survived prolonged periods in conflict zones and suffered traumatic events.
home across the narrow street, which killed two-year-old Ali Hassan Nafa and injured his father, Hassan. Ali’s mother told Amnesty International:

It was early morning, about 7am, and we were sleeping outside in the courtyard because it was hot. Ali was our only child. We had been married for many years but it took us so long to have a baby; we waited so many years and in the end we were blessed to have Ali. He was all we had, he was my life.39

While investigating this case, Amnesty delegates met an SDF member, who told the delegates: “We rained mortars down without discrimination, to clear the area.” Other SDF members echoed his description.40

Those killed by the mortars are as follows:

1. Hussein Ibrahim Hashish, late 40s (Munira’s husband)
2. Ibrahim Issa Antar, 40s (Munira’s sister’s husband)
3. Ali Hassan Nafa, two (neighbours’ child)

THE MINE/IED

Ahmad Hashish and his cousin Hussein, both injured by mines laid by IS as they were trying to flee Raqqa in August 2017. Hussein’s parents and five relatives were killed in the explosion and Hussein lost his left foot. © Amnesty International, © Private

Several weeks after the mortar strike which killed Munira’s husband and brother-in-law, the family made another attempt to escape. Seven family members were killed and several others injured by IS-laid mines/IEDs. The explosions occurred several blocks from the family’s home, along a residential road, close to the intersection with the main road. IS usually mined each road with more than one explosive device in order to maximise impact. Mohammed Hashish, 12, one of the children injured in the explosion told Amnesty International:

We walked softly, softly, trying not to make any noise so that if Daesh were lurking around they would not hear us. We walked through several streets and when we got a point very close to the main road the street we were walking on was blocked by a small earth mound; we had to walk on it to pass, and when we did, the explosion happened.41

Mohammed was among the injured. His right heel was shattered and he was still limping eight months after he sustained the injury. Hussein, the three-month-old baby son of Hassan and Azar, lost his left foot in the

39 Interview with Zahra Nafa, Raqqa, 10 February 2018.
40 Amnesty International spoke to nine SDF members separately in different neighbourhoods of Raqqa on different dates between 5 and 16 February 2018. Names, exact dates and locations are withheld to protect their identity.
41 Interview with Mohammed Hashish, Raqqa, 15 February 2018.
explosion that killed both his parents.

Those killed by the mine are as follows:

1. Mahdiya Ibrahim Hashish, 38 (Hussein Ali Hashish's wife)

Mahdiya's five children:

2. Hassan Hussein Hashish, 18-19
3. Ahmed Hussein Hashish, 16
4. Fatima Hussein Hashish, 10
5. Ismael Hussein Hashish, nine
6. Mustafa Hussein Hashish, seven

Mahdiya’s daughter-in-law (her eldest son’s Hassan’s wife)

7. Azar Ahmed Kutshi, 17

THE AIR STRIKE

During the last two weeks of August, after the mine/IED had killed seven family members as they attempted to escape, the house where Munira and her family were staying was hit by an air strike, which left nine dead and several injured. Amnesty International visited the scene of the strike on three separate occasions. Munira told Amnesty International:

Daesh were in the area, we didn’t see them in our street but we knew that at night they went around on motorcycles and lay mines [IEDs] under cover of darkness. It was impossible to know which house IS would be in from day-to-day as they used to move around. We heard that they had made openings in the walls of people’s houses so they could move without being seen on the streets. Any house was their house if they so wished.

The house was a single-storey house with five rooms arranged around a courtyard. Munira described how at 8am the men had left the house to fetch bread. As the bakeries had ceased to function, they had no choice but to search for bread in abandoned houses. Later that morning Munira and her two brother’s wives had filled a wheelbarrow with jerry cans and went to a well to fetch water. As they were returning to the house, a volley of shells landed close by but the women made it inside unharmed. Munira then explained what happened next:

It was when they (the Coalition planes) saw us that they struck. The strike occurred straight after we re-entered the house. It happened just after the call for midday prayer. I remember hearing the call to prayer, then the strike happened. My brothers Hussein and Mohammed and their kids and the neighbours were all killed. Those who were not killed were injured. The only one who survived unharmed is my grandchild, a baby aged four months. I was holding him in my arms and he was not hurt.

We pulled the children out between life and death. My four-year-old granddaughter Ahad’s knee was destroyed. We tried to get her to hospital for five hours but Daesh kept sending us back – Daesh left her to bleed for five hours and there was fighting around and planes in the sky. Eventually we managed to get her to the National Hospital. Later we made it out of Raqqa and she was treated by MSF in Tel Abyad. She’s in Turkey now.

I was injured and so were all my children. My seven-year-old son, Ahmad, was the worst; he suffered severe wounds to his abdomen. He never healed properly as he could not get proper medical care; he needs treatment. My nephew Hussein, who was only three months old, lost his foot. He lost both his parents and also his foot. He needs a prosthetic foot before he learns to walk, so that he can learn properly.

Those killed by the air strike are:

1. Hussein Ibn Ali Hashish, 45 (Munira’s brother)
2. Mohammed Ibn Ali Hashish, 40 (Munira’s brother)
3. Amal, six (Mohammed’s daughter)

42 See footnote 38.
43 Interview with Munira Hashish, Raqqa, 10 February 2018.
44 Ibid.
4. Nour Aayoun, four (Mohammed’s daughter)

As well as:

5. Nidhal Qacem, 25 (Munira’s son-in-law)
6. Manar, three (Nidhal’s daughter)

And three distant relatives who had been sheltering with the Hashish family:

7. Umm Najem
8. Najem, 12 (Umm Najem’s son)
9. Abdallah, 17

Munira does not know why the house was bombed. She told Amnesty:

Daesh was in the area but not specifically in our street. They did not come to our house; it was an Arabic house [one storey], not a tall building, so it wasn’t useful for them. We stayed in the house and kept very quiet, did not put on any light at night to avoid Daesh seeing us, because if they did they would have likely sent us to the centre of town [as human shields]. We didn’t want to go that way; we wanted to stay in our home because the SDF were getting close and we wanted to be liberated.

In the end we managed to escape Dara’iya by walking on the blood of others. We stepped where other people had been blown up, in the hope that there were no more live mines in that spot. It feels terrible but that is what we did. We had no choice.
Satellite images showing the house where nine members of the Hashish family were killed in a Coalition strike, before and after the strike.
OTHER ATTACKS IN THE AREA

While investigating this case, Amnesty International delegates visited the scenes of other strikes and collected information on several other cases of civilians killed in and around their homes in the same neighbourhood around the same time. Some were killed in air or artillery strikes carried out by Coalition forces, while others were killed in mortar strikes seemingly launched by SDF forces. mortar fragments recovered at the sites of these incidents and identified by military experts have been identified by Amnesty International as American 120mm mortars, used by the SDF (IS mostly used their own locally manufactured mortars).45

COALITION REPORTING

Given the witnesses' and survivors' uncertainty about precise dates, Amnesty International examined satellite imagery of the location, as it did for each of the attacks detailed in this report. The satellite imagery confirmed that the Hashish house was destroyed between 19 and 30 August 2017. Expert analysis of the satellite imagery confirmed that the pattern of destruction was consistent with an air strike having occurred. According to open source material, the air strike occurred on 19 August 2017.46 Given that the building was still standing on 18 August, 19 August is considered the most likely date of destruction.

CJTF-OIR released the following information about strikes “Against ISIS Terrorists” in Raqqa on 19 August 2017. It reported carrying out a total of 48 strikes on Raqqa that day:

Near Raqqah, five strikes engaged two ISIS tactical units and destroyed three fighting positions.

On Aug. 19, near Raqqah, Syria, 36 strikes engaged 22 ISIS tactical units and destroyed 29 fighting positions and seven command and control nodes.

On Aug. 19, near Raqqah, Syria, six strikes engaged an ISIS tactical unit and destroyed five fighting positions, an IED, and a command and control node.

On Aug. 19, near Raqqah, Syria, one strike suppressed an ISIS tactical unit.

Some of these strikes were carried out by British aircraft. The British Ministry of Defence released the following information:

Saturday 19 August – Tornados continued to provide close air support to the Syrian Democratic Forces in Raqqah, destroying a terrorist strongpoint.

During the course of the Raqqa operation, the French Defence Ministry occasionally released weekly updates of its activities including the strikes it carried out. It did not release information about the week in question.

45 Photographs of the fragments taken by Amnesty International researchers are on file with the organisation.
46 Facebook page “Raqqa is being slaughtered silently” (Arabic only), posted on 1 September 2017 and available at https://www.facebook.com/Raqqaa.S/posts/1666199833391261
48 Ibid, 20170821 Strike Release.pdf
49 Ibid, 20170822, Strike Release.pdf
50 Ibid, 20170823 Strike Release.pdf
BADRAN FAMILY

THIRTY-NINE CIVILIANS FROM ONE FAMILY AND 10 NEIGHBOURS KILLED IN SEVERAL AIR STRIKES AS THEY FLED FROM NEIGHBOURHOOD TO NEIGHBOURHOOD

“We hid in the rubble until the morning because the planes were circling overhead. In the morning we found Tulip’s body; our baby was dead. We buried her near there, by a tree.”

Rasha Badran, air strikes survivor

The ordeal endured by the Badran family provides a harrowing illustration of what had become a pattern of life for civilians trapped in Raqqa city as the battle raged and front lines shifted around them. Thirty-nine members of the family, from three generations, and 10 neighbours were killed in three separate strikes in the very places where they sought shelter, as they fled from neighbourhood to neighbourhood. They had not followed their relatives who fled early on in the conflict because they did not think the situation would become so bad. As Rasha, one of the survivors explained:

“We thought the forces who came to evict Daesh would know their business and would target Daesh and leave the civilians alone. We were naïve. By the time we realised how dangerous it had become everywhere, it was too late; we were trapped.”

Rasha and Abdulwahab Badran are in their mid and late 20s and were the proud parents of a one-year-old girl called Tulip. “We debated names of several flowers and in the end we chose Tulip”, recalled Rasha. Tulip, their only child, was among those killed in the last of the three strikes the young couple had survived. “She was an amazing baby. We lived on the run and under bombardment for weeks. We couldn’t carry her toys as we moved around, only essentials, but Tulip adjusted very quickly and did not make a fuss. She was a joy”, Rasha told Amnesty International.

52 Interview with Rasha Badran, Raqqa, 16 February 2018.
53 Ibid.
54 Ibid.

Baby Tulip Badran, who was killed along with 27 relatives and five neighbours when the house where her family was sheltering was destroyed in a Coalition strike on 20 August 2017 in Raqqa. © Private
Rasha and Abdulwahab lived in al-Fardous, a neighbourhood to the north-west of the city centre, not far from the stadium and the National Hospital.

We lived in a six-floor building but on the first floor so we thought we would be safe. But then two days before Eid [27th day of Ramadan] at about 9pm or 10pm at least three artillery shells landed in the street outside our building. We ran away and found shelter in a building near the Mara’i bakery. It was a four-storey building and we stayed on the first floor. We spend Eid there but a couple days later the building was hit (unclear if this was artillery or mortar fire) and four of our relatives were injured (two men and two women). So we fled again, but by then we had our injured relatives with us and we needed to find medical care for them and our movement was more restricted – as it was difficult for them to move.

This time the family went a few streets towards the north-east, into the centre of Raqqa near Mansour Street. They only stayed for four days, however, because IS had begun rounding up civilians from the streets to the south of the main thoroughfare (23 February Street) and forcing them to move further west, back towards al-Fardous, Harat al-Badu and Nazlet al-Shehade. Rasha told Amnesty International:

We went to Sharia al-Mansour and we took shelter in a two-storey house but after four days there Daesh forced us to move towards al-Fardous and Harat al-Badu neighbourhoods. So we went to Nazlet al-Shehade. On 18 July we fled from there because the fighting was getting closer. As we were fleeing nine of our relatives were killed in two bombardments – five of them in one of the houses just as they were about to leave and four others in the car. We had just left along with the rest of the women and children while the men were still at the house preparing to leave when the house and the car were bombed.
Members of the Badran family killed in three separate Coalition air strike on 18 July and 20 August 2017 in Raqqa. © Private
THE AIR STRIKES IN NAZLET AL-SHEHADE

FIVE FAMILY MEMBERS (PLUS TWO OTHERS) KILLED IN AN AIR STRIKE ON A HOUSE, FOUR MORE KILLED IN AN AIR STRIKE ON A CAR

IS had forced the Badran family to move to Nazlet al-Shehade. They got there separately, as they had been staying in different neighbourhoods. In Nazlet al-Shehade they stayed in a small house – the men in one room and the women and children in the next room. The Badrans were afraid of the approaching fighting but they knew that IS would shoot them if they tried to escape from the area. Their only chance to leave was to wait until the fighting reached a level that IS were either too engaged in battle or were fleeing the area themselves. On 18 July 2017, with the fighting intensifying in the area, the family took their chance to flee.

The Badrans had access to two cars in which they made several frantic trips, moving the women and children first. During one of these journeys, one of the cars was struck, reportedly by an air strike, killing four male family members inside. At the same time, another air strike destroyed the house where the men had been staying, just as they were waiting for a car to collect them. That strike killed five family members, along with two other men, relatives’ friends whose names the survivors did not know.

Amnesty International visited the destroyed house and spoke to members of the extended family, who had witnessed the strike and later helped to recover the bodies from the rubble. Hussein Ali, who lost his uncle in the strike, told Amnesty International:

I had been staying with my wife’s family near the house where the Badrans were sheltering, along with my aunt’s husband. I went to them that morning [18 July] to ask if they needed anything and they told me that they were just waiting for the car which had taken the women and children to come back to pick them up. The women and children had left a little earlier. They had some bread and food which the women had left for them to take to the place where they were going. By then it was so difficult to find food – they were not going to leave the food behind. At around 10.30am I wished them a safe journey and left. Shortly afterwards the house was bombed. It was an air strike. We were there to see it and the entire house was destroyed. We could not go to the house immediately because artillery shells were landing in the area. How did I know it was artillery? From the sound; it was louder and made a bigger thump than the mortars.

Shortly afterwards, a few streets away we saw the car which had taken the women and children slightly earlier on. It had been struck by an air strike I think, and it was burning. The men inside the car were killed. Initially I only saw two bodies, at the front, and then the other two, at the back.\(^{55}\)

Hussein and some of his relatives returned the following day to look for the bodies and bury them. Another female relative told Amnesty International: “We buried them. There wasn’t one body left intact. We took them out in pieces. We put the piece into plastic bags and we buried them.”\(^{56}\)

Those killed by the air strike on the house at Nazlet al-Shehade:

1. Mohamed Ahmed Badran Ibn Mohammed, 40 (Shamsa’s husband)
2. Daham Badran Ibn Ahmed, 50 (Shamsa’s husband’s brother)
3. Ismael Said, 55 (Sadeeqa’s husband)
4. Ibrahim Said Ibn Ismael, 15 (Sadeeqa’s son)
5. Khaled Badran Ibn Ibrahim, 52
6. An unidentified man
7. An unidentified man

Those killed in the strike on the car while escaping from Nazlet Shehade:

1. Mustafa Mohammed Badran (aka Steif), 14 (Shamsa’s son)
2. Khaled Ismail Said, 17
3. Mohamed Hussein Shamari (Khoud’s son), 24
4. Hassan Dandoush Ibn Hsein (son of Zarifa Sahu)

\(^{55}\) Interview with Hussein Ali, Raqqa, 11 February 2018.

\(^{56}\) Interview with Hussein Ali’s relative, Raqqa, 11 February 2018.
Satellite images showing the house where seven members of the Badran family were killed in a Coalition strike on 18 July 2017, before and after the strike.
**THE AIR STRIKES IN HARAT AL-SAKHANI**

**THIRTY-THREE MEMBERS OF THE BADRAN FAMILY AND OTHER CIVILIANS WERE KILLED IN HARAT AL-SAKHANI**

Rasha, Abdulwahab and other surviving relatives went back to al-Fardous, to be near the hospital so that their injured relatives could get some medical care. Their home in al-Fardous had been destroyed so they stayed in a neighbour’s house next door. They were there for a month but then the hospital ceased to function and they could no longer get bread or water. They went to Harat al-Sakhani neighbourhood in the Old City because they had been told there was a doctor working there.

As Rasha explained, they found the doctor – Dr Sofian Delli – and he did his best to treat their relatives. The family also found two houses to stay in but the area was not safe. On or around 18 August, shortly after arriving, Rasha, Abdulwahab and Tulip and other surviving Badran family members joined other local residents and decided to flee as a group.\(^57\) The group of around 65 got as far as Tal Abyad Street, by the Andalus Bakery, when they encountered three IS fighters who opened fire at them. Dr Delli was killed and his father was injured. The family went back to the houses in Harat al-Sakhani. In Rasha’s own words:

> So we went back to al-Sakhani. We had no other options. Two days later [on 20 August] we were bombed, both houses where we were staying got bombed. Almost everybody was killed. Only I, my husband and his brother and cousin survived. The strike happened at about 7pm. I fainted and when I regained consciousness I heard my husband’s cousin, Mohammed, calling out. I could neither move nor speak. Then my husband and his brother found me. My husband was the most seriously injured – he had a head wound and blood was pouring from his ears. It was dark and we could not see anything. We called out but nobody else answered; nobody moved. It was completely silent except for the planes circling above.

> We hid in the rubble until the morning because the planes were circling overhead. In the morning we found Tulip’s body; our baby was dead. We buried her near there, by a tree.

> Both houses were pulverised; nothing was left standing, there was only rubble. These were simple Arab houses, they were not sturdy. I don’t understand why they bombed us. Didn’t the surveillance planes see that we were civilian families?\(^58\)

Those killed in the main house at Harat al-Sakhani:

Six siblings – six sisters and one brother (Ali):

1. Thuraya Daham bint Mustafa, in her 60s
2. Summaia Daham bint Mustafa, 55 (widowed, without children)
3. Abta bint Mustafa Dahab, in her 50s
4. Ali Badran Ibn Mustafa, 50
5. Khood Daham bint Mustafa, 48
6. Shamsa Daham bint Mustafa, 40 (Shamsa’s husband was killed at Nazlet al-Shehada)
7. Sadeeqa Daham bint Mustafa, 38 (Sadeeqa’s husband was killed at Nazlet al-Shehada)

Thuraya’s son and his family:

8. Ibrahim Daham Ibn Khaleel, late 20s/early 30s
9. Madonna Daham, mid 20s (Ibrahim’s wife – originally from Damascus)
10. Madonna’s son, five
11. Madonna’s other son, three
12. Madonna’s daughter, nine months

Abta’s children:

13. Qaisal Sahoo Ibn Mohammed, 20 (Abta’s son)
14. Mais Sahoo bint Mohammed, 19 (Abta’s daughter)

Khood’s daughter:

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\(^57\) Survivors and witnesses often find it difficult to be precise about dates, amidst the trauma and the break-down in daily routines.

\(^58\) Interview with Rasha Badran, Raqqa, 16 February 2018.
15. Rana Shamari bint Hussein, 18 (Khood’s daughter

Shamsa’s children:

16. Sahar Badran bint Mohammed, 18
17. Saja Badran bint Mohammed, 16
18. Ahmed Badran Ibn Mohammed, 10
19. Hamsa Badran Ibn Mohammed, nine
20. Daham Badran Ibn Mohammed, four
(As well as her husband, Shamsa’s sixth child, Mustafa, was killed previously at Nazlet al-Shehade)

Sadeeqa’a children:

21. Sidra Said bint Ismael, 12
22. Munthir Said Ibn Ismael, 11
23. Aseel Said Ibn Ismael, six
24. Khatooneh Wahab, 75

Four others who were not from the Badran family also were killed:

25. Abu Riad, 60s
26. Souad, 50s (Abu Riad’s wife – originally from Iraq)
27. Maha, mid 20s (daughter of Abu Riad and Souad)
28. Ammina Raqim, 60s (Abu Riad’s sister)

Those killed in the other house across the street at Harat al-Sakhani:

1. Ibrahim Wahab Fahad, in his 70s (a tribal sheikh)
2. Khadeeja Sahoo bint Tayeb, 60 (Ibrahim’s wife)
3. Tulip Fahad, one-year-old (Rasha and Abdulwahab’s daughter)
4. Mohamed Khaeleel Badran, 32-33
5. Senad Dhaba, 19 (originally from Aleppo)

Another family member is also missing. When the family were staying in the al-Fardous neighbourhood (see below), Mohamed Fahad, 72, went out on foot to look for water some 20 days before the strikes on Harat al-Sakhani (in late July 2017) and never returned. The family does not know what happened to him.

THE AIR STRIKE AT AL-FARDOUS

The young couple and their two relatives soon realised that they were the only survivors. After they buried baby Tulip, they left, once again trying to find a safe place to shelter.

[After the air strike on 20 August], we went back to al-Fardous, to the same house as before. Then we tried to escape. Ousama and Mohammed, my husband’s brother and cousin, went to a neighbour to ask if they wanted to join us, so we would go as a group. As they came out from the neighbour’s and were trying to cross the street, a drone struck the road, so they ran back into the neighbour’s house. And immediately then a plane bombed the house (three floors) and destroyed it. Mohamed and Ousama and the owner of the house and two guests were all killed.59

We hid in the basement for three days, then Daesh discovered us and told us to leave. We walked towards the stadium and Harat al-Badu – me, my husband and five neighbours. We stayed in Harat al-Badu for two nights. Then we went to a nearby mosque (al-Nawawi mosque) for one night. There were about 60 or 65 people sheltering in the mosque. Finally, on 17 September at about 4am – we used the time of the morning prayer call to cover the noise of our steps – about 25 of us managed to cross the front line to where the SDF were. The rest could not make it because Daesh snipers started to shoot and they were forced to go back. I don’t know how many of them made it out alive, if any were killed by Daesh or by the Coalition bombardments.60

After weeks of hiding and fleeing the young couple finally managed to reach safety. They had lost their baby and 38 other family members in the ordeal.

59 Unlike the sites of the strikes in Nazlet al-Shehade and Harat al-Sakhani, Amnesty International was unable to visit the site of the al-Fardous strikes, where according to the testimonies of the witnesses interviewed by Amnesty International, five civilians were killed in an air strike.

60 Interview with Rasha Badran, Raqa, 16 February 2018.
Satellite images showing the house where 28 members of the Badran family and five neighbours were killed in a Coalition strike on 20 August 2017, before and after the strike.
COALITION REPORTING

CJTF-OIR released the following information about strikes “Against ISIS Terrorists” in Raqqa on 18 July and 20 August 2017. It reported carrying out a total of 30 strikes in Raqqa that day:

On July 18 – Near Raqqah, 12 strikes engaged 11 ISIS tactical units and destroyed nine fighting positions, two vehicles and a tactical vehicle.  

On July 18, near Raqqah, Syria, 18 strikes engaged 12 ISIS tactical units; destroyed 18 fighting positions, an anti-aircraft artillery system, a weapons cache, and a sniper position; and damaged a fighting position and a supply route.

CJTF-OIR released the following information about strikes “Against ISIS Terrorists” in Raqqa on 20 August 2017. It reported carrying out a total of 54 strikes in Raqqa that day:

On Aug. 20 – Near Raqqah, 21 strikes engaged 14 ISIS tactical units and destroyed 22 fighting positions, two UAS staging areas, two heavy machine guns, a vehicle and an explosives cache.

On Aug. 20, near Raqqah, Syria, 33 strikes engaged 21 ISIS tactical units and destroyed 41 fighting positions, five command and control nodes, an IED, an ISIS headquarters, two supply caches, ISIS engineering equipment and an ISIS UAS.

The British Ministry of Defence also reported carrying out air strikes on at least two targets in Raqqa on 20 August, with the following update:

Sunday 20 August, Typhoons bombed a further Daesh position in Raqqah.

The French Defence Ministry did not release information about its activities during the weeks of 18 July 2017 or 20 August 2017.

Incident reporting for the late August and early September (the survivors could not recall the exact date of the strike in al-Fardous which killed Ousama and Mohammed Badran and three others) is similarly vague, providing no indication of whether the reported strikes could be the same as those which killed the members of the Badran family.

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62 Ibid, 20170720 Strike Releases.pdf
64 Ibid, 20170822 Strike Release.pdf

"WAR OF ANNIHILATION"  
DEVASTATING TOLL ON CIVILIANS, RAQQA – SYRIA
Amnesty International
FAYAD FAMILY
SIXTEEN FAMILY MEMBERS AND NEIGHBOURS KILLED IN TWO SIMULTANEOUS AIR STRIKES

“He insisted that he had lived here for 50 years and would not be evicted by these people who had taken control of the city and who he considered illiterate, ignorant and extremists.”

“Fares” Fayad, air strikes survivor

No one knows his exact age, but Fayad Mohammed Saif was in his 80s when he was killed on 12 October 2017 together with his three daughters and 11 other relatives and acquaintances. His house and that of his brother-in-law, Hussein Hamad Fares, across the small street, where other relatives and neighbours were sheltering, were struck by Coalition planes just as a truce was being implemented which three days later would see the remaining hundreds of IS fighters being allowed to leave Raqqa in safety and with complete impunity.

Fayad was known as Abu Saif, (“Saif’s Father”, after his eldest son). He had married late for a man of his generation, in his late 30s or early 40s, upon his return from working in Kuwait. Abu Saif had lived in his house for at least four decades, since before there were any tall buildings in the area. He had been in Harat al-Badu so long that local people refer to the street he lived on as “Abu Saif Street”.

Initially Abu Saif had worked as a supplier of materials to the building trade. Later he supplied produce to supermarkets. After working all his life, he was a man of considerable financial means. A religious man who loved to pray, he used to complain that IS militants talked in the name of a religion they knew nothing about. Every Monday and Thursday throughout the entire three-and-a-half years of IS rule in Raqqa, Abu Saif made a point of shaving, as he always had - defying IS’s rules which demanded that men grow long beards. “It was his way of resisting and showing defiance,” his relatives told Amnesty International. IS seemed to tolerate him, but only because of his age and the respect he commanded in the neighbourhood. He even had a secret internet connection in his home - an “offence” warranting a severe punishment under IS if discovered.

He loved to be with children. A neighbour’s child told Amnesty International: “He made us laugh by joking and singing silly songs”.

Abu Saif used to tell his children that they were the only things that mattered to him, as well as his house, and that the rest was up to God. He refused to leave his house when the military operation to recapture Raqqa began (in early June 2017). “He insisted that he had lived here for 50 years and would not be evicted by these people who had taken control of the city and who he considered illiterate, ignorant and extremists,” his relative told Amnesty International. Most of his children stayed with him during the siege, and some left with their own families. They stayed mostly indoors, in the large, one-storey house, surviving mainly on dates and bread and using a secret internet connection to communicate with family members outside the city. They had money but there was not much food to buy.

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66 Interview with “Fares” Fayad (real name withheld for security reasons), Raqqa, 11 February 2018.
67 Anyone caught with phone or internet connection would be suspected of spying against IS and risked being killed.
68 Interview with Mohammed, 13, Abu Saif’s neighbour, Raqqa, 11 February 2018.
69 Interview with “Fares” Fayad (real name withheld for security reasons), Raqqa, 11 February 2018.

“WAR OF ANNIHILATION”
DEVASTATING TOLL ON CIVILIANS, RAQQA – SYRIA
Amnesty International
Fayad Mohammed and his daughters Wafa’, Fadda and Tanam; Anmar al-Faris; Reem al-Maddad, Yusra Abd-al-Aziz, and baby Razquia Habib; Jasim Hamal and Salem Hamadi. They were among the 16 civilians killed in Coalition air strikes on 12 October 2017 in Raqqa.
THE FINAL STAGES OF BATTLE

Harat al-Badu, a built-up area in central Raqqa, next to the stadium, was the scene of the final battle in the city between SDF-Coalition forces and IS. As in other parts of Raqqa, IS restricted people's movements out of Harat al-Badu from the beginning of the conflict. As the SDF took control of more and more of the city, IS fighters retreated to the area around the stadium, including the Harat al-Badu neighbourhood. IS fighters also redoubled efforts to force civilians from other areas into Harat al-Badu in order to use them as human shields. As a result, the number of civilians in Harat al-Badu during the closing stages of the battle was high and fleeing had become even more difficult. Ammar Amero, a taxi driver who remained in his home throughout the siege, told Amnesty International, “every house was full of people – in many houses both IS and civilians.”

THE INITIAL TRUCE

In early October IS militants informed civilians in Harat al-Badu that there would be a truce between them and the SDF surrounding the neighbourhood, under which both IS fighters and civilians would be allowed to leave the area. Local IS fighters also informed people, however, that, although the SDF were prepared to allow Syrian IS fighters to leave, they did not want to extend the privilege to foreign fighters. According to those in the area at the time, there were many Tunisian and Saudi fighters within IS ranks in Harat al-Badu, along with Syrian IS members from Homs and Aleppo.

The truce came into effect on 9 or 10 October 2017. It was supposed to hold for three days before both IS and the trapped civilians would be allowed to leave, but it did not last. Residents told Amnesty International that at around 4pm on 11 October some IS fighters fired mortars and rifles in the direction of the SDF forces in what locals believe was a deliberate attempt by foreign die-hard fighters to break the truce. Taxi driver Ammar, for example, put this down to disunity between local IS members and foreign fighters, who were suspicious about the terms of the truce. After the truce was broken, other IS members went looking for those responsible. The SDF and the Coalition responded almost immediately with artillery and air strikes. Residents told Amnesty International that it was a ferocious assault, which lasted throughout the evening and night.

THE AIR STRIKES

“I felt the roof of the house collapse on me... I called my wife, my mother, my daughter, but nobody answered... I realised that everybody was dead.”

Ali Habib, a taxi driver and father of six

Abu Saif’s house and that of Hussein Hamad Fares, across the small street, were among the last houses struck in the early hours of 12 October 2018. Among those sheltering in Hussein Hamad Fares’ house were Ali Habib and his family. His wife, his baby daughter and his mother were killed, along with Hussein Hamad Fares, his son Ammar and five other neighbours who were sheltering there. Ali Habib and his five-year-old son survived, both seriously injured.

In addition to his own family, Ali Habib, a taxi driver and father of six, was also looking after his half-brother and four half-sisters and his bedridden step-mother. He could not afford to pay smugglers to take his family out of Raqqa. As many other residents, the family left their home and tried to find safety where they could. He told Amnesty International:

“When the war started in Raqqa we first went to stay near the river, on the north side of the river, by the old bridge. We stayed there for 21 days in a tent. But just after Eid, Daesh forced us to move from there back into the city.”

The family then moved to Harat al-Kuwait but had to move again after two days because the area came

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70 Interview with Ammar Amero, Raqqa, 11 February 2018.
71 Interview with Ali Habib, near Raqqa, 14 February 2018.

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under mortars and artillery fire and air strikes. The two-storey house they were sheltering in took a direct hit and the family fled to Intifada Street, but there too they soon came under fire. After five days they fled to Harat al-Badu, first sheltering in an empty apartment they found in a four-storey building. After the ceasefire was first announced, around 10 October, the family tried once again to flee but only Ali Habib’s brother managed, with Ali Habib’s three oldest daughters and his oldest son. Ali Habib and the rest of the family were forced back by IS sniper fire, and they returned to the same apartment they had just left. As the ceasefire collapsed on the evening of 11 October, the shelling and air strikes intensified. Ali Habib told Amnesty International:

We first sheltered in an empty apartment in a four-storey building. At 3am the building opposite us was hit by an air strike and collapsed. Shrapnel was flying everywhere and my little boy and I were both injured by shrapnel. We were terrified. At 4am we tried to leave. Only my father’s wife stayed because she could not move and one of her daughters stayed with her. My small car was destroyed in that bombing so I could not move my father’s wife. My half-siblings decided to take shelter in a nearby building and me and my wife and our children and my mother went to Abu Saif (Fayad). We asked for shelter and Ammar told me that we could stay in his father’s house (opposite Abu Saif’s house). I knocked there and his father, Hussein, welcomed us.

Shortly after we arrived there the bombing happened. I was sitting on a chair holding my little boy (five years old) and the women were sitting on the floor, huddled together. I felt the roof of the house collapse on me. I could not move and my little boy was not next to me anymore. I called Haj Hussein, then I called my wife, my mother, my daughter, but nobody answered. One of the neighbours who was sheltering in the house was lying next to me. He was barely alive and died almost immediately. I felt the roof of the house collapse on me. I called my wife, my mother, my daughter, but nobody answered… I realised that everybody was dead.

I realised that everybody was dead. Then my boy, Mohammed, called out and that gave me the strength to free myself from the rubble and go to him. He had been thrown some 10m away by the explosion. We were both injured. I fainted and when I regained consciousness I heard voices on the other side of the rubble which was all around me and my boy and I called for help and eventually people removed some of the rubble and pulled us out. Later that day, at about 4pm, we heard that there would be another truce.72

Ammar Amero, a neighbour of Abu Saif who was in the area and helped recover the bodies of Abu Saif and his family from the rubble, told Amnesty International:

When they [IS] broke the truce I was in a cellar with my family, relatives and neighbours around the corner and down the street from Abu Saif’s house. I came out at 8.30-9am to see who had been killed and who needed help. In the street outside my house I met an Egyptian IS member who told me that the truce had been re-established and after three days we could all leave.

A little further down the road I came across a civilian who told me that Abu Saif’s house had been flattened to the ground. I was walking with a stick as I was disabled – it was a psychological condition I suffered after the death of my son. I hobbled around the corner and found the house flattened. There was a Syrian IS fighter in the street. He told me that he had come up out of a basement in order to pray at around 4.30am and that the house had not been hit then. It must have been the last house they hit before the bombardments stopped at 5am. I found the bottom half of Abu Saif in the rubble. Um Abdalla was also visible in the rubble but her legs were trapped under it. She was dead.73

Those that were killed in Abu Saif’s house are as follows:

1. Fayad Mohammed Saif (Abu Saif), over 80
2. Um Abdalá, 42 or 43 (Abu Saif’s sister)
3. Wafa’ Mohammed bint Fayad, late 40s (Abu Saif’s daughter)
4. Fadda Mohammed bint Fayad, 40 (Abu Saif’s daughter)
5. Tamam Mohammed bint Fayad 20 (Abu Saif’s youngest daughter)

Those killed in the air strike that destroyed the house across the street from Abu Saif’s house:

1. Hussein Hamad Faris Ibn Moussa, 60 (Abu Saif’s brother-in-law)
2. Ammar Hamad Faris, 32 (Ammar’s wife and child survived as they were out of Raqqa)

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72 Interview with Ali Habib, near Raqqa, 14 February 2018.
73 Interview with Ammar Amero, Raqqa, 11 February 2018.
THE STRIKES ON THE WATER POINTS

During the siege, which lasted several weeks, Harat al-Badu was subject to multiple air strikes, although they were not as intense as the night before the truce, when Abu Saif and his family were killed. The apartment block in which Ammar lived was damaged by an air strike, so he took shelter in a nearby basement with many other people. He told Amnesty International that on “the second or third day of Eid” [26-27 June 2017] an air strike killed 20-25 people, mainly civilians but some IS too, at a communal water point, around the corner from Abu Saif’s house. As elsewhere, IS had installed taps in the street connected to a nearby well, where people – civilians and IS alike – went to fill their jerry cans before returning to their shelters. Ammar did not know the names of those killed as they had been brought to Harat al-Badu by IS from other areas.

A few weeks later, on Wednesday 16 August 2017, Ammar Amero’s son Mirbat was killed by an air strike on another set of public taps a few streets away as he went to get water for the family. Ammar told Amnesty International:

“A plane came and targeted the taps as there was a crowd there. The crowd was mixed between civilians and IS. Water was not available at the well every day and when it was available it would only come on for two hours at a time – from 8-10am and then again between 3-4pm. That’s why there was a crowd at the well. When I came to the scene I found my son with a shrapnel wound in his shoulder. I took him to the National Hospital and waited two hours while he bled to death. They [IS] told us there were no doctors and no one with expertise.”

Workmen are rebuilding the Fayad family home, which was destroyed in a Coalition air strike on 12 October 2017 in Raqqa.

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Interview with Ammar Amero, Raqqa, 11 February 2018.
THE DEAL GRANTING IS FIGHTERS SAFE PASSAGE

“When we heard that there was a truce and we would be allowed to leave Raqqa, we thought this was for us, the civilians, but when the buses came we realised they were for Daesh.”

Jamira, mother of two, trapped in Harat-al-Badu

It seems the intense shelling the night between 11 and 12 October persuaded the surviving IS elements in Harat al-Badu to re-establish the truce with the SDF which had been broken the previous day. Residents told Amnesty International that around dawn on 12 October, IS fighters in Harat al-Badu informed civilians that the truce was in place and that everyone would soon be able to leave. This proved to be the case; shortly after, the SDF allowed everyone out of Harat al-Badu and out of Raqqa. They took all the remaining IS fighters – both the Syrians and the foreigners – and their families out on buses.

On 14 October, the Coalition issued the following statement:

A convoy of vehicles is staged to depart Raqqa Oct. 14 under an arrangement brokered by the Raqqa Civil Council and local Arab tribal elders Oct. 12. The arrangement is designed to minimise civilian casualties and purportedly excludes foreign Daesh terrorists as people trapped in the city continue to flee the impending fall of Daesh’s so-called capital. People departing Raqqa under the arrangement are subject to search and screening by Syrian Democratic Forces. The Coalition was not involved in the discussions that led to the arrangement, but believes it will save innocent lives and allow Syrian Democratic Forces and the Coalition to focus on defeating Daesh terrorists in Raqqa with less risk of civilian casualties. We do not condone any arrangement that allows Daesh terrorists to escape Raqqa without facing justice, only to resurface somewhere else...

The title of the Coalition statement, “Raqqa Civil Council and Tribal Elders Arrange Civilian Evacuation to Reduce Civilian Casualties”, is misleading in more ways than one. It refers only to the evacuation of civilians and does not mention the hundreds of IS fighters whose impunity and safe passage out of Raqqa was the primary condition for the evacuation of the civilians. It states that “People departing Raqqa under the arrangement are subject to search and screening by Syrian Democratic Forces”, but fails to mention that IS fighters were allowed to take large quantities of weapons with them.

The Coalition presented the deal as negotiated between the SDF and local tribal leaders, although Coalition representatives were reportedly present as the agreement was discussed. It is difficult to imagine that the deal could have been concluded without the Coalition’s agreement; as the only party with air power over the city and surrounding areas, the IS convoy’s safe passage was dependent upon Coalition agreement not to attack it.

Furthermore, civilians who were trapped in Harat-al-Badu until the end told Amnesty International that IS fighters were evacuated before the civilians. Jamila, a mother of two, said: “When we heard that there was a truce and we would be allowed to leave Raqqa, we thought this was for us, the civilians, but then when the buses came we realised they were for Daesh. We had to make our own way out of the city. I couldn’t believe it, but we were happy to get out by whatever means.”

Amnesty International

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Satellite images showing the houses where 16 members of the Fayad family and neighbours were killed in Coalition strikes on 12 October 2017, before and after the strike.
Maha, a 20-year-old student, said: “Me, my two sisters and my brother left with the Daesh convoy. We just followed the tail of the convoy because we did not want to miss the opportunity to get out the city. When we got out of Raqqa we went our own way.”

**COALITION REPORTING**

The CJTF-OIR released the following information about strikes “Against ISIS Terrorists” in Raqqa on 12 October 2017. It reported carrying out a total of 29 strikes in Raqqa that day.

*Near Ar Raqqah, 25 strikes engaged nine ISIS tactical units, suppressed one fighting position, destroyed two communications nodes, 10 fighting positions, one vehicle and one ISIS supply road.*

*Oct.12 – Near Raqqah, Syria, four strikes destroyed three ISIS lines of communication and one fighting position.*

At least two of these strikes were from British aircraft. The British Ministry of Defence released the following information:

> The SDF, supported by the Coalition, continue to make good progress towards the fall of Raqqah, having now cleared around 90% of the city. The RAF have played a pivotal role in this, striking 213 targets in and around Raqqah since the start of the SDF offensive. This included 2 Tornado GR4s providing close air support to the SDF in Raqqah on 12 October. A Paveway IV guided bomb was deployed to target the upper storeys of a building from which a Daesh sniper was firing, and a second weapon struck another building from which terrorists were engaged in a combat with the SDF.

The French Defence Ministry did not release information about its activities during the week of 12 October 2017.

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79 Interview with Maha, near Raqqah, 14 February 2018.
CJTF-OIR has sought to present itself as an international Coalition with broad-based support from nations and institutions around the world. Referring to itself as “the Global Coalition”, it boasts membership of 71 countries and four inter-governmental organisations; an eclectic alliance including nations as diverse as Panama and Poland, Australia and Afghanistan. Some Coalition members, Chad or example, or Niger, are likely to have given support in name only. Others, particularly European states, were more deeply involved, although the exact extent of their actions is not always clear.

However, contrary to its motto, “One Mission, Many Nations”, military action taken in the name of CJTF-OIR to wrest control of Raqqa from IS was an overwhelmingly US military affair. Throughout the battle, the staff of III Corps served as the headquarters element for CJTF-OIR at Camp Arifjan in Kuwait, and the campaign was led by a US three-star general, Lieutenant General Stephen Townsend; the US deployed some 2,000 of its own troops to north-eastern Syria, many of whom were engaged in direct combat operations, notably firing artillery into Raqqa from positions outside the city. In addition, a smaller number of special forces were operating close to front lines alongside SDF members. British and French special forces were also deployed to the area, but in much smaller numbers.

Among the US deployment were Army High Mobility Artillery Rocket Systems (HIMARS) with GPS-directed 227mm rockets, which could be fired from 300km away, as well as hundreds of Marines from the 11th Marine Expeditionary Unit (MEU) and the 24th MEU equipped with M777 howitzers, which they used to rain down 155mm artillery fire upon the city from a distance of up to 30km. The US military was the only

5. JOINT COALITION-SDF MILITARY OPERATION IN RAQQA

“WAR OF ANNIHILATION” DEVASTATING TOLL ON CIVILIANS, RAQQA – SYRIA

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Coalition partner with artillery capacity during the battle for Raqqah and was therefore responsible for all artillery strikes into the city.

Despite a Coalition made up of over 70 nations, the only countries to conduct air strikes on and around Raqqah were the USA, Britain and France. The Coalition launched tens of thousands of strikes on Raqqah during the military campaign. Of these, more than 4,000 were air strikes, almost all of them carried out by US forces. British forces carried out some 215 air strikes, while the French military was responsible for some 50 air strikes, with the overwhelming majority – more than 90% – carried out by US piloted aircraft and drones. No other members of the Coalition are known to have carried out air strikes in Raqqah. At the same time, US Marines launched tens of thousands artillery shells into and around Raqqah.

The SDF provided the ground troops needed to push into the city on foot. They were armed with assault rifles, rocket-propelled grenades (RPGs), and 120mm mortars, provided by the US. They have no air power and are not known to have had artillery capacity during the Raqqah military operation. While Coalition forces operated mostly from positions several kilometres outside the city, a small number of special operation forces from Coalition member states – notably the US, UK and France – operated alongside the SDF close to front line position in/around the city, reportedly mostly in an advisory rather than combat role.

The SDF were partly responsible for locating targets for Coalition air and artillery strikes. It is not clear what percentage of the Coalition air and artillery strikes were carried out based on co-ordinates provided by the SDF – as opposed to strikes on targets identified by Coalition forces themselves through air surveillance or other means – and the extent to which Coalition forces verified targets identified by the SDF prior to launching strikes on those targets.

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40 Per CJTF-OIR methodology, strikes are carried out by “fighter, attack, bomber, rotary-wing, or remotely piloted aircraft, rocket propelled artillery and ground-based tactical artillery,” and are defined as “one or more kinetic engagements that occur in roughly the same geographic location to produce a single, sometimes cumulative effect in that location. For example, a single aircraft delivering a single weapon against a lone ISIS vehicle is one strike, but so is multiple aircraft delivering dozens of weapons against a group of ISIS-held buildings and weapon systems in a compound”, see: CJTF-OIR, Release 20171211-01, 11 December 2017, available at http://www.inherentresolve.mil/Portals/14/12Dec/2017/20171211%20release%20release.pdf?ver=2017-12-11-033135-947
43 Information about the strikes carried out by French forces, published by the French Ministère des Armées, available at https://www.facebook.com/notes/arm%C3%A9e-fran%C3%A7aise-op%C3%A9rations-militaires/point-de-situation-des-op%C3%A9rations-francaises/1434338239945330/
44 Amnesty International researchers saw numerous fragments of American 120mm mortars used by the SDF all over Raqqah. SDF members confirmed to Amnesty International that they were using mostly US-supplied mortars. Also see: “They’re still pulling the bodies out of ISIS’ capital” by airwars.org’s Samuel Oakford, 12 March 2018, The Daily Beast, available at https://www.thedailybeast.com/theyre-still-pulling-bodies-out-of-isis-capital?ref=author.
45 “Coalition SDF are in Raqqah, and they are close to the front lines,” said Col. Ryan Dillon, a spokesperson for the U.S.-led coalition battling ISIS in Syria and Iraq, in “Boots on the ground: Elite U.S. troops are in Raqqah near the Islamic State’s front line”, Military Times, 9 June 2017, available at https://www.militarytimes.com/news/pentagon-congress/2017/06/09/boots-on-the-ground-elite-u-s-troops-are-in-raqqa-near-the-islamic-state-s-front-line/
46 “SASF soldiers, who have been working with the Syrian Democratic Forces (SDF) in northern Syria, are understood to be on the ground in a supporting role,” in “SASF helps launch dawn assault in final battle to capture Raqqah”, The Times, 7 June 2017, available at https://www.thetimes.co.uk/article/sas-help-launch-dawn-assault-as-final-push-on-raqqa-begins-99652385
Unexploded MK 82 bomb, dropped by the Coalition, in a street in the centre of Raqqa. Months after the recapture of Raqqa unexploded munitions still littered Raqqa, in places where they posed a threat to civilians and where they could have easily been removed. © Amnesty International

Unexploded MK 82 bomb dropped by the Coalition, which was subsequently rigged by IS and turned into a large IED, surrounded by six mortars locally produced by IS. © Amnesty International

“WAR OF ANNIHILATION”
DESTRUCTIVE TOLL ON CIVILIANS, RAQQA – SYRIA
Amnesty International
**KEY WEAPONS USED IN RAQQA BY THE WARRING PARTIES**

**MK 82 AND MK 84 BOMBS**

Manufacturers: US, UK, France  
Users: US, UK, France  
Net Explosive Weight: 199.5lb (90kg) / 992lb (450kg)²⁵  
Minimum Safe Distance: 584m / 997m²⁶  
Standard Mk 82 500lb bombs and Mk 84 2,000lb bombs can be fitted with Paveway II/IV kits to become laser-guided bombs, or JDAM tail kits to become GPS-guided weapons. Both bombs then have a circular error probable (CEP) of less than 5m.³⁷

**AGM-114 HELLFIRE GUIDED MISSILE**

Manufacturer: US  
User: US, UK  
Net Explosive Weight: 10kg  
Minimum Safe Distance: 280m  
These guided missiles are the standard armament of MQ-1 Predator and MQ-9 Reaper drones.

**M795 155MM ARTILLERY PROJECTILE**

Manufacturer: US  
User: US  
Net Explosive Weight: 14.3kg  
Minimum Safe Distance: 316m  
Using M777 howitzers, the US fired 100% of the artillery rounds into Raqqa, the majority of which were unguided M795 high-explosive projectiles, with a CEP of over a hundred meters. Some of the M795s were fitted with M1156 Precision Guided Kits (PGKs), which reduce the CEP to 10m, but because they cost USD8,000 per kit, ten times the amount of a standard projectile fuze, few have been purchased by the US Army or Marine Corps, and they constituted a relatively small percentage of the weapons used.⁹⁸

**M934 120MM MORTARS**

Manufacturer: US  
User: SDF  
Net Explosive Weight: 3kg  
Minimum Safe Distance: 190m  
The standard 120mm mortar of the US military, with a range of approximately four miles, these weapons were provided to the SDF for their use.⁹⁹ They can be identified by the M1020 ignition cartridges on the tail booms that survive detonation.

**220MM MORTARS**

Manufacturer: IS  
User: IS  
Net Explosive Weight: Approximately 9kg  
Minimum Safe Distance: 270m  
IS designed and manufactured these mortars in factories across their territory. They are often filled with a homemade explosive using precursors imported from Turkey.¹⁰⁰ In addition to the munitions highlighted above, Amnesty International researchers identified a variety of small arms and other weapons used by the combatants in Raqqa, including Yugoslavian M79 Osa rockets, M60 High-explosive Anti-tank (HEAT) recoilless rifles, and M74 120mm mortars; Soviet TM-62 anti-tank landmines, F-853U 160mm mortars, and 122mm artillery projectiles; and 81mm and 60mm mortars, PG-7 and PG-9 rocket-propelled grenades, and AK-pattern rifles from several countries.

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²⁵ All ordnance explosive weights, except where noted, available at orddata.info, a project of James Madison University’s Center for International Stabilization and Recovery.

²⁶ Minimum safe distances calculated based upon the net explosive weight of the munition and a k-factor of 328, the “absolute safe distance” standard used by the US Department of Defense, available at https://www.dau.mil/cps/edu/cpsource%20documents/K%20Factor.pdf.


⁹⁸ For an analysis of costs per fuze, and the numbers purchased by the Department of Defense, see https://www.nytimes.com/2018/05/01/magazine/army-artillery-budget-howitzer.html.

⁹⁹ See https://www.globalsecurity.org/military/systems/ground/m120-specs.htm.

¹⁰⁰ Per conversation with Damien Spleeters, Head of Regional Operations in Iraq and Syria for Conflict Armament Research. CAR has documented the existence of the same IS mortars in Tal Afar and al Qa'im, and the extensive use of Turkish precursors in IS-manufactured weapons throughout their area of control. See: www.conflictarm.com/download-file?report_id=2568&file_id=2574
6. COALITION RESPONSES TO CONCERNS OVER CIVILIAN CASUALTIES

“We are the good guys and the innocent people on the battlefield know the difference.”

James Mattis, US Defense Secretary

Officials representing CJTF-OIR led by the US have consistently failed to acknowledge the extent of the damage – human and material – wrought on the civilian population of Raqqa by the air and artillery strikes launched by Coalition forces, as have their civilian superiors. On the contrary, Coalition officials have repeatedly dismissed reports of civilian casualties as unfounded. Amnesty International has requested detailed information from CJTF-OIR about the strikes detailed in this report, and about all the strikes carried out by coalition forces, including exact dates, locations and munitions used, and about any investigations carried out so far. No response was received at the time of writing this report.

Nine days before the Coalition’s Raqqa offensive began, on 28 May 2017, US Defense Secretary James Mattis appeared on national television in the US and called for a “war of annihilation” against IS. When asked about civilian casualties he responded: “Civilian casualties are a fact of life in this sort of situation... We do everything humanly possible consistent with military necessity, taking many chances to avoid civilian casualties at all costs.” Eleven days after this statement US forces fired white phosphorus munitions over the Jezra intersection and the battle was underway.

As mentioned earlier, Amnesty International’s August 2017 report detailed its concerns about civilian casualties from seemingly disproportionate or otherwise indiscriminate Coalition attacks, notably artillery...
strikes, at the time that the military operation was still under way.\textsuperscript{106} A Coalition official dismissed the concerns raised by Amnesty International and by the UN Special Advisor on Syria, who had called for a pause in hostilities to allow civilians out of the city.\textsuperscript{106} The Commander of Coalition forces, Lieutenant General Stephen Townsend acknowledged that, after an escalation in attacks, “it is logical to assume there has been some increase in civilian casualties”, before going on to cast doubt over Amnesty International’s findings, saying, “I would ask someone to show me hard information.”\textsuperscript{107} He further stated: “I think we are being as careful as we need to be and as we can be, and I would challenge the individual from the UN who made this hyperbolic statement that civilian casualties are staggering. Show me some evidence of that.”\textsuperscript{108} US Defense Secretary James Mattis’ only response was: “We are the good guys and the innocent people on the battlefield know the difference.”\textsuperscript{109}

Following this in September 2017 and at the height of conflict in Raqqa, Lieutenant General Stephen Townsend wrote that “…there has never been a more precise air campaign in the history of armed conflict”, \textsuperscript{110} repeating a claim he had made at the start of the Raqqa campaign.\textsuperscript{111} He went on to claim that reports of civilian casualties “…are often unsupported by fact and serve only to strengthen the Islamic State’s hold on civilians, placing civilians at greater risk… Our critics are unable to conduct the detailed assessments the Coalition does. They arguably often rely on scant information phoned-in or posted by questionable sources.”\textsuperscript{112}

A change of leadership does not appear to have brought a change of attitudes. In September 2017 Lieutenant General Stephen Townsend was replaced as Coalition commander by Lieutenant General Paul E. Funk II. In a December 2017 interview Lieutenant General Funk II also defended the accuracy of the air

\textsuperscript{111} Ibid.
\textsuperscript{112} “Reports of civilian casualties in the war against ISIS are vastly inflated”, Foreign Policy, 15 September 2017, available at http://foreignpolicy.com/2017/09/15/reports-of-civilian-casualties-from-coalition-strikes-on-isis-are-vastly-inflated-f-t-gen-townsend-cjtf-oir/
\textsuperscript{113} “Reports of civilian casualties in the war against ISIS are vastly inflated”, Foreign Policy, 15 September 2017, available at http://foreignpolicy.com/2017/09/15/reports-of-civilian-casualties-from-coalition-strikes-on-isis-are-vastly-inflated-f-t-gen-townsend-cjtf-oir/
campaign, claiming that Coalition forces take “immense steps” to prevent civilian casualties. The General went on to blame IS for hiding amongst civilians, saying, “When the enemy uses civilians as human shields, it’s incredibly hard not to have civilian casualties. Our procedures are sound.”

The UK government, meanwhile, continues to be in denial about the realities of conducting air strikes in populated urban settings. On 8 January 2018, in response to a question by a Member of Parliament about “the number of civilian casualties in Syria as a result of UK air strikes”, the Ministry of Defence responded that:

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

These statements fail to recognise that it is the Coalition’s investigation methodology which is deficient, for it does not include visits to the sites of the alleged strikes or interviews with witnesses or survivors and their families. Even though since the end of September 2017 CJTF-OIR monthly casualty reports contain wording indicating an improvement in its methodology to include “site visits and interviews with witnesses, where possible”, such provisions do not appear to have yet been implemented. Site visits are a crucial element of investigations as they provide the opportunity to examine munition impact and pattern of destruction at the concerned location and in surrounding areas, observation of munition fragments and other material which can contribute to understanding of the dynamics at the time of the strike. Interviews with survivors, witnesses and relatives of victims are equally crucial for understanding events leading up to and during the strikes. Furthermore, site visits are necessary to proactively discover information about strikes which may not have been brought to the Coalition’s attention having not been reported by media or other sources.

The Coalition relies upon a “preponderance of evidence” test in order to determine whether an allegation that it harmed a civilian is credible or not. The Coalition lists most allegations that it caused civilian casualties as “non-credible”. So far in 2018, for example, CJTF-OIR has published the results of 452 “reviews of facts and circumstances” into allegations that it caused civilian casualties mainly in 2017. Of these, only 19 were deemed credible. The remaining 433 were deemed “non-credible”, a rate of 95.62%. The low credibility count suggests that some, possibly many, allegations may be dismissed before all necessary efforts are deployed to investigate them. Undercounting civilian casualties could result in underestimating potential harm to civilians in future Coalition operations, as civilian casualty mitigation procedures require military units to learn from their civilian casualty assessments and incorporate that learning into planning future operations.

During its field investigation in Raqqa, Amnesty International delegates visited dozens of Coalition strike sites in every district in the city and spoke to more than 100 residents who had survived or witnessed Coalition strikes. None of them had been interviewed or contacted by Coalition forces’ investigators, neither in Raqqa nor while they were in camps for displaced persons prior to their return to the city, nor were any of them


114 The UK has a long history of denying causing civilian deaths with its air strikes against the so-called IS. Back in 2016 it released information following a Freedom of Information request, claiming to have killed almost 1,000 IS fighters in Iraq and Syria in 1,000 strikes carried out between September 2014 and March 2016 and not a single civilian. See, https://www.independent.co.uk/news/uk/home-news/iraq-syria-air-strikes-civilians-casualties-killed-isis-daesh-islamic-state-air-wars-a7008276.html


On 2 May 2018, the UK government for the first time admitted that one of its air strikes in March 2018 in Syria had caused one civilian casualty. See, “Syria war: MoD admits civilian died in RAF strike on Islamic State”, BBC, 2 May 2018, available at http://www.bbc.co.uk/news/uk-43977394


120 Ibid – six allegations were deemed credible in January 2018, four in February 2018, six in March 2018 and three in April 2018.

121 Ibid – 207 allegations were deemed non-credible in January 2018, 102 in February 2018, 78 in March 2018 and 46 in April 2018.


“WAR OF ANNihilation” DEVASTATING TOLL ON CIVILIANS, RAQQA – SYRIA

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aware of any Coalition investigators having visited any strike sites anywhere in the city or having interviewed survivors or witnesses of other strikes. Such shortcomings in the investigation methodology appear to be a significant contributing factor to its dismissal of almost all the reports of civilian fatalities and casualties.

“[Image of destroyed buildings in Raqqa]”

122 “The Coalition conducted a total of 29,070 strikes between August 2014 and January 2018. During this period, the total number of reports of possible civilian casualties was 2,015. The total number of credible reports of civilian casualties during this time period was 218.” The figures refer to the total number of acknowledged Coalition strikes in all locations in Iraq and Syria. There is no specific report just for Raqqa. CJTF-OIR “Monthly civilian casualty report”, February 22 2018, available at http://www.inherentresolve.mil/News/News-Releases/News-Article-View/Article/1447350/cjtf-oir-monthly-civilian-casualty-report/
7. DIRE HUMANITARIAN SITUATION

"Why were those who spent so much on a costly military campaign which destroyed the city not providing the relief so desperately needed?"123

Raqqa residents

Eight months on from the end the military campaign, most of Raqqa’s residents remain displaced. Those who have returned live in dire conditions among the rubble and the stench of corpses trapped beneath. Unexploded ordnance litter the city and continues to kill and injure residents. At the time of writing, some 100,000 people had returned to Raqqa since the end of hostilities in October 2017, despite the danger posed by unexploded ordnance — mostly IEDs left by IS fighters, but also unexploded munitions dropped by Coalition forces — rendering the city unsafe.

Virtually every returnee that Amnesty International interviewed in Raqqa posed a simple question: why were those who spent so much on a costly military campaign which destroyed the city not providing the relief so desperately needed? Chief among their priorities was the provision of equipment needed to recover the bodies and remove the explosive devices trapped in the rubble. Coalition officials have so far failed to acknowledge the extent of the damage wrought on the city mostly by Coalition strikes.

The wholesale destruction wrought upon every almost street in Raqqa as a result of artillery and air strikes stands in stark contrast to Coalition claims about precision strikes.124 UN experts, Amnesty International’s researchers who conducted the investigation, and seasoned war correspondents found the level of destruction in Raqqa worse than anything previously witnessed in other wars.125 In April the UNHCR, the UN Refugee Agency stated that “the UN team entering Raqqa city were shocked by the level of destruction, which exceeded anything they had never seen before”.126

“The liberation of Raqqa… is not the end. It is actually the start of the process. The real healing starts once the fighting is over,” promised Major General Rupert Jones, CJTF-OIR Deputy Commander, as the battle to oust IS gathered momentum in July 2017.127 Since combat’s end, however, the humanitarian assistance

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123 These were sentiments that many Raqqa residents expressed to Amnesty International during interviews on the ground in Raqqa during February 2018.
127 Rupert Jones discussing the battle for Raqqa, ArtaFmRadio, 24 July, available at https://www.youtube.com/watch?v=KIrQ3B1AWO
residents hoped for has mostly not materialised. While some infrastructure repair projects are being carried out with international aid, residents lament not receiving help to overcome their losses. During Amnesty International’s visit in February 2018, families across the city complained that corpses had still not been recovered from the rubble of bombed buildings. Following an assessment of humanitarian needs conducted in early April, the UN Office for the Coordination of Humanitarian Affairs, OCHA, noted the “large-scale destruction throughout the city, a critical level of explosive hazard contamination amidst insufficient resources for surveying and removal of explosive hazards, as well as a shortage of public services.”

LETHAL LEGACY: UNEXPLODED ORDNANCE

“I’d rather get killed by a mine than watch my children crying every day because they are hungry.”

Roula, a woman scavenger in the rubble of buildings around the National Hospital

The number of mines and IEDs IS laid in homes, shops, public buildings and roads has been described by US officials as unprecedented. Many of these, as well as unexploded bombs dropped by Coalition forces, continue to contaminate the city, with the clearing process set to continue for months, if not years. In the meantime, mines/IEDs continue to pose a lethal danger, causing death and injury to civilians every day. Particularly at risk are the men and boys who work as casual labourers clearing the rubble from damaged house and shops, and the women and children who scavenge through the rubble for scrap metal and other material to sell.

Ayman, a 14-year-old boy who works as a daily labourer clearing rubble from damaged houses for SYP2,000 to SYP3,000 a day (approximately USD4-6), told Amnesty International that one of his friends, also a child, had been killed the previous week earlier doing the same work: “His name was Mohammed. He was working clearing the rubble from a house in the Hadiqa al-Baida neighbourhood and a mine in the rubble exploded and he died. He was the same age as me. What can we do? We have to work.” Roula, a woman who was collecting light metal in the rubble of buildings around the National Hospital with two of her children, aged seven and nine, told Amnesty International: “What can I do? I have three younger children and we have nothing to eat. I’d rather get killed by a mine than watch my children crying every day because they are hungry.”

The previous day, on 14 February 2017, another woman, Umm Anas, a mother of eight, was seriously injured in an explosion in the same area as she was collecting scrap metal. Her husband told Amnesty International that he did not know whether she was alive or dead. He was informed that she had been taken to hospital in Tal Abyad, but he could not afford to travel there. With no working telephone lines in Raqqa, he had no way of contacting the hospital to inquire about her condition.

According to local medical workers, more than 1,000 people, many of them children, have been injured or killed by mines between October 2017 and April 2018, though the actual number of victims is likely higher, as those who died before reaching medical assistance are not necessarily accounted for.

The international medical organisation Médecins Sans Frontières (MSF – Doctors without Borders), which has a clinic in Raqqa city, continues to receive large numbers of victims of blast-related injuries.

129 Interview with Roula, Raqqa, 15 February 2018.
130 “The number of unexploded ordnance in Raqqa is something that we have never seen before”, Panos Mountzis, UN Assistant Secretary-General and Regional Humanitarian Coordinator for the Syria Crisis, quoted in “Refugees in Syria’s Raqqa face ‘extreme’ IS landmine threat: U.N.”, Reuters, 6 February 2018, available at https://www.reuters.com/article/us-mideast-crisis-syria-raqqa/refugees-in-syrias-raqqa-face-extreme-is-landmine-threat-u-n-idUSKBN1F2H4D
131 Interview with Ayman, Raqqa, 15 February 2018.
132 Interview with Roula, Raqqa, 15 February 2018.
133 Interview with Abu Anas, Raqqa, 16 February 2018.
135 “Syria: 33 blast victims treated by MSF in Raqqa in the first week of 2018”, MSF, January 2018, available at

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Daily labourers and scavengers are sometimes referred to as “unofficial de-miners” because they risk their lives working in the rubble of bombed-out buildings which may be mined. A local businessman told Amnesty International:

People need to get back to whatever is left of their homes and businesses but nobody is clearing the mines. If you have money you can hire labourers and if there are mines they are the ones who get killed. Everybody knows about the danger from the mines but people need to work. People have lost everything and they will do any job to feed their children. Unfortunately, this is life in Raqqa today. I was able to rent a bulldozer to clear the rubble from the half of my house which was destroyed. But it is expensive and most people cannot afford it.\(^{136}\)

Raqqa Civil Council (RCC) is the body tasked with co-ordinating the administration of the city and surrounding areas, which are outside Syrian government control. RCC officials told Amnesty International that they lack the funds necessary to address even the destroyed city’s most basic needs. Laila Mustafa, the co-chair of the RCC told the organisation:

Residents come to us every day asking us to recover the bodies of their relatives trapped in the rubble of destroyed buildings but we only have very few bulldozers and mostly not of the right kind, so we cannot satisfy most of these requests. We need equipment for lifting large quantity of heavy rubble full of mines and we just don’t have it.\(^{137}\)


\(^{136}\) Interview, with Abu Ali, Raqqa, 16 February 2018.

\(^{137}\) Interview with Laila Mustafa, Ain Issa, 6 February 2018.
Statements made by US representatives have not always been promising. In April 2018 the US State Department’s Jerry Guilbert said, in response to a journalist’s question: “… we never went into this from the beginning with the view that the international community was going to clear Raqqa or clear Syria. Ultimately, this has to be viewed as a Syrian problem that is in need of a Syrian solution.”

Jerry Guilbert is Chief of Programs for the Office of Weapons Removal and Abatement in the Bureau of Political-Military Affairs at the US Department of State.

Another leading RCC member told The Wall Street Journal in March 2018 that the USA had done “practically nothing” to repair Raqqa since the end of the military operation. Funds were slow to arrive and when they did, the projects proposed by USAID, the US Agency for International Development, such as repainting curbs, were out of step with local needs. Amnesty International delegates also witnessed similarly superfluous, out of sync internationally funded activities in Raqqa, including smartly uniformed traffic police directing non-existent traffic at semi-deserted intersections and labourers sweeping dust into neat piles from streets flanked by mountains of uncleared rubble. Residents’ complaints about the failure of these projects to meet their needs seem well founded.

POST-BATTLE LOOTING

Immediately after the battle the SDF emptied Raqqa of its remaining residents. With no one around to protect it, property was looted on a large scale. “What was not destroyed during the war was looted after liberation,” Hassan, a household goods trader, told Amnesty International. He said that his house and adjacent shop and storeroom were cleaned out completely after he left Raqqa.

Daesh stole plenty from us earlier on, but during the battle they had other priorities. I left Raqqa a few days before the end of the battle and at that time there is no way that Daesh would have been able to take away such material – dozens of fridges, freezers, washing machines etc. I tried coming


back to Raqqa immediately after the battle but the SDF did not allow residents back then because they said there were mines planted by Daesh. But now, after everything has been looted, residents are allowed to come back even though there are still mines everywhere and people get blown up every other day by these mines.¹⁴⁰

Looting of whatever had not been destroyed by the bombardments and the fighting seems to have been routine in the areas recaptured from IS throughout Raqqa and beyond. Most Raqqa residents Amnesty International interviewed reported that their properties – homes as well as businesses – were looted. They blamed SDF members both for looting and for allowing others to loot.¹⁴¹ In the words of Abu Rami, a resident of one of the city’s central neighbourhoods:

> It was well known that Daesh were thieves but we did not expect those who came to liberate us from Daesh to steal as well. Daesh took the property of those who left the city and charged residents all sort of taxes but at the end they gave up as they were focused on saving themselves, or fighting to their death. The SDF came in and for weeks they did not allow us to return. When we did come back, we found that everything had been stolen. The SDF looted and allowed others to loot. They should take responsibility for this. We see our stuff being sold in markets here and there. It is wrong. They should take responsibility for this and do something about it.

Residents of several areas of Raqqa told Amnesty International that they have set up informal neighbourhood watch committees, with groups of residents taking turns to watch over homes and businesses to prevent further looting. Residents also complained that daytime SDF checkpoints at major intersections around the city are easily circumvented by thieves, who operate freely at night when the streets are almost deserted and the security presence melts away.

¹⁴⁰ Interview with Hassan, Raqqa, 15 February 2018.
¹⁴¹ Reports of looting by SDF soldiers began to emerge soon after Raqqa was recaptured. See, for example, https://twitter.com/24Raqqa/status/928228752768298720 At the beginning of the Raqqa military campaign, the UN High Commissioner for Human Rights expressed concern about human rights abuses, including looting, by SDF members in areas they recaptured from IS. See, for example, “Civilians must not be sacrificed for military victories – UN rights chief, as thousands trapped in Raqqa”, UN News, 28 June 2017, available at https://news.un.org/en/story/2017/06/560502-civilians-must-not-be-sacrificed-military-victories-un-rights-chief-thousands.
8. LEGAL FRAMEWORK

The evidence Amnesty International gathered in Raqqa in February 2018 and included in this report establishes that Coalition air strikes killed and injured civilians in Raqqa. It also provides evidence that other types of attacks, including Coalition artillery fire, and mortar fire from both the SDF and IS, also killed and injured civilians – although mortar fire casualties are more difficult to attribute to one party to conflict or another. Amnesty International also documented civilian casualties from IS laid mines/IEDs that continue to kill and maim civilians in Raqqa, as well as IS snipers who fired deliberately upon civilians who were attempting to escape.

International humanitarian law (IHL), or the laws of war, sets out legal rules that bind all parties to armed conflict, whether state armed forces or non-state armed groups. These rules, the most relevant of which to these cases are explained below, aim to minimise human suffering in war, and offer particular protection to civilians and those who are not directly participating in hostilities. In situations of armed conflict, not all civilian casualties will be unlawful. However, deaths and injuries of civilians are an indication that something has gone wrong. This could be the result of a violation of the rules, even of criminal wrongdoing; or it could be the result of an accident, mistake or malfunction of a weapons system, or the incidental result of a lawful attack. Investigation is necessary to make these determinations, ensure accountability in the case of violations and take measures to avoid unnecessary harm to civilians.

The cases presented in this report, based on the findings and analysis of Amnesty International, raise a very strong possibility that civilians were killed and injured (and civilian objects were destroyed or damaged) in violation of international humanitarian law. Amnesty International has written to the Coalition seeking additional information about these cases and about other attacks and raising questions about Coalition tactics, specific means and methods of attack, choice of targets, and precautions taken in planning and execution of attacks. Such information is necessary for a full assessment of the Coalition’s assertions about its compliance with international humanitarian law. Transparency on the Coalition’s part is a sine qua non of ensuring accountability and securing justice and reparation for civilians harmed as a result of violations. In addition to being a legal obligation, investigation of reported violations is also imperative for militaries to learn how to improve respect for IHL, a matter of life and death for civilians caught up in urban fighting.

APPLICABLE INTERNATIONAL HUMANITARIAN LAW

The Coalition and IS are party to the armed conflict in Syria. There is some disagreement as to what type of armed conflict: international or non-international. The Coalition is carrying out attacks in Syria without the consent of the government of Syria. In that sense, this is an international armed conflict. However, the fighting between the Coalition and IS, a non-state armed group, is a non-international armed conflict.

The USA is a party to the four Geneva Conventions of 1949. The UK and France are also party to these Conventions as well as to their three Additional Protocols. In any event, most of the rules on the conduct of hostilities of IHL, including all those cited in this report, apply in both international and non-international armed conflict and are binding on all parties, state and non-state forces.142

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THE PRINCIPLE OF DISTINCTION

The principle of distinction is one of the cornerstones of international humanitarian law. This requires parties to conflict to at all times, “distinguish between civilians and combatants” and to ensure that “attacks may only be directed against combatants” and “must not be directed against civilians”.143 Parties to conflict must also distinguish between “civilian objects” and “military objectives”. Anyone who is not a member of the armed forces of a party to the conflict is a civilian, and the civilian population comprises all persons who are not combatants.144 Civilians are protected against attack unless and for such time as they take a direct part in hostilities.145 In cases of doubt, individuals should be presumed to be civilians and immune from direct attack.146 Making the civilian population, or individual civilians not taking a direct part in hostilities, the object of attack (direct attacks on civilians) is a war crime.147

Civilian objects are all objects which are not “military objectives”, and military objectives are “limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage”.148 Civilian objects are protected against attack, unless and for such time as they become military objectives because all of the criteria for a military objective just described become temporarily fulfilled.149 In cases of doubt, parties to conflict are required to presume the building retains its civilian nature.150 Making civilian objects the object of attack is a war crime.151

Indiscriminate attacks are prohibited.152 Indiscriminate attacks may strike military objectives and civilians or civilian objects without distinction, either because the attack is not directed at a specific military objective, or because it employs a method or means of combat that cannot be directed at a specific military objective or has effects that cannot be limited as required by IHL.153 Launching an indiscriminate attack resulting in death or injury to civilians is a war crime.154

Most of the cases examined in this report involved attacks that struck civilian objects – homes or other places in which civilians were seeking shelter from the fighting – killing and injuring civilians. Witnesses reported that there were no fighters in the vicinity at the time of the attacks. Such attacks could be either direct attacks on civilians or civilian objects or indiscriminate attacks.

In the case of air strikes that used precision-guided munitions, the objects struck were the ones that were targeted. This raises questions about whether the intelligence used for selecting targets was unreliable or out of date. It also raises questions about why those planning these attacks were not aware of the presence of large numbers of civilians, or if they were, why they decided to proceed in the way they did. Given the fact that IS had already been routinely preventing civilians in areas under their control from fleeing and were even deliberately using them as human shields, the likelihood that large numbers of civilians were in the area should have been evident to the Coalition. Using munitions with very large payloads, even when precisely delivered, was guaranteed to kill and injure civilians in the immediate vicinity. And when civilian homes were directly hit by such air strikes, the consequences were devastating.

In the case of deaths and injuries to civilians resulting from artillery strikes or mortar fire, these would appear to be indiscriminate attacks. The repeated use of imprecise explosive weapons, such as these, in the vicinity of civilians is a reckless tactic that violates the prohibition of indiscriminate attacks. If at the outset the Coalition was not aware that using artillery in this manner in Raqqa city would lead to needless deaths and injuries to civilians (which in itself is implausible given the experience of fighting IS in Mosul), it should have very quickly learned this lesson and changed its tactics.

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143 ICRC, Customary IHL Study, Rule 1. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 48, and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 12(2).
144 ICRC, Customary IHL Study, Rule 5; see also Protocol I, Article 50.
145 ICRC, Customary IHL Study, Rule 6; see also Protocol I, Article 51(3); Protocol II, Article 13(3).
146 Protocol I, Article 50(1).
147 ICRC, Customary IHL, Rule 156, p. 591.
148 ICRC, Customary IHL Study, Rules 8 and 9; Protocol I, Article 52.
149 ICRC, Customary IHL Study, Rule 10.
150 Protocol I, Article 52(3). See also ICRC, Customary IHL Study, pp. 34-36.
151 ICRC, Customary IHL Study, Rule 156, pp. 591, 593, 595-598. See also Rome Statute of the International Criminal Court, Articles 8(2)(b)(i) and (ii) and 8(2)(e)(ii)(iv) and (xii). See also discussion in ICRC, Customary IHL Study, p. 27.
152 ICRC, Customary IHL Study, Rule 11; Protocol I, Article 51(4).
154 ICRC, Customary IHL, rule 156, p. 599.
PROPORTIONALITY

The principle of proportionality, another fundamental tenet of IHL, also prohibits disproportionate attacks, which are those “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.155 Intentionally launching a disproportionate attack (that is, knowing that the attack will cause excessive incidental civilian loss, injury or damage) constitutes a war crime.156 The Commentary on the Additional Protocols makes clear that the fact that the proportionality calculus requires an anticipated “concrete and direct” military advantage indicates that such advantage must be “substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded.”157

PRECAUTIONS

In order for parties to an armed conflict to respect the principles of distinction and proportionality they must take precautions in attack. “Constant care must be taken to spare the civilian population, civilians and civilian objects”; “all feasible precautions” must be taken to avoid and minimise incidental loss of civilian life, injury to civilians and damage to civilian objects.158 The parties must choose means and methods of warfare with a view to avoiding or at least minimising to the maximum extent possible incidental loss of civilian life, injury to civilians and damage to civilian objects.159 As well as verifying the military nature of targets and assessing the proportionality of attacks, the parties must also take all feasible steps to call off attacks which appear wrongly directed or disproportionate.160 Parties must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit.161 When a choice is possible between several military objectives for obtaining a similar military advantage, the parties must select the target the attack on which would be expected to pose the least danger to civilians and to civilian objects.162

The limited information available on the precautions in attack taken by the Coalition suggests that they were not adequate or effective. The cases examined in detail indicate that there were serious shortcomings in verification that targets selected for attack were in fact military, with disastrous results for civilian life. Further, several attacks examined by Amnesty International suggest that the Coalition did not, at least in those instances, select weapons that would minimise harm to civilians. Also, the warnings that were given to civilians were not effective. They did not take into account the reality that civilians were blocked from leaving Raqqa, and did not include specific information (such as warning civilians to stay away from tall buildings).

JOINT AND INDIVIDUAL RESPONSIBILITY OF COALITION MEMBERS

Although the US is estimated to have carried out the overwhelming majority of the air strikes in Raqqa as well as 100% of artillery strikes, British and French planes also carried out air strikes on the city.163 Due, in part, to the deliberate vagueness with which the Coalition reports strikes, there is a lack of clarity about the responsibility of individual Coalition member states for the strikes. Amnesty International is concerned that this lack of clarity may enable individual Coalition members to evade responsibility for their actions. The UK Government, for example, maintained until May 2018 that it had not killed a single civilian in Syria or Iraq,

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155 ICRC, Customary IHL Study, Rule 14, Protocol I, Articles 51(5)(b) and 57.
158 ICRC, Customary IHL Study, Rule 15. See also Protocol II, Article 13(1).
159 ICRC, Customary IHL Study, Rule 17.
162 ICRC Customary IHL, Rule 21.
Despite carrying out thousands of air strikes across the two countries. On 2 May 2018 it admitted for the first time that one of its drone strikes had caused one civilian casualty in Syria in March 2018.

The problem attributing responsibility to individual states acting in military coalitions is described in an article by the ICRC, International Committee of the Red Cross, legal advisers: “… (Partnering) might also be a cloak against accountability for such crimes. With the opaque distribution of tasks, the diffusion of responsibility that is inherent to partnering, the international community is less readily able to identify the State, the group, and even less likely, the individual, that is responsible for unlawful conduct. This can create a climate in which stakeholders, political and military alike, perceive themselves to be free from the scrutiny of accountability processes and act beyond the parameters of their usual normative reference frameworks.”

International law recognises, however, that a state which “aids or assists another state in the commission of an internationally wrongful” will be internationally responsible for doing so, provided it had knowledge of the circumstance and the act would be internationally wrongful if committed by that state. Furthermore, states will also be responsible for internationally wrongful acts for conduct consisting of an action or omission which is both attributable to the state and constitutes a breach of its international obligations (emphasis added). The responsibility of states is engaged by organs of state, including their military units or by “persons or entities exercising elements of government authority”, including military officers and politicians.

IHL requires all states to “respect and ensure respect” for its provisions under Common Article 1 of the Geneva Conventions. This includes both positive and negative obligations on states providing assistance to another state which is then used to commit a violation of international humanitarian law. The negative obligation is not to encourage, aid or assist in violations of IHL by parties to a conflict. The positive obligation includes the prevention of violations where there is a foreseeable risk they will be committed and prevention of further violations where they have already occurred.

The USA, UK, France, and other states involved in military operations as part of Operation Inherent Resolve therefore may be legally responsible for unlawful acts carried out by Coalition members. The involvement of senior military officers from Britain and France states in the upper echelons of the OIR’s command structure further underlines the potential for shared responsibility for internationally wrongful acts. By way of example, the Deputy Commander for Operational Inherent Resolve during the Raqqa operation – Major General Rupert Jones – was British. Military officers representing France and Australia also held senior positions within the Coalition. The orders and decisions of these officers engage the responsibility of their respective states for acts and omissions in relation to any unlawful acts committed by their own aircraft or military forces, or by others they control, direct or assist.

**DUTY TO INVESTIGATE, PROSECUTE AND PROVIDE REPARATION**

States have an obligation to investigate allegations of war crimes by their forces or nationals, or committed on their territory and, if there is sufficient admissible evidence, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction, including through universal jurisdiction, and, if appropriate, prosecute the suspects.

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167 Article 16, Responsibility of States for Internationally Wrongful Acts (“Articles on State Responsibility”), adopted by the International Law Commission in August 2001 and endorsed by the UN General Assembly in a number of Resolutions, and approved ad referendum, that is, without prejudice to the question of their future adoption or other appropriate action. See UN General Assembly Resolution 71/133, www.un.org/ga/search/view_doc.asp?symbol=A/RES/71/133
168 Ibid, Article 2.
169 Ibid, Article 4.
170 Ibid, Article 5.
174 ICRC Customary IHL Study Rule 158.
States responsible for violations of IHL are required to make full reparation for the loss or injury caused.\textsuperscript{175} In addition, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law enshrine the duty of states to provide effective remedies, including reparation to victims. This instrument sets out the appropriate form of reparation, including, in principles 19-23, restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.\textsuperscript{176}

\textsuperscript{175} ICRC, Customary IHL, Rule 150.

\textsuperscript{176} Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles on the Right to a Remedy and Reparation), adopted and proclaimed by UN General Assembly Resolution 60/147 of 16 December 2005, UN Doc. A/RES/60/147.
Coalition claims that its precision air campaign allowed it to bomb IS out of Raqqa while causing very few civilian casualties do not stand up to scrutiny. Based on information from Amnesty International’s field investigation and public reporting, Coalition air and artillery strikes killed hundreds of civilians and injured many more. The Coalition strikes detailed in this report appear either disproportionate or indiscriminate or both and as such unlawful and potential war crimes. The cases documented here, provide an example of a wider pattern, raise serious concerns and should be thoroughly and independently investigated. Mistakes must be acknowledged, causes analysed and lessons learned.

This report acknowledges that IS tactics created a challenging operational environment for Coalition forces and the SDF. However, such challenges did not justify failing to take all feasible precautions to minimise harm to civilians. States bearing responsibility for violations of international humanitarian law (IHL) have a duty to investigate and provide redress. Where evidence of war crimes exists, states are also obliged to prosecute.

**RECOMMENDATIONS TO MEMBER STATES OF THE US-LED COALITION**

Amnesty International calls on member states of the US-led Coalition to take the following measures as a matter of urgency:

- Fully comply with the rules of IHL in the planning and execution of air strikes and other attacks, including by cancelling attacks that risk being indiscriminate, disproportionate or otherwise unlawful;
- End the use of explosive weapons with wide-area effects, such as artillery and mortars, in the vicinity of populated civilian areas, consistent with the prohibition on indiscriminate and disproportionate attacks;
- Assume the presence of civilians in every structure when engaging IS fighters, given the likelihood of IS using civilians as human shields and adjust tactics to take civilian presence into account;
- Take all feasible precautions to minimise harm to civilians, including giving effective advance warnings of impending attacks to the civilian population in the concerned areas, including, when possible, by providing advice to civilians on possible evacuation routes;
- Ensure that SDF forces comply with IHL, including by refraining from the use of mortars in the vicinity of civilian areas, and refraining from looting civilian property;
- Ensure that concrete plans for evacuation and humanitarian assistance to civilians are put in place and budgeted for sufficiently early in the planning of military operations, so that adequate food, water, shelter and medical care can be promptly provided to civilians displaced by such military operations.
INVESTIGATION AND PUBLIC DISCLOSURE

- Publicly acknowledge the scale and gravity of the loss of civilian lives and destruction of property and livelihoods which resulted from Coalition strikes during the military operation to oust IS from Raqqa;
- Make public information which is necessary to investigate the circumstances of and establishing responsibility for civilian losses during the military operation, notably:
  - Dates, times, exact location, weapons used and intended target of the strikes carried out by Coalition forces
  - Which Coalition members’ forces carried out which strike
  - What measures were taken to ascertain how many civilians were present in the vicinity of the target and the precautions taken to minimise harm to civilian and civilian objects;
- Make public the findings of any investigation carried out so far to determine the scale of the human and material civilian loss, that is the number of civilians killed and injured and civilian property and infrastructure destroyed or damaged as a result of Coalition strikes;
- Make public the methodology of any investigation carried out into Coalition strikes, or attributed to Coalition forces, which reportedly killed or injured civilians, notably:
  - Whether any post-strike site visits and interviews with survivors, witnesses, and families of victims were carried out, and if so for which cases;
- Publicly disclose the findings of all investigations into civilian casualties or destruction and damage to civilian objects from Coalition strikes, including whether any attacks were found to violate IHL, whether reparation or compensation of any type was provided to the victims, and whether those suspected of responsibility for violation were held accountable;
- Urgently put in place an independent, impartial mechanism to effectively and promptly investigate credible reports of violations of IHL make the findings of such investigations public;
- Urgently commit to an urgent review of military procedures for assessing civilian casualties aimed at identifying procedural defects and rectifying them. It must make findings public in a timely and transparent manner.

ACCOUNTABILITY AND REPARATION

- Put in place the necessary mechanism to provide prompt and full reparation to victims and families of victims of violations, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition. The mechanism should be transparent, accessible to civilians in Syria, and ensure that reparation of is provided in a non-discriminatory manner;
- Allocate and provide adequate budgetary resources and ensure that all legislative and regulatory measures are in place to provide reparation to victims;
- Where there is admissible evidence that individual members of Coalition forces are responsible for war crimes, ensure they are prosecuted in a fair trial without recourse to the death penalty;
- Put in place a mechanism to ensure that lessons are learned and that strikes in ongoing Coalition military operations in Syria are carried out in full compliance with the rules of IHL.

HUMANITARIAN ASSISTANCE AND CLEARANCE OF UNEXPLODED ORDNANCE (UXO)

- Ensure that security, shelter and services to those displaced by the conflict in Raqqa is provided until such a time when they can safely and voluntarily return to their homes and support themselves;
- Ensure that these services are of the highest possible quality and they are provided based on needs and in a non-discriminatory manner, and ensure that the displaced are not arbitrarily prevented from returning to Raqqa;
- Ensure that the necessary resources, equipment and expertise are available to complete in the shortest time possible the clearance of (UXO) and IEDs in Raqqa. In the meantime, support the provision of awareness-raising programmes to educate residents about the dangers posed by UXO and IEDs;
- Provide the necessary funding for humanitarian assistance to enable civilians to return to Raqqa and set up a mechanism in consultation with the returning community to ensure that programmes are tailored to fit requirements on the ground and that assistance is provided in a non-discriminatory manner;
- Current donors should immediately review their assistance programmes in Raqqa to ensure that they are meeting the most immediate needs of the returning community. Such a review should be done in consultation with a cross-section of stakeholders in the community, and should ensure the participation of women;
- Ensure that funding plans for humanitarian assistance and UXO clearance in Raqqa are in place to provide the long-term support needed.

RECOMMENDATIONS TO THE SYRIAN DEMOCRATIC FORCES

Amnesty International calls on the SDF to:

INVESTIGATION AND PUBLIC DISCLOSURE

- Make public information which is necessary to investigate the circumstances of and establishing responsibility for civilian losses during the military operation, notably disclose full details of all coordinates provided to Coalition forces for air and artillery strikes including the intended targets for those strikes;
- Ensure that Raqqa residents can register complaints against SDF members with SDF authorities for conduct carried out during and post the Raqqa military operation without fear of reprisals or retaliation;
- Ensure that all allegations lodged against SDF personnel are investigated thoroughly and independently, remove from the ranks all persons who committed or ordered violations of IHL, and ensure those responsible for crimes are held accountable.

RECOMMENDATIONS TO THE RAQQA CIVIL COUNCIL

International calls on the RCC to:

ACCOUNTABILITY AND REPARATION

- Establish offices in and around Raqqa where residents can register their losses and any complaints about incidents which occurred during and since the military campaign. The offices must be adequately staffed and easily accessible to residents and to those who are still displaced;
- Co-operate with Coalition members to ensure that reparation/compensation is allocated to civilians with appropriate oversight in place in order to protect the integrity of the process.
AMNESTY INTERNATIONAL IS A GLOBAL MOVEMENT FOR HUMAN RIGHTS. WHEN INJUSTICE HAPPENS TO ONE PERSON, IT MATTERS TO US ALL.
“WAR OF ANNIHILATION”

DEVASTATING TOLL ON CIVILIANS, RAQQA – SYRIA

The four-month military operation carried out by the US-led Coalition to oust the armed group calling itself Islamic State (IS) from the Syrian city of Raqqa, killed hundreds of civilians, injured many more and destroyed much of the city. Residents were trapped, as fighting raged in Raqqa’s streets between IS militants and Kurdish-led Syrian Democratic Forces (SDF) fighters, and US-led Coalition’s air and artillery strikes rocked the city. With escape routes mined by IS and the group’s snipers shooting at those trying to flee, there was nowhere safe for civilians. Entire families were killed in Coalition air strikes in their homes or in the very places where they had sought refuge, or as they tried to flee. Eight months on, the Coalition remains in denial about the human tragedy resulting from its military campaign and the victims have received neither justice nor reparation. Amnesty International is urging Coalition members to promptly and impartially investigate allegations of international law violations and civilian casualties. They must provide reparation to the victims and adequate assistance for the desperately needed demining and reconstruction work.
The right to the truth in international law: The significance of Strasbourg’s contributions

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The concept of a right to the truth is increasingly utilised in different settings to empower victims and societies to find out about past abuses linked to conflict or authoritarianism. Since the last comprehensive study of this topic in 2006, there has been little attempt to draw together the advancements of fragmented practices. Recent developments in European human rights call for a fresh analysis of the right to the truth as a freestanding principle linked to, but separate from, the state duty to investigate. This paper takes stock of the more recent evolutions of the right to the truth and contributes to its independent conceptualisation. The first part investigates whether there is growing consistency between the Inter-American and European human rights systems around the contours of the right to the truth, as linked to survivors’ right to know the past and to access justice (make claims) as an individual and collective matter. The second part broadens the discussion to the status of the right to the truth under international law in light of the ECHR jurisprudence, and considers whether the available legal categories are suited to its formalisation.

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INTRODUCTION

The right to the truth is on an upward trajectory in international law and it is widely discussed in relation to conflict and authoritarianism. Its modern origins can be found in the jurisprudence of the Inter-American Human Rights system (IACHR) dealing with the legacy of violent regimes in Latin America. In 2010 the UN General Assembly

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established the international day for the right to the truth,³ and a UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has been appointed.⁴ More recently the European Court of Human Rights (the Court, ECTHR) has taken steps towards acknowledging the right to the truth (linked to the state obligation to investigate) in relation to authoritarianism and conflict (eg Aslakhanova v Russia;⁵ Association 21 December 1989 v Romania;⁶ and Mocanu v Romania⁷), as well as in other contexts where state policies limit human rights, for instance as part of counter-terror practices (eg Grand Chamber judgment of El-Masri v FYRM⁸).⁹ These developments call for a reappraisal of the right to the truth as part of international human rights law (IHRL).

In the aftermath of widespread – and often symbolic – human rights abuses connected to conflict and authoritarianism, individual victims and society at large reckon with the past in many ways to acknowledge harm and identify those responsible. Truth seeking initiatives such as trials and truth commissions contribute to the formation of collective memories, which can then become the object of further debates about the past. But top-down initiatives alone are likely to marginalise some victim accounts and disempower minority or counter-establishment views. The right to the truth offers survivors a tool to instigate truth-seeking processes though an actionable right to hold authorities accountable for effective investigations. This right, however, remains elusive. Building on the last comprehensive study of the right to the truth in 2006 by Yasmin Naqvi,¹⁰ this article takes stock of recent developments of this right and explores what they mean globally.

Specifically, this research presents a fresh analysis of the right to the truth in light of new ECHR case law and examines its impact on its international formulation. The paper evaluates the growing consistency around the contours of the right to the truth and the extent to which it has evolved in public international law (PIL). The first part traces the evolution of the right to the truth in global and regional sources, providing a comparative study of Inter-American and European human rights case law. Two distinct but intertwined themes are analysed: firstly, the connection between the state’s duty to investigate and survivors’ right to know the past through an actionable right; and secondly, the link between the individual and collective dimensions of the right to the

⁵. Aslakhanova and others v Russia, Apps Nos 2944/06 and 8300/07, 50184/07, 332/08, 42509/10 (ECHR, 18 December 2012).
⁷. Mocanu and others v Romania, App Nos 10865/09, 45886/07 and 32431/08 (ECHR, 17 September 2014).
⁹. F Fabbrini ‘The European Court of Human Rights, extraordinary renditions and the right to the truth: ensuring accountability for gross human rights violations committed in the fight against terrorism’ (2014) 14(1) HLR 85.
truth. The second part discusses what these developments mean in international law, and considers whether existing legal categories (customary international law (CIL) and general principles of law) are suited to the formalisation of the right to the truth. The findings suggest that regardless its formal characterisation, the repeated and varied uses of the right to the truth demonstrate its importance and benefits.

1. THE STATUS AND CONTOURS OF THE RIGHT TO THE TRUTH

The discovery of truth about past harm through formal legal proceedings\(^{11}\) is inherently permeable to uneven power structures that impact truth seeking initiatives such as trials and truth commissions. Existing laws may (deliberately or not) include and privilege the accounts of some groups and marginalise others.\(^{12}\) Through the applications of the right to the truth, victims and survivors can attempt to challenge prevailing versions of history and compel authorities to investigate and make public contested accounts of the past. Framing the need to know as a right empowers individuals to instigate truth-seeking processes directly. This, in turn, may help broaden perspectives during truth seeking processes, and ensure greater inclusivity in building collective memories.

The slow recognition of the right to the truth and its uneven application across the world calls for a study of its sources and development in order to understand its contours, normative status and value. Its origins have been traced in International Humanitarian Law (IHL):\(^{13}\) Art 32 of the Additional Protocol I to the Geneva Conventions refers to the ‘right of families to know the fate of their relatives’, both with respect to the remains of the deceased (Art 34) and for missing persons (Art 33).\(^{14}\) But its application is limited to armed conflicts, excluding the full range of situations in which serious violations occur (including authoritarianism). Moreover, IHL lacks easily justiciable rights that individuals may action to uncover the truth about past harm, as well as appropriate tools to deal with non-state actors.

In international criminal law (ICL), the Rome Statute of the International Criminal Court (ICC) provides only a ‘limited realisation’ of the right to the truth, restricted to the ‘context of enforced disappearances (Article 7(1)(i))’.\(^{15}\) Although, in principle, it could accommodate this right, costly and largely ineffective victim participation

\(^{11}\) The concept of the ‘legal truth’ is complex and cannot be discussed exhaustively in this article. Here, it is used to describe information about past harm elicited as part of formal (legal) proceedings. On this topic, see inter alia JM Balkin ‘The proliferation of legal truth’ (2003) 26 Harv J of L & Pub Pol 5; MS Moore ‘The plain truth about legal truth’ (2003) 26 Harv J of L & Pub Pol 23; RS Summers ‘Formal legal truth and substantive truth in judicial fact-finding – their justified divergence in some particular cases’ (1999) 18 Law & Philosophy 497.
\(^{13}\) Naqvi, above n 10, 248.
\(^{14}\) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977) 1125 UNTS 3.
schemes\(^\text{16}\) suggest that ICL is not yet ripe for operationalising victims’ right to the truth. Moreover, the punitive nature of criminal law exacerbates tensions between justice served, namely, convictions, and justice understood more broadly, in which accountability and punishment for past abuses could be uncoupled.

Today, the right to the truth – as presented in the language of rights – most closely relates to IHRL. It is framed as a right ‘in relation to other fundamental human rights by human rights bodies and courts’ and referred to as such in truth seeking mechanisms.\(^\text{15}\) Since the 1980s and 1990s the UN Human Rights Committee has considered cases about disappearances, death in police custody, prison torture and arbitrary detention in the contexts of authoritarianism and civil conflict in light of the International Covenant on Civil and Political Rights.\(^\text{18}\) This right is now being channelled and developed through the work of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, whose 2013 Report clearly states that the right to the truth is ‘enshrined in a number of international instruments’.\(^\text{19}\)

Building on existing sources, the 2013 Report by the Special Rapporteur on the promotion of truth frames the current UN understanding of the right to the truth within the scope of human rights. The Report sets out a state requirement to ‘establish institutions, mechanisms and procedures that are enabled to lead to the revelation of


\(^{17}\) Naqvi, above n 10, 267.


the truth’, described as ‘a process to seek information and facts about what has actually taken place, to contribute to the fight against impunity, to the reinstatement of the rule of law, and ultimately to reconciliation’. 20

This reflects the language of the ‘Van Boven/Bassiouni Principles’ adopted by the General Assembly in 2005, affirming that victims have the right to ‘access to relevant information concerning violations and reparation mechanisms’, and ‘should be entitled’ to ‘learn the truth in regard to (…) violations’. 21

Among the sources listed in the 2013 Report, the only clear treaty provision enshrining the right to the truth is Art 24(2) of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (CED):

Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.

The right to the truth, however, extends beyond the specific instance of disappearance, as evidenced in Human Rights Commission and Human Rights Council resolutions, 22 for example, it may be used to uncover information about confirmed killings and structural violence against certain ethnic or political groups. The 2005 UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Orentlicher Principles) already acknowledged the broad scope of the right to the truth:

Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. 23

Moreover, the 2006 Study on the Right to Truth of the Office of the UN High Commissioner for Human Rights confirmed the ‘inalienable right to know the truth vis-à-vis gross human rights violations and serious crimes under the international law’. 24 This indicates its relevance across many instances of abuse, constituting a cross-cutting independent right that spans different contexts and types of harm inflicted during conflict and authoritarianism.

The 2005 Orentlicher Principles also outlined the link between the victims’ right to know and the ‘general obligations of states to take effective action to combat impunity’. 25 The state obligation to investigate is key to giving the right to the truth a degree of justiciability, notwithstanding the difficulties of operationalising it in political contexts where human rights are abused. In extending the right to the truth to counterterrorism practices, the Special Rapporteur on the promotion and protection

24. OHCHR ‘Study on the right to truth’, above n 19.
of human rights and fundamental freedoms while countering terrorism has stated that ‘the legal right of the victim and of the public to know the truth’ is matched by:

Corresponding obligations on States which can be conveniently gathered together under the rubric of the international law principle of accountability’, which extends to ‘all three branches of government’.26

This is important for holding states to account when truth seeking is obstructed or investigations are known from the start to be ineffective, as some of the regional case law has found (eg ECHR, Association 21 Décembre v Romania). So by linking the right to the truth to a corresponding state obligation, regardless of the successor regime’s connection to past harms, survivors of abuse may in principle instigate inquiries into historic abuses, which in turn contribute to shaping collective memories.

(a) IACHR contributions to the right to the truth

The Special Rapporteur on the promotion of truth Pablo de Greiff has stated that ‘the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights were at the forefront of developing jurisprudence on the right to truth of the victim, his or her next of kin, and the whole of society’.27 Former President of the Inter-American Court of Human Rights (IACtHR) Antônio Augusto Cançado Trindade echoed this in relation to enforced disappearances.28 IACtHR jurisprudence considers the truth as a fully justiciable right.29 Two key intertwined features emerge from that case law: firstly, the centrality of the state’s duty to investigate in order to satisfy the applicants’ right to the truth. Secondly, the clear link between the individual and collective dimensions of the right to the truth, recognising that society as a whole, in addition to direct victims, has an interest in knowing about the past.

The IACtHR has employed the right to the truth to ensure states are held accountable for past institutional abuse and for refusing to investigate mass violence. And while this right is actionable by direct victims, its effects are relevant more broadly. Manuel Bolaños was the first significant Inter-American Commission (the Commission) case involving the right to the truth about enforced disappearances and location of remains.30 That decision found that the state’s failure to ‘use all means at its disposal to carry out a serious investigation of violations committed within its jurisdiction to identify those

responsible’ was a violation of the Inter-American Convention (IACHR). This specifically, the right to the truth was linked to Art 25 (the Right to Judicial Protection), namely the right of the victim’s family to know the fate of disappeared relatives. But as stated on the website of the Organisation of American States, the right to the truth also has a basis in Articles 1(1) (Obligation to Respect Rights), 8 (Right to a Fair Trial), and 13 (Freedom of Thought and Expression). This suggests that while the right to the truth is not listed in the IACHR, it is more than a procedural corollary to an existing right: it can be actioned in conjunction with an enumerated right but it also carries a special weight of its own as a cross-cutting principle.

To counter attempts to forget about the past and move on, the IACHR system has clarified that Art 13 is crucial to ‘delivering’ the right to the truth to family members and society as a whole, as opposed to amnesties. The IACtHR has stated that amnesty laws pose an obstacle to the right to the truth, because blanket policies to end investigations into past abuses cannot satisfy survivors’ right to know the circumstances and responsibilities.

The second aspect to consider is the overlap between individual and collective functions of the right to the truth, understood as serving interests beyond the parties to a case. Lucio Parada Cea et al v El Salvador describes the right to the truth as a:

Collective right which allows a society to gain access to information essential to the development of democratic systems, and also an individual right for the relatives of the victims, allowing for a form of reparation.

The notorious Villagran-Morales et al. v Guatemala (street children) case also provides a pertinent example of the importance for society at large to uncover the truth about the state’s role in abuse. The inextricable connection between the individual and collective right to know became apparent in the high-profile case of the political assassination of Monsignor Oscar Romero, Archbishop of El Salvador. The Commission found that the state’s failure to investigate the circumstances of extrajudicial killing constituted a violation of its duty to reveal the truth to both the victim’s family as well as to society at large. It specified that an investigation:

31. Ibid.
32. Ibid.
33. Art 13(1): ‘Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice’ (emphasis added).
34. OAS, Right to the Truth, fn [2]. A violation of Art 13 was found for the first time in Ignacio Ellacuría v El Salvador, Inter-American Court of Human Rights (December 22, 1999) Case 10.488, Report No 136/99.
Must be undertaken in good faith and must be diligent, exhaustive and impartial and geared to exploring all possible lines of investigation that make it possible to identify the perpetrators of the crime, so that they can be tried and punished. The IACtHR had already outlined the requirements of investigations in Velásquez Rodríguez:

[investigations] must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.

This case notably established the state’s positive obligation to investigate violations alongside its (preceding) duty to prevent them. The IACtHR upheld this position in the more recent Contreras, linking the ‘violation of the right to the truth, understood as a violation of the rights contained in Articles 8, 13 and 25 of the Convention’ to the state obligation to ‘demonstrat[e] that they have taken all the measures at their disposal to prove that the requested information does not exist’. The case also highlighted the importance of the state’s positive obligation to investigate in ‘democratic societies’, in which ‘every individual, including the next of kin of the victims of grave human rights violations’ has ‘the right to know the truth, so that they and society as a whole must be informed on what happened’. Contreras, therefore, illustrates how the IACHR has continued, over time, to consider serious investigations in light of the right to the truth, understood as an individual and a collective matter.

So while there is a direct, actionable right to the truth held by individuals affected by the violation, and the corresponding state duty to uncover the past through investigations, trials and other truth seeking mechanisms, the state must also respond to the need for the general public and society at large to know what happened. IACtHR jurisprudence thus establishes that the state obligation to investigate is relevant beyond the parties to individual cases, because truths uncovered contribute to constructing collective memories and inform political debates.

(b) ECHR contributions to the right to the truth

In contrast to the Inter-American system, ‘the right to truth has been comparatively slow to develop’ in the Council of Europe system. An initial acknowledgement came in 2005 when a series of resolutions of the Parliamentary Assembly of the Council of Europe recognised families of disappeared persons as ‘independent victims’, to be

39. Ibid para 80.
40. Ibid at para 79, quoting Velásquez Rodríguez v Honduras, Inter-American Court of Human Rights (29 July 1988) Series C No 4, para 177.
41. On the significance of the state obligations set out in Velásquez Rodríguez, see inter alia N Roht Arriaza ‘State responsibility to investigate and prosecute grave human rights violations in international law’, (1990) 78 California L R 449, 467–468.
43. Ibid, 170 and 173, linking the right to the truth to Arts 1(1), 8(1), 25 and, under certain circumstances, Art 13.

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granted a ‘right to be informed of the fate of their disappeared relatives’. However, it was only in the *El-Masri* judgment of December 2012 that the Grand Chamber made its first explicit reference to the right to the truth. This case, which emerged in the context of extraordinary renditions, brought to light the question of the right to the truth in relation to the procedural limb of Art 3 of the ECHR (prohibition of torture), dealing with the enforced disappearance and ill-treatment of the applicant, as well as the subsequent lack of effective state investigations.

The *El-Masri* judgment and concurring opinions ‘cautiously expand the function of the state duty to undertake a credible investigation’, setting ‘a novel standard to secure accountability of human rights violations committed in other national security cases and beyond’. Yet all the judgment says about the right to the truth is that ‘inadequate investigations’ had an ‘impact on the right to the truth’. For the substantive discussion on the right to the truth, the concurring opinions offer valuable insights into the debate between judges about this right in relation to the ECHR and international law more generally. The key issues explored the status of the right to the truth within the scope of the ECHR, whether it constitutes a new right, its relationship to the duty to investigate, and who holds it.

In the separate opinion of Judges Tulkens, Spielmann, Sicilianos and Keller (Tulkens et al), the right to the truth is described as a ‘well-established reality’ which is ‘far from being either innovative or superfluous’. They argue that it is neither a novel concept in the Court’s jurisprudence, ‘nor is it a new right’. To support their claim, they relied on the Court’s case law, global IHRL instruments, IACHR jurisprudence, EU and Council of Europe statements as well as evidence provided by third-party interveners. So by referring to the right to the truth as an established reality, these judges seem to pre-empt opposition to the introduction of unenumerated rights. Moreover, this indicates a conscious contextualisation of the ECHR within broader human rights developments.

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47. Fabbrini, above n 9, 102.
52. Velásquez Rodríguez v Honduras and Contreras v El Salvador.
But the second concurring opinion in El-Masri took the opposite stance. Judges Casadevall and Lopez Guerra asserted that judges have no place in introducing a right ‘different from, or additional to’ the provisions set out in the ECHR and the Court’s case law, dismissing the idea that the right to the truth merits attention either as an extension of Convention provisions or as a novel human right. Contrary to Tulkens et al, Casadevall et al argued that it was not necessary to address the right to the truth ‘as something different from, or additional to, the requisites already established in such matters’ in previous case law, concluding that ‘a separate analysis of the right to the truth becomes redundant’. Yet this reductionist approach seems disconnected from the evolution of the right to the truth elsewhere. A closer analysis of the Court’s case law suggests that the substance of the right to the truth, which includes the state duty to investigate and the collective dimension of knowing about past abuse, is nothing new in Strasbourg. However, the ECtHR is yet to formulate a coherent analysis of the right to the truth: its jurisprudence and separate opinions on the issue reveal the Court’s interest and ambiguity towards this emerging principle. The two key aspects to consider in assessing the Court’s position on the right to the truth are its relationship to the state duty to investigate and its individual and collective dimensions.

(c) The right to the truth and the state duty to investigate

The right to the truth is connected to the ‘right to know what happened’, ECtHR jurisprudence has long consolidated the state duty to investigate violations, echoing the substance of the positive obligation to investigate set out in IACHR jurisprudence in relation to the right to the truth. In El-Masri, the Grand Chamber traced a link between the lack of an effective investigation and the right to the truth, noting in relation to the procedural limb of Art 3:

Another aspect of the inadequate character of the investigation in the present case, namely its impact on the right to the truth regarding the relevant circumstances of the case.

This landmark reference to right to the truth requires analysing in conjunction with the state duty to investigate across various contexts considered in recent judgments.

Addressing widespread violence during authoritarian regimes, the Court has considered investigations in light of Arts 2 (and 3). In Association 21 Décembre 1989 v Romania, the Court drew on previous case law to restate that in order to be effective, investigations must

56. El-Masri v FYRM, Joint concurring opinion of Judges Casadevall and Lopez Guerra.
57. Ibid.
58. El-Masri v FYRM, para 191.
60. El-Masri v FYRM, para 191.
61. The context of this case is described as ‘dans le cas de l’usage massif de la force meurtrière à l’encontre de la population civile lors de manifestations antigouvernementales précédant la transition d’un régime totalitaire vers un régime plus démocratique’, Association 21 Décembre 1989 v Romania, para 144 concerning ‘la mort ou les blessures par balles et les mauvais traitements et privations de liberté infligés à plusieurs milliers de personnes, dans plusieurs villes du pays’, para 9.
be ‘prompt, complete, impartial and thorough’ in order to ‘identify and punish those responsible’. 62 This is an ‘obligation of means and not of results’: authorities must demonstrate the adoption of reasonable measures, promptly and with reasonable diligence, to obtain evidence and allow public scrutiny of results, ensuring that investigations are conducted by independent persons not implicated in the events.

The ECtHR has also considered the state obligation to investigate enforced disappearances during conflict. In the unanimous judgment of Aslakhanova (pertaining to hostilities between Russia and Chechen groups) s1 listed the regional and international instruments applicable to investigating enforced disappearances, explicitly acknowledging the right to the truth.63 With reference to Art 2 and in light of the Court’s ‘settled case-law’ (including Association 21 Décembre 1989) this judgment listed the guiding principles ‘for an investigation to comply with the Convention’s requirements’, characterised as an obligation of means, and not of results.64 In order to be effective, investigations must be carried out by persons independent from those implicated in the events, and be ‘capable of ascertaining the circumstances’ and determining whether the force used was justified, and identifying and punishing those responsible. This requires ‘promptness and reasonable expedition’, accessibility to family members and some public scrutiny.

With regard to Art 3, investigations into alleged ill-treatment should be thorough and prompt, and ‘in principle be capable of leading to the establishment of the facts of the case’ and identifying and punishing those responsible.65 Moreover, there must be ‘a sufficient element of public scrutiny of the investigation or its results’, suggesting that investigations matter to the parties to the case but also to society at large.

The criteria to assess the effectiveness of investigations were listed again in the recent Grand Chamber judgment, Mocanu (on the violent crackdown on anti-government demonstrations in Romania).66 While the Court did not address the right to the truth explicitly, it built on previous jurisprudence and on Arts 2, 3 and 6(1) to restate the requirements of effective investigations: independence, expedition and adequacy of the investigation, as well as the victim’s next of kin participation in the process. This judgment also considered the importance of investigations in the presence of numerous other similar cases:

The number of violations found in cases similar to the present case is a matter of particular concern and casts serious doubt on the objectivity and impartiality of the investigations.67

With regards to the passage of time leading to statutory limitations, the Court noted that high ‘political and societal stakes’ for Romanian society ‘should have led the authorities to deal with the case promptly and without delay in order to avoid any

63. Aslakhanova v Russia, paras 60–61, quoting ‘PACE Resolution 1463’ above n 45; ‘Convention on Enforced Disappearances’ (CED); also noting that Art 5 CED and Art 7 Rome Statute of the International Criminal Court (17 July 1998, entered into force on 1 July 2002) A/CONF.183/9 both describe widespread or systematic practice of enforced disappearance as a crime against humanity.
64. Ibid, para 121.
65. Ibid, paras 144–145.
66. Mocanu v Romania, paras 332–351; upheld in Bouyid v Belgium [GC], App No 23380/09 (ECHR, 28 September 2015), para 114; and Jeronovičs v Latvia [GC], App No 44898/10 (ECHR, 5 July 2016), para 103.
67. Ibid 334.
appearance of collusion in or tolerance of unlawful acts’. This echoes IACtHR jurisprudence on the duty to conduct serious investigations especially when violence affects the entire society.

Notwithstanding the attention the Court affords to the state obligation to investigate, its interconnectedness to the right to the truth has not been clearly established. In the first El-Masri concurring opinion, Judges Tulkens et al regretted the judgment’s ‘over-cautiousness’ in making a ‘somewhat timid allusion to the right to the truth in the context of Article 3 and the lack of an explicit acknowledgment of this right in relation to Article 13’ (effective remedy), and to procedural obligations under Arts 3, 5 and 8. Tulkens et al drew on Association 21 Décembre 1989 to argue that ‘in the absence of any effective remedies (…) the applicant was denied the “right to the truth”’, explaining that this right encompasses ‘an accurate account of the suffering endured and the role of those responsible’. They also suggested that if the right to the truth includes the ‘right to ascertain and establish the true facts’, it would be better situated in relation to Art 13, given the ‘scale and seriousness’ of violations and the political context of widespread impunity. As such,

The search for the truth is the objective purpose of the obligation to carry out an investigation and the raison d’être of the related quality requirements (transparency, diligence, independence, access, disclosure of results and scrutiny).

In the contrasting El-Masri concurring opinion Judges Casadevall and Lopez Guerra contended that the right to the truth was equivalent to the right to a serious investigation understood procedurally as a ‘serious attempt’ to ‘find out the truth of the matter’. For them, investigations must establish the facts of the case, the cause of harm suffered, and the identity of those responsible, as a procedural obligation linked to the deprivation of life (Art 2) and torture, inhuman or degrading treatment (Art 3), actionable only by direct victims. So by characterising the right to the truth as equivalent to the procedural limb of Arts 2 and 3 and the state duty to investigate, they argue it does not merit consideration as a separate issue. Yet Casadevall and Lopez Guerra’s approach seems unnecessarily cautious in light of the Court’s jurisprudence on the state duty to investigate, which indicates recognition of the broader significance of knowing the truth about past abuse. By discounting the development of the right to the truth about widespread violations as a concept that transcends individuality and affects society as a whole, they ignore the ECtHR’s own gradual contributions and the established position of the UN and IACHR jurisprudence.

(d) The individual and collective dimensions of the right to the truth

As noted, the right to the truth carries a collective element. Intervening as a third party in Al Nashiri v Poland (subsequent to El-Masri), the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism clarified the UN understanding of the right to the truth as having ‘two dimensions – a private dimension and a public dimension’. Indeed, ‘where gross or systematic human rights violations were alleged to have occurred, the right to know the truth was not one that belonged solely to the immediate victim but also to society’.

68. Ibid 338 and 288.
70. Ibid, Joint Concurring Opinion of Judges Casadevall and Lopez Guerra.
Importantly, he outlined that recognising a ‘free standing right to truth belonging to society at large’ gave ‘any individual with a legitimate interest in the truth’ the entitlement to invoke that right. If, instead:

the right to truth were to be confined to the individual who had suffered the violation or his representatives, then the exposure of grave and systematic international crimes would necessarily be dependent on the chance occurrence of there being an individual victim or relative who was able and willing to bring proceedings. The Special Rapporteur’s words, reported in the Al Nashiri judgment, indicate the Court’s awareness of the collective dimension of the right to the truth, in addition its importance for direct victims and relatives. According to the Grand Chamber in El-Masri, the ‘right to know what happened’, as linked to the right to the truth, is relevant to the victim (applicant), whose Convention rights are allegedly violated and who has standing before the Court; his family; ‘other victims of similar crimes’; and the ‘general public’. The broader understanding of the category of victims echoes established IACHR jurisprudence. Moreover, in El-Masri, the ECtHR stated:

The great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened.

The importance for the victim’s family to know about the past through an enquiry is established in the Court’s jurisprudence: there is a continuing violation of Art 3 found when a state persistently fails to account for missing persons. More recently, in Association 21 Décembre, the Court found that the ongoing failure of the state to provide families of the victims with adequate and prompt access to an independent judicial enquiry into brutal repression contributed to the violation of Art 2. Thus, relatives directly enjoy independent victim status when state investigations are inadequate, not vicariously through the violation of a loved one’s rights. Regarding disappearances, in Aslakhanova the Court stated that the ‘essence of such a violation

72. Ibid.
73. Ibid.
74. El-Masri v FYRM, para 191.
75. Ibid.
76. Eg Cyprus v Turkey, App No 25781/94 (ECHR, 10 May 2001); see also D Groome ‘Identifying Synergies between the Right to the Truth and International/Domestic Criminal Law in Combating Impunity’ (2011) 29 BerkJIL 175, 179–180. However, in older cases, eg Çakıcı v Turkey, App No 23657/94 (ECHR, 8 July 1999), paras 98-99, the Court refused to recognise an automatic ‘general principle that a family member of a “disappeared person” is thereby a victim of treatment contrary to Article 3’, suggesting that affording victim status to relatives depends on ‘special factors’ which give ‘the suffering of the applicant a dimension and character distinct from the emotional distress’, based on the proximity of familial ties, the circumstances of the relationship and whether the harm was directly witnessed.
78. Ibid, paras 142–145; In particular para 143: Or, “l’obligation procédurale découlant de l’article 2 de la Convention peut difficilement être considérée comme accomplie lorsque les familles des victimes ou leurs héritiers n’ont pas pu avoir accès à une procédure devant un tribunal indépendant appelé à connaître des faits”.

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does not lie mainly in the fact of the “disappearance” of the family member but rather concerns the authorities’ reactions and attitudes to the situation when it is brought to their attention’ (linking to Arts 2, 3 and 5). A disappearance is ‘a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred’, which ‘over time, prolong[s] the torment of the victim’s relatives’. So for as long as ‘the person is unaccounted for’,

The investigation must be accessible to the victim’s family to the extent necessary to safeguard their legitimate interests.

The collective dimension of the right to the truth expands the purpose of the state’s obligation to investigate. While it is established that victims and close relatives are entitled to make a legal claim, the general public’s interest in knowing the truth about widespread abuse that affects large portions of society contributes an additional, distinct dimension to the right to the truth. This interest can take a variety of forms. In Association 21 Décembre the judges considered that ‘the public must have a sufficient right to examine (droit de regard) the investigation or its findings, in order to challenge (mise en cause) it both in practice and in theory, depending on each case.’ Moreover, the general public may also want to know what emerged from those investigations through a related ‘right to access relevant information about alleged violations’, as noted by Tulkens et al in their concurring opinion in El-Masri. This connects the right to the truth to the right to access information of public interest also emerging in the Court’s jurisprudence.

In essence, when harm has affected society collectively, the right to the truth acquires significance for groups beyond persons directly affected. Since El-Masri the Court has reaffirmed that in cases of serious human rights violations:

the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened.

The Court has also found that if authorities fail to conduct serious investigations they may appear tolerant of human rights violations and undermine the rule of law. In El-Masri the Grand Chamber stated that an adequate response and investigation is ‘essential in maintaining public confidence in their adherence to the rule of law and

79. Aslakhanova v Russia, para 131.
80. Ibid 122.
81. Ibid 121.
82. Association 21 Décembre, para 133.
84. The emerging right to access information of public interest by members of the general public supports the existence of a collective dimension and social relevance of the right to the truth in relation to the state duty to investigate. The ECtHR has begun to outline its understanding of this in relation to Art 10, most recently in cases involving NGOs seeking information of public interest, like Youth Initiative for Human Rights v Serbia, App No 48135/06 (ECHR, 25 June 2013) and very recently in the Grand Chamber decision of Magyar Helsinki Bizottság v Hungary [GC], App No 18030/11 (ECHR, 8 November 2016).
85. Also in finding a violation of the procedural limb of Art 3, in Al Nashiri v Poland, App No 28761/11 (ECHR, 24 July 2014), para 495, and (verbatim) in Husayn (Abu Zubaydah) v Poland, App No 7511/13 (ECHR, 24 July 2014), para 489.
in preventing any appearance of collusion in or tolerance of unlawful acts’.

Subsequent case law upholds this, evidencing the Court’s view that failure to conduct serious investigations undermines respect for the rule of law in general. To support this, Tulkens et al drew on IACHR cases (Contreras and Velásquez Rodríguez) to illustrate that victims and relatives, as well as society as a whole, had ‘the right to know the truth’. Citing from Contreras, they recalled that in democratic societies there must be knowledge ‘about the facts of grave human rights violations’, which is especially important after conflict or authoritarianism.

But recognising the collective dimension of the right to the truth does not clearly identify rights-holders and, accordingly, subjects entitled to claim its violation. In order for human rights to be given legal effect and rendered justiciable, a degree of certainty around the rights holders is needed. In older cases the Court has accepted applications from family members as indirect victims, and in relation to enforced disappearances this includes spouses, parents, a nephew with close ties to the direct victim and the violation, but not an adult sibling living in a different city. This limited understanding of who may claim a violation clashes with the broad societal significance of the right to the truth articulated recently in El-Masri and Association 21 Décembre. This discrepancy can be interpreted as part of the Court’s gradual recognition of the significance of the collective dimension of the right to the truth: in certain instances, knowing the past is clearly relevant to society at large in principle, but in practice only a small number of claimants may be entitled to take legal action. As such, the right to the truth as a collective matter strengthens the right to know held by specific individuals and groups, but the Court is yet to afford a clear, actionable right to the truth to satisfy that collective dimension.

The second concurring opinion in El-Masri adopted this more conservative position, arguing that it is ‘the victim, and not the general public’ who is entitled to know, regardless of the general public’s interest (and curiosity) towards the case. So while not completely dismissing the fact that certain cases are significant beyond the parties to the dispute, Casadevall and Lopez Guerra considered the interest of society at large as irrelevant under the law. But this more conservative approach seems to completely miss the distinctive collective aspect of the right to the truth, especially when the outcome of a case is likely to affect large sections of society. The right to the truth is more that the

86. El-Masri v FYRM, para 192, restated in the Joint Concurring Opinion of Judges Tulkens et al, para 6: ‘The desire to ascertain the truth plays a part in strengthening confidence in public institutions and hence the rule of law’. And previously, Association 21 Décembre, paras 134, 144 and 194 with reference to the importance of society to know what happened to victims of violent transition in the context of structural and widespread harm.

87. In particular, Al Nashiri v Poland, para 495; Aslakhanova v Russia, para 231, noting that addressing ‘conditions of guaranteed impunity’ for abuses committed by state agents is especially important in establishing of the rule of law and building public confidence.

88. Contreras v El Salvador 173; 170. This echoes the Court’s own understanding of the ECHR as ‘an instrument designed to maintain and promote the ideals and values of a democratic society’, as discussed inter alia in Soering v UK.

89. ‘Where there is a personal and specific link between the direct victim and the applicant’, Council of Europe/ECHR ‘Practical Guide on Admissibility Criteria’ (2014), para 30.

90. McCann and Others v UK, App No 18984/91 (ECHR, 27 September 1995).


93. Çakıcı v Turkey, App No 23657/94 (ECHR, 8 July 1999), paras 98-99.

94. El-Masri v FYRM, Joint Concurring Opinion of Judges Casadevall and Lopez Guerra.
state obligation to investigate: in some cases, finding out about past abuses is a public concern, in addition to being a specific entitlement of persons who enjoy victim status.

A narrow legal analysis is unable to appreciate the important extra-legal implications of uncovering the truth about the past, which may carry individual and collective healing functions. Studies in criminology and socio-legal studies have explored the emotional repair of truth finding. Some suggest that ‘the restorative nature of truth is as much remedial as it is reparative, as much procedural as substantive, and as much immediate as enduring’. In *El-Masri* Tulkens et al acknowledged the importance of knowing the truth for:

Establishing the true facts and securing an acknowledgment of serious breaches of human rights and humanitarian law constitute forms of redress that are just as important as compensation, and sometimes even more so.

These considerations give the right to the truth an additional meaning that cannot be understood – or characterised – through law alone. But the Court may not (yet) have the tools to formalise this meaning. And while the ECtHR has reflected on similar issues emerging from IACHR case law, the development of the right to the truth through the ECHR does not match IACHR jurisprudence. Nevertheless, the Court is not oblivious to the potential of the right to the truth.

Since *El-Masri*, and *Association 21 December 1989* before it, the Grand Chamber has faced the question of the collective significance of the right to the truth in relation to widespread past abuses in relation to a number of ECHR provisions (including Arts 38, 7 and 10). In *Janowiec v Russia* (relating to the historic inquiry into the Katyn massacre of Polish prisoners by Soviet forces in 1940) the ECtHR found a failure to comply with the obligations under Art 38 and recognised both:

the public interest in a transparent investigation into the crimes of the previous totalitarian regime and the private interest of the victims’ relatives in uncovering the circumstances of their death.

Taking this further in their separate opinion, Judges Ziemele, De Gaetano, Laffranque and Keller pointed to a ‘clear trend towards recognising a right to the truth in cases of gross human rights violations’, reiterating that:

the obligation to investigate and prosecute those responsible for grave human rights and serious humanitarian law violations serves fundamental public interests by allowing a nation to learn from its history and by combating impunity.

Citing from the UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Ziemele et al argued that the right to the truth ‘protects the collective memory of the affected people’, again indicating a willingness of some judges to acknowledge more directly its collective significance.

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100. Ibid.
Judge Ziemele’s separate opinion in Vasiliauskas v Lithuania (another historic case on the retroactive conviction for genocide of a former KGB official for killing partisans in the 1950s) also highlights the broader social importance of certain cases:

the Court is not only dealing yet again with the rights of the applicant, but also finds itself at the centre of a complex social process in a society seeking to establish the truth about the past and its painful events. 101

Judge Ziemele, again, cited the UN Updated Set of Principles for the Protection and Promotion of Human Rights in arguing that while maintaining the rule of law standards contained in Art 7, the Court is also guided by the ‘broader principles regarding the right to truth and prohibition of impunity’. 102 This suggests that some judges have developed an understanding of investigations and accountability within the scope of the Convention that appreciates the collective and social significance of certain cases in addition to the importance for individual claimants. Their position clearly affects the work of the Court, but the fact that the collective significance of investigations is being discussed in separate opinions suggests that the judges are not unanimous on this issue. Consequently, the Court’s jurisprudence on the collective dimension of the right to the truth remains fragmented.

The Grand Chamber has also been presented with missed opportunities to consider the collective significance of the right to the truth when fraught histories are debated. For example, in Perinçek v Switzerland, the majority found that the criminal prosecution of a Turkish man denying the 1915 Armenian genocide in Switzerland (and not Turkey) constituted a violation of Art 10. 103 Yet seven of the 17 judges dissented, accepting instead the possibility for states ‘to make it a criminal offence to insult the memory of a people that has suffered genocide’. 104 Perhaps this case would have been more interesting for the elucidation of the Court’s position on the collective significance of the right to the know and debate the past had the respondent state been Turkey, where the Armenian massacre is yet to be politically accounted for and included in institutional memory.

When confronted with ‘historically and legally’ complex cases, 105 the Court has exercised its discretion to tackle disputes about more general historical truths emerging incidentally from the facts of a specific case. And while the Court is not mandated to settle disputes about the past, in establishing a violation of a Convention right it cannot ignore the wider political context and possible collective significance of a specific case. The jurisprudence illustrates the judges’ fragmented approach in engaging the right to the truth incidentally, by attaching it to different substantive articles depending on the facts, the applicant’s submissions, the state’s responses, and often the persuasiveness of third party interventions, and at times referring to it as an overarching principle not appended to a listed right. Yet the Court’s incidental consideration of the right to the truth in relation to historical abuses remains difficult to conceptualise coherently: perhaps its role, as noted by Judge Ziemele, permits only the following:

101. Vasiliauskas v Lithuania [GC], App No 35343/05 (ECHR, 20 October 2015), dissenting opinion of Judge Ziemele, para 27.
102. Ibid.
103. Perinçek v Switzerland [GC], App No 27510/08 (ECHR, 15 October 2015), paras 213 et seq.
105. To borrow from the language used in Vasiliauskas v Lithuania [GC], App No 35343/05 (ECHR, 20 October 2015), dissenting opinion of Judge Ziemele, para 27.
While maintaining the rule-of-law standard that Article 7 provides, it is particularly important that this Court, at the level of the presentation of facts and the choice of methodology and issues, is guided by these broader principles regarding the right to truth and prohibition of impunity.\textsuperscript{106}

How exactly the presentation of facts and methodological choices would operate in practice, however, remains open to further scrutiny.

The differences of opinion around the right to the truth within the Court evidenced in its jurisprudence are reflected in the limited degree of justiciability of the right to the truth. Existing case law does indeed recognise the significance of the collective dimension of the right to the truth, but no tangible legal effect has been given to that recognition, placing the ECtHR behind the pioneering decisions of the IACHR instruments. The explanation for this gap is likely to be informed by the political histories of the two regions and the extent to which dealing with legacies of widespread violence of dictatorships has been a central or peripheral preoccupation for each Court. Yet the EctHR is facing a wider range of contexts in which the right to the truth can be of use to victims and societies as a whole, which include post-authoritarian transitions, counterterror practices, international and non-international armed conflicts as well as illiberal policies of established democracies. This variety may expand the uses of the right to the truth within the scope of the ECHR, as future research may observe.

Nevertheless, in connection to the right to the truth emerging in the ECHR system, victims are able to hold states accountable for conducting inquiries into the circumstances and responsibilities for past abuse and instigate inquiries themselves. This serves the interests of the rule of law and human rights in general, as well as public confidence in state institutions, which affects the whole of society. At the same time, the outcomes of formal truth seeking informs the dynamic process of building, undoing and contesting the formation of collective memories in contexts of competing narratives. As such, identifying the contours of the right to the truth and its status in global IHRL, and making it justiciable, may help empower survivors of abuse and rebuild political communities recovering from violent histories. The ECtHR’s gradual process of recognition of the right to the truth seems encouraging for its further consolidation and actionability. Moreover, the position of the European human rights system is significant beyond its jurisdictional boundaries, strengthening the development of the right to the truth internationally.

2. THE STATUS OF THE RIGHT TO THE TRUTH IN PIL

A decade ago Yasmin Naqvi considered whether the right to the truth is emerging as ‘something approaching a customary right’ (CIL) or a general principle of law,\textsuperscript{107} concluding that it stood ‘somewhere on the threshold of a legal norm and a narrative device’. Today, these claims can be reassessed in light of new developments in ECHR jurisprudence on the right to the truth. Indeed, since the Strasbourg judges have drawn on UN and IACHR developments and started to explore applications of this principle in Europe, the right to the truth is being used across different jurisdictions, and this is significant for its status in international law more generally. But, in the absence of clear conventional status in PIL, does it reach the threshold of CIL or general principles? Turning to the significance of the recent ECHR jurisprudence in the global debates, this

\textsuperscript{106} Ibid.
\textsuperscript{107} Naqvi, above n 10, 267 and 273.
part will consider how this contributes to the evolution and formalisation of the right to
the truth internationally.

(a) The right to the truth and customary international law

In 2006 Naqvi explored the customary status of the right to the truth based on ‘repeated
inferences’ as related ‘to other fundamental human rights by human rights bodies and
courts’ and the proliferation of truth seeking mechanisms. She relied on Meron’s
seminal work on human rights and custom to discuss how the right to the truth could
reflect a CIL norm, concluding that it struggled to meet the requirements. So does
the fact that the ECtHR has begun referring to the right to the truth, joining the IACtHR
and the UN, demonstrate its emerging customary status?

Establishing the customary status of a norm under PIL remains a notoriously arduous
task. The ongoing work of the International Law Commission on CIL and the wealth of
(often critical) academic literature on this topic demonstrate the enduring complexity of
identifying custom. Defining international custom ‘as evidence of a general practice
accepted as law’, Art 38(1)(b) of the ICJ Statute is understood by the ILC (and
scholars) as setting out two constituent elements of CIL: general practice and
acceptance as law (opinio juris). The 2016 ILC Draft Conclusions indicate that the
practice of states, and in some cases international organisations, ‘contributes to the
formation, or expression, of rules of customary international law’ (Draft Conclusion
4) and may take a variety of forms (Draft Conclusion 6). The 2014 International
Law Commission ‘Report on identification of customary international law’ had already
reaffirmed that acts of the executive branch in international contexts are to be
understood as state practice. With regards to opinio juris, ‘the practice in question
must be undertaken with a sense of legal right or obligation’ (Draft Conclusion 9)
and may take a variety of forms (Draft Conclusion 10). The 2014 Report stressed that
‘accepted as law’ is a better term for understanding the ‘subjective element’ of CIL,
acknowledging the paradoxes of opinio juris evidenced in academic debates.

109. Ibid, 10, 254, discussing T Meron, Human Rights and Humanitarian Norms as Customary
Law (Oxford: Clarendon Press, 3rd edn, 1989), and in particular the description of the ‘dynamic
relationship between custom and treaty’, in which the latter may generate ‘new rules of customary
law and may eventually acquire probative value for establishing the customary character of the
new rules’, 89–90.
110. The ‘Identification of customary international law’ is currently being studied by the
International Law Commission, which provisionally adopted draft conclusions in summer
2016: International Law Commission, Identification of customary international law, text of the
draft conclusions provisionally adopted by the Drafting Committee, Sixty-eighth sessionGeneva,
Conclusions). And inter alia: JL Kunz ‘The nature of customary international law’ (1953) 47
AJIL 662; A D’Amato ‘Trashing customary international law’ (1987) 81 AJIL 101; JP Kelly
and modern approaches to customary international law: a reconciliation’ (2001) 95 AJIL 757; N
Arajarvi ‘Between lex lata and lex ferenda? Customary international (criminal) law and the
111. International Law Commission, above n 110.
112. ILC ‘Second report on identification of customary international law’ (66th session, 5th
113. Ibid. para 68.
Draft Conclusions (16) also envisage rules of particular customary international law at regional, local or other level.

One aspect of the right to the truth - the state obligation to investigate serious human rights violations - has been addressed in the context of the state practice requirement of CIL. Naomi Roht Arriaza acknowledged that 'although state-sponsored grave violations of human rights persist' and states often fail to investigate them, 'other aspects of state practice show that states do recognise these failures as breaches of international norms'. She points to verbal statements of governmental representatives in international organisations as 'recognition of an international obligation to investigate and prosecute'. But this does not directly address the opinio juris requirement of CIL, nor consider the collective dimensions of the right to the truth emerging from regional case law.

The recent developments in ECHR jurisprudence adding to IACHR and UN advancements call for an overall reassessment of the right to the truth in relation to CIL through its two constitutive elements. For the purpose of this analysis, and in the absence of state statements against the right to the truth elaborating on opinio juris, the role of the ECtHR will be interpreted as relevant to regional CIL and significant for international custom more generally.

With regards to the significance of Strasbourg’s jurisprudence in relation to IHRL (and PIL more broadly), the ECHR operates in the context of the rest of IHRL. Consequently, it is permeable to global human rights trends and ECtHR case law feeds back into those developments. The separate opinion of judge Tulkens et al in El-Masri, citing UN developments and IACHR case law, evidences the judges’ attention to global human rights debates. Established jurisprudence describes the ECHR as a ‘living instrument’ to be ‘interpreted in the light of present-day conditions’; while this is primarily understood in relation to the Court’s internal hermeneutics, in practice it provides ways for the Court to read global human rights developments into its mandate and through the ECHR. The progressive development of new rights through evolutive interpretation may help the Court respond to new

114. Roht Arriaza, above n 41, 489.
115. Ibid, 492.
120. In light of the Vienna Convention on the Law of Treaties (23 May 1969), Art 31(3)(b) on taking into account ‘any subsequent practice in the application of the treaty’.
challenges – looking to other human rights actors and leading to forms of cross-fertilisation across jurisdictions. References to the right to the truth through the UN and IACHR, as occurred in *El-Masri* and related judgments, illustrate this.

ECHR jurisprudence carries normative value both within its regional jurisdiction and beyond, and contributes to ‘international legal culture’ by providing important ‘elucidation and development of international law’ as well as developing ‘principles of general applicability’. Jointly with the IACHR, the ECtHR gives regional effect to general IHRL principles that may otherwise remain non-justiciable for rights-bearers. Thus, dialogue between regional human rights courts informs global human rights developments, including the right to the truth.

References to international law in the Court’s jurisprudence denote an interactive, reciprocal correlation. Former President of the Court Luzius Wildhaber highlighted the ‘dynamic and evolutive’ relationship between the ECHR and PIL, ‘checking and building on each other’. As ‘part of the legal background’ of the ECHR (a treaty under PIL), international law is a ‘vital reference point’ for the Court. By drawing on other international law instruments, the Court in effect develops a reading of the Convention mindful of other areas of IHRL. Thus, the ECHR plays a ‘key role’ in IHRL and PIL, which is desirable, argues Wildhaber, ‘if it contributes to the evolution of international law at large’ and furthers human rights.

The Court has relied on international law to determine ‘the effect of some substantive provisions of the Convention’ and looked at global developments to interpret and apply it. Yet, ‘unlike international treaties of the classic kind’ it creates ‘more than mere reciprocal engagements between contracting States’ and establishes obligations that

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**122.** Eg extraterritorially, see *Al-Skeini v UK*, App No 55721/07 (ECHR, 7 July 2011).

**123.** Merrills, above n 117, pp 252 and 17.

**124.** Wildhaber, above n 119, 230.

**125.** Thus, the 1969 Vienna Convention on the Law of Treaties applies to its interpretation, as confirmed in *Loizidou v Turkey*, App No 15318/89 (ECHR, 18 December 1996), para 43, discussing, inter alia, *Golder v the United Kingdom*, para 29.

**126.** Merrills, above n 117, pp 203–205. The ECHR explicitly mentions international law in Art 7, Art 15, Art 35 and Art 1 Protocol I, and the Court’s case law has clarified that ‘the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part’, as noted in *Al-Adsani v UK* [GC], App No 35763/97 (ECHR, 21 November 2001) para 55, discussed in Wildhaber, above n 117, 220. The same phrase is repeated elsewhere, eg *M and Others v Italy and Bulgaria*, App No 40020/03 (ECHR, 31 July 2012); *Catan and Others v Moldova and Russia*, App Nos 43370/04, 8252/05 and 18454/06 (ECHR, 19 October 2012). The Court routinely considers PIL within the applicable legal framework in deciding cases, under the heading ‘Relevant international law’ (eg *Sørensen and Rasmussen v Denmark*, App Nos 52562/99 and 52620/99 (ECHR, 11 January 2006)), or jointly under the heading of ‘Relevant comparative and international law’ (eg *Othman (Abu Qatada) v UK*, App No 8139/09 (ECHR, 17 January 2012)) and references ICJ jurisprudence (eg *Cyprus v Turkey*, 85-86). The ECtHR has also considered customary law provisions as part of applicable PIL eg *Cudak v Lithuania*, App No 15869/02 (ECHR, 23 March 2010) para 66.

**127.** Merrills, above n 117, pp 203 and 218–226.


**129.** *Al-Adsani v UK* in Wildhaber, above n 119, 225.
benefit from ‘collective enforcement’. The ECHR’s special character as a treaty for the collective enforcement of human rights and fundamental freedoms (and related democratic intent) makes it permeable to global IHRL developments in other treaties, fora, practices and debates. As such, the Court may reflect or give effect to IHRL trends even when these are not squarely set out in the Convention, and thus has been able to recognise the significance of the right to the truth within the scope of the ECHR. At the same time, ECHR judgments feed into global human rights developments and may be constitutive of PIL. ECHR jurisprudence, especially in Grand Chamber formation (like El-Masri), contributes to the consolidation of new norms, such as the right to the truth.

Could ECtHR general developments around the right to the truth provide a form of authoritative interpretation in relation to human rights in CIL, similar to UN human rights bodies? Bruno Simma and Philip Alston have examined the notion of authoritative interpretation by the UN in relation to CIL, arguing that UN member states, ‘having in good faith undertaken treaty obligations to respect “human rights”’ are bound by ‘the definition of “human rights” which has evolved over time’ through the ‘virtually unanimous practice’ of UN organs. Yet this reading is far from unanimous. Another indicator for tracing the establishment of CIL norms proposed by Meron is the ‘degree to which a statement of a particular right in one human rights instrument, especially a human rights treaty, has been repeated in other human rights instruments’, countered by ‘the degree to which a particular right is subject to limitations’. Meron (and others) posit that regional human rights courts may also

131. Evidenced in case-law, eg Mamakulov and Askarov v Turkey [GC], App Nos 46827/99 and 46951/99 (ECHR, 4 February 2005) para 100; Loizidou v Turkey; Al-Adsani v UK, para 55; Fogarty v UK; Cudak v Lithuania; Sabeh El Leyl v France, App No 34869/05 (ECHR, 29 June 2011). The Court has questioned ‘the fact that at the heart of any treaty-based agreement there could only be an agreement’, as ‘the integrity and unity of the Convention system’ go ‘beyond the consent- and sovereignty-oriented rules of general international law’, as noted in Wildhaber, above n 119, 229, discussing Bélisos v Switzerland, App No 10328/83 (ECHR, 29 April 1988) and Loizidou v Turkey.
132. Previous case law has indicated that interpretations must be consistent with ‘the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society’. See eg Mamakulov and Askarov v Turkey para 101, citing Soering v UK, para 87, and, mutatis mutandis, Klass v Germany, para 34.
135. Notably, Meron, above n 109, 87, expresses scepticism towards the ‘attempt to endow customary law status instantly upon norms approved by consensus or near-consensus at international law conferences’ (such as UN human rights conferences); and more recently, warnings against ‘a vague and easily manipulable consensus criterion’ have been highlighted by JL Goldsmith and EA Posner ‘A theory of customary international law’ (1998) The Chicago Working Paper Series in Law and Economics (Second Series), available at: http://www.law.uchicago.edu/Lawecon/workingpapers.html (accessed 3 January 2016), 73; And also JL Goldsmith and EA Posner, The Limits of International Law (Oxford: Oxford University Press, 2005).
136. Meron, above n 109, 93.
137. Arajarvi, above n 110, 182.
Contribute to the customary formation and interpretation of IHRL, especially through the ‘cumulative weight of their case-law’ in influencing and consolidating developments of customary human rights law. Moreover, the jurisprudence of regional human rights bodies is ‘frequently and increasingly invoked outside the context of their constitutive instruments and cited as authoritative statements of human rights law’; taken cumulatively, this ‘has a significant role in generating customary rules’. The notion of the right to the truth has indeed been repeated across different fora, including the ECtHR.

But the extent to which new developments around the right to the truth at ECHR level and the cross-referencing consolidate this right in relation to CIL remains unclear – primarily because the understanding of regional courts’ contribution to the formation of CIL remains under-theorised in light of the two constituent elements. As such, and despite recent ECHR developments, qualifying the right to the truth as CIL would be imprecise.

(b) The right to the truth and general principles

Alternatively, the increasing references to right to the truth across different fora could be interpreted as indicating an emerging general principle of law ‘as recognised by civilised nations’. Naqvi suggested that jurisprudence of human rights courts may indicate a nascent general principle; more specifically, procedural obligations that address violations of fundamental rights are emerging as ‘an expected response by a state to a violation’. Despite its colonial heritage, and contested meaning, general principles of international law may offer ‘a means to resolve a variety of issues which neither conventional nor customary international law’ are able to address, for example in developing human rights. For Simma and Alston, the notion of general principles admits a situation in which a ‘[human rights] norm invested with strong inherent authority is widely accepted even though widely violated’. In the absence of treaty provisions, this offers ‘a more plausible explanation of how substantive human rights obligations may be established in general international law, than that offered by a strained, or even denatured “new” theory of custom’.

138. Meron, above n 109, 80, 89.
139. Ibid, 100.
140. See Art 38(1)(c) of the ICJ Statute, and inter alia RB Schlesinger ‘Research on the general principles of law recognized by civilized nations’ (1957) 51 AJIL 734; FTF Jalet ‘The quest for the general principles of law recognized by civilized nations – a study’ (1962) 10 UCLA L Rev 1041; W Friedmann ‘The uses of “general principles” in the development of international law’ (1963) 57 AJIL 279; B Cheng, General Principles of Law as Applied by International Courts and Tribunals (Cambridge: Cambridge University Press, 1994).
141. Naqvi, above n 10, 268.
143. Discussed inter alia in GJH van Hoof, Rethinking the Sources of International Law (Deventer, Kluwer Law, 1983), pp 131–151.
145. Simma and Alston, above n 134, 102.
146. Ibid, 104, 100–102.
Considering both national and international sources of general principles, Cherif Bassiouni posited that ‘comparative legal technique’ offers an ‘objective test to measure breadth and depth of recognition and applicability of a given principle in national legal systems’ and by extension, in international (including regional) contexts. Therefore, the more a principle (to a degree of sameness) ‘is reiterated in national and international sources, the more it deserves deference’. A comparative analysis of the right to the truth across the UN, IACHR and ECHR mechanisms may thus signal a right under general principles. General principles are mentioned twice in the ECHR text and it has been argued that drafters ‘saw the use of general principles as inevitable’ as ‘part of the fundamental legal fabric’. This indicates ‘a process in which the resources of legal culture are constantly being scanned by the judicial mind in a search for new solutions’, bolstering Bassiouni’s comparative legal technique thesis for identifying general principles.

In El-Masri and subsequent cases the Court and individual judges examined ideas piloted by the UN and IACHR mechanisms, and connected them to the ECHR. But while the acknowledgment of the right to the truth by the ECtHR and cross-referencing of IACHR jurisprudence evidences a growing recognition of this right in two regional human rights systems (besides the UN), its generality would have to be evidenced in other jurisdictions too. Moreover, similarly to CIL, regional courts’ contribution to the formation of general principles of international law remains unclear. As such, it seems premature to bestow the character of general principle of law to the right to the truth based on the recent developments.

And yet, lack of clarity as to the formal contours of the right to the truth does not detract from the fact that it is being referred to and used to provide an actionable tool for some victims and survivors, with an important function for societies at large. Perhaps in the future, gradual repeated references to the right to the truth will be (borrowing from Koskenniemi) ‘formulated in non-controversial language’ giving the principle ‘good chance’ of acceptance ‘as part of the discursive stuff out of which international law is made’.

(c) The right to the truth: performing international law

Despite the difficulties of qualifying the right to the truth as a CIL norm or general principle of law, it is far from irrelevant. Some ECHR judges have argued that ‘in international law there is a clear trend towards recognising a right to the truth in cases of gross human rights violations’. And in his 2013 annual report, UN Special Rapporteur on the promotion of truth listed El-Masri among the regional sources that consolidate the right to the truth globally, alongside the rich IACHR jurisprudence

147. Bassiouni, above n 144, 772–773.
149. Art 7(2) and in Art 1, Protocol I.
150. Merrills, above n 117, p 177.
and the African Commission on Human and Peoples’ Rights work. Previously the UN-HRC and the IACHR judges drew on ECHR jurisprudence to elucidate laws applicable within their jurisdictions, suggesting that this could happen again in relation to European developments of the right to the truth. National courts within the ECHR jurisdiction could also take stock of new jurisprudence to support domestic uses of the right to the truth and evidence its global consolidation further. All of this indicates that the new ECHR jurisprudence is not irrelevant to the establishment of the right to the truth in international law.

Since Naqvi’s 2006 work, another important advancement in assessing the significance of developments of the right to the truth is the breadth of contexts in which it has been invoked. In addition to the post-authoritarian transitions of Latin America and Central and Eastern Europe considered by the IACHR and ECHR instruments, the ECtHR has also referred to the right to the truth in relation to institutional patterns of human rights abuse in the context of counterterror measures (El-Masri, Al-Nashiri), historic mass violence (Janowiec, Vasiliauskas), more recent conflicts (Aslakhanova), and current debates about past abuses (Perinçek) in relation to a range of ECHR articles. The UN itself, while originally focusing on disappearances, has also broadened the scope of applicability of the right to the truth to a range of contexts.

This evidence points to the fact that while falling short of a formal status under PIL, the right to the truth is being used productively across different international contexts and fora. An innovative way of interpreting these increasing – and cumulative – references could be as ‘performative utterances’ that do not merely describe an existing legal principle but actually constitute it. In light of J.L. Austin’s theory of performativity, the repetition of the expression ‘right to the truth’ by different actors, at different times, in different contexts indicates a statement that is not true or false (accurate or inaccurate) as such. Instead, this succession of performative utterances is constitutive of the right to the truth in international law, regardless of whether it meets the formal criteria of a CIL norm or a general principle of law.

The turn to an extra-legal theoretical framework to understand the status of the right to the truth in international law can help illustrate its importance in practice, without forcing a premature characterisation through formal sources of PIL. Through Austin’s theory of performativity, the right to the truth can be interpreted as being constituted in international law through repeated utterances in different fora, which cumulatively elevate this right’s global significance and standing. Furthermore, recognising that the right to the truth is already performed in two regional human rights courts (albeit to differing degrees) and within the UN system might also contribute to the formal processes of formation of general international law. This supports the theses of human

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154. Report of the Special Rapporteur on the promotion of truth (2013), above n 19, at 19 and fn [16]. In relation to the African Commission, the right to the truth is an aspect of the right to an effective remedy to a violation of the African Charter.


156. See JL Austin How to do things with words (Oxford: Oxford University Press, 1962)

157. Ibid, p 12
rights developments through general principles of law put forward by Bassiouni – as evidence of his comparative legal technique – and by Simma and Alston as a new norm invested with strong inherent authority. The ultimate test for the status of the right to the truth in international law, however, is whether it will continue to be used (performed) for practical purposes to allow victims and societies to find out about past violence and ensure accountability of those responsible for harm.

CONCLUSIONS

Since Naqvi’s analysis of the status of the right to the truth in international law a decade ago, the ECtHR has joined the conversation previously heralded by the IACHR and the UN. The recent case law, and in particular the El-Masri judgment, adds to the growing recognition of the right to the truth, and contributes to how it is understood both regionally and in its global evolution. Taking stock of this development, this article considers the significance of recent ECHR jurisprudence in consolidating the right to the truth regionally and internationally, and reflects on the contours and status of this right in general international law.

A survey of recent Strasbourg case law indicates that much like in the IACHR jurisprudence, the ECtHR has considered the right to the truth through two distinct, yet related, issues: the link between the right to the truth and the state duty to investigate, and the individual and collective dimensions of the right to know about the past in the context of widespread violations that affect society as a whole. The discussion also brings to light the connection between the right to the truth and democracy building after conflict and authoritarianism, as well as in relation to authoritarian practices in established democracies. In that regard, a more clearly defined right to the truth is desirable inasmuch as it helps strengthen the rule of law and promotes confidence in public institutions, as well as contributing to the formation of narratives that feed into wider debates about legacies of violence and abuse at domestic, regional and international levels.

In the quest for a more formal recognition of the right to the truth, it may be tempting to characterise it as a CIL norm or a general principle of law to give it greater authority. Yet despite the significant developments of the past decade that call for a reassessment since Naqvi’s study, the right to the truth has still not reached formal standing in PIL based on the sources set out in Art 38 of the ICJ Statute. Nevertheless, this does not detract from the substance and usefulness of the right to the truth: its repeated uses across different fora can be interpreted as performative utterances that contribute to its practical existence in international law. Regardless of its formal status under PIL, its uses indicate its growing significance regionally as well as internationally – with great domestic potential as well. As such, the upward trajectory of the right to the truth should continue to be closely monitored; and, most importantly, there should be no hesitation in actioning this right by those seeking the truth about widespread abuse, in order to hold authorities to account.
Clara Sandoval and Miriam Puttick

Reparations for the Victims of Conflict in Iraq
Lessons learned from comparative practice
Cover photo: Civilians walk by the destroyed Al-Nuri Mosque as they flee from the Old City of Mosul on 5 July 2017, during the Iraqi government forces’ offensive to retake the city from ISIS fighters.
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Ceasefire Centre for Civilian Rights and Minority Rights Group International
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Ceasefire Centre for Civilian Rights

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Introduction

Iraq is a country devastated by decades of conflict. Millions of victims have suffered as a consequence of gross human rights violations and serious violations of humanitarian law over the years, whether during Saddam Hussein’s dictatorship, Iraq’s invasion of Kuwait, the occupation of Iraq by the United States and its allies, or, more recently, as a result of the conflict with ISIS. These victims have a right to adequate, prompt and effective redress for harm suffered as a result of such violations.

There are compelling moral and political reasons why reparations matter to victims and societies as a whole. There are equally compelling legal reasons why states should provide reparations, not least because they are bound by various international treaties that incorporate this obligation. Iraq has ratified most international human rights treaties including the International Covenant on Civil and Political Rights (party since 1971), the International Convention on the Elimination of All Forms of Racial Discrimination (1970), the International Covenant on Economic, Social and Cultural Rights (1971), the Convention against Torture (2011), and the Convention for the Protection of all Persons from Enforced Disappearances (2010). Iraq has also ratified most treaties on humanitarian law, including the Geneva Conventions of 1949 (1956).

Iraq already has significant experience in providing redress to victims. In 1991, the United Nations (UN) Security Council set up the UN Compensation Commission to provide reparations to some victims of Iraq’s invasion of Kuwait. Subsequently, after Saddam Hussein was removed from power, the Iraq Property Claims Commission (later renamed the Commission for the Resolution of Real Property Disputes) was created to deal with land-related violations committed under his regime. Finally, a more recent effort in Iraq is Law No. 20 of 2009 on Compensating Victims of Military Operations, Military Mistakes and Terrorist Actions (amended in 2015), which provides redress to victims who have suffered violations since 2003.

While these efforts to provide redress in Iraq act as important precedents, the most recent phase of conflict raises new challenges. Since 2014, fighting between government-allied forces and ISIS has led to widespread violations, with millions displaced, thousands killed, and targeted campaigns perpetrated against ethnic and religious communities. Moreover, damage to infrastructure and personal property is widespread. At the same time, state institutions in large parts of the country have been left paralyzed and incapable of providing basic services to citizens.
As Iraq prepares to rebuild and recover from the conflict with ISIS, providing redress to victims of violations is an important priority. However, it is questionable whether the current legal and institutional framework in Iraq is capable of effectively addressing the violations committed, given their enormous scale and the diversity of actors involved. The task of providing reparations to victims of the conflict is also complicated by the fact that justice has still not been obtained by many victims of previous violations. The United States and other belligerents are arguably yet to take appropriate measures to redress the violations that took place as a result of the 2003 invasion and occupation of Iraq, and many victims of the Saddam Hussein regime are still waiting to receive reparations decades after violations occurred, even though relevant laws and processes have been put in place.

This report seeks to inform the discussion on reparations in Iraq through analysis of both international and domestic practice, with the goal of encouraging the development of a comprehensive framework that can provide adequate and effective reparations to victims of the conflict from 2014 onwards. The introduction provides an overview of the concept of reparations and their impact on individuals and societies. Section 2 outlines the relevant international legal instruments that obligate states to provide reparations. Section 3 expands further upon the scope and reach of this obligation, referring to examples of reparations programmes from international practice for the purpose of comparison. Section 4 serves as a case study on the reparations scheme established by Iraq’s Law 20, and examines both the progress and challenges faced so far in granting reparations to victims in the midst of ongoing conflict. Section 5 suggests how lessons from the implementation of Law 20 can be harnessed for the purpose of designing a more comprehensive reparations scheme for victims of the most recent conflict with ISIS, outlining ways in which the framework can be expanded and improved. Finally, Section 6 ends with some conclusions and recommendations.

While this report is mainly focused on monetary compensation, it has to be remembered that the right to reparation is not exhausted simply by providing compensation to victims. Full reparation should also include justice – including effective investigations leading to the identification of those responsible for violations – and truth, as victims have a right to know what happened. Moreover, states should take necessary measures to address the roots of conflict and repression to ensure that violations do not happen again. In other words, reparations programmes should take place as part of a holistic approach to transitional justice that will enable victims and society as a whole to move forward from conflict. Isolated reparation practices carry risks, as they do not properly address the harm suffered by victims and can even cause re-victimization.
Reparations for the Victims of Conflict in Iraq: Lessons learned from comparative practice

Victims of serious violations of international law such as gross human rights violations or serious violations of humanitarian law become targets because they are dehumanized by perpetrators. The role of reparations is to restore their humanity. Reparations aim to correct serious international wrongs that not only affect those directly victimized, but also those around them and the societies in which they live.

Pablo de Greiff, a philosopher by training and UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, makes a very powerful case for reparations. Reparations are clearly about fairness, or in other words, about trying to undo the harm that has been caused to the extent possible. However, this process cannot occur in isolation when many others have suffered similar violations. It is here that de Greiff calls for a change of approach. While for him fairness should be sought, it should be conceived as an element of a political project, as this would enable the pursuit of other aims, namely recognition, civic trust, social reconciliation and democratization.

Recognition is about reaffirming individuals’ status as citizens by acknowledging them as both the subjects and objects of action in a society. Victims should be recognized as individuals whose rights as citizens were violated and who are worthy of reparation in order to wipe out this harm. As de Greiff writes, ‘those whose rights have been violated deserve special treatment, treatment that tends towards the reestablishment of the conditions of equality.’

Civic trust is about restoring trust among citizens. In states devastated by authoritarianism or conflict, relationships of trust break down. Individuals, not only victims, distrust the state and its institutions as well as their fellow citizens. Therefore, reparations function to help re-establish civic trust as they symbolize the intention of the state and fellow citizens to rebuild relations based on equality and respect. A reparation effort that is genuine sends the message that victims matter to society and that without their participation a society will not be able to move forward.

Reconciliation, according to de Greiff, refers to:

‘the condition under which citizens can trust one another as citizens again (or anew). That means that they are sufficiently committed to the norms and values that motivate their ruling institutions, sufficiently confident that those who operate those institutions do so also on the basis of those norms and values, and sufficiently secure about their fellow citizens’ commitment to abide by and uphold these basic norms and values.’

De Greiff, however, notes that reconciliation and democracy are ultimate goals that are not exhausted by transitional justice or by its measures, including reparations. Indeed, he states that ‘the most that transitional justice measures can do is to give reasons to individuals to trust institutions’.

Finally, transitional justice and its measures can make a key contribution to the achievement of democracy. Here, de Greiff does not have in mind only the rule of law. Instead, what is crucial is how victims and society as a whole experience and relate to mechanisms such as reparations, and whether they create forms of participation. Therefore, in addition to building systems of law that are independent, impartial and certain, de Greiff believes that it is crucial to provide victims, and society as a whole, with institutional experiences that allow them to be active citizens and to act democratically. However, he recognizes that transitional justice, or for that matter, reparation, cannot deliver democracy, but the experiences that its mechanisms create can trigger important democratic behaviour in the future.

In sum, reparations matter not so much because they fully redress the harm that victims have suffered in terms of equal pay for equal harm, but because, if well conceived, they provide a transformative experience to victims. Reparations can empower, dignify and return a voice to victims, as well as provide them with the opportunity to become agents of social change.
This duty of states to provide reparation to individuals is well established today under international human rights law and international criminal law. Such a duty also exists, although in limited terms, under humanitarian law.\textsuperscript{10}

A key dimension to note is that this obligation is not bound territorially. Therefore, a state is responsible for violations of human rights (and for that matter of international humanitarian law) even if they are committed outside its own territory. This has been the reiterated position of UN and regional human rights bodies on the issue regardless of whether the violation happened during a conflict situation or not. Indeed, the Human Rights Committee, the body that oversees the International Covenant on Civil and Political Rights, states in General Comment 31 that: ‘the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality [...] who may find themselves in the territory or subject to the jurisdiction of the State Party’.\textsuperscript{11} The committee also noted that ‘this principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory ...’ \textsuperscript{12}

The duty under international human rights law

The first international human rights treaties to be enacted, such as the International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, as well as regional treaties such as the European Convention or the American Convention on Human Rights, did not contain explicit norms recognizing the right of individuals to obtain reparation for harm suffered as a result of the violations of rights incorporated in those treaties. However, those treaties establish the general obligation that states have to respect and ensure rights of individuals recognized under the treaties, which includes the obligation to have adequate and effective remedies in place to deal with violations, regardless of their gravity. One such remedy is precisely the duty to make reparation.\textsuperscript{13} This has been the authoritative and reiterated interpretation given by bodies with jurisdiction to apply and interpret those treaties.
The right to reparation, however, has been explicitly established in various other human rights treaties. For example, Article 14 of the UN Convention Against Torture explicitly recognizes the right of victims to compensation and rehabilitation when breaches occur. Similar articles are also present in regional treaties dealing with torture, such as the Inter-American Convention to Prevent and Punish Torture. Newer treaties, such as the UN Convention on Enforced Disappearances, contain an even stronger and more holistic approach to the right to reparation. Article 24.4 of the Convention reads as follows: ‘Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.’ The article also elaborates on the forms of reparation, the concept of victim, the right to know the truth and other related obligations held by states parties.

Treaty law, as described above, has been complemented and strengthened by the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles). Work on the Basic Principles began in 1989, just over four years after the signing of the UN Convention Against Torture in December 1984. While many years passed before they were finalized and adopted by consensus by the UN General Assembly in 2005, the Basic Principles helped to consolidate a common view about the obligation to provide reparation, both at the procedural and at the substantive level. Today it is possible to assert that victims have a right to reparation for violations of human rights law, and that this right entails adequate, prompt and effective redress for victims in the form of compensation, restitution, satisfaction, rehabilitation, and guarantees of non-repetition.

The duty under international criminal law

The Rome Statute of the International Criminal Court (ICC) recognizes in Article 75 that victims of international crimes under the jurisdiction of the court, namely crimes against humanity, war crimes, genocide and aggression, are entitled to reparation and specifically refers to three forms of reparation: restitution, compensation and rehabilitation. The ICC is a criminal tribunal and therefore it decides on reparations owed by convicted perpetrators (and not states or armed groups) to their victims. While this is an important development under international criminal law, its reach continues to be limited given that the ICC cannot exercise jurisdiction over all persons responsible for international crimes and that it cannot award reparations to all victims of the situation but only to some of them.

The duty under international humanitarian law

Under humanitarian law there is no express recognition of the right to reparation for victims of violations except for two articles that apply to international armed conflicts, that is to say, conflicts between two or more states. The first is Article 3 of the Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex (1907), which establishes that ‘[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.’ Such a norm is almost replicated in Additional Protocol I to the Geneva Conventions in Article 91, which states that: ‘[a] Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.’ It should be noted that such articles refer specifically to compensation and not to other forms of reparation.

While there is otherwise silence on the issue under international humanitarian law treaties, the Basic Principles on the Right to a Remedy and Reparation included such a right not only in relation to gross violations of human rights but also in relation to serious violations of international humanitarian law. Drafters of the Basic Principles had in mind violations that amount to international crimes. While some states were dissatisfied with the inclusion of serious violations of international humanitarian law, the Basic Principles
were adopted at the UN General Assembly by consensus.

Still, although the Basic Principles reflect international law as it stands today in relation to serious violations of international humanitarian law, the lack of a specific norm under humanitarian treaty law constitutes a gap that needs to be corrected. Nevertheless, lack of express recognition of this right should not be seen as an obstacle to claiming reparation as indeed there is legal recognition under both human rights law, which also applies in times of conflict or occupation, and under international criminal law, if violations of certain gravity occur. An additional issue not resolved by the international legal instruments already mentioned is whether non-state actors, such as armed groups, have an obligation to provide reparation for harm suffered as a result of their actions. This point is particularly important when armed groups are considered to have significant resources but there are no laws indicating that they shall make reparation to victims. An important precedent in this regard is contained in the Colombian Peace Agreement signed with the Revolutionary Armed Forces of Colombia (FARC) in which, after much negotiation, the FARC not only recognized the right to reparation of victims but also agreed to support the reparations process by helping with social work, demining fields and contributing financial assets obtained through the armed conflict.
The scope and reach of the right to reparation

Broad and flexible meaning of ‘victim’

There has been much debate in case law and the academic literature over the question of who qualifies as a victim for the purposes of reparation. However, there is consensus that the term cannot be defined in narrow terms. Indeed, there is a valid and implicit assumption that when violations of human rights or humanitarian law occur, victims are not only those who suffered direct harm (the person who is tortured or disappeared, for example) but also others affected by the violation (such as the next of kin of a person tortured or disappeared) or a witness of the events. Both the Basic Principles and the UN Convention on Enforced Disappearances offer broad definitions of the term. The Basic Principles, for example, state that:

‘[V]ictims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.’

Domestic reparation programmes have also adopted a flexible concept of victim. For example, the Victims and Land Restitution Law (Law 1448/2011) in Colombia defines victims as ‘persons who individually or collectively suffered harm as a result of violations that occurred from 1 January 1985’, and also includes family members and ‘persons who have suffered harm when intervening to assist a potential victim or to prevent victimization’.

An important exception to the above has been the tendency in various experiences around the world to prevent the con-
cept of victim from being extended to members of armed groups who could be perpetrators of violations themselves. For example, in Colombia, under the Victims and Land Restitution Law, members of armed groups, such as the FARC, cannot be considered as victims for purposes of that law unless they were still children when they left the armed group. In Peru, the law creating the Comprehensive Reparations Plan was even more limited. It established that members of the armed groups will not be considered as victims and as result they will not be beneficiaries of reparations.

However, there is nothing under international law that would indicate that a person loses his or her right to reparation as a result of being a member of an armed group. Indeed, there is evidence of the opposite. The Inter-American Court of Human Rights, in the case of *Bamaca v. Guatemala* concerning the disappearance of a guerrilla member during the conflict, awarded him, his partner and his family reparations for harm suffered (pecuniary and non-pecuniary damages). So, in principle, the legality of a programme that impedes the right to reparation of certain categories of victims could be challenged for contravening international standards.

At the very least, efforts should be made to distinguish among members of armed groups and to treat them differently depending on whether or not they themselves were perpetrators of serious violations of international law. Another basis to distinguish among perpetrators could be the degree of vulnerability of the perpetrator. For example, many children have been recruited worldwide as child soldiers, and states have failed to prevent their recruitment despite their obligations under the Convention on the Rights of the Child and its Optional Protocol on the involvement of children in armed conflict. Therefore, there are good moral arguments as well as legal ones to consider child soldiers as victims entitled to reparation. Indeed, child soldiers have been awarded reparation by the ICC and were afforded special treatment in Sierra Leone. If perpetrators in particular vulnerable situations are not recognized as entitled to reparations, at the very least demobilization, disarmament and reintegration strategies should be designed and implemented that could have a similar effect to that of reparations.

The requirement to be adequate, effective and prompt

Reparations aim to wipe out all the harm caused to the victim. However, when gross human rights violations and serious violations of humanitarian law are at stake, full reparation can be considered a guiding principle but is unlikely to materialize for different reasons, including the numbers of victims (thousands if not millions of them); the non-existence of state institutions capable of reaching victims; lack of financial and human resources to design and implement reparations; and the continuation of violence and conflict. Nevertheless, the Basic Principles state that reparations should be ‘adequate, effective and prompt.’

Although neither the Basic Principles nor other international instruments define these terms, important guidance can be derived from the international legal rule that allows exceptions to
the requirement of exhausting domestic remedies when these remedies are not adequate or effective. Here, a remedy is considered to be adequate when it is suitable to address the violation at stake and it is effective when, besides being adequate, it ‘is capable of producing the result for which it was designed’. Prompt refers to the availability of the remedy within a reasonable period of time. These concepts are directly applicable to the right to reparation as it is also a remedy that should be available to individuals at the domestic level to address violations of human rights. However, the nature of the right to reparation, and its application to gross human rights violations and serious violations of humanitarian law, calls for further specification of what these adjectives mean in the context of redress.

**Adequate**

When serious violations of international law are at stake, the question of which remedies are adequate to deal with the violations and the harm that ensues from them is critical. Part of the answer is contained in the five substantive forms of reparation available to deal with such harm, as found in the Basic Principles, the Principles to Combat Impunity and the jurisprudence of international bodies: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. While restitution is the preferred form of reparation under public international law, it is not always sufficient, possible or desirable under human rights law and therefore other forms of reparation are needed to wipe out the consequences of the violation depending on the nature of each case. Here, however, there has been a tendency to prioritize compensation over other forms of reparation. While compensation is important, it is not sufficient to adequately address the harm suffered by victims. Moreover, survivors of serious violations may see compensation as dirty money.

Reparations should also be individual, or both individual and collective, for them to be adequate. The Basic Principles are based on the idea that the right to reparation is primarily an individual right but also recognizes the existence of collective victims and collective reparations. While international law has not defined collective reparations, it is standard practice today domestically and internationally to award collective reparations to groups of victims when there is communal harm that cannot be wiped out simply by providing individual reparations. Therefore, an adequate remedy in terms of reparation would consider carefully how to use various forms of reparation, including individual and collective reparation, to maximize its potential for providing full redress to victims and should be assessed on those terms.

Remedies should also take due consideration of the victim and provide the necessary measures to ensure that reparation addresses the harm caused without leading to re-victimization. This is particularly relevant in relation to vulnerable groups such as women, children, LGBTI (lesbian, gay, bisexual, transgender and intersex) persons and victims of sexual violence, who are more vulnerable to violations. While international law does not specify how reparation programmes should be designed to avoid re-victimization, various measures have been taken, in practice, to achieve this goal. These have included consulting victims on the way that reparation should be made, ensuring that there is work on guarantees of non-repetition, enabling victims to have their voices heard so that they can avail themselves of remedies and reparations, fighting stigma, adopting affirmative action measures, and establishing and delivering on urgent reparation measures.

Other factors should also be taken into account when deciding what remedies would be adequate to deal with harm caused, including the religious, cultural and political context. For example, providing land restitution to internally displaced persons (IDPs) would not be adequate when conflict is still ongoing and safety conditions are not in place. Providing compensation to victims of sexual violence without addressing the many ways in which their bodies and minds were affected, and the stigma that often ensues, would also be inadequate.

While a combination of forms of reparation is desirable, it is equally important that each reparation measure is also adequate. For example, rehabilitation is a crucial form of reparation that should always be available for victims of serious violations. Rehabilitation requires access to adequate health services for a prolonged period of time both for physical and mental health issues. In such a context paying compensation for such services would not necessarily allow victims to deal
in the best way possible with the harm suffered. On the other hand, if the victim is a refugee who cannot return to the country where the violations occurred, compensation might be the best means possible to ensure access to adequate health services in another country.

Reparations provided to victims without recognition of responsibility, full investigation of the violations suffered and disclosure of the truth about what happened, would also place in question any process of redress and would indicate that reparations have not been adequate.

The Chilean reparation programme presents an interesting comparison. For example, for victims killed by Pinochet’s regime, it offers a comprehensive range of reparations, including a one-time reparation payment (bono), a pension for life for the widow, scholarships for the children and free access to the Programa de Reparación y Atención Integral en Salud y Derechos Humanos, known as PRAIS (The Program for Reparation and Integral Health Assistance for Victims of Human Rights) health care system for the widow and children. It even allows children to opt out of military service if they so wish. In addition to this, forms of satisfaction have also been used such as naming streets after victims and setting up monuments to honour the victims. Most of these measures have also been applied to victims of enforced disappearances and torture.

The Victims and Land Restitution Law (2011) in Colombia also stands out in terms of design. It not only includes all forms of reparation for victims, including land restitution and housing restitution, but also provides great detail in relation to the way each one should be implemented and the way they are jointly provided. It is of particular importance to note that the law also includes, in addition to all forms of reparation, various forms of assistance that it explicitly considers as complementary to reparations and not as a replacement for them.

While Chile and Colombia are landmark cases in the design of reparation programmes, it must be noted that they are countries with strong state institutions and relatively low levels of corruption. In Chile, reparation only began after the dictatorship had ended and improved over the years after the dictatorship. In Colombia, the law was adopted and began to be implemented in the midst of the armed conflict but there are relatively strong institutions in the country.

In other countries devastated by war that lacked the resources, strong state institutions and political will to adequately redress victims, different packages of reparations had to be designed. In Sierra Leone, the Truth and Reconciliation Commission recommended in 2004 that reparations be provided to certain categories of victims who were in a situation of extreme vulnerability and who suffered the most during or as a consequence of the conflict, namely amputees, others wounded in the war, victims of sexual violence, child victims and war widows. Taking into account Sierra Leone’s limited resources, the Truth and Reconciliation Commission also recommended providing victims with social services and means to enhance their livelihood such as ‘health care, pensions, education, skills-training and micro-credit/projects, community and symbolic reparations’. However, in practice the recommendations of the Truth Commission have not fully materialized.

**Effective**

Reparations should also be effective. This means that they should try as far possible to wipe out the harm caused. While it is almost impossible to bring things to the status quo ante in a context where gross violations are at stake, reparations need to be designed and implemented in a manner that allows victims to address the harm incurred to the maximum extent. In addition the substantive dimensions of redress, the process through which victims access reparation is also crucial, as acknowledged in the Basic Principles.

**Institutional structure**

In contexts of generalized victimization, states often opt for domestic administrative reparation programmes as a means of delivering redress to victims. In such circumstances, when there may be thousands if not millions of victims, administrative reparation programmes are more effective than tribunals at delivering redress quickly, at minimal expense to victims, and with lower standards of evidence. These types of programmes are encouraged by the Basic Principles as well as the Principles to Combat Impunity. There is no one-size-fits-all when it comes down to an ideal domestic administrative reparation programme.
However, there is a tendency to create new state institutions with a specific mandate to provide reparations, and with an assigned budget to work for a specific period of time. It should be noted that the establishment of administrative reparations programmes does not mean that judicial processes should not be available, as all victims have the right to adequate and effective judicial remedies to claim reparation.

In Chile, the Rettig Commission – a truth commission – was established in 1990 to deal with extrajudicial killings and disappearances that occurred during Pinochet’s regime between 1973 and 1990. The commission was also mandated with identifying the individual victims of extrajudicial killings and disappearances, and recommending reparations. This served as an impetus to create the Corporación Nacional de Reparación y Reconciliación (CNRR), a national institution responsible for providing reparations, determining the whereabouts of the disappeared, and continuing to identify victims. The CNRR was created as a government institution under the direction of the Ministry of Interior. While it was responsible for reparations, it delivered them in cooperation with other state institutions such as the PRAIS health system.

Torture survivors were not part of the mandate of the Rettig Commission. Only in 2004 did Chile establish the Valech Commission (Comisión Nacional sobre Prisión Política y Tortura) to establish the truth surrounding victims of torture. The commission’s mandate had to be extended twice to ensure that all victims could be included. The Valech Commission identified victims, while other state institutions were mandated with providing reparations. For example, the PRAIS health system was mandated to provide rehabilitation to victims, and the Pensions Institute (Instituto de Previsión Social) was responsible for paying pensions to surviving victims. The commission finished its work in 2011.

In contrast, Colombia’s 2005 Justice and Peace Law tasked the Justice and Peace Jurisdiction with providing reparations to victims. This system, however, proved ineffective and slow in deciding on cases, and awarded reparations amounts to victims that were too high to be extended to all cases. Learning from its mistakes, in 2011 Colombia enacted the Victims and Land Restitution Law, thereby moving from a reparation system that took place through the judiciary to a domestic reparation programme. The law created the Unit for Victims (Unidad para las Víctimas), responsible for coordinating all state institutions involved in the National System to Redress Victims and supporting victims’ participation in the reparation process. Furthermore, given the acute problem of internal displacement in Colombia (considered at the time to be the highest in the world), the Unit for Land Restitution was also established to create a registry of all land that had been abandoned or lost during the conflict, to receive restitution claims and to present the cases before the restitution judges on behalf of victims. Colombia chose to pursue restitution as the preferred form of reparation, only considering compensation where restitution was materially impossible. Between 2011 and 2016, the unit received 90,395 restitution claims. As of 2016, 51 per cent had been resolved and the restitution judges had issued 1,812 judgments.

**Processes and evidence**

As important as the institutional structure of reparations mechanisms are the process and rules they apply. Domestic reparation programmes require clear, accessible and summary procedures and relaxed standards of evidence.

In Colombia, for example, under the Victims and Land Restitution Law, any person can register as a victim and the administrative process is fast and effective. Moreover, the burden of proof falls on the state, not the victim. The law indicates that state authorities should always presume the good faith of victims and their ability to corroborate the harm they have suffered by any means legally acceptable. The law also establishes various principles that should be applied to cases where persons allege to have been victims of sexual violence. For example, the previous sexual behaviour of the victim cannot be used as evidence to deny reparations. The law also contains important evidentiary rules in relation to land. For example, if a victim seeking land restitution is able to show that he or she owned, possessed or occupied the land, and the person has been recognized as an IDP, the burden of proof rests on the party alleging the opposite unless the person is also an IDP.

In the case of Chile, a person would qualify as a victim if recognized as such by the Rettig Commis-
sion or the Valech Commission. To be recognized as a survivor of detention and/or torture during the dictatorship, the person had to have been detained and/or tortured for political reasons, by state agents or people acting with their acquiescence, between 1973 and 1990. The standard of evidence for victims was low, requiring them to simply complete a form with key information about the allegations such as places of detention, dates and description of facts, and then submit the form to the commission. The commission would then invite the person to an interview to take his or her testimony, then investigate the allegations using a database of information compiled from governmental, non-governmental, and international sources. Most people who appeared before the commission were recognized as victims, leading to more than 50,000 recognized survivors of detention and/or torture.

Registries of victims

Official registries of victims enable access to reparations. Not all countries have set up registries of victims, but the more the number of victims grows in armed conflicts, the more they constitute a suitable tool to identify victims and facilitate reparation.

In Colombia, a registry of victims (Registro Único de Victimas) was created by Article 154 of the Victims and Land Restitution Law. Before 2011, the country had many registries of victims, including a large registry on internal displacement, but there was no clarity as to the number of victims and the nature of the violations they had suffered. Therefore, Colombia decided to create a unified system as part of the Unit for Victims, linking all existing information and identifying new victims who could provide reliable information about victims of the armed conflict and specific human rights violations. As of June 2017, there were 8,421,627 victims registered in the country.

In Peru, a registry was also created as part of the Comprehensive Reparations Plan. The institution responsible for it is the equivalent to the Unit for Victims in Colombia, called the Reparations Council (Consejo de Reparaciones). It has the authority to register both individual and collective victims but expressly excluded the registration of victims that were at the same time members of armed groups.

Prompt

In addition to the existence of adequate and effective mechanisms to identify and register victims, it is equally important to ensure that victims have access to prompt reparation. Lack of access to prompt reparations makes even an adequate remedy ineffective, and therefore promptness is an essential element of an effective remedy.

Domestic reparation programmes are frequently instituted many years after human rights violations or violations of humanitarian law have taken place, often in the context of transitional justice processes. This means that reparations, if they happen, are provided very late in the process while harm often continues to ensue. For example, in Sierra Leone, reparations were only put in place in 2007 and became partially effective between 2007 and 2009, although the conflict ended in 2003. Similarly, in Chile, although the worst human rights violations happened during the first five years of the dictatorship (1973–8), they only began to be redressed in 1992.

It is a challenge to provide reparations in the midst of conflict or repression, as there is usually insufficient political will and a lack of adequate institutions to implement them. In such extreme situations, other remedies should be made available to contain or to deal with the harm suffered by victims, such as humanitarian aid. Urgent reparation measures should also be adopted for those most in need. While urgent measures have not been broadly used across states, they should be encouraged and they have proven important where they have been implemented.

In South Africa, for example, they were used in the form of urgent interim reparations. The South African Truth and Reconciliation Commission’s rationale for urgent interim measures was that victims would receive ‘information about and/or referral to appropriate services […] as well as financial assistance in order to access and/or pay for services deemed necessary to meet specifically identified urgent needs’. Urgent needs were defined as ‘medical, emotional, educational, material and/or symbolic needs’. The Committee on Reparations at the Truth Commission identified beneficiaries and for the most part provided them with cash payments that varied from US$250 to US$713 depending on the number of dependants.
Urgent reparations were paid between 1998 and 2001, benefiting more than 14,000 victims.\(^{58}\)

Urgent measures were also used in Sierra Leone. These measures were originally envisaged to include different types of victims, such as amputees, victims of sexual violence, and conscripted children, as well as different types of measures. However, in practice, the programme played out differently.\(^{59}\) Interim payments of about US$100 were granted predominantly to amputees and victims of sexual violence. Approximately, 21,700 victims received this interim relief.\(^{60}\) Besides this payment, a few victims also benefited from urgent medical care. The International Center for Transitional Justice (ICTJ) indicates that 31 victims in critical condition underwent surgery and 235 victims of sexual violence received medical treatment.\(^{61}\)

Urgent priority payments are also known to Iraq as the UN Compensation Commission took them into account when considering claims related to damage caused during Iraq’s invasion of Kuwait. Of the six categories of claims eligible for presentation before the commission, categories A, B and C were considered urgent. Category B, in particular, focused on serious personal injury and death, and as a consequence such claims were considered and paid with priority.\(^{62}\) Category B claims constituted a small number and therefore the commission was able to deal with them efficiently.\(^{63}\) A total of 3,935 claims were processed urgently and with priority under Category B.\(^{64}\)

### Funding for reparation programmes

Part of the success of a domestic reparation programme depends on allocation of financial resources to make it viable. While different mechanisms could be used to this end, the establishment of special reparation funds is a common practice.

In Colombia, for example, the 2005 Justice and Peace Law created a Fund to Redress Victims, which was later put under the responsibility of the Unit for Victims.\(^{65}\) Since it was created under the Justice and Peace Law, which dealt with the criminal responsibility of members of paramilitary groups that were demobilized under the law, the fund obtained financial resources and assets from members of paramilitary groups, resources allocated from the national budget, international funding, and donations. Today, the fund pays reparations to victims under both the Justice and Peace Law and the Victims and Land Restitution Law.\(^{66}\) A special fund for land restitution was also established under the Victims and Land Restitution Law responsible for managing all aspects of land recovery and restitution.

In the case of Iraq, the UN Compensation Commission paid reparations from the United Nations Compensation Fund. Notably, the fund received 5 per cent of the proceeds from Iraq’s oil exports to redress victims.\(^{67}\)

In Sierra Leone, the establishment of a fund was part of the Lomé Agreement (1999),\(^{68}\) and was also a recommendation of the Truth and Reconciliation Commission.\(^{69}\) The establishment of the fund only took place in 2009, a decade after it was envisaged in the Peace Agreement. Contributions to the fund have been minimal and highly dependent on international cooperation. For example, during the first year of the reparation programme, the United Nations Peace Building Fund gave US$3 million, with Sierra Leone contributing only US$246,000.\(^{70}\)

The Rome Statute that established the ICC also created the Trust Fund under Article 79. The fund has a double mandate. Not only does it implement the reparations ordered by the ICC in the cases it decides, but it also provides assistance programmes to victims. The fund is financed by private and public sources, including states’ voluntary contributions, and receives court-ordered fines and forfeitures.
This section explores Law 20 in depth, assessing progress in providing reparations to victims under its framework while also discussing some of the shortcomings in the process to date. It draws on analysis of the law itself and related documents, as well as interviews conducted with stakeholders in Iraq and media sources.

**Law No. 20 of 2009 and its 2015 amendment**

Following the 2003 US-led removal of Saddam Hussein, Iraq witnessed a near-total breakdown in law and order. The proliferation of armed groups which formed to resist the US-led invasion, coupled with the occupation’s controversial and often divisive policies, led to an upsurge in generalized violence. During the worst two years of bloodshed, from 2006 to 2007, more than 55,000 civilians were killed in attacks that were often carried out along sectarian lines. 

It was in this context that the Iraqi parliament passed Law No. 20 on Compensation for Victims of Military Operations, Military Mistakes and Terrorist Actions in late 2009. The law covers all natural persons harmed by the types of incidents specified in the title and also provides support to their family members. It applies retroactively to incidents occurring on or after 20 March 2003, the date of the American invasion of Iraq. Initially, the law was envisaged to apply to both civilians and military personnel, but responsibility for the latter was later shifted to the Ministry of Defence under a separate law.

In terms of the specific types of damage covered, the law identifies five categories eligible for reparation: martyrdom or loss; full or partial disability; injuries and conditions re-
quiring short-term treatment; damage to property; and damage affecting employment and study. For the first three categories, all of which involve bodily harm, the law stipulates three types of reparation: a one-time grant, the value of which ranges from IQD1.75 million to IQD3.75 million (US$1,480 to $3,173) depending on the severity of the case; a monthly pension; and a plot of residential land. All three types of reparation are awarded directly to the victim in the case of disability or injury, or to the family of the victim in the case of martyrdom or loss. The family of the victim includes the parents, sons, daughters, spouse, brothers and sisters of the victim. Islamic inheritance law determines each relative’s share in the compensation amount.

Compensation for damage to property is awarded on a case-by-case basis depending on the assessed value of the item and the extent of the damage incurred. The types of property eligible for compensation are wide-ranging and include vehicles, houses, agricultural lands, fixtures, stores and inventory, and companies. Finally, damage affecting employment and study is redressed by reinstating the victim to his or her former place of study or work, and paying any outstanding salaries or benefits for the period in which the victim was prevented from working.

In terms of the institutional structure for receiving and assessing compensation claims, the law creates a Central Committee in Baghdad, headed by a judge representing the Higher Judicial Council and formed of representatives of eight government ministries and the Kurdistan Regional Government (KRG). The law also creates subcommittees with a similar composition in each governorate and region. Victims wishing to claim compensation are required to apply through one of the subcommittees, which are responsible for preparing the case files and conducting investigations into the incidents in question. In cases of martyrdom or injury, the subcommittees themselves issue the decision on compensation, whereas for cases of property damage or lost persons, they issue a recommendation that is forwarded to the Central Committee for decision. The Central Committee also reviews appeals submitted by compensation claimants to prior decisions.

In 2015, the Iraqi parliament approved an amendment to the law that included a series of significant changes. The scope of the law was expanded to include both natural and legal persons, as well as injured members of the Popular Mobilization Forces (PMF) and the Peshmerga. Kidnapping was added as a form of damage covered under the law, and both kidnapping and loss are now treated in the same way as martyrdom for the purposes of compensation. The 2015 amendment also created a new division within the Martyrs’ Foundation for the victims of military operations, military mistakes and terrorist actions, and allocated it responsibility for forming subcommittees in each governorate responsible for receiving all types of claims. The role of the Central Committee in Baghdad is now limited to making the final decision on cases of property damage and reviewing appeals on other types of cases. The composition of the Central Committee was also changed to include only three ministries, as well as representatives of the KRG, the Iraqi High Commission for Human Rights, and a representative of the victims themselves. Lastly, the one-time grant amounts provided under the law were increased and now range from IQD2.5 million to IQD5 million (US$2,115 to US$4,230), depending on the gravity of damage.

Progress on compensating victims from 2009 to present

Official figures obtained from the Central Committee show that considerable progress was made in compensating victims of military operations, military mistakes and terrorist actions since Law 20 was passed. During the period 2011–16, decisions were reached on a total of 65,046 cases involving property damage and 118,894 claims involving martyrs, injuries and lost persons. The total amount awarded to victims over this five-year period was more than IQD420 billion (over US$355 million).

It should be noted that the years in Table 1 correspond to the year in which the claim was processed, and not necessarily the year in which the incident took place. Since the law applies retroactively and claims are processed in the order they are received, even the most recent yearly figures likely include claims for incidents dating back as early as 2003. Moreover, since the subcommittees in Anbar, Salahuddin and Nineva governorates...
were forced to suspend their work following the ISIS advance in 2014, the totals above include only pre-2014 incidents from those governorates.

Figures from the Central Committee also provide a breakdown by governorate of the claims processed each year over the period 2011–16. While the distribution of claims within and between governorates varied significantly each year, Baghdad ranked consistently as the governorate with the highest total number of claims over this period. Other governorates with relatively high numbers of claims processed over the period included Diyala, Anbar, Ninewa, Babel, Basra, Salahuddin and Kirkuk. The figures for these governorates are presented in Figure 1. Figures for the remaining governorates of Dhi Qar, Najaf, Maysan, Karbala, Wasit, Qadisiyya and Muthanna are not represented in Figure 1 due to the relatively low numbers of claims from these governorates.

### Gaps and challenges

Despite the achievements detailed above, the process of implementing Law 20 has not been without its shortcomings and challenges. To some degree, these are emblematic of the difficulties of implementing a reparations programme in the midst of ongoing conflict and in a context where state institutions are weak. Others are connected to the particular processes and structures created by the law.

First of all, extensive delays have marred the process of delivering reparations to victims under the Law 20 framework. According to a representative of an Iraqi civil society organization, although Law 20 was approved by the Iraqi parliament in late 2009, it was not until mid-2011 that the Ministry of Finance issued the directives required to put the law into practice.\(^\text{74}\) Even after implementation began, it reportedly took an average of two years to process a claim.\(^\text{75}\) Many governorates quickly accumulated a backlog of claims due to the high number of victims claiming compensation.\(^\text{76}\)

According to a legal adviser to the Human Rights Committee in the Iraqi parliament, the law’s bureaucratic procedures are a major source of delays in delivering reparations to victims.\(^\text{77}\) Unlike many of the other country examples presented in earlier sections of this report, Iraq did not opt to establish a strong central institution responsible for delivering reparations to victims. Instead, the Central Committee and subcommittees established under Law 20 are formed of representatives of various government ministries, headed by a judge. This means that there is no full-time, specialized institution dealing with reparations, even if some secretariat facilities have been established. In fact, in the original version of the law, the Central Committee was only required to meet once a week, and the subcommittees twice a week. This was undoubtedly a major factor causing a backlog in claims to build up.

It is also clear from analysis of the law and related documents that the process for claiming reparations involves quite onerous evidentiary requirements, obliging both victims and the subcommittees to obtain numerous official documents from multiple government offices. For victims these could include, depending on the case under consideration, authenticated investigation reports, death certificates, medical reports, property deeds, estate division documents, custody documents, power of attorney forms,
identification documents for the victim and all surviving heirs, and others. A senior official connected to the Central Committee in Baghdad explained that they had dealt with high numbers of fraudulent claims over the years, which may explain the reliance on heavy evidentiary requirements:

‘During the time of the transitional authority when we had the Al-A’immah bridge disaster in Baghdad, hundreds of people died. But over 3,300 submitted claims, and they all had original death certificates and authenticated witness statements! We need to check claims and prevent fraud.’

Nevertheless, the use of a high standard of proof is at odds with best practices internationally, where a more relaxed standard has been favoured to avoid placing undue burden on victims. In the Iraqi case, the need to obtain documents from different government offices is very costly for victims, especially in terms of time and transportation. This process can be seen as adding insult to injury for victims who have already suffered immense harm as a result of violations.

The poor security situation in Iraq has also negatively impacted on the implementation of the law. In governorates with active conflict, victims often faced difficulties in obtaining the documents needed to submit reparations claims from government offices. The reparations process was slow to accommodate the reality of displacement, initially requiring victims to submit their claims in the governorate that the incident occurred even if they were living somewhere else. The situation deteriorated further following the advance of ISIS in 2014. The subcommittees in Kirkuk, Ninewa, Anbar, and Salahuddin governorates were forced to suspend their work completely – Kirkuk for a period of three months, and the others for more than two years. In June 2014, the Central Committee reported that the secretary of the Diyala subcommittee was killed in a terrorist attack on his way to the office. According to an Iraqi Member of Parliament, prolonged displacement caused by the conflict hampered victims’ ability to obtain reparations. Compensation money is distributed at the governorate level, but many IDPs were unwilling to return to their governorates due to the volatile security situation.

There is also no central funding system to operationalize payments and other forms of reparation under Law 20. Instead, the Central Committee and the subcommittees forward their decisions to the Ministry of Finance, the Pension Authority, and the local authorities, which are responsible for issuing the compensation grants, the pension pay-
ments, and the plots of land respectively. This means that even when victims receive a positive decision on their cases, a variety of factors could prevent the reparations from being delivered to them by the other government offices. Three members of parliament interviewed in Baghdad stated separately that many victims had received confirmation of a positive outcome on their cases, but no actual money. According to the Central Committee, the delays encountered in the release of payments are due to the standard checks and procedures followed by the budget and cash accounting divisions in the Ministry of Finance. The process of granting land to victims has also proved problematic, especially in Baghdad governorate where there is a shortage of suitable residential land. As a result, many eligible victims have received neither a plot of land nor the equivalent monetary value specified under the law.

Following the 2015 amendment to Law 20, some changes have been made to the institutional structure through which claims are received, partly in an effort to speed up the process of granting reparations. The Central Committee and subcommittees now work full-time, and their membership structure has been somewhat simplified. The Central Committee has also formed teams of administrative staff to speed up the processing of applications and to perform preliminary checks on case files before presenting them to the committee members for final decision. Nevertheless, the Central Committee and subcommittees remain quasi-judicial bodies in essence rather than administrative institutions, which places important limitations on victims in accessing reparations.

Another important, and controversial, institutional change introduced by the 2015 law is that responsibility for delivering reparations to martyrs and their families has been transferred to the Martyrs’ Foundation. This change has stirred political tensions. According to a representative of an Iraqi civil society organization, the Martyrs’ Foundation is closely associated with the Dawa Party, which places high priority on compensating victims of the regime of Saddam Hussein. As a result, many within the establishment are resistant to the idea of incorporating victims of military operations and terrorism under their remit and granting them the same privileges as victims of the Saddam Hussein regime. The Ministry of Finance and the Public Pensions Authority also filed an objection to the amended law before the Federal Supreme Court, claiming the increase in compensation amounts for martyrs constituted an unenforceable financial burden on the state. However, according to a representative of another Iraqi civil society organization, the reasons behind this opposition are political rather than financial, as there was also strong opposition to the law in 2008, when oil prices were at a record high.

As a result of the 2015 amendment, the process of granting reparations to victims has met with further delays. The process of reconstituting the Central Committee and the subcommittees according to the new membership structure specified in the law took several months. When interviewed in March 2017, the director of the division in the Martyrs’ Foundation responsible for compensating victims covered by Law 20 stated that his office had not been allocated a budget from the central government and they did not even have the necessary furnishings to conduct their work. Moreover, at the time of writing, the Ministry of Finance had not issued the directives required to begin the process of compensation for cases of martyrdom, injury, loss, and kidnapping. Consequently, cases of property damage are the only area of compensation in which the 2015 amendment has been implemented.
Conditions in Iraq now are very different from when Law 20 first went into practice. The conflict with ISIS has led to the displacement of over 3 million people, large-scale destruction, and widespread violations of human rights and international humanitarian law perpetrated by an array of actors. With the defeat of ISIS appearing imminent, ensuring accountability for these violations and justice for victims is an immediate priority as Iraq seeks to rebuild and recover from the conflict. Reparations should be a central element of these processes. This section explores some key considerations to be taken into account when planning for reparations for victims of the conflict with ISIS, identifying ways in which the framework established by Law 20 could be expanded and improved.

Scope of violations and forms of reparations

In its current form, it unlikely that the Law 20 framework would be able to effectively cover the range of violations committed during the most recent conflict. While the stated focus of the law is ‘victims of military operations, military mistakes and terrorist actions’, it does not further specify the types of violations included under those categories. In practice, the only victims covered under the law are those who have been killed, kidnapped or gone missing; the physically injured; those who have been forced to leave studies or employment; and those who have lost property.

While a prioritization of certain types of violations has been justified in many cases where providing reparations to all victims would be unfeasible, the focus of Law 20 clearly excludes major types of violations that have been central features of the conflict. For example, victims of sexual violence, children recruited into forced military service, and those suffering from psychological trauma have no recourse to remedies under Law 20. Also missing from the law is a col-
lective approach to reparations for those who have been victimized on the basis of their group belonging, as is the case for many of Iraq’s ethnic and religious minorities.

Addressing this range of violations appropriately would require a mix of different forms of reparations. Currently, Law 20 is heavily focused on compensation. While compensation has many merits, it is not always the most appropriate form of reparations for some types of violations. For example, victims suffering from physical and mental health issues as a result of serious violations should have access to rehabilitation, which in turn requires access to adequate health services for a prolonged period of time. In such a context, paying compensation for such services would not necessarily allow victims to deal in the best way possible with the harm suffered. Similarly, redressing wrongs committed against entire groups might entail other measures in addition to compensation, such as satisfaction (including truth-recovery and memorials) and guarantees of non-repetition.

Redressing violations committed against vulnerable groups poses particular challenges that are unlikely to be resolved through compensation alone. In the case of child soldiers, comparative experience has shown that compensation can actually produce negative effects, and may not be effectively spent to the benefit of the child. A combination of measures, such as access to rehabilitation and education, can be more effective in redressing the harm inflicted on a child’s development by under-age military recruitment. Similarly, reparations for victims of sexual violence should be designed in a way that appropriately addresses the multiple and long-term dimensions of the harm suffered without causing re-victimization. This could include elements such as access to psychosocial care, vocational training, and education for the victim’s children in addition to compensation.

Responsibility of international actors and armed groups

In order to be effective, any post-conflict reparations scheme in Iraq needs to cover violations by all parties to the conflict. Otherwise, the process could be seen as one-sided and could risk inflaming tensions and perpetuating divisions. This issue is particularly challenging given the multiple and diverse armed actors that have participated in violations during the most recent phase of conflict. These include ISIS and other armed opposition groups, the Iraqi Security Forces, the Peshmerga, militias operating under the banner of the PMF, members of the US-led coalition and other foreign states.

This report has centred on the measures taken by the Iraqi government to provide reparations, but the Law 20 framework is clearly insufficient on its own to cover violations committed by all the actors above. While the categories of ‘military operations’ and ‘military mistakes’ would appear to refer primarily to actions taken by the Iraqi Security Forces, and ‘terrorist actions’ presumably covers some actions by non-state armed groups, further measures are needed to ensure that violations committed by all parties to the conflict are included.

ISIS and other non-state armed groups

In Iraq, as in many other modern conflicts, non-state armed groups have been responsible for a large share of the violations committed against civilians. This includes most obviously ISIS elements, but also an array of other militias operating under the umbrella of the Popular Mobilization Forces or outside of it. Armed opposition groups party to conflicts are bound by international humanitarian law and it is also becoming increasingly recognized that they may
Reparations for victims of enforced disappearances

Enforced disappearance is recognized as a serious violation that causes long-term pain and suffering not only for the direct victims, if they survive the ordeal, but also their relatives and friends, who are left in a state of uncertainty about the fate of their loved ones. As such, international law requires enforced disappearance to be recognized as a distinct offence with characteristics distinguishing it from other deprivations of liberty. The International Convention on the Protection of all Persons from Enforced Disappearances (ICPPED), to which Iraq is party, defines enforced disappearance as:

*the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.*

While enforced disappearances were practised widely by the Saddam Hussein regime until its overthrow by US-led forces, the period since 2003 has seen the increased use of enforced disappearance by non-state actors, including by ISIS. Most recently, the PMF have been accused of forcibly disappearing hundreds or even thousands of Sunni Arab men and boys captured while fleeing ISIS-held territory. The ICPPED also requires state parties to take measures to address enforced disappearances committed by non-state actors, while recognizing these acts as distinct from enforced disappearances committed by state actors.

While Law No. 20 provides reparations to the families of victims who have been kidnapped or gone missing, it does not specifically cover cases of enforced disappearance. In fact, there are no Iraqi laws that criminalize the act of enforced disappearance, as required by the ICPPED. To properly address enforced disappearance, Iraq should not only enact legislation criminalizing the practice and specifying penalties for perpetrators, but also recognize the right of victims and their families to reparations, irrespective of whether or not the victim has been declared dead. Moreover, the government should take measures to uphold relatives’ right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation, and the fate of the disappeared person.

have certain human rights obligations, alongside states. However, it is less clear whether they should be responsible for providing reparations to victims of their violations, or whether this role should be left for states.

In practice, it is not always feasible or desirable to compel armed groups to provide reparations. Armed groups may be militarily defeated and cease to have an organized presence in the aftermath of a conflict. Even if they continue to exist, they may not have the resources or political will to pay reparations. Governments may also refuse to deal directly with armed groups by including them in the reparations process, as doing so could impart those groups with a degree of legitimacy.

The factors above mean that it is unrealistic to expect that ISIS will play a direct role in granting reparations to its victims, as this is a role neither the group nor the Iraqi government would be likely to accept. However, one avenue to explore is whether assets confiscated from the group or its members could be used to fund a reparations effort implemented by the Iraqi government or the international community. On the other hand, militias that have been active on the anti-ISIS side may continue to exist after the end of the conflict and some enjoy a higher degree of legitimacy in the eyes of the Iraqi government. These groups might be engaged in the reparations process as a means of holding them accountable for violations committed. Appropriate reparations in this case should not be limited to compensation alone but could also include symbolic measures such as public apologies.

Members of the US-led coalition

*Those who have created the destruction should pay the compensation. And the greatest responsibility [in Ramadi] lies with the Americans.*

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The US-led Combined Joint Task Force (also known as Operation Inherent Resolve), which began conducting anti-ISIS airstrikes in Iraq in August 2014, is clearly responsible for significant civilian casualties and damage to civilian homes and infrastructure. While incidental civilian casualties are not necessarily unlawful under international humanitarian law, the scale of civilian deaths raises the question of whether members of the coalition have taken constant care to spare the civilian population and taken all feasible precautions to avoid, or in any event minimize, civilian death or injury or damage to civilian objects. In certain instances, coalition attacks have also been alleged to breach the proportionality principle in the conduct of military operations in Iraq.

Up to now, the coalition and its members have appeared reluctant to conduct thorough investigations into incidences of civilian casualties, and there has been almost no effort to provide reparations to victims of airstrikes. As of July 2017, the coalition had publicly admitted to 603 ‘accidental’ civilian deaths in the course of its airstrikes in Iraq and Syria. However, the coalition did not conduct interviews with witnesses on the ground as part of its information-gathering, and a leading monitoring group contended as of August 2017 that the true death toll was 5,117 – more than eight times the coalition figure. Despite these high figures, the coalition had reportedly only received two compensation requests and issued two condolence payments over the course of the operation as at June 2017.

The US-led coalition, as well as its individual members, must take greater responsibility towards the victims of its military operations. This should include conducting effective, prompt, thorough and impartial investigations into all civilian casualties, and paying reparations to victims or their families in cases where international law has been violated. The US should also consider granting condolence payments in cases where international law has not been violated but harm has been incurred, in line with previous practice.

### Processes and evidence

As discussed in the previous section, the standard of evidence used up until now in the Law 20 reparations process is quite high. Although the need to verify claims and prevent fraud is understandable, the evidentiary requirements currently used place barriers on victims in accessing reparation. Moreover, they cause long delays in the process of receiving and assessing claims. This problem will likely be compounded in the future given the large number of victims who have suffered violations during the most recent conflict. Consequently, efforts should be made to simplify the documentation requirements and speed up the processing of claims for victims of the conflict with ISIS.

There are already examples in Iraq where documentation requirements have been simplified to ease the processing of reparations claims in special cases. Following the July 2016 Karrada bombing, which claimed the lives of hundreds of civilians, an ad hoc reparations committee set up by the Prime Minister opted to accept victims’ claims on the basis of death certificates only, reportedly allowing them to finish their work within 40 days. Property claims are another area that warrants the adoption of a more flexible approach, since many victims are unlikely to possess complete documentation that confirms their ownership of damaged property or housing, especially if they have been displaced. The Central Committee has already initiated some modifications to the procedures for victims from rural areas, who are now permitted to submit a pledge by a village leader or other relevant authority to confirm their ownership of property if they do not possess official documents.

A representative of a civil society organization interviewed for this report also stated that her organization was supporting victims in Ninewa governorate to use geographic information system (GIS) data to corroborate damage to their properties.

In addition to carefully reconsidering the documentation requirements needed to claim reparations, Iraq should also take steps to ensure that
citizens are made aware of the reparations process and their rights thereunder. In the course of interviews conducted for this report, it emerged that even politicians lacked understanding of the reparations process created by Law 20, and some appeared completely unaware of the system. According to a senior UN representative interviewed in Baghdad, there may have been insufficient investment in raising awareness about the law. Awareness-raising will not only ensure that the greatest possible number of victims are able to claim reparations, but will also enhance the efficiency of the process by reducing the incidence of improperly submitted claims.

Finally, Iraq should also place priority on building a central and unified registry of victims to further improve its method of work. A registry of victims is needed to facilitate reparation but also to measure the reach of the programme and to be able to correct work on reparations as the programme is implemented. When interviewed in March 2017, the director of the division in the Martyrs’ Foundation responsible for compensating victims under Law 20 stated that his team was working on building a database of martyrs killed since 2003, but that they needed more support to ensure the inclusion of all those killed after the ISIS advance of 2014.
Iraq already has significant expertise in the implementation of reparations programmes, most notably the system established by Law 20 on Compensation for Victims of Military Operations, Military Mistakes and Terrorist Actions. Iraq should carefully reflect on the merits and flaws of this system and use the lessons learned in the design of a more comprehensive scheme for victims of the conflict with ISIS. Such an undertaking will require significant expansion in the scope of the law and a reconsideration of processes in order to effectively reach all victims, as well as strong implementing institutions with adequate financial resources.

Lastly, it is important to note that, in order to deliver the maximum benefits to victims, reparations should not be implemented in isolation from other transitional justice measures. Reparations would be less effective if provided to victims without recognition of responsibility, full investigation of the violations suffered and disclosure of the truth about what happened. Properly conceived, reparations can also enhance other policy interventions, such as humanitarian assistance and development projects, which are particularly important in contexts of poverty and deprivation to ensure that victims can take full advantage of reparations. Therefore, creating dialogue between relevant stakeholders responsible for such interventions is crucial in Iraq to ensure that points of potential cooperation and synergy are soon identified. With careful planning, a jointly implemented, comprehensive transitional justice and reconstruction process would enable the recognition of victims, build trust in state institutions, and foster reconciliation and democratization.

**Recommendations**

**To the Government of Iraq:**

- Strengthen the capacity of institutions involved in the reparations process by ensuring that staff have access to specialized training on the delivery of reparations
• Acknowledge violations committed by all parties to the conflict and ensure that all victims are eligible for reparations
• Expand the scope of harm eligible for reparations to include mental and sexual violence in addition to physical violence
• Adopt a multi-pronged approach to reparations that includes measures such as restitution, rehabilitation, satisfaction and guarantees of non-repetition alongside compensation
• Consider designing special measures to address instances of collective harm inflicted on communities, especially ethnic and religious minorities
• Adopt simplified and flexible evidentiary requirements for reparations processes so as to avoid putting an excessive burden on victims
• Consult with affected communities in the design and improvement of any reparations programmes
• Consider the establishment of a central registry of victims to facilitate access to reparations and enable the reparations programme to be measured and further improved
• Abide by a ‘do-no-harm’ approach in all reparations programmes
• Anchor reparations programmes within a transitional justice framework, which includes elements such as judicial accountability and truth-seeking alongside reparation
• Cooperate with other governmental and international agencies to identify points of congruence between reparations programmes, humanitarian assistance, and development programmes.

To the international community:

• Conduct effective, prompt, thorough and impartial investigations into all instances of civilian casualties caused by international military intervention, and provide reparations to victims
• Provide technical support to the Iraqi government in designing a comprehensive and appropriate reparations scheme for victims of the conflict with ISIS
• Consider developing jointly funded and implemented reparations programmes in cooperation with the Iraqi government
• Work with civil society organizations to raise awareness of existing reparations schemes and support victims in filing claims.
Endnotes


2 In the first piece written by de Greiff trying to justify reparations from a justice perspective and linking it to transitional justice he wrote about three goals: recognition, civic trust and social solidarity. However, in his later writing he has revised the argument and he identifies four goals: two ‘mediate’ goals (recognition and civic trust) and two ‘final’ goals (reconciliation and democratization). Contrast Ibid., p. 455 with de Greiff, P., ‘Theorizing transitional justice’, in M. Williams, R. Nagy and J. Elster (eds), Transitional Justice, New York, Nomos/New York University Press, 2012, pp. 31–77.

3 O’Neill, O., Towards Justice and Virtue, Cambridge, Cambridge University Press, 1988, p. 42 and de Greiff, ‘Justice and reparation’, op. cit., p. 460. It should be noted, however, that under international law, the duty to provide reparations not just to citizens but to all victims of violations.

4 Ibid., p. 460.

5 Ibid., p. 461.

6 Ibid., p. 463.


8 Ibid.

9 Ibid., pp. 52–8.


12 Ibid. The extraterritoriality of human rights obligations is relevant when considering the international responsibility of the United States and its allies during the occupation of Iraq that began in 2003. Unlike many other states (including the UK), the US does not accept the extraterritorial application of such obligations. It should also be noted that while the UN Security Council was able to compel Iraq to provide reparations following its occupation of Kuwait in 1990–1, it is very unlikely to agree such action against permanent members with veto powers.


16 Ibid., Principle IX.18.

17 The interplay between human rights law and international humanitarian law in times of conflict or occupation raises important questions relevant to reparations but is outside the scope of this report; see e.g. Lattimer, M. and Sands, P., The Grey Zone: Civilian Protection between Human Rights and the Laws of War, Oxford, Bloomsbury, 2018.


20 UN General Assembly, Basic Principles, op. cit., Principle V.8.

21 Victims and Land Restitution Law, Article 3.

22 Ibid.

23 Ley que Crea el Plan Integral de Reparaciones, Ley 28592/2005, Article 4.


26 ICC, Trial Chamber I, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, “Decision establishing the principles and procedures to be applied to reparations,” ICC-01/04-01/06, 7 August 2012 and ICC, Appeals Chamber, “Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012,” ICC-01/04-01/06 A A 2 A 3, 3 March 2015.


28 UN General Assembly, Basic Principles, *op. cit.*, Principle VII.b.


31 UN General Assembly, Basic Principles, *op. cit.*, Principle IX.15.


37 Ley No. 19.123, 8 February 1992, and Ley 19.980, 29 October 2004. This later law amended Law 19.123, increasing the pension by 50 per cent monthly and adding more health benefits.


39 Victims and Land Restitution Law, Articles 47–68.


45 UN General Assembly, Basic Principles, *op. cit.*, Principle VIII.

46 Victims and Land Restitution Law, Article 158.


54 Information obtained from the Unidad de Victimas, http://mi.unidadvictimas.gov.co/RUV


65 Ley de Victimas y Restitución de Tierras, Article 177.
68 Lomé Peace Agreement, Article XXVI.
73 The Martyrs’ Foundation is an independent government body established in 2006 that was initially charged with identifying martyrs of the Saddam Hussein regime and providing compensation and support to their families.
74 Interview with Hussein Ali abd al-Sadah, Al-Madhoun television programme, 8 April 2017.
76 Interview with an Iraqi Member of Parliament and Vice-Chair of the Migration and Displacement Committee, Baghdad, 8 March 2017.
77 Interview with legal adviser to the Human Rights Committee, Baghdad, 13 March 2017.
78 Interview with legal adviser to the Council of Ministers, Baghdad, 12 March 2017. The incident being referenced occurred in 2005 during a Shia religious occasion when pilgrims crossing the Al-A’immah bridge on their way to al-Khadihiyyah mosque stampeded after hearing rumours that there was a suicide bomber in the crowd. Media reports suggest that over 900 died, crushed or drowned.
79 Human Rights Watch, ‘Iraq: ISIS bombings are crimes against humanity, compensate civilian victims’, op. cit.
80 Interview with Hazem Al-Haidary, Al-Khat Al-Sakhin television programme, op. cit.
81 Interview with an Iraqi Member of Parliament and Vice-Chair of the Migration and Displacement Committee, Baghdad, 8 March 2017.
83 Interview with Tarek Al-Mandalawi, Al-Tal‘a Wa An-nas television programme, Al-Tal‘a Satellite Channel, 8 April 2017.
85 Interview with a representative of an Iraqi civil society organization, Suleymaniya, 19 July 2017.
86 Interview with Hussein Ali abd al-Sadah, Al-Madhoun television programme, op. cit.
88 Interview with the director of the Division for Compensating Victims of Military Operations, Military Mistakes and Terrorist Actions within the Martyrs’ Foundation, Baghdad, 12 March 2017.
89 Interview with a representative of an Iraqi civil society organization, Suleymaniya, 19 July 2017.
90 Interview with an administrative manager from the Central Committee responsible for property compensation, Baghdad, 12 March 2017.
91 Interview with the former chair of the Central Committee, Baghdad, 13 March 2017.
92 Interview with an Iraqi Member of Parliament and Vice-Chair of the Migration and Displacement Committee, Baghdad, 8 March 2017.
93 Sandoval, C., Rehabilitation as a Form of Reparation under International Law, London, REDRESS, 2009.
Note however that the current complex status of the PMF is governed by Executive Order 91, passed by the Iraqi Prime Minister in February 2016, which recognizes the PMF as an independent military formation that is part of the Iraqi armed forces and attached to the commander of the armed forces.


Ibid.

Interview with Iraqi Member of Parliament, 9 March 2017.

Interview with Iraqi Member of Parliament, 8 March 2017.

Figure cited is from Airwars, https://airwars.org


Amsterdam International Law Clinic and Center for Civilians in Conflict, *Monetary Payments for Civilian Harm in International and National Practice*, 2013.

Interview with Hussein Ali abd al-Sadah, Al-Madhoun television programme, op. cit.


Interview with a representative of an Iraqi civil society organization, Suleymaniya, 19 July 2017.

Interview with the Deputy Special Representative of the UN Secretary-General, Baghdad, 12 March 2017.

Interview with the director of the Division for Compensating Victims of Military Operations, Military Mistakes and Terrorist Actions within the Martyrs’ Foundation, Baghdad, March 2017.

Reparations for the Victims of Conflict in Iraq: Lessons learned from comparative practice
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In brief

The responsibility of states to provide reparation to individuals who have experienced violations in armed conflict is well established today under international law. If well designed, reparations can empower, dignify and return a voice to victims, as well as provide them with redress for the harm caused. From Colombia and Peru to Sierra Leone, a variety of reparations schemes have been designed around the world to address the effects of serious violations on those directly affected and on the societies in which they live.

In Iraq, millions of victims have suffered over the decades as a consequence of gross human rights violations and serious violations of humanitarian law. Most recently, the conflict with ISIS has led to the displacement of over 3.1 million people, the killing of thousands, and targeted campaigns against ethnic and religious communities. The conflict has also resulted in widespread damage to infrastructure and personal property. Victims of these violations have a right to adequate, prompt and effective redress for the harm they suffered.

Iraq already has significant experience in providing reparations, including the work of the Iraq Property Claims Commission covering land-related violations committed during the Saddam Hussein regime. More recently, Law No. 20 on Compensating Victims of Military Operations, Military Mistakes and Terrorist Actions, first passed in 2009, provides redress to victims who have suffered violations since 2003. Between 2011 and 2016, more than IQD 420 billion (USD $355 million) was distributed to victims under this framework.

While considerable progress has been made under the Law No. 20 framework in compensating victims of military operations, military mistakes and terrorist actions, the most recent phase of conflict raises new challenges. These include the range and severity of violations committed, the wide diversity of armed actors involved, and the barriers that widespread destruction and displacement present to victims’ ability to participate in reparations processes. This report argues that the existing reparations framework in Iraq could be strengthened by expanding the scope of violations covered, employing multiple forms of reparations, widening coverage to include all parties to the conflict, and simplifying evidentiary requirements imposed on victims.

As Iraq prepares to rebuild and recover from the conflict with ISIS, ensuring accountability for violations committed and justice for victims is an immediate priority. This report seeks to inform the discussion on reparations in Iraq through analysis of both international and domestic practice, with the goal of encouraging the development of a comprehensive framework that can provide adequate and effective reparations to victims.

This report recommends:

• The Government of Iraq should acknowledge violations committed by all parties to the conflict, and ensure that victims are eligible for reparations. Building upon existing experience, it should adopt a multi-pronged approach to reparations that includes measures such as rehabilitation, satisfaction and guarantees of non-repetition alongside compensation

• Reparations programmes should be anchored within a transitional justice framework, which includes elements such as judicial accountability and truth-seeking alongside reparation

• Members of the U.S.-led coalition and other foreign states conducting military operations in Iraq should conduct effective, prompt, thorough and impartial investigations into all instances of civilian casualties caused by their forces, make the results transparent and provide reparations to victims

• The international community should consider developing jointly funded and implemented reparations programmes in cooperation with the Iraqi government, and work with civil society organizations to raise awareness of existing reparations schemes and support victims in filing claims.

Reparations for the Victims of Conflict in Iraq: Lessons learned from comparative practice

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Shared Responsibility in Coalitions of the Willing

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1. Introduction

The subject of this chapter can be illustrated by the following example. In the beginning of 2013, French air and ground forces intervened in Mali to halt the advance of rebel groups towards the south of the country. Military operations (codename Operation ‘Serval’)\(^1\) started on 11 January 2013 and initially involved only Malian and French troops, the latter having been deployed upon the request of the country’s transitional government. By 24 January 2013, the Mali Air War’s order of battle changed radically, including United States (US), British, German, Danish, Belgian, Spanish, Dutch, United Arab Emirates (UAE) and Nigerian forces. At that time, regional states such as Mauritania, Senegal, Chad, Niger and Algeria had already granted French and allied forces the use of their air bases and air space to conduct attacks in the north of Mali.\(^2\) A few days earlier, on 18 January 2013, the first 40 Togolese soldiers of the ECOWAS (Economic Community of West African States) contingent landed in the Malian capital Bamako. The ECOWAS mission comprised forces from eight other African states,\(^3\) and represented the backbone of the United Nations (UN)-mandated International Support Mission in Mali (AFISMA), in charge of assisting Malian forces in ‘recapturing’ and stabilising the north of the country.\(^4\) The control of AFISMA troops was then transferred on 1 July 2013 to the UN-run Multidimensional Integrated Stabilization

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\(^1\) More updated information on Operation ‘Serval’ is available at M. Shurkin, *France’s War in Mali: Lessons for an Expeditionary Army* (Santa Monica, CA: Rand Corporation, 2014).


\(^4\) UN Doc. S/RES/2085 (20 December 2012).
Mission in Mali (MINUSMA), with French forces continuing to operate autonomously, but in support to the UN contingent.

During the first days of the intervention, notwithstanding the deployment of a large international military apparatus, summary executions and forced disappearances were reported to have taken place in the towns of Sévaré and in Konna. These acts of violence were allegedly committed by Malian troops, and Malian authorities were requested to open an official investigation. The question is whether, even if local troops were guilty of actually committing such war crimes, it would be possible to exclude a priori a wider responsibility of allied forces and organisations with whom Malian troops have coordinated their intervention. And how could such an extended responsibility be proved in the absence of publicly-available data on the relevant command/control structure and the flow of information and intelligence sharing among all the contingents involved?

The Mali crisis is a good example of how military operations have progressively evolved to embrace a growing number of actors, such as international organisations, regional organisations and single states, having different roles and obligations within a composite organisational and decisional framework. In this ambiguous international context, like-minded states and organisations do not associate on the basis of long-term alliances, but rather in so-called ‘coalitions of the willing’, created in view of the participants’ common short-term military-political goals. The term ‘coalition of the willing’ lacks an official definition. It can be simply defined as ‘[a] group of states that cooperate in an ad hoc or informal fashion, outside of more formal multilateral institutions and alliances’. As the Mali crisis clearly demonstrates, a multilateral institution may ‘relieve’ the coalition at a later stage, or otherwise step in aside the coalition or one or more nations (France and the US in the case of Mali) operating individually, so that in practice military operations are eventually conducted or coordinated by a coalition even when an international organisation is present on the scene.

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10 Ibid.
The international community’s response to the Mali crisis has been labelled as an example of ‘peace operation by proxy’.11

Born from the ashes of the Cold War as a viable alternative to UN-run missions, as originally provided in the UN Charter12 (Articles 43-47), this organisational model saw its fortune, reaching the apex, during the first Bush Administration (2000-2004) and the US-led military interventions in Afghanistan and Iraq (Operations ‘Enduring Freedom’ and ‘Iraqi Freedom’, respectively). Nowadays it is widely used in a large number of interventions, ranging from anti-piracy to traditional warfare. As the former UN Secretary General Kofi Annan once stated: ‘The United Nations does not have the capacity to conduct combat operations; ad hoc “coalitions of the willing” are usually better suited for this purpose. But authorization by the Security Council is essential if the enforcement operation is to have broad international support and legitimacy.’13 The raison d’être of this concept is the fact that it is the mission which determines the coalition, and not the other way around.14 As a result, partnerships are agreed under a ‘variable geometry’,15 i.e. on a case-by-case basis.

The decision-making framework of the coalitions of the willing is modelled around the canons of a traditional military command/control (C2) structure.16 This is normally divided into three distinct decisional levels, i.e. strategic, operational and tactical. All actors taking part in a military operation participate in one or more of such levels, and may thus be capable of influencing the decision-making process within the hierarchical chain, depending on their functions and specific tasks. Nevertheless, whilst key actors are present at all levels, secondary players (such as less important troop contributing nations – TCNs) normally only

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15 The concept of ‘variable geometry’ of coalitions is reportedly to be attributed to the former US Secretary of Defence Colin Powell (Woodward, ibid., at 49).
16 For a definition of the various types of command (e.g. ‘full command’, ‘national command’, ‘operational command’, etc.) and control (e.g. operational, tactical, etc.), see B. Cathcart, ‘Command and Control in Military Operations’, in T. Gill and D. Fleck (eds.), The Handbook of the International Law of Military Operations (Oxford University Press, 2010), 235, at 237-238. See also the NATO Glossary of Terms and Definition, AAP-06, edition 2013, 3 at www.dtic.mil/doctrine/doctrine/other/aap6.pdf.
figure at the lower levels. Alike coalition partnerships, the decisional structure of modern coalition operations has become explicitly tailored to accomplish the mission’s goals and it is thus established on ad hoc basis, taking into account the specific circumstances of the case and all the stakeholders concerned, which may vary from time to time. In coalitions led by western states, military directives and planning processes, elaborated by the North Atlantic Treaty Organization (NATO), are normally used as standard organisational and decisional rules/models which may apply and can be adapted to virtually any military confrontation involving a coalition of the willing, whether or not the participating states are members of such an organisation.

However, the informality and opacity which characterises the decision-making framework and the overall internal organisation of coalitions, together with the ambiguity as to the number of participants and their effective role in the conduct of hostilities or operations, may serve the purpose of hiding the intervening states and their armed forces’ potential responsibility or liability to third parties. Indeed, coalitions do not enjoy any international legal personality, because they are not founded by member states with this aim (they also lack a founding treaty), they are not formally recognised as such by other international law subjects, they do not bear international rights and duties distinct from those of its members, and, as a consequence, they do not possess any treaty-making power, although they normally present themselves to the public as unified and autonomous entities. Likewise, on the domestic plane, coalitions are not recognised as legal persons; hence, they cannot appear before state courts, neither as plaintiffs nor defendants. Their goal is to be ‘transparent’ to any

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19 The 2003 US-led military operation in Iraq is a good example in this respect (see below at n. 41). More recently, see also the 2014 September statement by President Obama on the Islamic State of Iraq and the Levant (ISIL): ‘I can announce that America will lead a broad coalition to roll back this terrorist threat’ (The White House, Office of the Press Secretary, ‘Statement by the President on ISIL’, 10 September 2014, see www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1). In this respect, uncertainty still remains as to the number of effective participants and their roles (see e.g. A. Fantz, ‘Who is doing what in the coalition battle against ISIS?’, CNN, 17 September, 2014.
20 It is not the aim of this chapter to present a comprehensive theoretical analysis of the international legal personality doctrine. It suffices to say that while traditionally the international legal personality of actors other than states is portrayed as quality derived from state sovereignty (as states are in fact considered primary international law subjects), nowadays scholars often look at more functional or pragmatic notions and definitions, which nonetheless tend to appear somewhat tautological (ex plurimis, see on the matter R. Portmann, Legal Personality in International Law (Cambridge University Press, 2010)).
judicial system, so that they cannot be held responsible or liable for any wrongdoing. In light of this, it is more convenient for coalition partners to publically attribute any misconduct to the whole coalition, rather than to member states’ forces. In practice, this way coalition members act as if the coalition existed as a single entity in the international relations’ sphere, but at the same time they deny its existence on the legal plane. This fiction is prima facie contradictory, but stands at the very basis of the recurring use of coalitions of the willing in military operations. It is the lack of accountability for member states which makes coalitions so appealing. Nevertheless, one could argue that coalition partners and their armed forces may be brought before international and domestic tribunals. But how to practically do that, if information on the participants in sorties/single operations, as well as on member states’ roles/tasks in multinational commands, is confidential or released – at best – during press conferences held by spokespersons belonging to the coalition themselves?

What if coalition operations could also lead to situations of shared responsibility, i.e. the conduct of coalition troops were to be imputed – at the same time – to all or some coalition partners? In the author’s view, this question may be addressed only through the analysis of the decisional processes in place, and the organisational structures characterising coalitions and their executive bodies/commands. This approach focuses on the reality of facts and attempts to look at the real powers and authority exercised by coalition members, rather than relying on formal statements and documents.

The second section will attempt to classify coalitions on the basis of their mandate, distinguishing between UN-mandated operations and interventions carried out under national mandate. This distinction might be relevant to the formal attribution of conduct to TCNs. In the third section, the focus will be on the concept of ‘effective participation’ in the planning or execution of a specific decision as a precondition for multiple attribution of conduct. Separate sub-sections will be dedicated to: the possibility of establishing different degrees of responsibility among coalition partners by reason of their degree of fault (section 3.1); the

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22 The term ‘shared responsibility’ is meant to denote an umbrella concept covering, at the same time, situations of ‘formal’ joint international responsibility (or ‘shared responsibility strictu sensu’), and circumstances whereby a multiplicity of actors is held accountable for a breach of primary norms, without this being considered as involving their international responsibility in the technical meaning (or ‘shared accountability’). See P.A. Nollkaemper and D. Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013) 34 MIJIL 359, 366-369. See also Chapter 1 in this volume, P.A. Nollkaemper and I. Plakokefalos, ‘The Practice of Shared Responsibility: A Framework for Analysis’, in P.A. Nollkaemper and I. Plakokefalos (eds.), The Practice of Shared Responsibility in International Law (Cambridge University Press, 2016), 1, at __.
concept of shared responsibility in coalition operations in light of the International Law Commission (ILC)’s Articles on State Responsibility (section 3.2), and the simultaneous application to coalition operations of the ‘effective’ and ‘ultimate authority and control’ attribution tests (section 3.3). The latter sub-section also includes a critique of the first decision delivered by the Strasbourg court on the matter of multiple attribution of conduct in coalition operations, namely the Saddam Hussein case. The fourth section is dedicated to the analysis of the most common decisional and implementation mechanisms adopted by coalition partners in the conduct of operations. Understanding such mechanisms is essential in order to correctly attribute the conduct of coalition troops to TCNs and lead nations. Section 5 presents the 2011 international military intervention against Libya as a case study.

The chapter will demonstrate how individual responsibility of coalition partners may co-exist with forms of shared responsibility. From a theoretical point of view, based on the ‘traditional’ attribution test theory, according to which the responsibility is to be imputed on a factual basis, this can be achieved by assessing the coalition partners’ effective participation and degree of responsibility in the alleged breach of law. A conduct which results in a breach of law may in fact represent the product of the actions of a multiplicity of actors, any of which has contributed in a vital manner to its realisation. Nevertheless, the analysis reveals that much depends on the specific circumstances of the case and relevant information is normally not publicly disclosed by coalition members.

This chapter does not include the analysis of primary rules applicable to coalition operations. In view of the lack of international legal personality of coalitions, concentrating on the applicability of existing customary law norms of international humanitarian or human rights law seems somewhat elusive. International law obligations coalitions are due to respect are, mutatis mutandis, those of member states, although such obligations may greatly differ from

23 Articles on Responsibility of States for Internationally Wrongful Acts, ILC Yearbook 2001/II(2) (ARSIWA or Articles on State Responsibility).

24 Saddam Hussein v. Albania and others, App. No. 23276/04 (ECtHR, 14 March 2006). For a more recent decision see Jaloud v. the Netherlands, App. No. 47708/08 (ECtHR, 20 November 2014). In Jaloud, the Netherlands was held responsible for not having properly investigated the circumstances of the death of an Iraqi citizen, Azhar Sabah Jaloud, who was shot dead in 2004 at a military checkpoint controlled by the Dutch contingent belonging to the Multinational Stabilisation Force in Iraq. According to the Court, although the Dutch contingent was deployed in an area in south-eastern Iraq which was under United Kingdom (UK) responsibility, the Dutch authorities alone exercised effective control over the checkpoint in question. In addition, since the Dutch government was held to retain the ‘full command’ over its forces in Iraq, the Court concluded that Mr Jaloud was under the Netherlands’ jurisdiction at the time of his death (see paras. 149-153). Interestingly, the Court did not pronounce on, but left the door open to, the UK concurrent jurisdiction: ‘The Court has established jurisdiction in respect of the Netherlands. It is not called upon to establish whether the United Kingdom, another State Party to the Convention, might have exercised concurrent jurisdiction’ (para. 153).
state to state. In principle, this matter should be regulated by ‘national caveats’ and transfer of authority agreements among TCNs, as will be reported in section 4.

This chapter does not explicitly deal with the responsibility of international organisations or entities, neither does it concern UN-run peacekeeping operations (as opposed to UN-mandated coalition operations, which are considered in section 2.3), nor interventions carried out by international or regional organisations such as NATO or the EU, both being the specific object of other chapters in this volume. Although a coalition may in theory encompass both states and international organisations, the practice of operations shows that this mostly occurs when, even though a military intervention is formally implemented by an international organisation, contributing states continue to run national command/control lines in parallel with that of the international command. Here, however, the key question is not represented by the shared responsibility of TCNs, but rather that of the state and the international organisation concerned, and this would lead us, again, to the issue of the responsibility of international organisations. The analysis is thus concentrated solely on operations conducted by groups of states whose forces get together on a temporary basis and by means of non-structured operational assets/commands, i.e. national assets and commands which are only temporary assigned to a coalition or not formally established to serve in the course of coalition operations. For instance, C2 communication assets may be provided by one or more coalition partners, while others may supply ground forces or the warship on board of which a tactical command may be established, etc. The explicit reference to NATO Operation ‘Unified Protector’ contained in section 5 only serves the purpose of affirming the practical irrelevance of a change in the operations’ decisional structure, in order to assess the potential shared responsibility of single troop contributing nations. Finally, this chapter only concerns state responsibility, leaving aside the military officers’ individual criminal and civil liability.

2. Different types of coalitions of the willing

2.1 The Security Council, the lead nation(s) and the other state partners

Coalitions can be categorised on the basis of their ultimate goal. Some coalitions are established for the ‘fulfilment of the global order’s ends, and even of its concrete norms’, whilst others are set up simply ‘to defy both substantive and procedural norms of the international system’. The purpose of a third group of coalitions would be that of acting in breach of ‘procedural norms of the international system, but arguably in the service of the international order’s substantive ends’, under a kind of Machiavellian logic, according to which coalitions of the willing may represent a way to bypass the rules on the use of force established by the UN Charter in view of a higher aim, such as the protection against mass atrocities.

The principle of dividing coalitions of the willing according to their final aim is also satisfied when coalitions are classified by reason of their mandate, since the formal legality of the mission’s goal (i.e. Roth’s ‘respect of international legal norms’) rests – in the last analysis – in a mandate received by the UN Security Council (UNSC). Nonetheless, such classifications may be significant at the theoretical or academic level, but they can hardly be of any use in explaining the powers or the authority effectively exercised by coalition members, and thus, a fortiori, the latter’s responsibility for the conduct of specific operations.

A more useful option could be to classify coalitions according to the type of relationship between the political entity/command in charge of the direction of operations and its subordinate units. As a result, it would become essential to focus on the analysis of the chain of command/control and its top level, which can be represented by one or more lead nations. Taking into account both the mission’s mandate and the entity in charge for the strategic direction of operations, one may thus distinguish between first, coalition operations mandated by the UN Security Council and led by one or more nations; and second, coalition operations undertaken without any UN Security Council’s mandate and carried out under national mandate.

27 Ibid., at 35. The author mentions the 1983 US-led invasion of Grenada, carried out in the framework of the Organisation of Eastern Caribbean States (OECS).
28 Ibid. The 1991 Operation ‘Provide Comfort’ in Northern Iraq is reported as an example.
In the former case, coalitions are initially established according to a UNSC’s mandate and then deployed under the strategic direction of one or more lead nations, which are requested to inform the UNSC through periodical reports. In the latter case, lacking any formal link with the UNSC, states act independently from any external authority. The main difference between the two categories is that in the first case responsibility for any misconduct of troops could potentially be attributed to the UN rather than to the TCNs concerned, according to the often criticised29 ‘ultimate authority and control’ attribution test, as developed by the European Court of Human Rights (ECtHR or Court) in Saramati.30 In the second case, given the absence of any involvement of the UN, the ‘ultimate authority and control’ of operations is beyond any doubt in the hands of those states sitting at the mission’s strategic level, i.e. the decisional level at which military authorities determine military objectives and guidance, in order to develop and use the resources at their disposal to accomplish such objectives. As will be discussed in the following sub-sections, one could argue that the distinction between the above quoted two types of operations is mostly theoretical, as even in the case of UN-mandated coalition operations the coalition’s link with the UN is in truth too tenuous to found the latter’s exclusive jurisdiction over the acts of coalition troops. Nevertheless, this distinction remains significant to any discourse on the responsibility of sending states in peace support operations, as states have never ceased to try to ‘pass the buck’ to the UN in case of need.31

2.2 UN-mandated coalitions

Numerous coalitions have been set up in view of a specific Security Council’s authorisation. This practice started with the 1950 Korea War,32 broke off during the Cold War, and resurfaced with the fall of the Berlin Wall. Examples of coalitions acting under a UNSC’s mandate are

30 Agim Behrami and Bekir Behrami v. France and Ruzhdi Saramati v. France, Germany and Norway, App. No. 71412/01 and App. No. 78166/01 (ECtHR, 2 May 2007), para. 140 (Saramati). The attribution test issue will be discussed below in section 3.
31 The issue of the UN’s exclusive responsibility was raised, for instance, by the British government in all judicial cases concerning the activity of its troops in Iraq. For a summary of the British government’s position see F. Messineo, ‘Things Could Only Get Better: Al-Jedda beyond Behrami’ (2011) 50 MLLWR 321.
32 UN Doc. S/RES/84 (1950), paras 4-5.
the US-led coalition participating in Operation ‘Desert Storm’ in Iraq,\textsuperscript{33} the US-led ‘Unified Task Force’ (UNITAF) in Somalia,\textsuperscript{34} the US-led Operation ‘Uphold Democracy’ in Haiti,\textsuperscript{35} the Italy-led Operation ‘Alba’ in Albania,\textsuperscript{36} the Australia-led ‘International Force for East Timor’ (INTERFET) in East Timor,\textsuperscript{37} and more recently, the US-led coalition which launched Operation ‘Odyssey Dawn’ in Libya against the Gaddafi regime.\textsuperscript{38} In all these interventions, coalitions were never mandated to obey UN directives, being instead merely requested to report to the UNSC (sometimes through the Secretary General) at regular intervals.\textsuperscript{39} While the effectiveness of such a reporting system is somewhat questionable, it highlights a clear division of tasks: command/control is the coalition’s exclusive responsibility, while the UNSC simply retains – in full or in part – a ‘remote control’ (or better the ‘overall/ultimate authority and control’) over the mission.\textsuperscript{40}

### 2.3 Coalitions operating without a Security Council’s mandate

A well-known example of a coalition of states, belonging to the second group, is the one which defeated Saddam Hussein’s regime in Iraq in 2003.\textsuperscript{41} Others are, for instance, the US-led Combined Maritime Forces (CMF),\textsuperscript{42} engaged in maritime security operations in the Persian Gulf, the Red Sea and off the Horn of Africa, and the group of states which have joined the US in Afghanistan and elsewhere since 2001 in Operation ‘Enduring Freedom’

\textsuperscript{33} UN Doc. S/RES/678 (1990), para. 2.
\textsuperscript{34} UN Doc. SR/RES/794 (1992), para. 10.
\textsuperscript{35} UN Doc. S/RES/940 (1994), para. 4.
\textsuperscript{36} UN Doc. S/RES/1101 (1997), para. 4.
\textsuperscript{37} Established on the basis of UN Doc. S/RES/1264 (1999), para. 3.
\textsuperscript{41} The exact number of coalition partners which assisted the US in Operation ‘Iraqi Freedom’ (2003-2011) is still unknown. Reportedly, however, up until July 2009 about 60 nations were involved in military operations in Iraq on the side of the US forces. Whilst the support provided by some of them was little more than nominal, 37 furnished a total of around 150,000 ground forces (See gen. S.A. Carney, \textit{Allied Participation in Operation Iraqi Freedom} (Washington, DC: United States Army, Center of Military History, 2011)).
\textsuperscript{42} The CMF is a multinational coalition headquartered in Bahrain together with the US Naval Central Command and US Navy 5th Fleet. It is composed of 27 member nations and it is commanded by a US Navy vice admiral, who also serves as Commander US Navy Central Command and US Navy 5th Fleet. A British Royal Navy commodore serves as deputy commander. Senior staff roles belong to personnel from major member nations, including Australia, France, Italy and Denmark. The CMF operates three task forces, i.e. Combined Task Force (CTF)-150 (maritime security), CTF-151 (anti-piracy), and CTF-152 (maritime security in the Persian Gulf). More information is available at CMF’s website at http://combinedmaritimeforces.com.
(OEF). Although these interventions have been considered and even praised by the UN in UNSC resolutions and other relevant documents the UN has never established formal links with them, nor has it been possible to impute the conduct of coalition partners to the UN. Also in the case of the Coalition Provisional Authority (CPA) in Iraq – a body exercising powers of government and even some UNSC-delegated powers under Chapter VII of the UN Charter – the attribution to the UN of conduct performed by the CPA has been correctly excluded.

Also belonging to this group is the counter-proliferation coalition established in 2003 in the context of the US-led Proliferation Security Initiative (PSI). Even though the member states’ obligation to adopt ‘effective measures’ to counter the diffusion of weapons of mass destruction is contained in UNSC Resolution 1540 (2004), and cases of successful interdictions that could have possibly resulted from PSI cooperation are included in some UN reports, so far PSI coalition operations have been kept separate from the UN.

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43 Established in 2001 in response to the 9/11 attacks, OEF has since then become an ‘operational umbrella’ for all counterterrorism operations conducted worldwide by the US and its allies. OEF encompasses subordinate operations in Afghanistan (OEF-A), Philippines (OEF-P), Horn of Africa (OEF-HOA – also including CTF-150 and CTF-152), Trans Sahara (OEF-TS), and Caribbean and Central America (OEF-CCA). At the operational level, operations are mainly directed by the US Central Command (CENTCOM), based in Tampa, Florida. The US Africa Command (AFRICOM), based in Stuttgart, Germany, is responsible for OEF-HOA and OEF-TS. The number of coalition partners is still unclear (apparently up to 80). Some of them have established permanent liaison teams or detached liaison officers within CENTCOM. Among them, Denmark, Italy, Belgium, Australia, Canada, United Kingdom, etc. (information available at CENTCOM’s website at www.centcom.mil/en/about-centcom-en/coalition-countries-en). Other foreign officers serve within the Command’s staff. Liaison officers from roughly 65 countries are embedded in the Command’s Coalition Coordination Center (CCC). International staff actively participates in the planning of missions, being part of a Combined Planning Group (CPG) embedded in the Command’s J5 Cell. The CPG is composed of officers from over 30 different nations (R. De Feo and R. Minini, ‘The Coalition and US Central Command: The Italian Contribution’, NRDC-ITA Magazine, 16 (2010), 4, at 8-9, www.nato.int/nrdc-it/magazine/2010/1016/1016b.pdf; S. Wood, ‘CENTCOM Coordination Center Represents Strong Coalition’, US Department of Defense – American Forces Press Service, 16 March 2007, www.defense.gov/News/NewsArticle.aspx?ID=32480.

44 See C. Gray, International Law and the Use of Force, 3rd edn (Oxford University Press, 2008), 206-207; and R. Geiß and A. Petrig, Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden (Oxford University Press, 2011), 25, respectively. The coalition in Iraq was also ‘authorised’ by the UNSC to provide security and stability in the country once it overruled Saddam Hussein’s regime (see UN Doc. S/RES/1511 (2003), para. 13).

45 See generally the three judgments delivered so far by the ECtHR on the responsibility of the UK for the conduct of its troops in Iraq: Al-Jedda v. the United Kingdom, App. No. 27021/08 (ECtHR, 7 July 2011); Al-Skeini and others v. the United Kingdom, App. No. 55721/07 (ECtHR, 7 July 2011); Al-Saadoun and Mufdhi v. the United Kingdom, App. No. 61498/08 (ECtHR, 2 March 2010) Error! Hyperlink reference not valid.


47 More information on the PSI is available at www.state.gov/t/isn/c10390.htm.

3. Effective participation as the key rationale for the attribution of conduct

At first sight, the issue of responsibility for coalition members does not pose problems from a legal point of view. Since coalitions do not possess any international legal personality, nor are they recognised as legal persons within the states’ domestic legal systems, both TCNs and lead nations act in their individual capacity. Hence, in general, they are only responsible for the conduct of their own troops. Upon closer examination, however, reality is a bit more complex and does not preclude forms of shared responsibility among coalition partners. Indeed, as construed in theoretical terms, shared responsibility arises when the ‘responsibility of two or more actors for their contribution to a particular outcome is distributed to them separately, rather than resting on them collectively’. As a result, given the coalitions’ lack of legal personality, this may occur more easily than, for instance, when an international organisation is in charge of the operations. The key issue here is tying the principle of attribution to the ‘effective participation’ of state officers – and thus, a fortiori, coalition partners – in the alleged misconduct/omission. The ‘effective participation’ concept may be evoked in two different meanings. Firstly, it may imply the effective participation of coalition partners to the decisional process, as elaborated within the coalition command, which eventually leads to the misconduct in question. In order to assess such a ‘participation’, it is essential that the coalition command may exercise some form of ‘factual control’, i.e. ‘effective control’, over coalition partners acting ‘on field’. Secondly, the ‘effective participation’ concept may be used to indicate a concrete contribution, on the ‘physical plane’, in the commission of a breach of law by one or more coalition partners.

These circumstances may occur in two cases in particular, namely: first, when a military unit belonging to a state is instructed or prohibited by the coalition command to carry out a specific action and a breach of an international obligation emerges as a result of such conduct or omission; and second, when military units belonging to two or more coalition partners act

49 Nollkaemper and Jacobs, ‘Shared Responsibility in International Law’, n. 22, 368.
50 The concept of ‘effective participation’ may be derived by analogy from the ‘factual control’ test reported in the Commentary to the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO Commentary), Commentary to Article 7 ARIO (‘Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization’), para. 4, according to which the attribution of conduct either to a contributing state or international organisation must be based on ‘full factual circumstances and particular context’, namely ‘on the factual control that is exercised over the specific conduct taken by the organ or agent’.
51 Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, ILC Yearbook 2001/II(2) (ARSIWA Commentary), Commentary to Article 4 ARSIWA.
or fail to act jointly and, again, a breach of law emerges as a result of their conduct or omission.

It can be noted that the two cases may occur in parallel, when orders are issued by the coalition command to units belonging to more state partners acting jointly. However, there is also a key distinction. While in the former case attribution stems from the direct participation in the conduct or omission and its rationale thus appears unquestionable, in the latter case the situation seems far more complex. Here the key elements are the entity exercising control over the unit concerned and the chosen concept of ‘control’, whether ‘effective’ or ‘overall’. In this respect, since control over troops is usually exercised by coalition commands, and such commands are composite organs staffed with officers belonging to several state partners, it remains to be seen who is in charge for the general conduct of operations, but – more importantly – also who exactly, in the case at hand, took the decision which subsequently led to the breach of law: was it the coalition command, i.e. a military asset whose decisions are the outcome of a joint decisional process held by a multiplicity of states, thus possibly entailing their joint responsibility, or the state partner that ordered the conduct or omission in question? Could the state partner refrain from executing the assigned task?

In light of this, in order to assess the joint responsibility of coalition partners, it should be considered how the decision-making and implementation process is framed, since the impugned decision is often the result of a complex planning process involving officers from different TNCs and, in order to be executed, the acting unit frequently necessitates cooperation or assistance by different coalition partners. The decisional mechanisms influencing the conduct of operations will be examined in more detail in sections 4 and 5.

3.1 Joint participation in coalition operations and different degrees of responsibility

Apart from assessing the concrete attribution of conduct, the study of the TCNs’ level of participation in the decision-making process and conduct of operations may also serve the scope of ascertaining their degree of responsibility, especially when the concurrent
responsibility or joint liability of two or more coalition partners is to be determined by an international or domestic court.\(^{53}\)

Arguably, the level of participation in a decision or conduct/omission may play an essential part for whether a specific threshold of responsibility is crossed. For instance, in order to assess the potential co-authorship of a misconduct, it could be considered whether the individual participation of a coalition officer in a breach of law has been ‘substantial’ or ‘significant’ for its responsibility/liability – and thus that of his/her sending state – to occur.\(^{54}\) The significance of this condition mostly hinges on the legal system of reference, whether domestic or international, and any applicable procedural rules. In any case, the individual criminal liability of state officers should in theory be kept separate from the international responsibility of their governments, as there might be cases where the former could be excluded and – at the same time – the latter could be established.\(^{55}\)

### 3.2 The Articles on State Responsibility

The potential shared responsibility of coalition partners is in line with the principles formulated by the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).\(^{56}\) In general, the ARSIWA provide for situations where a plurality of states may be responsible for a single misconduct.\(^{57}\) Moreover, under certain conditions, the ARSIWA acknowledge the responsibility of a state for actions performed by another state’s organ: Article 6 ARSIWA deals with the conduct of an organ placed at the disposal of a state by another state; while Article 8 ARSIWA concerns the

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\(^{53}\) Borrowing the principle from the civil law domain, the shared responsibility of more TCNs could for instance result in their joint and several civil liability towards a third party, but – at the same time – be relevant in the subdivision of payments among them, in proportion to the degree of fault. This general rule is established, e.g., in Article 2055 of the Italian Civil Code in case of a plurality of debtors. See the Commentary to Article 2055 by F.D. Busnelli, G. Comandé and E. Bargelli, ‘Multiple Tortfeasors under Italian Law’, in W.V.H. Rogers (ed.), *Unification of Tort Law: Multiple Tortfeasors* (The Hague: Kluwer Publishing, 2004), 117, at 117-118.

\(^{54}\) Concepts such as ‘significant’ or ‘substantial’ participation are borrowed from the international criminal jurisprudence and are at the basis of the notion of joint criminal enterprise (see e.g. *Prosecutor v. Brdanin*, Judgment, ICTY Case No. IT-99-36-A, A. Ch., 3 April 2007, paras. 427 and 430; *Prosecutor v. Bagilishema*, Trial Judgment, ICTR Case No. ICTR-95-1A-T, 7 June 2001, para. 30). On the ‘substantial effect’ test (to prove the defendant’s role in ‘aiding and abetting’ another individual in the planning, preparation, or execution of an international crime), see e.g. *Prosecutor v. Kajelijeli*, Trial Judgment, ICTR Case No. ICTR-98-44A-T, 1 December 2003, para. 766. Joint criminal liability of coalition officers belonging to different TCNs could in turn entail the joint civil liability of their sending states and *a fortiori* the latter’s international responsibility.

\(^{55}\) On the distinction between individual responsibility and state responsibility, see ARSIWA Commentary, n. 51, Commentary to Article 58 of the ARSIWA.

\(^{56}\) See n. 23.

\(^{57}\) Article 47 ARSIWA, ibid.
conduct of a person or group of persons – such as a military officer or unit – who acts upon the instructions, or under the direction or control, of a state (also different from their own state). Derived responsibility is addressed in Articles 16-17 ARSIWA. Under Article 16, a state which aids or assists another state in the commission of an internationally wrongful act can be held responsible for the act in question. The same principle applies to a state committing a breach of law or other obligation under the direction and control of another state (Article 17). All these provisions may relate to situations when a staff or liaison officer embedded in a multinational command participates in the decision-making process, or a military unit falls under the operational control of a multinational command, or is assisted in the action by other state partners. In sum, the ARSIWA leave the door open to both the exclusive and concurrent responsibility of TCNs and lead nations in coalition operations, depending on the specific circumstances of the case.

3.3 The simultaneous application of the two ‘classical’ attribution tests

With regard to the attribution test, in principle, attribution can be acknowledged according to both the ‘effective control’ test and the ‘overall/ultimate authority and control’ test. It is, however, important to note that, in the practice of coalition operations, the two tests are not mutually exclusive and can well apply in parallel. Indeed, on the one hand, there are no

58 It is not the scope of this contribution to analyse in-depth the two attribution tests. To the aim of this study, it may be said that the ‘effective control’ test is now the globally recognised criterion for the attribution of responsibility to an international legal person. See in particular ARIO Commentary, n. 50, Commentary to Article 7 ARIO. See also Tondini, ‘The Italian Job’, n. 29, 194. The ‘ultimate authority and control’ test lies at the opposite end of the responsibility spectrum. This criterion was invoked by the ECtHR in the Saramati judgment (see n. 30) and was harshly criticised by scholars for the way it was applied by the Court. It originates from Danesh Sarooshi’s ‘overall authority and control’ theory, as expressed in a famous book published in 1999 (D. Sarooshi, The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers (Oxford: Clarendon Press, 1999), 163-165). The ICTY also referred to the ‘overall control’ as the right criterion for the attribution of State responsibility (ICTY (Appeals chamber), Prosecutor v. Tadić, Judgment, ICTY Case No. IT-94-1-A, 15 July 1999, (1999) 38 ILM 1518, paras 120, 122-3. For the purpose of this study the, ‘overall authority and control’ and ‘ultimate authority and control’ will be considered as synonymous. The ECtHR’s decision in Saramati gave rise to a number of similar decisions, all issued in 2007-2009 (see e.g. Dušan Berić and others v. Bosnia and Herzegovina, App. Nos. 36357/04 et al., (ECtHR, 16 October 2007); Gajić v. Germany, App. No. 31446/02 (ECtHR, 28 August 2007); Blagojević v. the Netherlands, App. No. 49032/07 (ECtHR, 9 June 2009); Galić v. the Netherlands, App. No. 22617/07 (ECtHR, 9 June 2009). This trend ended soon after with the Court’s 2010 judgment in Al-Saadoon, see n. 45; see also the admissibility decision of 30 June 2009, and the following 2011 rulings in Al-Skeini and Al-Jedda, n. 45), in which the Strasbourg Court held the UK responsible for human rights violations committed by its troops in Iraq before and after the formal end of occupation in 2004. In order not to compromise its previous dictum in Saramati, however, the ‘Court in Al-Jedda cleverly stopped short of explaining which test it was actually applying to decide on attribution and mentioned both the thresholds of “effective control” and “ultimate authority and control” as not having been met’ (Messineo, ‘Things Could Only Get Better’, n. 31, at 339-340).
international law rules preventing the two tests from applying concurrently. On the other hand, operational reality suggests a concurrent application of both tests as a matter of fact. On the whole, all TCNs participating in a coalition retain the ‘effective control’ of their troops. In addition, lead nations – as well as other nations sitting in the coalition’s command, by reason of their participation in the decision-making process – may also exercise some degree of ‘effective control’ over the troops of other TCNs. This may possibly occur on a temporary basis only. Nonetheless, the above mentioned nations most certainly retain the ‘overall or ultimate authority and control’ of all the contingents placed at the coalition’s disposal. Therefore, whether ‘effective’ or ‘overall’, the presence of forms of joint control over military units during coalition operations – and thus a potential shared responsibility of coalition partners – is likely to be confirmed. The higher the command concerned in the hierarchical line (e.g. strategic as opposed to tactical), the greater is the likelihood that it may exercise some form of ‘overall’, rather than ‘effective’ control, given the planning/guidance, rather than executive, tasks assigned.

Nonetheless, the entity in charge of the ‘overall/ultimate authority and control’ over the operations is frequently unclear, due to the practice of establishing ‘contact groups’ of nations concerned with a specific international crisis. Such groups end up constituting the top decisional level (i.e. the political-military level) of coalition operations. Being informal by nature, they are not vested with any international or domestic legal personality. However, can member states of a contact group, once their ‘overall/ultimate authority and control’ over a specific coalition operation is clarified, be held jointly responsible for any breach of law or other obligation committed by coalition troops? If one portrays contact groups as ad hoc joint

59 See for instance the Al-Jedda ruling, ibid. Indeed, even though the ECtHR ended up attributing responsibility to the UK on a pure matter of fact (hence in practice applying the ‘effective control’ test without saying it), it did not in any way dispose of the “ultimate authority and control” test from Behrami/Saramati (K.M. Larsen, “Neither Effective Control nor Ultimate Authority and Control”: Attribution of Conduct in Al-Jedda” (2011) 50 MLLWR 347, 356). As a consequence, the Court’s decision does not prohibit the two attribution tests to apply in parallel. This paves the way to the concurrent responsibility of both the entity retaining the ‘overall/ultimate authority and control’ and the one exercising the ‘effective control’ over the troops concerned.

60 See R. Penttilä, ‘Multilateralism Light: The Rise of Informal International Governance’, Centre for European Reform, 2009, at www.cer.org.uk/publications/archive/essay/2009/multilateralism-light-rise-informal-international-governance. The first ‘Western contact group on Namibia’ was established in 1977 to deal with the crisis in the African state. Since then dozens of other contact groups have been set up by like-minded states and organisations. See for instance the Middle East Quartet (US, UN, EU and Russia), the Korean six-party talks (North Korea, South Korea, US, China, Japan and Russia), or the Contact Group on Piracy off the Coast of Somalia (CGPCS – formed by 60 states and a dozen of international organisations and agencies). Contact groups are temporary (i.e. they dissolve once the crisis is over) and work outside the UN framework. Participants are co-opted.

Alternatively, they could be held jointly responsible on the basis of their participation in the decision-making process at the political-military level.\footnote{As the ARSIWA Commentary, n. 51, confirms, Article 47 ‘neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned’ (Commentary to Article 46, para. 6).}

The analysis of the attribution test in coalition operations is at the basis of the \textit{Saddam Hussein} decision,\footnote{\textit{Saddam Hussein}, n. 24.} delivered by the ECtHR in 2006. The case concerned the former President of Iraq’s arrest, detention and handover to the new Iraqi political authorities. Since Saddam Hussein was arrested, detained and transferred solely by US forces, and the latter were also in charge for security in the zone where the alleged human rights violations took place, the Court affirmed that it could not exercise its jurisdiction over the case for the lack of effective control by ECHR member states over the alleged perpetrators. The fact that some ECHR member states ‘allegedly formed part (at varying unspecified levels) of a coalition with the US’\footnote{Ibid., 4.} was deemed insufficient to prove their responsibility by the Court, in the absence of further particulars on their involvement in the alleged human rights violations. In addition, the ‘overall command’ of coalition forces was in the hands of a non-member country, i.e. the US, hence the ‘overall or ultimate authority and control’ test could not be applied as well.\footnote{Ibid.}

According to the Court, the involvement of European states-members of the CPA could be proved by: first, addressing each TCN’s role and responsibilities or the division of labour/power between them and the lead nation(s); second, specifying what coalition partner retained military responsibility for the zone in which the alleged breaches of law occurred; third, identifying relevant command structures between the lead nation(s) and other TCNs; and fourth, indicating whether TCNs (other than the lead nation) had any (and, if so, what) influence or involvement in the alleged breaches of law.\footnote{Ibid., 3-4: “The applicant did not address each respondent State’s role and responsibilities or the division of labour/power between them and the US. He did not refer to the fact or extent of the military responsibility of each Division for the zones assigned to them. He did not detail the relevant command structures between the US}
In the ECtHR’s view, state responsibility in coalition operations is therefore totally individual and belongs to the entity in control of either the unit who materially commits the violation or the territory where it takes place. The same principle, i.e. the individual responsibility of TCNs for acts performed by their troops in the course of UN-mandated coalition operations (and thus the lack of responsibility for the UN), has been often asserted by the UN Secretary General.67

Nonetheless, the Court’s reasoning does not seem so convincing. In fact, what would have happened in Saddam Hussein if the lead nation had been an ECHR member state, instead of the US? Moreover, could the apprehension, detention and transfer of Saddam Hussein have been imputed to the CPA as a whole, and thus jointly to all the coalition partners, or at least to both the US and the United Kingdom (UK)?68 Furthermore, violations can be committed at the same time by two or more contingents. What if the participation or the mere assistance of British or other coalition officers in the capture of Saddam Hussein had been proved? More importantly, the decision to order a specific conduct that has then led to an alleged breach (in the case at hand, the applicant’s capture, detention and transfer) can be taken jointly by, or with the participation (whether limited or substantial) of, officers belonging to several coalition partners. Typically, coalition headquarters are in fact staffed with officers from different TCNs. As regards to omissions, should those TCNs, whose officers could prevent a violation from taking place, or were informed of an order/directive that could presumably lead to a breach of law and did not act accordingly, be held responsible/liable, even though the officer who eventually issued the order/directive and the unit that materially committed the violation belonged to other coalition partners? Perhaps an international or domestic court could answer this question in the affirmative.

68 According to Talmon, ‘A Plurality of Responsible Actors’, n. 46, at 204, the CPA was to be regarded as a State organ of the United States, but acting on behalf of both the occupying powers, i.e. the US and the UK. As a consequence, the CPA’s conduct was to be imputed to both of them.
4. Attribution of conduct in practice, according to the decisional mechanisms in place

As indicated above, the analysis of the decisional mechanisms in place is fundamental in assessing the effective participation of coalition partners in the conduct of operations, and thus in proving their individual or shared responsibility. In this respect, the analysis of the coalition’s command/control internal structure is particularly difficult to carry out, as unfortunately – but unsurprisingly – the coalitions’ organisational framework is, most of the time, established in confidential agreements. Under these circumstances, it becomes difficult to say whether such agreements also contain clauses on the responsibility of coalition members and thus ‘piercing the coalition veil’ may prove to be a tricky affair. In addition, the C2 structure and decisional mechanisms of the coalitions of the willing reveal a complex bundle of links and relationships among TCNs which are themselves difficult to disentangle. In view of the lead nations’ political goals, significant organisational changes may occur in the hierarchical chain over time and national contingents being subject to different commanding authorities. In general, coalitions’ operational commands are established according to three different organisational structures: 1) integrated command structure; 2) parallel command structure; and 3) ‘lead nation’ command structure. The key features of the integrated command structure is the presence of a designated single commander, a staff composed of representatives from member states and subordinate multinational commands, and staffs integrated into the lowest echelon. The parallel command structure is characterised by the absence of a single force commander and the presence of distinct national chains of command, interacting by means of ‘coordination centres’. In the last command structure, namely the ‘lead nation’ command structure, coalition partners place their forces under the control of one lead nation, supported by an international staff. Subordinate commands are normally composed of national contingents, answerable to national commanders.

All these organisational models may give rise to forms of joint responsibility, according to the attribution rules established by the ILC. In two out of three organisational models, namely the

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69 See e.g. the account of the changes in the chain of command occurred in the naval component of the US-led anti-terrorism coalition in the Persian Gulf in 2003, in the wake of the US-led invasion of Iraq, made by D.B. Crist, ‘The Formation of a Coalition of the Willing and Operation Iraqi Freedom’, in B.A. Elleman and S.C.M. Paine (eds.), Naval Coalition Warfare: From the Napoleonic War to Operation Iraqi Freedom (Abingdon: Routledge, 2008), at 208. Such changes included the creation of three autonomous Combined Task Forces (CTFs), distinct, but in support of, Iraqi Freedom naval coalition operations. Interestingly, such CTFs comprised countries such as France, Germany and Canada who – at that time – were opposing the war in Iraq, although their contribution in the anti-terrorism naval coalition is deemed to have been vital for the conduct of operations against Iraq (ibid., at 209).

integrated and the ‘lead nation’ command structures, there may be: a) situations of plurality of responsible states for the same internationally wrongful act (see e.g. the case of a misconduct ordered/committed by a multinational command or planned by a multinational staff);\textsuperscript{71} b) cases of organs placed at the disposal of a state by another state (see national commands at the disposal of the lead nation or the national staff members put under the authority of the coalition commander in the integrated command model);\textsuperscript{72} c) the direction/control exercised by a state over the commission of an internationally wrongful act by another state (a situation which may arise in the same circumstances as in the previous case);\textsuperscript{73} or d) circumstances in which a state aids or assists another state in the commission of an internationally wrongful act (again, see – in both command structures – the case of a multinational staff planning and conducting an unlawful military operation).\textsuperscript{74} Even in the case of a parallel command structure, joint responsibility of coalition partners under Articles 16 and 47 ARSIWA is still possible, by means of the above mentioned ‘coordination centres’. Coordination could in fact be so tight that two or more coalition partners are eventually to be held responsible for the same misconduct (Article 47), or that a state ends up aiding or assisting a coalition partner in the commission of an internationally wrongful act (Article 16).

On the other hand, potentially the attribution rules established by the ILC may fall short of concrete application, as the requirements provided in the ARSIWA may be difficult to prove in practice. For instance, how to demonstrate a coalition member’s ‘knowledge of the circumstances of the internationally wrongful act’ (Articles 16 and 17 ARSIWA), in the absence of clear or publically disclosed information as to the commission of the misconduct in question? Limiting the potential attribution of responsibility in coalition operations to the ARSIWA rules would therefore be quite risky.

Ultimately, on occasion, even when an international organisation (such as NATO or the UN) is officially in control of the mission, the reality of facts suggests that operations continue to be carried out under a coalition-type logic.\textsuperscript{75} See for instance the case of Afghanistan, where, on the one hand, notwithstanding the formal NATO chain of command, TCNs still exercise a

\textsuperscript{71} Article 47 ARSIWA, n. 23.
\textsuperscript{72} Article 6 ARSIWA, ibid.
\textsuperscript{73} Article 17 ARSIWA, ibid.
\textsuperscript{74} Article 16 ARSIWA, ibid.
\textsuperscript{75} See for instance the decision of the Dutch Supreme Court in the Nuhanović and Mustafić cases, where the conduct of Dutch troops was attributed first and foremost to the Netherlands, although the control of operations was formally in the hands of the UN, \textit{The Netherlands v. Hasan Nuhanović}, ECLI:NL:HR:2013:BZ9225 (6 September 2013); and \textit{The Netherlands v. Mehida Mustafić-Mujić et al.}, ECLI:NL:HR:2013:BZ9228 (6 September 2013).
tight control over their troops, and, on the other hand, some coalition partners prefer to establish informal coordination mechanisms among them, or with US forces acting under national chain of command.⁷⁶

Coalitions often intervene in the aftermath of a crisis and their role is often provisional, being limited to paving the way to the deployment of forces belonging to regional organisations or the UN itself.⁷⁷ Nonetheless, this change of authority is sometimes only related to the formal C2 structure in place, as the troops initially brought in by coalition partners remain deployed on the ground also after the formal handover. In addition, especially in missions led by the US, having a ‘double-hatted’ force commander – and thus two distinct hierarchical chains – is the rule, not the exception.⁷⁸ This makes it particularly difficult to assess the responsibility of single contributing nations re a specific operation, since it is often quite unclear under what chain of command the operation in question has been carried out. The ‘double-hatted’ force commander could in consequence be seen as a common organ of both the lead nation and the coalition, paving the way for the joint responsibility of both entities for a force commander’s wrongful conduct. This could in turn entail the responsibility of all coalition partners, under Article 47 ARSIWA, since the force commander can be seen as a ‘joint authority responsible for the management’⁷⁹ of coalition operations. In case ‘double-hatting’ is used in operations carried out by an international organisation vested with an international legal personality, the organisational structure ends up being that of a coalition formed by one or more lead nations and an international organisation.⁸⁰

Coalition members may directly control their own national assets and simply coordinate operations with other nations (i.e. according to the above mentioned parallel command structure), or – and this happens most times – opt for transferring their assets under the

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⁷⁷ For instance, the above-mentioned operations in Somalia, Haiti and East Timor were all followed by UN missions, while the conduct of operations in Libya were handed over to NATO on 31 March 2011. The same occurred with the NATO-led Afghanistan International Security Assistance Force (ISAF). Set up in December 2011 as a coalition operation, the operation’s command originally rotated among different nations on a 6-month basis. NATO assumed the leadership of ISAF only on 11 August 2003.
⁷⁸ Having a ‘double hat’ in military jargon means to serve, at the same time, as a commanding officer in two distinct C2 lines. Normally, one of them is the national one. So, for instance, ISAF Commander in Afghanistan is, at the same time, the top-level commander of NATO and US troops. As a result, he may opt for the national chain of command for the accomplishment of a specific mission (to be assigned to US troops only), and rely on the NATO one for other tasks.
⁷⁹ ARSIWA Commentary, n. 51, Commentary to Article 47, para. 2.
⁸⁰ During virtually all military operations carried out by international organisations and led by the US (see e.g. Somalia, Kosovo, Afghanistan, etc.), the latter has always maintained a national chain of command/control running in parallel with the international one.
control of the coalition’s multinational command, by issuing a ‘Transfer of Authority’ (ToA) telegraphic message. Through the ToA, TCNs formalise the passage of Operational/Tactical Control (OPCON/TACON) by issuing a ‘Transfer of Authority’ (ToA) telegraphic message. Through the ToA, TCNs formalise the passage of Operational/Tactical Control (OPCON/TACON) from national to coalition authorities. Before the formal ToA, usually command relationships have however been already agreed and described in more detail in the Operation Plan (OPLAN). After the ToA, coalition members should in principle only retain the Operational/Tactical Command (OPCOM/TACOM) of their troops. Nevertheless, as mentioned above, coalition partners tend to keep a good deal of authority over their contingents. In addition, when necessary, coalition partners may temporarily re-shift their assets under national control for the accomplishment of specific tasks. In this case they notify a ‘Reverse ToA’ message, which has basically the same form and functions of the ToA, although it is used to switch the control of national contingents from the coalition to a TCN. Under the ToA scheme, tasks are assigned and instruction issued to TCNs’ units by the coalition’s multinational command. However, as anticipated above, multinational commands are complex bodies, staffed with officers from different nations.

More specifically, coalition headquarters and operational commands may be provided by one or more lead nations, but are usually staffed with liaison officers, whose task is to inform and coordinate military operations with coalition partners. Typically, liaison officers are assigned to the office of the Chief of Staff and work closely with the head of the operations branch to resolve interagency problems. Other officers (coming from the most influent TCNs) are part of the staff and may be tasked with planning, conduct of operations, intelligence gathering, training, administrative duties, etc., depending on the specific agreements reached with the

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81 OPCON is ‘the authority delegated to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time, or location; to deploy units concerned, and to retain or assign tactical control of those units. It does not include authority to assign separate employment of components of the units concerned. Neither does it, of itself, include administrative or logistic control’ (AAP-06, n. 16, at 2-O-3).
82 OPLAN is defined as ‘[a] plan for a single or series of connected operations to be carried out simultaneously or in succession. It is usually based upon stated assumptions and is the form of directive employed by higher authority to permit subordinate commanders to prepare supporting plans and orders. The designation “plan” is usually used instead of “order” in preparing for operations well in advance. An operation plan may be put into effect at a prescribed time, or on signal, and then becomes the operation order’ (ibid., at 2-O-4).
83 OPCOM is ‘the authority granted to a commander to assign missions or tasks to subordinate commanders, to deploy units, to reassign forces, and to retain or delegate operational and/or tactical control as the commander deems necessary. Note: It does not include responsibility for administration’ (ibid., at 2-O-3).
84 The ‘Transfer of Authority ’ (ToA) is a formal act by which a government transfers, on a temporary basis, the operational command or control of designated forces to a multinational command. ToA is a unilateral act and can be revoked at the TCN’s convenience, also only temporarily and for the accomplishment of a single mission. In this case the TCN issues a ‘Reverse ToA’. The whole procedure is rather informal and normally the ToA/Reverse ToA is announced to the multinational command and other TCNs through an electronic message.
lead nation(s). Staff officers normally fill posts only up to the operational level. At the strategic level, coalition partners are represented by senior liaison officers or military representatives.

Therefore, it may be said that officers from different countries – in different capacities and degrees of responsibility – may all actively contribute to the generation, training, deployment and conduct of coalition operations. Even when they do not actively contribute, they (or at least some of them) are informed of the conduct of operations. In practice any single coalition operation is in principle the outcome of a complex planning and execution process. An example is the case of an aerial bombing of a target on the ground. Even though the coalition fighter jet who materially hits the target belongs to a single TCN, the planning team behind the attack would probably be ‘joint and combined’, i.e. comprising officers from different armed forces and contributing nations. In addition, the jet could drop bombs supplied by a third country; and be assisted by other aerial, naval and terrestrial assets (such as radars, Airborne Warning and Control Systems – AWACS, and missile systems); while bombs could be dropped with the support of ‘spotters’ on the ground, i.e. military officers – possibly belonging to different coalition partners – who illuminate the target with a laser (in case of laser-guided bombs), or communicate the exact coordinates of the target to the pilot (in case of GPS-guided bombs). As this example clearly illustrates, in coalition operations, a single action can easily be attributed to several TCNs, as its outcome is normally the product of the effective participation (meaning physical participation or contribution on the physical plane) of numerous coalition partners.

Central to the discourse on the joint responsibility of TCNs is also the role of two different types of senior officers, who are usually seconded by contributing nations to multinational commands. The first is the Senior National Representative (SNR), who is in charge of high level coordination between the multinational command and his/her government. The second is the Red Card Holder, namely a senior officer whose task is that of checking the compatibility with national policies, laws, directives and the sending state’s international obligations of mission tasks assigned to national forces by the multinational command, also in view of the existing ‘national caveats’. The SNR’s role consists of liaising with the force commander

86 See for instance the role of supplier played by Germany during the 2011 NATO military campaign against Libya, T. Harding, ‘Germany Replenishes NATO’s Arsenal of Bombs and Missiles’, The Telegraph, 28 June 2011.
87 National caveats are restrictions in the use of national contingents put forward by TCNs in view of their national legislation or policies. They can be issued by TCNs at different levels and stages, including the force
when important changes take place, concerning in particular the area of operations, the rules of engagement, the execution of the mandate, and the composition of the force. In case of concern of the SNR, issues are normally settled at the government level. On the contrary, the Red Card Holder is vested with the authority to refuse the assigned mission tasks. As US General Wesley Clark, former Supreme Allied Commander in Europe (SACEUR), reported in his memoir on the 1999 NATO intervention in Kosovo, ‘red-carding’ is a normal practice in multilateral operations. In his words, during the Kosovo campaign, ‘[i]t was well understood that nations always retained ultimate authority over their forces and had the right to override orders at any time, if they chose to do so’. The presence of staff officers, liaison officers, SNRs and Red Card Holders reveals that – at the operational level – information as to the concrete conduct of operations is widely spread among coalition partners, and this entails that there might be a considerable number of officers/TCNs who ‘could know or had reason to know’ when a certain breach of law is committed. Of course, this does not imply that any misconduct of any military unit/officer is automatically imputable to all TCNs.

Ultimately, the coalition partners’ shared responsibility could be established by attributing to the force commander and staff officers the status of common organs of the coalition, or otherwise consider multiple attribution to several TCNs as the object of a rebuttable presumption. Under the latter theory, any wrongful act would in principle be attributed to more than one TCN by reason of their effective participation in the conduct or omission. Again, assessing the ‘effective participation’ of TCNs in the conduct/omission concerned, in turn entails clear information about the roles and responsibilities in the decisional and

generation stage (i.e. at the political-military level, in the early stages of the mission’s preparation), but can also be notified to allied forces once the Operational Plan (OPLAN) and related rules of engagement (ROE) are finalised and distributed to all TCNs. National caveats are usually set out in the ToA message and can be lifted or reissued once the operation has already commenced.


89 Quoted in Auerswald and Saideman, NATO in Afghanistan, n. 76, at 6.

90 The reference to the ‘knew or had reason to know’ formula is not casual and is taken from para. 2 of Articles 7(1)(3) and 6(1)(3) of the ICTY and ICTR Statutes (ICTY Statute, 25 May 1993, UN Doc. S/RES/827 (1993); ICTR Statute, 8 November 1994, UN Doc. S/RES/955 (1994)). In this respect, criminal liability of planners and commanding officers sitting in the coalition command – and thus the responsibility of their sending States – cannot be excluded in case an international crime is committed by a dependent unit and they failed to prevent it, also with active opposition.

91 See ARSIWA Commentary, n. 51, Commentary to Article 47, para. 2.
execution process. Unfortunately, the hypothesis in question has not yet been explored by scholars the way it deserves. 92

5. The 2011 military intervention in Libya

The military intervention in Libya of March 2011 is a clear example of this ‘responsibility puzzle’ that serves to illustrate the possibility of shared responsibility identified above. It started as a pure UN-backed coalition operation led by the US (codename Operation ‘Odyssey Dawn’) and then evolved into a NATO-led intervention after the command and control of coalition forces was formally transferred to NATO on 31 March 2011. 93 Nonetheless, upon closer examination, the bundle of links and relationships among all the actors involved reveals the presence of several hierarchical chains operating simultaneously, also following the formal end of coalition operations. In practice, the ‘coalition logic’ has never really abandoned the conduct of operations.

Indeed, nine of the eleven states initially participating in Operation Odyssey Dawn were also members of NATO, 94 and all of them continued to take a major part in the operations over Libya after the formal handover to NATO. Again, the US joint task force commander was ‘double hatted’, namely the commander of the US naval forces in Europe (NAVEUR) and Africa (NAVAF) and, at the same time, the commander of NATO’s Allied Joint Force Command (JFC), based in Naples. 95 Once NATO took over, JFC Naples was tasked with the conduct of NATO Operation ‘Unified Protector’ (OUP); in practice, the Commander JFC Naples remained in charge and only changed ‘hat’. 96 Even before the formal handover to

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95 Ibid., 26.
96 NATO strategic decisions were implemented by JFC Naples, whose Commander, Adm. Samuel Locklear, had previously commanded Operation Odyssey Dawn in his capacity as a US officer. The OUP operational commander was the Deputy Commander of JFC Naples, Canadian Gen. Charles Bouchard. Once NATO took over, significant changes occurred in the command/control structure at the lower level: air operations passed
NATO, NATO had conducted surveillance operations of the Libyan skies using AWACS aircrafts deployed as part of NATO’s Operation ‘Active Endeavour’, and had carried out maritime embargo operations making the exact moment of the transfer of responsibility from the coalition to NATO forces quite uncertain. In addition, remarkably, single states such as France and the UK, ran separate military operations in parallel with both Operation Odyssey Dawn and the subsequent OUP (Operations ‘Harmattan’ and ‘Ellamy’, respectively), retaining ‘operational discretion over [their] assets’. As a result, even after the formal handover to NATO, operations against loyalist forces could have in fact been conducted under national command/control and not within the NATO command/control chain, possibly because of the uncertainty as to whether such actions could be considered covered by the UNSC’s mandate. Also the bombing of Gaddafi’s convoy, which then led to the capture and killing of the Libyan leader, was carried out by both NATO (i.e. French) and national (i.e. US) assets. NATO itself had to admit that it was in contact with ‘allied forces in Libya’, i.e. special forces operating under national command, but coordinating their activities with NATO forces, notwithstanding the explicit prohibition of ‘a foreign occupation force of any form on any part of Libyan territory’, contained in paragraph 4 of

from the US Air Base of Ramstein, Germany, to NATO’s Air Command Headquarters for Southern Europe, located in Izmir, Turkey, although the air campaign itself was conducted from NATO’s Combined Air Operations Centre, based in Poggio Renatico, Italy. The command of maritime operations, which was originally established aboard the US command and control ship USS Mount Whitney, transited to the NATO Maritime Component Command Naples. Notably, initially the Command of Joint Task Force Odyssey Dawn was established in Naples and then moved on board the USS Mount Whitney, together with the mission’s maritime component command. Likewise, NATO maintained the presence of a Task Force Commander on board an Italian command and control ship navigating off the Libyan coasts for all the duration of operations.


100 A. Cameron, ‘The Channel Axis: France, the UK and NATO’, in A. Johnson and S. Mueen (eds.), Short War, Long Shadow: The Political and Military Legacies of the 2011 Libya Campaign, Royal United Services Institute, Whitehall report 1-12 (2012) (ibid.), 15, at 18. See also the written evidence (Supplementary evidence from the Ministry of Defence) submitted by the UK Ministry of Defence to the British Parliament in relation to the military operations in Libya: ‘Some nations also deployed assets in support of operations in Libya under National Command arrangements, which were also made available for NATO tasking. The UK’s deployment of HMS OCEAN was done under such arrangements’ (House of Commons, Defence Committee, Operations in Libya: Ninth Report of Session 2010–12, 8 February 2012, Evidence No. 56, available at www.publications.parliament.uk/pa/cm201012/cmselect/cmdfence/950/950.pdf).


Resolution 1973 (2011). In light of that ‘asserting that NATO exercised the “effective control” over the conduct [of operations] seems inappropriate’. 103

Concerning the participation of non-US officers in the planning and conduct of Operation Odyssey Dawn, in support of the US joint task force staff there were reportedly 10 foreign liaison officers (all from Italy, France, and the United Kingdom). 104 British liaison and staff officers were embedded at every level of the C2 structure. 105 National Red Card Holders, supported by legal advisors, were appointed within national cells established in the operational commands of both Operation Odyssey Dawn and OUP, so that they could follow ‘each mission in detail, from preparation to debriefing, and had access to all available intelligence products and means of communications’. 106 With regard to the ‘overall political direction’ of military operations, starting from 29 March 2011, it was split between a dedicated Contact Group, the most powerful coalition members and the North Atlantic Council, the UN Secretary-General being relegated to the coordination of humanitarian assistance. 107

In sum, lead nations – also retaining the ‘overall political direction’ of operations – remained the same for all the duration of hostilities. Their forces operated several times under exclusive national control, even when formally assigned to NATO. Some TCNs actively participated in the planning and decisional process behind the conduct of coalition operations, while all TCNs were constantly informed about missions, targets and tasks through their liaison officers. More importantly, state forces tasked with the conduct of a specific ‘kinetic operation’ by the coalition or NATO command could decline the assignment on the basis of a

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103 G. Bartolini, ‘L’Operazione Unified Protector e la Condotta delle Ostilità in Libia’ (2012) 95 RDI 1012, at 1037 (author’s translation from Italian: ‘Alla luce degli elementi descritti appare quindi improprio affermare che la NATO esercitasse un “controllo effettivo” sulle condotte’).
104 James et al., ‘Joint Task Force Odyssey Dawn’, n. 94, 25. Other sources reported the presence on board the USS Mount Whitney of British and French naval officers, ‘as well as liaison officers from a number of other countries’ (Gertler, ‘Operation Odyssey Dawn (Libya)’, n. 97, 14).
national decision, by means of their Red Card Holders. In light of this, it seems clear that primary responsibility for the conduct of national forces remained in the hands of TCNs, even when assigned to an international control structure, whether led by the US or NATO. This, however, does not exclude the latter’s concurrent responsibility from any breach of law committed by TCNs’ forces. More importantly, the above-mentioned information on the C2 structure and the decisional mechanisms in place makes the case for a shared responsibility among a good number of coalition partners.

6. Conclusion

Based on the analysis contained in the previous sections, it is possible to conclude that the responsibility of states participating in a coalition of the willing is – at the same time – both individual and shared. On the one hand, since TCNs never really cease to exercise control over their troops, even when formally assigned to a coalition, any violation of law or other obligation committed by military contingents is to be attributed first and foremost to their sending states. On the other hand, in order to establish responsibility concretely in specific cases, becomes essential to rely on the ‘effective participation’ of coalition partners in the decision-making and execution process, and their presence within the C2 organisational framework. The goal is that of assessing the coalition members’ real powers, capacities, influence and participation in the commission of any alleged breach of law. Depending on the C2 structure and decisional mechanisms in place, a plurality of state partners could easily be held jointly responsible for the conduct of operations. However, any assessment should be based upon clear and publicly-available information, whereas such information and data are almost always classified or unpublished. This makes the responsibility of coalition partners difficult to be established in practice.

Shared responsibility of lead nations and TCNs may be ascertained by applying the ‘effective control’ test, also in conjunction with the ‘overall/ultimate authority and control’ test. In addition, the latter may be used to found the concurrent responsibility of states exercising political direction over coalition operations, especially when organised in ‘contact groups’.

108 The multiple attribution of conduct to both contributing States and NATO is confirmed in Bartolini, ‘L’Operazione Unified Protector e la Condotta delle Ostilità in Libia’, n. 103, 1038. See, mutatis mutandis, the recent decision of the Dutch Supreme Court in the Nuhanović and Mustafić cases, confirming the multiple attribution of the actions performed by the Dutchbat in Srebrenica to the Dutch Government and the UN, n. 75, para. 3.12.2.
Also the ARSIWA support the potential shared responsibility of coalition partners. Other general rules on responsibility/liability, which may be significant in proceedings before international or domestic courts, provide for the existence of forms of shared responsibility, even though the ECtHR – in its case law concerning the responsibility of coalition members for acts performed by one of them – considered the responsibility of TCNs as being exclusively individual. The same decision, however, did not rule out the possibility to extend responsibility to more TCNs and listed some relevant criteria in this respect.

As the military intervention in Libya shows, today the ‘coalition logic’ is present in any military intervention, even when it involves regional or international organisations. This is why only an in-depth analysis of the decisional and operational mechanisms and rules which regulate the conduct of operations may pierce the ‘coalition veil’ and consent to a fair attribution of responsibility in case of need.
Responsibility in Connection with the Conduct of Military Partners

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Abstract

This article analyses situations in which States and international organizations partnering in military operations can bear responsibility in connection with conduct attributed to another. When engaging in military cooperation, a variety of international norms providing for obligations in relation to others should be taken into account. These include negative obligations not to assist or direct military partners in engaging in conduct violating international obligations, and positive obligations to take steps to ensure that military partners do not commit wrongful conduct. Taken together, they result in a framework which regulates military collaboration by determining thresholds where implication in the conduct of another, or lack thereof, engages responsibility. The aim of this article is to clarify and to conceptualise this framework, so as to provide an analytical background on the basis on which military officials can determine the proper balance between excessively permissive attitudes fostering violations and unnecessarily precautionary approaches hindering military cooperation. Based on a comprehensive review of relevant rules found in the ILC articles on the responsibility of States and of international organizations, international humanitarian law, and international human rights law, the article identifies four key criteria to allocate responsibility in connection with the wrongful conduct of military partners: knowledge, capacity, diligence, and proximity. In addition, the article offers some perspectives on the apportionment of legal consequences such as reparation.

Keywords

Responsibility • Complicity • Aid or assistance • Derived responsibility • Indirect responsibility • Duty to prevent • Duty to ensure respect

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* Researcher, TMC Asser Institute. This article partly builds on previous research conducted as part of the SHARES Project on Shared Responsibility in International Law (led by Professor André Nollkaemper at the University of Amsterdam). The author wishes to thank two anonymous reviewers for their useful comments on this article.
I. Introduction

The conduct of military operations by several States cooperating as a coalition or under the aegis of an international organization raises complex issues of allocation of international responsibility amongst military partners. International military operations involve a multiplicity of States and international organizations participating in different degrees, and, when harmful conduct occur, it can be difficult to determine which participant should be held responsible, on which ground, and to which extent. A rich literature exists regarding attribution of conduct in military operations, but less attention has been devoted to other aspects of shared responsibility in international military operations. Attribution of conduct concerns the determination of which State or international organization should be deemed to have acted in relation to the given conduct of a soldier. In operations led by an international organization, it is established that the conduct of soldiers should be attributed to the entity which exercised effective control over the given conduct. At a second level of allocation of responsibility, an entity can bear responsibility in connection with conduct that it did not commit (in the sense that the conduct is not attributed to it), on the ground of its implication in the conduct, or lack thereof.

This article sets to address allocation of responsibility in connection with the conduct of military partners. Since it focuses on this second level of allocation of responsibility, the article takes as a hypothesis that some wrongful conduct is attributed to a given military partner, and enquires specifically in the circumstances in which other military partners can bear a share of responsibility in connection with that wrongful conduct. Examples of scenarios of military cooperation that could lead to responsibility in connection with the conduct of partners include: offering air support to

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ground forces, transporting troops and equipment, providing aerial refuelling, carrying out reconnaissance missions, supplying targeting intelligence, transferring individuals, allowing the use of military bases, providing arms and equipment, or financing.

A myriad of rules of international law prescribe obligations in relation to acts performed by others that should be taken into account when engaging in such forms of military cooperation. These include rules formulated by the International Law Commission (ILC) in the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the Articles on the Responsibility of International Organizations (ARIO), as well as a variety of rules found in international humanitarian law and in international human rights law. As will be shown in this article, the interplay of these various obligations results in a framework which regulates military collaboration between States and with international organizations by determining thresholds where implication in the conduct of another, or lack thereof, engages responsibility. The aim of this article is to clarify and to conceptualise this framework, so as to provide an analytical background on the basis on which military officials can determine the proper balance between excessively permissive attitudes fostering violations and unnecessarily precautionary approaches hindering military cooperation.

Section II begins by clarifying the notion of responsibility in connection with the conduct of another and how it is understood in this article. Section III provides a comprehensive overview of rules found in the ILC articles and in primary norms which prescribe negative or positive obligations and are relevant in the context of military operations. It uncovers the conditions under which responsibility in connection with the conduct of others is entailed, and analyses how the rules apply in the military context with reference to examples drawn from practice. In Section IV, the article engages in a more conceptual analysis, identifying four key criteria that are essential for allocation of responsibility in connection with the conduct of others: knowledge, capacity, proximity, and diligence. Section V addresses the issue of apportionment of legal consequences such as reparation. The regime of responsibility in connection with the responsibility of military partners will often result in situations where several military partners are responsible in relation to a harmful conduct, and this article provides some possible options regarding apportionment of responsibility in such circumstances. Section VI provides concluding remarks, noting in particular a trend towards a general framework of collective responsibility and mutual compliance.

II. Notion of Responsibility in Connection with the Conduct of Another

The notion of ‘responsibility in connection with the acts of another’ was devised by the ILC to cover situations where a State or international organization ‘B’ bears responsibility in relation to a conduct that is attributed to another subject ‘A’. The State or international organization B bears

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6 ARSIWA, p. 27; ARIO, pp. 56 and 67.
responsibility on the basis of its implication in the internationally wrongful act committed by A, while the State or international organization A is responsible for the commission of the main wrongful act itself. Under this heading appear rules addressing situations of aid or assistance, direction and control, coercion, and rules addressing collaboration within international organizations. The notion of responsibility in connection with the acts of another is also sometimes referred to as ‘indirect responsibility’, ‘attribution of responsibility’, or ‘derived responsibility’. The defining feature is that the responsibility of B for its own wrongful conduct arises in connection with a certain conduct of A, and would not arise if it was not for the acts or omissions of A.

There are contrasting views in scholarship regarding the nature of ILC rules prescribing responsibility in connection with the conduct of another. The law of responsibility is traditionally said to be made of secondary rules prescribing the general conditions under which responsibility arises and the legal consequences for it, while primary norms prescribe the substantive content of specific international obligations. However, rules of derived responsibility difficulty fit this distinction and it can be argued that they are, at least in part, of a substantive nature. The ILC itself admitted that the Chapter of the ARSIWA on responsibility in connection with the acts of another is particular in that it ‘specifies certain conduct as internationally wrongful’. Regarding aid or assistance, it has become relatively well accepted that Article 16 ARSIWA and its ARIO counterparts qualify as substantive rules providing that deliberate participation by a State or international organization in the conduct of another constitutes a separate wrong. In the words of the ILC, Article 16 ARSIWA constitutes an ‘obligation not to provide aid or assistance to

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8 Article 16 ARSIWA; Articles 14 and 58 ARIO; See Section III.1.A below.
9 Article 17 ARSIWA; Articles 15 and 59 ARIO; See Section III.1.B below.
10 Article 18 ARSIWA; Articles 16 and 60 ARIO.
11 Articles 17 and 61 ARIO; Section III.1.C below.
15 ARSIWA Commentaries, General commentary, §§ 1-4, p. 31.
17 ARSIWA Commentaries, Introductory commentary to Chapter IV of Part I, § 7, p. 65.

Interpreting ILC rules of derived responsibility as substantive in nature has two main consequences. First, it means that the State or international organization B is not responsible for the conduct of A as such, but for its own distinct wrongful act in breach of its obligation not to assist or direct A to engage in a wrongful conduct.\footnote{Crawford, supra note 18, p. 399; F. Messineo, ‘Multiple Attribution of Conduct’, SHARES Research Paper No. 2012-11, p. 7; Lowe, supra note 18, p. 4.} This conceptual distinction is important to note, because it has direct consequences when it comes to apportioning responsibility.\footnote{See Section V below.}

Second, it reveals that ILC rules of derived responsibility are akin to a number of primary norms which prescribe obligations in connection with the conduct of others within specific fields of law.\footnote{ARSIWA Commentaries, Introductory commentary to Chapter IV of Part I, § 4, p. 64.} These include for instance obligations to prevent in international humanitarian law or international human rights law. In view of their commonalities, this article analyses relevant rules found in primary norms alongside those found in the ILC Articles, so as to provide the full picture of grounds for responsibility in connection with the conduct of military partners.

**III. Negative and Positive Obligations in Connection with the Conduct of Military Partners**

In line with the comprehensive approach outlined above, the following sections analyse grounds for responsibility in connection with the conduct military partners both as found in the ILC Articles and in primary rules. The multitude of possibly relevant rules can be divided in two main categories, depending on whether they prescribe a negative obligation not to influence certain conduct of others (Section III.1), or a positive obligation to exercise some influence over the conduct of others (Section III.2).

**1. Negative Obligations in Connection with the Conduct of Military Partners**

A number of negative obligations prescribe that responsibility can arise if a State or international organization exercises undue influence or control over the conduct of others. Underlying these rules is the idea that States and international organizations should not blindly facilitate or knowingly foster violations of international law by others. In the context of military cooperation, the most relevant rules concern aid or assistance (Section III.1.A), direction and control (Section III.1.B), and some aspects of the relationship between international organizations and their member States (Section III.1.C).

**A. Aid or Assistance**

Providing support is a defining feature of international military cooperation. Military partners routinely assist each other in various ways through operational or logistical support. One example
is when a State conducts air strikes in support of ground forces that are under distinct command.\textsuperscript{24} This occurred for instance in Afghanistan, where troops under US command as part of Operation Enduring Freedom carried out air strikes in support of NATO-led ISAF forces on the ground,\textsuperscript{25} and during the UNOCI mission in Ivory Coast, where French forces have provided air support to UN forces.\textsuperscript{26} Other examples include the various forms of logistical support that can be provided to a mission, including transporting troops and equipment, providing aerial refuelling, carrying out reconnaissance missions, supplying intelligence, granting over-flight and landing rights, allowing the use of military bases, or escorting ships.\textsuperscript{27} With regards to international organizations, practices of assistance have included the lending of NATO assets to EU-led military operations,\textsuperscript{28} and the provision of substantial financial support by the EU to a number of AU-led peacekeeping operations.\textsuperscript{29} When providing such military support, partners must take full account of their obligations not to aid or assist in violations of international law by military partners.

\textit{i. ILC Articles}

Under Article 16 ARSIWA, ‘[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.’ Similar provisions exist with regards to aid or assistance to or by international organizations (Articles 58 and 14 ARIO). The requirement of knowledge means that the supporting State must be aware ‘of the circumstances in which its aid or assistance is intended to be used by the other State’.\textsuperscript{30} The ILC commentaries further add that, in order to be wrongful, aid or assistance ‘must be given with a view to facilitating the commission of the wrongful act’.\textsuperscript{31} In terms of causal threshold, the ILC considers that assistance must have ‘contributed significantly’ to the other’s wrongful conduct, but does not need to be ‘essential’.\textsuperscript{32}

The conditions formulated by the ILC have been criticized in some respects in the scholarship. In particular, several authors have argued that the requirement of assistance being provided for the purpose of facilitating the commission of a wrongful act was excessively narrow, as such subjective

\textsuperscript{24} Air support during a mission under integrated command does not involve aid or assistance as the conduct of both air and ground forces would be attributed to the same entity.


\textsuperscript{29} European Commission, African Peace Facility, Annual Report 2014, ISSN 2363-0914.

\textsuperscript{30} ARSIWA Commentaries, Commentary to Article 16, § 4, p. 66.

\textsuperscript{31} ARSIWA Commentaries, Commentary to Article 16, § 5, p. 66.

\textsuperscript{32} Ibid.
element would often be very difficult to demonstrate.\textsuperscript{33} The requirement that the substantive obligation breached by the aided entity must also be binding on the aiding entity has also been criticised as unnecessarily strict and ‘overly formalistic’.\textsuperscript{34} While it is recognised that the principle of prohibition of aid or assistance is part of customary international law,\textsuperscript{35} the specific requirements of Article 16 ARSIWA are not established,\textsuperscript{36} and it can be argued that knowledge and causation are the key requirements to demonstrate wrongful aid or assistance.\textsuperscript{37}

Applied to military operations, ILC provisions on aid and assistance could be able to address scenarios where an entity provides assistance in the accomplishment of a specific operational mission, for instance by providing precise targeting intelligence or offering air support to a particular ground operation. In this context, the aiding entity presumably is aware of the circumstances of that mission and supports its goals. Furthermore, it can be argued that some forms of logistical support constitute wrongful aid or assistance, as in some circumstances such support is crucial. For instance, the prompt deployment of a new mission can often only be achieved with help in transporting troops and equipment,\textsuperscript{38} and sustained bombing campaigns require aerial refuelling support.\textsuperscript{39} In both examples, supporting States arguably possess a certain degree of knowledge of the circumstances in which their assistance is to be used. More remote forms of logistical support could constitute wrongful support under the ILC Articles if they are linked to the commission a wrongful act,\textsuperscript{40} but the legal consequences for the aiding entity would then be limited.\textsuperscript{41} Aid or assistance through financial support can be more difficult to apprehend in view of its fungible nature, yet some scholars have demonstrated that providing resources to military partners could qualify as wrongful aid or assistance when funds are provided for a particular purpose and subject to certain conditions.\textsuperscript{42}

\textit{ii. International Humanitarian Law}

In the context of military operations, responsibility for assisting another to commit a wrongful act can also be grounded in international humanitarian law. Under Common Article 1 to the Geneva Conventions, States have the obligation ‘to ensure respect for [the Conventions] in all circumstances.’\textsuperscript{43} The duty to ensure respect for international humanitarian law has been interpreted as including an internal obligation for States to ensure respect by their own organs, as

\textsuperscript{34} Lanovoy, supra note 18, pp. 159–160.
\textsuperscript{36} Lanovoy, supra note 18, pp. 156 and 161.
\textsuperscript{40} ARSIWA Commentaries, Commentary to Article 16, § 5, p. 66.
\textsuperscript{41} ARSIWA Commentaries, Commentary to Article 16, § 10, p. 67. See Section V below.
\textsuperscript{43} 1949 Geneva Conventions, Common Article 1.
well as an external dimension prescribing that States and other international subjects should 'ensure that the humanitarian principles underlying the Conventions are applied universally.'\textsuperscript{44} The external obligation is itself two-fold, with 'at least'\textsuperscript{45} a negative obligation not to encourage or assist in violations of humanitarian law, and arguably a positive obligation to take steps to foster compliance by others.\textsuperscript{46}

The initial Pictet commentaries to the Geneva Conventions did not elaborate much on the interpretation of Common Article 1 as including a negative obligation not to encourage or assist in violations of humanitarian law. Since then, it has been widely discussed in scholarship,\textsuperscript{47} upheld by the International Court of Justice as a general principle of humanitarian law,\textsuperscript{48} and by the ICRC as a customary rule.\textsuperscript{49} Grounded in decades of subsequent practice, the 2016 ICRC Commentary provides further guidance notably by indicating that aid or assistance in humanitarian law violations does not require demonstrating a specific intent to facilitate a breach, and instead relies on the element of knowledge.\textsuperscript{50} Accordingly, States and international organizations have the obligation to refrain from providing support to activities if they are or become aware of the commission of violations of humanitarian law by the supported forces. The 2016 ICRC Commentary further suggests that aid or assistance could be wrongful not only in case of actual knowledge, but also 'if there is an expectation, based on facts or knowledge of past patterns, that [a specific operation] would violate the Conventions'.\textsuperscript{51}

Aid or assistance in international humanitarian law operates as lex specialis to the more general rule formulated by the ILC,\textsuperscript{52} and therefore allows capturing scenarios of military support that would not reach the high threshold of Article 16 ARSIWA, as long as actual or foreseeable knowledge can be demonstrated. The obligation enshrined in Common Article 1 applies 'in all circumstances' and therefore also binds States that are not directly involved in combat operation but provide some support from a distance.\textsuperscript{53}

\textsuperscript{44} J.S. Pictet (ed.), Commentary on the Geneva Conventions of 12 August 1949, Volume IV (1958), p. 16.
\textsuperscript{45} Aust. supra note 33, p. 388.
\textsuperscript{46} On the positive aspect, see Section III.2.A below.
\textsuperscript{48} ICJ, Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Merits, 27 June 1986, § 220.
\textsuperscript{50} ICRC, Commentary on the First Geneva Convention (ICRC and Cambridge University Press, 2016) (‘ICRC 2016 Commentary’), § 159. See also, Sassoli, supra note 47, p. 413; Aust, supra note 33, p. 389; Quigley, supra note 47, p. 90.
\textsuperscript{51} ICRC 2016 Commentary, § 161.
\textsuperscript{52} Article 55 ARSIWA; Aust, supra note 33, p. 389; ICRC 2016 Commentary, § 160.
\textsuperscript{53} ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004 ('Wall Opinion'), § 158; ICRC 2016 Commentary, §184.
iii. International Human Rights Law

International human rights law provides for similar obligations not to knowingly aid or assist in human rights violations by others. An in-depth discussion of the applicability of human rights law in extraterritorial military operations would be out of the scope of this contribution, but two relevant trends can be noted. First, it is increasingly accepted that, to a certain extent and with some qualifications, international human rights law applies in situations of armed conflict.\(^5^4\) Second, grounds for extraterritorial applicability of human rights obligations have been progressively expanding on the basis of broader interpretations of jurisdiction over individuals or territory.\(^5^5\)

The obligation not to assist in human rights violations by other States can be inferred from the obligation of States to secure the human rights of individuals within their jurisdiction,\(^5^6\) which includes an obligation to protect individuals from human rights violations by third parties.\(^5^7\) This obligation itself implies an obligation to refrain from assisting in human rights violations, and can apply not only to violations by private entities, but also with regards to the conduct of other States.\(^5^8\) In particular, there exists a strict obligation not to transfer individuals to another State where there is a serious risk of torture or other ill-treatment.\(^5^9\) The obligation not to assist in human rights violations can further be relevant in the context of arbitrary deprivation of life and arbitrary detention.\(^6^0\) In the case law of the European Court of Human Rights, the applicable standard appears to be one of actual or constructive knowledge, whereby States can be responsible for supporting violations they ‘knew or ought to have known’.\(^6^1\) Like with humanitarian law, this lower threshold for wrongful assistance can be interpreted as lex specialis displacing the strict requirements of the ILC articles in situations of assistance in human rights violations.

iv. Other Relevant Obligations Not to Aid or Assist

Two additional specific obligations that can be construed in terms of aid or assistance are worth mentioning in the context of military operations. First, the Arms Trade Treaty provides for an obligation not to authorise the transfer of arms ‘if [a State] has knowledge at the time of authorization that the arms or items would be used in the commission’ of certain serious violations


\(^5^6\) Article 1 ECHR; Article 2 ICCPR.


\(^6^1\) ECHR (Grand Chamber), *El-Masri v. the Former Yugoslav Republic of Macedonia*, Judgment, 12 December 2012, App No. 39630/09, § 198.
of international law. Second, States have a general ‘obligation not to allow knowingly [their] territory to be used for acts contrary to the rights of other States’, which could come into play for instance when a State allows another to use military bases.

B. Direction and Control

Provisions on responsibility for direction and control over the commission of a wrongful conduct address situations ‘where one State exercises the power to direct and control the activities of another State’, and can be relevant in the context of coalitions with strong lead State having prevailing influence over the chain of command. The criterion for wrongful direction and control are set out in Article 17 ARSIWA with a high threshold. Direction refers to ‘actual direction of an operative kind’, while control is defined as ‘domination over the commission of wrongful conduct’, and ‘[b]oth direction and control must be exercised over the wrongful conduct’. Despite these strict conditions, direction and control can arguably be relevant to situations where a dominant State maintains an overly strong position over the direction of a coalition, and is in a position to direct other States to commit wrongful conduct. For instance, the operations in Iraq in 2003–2011 were in a large part predominantly directed by the US. At the strategic level, policies and goals were developed by the US with very limited consultations with other coalition States. At the operational level, the organization of the forces and decisions regarding the respective missions and tasks of each contingent were initiated to a large extent by the US. In such settings, it can be argued that, in view of its high capacity to influence the conduct of others, the US could incur responsibility in connection with wrongful conduct attributed to coalition partners.

C. Negative Obligations at the Institutional Level

When military operations are undertaken under the lead of an international organization or with its authorization, additional issues arise pertaining to the responsibility of member States in connection with the conduct of the international organization, and vice versa.

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62 Article 6(3) ATT. The serious violations covered are: ‘genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.’

63 ICJ, Corfu Channel Case (United Kingdom v. Albania), Merits, 9 April 1949, p. 22. See Aust, supra note 33, p. 382.

64 ARSIWA Commentaries, Commentary to Article 17, § 5, p. 68. Direction and control over another State differs from attribution of conduct based on effective control over a conduct: the conduct of the directed State remains attributed to it, but the directing State can incur derived responsibility in connection to it.


66 Article 17 ARSIWA provides that ‘[a]State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.’

67 ARSIWA Commentaries, Commentary to Article 17, § 7, p. 69.

68 ARSIWA Commentaries, Commentary to Article 17, § 7, p. 69.

69 ARSIWA Commentaries, Commentary to Article 17, § 7, p. 69.

i. Negative Obligations of States Acting Through an International Organization

Under Article 61 ARI, a member State can incur responsibility if it circumvents its obligations by taking advantage of the distinct personality and competences of the organization and ‘causing the organization to commit an act that, if committed by the State, would have constituted a breach’ of its obligations. For instance, in maritime military missions led by the EU, member States should not take advantage of the limited refugee law and human rights obligations of the organization to circumvent their own obligation of protection and non-refoulement.71 Some authors have further argued that member States could incur responsibility for their participation in a decision leading to the wrongful conduct of an organization, if they exercised overwhelming influence over the decision-making process.72 In NATO operations, sensitive targets are sometimes unanimously approved by member States representatives through the NAC.73 In view of the particular influence of States in this specific procedure, it could be argued that a wrongful airstrike approved by the NAC and attributed to NATO would engage the derived responsibility of NATO member States.74

ii. Negative Obligations of International Organizations Acting Through States

Conversely, international organizations have an obligation not to impose or authorize wrongful conduct by member States. Under Article 17 ARI, an international organization can incur responsibility if a conduct attributed to a member State was committed pursuant to a binding decision or because of an authorization of the organization, and constitutes a breach of the organization’s obligations. The scenario of authorization is particularly relevant to military operations authorized by the UN.75 Responsibility if there is a ‘direct, causal relationship between the non-binding decision and the implementation by the member(s)’.76 Therefore, responsibility for authorization only covers the conduct specifically authorized, and not ‘any other breach that the member State or international organization to which the authorization is addressed might commit’ thereafter. In the context of UN-authorized military operations, responsibility under Article 17 ARI could cover conduct of member States specifically authorized by the UN Security Council, such as security detentions in the context of a particular operation.


75 Article 17(2) ARI provides that ‘[a]n international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.’


77 ARI Commentaries, Commentary to Article 17, § 13, p. 110.
2. Positive Obligations in Connection with the Conduct of Military Partners

Positive obligations in connection with the conduct of others constitute the reverse side of obligations not to facilitate or induce wrongs by others analysed in the previous Section. They provide that States and international organizations should take active steps to attempt to prevent wrongs by others and to ensure compliance with international norms. Positive obligations to ensure that military partners abide by their international obligations are found in international humanitarian law (Section III.2.A), international human rights law (Section III.2.B), and in the context of military operations involving international organizations (Section III.2.C).

A. Duty to Ensure Respect for Humanitarian Law

Next to the negative aspect analysed above, the duty to ensure respect for international humanitarian law comports a positive dimension, whereby States and international organizations should not only abstain from assisting in violations by others, but should also take steps to ensure that no violation is committed by others.\(^7^8\) Under this due diligence obligation, military partners ‘must exert their influence, to the degree possible’\(^7^9\) and ‘take proactive steps to bring violations of the Conventions to an end’.\(^8^0\) Furthermore, the obligation ‘is not limited to stopping ongoing violations but includes an obligation to prevent violations when there is a foreseeable risk that they will be committed and to prevent further violations in case they have already occurred.’\(^8^1\)

The obligation to exert influence over the conduct of others in order to foster compliance has particular implications in the context of multinational military operations. When military partners cooperate in the accomplishment of an operation, they are in a position to exercise a higher degree of influence over the conduct of each other. Since the duty to ensure respect for international humanitarian law is an obligation of means, States and international organization which are involved to some degree in an international military operation must make use of the capacity to exercise influence that they possess by virtue of their participation.\(^8^2\) For instance, various forms of logistical support such as ‘financing, equipping, arming or training’\(^8^3\) can provide significant leverage over the conduct of partners directly engaged in combat operations, including the possibility to withdraw support in case of violations.

In addition to the general duty to ensure compliance with humanitarian law, specific positive obligations exist in relation to the transfer of individuals in custody. Under the Geneva Conventions, an entity which transfers an individual that it captured has the obligation to ensure that the entity to which the individual is transferred is willing and able to abide by the

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\(^7^9\) Henckaerts and Doswald-Beck, supra note 49, p. 509 (Rule 144).
\(^8^0\) ICRC 2016 Commentary, § 164.
\(^8^1\) Ibid.
\(^8^2\) ICRC 2016 Commentary, § 165.
\(^8^3\) ICRC 2016 Commentary, § 167.
Conventions.\textsuperscript{84} If the receiving entity nonetheless fails to respect international humanitarian law, the transferring State has the subsidiary obligation to take steps to correct the situation and to request the return of the individual.\textsuperscript{85} The receiving State remains responsible for its own conduct in the treatment of the person in custody, but the transferring State can bear derived responsibility in connection with subsequent mistreatment by the receiving entity.

An illustrative example of the functioning of this obligation in international military operations is the case of Rahmatullah. It concerned a Pakistani national who had been captured by the UK in Iraq in 2004, and subsequently handed over to the US, which transferred him to the Bagram prison in Afghanistan where he remained detained until his release without charges in 2014. Rahmatullah’s lawyers argued before British courts that the UK had the obligation to ensure the protection of transferred individuals and should actively pursue Rahmatullah’s release by the US. The Court of Appeal agreed that, ‘in the light of Geneva IV, there [was] a substantial case for saying that the UK Government [was] under an international legal obligation to demand the return of the applicant’,\textsuperscript{86} and ordered the UK to take steps to obtain his return.\textsuperscript{87} The Supreme Court further affirmed that ‘there were sufficient grounds for believing that the UK Government had the means of obtaining control over the custody of Mr Rahmatullah’,\textsuperscript{88} but concluded that, in this case, the UK had done enough by sending a formal letter seeking his return.\textsuperscript{89}

\textbf{B. Duty to Protect Against Human Rights Violations}

Similarly, the positive dimension of the duty to protect against human rights violations imposes an obligation to take steps to attempt to prevent violations by others.\textsuperscript{90} The duty to prevent human rights violations by third parties concerns to a large extent violations by private entities, but can also apply to violations by other States,\textsuperscript{91} in particular with regards to violations of the right to life and the prohibition of torture and other ill-treatment.\textsuperscript{92} The standard is usually one of reasonableness, whereby States have the duty ‘to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid [the] risk [of human rights violations}

\textsuperscript{84} Article 12(2) GC III provides: ‘Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. [...]' A similar provision with regards to other protected persons is found in Article 45 GC IV.

\textsuperscript{85} Article 12(3) GC III provides: ‘Nevertheless if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with’. See, J.S. Pictet (ed.), \textit{Commentary on the Geneva Conventions of 12 August 1949, Volume III} (1960), p. 137.

\textsuperscript{86} \textit{Rahmatullah v Secretary of State for Foreign & Commonwealth Affairs & Another} [2011] EWCA Civ 1540 (14 December 2011), § 35.

\textsuperscript{87} \textit{Rahmatullah v Secretary of State for Foreign & Commonwealth Affairs & Another} [2011] EWCA Civ 1540 (14 December 2011), § 54.

\textsuperscript{88} \textit{Secretary of State for Foreign and Commonwealth Affairs v Yunus Rahmatullah} [2012] UKSC 48, § 60.


\textsuperscript{91} den Heijer, supra note 14, p. 422.

\textsuperscript{92} Human Rights Committee, Draft General Comment No. 36, supra note 58, § 26; Human Rights Committee, General Comment No. 31, supra note 54, § 12.
Besides, responsibility is subject to a threshold of actual or constructive knowledge of a foreseeable risk of human rights violations by other States. For instance, in the case law of the ECtHR, ‘[t]he State’s responsibility may therefore be engaged where the authorities fail to take reasonable steps to avoid a risk of ill-treatment [by another State] about which they knew or ought to have known’,94 which is appreciated in light of the circumstances of each particular case.95 Responsibility under the ECHR in connection with the conduct of military partners was notably upheld in the cases of Al-Saadoon (responsibility of the UK for transferring individuals to Iraqi custody),96 and El-Masri (responsibility of Macedonia for handing over an individual to the US in the context of the CIA renditions programme).97

C. Positive Obligations at the Institutional Level

Also at the institutional level, it can be argued that international organizations and their member States should take steps to ensure respect for international law.

i. Duty of States to Ensure Equivalent Protection by International Organizations

At least in the context of the ECHR, States have a duty to ensure that international organizations through which they act provide an equivalent level of human rights protection.98 This obligation to ensure respect can be seen as the positive side of the obligation not to circumvent one’s obligations by acting through an organization analysed above.99 Considering that States ‘establish international organisations' and ‘attribute to these organisations certain competences and accord them immunities’,100 they are in a position to also ensure that the international organizations through which it acts protect human rights in a way equivalent as guaranteed under the ECHR.101 In the context of military operations, it means that States contributing troops to operations led by an international organization should ensure that the operation is conducted in line with applicable human rights standards, and could bear a share of responsibility in relation to human rights violations attributed to the organization if they fail to do so.

ii. Duty of International Organizations to Ensure Respect by Authorized Missions

Conversely, a similar argument could be made when an international organization acts through others, such as when the UN authorizes another organization or a coalition of States to undertake a military operation. There is no established ground to support this claim, but the emergence of such a rule is well conceivable as part of the overall framework of responsibility in connection with

92 ECtHR, Osman v. the United Kingdom, supra note 60, § 116.
93 ECtHR, El-Masri v. Macedonia, supra note 61, § 198.
94 ECtHR, Osman v. the United Kingdom, supra note 60, § 116.
95 ECtHR, Al-Saadoon and Mufdi v. the United Kingdom, Judgment, 2 March 2010, App No. 61498/08.
96 ECtHR, El-Masri v. Macedonia, supra note 61.
98 See above Section III.1.C.i.
100 ECtHR, Gasparini v. Italy and Belgium, Admissibility Decision, 12 May 2009, App No. 10750/03, p. 6.
the conduct of military partners. The enforcement of collective security is primarily the responsibility of the UNSC, and it can therefore be argued that it should not give blind checks when authorizing others to use force. In particular, it can be argued that the UN has a duty to exercise some oversight over the conduct of authorized missions, and to ensure that international organizations or coalitions undertaking authorized operations abide by international standards. Accordingly, the UN could bear derived responsibility in relation to the conduct of authorized forces if it fails to take steps to ensure that the forces operate in accordance with applicable international obligations.

IV. Allocation of Responsibility Amongst Military Partners

The multitude of obligations in connection with the conduct of others that can come into play in military operations, combined with complex scenarios of intricate military cooperation, can make it difficult to ascertain which military partner can be held responsible on which basis and in connection with which conduct. In order to advance towards a clearer view of the overarching legal regime, this Section suggests four key criteria that can be used to determine whether a State or international organization bears responsibility in connection with the conduct of a military partner: knowledge (Section IV.1), capacity (Section IV.2), diligence (Section IV.3), and proximity (Section IV.4). The identification of these four criteria flows from the above analysis, in which each obligation explicitly or implicitly mentions one or more of these elements. Knowledge refers to whether a partner is aware that another is committing violations of international law. Capacity refers to the ability to influence the conduct of others, used either to induce or to prevent violations by others. Diligence refers to the standard of care and reasonableness exercised in ensuring respect by military partners, or in obtaining knowledge of possible violations. Proximity concerns the causal link between the implication or lack thereof of a military partner and the wrongful conduct of others. These four interrelated criteria can be appreciated relatively in terms of degrees, depending on the type of obligation and the factual circumstances of its breach, and thereby provide a useful conceptual framework to determine responsibility in connection with the conduct military partners.

1. Knowledge

Knowledge that a partner is committing, or will commit, violations is a key requirement found with different degrees in all positive and negative obligations in connection with the conduct of another. In the ILC rules of derived responsibility, the threshold is high, requiring actual knowledge that another is engaging, or intends to engage, in wrongful conduct. Pursuant to negative and positive obligations found in primary norms, lower degrees of knowledge can engage

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102 Article 24(1) UN Charter.
responsibility, as knowledge can be implied or presumed from circumstances under the criteria of constructive knowledge or foreseeable risk.\textsuperscript{105}

In practice, the degree of knowledge is likely to be higher amongst military partners closely cooperating in the accomplishment of common goals. For instance, a State which provides close air support, or discloses specific detailed intelligence on possible targets, arguably possesses a significant degree of knowledge of whether the supported entity commits wrongful conduct. By contrast, military partners with a limited involvement in an operation, for instance those only providing limited logistical support by way of airlift, will generally have a lower degree of knowledge of the activities of the States or international organizations to which it provides support. Knowledge that others are committing violations can also be informed by the recurrence and publicity of violations. For instance, the ECtHR considered that, by 2004, there were ample reports of ongoing abuse by the US, so that other States could not hide behind a lack of knowledge of information that was in the public domain.\textsuperscript{106}

2. Capacity

The second key criteria to allocate responsibility in connection with the conduct of others concerns the capacity to influence the conduct of military partners, either by virtue institutional or military agreements, or due to factual circumstances. With regards to negative obligations, capacity constitutes a prerequisite to wrongful facilitation or direction, which, in conjunction with causation,\textsuperscript{107} limits the scope of obligations to situations where an entity had the ability to induce or contribute to the wrongful conduct of another. In that sense, a State providing very limited remote forms of support will have a limited capacity of influence over the conduct of the assisted entity. At the institutional level, when a State or international organization has the capacity to influence the conduct of another, the abuse of such ability is sanctioned by negative obligations.\textsuperscript{108}

Capacity is particularly relevant to positive obligations, which impose a duty to make use of available means to influence the conduct of others. It is generally admitted that such obligations are more demanding towards military partners which, by virtue of military cooperation, can be endowed with a unique capacity to influence the conduct of other's.\textsuperscript{109} When a participant has the ability to exert some influence over the conduct of military partners, it has the duty to make use of that capacity so as to foster compliance. For instance, close military partners must take steps both at the strategic and operational levels to ensure that each participant acts in accordance with international standards. Furthermore, States or international organizations with limited involvement can also be able to exercise significant influence. In particular, certain forms of indirect support, such as authorizing the use of strategic military bases, can be crucial to the

\textsuperscript{105} See Section III above.

\textsuperscript{106} See Section IV.4 below.


supported operation, and therefore provide strong leverage, including through the withdrawal of the support provided.

3. Diligence

The third main criteria relevant to allocate derived responsibility amongst military partners is the degree of diligence exercised. Diligence comes into play with regards to positive obligations, which typically embed a standard of reasonableness, but also in the context of certain negative obligations with a low threshold for knowledge. Indeed, where knowledge can be inferred from circumstances, the degree of diligence exercised to obtain (or evade) knowledge is used to ascertain whether a participant should have known of ongoing or possible violations. Low degrees of diligence can be expressed through the notion of ‘wilful blindness’, where a participant deliberately avoids knowledge of violations. Depending on the obligation concerned, diligence requires at least to seek information on the activities of military partners.

One of the highest form of diligence probably lies in the adoption of conditional policies which seek to ensure compliance. In order to secure respect for their international obligations, military partners can enter into agreements stipulating that the participation in or support to a military operation is subject to respect by the other party of international norms. In practice, military partners sometimes enter into agreements regarding the transfer of captured individuals, which can include provisions regarding the right to access and to request the return of a detainee, or the prohibition to hand over a transferred individual to a third party. Another example is the UN Human Rights Due Diligence Policy adopted in 2013, which prescribe that UN support to other forces is subject to prior risk assessment and monitoring of possible abuse, and that support is to be withdrawn in case violations nonetheless occur.

4. Proximity

Finally, responsibility depends on the degree of causal proximity between the main wrongful conduct and the acts or omission of others in connection with it. Causation is not always expressly mentioned but is often implicitly required to determine whether a State or international organization contributed to the wrongful conduct of another. Furthermore, the degree of proximity can serve as a factor to assess the extent of such contribution. Proximity relates to all other three criteria, which can also be expressed in causal terms, and seeks to more generally capture the differences between essential and more remote contributions. Responsibility is more

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110 See, for instance, on the fundamental importance of the Ramstein military base for US drone strikes in Yemen: Cologne Administrative Court (Verwaltungsgericht Köln), 27 May 2015, 3 K 5625/14, § 6.
111 Moynihan, supra note 37, p. 14
112 See, e.g., Arrangement for the Transfer of Prisoners of War, Civilian Internees, and Civilian Detainees Between the Forces of the United States of America, the United Kingdom of Great Britain and Northern Ireland, and Australia, 25 March 2003 (Memorandum of Understanding for the transfer of prisoners in Iraq), §§ 4 and 6; Accord sous forme d’Échange de Lettres entre le Gouvernement de la République française et le Gouvernement du Mali déterminant le statut de la force ‘Servaf’, Journal Officiel de la République Française n°101, 30 April 2013, Article 10.
likely to arise when support, control, or failure to prevent have a close, proximate, link with the commission of wrongful conduct by another.

V. Apportionment of Responsibility Amongst Military Partners

When allocating responsibility in international military operations, situations of shared responsibility will likely arise, where more than one responsible subject can be identified in relation to a single harmful outcome. By combined operation of rules of attribution and rules on responsibility in connection with the conduct of others, complex scenarios of shared responsibility can occur where numerous participants bear responsibility for different wrongful acts in relation to a single injury. As the result of their wrongful conduct, military partners face legal consequences which include the obligations to provide full reparation, either in kind or in equivalent, to cease the wrongful act, and to provide guarantees of non-repetition. Yet, existing law provides very limited guidance on how to apportion the legal consequences of responsibility amongst a multiplicity of States or international organizations with varied degrees of involvement. The following Section provides some guidance and options on how legal consequences of responsibility can be apportioned in the context of military operations. It first addresses the obligation to provide compensation for the injury caused, which raises specific issues (Section V.1), before turning to other legal consequences (Section V.2).

1. Apportionment of the Obligation to Provide Compensation for the Injury Caused

The obligation to provide compensation does not always arise. Primarily, responsible entities have a duty to provide full reparation through restitution, and the obligation to compensate only arises if restitution in kind is not possible. In practice, however, monetary compensation is often the main remedy available to provide reparation for injury. Even when restitution is feasible, it is sometimes insufficient to ‘wipe out all the consequences of the illegal act’. For instance, releasing an individual after several years in arbitrary detention does not fully repair the injury.

In situations of shared responsibility, the question is to determine the extent to which each responsible partners must provide compensation in relation to a common injury. In theory, the obligation of reparation only extends to the injury caused by a participant’s own conduct, but in reality it is often impossible to isolate the respective contribution that each co-responsible

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115 Nollkaemper and Jacobs, supra note 16, p. 367.
117 Articles 28–42 ARSIWA; Articles 28–42 ARIO.
121 PCIJ, Case Concerning the Factory at Chorzów (Germany v. Poland), Merits, 13 September 1928, Series A, No 17, p. 47.
122 Article 31 ARSIWA.
brought to a final injury. In view of the limits posed by causal approaches to apportionment of compensation (Section V.1.A), this article proposes some possible alternative options (Section V.1.B).

A. The Limits of a Causal Approach

The basic principle that a responsible entity has the obligation to provide reparation for the injury caused by its own conduct reaches its limits in situations where multiple wrongful acts caused together a single injury. In case of multiple attribution of the same wrongful conduct, the standard operation of the principle leads to the conclusion that each entity to which the conduct is attributed has the obligation to provide full reparation. In situations of responsibility in connection with the conduct of another analysed in this article, however, it is not clear whether each responsible entity has the obligation to provide full or partial compensation. The ILC commentaries indicates with regards to aid or assistance that ‘the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act’ of another, but in many cases it is impossible to identify respective causal contribution to an indivisible injury. For instance, if significant military support is provided to a wrongful airstrike, it cannot be ascertained which part of the resulting injury was specifically caused by the conduct of each military partner. In that regards, the ILC commentaries mention that, ‘unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct’, which could mean that, when respective causal contributions to the injury cannot be isolated, each responsible bears an obligation of full compensation. It is also difficult to assess what part of an injury could be ascribed to a partner which failed to exercise steps to prevent the conduct of another. When it comes to apportioning compensation in concrete scenarios, the causal approach appears both equivocal and unhelpful.

B. Possible Alternative Options

A possible solution to the difficulties raised by apportionment could be to consider that States or international organizations responsible in connection with the conduct of each other are jointly liable, meaning that each has the obligation to provide full reparation for the injury they caused together, at least in situations where a causal apportionment is inconclusive. This has some theoretical support and practical value, but does not fully answer the question of apportionment. Indeed, even in situations where participants are jointly liable, it remains useful to

123 Plakokefalos, supra note 114, p. 480.
125 ARSIWA Commentaries, Commentary to Article 16, § 1, p. 66.
identify possible criteria to apportion reparation internally amongst responsible entity, which might seek contribution from each other.¹²８

As an alternative approach to the question of apportionment, this article proposes to rely on the four key criteria for derived responsibility identified in Section IV. The respective degrees of knowledge, capacity, and diligence give valuable indications of the degree of involvement of each participant in the final injury. Taken together, they allow a more tangible analysis of the respective contribution of various military partners. Causation, reflected in the criterion of proximity, remains relevant, but not as a sole standing standard. The relative significance of each criterion is highly contingent on the specific circumstances of a case, but it could for instance be considered that a military partner with a high degree of knowledge, or a strong capacity to influence partners, or which exercised low diligence, would bear a larger share of liability. These various factors can be appreciated in concert so as to offer a more nuanced analysis of the apportionment of compensation.

2. Distribution of Non-Pecuniary Obligations: Cessation, Non-Repetition, Restitution

The other obligations arising from the commission of a wrongful act are not fungible and cannot be apportioned in the same way as compensation. In addition, it is not always materially possible for every responsible entity to perform obligations of cessation or restitution. For instance, only the entity having custody of an individual has the capacity to release him or her. Accordingly, this article proposes to allocate non-pecuniary obligations arising from responsibility on the basis of the capacity to perform the obligation. Furthermore, taking into account the fact that, in the context of military cooperation, some partners can exert influence over others, it suggests that States or international organizations having the capacity to influence the entity able to perform the obligation could have a subsidiary obligation to ensure cessation, non-repetition and restitution.

The obligation of cessation applies to continuing violations,¹²⁹ which include for instance unlawful detentions, as well as recurrent breaches,¹³⁰ such as repeated mistreatment of detainees, widespread sexual abuses or disproportionate air strikes. Cessation attaches to the wrongful conduct and not to the injury, therefore, quite straightforwardly, each responsible entity must cease its own wrongful conduct.¹³¹ For instance, supporting States must cease providing support, and the supported entity must cease carrying wrongful attacks. In addition, if one of the co-responsible entity fails to cease its wrongful conduct, the other should attempt to ensure cessation.

When there are reasons to believe that a responsible entity is likely to reiterate the wrongful conduct,¹³² it also has the duty to ‘offer appropriate assurances and guarantees of non-repetition,

¹²⁹ ARSIWA Commentaries, Commentary to Article 30, § 3, p. 89.
¹³⁰ Ibid.
¹³¹ d’Argent, supra note 116, p. 215.
¹³² ARSIWA Commentaries, Commentary to Article 30, § 9, p. 89.
if circumstances so require.\textsuperscript{133} Guarantees of non-repetition can include not only verbal assurances but also specific ‘preventive measures to be taken by the responsible State designed to avoid repetition of the breach’.\textsuperscript{134} For military partners found responsible in the connection with the conduct of others, non-repetition means that they should take steps to ensure that further cooperation does not lead to wrongful conduct, for instance by adopting a due diligence policy, and make use of their capacity to influence the conduct of partners so as to foster future compliance.

Finally, if restitution is available to repair an injury for which several entities are responsible, such as in the case of wrongful detention, the entity having the capacity to provide restitution should perform that obligation. If the entity having custody of the individual fails to provide restitution, other military partners with a capacity to influence should seek the individual’s release.\textsuperscript{135}

\textbf{VI. Conclusion}

Allocating and apportioning responsibility in connection with the conduct of others can be an intricate matter. In order to clarify the legal framework, this article provided an overview of various relevant negative and positive obligations that are rarely comprehensively analysed, and explained their interplay. It showed that there can be a fine line between undue facilitation of wrongful conduct, and failure to act to prevent such wrongful conduct. In order to further provide guidance in the determination of responsibility in complex scenarios, the article identified the four main criteria of knowledge, capacity, diligence, and proximity. Appreciated relatively, these interrelated criteria can lead to a more systematic and nuanced analysis.

The arguments developed in this article are not only geared towards responsibility ex post facto, and also invite States and international organizations to take full account of their negative and positive obligations prior to engaging in military cooperation. From the onset, military partners must assess their respective duties, and together aim at overall compliance with international standards. Participants which choose to have a limited or indirect involvement in a military operation are not shielded from responsibility and should likewise assess the risk of fostering violations and the possibilities to ensure compliance.

At a more general level, the analysis conducted reveals the emergence of a legal regime aimed at ensuring compliance in the context of military operations, and perhaps more generally in international law. The combined operation of obligations not to support or induce wrongful conduct and obligations to take steps to prevent such conduct results in an overall duty for States and international organizations not to directly or indirectly engage in military cooperation without having regards to the possible unlawful activities of partners. In a context where the enforcement of international law remains faced with hurdles, a framework where military partners mutually ensure respect for international norms constitutes a possible way forward.

\textsuperscript{132} Article 30 ARSIWA.

\textsuperscript{134} ARSIWA Commentaries, Commentary to Article 30, § 12, p.90.

\textsuperscript{135} This corresponds to the specific obligations to ensure respect that exists with regards to the transfer of captured individuals. See Section III.2.A above.