How does the obligation to investigate alleged serious violations of international humanitarian law apply in ad hoc military coalitions?

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This article assesses how the obligation to investigate alleged violations of international humanitarian law (IHL) – also referred to as the law of armed conflict – applies in situations where multiple states cooperate militarily in an ad hoc manner. Following an examination of the particular accountability issues raised by ad hoc military coalitions, the article applies doctrinal legal analysis to: (1) the grave breaches regime, (2) the customary obligation to investigate alleged war crimes, (3) the obligation to ensure respect for IHL, and (4) the notion of complicity under international law. It is concluded that the interplay of these different legal regimes and standards requires the investigation of the conduct of other states in a variety of different circumstances during ad hoc military cooperation. However, Status of Forces Agreements (SOFAs) and the potential immunities of state officials from criminal jurisdiction complicate the implementation of these obligations in practice. As such, in addition to the legal conclusions reached regarding the obligation to investigate’s operation in ad hoc military coalitions, more fundamental issues are brought into focus, namely the tension between state sovereignty and current developments towards accountability for serious violations of IHL.

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How does the obligation to investigate serious violations apply?

Deze paper beoordeelt hoe de verplichting om vermeende schendingen van het internationaal humanitair recht (IHR) – ook wel het recht inzake gewapende conflicten genoemd – te onderzoeken, kan worden toegepast in situaties waarin meerdere staten ad hoc militair samenwerken. Na een onderzoek van de specifieke verantwoordingsplicht die militaire ad hoc-coalities met zich brengen, past de paper een doctrinaire juridische analyse toe op (1) de regeling inzake ernstige schendingen, (2) de gebruikelijke verplichting om vermeende oorlogsmisdaden te onderzoeken, (3) de verplichting om het IHR te doen naleven, en (4) het begrip medeplichtigheid in het internationaal recht. De conclusie luidt dat het samenspel van deze verschillende rechtsstelsels en rechtsnormen noopt tot het onderzoek van het gedrag van andere staten in uiteenlopende omstandigheden tijdens de ad hoc militaire samenwerking. Maar Status of Forces-akkoorden (SOFA’s) en de eventuele onschendbaarheden van vertegenwoordigers van de overheid voor strafrechtspraak bemoeilijken evenwel de implementatie van deze verplichtingen in de praktijk. Als zodanig worden, naast de juridische conclusies in verband met de werking van de verplichting om te onderzoeken in de context van militaire ad hoc-coalities, ook fundamentelere kwesties voor het voetlicht gebracht, zoals het spanningsveld tussen staatsoverereiniteit en de huidige ontwikkelingen op het gebied van verantwoording voor ernstige schendingen van het IHR.

Este artículo evalúa cómo se aplica la obligación de investigar presuntas violaciones del derecho internacional humanitario (DIH), también conocido como el derecho de los conflictos armados, en situaciones en las que múltiples Estados cooperan militarmente de manera ad hoc. Tras un examen de las cuestiones particulares de responsabilidad planteadas por las coaliciones militares ad hoc, el artículo aplica un análisis jurídico doctrinal a (1) el régimen de infracciones graves, (2) la obligación consuetudinaria de investigar los presuntos crímenes de guerra, (3) la obligación de garantizar el respeto del DIH, y (4) la noción de complicidad bajo el derecho internacional. Se concluye que la interacción de estos diferentes regímenes y estándares legales requiere la investigación de la conducta de otros estados en una variedad de circunstancias diferentes durante la cooperación militar ad hoc. Sin embargo, los Acuerdos sobre el Estatuto de las Fuerzas (SOFA) y las inmunidades potenciales de los funcionarios estatales frente a la jurisdicción penal complican la implementación de estas obligaciones en la práctica. Como tal, además de las conclusiones legales alcanzadas con respecto a la obligación de investigar la operación de coaliciones militares ad hoc, se abordan cuestiones más fundamentales, a saber, la tensión entre la soberanía estatal y los desarrollos actuales hacia la rendición de cuentas por violaciones graves del DIH.

Questo articolo valuta l’applicazione dell’obbligo di indagare presunte violazioni del diritto internazionale umanitario (IHL) – definito anche diritto dei conflittli armati – in situazioni in cui più Stati cooperano militarmente in maniera coordinata. Dopo aver esaminato le particolari questioni di responsabilità sollevate dalle coalizioni militari ad hoc, l’articolo analizza la dottrina giuridica de (1) il regime delle gravi violazioni, (2) l’obbligo consuetudinario di indagare sui presunti crimini di guerra, (3) l’obbligo di garantire il rispetto del diritto internazionale umanitario e (4) la nozione di complicità nel diritto internazionale. Si giunge alla conclusione che l’interazione di questi diversi regimi e standard giuridici obbliga ad indagare la condotta di altri Stati in una varietà di circostanze diverse durante la cooperazione militare. Tuttavia, gli accordi sullo status delle forze armate (SOFA) e le potenziali immunità dalla giurisdizione penale dei funzionari statali complicano, nella pratica, l’attuazione di questi obblighi. Pertanto, oltre alle conclusioni giuridiche raggirate in merito all’obbligo di indagare sull’operato delle coalizioni militari ad hoc, vengono evidenziate questioni di rilevanza maggiore, ovvero la tensione tra la...
sovranità dello Stato e i recenti sviluppi in materia di responsabilità in seguito a gravi violazioni del diritto internazionale umanitario.


Keywords: International humanitarian law, law of armed conflict, ad hoc military coalitions, investigations, prosecutions, war crimes, accountability, immunities

1 INTRODUCTION

Be it for reasons of political legitimacy or operational efficiency, states, in the context of contemporary military operations, increasingly coordinate with other states. Experience of recent and current conflicts in Syria, Afghanistan and Ukraine exemplify myriad forms of interaction that have rendered purely unilateral military operations the exception. Such interaction can take many forms: for example, the supply of arms, the provision of global positioning system (GPS) data to guide troops and operations, and the equal participation of different armed forces in kinetic military operations. Notably, such military cooperation regularly occurs outside the confines of established and institutionalized multilateral military forces, such as the North Atlantic Treaty Organization (NATO)’s ‘Response Force’ and the African Union (AU)’s ‘Standby Force’, or that

envisioned under the United Nations (UN) Charter. Indeed, it is widely accepted that informal and ‘ad hoc’ military cooperation is a trend that will continue in the near future.

While there are clear strategic incentives for states to engage in military partnerships, the diffusion of operational control between states often leads to a lack of clarity regarding which actors perpetrate serious violations of international humanitarian law (IHL), and, relatedly, which states are obliged to investigate them. As an example, the UN Eminent Group of Experts appointed by the Human Rights Council to monitor alleged violations of human rights law and IHL in the armed conflict(s) in Yemen have repeatedly identified airstrikes that appear to have seriously violated IHL. However, their reports recognize those responsible as ‘the Coalition’ rather than identifying the individual state(s) responsible. In addition to creating legal challenges, ad hoc military coalitions present a practical challenge to accountability through their naturally temporary nature. It has indeed been suggested that it is more convenient for coalition partners to publicly attribute any misconduct to the whole coalition rather than to a member states’ forces.

Using the phenomenon of ad hoc military coalitions as a focus, this article aims to contribute to a wider developing literature that analyses states’ obligation to (domestically) investigate alleged violations of IHL, rather than investigations and prosecutions occurring at international and hybrid criminal tribunals. Thus far, such studies have largely

5. Charter of the United Nations (signed 26 June 1945, entry into force 24 October 1945) 1 UNTS XVI, Article 43.
8. The terms ‘international humanitarian law’, ‘law of armed conflict’ and ‘jus in bello’ are used interchangeably throughout this article.
10. Ibid.
focused on instances where a state’s own military is assumed solely responsible for the underlying violation(s) of IHL. Less scrutiny has, however, been applied to the legal repercussions that arise when an alleged violation of IHL is perpetrated within multilateral contexts, particularly outside formalized military cooperation such as UN peacekeeping missions. As an illustration, the ‘Guidelines on Investigating Violations of International Humanitarian Law’, published by the International Committee of the Red Cross (ICRC) and the Geneva Academy in 2019 in an effort to clarify the requirements of the obligation to investigate, explicitly exclude ‘the particularities of States operating in multi-national military settings’ from the Guidelines, stating that ‘the specific issues involved would require separate examination’. In a brief engagement with the issue, Jenks puts forward an illustrative comparison: if a state unilaterally carries out an airstrike that results in a serious violation of IHL, the international community will demand that the state ‘explain[s] what happened, how and why’. Conversely, if the same harmful outcome stems from the cooperation of multiple states, Jenks asserts ‘[i]t cannot, yet seems to, be that in creating the coalition and dividing up those tasks and functions, as coalitions are designed and intended to do, that accountability has in a sense been disaggregated’.

Following an exposition of the specific accountability problems that military cooperation can foster, this article examines the relevance and utility of IHL and international criminal law (ICL) in ensuring accountability in ad hoc cooperation situations. More specifically, the following areas are assessed: (1) the grave breaches regime originally created in the Four Geneva Conventions (GCs) of 1949, (2) the customary obligation to investigate war crimes, as articulated in the ICRC’s customary IHL study, (3) the obligation to ensure respect for IHL, and, lastly, (4) the notion of complicity – or ‘aid or assistance’. Relevant literature from both the substantive obligation to investigate alleged violations of IHL and the wider legal repercussions of military partnerships is assessed throughout. To maintain focus on IHL, this article primarily assesses allegations of serious violations of IHL, also referred to as war crimes, and therefore does not address allegations of the violation of domestic criminal law and/or military law during multilateral conflicts. Also excluded from this study is

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13. See e.g. Cohen and Shany, ibid at 41–55.
14. On investigations in peace operations, see Todeschini (fn 12).
the analogous and complementary obligation to investigate under human rights law. On
the basis of this study, more overarching conclusions are also reached, namely that
the assessment of the obligation to investigate in ad hoc military coalition settings
highlights a tension between states’ priority of sovereign control over their own mili-
tary personnel and an increasing recognition – both legally and socially – of the need
to ensure accountability for the commission of war crimes.

2 CONTEMPORARY AD HOC MILITARY COALITIONS

2.1 Accountability

Impunity for the perpetration of war crimes, as with all core international crimes,
endures despite the relative increase of both the domestic prosecution of international
crimes and the functioning of hybrid and international criminal courts over the last dec-
ades. Encapsulating this sentiment, for Simpson ‘each war crimes trial is an exercise
in selective justice to the extent that it reminds us that the majority of war crimes go
unpunished’. This trend appears particularly acute at the domestic level despite
being, as envisaged by the Rome Statute of the International Criminal Court (ICC),
where the majority of those allegedly responsible for war crimes should be tried.

Indeed, even where conduct ostensibly fulfils the material elements required for a par-
ticular war crime, states often either prosecute such crimes as domestic crimes, pursue
disciplinary measures instead, or refuse to take punitive action altogether. For exam-
ple, the first successful war crime conviction of a British soldier in the UK did not
occur until 2007, and the individual was sentenced to a period of incarceration lasting
only 12 months. In the US, there is yet to have been charges brought under the 1996
domestic War Crimes Act. The prosecution of William L Calley Jr for his role in the

18. For an extensive account of the interplay of human rights law and IHL in this regard, see,
among others, Tan (fn 12).
19. For a collection of war crimes case law, see The International Crimes Database (T.M.C.
Asser Instituut), available at <https://www.internationalcrimesdatabase.org/Cases/ByCategory/
WarCrimes> (accessed 29 September 2022). It is notable that the majority of domestic war
crimes cases contained within this database concern individuals either: (1) from an opposing
side in an armed conflict than the prosecuting state, or (2) from a conflict with no involve-
ment of the prosecuting state (e.g. under universal jurisdiction).
(eds), The Law of War Crimes: National and International Approaches (Brill | Nijhoff, 1997) 1
and 11; cited in R Cryer, ‘The Boundaries of Liability in International Criminal Law, or “Select-
22. P Kastner, ‘Domestic War Crimes Trials: Only for “Others”? Bridging national and inter-
asser.nl/upload/documents/DomCLIC/Docs/NLP/UK/PaineSentencingtranscript.pdf> (accessed
29 September 2022); see also N Rasiah, ‘The Court-martial of Corporal Payne and Others
24. B Van Schaak quoted in C Miller, ‘The DOJ is Investigating Americans For War Crimes
Allegedly Committed While Fighting With Far-Right Extremists in Ukraine’ (BuzzFeed News,
8 October 2021), available at <https://www.buzzfeednews.com/article/christopherm51/craig-lang-
ukraine-war-crimes-alleged> (accessed 29 September 2022).
‘My Lai Massacre’ during the (US’) Vietnam War resulted in convictions for the murder (under domestic law) of a fraction of those allegedly killed, and Calley Jr was released on parole after serving less than four years of his sentence. In short, it can be assumed that most war crimes alleged to have been carried out by states’ own forces do not progress to investigation or meaningful prosecution.

Although the amount of domestic investigations and prosecutions of alleged violations of IHL remain low, military cooperation and support between actors involved in armed conflict has markedly increased in frequency, resulting in ‘an ever-growing number of actors organized in over-lapping webs of alliances, proxies and other types of support relationships’. And while, to the knowledge of the author, no empirical or comparative studies have directly assessed the amount of investigations and/or prosecutions of alleged war crimes committed during multilateral operations, hesitation to investigate appears heightened in the context of military cooperation. For instance, in March 2021, Human Rights Watch (HRW) cited the ‘presence of multiple armed forces’ in the Tigray conflict (namely, Eritrean and Ethiopian) as a principal factor underlying the urgency to establish an independent inquiry into alleged international crimes, including war crimes. Furthermore, at the European Court of Human Rights (ECtHR), states’ procedural obligation under the right to life to investigate deaths has been triggered in several instances where multiple states acted together during an ongoing armed conflict. For instance, the facts of the 2021 Grand Chamber judgment of Hanan v. Germany concerned two US Air Force F-15 aircraft that killed dozens of civilians under instruction from German Bundeswehr ground forces. Likewise, a 2018 Danish High Court case found Danish soldiers liable, under domestic tort law, for conduct within an operation carried out with Iraqi and British forces in 2004. As such, partnered warfare appears to neither reduce the quantity of serious violations of IHL nor immediately facilitate the securing of accountability.

In addition to a potential legal requirement to investigate alleged violations of IHL (as will be examined), states also have several non-legal incentives to investigate. In addition to securing accountability against those responsible for seriously violating IHL – which usually involves repugnant conduct – investigations and prosecutions of serious violations of IHL can, if implemented effectively, serve to prevent future violations through deterrence. Furthermore, investigations can provide the opportunity to highlight and remedy institutional military problems that can cause IHL violations to proliferate and become normalized. Investigations can also improve the effectiveness of a state’s military through identifying ‘good practices’ and ‘lessons-learned’ from failed operations and by providing evidence against allegations that are regularly levied against opposing sides – legitimately or not – during armed conflict. Improving military efficiency in multilateral environments is arguably more crucial owing to the already complicated challenges raised by military interoperability between states. Importantly, these extra-legal reasons to investigate remain regardless of the legal conclusions reached below.

2.2 Defining and unpacking ad hoc military coalitions

Before a legal appraisal of states’ obligations to investigate alleged violations of IHL in ad hoc coalition scenarios can be done, the phenomenon itself must be defined.

To begin with, military cooperation in general is an admittedly complex matter. Importantly, divisions of command-and-control between states can vary significantly in different situations and can also evolve and adapt as missions progress. The focus of this article, ad hoc military coalitions, are defined here as temporary situations of cooperation between states that occur related to a specific armed conflict situation and then cease afterwards. The term ‘coalitions of the willing’ is also often used to describe this phenomenon. Contemporary examples fitting the definition of ad hoc military coalitions used in this article include the aforementioned coalition of states supporting the government of Yemen, particularly against the Houthi armed group; Ethiopia and Eritrea’s collaboration against the Tigrayan People’s Liberation Front.

33. Indeed, IHL is a forward-looking legal regime compared to the inherently ex post facto nature of ICL. For an examination of these tensions, see R Bartels, ‘Discrepancies Between International Humanitarian Law on the Battlefield and in the Courtroom: The Challenges of Applying International Humanitarian Law During International Criminal Trials’ in M Matthee, B Toebes and M Brus (eds), Armed Conflict and International Law: In Search of the Human Face: Liber Amicorum in Memory of Avril McDonald (Asser Press/Springer, 2013).
34. Cohen and Shany (fn 12) 39.
35. Ibid.
36. Lubell, Pejic and Simmons (fn 15) 8.
38. See Hura et al, ibid at 40–43.
(TPLF) in Ethiopia; and, depending on conflict classification, Russia and Belarus’ cooperation during the 2022 invasion of Ukraine.41

While certain formal military alliances have arguably created ‘ad hoc’ coalitions for certain missions – for instance, the NATO mission in Kosovo (1999) – these are excluded from the present analysis where ‘effective control’ of participating forces is retained by an international organization (IO).42 Therefore, UN-mandated peacekeeping forces are in principle excluded from the scope of this study. Effective control is, however, a factual test not contingent on how military cooperation is portrayed by the actors involved. As such, while NATO or the UN may ‘lead’ certain operations, this does not automatically equate to effective control over the armed forces of cooperating states.43 As situations where an IO operates effective control over multilateral military operations within armed conflict are rare and making this determination over specific multilateral arrangements is beyond the scope of this article, much of the coming analysis is therefore applicable through analogy. This fact also explains any references to certain missions involving NATO Member States where it can be argued that effective control over troops remained with each state.44 Also excluded from the present study is the possibility of requiring non-state armed groups (NSAGs) to investigate the conduct of others, another topic in need of separate engagement.

A focus on ad hoc military coalitions is taken for several reasons: (1) there is a significant gap in the current literature addressing the ad hoc arrangements detailed above, (2) the potential responsibility of IOs to investigate alleged violations of IHL is a separate problem in need of dedicated analysis,45 and (3) a focus on ad hoc coalitions encapsulates situations of informality, temporariness, and qualified cooperation in line with wider trends in international cooperation.46 By assessing the obligation to investigate through the lens of ad hoc coalitions, the tensions between state sovereignty and accountability also become more tangible.


42. See ILC, Articles 5 and 7, Draft Articles on the Responsibility of International Organizations (ARIO) (2011) II(2) YILC. For an analysis of ‘Peace Operations’ see Todeschini (fn 12).

The issue of dual-attribution of conduct – to both a state and an IO – is also excluded from this present study. For this, see A Nollkaemper, ‘Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica’ (2011) 9 JICJ 1143.

43. KE Sams, ‘IHL Obligations of the UN and other International Organisations Involved in International Missions’ in M Odello and R Piotrowicz (eds), International Military Missions and International Law (Martinus Nijhoff, 2011).

44. Broadly, see M Zwanenburg, Accountability of Peace Support Operations (Martinus Nijhoff, 2005); R Kolb, G Porretto and S Vité, L’application du droit international humanitaire et des droits de l’homme aux organisations internationales: Forces de paix et administrations civiles transitoires (Bruylant, 2005).


Cooperation and support in ad hoc military contexts can vary wildly, with various potential legal consequences.47 Full military partners exist when two or more states are party to an international armed conflict (IAC) with the same opposing state. This relationship can also occur in a non-international armed conflict (NIAC) provided that the required intensity of hostilities is met between the relevant organized armed group and each respective state.48 For instance, the group of states each engaged in a NIAC with the Houthi armed group in Yemen since 2015.49 Another form of ‘partnership’ can occur when a state provides assistance to another state involved in an armed conflict without itself being a party to the armed conflict. Such assistance might consist of, for instance, the provision of technical assistance such as transport, intelligence or surveillance, or the hosting of a military base from which another state operates.50 Similarly, another form of assistance is the provision of arms to a state involved in an armed conflict, with the state providing arms itself having no other connection to the conflict. Political support, for example expressions of solidarity with a particular mission, is at the far end of the spectrum of cooperation. This article primarily focuses on the first identified situation, i.e. where more than one state is engaged in an armed conflict against a common adversary or adversaries. Again, this does not discount aspects of the obligation to investigate arising from the other situations identified.

2.3 Investigations and immunities

Prior to analysing the substantive law underlying the obligation to investigate, it is first necessary to briefly address the international law of state sovereignty and the immunity of state officials from the criminal jurisdiction of other states. In addition, agreements that states make during military cooperation that concern jurisdiction to investigate and prosecute must also be highlighted. As will be seen, such agreements can frustrate the opening of investigations into alleged serious violations of IHL committed in multilateral contexts.

Members of a state’s armed forces operating abroad are, as a general rule, considered to be acting in an official capacity and are therefore generally immune from the criminal jurisdiction of other states (also referred to as ‘functional immunity’) under

47. C Wiesener: ‘... international law does not provide one single solution for responsibility arising from misconduct by partners. Rather, there is a plethora of rules and regimes that possible situations may fall under ...’ in ‘Taking One for the Team: Legal Consequences of Misconduct by Partners’ (2020) 3(1) Scandinavian Journal of Military Studies 45, 50.
48. See The Prosecutor v. Duško Tadić a/k/a “Dule”, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (20 October 1995), Case No. IT-94-1-AR72, para 70.
customary international law. Immunity from the jurisdiction of other states for state officials stems from the principle that adjudicating upon the acts of an individual acting within their official capacity – such as within the armed forces – equates to judging the state itself and therefore violates its sovereignty. Such immunities – when applicable – extend to adjudicative and enforcement jurisdiction but do not affect states’ competency to legislate.

When a soldier of a sovereign state is accused of a war crime and another state attempts to operate its jurisdiction over them, the question of whether immunity from prosecution *ratione materiae* still exists is a highly contentious matter. For non-high ranking officials – the primary focus of this study – there is emerging state practice and *opinio juris* to suggest that an exemption from the customary international law immunity from prosecution exists for international crimes, including war crimes. The International Law Commission, in Article 7 of their draft treaty on the Immunity of State Officials from Foreign Criminal Jurisdiction, held as much, although this proved highly controversial. There are several arguments made in favour of this view, including that: (1) war crimes cannot constitute officials acts of the state, and (2) the *jus cogens* nature of international crimes renders the obligation to prosecute them hierarchically above the customary law of state immunity from jurisdiction. Indeed, serious violations of IHL are regularly perpetrated by state actors arguably acting in an official capacity. As such, upholding functional immunity when these acts constituted official acts appear to conflict with the legal avenues established to prosecute such individuals – the grave breaches regime and later customary obligation to investigate, as examined below. Nevertheless, it is currently unclear whether there is sufficient state practice and *opinio juris* to support the existence of an exception to the immunity from criminal jurisdiction of a foreign state for alleged serious violations of IHL as *lex lata*. As such, where alleged violations are ostensibly carried out in an official capacity, an investigating state must receive consent from the state whose military personnel are being investigated for invasive investigative steps (for example, interviewing their personnel). However, many investigative steps – especially at early stages – may not violate the sovereignty of other states. This is especially true with the rise of less intrusive investigative processes, such as via

55. ILC (fn 53) Article 7(1)(c), 177.
56. ILC (fn 53) 183–84.
57. Akande and Shah (fn 51) 843–44.
58. Ibid.
open-source materials. Furthermore, the granting of consent by the state of nationality can remove immunities, although this is rare in practice.

In addition to the customary law of immunities, when states engage in military cooperation with other states Status of Forces Agreements (SOFAs) and/or Memoranda of Understanding (MoUs) are regularly negotiated and agreed upon to clarify multiple issues ex ante. SOFAs are typically created between states that ‘host’ the armed forces of another state on their territory (host state) and states that send their armed forces to a host state (sending state). Even outside of military cooperation taken under the authorization of an IO, SOFAs are generally concluded between hosting and sending states. Most importantly, SOFAs aim to determine which state (either the host or sending state) has primary criminal jurisdiction to prosecute members of a sending state’s armed forces for crimes allegedly committed in the host state. In circumstances of concurrent jurisdiction, i.e. where both the sending and receiving states have jurisdiction over a service person, SOFAs normally empower the sending state to operate primary jurisdiction, reflecting an inherent interest states have in not allowing a foreign state to prosecute their armed forces for conduct abroad. SOFAs do, however, also regularly include requirements for states to cooperate with one another in achieving the prosecution of crimes committed in the host state.

Therefore, what can be seen is, on one hand, a move towards the removal of immunities for those alleged to have committed serious violations of IHL, and, on the other, a strong preference for states to retain criminal jurisdiction over their own forces and a hesitance to investigate and prosecute the militaries of other states, especially those with whom they cooperate. With these somewhat open issues in mind, an assessment of the substantive obligation to investigate and its application to ad hoc military coalitions can now be made.

3 THE OBLIGATION TO INVESTIGATE

Thus far, references have been made to an ‘obligation to investigate’ or ‘prosecute’ serious violations of IHL but the precise content, nature and source of this obligation is often misconstrued. The origins of an independent ‘obligation to investigate’ violations of IHL under international law is generally traced back to the grave breaches regime established in the GCs of 1949. Nevertheless, systems of punishing violations of the laws and customs of war have existed in different forms prior to this. The Lieber Code, issued during the American Civil War to regulate the conduct of Union

61. Ibid at 4.
62. Ibid at 5–6.
63. See the SOFAs cited in Todeschini (fn 12) 424–26.
forces, includes several provisions requiring the prosecution of individuals for violations of the rules and customs of war, stating that: ‘[o]ffenses to the contrary shall be severely punished, and especially so if committed by officers’.66 Later, marking the first attempt to operationalize a domestic obligation to repress violations of jus in bello treaty law, the 1929 ‘Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field’ required that ‘[t]he Governments of the High Contracting Parties shall also propose to their legislatures should their penal laws be inadequate, the necessary measures for the repression in time of war of any act contrary to the provisions of the present Convention’.67

This section first addresses which states will be required to investigate via the grave breaches regime and customary obligation, before establishing the threshold at which investigations must be started and determining how investigatory obligations can be fulfilled in ad hoc military coalition settings.

### 3.1 The grave breaches regime

Following the experiences of World War II, an effort was made by several states and the ICRC68 to ensure an effective and universal process for the domestic prosecution of individuals responsible for committing serious violations of IHL69 in part aiming to ‘remedy deficiencies’ in previous efforts (namely the 1929 Geneva Convention).70 This endeavour took form in the GCs of 1949, which, in articles common across the four Conventions (‘common articles’), set out the following obligation: ‘[t]he High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article’.71 In effect, these provisions required each state party to the GCs to create the potential for individual criminal responsibility under their domestic law for those that had violated the specified rules of IHL. As a reflection of the times, however, the provisions only apply to exhaustively defined conduct alleged to have been committed during IACs,72 including, for example, ‘wilful killing’ and ‘torture or inhuman treatment’.73

71. GCI, Article 49; GCII, Article 50; GCIII, Article 129; GCIV, Article 146 (emphasis added).
73. GCI, Article 50; GCII, Article 51; GCIII, Article 130; GCIV, Article 147.
The obligations contained within the grave breaches regime go further, stating in the next paragraph that:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.\(^74\)

Therefore, in addition to requiring states party to the GCs to domestically criminalize conduct constituting grave breaches, each state is also obliged to search for and bring those alleged to have committed – or ordered – such conduct before its own courts regardless of their nationality.

While the grave breaches articles do not directly articulate the requirement to ‘investigate’, it is clear from the ordinary meaning of ‘search for persons alleged’, the object and purpose of the articles – namely the repression of serious violations of IHL – and the general functioning of criminal procedure, that alleged conduct must first be investigated before progressing to adjudication (prosecution).\(^75\) The GCs also oblige contracting states to ‘take measures necessary for the suppression of all acts’ which violate the GCs other than grave breaches.\(^76\) While the present study focuses on serious violations of IHL, this suppression obligation can also give rise to an obligation to investigate.\(^77\)

In effect, the grave breaches provisions create a prosecute or extradite obligation on all contracting states or, more accurately, a *primo prosequi, secondo dedere* (first to prosecute, second to deliver) obligation, meaning that states, as a default, must prosecute individuals within their jurisdiction and only extradite them to another state when they have been requested to, considering that it would not violate their domestic legislation and a ‘prima facie’ case has been made by the requesting state.\(^78\) Especially salient for ad hoc military coalitions is that states are provided with a treaty-based obligation to enact universal jurisdiction for the prosecution of grave breaches, potentially allowing the investigation and prosecution of any person alleged to have committed a grave breach. Indeed, a textual reading of the second paragraph of the first grave breaches common article infers that states parties must prosecute or extradite *every* individual alleged to have committed a grave breach.\(^79\) As pointed out in the 2020 ICRC commentary, the text of Article 129 (GC III), if read literally, ‘could therefore imply that each State Party must search for and prosecute any alleged perpetrators the world over, regardless of their nationality’.\(^80\) However, subsequent practice has consistently shown states to interpret the grave breaches provisions as providing a right to enact universal jurisdiction over grave breaches regardless of the location of the accused, but only an *obligation* in situations where the alleged perpetrator is present.

\(^{74}\) See fn 71 (emphasis added).
\(^{76}\) GCI-IV (fn 71) (emphasis added).
\(^{77}\) Cohen and Shany (fn 12) 42.
\(^{79}\) See e.g. GCI, Article 49.
\(^{80}\) ICRC (fn 78) para 2866.
in their territory. Indeed, it seems counter-intuitive and practically impossible to require every state party to investigate or extradite an individual that it does not have custody over, nor access to any relevant evidence. While states are permitted to hand over persons to another state party if a “prima facie” case has been made of their culpability of a grave breach, this is also a right and not an obligation, seeming to further IHL’s historical focus on the territorial state and state of nationality as the vehicles for accountability.

In 1977, Additional Protocol I (API) to the GCs significantly expanded the list of substantive grave breaches, including ‘making the civilian population or individual civilians the object of attack’, but, nevertheless, the listed acts remained exhaustive. Despite concern being expressed about the proliferation of serious violations of IHL in NIACs and widespread impunity since the drafting of the GCs of 1949, no similar grave breaches were included by states in Additional Protocol II (APII) regulating NIACs. API further requires states parties to ‘afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches’. Examples of ‘assistance’ include ‘the compilation and exchange of information, and in general, any assistance with a view to the tracing, arrest and trial of suspects’. As a supplementary obligation to the main prosecute or extradite obligation, Article 88(1) goes further than simply requiring good faith. And, unlike extradition where a ‘prima facie’ case must be made, the assistance obligation under API is not contingent upon a request being made. Therefore, Article 88(1) seemingly requires active cooperation and assistance between states for the repression of grave breaches. It is noted, however, that Article 88(3) limits the cooperation obligation where other treaties govern ‘mutual assistance in criminal matters’, which can include SOFAs.

With the grave breaches framework of investigations and prosecutions now examined, how does it apply to alleged grave breaches committed during ad hoc military coalition contexts? To begin with, owing to the full prosecute or extradite obligations only applying to alleged grave breaches, these obligations will only apply to states in ad hoc military coalitions during IACs. Although IACs are notably less common than NIACs at the time of writing, the armed conflict situation in Ukraine, where Russia and Belarus are arguably both involved in an IAC with Ukraine, serves as a reminder of the grave breaches’ potential usefulness in this regard. The obligation to

81. VCLT (fn 75), Article 31(3)(b); ibid.
82. This is notwithstanding in absentia trials.
83. GCI-IV (fn 71).
84. See Hathaway et al (fn 66) 57–60.
85. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (signed 8 June 1977, entry into force 7 December 1978) 1125 UNTS 3, Article 85(3)(a). Note, only states that have ratified API will be bound by the further grave breaches.
87. API, Article 88(1).
investigate will, more particularly, depend on the obligation to search for and bring before courts those ‘alleged to have committed’ grave breaches. All states are obliged to investigate grave breaches allegedly carried out by members of their own forces, regardless of the location. Furthermore, where an individual alleged to have committed a grave breach in a multilateral setting is located within another state’s territory, that state will also be obliged to investigate them. This obligation will exist even if the individual is a national of a military partner (if extradition is not requested), and if the territorial state did not provide any assistance to the military operation in question. While the territorial state will likely prefer to allow the state of nationality to take the prosecutorial lead in such situations, early investigative steps will be required as long as potential immunities are not infringed. In addition to the nationality and territorial headings of jurisdiction, the requirement of assistance in criminal proceedings will require states, if they have unique information relating to the alleged acts owing to their role in a coalition operation, to prepare such materials, even if a trial is not immediately forthcoming.90 Therefore, while a full obligation to investigate and prosecute individuals alleged to have committed grave breaches in ad hoc military coalition environments will only arise where territorial or nationality jurisdiction exists, the obligation of mutual assistance in criminal matters relating to grave breaches requires states involved in the ad hoc coalition to investigate and prepare evidence at their disposal.

3.2 The customary obligation to investigate war crimes

Distinct from the treaty-based grave breaches regime, attendant developments in ensuring accountability for ‘war crimes’ further inform understandings of the obligation to investigate. War crimes, such as those prosecuted at the Nuremberg Trials following World War II, predate the grave breaches regime and are generally considered to consist of ‘acts or omissions that violate IHL and are criminalized in international criminal law’.91 The term ‘war crime’ is, however, often misunderstood both within general discourse and by some legal commentators. For instance, some erroneously believe that each violation of IHL amounts to a war crime,92 or that the grave breaches regime directly and instantly transformed such conduct into war crimes (if not already considered as such),93 failing to consider the incremental development of war crimes law and the basic tenets of treaty and customary law.

In fact, developments in the ad hoc international criminal tribunals in the 1990s confirmed the expansion of conduct constituting war crimes beyond the exhaustive list of grave breaches.94 Similar to grave breaches, war crimes are violations of IHL that are considered so severe that the international community has an interest in

89. As suggested by Wentker (fn 41).
90. API, Article 88(1).
94. Tadić (fn 48) para 94; Cohen and Shany (fn 12) 43.
their prosecution. While both war crimes and grave breaches involve the violation of a substantive rule of IHL, war crimes also directly give rise to individual criminal responsibility in international law. Although the grave breaches regime, as examined, requires the domestic criminalization and prosecution of grave breaches – admittedly severe violations of IHL – these are first and foremost obligations incumbent on the state and do not directly give rise to individual criminal responsibility for such conduct under international law. API’s subsequent indication that ‘grave breaches ... shall be regarded as war crimes’ simply confirmed the drafters’ intention that acts and omissions constituting grave breaches are so severe that they require domestic criminalization. Within the Rome Statute of the ICC, prosecutable war crimes explicitly include all grave breaches of the GCs and API and other serious violations of treaty and customary IHL applicable in both IACs and NIACs.

The remaining core distinction between grave breaches and war crimes is that: (1) war crimes are violations of IHL that are prosecuted as international crimes, and (2) grave breaches are an exhaustive list of IHL violations in IACs that oblige states to investigate and prosecute through their domestic law. Although the divergence between the obligation to prosecute grave breaches and the concept of war crimes may now seem solely historical, an understanding of their respective geneses is crucial for a complete conceptualization of the customary obligation to investigate.

3.2.1 Rule 158 of the ICRC’s Customary International Humanitarian Law Study

While the provisions providing for the repression of grave breaches and the suppression of other violations of IHL were considered a ‘revolutionary’ development for the enforcement of IHL, the lack of universal ratification of API and the absence of a requirement to criminalize and prosecute alleged conduct constituting grave breaches in NIACs leaves notable accountability gaps, especially considering the proliferation of such conflicts since 1949. As Meron argues, there is no moral argument justifying treating individuals that have seriously violated IHL in NIACs any more leniently than in IACs. In light of this, developments in state practice and opinio juris on the domestic and international investigation and prosecution of IHL violations in both IACs and NIACs led the ICRC, in its customary IHL study, to declare the formation of a more unitary customary obligation. Referencing both the grave breaches regime and the development of war crimes law, Rule 158 affirms: ‘States must investigate war crimes

96. Note, however, that Article 85(5) of API affirmed that all grave breaches are to be considered ‘war crimes’, a point relevant for the next part of the analysis: the purported customary obligation to investigate war crimes.
98. The Rome Statute, Article 8.
100. La Haye (fn 86).
allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.102 Accordingly, Rule 158 combines the requirements to investigate and prosecute – inherent in the grave breaches regime – and applies them to a broader category of IHL violations: war crimes.

3.2.1.1 Customary status As is well established, customary international law requires the existence of both state practice and opinio juris.103 As such, the ICRC’s customary international law study, while highly respected, is not in itself authoritative.104 Rule 158, nevertheless, has been accepted by states, scholars, and courts alike as accurately reflecting customary international law. In addition to war crimes being included in the statutes of various international tribunals, several states’ military manuals, such as Canada’s, makes reference to the requirement to investigate all war crimes (e.g. not limited to grave breaches).105 The second report of the Turkel Commission, which examined whether Israel had failed in its obligation to investigate alleged violations of IHL committed by its forces, also affirmed the existence of the customary obligation to investigate war crimes.106 The report surmised that states ‘have a duty to investigate complaints and claims regarding war crimes and examine all other violations’.107 Israel’s subsequent acceptance of the Turkel Commission’s report is another example of opinio juris supporting the customary obligation’s existence. In Hanan v. Germany, the Grand Chamber of the ECtHR – citing Rule 158 – found that Germany was obliged to investigate war crimes it was allegedly responsible for in its NIAC with the Taliban in Afghanistan during 2009.108 Therefore, Schmitt’s assertion that Rule 158 ‘unquestionably reflects’ customary international law is well supported and accurate.109

3.2.1.2 Content Rule 158 renders the obligation to investigate applicable in both NIACs and IACs.110 Furthermore, as the obligation does not rely upon an exhaustive list of crimes

107. Ibid at 82.
109. Schmitt (fn 12) 44.
110. Also affirmed in the Turkel Report (fn 106) 79–82. Rule 158 also obligates armed groups; however, states retain the focus in this study. Note that the veracity (or desirability) of armed groups constituting courts and prosecuting alleged perpetrators of war crimes is controversial: see E Heffes,
like the grave breaches regime or the ICC Statute, Rule 158, in theory, requires the investigation of all war crimes and is, therefore, attuned to developments in customary international law. For instance, while the widely recognized customary war crime of starvation during NIACs is only currently prosecutable before the ICC for states that have ratified the 2019 ICC Amendment, all states may have an obligation, pursuant to Rule 158, to investigate when this war crime has been allegedly committed.

The first sentence of Rule 158, according to which ‘States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects’, notwithstanding the standard of allegation required to trigger the obligation (assessed below), clearly requires states to investigate alleged war crimes under the nationality and territorial headings of jurisdiction. This is plainly similar to the grave breaches regime, albeit regarding an increased amount of conduct owing to war crimes being a more expansive collection of violations than the grave breaches regime.

The second sentence of Rule 158, however, seems to extend beyond that of the universal jurisdiction present in the grave breaches regime: states ‘must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects’. On first reading it may affirm that, as war crimes give rise to the possibility of universal jurisdiction under international law, each state must investigate and prosecute every war crime allegedly committed regardless of the location and potential perpetrator(s). However, the operation of universal jurisdiction over war crimes under customary international law – unlike the grave breaches regime – is currently a right and not an obligation for both absolute and conditional universal jurisdiction (with presence of the alleged perpetrator). Indeed, the summary of Rule 158 reads: ‘States must exercise the criminal jurisdiction which their national legislation confers upon their courts, be it limited to territorial and personal jurisdiction, or include universal jurisdiction, which is obligatory for grave breaches’.

Furthermore, similar to the grave breaches regime and drawing from Article 88 of API, the ICRC’s customary IHL study’s Rule 161 also requires international cooperation in relation to the investigation of war crimes: ‘States must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects’.


113. Triggers of the obligation to investigate are expanded below.

114. Emphasis added.


116. Emphasis added.

As such, within ad hoc military operations both the territorial and state of nationality of the alleged perpetrator(s) must investigate, even if the territorial state had no direct involvement in the potentially unlawful conduct. Regarding other states involved in the coalition, the customary obligation to investigate will depend on that particular state’s domestic legislation (i.e. whether universal jurisdiction exists for war crimes). In this vein, the customary obligation, while concerning more substantive acts than the grave breaches regime, will not arise when either territorial or national jurisdiction is lacking, a situation that will often occur when states act in ad hoc military coalitions. Similar concerns relating to immunities raised relating to grave breaches, i.e. bringing a partner state’s personnel before court, also apply here.

3.3 When is the obligation to investigate triggered?

Unfortunately, there are no distinct rules or indications to clarify when the obligation to investigate grave breaches and/or war crimes is triggered. However, as an obligation contingent upon a war crime or grave breach ‘allegedly’ having been committed, there must be an initial prompt for it to emerge. The previously discussed Turkel Report held that ‘the threshold required for an investigation is where a credible accusation is made or a reasonable suspicion arises that a war crime has been committed’. Cohen and Shany endorse this standard, stating further that the obligation to investigate can be triggered ‘on the basis of suspicious circumstances, in the absence of any formal complaint or allegation’. Describing the initial trigger in this way ostensibly precludes states from willfully ignoring conduct, considering that the alleged war crimes would come within their jurisdiction. The Minnesota Protocol, an instrument focused on investigations into violations of the right to life, uses the standard of ‘knows or should have known of any potentially unlawful death, including where reasonable allegations of a potentially unlawful death are made’. The Turkel Report further elaborates that information constituting reasonable suspicion or substantiating a credible allegation can originate from any source, including non-state actors such as non-governmental organizations (NGOs). On this interpretation, the duty to investigate can be triggered by information passed between coalition partners or brought to their attention by civil society. Indeed, analogous ECtHR jurisprudence has consistently affirmed that states cannot avoid the obligation to investigate suspicious deaths where, despite a lack of allegation, ‘the matter has come to their attention’. This analysis seems to match the underlying purpose of the grave breaches regime: to prevent geographical areas of impunity. As such, the obligation may arise due to conduct witnessed during a multilateral operation. The Turkel Report also highlights that war crimes which constitute absolute prohibitions (e.g. rape or the use of human shields) will require a lower threshold of suspicion or allegation to trigger the obligation. Equally, for non-absolute prohibitions, the threshold for triggering the obligation to investigate will

118. See fn 106, 100.
119. Cohen and Shany (fn 12) 52.
121. See fn 106, 100.
122. Al-Skeini and Others v. the United Kingdom [GC], no. 55721/07, § 165, ECHR 2011, cited in Cohen and Shany (fn 12) 52.
123. The Turkel Report (fn 106) 100.
depend on the substance of the IHL rule in question.\textsuperscript{124} Nevertheless, \textit{in lieu} of reasonable suspicion or a credible allegation, states are \textit{not} obliged by IHL to actively uncover potential war crimes and/or grave breaches.\textsuperscript{125}

Building from this analysis, an under-explored and particularly relevant aspect of the IHL obligation to investigate is that the obligation can be triggered before an alleged perpetrator’s identity is known. In the above analysis, it was assumed that the identity of the alleged perpetrator (and, as such, which state’s military they belonged to) was known; however, this is often not the case in multilateral military operations.\textsuperscript{126} Indeed, the purpose of an investigation is to uncover the circumstances of an event, using both deductive (e.g. from a hypothesis) and inductive reasoning (e.g. from evidence). Lack of knowledge of the perpetrator’s identity can occur in several situations. For example, the presence of multiple states’ forces in a certain area where a serious violation of IHL has been alleged will require each to investigate whether their forces were involved. Furthermore, even where harmful conduct points towards the commission of a war crime, for instance, the war crime of attacking civilians, those criminally responsible may not be the personnel who delivered the fatal munitions, but those who intentionally ordered the attack.\textsuperscript{127} Regarding an instance where multiple ground units of the same state were involved in an operation where war crimes are alleged, Schmitt argues that an \textit{administrative} investigation may satisfy a state’s obligation to investigate by uncovering the circumstances surrounding it.\textsuperscript{128} While Schmitt refers here to units of the same state, when two or more states are involved in an operation that results in conduct likely to constitute a war crime, it can be argued that each state will be obliged to uncover the roles of their respective troops, even if the later part of the investigation may rest with one of the states once exculpatory evidence has arisen. In this regard, cooperation between coalition partners will be essential in determining the identities of potential perpetrators.\textsuperscript{129}

### 3.4 The obligation to investigate’s substantive requirements

Once the obligation to investigate is triggered – where a credible suspicion or reasonable allegation of a grave breach or war crime having been committed exists – an investigation should fulfil several fundamental characteristics to satisfy the obligation, namely ‘independence, impartiality, effectiveness and thoroughness, and promptness’.\textsuperscript{130} However, IHL is mainly silent on the precise requirements. Noting the dearth of clarity regarding the content of the obligation to investigate, the 2019 ICRC and Geneva Academy Guidelines set out several principles to guide investigations. The extent to which these Principles reflect legal obligations is currently unclear, however. Under the Principles, an investigation should be \textit{capable} of (1) enabling a determination of whether there was a violation of international humanitarian law, (2) identifying the individual and systemic factors that caused or contributed to an incident, and

\textsuperscript{124} Ibid.
\textsuperscript{125} Schmitt (fn 12) 81.
\textsuperscript{126} See UNHRC (fn 9) 9.
\textsuperscript{127} For example, as seen in the Rome Statute, Articles 8(2)(b)(i) and 8(2)(e)(i).
\textsuperscript{128} See fn 12, 79.
\textsuperscript{129} On the importance of cooperation in multilateral investigations, see Todeschini (fn 12).
\textsuperscript{130} Turkel Report (fn 106) 114.
(3) laying the ground for any remedial action that may be required. Interestingly, part (2) relates to ‘systemic factors’ that contribute to the violation of IHL: as ad hoc military coalitions are the system through which violations are (or would be) perpetrated, it follows that investigations must, therefore, ostensibly examine their role in the underlying conduct.

While these Principles also draw from relevant human rights obligations such as the procedural obligation under the right to life, the ECtHR has confirmed that the obligation pursuant to the right to life for an effective investigation is wider than the IHL obligation to investigate, but that the two do not conflict. The ECtHR also recognizes that while the obligation to investigate under the procedural limb of the right to life does not disappear during armed conflict, the demands of the obligation are flexible depending on the circumstances. Such flexibility is also applicable to the IHL obligation to investigate and is, arguably, more acutely relevant owing to the omnipresent fog of war present within armed conflict. Indeed, Cohen and Shany opine that both IHL and human rights obligations to investigate are ‘of a relative nature’ that correlate ‘to the seriousness of the violation and the circumstances under which ... [they] may have occurred’. While the exact confluence of human rights and IHL standards applicable to potential violations are beyond this study’s scope, it can be presumed that an investigation that fulfils the above criteria will satisfy the IHL obligation to investigate and that less might be required where situations are especially precarious owing to ongoing hostilities or security concerns.

### 3.5 The obligation to investigate and ad hoc military coalitions

Before assessing the obligation to ensure respect with IHL and the notion of complicity, it is useful to summarize how the grave breaches regime and customary obligation to investigate apply to ad hoc military coalitions.

First, both the grave breaches provisions and the customary obligation to investigate will apply where territorial or national jurisdiction is present. The grave breaches obligations go further than the customary obligation, as a state will also be obliged to investigate and prosecute under universal jurisdiction where an alleged perpetrator is present on their territory. Furthermore, the obligation to assist investigating states, via API Article 88 and CIHL Rule 161, will require states to prepare any evidence at their disposal, even if they do not have the full obligation to investigate and prosecute. While this is the situation when the nationality of the alleged perpetrator(s) is known, it is also argued here that a preliminary obligation to investigate will become triggered for all states within the ad hoc military coalition potentially involved in a specific operation when the identity of the alleged perpetrator(s) is unknown. Once the

133. See Al-Skeini (fn 122) §§ 164-166.
134. Schmitt (fn 12) 80.
135. Cohen and Shany (fn 12) 49.
nationality of the alleged perpetrator is known, the state of nationality will continue to be obliged to investigate in addition to the territorial state. However, in such situations it is not possible to require a territorial state to investigate every alleged war crime and/or grave breach on its territory when there is a competent state also implicated (under the nationality jurisdictional heading). Deferring investigations and prosecutions to the state of nationality – in line with many SOFAs – is therefore not inherently contrary to the requirements of the grave breaches regime or the customary obligation, considering that an effective investigation and prosecution is carried out by at least one of the states involved. The language of ‘if appropriate’ in Rule 158 and the purpose of the grave breaches regime to prevent impunity lends itself to this interpretation, affording some flexibility on the part of investigating states as to how best to prosecute the alleged incident if a war crime is likely to have occurred.

4 THE OBLIGATION TO ENSURE RESPECT FOR IHL

An appraisal of accountability avenues within ad hoc coalition settings would be incomplete without assessing the relevance of Common Article I of the GCs and their Additional Protocols (CAI) which reads: ‘[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances’. CAI has been extensively debated in recent years, triggered in part by the ICRC’s updated commentaries to the GCs, with both restrictive and expansive interpretations of its position as a means of ensuring compliance with IHL presented. Even among those who subscribe to a more expansive interpretation, there is a common view that its exact confines are unclear. It is also argued that CAI is a principle of customary IHL, meaning that the obligations are not limited to those within the GCs and their APs, but to IHL in general.

CAI is divided into two ‘limbs’, the first to respect and the second to ensure respect with IHL. The first limb, ‘to respect ... the present Convention in all circumstances’, reflects the general public international principle of *pacta sunt servanda* (‘agreements must be kept’) rather than creating a novel obligation per se. The principle of *pacta sunt servanda* is also implicit in the obligation to investigate alleged violations of IHL committed by a state’s own personnel: a good faith undertaking to respect a body of law also involves preventing future violations. Investigating, prosecuting, and

136. The risk of impunity stemming from SOFAs has been recognized: see *Hanan v. Germany* (fn 30) § 138. In general on SOFAs, see Voetelink (fn 60).


141. See e.g. Focarelli (n 137).
evaluating potential war crimes and other violations of IHL are principal methods for states to ensure their own compliance with IHL. As a reflection of *pacta sunt servanda* (which is inherently related to a state’s own obligations), the first limb of CAI will only apply to investigative scenarios when the obligation to investigate (whether that be from the grave breaches regime or Rule 158) has already been triggered, therefore not supplementing the obligations examined in Section 3.

The second limb, to ‘ensure respect’, is professedly more external and, therefore, more relevant for ad hoc military coalitions. From the ICRC’s interpretations, the second limb of CAI is two-fold, encompassing: (1) a negative obligation not to aid or assist actors violating IHL, and (2) a positive due diligence obligation to prevent or bring to an end IHL violations by other actors. The negative obligation will be assessed below in Section 5 (‘Complicity’). Moving now to the positive aspect of ‘to ensure respect’, first, it must be determined if it exists at all. Several commentators and state representatives – especially from NATO member-states – have opined that such an external obligation, in whatever form, does not exist. For instance, the US has repeatedly asserted that they promote IHL adherence as a right and not from a sense of legal obligation. For partnered operations, the US’ position is to rely on the ‘law of State responsibility and our partners’ compliance with the law of armed conflict in assessing the lawfulness of our assistance to, and joint operations with, those military partners. These views exist despite the ICRC positing that joint operations place states ‘in a unique position to influence the behaviour of those forces, and thus to ensure respect for the Conventions’. In an expert paper on CAI, Boutruche and Sassòli concluded that if the external element does exist then it would be the ‘most frequently violated provision of IHL’. Nevertheless, despite pushbacks from states regarding the ICRC’s interpretation, as a treaty provision (notwithstanding its potentially parallel customary status) state practice and *opinio juris* cannot undermine the terms of CAI if it is adequately clear. The ICJ, in the *Wall* Advisory Opinion, opined that CAI gave rise to ‘an obligation to ensure that the requirements of the instruments in question are complied with’ regardless of whether the state in question was ‘party to a specific conflict’. Zwanenburg’s recent study also convincingly argues that the terms do

142. Emphasis added.
146. Ibid.
147. ICRC (fn 78), Article 1, para 167.
149. ICRC (fn 140).
support an external obligation, a view affirmed by Kjeldgaard-Pedersen and Weisener.\footnote{151} Assuming that the external element does exist, its relevance for ad hoc military operations must be assessed. Of particular note is that the word ‘undertake’ underpinning CAI shows that the obligation is not one of result, but of conduct – e.g. it has a due diligence character.\footnote{153} As a due diligence obligation, CAI’s positive external element requires the taking of positive measures to ensure that other states comply with their own obligations; it does not mean that an involved state takes on the responsibility for the obligations of the other state. Owing to this nature – and as argued by the ICRC\footnote{154} – the amount of ‘diligence’ required by a state will depend on their proximity to the alleged violation or, as suggested by the ICJ in the \textit{Bosnian Genocide} case, the amount of ‘influence’ it has over the corresponding state.\footnote{155} For ad hoc military coalitions, this means that states actively cooperating with other states will be required to use a higher degree of diligence than those that are not; furthermore, the closer the cooperation, the higher the diligence required. Importantly, when the investigatory obligation does not arise, or states are only required to investigate until a certain point (i.e. when the identity of the alleged perpetrator(s) become(s) known), CAI will still apply, meaning that the involved states are required to use their influence to ensure that the state with the obligation to investigate satisfies it.

Ensuring that another state complies with its own obligation may take several forms. For instance, calling out a failure to investigate and/or supporting an investigation in the first place through sharing any relevant or useful information to the investigating authorities. More practically, due diligence measures can include providing funding, training, etc. to states so that they can comply with the investigatory obligation.\footnote{156} Indeed, it might be the case that less well-funded militaries simply do not have the same investigative capacities, for instance, forensic capabilities, to assess what can be extremely complex crimes. Owing to these non-invasive modes of assisting investigations, it is unlikely that issues relating to immunities will be raised.

Therefore, this section subscribes to the view that an external element within CAI exists, that the amount of diligence increases as relationships between cooperating states become stronger, and concludes that measures below that of a full unilateral investigation of other states’ personnel may be required to fulfil it. CAI importantly helps to ‘fill in’ where an independent obligation to investigate (under the grave breaches regime or the customary obligation) hasn’t been triggered by all cooperating states, but that it arises for at least one of them.

Now, finally, we turn to a notion briefly discussed – that of complicity.

\begin{itemize}
\item \footnote{151} See fn 139.
\item \footnote{152} Ibid.
\item \footnote{154} ICRC (fn 69), ‘Article 1’, para 198.
\end{itemize}
5 COMPLICITY

This section, following a brief explanation of the topic of state responsibility and its relationship to IHL, examines whether the notion of complicity may supplement the existing substantive obligation to investigate. In other words, whether states can be responsible for aiding or assisting another state within an ad hoc military coalition through failing to investigate conduct that occurred during joint operations. Article 16 of ARSIWA and CAI of the GCs are examined in turn.

5.1 Article 16 ARSIWA

The principles of state responsibility, as reflected in ARSIWA, are known as secondary rules of international law. As such, these rules determine the repercussions of a violation of international law, but do not determine the conduct required for violating the obligation in the first place.\textsuperscript{157} The establishment for state responsibility is important, not only because it gives rise to secondary obligations for the violating state (cessation, non-repetition, and remedy) but also because it increasingly plays a normative role internationally, supporting a rules-based international system.\textsuperscript{158} For a state to be responsible for an internationally wrongful act, the act must be: (a) attributable to that state, and (b) violate an international obligation binding upon it at the time of the conduct.\textsuperscript{159}

The notion of complicity – or, ‘aid or assistance’ in ARSIWA – recognizes that state responsibility can be triggered below the usual threshold required for violating an international obligation. Article 16 reads:

[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: a) that State does so with knowledge of the circumstances of the internationally wrongful act; and b) the act would be internationally wrongful if committed by that State.

It is within this provision that multilateral accountability regarding coalition partners and material assistance provided to states alleged to violate IHL is primarily discussed.\textsuperscript{160} Article 16 is unique as it is concurrently a primary and secondary ‘rule’ (contrary to state responsibility’s primary existence as reflecting secondary rules): in addition to creating obligations following wrongful conduct, Article 16 also creates a substantive obligation not to aid or assist another state in the commission of a wrongful act.\textsuperscript{161} Therefore, aid or assistance is a ‘derivative responsibility’ of another state’s internationally wrongful act and, importantly, responsibility arises regardless of the

\textsuperscript{159} ARSIWA, Article 2.
illegality of the aiding or assisting conduct itself.162 Notably, however, an aiding or assisting state will only be responsible for the extent of its own conduct and not the underlying conduct in full.163 This is important in our situation as, stemming from the previous analysis, states may not have triggered the initial obligation to investigate. In these circumstances, Article 16 may complement this gap. It should be noted, however, that under Article 16, a state must have ‘intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct’, a high threshold.164

As assessed thus far, failing to fulfil the obligation to investigate once it is triggered, whether it relates to a grave breach or any other war crime, constitutes an internationally wrongful act.165 Therefore, for a state to be responsible for aiding or assisting a violation of the obligation to investigate, it must first have aided or assisted somehow in the failure to investigate, intended to assist the internationally wrongful act – in this case, the failure to adequately investigate, rather than the underlying alleged violation of IHL – and the obligation to investigate was triggered for the assisted/aided state at the relevant time.166 This situation is separate from aiding or assisting the underlying alleged serious violation of IHL, meaning that even states that are not involved in the specific conduct which triggered the obligation to investigate may still aid or assist in the violation of the separate obligation to investigate.

The initial issue with Article 16’s application to the failure to investigate is whether a state can be considered to have ‘aided or assisted’ an internationally wrongful act through omission. The ILC enumerates examples of aid or assistance as, inter alia, ‘by knowingly providing an essential facility or financing the activity in question’, with the language ‘voluntarily assists or aids another State in carrying out conduct ...’ implying that only positive action qualifies.167 Indeed, Article 16 is often raised in instances such as the provision of arms to actors alleged to use them in violation of IHL.168 The ICJ, in the *Bosnian Genocide* case, stated: ‘complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of genocide ...’.169 This dictum is supported by the majority of scholars, who broadly agree that mere approval of conduct does not amount to aid or assistance.170 Owing to the nature of a lack of investigation, this ostensibly occurs owing to a failure to take

163. ILC (fn 157) 66.
166. Note, while the customary obligation to investigate applies to all states, states not party to the relevant underlying treaties (e.g. GCs and API) will not be bound as a means of treaty law if aiding and assisting another state in violation of these obligations. This is the case for those states (e.g. US, Israel and Türkiye, among others) that have not ratified API which introduced a wider category of grave breaches in IACs. In practice, this is not an insurmountable issue. For general issues of legal interoperability, see Finucane (fn 2).
167. ILC (fn 157) 66.
168. David (fn 160).
action. Therefore, omitting to contribute to another state’s investigation or failing to urge them to investigate is likely not aiding or assisting in the violation of the obligation to investigate.

Violations of the obligation to investigate can also occur, however, when an investigation was started that did not meet the requisite standards or, especially relevant for the purposes of Article 16, when states work together to prevent or impede an investigation. In instances when a state actively contributes to the diffusion of accountability from an alleged war crime committed during an ad hoc coalition operation, this might constitute aiding or assisting in the violation of the obligation to investigate. This could be, for example, through shielding or the suppression of evidence. Even though such conduct may appear to constitute inaction, when a decision has been made to shield individuals or suppress evidence this conduct will no longer constitute an omission for the purposes of Article 16. On a more multilateral level, where a body is created within an ad hoc coalition with the intention to obfuscate rather than investigate allegations of serious violations of IHL – such as the ‘Joint Incidents Assessment Team’ created by the coalition of states operating in Yemen – or was established with the intention to investigate but subsequently becomes counter-productive, this arguably also amounts to the actus reus of aiding or assisting in the violation of the obligation to investigate. For this to arise, the underlying obligation to investigate must have been triggered by one of the coalition states in the first place. Article 16 will therefore apply to those states actively attempting to diffuse accountability in violation of the obligation to investigate, considering that at least one of the coalition states has triggered the obligation to investigate.

5.2 Common Article I

Regarding CAI of the GCs, stemming from the negative part of the external obligation to ensure respect with IHL, intention to facilitate underlying wrongful conduct is not required for CAI to be violated. Owing to CAI’s existence as a primary rule of international law specifically requiring states to ensure respect for IHL, providing support to other states in the knowledge that such support will be used to commit violations of humanitarian law would therefore violate common Article 1 even if Article 16 is not violated. As such, the ICRC’s most recent commentary to CAI asserts that during multinational operations the negative obligation not to aid or assist the violation of IHL requires that a state must ‘opt out of a specific operation if there is an expectation, based on facts or knowledge of past patterns, that it would violate the Conventions’.


174. Ibid at para 194.
This analysis is particularly relevant, as when states act in ad hoc military coalitions it can be assumed that past actions will influence future conduct (for instance, continued allegations against the coalition in Yemen of targeting civilians). Therefore, repeated violations of the obligation to investigate would entail an obligation on other states involved in military operations with them to stop joint operations. As investigations are viewed as methods of ensuring respect with one’s own IHL obligations (from the first limb of CAI), it is then logical that repeated failures to do so would require other states within ad hoc military coalitions to opt out of future operations.

6 CONCLUSION

6.1 Legal conclusions

The obligation to investigate alleged serious violations of IHL is an essential feature of ensuring accountability, preventing future IHL violations, and improving military efficiency both during and after armed conflict. Indeed, the UK’s military manual states that ‘[f]ailure by belligerent governments to investigate and, where appropriate, punish the alleged unlawful acts of members of their armed forces can contribute to the loss of public and world support, leading to isolation for the state involved’. Having considered present trends of ad hoc military cooperation during armed conflict, this study has therefore attempted to holistically map the potential legal avenues through which investigations may be triggered and carried out in such settings.

First, it was concluded that both the grave breaches regime and the customary obligation to investigate give rise to an obligation to investigate for the state of nationality of the alleged perpetrator of a grave breach or war crime and the state on whose territory the conduct was allegedly committed on. Furthermore, the requirement to provide assistance in criminal matters (under API and CIHL Rule 161) means that states with access to unique evidence, e.g. stemming from the multilateral operation giving rise to the alleged grave breach or war crime, must investigate and prepare that information for the state with the primary obligation to investigate. Cooperation is therefore a key requirement between military partners in ad hoc coalitions. Owing to the customary obligation to investigate’s application to a wider range of conduct than the grave breaches regime (which is limited to conduct in IACs), it is arguably the more relevant source for the obligation to investigate in ad hoc military coalitions, although recent developments in the armed conflict situation in Ukraine may generate grave breaches prosecutions. Furthermore, in both the grave breaches regime and the customary obligation, preliminary investigations were found to be required when the identity of the alleged perpetrators is unknown. It is argued that this preliminary obligation to a large extent remedies the identified diffusion of responsibility in multilateral military operations.

175. UNHRC (fn 9) 5: ‘[i]n each of its reports, the Group of Eminent Experts has repeatedly reminded the coalition of its obligations to take all feasible measures to protect civilians from the effects of hostilities, and to abide by the principles of distinction, proportionality and precautions in attack. The Group remains concerned that the coalition is failing to meet those obligations’.
178. Todeschini (fn 12).
179. See Jenks (fn 16).
Thereafter, CAI was found to complement the substantive obligation to investigate by requiring that states help to ensure that other states in an ad hoc military coalition satisfy their primary obligation to investigate through, for instance, providing funding. CAI is therefore a crucial addition to the legal framework as it applies even where states are not initially obliged to investigate through either the grave breaches regime or the customary obligation. Furthermore, the amount of diligence required by CAI increases the closer the relationships between states become which are naturally heightened in ad hoc military coalitions.

Finally, the notion of complicity was examined. It was found that, in general, a state cannot be found responsible for complicity in the violation of the obligation to investigate solely through omission, unless this turns into shielding or the suppression of evidence. However, in situations where an active attempt to diffuse or eschew accountability is made, a state may be considered to be aiding or assisting in the violation of the obligation to investigate. Furthermore, CAI’s more expansive conceptualization of complicity may require states to opt out of an ad hoc military coalition if its partner states have a clear and demonstrated history of violating the obligation to investigate.

6.2 Final remarks

Despite identifying an overlapping combination of legal sources that support the obligation to investigate’s application in ad hoc military coalitions, in practice, requiring the investigation of the conduct of partner states remains in tension with states’ continued expansive approach towards the immunity from foreign criminal jurisdiction of military personnel. In highlighting a lack of legal vacuum surrounding the obligation to investigate serious violations of IHL during ad hoc military cooperation, it becomes apparent that a sharp disconnect remains between the international community’s acceptance of war crimes as concerning enough to remove barriers to their prosecution and states’ continuing preference to solely operate criminal jurisdiction over their own military forces. These concerns also strike to the core of IHL’s state-centric enforcement architecture. Nevertheless, accountability in ad hoc military coalitions can still be secured while respecting state sovereignty, in line with the differing investigative steps examined above. Pending the outcome of the ILC’s work on the immunity of state officials from foreign criminal jurisdiction and states’ reaction to it, it is therefore desirable for states engaged in ad hoc military coalitions to ab initio clarify investigatory arrangements between themselves and transparently recognize the legal repercussions of alleged war crimes going un-investigated. In doing so, participating states will – in addition to complying with their legal obligations – vastly improve the legitimacy of their military forces and the mission.

181. Consistent with Cryer’s argument that accountability and state sovereignty are not inherently opposed (fn 64).