

# Whose perception of justice? Real and perceived challenges to military investigations in armed conflict

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## Abstract

*States must investigate possible violations of international humanitarian law in armed conflict, and many States use military procedures for all or part of the investigation process. Particular tensions can arise with regard to the perception of justice in the context of military judicial procedures, especially surrounding questions of independence and impartiality. This article lays out the international legal framework which should be used to solve these challenges, arguing that a State must address both the specificities of military institutions and the need for a perception of justice by the affected communities in considering the proper administration of justice in armed conflict.*

**Keywords:** military justice, investigations, IHL violations, independence and impartiality, perception of justice.

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## Introduction

States must investigate possible violations of international humanitarian law (IHL) in armed conflict, and many States use military procedures for all or part of the investigation process, especially for extraterritorial military operations. IHL gives

very little explicit guidance on how such procedures must be carried out, and although the standards under international law are beginning to gain more clarity, there remain key challenges to determining the legality or illegality of certain military-led procedures. Particular tensions arise with the perception of justice in the context of military judicial procedures, especially surrounding questions such as whether independence is possible within a chain of command, or how military culture might affect impartiality. In addition to these challenges, the nature of an armed conflict itself can often lead to aggravated distrust of State institutions, leading to particular difficulties in establishing a perception of justice.

This article lays out the international legal framework which should be used to solve the challenges surrounding a perception of justice with regard to military investigations into possible violations of IHL. It focuses on the concept of an effective investigation into violations of IHL, and what effectiveness means, in legal terms, when it is a military institution engaged in an armed conflict which is tasked with carrying out the investigation. The article argues that certain specificities of military institutions must be taken into account in determining the adequate standards of independence and impartiality of investigations, and that in many cases these can be adequately dealt with through due diligence and a careful application of existing judicial norms. However, the unique context of each armed conflict and the perception of justice by the affected communities may raise questions that are yet to be fully answered by the law.

Investigations into violations of IHL and issues surrounding military justice are both under increasing scrutiny in the legal and policy sphere in armed conflict. There is not always consensus between IHL lawyers, human rights lawyers, civil society actors and military practitioners as to the answers to some of these challenges. The very broad scope of what is understood as a “military justice system” means that criticisms of one specific system may be taken out of context and assumed to represent flaws inherent to all military systems. In order to hold States and their military institutions to account when violations of IHL are alleged, it is necessary for scrutiny into their actions to be based on legal reasoning. Existing literature addressing the adequacy of military institutions does not necessarily examine the whole scope of challenges which may affect the administration of justice in armed conflict. To this end, this article finds it helpful to divide the challenges facing military investigations into actual structural requirements for effectiveness on the one hand, and more abstract or perceived obstacles, which may nonetheless need to be addressed, on the other. Furthermore, it is important to clarify such obligations from an IHL perspective, including in assessing what reasonableness in investigating means.

The article begins in by addressing the legal framework and standards applicable to investigations into possible violations of IHL under international law, and how military institutions can contribute to effective investigations. The article then addresses one element which is often considered to undermine the effectiveness of military investigations – namely, their ability to be independent and impartial. Following this, the article examines the matter of the perception of justice when it comes to military investigations, and the challenges of achieving a

perception of justice in situations of armed conflict. The article concludes that there are structural and cultural obstacles to effectiveness which must be addressed in a military setting, but that there are also important measures related to improving the perception of independence and impartiality which must be considered by States when faced with possible violations of IHL. The ways in which investigations are carried out have a real humanitarian impact due to their role in addressing the rights of both victims and those suspected of committing violations. It is therefore important to gain further clarity at the legal and theoretical level as to how justice can and should be carried out in armed conflict.

## Framework for investigations in armed conflict

In assessing whether a State investigating a possible violation of IHL is complying with its international legal obligations, it is necessary to understand the legal framework of an effective investigation. A State will need to consider, in each circumstance, how the nature of an investigator (for example, whether they are civilian or military) may contribute to or hinder the effectiveness of the investigation. This section lays out the applicable international legal framework, and some of the ways in which military investigators are usually considered to contribute towards effectiveness in investigating.

### Investigations must be effective

Despite the lack of explicit guidance in treaty law, it is clear that States have an obligation to carry out some form of investigation into serious violations of IHL.<sup>1</sup> The form that such an investigation will take (for example, whether it is criminal or administrative in nature, and the standards applicable) may well depend upon the nature of the alleged violation and the context. In all cases, however, investigations must be “effective” – that is, they must be carried out in a manner

1 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 158, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>; Noam Lubell, Jelena Pejic and Claire Simmons, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice*, Geneva Academy of International Humanitarian Law and Human Rights and International Committee of the Red Cross (ICRC), Geneva, 2019 (Guidelines on Investigating Violations of IHL), paras 12–17; Turkel Commission, *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*, Israel, February 2013 (Second Turkel Report), p. 93, para. 37; *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*, UN Doc. A/HRC/15/50, 23 September 2010 (Tomuschat Report), para. 30; UNGA Res. 60/147, “UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, UN Doc. A/RES/60/147, 16 December 2005 (Basic Principles on the Right to Remedy), para. II(3)(b).

appropriate to the context in order to enable a determination of whether there was a violation of IHL.<sup>2</sup> Five general principles are generally recognized as contributing towards this effectiveness: independence, impartiality, thoroughness, promptness and transparency.<sup>3</sup> These are not absolute principles, but rather need to be adapted to the context in which the investigation is being carried out, and must be employed in a manner which contributes to the investigation's overall goal.

The concept of "effectiveness" also implies an element of reasonableness, insofar as States have an obligation to use in good faith all reasonable means to achieve the investigation's goal.<sup>4</sup> What is considered "reasonable" will depend on the practical context, but also on the particularities of the applicable law in question.<sup>5</sup> International human rights bodies, for example, have taken into account situations of armed conflict in determining what effectiveness in investigating means.<sup>6</sup> Courts under international criminal law have also assessed what is required under the obligation on commanders to take all "necessary and reasonable measures" to repress war crimes (which can include investigative duties).<sup>7</sup> Under IHL, the concept of reasonableness may be usefully informed by the fundamentals of the body of law, namely the "compromise based on a balance between military necessity, on the one hand, and the requirements of humanity, on the other".<sup>8</sup> This balance is used in the general interpretation of the concept of what is "feasible" in the context of precautions in attack in the conduct of hostilities under IHL.<sup>9</sup> What

2 Guidelines on Investigating Violations of IHL, above note 1, para. 32.

3 Second Turkel Report, above note 1, pp. 114–117 and 129, para. 82; Michael N. Schmitt, "Investigating Violations of International Law in Armed Conflict", *Harvard National Security Journal*, Vol. 2, No. 1, 2011, p. 55; Tomuschat Report, above note 1.

4 Guidelines on Investigating Violations of IHL, above note 1, para. 30.

5 Olivier Corten, "Reasonableness in International Law", in *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, March 2013, para. 24; International Court of Justice, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, para. 49; European Court of Human Rights (ECtHR), *Wemhoff v. Germany*, Appl. No. 2122/64, Judgment, 27 June 1968, para. 10.

6 ECtHR, *Al-Skeini and Others v. UK*, Appl. No. 55721/07, Judgment, 7 July 2011, para. 164. See also Inter-American Court of Human Rights (IACHR), *Moiwana Community v. Suriname*, Series C, No. 124, Judgment (Preliminary Objections, Merits, Reparations and Costs), 15 June 2005, para. 153; African Commission on Human and Peoples' Rights (ACHPR), *Zimbabwe NGO Human Rights Forum v. Zimbabwe*, Appl. No. 245/02, Decision on Merits, 15 May 2006, para. 154; Tomuschat Report, above note 1, para. 32; Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. E/CN.4/2006/53, 8 March 2006, para. 36; Françoise J. Hampson, "An Investigation of Alleged Violations of the Law of Armed Conflict", *Israel Yearbook on Human Rights*, Vol. 46, 2016, p. 19; Alon Margalit, *Investigating Civilian Casualties in Time of Armed Conflict and Belligerent Occupation: Manoeuvring between Legal Regimes and Paradigms for the Use of Force*, Brill Nijhoff, Leiden, 2018, p. 68.

7 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Judgment (Appeals Chamber), 30 January 2015, para. 1932; International Criminal Court (ICC), *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, 21 March 2016, para. 197; ICC, *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08 A, Judgment (Appeals Chamber), 8 June 2018, paras 169–170.

8 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 1389.

9 Bill Boothby, *The Law of Targeting*, Oxford University Press, Oxford, 2012, p. 173; Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations*, Oxford University Press,

is considered “reasonable” in the context of IHL is therefore dictated by the core of the body of law, thus taking both military necessity and humanity as the balancing factors in understanding the content of this reasonableness. When a State is faced with decisions of prioritization of resources, or security risks for its personnel in investigating, both these elements must therefore be considered in finding the correct way forward. When considering the role of military institutions in investigating, and what structural and other safeguards may be put in place, States must consider, in good faith, what reasonable measures can be taken.

## The role of the military in effectiveness

In situations of possible violations of IHL committed by a State’s armed forces,<sup>10</sup> it will often be military personnel who are legally and/or practically able to investigate initially. Legally, this may be because it is the military that has jurisdiction over offences committed extra-territorially (if applicable), or, more rarely, because an exceptional jurisdictional arrangement (such as “wartime” jurisdiction) has been triggered which expands military jurisdiction.<sup>11</sup> It may also be because the alleged violation is not criminal in nature, in which case it will most likely be a matter which only the military can deal with (such as administrative offences).<sup>12</sup> Practically, it may simply be that civilian police are not able or willing to come to the scene of the incident because of security risks, or at least not promptly enough to serve the effectiveness of the investigation.<sup>13</sup> There are other reasons why military investigators may be preferred, such as the need for expertise in the matter under investigation, obligations arising under command responsibility, and a commander’s need to maintain discipline over their troops.<sup>14</sup>

Oxford, 2010, p. 353; ICRC Customary Law Study, above note 1, Rule 15; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Arts 41(3), 56(2), 57(2) (a), 58, 78(1), 86(2); Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 2 December 1983, Art. 3; Protocol (III) on Prohibitions or Restrictions on the Use of Incendiary Weapons, 10 October 1980, Art. 1(5).

- 10 This article focuses on violations committed by a State’s own armed forces. Although duties to investigate may arise in other contexts and for other actors, different considerations may apply in such contexts, especially related to the perception of justice.
- 11 Michael Gibson, “Military Justice in Operational Settings, Peacekeeping Missions and Situations of Transitional Justice”, in Alison Duxbury and Matthew Groves (eds), *Military Justice in the Modern Age*, Cambridge University Press, Cambridge, 2016, p. 386; Rain Liivoja, “Service Jurisdiction under International Law”, *Melbourne Journal of International Law*, Vol. 11, No. 2, 2010, pp. 309–310; Rain Liivoja, “Military Justice”, in Markus Dirk Dubber and Tatjana Hornle (eds), *Oxford Handbook of Criminal Law*, Oxford University Press, Oxford, 2014, p. 347.
- 12 Guidelines on Investigating Violations of IHL, above note 1, para. 164; Claire Simmons, “The Scope of Military Jurisdiction for Violations of International Humanitarian Law”, *Israel Law Review*, Vol. 54 No. 1, 2021, p. 13.
- 13 ICTY, *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Judgment (Trial Chamber), 16 November 2005, paras 663–664; ECtHR, *Hanan v. Germany*, Appl. No. 4871/16, Judgment, 16 February 2021, para. 181.
- 14 Arne Willy Dahl, “Military Justice and Self-Interest in Accountability”, in Morten Bergsmo and Tianying Song (eds), *Military Self-Interest in Accountability for Core International Crimes*, Torkel Opsahl Academic EPublisher, Brussels, 2016, p. 27; Benjamin Heng, Rain Liivoja, Daniel Ng and Bruce Oswald, “Military Justice in Comparative and International Perspective: A View from the Asia Pacific”, *Journal of International Peacekeeping*, Vol. 20, No. 1–2, 2016; Victor Hansen, “The Impact of Military Justice

As noted above, investigations into serious violations of IHL must be effective, and the adequacy of the reasonable measures put into an investigation must be assessed in light of this effectiveness. There are multiple ways in which effectiveness can be served by the use of military institutions in situations of armed conflict, not least because these are often the actors most promptly and safely able to access scenes of potential violations. With this in mind, it is however important to consider the ways in which the use of military institutions may undermine effectiveness in investigating.

It is important to note at this stage that both legal and practical obstacles to the involvement of civilian investigators can potentially be overcome. Laws can be changed, and civilian police can be trained and equipped to accompany armed forces.<sup>15</sup> This article will not cover the full scope of arguments for and against the use of military versus civilian jurisdiction; rather, it will focus on the fact that military personnel are often *de facto* and *de jure* involved in investigations into alleged violations of IHL, and that there are at least some ways in which they can contribute to effectiveness in investigating. In light of this, what challenges arise, and can they be overcome?

## **Independence, impartiality and effectiveness for military investigations**

Perhaps one of the biggest causes of contention regarding the effectiveness of any military investigation into possible violations of international law is the matter of independence and impartiality. It is often perceived that if military personnel investigate a member of the armed forces for alleged (criminal) offences,<sup>16</sup> this is nothing more than “the military investigating itself”, and an expectation exists that a finding of wrongdoing would have no credibility. There are many different assumptions which arise in such criticisms, some more legitimate than others, and not all can be covered here. This section addresses two of the main elements which are believed to be most relevant to this concern – namely, how the independence and impartiality of investigators may be affected by military hierarchies on the one hand, and military culture and values on the other. Both these elements must necessarily be taken into account when seeking to establish an effective investigation.

### **Military hierarchy**

The factor which has most commonly been examined in light of the independence and impartiality of military investigations (and trials) is how military hierarchies

Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences”, in A. Duxbury and M. Groves (eds), above note 11, p. 126; C. Simmons, above note 12, p. 14. For criticisms and limits of some of these reasons, see Pauline Collins, *The Military as a Separate Society: Consequences for Discipline in the United States and Australia*, Lexington Books, Lanham, MD, 2019, pp. 15–36.

15 P. Collins, above note 14, p. 32; B. Heng *et al.*, above note 14, p. 135.

16 The matter of non-criminal offences is often not considered, although such offences can also have serious implications. A. Margalit, above note 6, pp. 158–160.

may affect these standards. Indeed, the unique relationships of subordination and discipline within armed forces are known to create dynamics which necessarily need to be taken into account in judicial proceedings. It is important to highlight first that the standards of independence and impartiality are not absolute standards in the context of investigations; an investigation may not necessarily be found to be ineffective simply because one of the standards is not fully met.<sup>17</sup> What matters is whether, overall, the standards of independence and impartiality (alongside the other principles of thoroughness, promptness and transparency) were sufficient to contribute to the effectiveness of the investigation, in light of the circumstances at the time. The use of military investigations does not necessarily, on its own, violate the required standards of independence and impartiality, though structural safeguards need to be set up for this to be possible.

An impartial investigator is expected to be able to make decisions related to the investigation (for example, in the collection of evidence) based solely upon the relevant facts of the case and the law or regulations applicable to the investigation procedures. Disciplinary or administrative powers (including both negative powers, such as demotion, and positive powers, such as promotion) over a judicial officer may lead them to consciously or unconsciously take into account whether their superior will approve or disapprove of the investigative decisions being made. If such a superior is considered to have an interest in the case, this is particularly problematic for the subordinate's ability to make impartial decisions, as an investigator should be sufficiently independent of persons whose responsibility is likely to be engaged.<sup>18</sup> An investigator should therefore not be institutionally or practically subordinate to anyone personally implicated in an alleged violation.

However, being a *superior* to an individual implicated in a violation may also occasionally be problematic. There are specific obligations incumbent upon commanders with regard to the repression and suppression of violations of IHL, as elaborated *inter alia* under international criminal law and the notion of command responsibility for war crimes. These obligations involve a duty either to directly suppress or repress (for example, through disciplinary action) or to report to the competent authority who may effectively suppress or repress the violation.<sup>19</sup> Courts examining this notion have found explicitly in certain cases that a commander has a duty to carry out an effective investigation into war crimes.<sup>20</sup> Nevertheless, this duty must be considered in light of developments in international law. It is clear that an investigation into possible criminal liability

17 ECtHR, *Mustafa Tunç and Fecire Tunç v. Turkey*, Appl. No. 24014/05, Judgment, 14 April 2015, paras 222, 249; ECtHR, *Hanan*, above note 13, para. 209; IACHR, *Favela Novela Brasília v. Brasil*, Series C, No. 333, Judgment (Preliminary Objections, Merits, Reparations and Costs), 16 February 2017, para. 189.

18 ECtHR, *Tunç*, above note 17, para. 223; IACtHR, *Favela Nova Brasília*, above note 17, para. 189; ACHPR, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Case No. 279/03-296/05, Decision, 27 May 2009, para. 150.

19 AP I, Art. 86; ICRC Customary Law Study, above note 1, Rule 153.

20 ICTY, *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgment (Trial Chamber II), 31 January 2005, para. 376; ICTY, *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgment (Trial Chamber), 26 February 2001, para. 446; Guénaël Mettraux, *The Law of Command Responsibility*, Oxford

cannot be carried out by those directly implicated in the violation being investigated.<sup>21</sup> Regardless of the role that the commander had in the commission of the possible war crime, the very notion of command responsibility means the commander is implicated in some way, as their responsibility is one of the elements of liability that must be investigated.<sup>22</sup> In such cases the effectiveness of the investigation may very well mandate that it be removed from the responsibility of the commander and passed on to a further authority. This will most likely be a military or civilian law enforcement agency, depending on the domestic system.<sup>23</sup> As international law currently stands, it is reasonable to suggest that in the case of war crimes, a commander should “discharge their duty to investigate by reporting and referring the case” to the relevant professional body for investigation.<sup>24</sup> This should not, however, be seen as withdrawing all authority from a commander; indeed, they will still have a crucial role to play in the initial stages and triggering of investigations, and domestic structures should reflect this responsibility.<sup>25</sup>

It may therefore be suggested that an investigator needs to be outside the chain of command from those possibly implicated. Yet in practice, this is complicated by the difficulty in determining precisely what constitutes “the chain of command” in any individual case, as chains of command are usually less like “chains” and more like a tree with many roots. Within the same armed forces there may be multiple branches of command, sometimes under the same single head (for example, under the commander-in-chief, who may be the political leader of the State). This raises questions with regard to the actual relationships of subordination and command, and how these may impact the personal independence of investigators. It is not the fact that an investigator is in a chain of command that is problematic, but rather which chain of command and where in the chain of command the individual holds their place. Even within a civilian justice system, there are hierarchical structures which may have the potential to create problems for impartiality if junior officers feel under pressure by more senior members to make certain judicial decisions. Independence can be threatened within the judiciary itself through administrative and personnel pressures exerted by senior judges over judges lower in the hierarchy.<sup>26</sup> Such pressures, therefore, are not unique to military hierarchy but rather relate to general requirements of personal independence for investigators to be free from any undue influence. In some institutions, military judges, and sometimes

University Press, Oxford, 2009, p. 233; Amy J. Sepinwall, “Failures to Punish: Command Responsibility in Domestic and International Law”, *Michigan Journal of International Law*, Vol. 30, No. 2, 2009, p. 256.

21 Second Turkel Report, above note 1, p. 118, paras 66–67; ECtHR, *Tunç*, above note 17, paras 219–223.

22 A. Margalit, above note 6, p. 69.

23 See *ibid.*, pp. 153–183.

24 *Ibid.*, p. 65.

25 Guidelines on Investigating Violations of IHL, above note 1, Guideline 2; A. Margalit, above note 6, p. 188.

26 David M. O’Brien and Yasou Ohkhosi, “Shifting Judicial Independence from Within: The Japanese Judiciary”, in Peter H. Russell and David M. O’Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World*, University Press of Virginia, Charlottesville, VA, 2001, p. 37.



investigators, have a separate chain of command from military personnel participating in military operations, and may report directly to the judicial instead of the executive branch of government.<sup>27</sup> Unless the suspect under investigation is a member of the military judicial chain of command (for example, a military judge or member of the military police), it should not be a problem that the investigator is in a military chain of command; rather, the issue is whether their chain of command is sufficiently free from undue pressure exerted by the chain of command implicated in the violation.

It is beyond the scope of this article to cover all structural requirements for an independent and impartial investigation, and how such requirements may differ in the context of non-criminal violations of IHL.<sup>28</sup> However, it is clear that there are certain structural safeguards which must be met for any military judicial institution to be considered legitimate, and that it is possible for military investigations to be considered sufficiently independent and impartial to be effective.

## Military culture

There are, however, concerns beyond the structure of military institutions which may be said to affect the independence and impartiality of military investigators. In a similar fashion to investigations into police misconduct, there is an assumption that there are factors within military life and military culture which will affect the impartiality of investigators, regardless of any structural guarantees of independence that may be in place (for example, even if the investigator is outside the operational chain of command).

Most pertinently, the concept of loyalty, a value which is encouraged in professional military forces, may be seen as hindering the administration of justice. Specifically, the argument posited by some observers suggests that military personnel will necessarily seek to protect the personal interests of other military personnel out of a sense of institutional loyalty, beyond the interests of justice.<sup>29</sup> It must be noted first of all that the counter-argument is also put forward, at least in theory, that the right type of loyalty to an institution may in fact have the opposite effect on impunity. This argument suggests that rather than military personnel being more likely to want to “conceal their part in the situation or to downplay the seriousness of the alleged crime”, it would in fact be in the interests

27 See, for example, the Australian Defence Force Investigative Service, the Canadian Forces Military Police and National Investigative Service, the Military Police Criminal Investigation Department in Israel, the Royal Military Constabulary in the Netherlands, the Special Investigations Branch of the Royal Military Police in the UK, and the Military Criminal Investigation Organizations in the US Army, Navy and Air Force.

28 It is suggested that the standards of independence and impartiality in such cases also need to respond to the effectiveness of the investigation as a whole. In some cases, this may mean that it is perfectly acceptable for the commander of a unit implicated in an incident to investigate. Guidelines on Investigating Violations of IHL, above note 1, para. 16; A. Margalit, above note 6, pp. 70–72.

29 See, for example, the arguments put forward in IACHR, *Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia*, Series C, No. 287, Judgment (Preliminary Objections, Merits, Reparations and Costs), 14 November 2014, para. 447, citing the expert opinion of Federico Andreu Guzmán.

of the military to hold a soldier accused of violations accountable and to “isolate him or her from the armed forces as a whole by describing the soldier as a ‘bad apple’ and thus restore the public image of the armed forces”.<sup>30</sup>

However, it is also true that a certain type of “toxic loyalty” has led to attempted cover-ups of violations.<sup>31</sup> Such toxic loyalty may lead to a “wall of silence”, a “closing of ranks” or “selective memory loss” by military personnel in the face of investigators, as members of a unit may believe that ethically, and perhaps even militarily, the right thing to do is to cover up for misconduct by their peers.<sup>32</sup> However, this is not a matter of independence and impartiality, but rather affects an investigator’s (whether civilian or military) ability to access and collect evidence, or the triggering of the investigation in the first place. This is extremely problematic for the administration of justice in military contexts, yet it cannot be addressed by providing more independence; in fact, it would appear that the more independent an authority would be, the more the ranks would close. A “wall of silence” is likely to occur precisely because an independent investigator is perceived to be outside of the loyalty sphere which is seeking to preserve certain interests.<sup>33</sup>

On the other hand, if the investigator is themselves included within a subgroup of toxic loyalty which has developed a separatist mentality from the applicable laws and regulations, it could be expected that this investigator may hold a bias towards those under investigation, usually leading the investigator to act more favourably towards their peers, above the interests of justice.<sup>34</sup> In such a case, it would seem necessary to provide further independence so as to ensure impartiality. Nevertheless, it would be necessary to be able to determine the exact scope or catchment of this loyalty. Is a military member expected to be problematically loyal to their unit members, their battalion, their service, or the

30 Peter Rowe, “How Well Do International Human Rights Bodies Understand Military Courts?”, in A. Duxbury and M. Groves (eds), above note 11, p. 28.

31 The effects of in-group loyalty on cover-up attempts are not unique to armed forces, and have been observed, for example, within private companies (Timothy G. Kundro and Samir Nurmohamed, “Understanding When and Why Coverups Are Punished Less Severely”, *Academy of Management Journal*, Vol. 64, No. 2, 2021). The phenomenon is, however, particularly problematic in contexts involving potential use of State-sanctioned lethal force such as police and military personnel (Marie Ouellet, Sadaf Hashimi, Jason Gravel and Andrew V. Papachristos, “Network Exposure and Excessive Use of Force: Investigating the Social Transmission of Police Misconduct”, *Criminology & Public Policy*, Vol. 18, No. 3, 2019, p. 679). For an example of how toxic loyalty has impeded military investigations, see Philip McCormack, “Case Study 1: Levels of Loyalty: Country, Service, Mission, Troops”, in Michael Skerker, David Whetham and Don Carrick (eds), *Military Values*, Howgate Publishing, Havant, 2019.

32 David Whetham, “Special Operations Command: Leadership and Ethics Review”, in *Inspector-General of the Australian Defence Force Afghanistan Inquiry Report, 2020* (Brereton Report), Annex A to Chap. 3.03, p. 504; P. Collins, above note 14, p. 6; P. McCormack, above note 31, p. 88. See also Daniel Muñoz-Rojas and Jean-Jacques Frésard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, ICRC, Geneva, October 2004, p. 6.

33 This closing of ranks has been observed in various cases, such as the Baha Mousa scandal involving the British Armed Forces (P. McCormack, above note 31, p. 88) and the war crimes allegedly committed in Afghanistan by the Australian Defence Force, as detailed in the Brereton Report (D. Whetham, above note 32, p. 504).

34 D. Whetham, above note 32, p. 512; P. Collins, above note 14, p. 6.

armed forces as a whole?<sup>35</sup> This issue may not necessarily be addressed by simply replacing a military investigator with a civilian one; indeed, even broader/alternate catchments can be envisioned, such as nationality, ethnicity, religion or political affiliation. It is worth considering that problematic loyalty affiliations are not confined to armed forces, and in the context of an armed conflict, problematic loyalties may well be drawn along the lines of “sides of an armed conflict” rather than belonging to a particular military institution or not.

There are, therefore, specificities unique to military institutions which can raise concerns with regard to these institutions’ ability to carry out effective investigations. Some of these concerns relate to the personal independence of investigators, which must be secured through adequate structural safeguards such as separate chains of command and other sufficient guarantees of independence from undue pressure. Other concerns appear to be related to problematic forms of loyalty which may be more likely to arise in a military setting, and which may not be adequately addressed through structural safeguards. Preventing and addressing such forms of toxic loyalty requires shaping adequate leadership within the armed forces, as well as appropriate training and effective sanctions of problematic behaviour in order to ensure that the “right type” of loyalty and values are upheld in the conduct of military operations.<sup>36</sup> Insofar as these factors may affect the effectiveness of investigations, States will therefore have to take them into account in addressing accountability mechanisms.

## The perception of justice in armed conflict

The above section considered the specificities of military institutions that may hinder the effectiveness of investigations in practice. Yet the need for a perception of justice, even for investigations, leads to some additional, difficult questions regarding what justice can and should mean in situations of armed conflict. Even if military investigations are independent and impartial enough to be effective, with adequate safeguards in the chains of command and no presence of toxic loyalty found to be promoting impunity, what role should the perception of justice have on the use of military investigations? And how can a State increase such a perception in armed conflict?

### The role of the perception of justice for investigations

Although the standards applicable are not the same,<sup>37</sup> both trials and investigations serve the administration of justice, and both must serve to contribute to the legitimacy of the State as the body with the monopoly over the use of force, and as a fair arbitrator over disputes.<sup>38</sup> It is therefore crucial that justice is not only

35 P. McCormack, above note 31, p. 92.

36 P. McCormack, above note 31, p. 90; D. Muñoz-Rojas and J.-J. Frésard, above note 32, p. 15.

37 See C. Simmons, above note 12, pp. 20–21; ECtHR, *Tunç*, above note 17, paras 219–225.

38 Theodor Meron, “Judicial Independence and Impartiality in International Criminal Tribunals”, *American Journal of International Law*, Vol. 99, No. 2, 2005, p. 359.

done but is also seen to be done, at both the investigative and trial stages. Indeed, the public must trust that the judicial system is fair, or it may withdraw its confidence in the State's ability to function as a legitimate government.<sup>39</sup> Nationals who withdraw their trust in the legitimacy of the State are likely to take justice and the use of force into their own hands; this can be seen in situations of armed self-defence groups that perceive their governments as corrupt.<sup>40</sup> A perception of justice is therefore as crucial as justice itself in seeking to establish the rule of law. An element of this perception is the need for "objective" impartiality—namely, the need for the appearance of (as well as factual) impartiality, which is crucial for the "confidence which the courts must inspire in the public in a democratic society".<sup>41</sup>

There are various problems that arise when trying to apply this requirement for the perception of justice to military investigations in armed conflict. First, the need for independence and impartiality in adjudication appears to stem from a nation-State-centric theory, although it has transcended to the international sphere through international human rights law.<sup>42</sup> It is undoubtable, therefore, that this idea holds most traction when it is a judicial body seeking to adjudicate over its own citizens, with whom a government is seeking to maintain legitimacy. What, then, can this mean for a State seeking to adjudicate on matters which may affect individuals beyond its own citizens, such as in extra-territorial armed conflicts? Furthermore, what does this mean for an internal conflict whose roots may lie in the very lack of trust in State institutions by a section of the population? These questions are not limited to situations of armed conflict, as similar crises of legitimacy are frequently seen in other contexts—for example, with police forces in their relationship with religious or ethnic minorities.<sup>43</sup>

In seeking to tackle this issue, it is important to address whose perspective is determinative in establishing the perception of justice. Some of these concerns are raised in contexts of occupation, or when a State is investigating or prosecuting individuals who are not members of its own armed forces,<sup>44</sup> where the accused or suspect may doubt the legitimacy of the proceedings. For a State investigating its

39 Brett Kyle and Andrew Reiter, *Military Courts, Civil-Military Relations, and the Legal Battle for Democracy: The Politics of Military Justice*, Taylor & Francis, London, 2021, p. 7; Pasquale Pasquino, "Prolegomena to a Theory of Judicial Power: The Concept of Judicial Independence in Theory and History", *Law and Practice of International Courts and Tribunals*, Vol. 2, No. 1, 2014, pp. 22–25; Kiyoshi Shimokawa, "Locke's Conception of Justice", in Peter R. Anstey (ed.), *The Philosophy of John Locke: New Perspectives*, Routledge, London, 2003, pp. 66–67.

40 T. Meron, above note 38, p. 359; Peter H. Russell, "Toward a General Theory of Judicial Independence", in P. H. Russell and D. M. O'Brien (eds), above note 26, p. 9.

41 ECtHR, *Piersack v. Belgium*, Appl. No. 8692/79, Judgment, 1 October 1982, para. 30; Human Rights Committee, General Comment No. 32, "Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial", UN Doc. CCPR/C/GC/32, 23 August 2007, para. 21.

42 Shimon Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", in Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debate*, Kluwer Academic Publishers, Amsterdam, 1985.

43 M. Ouellet *et al.*, above note 31, p. 676.

44 Amnon Reichman, "Judicial Independence in Times of War: Prolonged Armed Conflict and Judicial Review of Military Actions in Israel", *Utah Law Review*, Vol. 2011, No. 1, 2011, p. 63; Lisa Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza*, University of California Press, Berkeley, CA, 2005, p. 100.

own armed forces for alleged violations, the tensions usually lie with the perception by the victim or other individuals affected by military operations and judicial proceedings. However, the test generally accepted in assessing objective impartiality in courts and tribunals under fair trial rights is that of a “reasonable observer” in the general public,<sup>45</sup> insofar as it is the public’s confidence in the courts which must be maintained through the objective test.<sup>46</sup> It is therefore not only the perception of the accused, or indeed the victim, that matters in determining whether a lack of perception of impartiality is “objectively justified”, but rather that of the broader community.<sup>47</sup> This may involve not only the communities affected by the possible violations, but also the broader international community, as the State’s obligations to investigate arise under international law, not domestic law. This may require that the investigation is also perceived to be independent and impartial from an international perspective, regardless of whom a violation is alleged to have been committed against.

### How can the perception of independence and impartiality be improved in armed conflict?

With this in mind, it may be asked what can be done to improve the perception of independence and impartiality of investigations in armed conflict, given the difficulties in measuring such an abstract element. There is not one blanket answer for these challenges, and the adequate measures will always depend on the individual context, but there are some steps that can serve to enhance a perception of independence and impartiality.

One measure which may be taken to improve the perception of justice is to increase the level of civilian involvement in military justice. Many States have been moving towards a “civilianization” of military justice, which can mean anything from increased oversight to actual elimination of some forms of military justice.<sup>48</sup> At a domestic level, the increased role of civilian oversight over military justice can be seen as improving legitimacy because of the need for balanced civil–military relations in a democratic State.<sup>49</sup> Civilian oversight can also aid in legitimacy even when it is only military actors who may be able to investigate, which, as seen above, may be the case in some conflict situations. However, it must also be remarked that replacing military actors with civilian ones may not always solve the issue at hand – for example, if the “toxic loyalty” described above extends to civilian actors, and more generally if civilian actors are also corrupt.<sup>50</sup>

45 Peter Rowe, *The Impact of Human Rights Law on Armed Forces*, Cambridge University Press, Cambridge, 2006, p. 83.

46 ECtHR, *Piersack*, above note 41, para. 30.

47 ECtHR, *Hauschildt v. Denmark*, Appl. No. 10486/83, Judgment, 24 May 1989, para. 48. Although the function of investigations is not the same as that of trials, these considerations are still useful in informing the standards applicable to investigations as one element of the administration of justice by a State.

48 A. W. Dahl, above note 14, p. 21; B. Heng *et al.*, above note 14, pp. 136–137.

49 B. Kyle and A. Reiter, above note 39, p. 6.

50 C. Simmons, above note 12, p. 23.

In this regard, improving the perception of justice will always depend on the context, as it will be necessary to understand where the perception of injustice comes from. In a situation in which there has been a history of systematic violations, patterns of abuse and widespread impunity, structural changes to military (or civilian) institutions may not be sufficient to improve trust in these systems. In the context of such systematic violations, where the mistrust may be widespread throughout society and even internationally, the requirement of a perception of justice may be a strong tool for advocating for increased independence, for example by setting up exceptional investigative mechanisms.

Perhaps the most contentious yet important element that may support a perception of justice is increased transparency in investigation proceedings. Even if States do not consider it a direct legal obligation in all circumstances, transparency is key to enhancing the legitimacy of a State's actions in armed conflict.<sup>51</sup> Transparency can be important in two ways. First, in publishing the existing procedures and structures, States may make clear the structures of the judicial military chains of command and the safeguards that exist. Second, transparency in the carrying out and results of investigations serves to improve communication with those directly affected by the possible violations.<sup>52</sup> Even if there are legitimate security concerns which may justify withholding certain information, especially in relation to military operations, there will usually be some form of information on investigation proceedings which may reasonably be made public.<sup>53</sup>

Additionally, insofar as the international community's perception may be relevant in considering a perception of justice under international law, the role of international bodies must be mentioned. It may be that the use of (or at the very least monitoring by) international bodies would help to address some of these problems, and many individuals affected by IHL violations do call for international mechanisms to be used when serious violations of IHL are alleged. However, this must be considered in light of the fact that international investigative mechanisms are necessarily exceptional measures which take up a lot of time and resources and are rarely considered to be the most effective form of investigations.<sup>54</sup> Indeed, international mechanisms are almost exclusively set up as a measure of last resort in response to repeated failures by States to domestically address violations of

51 Second Turkel Report, above note 1, p. 114, para. 63, and pp. 145–146, paras 106–107; Eliav Lieblch, “Show Us the Films: Transparency, National Security and Disclosure of Information Collected by Advanced Weapon Systems under International Law”, *Israel Law Review*, Vol. 43, No. 3, 2012; Open Society Foundations and Open Society Justice Initiative, *The Global Principles on National Security and the Right to Information (Tshwane Principles)*, New York, 12 June 2013.

52 Guidelines on Investigating Violations of IHL, above note 1, para. 147.

53 *Ibid.*, para. 153.

54 Sylvaine Wong, “Investigating Civilian Casualties in Armed Conflict: Comparing U.S. Military Investigations with Alternatives under International Humanitarian and Human Rights Law”, *Naval Law Review*, Vol. 64, 2015, pp. 138–150; Theo Boutruche, “Credible Fact-Finding and Allegations of International Humanitarian Law: Challenges in Theory and Practice”, *Journal of Conflict and Security Law*, Vol. 16, No. 1, 2011; Shiri Krebs, “The Legalization of Truth in International Fact-Finding”, *Chicago Journal of International Law*, Vol. 18, No. 1, 2017.

international law.<sup>55</sup> It is therefore important for States to seek to implement effective domestic systems of redress for violations of IHL.

Finally, it is possible that conceptions of justice in such contexts will need to be considered beyond legal (especially criminal) measures. The role of investigations in disseminating truth, and potentially providing reparations, may be important in terms of contributing towards a more holistic conception of justice in armed conflicts than simply holding individuals and/or States to account. This also ties into the role of investigations within the broader concept under international law of a right to truth.<sup>56</sup> As established above, assessing who is best placed to carry out an effective investigation requires determining the purpose of the investigation. If the purpose goes beyond criminal accountability and traditional legal adjudication, but rather might involve the dissemination of truth and the recording of different accounts by those involved, the answer to the question “who can most effectively investigate?” may well change and may involve a greater variety of actors from civil society.

A perception of justice is therefore as crucial as the procedural carrying out of justice itself, especially with regard to maintaining a sense of legitimacy of State institutions. Yet such a perception can be difficult to achieve, especially in situations of armed conflict where the general political context may lead to a situation in which the accused or victims do not perceive the justice system as independent, impartial or generally just. Furthermore, the issue of the “reasonable observer” whose perception matters in such contexts is further complicated by the diversity of potential communities involved. There are certain steps which can be taken to begin answering these challenges, although these will always be context-dependent.

## Conclusion

IHL is premised upon the principle that justice can and must still continue to be sought in situations of armed conflict. Key to the administration of justice is the

55 This is evident through the subsidiary and complementary nature of most international mechanisms, such as regional human rights courts and the ICC. It is also observable through mechanisms set up by different UN bodies, often in response to “gross and systematic” violations at the domestic level. See, for example, Cecilia Medina Quiroga, *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System*, Martinus Nijhoff, Dordrecht, 1988, p. 7; Lori F. Damrosch, “Gross and Systematic Human Rights Violations”, in *Max Planck Encyclopaedia of Public International Law*, Oxford University Press, Oxford, 2011, paras 1–9.

56 Basic Principles on the Right to Remedy, above note 1, para. 22(b); Yasmin Naqvi, “The Right to the Truth in International Law: Fact or Fiction?”, *International Review of the Red Cross*, Vol. 88, No. 862, 2006; Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, Cambridge University Press, Cambridge, 2012, p. 51; Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 2nd ed., Cambridge University Press, Cambridge, 2013, p. 225; Sam Szoke-Burke, “Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies”, *Berkeley Journal of International Law*, Vol. 33, No. 2, 2015, pp. 532–535; Eduardo Ferrer Mac-Gregor, “The Right to Truth as an Autonomous Right under the Inter-American Human Rights System”, *Mexican Law Review*, Vol. 9, No. 1, 2016, pp. 122–126; James A. Sweeney, “The Elusive Right to Truth in Transitional Human Rights Jurisprudence”, *International and Comparative Law Quarterly*, Vol. 67, No. 2, 2018, p. 383.

effective implementation of the rules of IHL, to which investigations are crucial. As international law currently stands, States may still legally use military justice systems in various situations, including to investigate possible violations of IHL, and this article has addressed some of the ways in which properly structured military bodies can contribute to effectiveness in investigating. It has also considered some of the tensions which commonly arise when it is military institutions that investigate. States should be aware of the real dimensions of influence as well as the perceived tensions present through the use of such military institutions. There are structural specificities inherent to military hierarchies which must be taken into account when considering what constitutes an adequate system of military justice. There are also forms of toxic loyalty that may arise in a military setting and are not always addressed when considering possible spheres of influence in the administration of justice. Insofar as they may affect the likelihood of impunity or cover-ups, it is suggested that such influences must be further examined.

There is also a need for judicial proceedings to be perceived as just, a further element that has not been at the forefront of accountability efforts for violations of IHL. Such a perception can be particularly difficult to attain in situations of armed conflict, where the very legitimacy of a State may be part of the conflict itself. In addressing this challenge, it is first important to understand whose perception matters, and recognize that beyond the suspect and the victim, the perception of the international community may have a role to play in enhancing legitimacy. In all cases, States will need to make reasonable adjustments to mitigate the lack of appearance of independence and impartiality. Improving the perception of justice will necessarily depend on the context, but involving civilian actors and oversight, increasing transparency, and the use of international monitoring can all support this goal. Finally, considering the broader purpose of an investigation, for example in relation to truth-telling in conflict settings, may also affect how legitimacy can be achieved.

Fair scrutiny of military investigations into possible violations of IHL requires considering how military institutions can carry out effective investigations with adequate structural safeguards and due diligence measures in order to mitigate challenges that are likely to arise in military contexts. As long as armed conflicts exist, it is likely that military bodies will have a role in judicial proceedings involving their personnel, and it is therefore important to understand how they may carry out such proceedings according to their legal obligations. Yet States also need to consider all obligations arising under international law, including the role of a perception of justice. It would be necessary to further explore what such a perception of justice can mean at an international level, and within armed conflict where the relationships between States and the individuals affected by violations may be broken or non-existent. In the meantime, there are already recognized steps which can serve to promote legitimacy, and if such measures can reasonably be implemented, States may well have a legal obligation to do so.