

Criminal Investigation in Armed Conflicts

Tenente-coronel
Francisco José Bernardino da Silva Leandro



Investigation Fights Twice Against Impunity. It Serves Peace.

Setting the Scene

*Judicial processes depend upon the crimes
being first discovered and investigated.*

ICTY Manual on Developed Practices, 2009¹

One of the most remarkable achievements in armed conflicts worldwide is the fight against criminal impunity of the most brutal and horrendous intentional acts. In the context of this essay, the expression «*criminal accountability*» addresses the war crimes investigation and prosecution initial stages by international jurisdictions «side-by-side» with domestic tribunals. Recognizing that every military commander, whether belonging or not to a State structure (armed force concept - article 43.1 & article 87 Additional Protocol I, hereinafter AP, and article 1.1 AP II),² bears special responsibilities every time his subordinates are waging acts of armed violence. We believe that the legitimacy of armed force use is directly related to the adequacy of the measures taken to investigate serious violations and punish perpetrators of war crimes. Therefore, the purpose of this paper is to clearly identify the key characteristics of criminal investigation in a land operations theatre, and to provide every field commander³ with relevant information. If truth is to be told, the only reason why criminals might be held accountable lies on the discovery⁴ and investigation of their crimes. Consequently, each field commander plays an important role in discovering criminal activities, preparing the first steps of their investigation or, if applicable, reporting the criminal commission of the act.

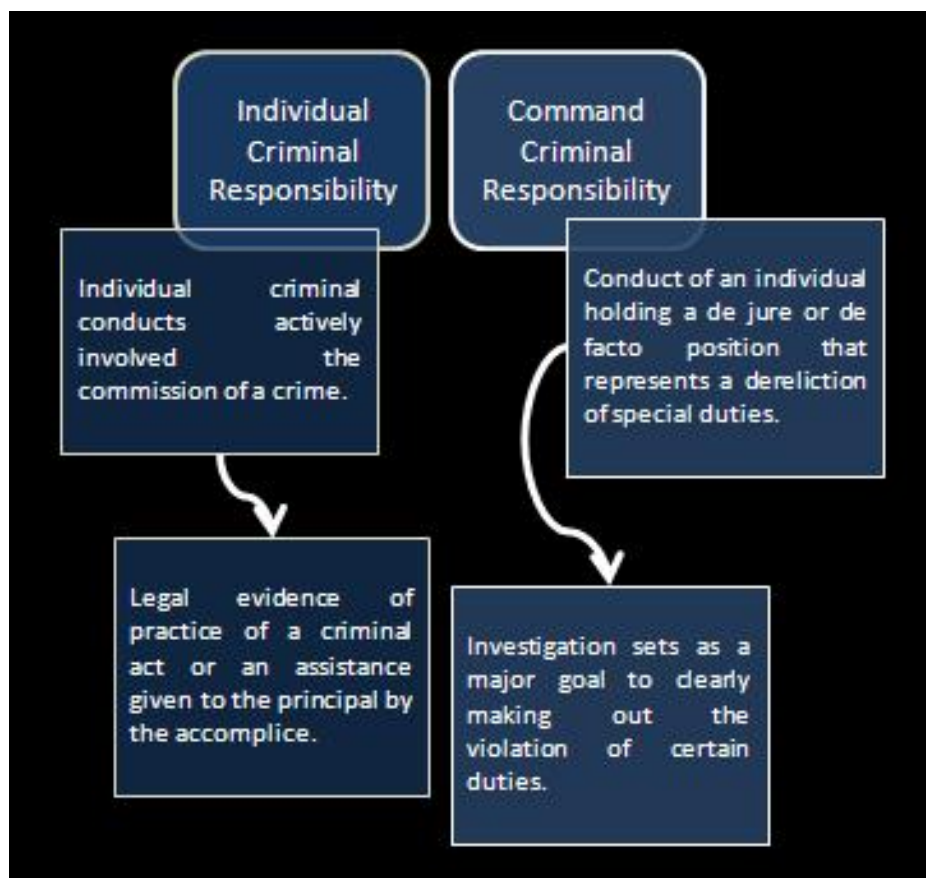


Diagram 1 - Types of Criminal Responsibility

By departing from two types of criminal responsibility, i.e. individual and command responsibility⁵ it is critical to distinguish them by emphasizing that the former addresses individual criminal acts carried out based on orders or other individuals' criminal conducts, who are involved in the commission of a war crime; the latter deals with the conduct of an individual, holding a *de jure* or *de facto* position, that represents a dereliction of special duties, by omitting a conduct at the time he receives or actively discovers a notice of a crime. Investigation of the individual criminal responsibility is a process that aims to identify the legal evidence of a criminal conduct, or of any assistance given to the principal by the accomplice. Differently, in the case of command or superiors criminal responsibility, the investigation major goal is to clearly making out the violation of certain duties by omission.

In addition, it is extremely relevant to draw the attention to the harsh and chaotic conditions in which criminal investigations in land operations are carried out, even where they take place during the consolidation or stabilization phase of a military land operation. Likewise, reference must be made to the fact that these activities should be granted high priority in the context of the adversary engagement, and that they are based on different domestic legal frameworks.

War Crimes Concept

Not every violation of IHL constitutes a war crime.

Michael N. Schmitt⁶

Not every violation of the international humanitarian law of armed conflicts, hereinafter IHLAC, carried out by individuals amounts to a war crime. However, the expression «war crimes» refers to violations leading to an individual criminal responsibility, based on *serious violations* of customary or treaty rules belonging to the corpus of the international humanitarian law of armed conflicts.

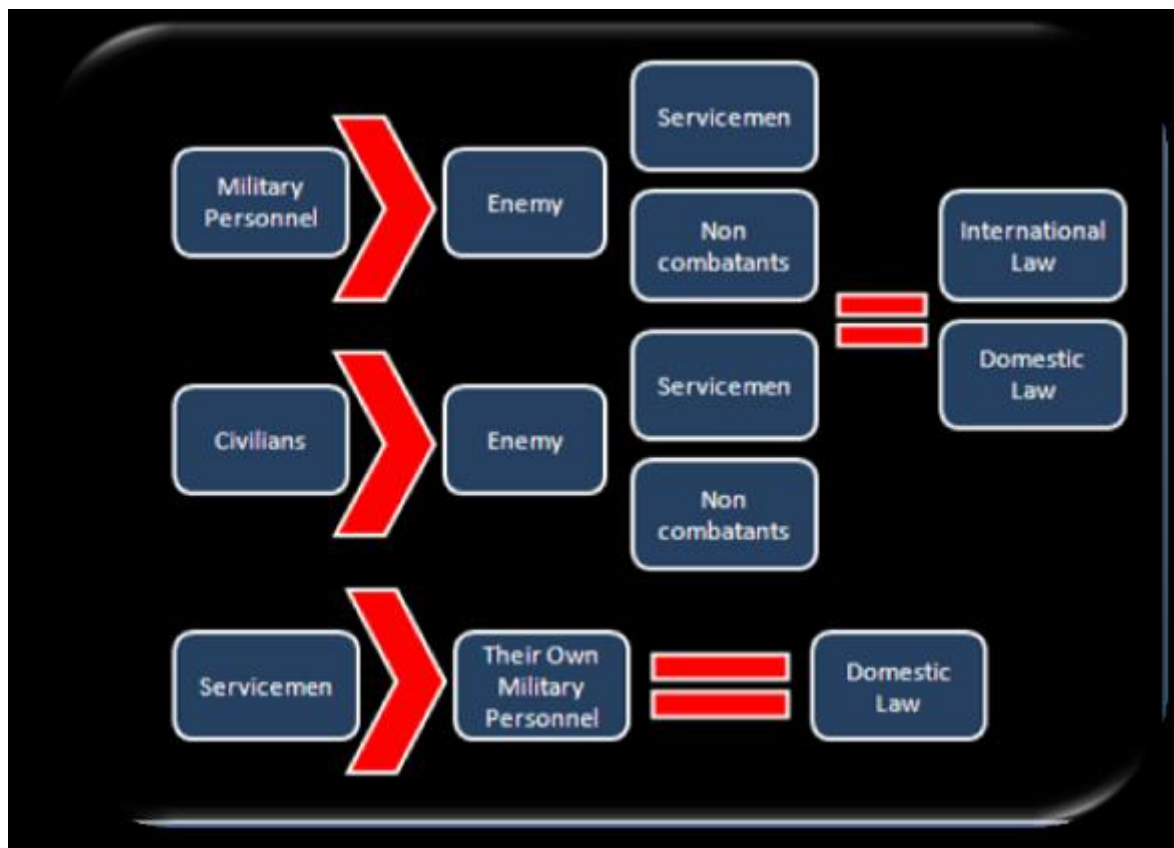


Diagram 2 - International crimes perpetrated against the enemy

In fact, Georges Abi-Saab and Rosemary Abi-Saab refer to war crimes concept as follows: L'on peut définir les «crimes de guerre» comme étant les violations des règles du jus in» bello (rebaptisé depuis les Conventions de Genève de 1949 «droits des conflits armés» et plus récemment «droit international humanitaire»), qui entraînent, selon le droit international, la responsabilité pénale des individus qui les commettent⁷. Besides, it is also necessary to identify not only the relation between the perpetrator and the crime base but also the mental element that directed or linked the perpetrator to the commission of the criminal act (Cassese, 2008: 53). Furthermore, and of the utmost importance, criminal offences that amount to a war crime must have a link with an international or a non-international armed conflict⁸ (Cassese, 2008: 82). Actually murder,

manslaughter, torture or other serious crimes might have taken place contemporaneously with an armed conflict, but their commission might not be directly related to the armed conflict. Finally the scale and the level of organization should be taken into consideration - article 8 of the Statute of the International Criminal Court refers "... in particularly when committed as part of a plan or policy or as part of a large-scale commission" (see note 25). Thus, in the light of these ideas, the war crime concept relevant to IHLAC is based on the following important features:

- It is an act committed by way of commission and omission of one or more individuals;
- Not every violation of IHLAC is a war crime;
- The act represents a serious violation and amounts to a violation of the IHLAC;
- It denotes criminal intent or debatably others forms of mental state such as *recklessness* or *dolus eventualis*⁹;
- The scale and level of organization denotes improbability of random occurrence;
- There is a link between the violation and the existence of an armed conflict.

War crimes might be carried out by military personnel against enemy¹⁰ (military and non combatants) or perpetrated by civilians against members of enemy armed forces or enemy civilians (diagram 2). As clarified by the jurisprudence in *Cases Pilz*¹¹ and *Motosuke*¹², crimes committed by servicemen against their own military (regardless their nationality) do not constitute war crimes. Likewise, crimes committed by civilians against civilians do not amount to war crimes, except if they are linked to the armed conflict. In both cases, their domestic jurisdiction applies exclusively in the majority of the cases.

To complete this short visit to the war crimes concept, we need to look into the legal definition of an armed conflict, once there is a need to establish the link between the commission of the crime and the existence on an armed conflict. The provisions of Geneva Conventions and of the ICC Statute undoubtedly identify the situations, which are not legally considered armed conflicts. In fact, "... situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature" are not armed conflicts. Nevertheless, article 8.2(f) introduces other important elements. Pursuant to article 8 (f),... it applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups¹³. Derived from article 2 of GC, 1949, it recognizes that an armed conflict is not limited to declared war. Additionally, article 1 GC, Additional Protocol II 1977, provides the following definition on non-international armed conflicts: "... shall apply to all armed conflicts... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol". Nowadays, two main

legal definitions of armed conflicts are at stake. The first was provided by the United Nations International Law Commission in the report on the effects of armed conflicts on treaties¹⁴: an “armed conflict” means a state of war or a conflict which involves armed operations which by their nature or extent are likely to affect the operation of treaties between State parties to the armed conflict or between State parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict¹⁵. The same report mentions the following: contemporary armed conflicts have blurred the distinction between international and internal armed conflicts. The number of civil wars has increased. In addition, many of these “civil wars” include “external elements”, such as support and involvement by other States in varying degrees, supplying arms, providing training facilities and funds, and so forth. Internal armed conflicts could affect the operation of treaties as much as, if not more than, international armed conflicts¹⁶. The second definition was delivered by the Jurisprudence of International ad hoc tribunals in the following cases: ICTY Duško Tadić (1996) - “... an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State¹⁷; and ICTR Jean-Paul Akayesu (1998) - 619. ...The Appeals Chamber in the Duško Tadić decision on Jurisdiction held “that an armed conflict exists whenever there is [...] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until [...] in the case of internal conflicts, a peaceful settlement is reached”¹⁸. Thus, in the light of these ideas, the armed conflict definition is based on the following important features:

- It is a resort to armed force between States;
- It is a protracted armed violence between governmental authorities and organized armed groups or between such groups within a State;
- It exists regardless of a formal declaration;
- It impacts the operation of treaties between States parties;
- There is a blurred distinction between international and internal armed conflicts;
- International humanitarian law of the armed conflicts (IHLAC) applies from the initiation to the very end.

Types of criminal investigations

Any investigation function is a tool for collecting facts.

OIOS, Investigations Division Investigations Manual, 2009¹⁹

Each criminal investigation might achieve purposes beyond the simple collection of facts. Indeed, investigation fights twice against impunity. In particular, investigation activities provide deterrence against possible impropriety²⁰ and commitment to serve justice through accountability²¹. Bearing in mind both purposes, let us focus on the latter. Thus,

considering that in war crimes there is a link between the commission of the crime and the armed conflict itself; considering that international humanitarian law applies in armed conflicts²², the investigation and the prosecution of war crimes need to consider the exercise of jurisdictions, the existing agreements (SOFA²³), and both the nature and scale of the crimes. Nevertheless, at this stage, it is important to distinguish four types of criminal investigations in land operations (diagram 3):

| Types of War Crimes Investigations | | | | |
|------------------------------------|-----------------------------------|--|--|--|
| Type | Committed by or against nationals | State is willing and capable of exercising jurisdiction. | War crimes, crimes against humanity, and genocide when committed as part of a plan or policy or as part of a large scale commission. | |
| 1 | Yes SN | Yes | No | Sending Nation Jurisdiction |
| 2 | Yes HN | Yes | No | Host Nation Jurisdiction |
| 3 | Yes HN | No | Yes/No | International Voluntarily Enforced Shared Jurisdiction |
| 4 | Yes/No | No | Yes | Complementary International Jurisdiction |

Diagram 3

- Type 1 (Sending Nation Jurisdiction) - The first type refers to war crime investigations of acts committed by or against a member of friendly military forces or any other special circumstances requiring further inquiry. This type of investigations is mainly a national responsibility or, where it involves personnel of more than one nationality, is to be carried out jointly with another State. It also represents the willingness and the ability²⁴ of a State to exercise its criminal jurisdiction;
- Type 2 (Host Nation Jurisdiction) - The second type addresses the war crimes investigation of acts committed in violation of IHLAC not involving members of friendly military forces of a sending State (non nationals of a sending State), which belong neither to the category of crimes against humanity nor to genocide, and if not committed as part of a plan or policy or as part of a large-scale commission²⁵;
- Type 3 (International Voluntarily/Enforced/Shared Jurisdiction) - The third type addresses the large-scale war crimes investigation of acts committed in violation of IHLAC involving members of military forces of a State, or even armed groups operating in the context of an armed conflict, in relation to which the host State is not in a position of exercising its criminal jurisdiction. This sort of investigations might be carried out by local jurisdictions through an international arrangement or

by international jurisdictions exclusively, depending upon the nature and the dimension of the crimes;

- Type 4 (Complementary International Jurisdiction) – The fourth type includes large scale war crimes, crimes against humanity and genocide, especially when committed as part of a plan or policy, or as part of a large-scale commission and the Host State displays neither willingness nor the ability to promote justice. Likewise, this sort of investigations is carried out under the responsibility of an international body, which jurisdiction is attributed by an international legal instrument and executed by the United Nations or the Prosecutor of an International Tribunal.

Field Commander's Role

Respect for the law is a matter of order and discipline.

Frederic de Mulinen²⁶

Among the best practices to prevent war crimes and to reduce the number of serious violations of IHLAC are the following: dissemination among all subordinates of an unequivocal mission statement each time that a military unit is assigned with a new task or mission; exercising a permanent and strong leadership along the chain of command with special attention to lower echelons; wide circulation of written directives in the troops mother language; issuing clear and detailed orders (if possible always committed to paper) in which the aim and the main tasks are clearly identified; practicing regular verbal debriefings; putting into practice a routine plan of commander's visits to units in direct contact with adversary, and establishing a reporting system that covers each armed action. Regarding the report system, the updated European Union guidelines on promoting compliance with international humanitarian law (IHL) mentions the following: "... Commanders of European Union Military Operations ... should include an assessment of the IHL situation in their reports about a given State or conflict. Special attention should be given to information that indicates that serious violations of IHL may have been committed. Where feasible, such reports should also include an analysis and suggestions of possible measures to be taken by the European Union"²⁷.

Generally speaking each commander is entrusted with four main types of responsibilities: implementing preventive measures to avoid IHLAC violations, enforcing compliance of the IHLAC, reporting violations, and supporting the investigation.

- In the preventive field commanders are playing the decisive role by establishing a culture of individual responsibility at disciplinary and criminal level fostering prevention and violations report. The Additional Protocol I to the Geneva Convention (article 87) stresses the importance of prevention and control. The commander must ensure that his subordinates are aware of their obligations, and he should take the necessary measures to prevent violations of the law of war. This understanding was again affirmed by the ICTY in the Sefer Halilović Judgement (2005) as follows: "40.

The elements of command responsibility are derived from the duties comprised in responsible command, and those duties are generally enforced through command responsibility. For many years the responsibility of commanders for the conduct of their troops has been recognized in domestic jurisdictions²⁸. Exercising a responsible command applies not only to commanders within a State structure, but also to commanders exercising their powers in non-State structures. Likewise, it applies to *de jure* commanders and to *de facto* commanders. The pertinent issue in this context is the effective capacity of an individual to exercise control, regardless the support structure. They need not to be formally designated as commanders according to the regulations of their armed forces... the obligations attach as soon as they assume a command function (Schmitt, 2011: 41).

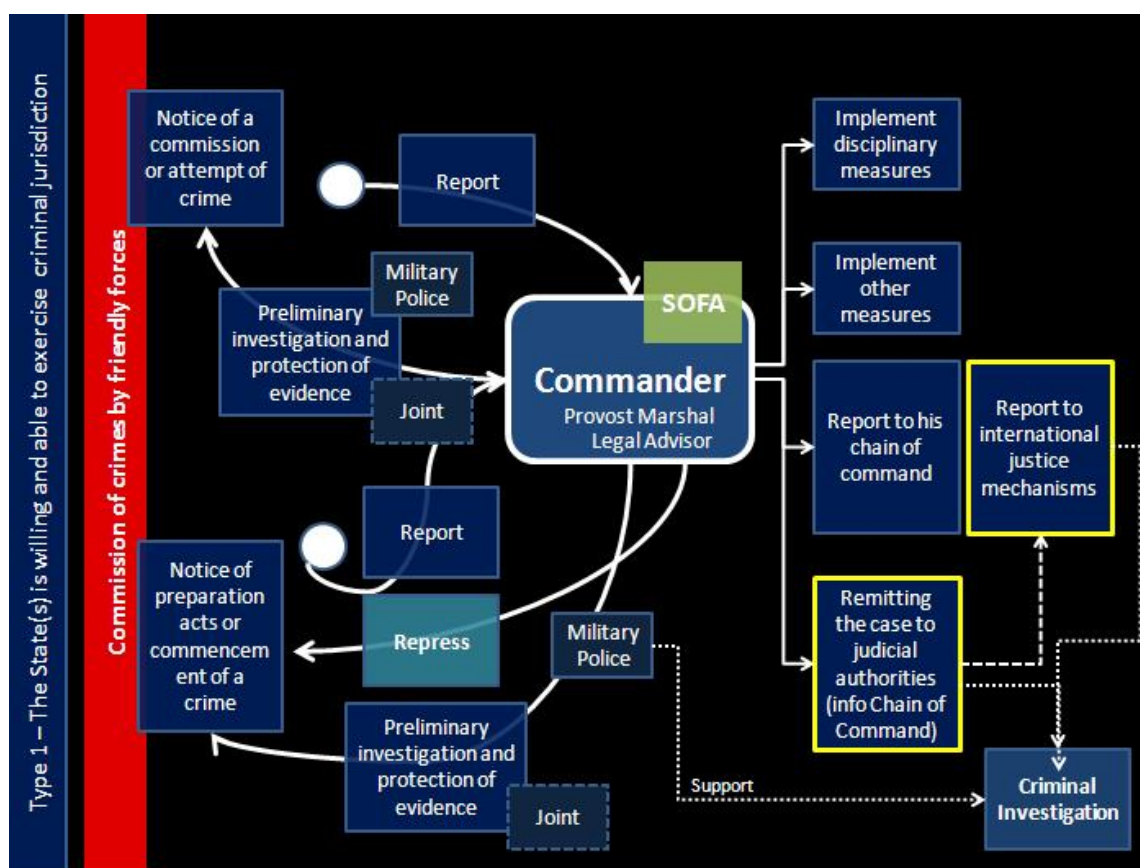


Diagram 4 - Commander Role and Responsibilities

- During the employment of the armed force the commander is to enforce compliance with IHLAC by guiding and controlling his direct staff and subordinate commanders, bearing in mind the rules established by SOFA (if applicable). The existence of a legal advisor, a military police unit and Force Provost Marshal²⁹ does not relieve the commander from enforcing IHLAC. In fact, the role of legal advisors (foreseen by the Geneva Convention IV article 82) is to provide legal counseling to guide orders and procedures, the Force Provost Marshal (NATO APP 12, pg 2-1) will act as the technical adviser to the Commander on all military police matters³⁰, and military police units are "the first responders to potential war crimes scenes".

Diagram 4 shows generically how each field commander is central to investigations type 1 and 2. Besides, NATO doctrine (despite of some reservations laid down by a few allies) recognizes that “the conduct of war crime investigations does not differ substantively from other criminal investigations conducted by Military Police”³¹. While the long-term investigative and prosecutorial responsibility for war crimes may not fall within the immediate scope of NATO operations, the consequences of inappropriate responses to allegations of war crimes could undermine the overall credibility and effectiveness of NATO”³². Therefore, by acknowledging indirectly the need for an appropriate response to allegations of war crimes, the NATO doctrine seems to accept the need for an immediate reaction, at least to protect evidence at the crime scene. However, United Nations doctrine addresses the situation of military not belonging to regular units and distinguishes between minor misconduct, serious misconduct, and criminal offenses³³. In relation with criminal offences the doctrine states the following “28. If the misconduct committed by a civilian police officer or military observer amounts to an alleged criminal offence, the Secretary-General has the right and the duty to waive the immunity, if applicable, of the individual(s) concerned, if in his opinion the immunity would impede the course of justice. The United Nations and the host country shall agree on whether or not criminal proceedings are to be instituted”. Consequently, when the doctrine mentions the need for an agreement, it emphasizes two ideas. The first, from the United Nations point of view, draws the attention to the need to investigate and account every conduct, and the second emphasizes the respect for the exercise of national jurisdiction.

- As a matter of law, it is incontrovertible that the State continues to bear responsibility for the implementation, that the duties to investigate and prosecute extend throughout the chain of command and that judicial and other disciplinary bodies retain full responsibility for performing their functions. The responsibilities are complementary. Commanders are expected to exercise whatever authority has been vested in them within the implementation, enforcement, and disciplinary structure of their armed forces and governments (Schmitt, 2011, page 43) are supposed to exercised jurisdiction to account war criminals³⁴ and implement a training program. For instance, doing so might involve “informing superior officers of what is taking place in the sector, drawing up a report in the case of a breach, or intervening with a view to preventing a breach from being committed, proposing a sanction to a superior who has disciplinary power, or - in the case of someone who holds such power himself - exercising it, within the limits of his competence, and finally, remitting the case to the judicial authority where necessary with such factual evidence as it was possible to find”³⁵. Currently the international practice seems to distinguish two groups of criminal investigations in land operations. The first group (type 1 and 2) refers to criminal investigations of military or civilian offences committed by or against a member of the military force or any other special circumstances requiring an inquiry (these offenses do not amount to a war crime). The purpose of criminal investigations is to gather and evaluate information and evidence to resolve a complaint³⁶. The procedures are legally framed at national

level. The second group (type 3 and 4) addresses war crimes and other breaches of IHLAC, committed in violation of the laws of war and other international conventions by any person or persons, either military or civilian. It seems also consensual that the former type of investigations require standard skills that regular military police units are equipped with, and the latter demands further and specific skills, equipment and organization that not all regular military police units are equipped with³⁷. Moreover, it is also consensual that “military police units must investigate all suspected grave breaches which may have been carried out by friendly forces... and in addition, military police, (or in some cases criminal investigation police) may be called upon to carry out the initial investigations of suspected grave breaches by enemy forces”³⁸. Nevertheless, we believe that all military police units deployed to a theatre of operations should be equipped with crime scene investigation capabilities, in order to preserve, collect, locate, and record evidence. Furthermore, the main bulk of the laboratory capabilities such as *post mortem forensics toxicology* (capabilities associated to forensic scientist) might be left as reach back capacity, out of theatre. Nonetheless, the capabilities to deploy and the procedures to follow are legally framed both at national and international level and are highly dependent on the rules of procedure and evidence applying to the situation.

Setting the Investigation in Motion

*In the commission of war crimes perpetrated
by friendly forces, the commander holds the trigger responsibility
to repress and initiate the accountability process.*

Customary provisions establish the responsibility of the State for violations of international humanitarian law³⁹ and the large majority of the voluntary treaty law acknowledges the requirement for States parties to actively pursue prosecution in the following terms: “The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention...”⁴⁰. The Statute of the International Criminal Court is in line with this principle by positively affirming the complementary nature of its jurisdiction in article 17⁴¹. Investigation is a confidential activity and each time that a large scale of crimes is to be investigated, it involves a long period of time and a significant amount of resources. That is why sometimes it goes unnoticed for a large period of time. However, justice cannot be served without proper investigations. Therefore, type 1 and type 2 war crimes investigations are a national responsibility, the military commander holds the trigger responsibility to repress and initiate the accountability process. The set of procedures are to be exercised according to national rules and standards which the main features were addressed previously. The criminal investigation⁴² is, as general rule, controlled by national judicial authorities.

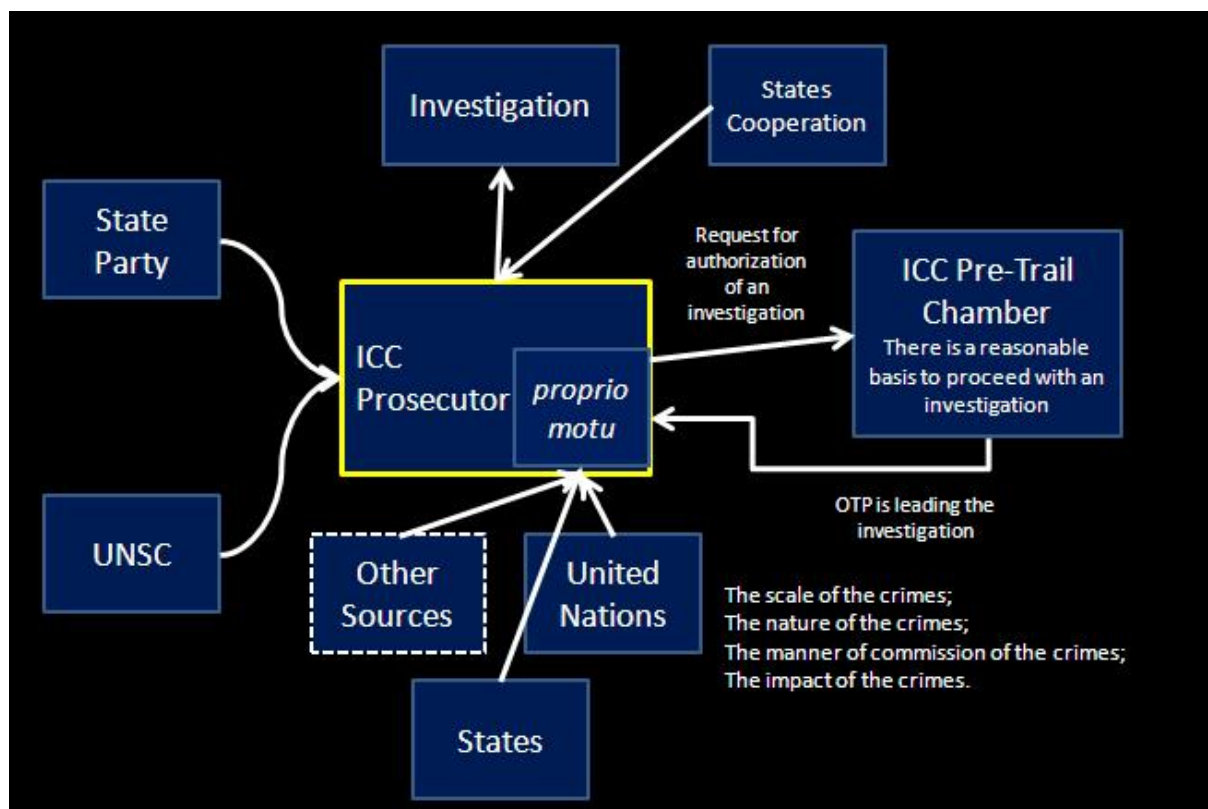


Diagram 5 - ICC Investigation Trigger Mechanisms

The remaining two types of investigations are internationally driven. For the sake of this study we will refer to the international *ad hoc* Tribunals⁴³, the International Criminal Court⁴⁴ and the hybrid courts such as the Special Court for Sierra Leone. These types of investigations addresses large scale commission of war crimes (and other violations) committed as part of a plan or policy. Thus, they often involve an immense geographical area, span a number of years, and engage a huge variety of stakeholders. Likewise, these crimes also produce an immense amount of victims and were eye witnessed by many individuals (some of them with different nationalities). Furthermore, these crimes were committed during periods of chaos and immense stress, and generally many years prior to the hearing... in most cases victims and witnesses are unwilling to give evidence unless protection guarantees will be provided⁴⁵, and the investigation involves judicial authorities from different States. On the top of these challenges arise many language barriers, piles of materials, psychological distresses, and an armed conflict that an initial stage of the investigation might still raging as it was the case of Rwanda, former Yugoslavia or Darfur (Sudan). A criminal investigation of this kind might be analyzed in following different stages (diagram 6):

- Opening the investigation or setting the investigation in motion - the decision to open an investigation must be properly documented and the process must follow the established criteria. In the case of ICTY guidelines on opening new investigations issued by the prosecutor office, it stresses the need for a written proposal discussing the following issues: the background of the crimes and the alleged perpetrator,

strategic considerations, charging theory and characterization of the crimes, role, position, authority and knowledge of the alleged perpetrator, status of the information and evidence, the required time and resources⁴⁶.

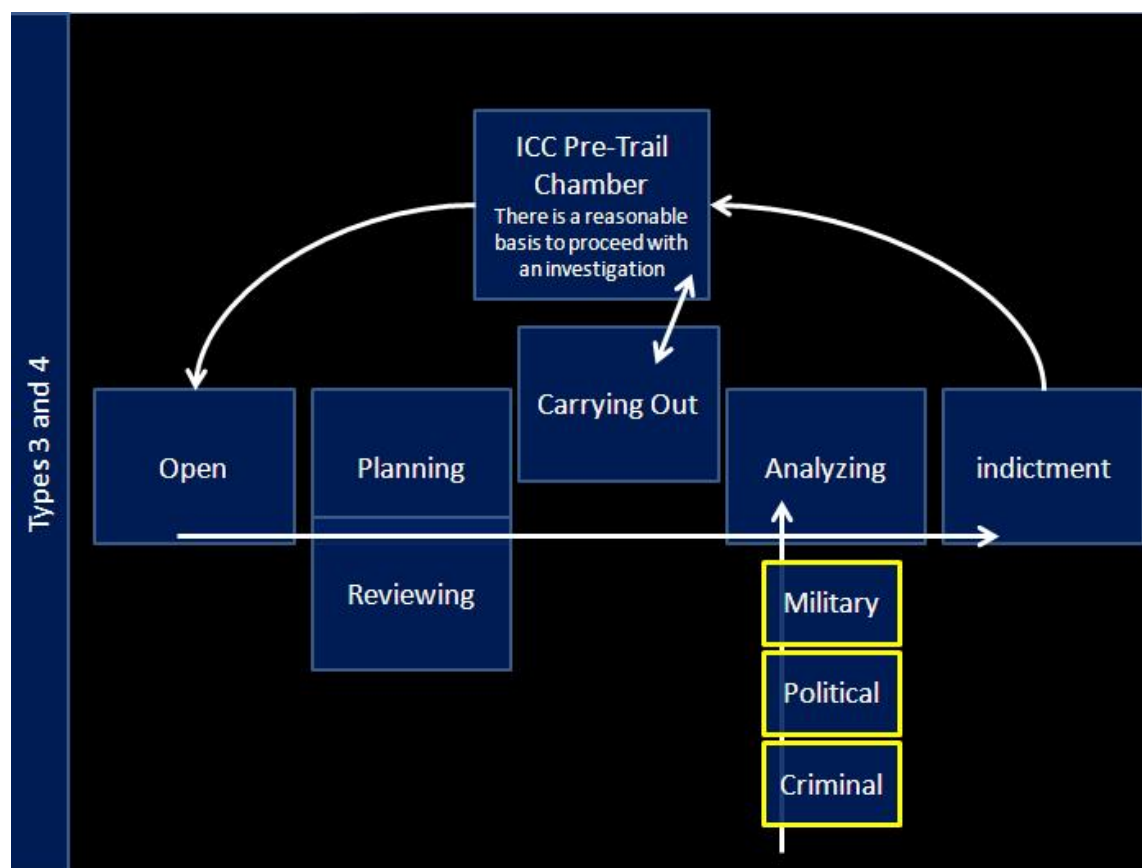


Diagram 6 - The Criminal Investigation

- Planning the investigation - A successful investigation should investigate the crime basis and the linkage to the leadership structure. Thus, prior to the commencing of any significant activity, a detailed and comprehensive plan should be developed, discussed and approved by senior management. The purpose of the investigation plan is to clarify the investigation objectives, and evidence collection methods. Once approved it should be a practical and useful guide to investigators, analysts and lawyers actively engaged in investigative activities. An investigation plan displays the following information: summary of the proposed investigation, fundamental questions, legal framework of the investigation, avenues of the investigation, departing from what is known (objectives, people whose activity will be examined, witnesses, physical evidence and documentary evidence), summary of the investigative tasks, resources to be deployed to conduct the investigation, implementation, comments of reviewers, approval and periodic reviews.
- Carrying out the investigation - Any armed conflict is likely to involve a large number of perpetrators⁴⁷. Thus, after selecting the target of the investigation based on the priority given to complex or high level cases, the gathering of evidence might

lead to the organization of modular⁴⁸ investigations or investigative missions. Throughout this phase might take place activities such as exhumation and identification of human remains, search, seizure and collection of evidence, identification of informants, victims, vulnerable victims, witnesses, and vulnerable witnesses, interviews, recording of contacts, suspects interviewing, personnel protection, handling, storage, and management of information. During the conducting of investigations the court might request the support of the military units deployed in the field to support their operations. This activity might also require support to seizure of materials, apprehension and detention of persons indicted for war crimes (PIFWC) or investigation of war crimes committed by military force members or by enemy personnel (military or civilian) against military personnel or against the local population⁴⁹, as well as physical security to the investigation teams and other tasks of general support.

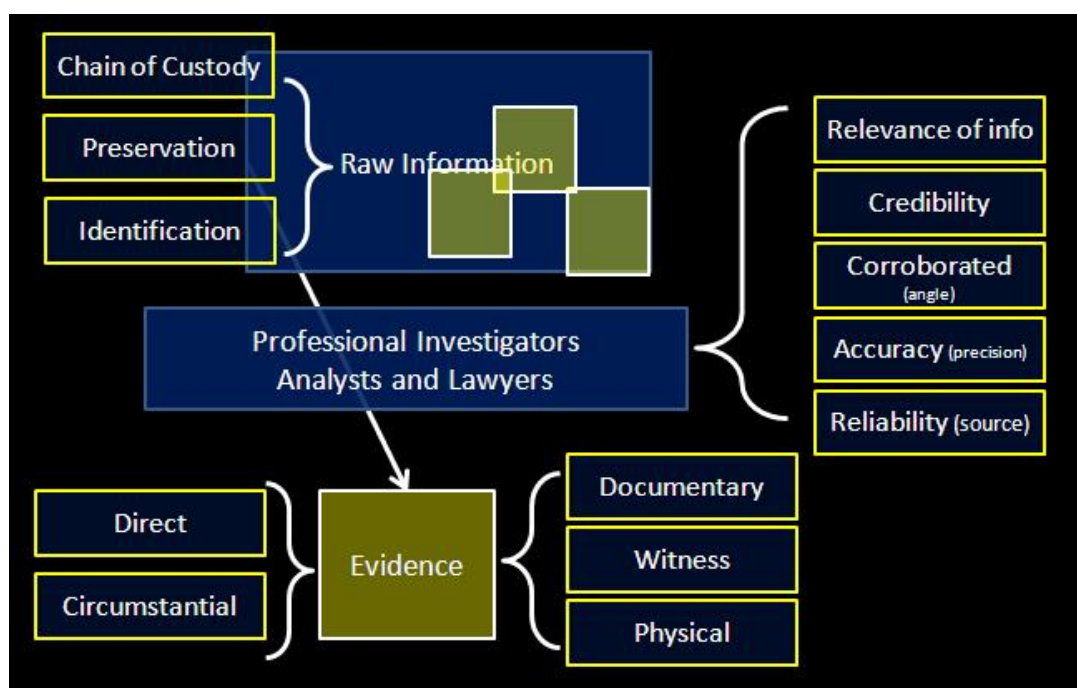


Diagram 7 - Criminal Information and Evidence

- Preservation and analysis of evidence - It is important to avoid confusing the two separate concepts of information and evidence. The distinction between these two is very important in international criminal justice. Anyone can collect information, and much of it may be useful later for international criminal courts. Ultimately, however, only professionally trained employees of international courts or personnel appointed by special courts are in a position to determine what information is eventually to be submitted as evidence in cases. Not all information necessarily becomes evidence, but all evidence is information⁵⁰. Thus, one of the key aspects when dealing with evidence is the maintenance of the chain of custody⁵¹. Information should be preserved, controlled and accurately identified (labeled). The source identification is one of the main concerns due to the court admissibility requirements⁵². Evidence is

regularly organized into three groups: documentary, witness and physical evidence. The documentary evidence includes namely⁵³: Official documents: orders, instructions, rulebooks, periodical reports, situation reports ("SITREPS"), meeting reports (agendas, minutes, stenographic records), military orders of battle and lists of soldiers, demographic and census data, land and property records, diplomatic cable and reports - Official logbooks (e.g. from military units, police stations, prisons, detention facilities, etc.) pertaining to visitors, shifts of guards and duty officers, incoming and outgoing correspondence, use of official vehicles, etc. - Official financial and personnel records (e.g. payslips, telephone and transportation billing records, personnel dossiers, commendations, attendance records, etc.) - Court files and prison records (case files, investigative reports and dossiers, records pertaining to detention and release of prisoners, prisoner health records, etc.) - Legal gazettes - Maps - Medical records (from hospitals, psychiatric institutions, etc.) - Records of large businesses (e.g. records from companies that specialize in resource extraction and export, which may contribute to funding a conflict) - Local NGO reports - Photographs (of crime scenes, official events and commemorations, damaged infrastructure and significant buildings such as religious objects, government facilities, detention centers, etc.) - Audio-video recordings (of combat activities, official events and commemorations, media reports, newscasts, documentaries, etc.) - Diaries, journals and other forms of individual records, kept by private individuals or officials - Newspapers and other print media (also called "open sources") - Records of (mobile) phone numbers, e-mail addresses, etc. The witness evidence is organized bearing in mind the security and support of the witnesses, their identification, the communication arrangements and their special needs. Finally, the physical or forensics evidence groups all the aspects of the crime scene and its analysis. Than the analysis of evidence often requires a military analysis⁵⁴, a political analysis (focuses on issues of a political/leadership nature) and a criminal analysis⁵⁵.

- Preparation of the indictment - The last phase purports to indicate clearly the charges, but there is no need for the prosecution to include evidence in the indictment as article 18 of the ICTY Statute foresees. However, in the case of ICC, article 58.2 (d) of the statute requires a summary of evidence in the case of the request for a warrant of arrest.

Dealing with Information and Evidence at the Crime Scene

*Professional collection of criminal information
at the early hours after a commission of a crime
will augment the possibility of increasing
the number of pieces of evidence and the
likelihood of serving justice.*

A direct notice of a crime, the beginning of the execution of a crime or merely the indicia

of preparatory acts to commit a crime, perpetrated by personnel belonging to friendly forces, should trigger any commander to take *“all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution⁵⁶”*, if the perpetrator of the crime is under the commander’s effective command and control. That brings precise and concrete responsibility to every commander. Even after setting in motion all the means to prevent or repress the commission of a crime, he needs to submit the case to the competent authorities. In fact, the national authorities are legally entitled to carry on a legal investigation and, if applicable, to prosecute the subordinate perpetrator, each time that a commission of a crime involves a member of their national armed forces. Moreover, each commander is responsible for ensuring the basis of a professional investigation in due time, which requires immediately steps to be taken. However, cognizant of the fact that the time available for the inspection of a possible war crime scene is often limited by ongoing military activity, and the large majority of war crimes do not involve military personnel of friendly forces, a number of suggestions are put forward below. Actually, the engagement in operational activity, the battle rhythm, the unit location and the limited legal personnel immediately available, should not prevent any commander to perform the following essential steps:

- Assign specialized personnel such as legal advisor, military police personnel, each time that a notice of a war crime is reported to or known by the chain of command;
- Draw the subordinate commander’s attention to the importance of the first steps of collecting criminal information and gathering/protecting evidence in a war crime scene;
- Secure and limit the access to the crime scene in order to allow professionally trained personnel to collect evidence. Protect physical evidence or, if tactically the situation turns it unfeasible to protect physical evidence, than collect, handle and maintain the chain of custody.
- Identify the location of the crime scene to support the commencement of an investigation and, if possible, prepare a sketch of the crime scene together with photos or/and videotape in order to preserve information and evidence in case the operational activity might impact on the collection by professionally trained personnel;
- Open an investigation logbook to support the judicial decision of opening an investigation or further inquire. In fact, it is important to maintain a chronological record of all activities. Moreover, if the war crime scene involves minors or gender-based violence additional steps are to be taken to protect the victims and possible eyewitnesses;
- Request legal assistance or submit the case to the competent national/international authorities;
- Pay special attention to the main sources of war criminal evidence in a land theater of operations such as the military reporting system, written and verbal orders, technical reports, visual verifications, medical records and testimonies, image, media products, witnesses, victims, refugees, Internal Displaced People, and Humanitarian Organizations Personnel;
- Bear in mind the following characteristics of criminal investigations in land

operations: harsh environmental conditions; seriousness of the violations, direct relation to the use of force in the context of an armed conflict, difficulties related to the evidence preservation and the crime scenes wide geographical extension, need for technical and legal expertise, contact of multi jurisdictions, the rules of procedure and evidence applying to the situation, and need for a multi-disciplinary approach.

Key Aspects to Retain

There is no prohibition on commanders investigating possible violations occurring within their own units or committed by others under their control.

N. Schmitt⁵⁷

Crimes are committed by people. They are not committed by abstract entities, mentioned Louise Arbour, ICTY Chief Prosecutor⁵⁸. In fact, investigating a war crime in a land theatre of operations is harsh, difficult, disturbing, and requires professional people. However, is the success of each investigation that unveils the truth, gives an opportunity to justice to be served, and allows the victim's families to grieve. In this context, grieving is the first step towards a long lasting peace.

Criminal investigations in armed conflicts can be of two types: nationally and internationally driven. Despite of the fact that the duty to report war crimes extends to every military in the battlefield, the field commander plays a central role in the first type of investigations and an important supporting role on the internationally driven investigations. In both cases, the responsibility to react and to repress, to examine the incident, to investigate and to report rests with every commander, throughout the chain of command. Likewise, every armed conflict represents a period of chaos and immense stress, and it tends to erase, to hide evidence or to prevent access to relevant evidence, field commanders should create the conditions to allow successful national professional investigations or to support international investigations. One of the essentials regarding this action is the preservation of evidence, and the distinction between criminal information and criminal evidence. The first steps given at every commander's level should bear in mind that the investigation looks into a crime scene to learn about the crime base and the linkage between individual behaviors and the result produced. Moreover, not all information will be taken as evidence, but the professional collection of criminal information at the early hours after the commission of a crime will increase the possibility of increasing the number of pieces of evidence and consequently the likelihood of justice to be served.

Regarding the concept of superior responsibility or command responsibility, it is worth to mention that the same principles apply, bearing in mind two important aspects: on the

one hand, it is basically a *suis generis* form of individual responsibility, in which the commander carries out a commission of a crime by omission. On the other hand, the trigger mechanisms to account such criminal responsibility pertaining to any individual by forwarding a report, to any international organization by bringing proceedings before the suitable jurisdiction, and likewise the chain of command by taking action.

At this stage, it is important to emphasize that internationally driven investigations, the major task of which is to support international tribunals, might also play a significant role supporting the domestic jurisdictions. A remarkable example to be mentioned is the action of the OSCE in the Balkans and the EU-led rule of law mission in Kosovo (EULEX). “Increasing the capacity for investigation of war crimes throughout Bosnia and Herzegovina’s criminal justice system is of paramount importance in light of the role of cantonal and district authorities in processing war crimes cases, which was affirmed under the National Strategy for War Crimes Processing.”⁵⁹

The day-to-day practice shows that the following war criminal acts are too often carried out in the context of an armed conflict: violation of medical neutrality, indiscriminate attacks to non-combatants, destruction of protected property, disappearances, torture and gender-based violence as a tool of war. Thus, regardless the tactical situation in which a commander is engaged, and in spite of the type of jurisdiction exercised, the utmost significant duty of creating the conditions to turn a blind eye to impunity of war crimes lays upon him. Individual self-discipline and commander’s guidance to fight against impunity by acknowledging the essential steps, are two remarkable weapons, holding the potential to dissuade attempts and to account criminals, particularly in relation to those horrendous and unbearable criminal acts, committed in the context of an armed conflict. To serve justice in the context of an armed conflict is not purely a court obligation, but rather an upmost common responsibility of those involved therein.

* Doutorado pela Universidade Católica Portuguesa em Ciência Política e Relações Internacionais. Possui o Diploma de Estudos Avançados em Direito Humanitário e Operações de Manutenção de Paz do *Istituto per gli Studi di Politica Internazionale*. É Licenciado em Direito pela Universidade Autónoma de Lisboa. Professor Convidado de vários estabelecimentos de ensino superior nacionais e estrangeiros. Atualmente, presta serviço na EUROFOR.

1 International Criminal Tribunal for the former Yugoslavia Manual on Developed Practices (2009: 11).

2 ICC-01/05-01/08, 15th June 2009, Pre-Trial Chamber II, Situation in the Central African Republic in the Case of the Prosecutor V. Jean-Pierre Bemba Gombo §409. With respect to a “person effectively acting as a military commander”, the Chamber

considers that this term is meant to cover a distinct as well as a broader category of commanders. This category refers to those who are not elected by law to carry out a military commander's role, yet they perform it de facto by exercising effective control over a group of persons through a chain of command. This concept was also acknowledged in several cases before the ICTY and the ICTR (ICTY, Prosecutor v Blaskic, Case IT-95-14-T, Judgment, 3rd March 2000, §300; ICTY, Prosecutor v Aleksovski, Case IT-95-14/1-T, "Judgment", 25th June 1999, §76; ICTR, The Prosecutor v. Gacumbitsi, Case ICTR-2001-64-A, Appeals Chamber Judgment, 7th July 2006, §143; ICTR, The Prosecutor v. Juvenal Kajelijeli, Case ICTR-98-44A-A, Appeals Chamber Judgment, 23rd May 2005, §85.). In the Celebici case, the first leading case on the doctrine of command responsibility before the ad hoc tribunals, the ICTY Trial Chamber stated that: "Individuals in positions of authority, (...) within military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their de facto as well as de jure positions as superiors. The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility" (ICTY, Prosecutor v Delalic et al, Case IT-96-21-T, Judgment, 16th November 1998, §354.), and §410. Thus, the Chamber finds that this category of military-like commanders may generally encompass superiors who have authority and control over regular government forces such as armed police units or irregular forces (non-government forces) such as rebel groups, paramilitary units (Working Group on General Principles of Criminal Law) UN Doc. A/CONF. 183/C.1/WGGP/L.7, 22nd June 1998, fn 1; W. Fenrick, "Article 28", O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, (Nomos Verlag, 1999: 518) including, inter alia, armed resistance movements and militias that follow a structure of military hierarchy or a chain of command.

3 The expression "field commander" also addresses partially the team leaders of the United Nations Military Observers deployed in an observation mission to an armed conflict. However, they have neither the same instruments to fight against impunity, nor the effective control of their subordinates as a regular military commander. Nevertheless, they have the ability to report war crimes directly to the United Nations Secretary-General, through his Special Representative.

4 The word "discovery" acknowledges the active responsibility of each commander based on the interpretation of Nuremberg Trials and ICC-01/05-01/08, 15th June 2009, Pre-Trial Chamber II, Situation in the Central African Republic in the Case of the Prosecutor V. Jean-Pierre Bemba Gombo §433. Thus, it is the Chamber's view that the "should have known" standard requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops (ICTR, The Prosecutor v. Kayishema and Ruzindana, Case ICTR-95-1-T, Judgment and Sentence, 21st May 1999, §227 (noting that article 28 (a) of the Statute "imposes a more active duty upon the superior to inform himself of the activities of his subordinates"); Fenrick, W., "Article 28", O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, (Nomos Verlag, 1999: 519) and to inquire, regardless of the availability of information at the time on the commission of the crime

(Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, T.M.C. Asser Press, 2003: 186). The drafting history of this provision reveals that it was the intent of the drafters to take a more stringent approach towards commanders and military-like commanders compared to other superiors that fall within the parameters of article 28(b) of the Statute. This is justified by the nature and type of responsibility assigned to this category of superiors (Summary Record of the 1st Meeting of the Committee of the Whole, UN Doc. A/CONF.183/C.1/SR.1, §67-82).

5 Group criminality and joint criminal enterprises are left out of this study. It indeed refers to joint co-perpetration which denotes a mode of criminal liability that appears particularly fit to cover the criminal liability of all participants in a common criminal plan (Cassese, 2008: 191). It is widely accepted that at the international level this mode of criminal liability can take three different forms as it was firstly articulated in *Duško Tadić Judgement*, 15th de July 1999 – §195. “Many post-World War II cases concerning war crimes proceed upon the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all the members of the group. Close scrutiny of the relevant case law shows that broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality... §196. The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention... §198. Another instance of co-perpetratorship of this nature is provided by the case of *Jepsen et al.* §202. The second distinct category of cases is in many respects similar to that set forth above, and embraces the so-called “concentration camp” cases... §204. The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect “ethnic cleansing”) with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk...”

6 *Investigating Violations of International Law in Armed Conflict*, Harvard National Security Journal, Vol. 2 (2011: 37).

7 *Les Crimes de Guerre – Chapitre 21, Droit International Pénal* (2000: 265-285).

8 ICTY IT-96-21-T, 16th November 1998, *Prosecutor v. Zejnil Delalic* §193. It is axiomatic that not every serious crime committed during the armed conflict in Bosnia

and Herzegovina can be regarded as a violation of international humanitarian law. There must be an obvious link between the criminal act and the armed conflict. Clearly, if a relevant crime was committed in the course of fighting or the take-over of a town during an armed conflict, for example, this would be sufficient to render the offence a violation of international humanitarian law. Such a direct connection to actual hostilities is not, however, required in every situation; and ICTY, IT-96-23-T& IT-96-23/1-T568, 22nd February 2001, Prosecutor v. Dragoljub Kunarac Radomir Kovac and Zoran Vukovic, §568. The Trial Chamber is also satisfied that the underlying crimes with which the Indictments were concerned were closely related to the armed conflict. Not only were the many underlying crimes made possible by the armed conflict, but they were very much a part of it. Muslim civilians were killed, raped or otherwise abused as a direct result of the armed conflict and because the armed conflict apparently offered blanket impunity to the perpetrators.

9 For more information we suggest the following references: Elies van Sliedregt (2003: 53); Antonio Cassese (2008: 93) and Guénael Mettreux (2009:75).

10 The word “enemy” stands as a broad significance such as adversary, warring factions or opposing parties.

11 Pilz Case in 1949, the Special Criminal Chamber of the District Court of The Hague (Netherlands), on appeal in 1950, the Special Court of Cassation of the Netherlands.

12 Temporary Court-Martial at Amboina, Netherlands, Motosuke Case, 28th January 1948.

13 Article 2.2 GC, APII, 1977 and Article 8.2(d),(f) ICC Statute, 1998.

14 International Law Commission – Fifty-seventh session, Geneva, 2nd May-3rd June and 4th July-5th August 2005. First Report on the Effects of Armed Conflicts on Treaties, Ian Brownlie, Special Rapporteur. International Law Commission – Fifty-seventh session, Geneva, 2nd May-3rd June 2005, and 4th July-5th August 2005, The Effect of Armed Conflict on Treaties: an Examination of Practice and Doctrine, Memorandum by the Secretariat.

15 Formulation adopted by the Institute of International Law in its resolution of 28th August 1985 quoted by §14 of the first report on the effects of armed conflicts on treaties by Ian Brownlie, Special Rapporteur, 2005.

16 First report on the effects of armed conflicts on treaties by Ian Brownlie, Special Rapporteur, 2005, §17.

17 International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A72, Prosecutor v. Duško Tadić a/k/a “DULE”, Appeals Chamber, 2 October 1995, §70 (1994-1995), 1 ICTY JR 352, at §70, reprinted in International Legal Materials, vol. 35 (1996: 32) and ICTY Prosecutor vs Kovac, Appeals Chamber, 12th June 2002, §50.

18 The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement, 2nd September 1998.

19 OIOS, Investigations Division, Investigations Manual (2009: 6).

20 Individuals who may be inclined to act improperly are deterred by the fact that such conduct will be subject to effective investigation - UN OIOS, Investigations Division, Investigations Manual (2009: 6).

21 The process of investigating matters of possible employee misconduct is a function of the internal accountability system in the United Nations. Also, as investigations are conducted into other categories of personnel engaged in United Nations activities, it is important for individuals, beneficiaries and Member States to see that there are consequences for misconduct. This requires a robust capacity to establish facts so that there will be consequences for this misconduct which is critical for achieving accountability - OIOS, Investigations Division, Investigations Manual (2009: 6).

22 Depending upon the situation it might also apply human rights law or other domestic bodies of law.

Status of Force Agreement (SOFA) or Status of Mission Agreement (SOMA) - define the legal status of the military personnel and property in the territory of another nation. The purpose of such an agreement is to set forth rights and responsibilities between the sending State and the host government on such matters as criminal and civil jurisdiction, the wearing of the uniform, the carrying of arms, tax and customs relief, entry and exit of personnel and property, and resolving damage claims. Reference documentation: A/RES/44/49 (1989) (8/12/89):

Comprehensive review of the whole question of PKO in all aspects; NATO MC 334/1 - Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces; UN Secretary-General's Bulletin 6th August 1999 - In the SOFA agreement concluded between the UN and a State in whose territory a UN force is deployed, the UN undertakes to ensure that the force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel. The UN also undertakes to ensure that members of the military personnel of the force are fully acquainted with the principles and rules of those international instruments. The obligation to respect the said principles and rules is applicable to UN forces even in the absence of a SOFA agreement.

24 The wording refers to article 17 a) of the ICC Statute.

25 The wording "committed as part of a plan or policy or as part of a large-scale commission" refers to article 8 of the ICC Statute. However, article 7 - crimes against humanity - uses the expressions "widespread or systematic". ICTY IT-96-23-T& IT-96-23/1-T, 22nd February 2001, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Trial, §427. The attack must be either "widespread" or

“systematic”, thereby excluding isolated and random acts (Prosecutor v Tadic, Case IT-94-1-T, Opinion and Judgement, 7 May 1997, par 648) §428. The adjective “widespread” connotes the large-scale nature of the attack and the number of its victims (Prosecutor v Tadic, Case IT-94-1-T, Opinion and Judgement, 7th May 1997, §648; and Prosecutor v Blaškić, Case IT-95-14-T, Judgement, 3rd Mar 2000, §206. See also Prosecutor v Akayesu, ICTR-96-4-T, Judgement, 2nd Sept 1998, §580) The Commentary of the International Law Commission in its Draft Code of Crimes against Peace and Security of Mankind describes this as follows: (Report of the International Law Commission on the Work of its Forty-Eighth Session (1996) GAOR, 51st Sess, Supp No 10, UN Doc A/51/10, 94-95) Inhumane acts must be committed on a large scale meaning that the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by perpetrator acting on his own initiative and directed against a single victim. §429. The adjective “systematic” signifies the organized nature of the acts of violence and the improbability of their random occurrence (Prosecutor v Blaškić, Judgement, 3rd Mar 2000, §203; and Prosecutor v Tadic, Opinion and Judgement, 7 May 1997, §648. See also Prosecutor v Akayesu, Judgement, 2nd Sept 1998, §580). Patterns of crimes – that is the non accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence.

26 Law of War Handbook, ICRC (1987: 63).

27 (2009/C 303/06) A. 15 (b)“Whenever relevant, European Union Heads of Mission, and appropriate EU representatives, including Heads of European Union Civilian Operations, Commanders of European Union Military Operations and European Union Special Representatives, should include an assessment of the IHL situation in their reports about a given State or conflict. Special attention should be given to information that indicates that serious violations of IHL may have been committed. Where feasible, such reports should also include an analysis and suggestions of possible measures to be taken by the European Union”.

28 Prosecutor v. Sefer Halilović, Judgement, Case No. IT-01-48-T, 16 November 2005

29 NATO APP-12 NATO Military Police Commander Authority – The NATO Military Police Commander will be given sufficient authority, by the NATO Commander, to execute Operational Command and Operational Control over all military police allocated resources in the most effective manner. The same should apply for non-NATO Military Police Commanders of multinational military police forces within a NATO led operation. If double hatted as the Force Provost Marshal (FPM), he will act as the technical adviser to the NATO Commander on all military police matters. He is responsible to the NATO Commander for establishing military police requirements and coordinating military police planning support within his area of responsibility (2002: 2-1 – 4).

30 He may, or may not, be double-hatted as the NATO Military Police Commander (NATO APP-12, Chapter 2, Annex A).

31 The expressions “preliminary investigation (diagram 4)” and “criminal investigations by Military Police” should be understood in the context of national jurisdictions bearing in mind the rules governing the procedure and evidence applying to each case. There are cases where the military police hold powers of criminal information/evidence collection, and cases where military police might only act to protect the crime scene.

32 Allied Joint Doctrine for Military Police, AJP-3.2.3.3, §7 (2009: 3-4).

33 Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers, DPKO/CPD/DDCPO/2003/001 DPKO/MD/03/00994, (2-3) - Serious misconduct: Any act, omission or negligence, including criminal acts, that is a violation of mission standard operating procedures, directives, or any other applicable rules, regulations or administrative instructions, that results in or is likely to result in serious damage or injury to an individual or to the mission. Serious misconduct includes, but is not limited to: Sexual abuse and exploitation of any individual, particularly children; Harassment, including sexual harassment; Abuse of authority; Excessive use of force; Unlawful discharge of firearms; Breach of confidentiality; Abuse of United Nations privileges and immunities; Conduct prejudicial to good order and discipline, Driving while intoxicated or other grossly negligent driving; Intoxicated while on duty or in public on repeated occasions; Repeatedly absent from duty without permission; Use, possession or distribution of illegal narcotics; Embezzlement or other financial malfeasance; Wilful disobedience of a lawful order; Unlawful acts (e.g. theft, fraud, smuggling, bribery) on or off United Nations premises, with or without the involvement of United Nations vehicles, and whether or not the individual was officially on duty at the time of the offence. Minor misconduct: Any act, omission or negligence that is a violation of mission standard operating procedures (SOPs), directives, or any other applicable rules, regulations or administrative instructions, but which does not result in or is not likely to result in major damage or injury to an individual or the mission. Minor misconduct includes, but is not limited to: Improper uniform appearance; Neglect in performance of duty not amounting to a wilful or deliberate act; Intoxication while on duty or in public; Negligent driving; Absence from duty without permission; Malingering.

34 The United Nations practice indicates an extensive use of mechanisms such as the establishment, by the Human Rights Council, of a committee of independent experts in international humanitarian and human rights laws to report on a specific situation (On December 27, 2008, the Israel Defense Force (IDF) launched Operation Cast Lead into Gaza due to the failure of Israel to open prompt, independent and impartial criminal investigations even after six months have elapsed constitute a violation of its obligations to genuinely investigate allegations of war crimes and other crimes, and other serious violations of international law - Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict, 1620, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009)). Another example is the Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, June 2011,

(A/HRC/17/44) in which the commission convey several suggestions to warring parties.

35 Introduction to the Commentary on the Additional Protocols I and II of 8th June 1977, Yves Sandoz *et al.*, 1987, 3562.

36 Allied Procedural Publication-12, NATO Military Police Doctrine and Procedures, 2002 (APP-12), Chapter 5, (2002: 5-2) §505. The expression “complaint” is to be understood according to domestic jurisdictions and is not exclusively linked to an individual initiative.

37 Allied Procedural Publication-12, NATO Military Police Doctrine and Procedures, 2002 (APP-12), Chapter 5, (2002: 5-3) §510. mention the following: §4. Standard investigative and interview techniques may have to be modified for interviews with war crime survivors and witnesses. Interviewees may be fearful and apprehensive. §5. It is desirable for a large portion of the investigative team to have language fluency. An alternative to language trained investigators is the use of interpreters.

38 APP-12, Chapter 7, annex A, (2002: 7-A-1), §3.

39 Rule 139 – Each party to the conflict must respect and ensure respect for IHL by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control. Customary International Law, Jean-Marie Henckaerts and Louise Doswald-Beck, ICRC, Vol I, (2009: 495).

40 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field article 49, Aug. 12, 1949; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, article 50; Geneva Convention Relative to the Treatment of Prisoners of War, article 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, article 146.

41 Article 17 of the Statute of the International Criminal Court states: “... a case is inadmissible where: a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; d) The case is not of sufficient gravity to justify further action by the Court”.

42 A criminal investigation is, as general rule, a complex activity controlled by a judicial authority and consists of assembling pieces of a puzzle according to a pre-established procedure, in which the reference image is unknown, and many pieces are missing or belong to other puzzles.

43 The judicial response to the Rwandan genocide involves three central processes: (1) the ICTR, (2) the national Courts in Rwanda, and the (3) Gacaca... beyond the scope of this book... (1) The trials adjudicated in the Rwanda military courts and (2) international third party-trials, Nicolas A Jones, The courts of Genocide, GlassHouse (2010: 7).

44 The Office of the Prosecutor is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court.

45 ICTY Manual on Developed Practices (2009:7).

46 ICTY Manual on Developed Practices (2009:7).

47 ICTY Manual on Developed Practices (2009: 14-29).

48 Refers to investigations organized in order to collect evidence of relevant facts, related to more than a single crime.

49 APP-12, Chapter 5, §510 (2002: 5-3).

50 Handbook on Assisting International Criminal Investigations, Maria Nystedt (ed.), Christian Axboe Nielsen and JaNn K. Kleffner, (2011:52).

51 Carefully recording the source of documentation and information received is only the first step of the process. From the moment it comes into your possession until the moment that it leaves your control, you should strive to be able to account for the whereabouts of the information at all times. This includes storing it in a safe location where it cannot be easily accessed or altered. As much as possible, the number of people who have access to this information should be limited. This helps to ensure the integrity of the information and can also lower the security risks that may be incurred by keeping such documentation... The principle of tracking the origin and possession of information and evidence is referred to as the "chain of custody." The goal is to establish a clear and unbroken chain of records that allows the court to reconstruct who has had what information at every point in time - from the moment the information was first provided until it is actually used in court. This helps to ensure that unauthorized persons have not had access to the information since it was collected. The primary purpose of the chain of custody is to prohibit anyone from tampering with evidence and thereby changing it and making it invalid for use in court. This is equally important for all kinds of artefacts and forensic information that stems from a crime scene and for documentary and electronic evidence, as it guards against potential forgeries or alterations to the information originally collected or provided to the court - A Handbook on Assisting International Criminal Investigations, Försvarshögskolan (2001:56).

52 Case No. IT-05-87-T. Decision on Prosecution Motion to Admit Documentary Evidence, 10th October 2006, §18, 19 - "Given the depth and breadth of this case, the

Trial Chamber is generally sympathetic to parties presenting documents from the bar table. However, if that is to be the case, the offering party must be able to demonstrate, with clarity and specificity, where and how each document fits into its case. §19. Whatever the number of documents the party seeks to have admitted through its Motion, it must satisfy the requirements of the rules governing the admission of evidence in relation to each one. The following decision seeks to strike a proper balance between ensuring a fair trial and not over-burdening the parties in regard to the admission of evidence.”

53 Handbook on Assisting International Criminal Investigations, Försvarshögskolan (2001:63). For a comprehensive reference see United Nations Office of Internal Oversight Services (OIOS), Investigations Division, Investigations Manual, 2009.

54 Among many examples, howitzer crater analysis requires military technical expertise.

55 Military analysis provides investigation and can lead to prosecution of cases that involve a military dimension, and can include scrutiny of integrated events, personalities, organizations and crimes. The military analyst will examine *de jure* and *de facto* issues relating to crimes, prosecution targets and events, and will provide analysis from the most preliminary stages of an investigation or assessment through to the presentation to the court of analyses for the prosecution. The military analyst also provides assistance in monitoring, researching for, and advising the prosecutor in the defense phase of a trial. Criminal analysis provides investigation and prosecution teams with a detailed overarching knowledge of the case, especially in relation to the conduct of the accused, the role and position of the accused in relation to the alleged crime base and the sequence of events. The criminal analyst provides analysis of crime patterns, linkage of the accused to the crime base and to other individuals, as well as contextual analysis of the events alleged in the indictments. ICTY Manual on Developed Practices (2009, E-4: 28).

56 Article 28 1. b) ICC Status.

57 Investigating Violations of International Law in Armed Conflict, Harvard National Security Journal, Vol. 2 (2011: 43).

58 Eric Stove and Gilles Peress, The Graves, Scalo, (1998: 314).

59 Ambassador Gary D. Robbins Head of OSCE Mission to Bosnia and Herzegovina - <http://www.osce.org/odihr/78103>. More details: War Crimes Before Domestic Courts, OSCE Monitoring and Empowering of the Domestic Courts to deal With War Crimes, Rule of Law and Human Rights Department – Belgrade, October 2003.