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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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3 The duty to investigate violations of IHL

1 INTRODUCTION

With the previous Chapter's introduction to IHL freshly in mind, it is now time to explore to what extent IHL imposes investigative obligations on States. This Chapter does so, firstly, by drawing out how the IHL system relies on self-investigations by States for its effectiveness (§2). A second step is then to explore the specific *sources* which provide for a duty to investigate IHL violations. These sources immediately delineate the obligation's scope of application, and these are therefore discussed together (§3). After having thus outlined *what* States must investigate, *when*, and *why*, section 4 discusses *how* they must do so. It does so by determining the investigative standards States must meet.

2 THE IHL SYSTEM'S IMPLICATION OF INVESTIGATIONS

2.1 The system of self-enforcement and the duty to ensure respect for IHL

As was explained in the previous Chapter, IHL has a weak implementation, oversight, and enforcement system. It lacks an institutionalised machinery on the international level, which stresses the role of States. At the same time, States are restricted in how they can enforce IHL *externally*, with regard to other States. They may not suspend or terminate their IHL obligations in response to violations, and their recourse to countermeasures is equally restricted.

Together, this puts the emphasis of oversight and enforcement fully on *internal* enforcement by States themselves. It is States themselves who must make sure that they comply with IHL, by properly implementing it on the domestic level, supervising compliance by their armed forces, and enforcing the law where necessary. This obligation does not only derive from IHL's system, which lacks other mechanisms, but also flows from Common Article 1. That provision, which is of a customary nature,[1] stipulates that States must

1 Rule 139 of the ICRC Customary IHL Study, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *ICRC Customary International Humanitarian Law – Volume I: Rules*, vol I (Cambridge University Press 2005) 495. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment (27 June 1986), *I.C.J. Reports* 1986, p. 14 [220].

'respect and ensure respect' for the Geneva Conventions, 'in all circumstances'. Thus, States must not only 'respect' IHL, as flows from the general obligation *pacta sunt servanda*, they must moreover *ensure respect* for IHL.[2] This goes beyond refraining from violations, and requires active measures to ensure that the State acts in line with IHL, to 'do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally'.[3] This – crucially – entails also a duty to supervise the execution of own implementation measures,[4] and to induce compliance by the own armed forces and population. The duty to ensure respect for IHL, in this context, also includes an obligation to *prevent* violations,[5] and in certain circumstances, to take penal action against transgressors.[6] Rendering IHL *effective* is contingent on this.[7]

How States must supervise and enforce the law, however, is not clearly set out in IHL treaty law. IHL in large part leaves it up to States themselves to decide how they implement the law, and this also goes for how they set up oversight mechanisms.[8] So long as States therefore properly effectuate their obligation to ensure respect for IHL by their own armed forces through effective supervision and enforcement mechanisms, this is principally in line with their IHL obligations. Although States are therefore to an extent free in how they decide to shape these systems, there does appear to be a strong implication that investigations are called for.

States' obligation to actively ensure that their armed forces, as well as private individuals over whom they exercise authority,[9] comply with IHL, and to enforce the law where necessary, renders it indispensable that they are *aware* of what goes on on the ground.[10] Effective supervision and enforcement are fully contingent on a system which functions as the State's 'eyes and ears' on the ground, which monitors military operations and their effects, and so forth. Without proper knowledge of the facts, of the effects of military operations,

2 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]; [154].

3 Jean S Pictet (ed), *Commentary to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1st edn, International Committee of the Red Cross 1958) 16.

4 Ibid; ICRC (n 2) [150].

5 ICRC (n 2) [164].

6 *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. [71].

7 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, 44.

8 ICRC (n 2) [146].

9 ICRC (n 2) [150].

10 Cohen and Shany (n 7) 44.

and of the conduct of their armed forces, any meaningful supervision and enforcement is illusory. States must therefore put a system in place which allows for them to keep abreast of their armed forces' compliance with IHL.[11]

This role is all the more pronounced if we consider that IHL does not only address obligations to States, but also imposes a number of obligations directly on individuals.[12] In their role as primary enforcers of IHL, States are in the crucial position to ensure that individuals respect their obligations, and to enforce the law if they do not. Irrespective of what this enforcement action entails exactly, in order for States to be able to take such action they must – as a matter of logic – first establish the facts to assess whether IHL violations have indeed taken place. Such assessment necessarily requires knowledge of the facts, and therefore some kind of investigation.

If we then look more closely at *how* States must shape such supervision over their armed forces, as well as over the acts of others, IHL treaty law contains relatively little guidance. Article 41(1) of AP I provides generally 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.' How to operationalise the executive supervision and enforcement is explicated mostly by setting out the role of the commander.[13] Commanders are seen as 'key' to enforcement,[14] due to their responsibility to prevent, suppress and report all breaches, to initiate disciplinary or penal sanctions where appropriate,[15] and by virtue of their own criminal liability for shortcomings in the exercise of these duties.[16] The purpose of these provisions is to render the law effective, and as the ICRC Commentary to AP I makes clear, commanders may even be required to conduct investigations and thereby function 'like an investigating magistrate'.[17]

Beyond this key role for the commander, as will be explored in-depth in section 3, IHL also refers to a role for judicial enforcement by States.[18] National courts present the main avenue for judicial enforcement of IHL;[19] these courts

11 Françoise J Hampson, 'An Investigation of Alleged Violations of the Law of Armed Conflict' (2016) 46 Israel Yearbook on Human Rights 1, 5–10.

12 See Chapter 2, §4.3.

13 Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 Harvard National Security Journal 31, 40–1.

14 Schmitt (n 13) 41; David Turns, 'The Law of Armed Conflict (International Humanitarian Law)' in Malcolm D Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 848.

15 AP I, art 87.

16 AP I, art 86(2).

17 Jean Pictet and others, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Yves Sandoz, Christophe Swinarski and Bruno Zimmermann eds, Martinus Nijhoff 1987); Schmitt (n 13).

18 Pictet and others (n 17).

19 Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford University Press 2014) 7–8.

must be involved in accordance with the duty to 'bring before their courts' perpetrators of grave breaches.[20] Should there be any competent international tribunal, national courts normally also present the last opportunity for the State to bring its domestic practice into compliance with international norms, which means these courts take up an important role in this respect.[21]

In lieu of detailed rules with regard to operationalisation, it is in principle up to States to decide for themselves how they wish to implement the general requirement to set up internal supervision and enforcement systems.[22] Nonetheless, some indications of how States should, optimally, do so can be gleaned from practice and soft law instruments.

In 2019, the ICRC together with the Geneva Academy of International Humanitarian Law and Human Rights, published *Guidelines on Investigating Violations of International Humanitarian Law* (hereinafter: *Guidelines*). This document sets out guidelines on how violations of IHL must be investigated, based on legal requirements, policy considerations, and good practice. The *Guidelines* do not, as such, aim to establish the 'agreement of the parties regarding [the treaty's] interpretation' in the sense of Article 31(3)b VCLT, and therefore do not as such propose legally binding interpretations.[23] Nonetheless, their strong basis in State practice make them of great added value in the interpretation of the relevant IHL,[24] and ensure their practicability. The following therefore explores briefly how the *Guidelines* flesh out States' obligation to institutionalise supervision and enforcement of IHL in their domestic systems.

The good practice promoted by the *Guidelines* foresees in a domestic process consisting of three principal steps before an actual in-depth investigation takes place. This includes good practice on how supervision and enforcement mechanisms can be shaped. In this context, the *Guidelines* suggest that States should set up domestic systems which ensure that they *make records* of incidents which may require investigation, and of all military operations, that relevant

20 Suspected perpetrators must be ensured at a minimum the due process rights also afforded to prisoners of war, see the last paragraph of the grave breaches provisions, GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146.

21 Weill (n 19) 8.

22 ICRC (n 2) [146].

23 Noam Lubell, Jelena Pejic and Claire Simmons, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* (The Geneva Academy of International Humanitarian Law and Human Rights & International Committee of the Red Cross 2019) 1.

24 It is submitted that State practice can nevertheless be of relevance under VCLT, art 32, as a supplementary means of interpretation – as was confirmed by the ICJ and in legal scholarship; *Kasikili/Sedudu Island (Botswana/Namibia)* Judgment (13 December 1999) *I.C.J. Reports* 1999, p. 1045 [79]-[80]; 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, 629.

incidents are *reported* to appropriate authorities, which authorities then *assess* whether, and if so what, further investigative steps are necessary.

Firstly, it is key that all military operations are *recorded*, meaning that relevant information is 'captured' by collecting, documenting, and retaining information.[25] These records serve the regular purposes of facilitating lessons-learned processes and gauging the effectiveness of military operations, but moreover provide the starting point for investigative processes.[26] Any incident which potentially violates IHL will also be recorded, and relevant information captured and stored.[27] *Secondly*, in case there is an indication of a violation, or of an incident which otherwise calls for further scrutiny – for instance an unexpectedly large number of civilian deaths following an air strike – this must then be *reported*.[28] IHL treaty rules clearly require commanders to report incidents indicating that a breach has occurred.[29] Reporting obligations, according to the *Guidelines*, should exist throughout the chain of command, so any member of the armed forces can report an incident internally, which can then be reported to the appropriate authority for assessment.[30] The same applies to external allegations, these too must be communicated to the appropriate authority for assessment.[31] At this point, *thirdly*, an appropriate authority, which can be a military or a civil authority, *assesses* and decides whether an incident requires further investigation. In doing so, it can decide (i) that no further investigation is necessary, (ii) that a criminal investigation must be opened, or that (iii) an administrative investigation must be conducted.[32]

This domestic system for the monitoring of military operations, as it is suggested by the *Guidelines*, constitutes good practice. It guides how States *can* shape the oversight of their armed forces, though they are free to choose other methods so long as they are effective. The *Guidelines*' suggestion of distinguishing between criminal and administrative investigations, however, as we shall see in the next section, flows directly from how investigative obligations are structured under IHL. Investigations under IHL are dependent on the *severity* of the violation, which also determines whether such a violation

25 Lubell, Pejic and Simmons (n 23) 14. This finding corresponds to the Turkel Report's duty to 'examine' suspected violations of IHL; The Turkel Commission, 'Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law' (2013) 73–4 <https://www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_b1-474.pdf (last acccessed 15 July 2021)>.

26 Lubell, Pejic and Simmons (n 23) 14–5.

27 Ibid.

28 Lubell, Pejic and Simmons (n 23) 16.

29 AP I, art 87.

30 Lubell, Pejic and Simmons (n 23) 19.

31 Lubell, Pejic and Simmons (n 23) 20.

32 Lubell, Pejic and Simmons (n 23) 21–3. Finally, they also stipulate that the assessment authority must be able to decide that it requires more information to take its decision.

constitutes an international crime, which requires a criminal response and investigation. This is the subject of section 3.

2.2 Rationales for investigative obligations under IHL

Much of what was said above, on how IHL's system of implementation, supervision, and enforcement *implies* a duty to investigate, also alludes to the *rationale* for investigative obligations. It was mentioned on several occasions how IHL, *for its effectiveness*, relies on States implementing and enforcing the law, and that they can do so effectively only by investigating. Commentators have even suggested that investigations are 'indispensable' in safeguarding the effectiveness of the system,[33] and as was shown above, the system is indeed reliant on State investigations. The lack of institutionalised international supervision and enforcement mechanisms, and the limited external enforcement options for States, make this so.

Effectuating IHL, thus, is a primary driving force for investigative obligations under IHL. This includes *structural*, and *incidental* aims. In order to structurally safeguard the integrity of States' implementation of IHL, recommended practice is to record *all* military operations, and report any notifiable incidents which indicate that further investigation may be called for.[34] This is meant to *ensure compliance* with the rules of IHL, *to put a stop to violations*, and to *uncover systemic shortcomings*. In other words, there is a strong *prospective*, forward-looking purpose to these requirements.[35] Procedural mechanisms must be set up and institutionalised in order to structurally safeguard States' compliance with IHL, and to improve relevant practices where applicable.

Then, investigative obligations also serve *retrospective* aims. The *ex post facto* investigation of incidents does not only safeguard the structural integrity of States' military operations, but also brings to light individual violations, facilitates and forms part of accountability processes, and provides the basis for individual remedies. *Holding those responsible to account* is an important aim of investigations – be it through measures geared towards individuals (such as disciplinary measures, reprimands, dishonourable discharge, or criminal proceedings), or towards the State (State responsibility and broader accountability structures, for instance aimed at making known the truth). Impunity is the polar opposite of accountability, and IHL's investigative requirements – insofar as concerned with *criminal* breaches of IHL – aim to prevent impunity. This includes ensuring perpetrators of war crimes are prosecuted and punished, which in turn serves the forward-looking aim of preventing

33 Cohen and Shany (n 7) 44.
34 Hampson (n 11).
35 Cf. Cohen and Shany (n 7) 46–7.

a culture in which violations can take place and be perpetuated. All this is explored in-depth in the following sections.

The pro- and retrospective sides of the duty to investigate, and in a broader sense the implementation and enforcement sides of IHL, together ensure the effectiveness of the system. The former requires States to set up a procedural mechanism to stay aware of the effects of military operations and their compliance with international norms; the latter requires the effectuation of the legislative and operational frameworks for investigation and accountability in case a norm is violated. As is explored further below, duties of investigation under IHL vary quite markedly depending on whether the (potential) violation is classified as 'serious' or not, and for serious violations IHL is much more stringent and explicit as to forms of accountability. For non-serious violations, meanwhile, investigations are not equally clearly governed by explicit rules, and the aspect of ensuring (future) compliance takes on a more prominent role here, with accountability requirements operating more in the background.

2.3 Résumé

States must implement IHL in their domestic systems, both in the law and in the practice of their armed forces, and must themselves oversee and review the actions of their armed forces in light of the applicable rules of IHL. This is reinforced by Common Article 1's obligation to 'ensure respect' for IHL. Thus, the system of IHL in itself requires States to supervise the conduct of their own armed forces, and it puts the primary responsibility for such oversight firmly on States themselves. This requirement is all the more clear if we consider that IHL does not only impose certain obligations on States, but also binds individuals directly. Ensuring individuals comply with IHL and enforcing the law where it is breached, in lieu of other mechanisms, requires States to institutionalise review and monitoring of its military operations. If these procedures bring to light potential violations, they must furthermore effectuate mechanisms for the enforcement of the law.[36] This system clearly relies on a *duty to investigate violations* by States themselves.

36 Cf. also AP I, art 41(1), which provides that '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'.

3 Scope of application and sources of investigative obligations

3.1 Introduction

In the preceding section, it was concluded that an obligation to investigate IHL violations may be inherent in IHL's enforcement system. Such a general duty to investigate IHL violations has also been accepted by numerous actors on the international level, such as the UN General Assembly,[37] and the former Commission on Human Rights. The latter found, for instance, that States must 'undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law'.[38] Yet, such general declarations, nor the general system of self-enforcement in and of itself, help us in determining the scope of application or contents of such an obligation. Nor do they clarify the specific sources of investigative duties under IHL. This section therefore examines in more detail the various specific sources which stipulate investigative duties for the State, and determines their scope of application. The investigative standards to be employed once an obligation has been established are discussed in the next section (§4).

The question *whether*, and if so, *when* States are under an obligation to investigate violations of IHL is subject to ongoing debate. The absence of unequivocal treaty provisions or judgments to the effect of the existence of a duty to investigate IHL violations, has led some authors to suggest that such a duty does not yet exist under IHL in general.[39] Others have put forward that the scope must in any case be limited, as for instance an obligation conforming to the human rights obligation to investigate every death would be unfeasible during armed conflicts.[40] Yet others have made a distinction between investigations of grave breaches and war crimes on the one hand – of

37 E.g. UNGA Resolution 3074(XXVIII) (1973), *Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*, UN Doc. A/RES/3074(XXVIII); 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, under 3(b).

38 See e.g. Principle 19 of ECOSOC Commission on Human Rights, *Impunity. Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher*, UN Doc. E/CN.4/2005/102/Add.1.

39 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.

40 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, 33.

which it appears largely accepted that they require investigatory action – and other IHL violations on the other.[41]

The following section sheds light on this discussion, by exploring the various sources for investigative obligations under IHL, and by outlining their scope of application. It will be shown that the question when States must investigate is contingent on the *type* of violation in question. The section is structured accordingly, distinguishing between 'serious' violations which constitute war crimes (§3.2), and 'non-serious' violations (§3.3).

3.2 Serious violations of IHL: war crimes

3.2.1 Introduction

'Serious violations' of IHL are violations with a certain severity to them. Because of their severity, they are considered war crimes under both customary[42] and treaty law,[43] which means that perpetrators of such crimes incur individual criminal responsibility directly under international law.

Within the broader category of serious violations, IHL distinguishes the separate sub-category of 'grave beaches'. Grave breaches are subject to a distinct treaty regime under the Geneva Conventions and AP I, which as we shall see, also gives rise to a slightly diverging investigative regime. The discussion below turns to the grave breaches first, before examining other serious violations.

3.2.2 Grave breaches

3.2.2.1 Defining grave breaches

Grave breaches, in a nutshell, are breaches of such severity that the drafters of the Geneva Conventions considered that they must be governed by a separate regime.[44] This regime comprises a number of identically worded provisions in the four universal Geneva Conventions, the 'grave breaches provisions'. Additional Protocol I supplements the regime.[45] Grave breaches

41 E.g. Cohen and Shany (n 7); Schmitt (n 13); Alon Margalit, 'The Duty to Investigate Civilian Casualties During Armed Conflict and Its Implementation in Practice' (2012) 15 Yearbook of International Humanitarian Law 155. See also Marten Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal' (2006) 24 Netherlands Quarterly of Human Rights 641, 656.

42 See Rule 156 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 1) 568.

43 ICC Statute, art 8(2)(b) and (c). See also ICRC (n 2) [2821]. The Turkel Commission (n 25) 96.

44 ICRC (n 2) [2821]. See also Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 477.

45 AP I, art 85ff.

are defined as 'wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly', when committed against protected persons or property. This list is completed by the additions made in Articles 11 and 85 AP I, which in essence provide that medical experiments on persons in the hands of the enemy, intentional violation of the distinction between civilians and combatants and miscellaneous other specific acts[46] are also to be considered as grave breaches. Thus, grave breaches comprise an exhaustive list of infractions of the most extreme severity. Importantly, only violations of the law of IAC can constitute a grave breach, as the relevant provisions in the Geneva Conventions and AP I all apply during international armed conflicts only.[47]

3.2.2.2 Sources and material scope of application of the duty to investigate grave breaches

Grave breaches are subject to a separate treaty regime, enshrined in Articles 49 of Geneva Convention I, 50 of GC II, 129 of GC III and 146 of GC IV. Because of their importance, I cite these core provisions here in full:

> 'The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
>
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.
>
> Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.
>
> In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of [Geneva Convention III].'

46 See AP I, art 85(4). These breaches have to do with (a) transferring one's own civilians into occupied territory; (b) unjustifiable delay in repatriation of POWs or civilians; (c) apartheid and other outrages based on racial discrimination; (d) targeting and destroying historical, cultural or religious monuments; and (e) depriving protected persons of the right to a fair trial.

47 ICRC (n 2) [2920]. As is discussed in section 3.2.3, violations of the law of NIAC can constitute war crimes – but the specific treaty regime for grave breaches does not apply.

The regime envisioned by the grave breaches provisions accordingly comprises three distinct, generally accepted, obligations. As the ICRC Commentary to the Conventions makes clear, these are the obligations '[1] to enact special legislation; [2] to search for persons alleged to have committed breaches of the Convention; [3] to bring such persons before its own courts or, if it prefers, [extradite them]'.[48] These obligations together have as their aim 'to prevent impunity and to deny safe haven to alleged perpetrators of grave breaches'.[49]

The obligation to enact legislation which criminalises grave breaches in the domestic legal order is a peacetime obligation, imposed on States immediately after ratification, irrespective of a concrete armed conflict.[50] In addition, the requirement that States bring suspects before their courts *regardless of their nationality*, is commonly perceived to entail an obligation to vest universal jurisdiction over grave breaches.[51] Of prime importance for this research, suspected perpetrators of grave breaches must moreover be 'searched for', and either prosecuted or extradited. In other words, the criminal legislation which was enacted must be applied and put into practice if a grave breach indeed occurs.

The obligation to *search* for suspected perpetrators of grave breaches, and to *bring them before the courts*, strongly imply a duty to *investigate* – without however explicitly using the term 'investigation'.[52] Searching without investigating is meaningless, and a prosecution and trial are unthinkable without properly investigating first. The same goes for the alternative where States extradite a suspect, rather than trying them themselves. The option given to States to either prosecute or extradite – *aut dedere aut iudicare* – means that States may fulfil their obligation in this respect by extraditing suspects rather than prosecuting them, subject to the condition that the State requesting extradition has made out a *prima facie* case.[53] But extradition can only take place once the alleged perpetrator has been apprehended, which requires a

48 Pictet (n 3) 590. See also e.g. Schmitt (n 13) 37; Stoyan Minkov Panov, 'The Obligation Aut Dedere Aut Judicare ('Extradite or Prosecute') in International Law: Scope, Content, Sources and Applicability of the Obligation "Extradite or Prosecute"' (University of Birmingham 2016) 102.

49 ICRC (n 2) [2864] and [2868].

50 Compare Common Article 2 of the Geneva Conventions.

51 Part of customary IHL, Henckaerts and Doswald-Beck (n 1) 606. See further Knut Dörmann and Robin Geiß, 'The Implementation of Grave Breaches into Domestic Legal Orders' (2009) 7 Journal of International Criminal Justice 703, 709; Paola Gaeta, 'Grave Breaches of the Geneva Conventions' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015) 638.

52 See also e.g. Schmitt (n 13) 38. Further, see Human Rights Council 23 September 2010, *Report of the Committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards*, A/HRC/15/50 [19].

53 As borne out by the grave breaches provisions themselves.

search and therefore investigation into at the very least the identity and whereabouts of the suspect.[54] A *search* is therefore always required, and not conditional on whether States ultimately prosecute themselves, or extradite the suspect.[55] Clearly then, IHL imposes on States a duty to investigate those suspected of having committed a grave breach.

Next, we may question whether beyond the *suspect*, States must also investigate the *breach itself*, the occurrence. In other words, are States merely held to investigate when there is a suspicion against an individual, or must they also investigate a grave breach when they find it, which might ultimately lead to the identification of a suspect? By way of illustration, must States investigate in a classic *whodunnit* scenario, where they find the body of someone who was apparently extrajudicially executed, even if there are no apparent suspects? The short answer is yes, they do. Although it must be conceded that the search for, and investigation into a *person* (an alleged perpetrator) can be distinguished from the investigation into an *occurrence* (a grave breach), it is nonetheless difficult to perceive of a meaningful search and subsequent prosecution without investigations into the breach itself. This view is widely accepted, in authoritative interpretations by the ICRC Commentaries[56] and the European Court of Human Rights,[57] as well as in State practice[58] and legal literature.[59] An obligation to investigate alleged grave breaches is therefore inherent in the duty to 'search' for persons alleged to have committed grave breaches, and to 'bring them before the courts'.

To sum up, in accordance with the grave breaches provisions, States are therefore under an obligation to investigate. The material scope of application of this duty extends to violations of IHL which constitute a grave breach. Both suspects of such breaches, as well as the breach itself, require an investigative response by the State. Furthermore, States must when appropriate prosecute and punish suspects, or – as a secondary obligation – extradite them. This

54 Supported by Panov, who makes clear that the obligation *aut dedere aut iudicare* applies to the *custodial* State, that is, the State who has custody over the alleged perpetrator; Panov (n 48) 243.

55 ICRC (n 2) [2859]; Panov (n 48) 102.

56 ICRC (n 2) [2859].

57 *Al-Skeini and others v United Kingdom*, ECtHR [GC] 7 July 2011, 55721/07 [92], holding that 'The Geneva Conventions also place an obligation on each High Contracting Party *to investigate and prosecute alleged grave breaches* of the Conventions, including the wilful killing of protected persons' (emphasis FT).

58 See the extensive State practice referenced in Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *ICRC Customary International Humanitarian Law – Volume II: Practice* (Cambridge University Press 2005) 3854–83 and 3941–4013.

59 Cohen & Shany find there 'is little question' about this, Cohen and Shany (n 7) 41. See also Schmitt (n 13) 38; Margalit (n 41) 157; 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) 668.

system aims to render the prevention of impunity watertight – though no obligation to come to a conviction exists.[60] The duty to investigate ought therefore be seen in this respect as unconditional: the duty to search and investigate must be discharged, and the only choice States have is whether they follow-up such investigation by prosecution, or rather by extraditing the suspect.[61]

3.2.2.3 The investigative trigger

Now that we know *that* States must investigate grave breaches, we can take a closer look at *when* they must do so, precisely. The question is thus what *triggers* the duty to investigate. The grave breaches provisions do not provide much guidance in this respect, stipulating only that 'persons alleged to have committed' grave breaches must be searched for. From a solely textual perspective, the provision appears to indicate that when it is *alleged* that someone has committed a grave breach, this triggers the States' obligation to investigate. As was set out above, beyond just suspected perpetrators, States must also investigate the grave breach itself, regardless of whether there is already a suspect. If we extrapolate from the text, this indicates that States must investigate *allegations* of a grave breach. The source of the allegation is not alluded to and would seem to be immaterial, which means that allegations by States, NGOs or victims must all alike be investigated.[62]

The authoritative ICRC Commentary goes further. In the 1950s Pictet commentaries, the ICRC stated that '[t]he necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another State'.[63] This indicates that States must investigate *ex officio*, and may not await outside allegations by third States. The updated 2016 Commentary adds that the duty to investigate arises at the moment a State 'realizes' an alleged perpetrator is present on its territory or under its jurisdiction.[64] A specific allegation does not therefore appear to be required in order to trigger the duty to investigate. Rather, whenever the State has information which indicates a grave breach occurred, or a suspect is present within its jurisdiction, it must initiate an investigation of its own motion.[65]

Very rarely, the Geneva Conventions make clear what type of an 'indication' of a breach triggers the duty to investigate. Geneva Convention III and IV require States to conduct an 'official enquiry' into '[e]very death or serious injury of an internee [or prisoner of war], caused or suspected to have been

60 ICRC (n 2) [2861]. Otherwise the rights of the defence, the presumption of innocence in particular, would be impermissibly restricted (AP I, art 75(4)d and AP II, art 6(2)d AP II).

61 This choice is not completely free, see *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment (20 July 2012), *I.C.J. Reports* 2012, p. 422 [95].

62 Lubell, Pejic and Simmons (n 23) 20.

63 Pictet (n 3) 593.

64 ICRC (n 2) [2890].

65 See also Panov (n 48) 102; Vöneky (n 59) 670.

caused by a sentry, another internee or any other person, as well as any death the cause of which is unknown'.[66] The trigger for this investigative obligation, then, is when a death or serious injury was caused or was *suspected* to have been caused by a third person; or any death of an internee or POW the cause of which is unknown. Similar to the grave breaches provisions, a *suspicion*, much like an allegation, can trigger the duty to investigate. But that a death with unknown causes in and of itself also triggers the duty to investigate, goes further, because while this of course raises the *possibility* that a grave breach was committed, it does not as such raise a suspicion to this effect. Thus, in this context, States are explicitly put under an obligation to *find out* whether a violation has occurred, even if there is no clear indication to that effect. This also makes sense in the given context. When a State detains individuals, it operates under a heightened duty of care, and if a detainee passes away for unknown reasons, the State must establish what happened.[67] In these specific circumstances, therefore, any death *sec* must be investigated, and is sufficient indication that a breach may have occurred. In other situations, however, what type of 'indication' triggers the duty to investigate, is less clear.

A next relevant question is then *what information*, when available to the State, triggers the duty to investigate? Is there a certain level of information which must be met, and can a credibility test be applied to the information or its source? When it comes to deaths of POWs or internees, the simple knowledge of their death is sufficient. But in other cases, the treaty text does not address this issue. It is therefore up for debate whether the information or the allegation must be somehow substantiated or plausible, or whether States may even have an active duty to uncover potential violations irrespective of prior and specific indications of wrongdoing.

Questions as to the type and level of information, the credibility of information sources, and a duty for States to actively uncover potential violations, are therefore left unanswered by the grave breaches provisions. Some indications may however be tentatively inferred from State practice,[68] and soft law instruments.

Soft law and State practice

The most recent guidance can again be found in the 2019 *Guidelines* by the ICRC and the Geneva Academy. As we saw previously, the *Guidelines* envision a system where States set up mechanisms which ensure the *recording* of information regarding *all* military operations, coupled with an obligation to *report*

66 GC III, art 121; GC IV, art 131.

67 See also Pictet (n 3) 509.

68 Some care must be taken in how State practice is used in the interpretation of treaty norms. According to the law of treaties, 'agreement of the parties regarding [the treaty's] interpreta-

incidents to appropriate authorities.[69] Reporting has to happen regardless of the source of the information or allegation, meaning that information stemming from internal records and outside allegations are both sufficient to trigger the reporting obligation. If the authority who receives such reports finds indications of a violation, it can then order further investigation, whether this is a criminal or an administrative investigation. According to the *Guidelines*, criminal investigations must be opened in case of 'reasonable grounds to believe' a war crime was committed; administrative investigations should be initiated if circumstances 'suggest' that a non-criminal IHL violation has occurred.[70]

Crucial for the trigger of the duty to investigate, are therefore the steps between recording and reporting (when must recorded information be reported?), and between reporting and the decision to investigate further (when does reported information warrant a further investigation?). Regarding the first issue, State practice would appear to indicate that 'reportable' or 'notifiable' incidents are subject to the obligation to report. What type of incidents are 'notifiable' varies from State to State, with States like Burundi and the United States of America (US) for instance imposing reporting obligations generally with regard to *all* violations of IHL,[71] whilst others like France list

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tion' can be relied on for treaty interpretation, ex VCLT, art 31(3)b. But because all States are party to the Geneva Conventions, this would necessarily require a comprehensive study of State practice which then ought to indicate 'agreement' between them. It is submitted that State practice can nevertheless be of relevance under VCLT, art 32, as a supplementary means of interpretation – as was confirmed by the ICJ and in legal scholarship; *Kasikili/ Sedudu Island (Botswana/Namibia)* Judgment (13 December 1999) *I.C.J. Reports* 1999, p. 1045 [79]-[80]; Zwanenburg (n 24) 629. Also if State practice is relied upon more loosely, care must be taken as to what conclusions are drawn from it, and whether those are used to confirm one's normatively preferred outcome. By way of example, two studies into investigative obligations have been carried out, by Schmitt on the one hand, and Cohen & Shany on the other. They have both relied on the practice by the same States, but their analysis of the IHL treaty framework, diverges. Then, when gauging the practice of the very same States against their normative yardsticks, their conclusions adapted to their normative analysis. Schmitt found that practice went beyond what was required of States, that this constituted best practice, which did not indicate what States though the law required of them. Cohen & Shany found the very same State practice did not meet the demands they found in their normative analysis, and concluded that State practice in this regard 'lagged behind' legal developments, but that this did not undercut the normative framework. Thus, while both scholarly endeavours are of very high quality and study the same State practice, they use this practice to confirm their diverging legal analyses. Compare Schmitt (n 13) 77–8; Cohen and Shany (n 7) 52.

69 See *supra*, §2.1.

70 Lubell, Pejic and Simmons (n 23) 22.

71 Règlement sur le DIH, 2007, para VIII.2.1; Chairman of the Joint Chief of Staff Instruction, Implementation of the DOD Law of War Program, CJCSI 5810.01D (2010) para 6(f)(4)(e)(2)CJCS; DoD Instruction 6055.07, "Accident Investigation, Reporting, and Record Keeping" (3 October 2000) Table 10 "Special Reporting Group Notification Requirements"]. As referred to in Lubell, Pejic and Simmons (n 23) 17–8, fn 51.

a number of specific infractions which must be reported,[72] and with yet others like Peru indicating reporting obligations with regard to war crimes only.[73] Certain States refer explicitly to international humanitarian law or the law of armed conflict, whilst others simply list offences without distinguishing whether those acts are prohibited pursuant to international law, or pursuant to domestic policy considerations.

As illustration of what could be considered 'good practice',[74] a number of States such as Australia, the United Kingdom (UK) and the US employ a fact-finding mechanism with a low threshold – as envisioned by the *Guidelines* – which is responsible for referring cases to either military or civil prosecutorial services when indications of criminal wrongdoings emerge.[75] In Australian practice, all Defence personnel are required to report 'notifiable incidents', which pertain to, in short, cases that give rise to a reasonable suspicion that an IHL violation has occurred – excluding minor disciplinary matters.[76] Commanders must determine whether an incident is notifiable as soon as they become aware of them, and if so – including when in doubt – report these incidents to the Defence Investigative Authority.[77] All other personnel are required to report such incidents to their commander or to the investigative authority directly if they have a reasonable suspicion of such an incident.[78] A suspicion is reasonable when the established facts 'objectively seen by a reasonable person [are] sufficient to give rise to a belief that an incident occurred'.[79] Commanders must therefore immediately after becoming aware of an incident assess the facts of the case, determining whether a reason-

72 Bulletin Officiel des Armées, Instruction N° 1950/DEF/CAB/SDBC/CPAG fixant la conduite à tenir par les autorités militaires et civiles en cas d'accidents ou d'incidents survenus au sein du ministère de la défense ou des établissements publics qui en dépendent (6 February 2004). As referred to in Lubell, Pejic and Simmons (n 23) 17–8, fn 51.

73 Manual para las fuerzas armadas, 2010, p. 222. As referred to in Lubell, Pejic and Simmons (n 23) 17–8, fn 51.

74 Cf. Schmitt, who considers these 'best practices'; Schmitt (n 13) 77–8.

75 It should be noted that this enquiry concerns legislative practice, and military manuals – not 'enforcement action' in the sense of prosecutions. Such practices can be somewhat difficult to assess, as Ferdinandusse explains, because it is often unclear whether specific instances of prosecution pertain to application of IHL because they oftentimes prosecute war crimes as domestic offences; Ward Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (2009) 7 Journal of International Criminal Justice 723, 725. Further, not all instances of alleged violations of IHL are investigated and prosecuted; Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' 738. For examples see Ward Ferdinandusse, 'Improving Inter-State Cooperation for the National Prosecution of International Crimes: Towards a New Treaty?' (*ASIL Insights*, 2014) 3 <www.asil.org/insights/volume/18/issue/15/improving-inter-state-cooperation-national-prosecution-international> (last accessed 15 July 2021).

76 Australian Department of Defence, *Defence Instructions (General)*, 26 March 2010 [3] and [6].

77 Ibid [7].

78 Ibid [9].

79 Ibid, Annex A, section 1(q).

able suspicion of an IHL violation exists, and if so report it to an investigative authority. On receipt of a report, the Defence Investigative Authority decides whether to initiate an independent investigation,[80] and in case of deaths, serious injuries, or disappearance (excluding enemy combatants) must provide immediate assistance and contact civilian police, as well as secure the area of the incident and preserve evidence.[81]

In UK practice, officers must communicate to service police any circumstance or allegation of which they are aware, that to a 'reasonable person' would indicate a 'Schedule 2 offence' has been committed.[82] Schedule 2 offences concern a list of various serious offences, some against military discipline, such as mutiny, and others against the law of armed conflict, including grave breaches of the Geneva Conventions.[83] Officers must involve service police – a form of military police[84] – as soon as reasonably practicable. Service police subsequently carry out an investigation, which if it renders 'sufficient evidence' to charge a grave breach, refers the case to an independent 'Director of Service Prosecutions', who decides on whether or not prosecution takes place.[85] The trigger for investigations is therefore one of reasonableness; officers must involve investigative services in all cases which to a reasonable person indicates a grave breach. Upon sufficient evidence, this must then be submitted to the authority which decides on prosecution.

US practice shows, similar to Australian practice, that reports must be drawn up and investigations instigated for all 'reportable incidents',[86] further defined as those giving rise to a 'possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict'.[87] Any 'credible' IHL violation must therefore be reported and investigated. What is credible information has been elaborated upon by the US Army Special Assistant for Law of War Matters, who has in addition made clear the system is explicitly meant to be over-inclusive.[88]

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80 Ibid [17].
81 Ibid [20] in conjunction with [6].
82 UK Armed Forces Act 2006, section 113(1) and (2). See also Cohen and Shany (n 7) 52–3.
83 UK Armed Forces Act 2006, Schedule 2 under 12(t), in conjunction with the UK Geneva Conventions Act 1957, section 1.
84 UK Armed Forces Act 2006, Explanatory note 12; see Schmitt (n 13) 67.
85 UK Armed Forces Act 2006, section 116(1) and (2) in conjunction with section 120, see also Explanatory note 18.
86 Schmitt (n 13) 69.
87 Department of Defence Directive 2311.01E, DoD Law of War Program, 9 May 2006 [4.4]-[4.5].
88 Sean Watts, 'Domestic Investigation of Suspected Law of Armed Conflict Violations: United States Procedures, Policies, and Practices' (2011) 14 Yearbook of International Humanitarian Law 85, 95.

> 'Information, although incomplete, is deemed credible when considering the source and nature of the information and totality of the circumstances the information leads a prudent person to suspect that a law of war violation may have occurred and investigate the allegation further. The severity of the alleged offense, the source of the information, and corroboration (if any) are all factors in determining whether the allegation is credible. In case of doubt, the information must be presumed credible.'[89]

US practice therefore employs, similar to Australian and UK practice, a test of reasonableness in assessing whether an IHL violation exists, which again similar to Australian practice advocates investigation in cases of doubt. The trigger for investigations is therefore an incident, not necessarily an allegation, that reasonably indicates an IHL violation.

Conclusion

The practice of these States reveals a low threshold fact-finding mechanism, which relies on internal reporting of notifiable incidents, and which in case of a 'reasonable suspicion' of a grave breach – or of a violation of IHL more broadly – triggers an obligation of further investigation, and if appropriate, prosecution. A good practice of monitoring military conduct, then, is to institute extensive reporting obligations, coupled with the recording of the effects of all military operations. Whether there is also hard legal obligation to uncover grave breaches – in the sense that States must actively look for such breaches even if no indications of such have reached it – is still subject to debate.[90] Any case giving rise to the suspicion of a violation is then investigated further, and remitted to prosecutorial services where appropriate. US practice further shows that allegations of a violation may be submitted to a credibility check, though this check must not be used to raise an unreasonable threshold for investigation. The *Guidelines* confirm this, in setting out that internal reports and outside allegations can be 'vetted for credibility', whilst also stressing that this must remain a low threshold, which ought not to be equated with the criminal law standard of 'reasonable grounds to believe a criminal offence has been committed'.[91] In other words, the threshold for investigating must remain low, so that all evidence is gathered. Only once this is done, can it be properly assessed whether there are indeed reasonable grounds to initiate further (criminal) investigation.

This modest enquiry into State practice, and the ICRC's and Geneva Academy's *Guidelines*, therefore help cultivate the relatively vague guidance provided by the grave breaches provisions. The trigger for an investigation would appear to be a 'notifiable incident' reaching a commander, who must

89 See Dick Jackson, 'Reporting and Investigation of Possible, Suspected, or Alleged Violations of the Law of War' (2010) 1 The Army Lawyer 95.

90 Gaeta (n 51) 630; Schmitt (n 13) 39.

91 Lubell, Pejic and Simmons (n 23) 23.

then report this to appropriate authorities who decide how to proceed, and whether to investigate further. What is a 'notifiable incident' varies among States, but in all cases includes grave breaches of the Geneva Conventions, as well as other war crimes. Thus, any information – regardless of whether it stems from internal reports or external allegations – which reasonably indicates a grave breach may have been committed, triggers the duty to investigate. Good practice will err on the safe side, and investigate in case of doubt.

Finally, investigations are not limited to a State's own armed forces. The grave breaches provisions make clear that investigations must take place regardless of the nationality of the alleged perpetrator, which must also be taken to mean that investigations must be conducted into allegations of grave breaches regardless of the perpetrator's allegiance, be it their own, allied or enemy forces, or civilians for that matter.[92]

3.2.2.4 Personal and geographic scope of application

A next relevant question to consider, in delineating the scope of application of the duty to investigate under IHL, is to look at *who* must investigate. The obligation to investigate under the grave breaches provisions is clearly addressed to States: '*Each High Contracting Party* shall be under the obligation to search (…)'.[93] This, however, does not answer *which* State is subject to this obligation in a concrete case. A starting point must be, in light of the system of self-enforcement explained previously, that States must investigate grave breaches perpetrated by their own armed forces and civilian population, as well as those of other actors which can be attributed to the State, or over which they exercise authority.[94] To this, there is principally no territorial limitation – all grave breaches attributable to the State are also subject to investigative obligations.[95] This also corresponds to the duty to *ensure respect* for the Geneva Conventions, which is addressed 'first and foremost' to States themselves for their own conduct,[96] and moreover flows from the State practice discussed above, as well as the ICRC and Geneva Academy *Guidelines*.

Yet, in the context of the duty to investigate grave breaches, the scope of States' obligations would appear to be markedly broader. The reference to 'each' State party indicates that the obligation is not limited to the parties to the conflict, but applies to *all States*. This corresponds to the idea that States must vest universal jurisdiction over such crimes, in line with their duty to

92 Compare Vöneky (n 59) 670.
93 GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146 (emphasis FT).
94 *Supra* §2.1.
95 See Chapter 2, §4.4.
96 ICRC (n 2) [118]. Arguing that CA1 applies exclusively to the State itself, see Carlo Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?' (2010) 21 European Journal of International Law 125.

search for perpetrators 'regardless of their nationality'.[97] The underlying aim of preventing impunity for these extremely serious war crimes would also support such an understanding.

Nonetheless, State practice shows that in most cases, States require there to be an additional jurisdictional link before they exercise universal jurisdiction.[98] Whether this practice has to do with pragmatic reasons or also purveys their *opinio iuris* in this regard is not completely clear,[99] though it has been observed that an obligation for every State to search for any alleged perpetrator of grave breaches across the globe is unfeasible.[100] This is also what the initial Pictet ICRC Commentaries seemed to envision: '[a]s soon as a Contracting Party realizes that there is *on its territory* a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed.'[101] Interpretation in light of the object and purpose of the grave breaches regime – preventing impunity and denying perpetrators a safe haven – might *prima facie* be thought to require true universal jurisdiction. But in fact, an obligation to investigate and prosecute applicable only to the State on whose territory the alleged perpetrator is present could be argued to already prevent impunity. After all, given the universal ratification of the Geneva Conventions, no safe haven is left as long as the State on the territory of which the alleged perpetrator is present, exercises jurisdiction.

In light of the lack of clarity on this point, one commentator has argued that the *primary* obligation to investigate and prosecute rests on the State the perpetrator 'belongs to', the State of nationality: 'That state has the main opportunity and, therefore, the first duty to punish.'[102] Taking into account which State is in the optimal position to effectuate IHL's insistence on investigation and prosecution indeed seems a promising avenue for interpretation. It is submitted that in addition to the State of nationality, the territorial State is equally in a primary position to investigate. Thus the State *on whose territory or under whose jurisdiction* the alleged perpetrator is,[103] is under the primary

97 ICRC (n 2) [2866]. *Supra* §3.2.2.2.

98 ICRC (n 2) [2889]. See e.g. the Netherlands International Crimes Act 2003, *Stb.* 2003, 270, art 2(1)(a).

99 Engaging at length with what conclusions ought to be drawn from how States have and have not vested universal jurisdiction in their domestic legislation, see *Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal*, appended to *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment (14 February 2002), *I.C.J. Reports* 2002, p. 3 [19]-[58], and [45] in particular.

100 ICRC (n 2) [2889]. Compare *mutatis mutandis* Vöneky (n 59) 651.

101 Pictet (n 3) 593 (emphasis FT).

102 Vöneky (n 59) 668.

103 Compare the inclusion of 'under its jurisdiction' in ICRC (n 2) 2890.

obligation of investigation and prosecution.[104] This corresponds better with the grave breaches provisions' imposition of the explicit obligation to investigate perpetrators 'regardless of their nationality', whilst also ensuring that the State with the 'main opportunity' is the one who is primarily responsible for carrying out the investigation. Further, as the obligation comprises also the investigation of the *occurrence*, the State with territorial jurisdiction over the breach itself must equally be under the primary obligation to investigate.

A 'secondary' obligation then applies to other States, as can also be derived from the ICRC Commentary, insofar as it holds that

> 'a State Party should take action when it is in a position to investigate and collect evidence, anticipating that either (…) itself at a later time or a third State, through legal assistance, might benefit from this evidence, even if an alleged perpetrator is not present on its territory or under its jurisdiction.'[105]

This would seem to indicate a duty to cooperate with other States, who conduct the primary investigation. Nonetheless, insofar as it involves the collection and preservation of evidence, this certainly requires investigative steps. Together, this system of States who operate under a 'primary' obligation to investigate because they are in the best position to do so, and other States who are under a 'secondary' obligation to cooperate with such investigations, seemingly creates a system which at the same time ensures accountability, and remains feasible.

Nonetheless, a problem not solved by a distinction between States which operate under a 'primary' and 'secondary' obligation, is the extent to which States *incur responsibility* for a failure to investigate. Theoretically, in every case in which an alleged grave breach is not investigated, all States are responsible for not fulfilling their duty.[106] As one commentator notes, '[t]he classic theory of international responsibility, built upon the reciprocity of rights and obligations of states, can prove rather inadequate in addressing cases where collective values such as peace, or basic human rights, need to be protected'.[107] This situation would present a type of mirror image of the obligation *erga omnes* – owed to all – in which the obligation is owed *by* all. If this

104 Compare Helen Duffy, *The 'War on Terror'' and the Framework of International Law'* (Cambridge University Press 2015) 155, with further referencing. *Mutatis mutandis*, see William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (1st edn, Oxford University Press 2010) 340–1.

105 ICRC (n 2) [2871].

106 The failure to fulfil the duty to investigate representing the internationally wrongful act. Responsibility further requires the act to be attributable to the State, see ARSIWA, art 2.

107 Gentian Zyberi, 'Responsibility of States and Individuals for Mass Atrocity Crimes' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017) 249.

is a shared responsibility of the international community as a whole, however, there is a real risk of States ducking their responsibility, passing the buck as it were,[108] and establishing a State's international responsibility in light of the failure of all States to act is a difficult proposition.[109]

One way to potentially solve this issue is by analogous reasoning having to do with the nature of the duty to investigate. The duty to investigate is a due diligence obligation, which requires States to do what they can without however holding them to an obligation of result, and serves to fulfil an interest of the international community as a whole: preventing impunity for war crimes.[110] There would, in this context, appear to be a clear parallel with the duty to prevent genocide as interpreted by the ICJ. According to the ICJ, in preventing genocide, States do not act out of their own interests, but act to safeguard interests of the international community as a whole.[111] In the *Bosnian Genocide case*, the ICJ held that the duty to prevent is a due diligence obligation which applies from the moment the State has knowledge of a serious risk of genocide, and which depends on its capacity to influence the (potential) genocidaires.[112] States must use the influence they have, and can be held liable if they fail to do so, and genocide ultimately occurs.[113] By analogy,[114] it is submitted that States without a territorial or personal nexus to grave breaches equally operate under a due diligence obligation in the name of the international community as a whole, and that their international responsibility is engaged only if they fail to employ the means they have at their disposal

108 Emma Irving, *Multi-Actor Human Rights Protection at the International Criminal Court* (Cambridge University Press 2020).

109 Extensively on this issue of shared responsibility, see André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 Michigan Journal of International Law 360; Andreì Nollkaemper and others (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017).

110 Marco Longobardo, 'The Contribution of International Humanitarian Law to the Development of the Law of International Responsibility Regarding Obligations Erga Omnes and Erga Omnes Partes' (2018) 23 Journal of Conflict & Security Law 383, 398–9; 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, 181. See also, in the context of the Convention Against Torture, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment (20 July 2012), *I.C.J. Reports* 2012, p. 422 [68]-[70].

111 *Reservations to the Convention on Genocide*, Advisory Opinion (28 May 1951), *I.C.J. Reports* 1951, p. 15, 23: 'In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention.'

112 *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment (26 February 2007), *I.C.J. Reports* 2007, p. 43 [430]-[431].

113 Ibid.

114 The duty to punish before domestic courts, as enshrined in the Genocide Convention, is dependent on a territorial nexus and therefore did not apply in this case (with the genocide being perpetrated outside the territory of Serbia and Montenegro); ibid [442].

– and those responsible for grave breaches are ultimately not held to account. Thus, States who are under a secondary obligation to investigate can only be held liable in specific circumstances, while those under a primary obligation – those with territorial and personal jurisdiction – will always incur liability if they fail to conduct an effective investigation.

A final point which merits attention in the context of the addressees of the obligation to conduct investigations, is the position of the military commander. Additional Protocol I requires States to impose on commanders the duty to supervise their troops and investigate alleged or potential violations when necessary.[115] This individual obligation is backed up further by a system providing for the individual criminal responsibility of commanders should they omit to carry out this duty.[116] Nevertheless, the obligation to conduct investigations into grave breaches must be viewed to lie with the State,[117] who through implementation measures may, and is required to, bestow their military commanders with the competence and obligation to report and carry out investigations. While commanders are therefore to an extent subjected directly to obligations and criminal liability under international law, this of course in no way shifts the responsibility away from the State. The function awarded to commanders is a means of operationalising the repression system,[118] and if commanders fail to investigate, both they themselves and the State will be liable for such a failure.[119] State responsibility and individual criminal responsibility must in this context be viewed as distinct, though complementary.[120]

The position of the commander is discussed further in the context of a duty to investigate also non-serious breaches (§3.3.3), and when discussing the standards investigations must meet (§4.3) – which necessarily also examines who must carry out such an investigation. This, after all, is closely linked with requirements such as independence and impartiality, and equally with the effectiveness and practicality of the investigation. For this moment, the research turns towards the temporal scope of application of the duty to investigate.

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115 AP I, art 87.

116 AP I, art 86(2).

117 See Schmitt (n 13); Pictet and others (n 17).

118 Schmitt (n 13) 40.

119 The State responsibility regime at any rate attributes acts and omissions by commanders to the State; ARSIWA, art 4 (and 7).

120 Compare Thordis Ingadottir, 'The ICJ Armed Activity Case – Reflections on States' Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions' (2009) 78 Nordic Journal of Human Rights 581, 586; Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 European Journal of International Law 2, 4.

3.2.2.5 Temporal scope of application

Finally, the temporal scope of application of the duty to investigate grave breaches must be briefly considered. As was remarked in the previous Chapter, the applicability of IHL in principle begins and ends with the outbreak and cessation of an armed conflict, but certain obligations can pre- and postdate the conflict itself. Thus, implementation obligations must be discharged in peacetime,[121] which clearly comprise the duty to criminalise grave breaches, and to set up effective recording, reporting, and assessment procedures, including an investigative machinery.[122] Doing so only once hostilities have begun would be ineffective, and irrational.

As was discussed above, the duty to investigate springs into life from the moment the State has information indicating a grave breach. When it concerns grave breaches perpetrated by its own troops, this will likely be an internal report or an outside allegation. When it comes to grave breaches perpetrated by third parties, this is as soon as the State 'realizes that a [suspected perpetrator] is on its territory or under its jurisdiction'.[123] The temporal scope of the duty to investigate grave breaches therefore stretches from the first moment the State gains knowledge of a grave breach, and ends only once the investigation is completed, resulting in prosecution, extradition, or a thoroughly reasoned decision to discontinue the investigation.

Finally, investigative obligations can persist after an armed conflict comes to a close. The search for, and prosecution of, perpetrators of grave breaches certainly does not stop when hostilities cease and peace is achieved.[124] As is illustrated by the prohibition of prescriptions for war crimes,[125] the fight against impunity does not stop at the moment the armed conflict concludes. Sadly, that is often only when the struggle against impunity starts, and it is often long years before it is concluded – if ever. The object and purpose of preventing impunity and denying perpetrators a safe haven would clearly be impeded if investigative obligations would cease at the close of hostilities.

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121 Common Article 2 to the Geneva Conventions; ICRC (n 2) [2839].

122 Dörmann and Geiß (n 51) 707.

123 ICRC (n 2) [2868].

124 This is illustrated most clearly by the fact that peace negotiations regularly include how to deal with war criminals and atrocities committed by both sides to the conflict – and the rule that even at the end of hostilities, amnesties may be not be granted for war crimes; Rule 159 of the ICRC's Customary IHL Study, Henckaerts and Doswald-Beck (n 1) 611.

125 Rule 160 of the ICRC's Customary IHL Study stipulates that 'Statutes of limitation may not apply to war crimes'; Henckaerts and Doswald-Beck (n 1) 614. Compare ICC Statute, art 29; 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 [6]. Not all agree that there is indeed a generally applicable prohibition of prescriptions for war crimes, see Claus Kreß, 'Reflections on the Iudicare Limb of the Grave Breaches Regime' (2009) 7 Journal of International Criminal Justice 789, 806–7.

The duty to investigate therefore continues to apply when the conflict is concluded.

3.2.3 Serious violations that are not grave breaches

3.2.3.1 Defining serious violations as distinct from grave breaches

As was introduced above, the category of 'serious violations' of IHL encompasses the grave breaches regime, but goes further than exhaustively enumerated grave breaches only. Serious violations are a broader category of war crimes, which can be committed in both IACs and NIACs.[126] A formal treaty definition of what serious violations entail remains elusive,[127] also because the term is not used in the Geneva conventions, and only sparsely in AP I.[128] Rather, it has been developed primarily by the *ad hoc* criminal tribunals, with the ICTY defining serious violations to be those which breach 'a rule protecting important values, and [involving] grave consequences for the victim' and which moreover 'entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule'.[129] Serious violations are thus synonymous with 'war crimes',[130] for which perpetrators incur individual criminal responsibility directly under international law.[131] Serious violations have developed into a widely accepted feature of IHL and international criminal law (ICL), as is illustrated by their inclusion in the ICRC

126 *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. [94]; ICC Statute, art 8. See further William A Schabas, 'Atrocity Crimes (Genocide, Crimes against Humanity and War Crimes)' in William A Schabas (ed), *The Cambridge Companion to International Criminal Law* (Cambridge University Press 2016) 210; Terry D Gill and Dieter Fleck, 'The Prosecution of International Crimes in Relation to the Conduct of Military Operations' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (2nd edn, Oxford University Press 2015) 547–8.

127 Theo van Boven, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines' in Carla Ferstman (ed), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff 2009) 33.

128 AP I, art 89 and 90(2)(c) under (i).

129 *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. [94]. See also Paola Gaeta, 'The Interplay Between the Geneva Conventions and International Criminal Law' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (Oxford University Press 2015) 741–6; Zwanenburg (n 41) 656.

130 Rule 156 of the ICRC Customary IHL Study, which stipulates that 'Serious violations of international humanitarian law constitute war crimes', Henckaerts and Doswald-Beck (n 1) 568. I leave aside here the *mens rea* element required to prove a war crime under ICL, a concept which is foreign to IHL; Robert Kolb, *Advanced Introduction to International Humanitarian Law* (Edward Elgar 2014) 188.

131 Rule 151 and 156 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 1) 551; 568.

Customary IHL Study,[132] the various international criminal law documents and decisions,[133] as well as numerous UN body Resolutions.[134]

As has been noted by others, compiling an exhaustive list of serious violations is difficult and not immediately useful, because the list will necessarily vary depending on the type of conflict, and the precise treaty obligations of each party.[135] Nonetheless, the ICC Statute contains a helpful list in Article 8(2), which besides grave breaches includes a list of additional IAC violations, and a number of violations of the law of NIAC.[136] The expansion of the reach of war crimes to NIACs is therefore the most important addition this system makes as compared to the grave breaches regime.

As was mentioned, serious violations are not as such alluded to in conventional IHL. The recognition of serious violations as war crimes therefore largely stems from customary international law, as well as the Statutes and decisions of various international criminal tribunals. The following examines to what extent States are under a *legal obligation to investigate* serious violations.

3.2.3.2 Sources and material scope of application of the duty to investigate serious violations

The starting point of the search for an international law duty to investigate serious violations, as was explained, must be in customary law. No IHL treaty obligation explicitly requires the prosecution or extradition of perpetrators of war crimes, outside of grave breaches.[137] According to the ICRC Study, customary international law does provide for such:

> 'Rule 158. States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.'[138]

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132 E.g. Rule 156, Henckaerts and Doswald-Beck (n 1) 568.

133 E.g. ICC Statute art 8(2)(b) and (c); ICTY and ICTR Statutes, art 1; Statute of the Special Court for Sierra Leone, UNSC Res. 1315, UN Doc. S/RES/1315 (2000), 14 August 2000 (hereinafter: SCSL Statute), art 1(1); *Prosecutor v Akayesu*, ICTR (Chamber I) Judgment (2 September 1998) ICTR-96-4-T [611].

134 E.g. UNSC Resolution 1894 (2009), UN Doc. S/RES/1894 [10]; 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*, A/RES/60/147.

135 Gill and Fleck (n 126) 548.

136 Art 8(2)(a) lists grave breaches of the Geneva Conventions only, the grave breaches of AP I being included under the serious violations under 8(2)(b), in addition to other violations.

137 'Final Report on The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)' (2014) www.legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf, fn 446.

138 Rule 158 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 1) 607 (bold in original).

The ICRC Study provides an abundance of evidence of both State practice and *opinio iuris* for this rule, which is held to apply in both IACs and NIACs.[139] The existence of this customary obligation is confirmed in the judicial practice of the Inter-American Court of Human Rights,[140] as well as the International Criminal Court,[141] and is given further credence by practice of the UN General Assembly. That organ, where virtually all States of the world are assembled, has adopted a number of resolutions affirming the customary obligation to investigate and prosecute war crimes, with few or no States voting against.[142] Most prominently, the UNGA in 2005 adopted without a dissenting vote[143] the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.[144] These Principles and Guidelines *inter alia* stipulate that States have a duty to investigate serious IHL violations constituting international crimes,[145] and expressly intend to be declaratory of pre-existing State obligations.[146] This, it is submitted, is a powerful signal of *opinio iuris*.[147] Finally, legal scholarship overwhelmingly supports the customary nature of the rule.[148]

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139 Henckaerts and Doswald-Beck (n 58) 3941ff. See further Sivakumaran, *The Law of Non-International Armed Conflict* (n 44) 475–510; Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) 173–204.

140 For IACs: *Gelman v Uruguay* (Merits and Reparations) Inter-American Court of Human Rights Series C No 221 (24 February 2011) [210]. Also for NIACs: *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 252 (25 October 2012) [286].

141 *The Prosecutor v Saif Al-Islam Gaddafi*, ICC (Pre-Trial Chamber I) Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute' (5 April 2019) ICC-01/11-01/11 [77]. The Court held: 'It follows that granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights. Amnesties and pardons intervene with *States' positive obligations to investigate, prosecute and punish perpetrators of core crimes*.' (emphasis FT)

142 See UNGA Resolution 2712 (1970), *Question of the punishment of war criminals and of persons who have committed crimes against humanity*, UN Doc. A/RES/2721(XXV); UNGA Resolution 2840 (1971), *Question of the punishment of war criminals and of persons who have committed crimes against humanity*, UN Doc. A/RES/2840(XXVI).

143 van Boven (n 127) 32. See the procedural history of the Resolution on the website of the UN Audiovisual Library of International Law, www.un.org/law/avl/, last sentence.

144 UNGA Resolution 60/147 (2005), UN Doc. A/RES/60/147 (2005).

145 UNGA Resolution 60/147 (2005), UN Doc. A/RES/60/147 (2005) [4].

146 Preambular paragraph 7. van Boven (n 127) 32. Finding the Principles and Guidelines go beyond customary law, see Zwanenburg (n 41) 653.

147 Further, see Panov (n 48) 240.

148 E.g. Alon Margalit, *Investigating Civilian Casualties in Time of Armed Conflict and Belligerent Occupation. Manoeuvring between Legal Regimes and Paradigms for the Use of Force* (Brill Nijhoff 2018) 28; Vito Todeschini, 'Investigations in Armed Conflict: Understanding the Interaction between International Humanitarian Law and Human Rights Law' in Paul De Hert, Stefaan Smis and Mathias Holvoet (eds), *Convergences and Divergences Between International Human Rights, International Humanitarian and International Criminal Law* (Intersentia 2018) section

The existence of a State duty to investigate war crimes, it is submitted, is moreover a logical necessity for the system to function. That serious violations of IHL constitute war crimes, which are subject to direct criminalisation under customary international law, is beyond reasonable controversy and has been affirmed time and again in judicial practice.[149] The retributive and deterrent effects of criminalisation would be illusory if States are *not* under the obligation to investigate and prosecute, because States are the primary enforcers of international law and IHL, and are the only ones in the position to forge the rules of international law into reality.[150] This flows from the IHL system of implementation, supervision, and enforcement as set out above.

The system's reliance on investigations, also in the context of war crimes, is operationalised in AP I. Article 87 of that Protocol stipulates that when commanders have knowledge of violations by their subordinates, they must 'initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof'.[151] If they fail to take 'all feasible measures' of pre-

2.1; Katharine Fortin, 'How to Cope with Diversity While Preserving Unity in Customary International Law? Some Insights from International Humanitarian Law' (2018) 23 Journal of Conflict & Security Law 337, 346; Giovanna Maria Frisso, 'The Duty to Investigate Violations of the Right to Life in Armed Conflicts in the Jurisprudence of the Inter-American Court of Human Rights' (2018) 51 Israel Law Review 169, 186; Amy ML Tan, 'The Duty to Investigate Alleged Violations of International Humanitarian Law: Outdated Deference to an Intentional Accountability Problem' (2016) 49 NYU Journal of International Law and Politics 181, 206–10; Gaeta (n 129) 741–6; Karen Engle, 'A Genealogy of the Criminal Turn in Human Rights' in Karen L Engle, Zinaida Miller and Dennis Davis (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press 2016) 15; Duffy (n 104) 381; Schmitt (n 13); Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press 2008) 15–6. Of a contrary view (before the 2005 Customary IHL Study), see Christian Tomuschat, 'The Duty to Prosecute International Crimes Committed by Individuals' in Helmut Steinberger and Hans-Joachim Cremer (eds), *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger* (Springer 2002).

149 E.g. *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. [94]; [128]; [134]; *Prosecutor v Akayesu*, ICTR (Chamber I) Judgment (2 September 1998) ICTR-96-4-T [611]-[615]. *Kononov v Latvia*, ECtHR [GC] 17 May 2010, Appl No 36376/04 [205]-[213]. See further, already in the Charters of the International Military Tribunals for Germany and the Far East; Charter of the International Military Tribunal for Germany, concluded by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics, acting in the interests of all the United Nations and by their representatives duly authorized thereto, annexed to the London Agreement, London, 8 August 1945, art 6(b); Charter of the International Military Tribunal for the Far East, approved by an Executive Order, General Douglas MacArthur, Supreme Commander for the Allied Powers in Japan, Tokyo, 19 January 1946, amended on 26 April 1946. Jean-Marie Henckaerts, 'The Grave Breaches Regime as Customary International Law' (2009) 7 Journal of International Criminal Justice 683, 690.

150 See *supra*, §2.1.

151 AP I, art 87(3).

vention and repression, they are criminally liable therefor under Article 86(2) AP I. The necessary steps in the context of disciplinary and penal action, and repression, have in the context of war crimes been developed by the international criminal tribunals. In the case of *Popović et al*, the ICTY Appeals Chamber found that 'it is well accepted that a superior's duty to punish the perpetrators of a crime includes at least an obligation to investigate possible crimes, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities'.[152] Thus, the responsibility of the commander includes a duty to investigate war crimes. Whether this duty is discharged depends on the circumstances of the case and the commander's level of control. If commanders, rather than investigate themselves, report the incident, the ICTY has found that 'in order to constitute a necessary and reasonable measure to punish, the commander's report must be sufficient to trigger the action of the competent authorities'.[153]

The duty to investigate war crimes under IHL is therefore confirmed in international criminal law. As is the case for IHL, the logical structure of ICL moreover relies heavily on a domestic duty to investigate war crimes. The International Criminal Court (ICC) has jurisdiction to investigate and prosecute international crimes perpetrated by nationals of, or on the territories of, States parties to the ICC Statute.[154] But, for an international court with universal aspirations to function, it must logically perform a *subsidiary* function. One court cannot prosecute all international crimes committed all over the world, and it is States who must primarily do so, with the ICC functioning as a safety net when States are unwilling or unable to take up their investigative and prosecutorial obligations. In fact, international criminal tribunals have arguably only come into being in light of the failure of States as primary actors to discharge their investigative duties.[155] In the words of the ICC's first Prosecutor, 'the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but also a duty of States'.[156]

There is therefore a heavy *implication* of an investigative obligation for States, though it is not explicitly contained in the operative provisions of the ICC Statute.[157] Under the principle of complementarity, the prosecution of

152 *Prosecutor v Popović et al.*, ICTY (Appeals Chamber) Judgment (30 January 2015) IT-05-88-A [1932]; *Prosecutor v Halilović*, ICTY (Appeals Chamber) Judgment (16 October 2007) IT-01-48-A [182].

153 *Prosecutor v Popović et al.*, ICTY (Appeals Chamber) Judgment (30 January 2015) IT-05-88-A [1932].

154 ICC Statute, art 12(2) (a) and (b).

155 Richard Burchill, 'Regional Approaches to International Humanitarian Law' (2010) 41 Victoria University of Wellington Law Review 205.

156 Paper on some policy issues before the Office of the Prosecutor, 5; William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, Oxford University Press 2016) 447.

157 Tan (n 148) 199; Duffy (n 104) 381.

a case is admissible only when States have failed to carry out a 'genuine' investigation or prosecution themselves.[158] This arguably presupposes an obligation for States to investigate, and to do so genuinely. This has been argued in legal scholarship, most prominently so by Jann Kleffner in 2008. He contends that whereas the complementarity of ICC prosecutions does not in and of itself constitute an *obligation* for States to investigate,[159] it does when it is read in conjunction with the Statute's preamble.[160] The preamble to the ICC Statute first affirms that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level', and subsequently recalls that it 'is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes', thereby pointing towards an obligation for States to employ their national criminal law instruments in prosecuting *inter alia* war crimes.[161] Read in conjunction with Article 17's system of complementarity, this leads Kleffner to conclude that an obligation to investigate and prosecute ICC crimes indeed exists. In this view, the preamble represents a primary norm providing for the obligation to exercise criminal jurisdiction, with the complementary jurisdiction of the ICC functioning in a subsidiary role.[162]

The attraction of this argument is evident: the system as it is *relies* on State investigations and prosecutions, and cannot function properly without it. An international court cannot investigate and prosecute all international crimes,[163] which means that the goal of preventing impunity can only be met primarily by way of national prosecutions. Nevertheless, the attribution of binding force to the preambular paragraphs is controversial.[164] It is undeniable that many States have implemented criminal legislation in order to effectuate their undertakings under the ICC Statute, but whether investigations and prosecutions take place because States consider themselves to be legally obliged to do so, or rather as a consequence of the indirect pressure that flows from a potential ICC investigation, or simply because of other policy considerations, is difficult to gauge.[165] Besides, a further hurdle in assessing State practice in this field is that many States decide to prosecute for 'ordinary' domestic crimes or

158 ICC Statute, art 17(1)a.
159 Compare Dörmann & Geiß, who classify it as indirect pressure on States to prosecute; Dörmann and Geiß (n 51) 718.
160 Kleffner (n 148) 248.
161 Preambular paragraphs 4 and 6.
162 Kleffner (n 148) 248–54.
163 See also Rod Rastan, 'The Responsibility to Enforce – Connecting Justice with Unity' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2009) 164.
164 For his line of reasoning on this point, see Kleffner (n 148) 237–40.
165 Dörmann and Geiß (n 51) 718.

terrorist crimes, rather than war crimes.[166] This makes fully a conclusive answer difficult, but there is a definite implication of investigative obligations under the ICC Statute.

Beyond the customary and treaty rules obliging States to investigate war crimes, finally, such duties also flow from decisions by the UN Security Council. In addition to general calls to respect IHL, the UNSC as at times stipulated a duty for States to investigate serious IHL violations or war crimes. Further, it in general terms

> '*Affirms* its strong opposition to impunity for serious violations of international humanitarian law and human rights law, and *emphasizes* in this context the responsibility of States to comply with their relevant obligations to end impunity and to thoroughly investigate and prosecute persons responsible for war crimes, genocide, crimes against humanity or other serious violations of international humanitarian law in order to prevent violations, avoid their recurrence and seek sustainable peace, justice, truth and reconciliation.'[167]

Thus, in 'affirming' and 'emphasising' these obligations, the Security Council clearly considers these obligations to be pre-existing, likely under customary international law. Further, even if this were not the case, the Security Council has later itself provided a binding nature to these stipulations. Acting under Chapter VII of the Charter, binding under international law, it has relied on the above-cited Resolution to call upon the Central African Republic (CAR) to investigate alleged abuses pertaining to children (including recruitment) and sexual violence, and in setting up an international commission of inquiry to investigate IHL violations committed in the CAR.[168] UNSC Resolutions have therefore also provided a basis to a duty to investigate war crimes.

In conclusion, the obligation to investigate serious IHL violations appears clearly established as a norm of customary international law, with further evidence of this obligation flowing from the ICC Statute and several UN body resolutions. Its material scope of application is broader than that of the grave breaches regime, because a number of additional war crimes is included, crucially including also war crimes committed during non-international armed conflicts.

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166 Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (n 75) 725; Hanne Cuyckens and Christophe Paulussen, 'The Prosecution of Foreign Fighters in Western Europe: The Difficult Relationship Between Counter-Terrorism and International Humanitarian Law' (2019) 24 Journal of Conflict and Security Law 537.

167 UNSC Resolution 1894 (2009), UN Doc. S/RES/1894 [10] (emphasis in original). Somewhat confusingly, the Security Council appears to distinguish 'other serious violations of international humanitarian law' from war crimes, although as was discussed above, each 'serious violation' of IHL is best viewed as constituting a war crime.

168 UNSC Resolution 2127 (2013), UN Doc. S/RES/2127, preamble and [22]-[24].

3.2.3.3 The investigative trigger

The question *when* States must investigate war crimes – the question as to the investigative trigger – does not appear to differ from what was established under the grave breaches regime. The customary rule requiring investigations pertains to 'war crimes *allegedly* committed', which similar to the grave breaches regime requires an examination of the level of information required before the obligation arises. The wording 'allegedly committed' does make clear that the *occurrence* of the war crime must be investigated, and that allegations need not necessarily levelled against an *individual*, although this is of course possible.

The interpretation given to the investigative trigger for grave breaches as derived from the ICRC and Geneva Academy *Guidelines* as well as corroborating State practice, equally applies to the broader category of serious violations. As the *Guidelines* set out, all incidents indicating a possible violation of IHL, must be reported.[169] State practice supports this, with military manuals indicating that the 'notifiable' or 'reportable' incidents for which States impose reporting obligations, include at the minimum war crimes. Many States, such as Argentina and South Africa, require reporting of all IHL violations.[170] This also goes for the practice of Australia and the US, discussed above.[171] Other States have compiled lists of reportable incidents, which do not as such refer to IHL. This for instance applies to France,[172] and the UK, but these lists include – at the minimum – war crimes. Thus, the list of 'Schedule 2 offences' under UK law, includes war crimes.[173]

Like in case of grave breaches, the trigger for an investigation would appear to be a 'notifiable incident' reaching a commander, who must then report this to appropriate authorities who decide whether further investigation is called for. War crimes are without a doubt 'notifiable'. Any information – internal or external – which reasonably indicates a serious violation may have been committed, triggers the duty to investigate. Good practice will err on the safe side, record the effects of all military operations, and investigate in case of doubt. Commanders are key figures, who operate as the main channel for the discovery and reporting of misconduct.

169 Lubell, Pejic and Simmons (n 23) 10; 16.

170 Manual de Derecho Internacional de los Conflictos Armados, 2010, 37 [2.06]; Revised Civic Education Manual, 2004 [58]. Lubell, Pejic and Simmons (n 23) 17.

171 See *supra* section 3.2.2.3. Under Australian law, minor disciplinary infractions are excluded.

172 Bulletin Officiel des Armées, Instruction N° 1950/DEF/CAB/SDBC/CPAG fixant la conduite à tenir par les autorités militaires et civiles en cas d'accidents ou d'incidents survenus au sein du ministère de la défense ou des établissements publics qui en dépendent (6 February 2004). Lubell, Pejic and Simmons (n 23) 17.

173 UK Armed Forces Act 2006, Schedule 2 under 12(aq), in conjunction with the UK International Criminal Court Act 2001, section 51.

3.2.3.4 Personal and geographic scope of application

When asking *who* must investigate serious violations of IHL, the answer must be similar to that under the grave breaches regime. It is *States* who must investigate. The customary rule as identified by the ICRC leaves no doubt as to this, finding that 'States must investigate war crimes'.[174] In order to properly determine the obligation's personal scope of application, we must, however, look further, and examine *which State* is under the obligation to investigate. This is closely tied to the obligation's geographic scope of application (is it only the territorial State?), and the two are therefore addressed together.

According to the ICRC's Customary IHL Study 'States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, [as well as] other war crimes over which they have jurisdiction (…)'.[175] This indicates, *firstly*, that in line with IHL's self-enforcement system, States must investigate serious violations of IHL by their own armed forces or nationals, and over which they therefore have personal jurisdiction.[176] There is in principle no geographic limitation to such obligations, because IHL is meant to govern a State's conduct during armed conflict regardless of where it operates.[177] Thus, war crimes by a State's armed forces or nationals abroad, must be investigated by that State nonetheless.[178] This could be of relevance also for the issue of 'foreign fighters', which concerns nationals of many countries who travelled to join the Islamic State in Syria and Iraq.[179] Insofar as these individuals committed war crimes, the State of nationality is under a duty to investigate, and if appropriate, prosecute them. *Secondly*, States must investigate serious violations which were committed on their territories, and over which they therefore have territorial jurisdiction. This therefore includes war crimes committed by non-nationals, and by enemy forces. *Thirdly*, States must investigate such other war crimes over which they have jurisdiction. Here, however, the customary rule as identified by the ICRC does not oblige States to *vest* other modes of jurisdiction over war crimes, and only stipulates that *if* States have jurisdiction, they must exercise it. This has been taken to mean that, in contradistinction with grave breaches, States are *not obliged* to

174 Rule 158 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 1) 607 (bold in original).

175 Ibid.

176 *Supra* §2.1.

177 See Chapter 2, §4.4.

178 The investigative means available to the State when operating outside its own territory may vary which can influence *how* a State must or can discharge its investigative obligations, but this in no way affects the existence of the obligation itself.

179 Further, see e.g. Cuyckens and Paulussen (n 166).

vest universal jurisdiction over serious violations, though they do have a *right* to do so.[180]

Insofar as an obligation to investigate war crimes flows from the ICC Statute, only States who have ratified the Statute are bound by it.[181] The follow-up question regarding *which* State party must investigate and prosecute, is best answered based on the wording of Article 17 of the Statute (pertaining to complementarity) and the preamble, both referring to the State who 'has jurisdiction' or who must exercise 'its criminal jurisdiction'.[182] Because the ICC's jurisdiction is limited to crimes committed on the territories of, or by nationals of States parties, the duty to investigate and prosecute is likely – like under customary law – limited to crimes over which States have personal or territorial jurisdiction. With regard to the question who has the primary duty to conduct investigations, the ICC Statute does not provide any answers, though the same logic as under the grave breaches regime appears to apply. The State on whose territory the alleged war crime took place and the State on whose territory or within the jurisdiction of which the alleged perpetrator is present should be under the primary obligation to investigate and prosecute.

With regard to the UN system, finally, the General Assembly and the Security Council either in general terms call upon all parties to armed conflict or States to comply with 'their obligation' to investigate,[183] and when seized of a specific matter will normally call upon the specific State in question to carry out its obligation.[184] Subjects are therefore explicitly outlined in the respective resolutions, which more generally is of course the States who are in a particular position to investigate and prosecute.

3.2.3.5 Temporal scope of application

For the temporal scope of application of the duty to investigate serious violations, considerations are again similar as those under the grave breaches regime.[185] Implementing obligations regarding criminalisation and the setting up of investigative machinery predate the existence of an armed conflict, and the duty to investigate and prosecute continues to apply also after the armed conflict concludes.

The duty to investigate serious violations is triggered at the moment the State has information indicating a war crime, whether through internal reports

180 ICRC (n 2) [2821]; Henckaerts and Doswald-Beck (n 1) 607. On the right to vest universal jurisdiction, see further *Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal*, appended to *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment (14 February 2002), *I.C.J. Reports* 2002, p. 3 [19]-[58].

181 VCLT, art 34.

182 Kleffner (n 148) 273.

183 E.g. UNSC Resolution 1894 (2009), UN Doc. S/RES/1894 [10]; UNSC Resolution 1960 (2010), UN Doc. S/RES/1960 (2010) [5].

184 UNSC Resolution 2127 (2013), UN Doc. S/RES/2127 [22]-[23].

185 See *supra*, §3.2.2.5.

or outside allegations. It ends once the duty has been fully discharged by way of a thorough investigation and decision to prosecute or to discontinue the investigation. There is no explicit *aut dedere aut iudicare* treaty regime,[186] which has led the ICRC Commentaries to conclude that this obligation does not apply to the duty to prosecute war crimes.[187] Indeed, it must be agreed that there is no treaty basis for extradition. Nonetheless, it is submitted that the international fight against impunity is equally served by extradition, so long as the extraditing State continues to cooperate with the prosecuting State, and if it provides the necessary assistance in investigating, or granting access to investigators.

3.2.4 Conclusion

IHL obliges States to investigate grave breaches of the Geneva Conventions and AP I, as well as the broader category of serious violations of IHL. Although grave breaches are subject to a more specialised regime under the Geneva Conventions and AP I, insofar as the obligation to investigate is concerned, States are equally obligated to conduct investigations into other serious violations of IHL. This, crucially, brings war crimes committed in the context of non-international armed conflicts within States' investigative obligations. Apart from a number of relatively minor points, the procedural duty to investigate violations appears therefore largely the same under the grave breaches regime, and the broader war crimes regime.

The trigger for the duty to investigate both grave breaches and other serious violations hinges on the information available. Whenever a commander is in possession of information that reasonably leads to the suspicion that a serious violation has occurred, investigations must be instigated. The source of the information has no bearing on the obligation. It is good practice to have a system in place which records the effects of all military operations, and extensive reporting obligations which ensure that appropriate authorities assess the incident, and decide whether further investigation, and prosecution, are necessary.

The recording, reporting, and assessment obligations with regard to all serious violations apply *internally*. States are therefore under the primary obligation to investigate the conduct of their own armed forces, whether at home or abroad. The obligation to investigate all serious violations must be held to lie first and foremost with the territorial State, and the State under whose jurisdiction the alleged perpetrator resides. These States are in the best

186 'Final Report on The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)' (2014) www.legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf, fn 446.

187 ICRC (n 2) [2821]; Robert Cryer, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) 69; Theodor Meron, 'Is International Law Moving towards Criminalization?' (1998) 9 European Journal of International Law 18, 23.

position to investigate both the occurrence of the breach itself, and search for the alleged perpetrator. While other States are also under an obligation to investigate, it is submitted that States without a territorial or personal nexus operate under more limited obligations. They are under a due diligence obligation in the name of the international community as a whole, and their international responsibility is engaged only if they fail to employ the means they have at their disposal – and those responsible for grave breaches are ultimately not held to account. In practice, this likely takes the form of the *cooperation* in the investigation and prosecution by other States. The grave breaches regime furthermore obliges States to vest universal jurisdiction over such crimes, whereas for other war crimes this is not mandatory, but a right.

The geographical and temporal scope of application of the duty to investigate, are broad. IHL is not principally limited in its geographic scope of application, and if a State's armed forces commit any type of serious violation, the State must investigate this no matter where it occurred. For the obligations of third States a territorial nexus is relevant, though even without it, investigative obligations can exist if the perpetrator has the nationality of the State involved. Temporally, the implementation obligations entailed by the duty to investigate – the criminalisation of war crimes in domestic law, and the setting up of a monitoring and investigative machinery – apply at all times, also in peacetime. Once triggered, the duty to investigate persists until it is discharged, or accountability of perpetrators is achieved. The end of the armed conflict therefore does not mean the end of the duty to investigate. This shows how obligations under IHL, and the duty to investigate in particular, is not limited to wartime application only.

3.3 Other IHL violations

3.3.1 Introduction

Having seen that IHL requires States to investigate grave breaches and serious violations, and what the scope of application of that obligation is, the research now turns to the question whether other, 'simple' IHL violations also require State investigations. A distinguishing feature setting aside this type of violations from grave breaches and serious violations, is that they are not considered international crimes.[188] This has kept these types of breaches largely out of the spotlight,[189] and the existence of a duty to investigate these violations is therefore somewhat hazy. Certain soft law instruments, however, do indicate

188 Cf. Margalit (n 41) 160. This does not prejudice criminalisation on the domestic level.

189 Jesse Medlong, 'All Other Breaches: State Practice and the Geneva Conventions' Nebulous Class of Less Discussed Prohibitions' (2013) 34 Michigan Journal of International Law 829, 830.

investigative obligations also for these non-criminal breaches of IHL. The UN General Assembly, for instance, in the Basic Principles and Guidelines on the Right to a Remedy include a duty to investigate all IHL violations,[190] although it has been called into question whether the Principles and Guidelines do not go beyond what the law requires.[191] The General Assembly is not alone, however, in its view that all violations of IHL must be investigated. The Security Council has similarly called upon States to investigate all violations of IHL,[192] and the more recent *Guidelines* published by the ICRC and the Geneva Academy equally recognise a duty to investigate 'simple' violations of IHL. The *Guidelines*, however, clearly distinguish between criminal investigations, called for in case of war crimes, and administrative investigations, which suffice to address non-criminal breaches.[193]

What the precise *source* of a legal obligation to investigate all IHL violations is, however, remains unclear in these documents. Legal scholarship on the issue is divided. On the one side, there are those authors who find that no duty to investigate simple breaches of IHL can be derived from IHL as it stands.[194] They rely primarily on the lack of *explicit* treaty obligations referring to investigations for these types of breaches, as well as the lack of judicial findings to that effect. On the other side of the debate, there are those authors who find that contemporary IHL *does* impose a duty on States to investigate all breaches.[195] In support, they cite a variety of sources, ranging from the general duty to ensure respect for IHL, to the duty to suppress all breaches of IHL, the institution of command responsibility, the duty to take precautionary measures, and the duty to provide reparations for violations of international law.

In light of the various pronouncements on investigative obligations into all violations of IHL, and the legal debate on the subject, this section queries whether IHL indeed imposes such a broad duty to investigate. In doing so, it first briefly addresses what type of violations are at issue here (§3.3.2). It then goes on to examine sources for a duty to investigate all IHL violations (§3.3.3), and provides an outline of its scope of application in its various modalities (§§3.3.3-3.3.6).

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190 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, principle 3(b). This principle appears to apply to all violations of IHL and IHRL, whether they are 'serious' or 'gross' or not. See also Zwanenburg (n 41) 648.

191 Zwanenburg (n 41) 653.

192 UNSC Resolution 1556 (2004), UN Doc. S/RES/1556 (2004) [1].

193 Lubell, Pejic and Simmons (n 23).

194 Schmitt (n 13) 31; Sivakumaran, 'International Humanitarian Law' (n 39) 528.

195 Cohen and Shany (n 7); Margalit (n 41); Tan (n 148) 203.

3.3.2 *Defining 'simple' IHL violations*

Giving a clear definition of 'simple' IHL violations is not easy, because they are essentially a leftover category. They can therefore best be defined negatively, as non-serious violations: all violations which are not serious, and which are therefore not war crimes, constitute 'simple' violations.[196] This means that it consists of a large variety of breaches. Whereas war crimes concern such issues as indiscriminate attacks, and the wilful killing, injuring, torturing, or performing medical experiments on protected persons, non-serious breaches are – rather obviously – less severe. Nonetheless, the type of breach varies. Examples of simple violations can range from ostensibly rather trivial situations, such as selling soap and tobacco to POWs above local market price,[197] or failing to post a copy of the Geneva Conventions in a POW camp,[198] to breaches with more serious consequences. If States fail to take all feasible precautions in attack, for instance, this constitutes a non-serious breach, even if it results in the loss of civilian life.[199] Thus, even relatively serious situations, where potentially large numbers of civilian deaths occurred, do not as such indicate a war crime was committed.

3.3.3 *Sources and material scope of application of a duty to investigate all IHL violations*

In the context of the duty to investigate non-serious violations of IHL, the heavy implication of investigations inherent in the IHL system is of enhanced importance.[200] The duty to ensure respect for IHL as enshrined in Common Article 1 of the Geneva Conventions, and as reflected in customary international law,[201] places States under a due diligence obligation to *internally* ensure compliance by their own armed forces, and those under their authority. This requires implementation and enforcement measures. States' role in this process is all the more important in light of the lack of international supervision and enforcement mechanisms, and as was explained above, the only way for States to keep track of whether their armed forces have violated IHL, is by instituting oversight. Good practice in this regard is to record *all* military operations. Any

196 Medlong (n 189) 832–9.
197 GC III, art 28.
198 GC III, art 41. Sivakumaran, *The Law of Non-International Armed Conflict* (n 44) 477.
199 AP I, art 57 and 58. When concerning military operations more broadly (i.e. not just attacks), the obligation is one of 'constant care' towards civilians and civilian objects, AP I, art 57(1). See also Vöneky, who finds that 'A serious breach of AP I is committed (…) when knowledge of the disproportionality of collateral damage exists'; Vöneky (n 59) 677.
200 *Supra*, §2.1.
201 Rule 139 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 1) 495. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment (27 June 1986), *I.C.J. Reports* 1986, p. 14 [220].

indication of a violation can then be reported and investigated. This system safeguards that States are in a position to 'ensure respect', because it deters violations, allows for the remedying of systemic shortcomings, and allows for establishing State responsibility for violations. This system is in no way restricted to war crimes, and applies to *all* breaches of IHL. After all, the duty to ensure respect applies to IHL in the broad sense, applies in both IACs and NIACs,[202] and does not distinguish between the gravity of the rule involved. In sum, the proper effectuation of IHL is fully contingent on the correct implementation of IHL, and entails a duty to supervise the execution of own implementation measures, through a system of supervision and investigation.[203]

The heavy implication of investigations in the IHL system forms the backdrop of this section's examination of sources of a duty to investigate simple IHL violations. It is principally up to States to decide how they implement their IHL obligations, if this is not stipulated explicitly in the law. Nevertheless, there are clear indications that indeed, investigative obligations extend also to simple violations.

Firstly, the Geneva Conventions contain an obligation to 'suppress' all IHL breaches. The grave breaches provisions quoted above, beyond the penal obligations discussed, also require that

> 'Each High Contracting Party shall take measures necessary for the suppression of *all acts* contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.'[204]

Pursuant to this paragraph common to the Geneva Conventions, States are under an obligation to suppress all violations, including breaches of AP I,[205] and including breaches which result from omissions.[206] Within the structure of the Geneva Conventions, this obligation is placed in Chapter IX, called 'Repression of Abuses and Infractions'. Thus, States' obligations with regard to the enforcement of IHL clearly extend to all breaches of IHL.

What 'measures necessary for the suppression' of violations entails, however, and whether this includes investigations is not readily apparent from the treaty text. Although some have argued the duty to suppress entails only an obligation to make sure the violations cease,[207] the 2016 ICRC Commentary

202 Ibid.
203 Pictet (n 3) 16.
204 Third paragraphs of GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146. Emphasis FT.
205 AP I, art 85(1).
206 AP I, art 86(1).
207 Yves Sandoz, 'The History of the Grave Breaches Regime' (2009) 7 Journal of International Criminal Justice 657, 673–4. This is seemingly in line with the French text, requiring '*les mesures nécessaires pour faire cesser les actes contraires aux dispositions de la présente Convention*'.

makes clear that States are required to 'address' all violations, which could include judicial, disciplinary, administrative or other measures, as long as the punishment is proportionate to the severity of the violation.[208] In the view of the ICRC Commentary, punishment is therefore important, which also presupposes implementing legislation.[209] The 2019 *Guidelines* published by the ICRC and Geneva Academy distinguish in this regard between breaches which indicate individual wrongdoing, and those resulting from systemic issues.[210] The former may very well indeed require (non-criminal) punishment, whereas the latter primarily require the identification relevant shortcomings in order to remedy them.

The open-ended requirement of taking measures to suppress breaches is certainly broad enough to also include investigations.[211] Insofar as a form of punishment is required – be it criminal or disciplinary in nature – an investigation into the facts and an assessment of responsibility preceding such punishment must be considered a 'necessary measure'.[212] The type of investigation may, however, differ from the strict requirement of criminal investigations under the regime for serious IHL violations. In this respect, the duty to 'repress' grave breaches must be distinguished from the duty to 'supress' other breaches. While the former indicates criminal law measures are in order, the latter allows States leeway in their reaction.[213] Administrative investigations may very well be sufficient,[214] especially for relatively 'mundane' violations such as selling soap and tobacco to prisoners of war above local market price.[215] Insofar as breaches indicate systemic shortcomings in States' compliance with IHL, for instance because a pattern of breaches can be discerned, the investigation ought to be aimed at identification of the source, and remedying it.[216] Regardless of whether the investigation examines a 'one off' or a systemic breach, it should facilitate the determination of State responsibility for the breach.[217] *How* States must shape their investigations, exactly, is returned to in section 4, pertaining to the exact standards to be employed in the investigation.

A second strong indication of the IHL system's insistence on investigations of all breaches, is to be found in the AP I provisions concerning the responsibil-

208 ICRC (n 2) [2896].
209 Pictet (n 3) 594.
210 Lubell, Pejic and Simmons (n 23) 32.
211 See also Cohen and Shany (n 7) 41–4.
212 Compare Margalit (n 41) 161.
213 Michael Bothe, Karl Joseph Partsch and Waldemar A Solf, *New Rules for Victims of Armed Conflicts. Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff 2013) 594–5.
214 See also Vöneky (n 59) 661.
215 GC III, art 28. GC III art 41.
216 Lubell, Pejic and Simmons (n 23) 35–6.
217 Lubell, Pejic and Simmons (n 23) 32–6.

ity and function of the commander.[218] Command responsibility for war crimes was briefly alluded to above,[219] and is also relevant for the duty to investigate other breaches. Article 87 of AP I places on commanders the duty to prevent, suppress and report 'breaches of the [Geneva] Conventions and of this Protocol'. The general and unqualified reference to 'breaches' must be taken to mean *all* breaches.[220] A commander's duty to suppress and report these breaches must, similar to what was concluded above, be interpreted as including the duty to investigate such violations, as is also illustrated by the third paragraph of Article 87:

> 'The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.'

Initiating disciplinary or penal action must, by necessity, involve investigation.[221] The ICRC Commentaries clarify the role of the commander in this context, explaining that commanders 'are in a position to establish or ensure the establishment of the facts, which would be the starting point for any action to suppress or punish a breach', with the commander in the role of an 'investigative magistrate'.[222] They are tasked with bridging the gap between treaty obligations and operational reality,[223] meant to ensure the effective enforcement of IHL.[224] Commanders, in other words, must take disciplinary or penal action in case of IHL violations 'when appropriate', which appropriateness must be established by the commander through investigations.[225] The only other way for commanders to discharge their obligation, is by reporting a breach to the appropriate authorities – who will then decide on the further investigation. Should commanders fail to carry out their duties, they are criminally

218 AP I, art 86 and 87. These provisions are part of customary IHL according to the ICRC Study, Rule 139 and 153, Henckaerts and Doswald-Beck (n 1) 495; 558.

219 *Supra*, §3.2.3.2.

220 Compare for AP I, art 86(2), Pictet and others (n 17) 1012 [3542].

221 *Mutatis mutandis*, in the context of serious violations, see *Prosecutor v Popović et al.*, ICTY (Appeals Chamber) Judgment (30 January 2015) IT-05-88-A [1932]; *Prosecutor v Halilović*, ICTY (Appeals Chamber) Judgment (16 October 2007) IT-01-48-A [182].

222 Pictet and others (n 17) 1022-3 [3560]-[3562].

223 The ICRC Commentary to AP I, art 87 puts forward that 'In fact the role of commanders is decisive. Whether they are concerned with the theatre of military operations, occupied territories or places of internment, the necessary measures for the proper application of the Conventions and the Protocol must be taken at the level of the troops, so that a fatal gap between the undertakings entered into by Parties to the conflict and the conduct of individuals is avoided'; Pictet and others (n 17).

224 *Prosecutor v Halilović*, ICTY (Trial Chamber) Judgment (16 November 2005) IT-01-48-T [39].

225 See also Cohen and Shany (n 7) 46; Margalit (n 41) 162.

liable therefor under Article 86(2) AP I. The picture is therefore one of a robust system of investigative obligations for States – through their commanders – and criminal liability for non-compliance with those obligations.[226]

A third avenue worth exploring does not concern in general the investigation of all non-serious breaches, but pertains to a more specific situation – the obligation to take precautionary measures set out in Article 57 of AP I. Violations of this provision do not in themselves constitute serious violations.[227] Article 57 provides that '[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects'[228] and that States are required to 'take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects'.[229] Based on this duty of 'constant care' and taking 'all feasible precautions', an argument can be made that States are required to investigate the effects of their actions, so they may optimise their conduct in the future.[230] Investigating past military operations and attacks therefore classifies as a feasible precaution for future operations and attacks.[231]

The scope of an obligation to investigate a lack of precautionary measures does not extend to all situations and violations. The duty of constant care is limited to military operations; the duty to take all feasible precautions is limited to attacks.[232] Clearly then, not all breaches are subject to investigations under this provision. To a certain extent however, within this scope precautionary obligations could be argued to go beyond the investigation of violations, as the investigation of all military conduct to assess its effects is in itself separate from a *prima facie* or potential violation of IHL. This corresponds to the duty to record the results of all military operations alluded to above.[233] As was shown above, a number of States rely on such a low-threshold fact-finding mechanism.[234] The *obligation* to conduct a further investigation beyond just the recording of the effects of military operations, however, is contingent on a suspected violation of the law.[235] This is an important limitation, especially as even cases of civilian deaths do not necessarily indicate a potential

226 Pictet and others (n 17) 1022 [3562].
227 Margalit (n 41) 158–60. See also Vöneky (n 59) 677.
228AP I, art 57(1).
229 AP I, art 57(2)(a) under (ii).
230 Cohen and Shany (n 7) 47.
231 Also to this effect, see William H Boothby, *The Law of Targeting* (Oxford University Press 2012) 548.
232 For the definition of attack, see AP I, art 49.
233 *Supra*, §2.1.
234 Ibid. See further Margalit (n 41) 167; see also Watts (n 88) 96 on the US practice of 'after-action reviews'.
235 Margalit (n 41) 169.

violation of IHL, as long as the expected casualties were proportionate to the anticipated military advantage.[236]

Fourthly and finally, an argument has been advanced that a duty to investigate is a *secondary* obligation under international law, in consequence to any breach of IHL.[237] Under the law of State responsibility, any breach of an international obligation which is attributable to the State, gives rise to State responsibility.[238] And, crucially, States must ensure the breach ceases, provide guarantees of non-repetition, and provide reparation.[239] Reparation can consist of restitution, satisfaction, and compensation.[240] Arguably, the duty to cease breaches, provide guarantees of non-repetition, and the duty to provide satisfaction for a breach, could all entail a duty to investigate.[241] After all, to be able to effectively stop a breach, the cause must be known, especially where violations are born out of systemic issues. The best way to make sure that such breaches do not repeat, is to identify root causes, and to remedy them. Deterrence of violations is one important way to do so, and ensuring individuals responsible for violations are held to account. This, as was argued above, requires investigations. Finally, insofar as a breach cannot be undone, and restitution is therefore not an option, the duty to provide satisfaction for a breach can, arguably, include investigation and prosecution of breaches.[242] The ILC's Commentary to the ARSIWA explicitly refers to 'due inquiry into the causes of an accident resulting in harm or injury' or 'disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act' as a form of satisfaction.[243] If, for example, a lack of precautions in

236 Margalit (n 41) 158. For arguments to nevertheless require the recording of civilian casualties, see Susan Breau and Rachel Joyce, 'The Responsibility to Record Civilian Casualties' (2013) 5 Global Responsibility to Protect 28, 34–6; Liesbeth Zegveld, 'Body Counts and Masking Wartime Violence' (2015) 6 Journal of International Humanitarian Legal Studies 443.

237 Most prominently, see Ingadottir (n 120); Thordis Ingadottir, 'The Role of the ICJ in the Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level' (2014) 47 Israel Law Review 285. *Case Concerning the Factory at Chorzów*, Judgment (26 July 1927), *P.C.I.J. Series A. No. 9*, p. 21.

238 ARSIWA, art 2.

239 ARSIWA, art 30-31.

240 ARSIWA, art 34.

241 Lubell, Pejic and Simmons (n 23) 5.

242 An early draft of the ARWSIWA in fact stipulated that 'Satisfaction may take the form of one or more of the following: (…) In cases where the international wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible'; see S Rosenne, 'War Crimes and State Responsibility' in Yoram Dinstein and M Tabory (eds), *War Crimes in International Law* (Martinus Nijhoff 1996) 96–7.

243 *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. Ingadottir (n 120) 588.

attack causes an unexpectedly large amount of civilian casualties, this breaches IHL.[244] If such an occurrence is followed-up by a thorough investigation identifying the causes for the breach, coupled with a public apology, or perhaps an accountability process, this can provide satisfaction for an injured State,[245] as well as for individual victims.[246] This argumentation may be more powerful when pertaining to serious violations, because their consequences are often more severe, but as the example illustrates, non-serious breaches can also entail loss of civilian life, which calls for an investigation in response.

In sum, the IHL framework for simple breaches quite clearly includes investigative obligations on the part of the State. The general system of implementation, supervision, and enforcement, together with the more specific obligations to suppress all breaches, command responsibility, the obligation to take precautionary measures, and the duty to provide reparation indicate States must act to counter all IHL violations, *inter alia* by investigating. The investigative trigger, and the duty's scope of application in its various modalities are considered below.

3.3.4 The investigative trigger

As was shown above, any violation of IHL triggers the duty to investigate. But this does not yet answer *from what moment on* States must investigate, precisely. Do States, like in the case of war crimes, only need to act once information regarding the breach reaches them? For simple violations, this is not easy to determine. The treaty texts do not reveal much. The Geneva Conventions indicate no more than that all violations must be subject to suppression. The operationalisation in AP I by means of the commander is more informative, stipulating that commanders must initiate sanctions when they are 'aware' of someone under their control who has committed or intends to commit a breach of IHL.[247] The criminal liability of commanders extends to those cases in which they knew or were in the possession of information on the basis of which they should have known of the (imminent) breach, and did not take all feasible measures of repression.[248] A certain subjective element, knowledge, is therefore required to trigger the commander's duty to investigate. They need not investigate what they have no way of knowing. The ICC Statute supports such an interpretation, requiring in Article 28 that the commander

244 AP I, art 57(2).
245 Margalit (n 41) 162–3.
246 Naomi Roht-Arriaza, 'Nontreaty Sources of the Obligation to Investigate and Prosecute' in Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (Oxford University Press 1995) 48–9; Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85; Weill (n 19) 173.
247 AP I, art 87(3).
248 AP I, art 86(2).

knew or 'should have known', 'owing to the circumstances at the time', of the (intended) offences.[249] Similar to the regime for grave breaches and serious violations, the trigger therefore appears to hinge on the available information. The nature of this information or its plausibility, however, are not expanded upon, although the 'reasonable commander-criterion' seems to be decisive in determining the commander's criminal responsibility.

The precautionary obligation to investigate military operations and attacks, as explained above, might suggest all military operations must be *recorded*. Further *investigation*, however, would appear to be contingent on a suspected violation.[250] In this view the suspicion of a violation remains the guiding principle, similar to the other prongs of investigatory obligations into non-serious violations.

When it comes to investigative obligations flowing from State responsibility, the trigger is not entirely clear. State responsibility ensues following a breach of an international obligation, but how to determine whether a breach has occurred, is not foreseen in the system. State practice and soft law may therefore be instructive in identifying the precise investigative trigger.

Soft law and State practice

If we once more take the *Guidelines* as recent authority, these as already discussed propose the recording of *all* military operations and their effects, and to report all 'incidents'.[251] Incidents are defined broadly, as 'any event, situation, or set of circumstances that has the potential to require an investigation because it raises concern about a possible violation of international humanitarian law'.[252] Thus, the reporting obligation is very extensive. Any *concern* of a *possible* violation, *regardless of what type of violation*, requires reports to be drawn up, which must then be assessed by the appropriate authority for the need for further investigation. The *Guidelines*, therefore, plead in favour of a very low threshold for fact-finding. Further investigations into non-criminal breaches of IHL must take place if circumstances 'suggest' such a breach has occurred.[253]

State practice in the context of simple IHL violations appears diverse. As was shown above, States impose reporting obligations for 'notifiable incidents', with some States indicating *all* violations of IHL as notifiable, whereas others limit this category to war crimes.[254] As it was shown above that IHL requires investigations in case of all violations of IHL, State practice which only requires

249 See also *Prosecutor v Jean-Pierre Bemba Gombo* (Situation in the Central African Republic), ICC (Appeals Chamber) Judgment (8 June 2018), ICC-01/05-01/08 A [168].
250 Margalit (n 41) 169.
251 Lubell, Pejic and Simmons (n 23) 19.
252 Ibid 10.
253 Lubell, Pejic and Simmons (n 23) 22.
254 *Supra* §3.2.2.3.

reports in case of war crimes would appear to fall short of the international standards.

If we once more consider the good practice of a few States, Australian practice requires reporting all IHL violations. Commanders must assess whether a reasonable suspicion of such a violation exists. US practice similarly does not distinguish between various categories of violations,[255] and requires all credible IHL violations to be reported and investigated. The trigger for investigations is information that would lead a 'prudent person' to the conclusion that an IHL violation may have occurred. UK practice does make a distinction between serious violations and non-serious violations, though the trigger for investigations is similar. Officers are required to act on any circumstance or allegation of which they are aware, that to a reasonable person would indicate a 'service offence' has been committed.[256] Service offences are a very broad category, including many non-serious breaches of IHL.[257] Officers must then either ensure that an appropriate investigation is conducted, or involve service police – a form of military police[258] – as soon as reasonably practicable.[259] The trigger for investigations is therefore, similar to Australian law, one of reasonableness; officers must involve investigative services in all cases which to a reasonable person indicates a violation.

In sum, 'good practice' is to include reporting obligations for *all* violations. If an incident reasonably indicates a simple breach of IHL, this must lead to further investigation. As is explored further in section 4.2, in case of non-serious breaches IHL does not require this to be a criminal investigation. Whereas States are free to decide to criminalise simple breaches of IHL, they may, under international law, suffice with administrative investigations.

3.3.5 Personal and geographic scope of application

Having established the existence of an obligation to investigate non-serious IHL violations, the research now aims to assess *who* is under this obligation to investigate, and *where*. In other words the personal and geographical scope of application of the duty.

The obligation to investigate 'simple' breaches falls to the State, or directly the State's commanders. After all, the duty to suppress violations is addressed

255 As pointed out by Watts, the US system is focused on efficiency and necessity, rather than compliance with international law. This is not to say that US practice does not comply with IHL standards, but the influence of international law cannot be easily discerned; Watts (n 88) 104.

256 UK Armed Forces Act 2006, section 113(1) and (2). See also Cohen and Shany (n 7) 52–3.

257 Schmitt (n 13) 67.

258 UK Armed Forces Act 2006, Explanatory note 12; see Schmitt (n 13) 67.

259 UK Armed Forces Act 2006, section 115(4).

to the 'High Contracting Parties' and their commanders.[260] If we ask *which* State must investigate, the Pictet Commentaries indicate the State 'on which those committing such breaches depend or the Power to which they belong'.[261] In other words, there must be a direct link between that State and the perpetrators.[262] In such instances, the duty to investigate is not subject to geographical limitations, and States must therefore equally investigate their armed forces' conduct extraterritorially. The 2016 ICRC Commentary to Common Article 1 adds that a duty to prevent and repress breaches may extend to violations committed by 'private persons over which a State exercises authority'.[263] What that entails, the Commentary adds, depends *inter alia* on 'the gravity of the breach', as well as the State's influence over the perpetrators and its knowledge.[264] This would seem to indicate that the diligence required of States is lessened in case of simple breaches. If we take the nature of the breaches in question into account, this makes logical sense. These breaches are often much more directly linked with the operational practices of militaries, which means supervision over these kinds of offences must lie with the State whose forces are involved. Further, because simple violations can concern such relatively minor issues as an officer forgetting to post a copy of the Geneva Conventions in a POW camp, the rationale of international crimes being a concern for the international community as a whole, does not apply in these situations.[265] This also explains why simple IHL violations are not subject to the regime of universal jurisdiction.

In sum, when it comes to simple breaches, States must investigate *their own* violations, and commanders must report and investigate breaches by their own forces.[266] This is especially clear for measures of precaution, which can only be taken by the State carrying out the operation in question.

3.3.6 Temporal scope of application

The temporal scope of application of the duty to investigate simple IHL violations, finally, in broad strokes coincides with that of serious violations. Implementation obligations of course predate the existence of armed conflict, and the duty to investigate is triggered from the moment that there is a reasonable indication of a breach. The duty ends when it is fully discharged through an effective investigation. Whether investigative obligations persist also after the armed conflict has come to an end, is less clear. The strong rationale for continued application which applies to war crimes does not apply equally

260 GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146; AP I, art 86-87.
261 Pictet and others (n 17) 1011 [3539].
262 Medlong (n 189) 831.
263 ICRC (n 2) 45–6 [150].
264 Ibid.
265 Compare ICC Statute, preambular paragraph 4.
266 Pictet and others (n 17) 1019-20 [3554]-[3555].

to these investigations, because the fight against impunity is concerned with international crimes, rather than relatively minor violations. Nonetheless, the purposes of the duty to suppress, the need for reliable facts in the context of precautions, and the duty to provide reparation for breaches, all persist after the conflict comes to an end. The need to deter violations, to uncover systemic shortcomings, to improve procedures in order to ensure future compliance, and to guarantee non-repetition and provide satisfaction, in no way dissipate after the end of a conflict. It is submitted, therefore, that the duty to investigate simple IHL violations ought to continue to apply after an armed conflict comes to an end.

3.4 Investigations in non-international armed conflicts

Above, it was shown that IHL imposes clear investigative duties on States with regard to grave breaches, other serious violations, as well as simple violations. Thus, all IHL investigations must be investigated. What may still be questioned, however, is whether this finding also applies to non-international armed conflicts. After all, the treaty law applicable in NIACs is much more limited,[267] and for many of the treaty rules in the Geneva Conventions and AP I relied upon above, it may be questioned whether these (can) apply also during NIACs. This section briefly shows that indeed, States must also investigate violations of IHL during NIACs.

Firstly, it must be reiterated that the grave breaches regime does not apply in NIACs.[268] The law of non-international armed conflict does not encompass a grave breaches regime, meaning that the specific treaty rules requiring States to enact legislation, search for alleged perpetrators and to try or extradite them, do not apply. Insofar as the rules found above derive from the grave breaches regime, therefore, they do not apply to situations of non-international armed conflict.[269]

The rules pertaining to serious violations, and therefore war crimes, *are* applicable in NIACs. The ICRC's Customary IHL Study identifies the rule that war crimes must be prosecuted to be applicable in both IACs and NIACs.[270]

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267 See Chapter 2, §4.2.

268 ICRC (n 2) [2903]-[2905]; Lindsay Moir, 'Grave Breaches and Internal Armed Conflicts' (2009) 7 Journal of International Criminal Justice 763, 769–84.

269 It has been argued that a development in customary law is taking place, extending the grave breaches regime, though this development does not appear to have culminated in binding legal norms and accepted practice. See *Prosecutor v Delacić, Mucić and Landžo*, ICTY (Trial Chamber), Judgment (16 November 1998), IT-96-21-T. See further Moir (n 268) 769–84.

270 'State practice establishes this rule [duty to investigate and prosecute war criminals] as a norm of customary international law applicable in both international and non-international armed conflicts'; Henckaerts and Doswald-Beck (n 1) 607.

This view is widely accepted, especially following the establishment of the *ad hoc* tribunals for Rwanda and the former Yugoslavia.[271] The Statutes of these tribunals provided the first authoritative definition of war crimes as including violations of Common Article 3, and a number of violations of AP II.[272] The ICC Statute similarly includes serious violations committed during NIACs as war crimes.[273] Command responsibility for war crimes, and the commander's individual criminal liability for failing to take measures to prevent and repress such breaches, also apply during NIACs.[274] Insofar as suspected war crimes are concerned, States are therefore under an equal obligation to investigate these in NIACs, as they are in international armed conflicts. This has been further confirmed in regional human rights courts' jurisprudence, stipulating that granting amnesties[275] is prohibited for war crimes, as IHL requires their investigation and prosecution.[276]

Pertaining to the duty to investigate non-serious IHL violations, the sources for this duty outlined above primarily pertain to obligations applicable in IACs. After all, the majority of the Geneva Conventions, as well as the entirety of AP I, are applicable in IACs only.[277] Nonetheless, it would appear that most of the relevant rules do also apply during NIACs. Above, the main sources which entail a duty to investigate were shown to be the duty to ensure respect for the Geneva Conventions and the system of self-enforcement, the duty to suppress all breaches of the Geneva Conventions, the responsibility of commanders, and the principle of precautions. The duty to investigate violations under the State responsibility regime of course applies equally during NIACs, as it is the breach of an international obligation which give rise to the secondary obligation to provide reparation, and this is in no way altered by the nature of the conflict.

The duty to ensure respect for IHL, beyond its conventional basis in Common Article 1, also reflects a norm of customary international law, equally

271 Sivakumaran, *The Law of Non-International Armed Conflict* (n 44) 478.
272 Dinstein (n 139) 175.
273 ICC Statute, art 8. The Statute was meant to codify existing international law, see e.g. Cryer (n 187) 151.
274 The applicability of provisions of AP I is restricted to IACs, as set out in its art 1. Nonetheless, the judicial practice of the international criminal tribunals shows its application during NIACs.
275 Under AP II, art 6(5).
276 *Gelman v Uruguay* (Merits and Reparations) Inter-American Court of Human Rights Series C No 221 (24 February 2011) [210]; *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 252 (25 October 2012) [286]; *Marguš v Croatia*, ECtHR [GC] 27 May 2014, Appl No 4455/10 [132].
277 See *supra*, Chapter 2, §4.2.

applicable in NIACs.[278] Further, the supervision and enforcement structure in this context relies perhaps even more heavily on self-enforcement by the State, given the potential lack of involvement of other States. This in principle prevents recourse to such supervision and enforcement mechanisms IHL *does* have – although they are rarely ever used – such as a procedure before the ICJ, requesting the International Humanitarian Fact-Finding Commission to investigate, or requesting an enquiry.[279] This is reinforced further if we consider that the duty to suppress breaches of IHL, applies to *all breaches* of the Geneva Conventions.[280] This, crucially, therefore includes breaches of Common Article 3, which regulates NIACs.[281] States must therefore suppress, and by implication investigate, all breaches of Common Article 3. To what extent the duties of commanders also extend to NIACs, is less clear. From the judicial practice of the international criminal tribunals, it flows that commanders are also criminally responsible for failing to prevent and punish war crimes committed during NIACs.[282] Whether this is also the case for non-criminal breaches is not clear, though it is submitted that if States organise their armed forces according to the rules applicable in IACs, then their command structures and responsibilities will normally apply also when those armed forces are deployed in a situation of NIAC. The duty to take precautions in military operations and attack, finally, are principally derived from AP I. Nonetheless, these also form part of customary international law, equally applicable during NIACs. This has been confirmed by the ICTY,[283] as well as the ICRC's Customary IHL Study,[284] and in legal scholarship.[285]

In sum, the duty to investigate applies equally in non-international and international armed conflict. The main difference is that the specific regime governing grave breaches, applies during IACs only. Finally, NIACs of course concern also non-State armed groups. As was set out in the Introductory

278 Rule 139 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 1) 495. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment (27 June 1986), *I.C.J. Reports* 1986, p. 14 [220].

279 See *supra*, Chapter 2, §5.

280 Third paragraphs of GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146.

281 Schmitt (n 13) 47.

282 *Prosecutor v Jean-Pierre Bemba Gombo* (Situation in the Central African Republic), ICC (Appeals Chamber) Judgment (8 June 2018), ICC-01/05-01/08 A [168]; *Prosecutor v Akayesu*, ICTR (Chamber I) Judgment (2 September 1998) ICTR-96-4-T [486ff].

283 *Prosecutor v Hadžihasanović and Kubura*, ICTY (Trial Chamber) Judgment (15 March 2006) IT-01-47-T [45].

284 Rule 14 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 1) 46.

285 Dinstein (n 139) 218; Sandesh Sivakumaran, 'Re-Envisaging the International Law of Internal Armed Conflict' (2011) 22 European Journal of International Law 219, 239–40.

Chapter, the potential investigative obligations of NSAGs fall outside the scope of this study, and are therefore left aside.[286]

3.5 Résumé

In terms of the questions this enquiry set out to answer, this section has, firstly, addressed the question 'Are States under an obligation to investigate (potential) violations of IHL?' This question can be firmly answered in the affirmative: States must certainly investigate IHL violations. Secondly, this section has explored *when* this obligation applies. This has resulted in a relatively circumscribed outline of the investigative trigger, and the obligation's scope of application in its material, personal, geographical, and temporal dimensions. Together, these steps are meant to take a first step in resolving the problem identified in the Introductory Chapter, that investigative obligations during armed conflict are insufficiently clear.

The research shows that within IHL, we must distinguish between various categories of violations, namely 'serious', and 'simple' violations. First, there are the *serious* violations, which are criminal violations of IHL. They constitute war crimes, and are subject to individual criminal responsibility directly under international law. Within this category of criminal violations, we can distinguish further, between the grave breaches, which are covered by a specialised treaty regime under the law of IAC, and other serious violations, which must be investigated and prosecuted under customary international law.

Despite the variety in sources, the research shows that criminal violations of IHL form a relatively unambiguous, univocal category of breaches when it comes to their investigative regimes. All serious violations are directly

286 There is some precedent for investigations being carried out by NSAGs, see Mark Lattimer, 'The Duty in International Law to Investigate Civilian Deaths in Armed Conflict' in Mark Lattimer and Philippe Sands (eds), *The Grey Zone: Civilian Protection between Human Rights and the Laws of War* (Hart Publishing 2018) 54. He observes that 'an example of practice by both state and non-state actors in an internal conflict is the 1992 agreement by the parties to the non-international conflict in Bosnia and Herzegovina to undertake, when informed of an allegation of IHL violations, "to open and enquiry promptly and pursue it conscientiously" and to punish those responsible' ["Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina" (London, 27 August 1992) art 5]. Currently, discussions are ongoing whether Kurdish forces who fought the Islamic State ought to prosecute foreign fighters, or whether States ought to take back their nationals and prosecute them domestically; see Dan Sabbagh, 'Syrian Kurds to Put Isis Fighters from Dozens of Countries on Trial' (*The Guardian*, 2020) <https://www.theguardian.com/world/2020/feb/06/syrian-kurds-to-put-isis-fighters-from-dozens-of-countries-on-trial> (last accessed 15 July 2021). Further, see e.g. Emma Broches, 'Accountability for Islamic State Fighters: What Are the Options?' (*Lawfare*, 2019) <https://www.lawfareblog.com/accountability-islamic-state-fighters-what-are-options> (last accessed 15 July 2021).

criminalised under international law, and must be investigated as soon as information which indicates such a crime reaches the State. Most IHL obligations are addressed to States themselves, and must be implemented by States with regard to their own armed forces. Thus, States must supervise the conduct of their forces, in line with their general obligation to ensure respect for IHL, and must investigate war crimes attributable to their armed forces wherever they are committed. But, because these are criminal violations of such severity that they are of a common concern to the international community as a whole, obligations do not stop there. States must also investigate war crimes by others, if they are committed by their nationals or on their territories. This is formalised further under the grave breaches regime, where States must further vest *universal* jurisdiction over such crimes, and operate under an explicit *aut dedere aut iudicare* obligation. For other war crimes, there is only a right, rather than an obligation, to vest universal jurisdiction. In practice, the difference in universal jurisdiction may not be overly great. Whereas the duty to *vest* universal jurisdiction exists only for grave breaches, the duty to *exercise* that jurisdiction in practice appears to be limited to cases where States have territorial or personal jurisdiction over the perpetrator. This is complemented by a duty of cooperation by other States. Finally, the duty to investigate war crimes is not temporally limited to the armed conflict, and continues to apply even after hostilities cease.

The regime for criminal violations of IHL is therefore relatively uniform. This corresponds to the rationale of preventing impunity, and denying a safe haven to war criminals. Wherever they go, and whenever they surface, IHL does not allow them to remain unpunished. This clearly conveys also the interest of the international community as a whole in their prosecution.

This is different for the *second* category of violations, the simple violations. These are non-criminal breaches of IHL, which can range in severity from omitting to post a copy of the Geneva Conventions in prisoners of war camp, to failing to take the necessary precautions in attack, causing civilian casualties. The range of obligations at play is therefore broad, but what they have in common is that violations are not of such gravity that IHL requires a criminal law response. Nonetheless, IHL *does* require that States investigate these violations, whenever circumstances suggest a violation has occurred. The research shows that the obligation is not explicit in treaty law, but derives from a systematic interpretation of a number of treaty and customary rules which together add up to a duty to investigate non-criminal breaches of IHL. Thus, the duty to ensure respect for IHL, the duty to suppress all violations, the responsibility of the commander, the duty to take all feasible precautions, and the duty to provide reparation for violations, all rely on, and require, State investigations.

This obligation corresponds directly with the overarching rationale of *effectuating* IHL. Effectively ensuring compliance, supervising, and enforcing the rules of IHL, cannot happen without investigations. This applies similarly

for all violations. Where simple violations differ from serious violations, however, is their severity. This means that criminal accountability is not required, and that the rationale of preventing impunity does not apply.[287] This directly translates to the obligation's scope of application, which is limited to States' own armed forces and others under their authority. Suppression of these less serious breaches is not a concern of the international community as such, and it is States themselves who must ensure that their militaries live up to international standards. They must do so wherever their forces operate, and it is submitted they must continue investigations also after the armed conflict comes to a close.

4 SUBSTANCE OF THE OBLIGATION: INVESTIGATIVE STANDARDS

4.1 Introduction

Having concluded in section 3 *that* States must investigate violations of IHL, the present section explores *how* they must do so. What type of enquiry fulfils the duty to 'investigate', what exactly must States do once it is established that they must start an investigation? Establishing a clear answer to this question is a precondition for the effectiveness of the obligation to conduct investigations in practice.[288] In terms of the sub-question guiding this Chapter, this section therefore answers what the 'contents' of the duty to investigate IHL amount to.

As this section shows, establishing how States must conduct IHL investigations, is no easy task. IHL contains very few – if any – indications on what the contents of the duty to investigate are.[289] A number of soft law instruments and contributions to legal scholarship have made efforts to establish a list of investigative standards, such as independence, impartiality, thoroughness, effectiveness, promptness and transparency.[290] This sections aims to

287 See *infra*, §4.2.

288 For the necessity of a legal concept, sufficiently developed to be communicated clearly, see Paul F Diehl, Charlotte Ku and Daniel Zamora, 'The Dynamics of International Law: The Interaction of Normative and Operating Systems' (2003) 57 International Organization 43, 43.

289 Compare Cohen and Shany (n 7) 56; Hampson (n 11) 17. See also Human Rights Council 23 September 2010, A/HRC/15/50 [19].

290 E.g. Human Rights Council 23 September 2010, *Report of the Committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards*, A/HRC/15/50 [21] and [33]; Goldstone Report (2009) UN fact-finding mission on the Gaza conflict (25 Sept 2009), UN Doc. A/HRC/12/48 [1814]; UNGA Resolution 60/147 (2005), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International*

determine whether such standards can indeed be derived from IHL itself, in spite of its lack of explicit rules, or whether such standards rather derive from the incorporation of standards of international human rights law. Whereas there is no principled objection against looking towards IHRL for inspiration, it is submitted that the interplay between IHL and IHRL must be approached by way of a specific methodology – as set out in Chapter 9 of this study. That approach requires the determination of what IHL and IHRL require separately. This section does so for IHL.

The examination first turns to the distinction already made in the previous section, between serious and simple IHL violations. As this distinction is decisive for the question whether the violation amounts to an international crime, it is argued this distinction also determines the *type* of investigation required (§4.2). Section 4.3 subsequently addresses the investigation of serious violations (i.e. war crimes), section 4.4 sets out the standards investigations into non-serious violations must adhere to. Finally, section 4.5 assesses whether general investigative standards may be derived from the previous sections.

4.2 The nature and purpose of the investigation: criminal or administrative

One way of establishing the standards applicable to investigations, is to *infer* them from the nature and purpose of the investigation. Because IHL itself says so little about how investigations must be conducted, this is one of the most promising avenues for establishing the standards which guide investigations. The main difference in the nature of investigations, has to do with whether the breach in question concerns a *criminal* breach, or rather a simple breach, which is not criminal in nature. This also has to do with the nature of IHL itself, which as a body of international law principally leads to *State responsibility* when it is breached, not criminal responsibility.

International humanitarian law is not criminal law. It is not comprised of penal provisions, rather it is concerned with obligations for the State which – when violated – in principle lead to State responsibility.[291] State responsibility is not criminal in nature,[292] which was made explicit in the drafting of the ILC

Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, principle 3(b); The Turkel Commission (n 25) 114–5. See further Michelle Lesh, 'A Critical Discussion of the Second Turkel Report and How It Engages with the Duty to Investigate under International Law' (2013) 16 Yearbook of International Humanitarian Law 119, 131.

291 Cf. ARSIWA, art 2.

292 *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment (26 February 2007), *I.C.J. Reports* 2007, p. 43 [403]. Further on the distinction between State responsibility and individual criminal responsibility, see Ingadottir (n 120) 586; Rosenne (n 242).

Articles on the Responsibility of States for Internationally Wrongful Acts – rejecting any form of criminal liability of States.[293] If a State breaches its international obligations, including those of IHL, this therefore principally leads to international State responsibility, which is more akin to 'civil' responsibility.[294] The international responsibility which flows from any breach of IHL, is therefore *not* criminal in nature.[295] Further, because they are not concerned with establishing individual responsibility, they do not need to identify individual perpetrators. These are relevant distinctions in how investigations must be conducted.

An important point to make with regard to the *nature* of the duty to investigate, comes back to the distinction between primary and secondary obligations under international law. The obligations to cease a violation, guarantee non-repetition, and provide reparation, are *secondary* obligations under international law.[296] Such secondary obligations arise in case a *primary* norm of international law has been breached.[297] Thus, if a norm of IHL is violated, this triggers the secondary obligations under the State responsibility regime.

Crucially, *the duty to investigate IHL violations, is a primary norm*. IHL establishes the obligation to investigate violations, as was explored in-depth in the previous section. This obligation entails the duty to *criminally* investigate war crimes, and to conduct *administrative* investigations into simple violations.[298] These are primary obligations under international law. This is not changed by the fact that they are in a sense 'accessory', and triggered only if other norms of IHL have been breached. This also means that if a State fails to conduct an investigation pursuant to its primary duty to do so under IHL, it will incur State responsibility for this failure, *in addition* to the State responsibility which already follows the initial violation. For example, if a POW was mistreated, the responsible State will have to provide reparation for this. Further, it will be under a duty to investigate. If it also fails to investigate, it will have to provide reparation for this omission as well.

Although IHL itself is not criminal law, it nevertheless distinguishes criminal and non-criminal breaches. This distinction affects the duty to investigate as

293 The first reading in 1996 of the Draft Articles included in Art. 19(2) the concept of crimes committed by the State (*Report of the International Law Commission on the work of its forty-eighth session 6 May-26 July 1996*, General Assembly Official Record, Fifty-first Session Supplement No. 10, UN Doc. A/51/10), 131. This concept was later rejected, see André Nollkaemper, *Kern van Het Internationaal Publiekrecht* (6th edn, Boom Juridisch 2016) 211.

294 Hampson (n 11).

295 Lubell, Pejic and Simmons (n 23) 5–6.

296 *Supra* §3.3.3.

297 See *Case Concerning the Factory at Chorzów*, Judgment (26 July 1927), *P.C.I.J. Series A. No. 9*, p. 21.

298 Lubell, Pejic and Simmons (n 23).

a primary obligation, because the *substance* of the investigative obligation changes. When it comes to criminal breaches, States must employ their criminal justice systems in order to discharge their investigative obligations, whereas for non-criminal breaches, other types of investigation may be equally suitable.[299]

The distinction between criminal and non-criminal breaches can be derived from conventional IHL. Both the grave breaches provisions in the Geneva Conventions and AP I make a clear distinction in the required response regarding grave breaches and other violations. Whereas grave breaches require 'effective penal sanctions'[300] and must be 'repressed', other violations must be 'suppressed'. Article 86(1) AP I is perhaps most explicit in the distinction, providing: 'The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol (…).' In this context, 'repression' denotes a criminal law response, whereas 'suppression' leaves room for other methods of implementation, such as disciplinary measures.[301] Although the treaties are not fully consistent in their use of these terms,[302] there can be no doubt that certain breaches are subject to direct criminalisation under international law and must be criminally repressed, while others do not.

All serious violations – war crimes – are of such gravity that they *must* be redressed by means of criminal accountability. Thus, when a war crime is committed by a State's armed forces, this *both* leads to State responsibility, *and* criminal accountability for the individual perpetrators, and potentially their commanders.[303] An airstrike deliberately targeting a hospital would, for instance, be both a war crime and lead to international State responsibility. Investigations will therefore need to focus equally on establishing individual criminal accountability, and on establishing the responsibility of the State. This can be achieved through separate investigations. If the investigation shows that violations may occur pursuant to a State policy, this will also need to be addressed.[304]

Other violations of IHL, simple violations, do not give rise to individual criminal responsibility under international law. Whereas States are free to choose to criminalise all IHL violations in their domestic legal systems – as some have[305] – this is not a requirement, and States may choose to adopt

299 ICRC (n 2) 1033 [2896].
300 GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146.
301 See Pictet and others (n 17) 1010-1 [3538]-[3539]; Bothe, Partsch and Solf (n 213) 494–5.
302 See e.g. AP I, art 86(2), and 87; Lesh (n 290) 124.
303 Cf. Ingadottir (n 120) 586. See also Nollkaemper (n 293) 232.
304 Lubell, Pejic and Simmons (n 23) 38.
305 As noted by the ICRC, ICRC (n 2) 1034, fn 181; e.g. Ireland, Nigeria, and South Africa. See Ireland's Geneva Conventions Act 1962; Nigeria's Geneva Conventions Act 1960; and South Africa's Geneva Conventions Act 2012.

other measures in response to simple violations. Thus, administrative, rather than criminal investigations suffice to satisfy the international requirements. On the level of individual perpetrators, there may be a need for punishment, but this may very well be disciplinary punishment.[306] The severity of the offence, such as omitting to post a copy of the Geneva Conventions in a POW camp, does not as such require criminal law measures. Deterrence and prevention can be achieved through other means. On the State level, State responsibility still ensues, also from relatively minor breaches. An investigation will therefore have to be capable of establishing State responsibility. Further, in order to serve its preventive and precautionary aims, it will need to enable an evaluation of military operations and procedures. This facilitates uncovering systemic shortcomings.

In conclusion, whilst all serious IHL violations entail an obligation for the State to conduct criminal investigations, non-serious violations leave States free to choose how to investigate. Because the investigation, no matter the gravity of the breach, will need to establish the responsibility of the State, it will necessarily have to establish the facts, and determine the lawfulness of the incident in question. Beyond establishing State responsibility, investigations pursue further aims. They also seek to contribute to prevention and deterrence. This, firstly, requires the examination of broader structures to uncover whether broader, systemic issues are the cause of a violation. Secondly, this requires individual measures which punish transgressors. In order for such individual punishment to be administered, a necessary step is obviously to *identify* individual members of the armed forces who were involved in a transgression. The *type* of sanction, penal or disciplinary, is then contingent on the breach in question. Grave breaches and other war crimes must at all times be subject to criminal investigation and punishment. Simple violations require a response in proportion to the transgression, but need not be criminal. States are more free in how they choose to sanction simple violations, and while they may criminalise such violations, they do not need to.

4.3 Standards for investigations into serious IHL violations (war crimes)

Let us now explore more in-depth what standards guide IHL investigations, starting with war crimes investigations. Such investigations must be criminal in nature, as was explained in the previous section. IHL itself does not provide much by way of guidance as to the further substantive and procedural requirements these investigations must adhere to. It has been suggested this leads to accountability concerns, because it leaves States free to decide how they

306 Pictet (n 3) 394; Lattimer (n 286) 56.

proceed with an investigation.[307] If we wish to flesh out further what investigative obligations entail, we may therefore proceed by *inferring* from the requirement of criminal prosecution and punishment, how the investigation must take shape. In doing so, this section firstly examines what little guidance IHL *does* provide, secondly looks towards ICL to determine how the criminal enforcement of IHL is shaped there, and thirdly interweaves this examination with the guidance provided by the *Guidelines on Investigating Violations of International Humanitarian Law*[308] and State practice.

If we turn firstly towards IHL itself, the Geneva Conventions provide no more than that the Contracting States must 'provide effective penal sanctions' and 'search for persons alleged to have committed (…) grave breaches'.[309] Additional Protocol I adds to this that grave breaches must be repressed.[310] Criminal punishment is, therefore, required. But, IHL provides no other indications of *how* States must conduct their investigations. The only further requirements set, are the grave breaches provisions' insistence that: 'In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of [Geneva Convention III].'[311] These provisions provide a number of procedural rights for defendants, which are complemented by the fundamental guarantees summed up in Article 75 of AP I.[312] These fair trial guarantees in part also govern the investigative process, insofar as for instance the rule that convictions must be based on individual criminal responsibility, the presumption of innocence, and the privilege against self-incrimination are concerned.[313] From these requirements, we may surmise that the investigation will have to be capable of establishing the *individual guilt* of the accused. This means, by necessity, that the investigation must establish the facts, and identify the suspected perpetrator. Further, it must garner sufficient evidence to *prove* the guilt of the accused, in line with the presumption of innocence. Finally, the accused may not be compelled to testify against themselves. These requirements guide the trial against, but also the investigation of those suspected of war crimes.[314] If we read these requirements in light of the overarching aim of preventing impunity and ensuring criminal accountability, this therefore requires highly effective investigations. They must not only lead to the conviction and punishment of those responsible, but they

307 Tan (n 148) 210.
308 Lubell, Pejic and Simmons (n 23).
309 GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146.
310 AP I, art 86 and 87.
311 Paragraph 4 of GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146.
312 ICRC (n 2) 1035–7 [2902].
313 AP I, art 75(4)(b), (d), and (f).
314 AP I, art 75(7) explicitly extends its protection to those accused of war crimes and crimes against humanity. See further Pictet and others (n 17) 887–9; Bothe, Partsch and Solf (n 213) 523.

must moreover do so without unduly relying on a presupposition of guilt, or by coercing confessions. This implies the gathering of solid evidence.

If we consider *how* evidence must be gathered, some guidance is provided by the responsibilities of the commander as set out in AP I. As was explained above, commanders are tasked with preventing, repressing, and reporting war crimes. The Pictet Commentaries clarify that commanders 'are in a position to establish or ensure the establishment of the facts, which would be the starting point for any action to suppress or punish a breach', with the commander in the role of an 'investigative magistrate'.[315] Various ICL bodies have further developed what the commander's responsibilities entail in this context. Firstly, they are themselves criminally liable if they 'failed to take all necessary and reasonable measures within [their] power to prevent or repress the commission of crimes by [their] subordinates (…) or to submit the matter to the competent authorities'.[316] What 'all necessary and reasonable measures' are must be determined contextually, on a case-by-case basis.[317] According to the ICTY, it must be examined 'what steps were taken to secure an adequate investigation capable of leading to the criminal prosecution of the perpetrators',[318] and at a minimum the duty entails an 'obligation to investigate possible crimes in order to establish the facts'.[319] These findings clearly corroborate the idea that an investigation must be *capable of leading to prosecution and punishment*. The *Guidelines* support this finding based on their survey of State practice.[320]

At the same time, the duty to investigate, and if appropriate, prosecute, and punish, must remain a *due diligence* obligation, an obligation of means. In line with the presumption of innocence, there can be no obligation to come to a conviction. All *reasonable* means must be used, but according to the ICC, commanders are not required 'to employ every single conceivable measure within his or her arsenal, irrespective of considerations of proportionality and feasibility'.[321] 'Operational realities on the ground' may influence what commanders can achieve by way of investigation, and they are allowed to make a 'cost/benefit analysis' in determining appropriate investigative measures which do not unduly disrupt military operations.[322] Whether these findings

315 Pictet and others (n 17) 1022-3 [3560]-[3562].

316 See also *Prosecutor v Jean-Pierre Bemba Gombo* (Situation in the Central African Republic), ICC (Appeals Chamber) Judgment (8 June 2018), ICC-01/05-01/08 A [166] and [168].

317 Ibid. See further Martha M Bradley and Aniel de Beer, '"All Necessary and Reasonable Measures" – The Bemba Case and the Threshold for Command Responsibility' (2020) 20 International Criminal Law Review 163.

318 *Prosecutor v Popović et al.*, ICTY (Appeals Chamber) Judgment (30 January 2015) IT-05-88-A [1932].

319 Ibid.

320 Lubell, Pejic and Simmons (n 23) 7.

321 *Prosecutor v Jean-Pierre Bemba Gombo* (Situation in the Central African Republic), ICC (Appeals Chamber) Judgment (8 June 2018), ICC-01/05-01/08 A [169].

322 Ibid [170].

on the *individual criminal responsibility* of commanders by the ICC can be transposed one on one to the *responsibility of the State* under IHL, is not clear. After all, the responsibility of the State may well exceed the more narrowly circumscribed individual responsibility of the commander. What is considered 'reasonable' may be assessed somewhat differently from the perspective of the individual commander or the State as a whole. Nonetheless, it is submitted that the duty to investigate is indeed a due diligence obligation which requires States to take all *reasonable* investigative measures.

The requirement that investigations are *capable* of leading to prosecution and punishment, clearly connote a standard of *effectiveness*.[323] If an investigation is not thorough, and does not pursue the relevant steps in gathering and securing evidence, criminal prosecutions are doomed to fail. It is submitted that this also requires an investigation to be conducted *promptly*. In the gathering of evidence, especially during armed conflict, a speedy reaction is key. If potential crime scenes are not secured as soon as possible, and potential witnesses not identified, the means for effectively investigating an incident deteriorate quickly. Forensic evidence is lost, witnesses cannot be found (or do not survive the armed conflict), the reliability of their memories decreases, bodily injuries heal, and mortal remains are buried. Promptness is therefore recognised universally as a crucial standard for the effectiveness of investigations.[324]

As was alluded to above, in order to be able to result in a criminal conviction, certain procedural guarantees must furthermore be respected. The rights of the accused must be respected insofar as the violation of these rights would impair the fairness of the trial to such an extent that a criminal conviction is no longer possible.[325]

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323 Compare the jurisprudence of the European Court of Human Rights, also requiring investigations to be capable of leading to the identification and punishment of those responsible – all under the umbrella of effectiveness and adequacy; see e.g. *Ramsahai v Netherlands*, ECtHR [GC] 15 May 2007, Appl No 52391/99 [321]. See further Chapters 5-8.

324 E.g. Human Rights Council 23 September 2010, *Report of the Committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards*, A/HRC/15/50 [21] and [33]; Goldstone Report (2009) UN fact-finding mission on the Gaza conflict (25 Sept 2009), UN Doc. A/HRC/12/48 [1814]; 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, principle 3(b); The Turkel Commission (n 25) 114–5. See further Lesh (n 290) 131; Schmitt (n 13); Cohen and Shany (n 7); Tan (n 148); Todeschini (n 148); Margalit (n 148); Hampson (n 11); Lubell, Pejic and Simmons (n 23).

325 Not all human rights violations during the investigative stage give rise to fair trial issues, see e.g. *Khan v United Kingdom*, ECtHR 12 May 2000, Appl No 35394/97. Further, not all fair trial violations lead to a bar to prosecution and conviction, as e.g. reasonable time violations can be remedied through a recognition of the unreasonable length of proceedings,

A second avenue worth exploring, is the complementarity mechanism which determines jurisdiction of the ICC. Pursuant to Article 17(1)(a) of the ICC Statute, a prosecution can be admissible only if the case was not genuinely investigated and prosecuted at the national level. In determining the admissibility of a prosecution before it, the ICC must therefore decide whether any domestic investigations have been 'genuine'. Any criteria formulated in that regard, can assist in deciding what a duty to investigate war crimes must entail.[326] Although ICC criteria cannot be transposed directly to requirements under IHL,[327] it certainly provides a source of inspiration given the lack of indications in IHL documents. The ICC, however, has yet to give a clear and coherent view on what it considers a *genuine* investigation. This issue has not played a role of importance in case-law thus far, because the Prosecutor has focused on those cases where States have remained *inactive*, and where no investigation whatsoever had taken place. If States fail to investigate or prosecute, this is sufficient for the ICC to find a case admissible for complementarity purposes.[328] This has allowed it to avoid treading into the question whether an investigation or prosecution carried out by a State has been 'genuine' – which is of course a much more delicate matter.[329] What constitutes a genuine investigation, therefore, is still in the process of crystallisation.[330]

The ICC has provided some more guidance in the context of the related question whether a national investigation or prosecution is *ongoing*. On this subject, Bill Schabas observes:[331]

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combined with a reduced sentence; see *Pietiläinen v Finland*, ECtHR 5 November 2002, Appl No 35999/97 [44] and *Eckle v Germany*, ECtHR 15 July 1982, 8130/78 [66] and [87]; Stefan Trechsel, *Human Rights in Criminal Proceedings* (Sarah J Summers ed, Oxford University Press 2005) 148.

326 See also e.g. Cohen and Shany (n 7) 57–8.

327 After all, ICL and IHL cannot be equated with one another. Further, see Sivakumaran, 'Re-Envisaging the International Law of Internal Armed Conflict' (n 285) 238–42. Moreover, the international crimes within the jurisdiction of the ICC extend beyond war crimes, to e.g. crimes against humanity not covered by IHL.

328 *Prosecutor v Lubanga Dyilo* (Situation in the Democratic Republic of the Congo), ICC (Pre-Trial Chamber I) Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo (24 February 2006), ICC-01/04-01/06 [29]; *Prosecutor v Katanga* (Situation in the Democratic Republic of the Congo), ICC (Appeals Chamber) Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case (25 September 2009), ICC-01/04-01/07 OA 8 [79].

329 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (n 156) 449.

330 For a case where a conviction (*in absentia*) was put to the test, also in light of amnesty laws, see *Prosecutor v Saif Al-Islam Gaddafi* (Situation in Lybia), ICC (Pre-Trial Chamber I) Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute' (5 April 2019) ICC-01/11-01/11. The Court ultimately decided the issue by finding that a prior conviction must be *final* before it leads to inadmissibility before the ICC. It did not, therefore, decide on the 'genuineness' of the investigation.

331 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (n 156) 459.

> 'The expression "the case is being investigated" requires evidence of "concrete and progressive investigative steps".[332] These may involve "interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses".[333] This consists of assessing both the quantity and the quality of the alleged investigative steps. In practice, it is very similar to the examination of the genuineness of the investigation.'

The criterion of a 'genuine' and 'thorough' investigation, can therefore be fleshed out further in light of a number of concrete measures, such as conducting interviews, collecting evidence and forensic analyses are therefore expected of States. The 'genuineness' of the investigation can moreover be linked to the requirement that an investigation, prosecution, or trial, is not merely conducted to shield the accused from justice.[334] Sham investigations and trials, in other words, do not meet the criterion of a 'genuine' investigation. This requirement could, loosely, be equated to one of 'impartiality'. The investigators may not have a personal interest in the outcome of the investigation, nor may they be biased or operate under the presupposition that no crime was committed.[335] Further guidance will have to be awaited.[336]

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332 *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Situation in Libya) ICC (Appeals Chamber) Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" (21 May 2014) ICC-01/11-01/11 OA 4 [54]-[55]; *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Situation in Libya) ICC (Pre-Trial Chamber I) Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi (7 December 2012) ICC-01/11-01/11 [11]; *Prosecutor v Simone Gbagbo* (Situation in the Republic of Côte d'Ivoire) ICC (Pre-Trial Chamber I) Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo (11 December 2014) ICC-02/11-01/12 [30].

333 *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Situation in the Republic of Kenya) ICC (Appeals Chamber) Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" (30 August 2011) ICC-01/09-02/11 OA [1] and [40]; *Prosecutor v Simone Gbagbo* (Situation in the Republic of Côte d'Ivoire) ICC (Appeals Chamber) Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo" (27 May 2015) ICC-02/11-01/12 [128].

334 Compare ICC Statute, art 17(2)(a) and 20(3)(a).

335 Lubell, Pejic and Simmons (n 23) 24.

336 Such guidance may remain relatively limited in light of the ICC Appeals Chamber's finding that because the complementarity mechanism aims to safeguard State sovereignty, strict scrutiny by the ICC and its Prosecutor of State investigations is not appropriate beyond clear-cut cases ('The purpose of article 17(1)(b) of the Statute is to ensure that the Court respects genuine decisions of a State not to prosecute a given case, thereby protecting the State's sovereignty', *Prosecutor v Katanga* (Situation in the Democratic Republic of the Congo) ICC (Appeals Chamber) Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case (25 September 2009) ICC-01/04-01/07 OA 8 [83]). Likely, this means that whenever a State is investigating a case, this will lead to the strong presumption that the investigation is genuine. Insofar

From the legal framework, we can therefore conclude that investigations must meet a standard of *effectiveness*. When fleshed out further, this standard indicates that the investigation must be *thorough* and *genuine*. All necessary and reasonable investigative measures must be taken, to ensure that the investigation is capable of leading to a prosecution and punishment. Examples of such steps are the collection and analysis of forensic evidence, and the hearing of witnesses. This must moreover be done *promptly*, in order to ensure that evidence is not lost, and the investigators must be *impartial*. Finally, the investigation must respect a number of *fundamental due process guarantees*. These relate to the fairness of the trial, and importantly include the presumption of innocence and the privilege against self-incrimination.

For further guidance, we must turn towards soft law and State practice. The *Guidelines* may once more serve as a recent and authoritative outline of investigative practice and requirements.

The entry into force of the Rome Statute constituting the ICC has had a significant effect on States' domestic legislation. Many States, not unlikely wary of the ICC's complementary jurisdiction, have gone on to pass domestic International Crimes Acts, criminalising amongst others war crimes.[337] Although many international crimes have been prosecuted as 'ordinary crimes' under domestic criminal law,[338] and the number of international crimes that have not been prosecuted greatly exceeds the ones that have,[339] the domestic legislation provides insight into how States have implemented their international obligations. Further, the way they have operationalised their investigative practice with regard to international crimes is particularly instructive.

As the *Guidelines* illustrate, States often grant the competence to investigate crimes of a certain severity – notably war crimes – to their military police when their armed forces are implicated in the event.[340] As was already explained, it is normally the relevant commander who reports the case, though this need not necessarily be so. Certain systems require *all* members of the armed forces to report breaches of IHL.[341] The exact status of military police can differ amongst States, with varying levels of independence from the military chain

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as such a deferential approach is inherent in the structure of the ICC Statute, this need not, of course, be applied equally to investigative standards under IHL itself. See further Dörmann and Geiß (n 51) 719; see also Michael A Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court' (2001) 167 Military Law Review 20.

337 E.g. Dörmann and Geiß (n 51) 718–9.

338 Sivakumaran, *The Law of Non-International Armed Conflict* (n 44) 488.

339 Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (n 75).

340 Lubell, Pejic and Simmons (n 23) 24.

341 E.g. Australian Department of Defence, *Defence Instructions (General)*, 26 March 2010 [3] and [6].

of command.[342] Nonetheless, normally such police authorities will enjoy a measure of independence from those they investigate. These types of investigators do not have any concrete personal interests in the situations they investigate, which also safeguards to an extent their impartiality. This all depends on perspective, however, as victims of alleged war crimes may very well feel that any investigation carried out by the State that committed the war crime, can never be impartial.[343] In light of such complaints, it is important that the investigation also considers a potential systemic problem, or even a State policy, which causes the breach.

The follow-up to military police investigations, when they bring to light potential crimes, largely differs between common law countries and civil law countries. Common law countries generally employ a court martial system, a separate branch of military justice for the trial of members of the armed forces.[344] Civil law countries usually try their armed forces in civil courts,[345] although a State such as the Netherlands does still have a separate Military Chamber within its civil courts.[346] The prosecution services charged with the prosecution of the armed forces similarly vary, with civil law countries using regular (though specialised) public prosecutors, and common law countries employing separate military prosecutors. Although all are outside the chain of command, the degree of independence of these institutions does appear to vary. These are, of course, generalisations. Nonetheless, a uniform practice with regard to investigation does not appear to exist at this time.

Any attempt to abstract general standards from this practice, must remain tenuous. According to the *Guidelines*, beyond the standard of thoroughness, promptness, impartiality, and respect for the fundamental rights of the accused, States must also ensure standards of independence, and transparency.[347] With regard to independence, they find that 'an independent (…) investigative authority *must* be available to carry out criminal investigations (…)'.[348] With regard to transparency, they rather state that 'a criminal investigation *should* be as transparent as possible taking into account the circumstances'.[349] This indicates that the *Guidelines* consider transparency to be 'good practice' rather than a hard requirement, whereas independence is absolutely required when it comes to criminal investigations.

342 Compare *Al-Skeini and others v United Kingdom*, ECtHR [GC] 7 July 2011, 55721/07 with *Jaloud v the Netherlands*, ECtHR [GC] 20 November 2014, Appl No 47708/08.

343 E.g. https://www.msf.org/kunduz-hospital-attack-depth (last accessed 15 July 2021); http://www.reuters.com/article/us-afghanistan-attack-idUSKCN0RW0HC20151004 (last accessed 15 July 2021).

344 See e.g. The Turkel Commission (n 25) 154–5.

345 Cohen and Shany (n 7) 66–70; Margalit (n 148) Chapters 6-8; Tan (n 148) 229–32.

346 Wet op de rechterlijke organisatie, *Stb*. 1827, 20, last modified *Stb*. 2015, 460, art 55.

347 Lubell, Pejic and Simmons (n 23) 24–31.

348 Lubell, Pejic and Simmons (n 23) 24. Emphasis FT.

349 Lubell, Pejic and Simmons (n 23) 28. Emphasis FT.

Whether independence could indeed be said to be an investigative standard imposed by IHL remains up for debate. Although it is an oft-mentioned criterion, its precise basis in IHL remains unclear. In fact, the operationalisation of the grave breaches regime in Additional Protocol I relies heavily *on the military commander* for investigations, rather than a fully independent investigative authority. Commanders must prevent, supress and report breaches, initiate disciplinary or penal action against perpetrators, and are criminally liable should they fail to do so.[350] Initial reliance on military commanders is unavoidable, as is also recognised by the *Guidelines*.[351] As the ICRC Commentary makes clear,

> 'military commanders are not without the means for ensuring respect for the rules of the Conventions. In the first place, they are on the spot and able to exercise control over the troops and the weapons which they use. They have the authority, and more than anyone else they can prevent breaches by creating the appropriate frame of mind, ensuring the rational use of the means of combat and by maintaining discipline. Their role obliges them to be constantly informed of the way in which their subordinates carry out the tasks entrusted them, and to take the necessary measures for this purpose. Finally, they are in a position to establish or ensure the establishment of the facts, which would be the starting point for any action to suppress or punish a breach.'[352]

IHL, therefore, considers commanders to be instrumental in the investigation of violations. This would appear to be at odds with the finding that IHL, in fact, requires independent investigations. The *Guidelines* indicate that, in case of a criminal breach of IHL, commanders must report the breach to an assessment authority, which must in case of war crimes be independent. This, indeed, seems to be good practice. This is also in no way precluded by applicable rules of IHL and ICL, which allow for commanders to report breaches, rather than investigate them themselves. Nevertheless, the claim that *IHL itself* requires independence, when treaty law would rather suggest that it is commanders who *must* investigate, appears to be good practice, rather than a strict legal requirement. At the very least the starting point for an investigation envisioned by AP I is the commander, and as further guidance in *lex scripta* is absent, abstracting a standard of independence appears to stretch the law too far.

With regard to transparency, finally, the *Guidelines* find that criminal investigations should be transparent towards next of kin, as well as society at large. IHL is largely silent on this issue. Only with regard to the dead and missing, the Geneva Conventions impose specific obligations on States to

350 AP I, art 87(1) and (2) in conjunction with art 86(2).
351 Lubell, Pejic and Simmons (n 23) 16.
352 Pictet and others (n 17) 1022 [3560].

record casualties, insofar as possible including an identity and place of burial.[353] This information must be transmitted to an 'Information Bureau', which in turn transmits the information to the Protecting Power or Central Prisoners of War/Tracking Agency. These intermediaries then convey the information to the adverse party to the conflict, who communicates the news to next of kin.[354] Whether a broader standard of transparency can be derived from this limited obligation, is questionable. It is submitted that it is indeed good practice for investigations to be transparent, and that they should not be unduly classified. Nevertheless, military necessities may militate against making public certain information, and restrict publicity.

In sum, whereas IHL does not contain much guidance on how States must conduct investigations, this must not be taken to mean that it is fully within States' discretion to decide how they fulfil their investigate duties. Standards of effectiveness, thoroughness, genuineness, promptness, impartiality, and fundamental due process guarantees can be inferred from IHL and practice. Standards of independence and transparency, however often mentioned in this context, appear more tenuously linked to contemporary IHL. It is submitted these standards constitute 'good practice', rather than hard requirements under the *lex lata*.

4.4 Standards for investigations into simple IHL violations

Non-serious violations of IHL do not amount to international crimes. Whether they are crimes at all is therefore a matter of domestic law. As was explained above, international law does not require States to employ their penal systems in response to these types of violations, though they are under an obligation to ensure their own armed forces comply with the entirety of IHL.[355] The duty to investigate is instrumental in this regard. This is arguably even more so for simple violations, because as was shown above, it is only in case of war crimes that States must also enforce the law externally. This places the onus fully on States to internally supervise and enforce the non-criminal rules of IHL. Yet, IHL provides no guidance on how such investigations must be carried out. This leaves a large measure of discretion to States in deciding *how* they investigate non-criminal breaches of IHL.[356]

353 GC IV, art 16; AP I, art 33; GC I, art 17; and Rules 112-116 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 1). See further Breau and Joyce (n 236) 34–6; Zegveld (n 236) 458–9.
354 Extensively, see ICRC (n 2) [1585]-[1600].
355 *Supra*, §4.2.
356 Compare Tan (n 148) 210.

Guidance on what non-criminal investigations must entail, must again be based on inferences, as well as soft law and State practice. Further, recourse cannot be had to the ICL bodies in this context, because simple IHL violations fall outside of their jurisdiction.[357] The *Guidelines on Investigating Violations of International Humanitarian Law* indicate that non-criminal breaches of IHL should be submitted to an administrative investigation.[358] Generally, the aim of any investigation must be to establish the facts, and include a legal assessment of those facts. Investigations into simple violations must moreover 'suppress' the breach, which has a strong connection with prevention of breaches, and of their repetition.[359] This requires an investigation to uncover root causes for a breach, whether the cause is individual, or systemic.[360] For instance, was a breach caused by individual misconduct, by a (one off) technical malfunction, or was it the result of policy, or the incorrect implementation of IHL in operational codes of conduct? Importantly, in contradistinction with criminal investigations, the primary objective of administrative investigations is not as such to achieve individual accountability and retribution. Rather, it is to be found in prevention, and deterrence.

These aims do not directly assist in formulating clear investigative standards. It is submitted that, regardless, the structure of self-enforcement, the duty to respect and ensure respect for IHL, and the duty to effectuate IHL in good faith, must together entail a standard of *effectiveness*. This interpretation has wide support in soft law instruments and legal scholarship.[361] If IHL imposes an investigative obligation, then this obligation must be rendered effective through its application and interpretation. In the words of the *Guidelines*, the investigation must be '*capable* of enabling a determination of whether there was a non-criminal violation of international humanitarian law, of identifying the individual and systemic factors that caused or contributed to the incident, and of laying the ground for any remedial action that may be required'.[362] The standard of effectiveness, which also applies to criminal

357 They may adjudicate war crimes, in addition to certain other international crimes, only.
358 Lubell, Pejic and Simmons (n 23) 32.
359 ICRC (n 2) [2894]-[2898].
360 Cf. Lubell, Pejic and Simmons (n 23) 32–6.
361 Human Rights Council 23 September 2010, *Report of the Committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards*, A/HRC/15/50 [21] and [33]; Goldstone Report (2009) UN fact-finding mission on the Gaza conflict (25 Sept 2009), UN Doc. A/HRC/12/48 [1814]; 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, principle 3(b); The Turkel Commission (n 25) 114–5 [63]; Lesh (n 290) 131–2; Cohen and Shany (n 7) 60; Hampson (n 11) 17.
362 Lubell, Pejic and Simmons (n 23) 32.

investigations, is therefore modified slightly, to take account of the different aim of administrative investigations.

To establish what an effective investigation requires, we must look further. *A contrario* reasoning may provide some indications of what an investigation into non-serious violations need *not* entail. As there is no *prima facie* indication of criminal behaviour, an investigation need not meet criminal law standards, nor be focused on identifying individual perpetrators or establishing accountability.[363] Reasoning from the point of view of the precautionary obligations resting on States, the facts must be established in order to prevent future transgressions of the law. This signifies a 'lessons learned'-approach usually implemented through 'after action reviews', 'after action reports', or 'post-attack reviews'.[364] Such methods primarily aim to improve the operational capacities of militaries by gathering all the facts and fine-tuning procedures and operations, although they may be followed by *ex gratia* payments to (relatives of) victims.[365] In these kinds of investigations, there is no need to identify individual perpetrators; the focus is rather on the *occurrence*. In fact, many States employ these kinds of review concerning *all* military operations in which enemy forces have been engaged, regardless of any indication of a breach of the law whatsoever. This corresponds to the good practice identified in the *Guidelines*, which recommends recording all military operations, and to report any potential breach of IHL.

Existing practices of recording operational results and processes, ought therefore be complemented by a review mechanism which identifies potential breaches of IHL. Practice shows such investigations are often informal, and conducted by the military chain of command.[366] The extension in practice to all military operations can be explained as the military simply aims to optimise its operations and to operate as efficient as possible; the aim here is not to identify individual culprits or to hold individuals accountable. Further, this appears to be one of the most promising means of ensuring compliance by the armed forces. It has been shown that IHL violations are most often caused by 'depersonalisation' experienced by combatants.[367] This leads to their not feeling individually responsible for their actions, shifting their sense of responsibility to either their superior or the group as a whole. At the same time, militaries *need* their troops to experience such depersonalisation. Victor Hansen explains this:

363 Compare Margalit (n 41) 175–6.

364 States such as the US and the Netherlands employ these mechanisms.

365 As US practice illustrates; US Government Accountability Office, 'The Department of Defense's Use of Solatia and Condolence Payments in Iraq and Afghanistan' (2007), online at https://www.gao.gov/assets/gao-07-699.pdf (last accessed 15 July 2021).

366 Lubell, Pejic and Simmons (n 23) 33; Pictet (n 3) 594; Pictet and others (n 17) [3560]-[3563].

367 Daniel Muñoz-Rojas and Jean-Jacques Frésard, 'The Roots of Behaviour in War: Understanding and Preventing IHL Violations' (2004) 86 Revue Internationale de la Croix-Rouge/ International Review of the Red Cross 189, 193–4.

> 'The success of any military organization depends in large part on the ability of the organization to subordinate the desires of the individual to the greater needs and goals of the organization. When individuals subordinate their individuality, it allows them to disassociate their personal responsibility for their actions, claiming instead that they were merely acting as a part of a larger military unit. In the individual soldiers' eyes, any responsibility for their conduct is based on collective responsibility and on the directions and orders of their superiors within the chain of command.'[368]

If this is true, and militaries require their troops to subordinate their own will to that of the organisation of which they form part, and this allows for them to disassociate from their own responsibility, then the soundness of the military system itself is of paramount importance in preventing violations of the law. Reviewing military operations through after action reports then takes up a major part in ensuring compliance, as it optimises the military's insight in the consequences of its operations and the conduct of its troops in certain situations.

Disciplinary measures seem sufficient to safeguard compliance with relatively minor obligations and prohibitions, such as the prohibition of selling tobacco to prisoners of war above local market price.[369] Non-penal responses in the form of disciplinary action have the necessary individual deterrent effect associated with suppressing a certain action. Absent in such a system is an outside, independent investigator who conducts the fact-finding and investigative work, as the entire process takes place within the military itself. Given the non-criminal nature of the behaviour in question, however, this does not appear to be problematic. Should the review bring to light any facts that give rise to a suspicion of criminal behaviour, one may then initiate the procedure for a criminal investigation.

Looking at the aim and the practice of investigations into simple breaches, it would seem that *prompt* and *impartial* investigative responses are crucial. As was explained above, the effectiveness of gathering facts progressively diminishes the more time passes. Further, if those tasked with gathering the facts have an own interest in the outcome, or are themselves implicated in an incident, this might harm the integrity of the investigation.[370] Additional investigative standards which have been proposed, such as independence and transparency,[371] do not seem to have a clear basis in IHL. Whereas they will

368 Victor M Hansen, 'Developing Empirical Methodologies to Study Law of War Violations' (2008) 16 Willamette Journal of International Law & Dispute Resolution 342, 344.

369 GC III, art 28.

370 Lubell, Pejic and Simmons (n 23) 32–4; Hampson (n 11) 17.

371 Human Rights Council 23 September 2010, *Report of the Committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light*

certainly contribute to the investigatory process as such, they do not appear to be required under *lex lata*. It has been rightly observed that the more severe the incident in question, the more demanding the investigation will need to be.[372] If the administrative investigation raises a suspicion of a war crime, the investigation will have to be remitted to the appropriate authorities to conduct a criminal investigation.

In sum, States enjoy a wider discretion in how they conduct investigations into simple breaches of IHL. The law would appear to require them to ensure an *effective* investigation, which is *prompt* and *impartial*. This obligation is best implemented through the recording of all military operations, as a number of States already do in 'after action reviews'. Any indication of a breach of IHL, must then be submitted to further assessment. This may be done within the chain of command, and can result in disciplinary measures, as well as the adjustment of how military operations are conducted (e.g. targeting operations), and can facilitate procedures establishing State responsibility, or provide the basis for the acknowledgement of such responsibility. All in all, the investigation must be capable of establishing the facts and determining the legality of the State's action.

4.5 Résumé

Having determined in the previous section *that* breaches of IHL must be investigated, this section has examined *how* States must do so. Because IHL does not explicitly formulate any investigative standards, it might be assumed that it is up to the discretion of States to decide how they investigate breaches. Whereas there is some truth to this, IHL nonetheless imposes a number of concrete investigative standards States must comply with.

How the investigation must take shape, is in large part determined by the nature of the breach: is it a criminal or a non-criminal breach of IHL? War crime investigations are bound by stricter standards than those into simple breaches. The aim of preventing impunity, ensuring criminal accountability, and thereby exacting retribution, to a large extent determine the shape of the investigation. A thorough analysis of IHL, of the judicial practice of ICL bodies, as well as of State practice and soft law instruments, shows that investigations into war

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of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards, A/HRC/15/50 [21] and [33]; Goldstone Report (2009) UN fact-finding mission on the Gaza conflict (25 Sept 2009), UN Doc. A/HRC/12/48 [1814]; 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, principle 3(b); The Turkel Commission (n 25) 114–5 [63]; Lesh (n 290) 131–2; Cohen and Shany (n 7) 60.

372 Lubell, Pejic and Simmons (n 23) 32; Hampson (n 11) 17.

crimes must meet standards of effectiveness, thoroughness, genuineness, promptness, impartiality, and fundamental due process guarantees. Even in lieu of specific treaty guidance in IHL, a robust set of investigative standards therefore guides the criminal investigation into serious violations of IHL.

Simple violations of IHL, in contrast, are more loosely governed by international standards, which leaves States a measure of discretion in how they conduct administrative investigations. Standards which can be derived from IHL, State practice, and soft law instruments, would appear to pertain to an effective investigation, which is prompt and impartial. Such investigations may take place within the military procedures of the armed forces themselves, and can be largely informal. In case of individual transgressions, disciplinary measures can sufficiently ensure a deterrent effect, and whereas States are free to criminalise simple breaches of IHL, they are not obligated to do so. Beyond individual measures, administrative investigations should also, where appropriate, take into account any potential systemic shortcomings which may be the root cause for a breach.

From a legal perspective, criminal and non-criminal breaches of IHL are therefore subject to different investigative regimes and standards. Yet, one important overarching aim of investigations, is to establish the facts and facilitate a legal assessment. This ostensibly leads to a certain circularity: the legal assessment (serious or non-serious violation) determines the investigative regime, while it is the investigation which must show whether an incident constitutes a serious breach, a simple violation, or no violation at all. Practice may therefore very well be that the *triggering process* for the duty to investigate is the same for all violations: constant recording, reporting, and assessing, of military operations and incidents. This creates a comprehensive monitoring mechanism. After action reviews are one way of shaping this obligation, where incidents which indicate a war crime are remitted to authorities tasked with criminal investigations, whereas simple breaches are investigated within the chain of command. This system ensures that no cases fall through the cracks, and that potential breaches are investigated according to the seriousness of the incident.

Finally, the *Guidelines on Investigating Violations of International Humanitarian Law*, as well as certain other soft law instruments, identify further investigative standards, either as a legal requirement, or as good practice. These standards primarily concern independence, and transparency. This study does not corroborate these standards as being legally required by IHL, though their inclusion as 'good practice' must certainly be supported. The independence and transparency of an investigation will contribute to their ultimate effectiveness, and to their being perceived as effective. If such standards do not, however, derive from IHL, we should query where they do originate. It is submitted that these standards are inspired by international human rights law, where

such standards have indeed been formulated by various courts and supervisory bodies. Part II of this study engages in-depth with this field.

5 Conclusion: The duty to investigate IHL violations

The Introductory Chapter to this study identified a marked lack of clarity pertaining to investigative obligations under IHL. Because IHL does not provide fully explicit obligations for States to conduct an investigation into breaches, there has been scope for debate on whether such obligations even exist. In this light, this Chapter – and Part I of this study – have sought to answer two questions:

> *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?*

The first question, whether States must investigate violations of IHL, can be answered with a firm and unequivocal 'yes'. As was shown, the IHL system of supervision, implementation, and enforcement, fully relies on State investigations for its effectiveness. The lack of institutionalised international means of supervision and enforcement, place the task of effectuating IHL fully on States. In order to take up this task, and in light of the duty to respect and ensure respect for IHL, investigations are instrumental. States cannot discharge their obligations if they do not institute monitoring mechanisms which allow them to keep tabs on the conduct of their armed forces on the ground, and the effects of their military operations, followed-up by further investigations where those are indicated. A duty to investigate is, in light of this, engrained in IHL's DNA.

Indeed, a more in-depth examination of the sources of IHL shows that investigative obligations exist for *all* breaches of IHL. Nonetheless, IHL makes a sharp distinction in the obligations pertaining to criminal, and non-criminal breaches. A violation of IHL is 'criminal' when it falls within the exhaustive list of 'grave breaches', or when it is otherwise classified as a 'serious' violation. Such violations are war crimes, and constitute international crimes. Investigative obligations for these types of violations are broad-ranging, as is required by the rationale of preventing impunity. This means that States must not only investigate and prosecute war crimes committed by their own armed forces, wherever they commit them, but also those committed by others, if they have territorial or personal jurisdiction over the crime. In case of grave breaches this is expanded further, into a duty to vest universal jurisdiction. Thus, wherever war criminals go, the system for investigating and prosecuting them, is watertight. This system is strengthened further because States must continue such investigations after the armed conflict comes to an end, and in light of certain international obligations prohibiting statutes of limitations for war crimes, these may extend indefinitely.

Simple violations of IHL, which are all breaches which are not 'serious', are subject to a less extensive investigative regime. For these 'lighter' transgressions, the rationale of preventing impunity does not apply as such. That States must nevertheless investigate these breaches, corresponds with the overarching rationale of *effectuating* IHL. Investigations are instrumental in effectively ensuring compliance, supervising, and enforcing the rules of IHL. Because ensuring the effectuation of non-criminal rules of IHL is not a concern of the international community as a whole, a State is only obligated to investigate breaches of these rules when its own armed forces, or others under their authority, are involved. Thus, the duty to investigate simple breaches has an internal focus, whereas the duty to investigate criminal breaches also has an external limb. Finally, States must investigate simple breaches no matter where their forces operate, and it is submitted that they must continue to do so after the armed conflict ends.

The trigger for the duty to investigate, appears to be very similar for all breaches. Whenever the State has information which reasonably leads to a suspicion of a violation, it must start an investigation. The source of the information is immaterial. Whether States should *actively uncover* such information, through monitoring, is not explicitly provided for under IHL. The system of self-supervision and enforcement would, however, strongly suggest it. It is good practice to have a system in place which records the effects of all military operations, and extensive reporting obligations which ensure that appropriate authorities assess the incident, and decide whether further investigation (and prosecution), are necessary. Such a system best effectuates States' obligation to ensure respect for IHL, because it picks up all potential violations through a low-threshold fact-finding mechanism, coupled with further investigations where called for.

Employing such a system also assists in determining the applicable *standards* which must guide the investigation. The assessment authority will, based on the reported information, be able to judge whether an incident indicates a war crime, or rather a non-criminal breach. The severity of the incident plays a role in the standards the investigation must meet. War crimes require criminal investigations, meeting standards of effectiveness, thoroughness, genuineness, promptness, impartiality, and fundamental due process guarantees. Simple violations of IHL require administrative investigations, which leave more discretion to States in how they shape the investigative process. Nonetheless, such investigations will need to be effective, prompt, and impartial. Because criminal punishment and retribution are not the aim of such investigations, they regularly take place within the chain of command, and can result in disciplinary measures. Further, they ought to identify potential systemic issues which caused a breach, and facilitate the establishment of, or acknowledgment of, State responsibility for the breach.

While the above conclusions answer the sub-questions which guided Part I of the study, other questions remain. For instance, various soft law instruments and scholars have asserted that investigations must be guided by 'universal' standards, including independence and transparency. This study does not corroborate these standards as forming part of IHL – though they must certainly be supported as good investigative practice. This does beg the question, however: where *do* these standards derive from? It is submitted they are likely inspired by international human rights law, where independence and transparency are indeed corner stones of an effective investigation.

Human rights law, in addition to IHL, equally governs States' conduct during armed conflict. Human rights compliant investigations during armed conflict may well impose further obligations than IHL does, and into human rights violations – such as killings – which are perfectly in line with IHL. In order to properly set out the law governing investigative obligations during armed conflict, we must therefore answer two further questions. Firstly, what investigative obligations does IHRL impose, and how must these be applied during armed conflicts? And, secondly, how do IHL and IHRL relate, and how must States operate when both apply? What must they do if rules diverge? The first question is addressed in Part II of this study, concerning duties of investigation under IHRL. The second question is the subject of Part III, on interplay.