

Durham Research Online

Deposited in DRO:

13 January 2011

Version of attached file:

Published Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Schmitt, Michael N. (2011) 'Investigating violations of international law in armed conflict.', *Harvard national security journal*, 2 (1). pp. 31-84.

Further information on publisher's website:

<http://www.harvardnsj.com/2011/01/investigating-violations-of-international-law-in-armed-conflict/>

Publisher's copyright statement:**Additional information:**

Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a [link](#) is made to the metadata record in DRO
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the [full DRO policy](#) for further details.

ARTICLE

Investigating Violations of International Law in Armed Conflict

Michael N. Schmitt*

On December 27, 2008, the Israel Defence Force (IDF) launched *Operation Cast Lead* into Gaza in an attempt to thwart continuing attacks by Hamas and other Palestinian organized armed groups. Military operations continued for twenty-two days until Israel declared a unilateral cease-fire and withdrew its forces. Allegations of widespread human rights and international humanitarian law (IHL) violations ensued.¹

Among the issues raised in the aftermath of the conflict was the adequacy of investigation by the parties into possible violations of international law. In *Turning a Blind Eye: Impunity for Laws-of-War Violations during the Gaza War*, Human Rights Watch charged that “[m]ore than one year after the conflict, neither side has taken adequate measures to investigate serious violations or to punish perpetrators of war crimes.”²

* Professor of Public International Law, Durham University Law School, United Kingdom.

¹ See, e.g., AMNESTY INTERNATIONAL, OPERATION “CAST LEAD”: 22 DAYS OF DEATH AND DESTRUCTION (2009), available at <http://www.amnestyusa.org/uploads/mdel50152009en.pdf>; HUMAN RIGHTS WATCH, RAIN OF FIRE: ISRAEL’S UNLAWFUL USE OF WHITE PHOSPHORUS IN GAZA (2009), available at <http://www.hrw.org/en/reports/2009/03/25/rain-fire>; HUMAN RIGHTS WATCH, PRECISELY WRONG: GAZA CIVILIANS KILLED BY ISRAELI DRONE-LAUNCHED MISSILES (2009), available at <http://www.hrw.org/en/reports/2009/06/30/precisely-wrong-0>; HUMAN RIGHTS WATCH, WHITE FLAG DEATHS: KILLINGS OF PALESTINIAN CIVILIANS DURING OPERATION CAST LEAD (2009), available at <http://www.hrw.org/node/85014>; HUMAN RIGHTS WATCH, ROCKETS FROM GAZA, HARM TO CIVILIANS FROM PALESTINIAN ARMED GROUPS’ ROCKET ATTACKS (2009), available at <http://www.hrw.org/node/84868>; HUMAN RIGHTS WATCH, “I LOST EVERYTHING”: ISRAEL’S UNLAWFUL DESTRUCTION OF PROPERTY DURING OPERATION CAST LEAD (2010), available at <http://www.hrw.org/node/90334>.

² HUMAN RIGHTS WATCH, TURNING A BLIND EYE: IMPUNITY FOR LAWS-OF-WAR VIOLATIONS DURING THE GAZA WAR (2010), available at <http://www.hrw.org/node/89575> [hereinafter TURNING A BLIND EYE]. Hamas had

B'Tselem, an Israeli non-governmental organization, similarly argued that because the military, including the IDF's legal officers, conducted most Israeli investigations, the process was tainted, for "no system can investigate itself."³ Perhaps most significantly, the September 2009 "Goldstone Report," commissioned by the United Nations Human Rights Council President, found that "the failure of Israel to open prompt, independent and impartial criminal investigations even after six months have elapsed constitute a violation of its obligations to genuinely investigate allegations of war crimes and other crimes, and other serious violations of international law."⁴ The United Nations General Assembly

conducted no meaningful investigations by the time of the report; Israel had conducted 150 investigations and issued two reports, but Human Rights Watch found them to "have fallen short of international standards for investigations." *Id.* at 1. For the Israeli reports, see STATE OF ISRAEL, THE OPERATION IN GAZA, 27 DECEMBER 2008-18 JANUARY 2009: FACTUAL AND LEGAL ASPECTS (2009), available at <http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperation.pdf>; STATE OF ISRAEL, GAZA OPERATIONS INVESTIGATIONS: AN UPDATE, (2010), available at <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf>. In July 2010, Israel published its third report on *Cast Lead*, specifically addressing the status of the ongoing investigations. STATE OF ISRAEL, GAZA OPERATION INVESTIGATIONS: SECOND UPDATE (2010), available at <http://www.mfa.gov.il/NR/rdonlyres/1483B296-7439-4217-933C-653CD19CE859/0/GazaUpdateJuly2010.pdf>.

In June 2010, the Israeli Government established an independent public commission consisting of a former Israeli Supreme Court Justice, a distinguished Israeli international law professor, a retired Israeli general, a Northern Irish Nobel Peace Prize Laureate, and the former Canadian Judge Advocate General (the commission was later expanded to include an Israeli scholar and a former diplomat). Although formed in response to the *Mavi Marmara* incident during the Israeli blockade of Gaza, the "Turkel Commission" was further empowered to investigate "the mechanism for examining and investigating complaints and claims raised in relation to violations of the laws of armed conflict ... conform with the obligations of the State of Israel under the rules of international law." *Government Establishes Independent Public Commission*, ISRAELI MINISTRY OF FOREIGN AFFAIRS (June 14, 2010), http://www.mfa.gov.il/MFA/Government/Communiques/2010/Independent_Public_Commission_Maritime_Incident_31-May-2010.htm. For discussion and criticism of such commissions, see Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/8/3 (May 2, 2008).

³ *Israel's Report to the UN Misstates the Truth*, B'TSELEM (Feb. 4, 2010), http://www.btselem.org/English/Gaza_Strip/20100204_Israels_Report_to_UN.asp. The organization also argued that "[t]he investigation must examine not only the conduct of the soldiers in the field but also the orders given them and the policy that was set by the senior military echelon and the political echelon." *Id.*

⁴ *Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, ¶ 1620, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009) [hereinafter Goldstone Report]. It specifically determined that "the system put in place by Israel...to deal with allegations of serious wrongdoing by armed forces personnel does not comply with [all of the universal principles of independence, effectiveness, promptness and impartiality]"...and that it "is not effective in addressing the violations

subsequently endorsed the Goldstone Report, although the action, like the report, proved highly contentious.⁵

In light of the controversy, the Human Rights Council established a “committee of independent experts in international humanitarian and human rights laws 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.”⁶ Essentially an “investigation into investigations,” the committee issued its report in September 2010.⁷ In

and uncovering the truth.” *Id.* ¶¶ 1611–13. The report was highly controversial. For instance, the U.S. House of Representatives passed a resolution condemning the report. H. Res. 867, 111th Cong. (2009). See also Laurie Blank, *The Application of IHL in the Goldstone Report: A Critical Commentary*, 12 Y.B. INT’L HUMANITARIAN L. (forthcoming 2010).

⁵ G.A. Res. 64/10, U.N. Doc. A/RES/64/10 (Dec. 1, 2009). Of the Permanent 5 members of the Security Council, the United States voted against approval of the report, whereas China voted in favor and Russia, France and the United Kingdom abstained. The Deputy U.S. Representative to the United Nations criticized the resolution and called the Goldstone Report biased:

We continue to believe that the Report of the UN Fact-Finding Mission on the Gaza Conflict, widely known as the Goldstone Report, is deeply flawed. We have previously noted shortcomings that include its unbalanced focus on Israel, the negative inferences it draws about Israel’s intentions and actions, its failure to deal adequately with the asymmetrical nature of the Gaza conflict, and its failure to assign appropriate responsibility to Hamas for deliberately targeting civilians and basing itself and its operations in heavily civilian-populated urban areas. The Goldstone Report is also problematic in its many overreaching recommendations and its sweeping legal and political conclusions.

U.N. GAOR, 64th Sess., 39th plen. mtg. at 12, U.N. Doc. A/64/PV.39 (Nov. 5, 2009). The General Assembly called upon both Israel and the Palestinians to conduct investigations that “are independent, credible and in conformity with international standards into the serious violations of international humanitarian and international human rights law reported by the Fact-Finding Mission.” G.A. Res. 64/10, *supra*, at 2. In February 2010, the Assembly reiterated its call for investigations. G.A. Res. 64/254, U.N. Doc. A/RES/64/254 (Mar. 25, 2010).

⁶ Follow-up to the report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict, H.R.C. Res. 13/9, U.N. Doc. A/HRC/RES/13/9 (Apr. 14, 2010). Of the P-5, the United States voted against the resolution, Russia and China voted in favor and France and the United Kingdom abstained.

⁷ Report of the Committee of Independent Experts in International Humanitarian and Human Rights Laws to Monitor and Assess Any Domestic, Legal or Other Proceedings

it, certain aspects of the investigations conducted by both sides were criticized.⁸

Although the Committee's report summarizes the human rights and IHL law bearing on the conduct of investigations, it neither does so in depth nor with reference to State practice.⁹ This article examines the legal standards in greater depth. It intentionally avoids the politically charged matter of Israeli and Palestinian investigative practices. Similarly, it draws no conclusions as to the Committee's assessment thereof. Rather, the goal is more general — to identify criteria against which investigations must be judged under international law and, in the process, clarify the relationship between IHL legal criteria and those residing in human rights law. This broader examination is essential, for claims of non-compliance are limited to neither *Operation Cast Lead*, nor to the conflict between Israel and the Palestinians.¹⁰ Moreover, since such investigations are increasingly frequent, an urgent need exists for practical legal guidance on their conduct.

The inquiry will proceed in four phases. First, the relevant IHL will be set forth. Since the *lex scripta* is limited, an effort will be made to identify criteria for investigations that are, or are not, implicit in the law. Second, human rights norms regarding investigations will be briefly surveyed, as will the relationship between IHL and human rights law. The purpose is to determine which body of law applies to investigations, and how. Third, the practice of four States (Canada, Australia, United Kingdom and United States) will be examined to determine whether there are commonalities that can elucidate the extant norms. Finally, the

Undertaken by both the Government of Israel and the Palestinian Side, U.N. Doc. A/HRC/15/50 (Sept. 21, 2010) (Advanced Edited Version) [hereinafter Investigations Report].

⁸ The Committee expressed concern about a purported conflict of interest involving the provision of legal advice on both operational and investigative matters by the Military Advocate General (although the criticism was specific to the case of Gaza), noted that the Israelis should have paid greater heed to victims and witnesses (although the committee did not find the human rights standards in this regard as strictly applicable to armed conflict), stated that Israel failed to meet its human rights and humanitarian law obligations to investigate torture and high level violations, and stated that it could not conclude that Hamas had met its obligation to conduct "credible and genuine" investigations. *Id.* at 23–24.

⁹ *Id.* at 3–11.

¹⁰ See, e.g., HUMAN RIGHTS WATCH, PROMOTING IMPUNITY: THE ISRAELI MILITARY'S FAILURE TO INVESTIGATE WRONGDOING (2005) (criticizing earlier Israeli investigations); *Issue Brief: Getting to the Truth through an Independent Commission of Inquiry*, AMNESTY INTERNATIONAL, <http://www.amnestyusa.org/war-on-terror/page.do?id=1541004> (calling for an Independent Commission of Inquiry into U.S. practices during the so-called "war on terror").

article will conclude by setting forth those characteristics of investigations that represent not “best practice” or *lex ferenda*, but instead the applicable minimum criteria for compliance with the *lex lata*.

I. IHL Requirements

Prior to the First World War, it was generally left to States to determine whether to punish their own nationals or captured enemy soldiers for violations of the laws and customs of war. The primary international remedy for violations was pecuniary in nature. As an example, the 1907 Hague Regulations provided that a “belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”¹¹ Following the conflict, the Versailles Treaty contemplated the prosecution by “military tribunals [of] persons accused of having committed acts in violation of the laws and customs of war,” and required Germany to hand over, on request, all such individuals.¹² However, the Dutch government declined to surrender the Kaiser for trial, claiming that to do so would be a breach of neutrality, and the German government refused to transfer its citizens, instead agreeing with the Allies to conduct prosecutions before the German Supreme Court in Leipzig.¹³ Very few trials were held and the sentences were disproportionately light.

The experience of the Second World War was dramatically different. During the conflict, the Allies made clear their intent to prosecute perpetrators of war crimes, including those who ordered them.¹⁴ Upon termination of hostilities, war crimes trials were conducted by the victorious Allies at the International Military Tribunals at Nuremberg and Tokyo,¹⁵ by occupying powers,¹⁶ and by individual States.¹⁷

¹¹ Hague Convention (IV) Respecting the Laws and Customs of War on Land, art. 3, Oct. 18, 1907, 36 Stat. 2277, 207 Consol. T.S. 277.

¹² Treaty of Peace with Germany, art. 228–29, June 28, 1919, 2 Bevens 43, 11 Martens Nouveau Recueil (ser. 3) 323, 225 Consol. T.S. 188.

¹³ On the trials, see CLAUDE MULLINS, *THE LEIPZIG TRIALS: AN ACCOUNT OF THE WAR CRIMINALS’ TRIALS AND STUDY OF GERMAN MENTALITY* (1921).

¹⁴ See, e.g., Declaration of Four Nations on General Security, Oct. 30, 1943, 9 Dep’t St. No. 307(1943) (Moscow Declaration on Atrocities).

¹⁵ See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal art. 1–3, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter]; Charter of the International Military Tribunal for the Far East at Tokyo, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Apr. 26, 1946, 4 U.S.T. 27, T.I.A.S. No. 1589.

A. *The 1949 Geneva Conventions*

As importantly, the international community required States to actively pursue prosecution in future conflicts by confirming such a duty in each of the four 1949 Geneva Conventions.¹⁸ The relevant articles in the instruments are nearly identical. They provide:

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

¹⁶ Control Council Law No. 10, (1946) (Ger.). The law was promulgated by the Allied Control Council, which was responsible for the military occupation of Germany by the United States, United Kingdom, Soviet Union, and France. The law authorized each of the occupying powers to conduct its own war crimes trials independent of the International Military Tribunal.

¹⁷ Many war crimes trials were conducted in national courts that enjoyed jurisdiction over the relevant offenses and offender (e.g., an offense committed by a national of the State or against its nationals). Control Council Law No. 10 set forth procedures for such cases when the accused was located in Germany: “When any person in a Zone in Germany is alleged to have committed a crime, as defined in Article II, in a country other than Germany or in another Zone, the government of that nation or the Commander of the latter Zone, as the case may be, may request the Commander of the Zone which the person is located for his arrest and delivery for trial to the country or Zone in which the crime was committed. Such request for delivery shall be granted by the Commander receiving it unless he believes such person is wanted for trial or as a witness by an International Military Tribunal, or in Germany, or in a nation other than the one making the request, or the Commander is not satisfied that delivery should be made, in any of which cases he shall have the right to forward the said request to the Legal Directorate of the Allied Control Authority. A similar procedure shall apply to witnesses, material exhibits and other forms of evidence.” Control Council Law No. 10, *id.* art. IV.1.

¹⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

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 [for in the Third Geneva Convention, Article 105 ff].¹⁹

By the provisions, States Party to the Conventions shoulder three fundamental obligations: 1) to enact the domestic legislation necessary to prosecute potential offenders; 2) to search for those accused of violating the Conventions; and 3) to either prosecute such individuals or turn them over to another State for trial (*aut dedere aut punire*). The grave breaches referenced in the first paragraph are set forth in other articles of the conventions.²⁰ Violations not constituting grave breaches (such as misuse of the Red Cross emblem) are nevertheless to be addressed in national penal legislation, although there is no treaty obligation to prosecute or extradite.

Not every violation of IHL constitutes a war crime. Instead, the term “war crimes” refers to violations that result in individual penal responsibility of individuals.²¹ While States have the obligation to ensure

¹⁹ GC IV, *supra* note 18, art. 146.

²⁰ GC I, *supra* note 18, art. 50; GC II, *supra* note 18, art. 51; GC III, *supra* note 18, art. 130; GC IV, *supra* note 18, art. 147.

²¹ There is no definitive delineation between the two categories. The Charter of the IMT cited the following as examples of war crimes: “murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or destruction not justified by military necessity.” IMT Charter, *supra* note 15, art. 6(b). Without doubt, all grave breaches of the 1949 Geneva Conventions constitute war crimes. Additionally, it is generally accepted that those offenses set forth in Article 8 of the Statute of the International Criminal Court amount to war crimes under customary law (although the precise parameters of the offenses may differ from those in the Statute). Rome Statute of the International Criminal Court art. 8, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter ICC Statute]. On the distinction between war crimes and acts that merely violate IHL, see Hersch Lauterpact, *The Law of Nations and*

compliance with all aspects of IHL, only war crimes give rise to the obligation to prosecute. For instance, States have the obligation to disseminate the Conventions,²² but the failure of officials to do so does not reach the level of a war crime.

With regard to investigations, the relevant text lies in the second paragraph's complementary requirements to "search for" persons alleged to have committed grave breaches and to try them domestically or turn them over to other Parties, an obligation which can be met by transfer to a competent international tribunal.²³ The International Committee of the Red Cross' official *Commentary* on the articles confirms that the obligation extends to nationals of the State and members of the enemy forces, and that the Parties must actively search for, arrest and prosecute those responsible for violations as quickly as possible.²⁴ Any request for extradition has to be supported by evidence establishing a "prima facie case," which the *Commentary* interprets as "a case in which the facts would justify proceedings taken in the country to which application is made for extradition."²⁵ Finally, the *Commentary* refers to the International Law Commission's 1954 *Draft Code of Offences against the Peace and Security of Mankind's* inclusion of "acts in violation of the laws or customs of war."²⁶ The reference implies that the duties set forth in the

the Punishment of War Crimes, 21 BRIT. Y.B. INT'L L. 77 (1944); Yoram Dinstein, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 263–66 (2d ed. 2010).

²² See, e.g., GC III, *supra* note 18, art 127; GC IV, *supra* note 18, art. 144; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict, art. 83, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

²³ International Committee of the Red Cross, COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK ARMED FORCES IN THE FIELD 366 (Jean Pictet ed. 1952) [hereinafter GC I Commentary].

²⁴ *Id.* at 365–66; INT'L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 623 (Jean Pictet ed. 1960) [hereinafter GC III Commentary]; INT'L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 592–93 (Jean Pictet ed. 1958) [hereinafter GC IV Commentary].

²⁵ GC I Commentary, *supra* note 23, at 366. Should extradition of an accused be precluded by national legislation, for instance because of nationality, the State having custody of the individual must try that person before its own courts. *Id.* See also INT'L COMM. OF THE RED CROSS, COMMENTARY: II GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF THE ARMED FORCES AT SEA 265 (Jean Pictet ed. 1960); GC III Commentary, *supra* note 24, at 623–64; GC IV Commentary, *supra* note 24, at 593.

²⁶ GC IV Commentary, *supra* note 24, at 588 (citing Draft Code of Offences against the Peace and Security of Mankind, art. 2 (13), in Rep. of the Int'l Law Comm'n, U.N. Doc. A/2693 GAOR, Supp. No. 9, at 9 (1954)).

provisions are not limited to those articulated in the Conventions themselves, but extend to any war crimes.

Beyond these basic explanations, the *Commentary* offers little guidance in interpreting the articles. In particular, it sets no standards for the nature of the investigation that has to be conducted into possible war crimes. Nevertheless, certain conclusions can be deduced from the text and its accompanying commentary.

- 1) The articles impose no obligation to conduct investigations to uncover IHL violations. Rather, 1) an allegation of 2) a war crime is the condition precedent to activation of the duty. There is no requirement that the identity of the possible offender be known, only that a violation be suspected.
- 2) There is no limitation as to the source of an allegation. Presumably, the requisite allegation could be levelled by State authorities, private individuals, non-governmental organizations, other States, or intergovernmental organizations.
- 3) There is a threshold of certainty below which the obligations do not apply, a fact suggested by the lack of a requirement to prosecute or extradite absent a *prima facie* case. Although the text refers solely to prosecution, an analogous condition of reasonableness logically applies to the duty to search for offenders (investigate). Thus, not every allegation requires an investigation; only those sufficiently credible to reasonably merit one do.
- 4) The requirements apply to all violations of IHL that constitute war crimes.
- 5) The requirement to investigate possible war crimes and prosecute those responsible extends to the actions of individuals who order the commission of an offense. By the principle of “command responsibility,” such individuals are treated as perpetrators of the resulting crime, not merely accomplices.²⁷ Thus, setting a policy of committing war crimes, such as directing forces to target the enemy civilian

²⁷ See, e.g., ICC Statute, *supra* note 21, art. 25.3(b); Statute of the International Tribunal for Rwanda, S.C. Res. 955 annex, U.N. Doc. S/RES/955, art. 6(1) (Nov. 8, 1994) [hereinafter ICTR Statute]; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/25704 annex, art. 7(1) (May 3, 1993) [hereinafter ICTY Statute]; ICRC, *I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* Rule 152 (Jean-Marie Henkaerts & Louise Doswald-Beck eds. 2005) [hereinafter CIHL].

population, would necessitate investigation and, if appropriate, prosecution.

B. The 1977 Additional Protocol I

Between 1974 and 1977 a Diplomatic Conference was convened to further develop the law that had been set forth in 1949.²⁸ The resulting Protocols Additional (Protocol I for international armed conflict and Protocol II for non-international) do not supplant the Conventions, but rather supplement them for State Parties to the two instruments.²⁹ While Protocol II makes no reference to a duty to investigate alleged war crimes, Protocol I builds on the duty to investigate and prosecute set forth in the Conventions, which it expressly references.³⁰ In addition to listing those violations that constitute grave breaches and requiring States to cooperate in criminal investigations, in Article 87 the Protocol “operationalizes” the requirements of investigation and prosecution.

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

...

3. 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

²⁸ The Conference was convened by the Swiss government and held four sessions: Feb. 20–Mar. 29 1974; Feb. 3–Apr. 18 1975; Apr. 21–June 11 1976; and Mar. 17–June 10 1977.

²⁹ AP I, *supra* note 22, art. 1.2; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 1.1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. Notably, the United States and Israel have elected not to become a Party to either of the Protocols, although some of the norms expressed in provisions thereof reflect customary international law and as such bind both States, as well as all other non-Parties.

³⁰ AP I, *supra* note 22, arts. 85, 87–89.

initiate disciplinary or penal action against violators thereof.³¹

Importantly, the ICRC *Commentary* on the Protocols expressly contemplates investigations conducted by the commander, who would in such cases “act like an investigating magistrate.”³² The article is designed to leverage the internal command and disciplinary structures of the armed forces to identify and prosecute offenders. As emphasized in the *Commentary*, “[w]hether 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.”³³ Thus, Article 87 imposes a duty on members of the armed forces to act proactively in the face of potential or possible IHL violations.

Commanders represent the key to implementation. The mandate to prevent, identify, and act extends to all members of the military exercising a command function, no matter how senior or junior.³⁴ They need not be formally designated as commanders according to the regulations of their armed forces; the obligations attach as soon as they assume a command function. For example, the concept of “commander” as used in Protocol I applies to “the common soldier who takes over as head of the platoon to which he belongs at the moment his commanding officer has fallen and is no longer capable of fulfilling his task.”³⁵ Commanders are not only charged with reacting to violations that occur in their presence or come to their immediate attention, but also with creating a “command climate” that fosters preventing and reporting violations.³⁶

³¹ *Id.* art. 87.

³² INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et al. eds. 1987), ¶ 3562 [hereinafter AP Commentary].

³³ *Id.* ¶ 3550.

³⁴ *Id.* ¶ 3553; MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICT 528 (1982).

³⁵ AP Commentary, *supra* note 32, ¶ 3553. Nor do commanders necessarily exercise command only over those officially assigned to their unit. Should a commander be temporarily in control of forces during a particular operation or as a result of the flow of battle, he or she must ensure compliance with the provisions of Article 87 and other IHL norms vis-à-vis such forces. *Id.* ¶ 3554. For the purposes of the article, a commander is also responsible for the actions of “other persons under their control,” as in the case of the civilian population in occupied territory or troops of other units operating in his or her sector of occupation. *Id.* ¶ 3555.

³⁶ *Id.* ¶ 3550.

The fact that legal advisers may be attached to a unit does not relieve the commander of responsibility for enforcing IHL. Such advisers “are there to ‘advise the military commanders’ in the field and not to replace them.”³⁷ Of course, this caveat does not imply that commanders must perform all associated tasks themselves; such an obligation would be impractical in light of their combat duties. Thus, commanders may assign tasks to, for example, the military police and legal advisers and rely on them to properly execute such tasks.³⁸ What they cannot delegate is the responsibility to ensure compliance with IHL by the forces they command.

The State must take measures to impose these duties upon commanders and ensure they implement them.³⁹ During the negotiations of Protocol I, a number of delegations expressed concern that Article 87 might be interpreted as relieving governmental authorities of their responsibilities or that commanders in the field might “encroach on the judgement of the judicial authorities.”⁴⁰ Despite such concerns, commanders often turn to the courts to address possible war crimes.⁴¹ As a matter of law, it is incontrovertible that the State continues to bear responsibility for implementation, that the duties to investigate and prosecute extend throughout the chain of command, and that judicial and other disciplinary bodies retain full responsibility for performing their functions. The responsibilities are complementary, with commanders expected to exercise whatever authority has been vested in them within the implementation, enforcement, and disciplinary structure of their armed forces and government.⁴² As with related provisions of the 1949 Geneva Conventions and the corresponding ICRC *Commentary* thereon, neither Article 87 nor the Additional Protocols *Commentary* offer

³⁷ *Id.* ¶ 3557. The obligation to have legal advisers available to advise on implementation of IHL is set forth in GC IV, *supra* note 18, art. 82.

³⁸ AP Commentary, *supra* note 32, ¶ 3563.

³⁹ *Id.* ¶ 3552.

⁴⁰ *Id.* ¶ 3562; *see also* BOTHE ET AL., *supra* note 34, at 527–29.

⁴¹ For instance, as of October 2010, the U.S. Army has court-martialed thirty-two soldiers on murder or manslaughter charges arising from the deaths of civilians, convicting twenty-two of them (the number excludes those charged and convicted of lesser offenses, such as negligent homicide or aggravated assault). Charlie Savage, *Case of Soldiers Accused in Afghan Civilian Killings May Be Worst of Two Wars*, N.Y. TIMES, Oct. 4, 2010, at A9.

⁴² For instance, doing so might involve “informing superior officers of what is taking place in the sector, drawing up a report in the case of a breach, or intervening with a view to preventing a breach from being committed, proposing a sanction to a superior who has disciplinary power, or—in the case of someone who holds such power himself—exercising it, within the limits of his competence, and finally, remitting the case to the judicial authority where necessary with such factual evidence as it was possible to find.” AP Commentary, *supra* note 32, ¶ 3562.

guidance regarding the nature of the investigations that must be conducted into possible violations that come to the commander's attention. However, certain conclusions can be derived from them.

- 1) The responsibility to enforce the requirement to identify, report, and respond to violations extends throughout the chain of command.
- 2) Although the article is framed in terms of commanders' duties, it is clear that the intent was to create a seamless system for identifying and responding to potential and possible war crimes. Thus, an implied duty of reporting violations extends to everyone in the military.
- 3) The article contemplates a system of military self-policing that complements the broader duty of States to investigate and prosecute. It is accordingly proper for the military to take action in response to possible breaches. To the extent the military, in light of the attendant circumstances, fully examines incidents and appropriately punishes those responsible for violations, the State's obligations have been met.
- 4) There is no prohibition on commanders investigating possible violations occurring within their own units or committed by others under their control.
- 5) The existence of a military justice system or the attachment of legal advisers to a unit does not relieve a commander of his or her responsibilities to respond to possible breaches.
- 6) That subordinate commanders have responsibility to investigate and otherwise repress breaches does not relieve superior commanders of the responsibility to address possible war crimes that have come to their attention and are not being effectively dealt with by those subordinates.
- 7) The emphasis on the criticality of command as a mechanism for handling possible violations suggests that methods of investigations that might undermine command functions and effectiveness are inappropriate.⁴³

⁴³ For instance, it would be unreasonable to impose a requirement to report a possible violation only to a superior commander if that commander may have been involved in the incident. The duty to report borne by the subordinate would remain intact in such circumstances, but other means of bringing the matter to the attention of authorities capable of taking action would be acceptable. Similarly, it would generally not be appropriate for a subordinate commander to formally conduct an investigation into the activities of an immediate superior, since doing so would otherwise undermine the superior's command authority and the command relationship may have a chilling effect on the subordinate's conduct of a full and objective investigation.

C. Customary International Humanitarian Law

The fact that Protocol I is binding as such only on Parties thereto begs the question of the customary status of IHL norms regarding investigations and prosecution conducted by non-Parties, such as the United States and Israel. In its *Customary International Humanitarian Law* study, the ICRC asserts that the principles set forth in the 1949 Geneva Convention and Protocol I regarding investigations and prosecutions enjoy this status.⁴⁴ Specifically, Rule 158 provides that “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.”⁴⁵ Although less detailed than the corresponding treaty text, the rule generally captures the principles the treaty articles express.

Rule 158 unquestionably reflects a customary norm. Beyond the 1949 Conventions and Protocol I, numerous other international law instruments articulate the obligation to investigate possible war crimes, or at least to prosecute those responsible for them. Examples include the Genocide Convention,⁴⁶ Hague Cultural Property Convention and its Second Protocol,⁴⁷ Torture Convention,⁴⁸ Chemical Weapons Convention,⁴⁹ Amended Landmines Protocol,⁵⁰

⁴⁴ It should be noted that the authoritativeness of the study has been questioned and, therefore, its determinations should be treated with caution. On the U.S. position, see Joint Letter from John Bellinger and William Haynes to Jakob Kellenberger on Customary International Humanitarian Law Study, 46 I.L.M. 514 (2007).

⁴⁵ CIHL, *supra* note 27, rule 158.

⁴⁶ Convention on the Prevention and Punishment of the Crime of Genocide, art. IV, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

⁴⁷ Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 7, May 14, 1954, S. TREATY DOC. NO. 106-1 (1999), 249 U.N.T.S. 240; Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts arts. 15–17, Mar. 26, 1999, 38 I.L.M. 769.

⁴⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 7, Dec. 10, 1984, S. TREATY DOC. NO. 100.20, 1465 U.N.T.S. 85.

⁴⁹ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, art. VII(1), Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 45.

⁵⁰ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Amended Protocol II art. 14, May 3, 1996, 35 I.L.M. 1206.

Ottawa Convention on Landmines,⁵¹ Dublin Convention on Cluster Munitions,⁵² and the Statute of the International Criminal Court.⁵³

Organs of the United Nations have likewise repeatedly cited the obligation to investigate and prosecute war criminals. Indeed, during its first session in 1946, the General Assembly called on Member States and non-members alike to take steps to apprehend war criminals and return them to those States where the offenses in question were committed.⁵⁴ It has since urged States to investigate IHL violations and facilitate the prosecution of war criminals on multiple occasions.⁵⁵ In particular, in 2005 the General Assembly adopted 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*. Paragraph 3 of the document provides that “[t]he obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to . . . [i]nvestigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law.”⁵⁶

The requirements also appear at the national level. Fulfilling the obligation set forth in the Geneva Conventions, most States have passed legislation providing for jurisdiction over war crimes.⁵⁷ Additionally, military manuals generally impose a duty on their armed forces to investigate and prosecute possible war crimes.⁵⁸ For instance,

⁵¹ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, art. 9, Sept. 18, 1997, 36 I.L.M. 1507.

⁵² Convention on Cluster Munitions, art. 9, Dec. 3, 2008, 48 I.L.M. 357.

⁵³ ICC Statute, *supra* note 21, pmb1.

⁵⁴ G.A. Res. 3(I), U.N. Doc. A/RES/3(I) (Feb. 13, 1946).

⁵⁵ *See, e.g.*, G.A. Res. 2338 (XXII), A/RES/2338(XXII) (Dec. 18, 1967); G.A. Res. 2391 (XXIII), A/RES/2391(XXIII) (Nov. 26, 1968); G.A. Res. 2583 (XXIV), A/RES/2583(XXIV) (Dec. 15, 1969); G.A. Res. 2712, A/RES/2712(XXV) (XXV) (Dec. 15, 1970); G.A. Res. 2840 (XXVI), A/RES/2840(XXVI) (Dec. 18, 1971); G.A. Res. 3074 (XXVIII), A/RES/3074(XXVIII) (Dec. 3, 1973).

⁵⁶ G.A. Res. 60/147, Annex, ¶ 3, A/RES/60/147 (Dec. 16, 2005).

⁵⁷ *See, e.g.*, War Crimes Act, 18 U.S.C. § 2441 (2006).

⁵⁸ The United States’ *Commander’s Handbook on the Law of Naval Operations* is illustrative: “Alleged violations of the law of armed conflict, whether committed by or against U.S., allied, or enemy personnel, are to be reported promptly through appropriate command channels. War crimes alleged to be committed by U.S. personnel or its allies, must be investigated thoroughly, and where appropriate, remedied by corrective action. War crimes committed by enemy personnel will be reviewed for appropriate responsive

a U.S. commander is criminally responsible if “he failed to exercise properly his command authority or failed otherwise to take responsible measures to discover and correct violations that may occur.”⁵⁹ This is especially relevant in light of the Protocol I non-Party status of the United States.

The British *Manual of the Law of Armed Conflict* achieves the same result by citing the language of Article 28 of the International Criminal Court Statute (to which it is Party) to confirm that a commander “becomes criminally responsible if he ‘knew or, owing to the circumstances at the time, should have known’ that war crimes were being or were about to be committed and failed ‘to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authority for investigation and prosecution.’”⁶⁰ The Manual points out that practical considerations reinforce this treaty obligation, for “[f]ailure by belligerent governments to investigate and, where appropriate, punish the alleged unlawful acts of members of their armed forces can contribute to the loss of public and world support, leading to isolation for the state involved.”⁶¹

Finally, the duty to investigate and prosecute has been the subject of agreements between belligerents. For instance, in 1991 Croatia and Yugoslavia agreed that “[e]ach party undertakes, when it is officially informed of [an allegation of violations of IHL] made or forwarded by the ICRC, to open an inquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence and to punish those responsible in accordance with the law in force.”⁶² A similar agreement was executed by the parties to the conflict in Bosnia and Herzegovina the following year.⁶³

action.” U.S. NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, ¶ 6.1.2.1 (2007) [hereinafter NWP 1-14M].

⁵⁹ *Id.* ¶ 6.1.3.

⁶⁰ U.K. MINISTRY OF DEFENCE, THE MANUAL ON THE LAW OF ARMED CONFLICT 438 (2004), [hereinafter U.K. MANUAL].

⁶¹ *Id.* ¶ 6.1.2.

⁶² Memorandum of Understanding on the Application of International Humanitarian Law between Croatia and the Socialist Federal Republic of Yugoslavia art. 11, Nov. 27, 1991, *quoted in* CIHL, *supra* note 27, at 3946.

⁶³ Agreement between Representatives of Mr. Alija Izetbegovic (President of the Republic of Bosnia and Herzegovina and President of the Party of Democratic Action), Representatives of Mr. Radovan Karadzic (President of the Serbian Democratic Party), and Representative of Mr. Miljenko Brkic (President of the Croatian Democratic Community) art. 5, May 22, 1992, *quoted in* CIHL, *supra* note 27, at 3947.

While the obligation undeniably constitutes a customary norm for belligerents during international armed conflict, its application in non-international armed conflict is less certain. On the one hand, Additional Protocol II (non-international armed conflict) contains no reference to investigations or prosecution, a curious omission in light of Protocol I's explicit cross-reference to the related articles in the 1949 Conventions, and their further development in the context of the commander's responsibilities. Common Article 3 to the Conventions, the sole provision in the instruments drafted specifically for conflicts "not of an international character," likewise includes no such obligation. Nor does the commentary on the article imply one. It should also be noted that the ICRC's commentary to the *Customary International Humanitarian Law* study's Rule 158 is especially sparse when justifying extension of the norm to non-international armed conflict.⁶⁴

On the other hand, the third paragraph of the Geneva Conventions' articles on investigation and prosecution refers to "the suppression of *all* acts contrary to the provisions of the present Convention other than . . . grave breaches." The *Commentary* confirms that the duty to suppress applies to any breach of the conventions,⁶⁵ which would presumably encompass Common Article 3 violations. Additionally, the conventions cited above in support of the existence of a customary norm pertain to all armed conflicts, regardless of character.⁶⁶ Perhaps most significantly, the Statute of the International Criminal Court makes no distinction between categories of armed conflict in either its preambular assertion that war crimes and other offenses "must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level" or in its mention in the article on command responsibility of situations in which a commander has failed to "submit the matter to the competent authorities for investigation and prosecution."⁶⁷ This is particularly pertinent given that the Statute's substantive delineation of war crimes differentiates between international and non-international armed conflicts. Inclusion of the notion of command responsibility for failure to prosecute in the Statute of the International Criminal Tribunal for Rwanda, which governs the prosecution of war criminals in that non-international armed conflict, further supports general applicability to such conflicts.⁶⁸

⁶⁴ CIHL, *supra* note 27, at 609–10.

⁶⁵ GC I Commentary, *supra* note 23, at 367; GC IV Commentary, *supra* note 24, at 594.

⁶⁶ See text accompanying notes 42–48.

⁶⁷ ICC Statute, *supra* note 21, pmbl., art. 28.

⁶⁸ ICTR Statute, *supra* note 27, art. 6.

The jurisprudence of international tribunals arguably supports extension of the obligation to investigate and prosecute to non-international armed conflict. In *Tadic*, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia surveyed the rules governing the conduct of hostilities during international armed conflict and argued that some now applied equally in internal conflicts as a matter of customary IHL.⁶⁹ The Chamber cautioned, though, that “(i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.”⁷⁰ The caveat is important, for sweeping application of the law of international armed conflict to non-international armed conflict is a matter of some concern for States which understandably seek to preserve their discretion to handle internal conflict as they see fit. Such concern does not manifest itself in the case of a duty to investigate and prosecute. States are merely investigating and prosecuting violations of IHL to which they are subject, an obligation already implicit in the notion of *pacta sunt servanda*.⁷¹

Overall, it would appear defensible to assert that the requirement to investigate and prosecute war crimes attaches in both international and non-international armed conflict. Therefore, there is no basis for deviating from the scope of the relevant provisions deduced earlier.

II. The Interplay Between International Human Rights and Humanitarian Law Norms

A. Human Rights Norms Regarding Investigations

As with IHL, human rights law mandates investigation when its norms have been breached. In particular, the International Covenant on Civil and Political Rights (ICCPR), which safeguards rights like that to

⁶⁹ Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 111–27 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

⁷⁰ *Id.* ¶ 126.

⁷¹ Vienna Convention on the Law of Treaties, art. 26, Jan. 27, 1980, 1155 U.N.T.S. 331. It should be noted that States differ on the content of the customary IHL governing non-international armed conflict. However, this is a different issue than that of investigation. Assuming a State accepts a purported norm as binding, it has no reason to object to an obligation to investigate its possible breach.

life, requires States to “adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”⁷² The Human Rights Committee, in General Comment 31, noted that “a failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.”⁷³

Human rights litigation is in accord. The European Court of Human Rights, applying the European Convention on the Protection of Human Rights and Fundamental Freedoms for parties thereto, has been particularly active in this regard.⁷⁴ For instance, in *McKerr v. United Kingdom*, a case arising out of the troubles in Northern Ireland, the Court held that “the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State’s general duty under Article 1 of the Convention to ‘secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention’, also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.”⁷⁵ The decision set out a number of requirements for investigations. Governmental authorities must take “whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.”⁷⁶ The next of kin must also be involved in the process as necessary.⁷⁷ In its assessment of the adequacy of investigation, the Court paid particular heed to the requirement for an independent investigation.⁷⁸

⁷² International Covenant on Civil and Political Rights, art. 2.2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. The right to life is set forth in Article 6.1.

⁷³ U.N. Human Rights Comm., General Comment No. 31, *Nature of the General Obligation Imposed on States Parties to the Covenant*, ¶ 15, U.N. Doc. CCPR/C/21/Re.1/Add.13 (May 26, 2004). In an individual communication in *Bautista de Arellana v. Colombia*, the Committee noted that, “the State party is under a duty to investigate thoroughly alleged violations of human rights . . . and to prosecute criminally, try and punish those held responsible for such violations.” U.N. Human Rights Comm. Communication No. 563/1993, ¶ 8.6, (Oct. 27, 1995).

⁷⁴ European Convention on the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221.

⁷⁵ *McKerr v. United Kingdom*, 2001-111 Eur. Ct. H.R. 475, ¶ 111.

⁷⁶ *Id.* ¶ 113.

⁷⁷ *Id.* ¶ 115.

⁷⁸ According to the court, this “means not only that there should be no hierarchical or institutional connection but also clear independence.” *Id.* ¶112. On the requirement to investigate uses of force resulting in death, *see also, e.g., McCann and Others v. the*

In *Ergi v. Turkey*, which involved clashes between Turkey and Kurdish rebels, the Court similarly held that “[n]either the prevalence of violent armed clashes nor the high incidence of fatalities could displace the obligation under Article 2 to ensure that an effective, independent investigation was conducted into the deaths arising out of clashes with security forces, particularly in cases such as the present where the circumstances were in many respects unclear.”⁷⁹ Importantly, in *Isayeva v. Russia*, a case involving Russia’s conflict in Chechnya, it noted that while the precise form of the requisite investigation varies according to circumstances, “it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events.”⁸⁰ Other human rights tribunals have arrived at comparable conclusions.⁸¹

Beyond case law, bodies concerned with implementing the requirement to investigate in the human rights context have added significant granularity to the form of the investigations, especially those involving the use of force.⁸² As an example, the United Nations *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* requires governments and law enforcement agencies to “ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances” and to send a detailed report “promptly to the competent authorities responsible for administrative review and judicial control, whenever a death or serious injury results.”⁸³ Those affected by the alleged violation (or their legal representatives) must enjoy access to an independent process, including a judicial process, and, in the event of their death, the right applies to their dependents.⁸⁴ The United Nations’ *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* likewise call for “thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary

United Kingdom, 324 Eur. Ct. H.R. (ser. A) ¶ 161 (1995); *Kaya v. Turkey*, 1998-I Eur. Ct. H.R. 324, ¶¶ 85–86.

⁷⁹ *Ergi v. Turkey*, 1998-IV Eur. Ct. H.R. 1776, ¶ 85.

⁸⁰ *Isayeva and Others v. Russia*, 2005 Eur. Ct. H.R. 128, ¶¶ 210–11.

⁸¹ See generally *Case of the Ituango Massacres*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006); *Case of the “Mapiripan Massacre,”* Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005).

⁸² On the norms, and their application in situations of armed conflict, see generally Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT’L L. 1 (2004).

⁸³ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, ¶ 22, U.N. Doc. A/CONF.144/28/Rev.1.

⁸⁴ *Id.* ¶ 23.

and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death.”⁸⁵ They set out guidance on the collection of evidence, autopsies, calling witnesses, disposal of the body, and the availability of budgetary and technical resources.⁸⁶

B. Applicability of Human Rights Norms in Armed Conflict

It is evident that the requirements for investigation under human rights law differ substantially from those elucidated in IHL in terms of depth and specificity. Accordingly, an important question arises as to the extent to which these human rights practices bear on investigations conducted during an armed conflict. Whenever a human rights tribunal has authoritatively interpreted a human rights treaty to which a State is Party, that interpretation will govern the State’s actions. For instance, decisions of the European Court of Human Rights regarding applicability of the European Convention in armed conflict bind the United Kingdom. But what rules generally apply to the relationship between IHL and human rights law and how does that relationship bear on the legal sufficiency of investigations?

Although both bodies of law afford protection to individuals, the foundational logic of human rights law and IHL differ. Human rights law, acknowledging that States enjoy disproportionate power over individuals, seeks to safeguard them from the abuse of that power by imposing limits on its abuse through the mechanism of “rights.” At its core is the relationship between the State (and its agents) and those individuals over whom it exercises control (jurisdiction). By contrast, IHL is premised on a delicate balance between two competing State interests—being able to effectively use force when embroiled in an armed conflict (military necessity) and the protection of those for whom the State is responsible (humanity). The rules of IHL therefore represent a compromise negotiated by States, either through treaty or customary law based in State practice and *opinio juris*, over how best to accommodate these interests.⁸⁷

⁸⁵ Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, E.S.C. Res. 1989/65, ¶ 9, U.N. Doc. E/1989/89 (May 24, 1989).

⁸⁶ *Id.* ¶¶ 9–17; *see also* Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 55/89, Annex, U.N. Doc. A/Res/55/89/Annex (Feb. 22, 2001).

⁸⁷ The classic example is the rule of proportionality, by which an attack may be conducted against a military objective even when civilians and civilian objects will be harmed, so long as the expected incidental harm is not excessive relative to the military

Given their divergent purposes, human rights and IHL cannot simply be superimposed on armed conflict, nor are they fungible. In the past, some experts argued that human rights law occupied no place in armed conflict.⁸⁸ Today, this view has generally been rejected, although it is essential to appreciate that the scope and manner of application in armed conflict is nuanced.⁸⁹ For instance, the United States maintains the position that human rights law, absent a specific treaty provision to such effect, does not apply extraterritorially.⁹⁰ And in *Bankovic*, the European Court of Human Rights rejected an application to consider an alleged violation of the European Convention on Human Rights during NATO's bombing of the Federal Republic of Yugoslavia in 1999 on the basis that NATO did not exercise "effective control" over the site of the attack.⁹¹

advantage anticipated to accrue from the attack. AP I, *supra* note 22, arts. 51, 57; CIHL, *supra* note 27, ch. 4.

⁸⁸ Contemporary arguments against applicability tend to be more sophisticated. For instance, applying human rights law in particular armed conflicts may be objected to on the basis that a relevant treaty norm was not intended to apply in armed conflicts or that human rights law has no extraterritorial effect, positions that have been advanced most notably by the United States. *See generally* Michael Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119 (2005).

⁸⁹ It has been perceptively pointed out that there are at least three situations during armed conflict where it makes sense to apply, to a degree, certain human rights norms: occupation, non-international armed conflict, and counter-terrorism. The instance and scope of applicability will depend in great part on whether the situation involves an incident directly related to the conduct of the armed conflict or one where the nexus with the conflict is attenuated. *See* Watkin, *supra* note 82, at 2. Thus, for example, whereas IHL norms on the use of force will apply to fighting organized armed groups during an occupation, human rights norms may govern various forceful actions taken by an occupant to comply with its duty to generally maintain law and order in occupied territory. By this position, an investigation into the excessive use of force while solely performing standard policing duties could be subject to most, and perhaps all, human rights standards to which the occupant was, as a matter of law, subject. But an investigation into an incident occurring during a fire fight with an insurgent group would involve further analysis, for IHL would apply to the incident, thereby making it necessary to determine the relationship between the two legal regimes. For an interesting, albeit somewhat controversial, discussion of the relationship between IHL and human rights, see generally Robert J. Delahunty & John Yoo, *What is the Role of International Human Rights Law in the War on Terror?* 59 DEPAUL L. REV. 803 (2010).

⁹⁰ For example, the position taken by the United States regarding the International Covenant on Civil and Political Rights. U.N. Human Rights Comm., *Third Periodic Reports of States Parties Due in 2003: United States of America*, at 109, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005).

⁹¹ The Court held: "In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all

The International Court of Justice has repeatedly confirmed the general premise that human rights apply in armed conflict. More importantly, it has addressed the manner in which IHL and human rights law relate. The Court held in the *Nuclear Weapons* advisory opinion that while the ICCPR applies during armed conflict, the determination of when a killing is arbitrary in violation of Article 6.1's prohibition on arbitrary deprivation of life is determined by reference to the *lex specialis* of IHL.⁹² In other words, the human rights standard is to be interpreted in accordance with the specialized body of law designed for armed conflict. This relationship was further developed in the *Wall* advisory opinion, where the Court highlighted three possibilities: "some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."⁹³ It went on, consistent with *Nuclear Weapons*, to apply the principle of *lex specialis*. Citing *Wall* in the *Congo* case, the Court applied both IHL and human rights instruments to find Uganda in violation of its obligations while in occupation of territory in the Congo.⁹⁴ Although the latter two cases dealt with the unique situation of occupation, *Nuclear Weapons* addressed the conduct of hostilities. Thus, at least in the Court's jurisprudence, the cohabitation of IHL and human rights law reaches to the very core of armed conflict.⁹⁵

The principle of *lex specialis* highlighted by the Court represents the key to determining the adequacy of a human rights investigation into a breach of a human rights norm during armed conflict.⁹⁶ *Lex specialis* can apply in one of two ways in relation to *lex generalis*. First, the *lex specialis* may directly conflict with the *lex generalis*. In such a case, the *lex specialis* prevails. An example that is presently the subject of much discussion is a purported duty to capture (if possible), rather than kill,

or some of the public powers normally to be exercised by that Government." *Bankovic & Others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom* 123 Eur. Ct. H.R. 335, ¶ 71 (2001).

⁹² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8); ICCPR, *supra* note 72, art. 6.1.

⁹³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9).

⁹⁴ *Case Concerning Armed Activity on the Territory of the Congo (Dem. Rep. of Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶¶ 216–220 (Dec. 19).

⁹⁵ Recall, as discussed above, that the United States takes a very restrictive view as to any extraterritorial application of human rights law.

⁹⁶ For a thoughtful discussion of the subject, see Francoise Hampson, *The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body* 90 INT. REV. RED CROSS 549 (2008).

enemy combatants and civilians directly participating in hostilities.⁹⁷ Human rights law contains precisely such a duty.⁹⁸ By contrast, since enemy combatants and directly participating civilians constitute lawful targets under IHL, until they surrender or are otherwise rendered *hors de combat*, it is lawful to kill them even when capture is feasible.⁹⁹ In that the action occurs during armed conflict, the *lex specialis* IHL norm supplants the *lex generalis* human rights standard.

That is not the situation with regard to investigations, for they are mandated in both human rights law and IHL. This raises the second possible application of the *lex specialis* principle—interpretation of the *lex generalis* by reference to the *lex specialis*. The paradigmatic case was cited above, determining arbitrariness under human rights law by reference to IHL. Applying the principle in the investigations context, the nature and scope of the IHL requirement to investigate will shape the analogous obligation in human rights law.

This makes sense. As noted by the European Court of Human Rights in *Isayeva*, the manner in which human rights driven investigations must be conducted necessarily varies according to the attendant circumstances; the standards are contextual.¹⁰⁰ Obviously, a State's ability to conduct investigations during an ongoing conflict is much less robust than in peace time. Evidence may have been destroyed during the hostilities, civilian witnesses may have become refugees or internally displaced persons, military witnesses may be deployed elsewhere or be engaged in combat, territory where the offense occurred may be under enemy control, forensic and other investigative tools may be unavailable on or near the battlefield, military police may be occupied by other duties such as prisoner of war handling, legal advisers may be providing conduct of hostilities advice, judicial bodies may be distant from the theatre of operations, communications may be degraded, travel may be hazardous, and so forth. Most importantly, it

⁹⁷ The issue is the subject of some debate. See, e.g., W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U.J. INT'L L. & POL. 769 (2010); Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT. SECURITY J. 5, 39–43 (2010).

⁹⁸ See, e.g., McCann, 324 Eur. Ct. H.R. (ser. A) ¶ 236, where the Court held that “the use of lethal force would be rendered disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk.” See also HCJ 769/02, Public Comm. Against Torture in Israel v. Israel (Targeted Killings Case) [2006] IsrSC 57(6) 285, ¶ 40.

⁹⁹ See, e.g., AP I, *supra* note 22, art. 41; CIHL, *supra* note 27, rule 47.

¹⁰⁰ *Isayeva*, 2005 Eur. Ct. H.R. ¶ 209.

must be remembered that the military forces, which may represent the sole governmental authority in the area, have a mission to accomplish other than conducting investigations. Accordingly, human rights measures deemed appropriate in the relative stability of peacetime, such as the duty to conduct autopsies, involve family members, or maintain strict chains of custody, would generally be ill-suited to the realities of conducting an investigation in the midst of combat or its immediate aftermath.¹⁰¹

IHL is, by contrast, sensitive to such factors because it was developed by States with the specific context of armed conflict in mind. Therefore, it is inappropriate to refer to human rights law practice to fashion standards for investigations of war crimes occurring during hostilities. Not only would doing so turn the notion of *lex specialis* on its head, it would be illogical. Instead, in much the same way that it is sensible to have IHL legally and practically inform the human rights notion of arbitrariness, and quite aside from the legal requirement to do so pursuant to the *lex specialis* principle, it is practical to apply IHL investigatory standards when determining whether the human rights investigatory requirements have been met in situations of armed conflict.

In this regard, the Goldstone Report identified four “universal principles” of investigations—independence, effectiveness, promptness, and impartiality.¹⁰² Although the report derived the principles from the work of human rights courts and bodies, similar principles surely infuse the IHL requirement to investigate.¹⁰³ The principle of independence is reflected, for instance, in the requirement that subordinates not be tasked to investigate possible misconduct by their immediate superiors. Effectiveness is an implicit characteristic of all investigations. A requirement of promptness is evident in the duty imposed on individuals throughout the chain of command to report possible violations, for the comprehensiveness of the requirement facilitates prompt reporting. The obligation to report and investigate possible violations by both the enemy and one’s own forces evidences impartiality. As a general matter, there is no inconsistency between the broad principles applicable in human rights and humanitarian law investigations. The question, then,

¹⁰¹ A word of caution is due. This analysis is not meant to suggest that measures highlighted in the human rights context cannot or should not be taken when armed conflict is involved. Armed conflict can range from tranquil occupation to high intensity combat. What is required under IHL will therefore be case specific. As with much of IHL, the only viable standard is one of reasonableness in the circumstances.

¹⁰² Goldstone Report, *supra* note 4, ¶ 1611.

¹⁰³ Human Rights Watch has suggested that the standard for investigations of war crimes is that they be “prompt, thorough, and impartial and that the ensuing prosecutions also be independent.” TURNING A BLIND EYE, *supra* note 2, at 7.

is how do States translate these general principles into practices applicable to situations of armed conflict.

III. State Practice

Although certain features of IHL investigations were teased from the extant law in Section I, the *lex scripta* of IHL fails to fully develop the requisite investigatory standards. Thus, whether the IHL standards are being applied to assess the adequacy of an investigation into possible war crimes or as the *lex specialis* in a human rights investigation, it is necessary to look to State practice to populate the content of the law.

In an effort to do so, the practices of four States will be examined — Canada, Australia, the United Kingdom, and the United States.¹⁰⁴ Each of these States enjoys a well-developed military justice system and is served by an active and well-trained judge advocate department. The four, despite periodic criticism, embrace the concept of rule of law, benefit from an active civil society that watches over their actions, and conduct regular reviews of the actions of their forces on the battlefield.¹⁰⁵

Admittedly, obstacles to the reliance on these particular case studies exist. Legal concerns do not motivate all their investigative practices. Many reflect policy choices influenced by factors like resources, particular political perspectives, international relations, and historic experience. The practices may also be mandated not by a sense of legal obligation emanating from IHL, but instead by domestic legislation or specific human rights norms applicable to the State in question (as in the case of the United Kingdom and the European Convention). Perhaps most significantly, these four States do not typify the vast majority of nations, many of which field no uniformed judge advocates or possess the resources on the battlefield to conduct robust investigations. Nevertheless, because of their normative maturity and sophistication, in addition to the fact that theirs are presently “fighting

¹⁰⁴ Both Israel and human rights NGOs have likewise focused on these four countries to examine practices. GAZA OPERATIONS INVESTIGATIONS: AN UPDATE, *supra* note 2, 21–25 (2010); OPEN SOCIETY JUSTICE INITIATIVE, COMPARATIVE ANALYSIS OF PRELIMINARY INVESTIGATION SYSTEMS IN RESPECT OF ALLEGED VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND/OR HUMANITARIAN LAW 1 (2010), available at <http://www.soros.org/initiatives/justice/litigation/gaza/comparative-analysis-20100810.pdf>. However, this article examines the practices of the four countries anew; its discussion has been reviewed by senior officers from each of the countries involved, although they preferred not to be named.

¹⁰⁵ It should be acknowledged that all four countries are from the common law tradition. However, while civil law practices may be different, common law practices are equally authoritative and *lex lata* must take into account both.

armies” involved in armed conflicts around the world, the practices of these States can be usefully distilled to set a threshold of investigatory independence, effectiveness, promptness, and impartiality which will comply with the somewhat vague requirements of IHL. Practices falling short of these standards, however, do not necessarily fail to comport with IHL.

A. Canada

To place Canadian investigative mechanisms in context, it is essential to understand that its military justice system is in part the consequence of the Canadian military’s traumatic experience in Somalia, where in 1993 members of the Canadian Airborne Regiment deployed in support of the United Nations Mission in Somalia (UNOSOM) were involved in the abuse and death of several Somalis. In addition to prosecution of the offenders, Canada launched several major investigations that eventually resulted in fundamental changes to the Canadian military justice system through amendment of the National Defence Act.¹⁰⁶

Of particular concern was the system’s independence, both organizationally (relation to the chain of command) and functionally (performance of judicial and quasi-judicial functions, such as exercising prosecutorial discretion). Accordingly, the new legislation separated, on an institutional basis, the investigative, prosecutorial, defence, and judicial functions by creating the posts of Court Martial Administrator, Director of Military Prosecutions, and Director of Defence Counsel Services. It also established an external Military Police Complaints Commission (MPCC) to investigate complaints from any individual, civilian or military, regarding military police conduct, and to consider allegations of improper interference in military police investigations by military personnel or senior Ministry of National Defence officials.¹⁰⁷ Additionally, in order to create an investigative capability independent of the chain of command, the Minister of National Defence established the Canadian Forces National Investigation Service (CFNIS), which

¹⁰⁶ National Defence Act, R.S.C. 1985, c. N-5 (Can.) [hereinafter National Defence Act]. In the incident one Somali was tortured and killed, one was killed, and another wounded while running away from the Canadian compound. On the investigations, see SPECIAL ADVISORY GROUP ON MILITARY JUSTICE AND MILITARY POLICE INVESTIGATION SERVICES, RECOMMENDATIONS OF THE SPECIAL ADVISORY GROUP ON MILITARY JUSTICE AND MILITARY POLICE INVESTIGATION SERVICES (1997); DEP’T OF NAT’L DEF., REPORT OF THE SOMALIA COMMISSION OF INQUIRY (1997).

¹⁰⁷ National Defence Act § 250.

reports to the Canadian Forces Provost Marshall (CFPM—senior military policeman).¹⁰⁸

That the changes resulted from an incident occurring during hostilities, albeit a peace operation, renders the Canadian experience especially relevant. However, it must be cautioned that the revisions to the military justice system resulted as much from constitutional requirements in domestic Canadian law. In 1992, the Canadian Supreme Court found in the *Genereux* case that Canada's General Court-Martial lacked the independence and impartiality required by the *Canadian Charter of Rights and Freedoms*.¹⁰⁹ This being so, any conclusions based on Canadian practice must be carefully drawn, for they do not necessarily derive from the implementation of international law requirements.

The Canadian *Law of Armed Conflict Manual* imposes on commanders the duty of ensuring that members of the forces they lead are “aware of their responsibilities related to LOAC and that they behave in a manner consistent with the LOAC.”¹¹⁰ Commanders are further required to “suppress and to report to competent authorities, breaches of the LOAC.”¹¹¹ A commander who becomes aware that “subordinates or other persons under his control . . . have committed a breach of the LOAC” must “initiate disciplinary or penal actions against these persons.”¹¹² Those who fail to “take all feasible measures within their power” in performing this duty have themselves acted unlawfully.¹¹³

¹⁰⁸ CANADIAN FORCES NAT'L INVESTIGATION SERV., 2007 ANNUAL REPORT 5 (2007) [hereinafter 2007 REPORT].

¹⁰⁹ *R. v. Généreux*, [1992] S.C.R. 259. The case recognized the military justice system as a co-equal constitutional partner to the civilian justice system and launched a process of increased integration of civilian criminal justice constitutional concepts into military justice. Of particular note, it removed the chain of command from many decisions, such as convening courts-martial. However, commanders still performed an investigatory function, and the charging function was, as discussed *infra*, shared with the CFNIS.

¹¹⁰ OFFICE OF THE JUDGE ADVOCATE GEN., LAW OF ARMED CONFLICT AT THE OPERATION AND TACTICAL LEVELS: JOINT DOCTRINE MANUAL B-GJ-005-104/FP-021 ¶¶ 1504, 1621.2 (2003). The acronym “LOAC” refers to the “law of armed conflict.” It is essentially synonymous with IHL, although it is sometimes interpreted as including the law governing when a State may use force as an instrument of its national policy.

¹¹¹ *Id.* § 8 ¶ 1621.1.

¹¹² *Id.* § 8 ¶ 10621.3.

¹¹³ *Id.* § 8 ¶ 1622. Although this article focuses on the military system, it must be noted that the Canadian Attorney General is responsible for implementation of the Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24. Canadian Forces members are subject to the act, but cases have been dealt with exclusively within the military justice system for violations of military law. For instance, an infantry officer has recently been convicted (sentencing pending) of disgraceful conduct in shooting a

Investigations of misconduct can occur through either administrative or law enforcement channels. Administrative investigations that do not clearly involve criminal actions may be conducted by Summary Investigations or Board of Inquiry. A commander may order a Summary Investigation into any matter affecting his or her command unless a conflict of interest exists or his or her superiors are implicated.¹¹⁴ The Minister of National Defence and commanders may order Boards of Inquiry.¹¹⁵ More formal than Summary Investigations, boards may be convened for serious matters, such as aircraft accidents or deaths of service members. Consisting of at least two officers, they may call witnesses, receive evidence, and examine records.¹¹⁶ It is essential to understand that the primary purpose of a Summary Investigation or Board of Inquiry is to inform the commander. As such, resulting reports may not be subsequently admitted into evidence at trial and statements made by witnesses are excluded as evidence against them in a subsequent court-martial.¹¹⁷ They are thus administrative fact-finding entities, and not prosecutorial in nature.¹¹⁸

wounded Taliban. Richard Brennan, *Capt. Robert Semrau Found Not Guilty of Murder*, THESTAR.COM (July 19, 2010),

<http://www.thestar.com/news/canada/article/837505--jury-reaches-semrau-verdict>.

¹¹⁴ CANADIAN FORCES, QUEEN'S REGULATIONS AND ORDERS FOR THE CANADIAN FORCES, art. 21.01 [hereinafter QR&O]. *See also* National Defence Act § 45.

¹¹⁵ QR&O, *supra* note 114, art. 21.06.

¹¹⁶ *Id.* arts. 21.08, 21.10. Note that civilians may serve on Boards of Inquiry if appropriate in the circumstances.

¹¹⁷ *Id.* arts. 21.10, 21.16.

¹¹⁸ As an example, in 2006 a Board of Inquiry was convened to investigate an incident involving detainee handling. A rear admiral and two colonels were appointed to the board, which had the benefit of numerous advisers (legal, military police, public affairs, etc.). The board was instructed to make the following findings:

1. Describe the specific details of the 14 June 2006 incident, regarding a person in CF custody, who was handed over to Afghan authorities and then taken back by CF personnel;
2. Identify all reports relating to the 14 June 2006 incident, made through the chain of command up to Comd CEFCOM, describing their form and to whom they were sent;
3. Determine to what conduct the words "police did assault him as it happened in the past" in the section commander's notes refer; and
4. Identify the process and doctrine in place at the time for reporting on detainees in Afghanistan, through the Comd TFA to Comd CEFCOM.

The Board of Inquiry was cautioned that should it "receive evidence that it reasonably believes relates to an allegation of a criminal act or a breach of the Code of Service Discipline (CSD), the BOI shall adjourn; the Convening Authority shall be notified, and the matter shall be referred to the nearest Judge Advocate General (JAG) representative for advice." NAT'L DEF. AND CANADIAN FORCES, BOARD OF INQUIRY INTO DETAINEE INCIDENT—14 JUNE 2006, <http://www.vcds-vcemd.forces.gc.ca/boi->

Should evidence of criminality be uncovered, a Board should adjourn and refer the matter to the CFNIS.

The CFNIS enjoys jurisdiction over all persons subject to the *Code of Service Discipline*, regardless of rank.¹¹⁹ Comprised of military personnel specially trained in investigative techniques, it conducts most investigations of alleged IHL violations since they involve “serious or sensitive service and criminal offences against property, persons, and the Department of National Defence.”¹²⁰ Incidents not rising to this level, which would be rare, may be investigated either by other military police units or the command itself. However, once the incident reaches the “serious or sensitive” threshold, as in a case where there is prima facie evidence of a war crime, it must be transferred to the CFNIS.¹²¹

Military members may report possible violations directly to the CFNIS. Reports may also be generated through military command channels or referred from outside the military. For instance, in 2007 Amnesty International filed a complaint with the MPCC regarding alleged mistreatment of Afghan civilians. The complaint was forwarded through the CFMP to the CFNIS for investigation.¹²² The following year, a Canadian academic at the University of Ottawa filed a similar complaint alleging prisoner mistreatment that was subsequently forwarded to the CFNIS for investigation, as was an allegation by a Member of Parliament that Canadian forces were ignoring sexual assaults on young Afghan males by members of the Afghan armed forces.¹²³

Although CFNIS personnel serve alongside operational units when deployed, they report directly to the CFPM to ensure

[cde/bid-ccd/co-oc-eng.asp](http://www.vcds.forces.gc.ca/cfpm-gpfc/cfp-ggp/nis-sne/index-eng.asp) (last modified Jan. 28, 2010) [hereinafter BOARD OF INQUIRY INTO DETAINEE INCIDENT].

¹¹⁹ NAT'L DEF. AND CANADIAN FORCES, THE CANADIAN FORCES NATIONAL INVESTIGATION SERVICE (CFNIS), <http://www.vcds.forces.gc.ca/cfpm-gpfc/cfp-ggp/nis-sne/index-eng.asp> (last modified Apr. 26, 2007). Jurisdiction also extends to Canadian civilians accompanying Canadian forces in the field. *See* National Defence Act, Part III.

¹²⁰ NAT'L DEF. AND CANADIAN FORCES, BACKGROUND: THE CANADIAN FORCES NATIONAL INVESTIGATION SERVICE INVESTIGATION PROCESS, <http://www.cefcom.forces.gc.ca/pa-ap/nr-sp/doc-eng.asp?id=2960> (last modified Apr. 27, 2010) [hereinafter BACKGROUND].

¹²¹ *See, e.g.*, BOARD OF INQUIRY INTO DETAINEE INCIDENT, *supra* note 118.

¹²² 2007 REPORT, *supra* note 108, at 11.

¹²³ CANADIAN FORCES NAT'L INVESTIGATION SERV., 2008 ANNUAL REPORT 20 (2008). It should be noted with regard to the latter case that Parliamentary Committees may conduct investigations on their own accord.

independence.¹²⁴ Throughout the process, and especially before charging an individual, the CFNIS receives legal advice from military prosecutors, although the CFNIS and prosecutors are independent of each other organizationally and operationally.¹²⁵

Once a charge has been levelled against a military member, the case will be handled by the Canadian Military Prosecution Service (CMPS), which screens cases for trial, tries them, and handles appeals before the Court-Martial Appeal Court (CMAC).¹²⁶ The independence of the prosecutorial function is guaranteed in a number of ways. The CMPS is led by the Director of Military Prosecutions (DMP) appointed by the Minister of Defence for a term not to exceed four years.¹²⁷ Although a uniformed Canadian legal officer within the Office of the Judge Advocate,¹²⁸ the DMP exercises substantial independence in performing prosecutorial functions. For example, while the Judge Advocate General (JAG—see below) may issue both general and case specific instructions to the DMP, the instructions must generally be made public.¹²⁹ Further, while the DMP is expected to keep the chain of command fully informed of a case's progress, such communication may not come at the expense of prosecutorial discretion.¹³⁰ Similarly, strict guidelines govern relations and communications between prosecutors and legal advisers assigned to units.¹³¹

¹²⁴ BACKGROUND, *supra* note 120.

¹²⁵ DIRECTOR OF MILITARY PROSECUTIONS, POLICY DIRECTIVE NO. 001/00: RELATIONSHIP WITH CANADIAN FORCES NATIONAL INVESTIGATION SERVICE (2009), available at <http://www.forces.gc.ca/jag/publications/CMPS-SCPM/policy-politiques-001-eng.pdf>. The Policy Directive was initially issued on March 1, 2000 and was updated on March 18, 2009.

¹²⁶ NAT'L DEF. AND CANADIAN FORCES, CANADIAN MILITARY PROSECUTION SERVICE, <http://www.forces.gc.ca/jag/justice/prosecutions-poursuites-eng.asp> (last modified Oct. 12, 2010).

¹²⁷ National Defence Act § 165.1–165.17.

¹²⁸ DMP & DDCS are under the general supervision of the JAG by virtue of National Defence Act §§ 165.17 & 249.2 (respectively).

¹²⁹ NAT'L DEF. AND CANADIAN FORCES, CANADIAN MILITARY PROSECUTION SERVICE, *supra* note 126. To date, the authority to issue instructions has not been exercised by any JAG.

¹³⁰ DIRECTOR OF MILITARY PROSECUTIONS, POLICY DIRECTIVE NO. 005/99, COMMUNICATIONS WITH SERVICE AUTHORITIES (2009), available at <http://www.forces.gc.ca/jag/publications/CMPS-SCPM/policy-politiques-005-eng.pdf>. The Policy Directive was initially issued on March 15, 2000 and was updated on March 18, 2009.

¹³¹ DIRECTOR OF MILITARY PROSECUTIONS, POLICY DIRECTIVE NO. 009/00, COMMUNICATIONS WITH UNIT LEGAL ADVISORS (2009). The Policy Directive was initially issued on March 15, 2000 and was updated on March 18, 2009.

The Director of Defence Counsel Services enjoys even greater independence, for there is no provision for receiving instructions from the JAG. Military lawyers assigned to the directorate to defend service personnel before military courts fall outside the unit chain of command.¹³² Military judges are also independent of the chain of command as a direct result of the *Genereux* holding.¹³³

The senior-most lawyer in the Canadian Forces is the Judge Advocate General, a general officer statutorily responsible to the Minister of National Defence.¹³⁴ He or she provides legal advice to the Minister, Deputy Minister, and military chain of command. The independence of the JAG from the chain of command is mirrored more generally by service regulations that provide that legal officers are assigned to the Office of the JAG and not to the military chain of command.¹³⁵ Although his or her oversight of courts-martial is limited as described above, the JAG remains statutorily responsible for the superintendence and administration of the overall Canadian military justice and disciplinary system.

B. Australia

Australian Defence Doctrine requires that all Australian Defence Force (ADF) members be trained in IHL and imposes the responsibility for ensuring compliance with the law on commanders.¹³⁶ Citing the post-World War II case of *Yamashita*, it provides that commanders will be held responsible if they know or should have known that subordinates have committed a war crime and fail to punish them.¹³⁷ This obligation implies a duty to investigate.

As a result of a 2005 report from the Australian Parliament's Senate Foreign Affairs and Defence and Trade Committee, the military justice system is being comprehensively reformed to, *inter alia*, enhance

¹³² NAT'L DEF. AND CANADIAN FORCES, DIRECTORATE OF DEFENCE COUNSEL SERVICES, <http://www.forces.gc.ca/jag/justice/defence-defense-eng.asp#ourlawyers> (last modified Sep. 14, 2010).

¹³³ NAT'L DEF. AND CANADIAN FORCES, CHIEF MILITARY JUDGE (CMJ), <http://www.jmc-cmj.forces.gc.ca/index-eng.asp> (last modified Sep. 30, 2010).

¹³⁴ National Defence Act § 9. For a discussion of the role of the JAG, see NAT'L DEF. AND CANADIAN FORCES, JAG: MILITARY LAW, <http://www.forces.gc.ca/jag/law-loi/index-eng.asp> (last modified July 28, 2010).

¹³⁵ QR&O, *supra* note 114, arts. 4.081(1), 4.081(4).

¹³⁶ AUSTRALIAN DEF. HEADQUARTERS, LAW OF ARMED CONFLICT, AUSTRALIAN DEFENCE DOCTRINE PUBLICATION (ADDP) 06.4, ¶¶ 13.2, 13.6 (2006).

¹³⁷ *Id.* ¶ 13.5.

the independence of the system.¹³⁸ The process was complicated by the 2009 decision of the High Court in the case of *Lane v. Morrison*. There, the Court invalidated the Australian Military Court, which had been established in 2007, to try serious cases involving members of the ADF, as violating the Constitution.¹³⁹ Thus, the system described below is currently in flux.

As with the Canadian system, possible violations of IHL may be dealt with either through administrative proceedings or the military prosecutorial system. In most cases, examination of an incident commences with the Quick Assessment (QA). Such assessments are appropriate whenever “any significant incident, allegation or problem . . . comes to the attention of the commander/supervisor.”¹⁴⁰ Should the commander or other responsible officer determine that an inquiry or investigation (see below) may be merited, he or she is obligated to direct a Quick Assessment.¹⁴¹ The QA, in which a military member appointed by the officer concerned examines the facts and circumstances of a matter within twenty-four hours, is the starting point for most inquiries or investigations.¹⁴² The primary purpose of the QA is to determine whether further action is required.

Subsequent action may involve such steps as convening a more formal administrative inquiry, transferring the matter to the Australian Defence Force Investigative Service (ADFIS) for disciplinary or criminal investigation, or referring the matter to the Australian Federal Police. The QA is merely an initial administrative procedure designed to quickly gather facts. It “must not prevent or interfere with the immediate requirement for notification to the relevant ADF Investigative Service (ADFIS) or Code of Conduct delegate, or investigation by ADFIS or civilian authorities.”¹⁴³ In the event evidence of criminal activity is uncovered, the matter must be forwarded to military law enforcement and legal personnel.

¹³⁸ STAFF OF S. COMM. ON AFFAIRS, DEF. AND TRADE REFERENCES, THE EFFECTIVENESS OF AUSTRALIA’S MILITARY JUSTICE SYSTEM (June 2005). On the reforms, see STAFF OF S. COMM. ON AFFAIRS, DEF. AND TRADE REFERENCES, FOURTH PROGRESS REPORT INTO REFORMS OF AUSTRALIA’S MILITARY JUSTICE SYSTEM: GOVERNMENT RESPONSE (Aug. 2009), available at http://www.apf.gov.au/Senate/committee/FADT_CTTE/Legmiljustice/index.htm.

¹³⁹ *Lane v. Morrison* (2009) 239 CLR 230, 236 (Austl.).

¹⁴⁰ Dep’t of Def., Defence Instructions (General), Admin. 67-2, ¶ 8 (Aug. 7, 2007) (Austl.).

¹⁴¹ See generally *id.*

¹⁴² Extensions may be requested from, and granted by, the investigating officer. *Id.* ¶ 11.

¹⁴³ *Id.* ¶ 8.

A number of more formal administrative inquiries exist to consider a matter. They include:

- 1) Routine Inquiry, an informal administrative inquiry into relatively simple matters;
- 2) Investigating Officer Inquiry, a formal administrative inquiry involving matters that are more serious, and which attach certain privileges, immunities, rights, and responsibilities in accordance with the Defence (Inquiry) Regulations;
- 3) Board of Inquiry or a Commission of Inquiry, a quasi-judicial administrative inquiry during which, for example, civilian witnesses subject to its jurisdiction can be compelled to testify, witnesses can have legal representation, and proceedings are generally made public; and
- 4) Combined Board of Inquiry, an administrative Board of Inquiry involving the participation of the forces of other countries.¹⁴⁴

Like their Canadian counterparts, Australian administrative inquiries serve a fact-finding function and are not designed to build a case for prosecution.¹⁴⁵ Typically, they will be ordered by a commander and conducted by military personnel detached temporarily to perform the inquiry. The aim is to establish what occurred and what needs to be done (if anything) to prevent recurrence. ADF personnel can be subject to adverse administrative action, which can include termination of service in the ADF, as a consequence of such administrative inquiries. If, during the course of any administrative inquiry, the inquiry officer forms a view that a disciplinary or criminal offense may have taken place, he or she must inform the authority which directed the inquiry (“Appointing Authority”) to allow consideration of whether to refer that part of the inquiry to ADFIS (or the respective Service Police for lower level issues) for investigation.

As an example, in 2009 the Australian Chief of Joint Operations appointed an investigating officer to inquire into an incident involving civilian casualties during an air strike against individuals believed to be

¹⁴⁴ Robert Creyke, Dir., Austl. Ctr. for Military Law & Justice, Address at the Defence Watchdogs Seminar, 2 (Nov. 26, 2008), *available at* <http://law.anu.edu.au/ACMLJ%5CWatchdogs/Creyke.pdf>. Defence Instructions (General), *supra* note 140, at C-1-C-3.

¹⁴⁵ On procedures during the inquiries, see AUSTRALIAN DEF. FORCE, AUSTRALIAN DEFENCE FORCE PUBLICATION 6.1.4: ADMINISTRATIVE INQUIRIES MANUAL (2006).

implanting an improvised explosive device (IED).¹⁴⁶ The officer formally interviewed witnesses, including an American service member, and considered the rules of engagement, targeting guidance, and targeting procedures. He ultimately concluded that those killed in the engagement were not innocent civilians but were instead laying an IED, and that the attack complied with the rules of engagement and other guidance.¹⁴⁷

The recommendations in his report suggest the range of measures that might be taken based on such inquiries. The investigating officer recommended no further investigation by the Australian Defence Force Investigative Service, no administrative action against anyone involved, no change to targeting practices, and no *ex gratia* payments. He did recommend that legal officers and command groups receive training in kinetic operations specific to Afghanistan.¹⁴⁸

As noted, the matter will generally be turned over to the ADFIS when criminal misconduct is identified unless it is minor, in which case it will be addressed by the service police of the respective service. This would be rare in the case of a war crime. The military Provost Marshall, who reports directly to the Chief of the Defence Force, leads the ADFIS. Its members are also military, drawn from the three services.¹⁴⁹

Avenues of prosecution include action through the military criminal justice system under the Defence Force Discipline Act and civilian prosecution pursuant to legislation such as the Commonwealth Criminal Code, which domestically implements the International Criminal Court Statute.¹⁵⁰ Although the ADF Legal Service, headed by a military Director General (one star) and a civilian (two star equivalent), generally oversees legal operations in the ADF, it is not responsible for the day-to-day running of the upper levels of the military disciplinary

¹⁴⁶ See REPORT OF AN INQUIRY OFFICER, POSSIBLE CIVILIAN CASUALTIES FROM CLOSE AIR SUPPORT STRIKE AT [REDACTED] AFGHANISTAN ON 28 APR 09, available at http://www.abc.net.au/mediawatch/transcripts/1011_redacted.pdf; see also REPORT OF AN INQUIRY OFFICER INTO THE SHOOTING OF TWO AFGHAN NATIONAL POLICEMEN, 11 AUGUST 2009, available at http://www.defence.gov.au/coi/reports/EOF_R.pdf.

¹⁴⁷ See REPORT OF AN INQUIRY OFFICER, POSSIBLE CIVILIAN CASUALTIES FROM CLOSE AIR SUPPORT STRIKE AT [REDACTED] AFGHANISTAN ON 28 APR 09, *supra* note 146, ¶¶ 38–39.

¹⁴⁸ *Id.* ¶ 41.

¹⁴⁹ DEP'T OF DEF., AUSTRALIAN DEFENCE FORCE INVESTIGATIVE SERVICE FACT SHEET, <http://www.defence.gov.au/mjs/resources/1ADFIS%20fact%20sheet%20-%20October%202007.pdf>.

¹⁵⁰ *Defence Force Discipline Act 1982* (Cth) s 10 (Austl.); *Criminal Code Act 1995* (Cth) div 268 (Austl.).

system.¹⁵¹ That responsibility currently lies in the hands of the Judge Advocate General (JAG), a title not to be confused with that of the “JAG” in Canada. In Australia, the JAG must be a Federal Court or a State Supreme Court judge appointed by the Governor General for a term not to exceed seven years.¹⁵² Deputy JAGs from each of the services, and who serve under the same conditions, assist the JAG. The JAG sets procedural rules for tribunals, performs final legal review of proceedings within the ADF, and takes part in the appointment of Defence Force Magistrates, Presidents and members of courts-martial, and legal officers for various purposes.¹⁵³ The Director of Military Prosecutions, who is appointed by the Minister for Defence, oversees prosecutions. Like the JAG, he or she is independent of the chain of command.¹⁵⁴

A number of oversight mechanisms exist to monitor performance of the system. While the aforementioned reforms are underway, there is a requirement for annual progress reports to Parliament. Additionally, the Inspector General of the ADF (IGADF), who is independent of the chain of command and reports directly to the Chief of Defence Force, reviews and audits the military justice system (both the disciplinary system and the administrative inquiries and consequences system). The IGADF may also receive complaints or submissions regarding the system from any individual regarding matters ranging from denial of due process to cover up or failure to act.¹⁵⁵

C. *United Kingdom*

As with their Canadian and Australian counterparts, British commanders are obligated to ensure their troops understand and comply with IHL. They are criminally responsible if they become aware of a possible violation and fail to “submit the matter to the competent authority for investigation and prosecution.”¹⁵⁶

¹⁵¹ It would be common, however, for the vast minor disciplinary matters to be handled by commanders pursuant to their powers as such under the DFDA. In such cases, they would be advised by attached legal officers on processes, but not with regard to prosecution or defense.

¹⁵² *Defence Force Discipline Act 1982*, §§ 179–88.

¹⁵³ This system is likely to change in the near future if Parliament passes a bill to create a Military Court of Australia under Chapter III of the Constitution.

¹⁵⁴ *Defence Force Discipline Act 1982*, pt. XIA.

¹⁵⁵ DEP’T OF DEF., ORGANIZATIONS WITHIN THE MILITARY JUSTICE SYSTEM THAT CAN PROVIDE ASSISTANCE TO ADF MEMBERS, <http://www.defence.gov.au/mjs/organisations.htm> (Austl.).

¹⁵⁶ U.K. MANUAL, *supra* note 60, ¶ 16.36 (quoting ICC Statute, *supra* note 21, art. 28).

Potential IHL violations may be the subject of military investigations or of inquiries. Under the Armed Forces Act of 2006, Service Inquiries may be directed by commanders and other officers of appropriate seniority.¹⁵⁷ The inquiry panel receives terms of reference by which to conduct the inquiry, which may include incidents that could raise IHL matters. Regulations issued pursuant to the Act set forth detailed provisions with regard to this process.¹⁵⁸ The investigations are fact-finding in nature, not prosecutorial. Should the panel determine that a crime may have been committed, it is generally required to adjourn and refer the case to military law enforcement officials. Typically, though, an incident in which suspicion of an IHL violation exists will be dealt with by such officials from the outset.

The “Service Police,” consisting of the military police of the three services, has authority over all members of the armed forces.¹⁵⁹ The Armed Forces Act requires that any officer who becomes aware of a serious offense report it to the Service Police.¹⁶⁰ While commanding officers play a key role in initially investigating most incidents, they are prohibited from investigating serious offenses such as murder or rape. These “Schedule 2” offenses must instead be reported to, and investigated by, the Service Police (or civil police depending on jurisdiction).¹⁶¹ Additionally, once an investigation is launched by the Service Police, commanding officers may no longer be involved. The Service Police, who are independent of the chain of command, will consult with the Service Prosecuting Authority (SPA) should they consider that there is evidence to support a charge, whether it be a criminal or service offense.

In 1996, the U.K. military justice system was dramatically revised in anticipation of litigation before the European Court of Human Rights in *Findlay v. United Kingdom*, which subsequently found that the previous system violated the European Convention’s Article 6.1 requirement for “a fair and public hearing . . . by an independent and impartial tribunal.”¹⁶² Today, prosecutions are the responsibility of the SPA, which resulted from consolidation of the prosecuting authorities of the three services in 2009. Cases are referred to the SPA by either the

¹⁵⁷ Armed Forces Act, 2006, c. 52, § 343 (Eng.).

¹⁵⁸ Armed Forces (Service Inquiries) Regulations, 2008, S.I. 2008, No. 1651, reg. 3.

¹⁵⁹ Armed Forces Act, 2006, c. 52, explanatory notes, at 1–4 (Eng.).

¹⁶⁰ Armed Forces Act, 2006, c. 52, §§ 113–15 (Eng.).

¹⁶¹ Manual of Service Law, ch. 6, annex D–E (Ver. 1.0 2009).

¹⁶² *Findlay v. United Kingdom*, 24 Eur. Ct. H.R. 221, 223 (1997). The legislation effecting the revision was the Armed Forces Act of 1996. It has since been superseded by the Armed Forces Act of 2006.

commanding officer or the Service Police. The Director of Service Prosecutions, a civilian, heads the SPA, which acts independently of the chain of command in making decisions on whether to direct a matter to court-martial and setting the charge that should be brought in light of the evidence.¹⁶³ The Director reports to the Attorney General and appoints service prosecutors.¹⁶⁴ Service prosecutors are seconded from the individual services, but are independent of the chain of command when performing their duties.

Interestingly, decisions of the SPA regarding the decision to prosecute and the charge brought may be reviewed by a civilian court to determine compliance with the United Kingdom's obligations under the European Convention. Victims and their families can request judicial review, a right which has led to such noteworthy litigation as *Baha Mousa* and *Al-Sweady*.¹⁶⁵

A civilian Judge Advocate General serves as the senior magistrate for the military; subordinate magistrates are civilians as well. With the exception of the Royal Navy, civilian barristers or solicitors (paid for by the member or through legal aid) provide defense services, although an individual being tried abroad may ask to be represented by a uniformed attorney from another service (to ensure independence from the chain of command). A small number of uniformed service lawyers are assigned to provide legal advice to service members in matters not involving defense at trial, for instance on their options when they are "cautioned" ("read their rights"). When performing this duty, they are independent of the chain of command. In the Royal Navy, defendants have the option of civilian or military representation at trial. In the latter case, the attorney must not have been previously involved in the matter at hand. Importantly, senior service lawyers, such as the Director of Army Legal Services, would not be involved in the decision to prosecute or the actual defense or prosecution of an offense. Instead, they give advice to the chain of command.¹⁶⁶

Outside the military justice system, investigative inquiries may be conducted pursuant to the Inquiries Act of 2005, by which any Cabinet

¹⁶³ Armed Forces Act, 2006, c. 52, § 364 (Eng.).

¹⁶⁴ *Id.* art. 365

¹⁶⁵ *In Re Al Skeini v. Secretary of State*, (2008) 1 AC 153 [Baha Mousa Case] (Eng.); *The Queen (on the application of Al-Sweady and Others) v. Secretary of State for the Defence* [2009] EWHC 2387 (Admin) (Oct. 2, 2009) (Eng.). For information on the Al-Sweady inquiry, see the inquiry webpage at <http://www.alsweadyinquiry.org>.

¹⁶⁶ Multiple interviews by author of senior Royal Navy and Royal Air Force legal officers (Aug.–Sept. 2010).

member may direct a commission be formed when he or she believes that “particular events have caused, or are capable of causing, public concern, or . . . there is public concern that particular events may have occurred.”¹⁶⁷ Individuals appointed to serve on such commissions must be impartial and, to the extent feasible, the proceedings must be public.¹⁶⁸

In some cases, commissions are established after the military justice system is seen to fail. For instance, the *Baha Mousa* inquiry involves the death of an Iraqi citizen while in British custody. The incident was investigated by the Service Police and brought to trial before a military court. Only one conviction resulted (based on a confession), while there were multiple acquittals. However, then-Chief of the General Staff General Sir Richard Dannatt acknowledged that some Iraqis “were subjected to a conditioning process that was unlawful.”¹⁶⁹ Moreover, an internal Army investigation, the Aitken Report, also identified systemic failures in the handling of detainees.¹⁷⁰ In May 2008, the Minister of Defence established a commission to inquire into the matter.¹⁷¹ The inquiry is presently ongoing.

D. United States

As noted above, and as with the other States surveyed, the United States recognizes the responsibility of commanders for failure to investigate possible IHL violations and take appropriate action.¹⁷² Specifically, Department of Defense policy requires that:

All reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual are reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action.

¹⁶⁷ Inquiries Act, 2005, c. 12, § 1 (Eng.).

¹⁶⁸ *Id.* §§ 9, 18.

¹⁶⁹ Press Statement, General Sir Richard Dannatt, Ministry of Defence (Apr. 30, 2007) (cited in JOINT COMMITTEE ON HUMAN RIGHTS, TWENTY-EIGHTH REPORT, 2008, ¶ 6 (U.K.), available at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/157/15703.htm#n12>).

¹⁷⁰ BRITISH ARMY, THE AITKEN REPORT: AN INVESTIGATION INTO CASES OF DELIBERATE ABUSE AND UNLAWFUL KILLING IN IRAQ IN 2003 AND 2004 10–16 (2008).

¹⁷¹ MOD Announces *Baha Mousa Public Inquiry*, GOV'T NEWS (May 14, 2008), http://gov-news.org/gov/uk/news/mod_announces_baha_mousa_public_inquiry/100298.html.

¹⁷² See text accompanying notes 58–59.

All reportable incidents are reported through command channels for ultimate transmission to appropriate U.S. Agencies, allied governments, or other appropriate authorities. Once it has been determined that U.S. persons are not involved in a reportable incident, an additional U.S. investigation shall be continued only at the direction of the appropriate Combatant Commander. The on-scene commanders shall ensure that measures are taken to preserve evidence of reportable incidents pending transfer to U.S., allied, or other appropriate authorities.¹⁷³

The policy defines a reportable incident as one in which 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.”¹⁷⁴ The policy intentionally sets the standard low to ensure that the chain of command and other U.S. officials are fully informed as to any incidents that might possibly amount to an IHL violation.¹⁷⁵ In other words, this threshold for reporting possible violations represents a policy decision, not necessarily the U.S. position on when reporting and investigation is required as a matter of IHL. The duty to report extends to “all military and U.S. civilian employees, contractor personnel, and subcontractors assigned to or accompanying a DoD Component,” not just those exercising command functions.¹⁷⁶

A commander who receives information concerning a possible violation must immediately report the matter through the chain of operational command and within his or her service channels (e.g., Air Force channels).¹⁷⁷ The higher level command receiving such a report must request a formal investigation by military criminal investigators if the matter is not already under appropriate investigation and appears to involve criminal conduct, as well as report it to the Combatant Command (Central Command for Afghanistan and Iraq) and the service

¹⁷³ Dep’t of Defense Directive (DoDD) 2311.01E, DoD Law of War Program, May 9, 2006, ¶¶ 4.4–4.5.

¹⁷⁴ *Id.* ¶ 3.2; see also Lloyd J. Austin III, U.S. Dep’t of Defense, Chairman of the Joint Chiefs of Staff Instruction 5810.01C, Implementation of the DoD Law of War Program, ¶ 5 (2007).

¹⁷⁵ See Dick Jackson, *Reporting and Investigation of Possible, Suspected, or Alleged Violations of the Law of War*, ARMY LAWYER, June 2010, at 95, 98.

¹⁷⁶ Dep’t of Defense Directive (DoDD) 2311.01E, *supra* note 173, ¶ 6.3.

¹⁷⁷ *Id.* ¶ 6.4.

concerned.¹⁷⁸ The Combatant Commander in turn reports the incident to the Chairman of the Joint Chiefs of Staff, the Secretary of Defense, and the Secretary of the Army (who serves as the Department of Defense Executive Agent for such matters).¹⁷⁹

It is not entirely clear whether a failure to report and investigate renders the commander or other responsible officer a principal or accessory to the war crime in question, or whether a separate offense has been committed.¹⁸⁰ In a Marine Corps case arising out of the Haditha incident, the commander was charged with a dereliction of duty (Article 92 of the Uniform Code of Military Justice (UCMJ)) for failing to report possible war crimes. The case was eventually dismissed on, *inter alia*, the basis that a senior judge advocate advising the Convening Authority had participated in the earlier investigation of the incident and therefore exerted undue influence on the proceedings,¹⁸¹ but the Article 32 Report (see discussion below) found that the accused was derelict in his duty by failing to “thoroughly and accurately report and investigate a combat engagement that clearly needed scrutiny, particularly in light of [the Marine Corps regulatory requirements to do so]. He failed to accurately report facts that he knew or should have known and inaccurately reported at least one critical fact that he specifically knew . . . to his higher headquarters.”¹⁸²

Unlike the other countries cited, the United States has no single system for conducting administrative or criminal investigations. Instead, the five services issue many of their own regulations and guidelines for service-specific investigations.¹⁸³ However, since the various processes derive from a common body of law and military heritage, and because Department of Defense guidance governs each, the investigations closely resemble each other.

¹⁷⁸ *Id.* ¶ 6.5.

¹⁷⁹ *Id.* ¶ 6.6. The Combatant Commander is also responsible for determining “the extent of investigation and manner in which a reportable incident not involving U.S. or enemy persons will be investigated by U.S. Forces and ensur[ing] such incidents are reported promptly to appropriate U.S. Agencies, allied governments, or other appropriate authorities.” *Id.* ¶ 5.11.7.

¹⁸⁰ For a useful discussion of U.S. practice regarding reporting and investigating possible IHL violations, see Jackson, *supra* note 175.

¹⁸¹ See *United States v. Chessani*, 2009 N-M Ct. Crim. App. 200800299 U 1, 5-7.

¹⁸² Memorandum from Investigating Officer to Commander, U.S. Marine Corps Forces, Central Command, Executive Summary of Pretrial Investigative Report in the Case of Lieutenant Colonel Jeffrey R. Chessani, USMC (July, 10, 2007), in Jackson, *supra* note 175, at 96.

¹⁸³ The five services are: Air Force, Army, Coast Guard, Marine Corps, and Navy.

As discussed, an allegation (reason to suspect) that a war crime has occurred obliges a commander to report the matter to law enforcement officials. Since allegations can be groundless, ill-motivated or purely speculative, this requirement cannot be absolute. A rule of reasonableness, commonly applied when interpreting IHL obligations, attaches, such that an investigation is required whenever a reasonable commander in the same or similar circumstances would, based on the information before him or her, suspect a violation.

The Rules for Courts-Martial, which apply to all the U.S. Armed Forces, provide a mechanism for assessing allegations for credibility. Pursuant to Rule 303, “[u]pon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.”¹⁸⁴ The accompanying discussion explains:

[t]he preliminary inquiry is usually informal. It may be an examination of the charges and an investigative report or other summary of expected evidence. In other cases a more extensive investigation may be necessary. Although the commander may conduct the investigation personally or with members of the command, in serious or complex cases the commander should consider whether to seek the assistance of law enforcement personnel in conducting any inquiry or further investigation. The inquiry should gather all reasonably available evidence bearing on guilt or innocence and any evidence relating to aggravation, extenuation, or mitigation.¹⁸⁵

Based on the results of the inquiry, the commander determines what further investigation, if any, is necessary, and what military justice actions to take.

Other tools short of a full criminal investigation for examining an incident include administrative inquiries and investigations. These proceedings are especially appropriate in cases where there may be no allegation of wrongdoing, but in which, because of the nature of the incident, review is advisable. A paradigmatic example is the airstrike that causes unexpected civilian casualties despite being executed as planned.

¹⁸⁴ Joint Service Committee on Military Justice, Manual for Courts-Martial II-19 (2008) [hereinafter MCM].

¹⁸⁵ *Id.*

An inquiry or investigation would allow the facts to be captured in order to assess procedures and ensure that the attack complied with IHL.

Air Force practices are illustrative of those employed throughout the U.S. Armed Forces. Air Force commanders possess the authority to conduct or direct administrative inquiries or investigations into any incident regarding their command. This authority is inherent in their command position. Air Force policy requires that inquiries and investigations be conducted at a level of command that can ensure that the investigation is “complete, impartial and unbiased.”¹⁸⁶ In most cases, a single officer will conduct investigations or inquiries, although they may seek advice from specialists, such as those who operate a weapons system. In complicated matters, a board of officers may conduct investigations or inquiries.

Inquiries serve to find facts in relatively simple or straightforward matters and usually result in a summarized report of findings. By contrast, investigations are used to examine complex matters. Investigative reports typically include relevant exhibits and sworn witness testimony.¹⁸⁷ Although their results are sometimes made public, investigations may be “privileged” in cases involving sensitive matters, with release governed by domestic legislation such as the Freedom of Information and Privacy Acts.¹⁸⁸ Witnesses must be informed of the nature of the investigation and those suspected of having possibly violated the law have to be advised of their right to either remain silent or insist on the presence of counsel while they testify.¹⁸⁹ Commanders

¹⁸⁶ AIR FORCE JUDGE ADVOCATE GENERAL’S SCHOOL, THE MILITARY COMMANDER AND THE LAW 408 (2009 electronic update of 2008 version), *available at* <http://www.afjag.af.mil/shared/media/document/AFD-091026-025.pdf>. Procedures are governed by Air Force Instruction (AFI) 90-301, Inspector General Complaints Resolution, May 15, 2008, although the inherent authority of the commander, not the instruction, is the authority for the investigation.

¹⁸⁷ THE MILITARY COMMANDER AND THE LAW, *supra* note 186, at 403. For instance, it may not be feasible to conduct a full investigation into every case involving collateral damage to civilian property during an attack, but a commander may nevertheless direct an inquiry to document facts and circumstances. Should the commander believe that something may have gone wrong during the attack, he or she might order an investigation. However, in the event criminal conduct is suspected (e.g., an intentional attack against civilian objects), referral to a military criminal investigative agency would be appropriate.

¹⁸⁸ Freedom of Information Act, 5 U.S.C. § 552 (2006); Privacy Act, 5 U.S.C. § 552(a) (2006).

¹⁸⁹ Air Force Instruction (AFI) 90-301, *supra* note 186, ¶ 2–45. The right to remain silent is set forth in Article 31 of the UCMJ for military personnel and the Fifth Amendment of the U.S. Constitution for civilians. *See* UCMJ art. 31, 10 U.S.C. § 831 (2006); U.S. Const. amend. V.

are required to consult with their servicing Staff Judge Advocate before directing an inquiry or investigation.

A commander may not investigate matters in which he or she is directly involved, for doing so would violate Air Force policy that investigations be conducted at a level that ensures impartiality. “Involvement” does not imply that a commander is precluded from directing an examination of any possible violation committed by his or her unit. Rather, only those incidents where he or she personally took part, as in approving a strike in which the question of proportionality is at issue, preclude consideration.

Based on the inquiry or investigation, the commander may decide to take no action, direct further investigation, refer the case to law enforcement authorities, take administrative action such as issuing a letter of reprimand, impose non-judicial punishment under the UCMJ (which can include punishments such as reduction in rank or forfeiture of pay),¹⁹⁰ or “prefer” charges against an individual involved; that is, send the case forward for trial. A commander with authority to convene a court-martial in the case must remain “neutral and detached” and thus, is prohibited from acting in any investigative capacity.¹⁹¹

Such investigations by military officers have been conducted on numerous occasions in high profile cases during recent conflicts. Most notable in this regard were the Taguba Report into allegations of detainee abuse at Abu Ghraib Prison (Baghdad Central Confinement Facility) in Iraq and the Fay/Jones Report, which considered intelligence activities at the prison.¹⁹²

When an incident reasonably appears to involve a war crime, the commander must notify military law enforcement personnel such as the Security Forces (Air Force military police) or, for serious matters, the Air Force Office of Special Investigation (AFOSI). The Security Forces are typically assigned to the commander’s unit. By contrast, the AFOSI is a separate specialized investigative agency that lies outside the chain of

¹⁹⁰ UCMJ art. 15, 10 U.S.C. § 815.

¹⁹¹ THE MILITARY COMMANDER AND THE LAW, *supra* note 186, at 156.

¹⁹² MAJOR GENERAL ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE ¶ 3 (2004), *available at* http://www.npr.org/iraq/2004/prison_abuse_report.pdf; LTG ANTHONY R. JONES & MG GEORGE R. FAY, ARMY REGULATION 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE (2004), *available at* <http://news.findlaw.com/nytimes/docs/dod/fay82-504rpt.pdf>. The investigations were conducted pursuant to Army Regulation 15-6, Procedures for Investigating Officers and Boards of Officers, Oct. 2, 2006.

command. AFOSI detachments, consisting of military and civilian investigators, report through AFOSI channels to the commander of the organization, a senior Air Force officer. He reports to the Air Force Inspector General (a military officer), who in turn reports to the Secretary of the Air Force. Only the Secretary of the Air Force is empowered to direct the AFOSI to delay, suspend, or terminate an investigation.¹⁹³

Once complete, the criminal investigation is transmitted to the commander, who determines how to proceed. The unit commander typically prefers charges against the individual accused. Preferral implies that the commander has grounds to believe an offense may have been committed, not that the charge has been proved beyond a reasonable doubt. The charges are then forwarded to the Special Courts-Martial Convening Authority, a more senior commander who can decide whether to direct resolution of the matter by means other than court martial, “refer” the charge to a Special Court-Martial (where punishment is capped at a low level), or convene an “Article 32 Investigation” to determine whether a General Court-Martial (which is empowered to adjudge all punishments) is merited.¹⁹⁴ Based on the results of the investigation, the Special Courts-Martial convening authority may decide the matter is not appropriate for trial, refer the case to a Special Court-Martial, or forward it to a more senior commander who exercises General Courts-Martial authority. The General Courts-Martial Convening Authority may direct alternative resolution or convene a Special or General Court-Martial.¹⁹⁵

Commanders acting in their capacity as Courts-Martial Convening Authorities continue to exercise substantial influence over the matter following trial. In particular, they have the authority to approve or disapprove the findings and the sentence adjudged at trial. Although the Convening Authority may reject or decrease punishment, he or she may not increase it. The Judge Advocate General also

¹⁹³AIR FORCE POLICY DIRECTIVE 71-1, CRIMINAL INVESTIGATIONS AND COUNTERINTELLIGENCE, ¶ 1.4.2 (2010); *See also* AIR FORCE INSTRUCTION 71-101 (VOL. 1), CRIMINAL INVESTIGATIONS (1999).

¹⁹⁴ Maximum punishments for particular offenses are set forth in the individual punitive articles (offenses) set forth in MCM, *supra* note 184, pt. IV. Punishment may also be limited based on the rank of the accused. MCM, *supra* note 184, at RCM 1003. A Special Court-Martial may not adjudge a sentence that includes death, dishonourable discharge, dismissal of an officer, confinement in excess of one year, hard labor without confinement for more than three months, or certain forfeitures of pay. UCMJ, 10 U.S.C. § 819.

¹⁹⁵ *See generally* AIR FORCE INSTRUCTION 51-201, ADMINISTRATION OF MILITARY JUSTICE (2007) [hereinafter AFI 51-201].

exercises certain limited authority over post-trial procedures in particular categories of cases.¹⁹⁶

All commanders are advised by a Staff Judge Advocate and his or her staff of military attorneys (judge advocates), who are usually assigned to the unit and report to the commander. Judge advocates may not act in matters in which they are directly involved; doing so would represent a “conflict of interest.” For instance, a judge advocate may not offer legal advice regarding investigation of an air strike causing collateral damage to civilians or civilian object if he or she was personally involved in the mission planning (assuming the mission planning advice is relevant to the issue at hand). In such a case, an uninvolved staff judge advocate will be assigned to provide legal advice to the commander.

Prosecution will generally be handled by judge advocates who are members of Special Courts-Martial Convening Authority’s staff. They may be assisted by Circuit Trial Counsel, experienced litigators who, although formally assigned to a Circuit Trial Judiciary, report to the Convening Authority’s Staff Judge Advocate for the purposes of the case. The Convening Authority also selects the pool of officers from which the “jury” will be formed if the accused elects trial “by members.”¹⁹⁷ Military judges and defense counsel are assigned to the Judiciary and are fully independent of the chain of command. They report only through judge advocate channels, ultimately to the Judge Advocate General as the senior lawyer of the service.¹⁹⁸ The Judge Advocate General is also charged with professional supervision and discipline of military trial and appellate military judges, judge advocates and other lawyers who practice in military proceedings under the UCMJ.¹⁹⁹ Convening authorities and commanders are specifically prohibited from censuring or admonishing counsel, military judges or members of a court-martial, and it is improper for any person subject to the UCMJ to interfere with court-martial proceedings, findings, or sentencing.²⁰⁰

In addition to military mechanisms for investigating incidents, numerous other avenues of inquiry exist. Presidential Commissions are typically established by executive order to provide advice to the

¹⁹⁶ See MCM, *supra* note 184, RCM 1101–07, 1201–05; AFI 51–201, *supra* note 195, ch. 9.

¹⁹⁷ AFI, 51–201, *supra* note 195, ¶ 5.9.

¹⁹⁸ *Id.* ¶¶ 5–1, 5–3.

¹⁹⁹ MCM, *supra* note 184, RCM 109.

²⁰⁰ *Id.* RCM 104.

President. More common are Congressional Select Committees or Investigative Commissions, which may be established by joint decision of both houses of Congress or by one of the houses. Congressional Standing Committees of Congress may also hold hearings to consider issues within their competency.²⁰¹ Individual agencies likewise possess the authority to investigate matters involving their personnel. For instance, the Department of Justice Inspector General has investigated the involvement of Federal Bureau of Investigation agents in detainee interrogations conducted in Guantanamo Bay, Iraq, and Afghanistan.²⁰² Similarly, the Department's Office of Professional Responsibility conducted an inquiry into legal advice regarding interrogations, finding professional misconduct on the part of two Office of Legal Counsel attorneys (although said findings were not adopted by the Associate Deputy Attorney General with authority over the matter).²⁰³

E. Conclusions as to State Practice

The four case studies reveal certain common characteristics of investigations into battlefield incidents. Numerous cautionary caveats are in order. First, the practices are those of States that operate at the high-end of investigative processes and procedures. Few States can marshal the resources necessary to conduct investigations at this level of complexity. Thus, while the legal bar may be lower than indicated in the following conclusions, it will surely be no higher.

Second, certain of the practices described above result not from the mandates of IHL, but rather reflect conduct demanded by domestic legislation, judicial decisions unique to the State concerned, or non-IHL treaty obligations bearing only on States Party. Sensitive to this fact, the

²⁰¹ LISA MAGARRELL, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE: U.S. INQUIRY INTO HUMAN RIGHTS ABUSES IN THE "WAR ON TERROR" 11 (2008).

²⁰² DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FBI'S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTANAMO BAY, AFGHANISTAN, AND IRAQ (2009).

²⁰³ DEP'T OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GENERAL (DAVID MARGOLIS), MEMORANDUM OF DECISION REGARDING THE OBJECTION TO THE FINDINGS OF PROFESSIONAL MISCONDUCT IN THE OFFICE OF PROFESSIONAL RESPONSIBILITY'S REPORT OF INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS (2010), *available at* <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf>; DEP'T OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INVESTIGATION TECHNIQUES" ON SUSPECTED TERRORISTS (2009).

conclusions seek to articulate legal standards gleaned from practice, but divorced from State-specific domestic norms and international obligations. For instance, in those systems where the operational and military justice functions are separate, such separation is, as explained, almost entirely the consequence of domestic legislation and case law (such as *Genereux*, *Findlay* and *Lane*), some of which applies treaty norms applicable only to States that are Party thereto. When this is the case and there is meaningful contrary practice (as in the dual role of the service Judge Advocate Generals in the United States), no corresponding requirement has been included.

Third, it must be understood that the conclusions set forth below are not meant to represent “best practice.” As an example, while there is no requirement for making known the results of an investigation, transparency, particularly among an affected population, generally enhances counterinsurgency operations.²⁰⁴ The Article 32 Investigating Officer in the Haditha case convincingly made this point when he noted that “[t]hese actions display not only negligence with regard to those duties reasonably expected of a Battalion Commander in combat; they also belie a wilful and callous disregard for the basic [tenets] of counterinsurgency operations and the need for popular support and legitimacy.”²⁰⁵

Fourth, practices based on policy choice pervade each of the case studies. For instance, all four States have military criminal investigative agencies that lie outside the chain of command investigate serious incidents, and the United States imposes extensive reporting requirements up the chain of command. It is difficult to pinpoint any rule of IHL requiring these practices. Similarly, while no requirement for investigations outside military channels can be found in IHL proper, each of the States surveyed provide for extra-military inquiries, thereby demonstrating a commitment to the principle of civilian control over the military in democracies. As should be clear, a practice that is not technically required by IHL may nonetheless represent a wise policy decision. But it is not the law, and thus is excluded from the obligations appearing below.

Based on the preceding survey of law and practice, the following conclusions are offered:

²⁰⁴ See generally DEP’T OF THE ARMY HEADQUARTERS & MARINE CORPS COMBAT DEVELOPMENT COMMAND HEADQUARTERS, COUNTERINSURGENCY, FM 3–24, MCWP 3–33.5 (2006) (“COIN Manual”).

²⁰⁵ Jackson, *supra* note 175, at 98 (citing Chessani Article 32 Investigation Officer Report).

- 1) The obligation to report applies to all individuals who exercise command authority over military forces. That a subordinate commander or other responsible officer bears this responsibility does not relieve more senior officers of the duty. Effective compliance with the requirement necessitates policies extending it to any member of the armed forces with knowledge of a possible IHL violation.
- 2) The obligation to investigate likewise encompasses the entire chain of command. The duty may be satisfied by investigations at any level of command, but only so long as the investigation in question is effective in terms of uncovering relevant facts and circumstances that will permit appropriate disciplinary action to be taken.
- 3) Every allegation of a war crime need not be investigated. The requirement to investigate applies only where such allegations appear credible.²⁰⁶ On the other hand, an investigation must be launched even in the absence of an allegation when credible reason to suspect a violation exists.
- 4) There is no requirement to investigate particular categories of incidents, such as those involving civilian casualties or damage to civilian property. Such a requirement would be impractical during armed conflict. Only incidents based on a credible allegation of a war crime or other reason to suspect a violation necessitate investigation.
- 5) Investigations may be administrative in nature. In particular, an administrative fact-finding investigation is appropriate where it is necessary to assess existing procedures and practices, such as current targeting guidelines, rules of engagement and other policy or operational practices, or to ascertain preliminary information regarding an event, such as the exact time and location of a particular incident, the identity of the unit involved and so forth.²⁰⁷ That an incident may involve a violation of IHL does not preclude an administrative investigation. Typically, States employ a combination of field investigations, administrative investigations of varying degrees of formality, criminal investigations and trials, and governmental oversight mechanisms to meet the requirement to investigate.
- 6) It is appropriate to conduct administrative investigations, including immediate in-the-field examination of the facts and circumstances

²⁰⁶ *See id.* at 99.

²⁰⁷ Such information may not be self-evident in a situation of intense fighting that involves the participation of various units moving in and out of the combat zone. While some military activities, such as air strikes, may be documented with video footage, manoeuvres of ground forces typically lack such documentation.

- surrounding an event, to assess the need for further investigation, whether administrative or criminal in nature.
- 7) Possible war crimes must be promptly investigated. In particular, an initial inquiry must be conducted immediately whenever a commander or other responsible officer reasonably suspects that a war crime may have taken place. The realities of the battlefield, however, will often influence the practicable pace of the investigation.
 - 8) The requisite depth of the investigation and its procedural robustness depend in part on the complexity of the matter and its seriousness. They also depend on the attendant circumstances, such as on-going hostilities in the area where the incident occurred, the location of witnesses, and so forth. In other words, the effectiveness of an investigation must always be judged contextually.
 - 9) Impartiality and independence are questions of fact. The issue is not whether an investigator falls within the chain of command, but whether he or she is in fact able to act without undue influence when making findings as to possible violations of IHL. Any attempt to interfere with the investigator's actions in order to affect the findings is improper. The safeguard for independence and impartiality lies primarily in prohibiting wrongful interference, not in mandating, for instance, a particular command or organizational relationship.
 - 10) There is no prohibition on commanders investigating possible violations by members of their unit. On the contrary, unit commanders are primarily responsible for conducting a prompt initial inquiry into an incident. However, commanders and other responsible officers may not conduct an investigation into any incident in which they have been personally involved. Such matters must be referred to a higher command or to law enforcement authorities.²⁰⁸
 - 11) There is no legal requirement that individuals investigating incidents be of a particular rank or serve outside the unit involved in the incident. Military police serving within the unit involved in an incident may conduct criminal investigations. However, as with commanders, they must be impartial.
 - 12) There is no legal requirement that those conducting an investigation be trained in investigative techniques or practices. In many cases, investigations are optimally conducted by officers with an operational background, as they may best understand the context in which the incident occurred and the manner of its execution.

²⁰⁸ This requirement ensures the impartiality of the officer directing the investigation and preserves the independence of those conducting it.

- 13) The investigative safeguards typically applicable in criminal and judicial proceedings do not apply in administrative investigations, except as a matter of policy. The differing purposes of the two categories of investigations — prosecution and fact-finding respectively — undergird the distinction. Fact-finding may necessitate expeditious procedures that ensure full cooperation with the investigation, but which run counter to such judicial limitations as the prohibition on compelling testimony from a suspect.²⁰⁹ However, in virtually all of the systems evaluated, at trial such administrative practices will bear on the use of any information obtained.
- 14) Investigations need not be conducted publically or their results released. Nor is there any requirement that victims or their families participate or otherwise be informed of investigative results. To the extent this is done, the practice represents a policy choice.²¹⁰
- 15) There is no obligation to conduct investigations outside military channels into possible IHL violations.
- 16) As the U.S. case study demonstrates, no absolute prohibition exists on military lawyers providing both operational and investigative or disciplinary advice; the restrictions in the other countries examined derive from domestic law and decisions. Nevertheless, it is improper for a lawyer to provide the legal advice regarding an incident in which he or she was personally involved.²¹¹
- 17) When an investigation reveals clear and reliable evidence of a war crime, disciplinary action must be taken or the case has to be referred to criminal investigative agencies.
- 18) Administrative and criminal investigations may take place simultaneously into the same incident, for they may serve different purposes.
- 19) States must take action to punish those who have violated IHL. Either appropriate disciplinary action (including prosecution) within the military justice system or prosecution by the civilian courts satisfies the requirement.
- 20) Criminal investigations and judicial proceedings involving possible war crimes are subject to the same safeguards for an accused, and for

²⁰⁹ For example, it may be vital in the investigation of an attack involving civilian casualties to quickly identify the causes of the incident so as to preclude repetition.

²¹⁰ In the context of armed conflict, such a requirement would make little sense. Sensitive intelligence sources might be compromised, operational tactics and military strategy could become public, witnesses may be placed at risk due to their cooperation, classified weapons data could be revealed, etc.

²¹¹ For instance, a lawyer who provided legal advice on whether a particular target represented a military objective may not subsequently serve as a legal adviser for an investigation or prosecution involving the legality of a strike against that target. The definition of military objective is at AP I, *supra* note 22, art. 52.2.

the overall integrity of the investigative and judicial system, as would apply in peacetime.

- 21) U.S. practice suggests that military lawyers who render advice on whether to prosecute or act as prosecutors need not serve outside the operational chain of command; restrictions on such service in other countries result from domestic limitations, not IHL. However, lawyers providing defense services to members of the armed forces accused of a violation, as well as judges in military trials, must be independent of the chain of command.
- 22) Senior military lawyers, including an armed force's most senior lawyer, may, as in the U.S. case, exercise professional and military supervision over both lawyers providing operational legal advice and those responsible serving within the military justice system. Domestic norms, not IHL, drive the separation of these functions in other States. However, senior military lawyers may not interfere with either investigations or criminal trials in any manner that would detract from the impartiality of such proceedings, nor may they act with regard to any matter in which they are personally involved.

IV. Concluding Thoughts

The *lex scripta* regarding investigations into violations of international law committed during an armed conflict is markedly exiguous. Although it is incontrovertible, as both a matter of treaty and customary law, that an investigation must be conducted whenever a war crime may have occurred, and that prosecution (or other appropriate disciplinary action) is mandated in the event a violation is found, little guidance exists in the law proper on the nature of such investigations.

Part I of this article suggested standards applicable to IHL investigations that were deduced from the relevant provisions of the 1949 Geneva Conventions and the 1977 Additional Protocol I. They pertain equally to the customary IHL governing investigations, as well as both international and non-international armed conflict. Human rights law also applies in situations of armed conflict, although the extent of application remains somewhat unsettled. As explained in Part II, four universal principles govern human rights investigations: independence, effectiveness, promptness, and impartiality. These principles also determine the adequacy of investigations into possible war crimes. Since IHL is the *lex specialis* in armed conflict, compliance of human rights investigations with the four principles is determined by reference to IHL.

It was accordingly necessary to examine State practice in Part III to ascertain how States actually interpret and implement the obligation

to conduct independent, effective, prompt, and impartial IHL investigations. The distinction between practices derived from IHL and those that merely reflect policy choice or the influence of domestic norms, including treaty obligations borne by particular States, proved decisive in several of the conclusions drawn. Importantly, the criteria set forth in Part III are intended to reflect likely *lex lata*, not necessarily best practice. At the same time, given the normative maturity of the States examined, as well as their relative wealth of resources to conduct the investigations, the conclusions represent the outer limits of the legal regime governing investigations.

In light of the current controversy over investigations during armed conflict, two points merit particular emphasis. First, investigations are required only if there is reasonable suspicion or a credible allegation of a war crime having been committed; not every allegation or possibility of violation necessitates investigation. Second, IHL does not require an investigation that exhausts all possible investigatory options. The sole requirement is one that meets the four universal principles. For example, while it may enhance independence for the person with authority to charge a war crime to operate outside the chain of command, such a relationship is not legally required so long as he or she is not subjected to improper pressures when conducting their activities. Similarly, while a trained criminal investigator may be better equipped to conduct a thorough investigation in some cases than another military officer, this fact does not render the latter's investigation ineffective as such.

Any assessment of whether an investigation has been properly conducted must also take cognizance of the relationship between human rights law and IHL. Human rights-specific procedures such as victim involvement or the performance of autopsies have no normative relevance to investigations of IHL violations. They may be practical measures that in certain specific cases could enhance the quality of an investigation, but do not represent legal criteria. Moreover, it must be remembered that, as a matter of law, practices that may be legally mandated during a human rights investigation occurring in peacetime are supplanted by IHL standards during armed conflict. And, of course, although particular human rights treaty law, and its authoritative interpretation by treaty bodies, may determine how a treaty provision is to be applied by States Party in armed conflict, such pronouncements have no direct bearing on the obligations of non-Party States.

Those who conduct "investigations into investigations" bear a further responsibility for discriminating *lex lata* from *lex ferenda*. Indeed, assertions of norms that in fact amount to *lex ferenda* may prove

counterproductive to the goal of performing meaningful investigations. For instance, some observers have criticized investigations by military personnel as nothing more than looking into one's own possible misconduct.²¹² While impartiality and independence are investigatory requirements, so too is effectiveness. An investigator who does not understand, for example, weapons options, fuzing, guidance systems, angle of attack, optimal release altitudes, command and control relationships, communications capabilities, tactical options, available intelligence options, enemy practices, pattern of life analysis, collateral damage estimate methodology, human factors in a combat environment, and so forth, will struggle to effectively scrutinize an air strike. Not surprisingly then, and as Part III demonstrates, it is common for operational personnel, including commanders, to examine military activities.

Similar care must be taken to avoid positing impractical, or even dangerous, standards. How, for example, does an investigator interview witnesses to an air attack executed beyond the front lines? How are the victims' families notified of an investigation's findings when they are in enemy held territory and have no access to modern communications such as the Internet? How does one interview witnesses in the field, when they will be killed for cooperating once the investigators depart? Who will conduct a prompt investigation into a possible war crime in the midst of on-going high-intensity hostilities if not members of the unit itself? The point is not that efforts like these are always poorly suited to investigations. Rather, they are cited to illustrate that the baseline norms for investigations during armed conflict are necessarily different than those that could be complied with easily in other situations.

It is hoped that those charged with appraising investigations conducted during an armed conflict will exhibit both sensitivity to the nature of the conflict in question and fidelity to the governing law as it is, not as they might have it to be. Failure to do so will only undercut respect for international humanitarian law, as well as the human rights norms that incorporate it, on the part of States conducting investigations.

²¹² See *Israel's Report to the UN Misstates the Truth*, *supra* note 3.