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New York Times, Law of War, and Congressional Overreach in U.S. Military Operations

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Abstract: Recent high-profile reporting by the New York Times and other media organizations involving U.S. military combat operations has elevated public awareness related to Department of Defense targeting and accountability practices. While scandal generated by media coverage forms the basis for demands for reform of DoD practice from civil society groups and select members of Congress, the narratives developed in the investigative reporting have thus far not been exposed to comprehensive scrutiny. This article conducts a critical analysis of recent New York Times reporting involving U.S. military combat operations to assess the legitimacy of the narratives developed therein. After considering various ways in which the reporting is used to shape public opinion, three case studies of media coverage are selected as the basis of the critical analysis: reporting involving the Kabul drone strike in August 2021 that punctuated the end of the presence of U.S. ground forces in Afghanistan; airstrikes in Baghuz, Syria in 2019; and attacks on and around Taqba Dam in Syria in 2017. Part I of the inquiry evaluates some of the central narratives presented in media reporting involving each case study, while Part II conducts an analysis of each incident by drawing on sources of doctrinal law and policy that apply to actual targeting operations in practice. Part III then expands beyond these three case studies to consider New York Times and other high-profile media reporting in the broader context of public discourse and the current perceptions of select members of Congress. Finally, the concluding reflections section presents suggestions for pursuing true "accountability" for individuals and groups that have thus far remained largely unaccountable: media companies, civil society organizations, and select members of Congress.

Preface for working paper: What is now the current draft of this article in progress was initially intended to be a much shorter blog essay on a separate but related topic. As I began the focused research of recent high-profile media coverage for that initial topic, I realized just how much a separate critical assessment of the reporting is needed in the forum of public discourse and legislative deliberations alike. The dedicated critical analysis of media coverage, then, started off as a standalone blog essay, and then it expanded to a potential series of blog posts, and finally developed into a journal-length article. This progression is reflected in the format of the current draft of the article, such as the line breaks rather than indentations between paragraphs and the hyperlinks rather than *Bluebook*-compliant footnotes for references. The current draft also reflects a general dearth of dedicated editing, as I have engaged in some light proofreading throughout the drafting but have not yet been able to devote exclusive effort to the editing process. I am publishing the current draft of the working paper now so at least the substance of the critical analysis can be made available to co-participants for an ASIL Lieber Society webinar scheduled for November 7, 2022, which is two weeks from the publication of the working paper. The critical analysis conducted in the working paper will form the foundation for my remarks during the webinar, so I decided to make the paper available to co-participants and the general public alike in advance of the webinar. Due to competing priorities, I will not be able to reengage on the article until after the Thanksgiving break, and from then until the beginning of the spring (2023) semester I will be able to engage in more thorough editing and proofreading endeavors. The intent is to have an initial review draft completed in time to be circulated when the next law review cycle opens in Spring 2023. While it is useful to emphasis the "working" component of the working paper, future editing and proofreading endeavors should make for a more orderly finished product.

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Introduction

Recent high-profile media coverage of U.S. military targeting operations has heightened awareness of and shaped public discourse related to combat operations abroad. In large part as a result of the current heightened public scrutiny, Congress now seeks to perform a more assertive role in regulating internal military targeting operations and processes. With the encouragement and backing of a number of NGOs that are active in the field of civilian harm mitigation, legislation introduced at the end of April in both the House and Senate would direct a fundamental overhaul of current processes utilized by the DoD to conduct and evaluate targeting operations.

At the same time, legislators in both the House and Senate likewise introduced bills that would significantly expand upon existing requirements for the DoD to provide reports to Congress related to suspected or confirmed incidents of civilian harm. These legislative proposals have since been introduced as potential amendments to the fiscal year 2023 National Defense Authorization Act for both the House and the Senate. At the time of writing, Congress is on recess during the November election period, but both chambers are set to pick back up on deliberations for the must-pass NDAA soon after the session resumes.

If passed, the pending legislation would represent a successful strategic outcome for civil society groups that have long pursued a dual-track strategy of shaping public opinion and influencing government officials – whether in the executive or legislative branches – to shift the center of gravity in U.S. military operations in favor of enhanced protections for civilians. This article explores recent media coverage that has sparked a clamor for reform of U.S. military operations and provided the tinder from which NGOs and other activists have drawn to ignite the pyre of public opinion in order to advance their strategic objectives.

Even though media reporting is at the core of the current progressive civilian harm mitigation movement, surprisingly little critical analysis of the characterizations of U.S. military operations presented therein exists in present discourse. If this core of the current movement presents a skewed and incomplete depiction of purported deficiencies in military operations, which in this article I assert to be the case, the "solutions" being proposed by Congress and in public discourse to address the apparent set of problems "exposed" by recent media coverage are themselves defective and must be reevaluated.

This article conducts a critical assessment of the media coverage that is propelling the current public outcry for "reform" of U.S. military targeting operations and of the corresponding attempts by Congress to achieve the suggested "reforms" through the legislative process. After first framing the examination by assessing the ways in which media reporting is utilized by those seeking to shape perspectives in contemporary public discourse, the substantive portion of the critical analysis is centered on three separate case studies of targeting incidents that have been the focus of recent award-winning New York Times media coverage.

The first case study examined below assesses NYT reporting involving civilian casualties inflicted in the drone strike in Kabul as the military closed out operations in Afghanistan last August. Next, the second case study presents an in-depth examination of NYT media reporting involving the 2019 attacks on an ISIL target in Baghuz, Syria as coalition forces fought to wrest control of the last bit of territory controlled by the terror group. Then, the third case study conducts a critical analysis of NYT media coverage of a series of strikes on the Tabqa Dam near Raqqa, Syria in 2017.

In Part I of the article, I examine each case study in turn and conduct a critical assessment of some of the central narratives presented in reporting related to each incident. Part II then addresses each case study again in sequence in order to present a doctrinal analysis of actual provisions of law and policy that apply to the incidents that form the basis of the reporting related to each individual case study. Then, in Part III, I expand beyond these three case studies to situate the substantive analysis conducted herein in the broader context of social and political discourse involving U.S. military combat operations. Finally, in concluding reflections, the article explores measures for holding individuals and groups responsible for distortions in public opinion that are generated by biased and uniformed media coverage that is the focal point of the present inquiry.

A primary suggestion for supporting actual accountability, at least in the near term, is for the respective leadership of the House and Senate Armed Services Committees to ensure that any draft legislative provision involving civilian harm mitigation and response is excluded from the final version of the FY23 NDAA. This measure is necessary to allow time for the leadership of both chambers of Congress to account for and correct distortions of the current legislative agenda that have been caused by sensationalized media reporting and by lobbying and other efforts to influence elected officials that may constitute violations of federal law. These matters are addressed below in

due course and are summarized in the section presenting concluding reflections. For now, the inquiry transitions to consider the ways in which media coverage is utilized to influence public discourse before then initiating the substantive inquiry with the case studies presented in Part I.

Framing the Examination: Utilization of Media Coverage in Contemporary Public Discourse

The plenary goal of the article is to address a current gap in public discourse involving U.S. military targeting operations abroad by engaging in a critical assessment of the media coverage that is largely responsible for defining and shaping prevailing perceptions involving these operations. That is, if recent high-profile NYT media coverage of U.S. military operations is the driving force behind the current progressive "reform" movement and this media reporting has yet to be subjected to an in-depth critical analysis, then this constitutes a gap in current public discourse that must be addressed. In addressing the existing gap in prevailing discourse, I make the case that the current "solutions" being presented by activists and legislators must be reassessed because they have been developed based on an ill-informed, ill-defined, and, therefore, illegitimate understanding of the "problems" the purported solutions seek to address.

Although NYT media coverage examined in the substantive portion of this article is not alone in defining and shaping public perceptions involving U.S. military targeting operations, the thread of NYT coverage explored herein has emerged as the primary tool upon which legislators, advocates, activists, and academics have seized to create and sustain momentum to make the case for "reforming" targeting processes. As I point in the final analytical section of this article, media coverage from organizations other than New York Times is largely shaped by the reporting presented in NYT articles examined below. It is this thread of reporting, then, that has so significantly shaped public perception and coverage presented by other media organizations that must be the primary subject of a critical analysis such as that conducted in this article.

As I likewise describe below in the final analytical section, a palpable sense of frustration related to a purported lack of "progress" from engaging directly with the Department of Defense has led NGO activists and other advocates to a shift in focus for the endeavor to achieve purported "solutions" to problems "exposed" primarily in this thread of media coverage. In addition to pressing the DoD to enact "reforms" suggested by activists and other advocates, legislators have now been encouraged to assume a more assertive role in compelling the military to alter current processes involving targeting and post-strike assessments. As the final analytical section of this article examines, the legislators involved in the "reform" movement are not only attempting to force legislative "solutions" that have been developed based on an illegitimate understanding of existing "problems," members of Congress involved in the process are also exceeding the bounds of their constitutional authority in attempting to do so. To frame the current critical analysis of NYT stories that have been so vital in shaping public perception involving U.S. military targeting operations abroad, the current section turns now to describe some of the specific ways in which the media coverage has recently been invoked to support calls to "reform" military targeting and accountability processes.

"Substantial Flaws" Exposed by Recent Media Reporting? Congressional Perspectives

Although the movement to "reform" DoD targeting processes to improve outcomes related to civilian harm is by no means a new phenomenon, the undertaking has taken on a renewed sense of urgency following a spate of recent high-profile media coverage. As the letter signed by 46 members of Congress in March and directed to the Secretary of Defense observes, "After the *New*

York Times brought to light substantial flaws in the US military's procedures to prevent, investigate, and respond to civilian deaths in Iraq, Afghanistan, and Syria," Secretary Lloyd Austin directed the DoD to present him with "a plan to address civilian harm within 90 days."

In a press release announcing publication of the congressional dispatch, Representative Ruben Gallego observes that the "letter comes after an investigation by the New York Times shed light on flaws in how the US military prevents, investigates, and responds to civilian deaths" in the theaters noted above. The press release notes that the letter "requests specific issues be addressed in [a] forthcoming DOD Instruction, Center of Excellence, or the Civilian Harm Mitigation Response Action Plan."

The specified topics include "reforms" related to: "resources and staffing; targeting procedures; tracking and analysis; investigations; amends; lessons learned; accountability; and [a] Center for Excellence." However, the factual predicate invoked to warrant this call for systemic "reform" is, again, "an investigation by the New York Times" that ostensibly "shed light on flaws" in US military targeting operations. If the factual foundation for this demand for "reform" is found to be deficient, the specific measures demanded by Congress are not supported by reality and must therefore be reexamined and reassessed.

Senator Elizabeth Warren likewise cites directly to media coverage by the New York Times in a recent letter directed to Senator Jack Reed, Chair of the Senate Armed Services Committee. In the letter, Senator Warren focuses on NYT coverage of a 2019 airstrike in Baghuz, Syria to request that SASC "immediately launch a formal inquiry into this alleged war crime and cover-up, including hearings."

Throughout the letter, Senator Warren refers to NYT reporting, apparently with no independent critical analysis, *as though* the coverage itself presents a trustworthy and incontrovertible account of the airstrike and the DoD response to the incident. As but one example, Senator Warren's letter claims that the NYT "report succinctly described the scope of the failure" before going on to incorporate a lengthy excerpt directly from one article on the incident.

Later, Senator Warren's letter likewise cites directly to media reporting to support the assertion that the NYT investigation:

> "[A]lso found that the Special Operations task force that undertook the strike repeatedly skirted rules designed to prevent and respond to civilian harm, and that after the strike was flagged as a potential war crime, U.S. military officials at multiple levels circumvented legally mandated reporting and investigation requirements, falsified strike log entries to cover up the incident, bulldozed the blast site, and repeatedly stalled inquiries."

Based on these supposed revelations exposed by NYT reporting, Senator Warren claims that the Baghuz "incident raises serious questions about the U.S. military's adherence to international humanitarian law…as well as the duty to investigate potential war crimes and hold responsible individuals to account."

As the analysis below in the second case study related to media coverage of the Baghuz airstrike demonstrates, the NYT "investigation" presents an incomplete and sensationalized account of the attack and follow-on response by the military. In doing so, the coverage fundamentally distorts

relevant law of armed conflict requirements, applicable operational rules of engagement, and "accountability" standards.

The perspectives expressed in this letter by Senator Elizabeth Warren, then, are just as ill-informed and misguided as the media coverage on which she relies to support her claims. The resulting request that SASC "launch a formal inquiry into this alleged war crime and cover-up…as expeditiously as possible" is likewise just as fundamentally flawed as the media coverage on which Senator Warren relies to substantiate her request.

"Accountability Deficit" and "Structural Problems" in DoD? Activist and Academic Perspectives

These members of Congress are certainly not alone in claiming that recent New York Times reporting has exposed substantial flaws in existing DoD processes. In an announcement for a conference involving "justice in war" held in April, for example, the National Institute of Military Justice refers to "recent New York Times reports" in support of the claim that the DoD is plagued by an "accountability deficit" when it comes to holding anyone in uniform accountable for "killings" in armed conflict.

This conference announcement follows a letter submitted to Secretary Austin by the NIMJ board of directors in which the signatories claim that recent media reporting involving a 2019 airstrike in Baghuz, Syria indicates that "U.S. military personnel may have committed serious violations of the law of armed conflict." Likewise, the NIMJ letter asserts that recent media reporting suggests that military members may have demonstrated "willful or criminally negligent failures to report and investigate" the airstrike.

In a similar manner, a letter submitted in November 2021 to the current leadership of the Senate and House Armed Services Committees by a coalition of 24 NGOs cites recent New York Times media reports to support the call for "urgent and sustained congressional action to address and investigate these specific civilian harm incidents as well as the systemic shortcomings of U.S. protection of civilians policies more broadly."

According to this coalition of NGOs, New York Times "reporting on the 2019 Baghuz strike and the alleged cover-up of a possible war crime [raises] serious concerns about the U.S. military's commitment to accountability and adherence to international humanitarian law." The call to action based on this characterization of recent media reporting claims that "despite years of good-faith engagement," the organizations "have seen little to no progress on implementing many of these recommendations" and congressional intervention is now required.

For yet another example, the respective authors of a recent two-part series on *Just Security* calling for congressional action to address civilian harm resulting from U.S. military operations cite media reporting to make the case for robust legislative intervention. Annie Shiel of CIVIC and Sarah Yager of Human Rights Watch assert in Part I that "a series of New York Times investigations revealing systemic flaws that led to civilian deaths and injuries" demonstrates the need for congressional action to complement ongoing DoD efforts related to civilian harm mitigation.

Likewise, Laura Dickinson, Brianna Rosen, and Rachel VanLandingham claim in the second installment of the series that media reporting related to the Baghuz airstrike "underscores structural problems with DoD assessments of civilian casualties" and that robust congressional intervention is

necessary, among other endeavors, to correct "systemic problems with civilian harm" that contribute "to a military culture of impunity."

Summarizing Current Public Discourse and the Present Legal Landscape

From across this spectrum of concerned lawmakers, activists, and academics, the message is clear: recent high-profile media coverage demonstrates that current DoD procedures related to preventing and accounting for civilian harm are a sustained and abject failure, and Congress must intervene through the legislative process to right the ship because the military has demonstrated an unwillingness or inability to do so. However, each of these perspectives shares at least one common characteristic: an assumption that recent media reporting presents a complete, accurate, and impartial depiction of the present state of targeting and accountability processes in U.S. military operations.

As the substantive analysis in the present article demonstrates, blind reliance on characterizations presented in relevant media reporting is a deficiency that afflicts all of the "reform" perspectives examined above. If New York Times reporting has not, in fact, brought to light "substantial flaws in the US military's procedures to prevent, investigate, and respond to civilian deaths" as members of Congress claim in the letter cited above, the "solutions" proposed by advocates and advanced by selected legislators have been crafted to "correct" deficiencies that have been distorted, fabricated, sensationalized, or, at the very best, mischaracterized by journalists and those who base demands for reform on this recent media reporting.

With current public discourse and the present lawscape thus in focus, the substantive analysis in the following case studies is centered on three specific case studies that are the focus of recent high-profile New York Times media coverage related to the current state of U.S. military targeting operations. The critical analysis of reporting of the three case studies reveals that media coverage routinely mischaracterizes the law and policy applicable to these incidents as well as the subsequent military response to each.

The series of case studies begins now with a critical assessment of recent media coverage of a drone strike conducted by the U.S. military in August 2021 that punctuated the close of active combat operations in Afghanistan with the tragic loss of civilian life – an incident that has become known in media discourse simply as the "Kabul drone strike."

Part I: Individual Case Studies of NYT Media Reporting

Relevant Media Coverage Beyond the Case Studies Analyzed Above

As I mention briefly above in the introductory remarks near the beginning of this article, the line of New York Times reporting examined in the present inquiry is by no means the only example of high-profile media coverage of U.S. military targeting operations abroad that features prominently in the current collective public consciousness. However, for a number of reasons, the collection of media coverage examined herein represents the centerpiece of current discussions involving the purported need to "reform" U.S. military targeting processes.

A related thread of NYT coverage involving U.S. military targeting operations abroad, for example, is centered on reporting on airstrikes from the perspective of those on the receiving end of the attacks. The first article in this line of reporting was written by NYT journalist Azmat Khan and published in 2017. A second article published by Khan four years later in 2021 adopts a similar lens to report on, to draw from the headline for the article, "the human toll of America's air wars." As Dave Phillips, who is on the team of journalists responsible for the media coverage examined in the three case studies above, described during remarks presented in a newsroom ceremony celebrating receiving the Pulitzer Prize in International Reporting, while his team was "digging deep" into a "top secret Special Operations strike cell…another reporter, Azmat Kahn, was digging from another direction." The reporting conducted from this "other direction" by Azmat Khan and her team represents a separate but related thread of high-profile NYT reporting related to U.S. military operations abroad.

Likewise, media coverage from organizations other than the New York Times explores U.S. military operations in a similar manner. For example, Washington Post recently published a story purporting to provide "the most complete picture yet of the depth and breadth of U.S. support for the Saudi-led air campaign" in Yemen. Nick Turse, a contributing writer for Intercept, also frequently publishes stories involving various aspects of U.S. military operations abroad for that media platform. Both within and beyond the New York Times, then, there is certainly no shortage of media coverage that examines American military operations abroad from many different angles.

While other NYT reporting as well as various coverage from other media organizations warrants critical scrutiny in the manner presented in herein, the three case studies analyzed above were specifically selected primarily for two reasons. First, NYT reporting on these three incidents in particular has emerged practically as a primary source upon which other media organizations in the business frame their own related coverage. NYT reporting involving the Kabul drone strike, for example, forms the central foundation for articles examining the attack published by other media organizations such as Rolling Stone, Politico, Global News, Independent, Task & Purpose, Washington Post, and CNN. The same can be said for the 2019 airstrikes in Baghuz, for which NYT stories formed the basis of reporting presented by media organizations such as Washington Post, BBC, NPR, Al Jazeera, Guardian, and Rolling Stone. Likewise, it is the NYT story about the Taqba Dam airstrikes from which media organizations such as Jerusalem Post, Times of Israel, Arab News, Times (of the UK), and Business Insider draw to frame their own coverage of the attacks.

It is this central role of these NYT articles in shaping media coverage involving U.S. military operations abroad that is likely responsible for the second reason these case studies were selected for the present article: the coverage examined in the substantive analysis above likewise has emerged as a primary foundation for the movement to "reform" current U.S. military targeting and accountability processes. As the overview of congressional, activist, and academic perspectives presented in the "Framing the Examination" introductory section of this article reveals, current demands to enact structural changes involving DoD-wide targeting and accountability procedures rely heavily on the media coverage examined above as evidence of supposed systemic deficiencies that must be "fixed" by the "reforms" sought by legislators and activists alike. As the critical analysis conducted above demonstrates, however, the media coverage at the center of the current "reform" movement is itself plagued by fundamental and systemic deficiencies.

Case Study #1: Kabul Drone Strike; August 29, 2021

The possibility that a drone strike in Kabul in fact affected a civilian family rather than ISIS-K operatives as intended by the U.S. military was first reported by the New York Times the day after the attack. At the time, Pentagon spokesperson John Kirby reportedly indicated that the military was "not in a position to dispute" that civilian casualties may have resulted from the attack and that an investigation was then ongoing.

While the military conducted its own inquiry, the New York Times Visual Investigations team performed a parallel external assessment. The team obtained and examined security camera footage and conducted "interviews with more than a dozen of the driver's co-workers and family members in Kabul."

As the NYT VI team reported just over a week after the strike, their inquiry "raises doubts about the U.S. version of events, including whether explosives were present in the vehicle, [and] whether the driver had a connection to ISIS." The outcome of the NYT examination is a meticulous and incredibly detailed description, to draw from the headline associated with the visual product of the investigation, of "how a U.S. drone strike killed the wrong person."

The investigations by the military and the media both correctly conclude that only civilian persons and objects – rather than ISIS-K personnel and equipment – were present at the site of the strike. However, throughout the NYT coverage of the attack, the various articles routinely reflect two fundamental flaws that skew the tenor of the reporting and distort the actual standards by which the military evaluates the incident.

Fundamental Flaw #1: Evaluating the Strike Based on Outcome Rather than Process

The first fundamental flaw presented in the reporting is that it persistently characterizes the strike based on the outcome of the attack rather than the process that led to the decision to engage. For example, an early NYT article includes a quote from a British Army veteran and security consultant claiming that examining photos and videos provided by the Visual Investigations team raises serious questions involving "the credibility of the intelligence or technology utilized to determine this was a legitimate target."

However, this assessment was published just over a week after the attack and a full week before the military released specific details regarding the pre-strike analysis. As the DoD account relates, strike cell personnel "deliberately followed and observed [the target] vehicle and its occupants for eight hours while crosschecking what they were seeing with all available intelligence to develop a reasonable certainty of the imminent threat that this vehicle posed to our forces."

Divining an assessment of the credibility of the intelligence or technology utilized *before* the attack based only on visual evidence collected *after* the strike – especially before details about the targeting process were released to the public – allows for only incomplete conclusions based on the outcome of the attack rather than the process that preceded it.

As the DoD Law of War Manual summarizes, "Decisions by military commanders or other persons responsible for planning, authorizing, or executing military action must be made in good faith and based on their assessment of the information available to them at the time." By relying solely on

visual information collected after the strike, the security consultant quoted in the early NYT article did the opposite. Nonetheless, the articles published by the NYT team throughout the coverage of the incident continue to characterize the strike based on the outcome of the attack rather than on an assessment of the process that led to the decision to engage.

For example, journalist Eric Schmitt repeated the conclusion that was offered by the British security consultant before the results of the investigation were announced – that the *outcome* of the strike "calls into question the reliability of the intelligence that will be used to conduct the operations" – in a story published three days *after* the details regarding the pre-strike process were released to the public.

Indeed, the headline of this later story refers to the attack as a "botched drone strike in Kabul" – a characterization that relies solely on the outcome of the attack rather than an assessment of the process that led to the decision to strike. That is, the word "botch" connotes "to do (something) badly" or "to ruin (something) because of carelessness or a lack of skill." Nothing about the results of the official investigation suggests that civilians were killed in the strike because of carelessness or lack of skill of the personnel involved in the attack.

Nonetheless, the media constructs an account early in the coverage of a "botched" drone strike based on the outcome of the attack – and this is an impression that permeates the coverage and the public discourse that is shaped by the coverage still today. The result is an impression, at best, that the U.S. military is simply incompetent at performing the targeting process or, even worse, was engaged in an attempt to mischaracterize or even cover up the incident.

As a NYT story published six weeks after the strike asserts, "almost everything senior defense officials asserted in the hours, days and weeks after the drone strike turned out to be false." While the factual predicate supporting the decision to strike, along with the initial account presented days after the attack by senior defense officials, has been demonstrated to be inaccurate, this *ex post* assessment has no bearing on the process that led to the strike.

In evaluating whether personnel complied with applicable legal and policy requirements, it is the *process* that is relevant – not details that emerged in the hours, days, and weeks after the attack. As the next section demonstrates, the deficiency of evaluating the strike by facts that surfaced after the attack rather than information that was reasonably known to relevant personnel at the time of the strike results in an erroneous and unjustified perception that the U.S. military experiences an "accountability" deficit in relation to targeting operations.

Fundamental Flaw #2: Assessing "Accountability" Measures Based on Outcome Rather than Process

This persistent deficiency in media coverage of evaluating the attack based on outcome rather than process gives rise to the second fundamental flaw that permeates existing press coverage: demands for "accountability" based on the outcome of the attack.

Emotive Demands for Accountability from Family and Close Associates

For example, the initial NYT story, published the day after the attack, concludes with a powerful and impassioned plea from the daughter of Zemari Ahmadi, who was one of ten civilians killed in

the strike, demanding, "Whoever dropped this bomb on our family, may God punish you." Months later, an article that begins by observing that "none of the military personnel involved in a botched drone strike in Kabul, Afghanistan, that killed 10 civilians will face any kind of punishment," includes a quote from Mr. Ahmadi's former employer asking, "How can our military wrongly take the lives of 10 precious Afghan people and hold no one accountable in any way?"

While such emotional demands for punishment and "accountability" are reasonable to expect from family members or close associates of those who were killed in the attack, these moving appeals do not represent a recognizable basis upon which *actual* determinations involving culpability are made in practice. As the most recent edition of the U.S. Army Operational Law Handbook observes in describing what is commonly referred to in practice as the "Rendulic Rule," "commanders and personnel should be evaluated based on information reasonably available at the time of decision" rather than on the aftermath of an attack.

Based on this standard, the decision to refrain from initiating adverse action against any personnel involved in the attack is reasonable and completely justifiable. While concluding prepared remarks during a press briefing during which he described the results of the official military investigation involving the drone strike, General Kenneth McKenzie, then the commander of U.S. Central Command, asserted that the responsible personnel conducted the strike "in the honest belief that they were preventing an imminent attack on our forces and civilian evacuees, [though] we now understand that to be incorrect."

When applying the so-called Rendulic Rule, then, the decision to refrain from initiating adverse action against military members involved in the attack is entirely reasonable given that they had an "honest belief" that the attack was directed against an identified military objective and since their actions "should be evaluated based on information reasonably available" at the time.

Throughout the coverage of the incident, the New York Times presents an incomplete and inaccurate depiction of the standards by which "accountability" measures are *actually* evaluated following targeting mishaps. In addition to reflections from family members or close associates of civilians killed in the attack, three examples of an incomplete assessment related to accountability are likewise presented in an article published days after details of the official investigation were released to the public. These three examples of *post hoc* "accountability" characterizations are addressed in turn below.

John Sifton via Email: Strike Demonstrates a "Terrible Track Record" of "Failed Accountability"?

In the first such example, John Sifton of Human Rights Watch claims that the U.S. military has a "terrible track record" following "decades of failed accountability" in Afghanistan. However, the article presents no analysis whatsoever from Sifton to support this assertion.

This observation from Sifton, then, amounts to a conclusory proclamation purporting to impugn not only the U.S. military response to this drone strike in particular but also the record of accountability for the duration of the armed conflict in Afghanistan. That John Sifton would mischaracterize and sensationalize U.S. military accountability processes should come as no surprise given that his public commentary demonstrates a long history of doing so – as I examine in more detail in this essay on *Lawfire*.

However, on this occasion his reflections set the stage for the journalistic depiction of a failure to properly hold personnel accountable for the August 2021 Kabul drone strike as well portraying the unsubstantiated impression that this is but one in a long-running pattern of such failures.

Luke Hartig on Twitter: Strike Evinces "Bungled Operational Things"?

This portrayal is expanded later in the same article by citing to and incorporating text from a thread of social media posts involving the drone strike from Luke Hartig of *Just Security*. Although Hartig observes in the thread that "[y]ou never want to judge too much from a single incident," in the very next clause of the same entry he appears to do so anyway with the assertion that the way the personnel involved in the attack "bungled fundamental operational things is really troubling and suggests more than a one-off mistake."

The other passage from Hartig's thread that is quoted in the NYT article likewise seems to judge much from a single incident by claiming that the "interpretation of an innocent man's set of movements as those of a terrorist or an attack facilitator show some massive flaws in targeting methodology." This assertion joins an observation near the end of the Twitter thread that is *not* quoted in the article (but is accessible from the link included in the story) wherein Hartig claims that the strike "suggests the need for a bigger evaluation of the drone program as we draw down the Forever War rather than insisting on the need for 'persistent pressure.'"

Like the characterizations presented earlier in the article from John Sifton, these observations by Luke Hartig do not address any data offered days earlier during a press briefing during which then-CENTCOM commander Gen. McKenzie announced the results of the official investigation involving the drone strike. In the absence of such an analysis, it is not possible to determine precisely what "fundamental operational things" Hartig believes the relevant personnel "bungled" and that suggest the incident is therefore "more than a one-off mistake."

Drawing from the transcript of that briefing, could it be that the personnel "deliberately followed and observed [the target] vehicle and its occupants for eight hours while crosschecking what they were seeing with all available intelligence to develop a reasonable certainty of the imminent threat that this vehicle posed to" U.S. forces? Or that the personnel "were very concerned that the vehicle could move quickly and be at the airport boundary in a matter of moments" and that the strike was executed when it was because the target vehicle was stationary in an attempt "to reduce the potential for civilian casualties"?

Perhaps Hartig concludes that delaying the fuse on the Hellfire "to detonate inside the vehicle to further minimize the chance for civilian casualties" was one of the "fundamental operational things" the personnel involved "bungled"? It is difficult to assess the basis for – and therefore the validity of – Hartig's conclusions since the quoted passages from his Twitter thread provide only conclusory observations with no supporting context.

Of course, this absence of contextual support should be expected given that the NYT article is here drawing quotes from a thread of tweets posted on Twitter as a source for expert analysis. The perspectives presented should come as no surprise, either, since Hartig offers in the thread, "If you follow my writing, you know that I support strong policy restraints on drone strikes."

In any event, the expert analysis presented by Luke Hartig suggests that current DoD practice is plagued by a systemic accountability gap and that, according to Hartig, "a bigger evaluation of the drone program" is required as a result.

Like the assertions by John Sifton presented earlier in the article, however, these observations from Luke Hartig claiming that the strike evinces "massive flaws in targeting methodology" are conclusory and appear to be based on the outcome of the attack rather than supported by factual evidence involving the process that led to the strike.

Senator Chris Murphy on Twitter: "Killing Kids and Civilians Will Be Tolerated"?

Finally, this particular NYT story ends with one concluding reflection involving accountability that also happens to be extracted from Twitter – from Senator Chris Murphy this time. Of the accountability characterizations presented in the NYT article, this final one is perhaps the most perplexing yet certainly the most sensational.

As the article notes, Senator Murphy asserts in the Twitter post, "There must be accountability" for the strike. In the post, Murphy continues, "If there are no consequences for a strike this disastrous, it signals to the entire drone program chain of command that killing kids and civilians will be tolerated." The current brief analysis of Sen. Murphy's reflections focuses on the apparent standard for accountability articulated in his social media post since this is the subject of the present engagement.

However, it is worth noting that the concern that a lack of consequences will signal to "the entire drone program" that it is fine to kill kids and civilians is rather bewildering. Although I have combed through organizational formations described on the Department of Defense website, as far as I can tell there exists no unified command structure anywhere in the DoD known as the "drone program" that must be taught a lesson in accountability from this attack.

Back to the substantive topic of accountability, Sen. Murphy fails to articulate an actual standard for which imposition of "consequences" would be appropriate in the wake of a targeting operation that results in civilian casualties.

If personnel involved in the attack deliberately engaged civilians *and* did so in the knowledge that the anticipated incidental damage would be excessive in relation to the concrete and direct military advantage expected from the strike, thereby violating the LOAC distinction and proportionality rules, respectively, severe consequences would absolutely be warranted. If an assessment determined that the personnel failed to take feasible precautions in the attack or violated applicable rules of engagement or other existing use of force policy, consequences would likewise be appropriate.

However, neither existing LOAC rules nor ROE requirements call for imposition of "consequences" simply because a strike is "this disastrous." This, of course, represents a demand for accountability based on the outcome of the attack rather than the process that led to the strike – and this constitutes a fundamental misapplication of relevant law and policy involving the conduct of hostilities.

The same is true regarding the assertion that a lack of consequences will indicate to "the entire drone program" that "killing kids and civilians will be tolerated." If the personnel involved in the

attack were aware that the attack would kill children and civilians *and* the children and civilians were assessed not to be taking a direct part in hostilities at the time *and* the anticipated incidental damage were assessed to be excessive in relation to the concrete and direct military advantage expected *and* the personnel conducted the strike anyway, *then* a failure to impose consequences would indeed send a corrosive message to personnel throughout the DoD.

Otherwise, the demand, from a currently-serving United States Senator, that "there must be accountability" is misguided. Nonetheless, the NYT article currently being examined closes with Sen. Murphy's ill-informed Twitter post, and in so doing the story advances the media depiction of a failure of accountability for the Kabul drone strike.

Consolidating Reflections Related to "Accountability" Perceptions Fashioned in NYT Coverage of the Kabul Drone Strike

Taken together, the sustained NYT reporting involving the "Kabul drone strike" cultivates the appearance that this "bungled" attack is merely one exhibit demonstrating "massive flaws" in existing systemic targeting methodology that is likewise part of a "terrible track record" following "decades of failed accountability" and that a failure to impose "consequences" sends the message throughout the military that "killing kids and civilians will be tolerated."

Unfortunately for the integrity of the reporting, not one of the commentators to which the journalists turn for expert analysis apparently applies the known facts of the attack to existing doctrinal law and policy in a dispassionate manner to develop informed and balanced conclusions, which is the method by which *actual* "accountability" measures must be assessed. Given the appearance of long-standing and widespread failures that is manufactured throughout the NYT coverage, it should come as no surprise that this brand of reporting has been embraced by activists and scholars advocating for a more intrusive role for Congress in regulating DoD targeting processes.

Unfortunately for the legitimacy of the emerging progressive civilian harm mitigation "reform" movement, then, the factual predicate upon which fervid demands for outside intervention are built are, quite simply, ill-informed and misguided. Given that this method of reporting has been described by those in the media industry as "accountability journalism," the skewed and sensationalized nature of the coverage begs the question: Who is holding the *media*, as well as those who would exploit the coverage to support their own agendas, "accountable" for distortions in public perception manufactured by the reporting?

This is a question to which I return in the final analytical section of the article. First, the substantive aspect continues in the next case study with an evaluation of recent NYT reporting involving a 2019 pair of airstrikes in Baghuz, Syria.

Case Study #2: Baghuz Strikes; March 18, 2019

The NYT headline that first "broke" the scandal involving airstrikes in Baghuz, Syria that may have caused civilian casualties in March 2019 frames the full story well: "How the U.S. Hid an Airstrike That Killed Dozens of Civilians in Syria."

What follows in the article is a harrowing account of a small band of brave service members risking everything to doggedly hold the military to account for a devastating targeting mishap, of a rogue special operations element bending the rules and recklessly bombing civilians along with ISIS fighters with callous disregard for innocent human life, and of a massive coverup of a potential war crime that represents yet another example of a systemic failure at every echelon of command to hold military members accountable for potentially committing serious violations of the law of war and applicable rules of engagement.

The NYT article is a genuinely compelling read in that it purports to present a disturbing and incredibly damning inside account of how U.S. targeting operations are *really* conducted and evaluated afterward across the DoD as an institution.

Unfortunately for the integrity of the journalistic account presented therein, none of it is true.

Factual Accord Between Media Reporting and Official Accounts

That is, there is no dispute that at least two airstrikes did occur and that some number of civilian casualties resulted from the attacks. The initial DoD public accounting of the incident acknowledges as much.

The day after the NYT article broke the "scandal," DailyMail.com reported that CENTCOM spokesperson Captain Bill Urban acknowledged the attack and the likelihood of civilian casualties in an email sent to the latter news organization.

In that statement, which was also posted separately for a *Just Security* article available here, Captain Urban indicates that a civilian casualty credibility assessment and a full "15-6" investigation "concluded that at least 4 civilians were killed and 8 were wounded" in the series of two strikes and that the "investigations were unable to conclusively characterize the status of more than 60 other casualties that resulted from these strikes."

So, there is no dispute between the media reporting and official accounts that two airstrikes were directed by U.S. special operations forces on behalf of Syrian Democratic Forces partners against ISIS targets in Baghuz Syria on March 18, 2019, and that ISIS fighters along with an indeterminate number of civilians were killed or injured in the attacks.

Although the foundation of the NYT article is factually accurate and accords with the official account of the incident, the portrayal of a sweeping conspiracy to cover up a potential war crime and a corresponding systemic refusal to properly investigate or hold anyone accountable for potentially serious violations of international law and rules of engagement has no basis in reality – and it never has even from the day the attacks occurred.

Possible War Crime "Flagged" by a "Legal Officer"?

The portrayal of war crimes and cover ups begins in the immediate aftermath of the strikes, when an unnamed analyst on a secure group communication platform (commonly referred to in military parlance as "mIRC chat") reportedly declared, "We just dropped [munitions] on 50 women and children."

The NYT article goes on to chronicle the experience of a "legal officer [who] flagged the strike as a possible war crime that required an investigation" and of an agent named Gene Tate who worked at the time in an inspector general office. The story sets the stage for the alleged coverup by reporting a number of reflections by Tate, whose quotes presented in the article claim, "Leadership just seemed so set on burying this. No one wanted anything to do with it."

In response to the supposed widespread conspiracy to cover up a potential war crime, Tate laments, "It makes you lose faith in the system when people are trying to do what's right but no one in positions of leadership wants to hear it."

The trouble is, the beleaguered protagonists in this story appear not to comprehend fundamental law of armed conflict requirements with which the military must comply in order to "do what's right" when conducting targeting operations or evaluating compliance afterward. This conclusion is apparent based on even a cursory understanding of the reported facts and the most basic understanding of legal and policy requirements.

Unfortunately, declaring in a headline, "U.S. Forces Comply with Legal Obligations but Analysts Mistakenly Believe Attacks May Qualify as War Crimes" does not make for a compelling media story. Instead, every attempt is made to characterize the attack as a war crime and the response as a cover up, and the trusted purveyors of public knowledge responsible for the media account are all too eager to provide a platform for our courageous protagonists to shine a light on the military's dastardly deeds.

"'Credible Information' Supporting a Law of War Violation"?

The assessment of the factual predicate that may have constituted credible information indicating that a law of war violation may have been committed with the strikes begins with an observation presented by Maj. Gen. (ret.) Charlie Dunlap, editor of the *Lawfire* blog site, in an essay he published that engages with a separate article published by Ryan Goodman on *Just Security*. In Maj. Gen. (ret.) Dunlap's article, he correctly points out that the "existence of civilian casualties, even if 'significant in number' do not alone necessarily constitute 'credible information' supporting a law of war violation – and nothing in the DoDI suggests it does."

The military publication to which Dunlap refers in that passage is Department of Defense Directive 2311.01, which establishes the foundation of the DoD law of war program. In his essay, Maj. Gen. (ret.) Dunlap likewise points out that the directive requires all military members, employees, and contractors to "report through their chain of command all reportable incidents, including those involving allegations of non-DoD personnel having violated the law of war."

This is the requirement the legal officer, identified in the NYT article as "Air Force lawyer" Lt. Col. Dean Korsak and IG evaluator Gene Tate appear to have been resolutely pursuing following the incident. When one echelon of command or inspector's office did not respond in a manner that satisfied Korsak and Tate, they reportedly went to the next higher echelon, and the next.

Eventually, still not satisfied with the results, the dynamic duo reportedly notified members of the Senate Armed Services Committee of the incident and potential coverup. When that pursuit failed to achieve adequate results, Tate was eventually reportedly fired and "escorted from the building by

security" because of his dogged pursuit for accountability – after which he apparently decided to take his account of supposed war crime and coverup to the press.

All along, the heroes of this harrowing story appear to have genuinely believed that they had witnessed evidence of an incident for which Lt. Col. Korsak reportedly advised relevant authorities to "preserve all video and other evidence" of a potential war crime. Unfortunately, this fervent belief that a "reportable incident" has been committed and was not being properly investigated never was based on credible information.

Instead, the allegation was founded upon an unmitigated misunderstanding of fundamental LOAC rules and reporting requirements.

Mission Command Doctrine: Centralized Command, Distributed Control, and Decentralized Execution

The entire narrative of violation and coverup rests on the premise that a legal advisor positioned in the Combined Air Operations Center (CAOC) in Al-Udeid AFB in Qatar "believed he had witnessed possible war crimes." Throughout the explosive NYT story, there is not a shred of evidence presented to support this characterization.

This is the case because, as an organization, the CAOC exists to serve as "the operational bridge that integrates and synchronizes strategic decisions to tactical-level execution." To provide that bridge, the CAOC "commands and controls the broad spectrum of what air power brings to the fight." As such, the CAOC, where Korsak and Tate were located, has aptly been described as "the nerve center of the air campaign."

Those who are familiar with culture of the U.S. Air Force will recognize the motto that is declared with almost charming repetition throughout the ranks, "Flexibility is the key to air power." As a matter of doctrine, this flexibility is implemented by executing "mission command through centralized command, distributed control, and decentralized execution."

Because the function of an air operations center (here, the CAOC) is to provide "the capability to plan, coordinate, allocate, task, execute, monitor, and assess the activities of assigned or attached forces," this element is responsible for managing "distributed control" in the "centralized command, distributed control, and decentralized execution" mission command model.

In the case of the Baghuz airstrikes, elements of Task Force 9 were reportedly responsible for the decentralized execution aspect of mission command. Special operations ground elements would have been under the command of Special Operations Joint Task Force – Operation Inherent Resolve (SOJTF-OIR) at the time of the battle for Baghuz, and SOJTF-OIR, in turn, was a subordinate command of Combined Joint Task Force – Operation Inherent Resolve, or CJTF-OIR.

In that phase of the counter-ISIS campaign, CJTF-OIR was the senior echelon of command *in theater* that was engaged in "conduct[ing] strikes in support of decisive battles against" ISIS. It is this chain of command, from TF 9 to SOJTF-OIR to CJTF-OIR and ultimately to US Central Command, then, that had responsibility for providing terminal control of air assets operating in theater – and for evaluating LOAC compliance of those who called in airstrikes in support of counter-ISIS operations. The CAOC is not represented in this chain of command that was

responsible for the conduct of the airstrikes or the post-strike assessment of LOAC and ROE compliance.

Lt. Col. Dean Korsak "Believed He Had Witnessed Possible War Crimes"?

This description of the applicable mission command structure, which situates the relevant organizational elements in the context of their respective doctrinal responsibilities, illustrates why Lt. Col. Dean Korsak, IG evaluator Gene Tate, and members of the CAOC in general were not in a position to assess whether the airstrikes in question constituted war crimes. In short, their organization exercised distributed control, while ground elements in theater conducted decentralized execution.

When the unnamed analyst reportedly declared on mIRC chat that "we just dropped on 50 women and children," the observers were forming an assessment founded upon the outcome of the attack. As the analysis related to the Kabul drone strike in the initial case study of this article describes, endeavoring to evaluate an attack "based on the outcome of the attack rather than the process" is a misapplication of the relevant LOAC rules.

This is a point Maj. Gen. (ret.) Charlie Dunlap makes in his *Lawfire* essay regarding the Baghuz strikes when he succinctly observes, "mistakes, errors and accidents are inevitable consequences of combat, and they are not necessarily 'war crimes' even where significant civilian casualties result." The initial NYT story involving the Baghuz strikes notes that the responsible command initially determined that "no formal war crime notification, criminal investigation or disciplinary action was warranted" in part because an inquiry determined that the incidental damage caused by the attacks was "accidental."

This should have been the end of the inquiry for the concerned protagonists at the CAOC. Instead they continued to press the issue, mistakenly believing that a reportable incident had occurred and a potential war crime had been committed because of the extent of the civilian casualties they assessed were inflicted *as a result* of the attack.

As I explained in the comments section of a CAAFlog (2.0) entry the day after the NYT story was published, the "relevant war crime [here, of violating the LOAC proportionality rule] is intentionally launching an attack *in the knowledge* that the incidental damage will be clearly excessive in relation to the direct overall military advantage *anticipated*." (emphasis in original) Operators situated in the CAOC were not in a position to assess the intent of the personnel responsible for carrying out the attack.

Unfortunately, it appears that they simply did not know any better. Although they reportedly found the "topic and incidents" to be "dead on arrival" when raising the issue with their supervisors, this was not a reflection of institutional indifference or, worse, a grand conspiracy to cover up a war crime. Rather, it was a function of the attacks correctly being assessed by the appropriate echelon of command not to constitute a violation of applicable LOAC rules or ROE requirements.

In short, to borrow the relevant terminology from DoDD 2311.01, there was no "credible information" to support the allegation that a "violation of the law of war" had been committed. As such, the attack did not constitute a "reportable incident" for Lt. Col. Korsak, Mr. Tate, or anyone else from the CAOC to doggedly pursue "through the chain of command to the Combatant

Commander" and beyond – and ultimately, for Mr. Tate it seems, all the way to the New York Times.

Sensationalized Reporting and Anticlimactic Conclusion

Of course, journalists with the New York Times have little incentive to portray the story in a manner consistent with applicable LOAC rules and ROE requirements – even if the journalists are qualified to accurately assess compliance with international law and military policy involving the use of force in the first instance. Instead, the initial story and the subsequent reports construct a narrative that creates the impression that military targeting operations are plagued by incompetence and that accountability processes are inadequate and readily manipulated.

An unnamed person who it seems was stationed at the CAOC reported that a "number of officers in the operations center suspected that the [special operations] task force was including misleading information in the logs to justify strikes." A self-styled "human rights organization" known as "Raqqa Is Being Slaughtered Silently" reportedly "posted photos of the bodies" that remained after the battle for Baghuz and described the scene as a "terrible massacre." A witness to the carnage left in the wake of the battle noted that the site was bulldozed soon after the fighting ceased.

And all of these revelations are utilized to carefully spin a narrative describing, to return to the headline of the article, "how the U.S. hid an airstrike that killed dozens of civilians in Syria." Two days after the initial NYT story was published, Defense Secretary Lloyd Austin reportedly requested to be briefed on the incident. Less than two weeks later and partially in response to the public outcry that ensued following the initial story, Secretary Austin directed General Michael Garrett, commander of Army Forces Command, to conduct an independent review of the incident.

That review was completed on 11 May, and a two-page executive summary was published by the DoD a few days later. According to the executive summary, Gen. Garrett "established a joint review committee" that consisted "of 20 personnel, including four general officers and 16 additional personnel, all with various subject matter expertise."

The committee spent approximately 2 months (presumably accounting for holiday block leave period that occurred during the review) evaluating "all relevant reports of investigation and associated documents" and "sought additional information when necessary from all relevant operating units." The results of this extensive review were consistent with the findings of the initial investigation conducted by the responsible echelon of command: no violations of applicable law and policy were committed and, therefore, no one involved should be considered for adverse personnel action as a result of the incident.

Throughout this review, no evidence is identified of falsified logs. There was no indication that relevant personnel stretched or mischaracterized applicable rules of engagement to obtain approval for the attacks. There was no war crime and, as a result, nothing to conspire to cover up. Nonetheless, (now) former IG evaluator Gene Tate remains unconvinced – and this is the narrative NYT media accounts continue to market.

Official Findings: A "Cascade of Mistakes" and a Faulty Review?

On the same day the executive summary was released to the public, the New York Times published yet another story involving the Baghuz strikes. Although the headline of this latest article suggests that Gen. Garrett's assessment "faults [the initial] review of [the] deadly airstrike," this headline presents the misleading impression that the subsequent evaluation found the initial *investigation* to be faulty.

This is a mischaracterization of Gen. Garrett's summarized findings. So too is the assertion in the NYT article that Garrett found a "cascade of mistakes that led to the strike." The findings Gen. Garrett *actually* presents in the executive summary are that ground force commander "demonstrated awareness and concern for CIVCAS and took steps to mitigate harm" but that "*through no fault of his own*, the [commander] relied on data that was not fully accurate." (emphasis added)

This finding does not reveal a "cascade of mistakes that led to the strike" but rather a determination that the commander "acted reasonably and within the bounds of the ROE and LOW." Likewise, regarding the actual initial *reviews* of the incident, Gen. Garrett found that "decisions throughout the process were made by the individual with the authority to do so, and decisions were made within their scope of authority" but the proper "*administrative steps* to *close the incident*" did not occur in accordance with timelines established in relevant policies. (emphasis added)

So, in the end, the actual initial *review* of the incident was not determined to be faulty, as the NYT headline indicates. Even so, the media report remains steadfastly committed to maintaining the appearance that the initial investigations were deficient.

"Standard Government Line" – or "No Evidence to Support These Allegations"?

Indeed, the article returns to one of our original protagonists who was first convinced that a war crime had been committed and the responsible command had not adequately investigated the incident. As former IG evaluator Gene Tate opines after the results of the subsequent review were announced to the public, "It's the standard government line: Mistakes were made but there was no wrongdoing."

Tate then continues, "None of the worker bees involved believe it was delayed." Instead, "[w]e believe there was no reporting." Although this latest NYT story provides a link to Gen. Garrett's executive summary and spins the findings to suggest that a "cascade of mistakes" led to the civilian casualties and the initial reviews were faulty, there are several important aspects of the executive summary that appear to have escaped the attention of the journalists involved.

That is, Gen. Garrett directly addresses the allegations of LOAC violations and coverup that formed the basis of the original NYT story.

On one such occasion, Gen. Garrett recalls that an initial allegation filed as a "DoD Inspector General Hotline Complaint" was originally closed as "unsubstantiated." Incidentally, this appears to be the same "hotline complaint with the inspector general's office in August 2019" the initial NYT story reports was filed by Lt. Col. Dean Korsak from the CAOC.

In addressing this initial complaint (apparently) filed by Lt. Col. Korsak, Gen. Garrett details that based on his "extensive review of the facts and circumstances," he agrees the complaint "was unsubstantiated" and he further finds "a number of assertions made that are not supported by evidence and/or are based on inaccurate or false information."

After dismissing this original IG complaint, Gen. Garrett goes on to explain that a "secondary basis for the allegations of concealment and wrongdoing was a series of three articles published by the New York Times." In relation to this reporting, Gen. Garrett finds determines that a "thorough analysis of all available information indicates there is no evidence to support these allegations as they relate to the strikes" examined by his review.

Pervasive Errors in NYT Reporting, Not Airstrikes or Official Response

In the end, then, the information upon which the NYT media story was built and from which the flames of scandal and coverup were fanned was found to be baseless – all of it. The war crime, the refusal to investigate, the widespread conspiracy to cover up the "crime," and the failure to hold anyone to account. The allegations were unsubstantiated and not supported by evidence all along.

These are findings that New York Times journalists Eric Schmitt and Dave Philips elected not to emphasize when reporting on the secondary review conducted by Gen. Michael Garrett. Indeed, this omission appears to be in the best interests of their employer and the team of journalists involved in this series of reporting.

Although these seemingly significant findings expressed in Gen. Garrett's executive summary appear to have escaped the attention of the journalists involved, the article does *not* miss the opportunity to point out that the team was awarded a Pulitzer Prize earlier in May for the series of reporting regarding U.S. military "airstrikes gone wrong" – including reporting related to the Baghuz airstrikes.

How inconvenient must it be to receive a Pulitzer Prize for International Reporting and then a few weeks later to report on a high-level review that involved 20 personnel and took over two months to complete that determines the sensational complaints upon which a centerpiece of your prize-winning reporting was built were actually unsubstantiated and not supported by evidence all along? It is hard to say for sure without asking Eric Schmitt, Dave Philipps, and their editorial team directly, but this query may help explain why these seemingly central findings presented in Gen. Garrett's executive summary are not reflected in the most recent NYT story.

It appears that Gen. Garrett and his team conclusively determined that the airstrikes and the subsequent initial inquiries complied with relevant legal and policy requirements, even if one of our original protagonists who is quoted in the most recent story was and remains unconvinced.

With the narratives and perceptions created by NYT reporting involving the airstrikes in Baghuz, Syria demonstrated to be built upon baseless assertions and inaccurate understandings of relevant law and policy, the substantive analysis now transitions to the final case study, which conducts a critical assessment of NYT reporting involving a series of airstrikes on Taqba Dam near Raqqa in Syria.

Case Study #3: Tabqa Dam Strikes; March 26, 2017

The central media reporting involving strikes on and around the Taqba Dam conducted by the U.S. military in 2017 is limited primarily to one NYT article. However, the coverage provided therein contributes to and reinforces many of the narratives and perceptions crafted in this line of reporting: those of a U.S. military element bending (and perhaps even breaking) the rules with impunity and with no accountability and with reckless disregard for the wellbeing of civilians who may be affected by the use of force.

As is the case for the other case studies conducted above, these carefully-curated perceptions do not withstand the scrutiny of a balanced and informed critical assessment.

It is worth noting at the outset of the analysis that an active duty U.S. Army judge advocate, Maj. Matt Montazzoli, has already performed an assessment of international law applicable to the strikes on Taqba Dam in a guest essay on *Lawfire*. While the focus of Maj. Montazzoli's essay is an explanation of international law involving dam strikes in general along with the U.S. view specifically of relevant rules, the impetus for his essay was NYT coverage of a series of U.S. airstrikes on the Tabqa Dam near Raqqa, Syria that occurred in March 2017.

Although Maj. Montazzoli does address the reporting and it is the coverage that inspired his essay, then, an assessment of the media story is not the direct focus of his analysis. Engaging with NYT reporting *is* the central focus of the present article, so I will engage with or build upon a number of topics Maj. Montazzoli addresses in his work on the subject.

No-strike List: Administrative Classification "Largely Divorced" from Legality of Strike

The headline for the NYT article currently being assessed sets the stage for the tone of the narrative engineered in the substantive coverage: "A Dam in Syria Was on a 'No-Strike' List. The U.S. Bombed It Anyway." The ensuing coverage cultivates a depiction of a rogue, secretive U.S. special operations element bending – or perhaps breaking – the rules related to the use of force in order to accomplish victory against ISIS in Syria but, in doing so, jeopardizing civilians and doing so with impunity.

The central hook utilized to shape this carefully-cultivated portrayal is an emphasis on the fact that the Tabqa Dam was listed on the operational "no-strike list" at the time of the attacks. Maj. Montazzoli correctly observes in passing that a no-strike list is "an administrative classification largely divorced from the legality of a strike under international law" in his essay.

However, Maj. Montazzoli does not explain *why* that is since the focus of his analysis is compliance with international law rather than with administrative requirements. For present purposes, an explanation of the actual function and use of a no-strike list *is* central to assessing the validity of the narratives presented in the NYT story.

Characterization in Media Reporting of Airstrikes in the Context of Applying a No-Strike List

According to the media report, ISIS was using the dam and the surrounding area as weapons depot, command center, and fighting position. The NYT article notes that CENTCOM spokesperson Capt. Bill Urban described in a press briefing that "U.S.-backed Syrian Democratic Forces tried to take

control of the dam and came under fire from enemy fighters, taking 'heavy casualties.'" To support the SDF effort, the article notes that the coalition then "struck the dam."

The NYT story goes on to assert that attacking the dam, or other "key civilian sites on the coalition's 'no-strike list'" required "elaborate vetting and the approval of senior leaders." Instead, the article cites unnamed and unidentified "current and former military personnel" who reportedly claimed the "solution" to the "problem" of burdensome restrictions on the use of force that was developed by the secretive special operations element supporting the SDF "too often was to set aside the rules intended to protect civilians."

According to these unnamed "current and former military personnel," soon the special operations element "was justifying the vast majority of its airstrikes using emergency self-defense procedures…even when not troops were in danger" and this allowed the secretive task force "to quickly hit targets – including no-strike sites – that would have *otherwise been off limits*." (emphasis added) As the commentary presented by the journalists observes, "Perhaps no single incident shows the brazen use of self-defense rules and the potentially devastating costs more than the strike on the Tabqa Dam."

In a similar characterization, the NYT article likewise asserts that unidentified "former officials" who claim that because of the "dam's protected status, the decision to strike it would normally have been made high up the chain of command." However, according to these unnamed former officials, the special operations task force on the ground in Syria routinely "used a procedural shortcut reserved for emergencies, allowing it to launch the attack without clearance."

After noting that these "two former officials" claim that some *other* unnamed and unidentified "officers overseeing the air war viewed the task force's actions as reckless," the NYT story then transitions to remarks that *are* attributed to an identified source. Here, the article attributes to retired Air Force Colonel Scott F. Murray an observation suggesting, "Even with careful planning, hitting a dam with such large bombs would likely have been seen by top leaders as unacceptably dangerous." According to Col. (ret.) Murray, "Using a 2,000-pound bomb against a restricted target like a dam is extremely difficult and should have never been done on the fly."

With these characterizations of a task force routinely bypassing required procedures for approving attacks against otherwise protected objects thus in focus, what of the claim that the inclusion of Taqba Dam on the no-strike list should have required "elaborate vetting" and that the dam would have "otherwise been off limits" but the task force on the ground circumvented these constraints that are "intended to protect civilians" by "brazenly" abusing "self-defense rules"? Answering this question begins with a basic understanding of the actual purpose and operational use of a no-strike list.

Purpose and Use of a No-Strike List

The NYT story is correct to cite and link to the military publication known as Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3160.01A here, for this instruction establishes doctrinal policy related to "No-strike and the Collateral Damage Estimation Methodology" – as the name of the publication describes. The version linked in the NYT article was published in October 2012 and has since been superseded, though the current version – CJCSI 3160.01D of the same title – is only available for military and other selected government officials with an active Common Access Card.

However, for present purposes the guidance established in 3160.01A is adequate and has not changed substantially across the 3 successive updates.

The first task in assessing the characterization of a no-strike list depicted in the NYT story is to describe exactly what an NSL is and what it does. As the glossary to CJCSI 3160.01A summarizes, an NSL is simply a list of no-strike entities (NSE). No-strike entities, in turn, are described as objects that are "functionally characterized [by the law of war] as civilian and/or noncombatant in nature and, therefore are protected from the effects of military operations under international law and/or rules of engagement."

A no-strike list, then, is simply a catalog of known civilian objects within a given theater of operations. The catalog is collected in a Modernized Integrated Database (MIDB), which "is the vehicle to archive requisite data on" no-strike entities. The list is compiled by utilizing a standardized approval and development process, and each known NSE is assigned a standardized category code – or "CATCODE" – that summarizes its function as a civilian object. Incidentally, based on the description of Taqba Dam provided in the NYT story, the MIDB CATCODE for Taqba Dam was likely 43910, which is the code for concrete dams.

Because the structure can be described as a "dam or dike whose engagement may result in the flooding of civilian areas," Taqba Dam was almost certainly characterized as a "Category I" no-strike facility (which is a term used throughout the Instruction synonymously with no-strike *entity*). The "Category I" (or CAT I) no-strike facility/entity, in turn, is the group that "includes the most sensitive subset of NSFs addressed by the LOW, other international and domestic laws, and significant policy concerns." CAT I no-strike entities are further described as objects that "typically constitute the core of the" no-strike list.

Although the definitions of NSL and NSE both describe objects that are known to be protected from being made the object of attack pursuant to the law of armed conflict – a description that essentially summarizes the LOAC distinction rule since this is the central aspect of international law that is relevant for present purposes – why would Maj. Matt Montazolli assert that an NSL is "an administrative classification largely divorced from the legality of a strike under international law"? There are two processes that are also summarized in the glossary to CJCSI 3160.01A that help answer that question.

First is the "no-strike process," which is defined as the "process used to identify, analyze, verify, catalog, and disseminate information about entities that are to be protected from negative effects of military operations." Second is a term with broad application in the targeting process known as positive identification, or PID. As the glossary describes, PID "is defined as the reasonable certainty that a functionally and geospatially defined object of attack is a legitimate military target in accordance with the LOW and applicable ROE." As the next section related to practical application of the NSL explains, obtaining "positive identification" of adversarial ISIS personnel and equipment resulted in at least the temporary loss of protection that had been accorded to the Taqba Dam by virtue of its identified status as a civilian object during the no-strike process.

When applying basic rules of the law of armed conflict, the dam qualified as a military objective at the time of the airstrikes – and this is the case whether or not Taqba Dam had been identified during the no-strike process as a CAT I NSE at the time. As Maj. Montazolli observed, then, inclusion of the dam on the NSL genuinely is an administrative classification that is largely divorced from the

legality of the strikes. However, as the next section describes, an administrative process still guided the conditions under which the dam could be attacked even with the temporary loss of protected status. With the general purpose and use of a no-strike list thus in focus, characterizations presented in the NYT story of the way in which U.S. personnel reportedly skirted the rules involving no-strike entities in practice can be evaluated.

Practical Application and Loss of Protected Status

The analysis related to practical application of the NSL and no-strike process in general picks up with the assertion presented in the NYT story by two unnamed "former officials" that "[g]iven the dam's protected status, the decision to strike it would normally have been made high up the chain of command." According to the general rule established in CJCSI 3160.01A, this claim is correct. The same is true of the journalistic commentary observing that attacking an object listed on the no-strike list would have "required elaborate vetting and the approval of senior leaders."

The general rule established in the Instruction – for which there are two primary exceptions – is that a combatant commander "or authorized designee may approve the [no-strike] entity for attack" if the NSE is determined to be "used to advance military or hostile force objectives" as Taqba Dam was at the time of the strikes. Although the presence of a possible operational delegation from the combatant commander, here the head of U.S. Central Command, would be classified and therefore not generally known to the public, the general rule established by default in the Instruction certainly supports the characterization in the NYT article that approval for the strikes "would normally have been made high up in the chain of command." The paragraph that establishes the general rule in CJCSI 3160.01A goes on to refer the reader to a later section in the Instruction – a segment labeled "Change of Status – for further guidance.

The additional guidance in the "Change of Status" further clarifies that the "CCDR [combatant commander] or his/her designated representative is the only level of command authorized to change the status of" a no-strike entity unless "designated by a higher authority." Because combatant commanders are subordinate only to the Secretary of Defense and the president, these are the only two positions with "higher authority" to permit delegation below the combatant command level. According to the general rule, then, it is certainly accurate to observe that "elaborate vetting and the approval of senior leaders" would be necessary prior to attacking military objectives on Taqba Dam. However, the next paragraph of the "Change of Status" section in the Instruction provides two exceptions to the general rule.

The first exception occurs when "intelligence confirms the use of the NSE for a military purpose and the need to strike is time sensitive (whereupon it is nominated as a TST [time-sensitive target])." The second exception arises if "troops are in contact and taking hostile fire from traditional" no-strike entities. When either exception applies, the Instruction reverses the general rule requiring high-level approval for a change of status by establishing, "Unless this authority is expressly limited in SecDef-provided supplemental ROE [rules of engagement], *operational imperatives* and established ROE, including the inherent right and obligation of self-defense, provide the requisite authority to engage in these instances." (emphasis added)

NSL Exception #1: Time-Sensitive Targets

Based on these two exceptions to the general rule requiring combatant commander approval for a change of status, the factual background reported in the NYT article reveals that both exceptions applied and, therefore, "elaborate vetting and the approval of senior leaders" was not in fact required based on the prevailing circumstances prior to the airstrikes. The media story goes to great lengths in an attempt to cast doubt on a potential claim that the self-defense exception would have applied at the time. The self-defense characterization, therefore, is addressed in further detail below in the next section of this article.

However, guidance established in CJCSI 3160.01A, for which the NYT article provides a direct hyperlink when claiming that "elaborate vetting" was required prior to obtaining approval for the strikes, provides for an exception to the general rule that does not involve a self-defense engagement. The glossary of the Instruction goes on to define a time-sensitive target – for which the first of two listed exceptions applies – as a "target requiring immediate response because it is a highly lucrative, fleeting target of opportunity or it *poses (or will soon pose) a danger* to friendly forces." (emphasis added) There are a number of factual conditions presented *in the NYT story* supporting the conclusion that the dam qualified as a military objective (and had therefore lost protection as a no-strike entity) but *also* qualified as a time-sensitive target at the time that the airstrikes were approved.

As the NYT story describes, for example, the Taqba Dam was one of several "no-strike sites" being used by ISIS "as weapons depots, command centers and fighting positions." Indeed, the NYT article opens by noting that the dam was a "strategic linchpin" and that "the Islamic State controlled it." The factual depiction presented in the story further describes that ISIS "militants kept a small garrison in the dam's towers, where the thick concrete walls and sweeping view created a ready-made fortress." As the article notes, U.S. and coalition forces were aware that ISIS would need to be dislodged from Taqba Dam in part "to prevent the enemy from intentionally flooding allied forces downstream."

When describing the conditions that existed prior to conducting the airstrikes, the NYT article notes that "the U.S.-led coalition controlled the north shore of the reservoir and the Islamic State controlled the south" and that the "two sides had been in a standoff for weeks." The article then presents an observation from a spokesperson from U.S. Central Command, Capt. Bill Urban, who "said that U.S.-backed Syrian Democratic Forces tried to take control of the dam and came under fire from enemy fighters, taking 'heavy casualties.'" The next sentence of the NYT story glosses over any potential operational developments that may have occurred after the SDF took "heavy casualties" while trying to take control of the structure by concluding, "Then the coalition struck the dam."

Whether or not the prevailing factual conditions activated the self-defense exception to the general rule regarding vetting and senior-leader approval for a strike against a no-strike entity, then, the scenario presented directly in the NYT article unambiguously establishes that the exception involving time-sensitive targets *did* apply. That is, the dam qualified as a "target requiring immediate response" *both* because it was "highly lucrative" *and* because it posed (or soon would pose) "a danger to friendly forces." Indeed, yet another quote from Capt. Urban that is presented in the article, in which the spokesperson observes that the attacks "prevented ISIS from weaponizing"

the dam and that ISIS "would have inflicted further suffering on the people of Syria" if the insurgents had not been dislodged from Taqba Dam, further supports the TST characterization.

As such, applying the factual narrative presented in the NYT story to the guidance established in the Instruction for which the article provides a hyperlink refutes the claim made by the journalists that attacking the dam "required elaborate vetting and the approval of senior leaders." By virtue of qualifying as a time-sensitive target, strikes on Taqba Dam under these conditions would have been permitted based on the prevailing "operational imperatives" and would not have required approval from senior leaders – specifically the commander of U.S. Central Command. This is the case whether or not the other exception involving self-defense applies. Nonetheless, because the NYT story goes to great lengths to discredit a potential self-defense characterization, the next section continues the analysis involving application of the no-strike list by engaging with the requirements for self-defense strikes and how these are characterized in the NYT article.

NSL Exception #2: Self-Defense

The manner in which the journalists responsible for writing the story related to the attacks on Taqba Dam characterize invocation of self-defense rules by U.S. military ground units is consistent with one overarching theme that permeates recent NYT coverage of DoD targeting operations abroad. Ground forces are typically represented as shadowy, secretive special operations elements operating with little oversight while bending, or outright breaking, rules intended to safeguard innocent civilians – and then taking deliberate measures to conceal their activities and to cover up evidence when allegations of wrongdoing are levied against them. Depictions of these shadowy units routinely abusing rules permitting engagements in self-defense are one primary tool that is leveraged by the journalists to help shape this narrative, and the story involving the airstrikes at Taqba Dam abounds with such characterizations.

The first mention of self-defense rules presented in the story is offered near the beginning of the article in conjunction with the claim that attacking "a dam, or other key civilian sites on the coalition's 'no-strike list,' required elaborate vetting and the approval of senior leaders." After noting that ISIS "sought to exploit" rules designed to protect civilian objects by using "no-strike sites as weapons depots, command centers and fighting positions," the story cites unidentified "current and former military personnel" claiming that the U.S. military ground "task force's solution to this problem too often was to set aside the rules intended to protect civilians."

According to the story, "Soon, the [ground] task force was justifying the vast majority of its airstrikes using emergency self-defense procedures intended to save troops in life-threatening situations, even when no troops were in danger." Doing so reporting allowed the task force "to quickly hit targets — including no-strike sites — that would have otherwise been off limits." Consistent with this trend of purportedly abusing rules related to self-defense, the NYT story claims, "Perhaps no single incident shows the brazen use of self-defense rules and the potentially devastating costs more than the strike on the Tabqa Dam." After the journalists dedicate a significant portion of the article to supporting this characterization, the story claims among the concluding lines that even after the attacks on Taqba Dam, the "secret unit continued to strike targets using the same types of self-defense justifications it had used on the dam."

According to the narrative careful curated by the NYT journalists, then, the "secret unit" operating on the ground in support of the SDF in Syria routinely bypassed more exacting restrictions on the

use of force by providing a fraudulent self-defense justification for airstrikes. This was purportedly the case well before the airstrikes at Taqba Dam as well as long after, and during the entirety of the counter-ISIS campaign the attacks on the dam were perhaps "the most brazen use of self-defense rules" in order to circumvent more stringent constraints on the use of force. Just like the characterizations related specifically to implementation of the no-strike list described above, however, these claims presented in the NYT story do not constitute an accurate analysis of the actual relevant rules.

Although the story never does cite to or articulate actual rules involving the use of force in self-defense, the journalists do present a number of reflections that contribute to the narrative suggesting that the "secret unit" broke those rules on this occasion. Here, the article links to what it describes as a "military report obtained through a Freedom of Information Act lawsuit." The "report" is merely a two-page memorandum (with only one substantive sentence and a signature block on the second page) with the subject line that reads, "CIVCAS [Civilian Casualty] Allegation Closure Report, Allegation No. 1067, Raqqa, Syria, 26 March [20]20."

As the title suggests, this internal memorandum is not intended to present a detailed review of airstrikes on or around Taqba Dam. Rather, it is simply a report that provides a record demonstrating that the U.S. military received an allegation that an attack resulted in civilian casualties, that the allegation was evaluated, and ultimately determined to be "not credible" based on a review of available evidence. This summary memorandum closing the civilian casualty credibility assessment implements reporting requirements established by executive order as well as obligations established by statute.

Notwithstanding the inherently perfunctory purpose of this CIVCAS Allegation Closure Report, the journalists responsible for the NYT article utilize the memorandum as the foundation from which to develop several significant analytical assumptions. For example, although the primary substantive paragraph of the report is heavily redacted, the story points out that the term "terrain denial" is used in the memorandum – at least to describe an undetermined number of the three targets that were attacked in the relevant strikes. Relatedly, the story points out that the memorandum "makes no mention of enemy forces firing or heavy casualties."

Based on these observations, the NYT article presents analytical conclusions developed from two anonymous "former officials" who determine that allied forces "were not in danger of being overrun by enemy fighters" when the airstrikes were requested. Instead, according to these unidentified analysts, "the task force's goal was likely to preemptively destroy fighting positions in the towers." As a result, the "two former officials" reportedly conclude that "[l]aunching that type of offensive strike under self-defense rules was a stunning departure from how the air war was supposed to work." Unfortunately for the legitimacy of the conclusions presented in the NYT story, neither the facts that are presented in the article nor the actual existing military doctrine support the conclusions presented by the two former officials quoted in the article.

As an initial matter, it is impossible to extrapolate any analytical conclusions based on the use of the term "terrain denial" in the perfunctory memorandum. As U.S. Army judge advocate Maj. Matt Montazzoli correctly describes when explaining the issue of "terrain denial fires on the modern battlefield," this is a "non-doctrinal" term. Instead, it is utilized in a fairly colloquial manner in a number of different contexts in military fire support community. Because "terrain denial" is not a doctrinal term, it is impossible to determine the intent of the personnel who requested the air

support at the time of the strikes or the rules of engagement justification presented for the attacks. Likewise, there is no legitimate basis upon which the unidentified "former officials" to determine whether the goal of the personnel from the special operations task force "was likely to preemptively destroy the fighting positions in the towers."

Regarding the specific characterizations presented in the story related to rules for using force in self-defense, referring to actual existing doctrine reveals that the analysis offered by the journalists and two unidentified former officials is also not sustainable. Although classified operational ROE will expand upon foundational doctrine, guidance presented in the unclassified portion of the current Standing Rules of Engagement (SROE) establishes "fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all military operations…occurring outside U.S. territory."

The basic rule related to self-defense established in the SROE is that U.S. forces may use force "in response to a hostile act or demonstrated hostile intent," and this authorization extends to the defense "of designated non-U.S. military forces." The SROE goes on to define "hostile act" as "an attack or use of force" against U.S. or other designated forces and "hostile intent" as a "threat of imminent use of force" against the same. Regarding the ambiguous term "imminent" that is utilized in the definition of "hostile intent," the SROE clarifies that a "determination of whether the use of force against U.S. forces is imminent will be based on an assessment of all facts and circumstances known to U.S. forces at the time" and that the determination "may be made at any level." The SROE then clarifies, "Imminent does not necessarily mean immediate or instantaneous."

When the anonymous "former officials" conclude that mention of "terrain denial" fire support suggests that "allied forces were not in danger of being overrun by enemy fighters" when the airstrikes on Taqba Dam were requested, the conclusion not only rests on an erroneous characterization based on the non-doctrinal term "terrain denial," it also constitutes a fundamental misapplication of actual U.S. military doctrine. That is, self-defense rules of engagement do not require U.S. or partnered elements to be "in danger of being overrun" to allow for a self-defense ROE justification. If U.S. forces determined that ISIS fighters at Taqba Dam presented a "threat of imminent use of force," a self-defense attack would be justified *regardless* of whether U.S. or supported elements were "in danger of being overrun."

The factual conditions reported in the NYT story suggest that a self-defense engagement was, in fact, permissible. If CENTCOM spokesperson Capt. Bill Urban was correct when he claimed that the SDF had tried to take control of the dam and took "heavy casualties" after taking fire from enemy fighters, and assuming that the ISIS fighters were still present at the dam (which is apparent from the CIVCAS Allegation Closure Report linked in the story), it is reasonable to conclude that ISIS fighters at the dam presented a "threat of imminent use of force" against the SDF if the partnered forces did intend to try again to retake Taqba Dam. If so, the requested airstrikes would qualify for a self-defense engagement, regardless of whether U.S. or partnered forces were "in danger of being overrun" at the time.

As such, the claim offered by the unidentified former officials that "[l]aunching that type of offensive strike under self-defense rules was a stunning departure from how the air war was supposed to work" is categorically erroneous. Regardless of the specious conclusions presented from these unidentified officials, there is no information presented in the NYT article that would conclusively support an assertion that a self-defense ROE justification was unwarranted. Indeed, the

CIVCAS Allegation Closure Report memorandum linked by the story concludes that the attacks "complied with" the law of armed conflict and were "authorized under the relevant" rules of engagement. This is a conclusion that was reached by the reviewing official after a "thorough review of all available strike records."

In the end, nothing presented in the NYT story actually does support the claimed characterization that "[p]erhaps no single incident shows the brazen use of self-defense rules and the potentially devastating costs more than the strike on the Tabqa Dam." Nor do the airstrikes support the general narrative the journalists attempt to careful craft of a special forces task force that is out of control and that routinely abuses rules involving self-defense to justify otherwise unjustifiable attacks. If the "secret unit" indeed did continue "to strike targets using the same types of self-defense justifications it had used on the dam" as the journalists contend, there is nothing in the story to demonstrate that the airstrikes on Tabqa Dam or anywhere else actually did violate existing rules.

This may well explain why, as the anonymous "officials" reveal, "[n]o disciplinary action was taken against the task force" for claiming a self-defense justification for the airstrikes. Applying the reported facts to actual existing policy supports the conclusion that the requests for air support complied with rules involving the use of force, despite the concerted efforts undertaken by the journalists responsible for this story to demonstrate otherwise. As the concluding section of the Taqba Dam case study describes, these self-defense narratives seem to be part of a broader scheme to discredit official claims and replace them instead with narratives developed in the relevant media coverage – though these substitute narratives are themselves of questionable merit.

Calculated Efforts to Refute Official Claims – With Misleading Narratives

Characterizations purporting to present the abuse of rules related to the use of force in self-defense contribute to a theme curated throughout NYT coverage of airstrikes in Baghuz and on Taqba Dam of a "secret" special operations unit operating with minimal oversight and with minimal regard for the safety and wellbeing of any unfortunate civilians who may happen to be in the area. This perception contributes to the sense that additional oversight – perhaps from an entity external to the Department of Defense – is needed in order to keep these rogue elements in check where the DoD has seemingly demonstrated it is unable or unwilling to do so. However, this overarching theme of out-of-control secretive elements bending and at times breaking relevant rules supports a perception of arguably even wider importance.

In short, the nature of the media coverage seems to be calculated to create the appearance that claims presented from official sources are either ill-informed or perhaps even deliberately misleading. As such, according to the appearance created by the reporting, it is up to the trustworthy journalists in the independent media to uncover the truth and expose it to the public. While this is a theme that will be visited again in broader context below in the final analytical section of the article, it is also appropriate to close analysis of the Taqba Dam story on this note since the perspectives presented in the NYT article contribute to this plenary premise.

One conspicuous example of this ostensive trend of exposing the truth from among misinformed or misleading official claims is set up by the journalists' observation that a "senior Defense Department official disputed that the task force overstepped its authority by striking [Taqba Dam] without informing top leaders." Here, the NYT article notes that the military official "said the strikes were conducted 'within approved guidance' set by the commander of the campaign against

the Islamic State, General Townsend" and that there was "'no requirement that the commander [of CJTF-OIR] be informed beforehand.'"

This official claim is presented at the beginning of a thread of editorial analysis creating the appearance that, contrary to the official characterization, the strikes on Taqba Dam in fact were *not* conducted "within approved guidance." The article then presents details regarding one airstrike at the dam, an "unusual truce" between adversaries as attempts were made to repair damage to the control room, and then "another strike" on the dam. With the factual details of the airstrikes described, the story returns to commentary mode to claim that an anonymous former official "who reviewed the operation" recalled that unidentified "senior officials" at the "air operations center" (presumably the CAOC in Qatar) "were shocked to learn how the top secret operators had bypassed safeguards and used heavy weapons" while attacking Taqba Dam.

This commentary is presented as a contrast to the official characterization – that the airstrikes were conducted "within approved guidance." The impression that emerges is that the intrepid investigative journalists have discovered the truth behind the official claims and that the secretive special operations ground elements in fact routinely bypassed or circumvented rules established in the "approved guidance." Purportedly bypassing rules involving the no-strike process and abusing rules of engagement related to self-defense are the primary analytical tools on which the manufactured media narrative relies, along with persistent commentary derived from unnamed and unidentified "former officials."

However, it is the narratives crafted by the journalists and commentary routinely presented by the anonymous former officials that misrepresents existing rules involving the use of force. In the endeavor to discredit official claims, then, the media coverage distorts the *actual* law and policy and thereby "counters" the truth with misleading characterizations that are given the veneer of legitimacy. In reality, it is the coverage – and not the official claims – that are misinformed or duplicitous.

The same phenomenon emerges in the same article when the journalists attempt to discredit an official claim involving the airstrikes made by then-Lt. Gen. Stephen Townsend, who was the commander of CJTF-OIR at the time of the attacks. Early in the article, the NYT story presents a link to a transcript of a press conference at which Townsend claims, "The Tabqa Dam is not a coalition target." The NYT story presents the quote from the press conference by claiming Townsend "declared" it "emphatically *two days after* the blasts." (emphasis added)

The article next observes, "In fact, members of a top secret U.S. Special Operations unit called Task Force 9 had struck the dam using some of the largest conventional bombs in the U.S. arsenal." The commentary then continues to provide factual details about the strikes and describe that anonymous "former officials said the task force used a procedural shortcut reserved for emergencies, allowing it to launch the attack without clearance." The impression created, then, is that the official claim presented by Lt. Gen. Townsend – that the dam is "not a collation target" – is either uninformed or an outright lie. After all, Townsend did "emphatically" declare this two days *after* the attacks.

This characterization crafted in the NYT story is misleading, and perhaps even deliberately so. While it is true that Townsend observed during the press conference linked in the NYT article that Taqba Dam is "not a coalition target," it is clear from the entirety of his remarks that Townsend is aware that attacks had occurred at and around the dam. Likewise, a full accounting of his remarks

demonstrates further that he is not attempting to conceal the attacks by claiming the dam is "not a coalition target."

The *full* sentence reflected in the transcript of the press conference from which the reporters draw the partial quote reveals that Lt. Gen. Townsend observed, "The Tabqa Dam is not a coalition target and when strikes occur on military targets, at or near the dam, we use non-cratering munitions to avoid unnecessary damage to the facility." The reference here to non-cratering munitions likely alludes to bombs that are programmed with variable time fuzing to achieve an air burst detonation, which "mitigates blast and debris effects and eliminates penetration effects." Indeed, this seems to correspond with the claim presented in the NYT story from an anonymous "senior military official" that a B-52 dropped "bombs set to explode in the air above the targets to avoid damaging the structures."

The NYT article continues with the claim from the unidentified military official suggesting that when the bombs rigged with variable timing fuzes "failed to dislodge the enemy fighters, the task force called for the bomber to drop three 2,000-pound bombs, including at least one bunker-buster, this time set to explode when they hit the concrete." However, given that none of the bombs seemed to explode on contact and the NYT article describes that a "dud" was found "[f]ive floors deep in the dam's control tower" and two other bombs dropped "on the southern tower penetrated three floors down," it seems likely that these three bombs were fused not to detonate *at all* and, instead, to penetrate into the towers in an attempt to kill or incapacitate any ISIS fighters located there.

Because "non-cratering munition" is not a doctrinal term, it is difficult to determine precisely what Lt. Gen. Townsend meant when he claimed that these were dropped "at or near the dam." However, both a variable timed fuse rigged for an air burst and a "bunker buster" fused to penetrate on contact but not explode could be described as "non-cratering munitions." Although the NYT article notes that a "crater" could be seen from satellite imagery "in the concrete of the dam next to the head-gates" after the strikes, targeting jargon uses the term "crater" in a slightly different manner. In targeting vernacular, the term "cratering" is used in the context of debris that is ejected – or "crater ejecta" – when a bomb or missile explodes on contact with the ground. As such, a bomb that is fused not to explode on contact is described colloquially as a "non-cratering munition" because it is not expected to expel a significant amount of crater ejecta – even if it leaves a "crater" from penetrating into a building or tower on contact.

In any event, the NYT story does not present any evidence that would refute Lt. Gen. Townsend's claim that the dam was "not a collation target." Based on the entire sentence presented in the transcript of the press conference, it is clear that he is aware that the coalition has attacked targets "at or near" the dam. Likewise, there is no indication that he is attempting to conceal these attacks from public disclosure. By observing that the dam is not a target, Townsend appears to be indicating that the dam is not the object of attack. To the contrary, ISIS personnel and equipment are the "target" – even if they are located "at or near" the dam.

While the distinction between the dam itself and ISIS fighters at or near the dam may seem pedantic, there is a significant difference between the two both in practice and as a matter of international law. Pursuant to the law of armed conflict, the enemy personnel and equipment qualified as military objectives – defined as "any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." In

practice, endeavoring to destroy or neutralize the enemy personnel and equipment – the actual military objectives – calls for a much different operation than, say, destroying a major hydroelectric dam.

Every indication from the facts reported in the NYT article and from the actual official sources from which the story draws is that coalition forces made adversarial ISIS fighters and equipment the object of attack. Lt. Gen. Townsend, then, was not uninformed or intentionally deceitful when he claimed that Taqba Dam was "not a coalition target." It appears he was well aware that attacks had occurred "at or near" the dam, and his claim that the coalition took steps to "avoid unnecessary damage to the facility" and "to preserve the integrity of the dam because it's a vital resource for the people of Syria" is supported by the factual circumstances presented in the NYT article. Throughout the story involving the attacks on Taqba Dam, it is attempts by the journalists to cast doubt on official claims that are actually misleading – not the official characterizations themselves. As I describe below, this is a common characteristic in this line of so-called "accountability journalism" involving U.S. targeting operations abroad.

Part II: Consolidated LOAC and ROE Analysis for the Three Case Studies

[pulled intro for "pervasive misapplication" section. add and develop intro here]

To give shape to the contours of this plenary deficiency, it is useful to at least briefly summarize some of the rules involving the use of force that are primarily relevant to the scenarios that are the subject of NYT reporting examined above.

The primary reason it is so vitally important to at least briefly articulate relevant use of force obligations is that it is these rules that are actually applied by commanders in the military organization that is the plenary subject of the media coverage when determining what accountability measures are appropriate in the aftermath of a targeting operation. If the U.S. military as an organization truly is beset by an accountability crisis, as characterized by the media coverage presented in the three substantive case studies examined above, this systemic shortcoming must be demonstrated by applying factual scenarios to the legal and policy obligations that are actually evaluated by those with the responsibility to make "accountability" decisions in practice. Because the relevant NYT articles never do present formulations of legal and policy rules that actually apply in practice, the analysis conducted herein does so and, thereby, addresses one central deficiency of the media coverage.

The substantive analysis in the present section begins, then, by summarizing rules established in international law, specifically the law of armed conflict. Next, an overview of U.S. policy involving the use of force established in relevant rules of engagement and other doctrinal publications is presented. With summaries of applicable rules involving the use of force distilled from relevant sources of international law and U.S. military policy, these rules can be applied to the factual circumstances presented in the media coverage of the three case studies analyzed above. The conclusion that emerges from this analysis is that the depiction presented in the NYT stories of a military organization afflicted by an accountability crisis is not actually supported by the circumstances reported in the coverage. As such, it is reasonable to conclude that characterizations presented in the NYT reporting are fundamentally flawed – not the U.S. military targeting operations as the media coverage attempts to portray.

Summarized Articulations of Relevant International Law Rules

The first international law provision to be addressed here is the distinction rule, which is often correctly described as a "cornerstone" of LOAC. As the DoD Law of War Manual summarizes, the distinction rule in practice establishes that "combatants may make enemy combatants and other military objectives the object of attack, but may not make the civilian population and other protected persons and objects the object of attack." This articulation is based on a fundamental rule described in a multilateral treaty the United States has not ratified. Nonetheless, the U.S. government routinely recognizes the distinction rule as a component of customary international law and, as such, a rule that is binding on all countries – including the United States.

Proportionality is another central law of armed conflict rule, even though the actual formulation for the rule does not directly refer to the word "proportionality." In U.S. military parlance, applying the rule in practice is unnecessarily complicated because the same term – proportionality – is used in other contexts, such as a "proportionate" use of force in self-defense pursuant to the Standing Rules of Engagement or a "proportionate" attack in an economy of force connotation. Nonetheless, the U.S. military articulation of the actual LOAC proportionality rule is derived directly from a widely-ratified multilateral treaty. The basic articulation for the proportionality rule in the DoD Law of War Manual describes, "Combatants must refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive in relation to the concrete and direct military advantage expected to be gained."

The final law of armed conflict rule that is central to the analysis of the incidents described in the case studies examined in this article is the requirement to take feasible precautions in an attack. The feasible precautions rule, like the distinction and proportionality rules, is drawn from a multilateral treaty the United States has not ratified. Unlike the two LOAC rules summarized immediately above, the U.S. military articulation and application of the feasible precautions rule represents a fairly significant departure from the formulation presented in the multi-lateral treaty.

For present purposes, though, the basic articulation for the feasible precautions rule described in the DoD Law of War Manual is sufficient. That is, "Feasible precautions are those that are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations." As the Manual succinctly summarizes after presenting some factors relevant to the matter, determining "what precautions are feasible depends greatly on the context and other military considerations."

Summarized Articulations of Relevant Use of Force Policy Rules

Although binding obligations are established in international law, specifically here the law of armed conflict, service members are also required to comply with guidance established in military rules of engagement and other use of force policy during combat operations. The foundation for this guidance is the Standing Rules of Engagement (SROE), which establishes "fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all military operations…occurring outside U.S. territory…and outside U.S. territorial seas." While supplemental rules of engagement, which are typically classified and therefore not available to the general public, "allow commanders to tailor ROE for mission accomplishment during the conduct of DoD operations," the unclassified SROE establishes basic guidance upon which operational ROE build and expand. The foundational definitions and rules presented in the SROE, while basic and

not mission specific, are sufficient for present purposes of evaluating the general themes that are derived from the media coverage examined herein.

As the SROE observes, military members are required to comply with relevant LOAC rules during all "military operations involving armed conflict." The SROE, then, builds upon applicable aspects of international law, and operational ROE and any other relevant regulatory guidance further expand upon the requirements established in the SROE. In this progression of sources that establish the rules involving the use of force, it is international law that defines the categories of people and objects that qualify as military objectives that can be made the object of attack. The SROE and other regulatory guidance, in turn, establish the conditions pursuant to which military objectives can be attacked and the procedures for doing so based on the operational circumstances prevailing at the time of the proposed or actual attack.

The SROE establishes two broad categories of personnel who are determined to be adversarial to U.S. forces, along with the general conditions pursuant to which each category may be attacked. The first category – described as a "declared hostile force" – is defined as "[a]ny civilian, paramilitary or military force or terrorist(s) that has been declared hostile by appropriate U.S. authority." The SROE establishes that for this category, which is sometimes referred to as a status-based target in operational vernacular, U.S. forces "need not observe a hostile act or demonstrated hostile intent before engaging the declared hostile force."

In contrast, the second broad category permits military members to exercise "individual self-defense in response to a hostile act or demonstrated hostile intent" unless otherwise directed by an appropriate commander. As the analysis conducted in the Taqba Dam case study above explains, the SROE defines "hostile act" as an "attack or other use of force" against U.S. personnel and other persons or objects designated by operational ROE. The SROE further describes "hostile intent" as the "threat of imminent use of force" where "imminent…does not necessarily mean immediate or instantaneous."

Additional clarification in the SROE establishes that the "determination of whether the use of force against U.S. forces is imminent will be based on an assessment of all facts and circumstances known to U.S. forces at the time and may be made at any level." A potential target that qualifies for engagement on the basis of self-defense (which includes so-called collective self-defense pursuant to the SROE) is sometimes described as a "conduct-based target" in operational military vernacular. With these foundational components of LOAC and ROE in focus, the analysis transitions now to describe how these and other relevant rules involving the use of force apply in practice to the factual scenarios presented in the three case studies examined above.

Applying Fundamental Legal and Policy Rules Involving the Use of Force to Factual Scenarios Presented in Media Coverage

As the analysis presented above in the three specific case studies of NYT reporting examined herein suggests, narratives crafted in media coverage and presented to the public generally do not engage in a thorough and informed evaluation regarding whether U.S. military operations comply with relevant legal and policy obligations. There is, of course, no absolute need for media organizations to do so since journalists, editorial teams, and the consumers that constitute the intended audience of the media coverage have no actual responsibility for assessing compliance or making decisions related to pursing accountability for personnel who are involved in or otherwise responsible for

attacks conducted in armed conflict. Nonetheless, narratives involving legal and policy compliance – either by directly articulating purported rules or by referring to notions of accountability (or lack thereof) – represent one theme that connects and pervades all the media coverage examined above.

The analysis presented below in this section, then, provides what the media stories do not – an informed assessment of compliance with relevant legal and policy rules involved in the factual scenarios presented in each of the three case studies examined above. The evaluation of compliance with *actual* legal and policy rules is accompanied by an explanation of the ways in which the media coverage is itself fundamentally flawed in relation to each case study. Following the consolidated analysis related to legal and policy compliance, the present inquiry pauses to ponder whether this line of media coverage truly does represent "accountability journalism" as it is sometimes described before then transitioning to consider some implications of defective media narratives in the broader context of prevailing public and political discourse.

Kabul Drone Strike

Like nearly all attacks that occur during the conduct of hostilities in armed conflict, analysis regarding compliance with relevant LOAC rules related to the Kabul drone strike begins by considering the distinction rule. The analysis of nearly all targeting operations begins here because the rule constitutes the "cornerstone" of the law of armed conflict. Although the rule is never articulated in the relevant NYT media coverage, the DoD Law of War Manual summarizes the practical application of the distinction rule by observing that "combatants may make enemy combatants and other military objectives the object of attack, but may not make the civilian population and other protected persons and objects the object of attack."

Based on the factual scenario presented in the media coverage and from official sources, there is no question that the personnel involved in the Kabul drone strike complied with the LOAC distinction rule. That is, the "object of attack" was believed at the time to be a vehicle-borne improvised explosive device, or VBIED in contemporary military parlance, that was intended to be used in an attack against U.S. forces located at the Hamid Karzai International Airport in Kabul. Media and official sources alike reveal that the target was not, in fact, a VBIED, but both categories of sources demonstrate that the personnel involved in the attack were not aware of this factual condition at the time of the attack.

Nonetheless, U.S. military doctrine unequivocally requires that "any decision by any military commander, military personnel, or any other person responsible for planning, authorizing, or executing military action shall only be judged on the basis of that person's assessment of the information reasonably available to the person at the time the person planned, authorized, or executed the action under review, and shall not be judged on the basis of information that comes to light after the action under review was taken." This obligation to assess combat activities based on information reasonably available at the time rather than on the basis of information that comes to light afterward is sometimes described in military parlance as the "Rendulic rule." Because there is no question – even from the factual narrative presented in applicable media coverage – that relevant personnel believed the target of the Kabul drone strike to be a VBIED that qualifies pursuant to international law as a military objective. This was the "object of the attack" that was targeted by the relevant personnel, even though the car was correctly determined afterward not to actually be a VBIED. As such, the personnel unequivocally complied with the LOAC distinction rule.

Another significant factual condition that emerges from both media and official sources is that the personnel involved in the attack did not expect the attack to result in, to draw from the general description presented in international law, "loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof." As a shorthand for this description, U.S. military doctrine summarizes "incidental damage" as "damage to the civilian population and civilian objects." Whether the full LOAC description or the shorthand definition for "incidental damage" is adopted, there is no question based on the factual circumstances presented in media and official narratives that the Kabul drone strike does not constitute a violation of the LOAC proportionality rule.

This is the case because applying the proportionality rule requires an assessment of whether the incidental damage *anticipated* at the time of the attack was excessive in relation to the concrete and direct military advantage expected. As I have explained elsewhere when analyzing application of the proportionality rule in the context of the 2015 attack on the Médecins Sans Frontières trauma center by U.S. forces in Kunduz, Afghanistan, proportionality "is not relevant in the absence of at least some expected incidental damage – regardless of whether the collateral damage was, as a factual matter, 'disproportionate' in result." If personnel involved in or otherwise responsible for an attack do not expect that the engagement will cause any damage to civilian persons or property, as was the case with the Kabul drone strike, by definition there is no incidental damage *anticipated* at the time of the attack. As long as there was at least some modicum of military advantage expected, which was also the case with the Kabul drone strike, it is impossible for the incidental damage anticipated (which, in this instance is none) to be excessive in relation to the anticipated damage to civilian persons or property. This results in an irrefutable conclusion that the Kabul drone strike complied with the LOAC proportionality rule.

Turning next to an assessment of the LOAC requirement to take feasible precautions in the attack, the outcome of the analysis is, unlike for the distinction and proportionality rules, a matter of judgement. The factual record described in the first case study above, which is derived from both official and media characterizations, presents ample evidence to support the conclusion that the personnel involved in or otherwise responsible for the Kabul drone strike did comply with the feasible precautions rule. Receiving a credible intelligence report involving a potential VBIED but waiting to engage the target until additional information can be acquired, gathering and considering multi-source intelligence while observing the target vehicle for approximately 8 hours before the strike, deciding to attack the target while the vehicle was stationary in order to reduce the risk of injuring or killing civilians who happen to be passing by the moving target when it is attacked, striking the vehicle when the travel time for the perceived VBIED was just a few minutes from the suspected insurgent target of Hamid Karzai International Airport, and delaying the fuse on the Hellfire used in the attack in an attempt to limit the potential for inflicting damage on surrounding civilian infrastructure all constitute precautions that were taken to reduce the risk of incidental damage.

Whether any one of these measures, or all of them collectively, constitute *feasible* precautions is a matter of judgment. As U.S. military doctrine involving the practical application of the LOAC feasible precautions rule succinctly summarizes, "what precautions are feasible depends greatly on the context and other military considerations." While reasonable perspectives may differ, applying relevant aspects of the factual record described immediately above to "the context and other military considerations" involved with the Kabul drone strike adequately supports the conclusion

that the personnel involved in or otherwise responsible for the attack complied with the LOAC requirement to take feasible precautions in the attack.

Turning now to a brief evaluation of compliance with relevant aspects of the rules of engagement that are available to the public, the official narrative reveals that the attack was a "self-defense" engagement. This means the strike was not conducted against a "declared hostile force," which is sometimes referred to as a "status-based" target. Among the broad two categories of self-defense engagements, attacks in response to a "hostile act" or demonstrated "hostile intent," the former does not apply since the suspected VBIED had not engaged in an actual "attack or other use of force" at the time of the strike. In ROE terms, then, this leaves a self-defense strike in response to the perceived hostile intent of the suspected target as the sole available policy justification for the attack.

Recalling the summary of the standard established in the SROE that is described above, "hostile intent" exists when a target is perceived to be engaged in an "threat of imminent use of force" where "imminent…does not necessarily mean immediate or instantaneous." Rather, the assessment may be made "at any level" based on "all facts and circumstances known to U.S. forces at the time" of the attack. Because the explanation regarding the justification for the engagement that was presented by official sources indicates that the decision to strike was based on an assessment of an "imminent threat [the target vehicle] posed to our [U.S.] forces" and that the responsible personnel had an "honest belief that they were preventing an imminent attack on our [U.S.] forces and civilian evacuees," there is adequate information by which to conclude that the Kabul drone strike complied with relevant ROE requirements.

Although relevant LOAC and ROE provisions are not a central aspect of NYT media coverage involving the Kabul drone strike, characterizations related to "accountability" are a significant theme presented in the news stories. The LOAC and ROE provisions examined immediately above represent the standards for which personnel involved in or otherwise responsible for the attack are actually held "accountable" in practice. Based on these foundational requirements, the conclusion that relevant personnel complied with legal and regulatory obligations is reasonable. As such, there is no basis upon which to impose adverse personnel action in order to hold personnel involved in or otherwise responsible for the Kabul drone strike "accountable."

A central, fundamental flaw of NYT media coverage involving the attack is that it fails to present standards by which personnel are *actually* held accountable and it, instead, presents a distorted depiction of culpability to support the narrative that the strike is evidence of a "terrible track record" following "decades of failed accountability" in Afghanistan. The observations presented by family or close associates of those who were injured or killed in the attack, by Luke Hartig, John Sifton, or Senator Chris Murphy, among others, all contribute to the journalistic depiction of a failure of accountability. However, it is ultimately the media narratives, rather than official "accountability" mechanisms, that are fundamentally and irredeemably flawed.

Baghuz Strikes

Because media coverage of the airstrikes in Baghuz, Syria directly addresses a number of relevant provisions of LOAC and ROE, the second case study analyzed above likewise engaged with several pertinent legal and policy standards. However, in the current section presenting a consolidated analysis of LOAC and ROE compliance for the incidents that form the basis of each case study,

there are some relevant factors to consider here that are not directly addressed in the second case study above. As such, the LOAC/ROE analysis here is limited only to the specific factors that are not examined extensively above.

To begin the LOAC assessment, there is no question that the relevant personnel complied with the distinction rule. A contrary conclusion would require evidence that the attack was *not* directed against an identified military objective and/or ISIS fighters. Although an unnamed analyst reportedly asserted on mIRC chat that U.S. forces "dropped [munitions] on 50 women and children" in the attack, this anonymous characterization does not suggest that *only* "women and children" were present at the site of the attack.

Even the concern that was raised by the would-be "whistleblowers" indicating that the attack inflicted "disproportionate destruction and civilian deaths" does not indicate that *only* civilians were targeted. The official narrative indicates that the strike was directed against "ISIS positions" and "ISIS fighters that were engaged in attacks against SDF positions." This supports the conclusion that the personnel responsible for the attack complied with the LOAC distinction rule, regardless of whether incidental damage *resulted* from the strike and, if so, to what degree.

The primary issue related to LOAC that is raised by the narratives presented in the NYT media coverage involves application of the proportionality rule. This is the concern that was raised, for example, by "whistleblower" Lt. Col. Dean Korsak when he claimed in the message directed to the Senate Armed Services Committee that the attacks resulted in a "shockingly high" death toll. In this regard, the depiction developed in the media coverage supports the overall narrative that NYT reporting "revealed" a "legacy" of "*disproportionate* destruction and civilian deaths." (emphasis added) However, these depictions involving proportionality fundamentally misrepresent the manner in which compliance with the rule is actually evaluated in practice.

Like the evaluation related to the LOAC proportionality rule in the context of the Kabul drone strike describes above, the initial matter of assessing compliance requires a determination of the degree of incidental damage *anticipated* at the time of the attack. If no incidental damage was anticipated yet at least some modicum of military advantage was expected, the only supportable conclusion is that the attack complied with the LOAC proportionality rule. Like the Kabul drone strike, this is the case for the Baghuz airstrikes.

As the initial official account describes, the remotely piloted aircraft that was on station before the attack "was unable to discern any civilians in the area at the time of the SDF request." Likewise, the subsequent review of the strikes conducted by determined that the ground force commander responsible for the attack "repeatedly received confirmation that no civilians were in the strike areas." Regardless of whether the attack *resulted* in civilian casualties, which is a conclusion reached by both media and official accounts, the official findings indicate that the personnel involved in the strikes did not *anticipate* that incidental damage would occur.

That Lt. Col. Korsak assessed the civilian death toll to be "shockingly high" is of no consequence to the assessment of whether the strikes complied with the proportionality rule, nor is the apparent characterization that the strikes were "disproportionate" in result. The *result* of an attack is not outcome determinative when assessing compliance with the LOAC proportionality rule. The factual record developed in relation to the Baghuz airstrikes demonstrates that no incidental damage was anticipated at the time of the attack and some degree of military advantage was expected. As such,

the only supportable conclusion is that relevant personnel did, in fact, comply with the LOAC proportionality rule.

As with most attacks that occur in the course of an armed conflict, an assessment involving whether the strikes complied with the LOAC feasible precautions rule is a matter of judgement. In summarizing the findings of the initial investigation the day after the NYT first published a story about an purported coverup of a potential war crime, Capt. Bill Urban relays that the investigation determined the "appropriate steps were taken [by the element requesting the airstrike] to rule out the presence of civilians at the time of the strike." In the subsequent examination of the airstrikes, initial investigation, and "concerns and allegations made to the Department of Defense Office of Inspector General and to the media," Gen. Michael Garrett describes in the executive summary of his full review that he found "clear evidence that the GFC [ground force commander] demonstrated awareness and concern for CIVCAS [civilian casualties] and took steps to mitigate harm." Gen. Garrett also determined that "multiple efforts to distinguish civilians from ISIS were made" prior to the attacks. Details developed from both the initial investigation and the subsequent review, then, support the conclusion that personnel involved in the attack complied with the LOAC feasible precautions rule – even if reasonable perspectives may well certainly differ regarding whether the measures taken were adequate in this regard.

Although the primary focus of the analysis conducted in relation to the second case study above focuses primarily on the allegation of a potential war crime and ensuing coverup, characterizations presented in NYT reporting involving the Baghuz airstrikes contributes to the general narrative suggesting that "secretive" special operations ground forces routinely abuse self-defense rules of engagement to circumvent more stringent requirements associated with status-based targets. The primary example depicted in the initial NYT story about a supposed war crime and coverup presents a characterization provided by three unnamed "people who viewed the footage" of the attacks. These unidentified sources claim the footage reveals that some people at the site "have rifles but do not appear to be maneuvering [or] engaging coalition forces or acting in a way that would seem to justify a self-defense strike with 2,000-pound bombs." Like the self-defense characterizations that feature even more prominently in the NYT story involving the airstrikes on and around Taqba Dam, this purported standard is not consistent with actual self-defense requirements established in the SROE.

As described above, the definition for "hostile intent" established in the SROE requires a determination that the target presents "a threat of imminent use of force" against "U.S. forces or "other designated persons." There is no requirement that the target must "appear to be maneuvering" or "engaging coalition forces" in order to "justify a self-defense strike." The unattributed claim to the contrary from three unnamed sources described in the NYT story represents a fundamental mischaracterization of actual existing ROE requirements.

This conclusion presented herein is likewise supported by both the description of the initial investigation presented by Capt. Urban and the executive summary of the ensuing review by Gen. Garrett. According to the statement attributable to Capt. Urban, the initial investigation found that "an SDF position under heavy fire and in danger of being overrun called for defensive airstrikes on ISIS fighter positions" on the day of the attack. In the executive summary of his subsequent review, Gen. Garrett describes the factual determination that, on the day of the airstrikes, ISIS "launched a successful counterattack against" the SDF and, in response, the SDF requested defensive Coalition

air support." According to Gen. Garrett, the U.S. military ground force commander "responsible for support validated ISIS' hostile act/intent" prior to authorizing "supporting airstrikes."

Although the initial NYT story asserts that "law of armed conflict — the rule book that lays out the military's legal conduct in war — allows troops in life-threatening situations to sidestep the strike team lawyers" by providing a self-defense justification for the attack, the media coverage mischaracterizes applicable LOAC rules and relevant ROE provisions in constructing this narrative. The law of armed conflict does not address in any manner whatsoever the conditions pursuant to which troops may "sidestep the strike team lawyers" in seeking approval to engage in an attack. Procedures related to justifying and approving an attack are established in ROE and related use of force policy, not in the law of armed conflict.

Likewise, the rules of engagement do not require a "life-threatening situation" in order to "sidestep" more stringent requirements related to status-based targets. While it is worth noting that the ISIS fighters targeted in the Baghuz airstrikes likely qualified as a "declared hostile force" pursuant to classified operational rules of engagement, official sources have also repeatedly determined that the justifications presented for the relevant Baghuz airstrikes are consistent with the self-defense provisions of the applicable rules of engagement. This determination has been reached by multiple official sources following a review of all available evidence and when applying actual standards established in the ROE, notwithstanding the unattributable conclusions to the contrary described by unnamed sources in media reports while presenting erroneous descriptions of the law of armed conflict and the rules of engagement.

Taqba Dam

Like the media coverage related to the airstrikes in Baghuz, the primary NYT story addressing the attacks on and around Taqba Dam incorporates claims related to LOAC and ROE compliance directly into the central narrative of the article. This sets coverage involving the Baghuz and Taqba Dam attacks apart from the Kabul drone strike, for which "accountability" is a central theme but explicit characterizations related to LOAC and ROE compliance is not. As such, examining the depictions presented in media coverage of the Taqba Dam attacks here in the consolidated LOAC and ROE compliance section can focus primarily on aspects not directly addressed in relevant NYT articles, as does the corresponding assessment of coverage related to the Baghuz strikes presented immediately above.

Starting with the cornerstone of LOAC analysis, there is no question that the attacks complied with the distinction rule. That is, the attacks were directed against ISIS personnel and equipment located in, on, and around Taqba Dam. This is apparent even from the factual narrative presented in the primary NYT story, which describes that ISIS "militants kept a small garrison in the dam's towers, where the thick concrete walls and sweeping view created a ready-made fortress." The article also includes an assertion from CENTCOM spokesperson Capt. Bill Urban describing that the "mission, and the strikes that enabled it, helped return control of the intact Tabqa Dam to the people of Northeast Syria and prevented ISIS from weaponizing it." These factors derived directly from the primary NYT story involving the strikes on Taqba Dam demonstrate that the attacks were directed against persons and objects determined to be military objectives. As such, the strikes complied with the LOAC distinction rule.

As the analysis presented in the third case study above describes, the U.S. interpretation of international law involving attacks on dams and other structures dictates that a standard LOAC assessment be conducted. This interpretive policy affects, among others, application of the proportionality rule. That is, the standard process of identifying the anticipated incidental damage and determining whether it is excessive in relation to the concrete and direct military advantage expected applies to a dam that is being used for adversarial purposes just like any other military object.

Although there are no details *explicitly* addressing the LOAC proportionality rule apparent in either the media or official narratives involving the strikes on and around Taqba Dam, some points that are raised in both can at least inform the analysis related to the proportionality rule. Regarding the military advantage expected from attacks aimed at forcing ISIS to abandon the dam, the introduction to the primary NYT article offers a succinct summary: "The Tabqa Dam was a strategic linchpin and the Islamic State controlled it." Combined with the observation by Capt. Urban that the purpose of the overall mission was to "return control of the intact Tabqa Dam to the people of Northeast Syria and [to prevent] ISIS from weaponizing it," the military advantage expected from attacks directed against ISIS personnel and equipment in, on, and near Tabqa Dam is readily apparent.

Like the assessment of the potential military advantage expected from the attacks on and near Taqba Dam, the incidental damage anticipated from the airstrikes can only be inferred through circumstantial evidence. However, the commitment described by Capt. Urban to returning control of the "*intact* Tabqa Dam" (emphasis added) to the local population combined with the fact that ISIS was ultimately removed from the area while control of the intact – rather than destroyed – dam was indeed returned to the populace suggests that measures were implemented to mitigate the incidental damage anticipated from the attacks. Similarly, the progression from an attempted but ultimately unsuccessful mission by the SDF to seize the dam using only an offensive by land to utilizing air burst munitions and eventually to non-cratering munitions suggests that measures were adopted to limit the incidental harm anticipated throughout the operation to clear ISIS personnel and equipment from the dam.

For a proper LOAC analysis, of course each specific attack must be individually evaluated for compliance with the LOAC proportionality rule. However, this progression of force used in the operation constitutes at least circumstantial evidence that the incidental damage anticipated from each attack was evaluated along with the expected military advantage that is itself apparent from the factual circumstances presented in media and official narratives. As long as the incidental damage anticipated from each individual attack was not excessive in relation to the rather considerable apparent military advantage of expelling ISIS fighters from the "strategic lynchpin" (as described by the NYT article) and preventing ISIS from weaponizing the dam (as described by Capt. Urban), each attack would comply with the LOAC proportionality rule.

The same factors that inform the proportionality assessment are also relevant to the analysis related to the LOAC feasible precautions rule. Just like almost any attack conducted in the course of an armed conflict, the conclusion regarding whether any precautions taken were adequate is a matter of judgement. Progressing from a ground assault that could limit the potential for harm to the dam if successful to then using air burst munitions and then to non-cratering munitions indicates that precautions were taken to limit the risk of incidental harm that may ultimately result from operation to expel ISIS from the dam. While the determination regarding whether these precautions were

adequate is a matter of judgement, the factual record developed from media and official sources is sufficient to support a conclusion that the attacks complied with the LOAC feasible precautions rule.

Turning then to an analysis of ROE compliance, it is quite likely that the ISIS personnel targeted in, on, and around Taqba Dam qualified as a "declared hostile force" pursuant to classified operational rules – as is the case for the Baghuz airstrikes. Also like the Baghuz strikes, the known factual record regarding the Taqba Dam attacks suggests that the strikes against the ISIS fighters targeted at Tabqa Dam qualified for designation as collective self-defense as well. An adequately comprehensive analysis related to application of the ROE, particularly regarding the self-defense provisions of the SROE, is conducted above in the third case study since ROE compliance is a central aspect of the media story that primarily engages with the attacks.

For present purposes of the consolidated analysis regarding ROE compliance, it is sufficient to recall two germane details that emerge from the NYT article that presents primary coverage of the attacks. One important aspect is the observation reportedly provided by CENTCOM spokesperson Capt. Bill Urban that SDF forces suffered "heavy casualties" after receiving heavy enemy fire while attempting to retake the dam in a ground assault. The second significant detail is the report that ISIS had established a "small garrison" at the dam that served as a "ready-made fortress" for the insurgent group.

Applying these details to relevant provisions of the SROE supports the conclusion that the airstrikes on the dam qualified for designation as self-defense – here, "collective" self-defense specifically. The ISIS fighters in the "small garrison" at Taqba Dam had already engaged in an "attack or other use of force" against the SDF, which took "heavy casualties" as a result, which meets the definition for "hostile act" established in the SROE. Likewise, it is reasonable to conclude that ISIS fighters in the "ready-made fortress" represented a "threat of imminent use of force" against the SDF, where "imminent does not necessarily mean immediate or instantaneous," such that the "hostile intent" provision of the SROE applied.

Because the classified operational ROE almost certainly included the SDF as "designated non-U.S. military forces" under the circumstances, U.S. military forces were presumably permitted to use force in "collective self-defense" – in SROE terms – on behalf of the SDF. If ISIS committed "hostile acts" by attacking the SDF or demonstrated "hostile intent" against the SDF, as the reported facts indicate, the attacks against ISIS on and around Taqba Dam qualified as "self-defense" engagements pursuant to the ROE. By neglecting to describe the actual doctrinal provisions of law and policy that applied to the series of attacks conducted by U.S. forces on behalf of the SDF and failing to apply the reported facts to these actual legal and policy provisions, the NYT story detailing the airstrikes on Taqba Dam presents a distorted and unapprised account of compliance with requirements that apply to the use of force in practice. In this regard, of course, the coverage of the fight for Taqba Dam is not alone.

Pervasive Misapplication of Targeting Rules in NYT Reporting, Not in Airstrikes

Although the media coverage examined in the three substantive case studies in Part I above and in the consolidated LOAC/ROE analysis here in Part II is a central component of a series of New York Times reporting on "airstrikes gone wrong," it is actually the reporting itself that has "gone wrong" in a number of aspects that, taken together, lead to a fundamentally flawed representation of the

purported defects in targeting and accountability processes supposedly exposed by the coverage. Chief among the deficiencies in the reporting that permeates the coverage is a persistent mischaracterization of the law and U.S. military policy related to the use of force in armed conflict. This is a central theme that emerges throughout the NYT stories examined in the three substantive case studies above.

For coverage of the Kabul drone strike, the primary plenary deficiency in the reporting is failing to describe standards by which military commanders hold personnel accountable for conduct in armed conflict while instead presenting anecdotal perspectives provided by sources to whom journalists turn for commentary. Whether from family members and close associates of those killed in the attack, analysts such as Luke Hartig and John Sifton, or legislators such as Sen. Chris Murphy, no source represented in the reporting presents doctrinal standards by which accountability measures are evaluated in practice. This flaw in the reporting allows media coverage to construct a narrative suggesting that the attack is part of a systemic and persistent pattern of failures by the U.S. military to hold personnel to account for targeting mishaps in armed conflict.

The fundamental flaws represented in coverage of the attacks in Baghuz and on Taqba Dam are slightly different but no less significant. For both stories, the coverage *does* present source assertions that address various provisions of applicable law and policy. However, the characterizations related to LOAC and ROE compliance distort the relevant provisions of law and policy. Unfounded assertions from Lt. Col. Dean Korsak and Mr. Gene Tate of a war crime and subsequent coverup presented in the Baghuz coverage and non-doctrinal characterizations from various unnamed sources claiming "secretive" special operations forces routinely misrepresented self-defense rules to circumvent restrictions on the tactical use of force portrayed in coverage both of the Baghuz and Taqba Dam attacks combine to create the appearance that the U.S. military is unwilling or unable to enforce applicable standards and rules. However, named and anonymous sources alike mischaracterize or misrepresent the doctrinal sources that actually apply in practice in support of the "accountability gap" narrative.

Consequently, the actual fundamental and systemic flaws exist in media coverage of U.S. military operations abroad rather than in the targeting processes and accountability determinations that are the subject of the reporting. As the first substantive section following the introduction to Part III below reveals, this systemic failure in relevant media coverage transcends the three case studies examined herein and is indeed not limited to NYT reporting alone. With systemic flaws in high-profile media coverage rather than in actual targeting and accountability processes revealed, situating the reporting in the broader context of public discourse requires a critical assessment of the ways in which distorted media coverage is utilized to support the agendas of advocacy groups and legislators seeking systemic changes to U.S. military operations. This is the primary task of Part III below.

Part III: Situating the Substantive Analysis in the Broader Context of Public and Political Discourse

With the substantive analysis of the three case studies examined complete, the present inquiry transitions now to address a number of common themes that emerge from across this line of reporting and to situate the present inquiry in the broader context of current public and political

discourse. Although specific limitations inherent in media coverage emerge in the individual case studies conducted above, several important themes that are common to the coverage in general are inevitably obscured when the analytical aperture is narrowed to focus on one specific case study as does the substantiative analysis above. Likewise, the broader context in which the present inquiry is situated falls out of focus when the analytical lens is adjusted to examine individual groupings of media coverage. The analysis in Part III, then, aims to bring these broader themes adequately into focus.

In the first section of Part III, media coverage analyzed in the case studies above is considered collectively along with similar examples of high-profile reporting involving military combat operations to bring focus to the inherent limitations that exist when reporters pursue "accountability" journalism in this context. The subsequent section broadens the analytical aperture to evaluate ways in which advocacy groups routinely exploit public scandal ignited by high-profile media coverage to support organizational objectives. Doing so brings focus to an assessment of why these organizations have been largely unsuccessful in the effort to convince officials in the Department of Defense to implement recommendations that reinforce the organizational objectives of relevant advocacy groups. The final section in Part III then considers the role of Congress in partnering with advocacy groups that lobby lawmakers to pass legislation in support of organizational objectives in response to unsuccessful attempts to convince DoD officials to implement recommendations presented by the groups.

As the analysis below demonstrates, scandal sparked by systemically flawed high-profile media coverage is an essential ingredient in the narratives that fuel reform agendas pursued by advocacy groups and legislators alike. If the apparent accountability gap "exposed" by flawed media coverage has distorted public perception of existing deficiencies in U.S. military operational processes, the "solutions" in the form of recommendations presented by civil society groups and now being considered in Congress must be reevaluated. That reevaluation begins by assessing whether media coverage that has inspired and fueled demands for reform truly represents "accountability journalism" as it is often characterized in public discourse.

"Accountability" Journalism at Its Best, or "Gotcha" Journalism at Its Worst?

The substantive analysis of the case studies explored above reveals systemic deficiencies that exist in the collection of high-profile media coverage featured in the critical assessment conducted in the present work, though these shortcomings should come as no surprise given the nature of external journalistic reporting on inherently internal and specialized operational and accountability processes. Military decision makers are trained and advised by a cadre of lawyers who specialize in the law and policy involving the use of force before and during most combat operations, and experienced judge advocates (in U.S. military vernacular) likewise directly advise investigating officers and commanders alike regarding options for pursuing accountability after targeting mishaps occur. In the process – before, during, and after engagements – decision makers and their supporting legal advisors have access to a degree of information that is neither possible nor advisable to be divulged to the general public.

External media coverage of combat operations from outside the military, often long after an incident occurs, benefits from none of this – and the journalistic product predictability bears the marks of that deficiency. Failing to articulate standards by which military officials actually assess individual responsibility while instead depicting an unfounded narrative of a systemic accountability gap is to

be expected, as is the case for NYT coverage of the Kabul drone strike, from non-specialist journalists who rely on external analysis from experts with access to only the degree of information that is available to the public and who bring their own agendas and biases to the commentary represented in the reporting. Crafting a narrative suggesting commission of a serious war crime and subsequent coverup when even the basic factual record reported in the media coverage indicates that the attack actually complied with applicable provisions of law and policy, as is the case for the Baghuz strikes, is to be expected for the same reasons. The same is true of the journalistic narratives developed in coverage of the attacks on and around Taqba Dam, as the substantive analysis above demonstrates that, in fact, procedures involving application of the "no-strike list" did not apply to the attacks under the circumstances and that the self-defense provisions of the applicable ROE likely *did* apply in reality.

Although the critical assessment of journalistic reporting conducted in this article focuses on these three case studies in particular in order to lend structure to the analysis, these examples of distorted accountability narratives depicted in high-profile media coverage are certainly not alone. Investigative reporter Azmat Khan has composed a number of high-profile NYT stories that distort the actual legal and policy provisions that apply to the conduct of hostilities while developing narratives reflected in her reporting. Revealing potential discrepancies between official assessments and actual incidents of civilian casualties, as Khan's reporting related to U.S. military operations routinely does, is an effective journalistic angle that produces information that is valuable to official and public sources alike. However, in developing the editorial narratives that support this important reporting, Khan routinely distorts the standards by which personnel involved in combat operations are held to account.

Distorted Accountability Narratives Presented in "The Civilian Casualty Files

In Part I of a NYT story described as "The Civilian Casualty Files," for example, Azmat Khan presents the findings of an investigative journalism project that examines "more than 1,300 reports of civilian casualties, obtained by The New York Times." As Khan describes in the story, the investigative "reporting offers the most sweeping, and also the most granular, portrait of how the air war [in Iraq and Syria] was prosecuted and investigated — and of its civilian toll." After visiting more than 100 sites of attacks that potentially resulted in civilian casualties, the central theme that emerges from the story is vitally important. At its foundation, the media coverage describes that "the reporting [conducted by the team of investigative journalists] closely matched basic information from the documents" obtained by the Times, yet "the detailed accounts that ultimately emerged from the rubbled ground were often in stark contrast to what had been assessed from the air."

If the journalistic narrative and commentary is stripped out of the article, from an operational perspective there are three central and significant lessons that emerge from the reporting. One is that official estimates of civilian casualties are not precise and may vastly underestimate the toll of military operations on the civilian population. This should come as no surprise, as official accounts do not purport to present a complete and accurate depiction of the civilian casualties that may result from the conduct of hostilities. Central Command spokesperson, Capt. Bill Urban, alludes to this phenomenon in quotes presented in the media story when he observes that official investigators are often unable to interview "personnel on the ground" even though the military does "the best we can, given the circumstances, to understand fully the effects of our operations and the harm done to innocent life." The media coverage does not break new ground in this regard, but it does reinforce

an important lesson: developing a comprehensive depiction of the toll of armed conflict on the civilian population is nearly impossible, and official accounts almost certainly underrepresent that toll.

A second important lesson that emerges from reporting on the "civilian casualties files" from an operational perspective is that the military should develop effective strategies to better identify factors that contribute to unintended civilian casualties in order to learn lessons from such engagements and thereby improve the targeting process in general. To this end, the coverage presents an excerpt from a Department of Defense Inspector General report that finds "feedback to subordinate commands on the cause and/or lessons learned from a civilian casualty incident is inconsistent." This is a lesson that resonates with the present author, as I identified this as a persistent challenge as an operational law advisor while deployed to Afghanistan and consequently developed specific methods by which the targeting community in the regional command to which I was assigned could improve the process of providing "feedback to subordinate commands" on lessons learned from targeting mishaps. While I do not endorse or fully agree with the specific prescriptions suggested in a recent Lawfare blog post by Ben Waldman and Michel Paradis to address the deficiency, the authors do, correctly by my assessment, identify "poststrike audits" as an area of improvement for DoD targeting processes. The need to improve "poststrike audits" and better use the information developed therefrom to learn and implement lessons that can enhance the effectiveness of operational targeting processes resonates with me and many former colleagues with experience providing legal advice to decision makers in armed conflict to whom I have spoken, and this challenge is reflected in Azmat Khan's reporting on the civilian casualty files.

A third lesson that is less apparent from the reporting but no less important is that strategic-level messaging involving the conduct of combat operations needs to be fundamentally reassessed and reimagined across the Department of Defense. While it may well be true that current technology allows for extraordinarily precise airstrikes and that the protection of civilians is a priority for the U.S. military, these talking points should be abandoned entirely in strategic level messaging. The current focus on these two points of emphasis is counterproductive since targeting mishaps still routinely occur despite precision strikes and attempts to avoid civilian casualties.

This phenomenon is apparent from comments from a source that are reported in the main story involving the civilian casualty files. Throughout the article, Azmat Khan presents commentary from Larry Lewis, a former Pentagon and State Department adviser. Near the end of the article, Lewis recalls his impression that the level of destruction in Raqqa, Syria after ISIS was defeated there appeared substantially similar to the devastation that was inflicted by Syrian and Russian forces in the fight against rebel insurgents in Aleppo. The article quotes Lewis's reflection revealing, "Eventually I stopped saying that this was the most precise bombing campaign in the history of warfare. So what? It doesn't matter that this was the most precise bombing campaign and the city looks like this."

While my own perspectives diverge significantly from those of Larry Lewis that are reflected in his scholarship involving the topic of civilian harm mitigation, on this account I enthusiastically agree with Mr. Lewis. It actually does *not* matter how precise a bombing campaign is if a populated area is reduced to rubble during the fighting, but rigorously applying fundamental rules of the law of armed conflict during the campaign is arguably what distinguishes the conduct of the U.S. military in Raqqa from that of Syrian and Russian forces in Aleppo. This needs to be the sole focus of strategic level messaging for the U.S. government: American military forces rigorously comply

with international legal obligations and internal policy requirements during targeting operations, and these establish the standards to which servicemembers are held accountable after an attack.

Departing from this messaging invites unwarranted criticism to which there is no legitimate response since the resulting condemnation becomes centered on the *outcome* of the attack rather than the *process* that led to the attack. Presenting two rhetorical questions here may be useful to illustrate this point: "If the technology supporting these attacks is so precise, why do targeting operations still kill civilians anyway?"; and "If the military places such an emphasis on protecting civilians, why is no one ever held accountable when civilian casualties occur?" There is no way to adequately address these two rhetorical questions since legal and policy provisions that apply to targeting operations are centered on the process that led to an attack based on the information that was reasonably available to those responsible for an operation at the time of the attack, whereas the only way to respond to the two rhetorical questions presented here is to focus on the outcome of the attack.

This phenomenon is apparent throughout Azmat Khan's reporting involving the civilian casualty files. As the subheadline claims at the beginning of Part I of the story, "The promise was a war waged by all-seeing drones and precision bombs. The documents show flawed intelligence, faulty targeting, years of civilian deaths — and scant accountability." As I described at the beginning of the current subsection, the basic premise of this reporting is incredibly important in informing both military and public perspectives: that official estimates quite likely vastly underestimate the toll of armed conflict on the civilian population. Again, this is not a novel revelation since official estimates do not *purport* to present an accurate estimate – though the reporting by Khan and her team brings that toll into sharp focus in a manner that is truly worthy of the accolades bestowed upon the team.

What is *not* warranted, though, is the theme of "scant accountability" that pervades this collection of reporting along with the other media representations analyzed herein. While the intrepid reporting of the NYT journalistic team often reveals that official reports erroneously conclude that an attack did not result in damage to civilian persons and property, the methodology adopted by the investigative journalists is simply not achievable or sustainable by military sources. As the article describes, the team "visited more than 100 casualty sites and interviewed scores of surviving residents and current and former American officials." This is undoubtedly dangerous work for investigative journalists, but for the DoD each one of those site visits would constitute a combat operation that would endanger military personnel and the surrounding civilian population that could be adversely affected by attacks directed against military personnel conducting a site visit alike.

Relatedly, there is certainly room for the DoD to improve what Ben Waldman and Michel Paradis refer to as "poststrike audits," but this current deficiency has almost no impact on existing accountability processes. That is because a "poststrike audit" is centered on the outcome of the attack, whereas actual accountability determinations are developed based on the process involved in an attack. Strategic messaging emphasizing that "even with the best technology in the world, mistakes do happen" and that the military works "diligently to avoid" harm to the civilian population, as Central Command Capt. Bill Urban is quoted as claiming in the article, invites a counter-representation that distorts the law and policy involved in targeting operations. Emphasizing instead *only* that military personnel stringently apply rules established in relevant law and policy and that these are the standards by which personnel are held to account would shift the

focus back to where it belongs: the process that led to an attack and the information that was reasonably available to personnel at the time.

Instead, the narratives developed by Azmat Khan in the primary article covering the civilian casualty files paint a picture of "scant accountability." On one occasion near the beginning of the story, Khan claims the civilian casualty files reveal that "despite the Pentagon's highly codified system for examining civilian casualties, pledges of transparency and accountability have given way to opacity and impunity." To support this characterization, she notes that not "a single record provided includes a finding of wrongdoing or disciplinary action." Later in the story, in a section entitled "Failures of Accountability," Khan emphasizes that "no record of disciplinary action" is noted in the files she and her team examined and that "only a quarter included any further review, recommendations or lessons learned." Again, the latter observation implies that the process of "poststrike audits" – as Ben Waldman and Michel Paradis describe them – could be improved.

This revelation, however, has almost no bearing on accountability processes – and it does not support the journalistic narrative of "Failures of Accountability" being developed by Azmat Khan here. Simply put, personnel are not held "accountable" for the outcome of an attack. That not "a single record provided includes a finding of wrongdoing or disciplinary action" should come as no surprise – primarily because Khan and her team were investigating files that were used internally in the DoD to assess the credibility of a claim of civilian casualties. A claim that civilian casualties resulted from an attack is centered on the *outcome* of the attack after a strike has occurred. In the exceedingly unlikely event that there were any indication suggesting personnel may have deliberately targeted civilians, for example, a separate investigation would be convened and the results would not be reflected in a CIVCAS incident report.

Nonetheless, the narrative involving "scant accountability" developed by Azmat Khan in this article is part of a general trend in media reporting – depicting a seemingly systemic "failure of accountability" without describing or applying the standards by which personnel are actually held to account. The three case studies examined in Part I and Part II of this article exhibit the same tendency to craft a narrative depicting an apparent accountability gap that is developed based on the outcome of an attack. As the analysis turns now to demonstrate, these examples of investigative reporting are part of a trend among journalists to focus with seemingly obsessive zeal on accountability based on facts that emerge after targeting operations. The narratives that emerge make it reasonable to question whether anyone is holding the journalists involved in this particular brand of accountability journalism to account for the distortions in public perceptions that result from the media coverage they purvey.

Assessing "Accountability" Characterizations Expressed by Reporters During Official Press Briefings

Although the subheadline for Azmat Khan's central NYT story covering the "civilian casualty files" suggests that U.S. military targeting operations are beset by "scant accountability," the deficiencies revealed above in the analysis of that article and of the case studies examined herein reveals that the brand of "accountability" journalists construct in media narratives does not reflect standards by which personnel are actually held to account for conduct that occurs in armed conflict. In the prevailing version of media accountability, a failure to impose adverse action on personnel based on the *outcome* of an attack that results in unintended consequences such as civilian casualties is evidence of "scant accountability." However, for commanders making actual disciplinary decisions

and military lawyers advising these officials in practice, the relevant legal and policy rules require an assessment of the conduct of relevant personnel in light of information that was reasonably available at the time of an attack. To illustrate the effect this disparity in perspective imposes on journalistic narratives regarding accountability that are generated in media coverage, it is helpful to broaden the analytical aperture beyond the New York Times reporting that has been the central focus of the inquiry thus far.

One primary source that is rich with media perspectives related to "accountability" for targeting mishaps is the media briefing held by Pentagon Press Secretary John Kirby in May 2022 when the results of the secondary review of the investigation related to the Baghuz airstrikes were announced. Following his prepared remarks, the transcript of the briefing reveals that Kirby addressed a number of questions presented by various media correspondents. A sampling of the questions posed and characterizations presented by journalists related to responsibility for the Baghuz attacks and civilian casualties in general provides useful context for the brand of "accountability" media correspondents have in mind when covering targeting operations that occur during armed conflict.

Analysis of these characterizations begin with a question presented by a correspondent identified by Kirby as "Oren." After acknowledging the secondary review of the Baghuz attacks, the reporter identified as "Oren" observes that "if you look back in Afghanistan, even with the Secretary's focus on civilian casualties, there appears to be a pattern emerging here of no one being held accountable. What does it take for accountability to be imposed, or for someone to be held accountable for civilian casualties?" The comments continue, with the correspondent noting, "Because you seem to be saying that look, as long as there's no malicious intent, the number is irrelevant of civilian casualties."

On the day of this press briefing, CNN Pentagon Correspondent Oren Liebermann published a story with the headline, "Pentagon doesn't hold anyone accountable for 2019 Syria strike that killed four civilians following review." After describing events involving the initial and secondary reviews related to the Baghuz strikes, Liebermann notes that "despite the increased focus" on preventing civilian casualties, "the Pentagon has not punished any of its commanders for civilian casualties." Liebermann's narrative then pivots to the Kabul drone strike, observing that "the Pentagon said it would not hold anyone accountable for a drone strike in late-August that killed 10 civilians, including seven children" while including a link to his own CNN coverage of the incident and official review.

Turning to the linked story involving the Kabul drone strike published by Liebermann, the headline for this article is, "Pentagon decides no US troops will be punished over botched Kabul drone strike that killed 10 civilians." Like a primary NYT story involving the Kabul drone strike, the Liebermann CNN article features a characterization related to accountability presented by a source who was a close associate of a civilian who was killed in the attack. That is, the article presents part of a statement made by Steven Kwon, who observes, "This decision is shocking. How can our military wrongly take the lives of 10 precious Afghan people, and hold no one accountable in any way?" The statement by Kwon continues to claim, "When the Pentagon absolves itself of accountability, it sends a dangerous and misleading message that its actions were somehow justified, increasing security risks and making evacuation even more urgent."

This narrative suggesting the Pentagon routinely absolves itself of responsibility for attacks that result in civilian casualties is presented against the backdrop of characterizations related to

accountability presented by official sources. At the beginning of the article, Liebermann observes that official recommendations involving the Kabul drone strike "did not include holding anyone accountable or punishing anyone involved in the strike," and "accountability" – Kwon's characterization competing with official findings – emerges as the primary theme for the story. Returning to the story published by Liebermann the day the results of the secondary review of the Baghuz strikes were announced, the opening observation there as well is that "the Pentagon has decided to hold no one accountable for" the attacks. Like the story involving the Kabul drone strike, accountability emerges as the primary theme in the article – and the resulting journalistic narrative depicts that the DoD, despite "increased focus" on prevention, "the Pentagon has not punished any of its commanders *for civilian casualties*." (emphasis added)

There is no question from these articles published by CNN Pentagon Correspondent Oren Liebermann that the standards by which personnel are actually held to account following targeting operations have been described to him and other journalists during press briefings, as these characterizations are a central component of his coverage. His story involving the Baghuz strikes includes a quote from spokesperson John Kirby observing that there was no reason to "hold somebody personally accountable for what happened" in the Baghuz airstrikes since the ground force commander reportedly "made the best decisions he could in the fog of war, in the midst of combat." Likewise, Liebermann's story following the secondary review of the Kabul drone strike includes a quote from Lt. Gen. Sami Said, who conducted the review, noting that relevant personnel "had a genuine belief based on the information they had that that was a threat to US forces, an imminent threat to US forces" and that the attack therefore does not constitute "criminal conduct" or "random conduct negligence."

As suggested above when noting the strategic imperative to reimagine official narratives to focus only on legal and policy compliance, this messaging from Kirby and Lt. Gen. Said could be improved by explaining the standards of "accountability" in more precise detail. Nonetheless, these official observations are correct to describe that actions taken during the conduct of hostilities is evaluated based on information that was reasonably known at the time rather than on facts that emerge afterward. Returning to Oren Liebermann's question during the press conference involving the Baghuz airstrikes regarding what it takes "for accountability to be imposed, or for someone to be held accountable for civilian casualties," the actual standards diverge from the narrative Liebermann develops in his coverage. In his journalistic narrative, that "the Pentagon has not punished any of its commanders for civilian casualties" is evidence of a systemic accountability failure. For official disciplinary decisions, it is the process that led to a strike – and not the outcome – that is relevant when deciding whether to hold personnel "accountable."

Returning to the transcript of the press conference at which Oren Liebermann asked what it takes for "someone to be held accountable for civilian casualties," it is abundantly apparent that the perspective of this CNN Pentagon correspondent that accountability should be assessed based on the outcome of attacks that result in civilian casualties is in no way an outlier among journalists on the Pentagon beat. During the question and answer period of the press conference following the Pentagon spokesperson's prepared remarks, a journalist identified by Kirby as "Jen" brings the focus of the discussion "back to the Baghuz report" and asks "how come nobody is ever punished when these reports come out?" The journalist follows this question by observing, "There's never any accountability."

As part of a meandering response claiming that senior military officials take "the leadership and accountability very seriously," Kirby correctly points out that the general officer who was assigned to conduct a review of the initial investigation did not "find that anybody acted outside the Law of War, that there was no malicious intent" and that "the ground force commander, given the information he had at the time, made the best decisions he could in the moment against a very aggressive ISIS force." Like other official claims, this response does not present specific details regarding the findings that personnel involved in the airstrikes complied with relevant provisions of the law of armed conflict. Nonetheless, the lamentation from the journalist identified as "Jen" – whom Kirby describes as a reporter who "has been covering the Pentagon a long time" – that there is "never any accountability" since "nobody is ever punished when these reports come out" demonstrates a distorted perspective regarding the standards for "accountability" that actually apply in practice. "Nobody is ever punished" because "these reports" determine that, as Kirby notes, personnel involved in the attacks do not act "outside the Law of War." As unsatisfying as that may seem for journalists covering the Pentagon beat, these are the standards that personnel are expected to apply during targeting operations and, likewise, that are used to assess whether adverse action should be initiated following a targeting mishap.

Yet another potential basis for supporting a journalistic narrative depicting systemic failures of accountability emerges in a question presented by a reporter Kirby identifies as "Gordon" involving what the reporter indicates involves the issue of "background accountability." Here, Gordon expresses that "what fuels a lot of the questions" involving accountability "is this idea that even when the Pentagon chooses a[n] independent four-star [general officer], separate from the operation and all that, the person is still cut from the same cloth cultural, the rest of it." After this setup, the reporter identified as "Gordon" asks, "Has the secretary [of Defense] given any thought to like further distancing some of these reviews, which are critical to your own scrutiny of these operations away from, as best or more, so from the culture and the operations that...?"

Pentagon spokesperson John Kirby begins speaking before the reporter finishes the question and initially points out that "it's got to be a balance, because somebody also has to be informed, and educated, and experienced in military operations as well." This perspective may well be true, though Kirby once again engages in a meandering response involving the concept of accountability, which includes a claim that "no other military in the world works harder than the United States military to prevent and to not cause civilian harm." As partial support for this assertion, Kirby notes that investigators and senior leaders "want to look and see if those [targeting] decisions were the right ones in the moment with the information that they had available to them…with the actual tangible, lethal threat in their face."

Yet again, Kirby addresses a question involving "accountability" for targeting mishaps with an unsatisfactorily vague, though generally accurate, characterization of legal and policy standards, which require an assessment of the information that was reasonably available at the time of an attack. Nonetheless, the underlying point presented by the reporter identified as "Gordon" is that assigning a senior leader who is "cut from the same [cultural] cloth" to review an initial investigation that was also conducted internally by military personnel may impugn the findings of the subsequent investigation and, relatedly, the determination not to hold personnel "accountable" for an incident. Perhaps one potential explanation for the fact that, as the reporter identified as "Jen" points out, personnel are routinely not "punished when these reports" of follow-on investigations are published is that subsequent inquiries are conducted internally by military personnel.

However, another explanation is that personnel routinely comply with relevant legal and policy requirements even if the *outcome* of an attack is not consistent with what the responsible personnel intended at the time. An initial investigation finding that personnel complied with the law of armed conflict, rules of engagement, and other relevant legal and policy provisions does not support a decision to impose disciplinary action following an engagement. A subsequent review validating the initial findings is legitimate even if it is conducted internally by military personnel. As the critical assessment that is the primary subject of the present inquiry indicates, nothing that has been "revealed" to the public in media coverage of military targeting operations supports a characterization that would impugn the validity either of initial investigations or subsequent reviews of targeting incidents – even if both are conducted internally by military personnel. At best, the concern appears to involve the *perception* of partiality or institutional bias, though there are no apparent factors to suggest this perception is indeed a reality.

Journalistic Narratives and the "Danger of Equivalence" for Effects-based Accountability

One final characterization involving "accountability" expressed by a reporter during the press briefing related to the subsequent review of the Baghuz strikes to be examined herein comes from a journalist identified by spokesperson John Kirby as "Kasim." This reporter notes that "we have seen Russian [military forces] striking a building where kids [and] civilians were" located during the conflict in Ukraine and journalists "have been reporting about this that could be…a war crime." Returning to the Baghuz report, the journalist observes that "in this case, we have seen that woman, children are being killed" and even though the U.S. military is "coming out speaking to these issues in a transparent way," that "doesn't change the fact that the United States military have killed dozens of kids and women."

Yet again, Kirby's response is characteristically meandering and imprecise involving how standards of accountability are applied in practice. Nonetheless, the point raised by the reporter identified as "Kasim" reflects a fundamental misunderstanding of applicable rules involving attacks that occur during the course of hostilities. On the topic of assessing the lawfulness of targeting operations that occur during the armed conflict in Ukraine, Professors Geoff Corn and Sean Watts recently warned against conclusions drawn from "effects-based enforcement of targeting law." In that article posted on the blog site *Articles of War*, the authors correctly describe that characterizations involving condemnation and accountability "require evidence that meets the law's standards of proof and persuasion" and that "the focal point of inquiry related to targeting operations must be the attack *judgment*, not the attack *outcome*." (emphasis in original)

While Corn and Watts are correct to criticize the validity of "effects-based" accountability characterizations, the reflections presented by the journalist identified as "Kasim" give rise to an even more insidious concern. Equating all attacks that *result* in civilian casualties based on the outcome of the attack, as do the reporter's reflections, risks eroding the legitimacy of international law in actual practice. For example, a letter circulated to the UN General Assembly and Security Council by the Permanent Representative of Russia to the United Nations in March claims that a "missile with a cluster warhead was fired at a residential block…from the territory controlled by the Kiev regime" days earlier and that the "assault led to the killing of more than 20 civilians while 37, including children, women and elderly people, were injured and taken to medical institutions."

After citing a number of relevant provisions of international law, the characterization advanced by Russia is that "the attack perpetrated by Ukrainian armed forces represents not only serious

violation of IHL, but amounts to act of terror and a war crime against civilian population." This characterization by Russia of "war crimes against the civilian population" allegedly committed by Ukrainian forces is based solely on the outcome of the attack and with no direct indication regarding whether the civilians who were purportedly injured or killed in the strike were deliberately targeted by Ukraine. Although concern has been expressed among the international community that Russia has engaged in "indiscriminate attacks" during the conflict in Ukraine, focusing on the *outcome* of attacks that result in civilian casualties will allow Russia to claim it is Ukraine – not Russia – that is committing war crimes and other serious violations of international law.

This gives rise to a phenomenon I will refer to here as the danger of equivalence. That is, effects-based characterizations may allow a party to an armed conflict to disregard relevant rules of international law by engaging in indiscriminate attacks while denouncing attacks conducted by an adversary that may comply with international law but result in civilian casualties. Doing so creates a mechanism whereby an offending party can seek to deflect criticism of its own violations.

Specifically in this example, characterizations such as those presented by the reporter identified as "Kasim" in the press conference announcing the completion of the secondary review of the Baghuz strikes based solely on the *outcome* of attacks provides a tool for Russian propaganda to deflect responsibility for potentially indiscriminate attacks by pointing to media coverage claiming that U.S. military forces engage in the exact same conduct. The journalistic narrative equating the outcomes – "the fact that the United States military have killed dozens of kids and women" as one example and Russian military forces "striking a building where kids [and] civilians were" located as the other – creates this potential danger of equivalence. The apparent aspiration by journalists in the West to use media coverage as a means to seek "accountability" for the outcome of attacks that result in civilian casualties, then, may well produce the seemingly unintended – and counterproductive – consequence of legitimizing offenses potentially committed by Russian military forces in the Ukraine conflict.

Based on the names Pentagon spokesperson John Kirby utilizes to refer to journalists as he invites questions following his prepared remarks at the press conference announcing the results of the secondary review of the Baghuz attacks, it does not appear that reporters from the New York Times team that is primarily responsible for the compilation of media coverage that is the primary focus of the present inquiry were called upon during the briefing. However, in an earlier press conference announcing actions taken following the secondary review of the Kabul drone strike, Secretary of Defense Lloyd Austin calls upon a journalist identified as "Eric Schmitt" during a question and answer period that follows Austin's prepared remarks. Eric Schmitt, of course, is one of the reporters listed on the bylines of all three collections of NYT stories that *are* the primary focus of the present inquiry.

During the exchange between the reporter and defense secretary, Schmitt's reflections and comments reveal a focus on effects-based accountability – just like the comments by the journalist identified as "Kasim" examined immediately above. That is, Schmitt begins what he describes as his "second question" by observing that the U.S. "military has taken responsibility for the casualties, again, both on August 29th [the Kabul drone strike], as well as the ones in Syria [potentially a reference to the Baghuz strikes], and many others, but it's very…rare when the military actually holds anyone…accountable or somebody -- there's administrative action or other -- some kind of other disciplinary action." The question posed by Schmitt following these introductory

remarks is, “To what extent are you personally committed to holding people accountable now for these kind[s] of actions?”

Although Eric Schmitt does not equate the conduct of U.S. military personnel and Russian forces based on the outcome of attacks as “Kasim” does in the later press briefing (indeed, the full invasion of Ukraine by Russia had not yet occurred at the time of the earlier briefing), the nature of Schmitt’s comments is consistent with the effects-based accountability demonstrated by “Kasim’s” later reflections that *do* equate Russian and American military conduct based on the outcome of attacks. That is, Schmitt correctly observes that “it’s very…rare when the [U.S.] military actually holds anyone…accountable” even though the military has routinely “taken responsibility for” civilian casualties. However, the expectation that the Secretary of Defense should be “personally committed to holding people accountable for” attacks for which the U.S. “military has taken responsibility for the casualties” inadvertently inflicted is centered solely on the *effects* of the attacks rather than the *process* that led to the decision to strike.

Dismay that “it’s very…rare” that the military imposes “administrative action or…some kind of disciplinary action” is evident throughout high-profile NYT media coverage of U.S. military operations examined herein, but the resulting perspective suggesting that this constitutes an accountability gap – or “scant accountability” as Azmat Khan describes it – creates the risk that the coverage may be used as a propaganda tool by Russia to deflect criticism of the conduct of Russian military forces in Ukraine. Indeed, Russia has already demonstrated the proclivity to blame the Ukrainian military and, by extension the U.S. government for supporting Ukraine, for the conduct of hostilities based on the *outcome* of attacks. On one such occasion, for example, Alexander Darchiev, Director of the Russian Foreign Ministry’s North American Department claimed on state-controlled media outlet TASS that “the *lethal bombardments of the civilian population* in the DPR and the LPR [the Donetsk and Lugansk People’s Republics] and on the liberated territories of Ukraine” by Ukrainian forces “take place at least with the approval of American decision-making centers.” (emphasis added)

In a similar example, Russian military Lt Gen Igor Konashenkov reportedly claimed, “It is the Biden administration that is directly responsible for all rocket attacks approved by Kyiv on residential areas and civilian infrastructure facilities in settlements of Donbas and other regions that *caused* mass deaths of civilians.” (emphasis added) Separately, in a Newsweek article with the headline “Russia Will Blame HIMARS for ‘War Crime’ POW Attack, U.S. Suggests,” a quote from Pentagon spokesperson John Kirby indicates that the U.S. government has “reason to believe...that Russia would go so far as to make it appear that Ukrainian HIMARS...were to blame” for an attack that resulted in the deaths of Ukrainian prisoners of war. These HIMARS, or high mobility artillery rocket systems, are widely reported to have been supplied to Ukraine by the United States.

All of these examples represent occasions in which the Russian government has blamed Ukrainian forces, and by extension the American government for supporting Ukraine, for violating international law based on the outcome of an attack – with no mention of the process that led to the decision to strike. Whether or not Ukrainian military personnel are *actually* responsible for any of the attacks is, of course, a separate matter altogether. However, even if Ukraine is demonstrated to be responsible for an attack that results in civilian casualties or other unintended consequences, the outcome alone is an insufficient basis upon which to expect personnel to be “held accountable” afterward. As the substantive case studies conducted in this article demonstrate, this is a

fundamental requirement of applying relevant provisions of international law…no matter *who* is responsible for an attack.

If the United States or an allied government discovers evidence indicating that the Russian military genuinely is engaging in indiscriminate attacks or is otherwise committing serious violations of the law of armed conflict in the conduct of hostilities in Ukraine, New York Times and other American media coverage of U.S. military combat operations may well be a central exhibit relied upon by the Russian government to deflect responsibility for these breaches. "Who is America to criticize Russia?", will be the argument. "Whom did the U.S. military hold accountable for the Kabul drone strike?"

In this plausible scenario that demonstrates the potential danger of equivalence, high-profile New York Times media coverage represents the proverbial soil that is exceedingly rich in the nutrients the Russian disinformation campaign will need to take roots and grow. While the Ukrainian population may suffer unspeakable horrors that result from systemic indiscriminate attacks carried out by the Russian military, it will be narratives generated in high-profile media coverage that lend the veneer of legitimacy to Russian atrocities – all while American media organizations reap the profits and prestige that flow from holding the U.S. government "accountable" externally for "violations" of international law that were never actually committed. Given these conditions, it is reasonable to ponder what entity it is that holds the media accountable for the distortions in public perception created by high-profile coverage of U.S. military operations and, just as importantly, how advocates in civil society and, now even select elected officials, take advantage of these distortions to support their own agendas.

Scant Accountability – for Misinformed and Biased Media Coverage

One central theme that emerges from the collection of media coverage reporting on U.S. military combat operations examined in the present article is that an apparent accountability deficit exists within the military and it is the role of interested journalists to use their reporting as a forum to bring public awareness to that deficiency. The critical assessment of the media coverage conducted herein, however, demonstrates that an accountability deficit does not actually exist in practice and that the *appearance* of "scant accountability" is created by distorting legal and policy rules that actually apply in practice. There has long been a sense in liberal democracies that a primary role of a free press is to assist with the monumental and essential task of ensuring that the government remains accountable to The People.

This is the ideal Thomas Carlyle famously espoused in 1787 when he declared that "[Edmund] Burke said there were Three Estates in Parliament; but, in the Reporter's Gallery yonder, there sat a *Fourth Estate* more important than they all." According to Carlyle, "Whoever can speak, speaking now to the whole nation, becomes a power, a branch of government, with inalienable weight in law-making, in all acts of authority." As the then managing editor of The Farmville Herald succinctly noted much more recently after referring to Carlyle's famous characterization of the press, one "main purpose of the Fourth Estate is to be the people's watchdog when it comes to all levels of government." Another related contemporary perspective suggests that the "press has always had its eyes on the government, and has always served as the voice of the people, speaking truth to power."

There is a palpable sense that contemporary media organizations in America and like-minded liberal democracies zealously embrace this role of being the "people's watchdog" by keeping "its eyes on

the government" while "speaking truth to power." Likewise, it is readily apparent that the journalists responsible for the media coverage examined herein enthusiastically pursue this role. Indeed, the reporters responsible for the coverage are keen to point out at any opportunity the actions and responses senior military officials have directed as a result of NYT coverage of military operations.

"Fourth Estate" Obsession for Holding Government "Accountable" Contributes to Biased Journalistic Angles

After Secretary of Defense Lloyd Austin sought to be briefed on the details of the Baghuz airstrikes, for example, Eric Schmitt published an article noting that Austin "requested the briefing after reading an investigative report published over the weekend by The New York Times detailing the strike and allegations that top officers and civilian officials sought to conceal the casualties." Two days later, Eric Schmitt and Dave Phillips published an article that likewise points out the role of NTY reporting in prompting the briefing. After Secretary Austin directed the DoD to develop a "Civilian Harm Mitigation and Response Action Plan," a story written by Schmitt, Charlie Savage, and Azmat Khan points out that the instruction "comes after a series of investigations by The New York Times into airstrikes that killed civilians, including the cover-up of a strike in Syria in 2019 that killed dozens of women and children and a botched drone strike in Kabul, Afghanistan, that killed 10 innocent people in August" and a separate New York "Times investigation based on a trove of Pentagon reviews of strikes revealed systemic failures to prevent civilian deaths in its air war against the Islamic State." After the action plan was released to the public by the DoD, a NYT story by the same three journalists points out that the directive "follows an investigative series by The New York Times into civilian deaths from American airstrikes."

The sentiment that is implicitly communicated by these observations is clear: changes in government processes are taking place because of extensive journalistic investigations carried out by the Times. In this regard, the press is embracing the role of the Fourth Estate – to be the people's watchdog while keeping its eyes on the government and speaking truth to power. This sense that the Times is pursuing an important endeavor to hold the government accountable is apparent not only in the text of the reporting, but also in remarks presented by reporters and editorial staff off of the printed page.

In a newsroom ceremony celebrating "an incredible year of journalism" and introducing the "year's Pulitzer Prize winners" in May, for example, then-executive director Dean Baquet lauded the team that "won for international reporting, for the stories of civilians killed in American airstrikes." According to Baquet, "Successive administrations boasted of an innovative program of drones and airstrikes that represented 'the most precise air campaign in history.' But we revealed the truth — a legacy of missed targets, disproportionate destruction and civilian deaths."

Following his remarks, Baquet cedes the floor to Matt Purdy, who was the deputy managing editor at the time but has since been promoted to editor at large. While extolling the work of Azmat Khan, Purdy asserts "Azmat knew more about the truth of the U.S. air wars than anyone outside the Pentagon, and probably inside it, too." Purdy goes on to describe that NYT reporter Dave Phillips "had a tip about an airstrike in Syria that [reportedly] killed 70 civilians, including women and children," and that Phillips and Eric Schmitt "confirmed the strike and also reported that the military had ignored repeated questions about it from within its ranks." This, of course, is a reference to what would go on to become coverage of the Baghuz airstrikes – which the critical

analysis conducted herein demonstrates was deficient from the very beginning due to the erroneous characterizations presented to the reporters by their sources. Even so, Purdy continues by noting that other stories by Dave Phillips and Eric Schmitt reportedly "exposed deep flaws in the air attacks" conducted by the U.S. military during combat operations.

During the newsroom ceremony, Matt Purdy then invites Azmat Khan to present remarks. As she describes the work that led to coverage of the civilian casualty files and related stories, Khan asserts "every American deserves to be informed about the wars waged in their names…and about whether claims of accountability and surgical warfare really stack up." After reflecting on a number of salient details regarding her work over the preceding several years, Khan then claims "each investigation in this series helped reveal a system of impunity" and she "truly believe[s] that this collaboration represents a radical transformation in the way we report about war, and how journalists respond to claims of precision in the future."

Azmat Khan then cedes the floor to Dave Phillips, who describes during his brief comments that he along with reporters Eric Schmitt and Mark Mazzetti were able to get "inside the top secret Special Operations strike cell and were able to show, not only that the strikes were killing civilians, but that there were systematic problems with the rules governing strikes. Furthermore, according to Phillips, their reporting revealed that "internal reports sounding the alarm" from within the military "were being ignored." This work, according to Phillips, "was difficult and important reporting."

From among these reflections presented at the newsroom ceremony by reporters and their editorial managers, a central theme that emerges is that a primary role of New York Times coverage of U.S. military combat operations abroad is to expose existing systemic flaws in military processes to allow the public to hold the DoD accountable since it is not doing so itself. It is the "scant accountability" angle that effectively transforms the coverage from a compelling human interest story about the often hidden human costs of warfare to an award-winning collection of accountability journalism. The human toll is the tragedy revealed by the reporting, but purporting to reveal *why* that tragedy repeatedly occurs and what needs to be done to correct the causal deficiencies in the future is the journalistic call to action that infuses the journalism with the apparent sense of accountability.

As the critical analysis conducted in this article reveals, however, the "scant accountability" angle is an illusion. In order to construct the narrative "demonstrating" that the military routinely fails to hold troops "accountable" for targeting operations that result in unintended consequences, media coverage persistently mischaracterizes the legal and policy rules that establish actual standards of conduct in practice. Even though compliance with relevant "accountability" standards is central to the reporting, not once does an article examined above present an accurate articulation of the applicable rules. The media coverage exhibits a seemingly obsessive devotion to the issue of accountability – but the brand of accountability presented in media coverage is not supported by law, policy, or, indeed, reality.

Based on the nature of the reporting, it is reasonable to conclude that the discrepancy between actual accountability standards and the narratives depicted throughout the media coverage are attributable to two central factors. The first, a deficiency of adequate information from which to draw balanced and fully informed conclusions related to the attacks that are the subject of media reporting and efforts by the military to evaluate the potential for adverse personnel action afterward, is predictable and unlikely to be corrected. Both topics are the subject of deliberations that are

internal to the military, and routinely releasing substantial amounts of information for public consumption can pose a serious risk to operational security.

Contravening Standards of Ethical Journalism in Pursuit of Government "Accountability"

The second central factor that likely accounts for the considerable discrepancy between actual accountability standards and the depictions presented in high-profile media coverage is an inherent mistrust of internal government processes that members of the vaunted "fourth estate" bring to their role as journalists. This sentiment is apparent, for example, both in the reporting examined in the present case study and in the perspectives communicated by the editorial team at the newsroom ceremony outside of the textual coverage of combat operations. The reporters and their editors are proverbial hammers in search of opportunities to hold the government accountable from the outside, and most of the information discovered in the course of investigative journalism looks like a nail.

While this may well be deemed a particularly noble pursuit in a liberal representative democracy wherein governmental constraint is a core founding principle, the media appears unable to unilaterally control for the inherent bias generated by the quest for external accountability. One central component of the New York Times "Ethical Journalism" standards is a section entitled "Our Duty to Our Readers." According to this component of the standards for ethical journalism, the New York Times aspires to treat "its readers as fairly and openly as possible." According to The Times, "In print and online, we tell our readers the complete, unvarnished truth as best we can learn it. It is our policy to correct our errors, large and small, as soon as we become aware of them."

Standards of Ethical Journalism Applied to Reporting on Baghuz and Taqba Dam strikes

While unquestionably noble in concept, this "duty" did not compel Eric Schmitt and Dave Phillips to report, for example, that the "extensive review of the facts and circumstances" conducted by General Michael Garrett related to the Baghuz strikes determined the original inspector general complaint that formed the basis of the initial NYT coverage "was unsubstantiated." Nor does the finding that "a number of assertions made that are not supported by evidence and/or are based on inaccurate or false information" all along appear in the coverage of the secondary review conducted by Gen. Garrett. The "two-page executive summary" is described in the story published by the two journalists along with a link to the official memorandum that presents the executive summary, so there is no question that the reporters were aware of and had read Garrett's findings as they drafted the follow-up story. Rather than Schmitt and Phillips treating NYT "readers as fairly and openly as possible" and telling "readers the complete, unvarnished truth as best we can learn it" as the standards of ethical journalism would seem to require, though, the journalists continue to emphasize in the reporting that Gen. Garrett's "findings did not call for any disciplinary action."

While touting that "the series [of NYT reporting] was awarded the Pulitzer Prize for international reporting" and that the Secretary of Defense ordered development of a new policy involving civilian harm mitigation "[i]n response to The Times's investigation," the journalists persist with the theme suggesting that the DoD is plagued by a persistent internal failure of accountability. The follow-on story includes a quote from Eugene Tate, the former inspector general analyst whose complaint was central to the initial reporting of the Baghuz strikes. "It's the standard government line: Mistakes were made but there was no wrongdoing," according to Tate. Considering that the memorandum published by Gen. Garrett and linked in the follow-up story includes the finding that Tate's original complaint was "unsubstantiated" and "not supported by evidence and/or are based on inaccurate or

false information" all along, it seems reasonable to expect Schmitt and Phillips to include this finding in their coverage if the aspiration to tell readers "the complete, unvarnished truth as best" they can learn it is taken seriously.

The critical analysis conducted in the present inquiry demonstrates that the "scant accountability" theme that pervades NYT (and other) media coverage is not supported by a doctrinal application of relevant rules of international law and military policy. Although a more detailed analysis would of course be permitted by applying operational rules of engagement and other classified doctrinal sources, material that *is* readily available to the public is more than adequate to demonstrate the pervasive flaws in existing high-profile media coverage. That the editorial teams responsible for the media coverage analyzed herein appear either unable or unwilling to access, assess, and report on these doctrinal sources raises serious questions regarding the ability of the media to engage in effective "accountability journalism" in this context as the vaunted "fourth estate" concept aspires to do. Instead, the driving ambition to keep the government honest on behalf of The People coupled with an apparent unwillingness or inability to engage in genuinely balanced coverage of internal disciplinary processes gives rise to an insidious version of "gotcha journalism" that results in an unjustifiable erosion of public trust in the military as an institution.

Then-Lt. Gen. Stephen Townsend claimed during a press conference, for example, "Taqba Dam is not a coalition target," but – gotcha! – investigative journalism carried out by the fourth estate reveals, "In fact, members of a top secret U.S. Special Operations unit called Task Force 9 had struck the dam using some of the largest conventional bombs in the U.S. arsenal." This apparent "correction" of the official narrative is presented to create the appearance that Townsend is either uninformed or is deceiving the public, notwithstanding that Townsend's full remarks are taken out of context in that he *actually* intended to communicate that the dam is not the object of attack and that "when strikes occur on military targets, at or near the dam, we use non-cratering munitions to avoid unnecessary damage to the facility."

What's more, according to the impression generated by this specimen of "accountability journalism," because of "the dam's protected status, the decision to strike it would normally have been made high up the chain of command." However, as the Taqba Dam case study above demonstrates, these claims presented by anonymous sources are erroneous since the procedures related to the "no-strike list" likely did not apply. As analysis presented in case study #3 above in Part I demonstrates, both exceptions to the standard process of removing an object from the NSL – that is, 1) ISIS fighters and equipment located on and around the dam qualified as time sensitive targets, and 2) the attacks actual did qualify for designation as (collective) self-defense strikes since ISIS fighters engaged in hostile acts and demonstrated hostile intent in relation to SDF partners – applied in practice. The journalistic claim that "[g]iven the dam's protected status, the decision to strike it would normally have been made high up the chain of command" but unnamed "former officials said the task force used a procedural shortcut reserved for emergencies, allowing it to launch the attack without clearance" is both ill-informed and misguided.

Nonetheless, this claim gives the appearance of supporting the general "scant accountability" narrative that pervades and connects this line of NYT reporting. In this instance, it is the assertion, "No disciplinary action was taken against the task force" according to unnamed officials, while the "secret unit continued to strike targets using the same types of self-defense justifications it had used on the dam." "No disciplinary action" was taken because the strikes did comply with applicable legal and policy requirements, including collective self-defense provisions of the unclassified

standing rules of engagement. This conclusion is supportable when applying the facts reported in the media story to doctrinal sources of international law and use of force policy that are readily available to the general public, yet there is no mechanism by which to hold the "investigative" journalists accountable for the distortions in public opinion generated by the ill-informed and misguided narratives curated in their reporting.

Standards of Ethical Journalism Applied to Reporting on Kabul drone strikes

The same phenomenon emerges from the critical analysis conducted herein of media coverage involving the Baghuz airstrikes. The initial story sets up the "scant accountability" narrative by summarizing the official claim that the U.S. "military said every report of civilian casualties was investigated and the findings reported publicly, creating what the military called a model of accountability." This summary of the official claim is followed immediately by the journalistic claim that "the strikes on Baghuz tell a different story." A few paragraphs later – gotcha! – the NYT investigation revealed "regulations for reporting and investigating the potential crime were not followed, and no one was held accountable" for the strikes. However, the critical analysis of coverage related to the Baghuz strikes demonstrates that this "scant accountability" narrative is as ill-informed and misguided as it is for coverage of the strikes on and around Taqba Dam.

The initial investigation correctly concluded that the attacks did not constitute war crimes or other serious violations of international law and likewise actually did comply as self-defense engagements pursuant to the SROE. The sources named in the initial NYT story, Lt. Col. Dean W. Korsak and inspector general evaluator Gene Tate were mistaken all along, and there never was a "war crime" for the "secretive commando force" to ignore or attempt to cover up. Likewise, the claim that "Tate could find no evidence that the Joint Chiefs, the defense secretary or criminal investigators had been alerted, as required" is blatantly misleading since the "requirement" to notify senior officials applies, in accordance with DoDD 2311.01, when there is "credible information" to support an allegation that a "violation of the law of war" has been committed. The initial investigation correctly determined the strikes complied with relevant provisions of the law of armed conflict, so there was never a requirement to notify senior military leaders.

Although the journalistic narratives developed in the initial article involving the Baghuz attacks were misleading, coverage of the secondary review directed by Secretary Austin and conducted by Gen. Garrett was an opportunity to present a more balanced perspective. Instead, the investigative journalists in effect doubled down on the "scant accountability" narrative by emphasizing Tate's "standard government line" claim while omitting the official determination that Tate's original complaint was "based on inaccurate or false information." Again, the unwarranted "scant accountability" narrative was promoted while the NYT standards of ethical reporting were incapable of holding the journalists accountable for the biased perceptions presented in their own reporting.

The same journalistic failure of accountability likewise emerges from the critical evaluation conducted herein of coverage related to the Kabul drone strike. Like coverage of the Baghuz and Taqba Dam attacks, media reports involving the Kabul drone strike present an extraordinarily compelling human interest angle involving the often unseen toll suffered by the civilian population in armed conflict. Contradicting with painstaking detail the initial characterization presented by Gen. Mark Milley of a "righteous strike" is likewise a seemingly important component of the

reporting that was only made possible by the dedication and skill of the NYT visual investigations team.

Consistent with the suggestion presented herein that official strategic messaging in the U.S. government involving the conduct of hostilities needs to be reassessed and reimagined, it is apparent from Gen. Milley's full remarks that what he *meant* by suggesting the attack was a "righteous strike" is that the relevant personnel complied with relevant legal and policy rules. In this portion of the initial press conference involving the Kabul drone strike, Gen. Milley communicated the initial belief that proper "procedures were correctly followed and it was a righteous strike." If Gen. Milley had omitted the superfluous "righteous strike" comment and instead emphasized that proper procedures were followed while presenting specific detail regarding that conclusion, one component of the media coverage demonstrating the *outcome* of the strike was not "righteous" at all could have been avoided.

Nonetheless, the "procedures were correctly followed" portion of Gen. Milley's characterization is stripped away in coverage of the attack and instead the imprudent "righteous strike" comment is repeatedly emphasized. Doing so supports the journalistic narrative that although Gen. Milley "initially called the Kabul drone attack a 'righteous strike'" – gotcha! – "almost everything senior defense officials asserted in the hours, days and weeks after it turned out to be false." A central component of NYT coverage of the Kabul drone strike is the suggestion that this is but one example of a systemic failure of accountability within the Department of Defense, but the investigative reporting never does present a complete and fully informed description of the standards to which personnel are actually held to account.

Instead, according to the journalistic narrative, pursuing accountability falls upon the fourth estate. As but one example, the NYT story with the headline "No U.S. Troops Will Be Punished for Deadly Kabul Strike, Pentagon Chief Decides" points out that the military "had not acknowledged the mistaken strike until a week after a [New York] Times investigation of video evidence challenged assertions by the military that it had struck a vehicle carrying explosives meant for Hamid Karzai International Airport in Kabul." However, a previous story points out that the "Times investigation helped investigators determine that they had struck a wrong target," which suggests military officials conducted an unbiased review of the attack and were open to all sources of credible information – *including* the remarkable work of the NYT video investigations team. As such, it is misleading to suggest that media coverage held the government to account rather than supplemented an already impartial review process.

Although the ultimate effect of this aspect of investigative journalism is debatable – whether it was necessary to keep an otherwise obstinate military review process honest or whether, instead, it supplemented an already open-minded official investigation – the second central component of the ostensive "accountability" journalism indisputably lacks merit. Returning to the story with the "No U.S. Troops Will Be Punished" headline, senior writer Eric Schmitt asserts that "while the military from time to time accepts responsibility for an errant airstrike or a ground raid that harms civilians, rarely does it hold specific people accountable." This version of "accountability" that is erroneously centered on the outcome of an attack permeates coverage of the Kabul drone strike. The journalistic perspective supports the recurring "scant accountability" theme, but in doing so – as demonstrated by the critical analysis conducted herein – the coverage distorts the actual standards by which personnel are held accountable in practice.

A scrupulous commitment to the NYT standards of ethical reporting to "tell our readers the complete, unvarnished truth as best we can learn it" does not appear to include identifying sources that can present a doctrinal assessment of the legal and policy rules to which military personnel are actually held to account in practice. Instead, the journalistic narrative indicates, "Critics of the Kabul strike pointed to the incongruity of acknowledging the mistake but not finding anyone accountable for wrongdoing." This claim sets up a quote from Steven Kwon, founder and president of Nutrition & Education International, asking "How can our military wrongly take the lives of 10 precious Afghan people and hold no one accountable in any way?"

As the critical analysis conducted herein confirms, the expectation that military members should be held "accountable" for taking "the lives of 10 precious Afghan people" in the absence of an assessment of the process that led to the attack represents a fundamental distortion of the legal and policy rules that actually apply in practice. Nonetheless, this misrepresentation of actual standards of accountability permeates NYT coverage of the Kabul drone strike. This accountability characterization presented by Kwon in the later "No U.S. Troops Will Be Punished" article, for example, complements the claims related to accountability described in the earlier "A Botched Drone Strike in Kabul Started With the Wrong Car" story published days after the findings of the initial senior-level review were announced to the public. While those characterizations are examined above in the first case study of Part I, briefly recounting them here is useful in the current context of evaluating the merits of "accountability journalism" more broadly.

The first "accountability" characterization from a source presented in the earlier story is from John Sifton of Human Rights Watch, who claims the United States "has a terrible record in this regard, and after decades of failed accountability, in the context of the end of the war in Afghanistan, the U.S. should acknowledge that their processes have failed, and that vital reforms and more independent outside scrutiny is vital." The second characterization is from a Twitter thread posted by Luke Hartig of Just Security, who asserts "the way they bungled fundamental operational things is really troubling and suggests more than a one-off mistake." Finally, the story closes with a Twitter post from Senator Chris Murphy, who declares "There must be accountability" because if "there are no consequences for a strike this disastrous, it signals to the entire drone program chain of command that killing kids and civilians will be tolerated."

Like the "hold no one accountable in any way" characterization that is based upon the outcome of the strike and presented in a later story centered on the Kabul drone strike, none of these three earlier reflections are founded upon an informed assessment of the process that led to the attack. Rather than identifying the doctrinal standards of accountability that must be applied by military officials in actual practice and applying the known facts to these standards, all are based upon the unintended and tragic outcome of the strike. All of these non-doctrinal characterizations support the journalistic narrative of senior writer Eric Schmitt, who claims in the later "No U.S. Troops Will Be Punished for Deadly Kabul Strike" story that "while the military from time to time accepts responsibility for an errant airstrike or a ground raid that harms civilians, rarely does it hold specific people accountable."

Scant Accountability – for Failure to Tell Readers Complete, Unvarnished Truth

All these depictions together support the general "scant accountability" narrative that pervades this line of NYT reporting. Like the rest of the coverage examined herein, it never does present the "complete, unvarnished truth" regarding the legal and policy rules that *actually* apply in practice, as

the NYT standards of ethical journalism seem to require. If this version of the "truth" is "as best [the investigative journalists] can learn it," the biased and uninformed characterizations purporting to reveal a systemic accountability failure within the U.S. military suggest the media is either disinclined or unable to present information to the public that is consistent with how accountability and disciplinary decisions are actually made in practice. It is therefore not genuinely "accountability journalism" at its best, as one might expect from coverage that was awarded a Pulitzer Prize.

Instead, the collection of journalism more closely resembles "gotcha journalism" at its worst. That is, the media coverage unrelentingly presents a distorted depiction of the standards that actually apply in practice in order to support the journalists' preferred version of "accountability," which is based upon the unintended consequences of attacks that occur during combat operations. In doing so, the biased and seemingly ill-informed journalistic narratives create the appearance of "scant accountability" that is not consistent with reality. This phenomenon persists notwithstanding the purported "duty to our readers" to "tell our readers the complete, unvarnished truth as best we can learn it" purportedly required by the New York Times standards of ethical journalism.

In this unrelenting quest for "accountability" based upon the outcome of attacks, the journalists and the sources from which they draw for expert analysis have developed a symbiotic relationship that supports the preferred agendas of both. For the journalists, the perceived role of the vaunted fourth estate in informing the public and holding the government accountable creates an incentive to develop and pursue the "scant accountability" narrative, even if it is centered on the outcome of errant attacks. This perspective explains, as but one example, senior writer Eric Schmitt's claim that during "two decades of war against shadowy enemies…the U.S. military has killed hundreds, if not thousands, of civilians by accident […and] rarely does it hold specific people accountable."

This version of "accountability" is consistent with the commentary from which Schmitt draws to support the journalistic narrative he develops in the earlier "Botched Drone Strike" story. Returning to John Sifton's claim in this earlier article that the United States "has a terrible record in this regard, and after decades of failed accountability, in the context of the end of the war in Afghanistan, the U.S. should acknowledge that their processes have failed, and that vital reforms and more independent outside scrutiny is vital" helps illuminate the connection between journalist and source. The purported systemic failure to "hold specific people accountable" described by Schmitt is consistent with the "terrible record" of "decades of failed accountability" depicted by Sifton. The preferred outcome described by John Sifton of Human Rights Watch is for some entity external to the Department of Defense to intervene to finally implement the "accountability" that has purportedly been so elusive during the past two decades of conflict.

That is, Sifton claims that because existing military "processes have failed," at present "vital reforms and more independent outside scrutiny is vital." This connection between the preferred perspectives of journalist and source is but one example of an ideological alignment that is persistently apparent in the media coverage examined herein. The pervasive convergence of perspectives indicates there is a sector of advocates and activists who provide expert commentary in media coverage and whose perspectives otherwise feature prominently in public discourse that both contribute to the "scant accountability" narrative and seek to take full advantage of the distortions in public opinion generated thereby in pursuit of their own "reform" agendas. As the next section suggests, the symbiotic alignment of perspectives that exists between journalist and civil society advocate does not extend to interactions between civil society and the government – and for good reason.

Accountability Journalism and the Divergence Between Civil Society Special Interests and Official Strategic Objectives

Thus far, the focus of the present inquiry has been a critical analysis of intrinsically biased and largely uninformed recent media coverage of U.S. military combat operations. In constructing and promoting the narrative purporting to demonstrate that the military is beset by a pernicious and systemic condition of "scant accountability," media reporting consistently misrepresents the standards by which personnel are actually held accountable in practice. In doing so, the vaunted fourth estate shapes public opinion of military combat operations in a manner that is likewise inconsistent with actual standards of accountability.

Along with media organizations that benefit from the prestige bestowed upon journalists engaged in this variety of apparent "accountability journalism," another sector of groups that also features prominently in public discourse has demonstrated the inclination to exploit – and indeed often to contribute to – distortions in popular opinion that result from recent media coverage of U.S. military combat operations. That group is an industry of civil society advocates that both features in and capitalizes on high-profile media coverage and the distortions in public opinion generated thereby. However, the special interests reflected in civil society advocacy do not align with official strategic objectives of the government.

This alignment in interests between investigative journalists and civil society advocates, along with the concurrent divergence between civil society special interests and the strategic interests of government agencies, creates a mutually reinforcing relationship between "accountability" journalism and civil society advocates. The synergy that exists between the two sectors creates a powerful incentive for both industries – media and civil society – to cooperate and to amplify discourse generated by the other in order to encourage systemic changes to DoD targeting and accountability processes. The endeavor to situate the critical analysis of media coverage conducted herein transitions now to examine the connections between media coverage and civil society advocates and to explore the ways in which media coverage is exploited in pursuit of a version of "accountability" that distorts actual legal and policy standards while advancing civil society special interests.

Expert Analysis from Civil Society Advocates as a Tool for Accountability Journalism

The present critical analysis of media coverage has already touched upon characterizations presented in the reporting by John Sifton of Human Rights Watch since these support the "scant accountability" narrative cultivated by the coverage. Indeed, one essential method by which reporters construct narratives supporting the apparent "accountability journalism" pursued by media coverage is to juxtapose operational characterizations presented from official sources with expert analysis drawn from civil society experts. In a primary NYT story involving the Kabul drone strike, for example, Sifton's claim that the U.S. military "has a terrible record" regarding civilian harm mitigation practices "after decades of failed accountability" is set against journalistic commentary observing that "new details" about the strike, "which the Pentagon initially said was necessary to prevent an attack on American troops, show the limitations of such counterterrorism missions even when U.S. forces are on the ground."

The same story involving the Kabul drone strike later presents a quote from then-CENTCOM commander General Kenneth McKenzie observing that external observers should not "draw any conclusions about our ability to strike in Afghanistan against ISIS-K targets in the future based on" the outcome of the engagement. This official characterization of the strike is followed immediately by commentary drawn from Luke Hartig's Twitter thread claiming that the way the military "bungled fundamental operational things is really troubling and suggests more than a one-off mistake" and evinces "some massive flaws in targeting methodology." Like the preceding claim regarding "decades of failed accountability" presented by John Sifton, this observation from Luke Hartig is set against characterizations from official sources in a manner to create the appearance that the experts to whom the investigative journalists turn for analysis are either better informed or are more forthcoming than government officials.

This story goes on to describe and provide a link to an official study of civilian casualties conducted by National Defense University in 2018 at the direction of the Chairman of the Joint Chiefs of Staff. That study concludes, among other findings, that existing military practice presents "clear written guidance and oversight regarding civilian casualty mitigation for deliberate and dynamic strikes" and demonstrates "a widespread priority to minimize civilian casualties from the highest to lowest levels." The story paraphrases a finding related to the targeting process of achieving positive identification by noting the official study "concluded that there was 'sufficient guidance and structure' in the targeting process, which did not increase the risk of civilian casualties." This official characterization is followed immediately by journalistic commentary describing that "two members of the study team — Lawrence L. Lewis and Sarah Holewinski, civilian casualty specialists — disagreed with the report's conclusions and urged more research on the issue." A quote provided by Larry Lewis to the journalist(s) is then presented as expert commentary to contradict the conclusion of the official report: "I just wish we could start fixing these problems instead of writing them off as 'mistakes.'"

In a similar fashion, a later NYT story involving publication by the DoD of the Civilian Harm Mitigation and Response Action Plan (CHMR-AP) presents expert commentary by civil society advocates to support the journalistic suggestion that official processes are inadequate and that it falls upon the fourth estate to hold the government to account for these apparent shortcomings. The "accountability" journalism narrative is set up with a quote from Defense Secretary Lloyd Austin claiming implementation of CHMR-AP will ensure the DoD is "well prepared to prevent, mitigate and respond to civilian harm in current and future conflicts." This quote is followed immediately by expert commentary from civil society advocates indicating that the plan will *not*, in fact, adequately ensure the DoD is so "well prepared" to do so.

The first quote is from Marc Garlasco of PAX. Although the NYT story presents a quote from Garlasco observing that the action plan "will ensure fewer people will die and create a way for the Defense Department to respond when civilians are killed" if it is resourced and implemented correctly, this note of optimism is accompanied with an air of caution. Among a number of purported gaps in the action plan, according to observations summarized by the journalists, is that the plan does not provide specific details regarding "whether individual officials or commanders would be held accountable for violations."

This would be a genuine deficiency, of course, if a failure to hold individuals or commanders "accountable for violations" were actually demonstrated to be a systemic problem. However, neither the expert commentary presented by Marc Garlasco nor the collection of NYT

"accountability journalism" involving military combat operations convincingly establishes this to be a shortcoming that exists in current DoD practice that the action plan would actually need to address. The venture by the fourth estate to draw upon expert commentary to demonstrate a fundamental flaw in the CHMR-AP, then, is more illusory than reality.

This misdirected example of "gotcha journalism" is followed by additional expert commentary presented for the purpose of demonstrating apparent deficiencies in the recently-published DoD CHMR-AP. The observations from Marc Garlasco of PAX are followed immediately by journalistic commentary indicating that the action plan "also does not say whether the new efforts will include reopening or studying past incidents that resulted in civilian deaths." This commentary sets up a quote from Annie Shiel of the Center for Civilians in Conflict (CIVIC). According to the NYT story, Shiel reportedly cautions, "Investigating and making amends for past harm is critical to achieving the kind of accountability and learning that the action plan rightly strives for."

If the CHMR-AP fails to require "reopening or studying past incidents that resulted in civilian deaths," as the accountability journalists observe, then, the expert commentary from Shiel suggests the plan will not achieve "the kind of accountability and learning" the DoD needs to implement. Yet again, there is no convincing suggestion from the commentary or from high-profile media coverage that achieving "accountability" for civilian harm is a deficiency in actual military practice. The same is true regarding the appeal for the DoD to investigate and make amends for past *harm* caused from military operations. An investigation would be necessary if there is any indication that personnel committed serious violations of international law in the conduct of hostilities, but no *actual* evidence has been presented in public discourse to support such a finding. The call for investigations and amends for *harm* caused in the past is centered on the outcome of attacks rather than the processes that led to the strikes. That the CHMR-AP does not provide for "reopening or studying past incidents that resulted in civilian casualties" is not a deficiency in the plan, notwithstanding the commentary that would suggest otherwise by civil society expert Annie Shiel presented in the NYT story.

Collectively, the expert analysis presented from civil society advocates as sources in media coverage supports the journalist's campaign for "accountability" in performing the role of the fourth estate. However, the expert analysis actually serves the purpose of supporting what the present inquiry above characterizes as "gotcha" journalism. In essence, the narratives paraphrase or directly quote claims made from official sources, then – gothca! – official sources are "exposed" as misleading or misinformed. A primary tool relied upon by accountability journalists, along with claims often attributed to unnamed government sources, is commentary from civil society advocates selected by the reporters that gives the appearance of refuting characterizations from official sources regarding combat operations.

Accountability Journalism as a Tool to Advance Civil Society Special Interests

As the critical analysis conducted herein establishes, narratives developed in high-profile media coverage distort the standards by which personnel are actually held accountable in practice. These distortions align with the special interests pursued by civil society advocates, and this alignment generates a mutually reinforcing relationship since civil society advocates likewise draw extensively on media coverage as purported proof that existing targeting processes and accountability practices are systemically deficient across the DoD. The present inquiry transitions now to explore how distorted narratives developed in high-profile media coverage are utilized as a primary foundation

upon which civil society advocates rely to make the case that existing military processes are fundamentally and irrevocably deficient and, as a result, the DoD should be forced to adopt recommendations presented by advocates external to the military if senior leadership remains reluctant to do so of their own accord.

Center for Civilians in Armed Conflict and Media Reporting as an Advocacy Tool

Among the civil society advocacy groups that feature prominently in high-profile media coverage of U.S. military combat operations is the Center for Civilians in Conflict, or CIVIC. As the analysis immediately above describes, Annie Shiel of CIVIC provides expert commentary in a NYT story involving publication of the CHMR-AP, with Shiel cautioning that the plan does not explicitly require the DoD to investigate or make amends for past *harm* caused by U.S. military combat operations. While this commentary is utilized in media coverage seemingly engaged in accountability journalism to support the suggestion that the CHMR-AP is potentially deficient, the media coverage itself is, in turn, a centerpiece of Annie Shiel's own commentary intended to demonstrate that DoD practices – including the CHMR-AP – are unsatisfactory and that, as a result, the military should adopt recommendations developed by her and by CIVIC.

In an article posted on *Just Security* as CHMR-AP was still in development, for example, Annie Shiel makes extensive use of NYT media coverage as evidence in support of the policy reform suggestions for which she advocates. As the title of the article, "DoD Can't Move Forward on Civilian Casualties Without Looking Back" suggests, Shiel calls for an extensive accounting of past civilian *harm* in order to inform future mitigation and response practices. In her concluding remarks, Shiel claims doing so "could ensure acknowledgement for victims and survivors waiting for recognition and justice and allow the U.S. military to learn for the future."

This policy suggestion is built upon an effects-based approach by focusing on "recognition and justice" for "victims and survivors" of attacks without regard for processes that led to potential incidents of civilian casualties. In contrast, the doctrinal application of applicable provisions of law and policy that is actually applied in military practice is focused on the process that leads to an attack, as the analysis conducted in the case studies above demonstrates. In the process of developing and advocating outcome-based policy recommendations, Shiel refers to and repeatedly draws upon characterizations presented in recent "investigative reporting by the *New York Times*" to demonstrate the apparent need to adopt the favored recommendations in practice.

A similar dynamic between civil society policy suggestions and recent NYT investigative reporting is evident in a separate article posted to *Just Security* a week later by Annie Shiel of CIVIC and co-author Sarah Yager of Human Rights Watch. In this subsequent article, Shiel and Yager advocate in favor of a pair of bills that had been introduced in both chambers of Congress that would impose extensive legislative requirements for DoD civilian harm mitigation efforts. The relative merits of these provisions and the constitutional authority for Congress to impose the requirements are examined below. For present purposes, it is sufficient to note that recent NYT media coverage purportedly revealing "systemic flaws that led to civilian deaths and injuries" features prominently in the depiction developed by Shiel and Yager of the apparent deficiencies the legislation seeks to address.

As an organization, CIVIC has long drawn upon high-profile media coverage, particularly from the New York Times, as apparent "evidence" of deficiencies in U.S. government security practices that

can be "corrected" by recommendations presented by civil society activists. Indeed, the first NYT story involving civilian casualties published by Azmat Khan and co-author Anand Gopal in 2017, which seeks to discredit U.S. coalition casualty figures that are not claimed by official sources to be complete and accurate, asserts that the NYT investigative "reporting, conducted over 18 months, shows that the air war has been significantly less precise than the coalition claims." The NYT story, which lauds the efforts by CIVIC that "culminated in legislation that established a fund to provide Iraqi victims of American combat operations with nonmonetary assistance," is, perhaps not surprisingly, in turn extolled on the CIVIC website as an article that "should be required reading for all those involved in Operation Inherent Resolve, which the Pentagon often refers to as the most precise air campaign in history."

This page on the organization's website expresses that CIVIC activists "are obviously dismayed by the findings" of Khan and Gopal. According to CIVIC, the media investigation demonstrates "it is obvious much work remains," and as a result CIVIC renews its call for "militaries and governments to place civilian protection at the center of their planning." Of course, seeking to characterize civilian casualty figures as inaccurate when the government does not *claim* the figures are complete and accurate, as Khan and Gopal seek to accomplish, does not indicate the U.S. military fails to "place civilian protection at the center of their planning" as CIVIC asserts. Nonetheless, the organization calls for the story to be "required reading" for all military members involved in combat operations in Iraq and Syria.

A similar symbiotic dynamic is evident in more recent high-profile NYT media coverage of U.S. military combat operations. For example, in another article posted on Just Security, this in late December 2021, CIVIC advocates John Ramming Chappell and Ari Tolany claim that "legislative action is needed…not only to investigate and make amends for civilian harm, but to implement strong policies concerning the protection of civilians in U.S. and partner military operations." This appeal for intensifying legislative assertiveness in U.S. military combat operations set the stage in support of bicameral legislation that would be introduced a few weeks later as the second session of the 117th Congress got underway. According to the CIVIC advocates, expanding legislative intervention is needed in part because a NYT investigation found that the DoD "failed to investigate properly several civilian casualty incidents in Syria, including the March 2019 airstrikes in Baghuz that killed as many as seventy civilians." Likewise, according to the CIVIC narrative, "This reporting, along with five years of other in-depth New York Times investigations, illustrates the systemic failures of accountability for civilian casualties which have plagued U.S. air wars in Syria, Iraq, and Afghanistan."

As the critical analysis of the cited media coverage conducted herein demonstrates, however, the claim that the Baghuz strikes constituted potential war crimes that were insufficiently investigating were unfounded from the outset, and the "systemic failures of accountability" actually afflict NYT investigative reporting rather than "U.S. air wars in Syria, Iraq, and Afghanistan." Nonetheless, the CIVIC co-authors rely on NYT investigations that purportedly "demonstrate a lack of DOD transparency and failure to self-regulate that requires legislative action." Based on systemic deficiencies inherent in the media coverage on which the CIVIC advocates rely to justify the need for assertive congressional intervention, the concluding call to action for legislators to "ask hard questions of DOD in light of recent revelations of civilian harm, thoroughly investigate longstanding shortcomings, and work to facilitate transparency and amends for twenty years of civilian harm in the so-called 'war on terror'" rings hollow.

For yet another example of the symbiotic relationship between NYT "accountability" journalism and policy recommendations presented by CIVIC to "improve" DoD accountability mechanisms, the present inquiry returns to claims made by Annie Shiel, this following the official announcement of the results of the secondary review of the Baghuz airstrikes. In a statement posted to the CIVIC website, Shiel claims the review of the initial investigation "illustrates again systemic shortcomings in how the U.S. military prevents, investigates, and transparently responds to civilian harm." In support of the apparent "systemic shortcomings," the statement presents a hyperlink to a NYT story that, according to Shiel, reveals the secondary review "of the Baghuz strike classified all adult males at the site as fighters, whether they were armed or not." However, this assertion from the NYT story, which is presented by unnamed "officials familiar with the findings" of the review, is not relevant to a doctrinal assessment of whether responsible personnel complied with applicable provisions of law and policy in conducting the attack. As the executive summary of the secondary review, to which the NYT story provides a link, determines, the "ground force commander" responsible for the strikes "repeatedly received confirmation that no civilians were in the strike areas" and was unaware at the time that "civilians were within the blast radius."

Like the NYT story published by Eric Schmitt and Dave Phillips, Annie Shiel of CIVIC refrains from acknowledging that the "extensive review of the facts and circumstances" conducted by Gen. Michael Garret in the secondary assessment concludes the initial claim of war crime and coverup at the center of the initial NYT story "was unsubstantiated" and "not supported by evidence and/or are based on inaccurate or false information." Instead, Shiel condemns the review as yet another example of "systemic shortcomings in how the U.S. military prevents, investigates, and transparently responds to civilian harm." A primary exhibit supporting this apparent "scant accountability" narrative is a claim offered by unnamed sources presented in a NYT story and that is irrelevant to the issue of LOAC compliance and the adequacy of both the initial investigation and the subsequent review.

PAX and Media Reporting as an Advocacy Tool

Although the analysis in the present section has thus far focused on connections in public discourse between New York Times reporting and activism from the Center for Civilians in Conflict, CIVIC is not the only civil society group for which a symbiotic relationship exists with NYT accountability journalists. For another article posted on Just Security, for example, Erin Bijl of PAX and Archibald Henry of InterAction make the case, as the title indicates, that the U.S. Department of Defense "needs to rethink its civilian casualty reporting mechanism." After beginning with a brief narrative describing efforts of Somali civilians who "approached an international civil society organization for help with filing a report regarding alleged harm experienced at the hands of the U.S. Africa Command," the opening section is titled, "This is Not New: Shortcomings In Civilian Harm Mitigation and Response." The first sentence of this initial section presents a link to "The Civilian Casualty Files" NYT story and claims, "A series of New York Times investigations have revealed persistent gaps in U.S. military efforts to prevent, respond to, and learn from incidents of civilian harm, including civilian deaths, injuries, and damage to infrastructure and property."

The main point of the article is to present the findings of a PAX study that purportedly demonstrates, as the title of the second section describes, "New Research Finds DoD Should Do More to Improve Civilian Harm Reporting." In their concluding remarks, the co-authors from PAX and Interaction assert that "civilians affected by conflict should have the right to report the human toll of war and be able to trust that their reporting will lead to concrete actions to remedy the harm

inflicted." Throughout the article, no authoritative provision of existing domestic or international law is identified as the source of the right "to report the human toll of war" and "to trust" the reporting "will lead to concrete actions," yet NYT reporting is cited as the primary evidence purportedly demonstrating the existence of "persistent gaps in U.S. military efforts to prevent, respond to, and learn from incidence of civilian harm" that must now be ostensibly addressed and corrected.

While these civil society advocates associated with PAX and InterAction have relied on NYT reporting as "evidence" of the need for DoD to adopt their preferred policy prescriptions, NYT investigative journalists have likewise drawn on commentary from PAX advocate Marc Garlasco for expert commentary regarding various aspects of U.S. military targeting practices. In one story presenting an analysis of official records "by The Times's Visual Investigations unit [that] found that a number of allegations of civilian casualties had been dismissed as 'noncredible' based on flawed reviews of evidence," for example, one quote from Garlasco claims, "I'll tell you what it is: That's negligence." According to Garlasco, the NYT methodology represents "the most basic level of investigation that they [DoD practitioners] should be doing, and not to do it is completely negligent."

As the present inquiry demonstrates, however, very little information of value regarding compliance with relevant rules involving the use of force can be drawn from a robust post-strike analysis of an engagement. A "most basic level" of *investigation* requires an assessment of information that was reasonably available to personnel responsible for an engagement at the time of the attack, along with an evaluation of the intent of the personnel in conducting the strike. Although engaging in a thorough post-strike analysis to verify the authenticity of an allegation of civilian casualties and to develop any potential lessons from the engagement is certainly prudent practice, failure to do so is not negligence "plain and simple" as Garlasco claims. If conclusions following "the most basic levels of investigation" were developed primarily from the *outcome* of attacks, Garlasco's claim of "negligence" would be entirely reasonable. This is not the case, yet expert commentary by Marc Garlasco of PAX is relied upon by the NYT accountability journalists to "demonstrate" the systemic flaws in existing government practice the journalists seek to expose.

In a later story involving the perceived merits of the DoD CHMR-AP when the policy was made public, NYT investigative journalists return yet again to Marc Garlasco (along with Annie Shiel of CIVIC) for expert analysis. According to this later NYT story, "Garlasco said the plan did not fully address several questions, including how the military would improve its ability to estimate civilian casualties; how information from outside groups would be incorporated into the Pentagon's civilian harm assessments; and whether individual officials or commanders would be held accountable for violations." As the analysis in the preceding paragraph indicates, however, improving the DoD "ability to estimate civilian casualties" is not a necessary component of evaluating compliance with existing legal and policy rules, and, as such, failure to present specific guidance on this topic is not an indication that CHMR-AP is fundamentally flawed. Likewise, the narrative purporting to demonstrate that "individual officials or commanders" are *not* currently "held accountable for violations" has been manufactured by unaccountable investigative journalists and exploited in turn by civil society advocates. Failure to address this apparent deficiency in DoD practice is not a limitation of the CHMR-AP since the "scant accountability" narrative the plan would set out to correct, pursuant to the prescription presented by Garlasco, is the product of fiction rather than fact.

As might be expected based on the analysis of methods by which CIVIC advocates rely on media coverage to support preferred policy outcomes, Marc Garlasco of PAX likewise draws upon NYT reporting in his own commentary in public discourse as evidence of apparent deficiencies inherent in the DoD CHMR-AP that must be addressed. Indeed, Garlasco notes in an article providing his assessment of CHMR-AP that was published on Lawfare soon after the plan was made available to the public, "the New York Times reported on the dozens of civilians killed in Syria by U.S. airstrikes, and the newspaper's Pulitzer-prize-winning series on other civilian deaths from U.S. airstrikes earlier this year continued to put pressure on the Pentagon." However, careful scrutiny of these observations provides additional evidence revealing the ways in which civil society advocates, in this case Marc Garlasco of PAX, both contribute to and exploit misleading narratives developed in media coverage of military combat operations.

For example, the story regarding "dozens of civilians killed in Syria by U.S. airstrikes" includes coverage of the Baghuz strikes, in which an indeterminate number of civilians were reportedly killed in an attack that was misleadingly characterized in NYT coverage as a potential war crime and ensuing coverup. Likewise, media coverage of the attacks on and around Taqba Dam in Syria created the appearance that personnel responsible for attacks manipulated rules involving the use of force to secure approval for the strikes, yet the doctrinal analysis conducted in the present inquiry confirms the strikes in fact complied with relevant legal and policy rules – despite the appearance to the contrary developed in media coverage. While it is undoubtedly true that the NYT "Pulitzer-prize-winning series on other civilian deaths from U.S. airstrikes…continued to put pressure on the Pentagon," this series of investigative journalism repeatedly relied upon non-doctrinal analysis from civil society advocates to develop the narrative purporting to demonstrate that a pernicious "scant accountability" condition seemingly plagued military combat operations. As the present inquiry transitions now to explore, both PAX and CIVIC participated in a coalition of civil society organizations that combined to both shape the narratives developed in high-profile media coverage of combat operations and exploited the narratives in support of policy reform suggestions presented by the civil society coalition.

Civil Society Coalition and Media Reporting as an Advocacy Tool

The appearance that the U.S. military is plagued by a condition of "scant accountability" involving the conduct and evaluation of targeting operations has been cultivated primarily by a symbiotic relationship between high-profile "accountability" journalism and civil society advocacy. Although CIVIC and PAX have featured prominently in public discourse involving this apparent military accountability gap, these organizations are not alone in the pervasive advocacy campaign. Although a full accounting of civil society activism in this area is beyond the scope of the present inquiry, the analysis in this section considers two examples for which CIVIC and PAX joined a coalition of civil society groups demanding DoD policy reforms while drawing on high-profile media coverage as "evidence" of the systemic problems that purportedly must be corrected in U.S. military practice.

The first example considered herein is a letter signed in December 2021 by more than 20 civil society groups, including CIVIC and PAX, and addressed to Secretary of Defense Lloyd Austin. The subject line presented in the letter is, "Defense Department Civilian Harm Policies and Practices," and the opening sentence indicates the organizational signatories "write to express our grave concerns about the Department of Defense's civilian harm policies and practices and their impact." The primary factual examples cited as evidence by the letter that raises "grave concerns" about DoD civilian harm policies are incidents reported in NYT media coverage that, according to

the letter, are "emblematic of twenty years of U.S. operations that have killed tens of thousands of civilians in multiple countries."

As the civil society organizations point out, NYT reporting involving the Baghuz strikes, for example, "raises grave concerns about the U.S. military's commitment to accountability and adherence to international humanitarian law, including the duty to investigate potential war crimes and hold responsible individuals to account." As the doctrinal analysis conducted in the present inquiry demonstrates, however, the appearance of a potential war crime and coverup was the product of mistaken impressions presented to journalists by their sources initially and then further developed in relevant media coverage. Coverage of the Baghuz strikes is cited as but one example in a pattern of "unwillingness to thoroughly investigate and acknowledge civilian harm" that is purportedly "often the reality across the Department of Defense." The actual reality, though, is that "thorough investigation" in practice involves an assessment of the process that led to an attack rather than the outcome of a strike – whether or not a strike becomes the subject of a high-profile media investigation.

A similar dynamic emerges from a critical analysis of a letter sent from a coalition of dozens of nongovernmental organizations, including CIVIC and PAX, to President Joe Biden a few months after the letter directed to Secretary Austin. This later letter, which refers to and cites the previous dispatch, urges the commander in chief "to lead a much-needed overhaul of U.S. civilian harm policies and practices." The problem statement described by the coalition of NGOs as a call to action is, "Recent New York Times investigations into U.S-caused civilian harm have documented significant shortcomings in how the U.S. government prevents, investigates, and responds to civilian casualties and damage to civilian objects." According to the letter, the "findings" of these media "investigations" demonstrate "legal and policy flaws that our groups and others have repeatedly raised with the U.S. government for many years." As a call to action, the letter requests that President Biden "publicly recognize the longstanding structural flaws in how the U.S. mitigates, investigates, and responds to civilian deaths and injuries in its operations, and to" accept a number of recommendations presented by the coalition.

These suggestions are reportedly designed to ensure "the U.S. government can finally account for and reckon with the civilian deaths, injuries, and other harms of the last twenty years." However, recent NYT "investigations" have not, in reality, demonstrated "significant shortcomings in how the U.S. government prevents, investigates, and responds to civilian casualties and damage to civilian objects." As the critical analysis in the present inquiry reveals, the focus of military officials in practice is on compliance with doctrinal legal and policy rules.

Neither media "investigations" nor civil society studies have convincingly demonstrated the existence of "longstanding structural flaws in how" officials in the U.S. government assess compliance with doctrinal provisions of LOAC and ROE. This divergence in perspective must be accounted for in order to illustrate the reasons civil society recommendations are met with resistance in actual practice. Likewise, clarifying the causes for the divergence in approaches among military practitioners and civil society advocates can illuminate the motivation for civil society groups, including the coalition responsible for the letters analyzed immediately above, to both contribute to and exploit distortions in public opinion generated by high-profile media coverage.

Divergence Between Civil Society Interests and Government Strategic Objectives

Uncovering the discord in perspectives between civil society groups and military practitioners begins with illuminating the divergence in the strategic vision and mission of both camps. The mission of the U.S. Department of Defense, for example, is "to provide the military forces needed to deter war and ensure our nation's security." In support of this mission, the DoD is organized by seven geographic combatant commands and four functional combatant commands. As an example of a geographic combatant command, the mission of U.S. European Command is to execute "a full range of multi-domain operations in coordination with Allies and partners to support NATO" and, if required, "to fight alongside Allies and partners to prevail in any conflict." As an example of a functional command, the vision of U.S. Special Operations Command is to field a develop a group of professionals "relentlessly seeking advantage in every domain to compete and win for the Joint Force and the Nation."

From a doctrinal perspective, the commitment for the military to "prevail in any conflict" or "win for the Joint Force and the Nation" requires "leaders at all echelons [to] exercise disciplined initiative, acting aggressively and independently to accomplish the mission." Likewise, military doctrine establishes that "actions of military personnel and units" must be "framed by the disciplined application of force, including specific" rules of engagement. While restraint in exercising military capabilities "is essential for success," military doctrine emphasizes that the "principle of restraint does not preclude the application of overwhelming force, when appropriate and authorized, to display US resolve and commitment."

This strategic mission, vision, and perspective on the application of force is not shared by civil society groups. Returning to the coalition of NGO signatories to the letter sent to President Biden in February 2022, a sampling of the declared missions and visions of a number of members of this coalition helps illustrate this point. According to the mission and vision presented on the CIVIC website, for example, the organization "envisions a world in which no civilian is harmed in conflict." One of the guiding principles listed on this page is that "[a]rmed actors are responsible and must be *held accountable* for preventing and addressing civilian *harm*." (emphasis added) Likewise, the website for PAX – or Protection of Civilians – avows that "protection of civilians living in conflict is at the heart of our work." In support of this work, the organization seeks to "enable civilians to hold security actors to account" while encouraging security actors to "civilian-centered protection strategies." International Rescue Committee, in turn, is guided by the commitment to "help restore health, safety, education, economic wellbeing and power to people devastated by conflict and disaster." The website for Win Without War expresses that the group "is a diverse network of activists and organizations working for a more peaceful, progressive U.S. foreign policy." Human Rights Watch seeks to "create an undeniable record of human rights abuses" by partnering with groups "to help hold abusers to account and bring justice to victims."

And so on. For each one of these civil society groups, the *outcome* of civilian protection is at the center of the organizational mission and vision. Holding armed actors accountable for civilian *harm*, as CIVIC seeks to achieve, detaches the group's advocacy pursuits from doctrinal application of relevant rules of law and policy since the latter is centered on the process that led to harm rather than the harm itself. The goal for PAX of enabling civilians to hold security actors accountable is likewise disengaged from doctrinal sources such as LOAC and rules of engagement. The same is true for the Human Rights Watch goal of bringing justice to victims. Similarly, while working for a more peaceful and progressive American foreign policy may be an honorable pursuit for members

of Win Without War, this strategic objective does not necessarily align, for example, with the European Command mission to "prevail in any conflict."

In short, civil society groups such as CIVIC and PAX approach incidents of civilian harm that occur during the conduct of hostilities from a perspective that is detached from the requirement to "exercise disciplined initiative" that is "framed by the disciplined use of force" required for the military to fight and prevail in armed conflict. This infuses civil society advocacy pursuits with institutional bias that does not align with the strategic interests of the Department of Defense. As Michael Schmitt succinctly observes on the topic, "NGOs and others are…unfettered in pushing the balance" between military necessity and humanity "in the direction of humanity" in part because "they pay no price for forfeiting a degree of military necessity." According to Schmitt, this results in "a frequent assertion of *lex ferenda*" by NGOs "in the guise of purported" *lex lata*. (the text of the article actually describes "a frequent assertion of *lex ferenda* in the guise of purported *lex ferenda*," though the duplication of *lex ferenda* at the end of the sentence appears to be a typographical error given that the author correctly states this point earlier in the article by noting that "the desire to protect human beings" expressed by international tribunals may be noble, but "such pronouncements are more suited to proposals of *lex ferenda* than claims of *lex lata*.")

The institutional bias that leads civil society advocates to be "unfettered in pushing the balance in the direction of humanity" creates a divergence in perceptions of accountability among military practitioners and NGOs. As the book *On Civilian Harm*, which was published by PAX in 2021, notes, "From the perspective of the civilians being harmed, the motive behind a decision causing harm often matters very little: Survivors will have to deal with violence induced trauma regardless of whether the perpetrator was directly out to harm them or was unable to avoid harming them." From this civilian-centric perspective, those who experience harm "will need to rebuild or relocate regardless of whether the house was destroyed with malicious intent or as 'collateral damage.'" From the perspective of a military commander determining whether to impose adverse personnel action following an attack that results in incidental damage, in contrast, the intent of those responsible for the engagement is of primary importance, while the outcome of the attack is of almost no consequence.

The resulting divergence in approaches and perspectives results in the persistent reluctance by the DoD to adopt recommendations presented by civil society advocates related to civilian harm mitigation and response. Personnel are held accountable for compliance with doctrinal provisions of relevant law and policy in actual military practice. The DoD, therefore, would remain reluctant to adopt "structural changes to prioritize civilian protection and *accountability for civilian harm*," as the letter submitted to Secretary Austin by a coalition of civil society groups. (emphasis added)

Likewise, demands for revised policies involving more robust investigations based on harm *caused* during the conduct of hostilities will be met with reluctance in military practice. Returning to the letter submitted to Defense Secretary Austin by a coalition of NGOs, including CIVIC and PAX, for example, the authors note that "twenty years before" the Kabul drone strike, "independent rights groups, family members, and others have documented and submitted numerous credible reports of civilian harm from U.S. operations around the world" yet "the vast majority have been under-investigated [and] unacknowledged." As the DoD Law of War Manual observes on the topic of investigating purported incidents of civilian harm, however, while "battle damage assessments or other after-action reviews or investigations of whether and how many civilians were harmed by an attack may serve a number of useful purposes, the actual results of an attack do not always provide

useful information in assessing" compliance with LOAC rules such as proportionality. Compliance with doctrinal rules is assessed "based on the information available" to personnel at the time of an attack rather than "with the benefit of hindsight" that develops from a post-strike investigation.

The same reluctance to adopt civil society suggestions is also apparent, for example, related to advocacy involving demands for the DoD to provide more robust amends when civilian persons or objects are harmed in attacks. To continue the point regarding "under-investigated [and] unacknowledged" incidents of civilian harm during the "twenty years before" the Kabul drone strike, for example, the civil society letter to Secretary Austin also criticizes that "the vast majority" of incidents remain "without compensation or amends" offered or provided by the military. However, as the DoD Law of War Manual notes on the topic of amends, "although indemnification is not required for injuries or damage incidental to the lawful use of armed force, compensation may be provided as a humanitarian gesture."

This passage from the Manual cites to a statement presented by a State Department legal advisor, Abraham Sofaer, to the House Armed Services Committee in 1988 recognizing three basic principles of international law. According to the statement provided by Sofaer three decades ago and more recently cited by the Manual in 2016, "First, indemnification is not required for injuries or damage incidental to the lawful use of armed force. Second, indemnification is required where the exercise of armed force is unlawful. Third, states may, nevertheless, pay compensation *ex gratia* without acknowledging, and irrespective of, legal liability." While civil society advocates may object to the fact that "the vast majority" of incidents of civilian harm are not accompanied by offers of "compensation or amends" by the Department of Defense, indemnification is merely discretionary unless the attack violates international law.

The focus on compliance with doctrinal provisions of law and policy by military practitioners and the concomitant emphasis on investigating, holding personnel accountable for, and indemnifying civilian on the basis of civilian *harm* encourages civil society advocates to engage in what I have previously described as "lawscaping." That is, "the endeavor to shape relevant provisions of the law to support an advocated outcome that is not necessarily implemented as a method of warfare." (the practice of governments "using – or misusing – law as a substitute for traditional military means to achieve an operational objective" would be widely recognized as lawfare rather than lawscaping, which is centered on private actors rather than governments.) Returning to the assessment of the balance between humanity and military necessity described by Michael Schmitt, what I describe as "lawscaping" results in "a frequent assertion of *lex ferenda*" by advocates "in the guise of purported" *lex lata* that supports civil society strategic objectives.

As the letter from the civil society coalition directed to Secretary Austin claims, for example, "The Kabul and Baghuz strikes also illustrate long-standing problems with the U.S. military's interpretations of its international humanitarian law obligations and its response to civilian harm, including failures to investigate, publicly acknowledge, and offer amends for harm, and ensure accountability in the event of wrongdoing." However, this opening sentence of the section labeled "Failures of Response and Accountability" relies on narratives generated in New York Times reporting as purported evidence of "secretive Special Operations strikes that apparently circumvented legal and policy civilian protection safeguards and raised alarm among Defense Department and CIA personnel, as well as U.S. military officials' attempts to conceal a possible war crime at Baghuz." As the present inquiry demonstrates, the New York Times reporting is itself

plagued by failures of accountability rather than the U.S. military combat operations covered thereby.

Just like the biased and ill-informed media coverage on which this style of advocacy relies, there is no mechanism in public discourse by which to hold civil society advocates accountable for claiming the U.S. military is plagued by "long-standing problems with…interpretations of its international humanitarian law obligations and its response to civilian harm" in the absence of actual evidence to support this (mis)characterization. These mischaracterizations of relevant provisions of law and policy may well support civil society missions such as enabling "civilians to hold security actors to account" for PAX or ensuring "[a]rmed actors are responsible and must be held accountable for preventing and addressing civilian harm" for CIVIC. However, the actual armed actors, such as members of the U.S. Department of Defense, must apply doctrinal sources of law and policy in actual practice in support of the requirement "to fight alongside Allies and partners to prevail in any conflict," as the European Command mission observes.

In short, the actions of military personnel actually engaged in the conduct of hostilities must be "framed by the disciplined application of force," which may include the use of "overwhelming force, when appropriate and authorized, to display US resolve and commitment." The strategic objectives of civil society advocates, in contrast, encourage the use of lawscaping in support of the campaign to demand that organizations such as the U.S. Department of Defense hold personnel accountable for incidents of civilian *harm*. As Michael Schmitt observes, the "*raison d'être*" of "NGOs and others" is to push the balance between military necessity and humanity "in the direction of humanity," and these civil society advocates "pay no price for forfeiting a degree of military necessity." The divergence between the strategic objectives of military organizations such as the Department of Defense and civil society organizations such as CIVIC and PAX generates reluctance among military practitioners to adopt suggestions developed by civil society advocates involving operational and accountability practices.

This reluctance of military organizations, in turn, provides motivation for advocates to both contribute to and exploit scandal and outrage in the endeavor to influence public opinion and generate pressure on organizations such as the DoD to adopt civil society recommendations. Striving to hold the government accountable while performing the role of the fourth estate creates an inherent motive for "accountability journalists" to call upon civil society advocates seeking their own version of accountability – for the *outcome* of civilian harm – for expert commentary. Likewise, because there is no requirement for investigative journalists to themselves be particularly familiar with doctrinal sources of law and policy, these purveyors of media narratives may not even be aware that the sources to whom they turn for expert analysis are inclined to offer *lex ferenda* in the guise of *lex lata* when provide commentary to reporters. As the concluding substantive section of the present inquiry now examines, there is another institution populated with individuals who are not required to be particularly familiar with doctrinal sources of law and policy or the divergence between perspectives between military practitioners and civil society groups to which advocates can turn in pursuit of their organizational strategic objectives: the United States Congress.

Congressional Overreach in U.S. Military Targeting Operations Abroad

One day before the correspondence examined in the previous section was addressed to Secretary of Defense Lloyd Austin, nearly the same collection of civil society groups published a letter to select lawmakers requesting "urgent congressional oversight of U.S. civilian harm policies and adherence

to international humanitarian law." Like the letter directed to Secretary Austin, the dispatch to Congress relies on "New York Times reporting" to establish the parameters of the apparent problems that require assertive legislative intervention. Reporting involving "the 2019 Baghuz strike and the alleged cover-up of a possible war crime," for example, purportedly has "raised serious concerns about the U.S. military's commitment to accountability and adherence to international law, including the duty to investigate possible war crimes and hold responsible individuals to account." Likewise, media coverage involving the Kabul drone strike reportedly is part of a persistent "failure to implement lessons learned from twenty years of repeated civilian harm without meaningful investigations, acknowledgement, or accountability."

The critical assessment of the narratives presented in recent high-profile media coverage involving U.S. military combat operations that is the primary focus of the present inquiry and upon which the coalition of civil society advocates relies need not be recounted in full here. For current purposes, the call to action reflected in this dispatch to Congress is of primary importance. According to the institutional signatories, "Over the years, many of our organizations have worked to engage the Department of Defense to improve its policies for preventing civilian harm and investigating, acknowledging, and providing compensation and amends for harm when it occurs." After chronicling a number of such endeavors, the letter laments, "Despite years of good-faith engagement, we have seen little to no progress on implementing many of these recommendations." Following a number of specific requests offered to the various congressional committees of which the recipients are members, the letter claims, "Accountability and transparency are foundational to democratic governance and legitimacy, and the protection of civilians is a moral, ethical, legal, and humanitarian imperative."

Due to the systemic deficiencies in DoD practice purportedly enumerated by the letter, the signatories implore the recipient lawmakers "to take urgent action to prevent and address civilian harm." This letter directed to the chair and ranking member of both the House and Senate Armed Services Committees, then, makes much the same case as the correspondence examined above directed to Secretary Austin and President Biden regarding apparent persistent and systemic deficiencies in the manner in which the U.S. military conducts combat operations and accounts for them afterward. A perceptible change in tack for this letter directed to lawmakers, though, is an appeal to Congress to force the military, through legislation, to adopt suggestions perennially issued by civil society advocates to the executive branch given that "years of good-faith engagement" have now yielded "little to no progress on implementing many of these recommendations."

What is missing from this appeal for assertive intervention by Congress is an accounting of why the Department of Defense has remained persistently reluctant to adopt these "reform" measures presented by civil society groups, advocates, and activists. As the section immediately above examines, the persistent reluctance demonstrated by military officials is attributable in large part to the divergence in priorities and strategic objectives that exists between the Department of Defense and civil society groups. While a non-governmental organization such as CIVIC may prioritize holding armed actors "accountable for preventing and addressing civilian *harm*," (emphasis added) or groups such as PAX may declare that "protection of civilians living in conflict is at the heart of our work" such that the organization seeks to "enable civilians to hold security actors to account," defense organizations such as U.S. European Command must persistently be prepared "to fight alongside Allies and partners to prevail in any conflict."

If "years of good-faith engagement" with the military by civil society groups have yielded "little to no progress on implementing many" of the recommendations presented to the Department of Defense, this is largely a function of the divergence in strategic objectives that exists and will inherently persist as between the military and civil society advocates. While civil society groups and advocates contribute to distortions in public opinion generated by biased and ill-informed high-profile media reporting and then engage in a campaign of lawscaping to take advantage of the scandal and outrage created thereby, practitioners within the military continue to apply doctrinal provisions of law and policy during targeting operations in support of strategic priorities and while making determinations related to accountability after mishaps that lead to incidental damage do occur. This dynamic is not reflected in the letter presented by the coalition of civil society advocates to the leadership of the House and Senate Armed Services Committee. Unfortunately for the continued capability of the Department of Defense to carry out the assigned mission to "deter war and ensure our nation's security," an appreciable proportion of the 535 lawmakers elected to Congress appear to be either incapable of recognizing, or disinclined to recognize, this dynamic and its impact on the advocacy that is directed toward them and on their resultant legislative endeavors.

Correspondence from Congress Denouncing "Substantial Flaws in the US Military's Procedures"

After Secretary of Defense Lloyd Austin directed the DoD to develop an action plan designed to facilitate the implementation of enhanced civilian harm prevention and response practices, two separate coalitions of legislators directed correspondence to Secretary Austin to present their guidance for the plan. The first letter was signed in March 2022 by a group of 46 members of the House of Representatives, while the second dispatch was signed just over a month later by a group of seven senators. Because both letters are extraordinarily similar in substance, the two dispatches can be analyzed together in tandem.

Both letters set the stage for the respective congressional interventions by claiming recent New York Times reporting "brought to light substantial flaws in the U.S. military's procedures to prevent, investigate, and respond to civilian deaths in Iraq, Afghanistan, and Syria." The apparent inability or unwillingness to engage in an independent critical assessment of the appearance that high-profile media reporting has indeed "brought to light substantial flaws" in military practice represents cause for concern in the opening paragraphs of each letter given that the signatories are elected officials with the responsibility and authority to, among other duties, deliberate and adopt the annual must-pass National Defense Authorization Act. The recommendations that follow in both dispatches, even more troublingly, could be mistaken for suggestions written directly by the same coalition of civil society groups that "continue to urge the systemic reforms needed to address the longstanding issues raised in" their own earlier letter (fn 4).

Indeed, the primary categories of topics about which the two separate dispatches from lawmakers address as areas of concern in DoD practice could be extracted directly from the letter cited immediately above that was addressed to President Biden in the weeks before the congressional letters were signed. The primary categories, which are each denoted by a separate subheading, presented in both legislative dispatches are: resources and staffing, targeting procedures, tracking and analysis, investigations, amends, lessons learned, accountability, and Center of Excellence. A review of the civil society letter addressed to President Biden weeks earlier, as well as the correspondence from a coalition of civil society groups directed to the respective leadership of the House and Senate Armed Services Committees, reveals that the matters addressed in the letters signed by legislators directly.

One component all the dispatches have in common is the claim that New York Times reporting has exposed systemic flaws in DoD targeting and accountability practices in the context of civilian harm. However, the same civil society priorities that have reportedly resulted in "little to no progress on implementing" despite "years of good-faith engagement" with the DoD have now been elevated to congressional concerns by virtue of the correspondence directed to Secretary Austin by the two separate coalitions of legislators. As the above analysis related to divergent strategic objectives demonstrates, however, the primary reason "years of good-faith engagement" have resulted in "little to no progress" is that official priorities of the military responsible for preparing for and, when necessary, winning in armed conflict do not align with civil society priorities. By partnering with Congress, civil society groups seek to alter that dynamic in favor of their own objectives.

Congressional Dispatches Endorsing Civil Society Lawscaping and Advancing Civil Society Priorities

Indeed, not only do the priorities expressed in civil society and congressional dispatches impeccably align, some examples of civil society lawscaping reflected in, for example, the letter directed to President Biden are copied almost verbatim in the correspondence signed by legislators. For one such example, the civil society letter addressed to the commander in chief demands "full, independent, and transparent investigations of all credible reports of civilian harm" that "meet international standards for independence, thoroughness, and impartiality, and should evaluate conduct according to the applicable international human rights and international humanitarian law standards." The later correspondence signed by 46 members of the House of Representatives, in turn, copies that language to the letter, while the still later letter signed by seven senators calls for investigations of civilian harm that are "held to the highest standard of applicable international law and be conducted thoroughly and impartially."

Although two of the three letters utilize identical wording for this demand for investigations of civilian harm, while the relevant language of the third dispatch deviates slightly from that of the first two, the underlying call for investigations of civilian *harm* is misguided – regardless of the precise verbiage used. Official investigations in actual practice are centered on assessing compliance with doctrinal provisions of law and policy and, therefore, focus on the process that led to an engagement rather than a thorough evaluation of the *harm* caused by the attack. Likewise, there are no "international standards for independence, thoroughness, and impartiality" related to investigations of civilian *harm* since, among other reasons, any "international standards" that do exist, which is itself a doubtful proposition, involve investigating compliance with LOAC and ROE rather than on investigating the result of an engagement. Furthermore, according to Department of Defense doctrine, "international human rights law" is not "applicable" at all in the context of targeting operations since the law of armed conflict is the *lex specialis* that applies during the conduct of hostilities. The suggestion, then, that investigations of "civilian harm" should comply with international human rights law would be contrary to DoD practice even *if* such "international standards" could be identified.

This characterization regarding "international standards" for investigations of civilian harm is not the only example of lawscaping reflected in civil society correspondence that is reproduced in the congressional dispatches to Secretary Austin. Returning to the letter written by the coalition of civil society groups and addressed to President Biden, for example, the authors claim that the findings of

New York Times investigations "illustrate systemic legal and policy flaws that our groups and others have repeatedly raised with the U.S. government for many years." The critical analysis conducted in the present inquiry demonstrates the assertion that recent media coverage has indeed illustrated "systemic legal and policy flaws" in U.S. military targeting and accountability processes to be unsubstantiated. Nonetheless, both letters from lawmakers to the Secretary of Defense express the belief that because targeting operations "all too often" miss "the presence of civilian bystanders," it is crucial for the DoD "to examine targeting processes to ensure tactical and operational improvements comply with the Law of Armed Conflict principles of distinction and proportionality."

This legislative recommendation is fundamentally flawed for at least two primary reasons. First, a targeting operation that *misses* "the presence of civilian bystanders" does not, by definition, implicate the LOAC distinction and proportionality rules. If the presence of civilians is not detected by the attacker, civilians cannot be said to be made the object of attack, which is required to sustain an allegation that the distinction rule was violated. Likewise, if there is no anticipated incidental damage, an attack, by definition, does not violate the LOAC proportionality rule as long as some degree of military advantage is expected. As I have explained elsewhere, there are "two specific requirements" for the proportionality rule to be relevant. "First, the attacker had to expect that incidental damage would occur. Second, some quantum of military advantage had to be anticipated." Even if targeting operations "all too often" miss "the presence of civilians," then, this concern does not implicate the "Law of Armed Conflict principles of distinction and proportionality" as both legislative dispatches suggest.

The phenomenon of adopting civil society suggestions as congressional priorities is evident as well involving demands for accountability. As the civil society letter directed to President Biden urges, the United States government must provide "meaningful accountability to civilian victims and survivors of U.S. operations by publicly and transparently acknowledging deaths and injuries, providing amends or redress, and appropriately holding civilian leaders and military commanders responsible for their actions, including by addressing findings of wrongdoing through disciplinary measures or prosecutions." Yet again, the letter addressed to Secretary Austin a few months later by the coalition of 46 members of the House of Representatives copies this language word for word. The letter signed by seven senators deviates slightly from the verbatim transcript by calling on the Secretary of Defense to hold "civilian and military leaders and military commanders responsible to include any and all disciplinary measures or prosecutions, as appropriate" as a means to "provide meaningful accountability to the families of civilians killed and injured survivors resulting from U.S. military operations."

Of course, actual accountability practices and disciplinary proceedings are not evaluated on the basis of whether an attack *results* in death or injury to civilians. Doing so is a strategic imperative for civil society groups and advocates since the outcome of attacks is of paramount importance. Likewise, the aspiration to provide "meaningful accountability" to civilians harmed in attacks is a priority for a civil society organization such as PAX that is committed to enabling "civilians to hold security actors to account." However, military organizations engaged in the actual conduct of hostilities are responsible for holding their *members* to account for complying with doctrinal provisions of relevant law and policy with almost no regard for whether an engagement *results* in incidental damage.

Nonetheless, legislators who have signed correspondence demanding systemic "reform" of targeting and accountability practices within the Department of Defense are either unwittingly or, worse, deliberately pressing the U.S. military to adopt changes that align with civil society objectives rather than national security priorities. In doing so, language from civil society dispatches is copied into congressional correspondence word for word on occasion, and sometimes the substance is the same even if the text is paraphrased for letters from lawmakers. Either way, the seemingly obsessive emphasis on accountability among all the correspondence, civil society and lawmaker alike, along with the conspicuous yet undisclosed nature of the behind-the-scenes collaboration, raises significant concerns regarding the processes by which civil society advocates and legislators are themselves held to account, as the present inquiry now transitions to address while considering and presenting some concluding reflections.

Concluding Reflections

Although the analysis of recent high-profile media coverage of U.S. military combat operations conducted in the present inquiry has been unflinchingly critical, the commitment of the reporting to expose the often untold story of the human tragedy and suffering inflicted by warfare is commendable. As the description that accompanies Azmat Khan's "Human Toll" story notes, "Airstrikes allowed America to wage war with minimal risk to its troops. But for civilians on the ground, they brought terror and tragedy." This is undoubtedly true, and bringing this angle to light in the global public consciousness while giving a voice to the suffering voiceless – to the often uncounted and unknown casualties of armed conflict – constitutes a momentous contribution to the field of international reporting.

While this aspect of the media coverage truly is a credit to the journalists, teams, and organizations involved, the second central theme of the reporting is decidedly less commendable. Drawing this time on the summary accompanying the NYT "Civilian Casualties File" story, "The promise was a war waged by all-seeing drones and precision bombs. The documents show flawed intelligence, faulty targeting, years of civilian deaths — and scant accountability." In reality, the "promise" presented by all-seeing drones and precision bombs is not that civilian casualties will not occur – potentially on an unimaginable scale, depending on the circumstances of the conflict – even with advanced weapons technology. The critical analysis conducted herein casts doubt on the claim that NYT reporting genuinely has revealed that combat operations are beset by systemic flaws in intelligence or targeting procedures.

Nonetheless, it is the "scant accountability" angle of both the "Civilian Casualties Files" story, and indeed the compilation of recent high-profile NYT coverage of U.S. military combat operations abroad, that is misleading and, therefore, of dubious character. In cultivating the "scant accountability" narrative, relevant NYT stories routinely misstate the standards by which personnel are actually held to account in reality. The narratives habitually draw upon commentary of unascertainable credibility and authority presented by unnamed sources as well as expert opinions from identified sources with a discernible ideological bias. The cultivated journalistic narratives emphasize details and commentary that appears to contradict official characterizations while also selectively disregarding factors that repudiate the validity of the preferred "scant accountability" theme.

In doing so, the favored narratives and sources draw conclusions from insufficient data and evidence. Likewise, doctrinal sources of law and policy that actually do apply to combat operations

are either not represented at all or, when they are described, are profoundly mischaracterized. Above all, the brand of "accountability" developed by journalistic narratives and source commentary is centered on the outcome of attacks – the prevention of and response to civilian harm – rather than on the process involved in the attacks. In contrast, the doctrinal standards for targeting operations and accountability processes are centered on the process that leads to an engagement, while little information of value in terms of "accountability" can be derived from battle damage assessments and other post-strike analysis.

The true condition of "scant accountability," then, exists in relation to the media enterprises that create and market this brand of gotcha journalism to a global audience and to the civil society advocates and organizations that both contribute to and capitalize on the distortions in public opinion that are generated by high-profile press coverage of military combat operations. While there can be no doubt that the U.S. military should always seek to optimize existing practice in relation to the prevention of and response to incidents of civilian harm, the claim that the Department of Defense is plagued by a persistent and systemic condition of "scant accountability" in this regard is, at its core, an illusion. Although the coverage and commentary on which it relies is misleading and untrustworthy, viable options do exist to bring accountability to the protagonists who have, to date, distorted doctrinal standards and, with them, public opinion, with impunity.

In relation to the narratives cultivated in media coverage, New York Times publisher A.G. Sulzberger can commission an external inquiry to investigate whether the "civilian casualties files" line of reporting violated The Times standards of ethical reporting. As far as I am aware, the legitimacy of this collection of media reports has not been subjected to a comprehensive external critical analysis – save for the present inquiry. While I am merely one researcher who is presumably an unknown source of commentary for The New York Times Company, further inquiry is warranted if the characterizations and conclusions presented herein are assessed to be potentially credible. According to the narrative presented to the public regarding the members of the board of directors for The New York Times Company, Sulzberger "has invested heavily in investigative journalism, pushed The Times to expand into new digital formats like audio and multimedia, and has been an outspoken defender of the free press in the United States and abroad" during his tenure as publisher.

The critical analysis of relevant NYT media coverage conducted during the course of the present inquiry has directly challenged the validity of journalistic narratives presented in a centerpiece component of Company investigative journalism and multimedia reporting. With the great power associated with being the self-described "most influential and award-winning English-language news organization in the world" comes great responsibility. An external review to determine the validity of the critical characterizations presented herein is merited if the assessment and conclusions developed in the present inquiry are determined to be credible.

If such an inquiry determines relevant members of the editorial and journalistic teams violated NYT standards of ethical journalism, the external review should present recommended measures to remedy past transgressions and to ensure similar breaches do not occur again in the future. In the interest of trust and transparency, the proceedings, results, and recommendations of any such external review should be made public. Committing to this suggestion will bring a measure of accountability to high-profile media coverage the present inquiry characterizes as unaccountable journalism.

The critical analysis of media coverage conducted herein also exposes the prospect of "scant accountability" involving the civil society advocates who contribute to and take advantage of distortions in public opinion that are generated by the investigative reporting that is the focal point of the present inquiry. Given the remarkable similarities, and indeed on occasion the verbatim duplications, that are apparent in correspondence published by civil society advocates and elected officials alike, it is reasonable to conclude that relevant advocates are coordinating directly with select lawmakers to influence legislative agendas and, indeed, the very text of draft legislation itself. In many, perhaps most, contexts, the term "influence" is adequate and appropriate. In the context of influencing a Member of Congress or other qualifying public official, however, this activity can be described by another, more specific, term of art: a lobbying activity.

According to relevant legislation, the term "lobbying activities" means "lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others." If relevant civil society advocates and groups are indeed determined to be engaged in lobbying activities and have not registered as lobbyists and do not comply with established requirements for lobbyists and lobbying activities, the individuals and the organizations for which they advocate are violating federal law unless a qualifying exemption or exception applies. My research of the databases of registered lobbyists for the Senate and House of Representatives is unable to identify names of individuals or organizations that appear to be involved in what seem to qualify as lobbying activities, and I am unable to definitively determine whether an exception to activities or an exception from registration applies without access to relevant internal records of applicable organizations.

While the present inquiry is not in a position to confirm compliance with federal law involving lobbying activities, the Secretary of the Senate and the Clerk of the U.S. House of Representatives are conferred with the responsibility to monitor compliance. Both offices are charged with the responsibility to "notify any lobbyist or lobbying firm in writing that may be in noncompliance with" federal law and to "notify the United States Attorney for the District of Columbia that a lobbyist or lobbying firm may be in noncompliance with" relevant federal law. The USADC, in turn, is responsible for enforcement actions and for submitting a semiannual report to Congress that presents "the aggregate number of enforcement actions taken by the Department of Justice" in relation to requirements involving lobbying activities. Section 1606 of the relevant provision of federal law provides for a civil fine of "not more than $200,000, depending on the extent and gravity of the violation" of the law as well as a criminal penalty of "not more than 5 years" imprisonment for any person convicted of "knowingly and corruptly" failing to comply with federal law involving lobbying activities.

A separate provision of federal law provides for the denial of tax-exempt status for otherwise qualifying organizations such as charities because "a substantial part of the activities of such organization consists of carrying on propaganda, or otherwise attempting, to influence legislation," unless an exemption applies. The Internal Revenue Service is responsible for publishing an "appropriate notice to taxpayers of" a suspension "and of the fact that contributions to such organization are not deductible during the period of such suspension." For individuals or organizations deemed not to be in compliance with federal law involving lobbying activities or otherwise attempting to influence legislation, suspension of tax-exempt status, as well as appropriate civil and potentially criminal liability, could introduce a measure of accountability for otherwise unaccountable civil society advocates and organizations responsible for contributing to

and exploiting distortions in public opinion created by high-profile media coverage of U.S. military operations.

Individual lawmakers are themselves largely immune from true accountability in the present context since it is reasonably unlikely that a significant proportion of constituents are particularly knowledgeable related to the law involving armed conflict and whether Congress is adequately holding the DoD to account in this regard. As Harold Koh noted during a 2017 Brookings lecture, international law involving armed conflict "in many ways stands as the most discussed, but least understood, of these evolving bodies of transnational public law." The reasons underlying this phenomenon and its effect on the quality and nature of discourse involving "the emerging law of 21st century war" is an important topic that is beyond the scope of the current concluding reflections. For present purposes, it is sufficient to note that the "least understood" aspect of Koh's astute observation means, in the current context, that politicians are largely insulated from electoral accountability regarding votes they may cast for legislation addressing DoD civilian harm mitigation and response practices.

Nonetheless, it is manifestly apparent based on the nature of the commentary originating from select lawmakers that Congress as an institution is either unwilling or unable to become sufficiently informed on the topic of civilian harm mitigation and response. This makes lawmakers, to be quite frank, derelict in the dispatch of their legislative duties. Members of Congress are not well equipped to be experts, for example, regarding the law and policy that applies to targeting operations in combat. This observation is sensible, since constitutional authority informs the competence of Congress.

The executive is vested with the constitutional responsibility to serve as the commander in chief of the United States armed forces, and in this capacity the president is in command of the Department of Defense. The DoD, in turn, has been described as "the largest employer on earth." It is the mission of the Department of Defense "to provide the military forces needed to deter war and ensure" America's security, and the entire workforce of the world's largest employer is engaged in support of that singular purpose. A member of Congress, in contrast, typically employees a small staff of legislative assistants, one of whom is often focused on international affairs on behalf of the elected official. Prior military experience, of course, is not among the qualifications for public office enumerated in the United States Constitution, and there is likewise no requirement for staffers to be experienced in, or even knowledgeable about, military operational and accountability practices.

This general lack of familiarity with relevant sources of doctrinal law and policy is easily identifiable in remarks presented in public discourse by members of Congress. According to a current page on the website for Senator Elizabeth Warren, for example, this long-serving lawmaker and former presidential candidate "has long led the call for accountability for U.S. military operations that kill innocent civilians." This brand of accountability, of course, aligns well with the civil society version that is centered on the outcome of attacks, but it constitutes a gross misapplication of the doctrinal law and policy that actually applies to targeting operations in practice. The same is true regarding the call for the United States to "provide meaningful accountability to the families of civilians killed and injured survivors *resulting* from U.S. military operations" expressed in a letter signed by Senator Warren and six other senators (emphasis added).

A dispatch sent from Senator Warren to the Chair of the Senate Armed Services Committee, Senator Jack Reed, demonstrates a similar troubling lack of familiarity with doctrinal provisions of law and policy that actually apply to combat operations. In this letter, for example, Senator Warren claims that New York Times reporting involving the Baghuz strikes "raises serious questions about the U.S. military's adherence to international humanitarian law (IHL) – particularly requirements for positive identification of combatants and proportionality assessments – as well as the duty to investigate potential war crimes and hold responsible individuals to account." As the critical analysis conducted herein of media coverage of the Baghuz strikes demonstrates, however, the appearance that the incident and the DoD response afterward "raises serious questions about the U.S. military's adherence to" the law of armed conflict is more closely aligned with fiction than fact.

Nonetheless, the narratives generated in this collection of NYT reporting form the basis for assertive legislative intervention to "correct" the condition of "scant accountability" that purportedly persists in existing DoD practice. Investigative journalists, civil society advocates, lawmakers, and legislative staffs alike have thus far been immune from accountability for the distortions in public opinion that are generated and exploited by these individuals and groups to support their own objectives. For the sake of constitutional integrity and American national security, this *actual* condition of scant accountability must change.

There is no quick and easy solution to the challenges raised in these concluding reflections and, more broadly, in the present inquiry in general. One immediate course of action that should be implemented by the respective leadership of the House and Senate Armed Services Committees is to omit all draft legislation involving civilian harm mitigation and response from the final version of the FY23 National Defense Authorization Act that ultimately gets signed into law. In July, the Ranking Member of the House Armed Services Committee, Representative Mike Rogers, reportedly noted during NDAA markup that if a proposed legislative provision "doesn't help the warfighter, it doesn't need to be in this bill." This is the correct approach for a bill that is supposed to be centered on national defense.

Select members of Congress have adopted the special interests of civil society advocates for their own legislative agendas, and may well have violated rules involving lobbyists and otherwise influencing elected officials in the process. In order to determine the full extent to which the legislative agenda of Congress has been corrupted, both chambers can hold hearings that can be scheduled for future congressional sessions. Likewise, the Clerk of the House and the Secretary of the Senate can initiate inquiries to determine whether lobbying rules have been violated in the past and to develop remedial measures for the future.

At the time of the current writing, however, the current session of Congress is in recess until immediately after the November election. When Congress returns from recess, work will begin again on the draft NDAA in both chambers. Given the likelihood that the legislative agenda has been corrupted by distortions in public opinion generated by recent high-profile media coverage and by influencing activities that may constitute violations of federal law and congressional rules, HASC and SASC leadership must ensure that any draft legislative provision involving civilian harm mitigation and response is omitted from the final bill. The Department of Defense recently published an impressive Civilian Harm Mitigation and Response Action Plan, and this significantly changes the landscape of the civil-military relationship on the topic of the prevention of civilian harm.

There will certainly be a role for Congress to monitor and resource implementation of CHMR-AP in the months and years ahead. However, the appearance that the DoD is beset by a condition of scant accountability that requires assertive intervention by Congress to correct is an illusion. The Department of Defense needs to be trusted to take the lead on CHMR-AP implementation, and this includes coordinating with Congress to determine what resources are needed to measure the effectiveness of implementation. Current proposed provisions of the NDAA related to civilian harm mitigation help civil society advocacy groups rather than warfighters, and as Representative Rogers notes, these provisions do not "need to be in this bill."

As for the *actual* measure of accountability at the center of the high-profile media reporting that is the subject of the present inquiry, a remark during a 2017 press conference by then-Lieutenant General Stephen Townsend, who was at the time the commander of Combined Joint Task Force-Operation Inherent Resolve, provides an appropriate note in closing. According to the transcript of the press briefing, to which the NYT story involving the Baghuz strikes presents a link, Townsend notes that the CJTF-OIR-led "coalition freely and transparently takes on the responsibility to act in accordance with the law of armed conflict, in all of our operations." Regardless of public perceptions generated in high-profile media coverage of U.S. military combat operations, this is the true measure of whether the Department of Defense is plagued by a systemic condition of "scant accountability."

Military personnel are expected to act in accordance with the law of armed conflict in all combat operations, and this forms the standard by which personnel are held accountable after an attack – regardless of whether the engagement *causes* incidental harm. Although there is always room to improve military targeting and accountability processes, compliance with relevant doctrinal provisions of law and policy is the standard to which individual personnel are held. Investigative journalists, civil society advocates, and elected officials may well prefer a version of the law that would hold personnel accountable for the outcome of an attack, but this constitutes a fundamental misapplication of actual rules of law and policy. To the extent that journalists, advocates, and legislators insist on engaging in effects-based condemnation of U.S. military combat operations abroad, it is this movement wherein the true condition of "scant accountability" is to be found.