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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2 Introduction to the IHL System

1 Introduction

This Chapter introduces the IHL system, with a view to facilitating the research into duties of investigation in the next Chapter. In doing so, it considers briefly, first, IHL's primary sources, and its general aim and purpose (§2). This flows into an introduction of the general principles of IHL (§3). The thresholds for applicability are discussed next (§4), before finally introducing the implementation and enforcement system of IHL (§5). For readers with an advanced knowledge of IHL, much of what is set out in this Chapter will be familiar. They may wish to focus their attention on section 5 of this Chapter, and the exploration of investigative obligations in Chapter 3.

2 The aims, purposes, and main sources of IHL

International law historically distinguishes between the law governing war, and the law governing peace. Dating as far back as 1625, Grotius already made the distinction in the title of his seminal work *De Iure Belli ac Pacis*.[1] As a result of this distinction, situations of armed conflict and occupation are governed by a special body of law commonly referred to as international humanitarian law or IHL.[2]

IHL is a pragmatic field of law. Regardless of the general prohibition of the use of force in international law,[3] IHL acknowledges the existence of armed conflict and is concerned with regulating such conflicts.[4] Its main purpose is to mitigate the consequences of armed conflict, and a crucial premise of IHL is therefore that 'the means and methods of injuring the enemy are not un-

1 For a recent translation, see Hugo de Groot, *Hugo Grotius on the Law of War and Peace* (Stephen C Neff ed, Cambridge University Press 2012).

2 For a criticism of this terminology, see Yoram Dinstein, *The Conduct of Hostilitites under the Law of International Armed Conflict* (3rd edn, Cambridge University Press 2016) 20. He prefers the term 'law of (international) armed conflict' or LOIAC.

3 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (hereinafter: UN Charter), art 2(4).

4 See e.g. Karima Bennoune, 'Toward a Human Rights Approach to Armed Conflict: Iraq 2003' (2004) 11 University of California Davis Journal of International Law & Policy 171, 174.

limited'.[5] The International Court of Justice (ICJ) has consequently identified two 'cardinal principles', which according to one commentator 'are the red threads weaving through the whole tissue of [IHL]'.[6] These principles, according to the ICJ in *Nuclear Weapons*, are as follows:

> 'The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.'[7]

The two principles 'constituting the fabric of humanitarian law', are therefore clearly concerned with limiting the detrimental effects of warfare. Firstly for civilians and civilian objects, who may never be made the subject of attack. Secondly for combatants, who may not be led to suffer in ways which go beyond what is necessary to 'weaken the military forces of the enemy'.[8] Accordingly, most rules of IHL are grounded on either protecting civilians from harm, or protecting combatants from superfluous injury and unnecessary suffering.[9]

Thus, IHL accepts the existence of armed conflict, but strives to 'humanise' warfare insofar as feasible in light of military necessities.[10]

IHL constrains the lawful means and methods of warfare, and protects certain categories of persons from the harmful effects of war. It does so in a number of treaties of a 'general' character – regulating the conduct of hostilities and the protection of civilians and other protected persons in a variety of circumstances – as well as more specialised treaties that, for instance, relate to the prohibition of a specific type of weaponry. To give an example, IHL restricts the use of certain types of weaponry, such as landmines and incendiary

5 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) (hereinafter: 1907 Hague Regulations), art 22.

6 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2010) 8.

7 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996) *I.C.J. Reports* 1996, p. 226 [78].

8 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (adopted 29 November 1868, entered into force 11 December 1868) 18 Martens Nouveau Recueil (ser. 1) 474, 138 Consol. T.S (hereinafter 1868 St. Petersburg Declaration).

9 See for example AP I, art 35(2).

10 Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 American Journal of International Law 239.

weapons.[11] Such prohibitions go back to the cardinal principles of IHL, which do not allow for the use of indiscriminatory or unnecessarily cruel weapons. Further, IHL grants specific protections especially to civilians, prisoners of war, and combatants who are placed *hors de combat*.

Far and away the most important protective treaties are the four 1949 Geneva Conventions (GC), and their Additional Protocols (AP).[12] The Second World War gave a decisive impulse for the negotiation and adoption of the four Geneva Conventions,[13] which have now gained universal ratification. The Geneva Conventions enjoy the most general applicability, and provide a great number of rules which protect the wounded and sick (GC I and II), prisoners of war (POWs, GC III), and civilians (GC IV). The Additional Protocols (AP I and AP II) supplement these rules. Together, these rules form the heart of IHL treaty law. This study therefore mainly relies on these IHL treaties.

Beyond these crucial treaty rules, customary international law (CIL) also remains of significance. Whereas the Geneva Conventions can boast universal ratification, this does not go for the Additional Protocols, and CIL therefore potentially extends the reach of rules of IHL to non-States parties to these Protocols. Moreover, as will be discussed briefly below, most rules of the Geneva Conventions, and of AP I, apply to international armed conflicts (IACs) only. This means that these treaty rules do not apply as such to non-international armed conflicts (NIACs), while non-international conflicts these days make up the majority of conflicts in the world.[14] Most rules of customary IHL, however, have been argued to apply equally to IACs and NIACs, which importantly extends many IAC treaty rules to NIACs.[15] In NIACs, customary IHL is therefore of great importance.

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11 See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211, art 1; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (adopted 10 October 1980, entered into force 2 December 1983), Protocol III to Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 137.

12 AP I; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 609 (hereinafter: AP II).

13 For a fantastic insight into the drafting of the GC, see Boyd Van Dijk, 'Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions' (2018) 112 The American Journal of International Law 553.

14 Ward Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (2009) 7 Journal of International Criminal Justice 723, 739; Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002) 1.

15 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *ICRC Customary International Humanitarian Law – Volume I: Rules*, vol I (Cambridge University Press 2005); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *ICRC Customary International Humanitarian Law – Volume II: Practice* (Cambridge University Press 2005).

To what extent rules of IHL constitute CIL can moreover be of relevance for their judicial application. Some international as well as national judges have jurisdiction to apply customary international law as part of domestic law, whilst the application of certain treaties is not within their purview.[16] Finally, the International Court of Justice (ICJ) considers that 'a great many rules' of IHL constitute 'intransgressible principles of international customary law',[17] thereby clearly illustrating the importance of these norms even beyond the treaty provisions. The study on customary IHL carried out by the International Committee of the Red Cross (ICRC)[18] provides a solid point of reference in finding the relevant customary norms of IHL, as well as the State practice and *opinio iuris sive necessitatis*[19] underlying these norms.

Thus, IHL presents the law specifically designed to govern conduct during armed conflict. In this aim, it must be strictly distinguished from the *ius ad bellum*, which governs whether States may have resort to the use of force. The IHL treaty law which is at the heart of this study, are the 1949 Geneva Conventions and their Additional Protocols, supplemented by customary international humanitarian law.

Because of the variety of sources, and because of how IHL works, care must be taken to correctly classify a situation. Each situation requires an assessment of the applicable treaty and customary rules. The outcome of such assessments is contingent on whether a conflict constitutes an international or non-international conflict, whether an individual is a civilian or a combatant, whether someone is a protected person or not – such classifications determine what rules of IHL apply, and often quite literally determine life and death.[20]

What these stark distinctions reveal, is the 'tug-of-war' which underlies the rules of IHL.[21] Rules of IHL constantly strike a balance between various interests, interests which were already touched upon above. IHL at the same time attempts to *humanise* conflict, whilst also pragmatically acknowledging

16 Mary Ellen O'Connell, 'Historical Development and Legal Basis' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press 2013) 27, with further referencing.

17 *Legality of the Threat or Use of Nuclear Weapons* (n 7) [79].

18 Henckaerts and Doswald-Beck, *ICRC Customary International Humanitarian Law – Volume I: Rules* (n 15); Henckaerts and Doswald-Beck, *ICRC Customary International Humanitarian Law – Volume II: Practice* (n 15).

19 As identified by the ICJ in *The North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment (20 February 1969), *I.C.J. Reports* 1969, p. 4 [77].

20 As posited by Solis, every law of war student should be able to answer the questions of 'conflict status' and the 'status of the individuals involved in the conflict', Gary D Solis, *The Law of Armed Conflict. International Humanitarian Law in War* (Cambridge University Press 2010) 149.

21 Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals Vol. II: The Law of Armed Conflict* (Stevens & Sons Limited 1986) 4.

its existence, and accounting for States' *necessities* in waging war. These two interests, which often pull in quite opposite directions, represent two of the most important *principles* of IHL.

3 THE PRINCIPLES OF IHL

International humanitarian law is thought to be based on a number of underlying principles, which are to be distinguished from the concrete *rules* that together make up the body of law called IHL. The rules of IHL are the specific treaty provisions and rules of customary law, that – though some are rather vague in nature – provide relatively specific regulations, requirements and prohibitions for particular situations. In other words, they constitute binding legal norms. Principles of IHL, on the other hand, are the guiding values underlying the body of law as a whole.[22] They function as a guide in establishing and interpreting the rules, and rules often represent a compromise between two or more principles.[23]

The two 'fundamental principles' between which almost all rules of IHL strike a balance,[24] and which have also been referred to as IHL's 'driving forces',[25] are on the one hand military necessity and on the other the principle of humanity.[26]

The principle of military necessity represents the realistic or pragmatic side of IHL, ensuring it takes into account the perspective of what is militarily required in order to wage war. It operates both at once as a justification for, and as a limitation on the use of force in a specific instance.[27] On the one hand, military action is only permitted when it is necessary from a military point of view, which limits the permissibility of military action. On the other

22 AM Van Gorp, 'Humanitair Oorlogsrecht' in PJJ Van der Kruit (ed), *Handboek Militair Recht* (2nd edn, Nederlandse Defensie Academie 2009) 450.

23 Although one might deduce a different meaning from the ICJ's opinion that 'a great many rules of [IHL] (…) constitute intransgressible principles of international customary law', *Legality of the Threat or Use of Nuclear Weapons* (n 7) [79]. This finding appears to deduce principles from rules, or perhaps even equate them, rather than basing rules on a compromise between principles.

24 Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflict* (Hart Publishing 2008) 43.

25 Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 6) 4–8.

26 See e.g. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 6) 5; Leslie C Green, *The Contemporary Law of Armed Conflict* (Manchester University Press 2008) 388; Jann K Kleffner, 'Scope of Application of International Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press 2013) 43; Kolb and Hyde (n 24) 43; O'Connell (n 16) 36–7.

27 Robert Kolb, *Advanced Introduction to International Humanitarian Law* (Edward Elgar 2014) 83–6; Nils Melzer, *Targeted Killing in International Law* (Oxford University Press 2008) 286–91. Of a different opinion, see Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 6) 4.

hand, a military action may be justified as long as some military gain is accomplished. What these military gains entail is best illustrated by way of the 1868 St. Petersburg Declaration, which states that 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy'.[28] Taken together, military necessity therefore justifies military action which weakens the enemy military forces, but simultaneously restricts such action: only so long as the enemy military forces are weakened, can the action be justified.

Operating in 'equipoise' with military necessity are 'humanitarian considerations',[29] or the principle of humanity.[30] Humanitarian considerations drive IHL's aim of reducing human suffering to what is strictly required by the exigencies of war.[31] The core of this principle can be illustrated by the 1907 Hague Regulations, Article 22 of which provides that '[t]he right of belligerents to adopt means of injuring the enemy is not unlimited'. Human suffering, in other words, must be limited to a minimum, according to the principle of humanity.[32] This principle often pulls in the opposite direction of what is militarily required, for instance where an air strike on a military target may cause civilian casualties. This is why the rules of IHL reflect a balance between the two.

The constant balance rules of IHL strike between the principles of military necessity and humanity,[33] helps our understanding of IHL in several ways. Firstly, they lay bare the underlying interests which rules of IHL serve, and can therefore provide a meaningful tool in a purposive interpretation of such rules. Because the principles help explain why a certain rule was adopted,[34] and because they are by their very nature of a broader application than rules,

28 1868 St. Petersburg Declaration.

29 Not all commentators agree on the term 'principle of humanity'. See Yoram Dinstein, 'The Principle of Proportionality' in Camilla Guldahl Cooper, Gro Nystuen and Kjetil Mujezinović Larsen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge University Press 2012); more broadly Camilla Guldahl Cooper, Gro Nystuen and Kjetil Mujezinović Larsen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge University Press 2012).

30 Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 Virginia Journal of International Law 796, 796.

31 1868 St. Petersburg Declaration, Preamble [1]-[2].

32 See e.g. the Preamble to the 1907 Hague Regulations, expressing the 'desire to diminish the evils of war, as far as military requirements permit'.

33 Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 6) 5; Kolb and Hyde (n 24) 43; Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (n 30) 796. As Koppe insightfully explains, not all rules can be traced to *humanitarian* considerations, however, as e.g. environmental considerations can also play a role; Erik Vincent Koppe, 'The Principle of Ambituity and the Prohibition against Excessive Collateral Damage to the Environment during Armed Conflict' (2013) 82 Nordic Journal of International Law 53, 59–60.

34 Koppe (n 33) 64.

they are particularly well-suited for the interpretation and development of the law.[35]

Secondly, because the rules of IHL already reflect a careful balance between military necessity and humanity, the interpretive powers of the principles cannot serve to disregard rules as such.[36] By way of example, if military forces behind enemy lines were to take a civilian captive, who if let go will likely alert enemy forces to their presence, they cannot invoke military necessity to harm or kill this civilian. Unless the rule itself provides that principles can be taken into account to modify the rule's application, principles cannot set aside rules.[37] It is generally accepted that military necessity cannot be invoked to circumvent or trump a specific rule as it has already been taken into account in formulating that rule,[38] and the same must go for the principle of humanity. It follows that principles of IHL play an important role in the *interpretation* of the existing rules, though that interpretive role does have its limits. This interpretive and developmental function of the principles of IHL is a widely accepted feature of the system.

Thirdly, it has been argued that the principles of IHL constitute 'general principles of law' in the sense of Article 38 of the Statute of the International Court of Justice, thereby forming a *separate and independent* source of international law.[39] In line with this claim, it could be argued that the principles of IHL in fact constitute a primary source of international law in and of themselves. This could prove relevant later on in this study, insofar as the principles of IHL could play a role in mitigating tensions under the interplay of IHL and human rights law.

Fourthly and finally, when there are *no applicable rules* of IHL, the principles can directly affect what States may or may not do. The principle of humanity generally, and the Martens Clause in particular, limits States' action radius even when no specific prohibitive rules exist.[40] The Martens clause provides that in cases not specifically regulated by IHL, 'civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from

35 Kolb (n 27) 75.

36 See e.g. O'Connell (n 16) 36–7.

37 *The Hostage case*, IMT Nuremburg 19 February 1948, 11 *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* 757, p. 1281 (*USA v List et al.*).

38 E.g.Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 6) 7; Kolb (n 27) 14; Kolb and Hyde (n 24) 44. Extensively on military necessity as an exception, see Nobuo Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law' (2010) 28 Boston University International Law Journal 39, 59–100.

39 Koppe (n 33) 61–5; see also Kleffner (n 26) 53.

40 Kolb (n 27) 19–20.

the dictates of public conscience'.[41] This clause therefore clearly provides for the operation of the principle of humanity outside of specific IHL treaty provisions. Conduct that is not expressly prohibited is therefore not automatically lawful, but remains subject to humanitarian considerations.

Beyond the two fundamental principles of military necessity and humanity, IHL also recognises a number of other principles. These are not discussed at length here, but are introduced where relevant later on. Commentators vary in their views on an exact list of *the* principles of IHL. Important widely accepted principles are those of distinction and proportionality.[42] Other than these, a literature review reveals principles of, among others: precaution; limitation; chivalry; ambituity (protection of the environment); the prohibition of causing unnecessary suffering; and the independence of *ius in bello* from *ius ad bellum*. Certain of these principles we will revisit later, others not. The balance between military necessity and humanity, however, is an important guide not only for the rules of IHL, but also for this study.

4 IHL'S SCOPE OF APPLICATION

4.1 Introduction

Now that we have familiarised ourselves with IHL's main sources, aims, and principles, we can take a closer look at its specific contours. This section briefly introduces IHL's main modes of application. This informs *when* and *to whom* IHL applies, as well as *where*. IHL's scope of applicability can be divided into its material, personal, temporal and territorial scope of application.[43] Because this study's research question enquires into the duty to investigate violations *during armed conflict*, this is naturally intertwined with the question when an armed conflict exists. This renders two main issues of applicability primarily relevant. The first is the material scope of application. IHL contains a 'threshold-criterion' for its applicability, meaning that IHL applies in situations of international armed conflict, non-international armed conflict, or belligerent occupation. This is discussed first (§4.2). Then, we move on to IHL's *personal* scope of application, which pertains to the question *who* is bound by its rules. As

41 As quoted from the modern version of the Martens clause, enshrined in AP I, art 1(2). See also Hague Convention (II) with Respect to the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) (hereinafter: 1899 Hague Convention (II)), Preamble.

42 Compare Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar 2013) 51–5; Dinstein, 'The Principle of Proportionality' (n 29) 73; DW Greig, 'The Underlying Principles of International Humanitarian Law' (1980) 9 Australian Yearbook of International Law 46; Kolb (n 27) 75–92; Koppe (n 33) 56; Solis (n 20) 250–85.

43 See e.g. Kleffner (n 26); Kolb and Hyde (n 24) 73–111.

we will explore, this can pertain to States, non-State armed groups (NSAGs), and individuals (§4.3). Finally, a few brief remarks are made as to the temporal and geographical scope of application of IHL (§4.4). These modes of application do not raise particular issues in the context of this study, and therefore remain brief.

4.2 IHL's material scope of application

4.2.1 From declarations of war to a fact-based assessment of 'armed conflict'

In its classic conception, IHL – long termed the 'laws of war' – applied whenever a formal declaration of war was made. Since such declarations have fallen into disuse, determining the subject matter applicability of IHL has changed.[44] Common Article 2 of the 1949 Geneva Conventions now provides that the Conventions apply to 'cases of declared war', as well as 'any other armed conflict which may arise between two or more of the High Contracting Parties', and 'cases of partial or total occupation of the territory of a High Contracting Party'. IHL's subject-matter applicability is therefore contingent on the existence of 'armed conflict', or 'occupation'.[45] Both terms are discussed below, with the necessary attention for the distinction between armed conflicts of an international (§4.2.2) or a non-international nature (§4.2.3).

Before doing so, one final important point must be made as to IHL's applicability. Whereas most of its rules are contingent on the existence of either an armed conflict or an occupation, Common Article 2 moreover refers to 'provisions which shall be implemented in peacetime'. Thus, certain rules of the Geneva Conventions apply also in peacetime. These, notably, include obligations of *implementation*. For instance, rules regarding the dissemination and teaching of IHL, would clearly be obsolete if they were activated only once an armed conflict has erupted. Similarly, and crucially for this study, obligations to institute administrative mechanisms which supervise whether States' armed forces comply with their IHL obligations, and obligations to criminalise certain violations of IHL in domestic legislation, would be useless if they were not

44 Although according to Greenwood, even in the eighteenth and nineteenth centuries wars did not usually start with a declaration of war; Christopher Greenwood, 'The Law of War (International Humanitarian Law)' in Malcolm D Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 785. To counter the disuse of declarations of war initially, a specific convention was adopted, see Hague Convention (III) relative to the Opening of Hostilities (adopted 18 October 1907, entered into force 26 January 1910), 205 CTS 264 (hereinafter: 1907 Hague Convention (III)).

45 Further, see Helen Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' in Helen Duffy, Janina Dill and Ziv Bohrer (eds), *Law Applicable to Armed Conflict* (Cambridge University Press 2020) 22ff.

implemented in peacetime.[46] While IHL is meant to regulate armed conflict, certain rules therefore apply generally, without a threshold-criterion.

4.2.2 *International armed conflicts*

International armed conflicts are defined in Common Article 2 as conflicts 'between two or more of the High Contracting Parties', meaning that only conflicts between *States* are covered by the provision. As was mentioned previously, IACs are subject to a detailed and extensive set of treaty rules, in the Geneva Conventions and AP I.

As the ICRC Commentary to the Geneva Conventions makes clear, the further criteria for armed conflict are not very demanding: 'any difference between two States and leading to the intervention of members of the armed forces is an armed conflict'.[47] Every relatively minor incident at the border between States therefore leads to the applicability of the law of international armed conflict, regardless of whether these States consider themselves at war or not.[48] Thus, this definition leaves no gaps in the applicability of the law, as there are no lower intensity skirmishes falling outside the field of application of the law of armed conflict.[49]

The most important consequence of qualifying a conflict as an international armed conflict, is that most conventional and customary rules of IHL apply. For current purposes, it is sufficient to note that the four 1949 Geneva Conventions apply,[50] as well as Additional Protocol I of 1977.[51]

In situations of clear State versus State conflicts, applicability of IHL is relatively straightforward. Whereas determinations can become difficult for instance when not all facts are known, or where one-off targeted killings are at issue, such issues are left aside here.

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46 Marco Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 186–7.

47 Jean S Pictet (ed), *Commentary to the First Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field* (1st edn, International Committee of the Red Cross 1952) 32.

48 Kleffner (n 26) 45; Robert Kolb, 'The Main Epochs of Modern International Humanitarian Law Since 1864 and Their Related Dominant Legal Constructions' in Kjetil Mujezinovi Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge University Press 2012) 48–9.

49 Kleffner (n 26) 45; Kolb (n 48) 48–9. There are detractors to this definition, see e.g. Greenwood (n 44) 786.

50 GC, Common Article 2.

51 AP I, art 1.

4.2.3 Non-international armed conflicts

Looking then at when IHL applies to non-international armed conflicts, things become somewhat more complex.[52] Common Article 3 negatively defines NIACs as armed conflicts 'not of an international character'.[53] The International Criminal Tribunal for the Former Yugoslavia (ICTY) has defined this as 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[54] Thus, under the Geneva Conventions, the lower threshold for the existence of a NIAC is protracted armed violence, between a State on one side, and a non-State armed group on the other side, or between two or more NSAGs.[55] The classical example is that of a State engaged in a conflict with armed rebels on its own territory, though increasingly, States are also involved in extraterritorial NIACs with NSAGs halfway across the world.[56]

Additional Protocol II, which contains further rules governing NIACs, however, sets a higher threshold for its applicability. It applies only to conflicts that do not fall under AP I, *and* take place between a High Contracting Party and organised armed groups.[57] Moreover, these armed groups must, for the Protocol to be applicable, exercise control over a territory and be sufficiently organised. Whilst Common Article 3 therefore applies to every conflict not of an international character so long as it can be characterised as a conflict, AP II's scope of application is somewhat more limited. The net result is that *certain* NIACs are covered by rules of Common Article 3 only, namely those which do not meet the threshold of AP II, whilst others are covered by the rules of both CA3 and AP II.

Practically speaking, it is therefore important to establish carefully the applicable rules in a specific NIAC. Conflicts falling solely within the scope of Common Article 3 are subject to the treaty criterion of humane treatment set out in that provision only, whilst conflicts that satisfy the applicability criteria of AP II are regulated by both Article 3 and the relatively more extensive provisions of that Protocol.[58] The applicability of norms of customary IHL is progressively complex in these situations, as it remains undetermined which of the applicability thresholds applies to these customary norms, or whether

52 Further, see Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' (n 45) 32–8.

53 See also Kolb (n 27) 22.

54 *Prosecutor v Duško Tadić*, ICTY (Appeals Chamber) Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) IT-94-1-AR72, A. Ch. [70].

55 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 155–6. See also Kleffner (n 26) 49.

56 Extensively, see Helen Duffy, *The 'War on Terror'' and the Framework of International Law'* (Cambridge University Press 2015).

57 AP II, art 1(1).

58 Assuming of course that the State in question has ratified AP II.

perhaps two regimes of customary norms exist.[59] As this issue is not central to the present study, it will not be discussed further.[60]

Classifying a conflict as non-international can be challenging. Regarding the lower limit, the required intensity and the exact delineation with internal disturbances, as well as a potential minimum duration, can be tricky.[61] Regarding the 'upper limit', extraterritorial NIACs where States engage with NSAGs on the territory of a third State without their consent, conflicts where States support a NSAG in a conflict with a third State, or where NIACs 'spill-over' into other States' territories, can be equally difficult to classify.[62] Whereas these issues are not discussed further at this junction, they are relevant to keep in mind when we take a closer look at the various human rights courts' and bodies' case-law pertaining to NIACs – who have at times struggled with the resource-intensive challenge that is conflict classification.[63]

4.2.4 Belligerent occupation

Finally, the Geneva Conventions and AP I also apply to situations of occupation.[64] The IHL regime for IACs therefore applies equally to situations of occupation, with Geneva Convention IV, on the protection of civilians, being the most relevant.

A definition of occupation is not provided in the Geneva Conventions, which provides no more than that a situation of occupation can exist even where the occupying forces met with no armed resistance.[65] A definition, reflecting customary international law,[66] can be found in Article 42 of the 1907 Hague Regulations: 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised'. The law of occupation therefore pertains to all situations in which a State's authority over a territory is taken over by a hostile army, insofar as its authority replaces that of the ousted sovereign.[67]

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59 Kolb (n 27) 105. Arguing that the *Tadić* test suffices for the applicability of the customary law of NIAC, see Sivakumaran (n 55) 155–6.

60 For an extensive discussion, see Sivakumaran (n 55); Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014).

61 Dinstein, *Non-International Armed Conflicts in International Law* (n 60) 21ff.

62 For an illustrative example, see the classification of the Syrian conflict, Terry D Gill, 'Classifying the Conflict in Syria' (2016) 92.

63 See in particular Chapter 6, on the Inter-American Court of Human Rights.

64 See GC, Common Article 2 and AP I, art 1(3).

65 GC, Common Article 2.

66 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004) *I.C.J. Reports* 2004, p. 136 [78] and [89]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment (19 December 2005), *I.C.J. Reports* 2005, p. 168 [172].

67 See Kleffner (n 26) 205.

In situations of occupation, the occupying State is bound by the law governing international armed conflicts. Thus, that body of law extends also to situations where there is no ongoing fighting. Even occupations where not a single shot is fired are governed by IHL. This may be of relevance for issues of interplay with human rights law, because the level of control exercised by the State in such situations is much more extensive than when it is engaged in active hostilities.[68] What is important for now, however, is simply that the law of IACs governs situations of occupation.

4.3 IHL's personal scope of application

Pertaining to the personal applicability of IHL, the entities bound by it are 'first and foremost' the parties to a conflict, whether they are States or non-State armed groups.[69] In addition to these well-accepted duty bearers under IHL,[70] IHL is also directly addressed to individuals.[71] They are bound by IHL, without the need for domestic implementing legislation.[72] Such individuals firstly are under a duty to comply with the applicable rules of IHL, the most prominent example of which is the grave breaches regime, which explicitly entails individual criminal responsibility.[73] Secondly, individuals are subjects of IHL 'passively', in the sense that individuals who are classified as civilians or

68 See Chapter 9. See also e.g. Watkin, who states 'The pressure to apply human rights principles arises in particular during situations more closely associated with governance than direct combat with an enemy force'; Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98 American Journal of International Law 1, 2. See further Helen Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press 2013) 508; Alon Margalit, 'The Duty to Investigate Civilian Casualties During Armed Conflict and Its Implementation in Practice' (2012) 15 Yearbook of International Humanitarian Law 155, 181; Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 Harvard National Security Journal 31, 52 (in particular fn 89).

69 Kleffner (n 26) 53; Kolb and Hyde (n 24) 86–7.

70 Non-State armed actors are somewhat less 'classic' of course, but their limited international legal personality under IHL is widely accepted. See e.g. Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017).

71 Further, see Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' (n 45) 40–4.

72 Kleffner (n 26) 55. See also Robert McCorquodale, 'The Individual and the International Legal System' in Malcolm D Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 286–8.

73 See *infra*, Chapter 3, section 3.2.2. See also for war crimes more generally, Rule 151-155 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck, *ICRC Customary International Humanitarian Law – Volume I: Rules* (n 15) 551–65; compare Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press 2008) 8.

otherwise as protected persons, are afforded protection against attack.[74] Thus, individuals are directly addressed under IHL, and are therefore directly subject to certain obligations and protections.

Whether IHL also confers *rights* that can be directly invoked by individuals, is a more controversial issue.[75] They cannot invoke rights under IHL at the international level, simply because there are no available international mechanisms for such – as will be explored further below. At the domestic level, results have been mixed when individuals invoke rights under IHL.[76] Certain commentators find that no individual rights exist under IHL, and that whereas the interests of individuals are safeguarded, IHL does so by means other than conferring individual rights.[77] In this view, IHL regulates inter-State relations, and individuals only incidentally benefit from such agreements. Others, however, find that IHL *does* confer rights on individuals.[78] The majority of scholarship on this issue pertains to an individual right to reparation for violations of IHL,[79] with critiques focusing more specifically on the lack of remedies for individual victims.[80] The UN General Assembly (UNGA) has also asserted that individuals have a right to a remedy for violations of IHL.[81] Whatever the merits of this position are, this study is concerned primarily with States' *duty* to investigate, which means that the discussion on *rights* is left aside for now.

Crucially, however, the direct imposition of obligations by the IHL framework on individuals has important consequences for what is expected of States in implementing and enforcing IHL. Safeguarding the effectiveness of individual obligations, after all, requires active intervention by the competent enforcement or supervisory body. As is explored further below, this could be held to imply investigative obligations on the part of the State.

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74 Kolb and Hyde (n 24) 87. See e.g. AP I, art 51.

75 See e.g. GC I, II and III, art 7; GC IV, art 8, providing that protected persons cannot renounce the rights secured to them. Although the term 'rights' appears to point towards conferral of individual rights, the non-renunciation of those rights could be seen as evidence that they are in fact not 'their' rights, so much as protections afforded to them.

76 Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford University Press 2014).

77 René Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press 2002) 16.

78 Lawrence Hill-Cawthorne, 'Rights under International Humanitarian Law' (2017) 28 European Journal of International Law 1187; Anne Peters, 'Direct Rights of Individuals in the International Law of Armed Conflict' (2019) 2019–23 <https://ssrn.com/abstract=3506742> (last accessed 15 July 2021).

79 Hill-Cawthorne (n 78) 1215.

80 E.g.Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85.

81 UNGA Resolution 60/147 (2005), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147.

4.4 IHL's temporal and geographic scope of application

On IHL's temporal and geographic scope of application, we can be brief. As was mentioned above, certain IHL obligations must be implemented in peacetime, and therefore apply at all times. Most obligations, however, are triggered by the occurrence of armed conflict or occupation. This means they apply from the outbreak of the conflict, until the 'general close of military operations', or until the end of the occupation.[82] Application to protected persons, such as prisoners of war, continues until they are released and repatriated.[83] Thus, whereas the applicability of IHL in principle begins and ends with the armed conflict, certain obligations can pre- and postdate the conflict itself.

The geographical scope of application of IHL is not principally limited.[84] It was designed to regulate the conduct of hostilities and actions which form part of an armed conflict, 'wherever they may occur'.[85] Whereas IHL does set certain boundaries as to where hostilities may be carried out, such as in the territories of neutral States,[86] it principally simply binds States' conduct wherever they operate. It has moreover been found to apply throughout the territories of parties to a conflict.[87] For NIACs, this latter finding is contested, as some find that the application of the law of NIAC throughout a State's territory, even though it may be engaged in a conflict in a very limited area within its territory, or perhaps solely extraterritorially, would be unreasonable.[88] It has therefore been proposed to require a *nexus* between the conduct in question and the conflict for IHL's applicability, so that for instance deprivations of liberty 'for reasons related to the conflict' are governed by IHL, whereas others are not.[89]

Insofar as relevant, these issues shall be returned to in the context of the research into investigative obligations. Noteworthy, at this junction, is that IHL's geographic scope of application is not principally territorially limited. This is an important distinguishing factor from IHRL, where extraterritorial conduct is only covered under certain circumstances.

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82 GC IV, art 6; Kleffner (n 26) 60.

83 GC III, art 5.

84 More extensively on geographic scope of application, see Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' (n 45) 45–8.

85 Noam Lubell, 'Fragmented Wars: Multi-Territorial Military Operations against Armed Groups' (2017) 93 International Law Studies 21, 244.

86 Kleffner (n 26) 59.

87 For IACs, see Michael N Schmitt, 'Charting the Legal Geography of Non-International Armed Conflict' (2014) 90 International Law Studies 1, 5. For NIACs, see Kleffner (n 26) 59.

88 Sivakumaran (n 55) 250–2; Schmitt, 'Charting the Legal Geography of Non-International Armed Conflict' (n 87) 5–6.

89 Sivakumaran (n 55) 250–2.

5 IHL'S IMPLEMENTATION, SUPERVISION, AND ENFORCEMENT SYSTEM

5.1 From the State level …

Enforcement, together with implementation is often considered to be the weak point or 'Achilles heel' of IHL.[90] The reason for this is that IHL, nor international law in general, provides for a central power or institution to implement and enforce its legal norms.[91] This lack of institutionalised oversight leaves it up to States themselves to implement IHL in their national legal systems. Because in some States international law must be transposed into domestic law before gaining binding force in the domestic legal order, and because in others rules of international law must be 'self-executing' for them to have direct effect, domestic implementation is a crucial step to ensure the effectiveness of IHL.[92] States' obligation to safeguard the effectiveness of IHL flows both from Common Article 1 to the Geneva Conventions (the obligation to 'respect and ensure respect') as well as the general public international law obligation of *pacta sunt servanda*, requiring States to carry out their treaty obligations in good faith.[93] This results in a system that, as Robert Kolb categorises it, is largely dependent on 'voluntary' compliance by States, as opposed to a system of coercion.[94]

It is through implementation of IHL in their domestic systems that States ensure that they act in conformity with international standards. Implementation measures can pertain to the enactment of legislation, the training and instruction of armed forces, the more general dissemination of IHL, and so on.[95] Such measures facilitate and seek to ensure compliance with IHL by and within the State itself, by binding the State's own subjects and armed forces through legislative implementing measures. This legislation transposes the norms of international law into the domestic legal order. Regarding means and methods of combat, this implementation largely takes the form of military manuals,

90 E.g. Kolb (n 27) 187–8; David Turns, 'The Law of Armed Conflict (International Humanitarian Law)' in Malcolm D Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 821; Dieter Fleck, 'International Accountability for Violations of the Ius in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law' (2006) 11 Journal of Conflict and Security Law 179.

91 Silja Vöneky, 'Implementation and Enforcement of International Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) 647.

92 For examples, see e.g. Eileen Denza, 'The Relationship between International and National Law' in Malcolm Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 418–25. See also Weill (n 76) 7.

93 See VCLT, art 26; ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) [143].

94 Kolb (n 27) 187.

95 For further examples, see ICRC (n 93) [146].

promulgated by States in order to regulate the conduct of their armed forces.[96] States further adopt rules of engagement (RoE), in which they lay down their instructions on the use of force.[97] Important further means of implementation pertain to the enactment of criminal legislation for grave breaches,[98] and establishing universal jurisdiction over those breaches,[99] the prohibition of other breaches either through criminal or disciplinary law,[100] and setting up a sufficient infrastructure to enable conducting genuine investigations (at least into core crimes and grave breaches).[101] These obligations have furthermore been confirmed by the UN General Assembly.[102] This infrastructure can be found partly in (military) criminal codes, as well as in military manuals that provide for the carrying-out of disciplinary or preliminary investigations by commanders under certain circumstances.[103] The ICRC's Advisory Service can provide some assistance to help States implement IHL, even drawing up 'model implementation legislation' that can be used by States to base their domestic measures on.[104]

96 Heike Spieker, 'Implementation' in Dražan Djukicì and Niccolò Pons (eds), *The Companion to International Humanitarian Law* (Brill 2018).

97 Maria Giovanna Pietropaolo, 'Rules of Engagement' in Dražan Djukicì and Niccolò Pons (eds), *The Companion to International Humanitarian Law* (Brill Nijhoff 2018).

98 Compare the obligation for High Contracting Parties to 'undertake to enact any legislation necessary to provide effective penal sanctions' for perpetrators of grave breaches; GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146. See also Vöneky (n 91) 665. And more specifically Dörmann & Geiß, who also explain that 'undertake' signifies a strict legal obligation and that specific legislation is required, not merely ordinary criminal law sanctioning, for instance, murder; Knut Dörmann and Robin Geiß, 'The Implementation of Grave Breaches into Domestic Legal Orders' (2009) 7 Journal of International Criminal Justice 703, 706–10.On this last point, see of a different view Ferdinandusse (n 14) 729.

99 Henckaerts and Doswald-Beck, *ICRC Customary International Humanitarian Law – Volume I: Rules* (n 15) 606; Dörmann and Geiß (n 98) 709. ICRC (n 93) [2863]-[2867].

100 Following paragraph 3 of the grave breaches provisions, see Pictet (n 47) 368. Compare Schmitt, 'Investigating Violations of International Law in Armed Conflict' (n 68) 37; Vöneky (n 91) 661 (although she seems to imply on p. 670 that all violations must be criminally prosecuted).

101 Compare Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (hereinafter: ICC Statute), art 17(1)(a) in conjunction with its Preamble [6]; Kleffner (n 73) 306–7. See also ICRC (n 93) [2860] and [2891].

102 See Principle 2 of UNGA Resolution 60/147 (2005), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147.

103 For many of these documents, see https://www.icrc.org/casebook/the-law-in-practice/.

104 www.icrc.org/en/document/national-implementation-ihl-model-laws (last accessed 15 July 2021); see also Kolb (n 27) 190; and more extensively MT Dutli, 'The ICRC Advisory Service on International Humanitarian Law' in Michael Bothe (ed), *Towards a Better Implementation of International Humanitarian Law* (Arno Spitz 2001).

5.2 … to the international …

When it comes to the supervision of States' correct implementation of, and compliance with IHL, as well as to the enforcement of the rules, IHL does not have real institutionalised oversight, implementation, or enforcement mechanisms. In lieu of specific enforcement mechanisms, general international law normally leaves it up to States to enforce the law through unilateral (or coordinated) sanctions. This, in fact, is the starting point of the international legal system: supervision and enforcement, whether judicial or otherwise, are not a given, and States themselves are the primary actors when it comes to ensuring compliance by other States, and enforcing the law.[105] Insofar as IHL *does* provide for possibilities of oversight or enforcement, these are contingent on prior *ad hoc* consent or discretionary powers, and they are therefore not *institutionalised*. This ultimately leaves the responsibility for implementation and enforcement to States themselves. This section gives a brief overview of IHL's existing supervision and enforcement system, before returning to States' role in enforcing IHL.

On the international level, supervision of States' compliance with IHL is limited. For the supervision of implementing measures, there is a system of 'protecting powers'. A protecting power is a neutral State agreed upon by the belligerents, who, among other things, can supervise proper implementation of the rules.[106] In order to function, however, this system relies on the *consent* of both the parties to the conflict and the protecting power itself.[107] Due to this high threshold, it has fallen into disuse. Although the protecting power can be substituted by the ICRC when no power is assigned,[108] the ICRC almost exclusively works on a confidential basis, which means its functioning as a supervisory body is necessarily somewhat limited in nature.[109]

IHL does not contain any kind of reporting system, which requires States to report on how they comply with their obligations. AP I does provide for the possibility of meetings of the High Contracting Parties, but such meetings are again contingent on State agreement, and have never been convened.[110]

105 As illustrated by the UN Security Council, '*Reaffirming* that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians', Preambular paragraph to UNSC Res. 1894 (2009), UN Doc. S/RES/1894. See also Weill (n 76) 8.

106 E.g. GC III, art 126.

107 Vöneky (n 91) 686.

108 AP I, art 5(4).

109 See also Kolb (n 27) 187.

110 AP I, art 7. See Sofia Poulopoulou, 'Strengthening Compliance with IHL: Back to Square One' https://www.ejiltalk.org/strengthening-compliance-with-ihl-back-to-square-one/#more-16906 (last accessed 15 July 2021).

Similarly, AP I's institution of a permanent International (Humanitarian) Fact-Finding Commission[111] has remained largely ineffective because most States are not willing to give the prior consent which is required for it to spring into action. If called upon, the Commission can conduct an enquiry into facts alleged to be grave breaches or other serious violations of the Geneva Conventions or AP I.[112] A legal assessment of the facts, however, is beyond the competence of the Commission.[113] Thus far, the Commission has been asked to investigate only once, by the Organisation for Security and Co-operation in Europe (OSCE).[114] This confirms the accuracy of its nickname, the 'Sleeping Beauty',[115] and underscores that it is not an institutionalised form of supervision. The requirement of prior State consent has prevented such, which is quickly becoming the story of this section. Beyond the modalities mentioned above, IHL also provides for an enquiry procedure which can be requested by a party to the conflict. Again, however, this procedure can be relied upon only where *both* parties to the conflict give their prior consent, which renders this procedures' use limited.[116]

IHL itself, in sum, does provide for certain procedures which are meant to ensure supervision or enforcement of its rules. But the effectiveness of these rules is undercut by the requirement of prior State consent, which often goes against States' interests when they are engaged in armed conflict. This means that States are themselves responsible for proper implementation of IHL into their domestic systems. Because of the lack of international mechanisms monitoring or enforcing such implementation, this system has been characterised as 'voluntary'[117] – the system is wholly dependent on States' active engagement in fulfilling their obligations. Although the ICRC takes up a certain role in assisting in the implementation of IHL, the system therefore hinges on States taking up their responsibilities. The interpretation of what is required under provisions requiring enacting domestic (criminal) legislation must

111 AP I, art 90.

112 AP I, art 90 (2)(c) under i.

113 Compare Heike Spieker, 'International (Humanitarian) Fact-Finding Commission', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2015) under 12-3; Turns (n 90) 850.

114 Robert Heinsch, 'The Future of the International Humanitarian Fact-Finding Commission: A Possibility to Overcome the Weakness of IHL Compliance Mechanisms?', *The Companion to International Humanitarian Law* (Brill | Nijhoff 2018) 84; 89. See *Executive Summary of the Report of the Independent Forensic Investigation in relation to the Incident affecting an OSCE Special Monitoring Mission to Ukraine (SMM) Patrol on 23 April 2017*, https://www.osce.org/home/338361 (last accessed 15 July 2021).

115 F Kalshoven, 'The International Humanitarian Fact-Finding Commission: A Sleeping Beauty?', *Reflections on the Law of War: Collected Essays* (Brill | Nijhoff 2007); Heinsch (n 114) 81.

116 AP I, art 52.

117 Kolb (n 27) 187.

therefore rely largely on the manner in which States have given effect to this obligation in their legislation and military manuals.

Beyond rules of IHL, general international law can also provide avenues for supervision and enforcement of the rules. Some form of supervision is possible if States accept the jurisdiction of the ICJ,[118] set up an *ad hoc* claims commission,[119] or if the UN Security Council (UNSC) decides,[120] based on its discretionary powers, to exercise enforcement action. Such action, however, is fully contingent on either the consent of the parties to the conflict, or the discretionary power of others. This renders the judicial avenues rarely used, while the UNSC's enforcement action with regard to rules of IHL is mixed, also due to the political nature of that organ.

Oversight by bodies of other specialised branches of international law, such as international human rights law and international criminal law (ICL), can certainly contribute to compliance with IHL. Nonetheless, such bodies are principally limited in their jurisdiction to apply IHL. Their subject-matter jurisdiction is limited to their own legal regime. They cannot therefore, pronounce directly on issues of IHL, but necessarily do so through the lens of their own regime. Thus, as is discussed extensively in Part II, IHRL courts and bodies do not have the jurisdiction to apply IHL directly, and can only do so incidentally, insofar as their application of IHRL coincides with IHL. Similar

118 The ICJ has jurisdiction to hear inter-State disputes, ICJ Statute, art 34(1).

119 The Eritrea-Ethiopia Claims Commission, for instance, had the competence to: 'decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (…) of one party against the Government of the other party (…) that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law. The Commission shall not hear claims arising from (…) the use of force, except to the extent that such claims involve violations of international humanitarian law.' Agreement of 12 December 2000, see the Annex to UN Doc. A/55/686 – S/2000/1183 (Algiers Agreement), art 5(1).

120 The UN Security Council (UNSC) has on occasion used its powers under Chapter VII of the UN Charter to either enforce IHL itself, or to set up ad hoc tribunals with the competence to apply IHL. Such action can be based on the UN Charter itself, granting the UNSC powers in situations which threaten or breach the peace in art 39ff, and can also be inspired by AP I, which in art 89 provides for States to act in response to serious violations of AP I and the GC, either unilaterally or in cooperation with other States *or the UN*; see also Kolb (n 27) 196. The Council has at times made clear its readiness to 'adopt targeted and graduated measures' to put an end to certain violations, and to 'adopt appropriate measures aimed at those who violate [IHL and HRL]'. More specifically, Security Council action has occasionally included calls for investigations or prosecutions, and also established fact-finding missions by UN Commissions to examine allegations of grave breaches of the Geneva Conventions as well as other violations of IHL. See UNSC Statement by the President, UN Doc. S/PRST/2013/2, p. 2; UNSC Resolution 1894 (2009), UN Doc. S/RES/1894 [10]; UNSC Resolution 780 (1992), UN Doc. S/RES/780 [2], pertaining to the conflict in the former Yugoslavia.

restrictions apply for international criminal courts and tribunals, which are limited in their application of IHL in two ways. Firstly, they can only exercise jurisdiction over war crimes, which therefore excludes violations of the majority of IHL provisions.[121] Secondly, the ICC applies ICL, which differs from IHL primarily when it comes to the element of *mens rea* – a concept that is in large part alien to IHL.[122] Although IHRL and ICL bodies therefore incidentally enforce rules of IHL, they only do so insofar as their own documents coincide with IHL, and they do so indirectly.[123]

5.3 … back to the State

As was shown above, any form of institutionalised oversight over, or enforcement of States' IHL obligations, is lacking. Insofar as mechanisms or procedures do exist, these are either dependent on prior *ad hoc* consent (for instance the International (Humanitarian) Fact-Finding Commission), on discretionary powers (such as the Security Council's powers of enforcement), or are principally limited in their jurisdiction to apply IHL, as applies to human rights courts, as well as international criminal tribunals. This must lead us to the conclusion that it is *States* who are the primary enforcers of IHL. We can distinguish between States' role in enforcing the law *externally*, to make sure others comply with the law, and its role in implementing and enforcing the law *internally*, with regard to its own conduct and organs.

5.3.1 External implementation, supervision, and enforcement

Enforcement of State obligations under international law remains essentially a system of 'self-help',[124] which means that States themselves must enforce

121 ICC Statute, art 5(1)(c) and 8; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UNSC Res. 827, UN Doc. S/RES/827 (1993), 25 May 1993 (hereinafter: ICTY Statute), art 1; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, UNSC Res. 955, UN Doc. S/RES/955 (1994), 8 November 1994 (hereinafter: ICTR Statute), art 1.

122 Kolb (n 27) 188.

123 Further, see Sandesh Sivakumaran, 'Re-Envisaging the International Law of Internal Armed Conflict' (2011) 22 European Journal of International Law 219, 238–42.

124 Nigel D White and Ademola Abass, 'Countermeasures and Sanctions' in Malcolm D Evans (ed), *International Law* (Oxford University Press 2014) 537–9. See also Jutta Brunnée, 'International Legal Accountability Through the Lens of the Law of State Responsibility' (2005) XXXVI Netherlands Yearbook of International Law 21, 37.

the legal obligations owed to them by other States.[125] To do so, international law allows States to act unilaterally or collectively to induce other States to comply with their international obligations.[126] Further, an important incentive for States to comply with their obligations, is the pull of reciprocity.[127] Both the taking of unilateral countermeasures, and the functioning of reciprocity, however, are restricted under IHL.[128]

Firstly, States' resort to countermeasures is limited under IHL. Normally, the system of countermeasures allows States to induce a State who breaches its obligations, into coming back into the fold. It allows States to take measures which deviate from their own international obligations, under certain conditions, to pressure a State into honouring its obligations.[129] Under IHL, however, resort to countermeasures as a response to breaches of the law by a party to the conflict is limited.[130] Article 50(1)(c) ILC Articles on the Responsibility of States (ARSIWA) makes clear that '[c]ountermeasures shall not affect (…) [o]bligations of a humanitarian character prohibiting reprisals', reflecting the prohibition of reprisals carried out against individuals.[131] Responding to an opposing State's ill-treatment of POWs by ill-treating one's own captives, for example, can clearly not be allowed. Thus, States cannot lawfully resort to countermeasures which deviate from their IHL obligations – they must comply 'in all circumstances'.[132]

Secondly, and closely connected, States may not condition their compliance with IHL on reciprocity. Reciprocity essentially relies on States observing the law in hopes that others will do the same – and knowing that if they do not observe the law, others will not either. This functioning is restricted under IHL.[133] Whereas a material breach of a treaty may normally justify the suspension or termination of a treaty by other contracting parties,[134] Article 60(5) of the Vienna Convention on the Law of Treaties (VCLT) makes clear that suspension and termination are ruled out regarding 'provisions relating to

125 In fact, according to the ICRC, States are even under an obligation under Common Article 1 to induce compliance externally, by other States; ICRC (n 93) [153]-[157]. Of a contrary opinion, see Carlo Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?' (2010) 21 European Journal of International Law 125.

126 Jan Klabbers, *International Law* (Cambridge University Press 2013) 165–84.

127 Francesco Parisi and Nita Ghei, 'The Role of Reciprocity in International Law' (2003) 36 Cornell International Law Journal 93.

128 ICRC (n 93) [175].

129 *Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), A/56/10, *Yearbook of the International Law Commission* 2001, vol. II, Part Two, 106, art 49-54.

130 See also Theodor Meron, *Human Rights in Internal Strife: Their International Protection* (Grotius Publications Limited 1987) 10–1; Fleck (n 90) 184.

131 *Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), A/56/10, *Yearbook of the International Law Commission* 2001, vol. II, Part Two, 106, Article 50 under (8).

132 Common Article 1; ICRC (n 93) [188].

133 Bryan Peeler, *The Persistence of Reciprocity in International Humanitarian Law* (Cambridge University Press 2019).

134 VCLT, art 60.

the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'.[135] The regular functioning of reciprocity (*do ut des*) is thought not to be suitable for these kinds of obligations, as they protect human beings rather than State interests alone.[136] The ICRC has found this rule to reflect customary IHL.[137]

5.3.2 Internal implementation, supervision, and enforcement

The weakness in the external supervision and enforcement machinery of IHL, and the limited ways that States can enforce IHL externally, places a strong emphasis on what Robert Kolb has named the 'voluntary nature'[138] of the system. States are responsible for employing an enforcement system that ensures *their own* organs, armed forces, and individuals comply with IHL, by means of prevention, control and suppression of violations.[139] States have from the conception of the 1949 Geneva Conventions been envisioned as the main enforcers of IHL with regard to individuals, as is borne out primarily by the grave breaches provisions that require States to enact and enforce criminal legislation, and search and bring before their courts perpetrators of these breaches.[140] This conclusion also flows from AP I, which in Article 41(1) provides that the 'armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.' State measures are therefore clearly not limited to enacting criminal legislation, but must also entail the institutionalisation of the command structure required to ensure the compliance with IHL by individual soldiers.[141] This also flows from Common Article 1's requirement that States 'respect *and ensure respect*' of the Conventions. The obligation to ensure respect requires States to ensure that their own armed forces comply with IHL.[142]

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135 See also Robert Kolb and Katherine Del Mar, 'Treaties for Armed Conflict' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 86.

136 Ibid.

137 Rule 140 ICRC Customary IHL Study, Henckaerts and Doswald-Beck, *ICRC Customary International Humanitarian Law – Volume I: Rules* (n 15) 498.

138 Kolb (n 27) 187.

139 See Kolb (n 27) 189–96. Turns distinguishes seven methods of enforcement, Turns (n 90) 846.

140 Weill (n 76) 7.

141 Compare AP II, art 1(1), which for its application requires armed groups to have a sufficient level of organisation to enable them to implement the Protocol.

142 Extensively, see Focarelli (n 125). Arguing Common Article 1 has an external element (but not yet setting out what this duty entails), see Marten Zwanenburg, 'The "External Element" of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation' (2021) 97 International Law Studies 622.

Besides implementation measures such as legislation and military manuals, these rules must also be enforced by domestic executive and judicial action. The next Chapter examines to what extent this also entails investigative obligations on the part of the State.

5.4 Résumé

In conclusion, the system set up under IHL is ultimately one of *self-enforcement*: it is the subjects of the law themselves – States – who must not only implement the rules in their domestic systems, but who must moreover supervise their own compliance, and enforce the rules in respect of their own conduct. Three factors in particular lead to this conclusion.

Firstly, under IHL there are no institutionalised oversight, implementation, or enforcement mechanisms. This, *secondly*, brings us back to *States*, who are the primary enforcers of IHL. In lieu of specific enforcement mechanisms, general international law leaves it up to States to enforce the law through unilateral (or coordinated) sanctions. For IHL, however, there is a *third* factor in play, which limits the regular operation of unilateral enforcement measures. States may not readily take countermeasures which deviate from their humanitarian obligations under IHL, nor may they suspend or terminate IHL obligations in response to violations by other parties. The regular functioning of reciprocity is therefore limited.

Together, these three factors paint the picture of a system which because of the lack of institutionalised oversight mechanisms, relies on States to enforce the law, but which at the same time restricts States' powers of unilateral enforcement. Thus, it is up to States to take responsibility *for their own conduct*. The next Chapter examines to what extent this also entails a *duty to investigate* violations.

6 Conclusion

This Chapter set out to provide a basic understanding of the IHL system, which facilitates the research into specific investigative duties under IHL. It was shown that IHL is a pragmatic field of law, which aims to mitigate the consequences of armed conflict. It does so by striking a constant balance between what is militarily necessary, and what humanitarian considerations require. Thus, the entirety of IHL is built on the tension between these two guiding principles. This applies equally to rules of IHL enshrined in the Geneva Conventions and their Additional Protocols, and to customary international humanitarian law – the main IHL sources relied upon in this study.

Main other points which must be taken away from this introduction to the IHL system, are that it binds States, non-State armed groups, and – crucial-

ly – individuals. All three actors are directly bound by rules of IHL, and must comply with such rules in situations of international or non-international armed conflict, as well as situations of occupation. Also, importantly, the rules applicable to these three situations to which IHL applies, vary. Thus, conflict classification is an important first step in determining the legal regime applicable to a conflict situation. Finally, obligations under IHL in principle extend to wherever and whenever the armed conflict may take place. There is no territorial restriction *per se*, and the rules remain applicable for so long as the conflict lasts. Nonetheless, in determining the contextual relevance of rules, it may be useful to determine to what extent certain conduct has a nexus to the armed conflict.

Lastly, it was shown that IHL has a weak implementation, supervision, and enforcement system. There is no dedicated and IHL specific institutionalised oversight or enforcement, and insofar as any procedures exist, these are contingent on prior State consent, and hardly – if ever – used. This leaves us with a system of self-enforcement, where States themselves are primarily responsible for ensuring compliance, and for enforcing IHL.

The next Chapter uses these fundaments of IHL as a platform, and examines to what extent States must investigate violations of IHL, and if so, how they must do so.