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The duty to investigate in situations of armed conflict: an examination under international humanitarian law, international human rights law, and their interplay

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PART I

International humanitarian law

Part I of the study starts by taking a closer look at the duty to investigate as it flows from international humanitarian law. The first step in answering *what the law is* regarding investigative obligations must be to examine the obligations which flow from IHL and IHRL separately. This Part does so for IHL.

The aims of this Part are twofold. Firstly, it aims to clarify the law governing investigative obligations under IHL. Under IHL, the existence of an obligation for States to investigate violations is still subject to debate. Some have suggested such a duty simply does not exist,¹ others argue either for a duty limited to investigations of war crimes,² or for a broader duty to investigate also violations not reaching that level.³ Thus, this Part answers the first sub-question which guides this research, *Are States under an obligation to investigate (potential) violations of IHL? If so, what are the scope of application and contents of such an obligation?* This addresses the problem stated in the Introduction, that the law governing investigations during armed conflict lacks clarity – at least insofar as IHL is concerned. Insofar as a situation is governed by IHL exclusively, because IHRL does not apply, this Part therefore provides solutions to the problems stated in the Introduction.

Part I consists of two Chapters. Chapter 2, firstly, introduces the IHL system. This informs the discussion on duties of investigation under IHL. It addresses a number of definitional and applicability issues regarding IHL, and examines its implementation and enforcement structure. In short, it sets the scene for the detailed examination of investigative obligations which flow from IHL in Chapter 3. Chapter 3 then builds on Chapter 2's explanation of the IHL system of implementation and enforcement, and asks whether a State obligation to

1 Sandesh Sivakumaran, 'International Humanitarian Law' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (1st edn, Oxford University Press 2010) 528.

2 Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 *Harvard National Security Journal* 31.

3 Amichai Cohen and Yuval Shany, 'Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts' (2011) 14 *Yearbook of International Humanitarian Law* 37; Alon Margalit, 'The Duty to Investigate Civilian Casualties During Armed Conflict and Its Implementation in Practice' (2012) 15 *Yearbook of International Humanitarian Law* 155.

investigate is implied in the system's reliance on States to implement and enforce the law. Afterwards discussion turns towards more concrete investigative obligations which flow from IHL. It establishes the scope of the duty to investigate by looking at various categories of violations, namely grave breaches, other war crimes, as well as all other violations – and determines the investigative regime for these violations. The Chapter then moves on to *how* States must investigate these violations, and sets out the investigative standards which IHL imposes.