

GUIDELINES ON INVESTIGATING VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW: LAW, POLICY, AND GOOD PRACTICE

Noam LUBELL

Professor of International Law of Armed Conflict at the University of Essex, and Swiss Chair of International Humanitarian Law at the Geneva Academy of International Humanitarian Law and Human Rights.

Jelena PEJIC

Senior Legal Advisor at the International Committee of the Red Cross (ICRC), Geneva.

Claire SIMMONS

Researcher at the University of Essex and at the Geneva Academy of International Humanitarian Law and Human Rights.

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GENERAL INTRODUCTION

PURPOSE OF THE GUIDELINES

1. A number of States have recognised the importance of robust domestic¹ investigations into the lawfulness of their own actions in armed conflict. There are, however, significant differences between the various national legal frameworks and disparate practice across States in the way investigations are carried out. Clarity on a number of issues would appear to be useful, including the circumstances in which investigations should be triggered, the different forms investigations may take depending on the nature of an incident, and the principles and standards applicable during the investigative process.
2. These Guidelines consider investigations into possible violations of international humanitarian law – the body of international rules governing armed conflict – from the perspective of existing international law, policy, and good practice. The intent is not to set forth a uniform investigative process for all States. Rather, the purpose is to identify and present – while remaining sensitive to the differences that characterise domestic legal and investigative systems – a range of practical and legal issues that can arise in investigations or should be considered beforehand. The aim is likewise to provide practical assistance by setting out a general framework for investigations in armed conflict and, where relevant, the corresponding international principles and standards.
3. The text refers to “investigations in armed conflict” by way of shorthand. This term is used to denote investigations into possible violations of international humanitarian law, that is, acts in contravention of international humanitarian law with a nexus to an armed conflict, whether or not the investigations themselves are carried out during an armed conflict. Investigations undertaken during an armed conflict for acts not linked to the armed conflict are outside its scope.
4. While the Guidelines are focused on investigations carried out into possible violations of international humanitarian law, they may also be useful for investigations into behaviour prohibited by international law not addressed in this text, such as genocide or crimes against humanity.
5. The Guidelines deal with investigations by States into their own actions but, on occasion, consider the role of cooperation in multi-national military operations for various parts of an investigative process.² They may also prove useful for actors other than States.³

¹ The terms “domestic” and “national” are used interchangeably in this text.

² Special considerations in relation to investigations may arise in the case of multi-national military operations, including UN peacekeeping operations, as regards, in particular, the sharing of information, as well as cooperation and relations with partner and host States. The Guidelines are not focused on the particularities of States operating in multi-national military settings, and the specific issues involved would require separate examination.

³ In particular, organised non-State armed groups party to a non-international armed conflict.

STRUCTURE

6. The text contains 16 Guidelines, each followed by a commentary. The Guidelines draw on common elements found in international law, domestic law and policy, and are informed by State practice. The commentaries aim to provide clarification on the meaning of the Guidelines and give further indication as to how they could be implemented in practice. The Guidelines are not a blueprint for a specific domestic system. Likewise, they do not – and cannot – relieve a State of its domestic, regional and international law obligations, the interpretation of which will require appropriate consideration in each case.
7. Section I deals with the steps prior to the launching of an investigation in armed conflict. These include the recording of military operations, on-scene action, internal reporting and external allegations,⁴ and the assessment of facts.
8. Section II deals with the standards applicable to criminal investigations of war crimes.⁵ The Guidelines address the standards of independence and impartiality, thoroughness, promptness, and transparency that make up an effective investigation, as they apply to criminal investigations. This section also covers fair trial guarantees in relation to investigations.
9. Section III deals with administrative investigations in armed conflict. The Guidelines address the different types of non-criminal investigations into violations of international humanitarian law and how the standards of independence and impartiality, thoroughness, promptness, and transparency apply to such investigations.
10. Section IV deals with how matters of State responsibility should be approached, the concept of policy-related violations of international humanitarian law and how they may be addressed, and the need to have legal advisors to the armed forces so that, *inter alia*, effective investigations can be carried out.

WHY INVESTIGATE?

11. There are both legal and non-legal reasons to conduct investigations in armed conflict.

LEGAL REASONS

INTERNATIONAL HUMANITARIAN LAW

12. Investigations into possible violations of international humanitarian law are recognised as critical for the proper application of this body of norms in both international and non-international armed conflict. Legal sources for a duty to investigate can be found in both treaty and customary international humanitarian law, *inter alia* in the obligation of the High Contracting Parties to the Geneva Conventions of 1949 and their Additional Protocol I of 1977, applicable in international armed conflict, to enact any legislation necessary to provide effective penal sanctions for persons suspected of having committed or ordering the

⁴ See para 48 of the Guidelines below.

⁵ For how this term is used in the Guidelines, see para 14 below.

commission of “grave breaches” of their provisions.⁶ States have a legal obligation to search for such persons, regardless of their nationality, and to carry out criminal proceedings (or extradition under certain conditions), which necessarily includes investigations, so as to bring the perpetrators to justice.

13. “Other serious violations of the laws and customs of war” – which may be committed in international or non-international armed conflict – is a legal term of art synonymous with “war crimes”. A list of such serious violations (which is wider than the concept of grave breaches), is provided for in the Statute of the International Criminal Court (in Article 8 (2) (b), (c), and (e))⁷ and is generally considered to reflect customary international law. This source of law requires that, in both international and non-international armed conflict, States investigate all war crimes committed by their nationals or on their territory, and other war crimes over which they have jurisdiction, and, if appropriate, prosecute the suspects.⁸
14. The term “war crime” is used further in this text to encompass both grave breaches of the 1949 Geneva Conventions and of Additional Protocol I, and other serious violations of the laws and customs of war⁹ that may be committed in international and non-international armed conflict and give rise to individual criminal responsibility. The term “violation” encompasses, in addition to war crimes, all other breaches of international humanitarian law that, under its rules, do not give rise to individual criminal responsibility.¹⁰
15. It should be recalled that the Geneva Conventions distinguish between a State’s duty to “repress” grave breaches and its duty to “suppress” all other acts contrary to their provisions.¹¹
16. The term to “repress” is generally understood to encompass measures that will include individual criminal prosecutions for acts that must be criminalised under treaty and customary international humanitarian law. The term to “suppress” usually denotes the wide range of measures that States may take to address all other violations of the laws and customs of war, including violations that do not give rise to individual criminal responsibility, so as to ensure they cease, are prevented and that their reoccurrence is precluded. The notion of suppression also comprises administrative measures that States may take to deal with violations not amounting to war crimes, i.e. administrative investigations (see Guidelines 12 and 13).

⁶ For treaty provisions see Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [hereinafter “GCI”], 12 August 1949, 75 UNTS 31, Article 49; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea [hereinafter “GCII”], 12 August 1949, 75 UNTS 85, Article 50; Geneva Convention (III) Relative to the Treatment of Prisoners of War [hereinafter “GCIII”], 12 August 1949, 75 UNTS 135, Article 129; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War [hereinafter “GCIV”], 12 August 1949, 75 UNTS 287, Article 146; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts [hereinafter “API”], 8 June 1977, 1125 UNTS Article 85. For customary law see Henckaerts, J.-M. and Doswald-Beck, L., ICRC Customary International Humanitarian Law [hereinafter “ICRC Customary Law Study”] Rule 158.

⁷ Rome Statute of the International Criminal Court (2002) [hereinafter “ICC Statute”] Article 8. Article 8(a) repeats the grave breaches provisions of the four Geneva Conventions. See also ICRC Customary Law Study (above note 6) Rule 156 and commentary.

⁸ ICRC Customary Law Study (above note 6) Rule 158.

⁹ See para 13 of the Guidelines above.

¹⁰ States are of course free to criminalise such violations (and many do) under domestic law.

¹¹ See GCI (above note 6) Article 49; GCII (above note 6) Article 50; GCIII (above note 6) Article 129; GCIV (above note 6) Article 146; API (above note 6) Articles 85(1) and 86(1).

17. Certain other international treaties also provide for the obligation of States parties to take appropriate measures to deal with violations of their provisions, including the Hague Cultural Property Convention and its Second Protocol, the Chemical Weapons Convention, the Amended Landmines Protocol, the Ottawa Convention on Landmines, and the Dublin Convention on Cluster Munitions.¹²

OTHER BRANCHES OF INTERNATIONAL LAW

18. The legal sources for a duty to investigate acts committed in armed conflict can also be found in other branches of international law. Certain international human rights law treaties explicitly provide for a duty to investigate specific human rights violations,¹³ with provisions that have been further developed through the interpretations of human rights bodies.¹⁴ International and regional human rights treaties have likewise been interpreted by relevant bodies as containing a general requirement to investigate alleged violations to give effect to the rights provided for.¹⁵
19. Under international criminal law, investigations are necessarily required as part of the duty to prosecute certain crimes under international law.¹⁶ Moreover, investigations are an important element of the complementarity principle under the Statute of the International Criminal Court: a State Party must carry out an effective investigation into alleged crimes covered by the Statute in order to preclude the Court's jurisdiction.¹⁷
20. Investigations are also referred to in human rights "soft law" and other non-treaty standards,¹⁸ and are commonly called for by UN bodies, including the General Assembly and the Human Rights Council, by regional human rights bodies, and others.

¹² Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) 249 UNTS 240, Article 7; Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1999) 38 ILM 769, Articles 15-17; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993) 1974 UNTS 45, Article VII(1); 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 (1996) 35 ILM 1206, Article 14; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (1997) 36 ILM 1507, Article 9; Convention on Cluster Munitions, (2008) 48 ILM 357, Article 9.

¹³ This includes the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) UNTS 1465, Article 6; International Convention for the Protection of All Persons from Enforced Disappearance (2006) Article 12; Inter-American Convention to Prevent and Punish Torture (1985) Article 8; Inter-American Convention on the Forced Disappearance of Persons (1994) Article VI.

¹⁴ UN Human Rights Committee, "General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)" (10 March 1992) para 14; UN Human Rights Committee, "General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life" (10 October 2018), CCPR/C/GC/36, paras 27-29; Inter-American Court of Human Rights: *Velásquez Rodríguez v Honduras*, Judgment, 29 July 1988, (Ser. C) No. 4, paras 166-181; *Santo Domingo Massacre v Colombia*, (Ser. C) No. 259, Judgment of 30 November 2012 (Preliminary objections, merits and reparations) paras 154-173; European Court of Human Rights: *Isayeva v Russia*, Judgment, 24 February 2005 (57950/00) paras 209-214; *Al-Skeini v UK*, Judgment, 7 July 2011 (55721/07) paras 161-167.

¹⁵ E.g., the International Covenant on Civil and Political Rights [hereinafter "ICCPR"] (1966) UNTS 999, Article 2.2 as interpreted by the Human Rights Committee in "General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (26 May 2004), CCPR/C/21/Rev.1/Add.13, paras 8 and 15.

¹⁶ ICC Statute (above note 7) preamble, para 6.

¹⁷ ICC Statute (above note 7) Articles 17-18.

¹⁸ ECOSOC, Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1989) para 9; UN OHCHR, Basic Principles on the Use of Force and Firearms by Law

STATE RESPONSIBILITY

21. The military of a State is an organ of the State and its acts are attributable to the State. A violation of international humanitarian law committed by one (or more) members of the armed forces may thus give rise to the responsibility of the relevant State.¹⁹ An obvious example is where a member of the armed forces commits a war crime.²⁰ State responsibility for violations of international humanitarian law can arise even where no individual responsibility can be established (e.g., if adequate structures for compliance with the law were not in place).
22. A State has a duty under international humanitarian law to comply with its rules (to “respect and ensure respect for them in all circumstances”).²¹ This is a “primary rule” under the international law of State responsibility,²² which will be breached when a member of the armed forces violates the law.
23. In consequence, under the “secondary rules” of State responsibility, a State must take all relevant measures to cease an ongoing violation of international humanitarian law, ensure its non-repetition and make appropriate reparation.²³ An investigation will in many cases be a preliminary step to any such action and is thus essential.²⁴

Enforcement Officials (1990); 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 [hereinafter “Basic Principles on the Right to a Remedy and Reparation”], Resolution adopted by the General Assembly, 16 December 2005, A/RES/60/147, para 22; Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, Resolution adopted by the General Assembly, 3 December 1973, A/RES/3020(XXVIII), para 1.

¹⁹ UN International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts [hereinafter “Articles on State Responsibility”] Supplement No. 10 (A/56/10), chp.IV.E.1 (2001), adopted by the UN General Assembly in Resolution A/RES/62/61 (8 January 2008) Article 4; GCI (above note 6) Article 51; GCII (above note 6) Article 52; GCIII (above note 6) Article 131; GCIV (above note 6) Article 148; API (above note 6) Article 91. See also ICRC Customary Law Study (above note 6) Rule 149.

²⁰ State responsibility for conduct attributable to it will arise in other cases as well (see Articles on State Responsibility (above note 19), Articles 2-11). A State is also responsible for the acts of members of State organs other than the military, e.g., the security services or the gendarmerie (see Articles on State Responsibility, Article 5). A State will likewise be responsible for the conduct of a person or group of persons if the person or group is in fact acting on the instructions of, or under the direction or control of, the State carrying out the conduct (see Articles on State Responsibility, Article 8).

²¹ Common Article 1 to the four Geneva Conventions 1949 (above note 6); Pictet, J. S. (ed.), Commentary on the First Geneva Convention, ICRC (1952) [hereinafter “Pictet Commentary”] p. 26; ICRC Commentary on the First Geneva Convention (2016) [hereinafter “ICRC 2016 Commentary”] para 118; International Court of Justice: *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)*, Judgment of 27 June 1986 (Merits), para 220.

²² International Law Commission, Commentary to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the work of its fifty-third session, Yearbook of the International Law Commission (2001), vol. II, Part Two, p. 31, para 1.

²³ Articles on State Responsibility (above note 19) Articles 30-31; International Court of Justice, *Case Concerning Armed Activities on The Territory of The Congo (Democratic Republic of The Congo v Uganda)*, Judgment of 19 December 2005, paras 255-259.

²⁴ Where violations of the law are committed by a non-State armed group party to a non-international armed conflict whose actions cannot be attributed to the State, a State may still have certain obligations regarding the prevention of violations and the prosecution and punishment of perpetrators. This may also presuppose an investigation. See International Law Commission, Commentary to the Draft Articles on State Responsibility (above note 19) p. 39 para 4.

24. State responsibility may also arise in relation to individuals or other entities harmed by a violation of another branch of international law which provides that they are the direct holders of rights (e.g., individuals under international human rights law). The specific form of reparation due, which may often include compensation, will depend on the source of law and procedure involved.
25. Domestically, a State's responsibility may take the form of civil liability for harm committed to individuals or entities by the armed forces. The extent to which, and the specific ways in which, the civil liability of a State may be established in domestic proceedings (judicial or other), and the remedies available, will vary according to the domestic legal system.²⁵

NON-LEGAL REASONS

26. The existence of effective domestic procedures and mechanisms for investigations in armed conflict serves to enhance a State's military operational effectiveness. Investigations may be a source of information on the success or failure of military operations and enable appropriate steps to be taken in the latter case. They can likewise assist in the identification of good practice and lessons-learned. Ultimately, investigations are crucial for maintaining discipline in an institution that depends on high levels of command and control.
27. Investigations are also a form of accountability to a State's own population, to victims of violations of international humanitarian law and their next of kin, the population of another territory in which a State's military may be operating, as well as to the international community. They can demonstrate that a State is adhering to its international obligations – either by clarifying that international humanitarian law was not violated or by demonstrating that the State is addressing an alleged violation of the law and taking appropriate corrective action. Showing a genuine effort to comply with the law and rejecting impunity for violations may, for example, increase trust in the military's actions. Proper investigations of alleged violations can also facilitate transition to peace as there is likely to be more clarity on certain events and the corrective action that has been, or still needs to be, taken. The fact that a State is striving to implement its international legal obligations also promotes the overall credibility of the law.
28. The parties to an armed conflict will often direct accusations of violations of international humanitarian law against each other in order to, for example, achieve political, psychological, propaganda, or other goals. This can include mutual recriminations over the way in which the law is being interpreted or applied by the other side. Effective investigations are crucial for a credible response to such claims. They may also serve to reduce the risk that the parties will engage in an escalating series of further violations that each side seeks to justify as a response to the other's actions.
29. Taking steps to determine whether a violation of international humanitarian law has occurred, and if so, to remedy it, is the primary responsibility of States. It should be noted, however, that when accountability failures occur or are thought to have occurred, international or regional bodies and processes (such as fact-finding missions, commissions of inquiry, tribunals), may be triggered to examine events and recommend or require action.

²⁵ It should be noted that in domestic legal proceedings, whether criminal or civil in nature, a violation of international humanitarian law (e.g., the grave breach of wilfully killing of a prisoner of war) may be classified and dealt with as a crime under domestic law (e.g., murder).

Effective domestic investigations would preclude, or at least limit, the need to resort to external engagement.

BASIC REQUIREMENTS OF AN EFFECTIVE INVESTIGATION

30. Regardless of its nature, an investigation needs to be effective. The term “effective” is not presented here as a legal term of art, as it does not have an agreed definition. It has been used generically in many contexts to indicate that a process must be appropriate and undertaken in good faith, with all feasible means employed to achieve its goal.
31. As noted above, the grave breaches provisions of the 1949 Geneva Conventions and of Additional Protocol I state that the High Contracting Parties must provide “effective penal sanctions”;²⁶ other international treaties require that States provide for “effective remedies” for violations of the relevant law;²⁷ and *ad hoc* criminal courts and human rights bodies have issued judgments or decisions on the obligation to carry out “effective investigations”.²⁸ Non-treaty instruments adopted by the UN General Assembly have likewise reiterated the requirement of an effective investigation.²⁹
32. For the purpose of these Guidelines an investigation must be effective insofar as it should be *capable* of enabling a determination of whether there was a violation of international humanitarian law, of identifying the individual and systemic factors that caused or contributed to an incident, and of laying the ground for any remedial action that may be required. The Guidelines draw on the internationally recognised principles most commonly required for the effectiveness of an investigation³⁰ and elucidate their practical application to investigations in armed conflict. The principles referred to are: independence, impartiality, thoroughness and promptness. A fifth principle, that of transparency, is also deemed to be applicable to investigations in armed conflict, albeit in a modified form.
33. While an underlying requirement for investigations can be extrapolated from international humanitarian law, this body of law has very few provisions on the specific way in which investigations should be carried out. International human rights law bodies have had an opportunity to more precisely elaborate on this matter and also on how the general principles of an effective investigation should be implemented. These bodies have indicated

²⁶ See note 6 above.

²⁷ ICCPR (above note 15) Article 2(3)(a); European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ETS 5, Article 13.

²⁸ International Criminal Tribunal for the former Yugoslavia [hereinafter “ICTY”]: *Prosecutor v Ljube Bošković and Johan Tarčulovski*, Trial Chamber Judgment (IT-04-83-T) (10 July 2008) para 418; *Prosecutor v Pavle Strugar*, Trial Chamber II Judgment (IT-01-42-T) (31 January 2005) para 376; European Court of Human Rights: *Al-Skeini v UK*, Judgment, 7 July 2011 (55721/07) para 166; Inter-American Court of Human Rights: *Acosta et al v Nicaragua* (2017) para 136; African Commission on Human and Peoples’ Rights: *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v Sudan* (2009) para 147.

²⁹ See Basic Principles on the Right to a Remedy and Reparation (above note 18) Principle III.

³⁰ See e.g., “Second Report of the Public Commission to Examine the Maritime Incident of 31 May 2010: Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law” [hereinafter “2nd Turkel Report”] pp. 114-148, paras 63-112; Human Rights Council, “Report of the 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 254/64 including the independence, effectiveness, genuineness of these investigations and their conformity with international standards” (2010), A/HRC/15/50, para 21.

that the fulfilment of the respective requirements should be assessed taking into account the specific circumstances of armed conflict.³¹

34. There should be no fundamental difference between the general principles of an effective investigation in armed conflict and outside it, as their application will depend on what is feasible in each situation.³² The findings of authorities in both international human rights law and international criminal law have therefore been consulted, where appropriate, in the drafting of the Guidelines to interpret the relevant international humanitarian law rules and to inform their practical implementation.

CONCEPTS AND TERMINOLOGY

35. States have a myriad of diverse approaches to domestic investigations in armed conflict. Some investigative systems provide for distinct and consecutive phases to investigations of possible violations of international humanitarian law, while others merge certain stages. As a result, the wording used by States and their militaries varies significantly and cannot necessarily be transposed from one system to another. Different terminology is likewise used in the branches of international law mentioned above.
36. The terminology set forth below encompasses different types, stages and elements of investigations through reliance on terms that were believed to best encapsulate the purpose of a particular investigation type, stage or element. While these terms are used consistently in the Guidelines, it should be noted that similar uniformity will not be found in the law and practice of different States.
37. The definitions of concepts and terms provided below are solely for the purpose of these Guidelines and do not purport to have any agreed legal meaning beyond this document. As noted above, the aim of the Guidelines is not to suggest a structure or terminology to be shared by all States, but rather to provide guidance on certain practical and legal issues relevant to the various investigative systems regardless of the particular terminology in use domestically.

COMMANDER

38. The term “commander” is used in the Guidelines to designate any person with command responsibility over subordinates in a military hierarchy, i.e. in its generic meaning. It may, in other words, denote a commander at any level.
39. A military commander can be held individually criminally responsible for directly carrying out or ordering the commission of a war crime.³³

³¹ European Court of Human Rights: *Al-Skeini v UK*, Judgment, 7 July 2011 (55721/07) para 168; *Bazorkina v Russia*, Judgment, 27 July 2006 (69481/01) para 121; *Jaloud v The Netherlands*, 20 November 2014 (47708-08) para 186.

³² Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston: Civil and Political Rights, Including the Questions of Disappearances and Summary Executions (8 March 2006), E/CN.4/2006/53, para 36; Inter-American Court of Human Rights: *Velásquez Rodríguez v Honduras* (29 July 1988), (Ser. C) No. 4, para 177; European Court of Human Rights: *Al-Skeini v UK*, Judgment, 7 July 2011 (55721/07) para 164; African Commission on Human and Peoples’ Rights: *Zimbabwe NGO Human Rights Forum v Zimbabwe* (245/02) para 210.

³³ See GCI (above note 6) Article 49; GCII (above note 6) Article 50; GCIII (above note 6) Article 129; GCIV (above note 6) Article 146; ICRC Customary Law Study (above note 6) Rule 152. A person may “commit” a

40. Commensurate with their level of responsibility, commanders have a duty to ensure that members of the armed forces under their command are aware of their obligations under international humanitarian law.³⁴
41. In addition, commanders have a duty to prevent and, where necessary, to suppress and report to competent authorities violations of international humanitarian law rules, including with respect to members of the armed forces under their command and other persons under their control.³⁵
42. A commander who is aware that subordinates or other persons under their control are going to commit or have committed a violation of international humanitarian law is obliged to initiate steps necessary to prevent violations and, where appropriate, to initiate disciplinary or criminal action against the violators.³⁶
43. The fact that a violation was committed by a subordinate does not absolve their superiors from responsibility if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that the subordinate was committing or was going to commit such a violation and if they did not take all feasible measures within their power to prevent or repress the breach.³⁷ Thus, a failure to carry out appropriate action in respect of possible war crimes may likewise give rise to the individual criminal responsibility of a commander.³⁸
44. It should be noted that in certain domestic systems an authority other than a commander (a superior authority) may have duties related to investigations, while not necessarily possessing actual command responsibility (e.g., to discipline subordinates). This is also provided for in international criminal law³⁹ and international humanitarian law.⁴⁰

RECORDING

45. The “recording” of information comprises the collection, documentation and retention of information related to military operations. Recording is an ongoing process and has purposes beyond the gathering of information for a possible investigation.

REPORTING

46. “Reporting” is the transmission of information on an incident following either direct observation, the receipt of information from subordinates or through recording processes, or external allegations.

crime by different modes of participation provided for in domestic and international criminal law (for the latter see e.g., ICC Statute (above note 7) Article 25), issues that are outside the scope of this text.

³⁴ API (above note 6) Article 87(2).

³⁵ API (above note 6) Article 87(1).

³⁶ API (above note 6) Article 87(3).

³⁷ API (above note 6) Article 86(2). See also ICRC Customary Law Study (above note 6) Rule 153.

³⁸ ICRC Customary Law Study (above note 6) Rule 153.

³⁹ See ICC Statute (above note 7) Article 28.

⁴⁰ See ICRC Customary Law Study (above note 6) Rules 152 and 153.

INCIDENT

47. An “incident” is broadly speaking any event, situation, or set of circumstances that has the potential to require an investigation because it raises concern about a possible violation of international humanitarian law. It can also be an unexpected or undesired occurrence that does not immediately raise concern about a possible violation but, given the circumstances, may warrant an investigation (e.g., if it suggests inadequate rules of engagement, insufficient training for detention operations, or a weapons malfunction), all of which could lead to violations in the future even if they did not initially occur.
48. An incident may be internally brought to attention through or by the military chain of command or via other State institutions, or may be brought to attention by means of an external allegation. The terms “internal” (reporting) and “external” (allegations) are used throughout this text to distinguish between reports made within the military and other State institutions on the one hand (“internal”), and those coming from external actors such as members of a civilian population, international, or civil society organisations on the other (“external”) (for more, see Guidelines 4 and 5 below).
49. Internally, incidents can include both reportable incidents (those that must be communicated to a higher authority for assessment or other action), and non-reportable incidents (those that may be actioned by the commander, e.g., with disciplinary procedures). This is distinct from whether or not an incident is recorded.

ASSESSMENT

50. The term “assessment” is used to describe the process leading to a decision on the action that should be taken in response to an incident, regardless of whether the incident was brought to attention internally or externally.
51. The purpose of an assessment is to determine whether an investigation is needed and, if so, establish the type that should be opened or, depending on the circumstances, whether more facts may be needed in order to decide on the launching of an investigation and its type.
52. An assessment can take different forms and is not usually linear: it can be triggered by the decision of a single individual or be the result of multiple decisions involving different actors taken subsequently or in parallel to one another.

INVESTIGATION

53. “Investigation” is used to denote activity which has the purpose of establishing the facts surrounding an incident in order to allow for a subsequent determination of individual and/or State responsibility for a possible violation of international humanitarian law. The activities undertaken and the procedure provided for will comprise the investigative proceedings.
54. Within this broad definition of investigation, a distinction is drawn in the Guidelines between two types of investigations: criminal and administrative.

CRIMINAL INVESTIGATIONS

55. A criminal investigation is one aimed at determining the facts surrounding an incident so as to enable the establishment of possible individual criminal responsibility for conduct prohibited by law, and of the criminal sanction(s) that may be required. For the State responsibility aspects see Guidelines 7⁴¹ and 14 below.
56. As mentioned, under international humanitarian law States are under an obligation to prosecute persons suspected of having committed war crimes. Domestic law cannot be relied on to absolve a State from implementing its international legal obligations, including those provided for in international humanitarian law.
57. In practice, many States have domestically criminalised a much broader range of offences that may be committed in armed conflict than the war crimes provided for in international humanitarian law.⁴² While all criminal offences must be subject to criminal investigation, the focus here is only the investigation of criminal offences that constitute war crimes under international humanitarian law. It should be noted that in some national systems criminal sanctions are also provided for certain acts that constitute disciplinary offences.⁴³

ADMINISTRATIVE INVESTIGATIONS

58. An administrative investigation is one aimed at determining the facts surrounding an incident to establish whether there was a non-criminal violation of international humanitarian law, and consider any individual and/or State responsibility that may arise.
59. Administrative investigations are one way in which States can fulfil their obligation to suppress violations of international humanitarian law that are not war crimes.⁴⁴ This type of proceeding can be conducted prior to, in parallel with, or following a criminal investigation, in order to, for example, address issues linked to an incident that are not of a criminal, but of an operational, policy, or disciplinary nature.
60. In some domestic systems, certain administrative investigations deliberately exclude the possibility of looking into individual responsibility for an incident (e.g., in order to encourage frankness by those who were involved).⁴⁵ For the purpose of these Guidelines, however, administrative investigations include proceedings that aim to, *inter alia*, establish individual, non-criminal responsibility for an incident. Such proceedings can take many forms in practice.

⁴¹ See para 134 below.

⁴² In the majority of cases these offences are tried as domestic offences and not violations of international humanitarian law. Examples include criminalising the failure to take feasible precautions in attack, looting, theft, simple assault, the taking of artefacts or trophies of war.

⁴³ The term “disciplinary offence” has different connotations in different investigative systems; the Guidelines do not attempt to address the full scope of possible disciplinary violations under domestic law or the mechanisms to deal with them. See commentary to Guideline 12.

⁴⁴ See paras 13-16 above.

⁴⁵ Such proceedings are often focused on fixing a human error or detecting defective equipment and preventing repetition, rather than attributing individual responsibility.

FEASIBILITY

61. “Feasibility” refers to action that is practicable or practically possible taking into account all the circumstances prevailing at the time, including humanitarian and military considerations.⁴⁶ This standard is particularly important in situations of armed conflict which may involve a rapid change of circumstances on the ground (e.g., preventing access to the scene of an incident or witness interviews). The standard of feasibility must be applied in good faith and cannot be relied on to preclude an investigation as such, given that certain investigative measures should always be possible. Where appropriate, the commentary to the Guidelines will specify what may be relevant to take into account in a feasibility assessment.

SYSTEMIC ISSUES

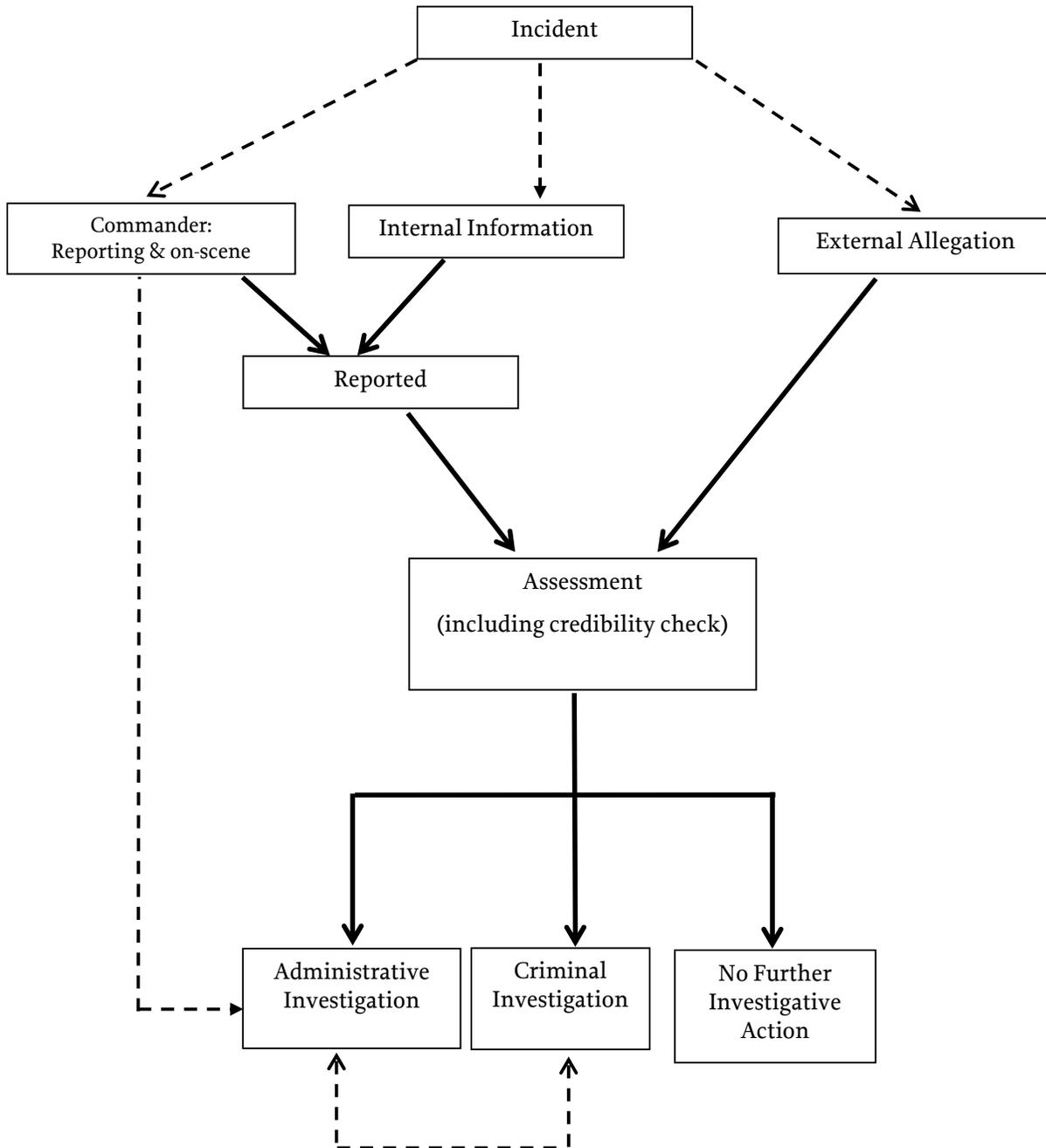
62. An issue is considered systemic if the underlying causes of an incident are likely to have led to or could lead to further incidents. Systemic issues can surface in a single unit, across multiple units, and at any level within the military. Investigating systemic issues can be part of the duty to prevent or cease a violation of international humanitarian law, avoid its reoccurrence, and/or take appropriate remedial action. Systemic issues may arise without any intent to commit violations or fault that could be attributed to a specific person or body.

POLICY-RELATED VIOLATIONS

63. Policy-related violations are a type of systemic issue and will often involve multiple and/or severe acts contrary to international humanitarian law. Two scenarios may be distinguished. The first is a case in which the cause of an incident – or incidents – lies in an explicit or implicit policy to violate international humanitarian law. The second is a case in which there is wilful disregard for ongoing reports, allegations and/or information that international humanitarian law is being violated.

⁴⁶ See Sandoz, Y., Swinarski, C., Zimmermann, B. (eds.), *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* [hereinafter “ICRC Commentary to API”], Martinus Nijhoff (1987) to Article 57 API, para 2198.

INVESTIGATIONS FLOWCHART



GUIDELINES

I THE TRIGGERING PROCESS

64. This section covers steps prior to and necessary to trigger an investigation, from the recording of military operations to an assessment that an investigation is needed. These first steps will be critical to the effectiveness of any subsequent investigation.
65. **Guideline 1** covers the recording of military operations. Recording activities are separate from the investigative process inasmuch as they should be carried out regardless of any incident. When an incident occurs, recording will be an essential pre-requisite for many subsequent investigative steps.
66. **Guidelines 2 to 5** deal with actions that should be undertaken immediately following an incident. The Guidelines cover action necessary at the scene of an incident, reporting requirements, as well as internal reporting and external allegations procedures.
67. **Guideline 6** describes the assessment process. This is the process within which a decision is, *inter alia*, made on whether to open an investigation following an incident (regardless of the way in which it was brought to attention: internally or externally). The Guideline addresses the circumstances under which a criminal or an administrative investigation should be launched, and other possible assessment outcomes.

GUIDELINE 1: RECORDING

Military operations should be recorded at the earliest possible time. The scope of recording may depend on the feasibility of doing so in the circumstances.

COMMENTARY:

68. The “recording” of information comprises the collection, documentation, and retention of information related to military operations (the “capturing” of information). Outside of investigations it serves to assess the effects of operational activity, to enable lessons-learned, and to help detect systemic issues, all of which, in turn, can improve operational effectiveness and contribute to the success of future operations. It is important that the planning of military operations also be part of record-keeping.
69. Recording should, for example, be made of unplanned use of force or unexpected/undesired consequence of the use of force; civilian casualties/harm; property damage/harm; detention activities; planned operational success and effects. It is good practice to record special instructions, applicable rules of engagement, soldier cards, tactical guidance, the training provided, those involved in the decision-making processes, and the context of operations.
70. The chain of command should ensure that recording is carried out. The realities of armed conflict may make recording difficult, meaning that the amount and type of feasible recording will differ depending on the circumstances. Given the importance of capturing information related to military operations, the criterion of feasibility should not be used as an excuse not to record, but prioritisation of resources may be necessary in this regard.

71. In the context of investigations, recording is important for determining whether an incident needs to be investigated. The capturing of information serves to help reconstruct what happened and whether appropriate action was taken at the time of an incident. Such information will, among other things, be important for responding to internal reports or external allegations that may arise following an incident, including one that was not initially deemed problematic.
72. Recorded information related to an incident should include: what happened, who did what, where, as well as the time, date and unit(s) involved. All cases of capture and detention of persons must be recorded.⁴⁷ Examples of the different formats in which information can be recorded include post-mission debriefs, after-action reviews, contact reports, mission reports, data accumulated by operation centres, detention logs, strike logs, electronic communications, and targeting packages. Some of these records will be generated automatically, in which case recording will involve simply retaining the information.
73. Information can be recorded via written, photographic, audio, video, or electronic means. It should be stored, with due attention paid to data protection and privacy concerns, and, if relevant, archived in suitable conditions, with the ability to be retrieved if necessary.
74. Information should be recorded at the earliest possible time given the operational context. This means that the time-frame within which recording is done may differ between, for example, deliberate (pre-planned) operations versus dynamic operations (those responding to immediate circumstantial requirements or opportunities).
75. Adequate training and guidance are critical to the success of recording and should be provided to persons with that responsibility. Training on effective recording should be organised as part of exercises prior to armed conflict or deployment. Persons tasked with recording may need particular operational knowledge and expertise to accurately observe the causes and effects of an incident. Training should include what information is useful to record and how recording should be done.
76. Military regulations should determine who is tasked with recording. Recording procedures should be adapted to the capabilities of those who will be recording (e.g., the literacy levels of persons expected to record) and to the conditions within which they are expected to operate (e.g., the equipment and technology available). Timelines, as well as procedures for preserving the integrity of recorded information and its storage, should likewise be set out beforehand.
77. A range of units may have material which is relevant to a military operation, such as aircraft imagery, intelligence intercepts, or information relating to the transfer of detainees from the point of capture to a detention facility. In the case of an incident, the unit involved may need to reach out to other units that may have such additional information. In multi-national military operations, a procedure for information-sharing related to possible incidents should be established in advance, within reasonable expectations, given the challenges of verification of the material shared and classification of information recorded.

⁴⁷ See also para 108 below.

GUIDELINE 2: ACTIONS AT THE SCENE OF AN INCIDENT

A commander present at the scene of an incident should take all feasible steps to ensure the securing and preservation of relevant information and evidence if more appropriate authorities are not available.

COMMENTARY:

78. The securing and preservation of information and evidence are key to establishing that a violation of international humanitarian law has occurred, and may be equally essential to establishing that no violation has taken place. Certain steps such as the collection of evidence are highly dependent on expert and prompt action. A commander may therefore be required to carry out certain safeguarding actions such as securing the scene of an incident, documenting it with photographs, drawings, video recording or audio description, collecting and preserving other evidence, identifying possible victims and witnesses, and collecting statements from them and members of their own armed forces.
79. On-scene commanders should be given specific training on what sort of action should be taken at the scene of an incident in order to secure and preserve evidence for any potential investigation. While it should be recognised that this task is additional to the primary role of a commander, it will on occasion be necessary for it to be performed, and properly so.⁴⁸ Commanders should in all cases be instructed in how not to jeopardise a possible investigation, which should include being given basic information on how to maintain the chain of custody of evidence and treat potential victims and witnesses.
80. The expectations on the commander should be held to what is feasible given the circumstances, including the specific mission, the accessibility of the relevant site, the security situation, and available resources.⁴⁹
81. In cases of suspected criminal behaviour, more appropriate military or civilian law enforcement agencies, where they exist, should be included as soon as possible. A commander's on-scene actions should not hinder the prompt involvement of such investigative bodies.

GUIDELINE 3: REPORTING

Any incident must be promptly reported by a commander to the competent authority for assessment.

COMMENTARY:

82. "Reporting" is the transmission of information on an incident following either direct observation, the receipt of information from subordinates or through recording processes, or external allegations. The purpose of reporting is to draw attention to an incident which, in turn, may trigger the first steps of an investigation.
83. Military commanders have a legal obligation to report violations of international humanitarian law to the competent authority (see Guideline 6). Three types of reporting obligations may, generally speaking, be identified: i) incidents that must be reported because

⁴⁸ ICRC Commentary to API (above note 46) Article 87, para 3563.

⁴⁹ In this context see also para 133 of the Guidelines below.

they involve suspected war crimes under international humanitarian law, such as the killing of prisoners of war, deliberate and direct attacks against civilians, perfidy; ii) incidents in which it is not clear that a violation of international humanitarian law has been committed but where the circumstances indicate that this may be the case, such as a failure to take precautions in attack; and iii) situations that involve no violation of international humanitarian law but that nonetheless require reporting for legal and operational reasons, such as the capture and detention of persons. It is good practice to provide for a wider range of situations that may require reporting as well, which some systems do.⁵⁰

84. Military manuals often provide guidance on the actions or incidents that should be reported, with some listing and defining specific examples of “reportable incidents” as a useful way of operationalising commanders’ reporting obligations.⁵¹

⁵⁰ See note 51 below.

⁵¹ Examples of reportable incidents or equivalent:

- Argentina: Commanders are obliged to report violations of the Conventions and Protocol I, if necessary, to the competent authorities. [Manual de Derecho Internacional de los Conflictos Armados, 2010, para 2.06, p. 37].
- Australia: “Notifiable incidents” include reasonable suspicion that a disciplinary offence has been committed (excluding minor disciplinary matters); reasonable suspicion that a criminal offence has been committed; any death, serious injury, disappearance of civilian; death, serious injury of disappearance of an “enemy combatant” in custody or under effective control. [DOD, Defence Instructions (General), Admin 45-2: The reporting and management of notifiable incidents, para 6].
- Burundi: Each soldier has the obligation to report violations of international humanitarian law. [Règlement sur le DIH, 2007, para VIII.2.1].
- Canada: Officers must “report to the proper authority any infringement of the pertinent statutes, regulations, rules, orders and instructions governing the conduct of any person subject to the Code of Service Discipline when the officer cannot deal adequately with the matter.” [Queen’s Regulations and Orders 4.02(1)].
- France: incidents which must be reported to higher authorities by military authorities include 16 categories of “serious incidents” [“Evengrave”], including serious accidents, allegations of criminal offences, and incidents which cause concern due to their nature, persons implicated or potential consequences. [Bulletin Officiel des Armées, Instruction N° 1950/DEF/CAB/SDBC/CPAG fixant la conduite à tenir par les autorités militaires et civiles en cas d’accidents ou d’incidents survenus au sein du ministère de la défense ou des établissements publics qui en dépendent (6 February 2004)].
- Mexico: Commanders have the obligation to [...] prevent any violation of [the Geneva Conventions and Protocol I], to repress them and, if necessary, to report them to the competent authorities. [Manual de DIH para el ejército YFAM, 2009, para 173].
- Netherlands: After witnessing a possible violation of international humanitarian law, MoD personnel must report this to the Royal Marechaussee; A commander must report any crime committed by their subordinates to the Royal Marechaussee; Any use of force in military operations must be reported in the chain of command. The authorised commander must submit an After Action Report in the chain of command. A copy of this report is sent to the Public Prosecution Service via the Royal Marechaussee. [2nd Turkel Report (above note 30) Annex, pp. 925-930].
- Peru: Report acts or facts that constitute war crimes and enforce criminal and disciplinary responsibility for such crimes committed by superiors and subordinates, applying article 87 of Protocol I Additional to the Geneva Conventions. [Manual para las fuerzas armadas, 2010, p. 222].
- South Africa: All soldiers must be aware of their responsibility to report war crimes, which are breaches of the LOAC. Normally the report should be made to the next senior in the chain of command. A report may also be made to the Military Police, a Legal Officer or a Chaplain. [Revised Civic Education Manual, 2004, para 58].
- UK: Examples of Schedule 2 offences (reported to Service Police) include murder, manslaughter, kidnapping, inflicting GBH [grievous bodily harm], cruelty to children, infanticide, grave breaches, threatening with offensive weapon in public, robbery, torture, certain terrorism acts, war crimes, crimes against humanity, genocide. [Armed Forces Act (2006) Section 113; Schedule 2 offences as defined, pp. 198-200].

85. In many States all members of the military (in addition to commanders) have a duty to report and it is good practice for legislation or military regulations to provide for that. Reports from subordinates can serve as an additional source of information on violations that will enable a commander to fulfil their legal obligation to report incidents to the competent authority for assessment.
86. The commander must ensure that reporting procedures are in place and that reporting is carried out.⁵² Reporting structures and guidance should be provided to commanders prior to armed conflict or deployment, with clear criteria on what to report, what details to provide, when, and to whom. Failure to report must always be addressed and, where appropriate, be subject to sanctions.
87. It should be recalled that a failure to carry out appropriate action in respect of possible war crimes may give rise to the individual criminal responsibility of a commander. The duty to report may be seen as a particularly important step in this regard.
88. Reported information should include as appropriate: what happened, who did what, where, and the time, date and unit(s) involved, as well as other information and/or details the commander may have been apprised of or personally observed. Reporting obligations should be undertaken as soon as feasible after an incident, taking into account the circumstances, including available communications capabilities.
89. Reportable information should be passed on to a person or body with the competence to make an assessment, which will depend on the national system. This will often be “up” the chain of command. It should be stressed that the competent authority may depend on the nature of the incident, and may also change as information is passed on and facts are clarified. Importantly, the reporting obligation continues until the appropriate level of assessment is reached (see Guideline 6 for details).
90. There are certain types of non-criminal violations of international humanitarian law for which the commander may be the competent authority under domestic law (see e.g., Guideline 12). It would still be desirable to maintain a reporting obligation in such cases. A commander’s report would then be submitted for information and lessons-learned processes, rather than for referral to a competent authority for assessment.⁵³

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- USA: Reportable Incidents: “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.” [Chairman of the Joint Chief of Staff Instruction, Implementation of the DOD Law of War Program, CJCSI 5810.01D (2010) para 6(f)(4)(e)(2)CJCS; DoD Instruction 6055.07, “Accident Investigation, Reporting, and Record Keeping” (3 October 2000) Table 10 “Special Reporting Group Notification Requirements”].

⁵² A commander’s reporting obligations are explicitly provided for in international humanitarian law and in many military manuals. See API (above note 6) Article 87(1); ICRC Customary Law Study (above note 6) commentary to Rule 153 and State Practice relating to Rules 153 and 158; ICTY: *Prosecutor v Vujadin Popović et al*, Appeals Chamber Judgment, 30 January 2015 (IT-05-88-A) para 1932-1941; *Prosecutor v Delalić*, Judgment, Case NO IT-920210T, 16 November 1998, para 770; International Criminal Court [hereinafter “ICC”]: *Prosecutor v Jean-Pierre Bemba Gombo*, Trial Chamber III Judgment (21 March 2016) para 727.

⁵³ For example, a commander notices their subordinates are failing to adequately separate men and women in a detention centre and carries out an investigation into the causes of the violation in order to suppress it and prevent its reoccurrence. The commander is the competent authority to suppress the violation through investigative action, but also reports the information and corrective action taken through the chain of command for information.

GUIDELINE 4: INTERNAL REPORTING

An internal process should be in place for persons other than a commander to report incidents through the chain of command or to corresponding law enforcement agencies where they exist. Individuals must be free to make such reports without fear of retribution.

COMMENTARY:

91. Persons other than a commander – who, as discussed above, clearly has reporting obligations – should be able to report incidents which they believe indicate a violation of international humanitarian law. This should include all members of the armed forces, civilian employees and contracted personnel under the authority of the armed forces. An internal process for submitting reports should be available and made known by the military, so as to ensure that all incidents are brought to the attention of a competent authority and that appropriate assessment of whether an investigation is required may be made. Internal reports may also involve information on an incident that a commander did not consider problematic at the time.
92. An internal reporting process should be accessible and efficient if it is to enable the military to take subsequent action to put an end to, prevent, or remedy possible violations of the law. Such a process can, however, also serve to enhance operational effectiveness by maintaining the discipline required of all members of the military in following the rules, a feature inherent to the proper functioning of any armed force. Military or other appropriate regulations should thus include provisions that explain the process by which persons other than commanders can report incidents which they believe indicate a violation of international humanitarian law.
93. Given the structural particularities of the military, internal reporting procedures will not be effective unless protection is provided for those submitting a report (except for cases of bad faith). This can include ensuring that persons reporting incidents will not be discharged, disciplined, downgraded in rank, or subjected to other measures of reprisal or punishment as a consequence of reporting. Internal reports may need to be vetted for credibility, but such verification should protect the person who reported, particularly from the undue actions of their immediate superior.
94. As mentioned, internal reports will usually be expected to be made through the chain of command. In certain circumstances an individual may not wish to report to their direct commander (e.g., because the latter was implicated in the incident) or is barred from reporting directly higher up the chain, i.e. to their commander's commander. Guidance on reporting in such cases should be specified in the relevant military regulations. In these scenarios, one possibility would be to enable "lateral" reporting to another commander who is at the same level as the immediate superior of the person reporting (e.g., to the commander of another company within the same battalion), in order to ensure that all incidents are brought to appropriate attention.
95. Some States enable individuals to report directly to law enforcement agencies that deal with military law enforcement issues, such as the military or civilian police.

GUIDELINE 5: RECEIPT OF EXTERNAL ALLEGATIONS

Accessible and effective processes for receiving external allegations of an incident should be provided for.

COMMENTARY:

96. Accessible and effective processes for receiving external allegations related to an incident should be provided for by the military and/or by the appropriate State authorities. Allegations extraneous to the military may constitute valuable sources of information: for example, they may bring to attention facts that may not have been observed by the military, shed light on facts additional to those already observed, or permit an understanding of the full scope of the consequences of military action. In some cases, an external allegation may be the only source of information that an incident has occurred.
97. How the military or other State authorities receive external allegations will vary depending on factors such as the context, location, and type of armed conflict. Information should be made available to the general public regarding the existence of the relevant processes/mechanisms, how to access them, who receives the allegation(s), and how to follow up on an allegation.
98. Allegations related to an incident can be made by persons affected by military operations directly or indirectly, and also by other persons or bodies – domestic or international – with an interest in the matter. Procedures and channels of communication that ensure the safety, security, and privacy of complainants should be established. Challenges such as language barriers, and other social and cultural factors that may affect the ability of individuals or bodies to bring an allegation should be anticipated, with possible solutions provided. The sharing of good practices between units, services, and militaries is valuable in this regard.
99. All allegations should be taken seriously, with no hierarchy between the different sources. The prioritisation of allegations may, however, be necessary: some will require more meticulous attention, particularly those indicating that war crimes have been committed (e.g., intentionally directing attacks against the civilian population, pillage, torture of detainees, hostage-taking). A large number of allegations related to the same incident or the repetition of allegations indicating a pattern of similar incidents should raise particular concern about systemic issues or policy-related violations.
100. Whenever feasible, the military should seek to proactively engage with a range of actors including other militaries (particularly in multi-national military operations), UN bodies, international monitors, NGOs and other civil society organisations, as well as the media regarding information arising from allegations. Providing for points of contact or intermediaries with such actors is good practice. Direct engagement with the ICRC is of particular importance given the organisation's specific mandate and operational experience in situations of armed conflict.⁵⁴

⁵⁴ See Khairullin, E., “5 things that make ICRC confidential information unsuitable for legal proceedings”, ICRC Humanitarian Law & Policy (31 January 2019), available at <https://blogs.icrc.org/law-and-policy/2019/01/31/5-things-make-icrc-confidential-information-unsuitable-legal-proceedings/>.

GUIDELINE 6: ASSESSMENT

Internal reports or externally received allegations related to an incident should be passed on to the appropriate authority for an assessment of the action to be taken in response. The appropriate authority should be competent to launch a criminal and/or administrative investigation, to determine that no investigative action is necessary, or to establish that more facts are needed prior to a decision.

COMMENTARY:

101. Legislation or military regulations should describe to whom and which sort of internal report and/or external allegation related to an incident should be transmitted for assessment. In some domestic systems there will be more than one authority to which such reports and/or allegations must be passed on to for assessment.
102. The degree of independence and impartiality of an assessment authority should as a general rule correspond to the gravity of the incident being assessed. As already mentioned, many States have clarified that there are certain types of incidents, or incidents of a certain severity that must be reported by a commander for assessment higher up. Such an assessment will be made by the commander's superior, or other assessment authority that may be designated under domestic law or regulations. In some systems reports/allegations of incidents indicating that a crime has been committed must be passed on by the commander to law enforcement agencies, either military or civilian.
103. The assessment authority should not have been implicated in the incident. If a commander was implicated in an incident (i.e. if they were involved in it or if actions taken by the commander related to the incident could cast doubt on their independence and impartiality), legislation or military regulations should at a minimum provide that the internal report or external allegation is to be referred by the commander to another authority for assessment.
104. The person or body making an assessment decision should be able to determine whether it is competent to conduct the assessment and be able to carry out a credibility check of the internal report or external allegation if necessary.⁵⁵
105. The assessment authority must under domestic law be competent to launch a criminal and/or an administrative investigation as may be required and to examine whether the incident at hand may give rise to systemic issues or policy-related violations. A person or body tasked with an assessment may also decide that further facts are needed in order to make a decision,⁵⁶ or that no investigative action is warranted.
106. An assessment which, properly carried out, finds there is no need to investigate will discharge a State's obligations related to the repression and suppression of violations of international humanitarian law. Legislation and military regulations should however provide that a further assessment will take place if new information (reports or allegations) related to an incident is received.
107. It is good practice to pass on the results of assessment decisions to authorities that may be tasked with monitoring for systemic issues or policy-related violations (see Guidelines 13 and 15 below).

⁵⁵ For the latter see paras 114 and 115 below.

⁵⁶ See paras 116 and 117 below.

108. In situations of armed conflict, in particular during ongoing hostilities, there may be a need to prioritise which incidents to deal with most promptly at the assessment stage. This decision will be context-specific, but the gravity of the incident, the need to react quickly, and the likelihood of repetition should be considered. It should be noted that international humanitarian law provides for clear obligations to deal with incidents involving the death or serious injury of detainees.⁵⁷
109. Legal training or legal support must be provided to a person or body making assessment decisions arising from internally reported incidents or external allegations as it will be necessary to be able to identify possible violations of international humanitarian law (see Guideline 16).
110. It is important that military or civilian law enforcement agencies, where they exist,⁵⁸ to which an internal report or external allegation is passed on are able to independently recommend or refer to the appropriate authority (or independently initiate as the case may be under domestic law), criminal and/or administrative investigations.
111. The assessment authority must open a criminal investigation if there are reasonable grounds to believe that a war crime has been committed (see para 119 and Guideline 7). Some States may have a lower threshold for opening a criminal investigation for various policy or operational reasons.⁵⁹ As already mentioned, States may for similar reasons criminalise under domestic law violations of international humanitarian law that are not provided for as war crimes under its rules.⁶⁰ There may also be other applicable bodies of international law relevant to determining whether a criminal investigation is required (in particular international human rights law). While the triggers for a criminal investigation in such cases are not dealt with in these Guidelines, it should be noted that an assessment decision will need to take into account the totality of the applicable legal framework. This should include examining any issues of State responsibility that may arise (see Guideline 14).
112. The assessment authority should open an administrative investigation (see Guidelines 12 and 13) if the circumstances of an incident suggest that a violation of international humanitarian law has been committed which does not require a criminal investigation. Even if a violation is not apparent, exceptional or unexpected events may also require an administrative investigation.⁶¹ Administrative investigations can also be triggered for a variety of non-legal reasons such as operational needs, lessons-learned exercises, or performance improvement which are not addressed in these Guidelines. If the assessment authority notices that certain types of reports or allegations are repeated over a period of time, it should be able to recommend or open an administrative investigation into possible systemic issues or policy-related violations.
113. The involvement of an assessment authority should be prompt as this is crucial to ensuring that an incident is given the appropriate investigative response. Certain actions following incidents (e.g., reusing the weapons discharged in an incident again shortly after it

⁵⁷ GCIII (above note 6) Articles 120-121; GCIV (above note 6) Article 131; ICRC, “Guidelines for Investigating Deaths in Custody” (2013). See also other bodies of law, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) UNTS 1465, Article 6; International Convention for the Protection of All Persons from Enforced Disappearance (2006) Article 12.

⁵⁸ See paras 126-129 below.

⁵⁹ See note 64 below.

⁶⁰ See para 57 above.

⁶¹ See definition of incident in para 47 above.

happened, failing to restrict access to the scene following the death of a detainee), may delay or hinder criminal investigations by modifying or removing evidence so that it cannot be used in criminal proceedings due to domestic rules of evidence and procedure. It is thus essential that a decision on whether to launch a criminal investigation be made promptly.

114. External allegations may need to be vetted for credibility. As mentioned, such allegations may be received in different ways and come from various sources. Establishing the credibility of an allegation is essential to determining whether the information contained requires further attention, i.e. should be transmitted to the investigative process. Various factors can be taken into account in assessing the credibility of external allegations (e.g., the source of the allegation, the level of detail on the incident provided, corroboration with other sources), and will be context-dependent. Military regulations should provide clear guidance on the process and criteria for vetting external allegations.
115. It is important to note that determining the credibility of an external allegation is not the same as determining whether there are “reasonable grounds” to believe a criminal offence has been committed. While the latter standard is used to trigger a criminal investigation, the former constitutes a much lower threshold. It is not necessary to demonstrate that an incident involving possible violations of the law actually occurred, only that the allegation itself is deemed credible.
116. If further facts are needed in order to make an assessment, the assessment authority should carry out – or delegate the responsibility⁶² for – appropriate action to establish the additional facts. Gathering further facts for assessment purposes is a different process to administrative investigations. The former procedure is used only for gathering initial information sufficient for an assessment decision, and might not, for example, require the formal interrogation of witnesses.
117. In all cases a fact-finding exercise must at the very least not delay or hinder future criminal proceedings, particularly as regards the handling of potential evidence and the gathering of victim or witness statements.
118. It should be noted that in some cases of violations of international humanitarian law an assessment may not be necessary. Certain circumstances may be so obvious that it is possible to take follow-up action immediately.⁶³

⁶² In some domestic systems, the assessment authority will include a preliminary investigative body, such as the military or civilian police, for this purpose.

⁶³ For example, if a commander sees a member of the armed forces inappropriately displaying a Red Cross or Red Crescent emblem, but removes the emblem and corrects the soldier before any other consequences arise from the act (except if the act constitutes attempted perfidy which would be a war crime). Where such behaviour by a soldier is the result of inadequate training, a systemic issue may be involved and need to be addressed. See Guideline 13 below.

II CRIMINAL INVESTIGATIONS

119. A criminal investigation must be opened if there are reasonable grounds to believe that a war crime has been committed.⁶⁴ The purpose of a criminal investigation is to determine the facts surrounding an incident so as to enable the establishment of possible individual criminal responsibility for conduct prohibited by law and of the criminal sanction(s) that may be required. The rights of suspects, victims, and witnesses must be guaranteed from the onset of a criminal investigation.
120. **Guidelines 7 to 10** deal with the principles of an effective investigation and how they apply to a criminal investigation in armed conflict.
121. **Guideline 11** deals with the fair trial guarantees which must be respected throughout a criminal investigation.

GUIDELINE 7: INDEPENDENCE AND IMPARTIALITY

An independent and impartial investigative authority must be available to carry out criminal investigations if there are reasonable grounds to believe that an individual has committed a war crime.

COMMENTARY:

122. A criminal investigation must be independent and impartial. The way in which these principles are specifically implemented in a domestic legal system will vary, and may differ depending on the authority carrying out an investigation, as described in paragraphs 126 and 127 below.
123. In terms of independence, an investigative authority must be able to conduct an investigation without interference or influence by authorities other than those performing an investigative or judicial function, and without fear of reprisal or expectation of favour for any finding, recommendation, or decision made.
124. In terms of impartiality, an investigative authority must not have a personal bias or a conflict of interest in relation to the case at hand.
125. In light of the principles of independence and impartiality, the investigative authority must not have been implicated in the incident and must take themselves out of the proceedings where this is the case. The relevant legislation or military regulations should provide so.
126. In some domestic systems, all investigations, including criminal ones, are within the purview of the commander. In some such cases, law, policy, or military regulations nevertheless define certain exceptions/caveats to the commander's authority to conduct a criminal investigation. It is, for example, foreseen that crimes of a certain level of severity must be investigated by an authority up or outside the chain of command. It is likewise provided that particular categories of crimes (e.g., acts of sexual violence), must be investigated by an authority outside the chain of command (e.g., a military or civilian law enforcement agency) regardless of their severity.

⁶⁴ See para 111 above. Domestically, States use different standards for triggering a criminal investigation, for example "reasonable belief", "reasonable suspicion", "credible information", "sufficient grounds for suspicion".

127. In yet other domestic systems all criminal offences are outside the remit of the commander so as to ensure that criminal investigations are structurally and practically independent and impartial and are seen as such. In these systems, the investigation of possible criminal acts must always be passed on to a body outside the chain of command, such as a military or civilian law enforcement agency.
128. It is submitted that States must have a law enforcement agency outside the chain of command (e.g., the military or civilian police), that conducts investigations into suspected war crimes committed by members of the armed forces in order for criminal investigations to be independent and impartial and be seen as such. The relevant agencies will also have the expertise necessary to investigate particularly serious or complex cases, including incidents in which the chain of command is suspected to have been involved.
129. Structural guarantees contributing to the independence and impartiality of a military law enforcement agency⁶⁵ will include the way in which its members are appointed, their tenure and rank, and the relevant reporting structure. Safeguards and checks against command influence should also be foreseen.
130. Persons, agencies, or other bodies tasked with criminal investigations should be adequately trained, equipped, and funded. They should, *inter alia*, be able to collect and securely store evidence (with due attention paid to data protection and privacy concerns, and implementing chain of custody standards), have access to and be able to interview suspects, victims, and witnesses, be supplied with forensic equipment, and be skilled in investigative techniques. They should have the relevant operational expertise, as well as the necessary operational information related to the incident. Investigators should be familiar with the applicable legal framework or be able to rely on legal advisors.
131. Special expertise related to specific vulnerabilities in armed conflict should be ensured, such as for cases of alleged sexual violence, torture, or incidents in which children may have been victims, witnesses, or suspects.
132. Providing adequate interpretation for persons conducting an investigation is essential, and competent interpreters should be available whenever needed (see Guideline 8).
133. Some States have different investigative arrangements in place depending on whether the military is acting in its own territory or abroad, for example as part of a multi-national coalition, or under UN or regional organisation auspices. Whether a criminal offence is committed in or outside a State's territory may affect the capacity of an investigative authority (other than a commander) to act, or act promptly, where, for example, such authority is not deployed alongside the armed forces. It may also raise questions as to the appropriate jurisdiction to investigate. These and other similar issues that would arise in extraterritorial operations should be considered prior to an armed conflict or deployment to ensure that investigations can be adequately conducted, in order to preclude impunity and safeguard the rights of suspects, victims, and witnesses.
134. As already noted above, a war crime may give rise to both individual criminal responsibility and to State responsibility. The investigative authority in criminal proceedings should, with the necessary legal advice, be able to pass information on to and/or be able to initiate action before an appropriate authority that could separately examine and address the possible State

⁶⁵ This paragraph deals with military law enforcement agencies given the focus of the Guidelines, but guarantees of independence and impartiality will of course equally apply to civilian law enforcement bodies.

responsibility issues that may arise (see Guideline 14). This should take place regardless of whether the criminal proceedings may have been discontinued.

GUIDELINE 8: THOROUGHNESS

Investigations must be thorough. All feasible steps must be taken to collect, analyse, preserve, and store evidence. Action that cannot be undertaken must be documented and justified.

COMMENTARY:

135. Thoroughness refers to the means of carrying out a criminal investigation in order to achieve the intended purpose of uncovering the facts. It relates, more specifically, to the practical and/or procedural steps that will be necessary to ensure that the facts can be adequately elucidated. These will include the collection, analysis, preservation, and storing of material and documentary evidence, identifying and interviewing victims and witnesses and members of the armed forces who may have been involved in the incident, and documenting and storing the respective testimonies. Conducting autopsies and undertaking other forensic examinations may also be necessary. Evidence may likewise need to be appropriately transported.
136. In this context it should be recalled that criminal investigations will require the fulfilment of standards of evidence for a criminal trial, the exact modalities of which will be provided for in domestic law. While flexibility may be necessary, attention must be paid to ensure that the evidence collected will be admissible in possible criminal proceedings. Evidence gathered in a way that does not respect the rights of suspects, victims, and witnesses may be of limited use or even prove detrimental to such proceedings.
137. Whether a criminal investigation may be deemed thorough will depend on whether all feasible steps were undertaken to establish the facts in the circumstances at hand. The degree of thoroughness expected in investigating an incident that, for example, took place at a checkpoint in a rear area, or in a detention facility, or after hostilities have subsided, will be different to that required from an investigation occurring in an active combat zone.
138. Challenges related to the thoroughness of an investigation in armed conflict may include: accessing, preserving and transporting evidence; accessing victims and witnesses and carrying out interviews;⁶⁶ cultural and human rights considerations (e.g., as regards autopsy, burial, exhumation); ongoing hostilities and the lack of safety of investigative personnel. The location and pace of military operations may also be relevant, for example where territorial control is lost over an area entailing lack of personnel on the ground. While these and other obstacles to the thoroughness of an investigation may arise, all circumstances should be taken into account when deciding on the feasibility of an action, and alternative action should be sought.
139. Certain challenges should be anticipated and can be overcome by means of preparation, including by planning and training prior to armed conflict or deployment. Specific ways of adapting investigative steps to armed conflict conditions, where resources permit, include the use of technology, for example scanners for autopsies in cases of cultural concerns, the

⁶⁶ It should be recalled that victims and witnesses may in a given situation also be accessed and interviewed outside the site of an incident, e.g., internally displaced persons or members of one's own armed forces who have returned home.

use of unmanned aerial vehicles (UAVs) to access dangerous scenes and collect video evidence, the use of video recording equipment during operations, and involving the local population/government in the investigative process when possible. Where there is no ground control it is still possible to use recorded operational planning to review the decision-making process, and available technology can be used to assess mission effects from the air. Technology and digital communication can also be used to overcome certain difficulties associated with distance and security problems, for example to enable the participation of victims or witnesses remotely.

140. There may be a need to make prioritisation decisions at the investigative stage regarding which evidence can most feasibly be collected and which is likely to be most useful for a possible prosecution. The key purpose in such decisions should be to establish whether an incident included criminal behaviour so as to enable the effective repression of such behaviour. Allocation of resources to investigations should be made in an adequate and reasonable manner within the overall context.⁶⁷
141. Investigative steps should be documented. This should include what actions have been taken, what actions were attempted, and what actions were not able to be taken and why. Documentation serves, *inter alia*, to demonstrate the thoroughness of an investigation should queries and challenges later arise.
142. The investigation of certain criminal acts has received detailed attention at the international level under both international humanitarian law and international human rights law. UN and independent human rights bodies or processes have developed best practice guidance for, *inter alia*, extra-legal, arbitrary and summary executions,⁶⁸ torture,⁶⁹ deaths in custody,⁷⁰ sexual violence,⁷¹ and enforced disappearances.⁷² Some of these documents have not been drawn up specifically for situations of armed conflict, but provide useful guidance on how to conduct thorough investigations in case of the respective violations.

⁶⁷ ICC: *The Prosecutor v Jean-Pierre Bemba Gombo*, Judgment on Appeals (8 June 2018), No. ICC-01/05-01/08 A, paras 169-170; ICTY: *Prosecutor v Boškoski and Tarčulovski*, Trial Chamber Judgment (10 July 2008), IT-04-82-T, para 415; *Prosecutor v Orić*, Appeals Chamber (3 July 2008), IT-03-68-A, para 177; *Prosecutor v Halilović*, Appeals Chamber (16 October 2007), IT-01-48-A, para 63.

⁶⁸ UN OHCHR, Revision of the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (“Minnesota Protocol”).

⁶⁹ UN OHCHR, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Istanbul Protocol”) (2004), HR/P/PT/8/Rev.1.

⁷⁰ ICRC, “Guidelines for Investigating Deaths in Custody” (2013).

⁷¹ UK Foreign and Commonwealth Office, “International Protocol on the Documentation and Investigation of Sexual Violence in Conflict” (2nd ed, March 2017).

⁷² International Commission of Jurists, “Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction” (2015) – this is a practitioner’s guide rather than an investigation manual but contains some elements about the particularity of investigating offences of this type.

GUIDELINE 9: PROMPTNESS

A criminal investigation must be opened promptly after an assessment determines that reasonable grounds exist to believe a war crime has been committed. The investigative process must be carried out without unreasonable delay.

COMMENTARY:

143. A criminal investigation must be promptly opened because the collection of evidence is often only possible very soon after an incident. The effects of the passage of time are well known: a crime scene will change, evidence may disappear, memories fade, witnesses can be threatened, suspects may collude. A lack of promptness in the launching of an investigation can thus affect the rights of suspects, victims, and witnesses. Sufficient planning, resources, personnel, and training are essential to ensure the promptness of any criminal investigation given the challenges that may be posed by battlefield conditions. As already mentioned, the on-scene commander may have a key role to play in securing certain types of information and evidence (see Guideline 2).
144. Once an investigation has been initiated, the necessary subsequent action must be taken without unreasonable delay. The fulfilment of this standard is not to be equated with the speediness of the results, but means that there must be sustained investigative activity and proper justification for delay when that is not the case. (For example, the effectiveness of an investigation requires that sufficient care is taken in the investigative steps, and certain steps such as forensic testing, may require time.) Here too, consistently documenting investigative steps will be necessary in order to demonstrate that an investigation was carried out without undue delay should queries and challenges later arise.
145. It should be recalled that there are no time limitations in respect of bringing the perpetrators of war crimes to justice under international law,⁷³ which means that a criminal investigation may be opened long after the events at issue. Such an investigation is likely to face particular obstacles as regards the collection of information and evidence which, in turn, can affect the due process rights of suspects, as well as of victims and witnesses. The proper documentation of investigative steps is thus crucial. In cases where investigations and prosecutions are initiated in respect of war crimes that happened long ago, effectiveness may require that their mandate and scope be carefully determined.

GUIDELINE 10: TRANSPARENCY

A criminal investigation should be as transparent as possible taking into account the circumstances.

COMMENTARY:

146. Transparency may be described as the need for openness, communication and accountability in the investigative process. It should, however, be acknowledged that the international discussion about the transparency of criminal investigations in armed conflict is evolving.

⁷³ UN GA, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted and opened for signature, ratification and accession 26 November 1968, A/RES/2391; Council of Europe, European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, 25 January 1974, ETS No. 082; ICC Statute (above note 7) Article 29; ICRC Customary Law Study (above note 6) Rule 160.

147. Two aspects of transparency in criminal investigations may generally be identified: providing information to victims and their next of kin regarding ongoing criminal investigative processes, and providing information on such processes to the general public for overall accountability purposes. The general public will include international and domestic organisations and bodies, civil society, the media, and others.
148. The investigative authority should whenever possible, taking into account the circumstances, communicate with the victims of an incident and their next of kin, and or/lawyers where engaged. This can include: confirming receipt of an externally submitted allegation; communicating a decision to open an investigation or not, with acknowledgment in the former case that the investigation may take time for a specified reason; explaining whether an investigation is ongoing; informing about an investigation's findings (including its factual and legal basis); explaining a decision to criminally prosecute or not. Communication should be prompt, as this can help mitigate concerns of inaction. Providing liaison officers to communicate with victims and their next of kin is good practice.
149. It should be recalled that under international humanitarian law the parties to an armed conflict have specific obligations related to persons missing or dead due to the armed conflict, including to provide family members with any information on the fate and whereabouts of their relatives.⁷⁴
150. Information on what procedures are in place for carrying out criminal investigations should be available to the general public.⁷⁵ Communicating the outcome of an investigation is good practice,⁷⁶ as it will demonstrate that international humanitarian law is being applied and is seen to be applied. It can also help maintain or improve relations with the civilian population.
151. Where third parties, such as international or domestic organisations and bodies, NGOs, civil society organisations, and others have made external allegations about an incident, it is likewise good practice for the military to provide for appropriate channels and modes of communication. Third parties should be able to access the channels for submitting allegations, know that their allegation has been received, and be informed about whether action is being taken, including, where feasible, the reasons for any decision in this regard.⁷⁷
152. Transparency in a criminal investigation is in practice limited by domestic law and/or policy for various reasons, including to guarantee the rights of suspects, victims, and witnesses, to safeguard other ongoing investigations, or for national security reasons. It should be noted that information classified in the investigative stage may be released in the trial stage.
153. There is a risk of over-classification of information in armed conflict, including on national security grounds. Over-classification may hinder investigations if the competent investigative authorities are not able to access the information necessary to carry out an

⁷⁴ API (above note 6) Articles 32 and 33; ICRC Customary Law Study (above note 6) Rules 116 and 117 and commentary.

⁷⁵ There are a range of practical ways to facilitate transparency of information about criminal investigations. Communication can take place for example by means of websites, electronic reading rooms (with various levels of access if necessary), reading rooms for on-site only access to documents by members of the media. Any redaction of documents should not render them incomprehensible.

⁷⁶ The outcome of a trial must be publicly communicated (except in cases specified under international law).

⁷⁷ Possible language barriers should be taken into account so as to enable the accessibility of information.

effective investigation,⁷⁸ and may also come into conflict with the need for transparency related to criminal investigations as discussed above. It is good practice to have an appropriate process to enable review of classification decisions, including when challenges to classification are made in criminal proceedings. The review process should allow for independent assessment of the national security concerns so that scrutiny into violations of international humanitarian law is not precluded.

GUIDELINE 11: FAIR TRIAL GUARANTEES

The fair trial guarantees of a suspect must be respected in an investigation as in all other stages of criminal proceedings.

COMMENTARY:

154. The fair trial rights of a suspect must be respected in all stages of any criminal proceedings, from the moment an investigation commences until the rendering of a final judgment on appeal. The right to a fair trial is a fundamental guarantee of international humanitarian law,⁷⁹ and is also protected under human rights law.⁸⁰ Having in mind the abundance of international jurisprudence and other sources of information on its various elements, only a few salient reminders are made below.
155. Some rights are applicable in the investigative stage of criminal proceedings, which is part of the pre-trial process.⁸¹ This includes safeguarding the way in which evidence (including victim and witness statements) is collected, and ensuring the requisite independence and impartiality in the choice and actions of an investigative authority as described above (see Guideline 7). The way in which these rights are elaborated will differ depending on the domestic legal system but, as already noted, a failure to safeguard may hinder or prevent an outcome in further stages of the criminal proceedings.
156. Other fair trial rights applicable to the investigative stage guaranteed by international law non-exhaustively include the presumption of innocence, the right of a suspect to information about the nature and cause of the charge against them, the right to legal counsel, to be tried without undue delay, the right to an interpreter where necessary, and the right not to be compelled to testify against oneself or to confess guilt.⁸²

⁷⁸ In this way classification of information can also impact the thoroughness of an investigation, for example if investigators are not able to access the information required to determine the facts of an incident, including who may have been involved.

⁷⁹ Fair trial rights are provided for in GCIII (above note 6) Articles 99, 102, 105 and 106 for prisoners of war, and GCIV (above note 6) Articles 5, 66 and 71 for civilians. A list of fair trial rights is set forth in API (above note 6) Article 75(4) for international armed conflict. Fair trial rights are guaranteed by common Article 3 to the four Geneva Conventions of 1949 (above note 6) in non-international armed conflicts and a list is included in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter “APII”] (8 June 1977) 1125 UNTS 609, Article 6. See also ICCPR (above note 15) Article 14.

⁸⁰ Some human rights treaties permit derogation from fair trial guarantees under specific circumstances, but certain fundamental principles of fair trial rights must be respected at all times. See e.g., UN Human Rights Committee, “General Comment No. 32 Article 14, Right to Equality Before Courts and Tribunals and to a Fair Trial” (23 August 2007) CCPR/C/GC/32, para 6.

⁸¹ UN OHCHR, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, “Chapter 6: The Right to a Fair Trial: Part I – From Investigation to Trial” (2003).

⁸² See e.g., API (above note 6), Article 75(4), and APII (above note 79) Article 6, which are widely considered to reflect customary law in international and non-international armed conflicts, respectively, and ICCPR (above note 15) Article 14.

157. Whether and how victims can participate in a criminal investigation will depend on domestic law (e.g., common and civil law systems tend to differ in this regard) and applicable international law. In some systems, victims or next of kin may be a party to criminal proceedings, in others they may participate as witnesses. The involvement of victims or their next of kin may be particularly delicate in armed conflict settings due to possibly difficult relations between a State and the civilian population, security concerns, and other factors. Technology and digital communication can, however, be relied on to overcome certain challenges associated with distance and security issues to enable the participation of victims or next of kin remotely, for example by video link.

III ADMINISTRATIVE INVESTIGATIONS

158. For the purpose of these Guidelines, administrative investigations encompass all forms of investigations that are not criminal in nature. They are one way in which States can fulfil their obligation to suppress violations of international humanitarian law.⁸³ This type of proceeding can be conducted prior to, in parallel with, or following a criminal investigation, in order to, for example, address issues linked to an incident that are not of a criminal, but of an operational, policy, or disciplinary character. The exact interplay will depend on the domestic legal system, but administrative investigations should never hinder criminal investigations.
159. The two categories of administrative investigations broadly distinguished in this text are:
1. Investigations into individual conduct in order to, *inter alia*, establish possible non-criminal responsibility arising from an incident, and whether State responsibility may have been engaged;
 2. Investigations aimed at identifying systemic issues that may have caused or contributed to an incident, and whether State responsibility may have been engaged.
160. **Guideline 12** deals with administrative investigations into the acts of individuals and the way in which these investigations should be carried out.
161. **Guideline 13** deals with administrative investigations into systemic issues, and how such issues can be detected and investigated.
162. Administrative investigations must be “effective” insofar as they should be *capable* of enabling a determination of whether there was a non-criminal violation of international humanitarian law, of identifying the individual and systemic factors that caused or contributed to the incident, and of laying the ground for any remedial action that may be required. The principles of an “effective” investigation commonly associated with criminal investigations (independence, impartiality, thoroughness, promptness and transparency) are thus also relevant to administrative investigations. Their application will depend on the specific context, taking also into account that administrative investigations are often carried out by the commander and/or within the military itself. However, the severity of an incident should be an important criterion: the more serious it is, the greater the expectation that the application of the principles will resemble that of a criminal investigation.

GUIDELINE 12: ADMINISTRATIVE INVESTIGATIONS INTO ACTS OF INDIVIDUALS

An administrative investigation should be carried out if the circumstances of an incident suggest that an individual may have committed – through act or omission – a non-criminal violation of international humanitarian law.

COMMENTARY:

163. An administrative investigation should be carried out if the circumstances of an incident suggest that a non-criminal violation of international humanitarian law has been committed through the act or omission of an individual. This type of investigation should,

⁸³ See paras 13-16 above.

for example, occur if there is doubt about what happened in the course of a military operation (did a commander fail to provide adequate warning?), the reasons for the extent of damage to civilian objects caused (did an individual forget to communicate a “no-strike” list?), whether or not military regulations were respected (why did a member of a guard force turn away relatives coming to visit a detainee in a detention facility?), or whether an incident was due to military personnel action (were riots in a detention centre caused by guard force behaviour?).

164. Jurisdiction over violations of international humanitarian law other than war crimes is usually the exclusive purview of military bodies, and corrective action over a member of the military is generally vested in their commander.⁸⁴
165. A commander or other authority responsible for an administrative investigation should be able to sanction those liable, i.e. must be superior in rank and be able to take other measures that may be necessary to suppress a violation. They should be in a position to make an informed and objective decision on whether individual responsibility exists and have access to legal advisors for this purpose if necessary (see Guideline 16).
166. The format of administrative investigations is determined by each State and its military and may also be within the discretion of the commander. It can be fairly informal and entail what are in some domestic systems called “commander investigations”, “summary investigations”, or “disciplinary investigations”, or be more formal and comprise “boards of inquiry”, “commissions of inquiry”, or “service inquiries”, carried out at a higher level. Administrative investigations can involve interviewing members of a military unit, designating an individual to gather the facts (*inter alia* the recorded information) surrounding an incident, or require the involvement of a professional investigative team in the case of more serious incidents.
167. As already mentioned, if reasonable grounds to believe that a war crime has been committed arise in the course of an administrative investigation, the case must be referred to the competent authority for criminal investigation.
168. Administrative investigations can also be used to establish facts (including the consequences of mistakes) that would not lead to any individual responsibility as such, but should be examined in order to avoid repetition of the conduct in question (e.g., why was there a disruption of delivery of sufficient blankets to a detention facility?). This type of administrative investigation is particularly employed in some domestic systems when it is deemed more important to preclude the reoccurrence of a practice or behaviour than to possibly identify and take appropriate action against those involved.
169. The degree of independence and impartiality⁸⁵ of an investigative authority should as a general rule correspond to the gravity of the incident being assessed. Where serious incidents are at issue – including, for example, the death or serious injury of a civilian or civilian property damage – which nonetheless do not raise reasonable grounds to believe that a war crime has been committed, the investigative authority should be up or outside the chain of command to ensure the necessary independence and impartiality and a perception thereof.

⁸⁴ Pictet Commentary to GCIV (above note 21) Article 146, p. 594; ICRC Commentary to API (above note 46) Article 87, paras 3560-3563.

⁸⁵ See paras 123-125 above.

170. The investigative authority should not have been implicated in the incident. The commander of a unit involved in an incident may in some systems nevertheless be tasked (e.g., by the assessment authority or an investigative authority higher up) to undertake certain investigative steps, such as collecting more information or evidence on an incident and reporting back on their findings. In such a case, the commander should not be tasked with the legal assessment of the facts, i.e. determining whether there was a violation of international humanitarian law.
171. Adequate resources should be provided to the authority responsible for an administrative investigation. This includes training prior to armed conflict or deployment, as well as such support as may be needed for investigations in ongoing operations (e.g., access to the site if necessary, to victims, and witnesses, or alleged perpetrators). The investigative authority should possess sufficient operational knowledge to understand the context.
172. Action taken in administrative investigations should be prompt. In some circumstances there may be a need to prioritise which incidents to deal with first. Relevant considerations will include the seriousness of the incident, the urgent need to ensure the cessation of a violation, to take immediate disciplinary action, to take remedial action for those affected by an incident, and to implement changes so as to avoid the repetition of similar acts or omissions.
173. Actions that could not be taken by the investigative authority due to lack of resources, security, or other reasons linked to military operations should be justified and recorded. This will enable the military to assess whether an incident has been adequately dealt with. It may also prove crucial if internal reports or external allegations later arise concerning an incident, or criminal proceedings are subsequently triggered.
174. Information about the structure and methodology of administrative investigations, for example on the military's disciplinary policy or on the way in which administrative investigations are generally conducted, should be publicly available. It is good practice to make information publicly available about the content and course of specific administrative investigations as well: of the steps that were taken, of the decisions made, and of the remedial action initiated, as a way of demonstrating compliance with international humanitarian law. Particular regard should be paid to the interests of victims and next of kin who may have submitted allegations on an incident.
175. It should be expected that administrative investigations related to individual acts will generate questions related to State responsibility when an incident was of a serious nature. The competent authority should, with the necessary legal advice, be able to pass information on to and/or be able to initiate action before an appropriate authority that could separately examine and address the possible State responsibility issues that may arise (see Guideline 14).⁸⁶ This should take place in addition to whatever corrective measures may be taken with respect to an individual.

⁸⁶ Follow-up could include providing a declaration as to the finding of a violation, and financial compensation if persons or property were harmed as a result of the violation.

GUIDELINE 13: ADMINISTRATIVE INVESTIGATIONS INTO SYSTEMIC ISSUES

An administrative investigation into systemic issues should be carried out if the circumstances of an incident suggest that underlying causes are likely to have led to an incident or could lead to further incidents.

COMMENTARY:

176. A systemic problem can arise at many different levels and in different contexts. Examples of systemic issues that could cause or contribute to an incident include inadequate training within a unit,⁸⁷ the application of inappropriate rules of engagement in a military operation,⁸⁸ or an inherent weapon malfunction across the whole military.⁸⁹ An investigation into a systemic issue may be undertaken as part of an already ongoing administrative investigation of an individual for an incident or be stand-alone.
177. Identifying and addressing systemic issues is important to ensure compliance with international humanitarian law, but will also help improve operational effectiveness and mission success. An administrative investigation into systemic issues can likewise help determine whether a certain policy may be the cause of systemic issues (see Guideline 15).
178. A systemic issue will often be detected through a pattern of problems. It is more likely to be detected if investigators are instructed to seek to understand whether a certain type of incident has occurred before and to compare it with other recent investigations of a similar nature. In more complex cases it may be necessary to collect data from different operations and have the capacity to undertake cross-cutting analysis of information in order to detect the interrelatedness of problems (e.g., by means of review of relevant operational records, incident reports, disciplinary proceedings, or investigative results).
179. Systemic issues can also be detected following a single incident where there is reason to believe that the cause of the incident is likely to lead to further incidents. In some situations, systemic issues may even be detected before any incidents arise: they can be identified through simple operational observation and due diligence (e.g., noticing that accommodation provided to detainees is inadequate for the climate).
180. The competent authority will depend on the nature of the problem and the necessary skills may differ from those required for other types of investigations, for example, criminal. The competent authority can range from a ground commander all the way up to a Ministry of Defence lessons-learned unit, assisted by the necessary technical experts.
181. The degree of independence and impartiality⁹⁰ of an investigative authority should as a general rule correspond to the gravity of the systemic issue(s) being examined. Systemic problems related to the application or interpretation of the law, policy, or military regulations that may be causing or contributing to incidents would require review by a high-level authority – not involved in setting the law, policy, or military regulations – with a mandate to initiate changes in the way they are applied or interpreted (see Guideline 15).

⁸⁷ E.g., The guard force in a place of detention denies detainees the right to practice their religion due to lack of adequate training on the treatment of detainees.

⁸⁸ E.g., Inadequate rules of engagement for soldiers at checkpoints leading to civilian injuries.

⁸⁹ E.g., The malfunction is the result of inadequate quality of weapons due to corruption in the procurement system.

⁹⁰ See paras 123-125 above.

182. In this context it should be mentioned that regular monitoring for possible systemic problems – as distinct from administrative investigations – should in practice be undertaken. Monitoring should be a part of the everyday command function. It can also be assigned to lessons-learned bodies, weapons or material management agencies, appropriate inspection bodies, and others. Setting up a dedicated body to track, review reports about, and take action in case of systemic problems would be good practice. In reality it may be difficult for a State to abide by its obligations in relation to systemic violations without a monitoring system.
183. Thorough recording of military operations, as well as its adequate storage and archiving will be essential for the purpose of detecting systemic problems (Guideline 1). Reports of incidents and assessments should be copied to a dedicated review body, where it exists, in parallel to the normal reporting procedure. The effective and efficient storage and archiving (manual or electronic) of any prior investigation into an incident will likewise be key to identifying systemic issues.
184. Adequate resources need to be provided to those carrying out administrative investigations into systemic issues. The expectation to detect and investigate systemic problems should be held to what is feasible. Actions that could not be taken due to lack of resources, security, or other constraints linked to battlefield conditions should be justified and recorded. This will enable the military to assess whether a systemic issue has been adequately identified and dealt with, including where internal reports or external allegations arise related to an incident.
185. Action taken in administrative investigations into systemic issues should be prompt, having in mind the need to prevent possible violations of international humanitarian law or the reoccurrence of those that may have been committed.
186. Investigations into systemic issues should be able to identify whether State responsibility may be engaged. A systemic issue may have caused a violation, or multiple violations of international humanitarian law, with no intent by any person or body to do so. The competent authority should, with the necessary legal advice, be able to pass information on to and/or be able to initiate action before an appropriate authority that could separately examine and address the possible State responsibility issues that may arise (see Guideline 14).⁹¹ This should take place in addition to whatever corrective measures may be taken with respect to the systemic issue.

⁹¹ Follow-up could include financial payments to the victims or their next of kin, publishing the outcome of the investigation, issuing an apology, guaranteeing non-repetition.

IV GENERAL PROVISIONS

GUIDELINE 14: ESTABLISHING STATE RESPONSIBILITY

The responsibility of the State for a violation of international humanitarian law should be established separately from the responsibility of an individual.

COMMENTARY

188. War crimes and other violations of international humanitarian law may give rise to the responsibility of the relevant State,⁹² in addition to individual responsibility. Furthermore, the consequences of violations of international humanitarian law are usually such that action beyond criminal or administrative proceedings may need to be instituted to, in particular, bring about the cessation of certain violations, ensure their non-repetition, and provide victims with remedies.
189. It is well-established that a party to an international armed conflict that violates international humanitarian law is liable to pay compensation (a form of reparation) if the case demands. This obligation has been implemented through various agreements among States, usually adopted as part of post-conflict settlements. While nothing in the relevant provisions suggests that individual victims cannot also be the direct beneficiaries of reparations for violations of international humanitarian law by a State in this type of armed conflict, the practice has been uneven. In non-international armed conflicts victims will usually have access to domestic courts to seek reparations for violations of IHL.⁹³
190. Domestically, a State's responsibility may take the form of civil liability for harm committed to individuals or entities by the armed forces. The extent to which, and the specific ways in which, the civil liability of a State may be established in domestic proceedings (judicial or other), and the remedies available, will vary according to the domestic legal system.
191. As mentioned earlier, it may also be necessary to consider matters of State responsibility in relation to individuals or other entities harmed by a violation of another branch of international law which explicitly provides that they are the direct holders of rights, e.g., individuals under international human rights law.
192. Establishing matters of State responsibility can either be part of the investigative process (whether criminal or administrative) or carried out in parallel or subsequent to the respective investigations by a separate authority, based, for example, in the State's Ministry of Defence. Alternatively or additionally, this authority should also be able to examine and make findings related to possible State responsibility on its own motion.
193. In order to cease or prevent the repetition of violations, it may, for example, be necessary to carry out organisational changes within the military reporting system, amend the law, repeal certain military regulations, or address the behavioural or cultural roots that may

⁹² See notes 19 and 20 above.

⁹³ Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (1907) Article 3; API (above note 6) Article 91; ICRC Customary Law Study (above note 6) Rules 149 and 150 and commentary.

have caused the violation in the first place, for example through modifications in teaching or training.⁹⁴

194. Similarly, respect for the right of victims to an effective remedy may require the introduction of appropriate mechanisms or processes by the State. These can include official verification of the facts, public disclosure of the truth, an accurate accounting of the violations, the search for the disappeared and the bodies of those killed,⁹⁵ compensation (including by establishing compensation funds), and other.⁹⁶

GUIDELINE 15: POLICY-RELATED VIOLATIONS

Oversight bodies or mechanisms should be provided for and authorised by domestic law to take action in case of policy-related violations of international humanitarian law.

COMMENTARY:

195. Policy-related violations of international humanitarian law can be the result of: 1) an explicit or implicit policy to violate international humanitarian law (e.g., related to targeting practices or the treatment of detainees) or 2) wilful disregard for ongoing reports, allegations and/or information that international humanitarian law is being violated (e.g., failure to investigate allegations related to sexual abuse). Policy-related violations can occur at different levels, but are more likely to emanate from the highest levels of the military or of the executive branch. A policy to commit or tolerate violations can result in multiple and/or severe incidents, involving war crimes.
196. As a type of systemic issue, policy-related violations should generate internal reports or external allegations. They should also be detected through appropriate investigative procedures and their results, and the general monitoring of military operations (see Guideline 13 above).
197. A properly constituted and functioning domestic investigative system should be capable of effectively investigating policy-related issues. However, where a policy is set at higher levels in the military, or depending on the type of violations involved (e.g., against a particular ethnic group), the regular investigative system may be unable or unwilling to act. It would thus be good practice for a State to, in advance, have in place appropriate oversight bodies or mechanisms mandated to react.
198. The oversight bodies or mechanisms can be located within the military (e.g., a specific military inspection body with appropriate powers) and/or be outside the military (e.g., judicial or parliamentary bodies, commissions of inquiry, or ombudspersons having the requisite oversight authority). Such bodies should have the authority to make binding decisions on how the matter should proceed, including referral of appropriate cases to

⁹⁴ See e.g., measures ordered by the Inter-American Court of Human Rights regarding non-repetition of human rights violations: *Paniagua-Morales et al v Guatemala*, Reparations and Costs (25 May 2001), Ser. C No. 76, para 203; *Juan Humberto Sánchez v Honduras*, Preliminary Objections, Merits, Reparations and Costs (7 June 2003), Ser. C. No 99, para 189; *Vélez Loor v Panama* Judgment (23 November 2010), Ser. C No 218, paras 271-272.

⁹⁵ See para 149 above.

⁹⁶ See Basic Principles on the Right to a Remedy and Reparation (above note 18) paras 15-23. According to these Principles, full and effective reparation to victims of serious violations of international humanitarian law includes the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The adequate content of these forms of reparation are elaborated within the Principles.

criminal or other proceedings, and be able to recommend reforms of the investigative or judicial system as may be necessary. The mandate and procedures of the relevant oversight bodies or mechanisms should be provided for in domestic legislation.

199. It should be noted that policy-related violations may give rise to the scrutiny or involvement of international mechanisms and bodies, including of a judicial nature. This will especially be the case where there is a failure to conduct effective investigations into violations of international humanitarian law at the domestic level.

GUIDELINE 16: LEGAL ADVISORS

Armed forces are expected to have legal advisors available to assist commanders and/or investigative authorities whenever required or necessary.

COMMENTARY:

200. In international armed conflict, legal advisors must be available when necessary to advise military commanders at the appropriate level on the application of international humanitarian law and on the appropriate instruction to be given to armed forces on this subject. This is a requirement of Additional Protocol I to the 1949 Geneva Conventions⁹⁷ to which 174 States are party, but is also widely observed by States that are not party to the Protocol. In State practice legal advisors can be military or civilian.
201. As demonstrated in these Guidelines, legal advisors can be called on to perform a range of other roles in the implementation of international humanitarian law in international armed conflict. In addition to support to military operations and training, legal advice will be required or necessary in criminal or administrative investigations, and legal advisors may provide legal counsel in prosecutions, assess for issues of State responsibility, and have other tasks.
202. The military is expected to have legal advisors to carry out the same functions in non-international armed conflict.⁹⁸ Compliance with international humanitarian law governing this type of conflict is likewise an international legal obligation.⁹⁹ The armed forces must respect the relevant norms and, *inter alia*, undertake investigations to suppress violations of international humanitarian law, or repress war crimes. In fact, the applicable legal framework may be more complex than in international armed conflict. Many militaries now have legal advisors available in any type of armed conflict in which they may be involved, as well as in peacetime.
203. The appropriateness of the involvement of a legal advisor in a specific investigation will depend on the context and the role of the legal advice in the incident under investigation.

⁹⁷ API (above note 6) Article 82. See also ICRC Customary Law Study (above note 6) Rule 141, and commentary: “This rule is contained in many military manuals. It is also supported by official statements and reported practice. Practice indicates that many States which are not party to Additional Protocol I have legal advisers available to their armed forces (...) No official contrary practice was found.”

⁹⁸ See ICRC Customary Law Study (above note 6) Rule 141, and commentary: “State practice establishes this rule as a norm of customary international law for State armed forces. The practice collected does not indicate that any distinction is made between advice on international humanitarian law applicable in international armed conflicts and that applicable in non-international armed conflicts.”

⁹⁹ Article 1 Common to the four Geneva Conventions of 1949 (above note 6); ICRC Customary Law Study (above note 6) Rule 141 with related State practice. See further ICRC Advisory Service on International Humanitarian Law, “Legal Advisors in Armed Forces” (2003).

The institutional separation of legal roles in a military legal advisory service – the provision of legal advice to operations versus advising in investigations – would help avoid conflicts of interest and promote a perception of independence. This may not be feasible for smaller armed forces with fewer legal advisors but, at a minimum, a legal advisor’s impartiality must be ensured. They must be excluded from an investigation if the investigation is examining behaviour or a course of action that was based on their legal advice (see Guideline 7).

METHODOLOGY

This document is the outcome of a project on Investigations in Armed Conflict, initiated in 2014 by the Geneva Academy and joined in 2017 by the International Committee of the Red Cross (ICRC). The Guidelines are the result of research undertaken, as well as consultations organised with a range of experts.

Sources used for the research include governmental legal and policy documents where available in the public domain, military manuals and regulations where available in the public domain, international treaty and customary law, the case law of international and domestic courts, academic literature (books, journals, and articles), international organisation publications, and NGO reports (see Sources below).

Expert exchanges took place at five expert meetings held over the course of five years,¹⁰⁰ and further experts were consulted bilaterally. Experts included senior government lawyers, military lawyers, academics, staff of international organisations, and civil society organisations – from Africa, Asia, North and South America, Europe, and the Middle East. All experts participated in a personal capacity and are listed at the end of this document.

¹⁰⁰ The expert meetings were held on 14-15 July 2014 (Geneva, Switzerland); 7-8 September 2015 (Geneva, Switzerland); 23-24 March 2017 (The Hague, Netherlands); 12-13 April 2018 (Paris, France); and 1-2 April 2019 (Geneva, Switzerland).

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LIST OF EXPERTS CONSULTED

All the experts took part in a personal capacity; their participation does not reflect the views of or engage the institutions with which they are affiliated, nor do the Guidelines reflect the views of each and every participant.

Don AMMERAAL, Coordinator, Centre of Expertise on Military Justice of the Public Prosecution Service, Netherlands Prosecution Service (The Netherlands)

Brigadier General Javier Alberto AYALA AMAYA, PhD (Colombia)

Léa BASS (France)

Gleb BOGUSH, National Research University Higher School of Economics (Russia)

Dr Godard BUSINGYE, LL.D (Uganda)

Agnès CALLAMARD, United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions (2016-)

Lindsey CAMERON, Head of Unit of Thematic Legal Advisers, Legal Division, International Committee of the Red Cross (ICRC)

Damaris CARNAL (Switzerland)

Stuart CASEY MASLEN, Honorary Professor, Centre for Human Rights, University of Pretoria (South Africa)

Major-General (retired) Blaise CATHCART, OMM, CD, QC (Canada)

Antonio COCO, University of Oxford (UK)

Ghislaine DOUCET, Principal Legal Advisor, International Committee of the Red Cross (ICRC), Paris regional delegation

Mickaël DUPENLOUP (France)

Colonel Nathalie DURHIN (France)

Tamar FELDMAN, Association for Civil Rights in Israel (Israel)

Thomas FORSTER (Switzerland)

Auro FRASER, Office of the United Nations High Commissioner for Human Rights

David FREND, Drystone Chambers (UK)

Lieutenant-Colonel Paul FROST, Canadian Armed Forces (Canada)

Gloria GAGGIOLI, Swiss National Science Foundation Professor, University of Geneva (Switzerland)

Professor Charles GARRAWAY, Fellow, Human Rights Centre, University of Essex (UK)

Professor Robin GEISS, Professor of International Law and Security, University of Glasgow (UK)

Karl GOETZKE (USA)

Etienne GOUIN (France)

Professor Francoise HAMPSON, Human Rights Centre, University of Essex (UK)

Christof HEYNS, United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions (2010-2016)

Edgardo HIRANG, Department of Justice (Philippines)
Jonathan HOROWITZ, Open Society Justice Initiative
Matthew HOVER (USA)
Wilson O. V. IJIDE, PhD, Retired Army Colonel, Associate Lecturer at Department of Psychology and Institute for Peace and Strategic Studies, University of Ibadan (Nigeria)
Roni KATZIR (Israel)
Kamelia KEMILEVA, Executive Manager, Geneva Academy of International Humanitarian Law and Human Rights (Switzerland)
Dilawar KHAN (Pakistan)
Mohammad Aamir KHAN (Pakistan)
Professor Dr Jann K. KLEFFNER, Swedish Defence University (Sweden)
Daniel KLINGELE (Switzerland)
Sarah KNUCKEY, Professor of Clinical Law and Director of the Human Rights Clinic, Columbia Law School (USA)
Brigadier General (Professor) Dan KUWALI, Malawi Defence Force (Malawi)
Professor Philip LEACH, Professor of Human Rights Law, Middlesex University (UK)
Philippe LEJEUNE (France)
Liesbeth LIJNZAAD (The Netherlands)
Jürg LINDENMANN (Switzerland)
Dan MAHANTY, Center for Civilians in Conflict (USA)
Emilie MAX (Switzerland)
Professor Lorna MCGREGOR, University of Essex (UK)
Mosaed ALMUJAHID, Senior Investigator in the Joint Incident Assessment Team (JIAT) (Saudi Arabia)
Eric MONGELARD, Office of the United Nations High Commissioner for Human Rights
Alex MOOREHEAD, Human Rights Institute, Columbia Law School (USA)
Vivian NG, University of Essex (UK)
Camille PERON (France)
Matt POLLARD, International Commission of Jurists
Dr Rod RASTAN, Legal Advisor, Office of the Prosecutor, International Criminal Court
Donald J. RILEY (USA)
Vincent RITTENER (Switzerland)
Professor Robert ROTH, Geneva Academy of International Humanitarian Law and Human Rights (Switzerland)
Professor Marco SASSÒLI, Professor of International Law at the University of Geneva and Director of the Geneva Academy of International Humanitarian Law and Human Rights (Switzerland)
Professor Michael SCHMITT, University of Exeter (UK)
Dr Roy SCHÖNDORF (Israel)

Professor Sikander Ahmed SHAH, LUMS Law School (Pakistan)

Major-General Yusuf Ibrahim SHALANGWA, Director of Nigerian Army Legal Services (Nigeria)

Hina SHAMSI, American Civil Liberties Union (USA)

Professor Hongsheng SHENG, Professor of Public International Law, Shanghai University of Political Science and Law (China)

Brigadier Darren STEWART OBE, Head Operational Law, Army Headquarters (UK)

Commander Andrew THOMSON, Canadian Armed Forces (Canada)

Major Stephen TURNER, Canadian Armed Forces (Canada)

Victor ULLOM, Office of the United Nations High Commissioner for Human Rights

Bas VAN HOEK (The Netherlands)

Welmoet WELS, independent consultant, formerly United Nations

Tim WOOD, (New Zealand/UK)

Major Mahama Kosso MALAM YAGANAMI, Commandant groupement gendarmerie Dosso (Niger)

Mirko ZAMBELLI (Switzerland)

Valentin ZELLWEGER (Switzerland)

Marten ZWANENBURG, Legal Counsel, Ministry of Foreign Affairs (The Netherlands)

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