Two Calls from Kunduz:
National Security Implications of Divergent Domestic Legal and Policy Frameworks

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[Note to AALS Annual Meeting reader: This work-in-progress is one of several papers on which I am currently working as part of a project that focuses on the attack by U.S. military forces on the MSF trauma center in Kunduz, Afghanistan in 2015. The comparative perspective adopted in this paper is primarily meant assess the advantages and disadvantages of the respective (here, German and U.S.) approaches to international law and military justice. This current draft of the paper provides the framework for the analysis. Future work will build on the conclusions regarding the respective advantages and disadvantages of the approaches; advantages and disadvantages are mentioned in the current draft but not thoroughly explored. Also, the introduction and conclusion for the paper will be expanded in future work. Thank you for taking the time to read and consider the current draft of the paper.]

Two military incidents that inadvertently resulted in civilian casualties occurred in Kunduz, Afghanistan six years apart. The incidents primarily involved the armed forces of two different countries: Germany in 2009 and the U.S. in 2015. The resulting investigations and the responses by each respective government represent important case studies in the field of emerging conflict law. This paper adopts a comparative perspective to explore how similarities and differences in respective approaches inform the development of contemporary conflict law.

The comparative conflict law approach thus adopted is useful in two primary contexts. First, emerging law and policy related to armed conflict is struggling to keep pace with the evolution of contemporary conflict. Second, coalitions comprised of military forces from an ever-increasing variety of nations and non-state actors will continue to be a defining feature of armed conflict for the foreseeable future. The comparative conflict law approach adopted by this paper seeks to offer clarity to emerging conflict law and policy while alleviating friction that is inherent in coalition operations.

The nature of contemporary armed conflict requires an increasingly plenary approach to the concept of conflict law. Boundaries between discrete fields of practice and study are blurring and becoming less relevant. For example, discussions regarding acceptable means and methods of warfare, detention operations, and scope of the battlefield now span the divide between the law of armed conflict and international human rights law. Interactions between domestic and coalition military law and policy, domestic criminal law and procedure, and international criminal responsibility are becoming increasingly relevant. Common criticisms of military practice reveal fundamental misapplication of legal theory. A comparative conflict law perspective is well-suited to explore the development of and challenges associated with emerging conflict law.

The Kunduz Incidents: In Brief

The incident involving German armed forces occurred on September 4, 2009. A German military commander directed an aerial attack on two fuel tanker trucks that had been hijacked by suspected Taliban insurgents. The commander believed that the Taliban intended to use the trucks to attack a German base nearby. The intent of the attack was to alleviate the threat posed by the tankers by destroying the trucks and the Taliban personnel involved in the perceived impending attack. The German commander did not believe civilians were in the vicinity of the attack, and he directed measures designed to reduce the probability of injury to civilians or damage to civilian property. The attack resulted in an unknown number of civilian casualties.

The incident involving U.S. armed forces occurred on October 3, 2015. An AC-130 attack aircraft, at the request of an American ground commander, engaged a compound believed to be occupied by an unknown number of Taliban insurgents. The ground commander's intent for the close air support was to facilitate the advance of Afghan National Defense Security Forces (ANDSF) in the area. Because of what was later described as a "cascade of errors",[1] the compound attacked by the AC-130 was not the same intended by the ground commander. In fact, the compound was a trauma center operated by the international aid agency *Médecins Sans Frontières* (MSF). The attack resulted in the deaths of 42 civilians, with scores more injured, and the destruction of the trauma center.

Both incidents resulted in widespread public condemnation, including popular allegations of war crimes. Largely because of sustained public criticism, both incidents prompted the governments involved to conduct in-depth investigations into the incidents and release the findings of the investigations to the public. The popular criticism, the findings and conclusions of the investigations, and the respective processes for determining appropriate accountability measures for the personnel involved all represent important aspects of the comparative inquiry. These will constitute the primary subject matter of this paper.

Central Topics and Themes: A Roadmap

One single, fundamental question lies at the heart of the inquiry: Do these incidents constitute a war crime? Condemnation of both incidents as a war crime was persistent and pervasive in public discourse across the global community.[2] The responsible government authorities concluded that the respective incidents do not constitute war crimes. Even if the

[1] Gregor Aisch, Josh Keller, and Sergio Pecanha, *How a Cascade of Errors Led to the U.S. Airstrike on an Afghan Hospital*, N.Y. Times, April 29, 2016, www.nytimes.com/interactive/2015/11/25/world/asia/errors-us-airstrike-afghan-kunduz-msf-hospital.html?_r=1.

[2] *See, e.g.* Wolff Heintschel von Heinegg; Peter Dreist, *The 2009 Kunduz Air Attack: The Decision of the Federal Prosecutor-General on the Dismissal of Criminal Proceedings against Members of the German Armed Forces*, 53 German Y.B. Int'l L. 833, 866 (2010) (taking note of the "ill-founded allegations of war crimes").; *See also*, Joanne Liu, *Médecins Sans Frontières (MSF) Denounces Blatant Breach of International Humanitarian Law*, October 6, 2015, http://www.msf.org/en/article/m%C3%A9decins-sans-fronti%C3%A8res-msf-denounces-blatant-breach-international-humanitarian-law).

official conclusions are correct, the reasoning supporting the negative war crime assertions reveals a surprisingly inaccurate and incomplete understanding of the applicable law. The analysis offered in each negative conclusion to the negative war crime determination is subjected to a critical evaluation in this paper.

The war crime analysis leads to a related inquiry regarding varying interpretations of the concept of intent in criminal law. The U.S. military rests its conclusion that the 2015 incident does not constitute a war crime almost exclusively on an absence of requisite intent. This conclusion reveals an inadequate and simplistic understanding of one of the most complicated and contested topics in domestic and international criminal law. Judged by at least one species of intent, *dolus eventualis*, the 2015 incident may very well qualify as "intentional". While *dolus eventualis* is not a component of intent in the Anglo-American common law tradition, it is part of the intent framework in, for example, the Bavarian-German civil law tradition. This paper will therefore explore the specific topic of intent from a comparative perspective.

Another comparative distinction explored in this paper is the applicability of the Rome Statute of the International Criminal Court (ICC). Germany is a state party to the treaty and was at the time of the 2009 incident; the United States is not and was not in 2015. The prospect of ratification of the Rome Statute remains a significant source of debate in the United States, primarily due to popular concerns of international judicial encroachment in situations such as the 2015 Kunduz incident. The comparative perspective adopted in this paper will explore what difference, if any, being party to the Rome Statute would make in the context of inadvertent consequences of military operations.

The negative response to the war crime inquiry naturally leads to a related important question: If the incidents were not war crimes, were they nonetheless a violation of international law – specifically of the law of armed conflict? Answering that question requires reference to both broad sources of international law: treaty law and customary international law. This is because Germany is state party to Additional Protocol I to the 1949 Geneva Conventions (AP I), while the United States is not. What difference, if any, does being state party to AP I make in analyzing whether the respective incidents constitute violations of specific principles of international law? This paper will explore the central topic of precisely defining applicable legal principles in the context of treaty and customary law.

The evaluation of specific principles of the law of armed conflict provides an opportunity to engage in a critical assessment of the conclusions reached by the respective responsible government authorities. The Prosecutor-General in Germany, for example, relied heavily on published legal interpretations of the International Committee of the Red Cross in the prosecutorial legal analysis. The U.S. military investigation concluded that the 2015 incident violated the legal principle of proportionality, but this incorrect conclusion rests on an analysis that practitioners familiar with LOAC would recognize as uninformed. Reviewing the respective governmental processes and decisions offers an opportunity to engage in a critical analysis of the conclusions of each. Identifying deficiencies in military decision processes can improve the quality of lessons learned and help prevent similar incidents in the future.

Finally, the comparative case study performed throughout this paper helps identify differences in domestic criminal law and criminal procedure. The German system of military justice refers criminal allegations to a federal prosecutor, the Prosecutor-General, for consideration and disposition. The American system entrusts military commanders with

prosecution decisions, with the advice of legal counsel assigned to the commander's unit. The German system utilizes the federal penal code for potential prosecutions, whereas the American system almost exclusively employs a uniform military code. Analyzing and predicting differences in approach that result from divergent criminal procedures and laws is indispensable to the vital subject of coalition interoperability. With the roadmap thus established, we turn now to the first substantive topic in the analysis: did these incidents constitute war crimes?

Attack on the Geneva Conventions? The War Crime Analysis

Chief among the similarities of the two incidents is that widespread and vociferous allegations of war crimes asserted in public discourse. While the pervasive popular condemnation played an important role in ensuring the respective governments devoted sufficient attention and resources to the incidents, the criticism typically relied on inaccurate notions of war crimes rather than sound and informed legal analysis. An in-depth evaluation of the public criticism, while important, is beyond the scope of this paper, which focuses on comparing and analyzing the respective government responses. In brief, the condemnation was typically deficient in that it relied on a retrospective rather than prospective viewpoint as is required by LOAC, it impermissibly interjected principles of international human rights law into the LOAC context, or it adopted a definition of "war crime" that is not legally supportable.

It would be helpful to address deficiencies characteristic in public war crime condemnation, but the court of global public opinion is not the venue for actual prosecutorial decisions. Through the respective justice processes, the responsible government authorities concluded that neither incident constitutes a war crime. Comparing the processes utilized to reach those conclusions is informative in terms of interoperability. More fundamentally, were the analyses and negative conclusions accurate? This section offers an examination of these topics.

2009 Incident Involving German Armed Forces

The 2009 incident represents the first occasion in which the German government evaluated a potential war crime after becoming state party to the Rome Statute of the International Criminal Court.[3] The Prosecutor-General reviewed an extensive collection of

[3] Von Heinegg and Dreist, *supra* note 3, at 833.

material derived from a wide array of public and private sources.[4] A press release from the prosecutor's office provides a summary of the facts determined as well as the analysis utilized.[5]

Information reflected in the available media and scholarly resources is consistent with the recitation of facts published later by the civil court that adjudicated claims for damages and compensation.[6] That court decision provides a thorough recitation of relevant facts, which is also consistent with the facts reflected in the report published by the Prosecutor-General's office. All of these resources – the Prosecutor-General's press release and full report, media reports and scholarly articles, and the published judicial decision of the civil court – have been consulted to discover the relevant facts and ascertain the analysis utilized by the Prosecutor-General set forth in this paper.

The Prosecutor-General begins the analysis with a brief historical overview of the conflict in Afghanistan and Germany's role in the conflict.[7] The events leading to the decision to conduct the strike are then discussed. According to the Prosecutor-General's report, members of the Taliban used armed force to hijack the two tanker trucks near Kunduz, killing one of the two truck drivers in the process. After the hijacking, both trucks got stuck in sand while attempting to cross the Kunduz River. The Kunduz provincial governor was informed of the incident, and he in turn informed officials at the provincial reconstruction team (PRT) camp operated by the International Security Force Assistance (ISAF) coalition.

A German military officer, Colonel Georg Klein, was commander of the PRT Kunduz camp as well as a military element known as Task Force 47, which was based at the PRT Kunduz camp.[8] Colonel Klein was informed of the two stuck tanker trucks and the hijacking incident by a joint terminal air controller (JTAC), a German sergeant assigned to Task Force 47. The JTAC informed Colonel Klein that a source of human intelligence located at the scene of the trucks was providing continuous reporting and that the "informant had proven to be reliable in the past."[9]

Colonel Klein requested and received aerial support that provided real-time video observation of the scene. Based on his knowledge of recent Taliban tactics, Colonel Klein was convinced that the Taliban intended to use the two tanker trucks in a complex attack against the PRT camp. After a lengthy discussion between the JTAC (on behalf of Colonel Klein) and the

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[4] Generalbundesanwalt beim Bundesgerichtshof [Federal Prosecutor-General of the Federal Court of Justice], 3 BJs 6/10-4, Ermittlungsverfahren gegen Oberst Klein und Hauptfeldwebel W. wegen des Verdachts einer Strafbarkeit nach dem VStGB und anderer Delikte, hier: Einstellung des Verfahrens gemäß § 170 Abs. 2 Satz 1 StPO [Preliminary proceedings against Colonel Klein and Sergeant Major W. on suspicion of criminal liability under the CCAIL and other offenses here: termination of the procedure pursuant to § 170 para. 2 sentence 1 StPO], April 16, 2010, *available at* https://www.generalbundesanwalt.de/docs/einstellungsvermerk20100416offen.pdf [hereinafter Prosecutor-General Decision] (original in German) at 3.

[5] Generalbundesanwalt beim Bundesgerichtshof [Federal Prosecutor-General of the Federal Court of Justice], Ermittlungsverfahren wegen des Luftangriffs vom 4 September 2009 eingestellt [Preliminary Investigation into the Air Strike of 4 September 2009 Has Ended], Press release 8/2010, Apr. 19, 2010, *available at* http://www.generalbundesanwalt.de/de/showpress.php?themenid=12&newsid=360 [hereinafter Prosecutor-General Press Release] (original in German).

[6] Landgericht Bonn [LB] [Regional Court – Bonn] Dec. 11, 2013, 1 O 460/11, *available at* https://openjur.de/u/667409.html (original in German).

[7] Prosecutor-General Decision at 3; von Heinnegg and Dreist, *supra* note 3, at 835.

[8] Prosecutor-General Decision at 19.

[9] Von Heinegg and Dreist, *supra* note 3, at 837.

American F-15 pilots providing air support, Colonel Klein directed the destruction of the tanker trucks. In order to mitigate the risk to civilian structures near the scene, Colonel Klein requested that the attack be conducted with two 500 pound bombs utilizing a delayed fuse.[10] The efforts to limit the effects of the strike were successful – only the target trucks and personnel in the immediate vicinity were affected by the strike. The tanker trucks were destroyed, and an unknown number of personnel on or near the trucks were killed or injured.

Allegations of civilian casualties followed closely after the attack. The informant reporting from the scene assured the PRT that the only civilians in the vicinity of the trucks were Taliban insurgents. Colonel Klein, relying heavily on this report, determined that all personnel in the immediate vicinity of the trucks were military objectives and were therefore legitimate targets. The Prosecutor-General was not able to determine the precise number of personnel killed or injured in the strike, but finds that between 30 and 50 people were on the sandbar at the time of the attack.[11] Likewise, the prosecutor was not able to determine with certainty how many of the personnel killed or injured were members of the Taliban or how many were instead civilians taking no direct part in hostilities.[12]

Based on these facts determined by the prosecutor's inquiry, the Prosecutor-General made two findings that are central to the legal analysis. First, the Prosecutor-General determined that, "based on the circumstances known to Colonel Klein at the time (distance to civilian settlements, nighttime presence of the Taliban) and the information provided by the informant, the possibility of the presence of civilians was remote."[13] Second, the prosecutor emphasized that "the perspective of the attacker at the time of the attack must be considered, not what is determined to have occurred at a later time" must be considered evaluating an attack that resulted in so-called collateral damage.[14]

For the war crime analysis, the Prosecutor-General assessed the incident pursuant to the domestic Code of Crimes against International Law (CCAIL).[15] After determining that the situation in Afghanistan at the time constituted a non-international armed conflict (NIAC),[16] the prosecutor goes on to evaluate criminal liability based upon the objective and subjective elements of the relevant provision of the CCAIL.[17] The objective element is met simply by the

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[10] Prosecutor-General Decision at 24; von Heinegg and Dreist, *supra* note 3, at 838. Utilizing a delayed fuse is a common method of limiting the effects of a bomb. This type of fuse delays the explosion of the bomb for a set number of milliseconds after the bomb makes impact. The delayed explosion causes much of the heat and shrapnel created by the blast to be absorbed by the impact site, thereby providing a method of reducing the collateral hazard area of the bomb's explosion.

[11] Prosecutor-General Decision at 34; von Heinegg and Dreist, *supra* note 3, at 840.

[12] Prosecutor-General Decision at 34; von Heinegg and Dreist, *supra* note 3, at 840.

[13] Prosecutor-General Decision at 65. The conclusion in the original German is, "Für Oberst Klein war angesichts der ihm bekannten Umstände (Entfernung von bewohnten Ansiedlungen, Nachtzeit, Präsenz bewaffneter Taliban) und der Angaben des Informanten die Anwesenheit geschützter Zivilisten fernliegend (vgl. im Einzelnen C I)."

[14] *Id*. The conclusion in the original German is, "Auch hinsichtlich der zu erwartenden zivilen Begleitschäden ist von der Perspektive des Angreifenden zur Tatzeit auszugehen, nicht von dem erst nachträglich erkennbaren tatsächlichen Verlauf."

[15] Völkerstrafgesetzbuch, or VStGB

[16] Prosecutor-General Decision at 45 ("Der Luftangriff vom 04. September 2009 erfolgte 'im Zusammenhang mit dem nichtinternationalen bewaffneten Konflikt' in Afghanistan.").

[17] § 11 (1) No. 3.

fact that Colonel Klein directed an attack by military means.[18] The subjective element would require the perpetrator to engage in an attack in which the damage to civilian persons or property is out of proportion[19] to the concrete and direct military advantage anticipated. The Prosecutor-General determined that this subjective element is not met because Colonel Klein did not anticipate any damage to civilian persons or property at all.[20]

The published decision goes on to consider whether the incident qualifies for criminal liability pursuant to the German Criminal Code.[21] For the present discussion, the negative conclusion of the war crime analysis is sufficient. Germany's obligation to investigate and consider punitive action when appropriate pursuant to the Rome Statute of the ICC is implemented in this situation by considering possible violation of § 11 (1) No. 3 of the CCAIL.

The Prosecutor-General finds that Colonel Klein reasonably believed the tanker trucks were military objectives, the conclusion by Colonel Klein that the personnel on and around the trucks were members of the Taliban was reasonable and permissible, and that the object of the attack ordered by Colonel Klein was limited to the tanker trucks and the perceived Taliban personnel. The decision explicitly adopts a prospective approach as is required by LOAC,[22] thereby disregarding the retrospective perspective typical of criticism found in global public discourse. Based upon these findings, the Prosecutor-General concludes that Colonel Klein did not violate the prohibition on *Kriegsverbrechen*, or "war crimes".[23]

2015 Incident Involving U.S. Armed Forces

The United States is not state party to the Rome Statute of the ICC, which means there is no applicable domestic statute to which to refer that would incorporate obligations pursuant to the treaty. Federal criminal law does contain a war crimes statute,[24] but a domestic conflict of laws makes this statute unlikely to be implemented when a U.S. service member commits an alleged offense. Typically, a violation of one or more applicable punitive provisions of the

[18] Prosecutor-General Decision at 45 ("Der objektive Tatbestand des § 11 Abs. 1 Nr. 3 VStGB ist erfüllt, weil er lediglich voraussetzt…mit militärischen Mitteln ein Angriff durchgeführt wird.").

[19] Von Heinegg and Dreist, *supra* note 3, at 843. The authors point out that application of the phrase "out of proportion" is due to an error in translation between the authentic "excessive in relation to" text of AP I and the German adaptation of the text for the CCAIL. The Prosecutor-General accounts for the difference in language, but in this particular case both the incorrect "out of proportion" and correct "excessive in relation to" tests would result in the same negative conclusion since Colonel Klein did not anticipate any incidental damage at all.

[20] *Id*. at 46 ("Da der Beschuldigte davon ausging, dass nur Aufständische vor Ort waren, erwartete er die Schädigung von Zivilpersonen demgegenüber nicht nur nicht mit der von § 11 Abs. 1 Nr. 3 VStGB geforderten Sicherheit, sondern überhaupt nicht.").

[21] Prosecutor-General Decision at 59, considering violation of § 211 (murder) of the German Criminal Code ("*Strafgesetzbuch*").

[22] *Id*. at 65 (noting that the proper assessment is based on "expectations at the time of military action (*ex ante* perspective')" ("Erwartungen zum Zeitpunkt der militärischen Handlung an ('ex ante Betrachtung')….").

[23] *Id*. at 41 (finding that, "Nevertheless, Colonel Klein did not commit an offense under the [war crimes section of the] CCAIL, because the relevant facts of his behavior do not meet the additional requirements of the law.") ("Gleichwohl hat sich Oberst Klein nicht nach dem Völkerstrafgesetzbuch strafbar gemacht, denn sein Verhalten erfüllt die weiteren Anforderungen der in Betracht kommenden Tatbestände nicht.").

[24] 18 U.S.C. § 2441, War Crimes Act of 1996.

Uniform Code of Military Justice (UCMJ) such as murder, negligent homicide, or dereliction of duty would be charged rather than a violation of the War Crimes Act.[25] The War Crimes Act could arguably be utilized since members of the U.S. armed forces are specifically included within the scope of the Act,[26] but the preemption doctrine[27] makes utilization of the punitive articles of the UCMJ more likely.

Several separate investigations were conducted following this incident as well as the 2009 Kunduz incident. The main investigation following the 2015 incident – the one upon which the decision whether to initiate criminal proceedings relied – was conducted within the military rather than by an outside federal prosecutor. The implications of that distinction will be examined in greater detail later. For now, it is worth mentioning that the investigation and subsequent disposition decision was purely a military matter.

Due in no small part to intense public pressure, much of the investigation was released to the public in redacted form.[28] The investigation was appointed by General John Campbell, then commander of United States Forces – Afghanistan (USFOR-A).[29] A two-star general, Major General William Hickman, was appointed as the lead investigator, and an investigation team consisting of two one-star generals, a legal advisor, and a team of various subject matter experts and support staff were specifically appointed to assist with the investigation.[30] With the procedural background of the investigation thus established, the facts relevant to the war crime analysis will now be explored.

The factual narrative begins with a brief background review of the circumstances leading to the battle during which the airstrike incident took place.[31] The report explains that

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[25] *See* U.S. military Rules for Courts-Martial, Rule 307(c)(2), Discussion, subparagraph (D) (suggesting that, "Ordinarily persons subject to the code [the Uniform Code of Military Justice] should be charged with a specific violation of the code rather than a violation of the law of war.").

[26] 18 U.S. Code § 2441 (a).

[27] 10 U.S. Code § 934, or Article 134 of the UCMJ. Article 134 is referred to as the "general article". It permits prosecution of three categories of offenses: "all disorders and neglects to the prejudice of good order and discipline in the armed forces," (so-called "Clause 1" offenses); "all conduct of a nature to bring discredit upon the armed forces," (so-called "Clause 2" offenses); and "crimes and offenses not capital" (so-called "Clause 3 offenses). Clause 3 of Article 134 is the provision of the UCMJ that permits incorporation or assimilation of federal law. The non-binding but authoritative discussion accompanying this Article (as well as all others) in the Manual for Courts-Martial (MCM) provides further clarifying guidance regarding when provisions of federal criminal law may be incorporated or assimilated by the UCMJ. For example, the commentary discusses the preemption doctrine, which "prohibits application of Article 134 [including Clause 3 offenses] to conduct covered by" the punitive Articles of the UCMJ (MCM, ¶60.c.(5)). Further helpful practical guidance requires each element of the federal offense to be incorporated and alleged and requires the applicable U.S. Code provision to be specifically identified in an Article 134 violation (MCM, ¶60.c.(6)).

[28] U.S. Central Command, Investigation Report of the Airstrike on the Medecins Sans Frontieres/Doctors Without Borders Trauma Center in Kunduz, Afghanistan on 3 October 2015, *available at* https://www3.centcom.mil/foia_rr/FOIA_RR.asp?Path=/5%20USC%20552%28a%29%282%29%28D%29Records&Folder=1.%20Airstrike%20on%20the%20MSF%20Trauma%20Center%20in%20Kunduz%20Afghanistan%20-%203%20Oct%202015. Specific documents related to the investigation cited hereinafter are extracted from the complete investigation file available at this link.

[29] Department of the Army Form 1574, Report of Proceedings by Investigating Officer, Oct. 17, 2015.

[30] USFOR-A, Appointment Memorandum; Convening Investigation Team, Oct. 21, 2015.

[31] *See* USFOR-A, Complete Report of Investigating Officer into Civilian Casualty Incident in Kunduz City, Afghanistan, Nov. 11, 2015 [hereinafter Complete Investigation Report].

the Taliban leadership structure experienced an "insurgent power vacuum" following announcement of the death of Taliban leader Mullah Omar.[32] Three insurgent networks – the Taliban, Haqqani, and Lashkar e' Taiba – together initiated the attack on Kunduz to support strategic efforts to fill the leadership void, bolster the legitimacy of the new Taliban leadership, and restore illicit trade facilitation routes. The insurgent group initiated the attack on Kunduz on September 28, 2015, and took control of the city that same day.[33] U.S. military forces were tasked to support Afghan National Defense Security Forces (ANDSF) in the effort to regain control of Kunduz from the Taliban and associated insurgent forces.[34]

Intense and prolonged fighting ensued as the ANDSF, supported by U.S. air and ground elements, struggled to regain control of Kunduz. Beginning on October 2, a small U.S. Special Forces team requested air support from an AC-130 attack aircraft to facilitate the plan of an ANDSF ground element to regain control of an Afghan National Directorate of Security (NDS) compound that had been captured by insurgent forces.[35] Due to what was later characterized as "a combination of human errors, compounded by process and equipment failures",[36] the crew of the AC-130 mistakenly identified what was later revealed to be the MSF trauma center as the target. Early in the morning of October 3, the AC-130 opened fire on the MSF compound. The aircraft fired a total of 211 rounds at the target.[37] MSF later reported that 42 staff and patients were killed, and that the trauma center was rendered completely inoperable as a result of the attack.[38]

Allegations that the incident constitutes a war crime quickly circulated throughout the global community. Dr. Joanne Liu, President of MSF International, provided a statement a few days after the incident in which she asserts, "Until proven otherwise, the events of last Saturday amount to an inexcusable violation of this law. We are working on the presumption of a war crime."[39] The next day, Dr. Liu described the incident as not just an attack on a hospital, but "an attack on the Geneva Conventions."[40] The war crime characterization gained

[32] *Id*. at 1.
[33] *Id*. at 8.
[34] *Id*. at 9.
[35] *Id*. at 18.
[36] General Joseph Votel, U.S. Central Command, Apr. 29, 2016, https://www.defense.gov/News/Transcripts/Transcript-View/Article/746686/department-of-defense-press-briefing-by-army-general-joseph-votel-commander-us. General Votel was the commander of CENTCOM when the investigation was released to the public.
[37] Complete Investigation Report at 31.
[38] MSF, *Factsheet: Kunduz Hospital Attack*, October 7, 2015, http://www.msf.org/en/article/factsheet-kunduz-hospital-attack.
[39] Joanne Liu, *Médecins Sans Frontières (MSF) Denounces Blatant Breach of International Humanitarian Law*, October 6, 2015, http://www.msf.org/en/article/m%C3%A9decins-sans-fronti%C3%A8res-msf-denounces-blatant-breach-international-humanitarian-law.
[40] Joanne Liu, *Afghanistan: Enough. Even War Has Rules*, October 7, 2015, *available at* http://www.msf.org/en/article/afghanistan-enough-even-war-has-rules.

momentum, with observers such as academics,[41] non-governmental organizations,[42] activists,[43] and even poets[44] calling the incident a war crime or serious violation of international law.

The U.S. military dismissed the war crime characterization with one simple sentence. The investigation itself does not engage in an analysis regarding war crimes, but the U.S. Central Command (CENTCOM) summary memorandum offers this conclusion: "The label 'war crimes' is typically reserved for *intentional* acts – *intentionally* targeting civilians or *intentionally* targeting protected objects."[45] This finding is copied by a CENTCOM press release announcing publication of the investigation.[46] The conclusion was reiterated almost *verbatim* during a press briefing by General Votel following release of the investigation.[47]

That single sentence constitutes the entirety of the analysis regarding the war crime determination. What is not as clear is exactly what definition of "intent" is meant by this central conclusion. The U.S. military's simple, one-sentence finding fails to account for the complexity involved with this fundamental concept. As one scholar succinctly framed the issue, the "concept of intent is one of the most contentious issues for domestic and international criminal law, and the indeterminacy surrounding the concept of intent now threatens to bleed into IHL, where the rule of collateral damage was previously well settled."[48] A more nuanced understanding of the concept of intent can help avoid confusion in coalition operations and improve the credibility of U.S. military findings in the future.

War Crimes and Intent: Purpose, Knowledge, and More

The U.S. military places enormous emphasis on the requirement for intentional action – "*intentionally* targeting civilians or *intentionally* targeting protected objects." Judged by notions of intent typical in the Anglo-American common law tradition, the conclusion that the incident was "unintentional" is likely accurate. However, jurisdictions with other legal traditions – including nations such as Germany that are commonly U.S. military partners –

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[41] *See*, *e.g.* Phyllis Bennis, *The Pentagon Shouldn't Get to Absolve Itself for Bombing a Hospital*, Foreign Policy in Focus, May 3, 2016, *available at* http://fpif.org/pentagon-shouldnt-get-absolve-bombing-hospital.

[42] *See, e.g.* START Network, *Statement from the START Network on the Kunduz Hospital Bombings*, October 12, 2015, *available at* https://startnetwork.org/news-and-blogs/statement-start-network-kunduz-hospital-bombings.

[43] *See, e.g.* War Resisters League, *Kunduz Hospital Bombing = War Crime*, https://www.warresisters.org/kunduz-hospital-bombing-war-crime.

[44] *See, e.g.* Poetry and Chocolate, *Kunduz Hospital Bombing is a War Crime: Public Responses*, May 2, 2016, https://ancientruned.wordpress.com/tag/Kunduz.

[45] CENTCOM, Summary of the Airstrike on the MSF Trauma Center in Kunduz, Afghanistan on October 3, 2015; Investigation and Follow-on Actions, *available at* https://www3.centcom.mil/foia_rr/FOIA_RR.asp?Path=/5%20USC%20552%28a%29%282%29%28D%29Records&Folder=1.%20Airstrike%20on%20the%20MSF%20Trauma%20Center%20in%20Kunduz%20Afghanistan%20-%203%20Oct%202015 (emphasis in original).

[46] Press release, CENTCOM Releases Investigation into Airstrike on Doctors Without Borders Trauma Center, April 29, 2016, http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/904574/april-29-centcom-releases-investigation-into-airstrike-on-doctors-without-borde/.

[47] *Supra* note 39. General Votel concludes, "The label war crimesis typically reserved for intentional acts -- intentional targeting of civilians or intentionally targeting protected objects or locations."

[48] Jens Ohlin, *Targeting and the Concept of Intent*, 35 Mich. J. Int'l L. 79, 81 (2013).

adopt different interpretations of the concept of intent and may reach different conclusions. The concepts familiar in the Anglo-American context will be addressed before expanding the inquiry to less familiar territory.

One influential source for exploring the concept of intent in the U.S. context is the Model Penal Code (MPC). The MPC is not itself a source of law, but it is a persuasive resource upon which many jurisdictions in the U.S. base their own individual criminal codes. The American Law Institute, which publishes the MPC, elected to abandon "the ambiguous language of intent in favor of the more precise categories of purpose and knowledge."[49] The MPC provides precise definitions for both varieties of intent.

A person acts purposefully when the person acts with the "conscious object to engage in conduct of that nature or to cause such a result."[50] "Purposeful" is the stricter of the two concepts of intent contained in the MPC. This formulation is sometimes referred to as specific intent – specifically intending to engage in the social harm the penal statute aims to prohibit.

The definition for the term "knowingly" is bifurcated depending on whether the conduct or a consequence is the focus of the offense. With regard to conduct, "A person acts knowingly with respect to a material element of an offense when…he is aware that his conduct is of that nature."[51] With regard to a consequence, a person acts knowingly if "he is aware that it is practically certain that his conduct will cause such a result."[52] The MPC formulation of "knowingly" is sometimes referred to as general intent.

This framework for the concept of intent is sufficient in the Anglo-American common law tradition. A U.S. military law practitioner advising a U.S. commander or investigating officer can refer to these concepts when evaluating whether a specific offense has been committed pursuant to the punitive articles of the UCMJ. In a coalition setting where effective interoperability is vital, however, an awareness of other notions of intent is important. Because this paper offers a comparison of separate incidents involving German and American armed forces, the concept of intent in the German context will be explored.

German criminal law adopts three discreet categories for "intent". In terms of organizing the categories, "It is generally accepted in German jurisprudence that there are three different forms of *Vorsatz*: *Absicht* or purpose (intent in the narrow sense or *dolus directus* of first degree); knowledge (*dolus directus* of second degree); and *bedingter Vorsatz* (*dolus eventualis*)."[53] It is not a coincidence that the first two categories resemble the construct adopted by the MPC, as the drafters were "inspired by German criminal law."[54]

This third concept, *dolus eventualis*, requires a bit more examination since it is less familiar in the Anglo-American common law tradition. *Dolus eventualis* is commonly described as being similar to the common concept of recklessness, "but it is more restricted in a way that the perpetrator need not only be aware of the risk but must also accept the possibility that the

[49] *Id*. at 82.
[50] MPC § 2.02 (2)(a).
[51] *Id*. at § 2.02 (2)(b).
[52] *Id*.
[53] Mohamed Elewa Badar, Mens Rea - *Mistake of Law & Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals*, 5 Int'l. Crim. L. Rev. 203, 221 (2005).
[54] ELIES VAN SLIEDREGT, INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW, 45 (2012).

criminal consequence occurs."[55] One frequent way of describing the concept in context is that the "offender must 'reconcile himself' (*sich abfinden*) to the prohibited result" of his actions.[56]

For a positive finding with regard to *dolus eventualis*, a volitional element is required (hence the categorization of "intentional"). However, knowledge that the prohibited conduct or consequence is likely occur is not required – simply "reconciling" oneself with the prospect of the prohibited outcome is sufficient. Absent the volitional element, the action would not qualify as "intentional" and would thus fall below the dividing line between intent and negligence.

Consolidating the various interpretations of the concept of intent examined here into one manageable framework is challenging. *Dolus directus* in the first degree, or *Absicht*, is closely related to the MPC construct of acting with the purpose of causing the prohibited consequence. *Dolus directus* in the second degree is closely related to the MPC construct of knowledge, though the MPC bifurcates "knowingly" depending on whether conduct or a consequence is at issue. *Dolus eventualis* also qualifies as "intentional" because of the volitional element, though the requirement of reconciling oneself with the prospect of the prohibited outcome is lower than the MPC construct of "knowingly". This complexity materializes when comparing only two criminal law traditions; adding additional jurisdictions to the comparison increases the complexity.

With this more comprehensive understanding of the concept of intent, the 2015 Kunduz incident can be adequately evaluated.[57] The prohibited conduct in question is making civilians the object of attack, thereby violating the LOAC principles of distinction or proportionality. Like Colonel Klein in the 2009 incident, the purpose of the U.S. personnel involved in the 2015 incident was to attack insurgents, not civilians. Furthermore, the personnel did not know at the time of the attack that civilians were present. That the personnel later became aware that the compound was in fact the MSF trauma center is of no consequence in the LOAC analysis, as a prospective rather than retrospective viewpoint must be adopted.

The first two species of intent – purposeful or *dolus directus* in the first degree and knowingly or *dolus directus* in the second degree – therefore result in a negative finding. The finding with regard to *dolus eventualis* is less clear. Evidence ascertained in the investigation supports the conclusion that all three main categories of personnel involved, the U.S. ground commander, the JTAC, and the aircrew, were aware of a substantial risk of civilian casualties and that they all reconciled themselves with that possibility in deciding to engage in the attack.

The ground commander and JTAC, for example, were aware that their sole source of target identification was the ANDSF but did not communicate that fact to the

[55] Badar, *supra* note 56, at 221.

[56] *Id*. at 228.

[57] The concept of intent in relation to the 2009 incident involving German armed forces is adequately addressed by the Prosecutor-General. The Prosecutor-General finds that Colonel Klein reasonably believed only insurgent personnel – and no civilians – were present at the site at the time of the attack. This negates the "purpose" and "knowledge" (or *dolus directus* in the first degree and *dolus directus* in the second degree) definitions of "intent". Rather than reconciling himself with the prospect of excessive civilian casualties, the Prosecutor-General finds that Colonel Klein took extraordinary measures to prevent any civilian casualties whatsoever.

supporting aircrew.[58] The aircrew was aware that the activity they observed at the proposed target was not consistent with what they expected to observe based on the description they received from the ground forces, yet they engaged the target anyway without clarifying the discrepancy with the ground element.[59] When the sensor operator in the aircraft was finally able to identify a compound that matched the grid location provided by the ground element – the compound that turned out to be the correct intended target – the aircrew failed to incorporate the updated information into their effort to identify the correct target.[60] Instead, "the crew relied solely upon target description from [redacted – possibly the JTAC] , which was the [redacted – possibly ANDSF] description to the GFC by way of an interpreter."[61]

These factual determinations of the U.S. military investigation represent but a few examples of conduct that supports the conclusion that the personnel involved acted "intentionally" as that term is understood in the *dolus eventualis* context. Deciding to engage in the attack in these circumstances could easily be considered "reckless", but something more than pure recklessness is required for a positive finding with regard to *dolus eventualis*. Based upon all the facts and circumstances, a strong case can be made that the personnel involved were aware of a substantial risk of misidentification of the target and that engaging in an attack anyway created a significant risk of inflicting civilian casualties.

If knowledge of the substantial risk of attacking civilians were thus established, the finding that the personnel involved reconciled themselves with that risk and engaged in the attack anyway would follow from their conduct – attacking the compound. This analysis could result in a positive finding in the *dolus eventualis* context. While this would not amount to purposeful or knowingly as is required in the American legal tradition, the attack against civilians could nonetheless be considered "intentional" if the concept is expanded to include the German principle of *dolus eventualis*.

What should be clear from this examination of various concepts of intent is that dismissing an allegation of a war crime simply on the assertion that the incident was not "intentional" is not sufficient. Even if the discussion is limited strictly to the American context, the term "intent" has multiple meanings. In a coalition context where effective interoperability is critical, a more nuanced understanding and application of the concept of intent is absolutely vital. The issue of implementing accountability measures after an incident is almost strictly the purview of individual contributing nations. However, failure to adequately account for national legal and policy differences can be detrimental to operational effectiveness and can erode public willingness to participate in coalition campaigns.

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[58] Complete Investigation Report at 19. The GFC and [redacted – possibly the JTAC] could not see the NDS compound from their location. [Redacted – possibly the JTAC] failed to advise [redacted – possibly the aircrew] of this fact and that they were relying on [redacted – possibly ANDSF] grid coordinates and physical descriptions."

[59] *Id*. at 22. "The TV Sensor Operator [in the aircraft] also voiced his concern to the aircrew about declaring personnel hostile without fully confirming the target compound."

[60] *Id*. at 21. "Upon identifying the buildings at that location [the updated grid location], the TV Sensor Operator provided the crew a description of what he was observing (the NDS facility) [the intended target]. He stated the grid coordinates passed by [redacted – possibly the JTAC] placed his sensor on this location (the NDS facility), not the previous compound upon which the crew was currently focused (MSF Trauma Center). Despite this critical realization by the TV Sensor Operator, the navigator answered with 'Copy' and there was no response by the pilot."

[61] *Id.* at 22.

To Rome or Not to Rome?
Implications of Varying Legal Obligations on Interoperability and Legitimacy

Another important consideration with regard to interoperability and public legitimacy is complying with international and domestic legal requirements in combat operations. After an incident occurs involving multiple national members of a military coalition, disparities in imposing accountability measures upon the personnel involved in the incident can lead to erosion of public support in continued coalition participation. Understanding differences in methods of imposing accountability measures before an incident occurs is therefore an important factor in effective interoperability.

On the surface, differences in legal requirements based on variance in treaty obligations can seem to have significant implications across the strategic, operational, and tactical spectrum. This conclusion may be accurate in certain contexts. However, the applicability of customary international law has the effect of attenuating differences that would be more prevalent if only varying treaty obligations were considered. The dual Kunduz incidents offer an opportunity to examine the interplay between treaty and customary law and the resulting effects on interoperability and legitimacy.

Individual Criminal Responsibility and the Rome Statute

Ratification of the Rome Statute of the International Criminal Court remains one of the most contentious issues regarding international law in American public discourse. Many Americans continue to view with hostility and distrust the perceived prospect of ceding sovereignty in this manner to an international body responsible for investigating and possibly prosecuting American military members and other government actors.[62] Germany is state party to the Rome Statute and was at the time of the 2009 Kunduz incident; the U.S. is not and was not at the time of the 2015 incident. While this disparity leads to differences in approaches, the variance in treaty obligations does not have an identifiable effect on the conclusions and outcomes of the respective incidents.

As we examined in the previous section, Germany implements its obligations pursuant to the Rome Statute through the domestic CCAIL statute. This statute permits criminal sanctions for violating, among others, Germany's LOAC obligations. Following the 2009 Kunduz incident, the Prosecutor-General evaluated Colonel Klein's conduct against the CCAIL, § 11 (1) No. 3.[63] This specific statute incorporates the LOAC principle of proportionality into German criminal jurisprudence. It is worth noting here that the Prosecutor-General applies the

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[62] *See, e.g.,* John Bolton, Editorial, *The Hague Aims for U.S. Soldiers: A 'War Crimes' Inquiry in Afghanistan Shows the Danger of the International Criminal Court*, WALL ST. J., November 27, 2017, https://www.wsj.com/articles/the-hague-tiptoes-toward-u-s-soldiers-1511217136 (arguing that, "When American servicemembers violate their doctrine and training—which can happen in any human institution—the U.S. is perfectly capable of applying our own laws to their conduct. These laws and procedures do not need to be second-guessed by international courts, especially ones that violate basic rights guaranteed by the U.S. Constitution, like trial by jury.").

[63] Prosecutor-General Decision at 45.

proportionality principle by referring to AP I, Article 51,[64] even though AP I applies by its terms exclusively to an IAC[65] and the Prosecutor-General characterizes the situation in Afghanistan as a NIAC.[66] This is an indication of the customary character of the LOAC principle of proportionality, which is a topic that will be examined later.

As for the 2015 Kunduz incident involving U.S. military members, the investigation was carried out by military members rather than by an external prosecutor. The investigation was conducted pursuant to various service regulations, primarily Army Regulation 15-6, *Procedures for Investigating Officers and Boards*.[67] The decision whether to initiate criminal prosecution or to impose any other accountability measure for the personnel involved was made by the responsible military commanders pursuant to the command authority vested in them by the UCMJ.[68] If criminal prosecution were deemed appropriate, the charged offense(s) would likely be a punitive article of the UCMJ rather than for alleged commission of a war crime.[69]

Implications related to differences in criminal procedure will be examined below. For now, differences in criminal law are relevant in the context of war crimes and the Rome Statute. In both cases, the relevant governmental authority – the Prosecutor-General in the German context and military commanders in the U.S. context – made prosecution decisions pursuant to the applicable domestic criminal law. In the German context, that domestic law is the CCAIL; in the U.S. context, the UCMJ. Both respective authorities declined to initiate criminal charges. Had the Prosecutor-General elected to initiate criminal charges, the matter would have been heard in a federal court. Had a military commander in the U.S. context elected to "prefer", or initiate, criminal charges, the matter would have been heard by a military court-martial.

In either case, ratification of the Rome Statute of the ICC by the states concerned would not have altered the respective outcomes following the attacks. This is because of the so-called complementarity principle reflected in Article 1 and other provisions of the treaty.[70] Complementarity requires the ICC to find that a state is "unwilling or unable genuinely to carry out the investigation or prosecution"[71] of potential offenders before the court can assume jurisdiction of a matter.

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[64] *Id*. at 63.

[65] AP I, Article 1 (3) (referring to Common Article 2 of the 1949 Geneva Conventions, which establishes that the Conventions "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties….")

[66] Prosecutor-General Decision at 45.

[67] *See, e.g.*, Legal Review - Army Regulation 15-6 Report of Investigation (ROI) into the Airstrike on the Medecins Sans Frontieres (MSF)/Doctors Without Borders Trauma Center, Kunduz, Afghanistan, on 3 October 2015, Nov. 20, 2015 (advising that, "The investigation complies with the procedural requirements found in U.S. Army Regulation 15-6, *Procedures for Investigating Officers and Boards of Officers*.").

[68] *See* UCMJ, Articles 22-24 (establishing that only certain military commanders may convene courts-martial).

[69] Rules for Courts-martial, Rule 307(c)(2), s*upra* note 28.

[70] *See, e.g.* Preamble, paragraph 6 ("Recalling that is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.") and paragraph 10 ("Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdiction."), Article 17 (1)(a) (establishing that the Court may investigate a matter unless a state party "is unwilling or unable genuinely to carry out the investigation or prosecution.").

[71] Rome Statute, Article 17 (1)(a).

With regard to complementarity, the outcome of an investigation or prosecution is not significant. The relevant consideration is that a genuine investigation or prosecution was undertaken, as is the case for both the 2009 and 2015 incidents. Even if the United States were instead a state party to the Rome Statute and Germany were not, the actual outcomes would not have been different. This is because the ICC would not have been permitted to exercise jurisdiction, following a genuine investigation, due to the principle of complementarity.

LOAC Principles in Treaty and Customary Law

Compliance with international legal obligations is an important aspect of domestic support for military operations and effective interoperability, but disparities in legal obligations can make compliance challenging in a multi-lateral coalition context. Understanding differences in legal obligations – and the sources of these differences – is important both before and after events such as the 2009 and 2015 Kunduz incidents. One such area of potential friction involves identifying the basic, fundamental LOAC principles that apply to military operations.

For many of the U.S. military's strategic partners, the effort to identify fundamental LOAC principles begins with referring to AP I. The intent of the drafters of the treaty was to capture in one consolidated, binding document an expression of what was considered to be customary international law at the time.[72] Most frequent U.S. coalition partners, including Germany, are state party to AP I, while the U.S. is not.

While AP I is not a complete and comprehensive recitation of all applicable LOAC principles, it is the most common source for initial reference – especially for states party to the treaty. For states not party to the treaty, such as the United States, the treaty is often an initial reference point for determining what the non-state party may consider to be an expression of customary international law. The resulting differences in perceptions of legal obligations are important to recognize and understand, both in terms of interoperability and public legitimacy.

Regarding application and interpretation of fundamental LOAC principles pertaining to the two incidents at issue in this paper, here again being state party or not to the relevant treaty does not have an identifiable effect on the outcome. The Prosecutor-General specifically referred to the proportionality rule established in Article 51 of AP I in assessing whether Colonel Klein's conduct violated the CCAIL. The negative conclusion was reached based upon the finding that Colonel Klein believed no civilians would be injured or killed at all as a result of the attack.[73] The Prosecutor-General makes a similar finding regarding the related LOAC rule of distinction, finding that Colonel Klein identified specific military objectives and directed the attack against those military objectives.[74]

The Prosecutor-General also considers a separate LOAC rule requiring feasible precautions in the attack. The conclusion that the reasonable precautions requirement was not

[72] *See, e.g.,* AP I, Preamble, ¶ 3 ("*Believing* it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application.").
[73] *Supra* note 23.
[74] Prosecutor-General Decision at 63.

violated is based upon the finding that the possibility of the presence of civilians was considered by Colonel Klein to be remote[75] and, under the circumstances, precautionary measures in addition to the ones already implemented by Colonel Klein were not feasible at the time.[76] The Prosecutor-General acknowledges public discussion indicating that Colonel Klein violated applicable ISAF rules of engagement (ROE) and other internal rules related to the use of force, but the prosecutor clarifies that rules of international law are relevant to the inquiry rather than whether internal ROE were violated.[77]

An analysis of similar LOAC principles is performed by the U.S. military investigating officer following the 2015 Kunduz incident. However, the analysis performed by the investigating officer reveals a basic lack of comprehension of fundamental LOAC rules that many observers may consider to be quite astonishing. Rather than reciting a particular LOAC rule and identifying the authoritative source of that rule before applying the facts to the particular rulee, the investigating officer routinely names a rule, makes a conclusory statement indicating whether that rule is found to be violated, then recites facts the investigating officer believes supports the conclusory statement. The result is a legal analysis that most practitioners and scholars familiar with international law would not recognize as valid.

For example, the investigating officer does address the fundamental LOAC principle of distinction. The investigation finds that, "Neither the GFC [ground force commander] nor the Aircraft Commander exercised the principle of distinction. Neither commander distinguished between combatants and civilians nor a military objective and protected property."[78] This conclusion is supported with a recitation of facts ascertained by the investigation, "Even though the Navigator, [redacted] didn't fully describe the actions of the nine people [that were observed in the compound prior to the attack], this mistake doesn't exonerate the GFC from authorizing an engagement of the compound that resulted in 211 rounds fired, the destruction of the main building and deaths of 30 people."

A statement of the actual LOAC distinction rule with which most practitioners and scholars would be familiar can be found in AP I: parties shall "distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[79] The *ex ante* rather than *ex post* perspective recited by the Prosecutor-General in the German investigation is implied here as in other LOAC rules. The determining factor is the perspective of the attacker at the time of the attack; this is the way to determine whether the attacker "directed" the attack against military objectives.

In the 2015 incident, the U.S. personnel involved did in fact direct their attack against what was perceived at the time to be military objectives – the NDS facility and insurgents. That the facility actually targeted was a protected civilian object is not relevant to the distinction analysis. Although the investigating officer addresses the LOAC distinction rule, the positive

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[75] *Supra* note 16.

[76] Prosecutor-General Decision at 65 ("Weitere praktikable Aufklärungs- und Vorsichtsmaßnahmen („feasible precautions") standen in der konkreten Situation zeitnah nicht zur Verfügung.").

[77] *Id*. at 68 ("Die - hier als Rechtfertigungsgrund erhebliche – Zulässigkeit militärischen Verhaltens ist aber nach dem geltenden Völkerrecht, nicht nach dem jeweiligen Binnenrecht der Konfliktparteien zu beurteilen.").

[78] Complete Investigation Report at 41.

[79] AP I, Article 48.

conclusion (that the personnel violated the rule) is not based upon a recognizable legal analysis and is not supportable by the facts ascertained in the investigation.

The investigation also addresses the proportionality rule, though a similarly flawed analysis is provided. The investigating officer observes that, "Proportionality assumes that the target to be engaged is a lawful military objective. Therefore, any engagement of a target that is not a lawful military objective is facially disproportional."[80] With the purported legal standard thus established, the conclusion reached by the investigation is, "The MSF Trauma Center was not a lawful military objective. At the point of engagement, any use of force against it was disproportional."[81]

A statement of the actual customary LOAC proportionality rule with which most practitioners and scholars would be familiar can also be found in AP I: an attack that "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" is prohibited.[82] Again, the "may expected to cause" language confirms the appropriate prospective rather than retrospective viewpoint to be utilized.

In the 2015 incident, the U.S. personnel involved believed at the time of the attack that only military objectives and no civilians or civilian objects were present at the target compound. If no damage to civilians or civilian objects is anticipated at all, such cannot be "excessive in relation to" the military advantage anticipated. This is precisely the analysis and conclusion reached by the Prosecutor-General in the 2009 Kunduz incident. The legally-supportable conclusion in the 2015 incident is that the personnel did not violate the LOAC proportionality rule. This conclusion is required because the personnel did not anticipate the presence of civilian persons or objects, therefore the "expected" damage to civilian persons or property could not be excessive in relation to the concrete and direct military advantage anticipated.

The facts ascertained by and conclusions reached by the investigating officer actually suggest violation of another customary principle: the requirement to take reasonable precautions in the attack. The term "feasible precautions" is actually utilized in the investigation report, but it is mentioned only in passing.[83] The factors the investigating officer attributes to purported violations of the principles of distinction and proportionality actually support the conclusion that the personnel involved failed to take feasible precautions in the attack.

An extensive examination of the reasons for the faulty legal analysis performed in the U.S. military investigation, along with suggestions for improvement, is beyond the scope of this paper.[84] For now, the fact that these principles formed the basis of the analysis for both

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[80] Complete Investigation Report at 59.

[81] *Id*.

[82] AP I, Article 51, 5(b).

[83] *See* Complete Investigation Report at 61 (finding that, "The aircrew failed to take feasible precautions to reduce the risk of harm to individuals they could not positively identify as combatants. The aircrew consistently engaged individuals that it did not positively identify as a threat for 30 minutes."). No other mention of reasonable precautions or feasible precautions is made in the report.

[84] By way of preview, this specific finding of the investigation is particularly telling: "Commanders and individual service members at each level acknowledged that they received training on these areas [ROE and other use of force policies] before and upon arriving in theater. Judge Advocates at every command confirmed that they had provided training. Each unit provided training products which attempted 'to simplify what is recognized as an

investigations is indicative of the customary nature of the fundamental LOAC principles involved. The effort of identifying similarities and differences in application of legal principles becomes ever more important as reliance on international coalitions continues to be a strategic imperative. Effective interoperability and strategic legitimacy rely on a shared understanding of the legal obligations of each individual nation within a coalition. A comparative approach such as the one above is critical to identifying legal obligations and, as importantly, areas of legal understanding that could use improvement.

Closing Thoughts

Although the approaches utilized to address the two separate incidents examined in this paper are quite diverse, the outcome ultimately was the same. Limitations inherent in both approaches examined are apparent. The Prosecutor-General, for example, was criticized for over-reliance on sources that do not constitute actual statements of the law, such as the International Committee of the Red Cross interpretive guidance on the topic of civilians taking a direct part in hostilities.[85] The German system of referring matters related to military operations to a federal prosecutor rather than a military commander has benefits, but it also comes with limitations.[86] The U.S. system of investigating and implementing appropriate accountability measures within the military structure has benefits and limitations as well.

The virtues and limitations of any particular approach can and should be the subject of vigorous debate. The effort to identify and explore similarities and differences in approaches is equally important. Disparities in approaches reflect differences in national histories, experiences, perspectives, and values. Such disparities should be anticipated and embraced. Left unexplored and unexplained, the differences can erode effective interoperability and public support. This paper has engaged in a comparative case study of two similar incidents to help illustrate the practical implications inherent in different approaches. The intent is to contribute to the effort of identifying and exploring similarities and differences in approaches in an effort to improve interoperability and to enhance public legitimacy.

exceptionally complex authorities environment. However, the investigation also discovered multiple instances of lack of understanding of the authorities." Complete Investigation Report at 37.

[85] Von Heinegg and Dreist, *supra* note 3 at 858.

[86] *See id*. at 865 (noting that, "Of course, the Prosecutor-General is not confronted with issues concerning the law of armed conflict on a regular basis.").