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The duty to investigate in situations of armed conflict: an examination under international humanitarian law, international human rights law, and their interplay

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The Duty to Investigate in Situations of Armed Conflict

The duty to investigate in situations of armed conflict

An examination under international humanitarian law, international human rights law, and their interplay

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It was during my exchange semester in Sydney, when during a lecture by Yuval Shany I first jotted down 'thesis idea: IHL and human rights?'. Little did I know, this would – after working a case on investigations into human rights violations during armed conflict while interning at Böhler Advocaten – grow into a research proposal and dissertation which I wrote at Leiden University, and ultimately finished when working with the Netherlands Ministry of Foreign Affairs.

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Table of abbreviations

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
ACmHPR	African Commission on Human and Peoples' Rights
AP I / AP II	Protocols to the 1949 Geneva Conventions
Appl No	Application Number
ARSIWA	ILC Articles on the Responsibility of States for Internationally Wrongful Acts
art	article
c.s.	*cum suis* (and associates)
CA	Common Article (to the Geneva Conventions)
CAR	Central African Republic
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CDDH	*Comité directeur pour les droits de l'homme* (Council of Europe Steering Committee for Human Rights)
CED	International Convention for the Protection of All Persons from Enforced Disappearance
cf.	confer
CIA	US Central Intelligence Agency
CIL	customary international law
CoE	Council of Europe
Comm. No.	Communication Number
CtAT	Committee against Torture
CtED	Committee on Enforced Disappearances
CtEDAW	Committee on the Elimination of Discrimination against Women
CtRC	Committee on the Rights of the Child
dec.	decision
DNA	Deoxyribonucleic acid
doc	documents
DoD	United States Department of Defence
Dr.	doctor
ECHR	European Convention on Human Rights
ECmHR	European Commission on Human Rights
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
edn	edition
eds	editors
e.g.	exempli gratia (for example)
et al.	et alia (and others)

etc	et cetera
ETS	European Treaty Series
FARC	*Fuerzas Armadas Revolucionarias de Colombia* (Colombian Revolutionary Armed Forces)
ff	and following
fn	footnote
FT	Floris Tan
FYROM	Former Yugoslav Republic of Macedonia
GC	1949 Geneva Convention
[GC]	Grand Chamber
HRC	Human Rights Committee
IAC	international armed conflict
IACmHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ibid	ibidem
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ / I.C.J.	International Court of Justice
ICL	international criminal law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IED	improvised explosive device
IHFFC	International Humanitarian Fact-Finding Commission
IHL	international humanitarian law (also, the law of armed conflict)
IHRL	international human rights law
ILA	International Law Association
ILC	International Law Commission
I.L.M.	International Legal Materials
IMT	International Military Tribunal
IRA	Irish Republican Army
IS	Islamic State
ISAF	International Security Assistance Force
LOAC	law of armed conflict
LOIAC	law of international armed conflict
Mr.	mister
MRTA	*Movimiento Revolucionario Túpac Amaru* (Túpac Amaru Revolutionary Movement)
n	footnote
NATO	North Atlantic Treaty Organization
NB	nota bene
NGO	non-governmental organisation
NIAC	non-international armed conflict
no	number
NSAG	non-State armed group
OAS	Organization of American States
OAU	Organisation of African Unity

OSCE	Organisation for Security and Co-operation in Europe
p.	page
para.	paragraph
PCIJ	Permanent Court of International Justice
PIL	public international law
PKK	Partîya Karkerên Kurdistanê (Kurdistan Workers' Party)
POW	prisoner of war
Res	Resolution
RoE	rules of engagement
SAS	UK Special Air Service
ser.	series
St.	Saint
TCIDT	torture or cruel, inhuman or degrading treatment or punishment
TRNC	Turkish Republic of Northern Cyprus
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKTS	United Kingdom Treaty Series
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
US / USA	United States of America
USD	US Dollar
v	versus
VCLT	Vienna Convention on the Law of Treaties
VRS	Army of the Republika Srpska

1 Introduction

1 INVESTIGATING INCIDENTS IN ARMED CONFLICT SITUATIONS

1.1 The role of investigations during armed conflicts

During armed conflict, human suffering is inevitable. Incapacitating the opposing party's armed forces necessarily includes killing and injuring, and civilians inescapably get caught up in armed clashes. Whether civilians are made the direct target of attack, whether they are misidentified as legitimate targets, or whether they are simply too close to a target when it is hit by an air strike, no war has ever been fought without civilian casualties. Both international humanitarian law (IHL) and international human rights law (IHRL) govern whether loss of life in these scenarios is lawful or not. Assessing lawfulness, however, requires more than just knowing the applicable law. It also requires application of the rules to the facts of a specific incident taking place during armed conflict. Yet, the chaos accompanying military operations and the propaganda of the warring parties – the 'fog of war',[1] as it is often referred to – obfuscate the facts, and render it difficult to gain reliable information of what happens on the ground. This, in turn, makes it imperative to ensure that an effective and thorough investigation is conducted: without proper knowledge of the facts, any legal assessment is destined to remain abstract.

If it remains unclear whether the law was violated, because the facts of an incident are not clarified, this also necessarily prevents accountability processes from running their course. Even if suffering is inevitable during armed conflict, the *response* to violations is often within our control, and can do much to either alleviate, or exacerbate the suffering of victims of war. A very first step, upon which others depend, is unearthing what happened. This in itself provides a form of satisfaction for victims, who at the very least know the truth of what has befallen them. Moreover, it achieves accountability in its most basic sense: actors must 'give an account' of what happened.[2] This

1 See e.g. Victor M Hansen, 'Developing Empirical Methodologies to Study Law of War Violations' (2008) 16 Willamette Journal of International Law & Dispute Resolution 342, 346 and 358.

2 Deirdre Curtin and André Nollkaemper, 'Conceptualizing Accountability in International and European Law' (2005) XXXVI Netherlands Yearbook of International Law 3, 8; Katharine

then allows for further examination of the lawfulness, and potential further consequences such as an acknowledgement of responsibility – whether or not following legal proceedings – and a form of reparation. Knowledge of the facts, therefore, is both a prerequisite for, and an element of, accountability.

This study examines to what extent, and how, States must investigate incidents occurring during armed conflicts which have potentially violated IHL or IHRL. It aims to contribute to transparency and accountability in relation to violations during armed conflicts, by clarifying States' duty to investigate such violations, and individuals' *right* to an investigation. Because both IHL and IHRL govern conduct during armed conflict, and because both regulate to what extent and how infractions must be investigated, but do so differently, this study also engages in-depth with the 'interplay' between IHL and IHRL: the interaction between the simultaneously applicable norms of both regimes.

1.2 Investigations during armed conflicts: a search for clarity

1.2.1 An example from practice

An example from practice may help illustrate what is at stake, and a number of the issues which arise. In the night of 2 June 2015, the Global Coalition to Defeat ISIS (Islamic State; IS) carried out an aerial bombardment of an IS ammunition and explosives depot, used to build improvised explosive devices (IEDs) in Hawija, Northern Iraq. The depot contained significantly more explosives than apparently anticipated, and an enormous explosion ensued, levelling an entire block of civilian houses, killing at least 70 civilians and injuring many more.[3] The international coalition has been reluctant in making public any information on what has happened, and which State was responsible for the fighter jet carrying out the bombardment.[4] The Netherlands has reluctantly

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Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017) 5-8.

3 Kees Versteegh and Jannie Schipper, 'De Nederlandse "precisiebom" op Hawija' [The Dutch "precision bomb" on Hawija], *NRC Handelsblad* 19 October 2019, 25-9 https://www.nrc.nl/nieuws/2019/10/18/de-nederlandse-precisiebom-op-een-wapendepot-van-is-a3977113(last accessed 15 July 2021). For a brief summary in English, see Jannie Schipper and Kees Versteegh, 'Dutch Bomb Killed Seventy in Iraq', *NRC* 18 October 2019, < https://www.nrc.nl/nieuws/2019/10/18/dutch-bomb-killed-seventy-in-iraq-a3977301> (last accessed 15 July 2021).

4 In its strike releases, the Coalition merely identifies which States took part in bombardments, without specifying which State carried out which attack. See the strike release for 2 June 2015, available at https://www.inherentresolve.mil/Portals/14/Documents/Strike%20Releases/2015/06June/2%20June%20Strike%20Release.pdf?ver=2017-01-13-131136-640 (last accessed 15 July 2021). Within the international coalition, it has been agreed not to make public which State is responsible for specific bombardments; See Netherlands District Court The Hague (*Rechtbank 's-Gravenhage*) 15 October 2019, ECLI:NL:RBDHA:2019:10843 [4.13], in a case brought by two Iraqi victims of a coalition air strike, but who were insufficiently

acknowledged it carried out the attack,[5] after journalists had traced the attack back to its forces. Over the course of its involvement in the fight against IS, the Netherlands Prosecutor's Office has investigated four incidents for potential violation of the applicable rules.[6] The investigation by the Prosecutor's Office found no criminal wrongdoing in any of the four incidents, and discontinued further investigations.[7]

This brief example shows a number of difficulties encountered during investigations into military operations. Firstly, the facts are often complex and it may be difficult to establish what occurred and who is responsible. Secondly, victims of war violence are dependent on investigation by either the State, or by journalists, to learn the truth of what has befallen them, and are therefore unlikely to obtain some form of justice or accountability. So long as there is no transparency regarding who is responsible for a specific military operation, who carried out an air strike, and what the process was leading up to an attack, victims have no place to turn to if they wish to assert their rights, obtain some form of compensation or satisfaction, or hold to account those responsible. For this, they are completely dependent on an effective investigation. Moreover, whereas the Dutch Prosecutor's Office likely has investigated the incident, because its findings and lines of argument have not been made public, this hampers the rights of victims and their next of kin to participate at critical junctions in the investigation. Thirdly, the decision not to prosecute may on its surface seem favourable to service members and commanders involved, but the lack of transparency in the decision-making process potentially opens the investigation up to question. Because the Netherlands have never been open about which air strikes they carried out, it came as a shock to Parliament when journalists made public their finding that the Netherlands had been responsible for the strike leading to the deaths of 70 civilians.[8] As a result, there is a chance this investigation is reopened at some point in the future, to remove any lingering doubts as to the thoroughness and genuineness of the investigation. Insofar as investigation into military operations is harmful for armed forces' morale, a prompt and thorough investigation can do much to provide clarity as soon as possible. But where investigations are either insufficiently thorough, or lack transparency, this opens them up to the risk

able to show they had become victims of a Dutch air strike, and where the Netherlands Government refused giving further information citing the confidentiality of any further information, also with regard to coalition allies.

5 'Netherlands Admits Killing up to 70 Civilians in Botched Airstrike in Iraq' (4 November 2019), *Deutsche Welle*, < https://www.dw.com/en/netherlands-admits-killing-up-to-70-civilians-in-botched-airstrike-in-iraq/a-51109053 > (last accessed 15 July 2021).

6 As made clear in a letter by the Ministers for Foreign Affairs, Defence, and Foreign Trade and Development Cooperation to Parliament; *Kamerstukken II* 2017/18, 27925, no. 629 (letter dated 13 April 2018), at 11.

7 Ibid, at 12.

8 See Netherlands Parliamentary publications, *Kamerstukken II* 2017/18, 27925, no. 631, at 12.

of future misgivings which lead to their reopening. Thus, a prompt and effective investigation is not just in the interest of victims, it is also in the interest of service members, for whom the constant threat of investigation or re-investigation can loom large, potentially affecting morale as well as their legal interests.[9] Fourthly, the lack of transparency can also be harmful for the democratic legitimacy of military operations. If Members of Parliament are unaware of the 'costs' of war, if they do not know the effects of military operations carried out abroad, they cannot take an informed decision on whether or not their country ought to take part in a military mission. For the proper functioning of the democratic fiat for the use of armed force, effective investigations are therefore essential.

As a final remark, in lieu of the results of an effective investigation, it is impossible to assess the lawfulness of the air strike. Reactions to the news of the high number of civilian casualties lean towards the idea that a war crime has occurred, which was potentially 'kept under wraps' by ways of a secret investigation. Whether the law of armed conflict was violated, let alone whether a war crime occurred, however, cannot be concluded based on the high number of casualties alone. That would depend on the *expected* civilian costs, weighed against the *anticipated* military advantage of the destruction of the ammunition and explosives depot – and is in other words dependent on a proportionality assessment based on the information that was available at the time of the strike, *ex ante*.[10] Should the strike have been based on deficient information, this might indicate a lack of precautions in attack, but a lack of precautions, even when leading to civilian casualties, does not constitute a war crime.[11] As a 'non-serious violation', a lack of precautions therefore does not necessitate a criminal response.[12] Thus, it is conceivable that the Prosecutor's Office's investigation concluded that although IHL was violated due to a lack of precautions, there had not been any criminal wrongdoing, leading to a discontinuation of the investigation. But because there has not been any transparency regarding this decision, and because no State responsibility has been established or acknowledged, the result has rather been a storm of critique, calling for further investigation. This process is harmful for victims

9 Françoise J Hampson, 'An Investigation of Alleged Violations of the Law of Armed Conflict' (2016) 46 Israel Yearbook on Human Rights 1, 3.

10 Protocol Additional to the Geneva Conventions, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 3 (hereinafter: AP I), art 57(2)(a)(iii); Rule 14 of the ICRC Customary IHL Study, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *ICRC Customary International Humanitarian Law – Volume I: Rules*, vol I (Cambridge University Press 2005) 46.

11 AP I, art 57; Rule 15 and following of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 10) 51ff.

12 See Alon Margalit, *Investigating Civilian Casualties in Time of Armed Conflict and Belligerent Occupation. Manoeuvring between Legal Regimes and Paradigms for the Use of Force* (Brill Nijhoff 2018) 11.

and service members alike, and underlines the importance of proper and prompt investigations, which clarify the facts, determine the lawfulness of an incident, and where appropriate lead to State responsibility and/or criminal proceedings.

1.2.2 *Stating the first problem: diverging investigative requirements under IHL and IHRL*

The example of the air strike on Hawija showcases the importance of investigations during armed conflicts. The rights and interests of victims and their next of kin, of individual service members and their commanders, as well as broader democratic interests, all require proper investigation of potential violations of human rights and IHL.

The response to the air strike also exemplifies the difficulties encountered when investigating incidents arising from armed conflict situations. While many are practical and political, some of these problems stem from a lack of clarity in the law. Whereas both IHL and IHRL provide for rules with respect to investigations, a first question which arises is which body of law applies, and for instance whether IHRL can govern extraterritorial air strikes. A second issue is that IHL nor IHRL fleshes out in treaty provisions, what is required of States in relation to when and how States must conduct investigations. Both issues together indicate a lack of clarity in the law, because if the question which rules apply and what those rules provide for are both unclear, an effective regulation of State conduct appears out of reach.

Beyond this fundamental lack of clarity, IHL and IHRL diverge when it comes to *what conduct must be investigated*, as well as *when* and *how the investigation must be carried out*. If we first consider the rules of IHL, it calls for criminal investigations into grave breaches of the Geneva Conventions and the Additional Protocols.[13] But IHL treaty law does not explicitly require investigation into other violations, such as a lack of precautions in attack. Moreover, whether IHL also requires investigations into breaches which are not war crimes is not clarified in treaty law, nor whether if such an obligation were to exist, criminal investigation is required. This potentially explains the Netherlands Prosecutor's Office's decision to discontinue the investigation, as no *criminal* wrongdoing had been found. This leaves open, however, whether a violation of the law occurred, for which State responsibility may exist.

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13 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31 (hereinafter: GC I), art 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 UNTS 85 (hereinafter: GC II), art 50; Geneva Convention relative to the Treatment of Prisoners of War 75 UNTS 135 (hereinafter: GC III), art 129; Geneva Convention relative to the Protection of Civilian Person in Time of War 75 UNTS 287 (hereinafter: GC IV), art 146 (all adopted 12 August 1949, entered into force 21 October 1950); AP I, art 85. See further Chapter 3.

IHRL, meanwhile, provides very little by way of treaty rules with respect to investigations. Yet, human rights courts and treaty bodies have developed an extensive jurisprudence on the subject, which appears more extensive than IHL. Under IHRL, courts and treaty bodies have found that any violent death, especially when caused by the use of force by State agents, must in principle be investigated.[14] Criminal prosecution may be required if the deprivation of life was unlawful, as well as transparency of the investigative process.[15] Victims and their next of kin must be sufficiently involved in the investigation, and there must be a degree of transparency with a view to ensuring public confidence in a State's adherence to the rule of law, as well as ensuring the broader right to truth.[16] Finally, IHRL requires a fully independent investigation. Military practices, however, are often to rely on command investigations, where it is the direct commander within the chain of command, who conducts the (initial) investigation. This therefore leads to tensions between norms of IHL, and norms of IHRL. Assuming of course, that IHRL applies in the first place. Human rights law's applicability is limited to individual victims 'within the jurisdiction' of the State, and whether aerial bombardments lead to jurisdiction has been a bone of contention, with various courts and bodies coming to different conclusions.[17]

If we put all the above information together, we can see how the lack of clarity regarding the norms governing the duty to investigate affects investigative practices and their effectiveness. The applicable IHL is unclear when it comes to the duty to investigate, with some authors contesting the existence of such an obligation in the first place,[18] and with others arguing over whether only war crimes require an investigation,[19] or whether this is so for all violations.[20] Moreover, IHL treaty law does little by way of clarifying the standards investigations must adhere to, which for instance renders it open to discussion whether transparency is strictly required.[21] IHRL is more explicit

14 See Chapter 5, §4.2; Chapter 6, §4.2; Chapter 7, §4.2.
15 See Chapter 5, §5; Chapter 6, §5; Chapter 7, §5.
16 Ibid.
17 See the discussion in Chapter 4.
18 Sandesh Sivakumaran, 'International Humanitarian Law' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (1st edn, Oxford University Press 2010) 528.
19 Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 Harvard National Security Journal 31.
20 Amichai Cohen and Yuval Shany, 'Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts' (2011) 14 Yearbook of International Humanitarian Law 37; Alon Margalit, 'The Duty to Investigate Civilian Casualties During Armed Conflict and Its Implementation in Practice' (2012) 15 Yearbook of International Humanitarian Law 155.
21 Noam Lubell, Jelena Pejic and Claire Simmons, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* (The Geneva Academy of International Humanitarian Law and Human Rights & International Committee of the Red Cross 2019) 28–30.

in both the requirement of investigating deaths resulting from the use of force, as well as regarding investigative standards. But the extraterritorial applicability of IHRL as a whole in situations such as these is not without its controversy. Moreover, even in situations where the applicability of IHRL itself is beyond reasonable controversy, such as where States operate on their own territories, how the IHL and IHRL norms regarding the duty to investigate interact, is unclear.

1.2.3 Stating the second problem: the complex interplay between IHL and IHRL

Despite the historical view to the contrary, it is now well-established that during armed conflict, IHL and IHRL apply alongside each other.[22] These legal regimes, both branches of public international law, do not, however, regulate *how* they interact. Moreover, international law does not stipulate a hierarchy between the various sources of international law, or its various specialised branches. Coupled with the proliferation of rules within the international legal system, this has led to what is called the 'fragmentation of international law'. Overlapping norms and regimes pertaining to the same conduct apply simultaneously, but often pull in different directions, with no clear hierarchy between them, and with no hierarchy between (judicial) institutions tasked with interpreting these various norms.[23] The co-application of, and interplay between, IHL and IHRL must be positioned against this background of fragmentation.

The clearest judicial guidance on how to assess the interplay of IHL and IHRL, is to be found in pronouncements by the International Court of Justice (ICJ). In two Advisory Opinions, it articulated the relationship as one of '*lex specialis*'.[24] While that seemingly clarifies how we must assess interplay, as will be shown later on in this study,[25] because the ICJ does not elaborate on the manner in which this maxim is to be applied, it is unclear whether it is to function as a rule of conflict avoidance or of conflict resolution,[26] and whether the *lex specialis* is to be seen as a specification of the *lex generalis*, or

22 See Chapter 9.

23 Mads Andenas and Eirik Bjorge, 'Introduction: From Fragmentation to Convergence in International Law' in Eirik Bjorge and Mads Andenas (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015) 4-7. Further, see Chapter 9.

24 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996) *I.C.J. Reports* 1996, p. 226 [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004) *I.C.J. Reports* 2004, p. 136 [106]. Further, see Chapter 9.

25 See Chapter 9.

26 Marko Milanović, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford University Press 2011) 113.

as an exception thereto.[27] Adding to the confusion, in a later contentious judgment the ICJ no longer mentions the principle of *lex specialis*, leaving the exact status of the applicability of the principle uncertain.[28]

The ICJ's ambiguous findings, rather than resolving the issue, have spawned a widespread debate on how issues of interplay between IHL and IHRL must be resolved. In essence, three main views have been put forward which all to some extent invoke the ICJ's case-law in support.[29] On one end of the spectrum, there is the *separation* or *displacement* approach. Under this approach, the applicability of IHL, as *lex specialis*, is considered to displace IHRL entirely, thus rendering IHRL inapplicable. In this view, IHRL is considered the law of peace, IHL the law of war;[30] both operating on a mutually exclusive basis.[31] On the other end of the spectrum, an *integrationist* or *merger* approach has been proposed. In this model, the rule that applies is the one providing the most extensive protection in a specific case regardless of whether it is a rule of IHL or IHRL,[32] because both are predicated on protecting human dignity.[33] The *specialis*, in this view, is the rule most attuned to individual protection. Taking up a middle ground is the *complementarity* model, which posits that both bodies of law apply concurrently, with harmonious interpretation or systemic integration as the key factor for interplay.[34] Several variations and nuances exist within this model, but the essence would appear to be a situation-by-situation assessment of interplay, interpreting both bodies of law in light of one another, and determining on the facts of the situation which body of law is to serve

27 ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*, finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682 (2006), at 49-59 (ILC Report 2006); see also Cordula Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Israel Law Review 310, 340; Nehal Bhuta, 'States of Exception: Regulated Targeted Killing in a "Global Civil War"' in Philip Alston and Euan McDonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford University Press 2008) 257.

28 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment (19 December 2005) *I.C.J. Reports* 2005, p. 168 [216].

29 Oona A Hathaway and others, 'Which Law Governs during Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law' (2012) 96 Minnesota Law Review 1883, 1893–1912.

30 Bhuta (n 27) 245–6.

31 Hans-Joachim Heintze, 'Theories on the Relationship between International Humanitarian Law and Human Rights Law' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013) 55.

32 Bhuta (n 27) 251–2.

33 E.g. Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 American Journal of International Law 239; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012). See also *Prosecutor v Anto Furundžija*, ICTY (Trial Chamber) Judgement (10 December 1998) IT-95-17/1 [183].

34 Heintze (n 31) 57; Bhuta (n 27) 252; Helen Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' in Helen Duffy, Janina Dill and Ziv Bohrer (eds), *Law Applicable to Armed Conflict* (Cambridge University Press 2020).

as the primary frame of reference, and which remains to operate in the background.[35] This also means that which norm is to be considered *specialis* can vary, and depending on context can be either IHL or IHRL. A lack of clarity therefore persists.

The resulting obscurity is detrimental to legal certainty for States, who cannot properly determine their legal obligations during armed conflicts, and for individuals, who are left uncertain about their rights when they are already at their most vulnerable. International law can only be effective if its legal concepts are sufficiently developed to be communicated clearly.[36] This is not currently the case. This state of affairs is harmful for the effectiveness of the international law governing armed conflict, for the practicality and effectiveness of individual rights, accountability for violations, and the protection of individuals during armed conflict more broadly. In the words of the ICJ, 'The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.'[37]

2 Central research questions

2.1 Questions guiding the enquiry

Against the background of the importance of investigations for victims of war, as well as States and their armed forces, and in light of the lack of clarity which persists regarding the divergent investigative obligations under IHL and IHRL, and especially under their interplay, this study means to answer the following question:

> *What are the scope of application and contents of States' duty to investigate (potential) violations during armed conflicts, under international humanitarian law, international human rights law, and their interplay?*

Insofar as research projects have been carried out into the duty to investigate armed conflict related incidents, they have often focused either solely on one or other of the two applicable legal regimes that are the focus of this study,

35 Daragh Murray and others, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford University Press 2016).

36 Paul F Diehl, Charlotte Ku and Daniel Zamora, 'The Dynamics of International Law: The Interaction of Normative and Operating Systems' (2003) 57 International Organization 43, 43.

37 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* Judgment (30 November 2010) *I.C.J. Reports* 2010, p. 639 [66].

that is, on either IHL or IHRL, but not on their simultaneous application.[38] Insofar as they have engaged with both, they have yielded wildly varying results.[39] It is submitted this is in part due to the lack of clarity that persists concerning the interplay between IHL and IHRL, and whether IHL or IHRL is taken as a starting point.[40] This study aims to move beyond such limitations, by first examining duties of investigation separately under IHL and IHRL, to then turn to interplay, develop an understanding and an approach towards resolving the interaction of norms of IHL and IHRL, to finally put all these pieces together in answering the research question.

This results in the following sub-questions, which together add up to an answer to the central research question:

1. Are States under an obligation to investigate (potential) violations of IHL? If so, what are the scope of application and contents of such an obligation?
2. Are States under an obligation to investigate (potential) violations of IHRL? If so, what are the scope of application and contents of such an obligation, in particular during armed conflict and occupation?

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38 This is by no means a criticism of carrying out research into the duty to investigate under one of these branches only; this is certainly a worthwhile exercise. It is merely submitted that in order to more fully understand State obligations and individual rights relating to investigations, both regimes must be considered. For research on the duty to investigate under IHL, see e.g. Hampson (n 9); Schmitt (n 19). For research on the duty to investigate under IHRL, see e.g. Philip Leach, Rachel Murray and Clara Sandoval, 'The Duty to Investigate Right to Life Violations across Three Regional Systems: Harmonisation or Fragmentation of International Human Rights Law?' in Carla Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill Nijhoff 2017); Noëlle Quénivet, 'The Obligation to Investigate After a Potential Breach of Article 2 ECHR in an Extra-Territorial Context: Mission Impossible for the Armed Forces?' (2019) 37 Netherlands Quarterly of Human Rights 119; Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford University Press 2009).

39 Compare e.g. Watkin, who finds that investigating every casualty during armed conflict is clearly unfeasible, with Breau and Joyce, who argue for an obligation to monitor all civilian casualties, and also outline obligations with regard to combatant deaths; Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98 American Journal of International Law 1, 33; Susan Breau and Rachel Joyce, 'The Responsibility to Record Civilian Casualties' (2013) 5 Global Responsibility to Protect 28. For other examples, see Margalit (n 12); Vito Todeschini, 'Investigations in Armed Conflict: Understanding the Interaction between International Humanitarian Law and Human Rights Law' in Paul De Hert, Stefaan Smis and Mathias Holvoet (eds), *Convergences and Divergences Between International Human Rights, International Humanitarian and International Criminal Law* (Intersentia 2018).

40 Normative presuppositions of authors may play a role in the outcomes of their research, and in how they shape their research. See Anthony Bradney, 'Law as a Parasitic Discipline' (1998) 25 Journal of Law and Society 71, 72; Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 33 Law Quarterly Review 635, 635.

3. How do norms of IHL and IHRL interact, and how can instances of normative overlap be resolved under the interplay of both regimes?
4. How are normative overlaps between investigative obligations under IHL and IHRL resolved under the interplay of both regimes?

2.2 Breaking down the research question: relevant concepts and terminology

Let us now break down the various steps involved in the research project, and set the necessary limitations to the enquiry. The following explores the key concepts relied upon in the central research question, simultaneously clarifying the scope of the enquiry, and limiting its range.

Investigation

Given the focus on the 'duty to investigate;', a first term we must preliminarily define is what 'investigation' means for these purposes. Firstly, 'investigation' connotes fact-finding, but it is also more than that. It is fact-finding, coupled with a *legal assessment*, an examination of the lawfulness of certain conduct, or of an 'incident' involving a potential violation of IHL or IHRL. This means that we are concerned with *ex post facto* investigations, which follow-up on potential violations. Thus, whereas 'investigations' might colloquially be understood to include *ex ante* 'impact assessments' and the like as well, such assessments fall outside the scope of this study. This is not to say that investigations cannot also serve forward-looking aims, such as informing lessons-learned processes, and to identify for instance systemic shortcomings in targeting exercises; they most certainly do. But the investigation we are concerned with, always pertains to an incident in the past.

Secondly, the term 'investigation' itself does not yet reveal its legal character. We may distinguish between criminal investigations, and administrative or disciplinary investigations.[41] Criminal investigations are aimed at ascertaining whether there is evidence of individual criminal responsibility, with a view to criminal trials. The aim of instituting criminal proceedings influences how an investigation can and must be carried out; for example in gathering and storing evidence, the chain of custody must be closely safeguarded. Administrative investigations aim to establish the facts and examine the lawfulness thereof, to establish State responsibility for a violation, and potentially to mete out disciplinary punishment against individuals responsible for such non-criminal violations. Both types of investigation in principle fall within the scope of the enquiry, although as will be seen, most of the available sources of law

41 Lubell, Pejic and Simmons (n 21) 10–1.

address criminal investigations more so than they do administrative investigations.

Thirdly, it is important to note that investigations are a progressive *process*. Their essence is always to bring to light what has happened and to establish whether the law may have been violated. But when a first 'investigation' starts, it will normally be unknown whether any violation will be found, and therefore whether the investigation needs to conform to certain standards such as those required for a fair criminal process. The way the investigative process unfolds is thus dependent on what the investigation itself brings to light, and the character of the investigation and following proceedings can alter during the process. What this means, is that when a State initiates the investigation, it must leave all avenues open, and when it finds that criminal conduct has potentially occurred, the investigation must take the form of a criminal investigation. If we return briefly to the air strike on Hawija, causing 70 civilian casualties, it: (i) *can* constitute a war crime, if it the strike was intentionally directed against civilians, or was wilfully carried out whilst knowing the resulting civilian casualties would be excessive in light of any military advantage;[42] (ii) *can* constitute a non-serious violation of IHL, if it turns out that precautions in attack were lacking; and (iii) *can* constitute a completely lawful use of force. Only through investigation can it be established whether a violation has occurred, and whether this violation gives rise to individual criminal responsibility of those involved, or not. Preliminary outcomes during the investigative process therefore codetermine whether the investigation must meet criminal or administrative standards.

Finally, the definition of 'investigation' also brings us to a more substantive issue. The later stages of this study will examine in-depth when a duty to investigate first arises, in other words what *triggers* the obligation. As was explained, the material event triggering the duty is a (potential) violation of IHL or IHRL. Thus, if States have information indicating a violation potentially occurred, they must investigate. But, do they also have an obligation to *uncover* the information which *in turn* triggers the duty to investigate? In other words, do States need to actively *monitor* their conduct, even before any indication of a violation is present, in order to be aware of potential violations immediately, which then triggers a duty to investigate. This is a relevant question which is touched upon at several stages in the research. Importantly though, monitoring itself, even though this is certainly required of States in certain contexts, principally does not fall within the scope of the central research question. Monitoring obligations are addressed insofar as they are relevant to a proper understanding of the investigative system, but are not the object of enquiry as such.

42 GC I, art 50; GC II, art 51; GC III, art 130; GC IV, art 147; AP I, art 85(3).

'Scope of application' and 'contents' of the duty to investigate

By 'scope of application' of the duty to investigate, the central research question aims to uncover the material, personal, temporal, and geographic scope of the duty to investigate. This leads to questions with respect to *when* a duty to investigate arises. What type of violation gives rise to a duty to investigate? Must an investigation be conducted into any potential violations of human rights or IHL, or is this obligation limited to serious violations only? And must only clear violations be investigated, or any allegation no matter whether it is substantiated, or something in between? Other questions are who is the subject of the duty to investigate, whether there is an individual right to an investigation, whether incidents long in the past might still need to be investigated, and whether States must also conduct investigations when they operate halfway across the world.

Insofar as the research question refers to the 'contents' of the duty to investigate, it asks what *standards* investigations need to comply with. Once a duty to investigate a (potential) violation exists, *how* must States then proceed to investigate? Does it need to be a criminal investigation, or is an administrative inquiry sufficient? Must the investigation be fully independent, and does it need to be initiated immediately after a violation has come to light, or do command investigations within the chain of command, initiated perhaps after active hostilities have died down, suffice?

State obligations

The central research question enquires into *State* obligations. This study is concerned with duties of investigation of *the State*, in other words, not those of non-State actors such as non-State armed groups (NSAGs). This means, firstly, that international armed conflicts (IACs), that is conflicts between two or more States, obviously fall within the purview of the research. The extent to which States are under an obligation to investigate violations of IHL and IHRL during such conflicts is addressed, whether by their own troops or by the opposing party. Obligations of third States are equally explored. Secondly, the research also looks at non-international armed conflicts (NIACs). States' investigative obligations in respect to such conflicts – between one or more States on one side, and one or more NSAGs on the other – can pertain to the State's own conduct, but can also encompass violations committed by NSAGs. Many violations committed by NSAGs are therefore covered by this study, albeit through the lens of States' obligation to investigate them. Individual victims of war increasingly find their way to international human rights courts and treaty bodies, to assert their rights.[43] An important incentive for this research is to assist such bodies in how they approach cases where IHRL co-applies with IHL,

43 Jean-Marie Henckaerts and Ellen Nohle, 'Concurrent Application of International Humanitarian Law and International Human Rights Law Revisited' (2018) 12 Human Rights & International Legal Discourse 23, 24.

but these courts and bodies have jurisdiction to receive complaints against *States* only. In fact, the extent to which NSAGs can be bound to international human rights law, remains a hotly contested issue.[44] Future research will need to look into NSAG's responsibilities in carrying out investigations.[45]

International humanitarian law

One of the guiding terms for the research is that of 'international humanitarian law', or IHL. IHL is the law governing armed conflict.[46] It governs both international and non-international armed conflicts, as is set out further in Chapter 2. It is a pragmatic field of law which acknowledges the existence of armed conflicts and is concerned with regulating them,[47] to be distinguished from the *ius ad bellum*, the law regulating whether the resort to armed force is lawful under international law.[48] This research is primarily concerned with the four 1949 Geneva Conventions, and their 1977 Additional Protocols. These sets of treaties are most relevant when it comes to the protection of individuals from the exigencies of armed conflict, and are also most relevant when it comes to duties of investigation into violations.[49]

One further definitional issue, is the nomenclature used. 'International humanitarian law', or IHL, is a broadly accepted term, relied upon also by such institutions as the ICJ,[50] the United Nations Security Council,[51] the International Committee of the Red Cross (ICRC),[52] and the Inter-American[53] and

44 For in-depth discussion, see Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002); Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006); Fortin (n 2).

45 On this subject, see Joshua Joseph Niyo, 'The Rebel with the Magnifying Glass: Armed Non-State Actors, the Right to Life and the Requirement to Investigate in Armed Conflict' (2020) 22 Yearbook of International Humanitarian Law 63.

46 Generally, see e.g. Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013); Robert Kolb, *Advanced Introduction to International Humanitarian Law* (Edward Elgar 2014); Marco Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019).

47 See e.g. Karima Bennoune, 'Toward a Human Rights Approach to Armed Conflict: Iraq 2003' (2004) 11 University of California Davis Journal of International Law & Policy 171, 174.

48 See e.g. Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar 2013) 7.

49 Similarly, see Margalit (n 12); Jacopo Roberti di Sarsina, *Transitional Justice and a State's Response to Mass Atrocity. Reassessing the Obligations to Investigate and Prosecute* (TMC Asser Press 2019).

50 *Legality of the Threat or Use of Nuclear Weapons* (n 24) [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 24) [106]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (n 28) [216].

51 E.g.UNSC Resolution 1894 (2009), UN Doc. S/RES/1894 [15].

52 E.g. Nils Melzer, *International Humanitarian Law. A Comprehensive Introduction* (1st edn, International Committee of the Red Cross 2016).

53 E.g. *Santo Domingo Massacre v Colombia* (Preliminary Objections, Merits and Reparations) Inter-American Court of Human Rights Series C No 259 (30 November 2012) [187].

European[54] Courts of Human Rights. Nonetheless, the terminology is not uncontested. Historically, 'laws of war', or *ius in bello* were most prevalent. Presently, some prefer the term the 'law of armed conflict', or LOAC, especially in military law circles.[55] A main reason for this, is that it is felt that because the law of armed conflict is meant to strike a pragmatic balance between military necessities and humanitarian considerations, the term 'humanitarian law' may lean too much towards humanitarian considerations, and is therefore unbalanced, or lop-sided.[56] Whatever the merits of such discussions, this study regards 'IHL' and 'LOAC' as synonyms, and a proper understanding of the law in any case does not hinge on what name is used. For the sake of consistency, like the majority of international institutions, this study uses the term 'IHL'.

International human rights law

The other main body of law addressed in this research project is international human rights law. By this, the study refers to the branch of international law concerned with the protection of human rights.[57] International human rights law consists of many different, partly overlapping treaty regimes, with some treaties geared towards the protection of one or several specific rights only, and others designed to safeguard a whole catalogue of rights.[58] Moreover, certain treaties have a global scope of application, whereas others are geographically limited. Although this study refers generally to 'IHRL', it does not include all human rights regimes, a selection was made.

Firstly, this study focuses on civil and political rights. One reason for this, is that as will be shown in Part II of this study, the vast majority of cases concerning the duty to investigate concerns a limited number of rights: the rights to life and liberty and security, and the rights not to be tortured, cruelly, inhumanly or degradingly treated, subjected to slavery or forced labour, genocide, or enforced disappearance.[59] Insofar as substantive rights are concerned, the emphasis of the research is therefore on the duty to investigate potential violations of these rights. Beyond the rights mentioned here, the research also explores certain rights which function to an extent as 'accessory' to the core rights referred to. For instance, the right to non-discrimination takes up a role where violations of the right to life or the prohibition of torture had

54 E.g. *Varnava and Others v Turkey*, ECtHR [GC] 18 September 2009, Appl No 16064/90, etc. [185].

55 See e.g. Yoram Dinstein, *The Conduct of Hostilitites under the Law of International Armed Conflict* (3rd edn, Cambridge University Press 2016) 20.

56 In other words, it overemphasises the 'humanising' element of IHL, see Meron (n 33).

57 Generally, see Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd edn, Cambridge University Press 2016).

58 Gerald L Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 Stanford Law Review 1863, 1865.

59 As is explained in Part II, the duty to investigate can be interpreted more broadly, but the core consists of 'violent' violations.

a discriminatory motive, and where investigations will also need to specifically target such malicious motives. Further, the right to access to justice, the right to an effective remedy, and the right to truth, as will be shown in Part II of this study, are all relevant in the context of the duty to investigate. These rights therefore form an important avenue of the research as well. Whilst social, economic, and cultural rights remain of great importance also during armed conflict,[60] they are less likely to have an equivalent in IHL, or lead to direct normative tension with IHL. This therefore leads the research to focus on civil and political rights.

Secondly, within the sphere of civil and political rights treaties, a further selection has been made. Under the American Convention on Human Rights (ACHR),[61] the Inter-American Court of Human Rights (Inter-American Court; IACtHR) was the first international court to develop in binding judgments, the duty to investigate violations.[62] The European Court of Human Rights (European Court; ECtHR) soon followed suit in interpreting the duty to investigate violations to form part of the European Convention on Human Rights (ECHR).[63] Both Courts have gone on to develop an extensive jurisprudence on duties of investigation, and both have the jurisdiction to give binding judgments, thereby arguably rendering them the most important and authoritative institutions when it comes to the duty to investigate human rights violations. Moreover, both Courts have extensive experience in deciding cases which stem from armed conflict situations. Beyond these regional treaties, the most developed system with a global scope of application is the International Covenant on Civil and Political Rights (ICCPR).[64] The ICCPR was concluded under the auspices of the United Nations (UN), and was meant to codify into a binding treaty the civil and political rights enshrined in the Universal Declaration of Human Rights (UDHR).[65] The ICCPR's supervisory body, the Human Rights Committee (HRC), has also developed an extensive body of 'case-law' with authoritative interpretations of the Covenant's rights, including investigative duties. The most important limitation here, however, is that the HRC's findings,

60 For examples, see Katharine Fortin, 'The Application of Human Rights Law to Everyday Civilian Life Under Rebel Control' (2016) 63 Netherlands International Law Review 161; Antoine C Buyse, *Post-Conflict Housing Restitution: The European Human Rights Perspective with a Case Study on Bosnia and Herzegovina* (Intersentia 2008).

61 American Convention on Human Rights, Pact of San José, Costa Rica (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123; OAS Treaty Series No 36.

62 *Velásquez Rodríguez v Honduras* (Merits) Inter-American Court of Human Rights Series C No 4 (29 July 1988) [166]. See further Chapter 6.

63 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953), 2889 UNTS 213; *McCann and Others v the United Kingdom*, ECtHR 27 September 1995, Appl No 18984/91 [161]. See further Chapter 7.

64 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

65 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)).

as a quasi-judicial body, are not formally legally binding. Yet, the ICCPR remains the most important source of relevant civil and political rights, and of corresponding investigative duties, on the global level.[66]

Together, the ACHR, ECHR, and ICCPR, are the main treaties examined in this study. Other human rights treaties are occasionally included to enrich the discussion, but these are not explored in-depth. Whereas the African Charter on Human and Peoples' Rights (ACHPR) also has a Court with competence to take binding decisions,[67] the Court has, because it is still a young Court, not yet developed a body of case-law which is as extensive as the other regional systems, or the HRC. It is important to keep an eye on the developments at the African Court as it delivers more judgments, but for now, this study is limited to the ICCPR, ACHR, and ECHR. The study also briefly examines three human rights treaties which safeguard specific rights, rather than a full catalogue of civil and political rights. These are the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),[68] the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[69] and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (CED).[70] These treaties stand out, because they include explicit duties of investigation for States, whereas the main human rights catalogues discussed above, do not. It is therefore of a specific interest to see how and why these investigative obligations were included in these treaties, to provide context to the discussions focusing on the ICCPR, ACHR, and ECHR.

Interplay

Finally, the research aims to determine the scope of application and contents of the duty to investigate, not only under IHL and IHRL separately, but it importantly also examines how these two legal regimes interact. Insofar as the central research question pertains to 'interplay', it refers to this interaction of both legal regimes. Whereas discussions have for a time focused on whether IHRL continues to apply during armed conflicts at all, that question was ans-

66 The section on methods explains further how the HRC's findings are incorporated in the research; *infra*, §3.2.2.

67 The African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5 (adopted 27 June 1981, entered into force 21 October 1986), 21 I.L.M. 58 (1982).

68 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

69 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 .

70 International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, UN Doc. A/ RES/61/177.

wered resolutely in the affirmative by the ICJ,[71] as well as other international and regional courts and bodies,[72] and discussions have since turned to the question *how* IHL and IHRL apply together. This is what 'interplay' is meant to connote: how the interaction between IHL and IHRL, shapes the legal norms governing State conduct during armed conflict.

3 Selecting research methods

3.1 The doctrinal legal method and the question *what the law is*

The central research question essentially asks, in light of the lack of clarity identified above, *what the law is* pertaining to the duty to investigate violations committed during armed conflict. The question thus aims to identify relevant applicable legal norms, a question which lends itself best to an answer formulated through a *doctrinal legal method*.[73] Doctrinal research methods aim to *identify* legal norms through recourse to legal sources. They moreover allow for a coherent *interpretation* of the norms identified through a number of interpretive methods, which are used throughout legal scholarship and practice.[74] Because the central research question aims at identifying and describing the scope of application and contents of a legal norm – the duty to investigate – it is through this legal method that the query must be pursued. Ultimately, doctrinal research's focus on identifying, interpreting, and clarifying the

71 *Legality of the Threat or Use of Nuclear Weapons* (n 24) [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 24) [106]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (n 28) [216].

72 The UN Human Rights Committee in *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, HRC 29 March 2004, CCPR/C/21/Rev.1/Add. 13 [11]; and *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, HRC 30 October 2018, CCPR/C/GC/36 [64]. The IACtHR in *Santo Domingo Massacre v Colombia* (n 53) [21]; and along the same lines, *Las Palmeras v Colombia* (Preliminary Objections) Inter-American Court of Human Rights Series C No 67 (4 February 2000) [32]; *Case of the Serrano Cruz Sisters v El Salvador* (Preliminary Objections) Inter-American Court of Human Rights Series C No 118 (23 November 2004) [113]. The ECtHR in *Al-Skeini v the United Kingdom*, ECtHR [GC] 7 July 2011, Appl No 55721/07 [164]; and for violent clashes in the context of NIACs in *Kaya v Turkey*, ECtHR 19 February 1998, Appl No 22729/93 [91]. The African Commission in *Article 19 v Eritrea*, ACmHPR 30 May 2007, 275/03 [87].

73 Suzanne Egan, 'The Doctrinal Approach in International Human Rights Law Scholarship' in Lee McConnell and Rhona Smith (eds), *Research Methods in Human Rights* (1st edn, Routledge 2018) 25; Jan M Smits, *The Mind and Method of the Legal Academic* (Edward Elgar 2012) 9.

74 Martin Scheinin, 'The Art and Science of Interpretation in Human Rights Law' in Bård A Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights. A Handbook* (1st edn, Edward Elgar 2017) 20–1.

applicable legal norms, is a form of 'system building'.[75] It results in the systematisation of our body of legal knowledge. In studying this system, and in positioning the duty to investigate within the system, the research aims to clarify what is required of States and what rights individuals or society at large have in this context.

Building a 'system' through doctrinal legal methods can also provide a basis for drawing more normatively charged conclusions, as to the desirability of certain interpretations of the duty to investigate. Doctrinal system building allows us to test to what extent certain interpretations are in line with the 'system', which means that the system in itself provides an evaluative normative framework.[76] Insofar as the research makes normative claims as to the *desirability* of a certain interpretation of the duty to investigate, or other legal norms for that matter, these are primarily grounded in their coherence with the system. Whereas this research does not principally set out to answer a normative question, it is submitted that even when applying a purely doctrinal legal method, drawing normative conclusions as to whether the identification, or a certain interpretation of a norm is 'correct' under applicable law, is part and parcel of the legal science,[77] and this research follows in this tradition. Beyond the coherence of the legal system, certain recommendations can also be based in a comparative approach. This involves a comparison between how the duty to investigate is conceptualised and applied in various systems, which informs our understanding of what approach best approximates the aims the duty to investigate sets out to achieve.[78] The question how a comparative law approach informs this study's findings, shall be returned to shortly.

Finally, doctrinal legal methods correspond closely with those used in legal practice: judges, lawmakers, and other actors in the legal field all argue and operate within a relatively well-defined structure for legal argumentation, which guides what is a 'good' interpretation of the law, and what is not.[79] Whereas doctrinal research has been subject to critiques, it does therefore guarantee a large degree of resonance within *legal practice*, which arguably adds to the utility of research outcomes; they can easily be incorporated into legal practice.[80] This is hoped to maximise the research output's contribution to practice.

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75 APM Coomans, MT Kamminga and F Grünfeld, 'Methods of Human Rights Research: A Primer' (2010) 32 Human Rights Quarterly 179, 181.

76 Egan (n 73) 27–8; Smits (n 73) 17–20.

77 Jan M Smits, 'Redefining Normative Legal Science: Towards an Argumentative Discipline' in Fons Coomans, Fred Grünfeld and Menno T Kamminga (eds), *Methods of Human Rights Research* (1st edn, Intersentia 2009).

78 Sue Farran, 'Comparative Approaches to Human Rights' in Lee McConnell and Rhona Smith (eds), *Research Methods in Human Rights* (1st edn, Routledge 2018).

79 Egan (n 73) 27.

80 Compare Smits (n 73) 112–3. For an example of how this can work in practice, see Leonie M Huijbers and Claire MS Loven, 'Pushing for Political and Legal Change: Protecting the Cultural Identity of Travellers in the Netherlands' [2019] Journal of Human Rights Practice 1.

3.2 Tailoring the method, and structuring the enquiry

3.2.1 The various steps in answering the central research question

Let us now turn back to the central research question. Looking more closely at our query, it requires *first*, that we identify and interpret duties of investigation under two branches of law, IHL and IHRL. *Secondly*, it requires the study of general international law as the overarching legal framework, querying how norms of IHL and IHRL interact. This provides a normative framework for how to resolve normative overlaps between IHL and IHRL. *Thirdly* and finally, these various findings must be put together to answer the central research question. The research methods must therefore be tailored to fit these steps.

3.2.2 Step 1: identifying and interpreting the duty to investigate under IHL and IHRL

First, this research applies a doctrinal legal method to identify and interpret duties of investigation under IHL and IHRL, separately. Part I, consisting of Chapters 2 and 3, addresses the duty to investigate under IHL. Part II is concerned with the duty to investigate under IHRL, and consists of Chapters 4 through 8. Both Parts rely on the same legal method, with minor differences between them which have to do with the character of the legal regime. Because both IHL and IHRL are branches of international law, the primary method for identifying norms and interpreting them, derives from the doctrinal method for international law.

For the *identification* of legal norms, the research relies on a *positive law* perspective, which means that the identification of a rule must always be grounded in positive sources of law. Traditionally, an authoritative list of sources of international law is found in the Statute of the ICJ, which recognises as primary sources of law treaty, custom, and principles of law, and as subsidiary sources judicial decisions and 'teachings of the most highly qualified publicists'.[81] This research primarily relies on these sources of law, though it also affords some attention to certain (binding) decisions by international organisations, and at certain junctions also takes into account 'soft law' instruments. Insofar as soft law is relied on in the identification of legal norms, it is principally cited *in further support* of conclusions already drawn based on other 'hard' sources of law, or where these soft law instruments are themselves referenced in other legal sources, such as courts' judgments. Thus, to identify duties of investigation under IHL and IHRL, respectively, this research principal-

81 Statute of the International Court of Justice (entered into force 18 April 1946) UKTS 67 (1946) (hereinafter: ICJ Statute), art 38.

ly relies on the same method, namely a doctrinal method relying on positive sources of law.

Despite the approach being generally the same, there is nonetheless a marked difference between Part I dealing with IHL, and Part II dealing with IHRL. This difference reflects differences in the sources of law themselves, and the institutional design and context of both systems: under IHL, we must rely on the treaty norms of the primary IHL treaties, the guiding principles of IHL, State practice, and legal scholarship to identify legal norms, and only to a very limited extent on case-law. This has to do with the institutional absence of oversight mechanisms with the jurisdiction to decide cases based on IHL, as is addressed further in Chapters 2 and 3. Under IHRL, on the other hand, there is an abundance of case-law, and each treaty regime has its own supervisory mechanism which provides binding or authoritative interpretations of the rights enshrined in their treaty. On the one hand, this body of case-law is of great assistance in identifying duties of investigation, as these courts and bodies have explicitly ruled that such duties are part and parcel of the effective system of human rights protection required by the various treaties. On the other hand, the case-by-case development of human rights norms requires an extensive case-law analysis in order to abstract general principles, and because all systems have slightly differently worded treaty texts, with their own supervisory bodies, a further analysis is necessary in order to bring the results of the various systems together. Thus, Chapters 5, 6, and 7 explore the duty to investigate under the ICCPR, ACHR, and ECHR respectively, before Chapter 8 brings these findings together.

When it comes to the ICCPR, this gives rise to one methodological issue which does not arise under IHL: whereas the ICCPR does have an institutional oversight mechanism in the Human Rights Committee, this quasi-judicial bodies' views, concluding observations, and general comments, are not legally binding. As was briefly mentioned above, the HRC's findings are nonetheless widely regarded as authoritative interpretations of the legally binding norms of the ICCPR.[82] Various authors have explained how General Comments and States' acquiescence therein can be viewed as 'subsequent practice' in the sense of Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT),[83]

82 Having been characterised as a 'vital tool for the interpretation', 'authoritative interpretation' and 'authoritative guidance' of the treaties. See Bantekas and Oette (n 57) 209; Nico J Schrijver, 'Fifty Years International Human Rights Covenants. Improving the Global Protection of Human Rights by Bridging the Gap between the Two Covenants' (2016) 41 Nederlands Tijdschrift voor de Mensenrechten | NJCM-Bulletin 457, 431; Markus Schmidt, 'United Nations' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press 2010) 409.

83 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

and as an authoritative interpretation of the treaty in question,[84] or even as 'something close to a codification of evolving practice'.[85] The ICJ has also relied on General Comments on multiple occasions, which cements their authoritative status.[86] The Human Rights Committee's pronouncements on the ICCPR will therefore be relied on in this research as authoritative interpretations of the ICCPR.[87]

Regarding the *interpretation of norms*, the research equally relies on positive sources of law. Interpreting norms of international law must generally follow the structure of Articles 31 and 32 VCLT, which stipulate a whole range of interpretive methods, and which importantly constitute customary international law.[88] Such interpretive principles range from textual to systematic interpretations, and from contextual, to purposive, to historic interpretation, and may equally take into account other applicable rules of international law.[89] These rules form the primary guidelines for the interpretation of the norms regarding the duty to investigate.

The general rules on treaty interpretation, as enshrined in the VCLT, are complemented under IHRL by various other interpretive principles. The customary rules enshrined in the VCLT are dispositive, which means specific treaties may diverge from these rules if they so wish.[90] Human rights law has indeed developed relatively innovative methods of treaty interpretation which at times

84 Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and Their Legitimacy' in Geir Ulfstein and Helen Keller (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 128–33.

85 Nigel S Rodley, 'The Role and Impact of Treaty Bodies' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 631.

86 E.g. *Judgment No.2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion (1 February 2012) *I.C.J. Reports* 2012, p. 10 [39]; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (n 37) [66] and [77]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 24) [136].

87 Where called for, the study distinguishes between situations where the HRC's findings represent *lex lata*, and where they rather present *lex ferenda*; Egan (n 73) 33. The HRC moreover at times does so itself, through its precise phrasing. For an analysis of the wording, see Sarah Joseph, 'Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36' (2019) 19 Human Rights Law Review 347, 349. Yuval Shany, chairperson of the HRC at the time of conclusion of General Comment 36, has remarked that a conscious distinction is made between *lex lata* and *lex ferenda*, through precise formulations.

88 *Kasikili/Sedudu Island (Botswana/Namibia)* Judgment (13 December 1999) *I.C.J. Reports* 1999, p. 1045 [18]. See further Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties' in Malcolm D Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 170.

89 See e.g. Scheinin (n 74); Eirik Bjorge, 'The Convergence of the Methods of Treaty Interpretation: Different Regimes, Different Methods of Interpretation?' in Eirik Bjorge and Mads Andenas (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015).

90 Scheinin (n 74) 21.

go beyond what is stipulated by the VCLT.[91] Whilst supervisory bodies confirm their adherence to the VCLT, they also stress the need to have regard to the special nature of their conventions.[92] By way of example, the European Court of Human Rights has famously developed an 'evolutive approach' which regards the ECHR as a 'living instrument which (…) must be interpreted in the light of present-day conditions',[93] and its Inter-American counterpart has developed a *pro homine* approach, which puts individual protections centre stage when making use of international law outside of the ACHR itself.[94] This study incorporates these specialised principles of interpretation insofar as they are part of the various (quasi-)judicial bodies' case-law on the duty to investigate.

Finally, it was submitted above that in the identification of norms, soft law can provide support for the existence of a norm, but cannot constitute the source of that norm in and of itself. In regard to the *interpretation* of norms, soft law can provide guidance as to how otherwise vague norms of hard law, can be interpreted. As was explained above, this is how the case-law of the HRC can be understood in the context of interpreting the ICCPR. Under IHL, there is not normally an institution which can provide authoritative guidance on how vague norms must be interpreted. Here, recourse to soft law sources – in addition to other documents, such as the principles of IHL, State practice, and preparatory work[95] – may prove useful. For instance, the ICRC has, together with the Geneva Academy of International Humanitarian Law and Human Rights, published *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice*.[96] These Guidelines assist in further fleshing out relatively vague or undeveloped legal provisions, although as the name of these guidelines itself indicates, it goes beyond what

91 Generally, see Başak Çali, 'Specialized Rules of Treaty Interpretation: Human Rights' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012).

92 Bjorge (n 89) 507. See e.g. the ECtHR in *Golder v the United Kingdom*, ECtHR 21 February 1975, Appl No 4451/70 [29]; and *Mamatkulov and Askarov v Turkey*, ECtHR [GC] 4 February 2005, Appl Nos 46827/99 and 46951/99 [111].

93 *Tyrer v the United Kingdom*, ECtHR 25 April 1978, Appl No 5856/72 [31]. On this, as well as other interpretive principles applied by the ECHR, see Janneke H Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019) 46–77.

94 *Mapiripán Massacre v Colombia* (Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No 134 (15 September 2005) [106] with further case-law references; Alejandro Fuentes, 'Expanding the Boundaries of International Human Rights Law. The Systemic Approach of the Inter-American Court of Human Rights' [2017] European Society of International Law Conference Paper Series (SSRN Online) 14–16; Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21 European Journal of International Law 585, 588.

95 Interestingly, colloquially referred to as *travaux préparatoires*, despite the VCLT's use of the English version. See VCLT, art 32.

96 Lubell, Pejic and Simmons (n 21).

the law strictly requires and also indicates 'good practice'. While care must therefore be taken when relying on such soft law instruments, they can be of great value in the interpretation of the law, and are also used in this study. Where this is the case this will be noted explicitly, so readers may decide for themselves whether incorporating soft law standards is appropriate.

One point, lastly, needs to be made regarding Part II. As was explained above, 'international human rights law' consists of a variety of treaty regimes. The research examines in detail the duties of investigation entailed by the ICCPR,[97] ACHR[98] and ECHR,[99] and in addition looks more briefly at the explicit investigative obligations enshrined in the Genocide Convention, the CAT and CED.[100] The conclusion of the IHRL Part, in Chapter 8, brings the findings under the various systems together, and thus adopts a comparative human rights approach. The aim is to identify commonalities and divergences in how the various systems incorporate a duty to investigate, which is meant also to enrich and deepen our understanding of the duty to investigate under IHRL. The elements of comparison, required for a comparative approach,[101] are the legal standards regarding the scope of application of the duty to investigate, the investigative trigger, and the various investigative standards.

The chapters addressing the various human rights systems separately thus present the duty to investigate under positive law, under the *lex lata*, and it is therefore these chapters which provide the necessary guidance on how to resolve cases arising under the various systems. Chapter 8 then, through a comparison of the various systems, aims to deepen our understanding of the duty to investigate human rights violations, which in turn informs the assessment of how the duty to investigate under IHRL interplays with that under IHL.

The aim of the comparative assessment is largely descriptive and analytical – not to build a normative framework for what is the 'best' interpretation of the duty to investigate – although readers may also draw their own normative conclusions as to the effectiveness of the various incarnations of the duty to investigate under IHRL. Importantly, the research also does not deal with what 'IHRL' requires under a globally applicable customary human rights law. Whereas the comparative analysis may be used to assist in such an exercise, this is left to other research projects.[102]

97 Chapter 5.
98 Chapter 6.
99 Chapter 7.
100 Chapter 5.
101 Cf. Esin Örücü, 'Methodology of Comparative Law' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012) 561; Farran (n 78) 134–5.
102 This would require finding extensive and virtually uniform State practice and *opinio iuris* which together constitute a norm of customary international law; *The North Sea Continental*

In sum, in order to find out whether a duty to investigate exists under IHL and IHRL, and if so, what its scope of application, trigger, and contents are, Parts I and II adopt a doctrinal approach. This approach is tailored to meet the requirements of the legal regime, and therefore works out slightly differently, respectively, for IHL, and IHRL.

3.2.3 Step 2: articulating the normative framework for the interplay of IHL and IHRL

Once the research has mapped the scope of application, trigger, and contents of duties of investigation under IHL and IHRL, what remains is to bring them together. One complicating factor, examined in Part III, however, is that the relationship between IHL and IHRL is far from settled. Step 2 is therefore to explore the interplay between IHL and IHRL, which is the final building block before being able to articulate the scope and contents of a duty to investigate under the interplay of IHL and IHRL.

The method for determining how IHL and IHRL interact, in Chapter 9, again relies on a doctrinal legal method. Here too, the study's main aim is to establish 'what the law is', regulating how the two legal regimes interact. This entails identifying the secondary rules of law which determine the interaction of norms deriving from various branches, or specialised regimes, of international law. By identifying these norms, the research aims to set up a normative framework which guides how IHL and IHRL are to be co-applied, and to capture these steps in a flowchart.

Because general international law governs how its various branches interact, the doctrinal method is once more based on international legal sources and interpretive tools. On one point in Chapter 9, the doctrinal method cannot provide an answer. There, the doctrinal method uncovers a normative gap when it comes to the definition of normative conflict, which, it is submitted, must be filled through recourse to legal theory and 'deontic logic'.[103] Here, the Chapter therefore takes up a normative position in order to fill a gap in positive law.

3.2.4 Step 3: a comparative analysis of the duty to investigate under IHL and IHRL, through the lens of a normative framework for interplay

The final step in answering the central research question is to put all of the previous pieces of the puzzle together. Chapter 10 does so. The method for resolving issues of interplay developed under Step 2, in Chapter 9, requires an assessment of whether duties of investigation operate in harmony, or conflict with each other, under IHL and IHRL. This requires a *comparative ana-*

Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) Judgment (20 February 1969) *I.C.J. Reports* 1969, p. 4 [77].

103 Chapter 9, §5.1.

lysis, which outlines to what extent investigative duties' scope of application, trigger, and contents converge and diverge, under IHL and IHRL.

This comparative approach in itself provides a deeper understanding of the duty to investigate. Having gained a rigorous understanding of duties of investigation 'internally' under IHL and IHRL, mapping out where they converge and diverge allows this study to look beyond the narrow limitations of one regime itself. They are, after all, not self-contained, and do not operate in a normative vacuum.[104] This in and of itself adds to the present state of the art in the field, because as was outlined above, most research projects thus far rely on the normative presupposition of one of the two legal regimes, and thus do not apply a full comparative approach to the two.

The results of the comparative approach are finally examined through the normative lens developed in Chapter 9. The stepping stones, or building blocks, of Chapters 2 through 9 are put together, which allows for an answer to the central research question in the concluding Chapter 11. This is ultimately a doctrinal exercise in putting the results of the doctrinal research in the various previous chapters together, whilst simultaneously relying on a comparative approach to map where IHL and IHRL converge and diverge, in relation to duties of investigation. This comparative approach is supplemented by a specific normative lens, namely that of the international legal regime's regulation of normative overlap.

104 ILC Report 2006, at 99-101.

PART I

International humanitarian law

Part I of the study starts by taking a closer look at the duty to investigate as it flows from international humanitarian law. The first step in answering *what the law is* regarding investigative obligations must be to examine the obligations which flow from IHL and IHRL separately. This Part does so for IHL.

The aims of this Part are twofold. Firstly, it aims to clarify the law governing investigative obligations under IHL. Under IHL, the existence of an obligation for States to investigate violations is still subject to debate. Some have suggested such a duty simply does not exist,[1] others argue either for a duty limited to investigations of war crimes,[2] or for a broader duty to investigate also violations not reaching that level.[3] Thus, this Part answers the first subquestion which guides this research, *Are States under an obligation to investigate (potential) violations of IHL? If so, what are the scope of application and contents of such an obligation?* This addresses the problem stated in the Introduction, that the law governing investigations during armed conflict lacks clarity – at least insofar as IHL is concerned. Insofar as a situation is governed by IHL exclusively, because IHRL does not apply, this Part therefore provides solutions to the problems stated in the Introduction.

Part I consists of two Chapters. Chapter 2, firstly, introduces the IHL system. This informs the discussion on duties of investigation under IHL. It addresses a number of definitional and applicability issues regarding IHL, and examines its implementation and enforcement structure. In short, it sets the scene for the detailed examination of investigative obligations which flow from IHL in Chapter 3. Chapter 3 then builds on Chapter 2's explanation of the IHL system of implementation and enforcement, and asks whether a State obligation to

1 Sandesh Sivakumaran, 'International Humanitarian Law' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (1st edn, Oxford University Press 2010) 528.

2 Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 Harvard National Security Journal 31.

3 Amichai Cohen and Yuval Shany, 'Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts' (2011) 14 Yearbook of International Humanitarian Law 37; Alon Margalit, 'The Duty to Investigate Civilian Casualties During Armed Conflict and Its Implementation in Practice' (2012) 15 Yearbook of International Humanitarian Law 155.

investigate is implied in the system's reliance on States to implement and enforce the law. Afterwards discussion turns towards more concrete investigative obligations which flow from IHL. It establishes the scope of the duty to investigate by looking at various categories of violations, namely grave breaches, other war crimes, as well as all other violations – and determines the investigative regime for these violations. The Chapter then moves on to *how* States must investigate these violations, and sets out the investigative standards which IHL imposes.

2 Introduction to the IHL System

1 Introduction

This Chapter introduces the IHL system, with a view to facilitating the research into duties of investigation in the next Chapter. In doing so, it considers briefly, first, IHL's primary sources, and its general aim and purpose (§2). This flows into an introduction of the general principles of IHL (§3). The thresholds for applicability are discussed next (§4), before finally introducing the implementation and enforcement system of IHL (§5). For readers with an advanced knowledge of IHL, much of what is set out in this Chapter will be familiar. They may wish to focus their attention on section 5 of this Chapter, and the exploration of investigative obligations in Chapter 3.

2 The aims, purposes, and main sources of IHL

International law historically distinguishes between the law governing war, and the law governing peace. Dating as far back as 1625, Grotius already made the distinction in the title of his seminal work *De Iure Belli ac Pacis*.[1] As a result of this distinction, situations of armed conflict and occupation are governed by a special body of law commonly referred to as international humanitarian law or IHL.[2]

IHL is a pragmatic field of law. Regardless of the general prohibition of the use of force in international law,[3] IHL acknowledges the existence of armed conflict and is concerned with regulating such conflicts.[4] Its main purpose is to mitigate the consequences of armed conflict, and a crucial premise of IHL is therefore that 'the means and methods of injuring the enemy are not un-

1 For a recent translation, see Hugo de Groot, *Hugo Grotius on the Law of War and Peace* (Stephen C Neff ed, Cambridge University Press 2012).

2 For a criticism of this terminology, see Yoram Dinstein, *The Conduct of Hostilitites under the Law of International Armed Conflict* (3rd edn, Cambridge University Press 2016) 20. He prefers the term 'law of (international) armed conflict' or LOIAC.

3 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (hereinafter: UN Charter), art 2(4).

4 See e.g. Karima Bennoune, 'Toward a Human Rights Approach to Armed Conflict: Iraq 2003' (2004) 11 University of California Davis Journal of International Law & Policy 171, 174.

limited'.[5] The International Court of Justice (ICJ) has consequently identified two 'cardinal principles', which according to one commentator 'are the red threads weaving through the whole tissue of [IHL]'.[6] These principles, according to the ICJ in *Nuclear Weapons*, are as follows:

> 'The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.'[7]

The two principles 'constituting the fabric of humanitarian law', are therefore clearly concerned with limiting the detrimental effects of warfare. Firstly for civilians and civilian objects, who may never be made the subject of attack. Secondly for combatants, who may not be led to suffer in ways which go beyond what is necessary to 'weaken the military forces of the enemy'.[8] Accordingly, most rules of IHL are grounded on either protecting civilians from harm, or protecting combatants from superfluous injury and unnecessary suffering.[9]

Thus, IHL accepts the existence of armed conflict, but strives to 'humanise' warfare insofar as feasible in light of military necessities.[10]

IHL constrains the lawful means and methods of warfare, and protects certain categories of persons from the harmful effects of war. It does so in a number of treaties of a 'general' character – regulating the conduct of hostilities and the protection of civilians and other protected persons in a variety of circumstances – as well as more specialised treaties that, for instance, relate to the prohibition of a specific type of weaponry. To give an example, IHL restricts the use of certain types of weaponry, such as landmines and incendiary

5 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) (hereinafter: 1907 Hague Regulations), art 22.

6 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2010) 8.

7 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996) *I.C.J. Reports* 1996, p. 226 [78].

8 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (adopted 29 November 1868, entered into force 11 December 1868) 18 Martens Nouveau Recueil (ser. 1) 474, 138 Consol. T.S (hereinafter 1868 St. Petersburg Declaration).

9 See for example AP I, art 35(2).

10 Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 American Journal of International Law 239.

weapons.[11] Such prohibitions go back to the cardinal principles of IHL, which do not allow for the use of indiscriminatory or unnecessarily cruel weapons. Further, IHL grants specific protections especially to civilians, prisoners of war, and combatants who are placed *hors de combat*.

Far and away the most important protective treaties are the four 1949 Geneva Conventions (GC), and their Additional Protocols (AP).[12] The Second World War gave a decisive impulse for the negotiation and adoption of the four Geneva Conventions,[13] which have now gained universal ratification. The Geneva Conventions enjoy the most general applicability, and provide a great number of rules which protect the wounded and sick (GC I and II), prisoners of war (POWs, GC III), and civilians (GC IV). The Additional Protocols (AP I and AP II) supplement these rules. Together, these rules form the heart of IHL treaty law. This study therefore mainly relies on these IHL treaties.

Beyond these crucial treaty rules, customary international law (CIL) also remains of significance. Whereas the Geneva Conventions can boast universal ratification, this does not go for the Additional Protocols, and CIL therefore potentially extends the reach of rules of IHL to non-States parties to these Protocols. Moreover, as will be discussed briefly below, most rules of the Geneva Conventions, and of AP I, apply to international armed conflicts (IACs) only. This means that these treaty rules do not apply as such to non-international armed conflicts (NIACs), while non-international conflicts these days make up the majority of conflicts in the world.[14] Most rules of customary IHL, however, have been argued to apply equally to IACs and NIACs, which importantly extends many IAC treaty rules to NIACs.[15] In NIACs, customary IHL is therefore of great importance.

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11 See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211, art 1; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (adopted 10 October 1980, entered into force 2 December 1983), Protocol III to Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 137.

12 AP I; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 609 (hereinafter: AP II).

13 For a fantastic insight into the drafting of the GC, see Boyd Van Dijk, 'Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions' (2018) 112 The American Journal of International Law 553.

14 Ward Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (2009) 7 Journal of International Criminal Justice 723, 739; Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002) 1.

15 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *ICRC Customary International Humanitarian Law – Volume I: Rules*, vol I (Cambridge University Press 2005); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *ICRC Customary International Humanitarian Law – Volume II: Practice* (Cambridge University Press 2005).

To what extent rules of IHL constitute CIL can moreover be of relevance for their judicial application. Some international as well as national judges have jurisdiction to apply customary international law as part of domestic law, whilst the application of certain treaties is not within their purview.[16] Finally, the International Court of Justice (ICJ) considers that 'a great many rules' of IHL constitute 'intransgressible principles of international customary law',[17] thereby clearly illustrating the importance of these norms even beyond the treaty provisions. The study on customary IHL carried out by the International Committee of the Red Cross (ICRC)[18] provides a solid point of reference in finding the relevant customary norms of IHL, as well as the State practice and *opinio iuris sive necessitatis*[19] underlying these norms.

Thus, IHL presents the law specifically designed to govern conduct during armed conflict. In this aim, it must be strictly distinguished from the *ius ad bellum*, which governs whether States may have resort to the use of force. The IHL treaty law which is at the heart of this study, are the 1949 Geneva Conventions and their Additional Protocols, supplemented by customary international humanitarian law.

Because of the variety of sources, and because of how IHL works, care must be taken to correctly classify a situation. Each situation requires an assessment of the applicable treaty and customary rules. The outcome of such assessments is contingent on whether a conflict constitutes an international or non-international conflict, whether an individual is a civilian or a combatant, whether someone is a protected person or not – such classifications determine what rules of IHL apply, and often quite literally determine life and death.[20]

What these stark distinctions reveal, is the 'tug-of-war' which underlies the rules of IHL.[21] Rules of IHL constantly strike a balance between various interests, interests which were already touched upon above. IHL at the same time attempts to *humanise* conflict, whilst also pragmatically acknowledging

16 Mary Ellen O'Connell, 'Historical Development and Legal Basis' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press 2013) 27, with further referencing.

17 *Legality of the Threat or Use of Nuclear Weapons* (n 7) [79].

18 Henckaerts and Doswald-Beck, *ICRC Customary International Humanitarian Law – Volume I: Rules* (n 15); Henckaerts and Doswald-Beck, *ICRC Customary International Humanitarian Law – Volume II: Practice* (n 15).

19 As identified by the ICJ in *The North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment (20 February 1969), *I.C.J. Reports* 1969, p. 4 [77].

20 As posited by Solis, every law of war student should be able to answer the questions of 'conflict status' and the 'status of the individuals involved in the conflict', Gary D Solis, *The Law of Armed Conflict. International Humanitarian Law in War* (Cambridge University Press 2010) 149.

21 Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals Vol. II: The Law of Armed Conflict* (Stevens & Sons Limited 1986) 4.

its existence, and accounting for States' *necessities* in waging war. These two interests, which often pull in quite opposite directions, represent two of the most important *principles* of IHL.

3 THE PRINCIPLES OF IHL

International humanitarian law is thought to be based on a number of underlying principles, which are to be distinguished from the concrete *rules* that together make up the body of law called IHL. The rules of IHL are the specific treaty provisions and rules of customary law, that – though some are rather vague in nature – provide relatively specific regulations, requirements and prohibitions for particular situations. In other words, they constitute binding legal norms. Principles of IHL, on the other hand, are the guiding values underlying the body of law as a whole.[22] They function as a guide in establishing and interpreting the rules, and rules often represent a compromise between two or more principles.[23]

The two 'fundamental principles' between which almost all rules of IHL strike a balance,[24] and which have also been referred to as IHL's 'driving forces',[25] are on the one hand military necessity and on the other the principle of humanity.[26]

The principle of military necessity represents the realistic or pragmatic side of IHL, ensuring it takes into account the perspective of what is militarily required in order to wage war. It operates both at once as a justification for, and as a limitation on the use of force in a specific instance.[27] On the one hand, military action is only permitted when it is necessary from a military point of view, which limits the permissibility of military action. On the other

22 AM Van Gorp, 'Humanitair Oorlogsrecht' in PJJ Van der Kruit (ed), *Handboek Militair Recht* (2nd edn, Nederlandse Defensie Academie 2009) 450.

23 Although one might deduce a different meaning from the ICJ's opinion that 'a great many rules of [IHL] (…) constitute intransgressible principles of international customary law', *Legality of the Threat or Use of Nuclear Weapons* (n 7) [79]. This finding appears to deduce principles from rules, or perhaps even equate them, rather than basing rules on a compromise between principles.

24 Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflict* (Hart Publishing 2008) 43.

25 Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 6) 4–8.

26 See e.g. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 6) 5; Leslie C Green, *The Contemporary Law of Armed Conflict* (Manchester University Press 2008) 388; Jann K Kleffner, 'Scope of Application of International Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press 2013) 43; Kolb and Hyde (n 24) 43; O'Connell (n 16) 36–7.

27 Robert Kolb, *Advanced Introduction to International Humanitarian Law* (Edward Elgar 2014) 83–6; Nils Melzer, *Targeted Killing in International Law* (Oxford University Press 2008) 286–91. Of a different opinion, see Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 6) 4.

hand, a military action may be justified as long as some military gain is accomplished. What these military gains entail is best illustrated by way of the 1868 St. Petersburg Declaration, which states that 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy'.[28] Taken together, military necessity therefore justifies military action which weakens the enemy military forces, but simultaneously restricts such action: only so long as the enemy military forces are weakened, can the action be justified.

Operating in 'equipoise' with military necessity are 'humanitarian considerations',[29] or the principle of humanity.[30] Humanitarian considerations drive IHL's aim of reducing human suffering to what is strictly required by the exigencies of war.[31] The core of this principle can be illustrated by the 1907 Hague Regulations, Article 22 of which provides that '[t]he right of belligerents to adopt means of injuring the enemy is not unlimited'. Human suffering, in other words, must be limited to a minimum, according to the principle of humanity.[32] This principle often pulls in the opposite direction of what is militarily required, for instance where an air strike on a military target may cause civilian casualties. This is why the rules of IHL reflect a balance between the two.

The constant balance rules of IHL strike between the principles of military necessity and humanity,[33] helps our understanding of IHL in several ways. Firstly, they lay bare the underlying interests which rules of IHL serve, and can therefore provide a meaningful tool in a purposive interpretation of such rules. Because the principles help explain why a certain rule was adopted,[34] and because they are by their very nature of a broader application than rules,

28 1868 St. Petersburg Declaration.

29 Not all commentators agree on the term 'principle of humanity'. See Yoram Dinstein, 'The Principle of Proportionality' in Camilla Guldahl Cooper, Gro Nystuen and Kjetil Mujezinović Larsen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge University Press 2012); more broadly Camilla Guldahl Cooper, Gro Nystuen and Kjetil Mujezinović Larsen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge University Press 2012).

30 Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 Virginia Journal of International Law 796, 796.

31 1868 St. Petersburg Declaration, Preamble [1]-[2].

32 See e.g. the Preamble to the 1907 Hague Regulations, expressing the 'desire to diminish the evils of war, as far as military requirements permit'.

33 Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 6) 5; Kolb and Hyde (n 24) 43; Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (n 30) 796. As Koppe insightfully explains, not all rules can be traced to *humanitarian* considerations, however, as e.g. environmental considerations can also play a role; Erik Vincent Koppe, 'The Principle of Ambituity and the Prohibition against Excessive Collateral Damage to the Environment during Armed Conflict' (2013) 82 Nordic Journal of International Law 53, 59–60.

34 Koppe (n 33) 64.

they are particularly well-suited for the interpretation and development of the law.[35]

Secondly, because the rules of IHL already reflect a careful balance between military necessity and humanity, the interpretive powers of the principles cannot serve to disregard rules as such.[36] By way of example, if military forces behind enemy lines were to take a civilian captive, who if let go will likely alert enemy forces to their presence, they cannot invoke military necessity to harm or kill this civilian. Unless the rule itself provides that principles can be taken into account to modify the rule's application, principles cannot set aside rules.[37] It is generally accepted that military necessity cannot be invoked to circumvent or trump a specific rule as it has already been taken into account in formulating that rule,[38] and the same must go for the principle of humanity. It follows that principles of IHL play an important role in the *interpretation* of the existing rules, though that interpretive role does have its limits. This interpretive and developmental function of the principles of IHL is a widely accepted feature of the system.

Thirdly, it has been argued that the principles of IHL constitute 'general principles of law' in the sense of Article 38 of the Statute of the International Court of Justice, thereby forming a *separate and independent* source of international law.[39] In line with this claim, it could be argued that the principles of IHL in fact constitute a primary source of international law in and of themselves. This could prove relevant later on in this study, insofar as the principles of IHL could play a role in mitigating tensions under the interplay of IHL and human rights law.

Fourthly and finally, when there are *no applicable rules* of IHL, the principles can directly affect what States may or may not do. The principle of humanity generally, and the Martens Clause in particular, limits States' action radius even when no specific prohibitive rules exist.[40] The Martens clause provides that in cases not specifically regulated by IHL, 'civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from

35 Kolb (n 27) 75.

36 See e.g. O'Connell (n 16) 36–7.

37 *The Hostage case*, IMT Nuremburg 19 February 1948, 11 *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* 757, p. 1281 (*USA v List et al.*).

38 E.g.Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 6) 7; Kolb (n 27) 14; Kolb and Hyde (n 24) 44. Extensively on military necessity as an exception, see Nobuo Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law' (2010) 28 Boston University International Law Journal 39, 59–100.

39 Koppe (n 33) 61–5; see also Kleffner (n 26) 53.

40 Kolb (n 27) 19–20.

the dictates of public conscience'.[41] This clause therefore clearly provides for the operation of the principle of humanity outside of specific IHL treaty provisions. Conduct that is not expressly prohibited is therefore not automatically lawful, but remains subject to humanitarian considerations.

Beyond the two fundamental principles of military necessity and humanity, IHL also recognises a number of other principles. These are not discussed at length here, but are introduced where relevant later on. Commentators vary in their views on an exact list of *the* principles of IHL. Important widely accepted principles are those of distinction and proportionality.[42] Other than these, a literature review reveals principles of, among others: precaution; limitation; chivalry; ambituity (protection of the environment); the prohibition of causing unnecessary suffering; and the independence of *ius in bello* from *ius ad bellum*. Certain of these principles we will revisit later, others not. The balance between military necessity and humanity, however, is an important guide not only for the rules of IHL, but also for this study.

4 IHL'S SCOPE OF APPLICATION

4.1 Introduction

Now that we have familiarised ourselves with IHL's main sources, aims, and principles, we can take a closer look at its specific contours. This section briefly introduces IHL's main modes of application. This informs *when* and *to whom* IHL applies, as well as *where*. IHL's scope of applicability can be divided into its material, personal, temporal and territorial scope of application.[43] Because this study's research question enquires into the duty to investigate violations *during armed conflict*, this is naturally intertwined with the question when an armed conflict exists. This renders two main issues of applicability primarily relevant. The first is the material scope of application. IHL contains a 'threshold-criterion' for its applicability, meaning that IHL applies in situations of international armed conflict, non-international armed conflict, or belligerent occupation. This is discussed first (§4.2). Then, we move on to IHL's *personal* scope of application, which pertains to the question *who* is bound by its rules. As

41 As quoted from the modern version of the Martens clause, enshrined in AP I, art 1(2). See also Hague Convention (II) with Respect to the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) (hereinafter: 1899 Hague Convention (II)), Preamble.

42 Compare Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar 2013) 51–5; Dinstein, 'The Principle of Proportionality' (n 29) 73; DW Greig, 'The Underlying Principles of International Humanitarian Law' (1980) 9 Australian Yearbook of International Law 46; Kolb (n 27) 75–92; Koppe (n 33) 56; Solis (n 20) 250–85.

43 See e.g. Kleffner (n 26); Kolb and Hyde (n 24) 73–111.

we will explore, this can pertain to States, non-State armed groups (NSAGs), and individuals (§4.3). Finally, a few brief remarks are made as to the temporal and geographical scope of application of IHL (§4.4). These modes of application do not raise particular issues in the context of this study, and therefore remain brief.

4.2 IHL's material scope of application

4.2.1 From declarations of war to a fact-based assessment of 'armed conflict'

In its classic conception, IHL – long termed the 'laws of war' – applied whenever a formal declaration of war was made. Since such declarations have fallen into disuse, determining the subject matter applicability of IHL has changed.[44] Common Article 2 of the 1949 Geneva Conventions now provides that the Conventions apply to 'cases of declared war', as well as 'any other armed conflict which may arise between two or more of the High Contracting Parties', and 'cases of partial or total occupation of the territory of a High Contracting Party'. IHL's subject-matter applicability is therefore contingent on the existence of 'armed conflict', or 'occupation'.[45] Both terms are discussed below, with the necessary attention for the distinction between armed conflicts of an international (§4.2.2) or a non-international nature (§4.2.3).

Before doing so, one final important point must be made as to IHL's applicability. Whereas most of its rules are contingent on the existence of either an armed conflict or an occupation, Common Article 2 moreover refers to 'provisions which shall be implemented in peacetime'. Thus, certain rules of the Geneva Conventions apply also in peacetime. These, notably, include obligations of *implementation*. For instance, rules regarding the dissemination and teaching of IHL, would clearly be obsolete if they were activated only once an armed conflict has erupted. Similarly, and crucially for this study, obligations to institute administrative mechanisms which supervise whether States' armed forces comply with their IHL obligations, and obligations to criminalise certain violations of IHL in domestic legislation, would be useless if they were not

44 Although according to Greenwood, even in the eighteenth and nineteenth centuries wars did not usually start with a declaration of war; Christopher Greenwood, 'The Law of War (International Humanitarian Law)' in Malcolm D Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 785. To counter the disuse of declarations of war initially, a specific convention was adopted, see Hague Convention (III) relative to the Opening of Hostilities (adopted 18 October 1907, entered into force 26 January 1910), 205 CTS 264 (hereinafter: 1907 Hague Convention (III)).

45 Further, see Helen Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' in Helen Duffy, Janina Dill and Ziv Bohrer (eds), *Law Applicable to Armed Conflict* (Cambridge University Press 2020) 22ff.

implemented in peacetime.[46] While IHL is meant to regulate armed conflict, certain rules therefore apply generally, without a threshold-criterion.

4.2.2 *International armed conflicts*

International armed conflicts are defined in Common Article 2 as conflicts 'between two or more of the High Contracting Parties', meaning that only conflicts between *States* are covered by the provision. As was mentioned previously, IACs are subject to a detailed and extensive set of treaty rules, in the Geneva Conventions and AP I.

As the ICRC Commentary to the Geneva Conventions makes clear, the further criteria for armed conflict are not very demanding: 'any difference between two States and leading to the intervention of members of the armed forces is an armed conflict'.[47] Every relatively minor incident at the border between States therefore leads to the applicability of the law of international armed conflict, regardless of whether these States consider themselves at war or not.[48] Thus, this definition leaves no gaps in the applicability of the law, as there are no lower intensity skirmishes falling outside the field of application of the law of armed conflict.[49]

The most important consequence of qualifying a conflict as an international armed conflict, is that most conventional and customary rules of IHL apply. For current purposes, it is sufficient to note that the four 1949 Geneva Conventions apply,[50] as well as Additional Protocol I of 1977.[51]

In situations of clear State versus State conflicts, applicability of IHL is relatively straightforward. Whereas determinations can become difficult for instance when not all facts are known, or where one-off targeted killings are at issue, such issues are left aside here.

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46 Marco Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 186–7.

47 Jean S Pictet (ed), *Commentary to the First Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field* (1st edn, International Committee of the Red Cross 1952) 32.

48 Kleffner (n 26) 45; Robert Kolb, 'The Main Epochs of Modern International Humanitarian Law Since 1864 and Their Related Dominant Legal Constructions' in Kjetil Mujezinovi Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge University Press 2012) 48–9.

49 Kleffner (n 26) 45; Kolb (n 48) 48–9. There are detractors to this definition, see e.g. Greenwood (n 44) 786.

50 GC, Common Article 2.

51 AP I, art 1.

4.2.3 Non-international armed conflicts

Looking then at when IHL applies to non-international armed conflicts, things become somewhat more complex.[52] Common Article 3 negatively defines NIACs as armed conflicts 'not of an international character'.[53] The International Criminal Tribunal for the Former Yugoslavia (ICTY) has defined this as 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[54] Thus, under the Geneva Conventions, the lower threshold for the existence of a NIAC is protracted armed violence, between a State on one side, and a non-State armed group on the other side, or between two or more NSAGs.[55] The classical example is that of a State engaged in a conflict with armed rebels on its own territory, though increasingly, States are also involved in extraterritorial NIACs with NSAGs halfway across the world.[56]

Additional Protocol II, which contains further rules governing NIACs, however, sets a higher threshold for its applicability. It applies only to conflicts that do not fall under AP I, *and* take place between a High Contracting Party and organised armed groups.[57] Moreover, these armed groups must, for the Protocol to be applicable, exercise control over a territory and be sufficiently organised. Whilst Common Article 3 therefore applies to every conflict not of an international character so long as it can be characterised as a conflict, AP II's scope of application is somewhat more limited. The net result is that *certain* NIACs are covered by rules of Common Article 3 only, namely those which do not meet the threshold of AP II, whilst others are covered by the rules of both CA3 and AP II.

Practically speaking, it is therefore important to establish carefully the applicable rules in a specific NIAC. Conflicts falling solely within the scope of Common Article 3 are subject to the treaty criterion of humane treatment set out in that provision only, whilst conflicts that satisfy the applicability criteria of AP II are regulated by both Article 3 and the relatively more extensive provisions of that Protocol.[58] The applicability of norms of customary IHL is progressively complex in these situations, as it remains undetermined which of the applicability thresholds applies to these customary norms, or whether

52 Further, see Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' (n 45) 32–8.

53 See also Kolb (n 27) 22.

54 *Prosecutor v Duško Tadić*, ICTY (Appeals Chamber) Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) IT-94-1-AR72, A. Ch. [70].

55 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 155–6. See also Kleffner (n 26) 49.

56 Extensively, see Helen Duffy, *The 'War on Terror'' and the Framework of International Law'* (Cambridge University Press 2015).

57 AP II, art 1(1).

58 Assuming of course that the State in question has ratified AP II.

perhaps two regimes of customary norms exist.[59] As this issue is not central to the present study, it will not be discussed further.[60]

Classifying a conflict as non-international can be challenging. Regarding the lower limit, the required intensity and the exact delineation with internal disturbances, as well as a potential minimum duration, can be tricky.[61] Regarding the 'upper limit', extraterritorial NIACs where States engage with NSAGs on the territory of a third State without their consent, conflicts where States support a NSAG in a conflict with a third State, or where NIACs 'spill-over' into other States' territories, can be equally difficult to classify.[62] Whereas these issues are not discussed further at this junction, they are relevant to keep in mind when we take a closer look at the various human rights courts' and bodies' case-law pertaining to NIACs – who have at times struggled with the resource-intensive challenge that is conflict classification.[63]

4.2.4 Belligerent occupation

Finally, the Geneva Conventions and AP I also apply to situations of occupation.[64] The IHL regime for IACs therefore applies equally to situations of occupation, with Geneva Convention IV, on the protection of civilians, being the most relevant.

A definition of occupation is not provided in the Geneva Conventions, which provides no more than that a situation of occupation can exist even where the occupying forces met with no armed resistance.[65] A definition, reflecting customary international law,[66] can be found in Article 42 of the 1907 Hague Regulations: 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised'. The law of occupation therefore pertains to all situations in which a State's authority over a territory is taken over by a hostile army, insofar as its authority replaces that of the ousted sovereign.[67]

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59 Kolb (n 27) 105. Arguing that the *Tadić* test suffices for the applicability of the customary law of NIAC, see Sivakumaran (n 55) 155–6.

60 For an extensive discussion, see Sivakumaran (n 55); Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014).

61 Dinstein, *Non-International Armed Conflicts in International Law* (n 60) 21ff.

62 For an illustrative example, see the classification of the Syrian conflict, Terry D Gill, 'Classifying the Conflict in Syria' (2016) 92.

63 See in particular Chapter 6, on the Inter-American Court of Human Rights.

64 See GC, Common Article 2 and AP I, art 1(3).

65 GC, Common Article 2.

66 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004) *I.C.J. Reports* 2004, p. 136 [78] and [89]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment (19 December 2005), *I.C.J. Reports* 2005, p. 168 [172].

67 See Kleffner (n 26) 205.

In situations of occupation, the occupying State is bound by the law governing international armed conflicts. Thus, that body of law extends also to situations where there is no ongoing fighting. Even occupations where not a single shot is fired are governed by IHL. This may be of relevance for issues of interplay with human rights law, because the level of control exercised by the State in such situations is much more extensive than when it is engaged in active hostilities.[68] What is important for now, however, is simply that the law of IACs governs situations of occupation.

4.3 IHL's personal scope of application

Pertaining to the personal applicability of IHL, the entities bound by it are 'first and foremost' the parties to a conflict, whether they are States or non-State armed groups.[69] In addition to these well-accepted duty bearers under IHL,[70] IHL is also directly addressed to individuals.[71] They are bound by IHL, without the need for domestic implementing legislation.[72] Such individuals firstly are under a duty to comply with the applicable rules of IHL, the most prominent example of which is the grave breaches regime, which explicitly entails individual criminal responsibility.[73] Secondly, individuals are subjects of IHL 'passively', in the sense that individuals who are classified as civilians or

68 See Chapter 9. See also e.g. Watkin, who states 'The pressure to apply human rights principles arises in particular during situations more closely associated with governance than direct combat with an enemy force'; Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98 American Journal of International Law 1, 2. See further Helen Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press 2013) 508; Alon Margalit, 'The Duty to Investigate Civilian Casualties During Armed Conflict and Its Implementation in Practice' (2012) 15 Yearbook of International Humanitarian Law 155, 181; Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 Harvard National Security Journal 31, 52 (in particular fn 89).

69 Kleffner (n 26) 53; Kolb and Hyde (n 24) 86–7.

70 Non-State armed actors are somewhat less 'classic' of course, but their limited international legal personality under IHL is widely accepted. See e.g. Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017).

71 Further, see Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' (n 45) 40–4.

72 Kleffner (n 26) 55. See also Robert McCorquodale, 'The Individual and the International Legal System' in Malcolm D Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 286–8.

73 See *infra*, Chapter 3, section 3.2.2. See also for war crimes more generally, Rule 151-155 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck, *ICRC Customary International Humanitarian Law – Volume I: Rules* (n 15) 551–65; compare Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press 2008) 8.

otherwise as protected persons, are afforded protection against attack.[74] Thus, individuals are directly addressed under IHL, and are therefore directly subject to certain obligations and protections.

Whether IHL also confers *rights* that can be directly invoked by individuals, is a more controversial issue.[75] They cannot invoke rights under IHL at the international level, simply because there are no available international mechanisms for such – as will be explored further below. At the domestic level, results have been mixed when individuals invoke rights under IHL.[76] Certain commentators find that no individual rights exist under IHL, and that whereas the interests of individuals are safeguarded, IHL does so by means other than conferring individual rights.[77] In this view, IHL regulates inter-State relations, and individuals only incidentally benefit from such agreements. Others, however, find that IHL *does* confer rights on individuals.[78] The majority of scholarship on this issue pertains to an individual right to reparation for violations of IHL,[79] with critiques focusing more specifically on the lack of remedies for individual victims.[80] The UN General Assembly (UNGA) has also asserted that individuals have a right to a remedy for violations of IHL.[81] Whatever the merits of this position are, this study is concerned primarily with States' *duty* to investigate, which means that the discussion on *rights* is left aside for now.

Crucially, however, the direct imposition of obligations by the IHL framework on individuals has important consequences for what is expected of States in implementing and enforcing IHL. Safeguarding the effectiveness of individual obligations, after all, requires active intervention by the competent enforcement or supervisory body. As is explored further below, this could be held to imply investigative obligations on the part of the State.

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74 Kolb and Hyde (n 24) 87. See e.g. AP I, art 51.

75 See e.g. GC I, II and III, art 7; GC IV, art 8, providing that protected persons cannot renounce the rights secured to them. Although the term 'rights' appears to point towards conferral of individual rights, the non-renunciation of those rights could be seen as evidence that they are in fact not 'their' rights, so much as protections afforded to them.

76 Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford University Press 2014).

77 René Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press 2002) 16.

78 Lawrence Hill-Cawthorne, 'Rights under International Humanitarian Law' (2017) 28 European Journal of International Law 1187; Anne Peters, 'Direct Rights of Individuals in the International Law of Armed Conflict' (2019) 2019–23 <https://ssrn.com/abstract=3506742> (last accessed 15 July 2021).

79 Hill-Cawthorne (n 78) 1215.

80 E.g.Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85.

81 UNGA Resolution 60/147 (2005), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147.

4.4 IHL's temporal and geographic scope of application

On IHL's temporal and geographic scope of application, we can be brief. As was mentioned above, certain IHL obligations must be implemented in peacetime, and therefore apply at all times. Most obligations, however, are triggered by the occurrence of armed conflict or occupation. This means they apply from the outbreak of the conflict, until the 'general close of military operations', or until the end of the occupation.[82] Application to protected persons, such as prisoners of war, continues until they are released and repatriated.[83] Thus, whereas the applicability of IHL in principle begins and ends with the armed conflict, certain obligations can pre- and postdate the conflict itself.

The geographical scope of application of IHL is not principally limited.[84] It was designed to regulate the conduct of hostilities and actions which form part of an armed conflict, 'wherever they may occur'.[85] Whereas IHL does set certain boundaries as to where hostilities may be carried out, such as in the territories of neutral States,[86] it principally simply binds States' conduct wherever they operate. It has moreover been found to apply throughout the territories of parties to a conflict.[87] For NIACs, this latter finding is contested, as some find that the application of the law of NIAC throughout a State's territory, even though it may be engaged in a conflict in a very limited area within its territory, or perhaps solely extraterritorially, would be unreasonable.[88] It has therefore been proposed to require a *nexus* between the conduct in question and the conflict for IHL's applicability, so that for instance deprivations of liberty 'for reasons related to the conflict' are governed by IHL, whereas others are not.[89]

Insofar as relevant, these issues shall be returned to in the context of the research into investigative obligations. Noteworthy, at this junction, is that IHL's geographic scope of application is not principally territorially limited. This is an important distinguishing factor from IHRL, where extraterritorial conduct is only covered under certain circumstances.

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82 GC IV, art 6; Kleffner (n 26) 60.

83 GC III, art 5.

84 More extensively on geographic scope of application, see Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' (n 45) 45–8.

85 Noam Lubell, 'Fragmented Wars: Multi-Territorial Military Operations against Armed Groups' (2017) 93 International Law Studies 21, 244.

86 Kleffner (n 26) 59.

87 For IACs, see Michael N Schmitt, 'Charting the Legal Geography of Non-International Armed Conflict' (2014) 90 International Law Studies 1, 5. For NIACs, see Kleffner (n 26) 59.

88 Sivakumaran (n 55) 250–2; Schmitt, 'Charting the Legal Geography of Non-International Armed Conflict' (n 87) 5–6.

89 Sivakumaran (n 55) 250–2.

5 IHL'S IMPLEMENTATION, SUPERVISION, AND ENFORCEMENT SYSTEM

5.1 From the State level …

Enforcement, together with implementation is often considered to be the weak point or 'Achilles heel' of IHL.[90] The reason for this is that IHL, nor international law in general, provides for a central power or institution to implement and enforce its legal norms.[91] This lack of institutionalised oversight leaves it up to States themselves to implement IHL in their national legal systems. Because in some States international law must be transposed into domestic law before gaining binding force in the domestic legal order, and because in others rules of international law must be 'self-executing' for them to have direct effect, domestic implementation is a crucial step to ensure the effectiveness of IHL.[92] States' obligation to safeguard the effectiveness of IHL flows both from Common Article 1 to the Geneva Conventions (the obligation to 'respect and ensure respect') as well as the general public international law obligation of *pacta sunt servanda*, requiring States to carry out their treaty obligations in good faith.[93] This results in a system that, as Robert Kolb categorises it, is largely dependent on 'voluntary' compliance by States, as opposed to a system of coercion.[94]

It is through implementation of IHL in their domestic systems that States ensure that they act in conformity with international standards. Implementation measures can pertain to the enactment of legislation, the training and instruction of armed forces, the more general dissemination of IHL, and so on.[95] Such measures facilitate and seek to ensure compliance with IHL by and within the State itself, by binding the State's own subjects and armed forces through legislative implementing measures. This legislation transposes the norms of international law into the domestic legal order. Regarding means and methods of combat, this implementation largely takes the form of military manuals,

90 E.g. Kolb (n 27) 187–8; David Turns, 'The Law of Armed Conflict (International Humanitarian Law)' in Malcolm D Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 821; Dieter Fleck, 'International Accountability for Violations of the Ius in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law' (2006) 11 Journal of Conflict and Security Law 179.

91 Silja Vöneky, 'Implementation and Enforcement of International Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) 647.

92 For examples, see e.g. Eileen Denza, 'The Relationship between International and National Law' in Malcolm Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 418–25. See also Weill (n 76) 7.

93 See VCLT, art 26; ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) [143].

94 Kolb (n 27) 187.

95 For further examples, see ICRC (n 93) [146].

promulgated by States in order to regulate the conduct of their armed forces.[96] States further adopt rules of engagement (RoE), in which they lay down their instructions on the use of force.[97] Important further means of implementation pertain to the enactment of criminal legislation for grave breaches,[98] and establishing universal jurisdiction over those breaches,[99] the prohibition of other breaches either through criminal or disciplinary law,[100] and setting up a sufficient infrastructure to enable conducting genuine investigations (at least into core crimes and grave breaches).[101] These obligations have furthermore been confirmed by the UN General Assembly.[102] This infrastructure can be found partly in (military) criminal codes, as well as in military manuals that provide for the carrying-out of disciplinary or preliminary investigations by commanders under certain circumstances.[103] The ICRC's Advisory Service can provide some assistance to help States implement IHL, even drawing up 'model implementation legislation' that can be used by States to base their domestic measures on.[104]

96 Heike Spieker, 'Implementation' in Dražan Djukicì and Niccolò Pons (eds), *The Companion to International Humanitarian Law* (Brill 2018).

97 Maria Giovanna Pietropaolo, 'Rules of Engagement' in Dražan Djukicì and Niccolò Pons (eds), *The Companion to International Humanitarian Law* (Brill Nijhoff 2018).

98 Compare the obligation for High Contracting Parties to 'undertake to enact any legislation necessary to provide effective penal sanctions' for perpetrators of grave breaches; GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146. See also Vöneky (n 91) 665. And more specifically Dörmann & Geiß, who also explain that 'undertake' signifies a strict legal obligation and that specific legislation is required, not merely ordinary criminal law sanctioning, for instance, murder; Knut Dörmann and Robin Geiß, 'The Implementation of Grave Breaches into Domestic Legal Orders' (2009) 7 Journal of International Criminal Justice 703, 706–10.On this last point, see of a different view Ferdinandusse (n 14) 729.

99 Henckaerts and Doswald-Beck, *ICRC Customary International Humanitarian Law – Volume I: Rules* (n 15) 606; Dörmann and Geiß (n 98) 709. ICRC (n 93) [2863]-[2867].

100 Following paragraph 3 of the grave breaches provisions, see Pictet (n 47) 368. Compare Schmitt, 'Investigating Violations of International Law in Armed Conflict' (n 68) 37; Vöneky (n 91) 661 (although she seems to imply on p. 670 that all violations must be criminally prosecuted).

101 Compare Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (hereinafter: ICC Statute), art 17(1)(a) in conjunction with its Preamble [6]; Kleffner (n 73) 306–7. See also ICRC (n 93) [2860] and [2891].

102 See Principle 2 of UNGA Resolution 60/147 (2005), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147.

103 For many of these documents, see https://www.icrc.org/casebook/the-law-in-practice/.

104 www.icrc.org/en/document/national-implementation-ihl-model-laws (last accessed 15 July 2021); see also Kolb (n 27) 190; and more extensively MT Dutli, 'The ICRC Advisory Service on International Humanitarian Law' in Michael Bothe (ed), *Towards a Better Implementation of International Humanitarian Law* (Arno Spitz 2001).

5.2 … to the international …

When it comes to the supervision of States' correct implementation of, and compliance with IHL, as well as to the enforcement of the rules, IHL does not have real institutionalised oversight, implementation, or enforcement mechanisms. In lieu of specific enforcement mechanisms, general international law normally leaves it up to States to enforce the law through unilateral (or coordinated) sanctions. This, in fact, is the starting point of the international legal system: supervision and enforcement, whether judicial or otherwise, are not a given, and States themselves are the primary actors when it comes to ensuring compliance by other States, and enforcing the law.[105] Insofar as IHL *does* provide for possibilities of oversight or enforcement, these are contingent on prior *ad hoc* consent or discretionary powers, and they are therefore not *institutionalised*. This ultimately leaves the responsibility for implementation and enforcement to States themselves. This section gives a brief overview of IHL's existing supervision and enforcement system, before returning to States' role in enforcing IHL.

On the international level, supervision of States' compliance with IHL is limited. For the supervision of implementing measures, there is a system of 'protecting powers'. A protecting power is a neutral State agreed upon by the belligerents, who, among other things, can supervise proper implementation of the rules.[106] In order to function, however, this system relies on the *consent* of both the parties to the conflict and the protecting power itself.[107] Due to this high threshold, it has fallen into disuse. Although the protecting power can be substituted by the ICRC when no power is assigned,[108] the ICRC almost exclusively works on a confidential basis, which means its functioning as a supervisory body is necessarily somewhat limited in nature.[109]

IHL does not contain any kind of reporting system, which requires States to report on how they comply with their obligations. AP I does provide for the possibility of meetings of the High Contracting Parties, but such meetings are again contingent on State agreement, and have never been convened.[110]

105 As illustrated by the UN Security Council, '*Reaffirming* that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians', Preambular paragraph to UNSC Res. 1894 (2009), UN Doc. S/RES/1894. See also Weill (n 76) 8.

106 E.g. GC III, art 126.

107 Vöneky (n 91) 686.

108 AP I, art 5(4).

109 See also Kolb (n 27) 187.

110 AP I, art 7. See Sofia Poulopoulou, 'Strengthening Compliance with IHL: Back to Square One' https://www.ejiltalk.org/strengthening-compliance-with-ihl-back-to-square-one/#more-16906 (last accessed 15 July 2021).

Similarly, AP I's institution of a permanent International (Humanitarian) Fact-Finding Commission[111] has remained largely ineffective because most States are not willing to give the prior consent which is required for it to spring into action. If called upon, the Commission can conduct an enquiry into facts alleged to be grave breaches or other serious violations of the Geneva Conventions or AP I.[112] A legal assessment of the facts, however, is beyond the competence of the Commission.[113] Thus far, the Commission has been asked to investigate only once, by the Organisation for Security and Co-operation in Europe (OSCE).[114] This confirms the accuracy of its nickname, the 'Sleeping Beauty',[115] and underscores that it is not an institutionalised form of supervision. The requirement of prior State consent has prevented such, which is quickly becoming the story of this section. Beyond the modalities mentioned above, IHL also provides for an enquiry procedure which can be requested by a party to the conflict. Again, however, this procedure can be relied upon only where *both* parties to the conflict give their prior consent, which renders this procedures' use limited.[116]

IHL itself, in sum, does provide for certain procedures which are meant to ensure supervision or enforcement of its rules. But the effectiveness of these rules is undercut by the requirement of prior State consent, which often goes against States' interests when they are engaged in armed conflict. This means that States are themselves responsible for proper implementation of IHL into their domestic systems. Because of the lack of international mechanisms monitoring or enforcing such implementation, this system has been characterised as 'voluntary'[117] – the system is wholly dependent on States' active engagement in fulfilling their obligations. Although the ICRC takes up a certain role in assisting in the implementation of IHL, the system therefore hinges on States taking up their responsibilities. The interpretation of what is required under provisions requiring enacting domestic (criminal) legislation must

111 AP I, art 90.

112 AP I, art 90 (2)(c) under i.

113 Compare Heike Spieker, 'International (Humanitarian) Fact-Finding Commission', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2015) under 12-3; Turns (n 90) 850.

114 Robert Heinsch, 'The Future of the International Humanitarian Fact-Finding Commission: A Possibility to Overcome the Weakness of IHL Compliance Mechanisms?', *The Companion to International Humanitarian Law* (Brill | Nijhoff 2018) 84; 89. See *Executive Summary of the Report of the Independent Forensic Investigation in relation to the Incident affecting an OSCE Special Monitoring Mission to Ukraine (SMM) Patrol on 23 April 2017*, https://www.osce.org/home/338361 (last accessed 15 July 2021).

115 F Kalshoven, 'The International Humanitarian Fact-Finding Commission: A Sleeping Beauty?', *Reflections on the Law of War: Collected Essays* (Brill | Nijhoff 2007); Heinsch (n 114) 81.

116 AP I, art 52.

117 Kolb (n 27) 187.

therefore rely largely on the manner in which States have given effect to this obligation in their legislation and military manuals.

Beyond rules of IHL, general international law can also provide avenues for supervision and enforcement of the rules. Some form of supervision is possible if States accept the jurisdiction of the ICJ,[118] set up an *ad hoc* claims commission,[119] or if the UN Security Council (UNSC) decides,[120] based on its discretionary powers, to exercise enforcement action. Such action, however, is fully contingent on either the consent of the parties to the conflict, or the discretionary power of others. This renders the judicial avenues rarely used, while the UNSC's enforcement action with regard to rules of IHL is mixed, also due to the political nature of that organ.

Oversight by bodies of other specialised branches of international law, such as international human rights law and international criminal law (ICL), can certainly contribute to compliance with IHL. Nonetheless, such bodies are principally limited in their jurisdiction to apply IHL. Their subject-matter jurisdiction is limited to their own legal regime. They cannot therefore, pronounce directly on issues of IHL, but necessarily do so through the lens of their own regime. Thus, as is discussed extensively in Part II, IHRL courts and bodies do not have the jurisdiction to apply IHL directly, and can only do so incidentally, insofar as their application of IHRL coincides with IHL. Similar

118 The ICJ has jurisdiction to hear inter-State disputes, ICJ Statute, art 34(1).

119 The Eritrea-Ethiopia Claims Commission, for instance, had the competence to: 'decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (…) of one party against the Government of the other party (…) that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law. The Commission shall not hear claims arising from (…) the use of force, except to the extent that such claims involve violations of international humanitarian law.' Agreement of 12 December 2000, see the Annex to UN Doc. A/55/686 – S/2000/1183 (Algiers Agreement), art 5(1).

120 The UN Security Council (UNSC) has on occasion used its powers under Chapter VII of the UN Charter to either enforce IHL itself, or to set up ad hoc tribunals with the competence to apply IHL. Such action can be based on the UN Charter itself, granting the UNSC powers in situations which threaten or breach the peace in art 39ff, and can also be inspired by AP I, which in art 89 provides for States to act in response to serious violations of AP I and the GC, either unilaterally or in cooperation with other States *or the UN*; see also Kolb (n 27) 196. The Council has at times made clear its readiness to 'adopt targeted and graduated measures' to put an end to certain violations, and to 'adopt appropriate measures aimed at those who violate [IHL and HRL]'. More specifically, Security Council action has occasionally included calls for investigations or prosecutions, and also established fact-finding missions by UN Commissions to examine allegations of grave breaches of the Geneva Conventions as well as other violations of IHL. See UNSC Statement by the President, UN Doc. S/PRST/2013/2, p. 2; UNSC Resolution 1894 (2009), UN Doc. S/RES/1894 [10]; UNSC Resolution 780 (1992), UN Doc. S/RES/780 [2], pertaining to the conflict in the former Yugoslavia.

restrictions apply for international criminal courts and tribunals, which are limited in their application of IHL in two ways. Firstly, they can only exercise jurisdiction over war crimes, which therefore excludes violations of the majority of IHL provisions.[121] Secondly, the ICC applies ICL, which differs from IHL primarily when it comes to the element of *mens rea* – a concept that is in large part alien to IHL.[122] Although IHRL and ICL bodies therefore incidentally enforce rules of IHL, they only do so insofar as their own documents coincide with IHL, and they do so indirectly.[123]

5.3 … back to the State

As was shown above, any form of institutionalised oversight over, or enforcement of States' IHL obligations, is lacking. Insofar as mechanisms or procedures do exist, these are either dependent on prior *ad hoc* consent (for instance the International (Humanitarian) Fact-Finding Commission), on discretionary powers (such as the Security Council's powers of enforcement), or are principally limited in their jurisdiction to apply IHL, as applies to human rights courts, as well as international criminal tribunals. This must lead us to the conclusion that it is *States* who are the primary enforcers of IHL. We can distinguish between States' role in enforcing the law *externally*, to make sure others comply with the law, and its role in implementing and enforcing the law *internally*, with regard to its own conduct and organs.

5.3.1 External implementation, supervision, and enforcement

Enforcement of State obligations under international law remains essentially a system of 'self-help',[124] which means that States themselves must enforce

121 ICC Statute, art 5(1)(c) and 8; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UNSC Res. 827, UN Doc. S/RES/827 (1993), 25 May 1993 (hereinafter: ICTY Statute), art 1; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, UNSC Res. 955, UN Doc. S/RES/955 (1994), 8 November 1994 (hereinafter: ICTR Statute), art 1.

122 Kolb (n 27) 188.

123 Further, see Sandesh Sivakumaran, 'Re-Envisaging the International Law of Internal Armed Conflict' (2011) 22 European Journal of International Law 219, 238–42.

124 Nigel D White and Ademola Abass, 'Countermeasures and Sanctions' in Malcolm D Evans (ed), *International Law* (Oxford University Press 2014) 537–9. See also Jutta Brunnée, 'International Legal Accountability Through the Lens of the Law of State Responsibility' (2005) XXXVI Netherlands Yearbook of International Law 21, 37.

the legal obligations owed to them by other States.[125] To do so, international law allows States to act unilaterally or collectively to induce other States to comply with their international obligations.[126] Further, an important incentive for States to comply with their obligations, is the pull of reciprocity.[127] Both the taking of unilateral countermeasures, and the functioning of reciprocity, however, are restricted under IHL.[128]

Firstly, States' resort to countermeasures is limited under IHL. Normally, the system of countermeasures allows States to induce a State who breaches its obligations, into coming back into the fold. It allows States to take measures which deviate from their own international obligations, under certain conditions, to pressure a State into honouring its obligations.[129] Under IHL, however, resort to countermeasures as a response to breaches of the law by a party to the conflict is limited.[130] Article 50(1)(c) ILC Articles on the Responsibility of States (ARSIWA) makes clear that '[c]ountermeasures shall not affect (…) [o]bligations of a humanitarian character prohibiting reprisals', reflecting the prohibition of reprisals carried out against individuals.[131] Responding to an opposing State's ill-treatment of POWs by ill-treating one's own captives, for example, can clearly not be allowed. Thus, States cannot lawfully resort to countermeasures which deviate from their IHL obligations – they must comply 'in all circumstances'.[132]

Secondly, and closely connected, States may not condition their compliance with IHL on reciprocity. Reciprocity essentially relies on States observing the law in hopes that others will do the same – and knowing that if they do not observe the law, others will not either. This functioning is restricted under IHL.[133] Whereas a material breach of a treaty may normally justify the suspension or termination of a treaty by other contracting parties,[134] Article 60(5) of the Vienna Convention on the Law of Treaties (VCLT) makes clear that suspension and termination are ruled out regarding 'provisions relating to

125 In fact, according to the ICRC, States are even under an obligation under Common Article 1 to induce compliance externally, by other States; ICRC (n 93) [153]-[157]. Of a contrary opinion, see Carlo Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?' (2010) 21 European Journal of International Law 125.

126 Jan Klabbers, *International Law* (Cambridge University Press 2013) 165–84.

127 Francesco Parisi and Nita Ghei, 'The Role of Reciprocity in International Law' (2003) 36 Cornell International Law Journal 93.

128 ICRC (n 93) [175].

129 *Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), A/56/10, *Yearbook of the International Law Commission* 2001, vol. II, Part Two, 106, art 49-54.

130 See also Theodor Meron, *Human Rights in Internal Strife: Their International Protection* (Grotius Publications Limited 1987) 10–1; Fleck (n 90) 184.

131 *Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), A/56/10, *Yearbook of the International Law Commission* 2001, vol. II, Part Two, 106, Article 50 under (8).

132 Common Article 1; ICRC (n 93) [188].

133 Bryan Peeler, *The Persistence of Reciprocity in International Humanitarian Law* (Cambridge University Press 2019).

134 VCLT, art 60.

the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'.[135] The regular functioning of reciprocity (*do ut des*) is thought not to be suitable for these kinds of obligations, as they protect human beings rather than State interests alone.[136] The ICRC has found this rule to reflect customary IHL.[137]

5.3.2 Internal implementation, supervision, and enforcement

The weakness in the external supervision and enforcement machinery of IHL, and the limited ways that States can enforce IHL externally, places a strong emphasis on what Robert Kolb has named the 'voluntary nature'[138] of the system. States are responsible for employing an enforcement system that ensures *their own* organs, armed forces, and individuals comply with IHL, by means of prevention, control and suppression of violations.[139] States have from the conception of the 1949 Geneva Conventions been envisioned as the main enforcers of IHL with regard to individuals, as is borne out primarily by the grave breaches provisions that require States to enact and enforce criminal legislation, and search and bring before their courts perpetrators of these breaches.[140] This conclusion also flows from AP I, which in Article 41(1) provides that the 'armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.' State measures are therefore clearly not limited to enacting criminal legislation, but must also entail the institutionalisation of the command structure required to ensure the compliance with IHL by individual soldiers.[141] This also flows from Common Article 1's requirement that States 'respect *and ensure respect*' of the Conventions. The obligation to ensure respect requires States to ensure that their own armed forces comply with IHL.[142]

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135 See also Robert Kolb and Katherine Del Mar, 'Treaties for Armed Conflict' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 86.

136 Ibid.

137 Rule 140 ICRC Customary IHL Study, Henckaerts and Doswald-Beck, *ICRC Customary International Humanitarian Law – Volume I: Rules* (n 15) 498.

138 Kolb (n 27) 187.

139 See Kolb (n 27) 189–96. Turns distinguishes seven methods of enforcement, Turns (n 90) 846.

140 Weill (n 76) 7.

141 Compare AP II, art 1(1), which for its application requires armed groups to have a sufficient level of organisation to enable them to implement the Protocol.

142 Extensively, see Focarelli (n 125). Arguing Common Article 1 has an external element (but not yet setting out what this duty entails), see Marten Zwanenburg, 'The "External Element" of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation' (2021) 97 International Law Studies 622.

Besides implementation measures such as legislation and military manuals, these rules must also be enforced by domestic executive and judicial action. The next Chapter examines to what extent this also entails investigative obligations on the part of the State.

5.4 Résumé

In conclusion, the system set up under IHL is ultimately one of *self-enforcement*: it is the subjects of the law themselves – States – who must not only implement the rules in their domestic systems, but who must moreover supervise their own compliance, and enforce the rules in respect of their own conduct. Three factors in particular lead to this conclusion.

Firstly, under IHL there are no institutionalised oversight, implementation, or enforcement mechanisms. This, *secondly*, brings us back to *States*, who are the primary enforcers of IHL. In lieu of specific enforcement mechanisms, general international law leaves it up to States to enforce the law through unilateral (or coordinated) sanctions. For IHL, however, there is a *third* factor in play, which limits the regular operation of unilateral enforcement measures. States may not readily take countermeasures which deviate from their humanitarian obligations under IHL, nor may they suspend or terminate IHL obligations in response to violations by other parties. The regular functioning of reciprocity is therefore limited.

Together, these three factors paint the picture of a system which because of the lack of institutionalised oversight mechanisms, relies on States to enforce the law, but which at the same time restricts States' powers of unilateral enforcement. Thus, it is up to States to take responsibility *for their own conduct*. The next Chapter examines to what extent this also entails a *duty to investigate* violations.

6 Conclusion

This Chapter set out to provide a basic understanding of the IHL system, which facilitates the research into specific investigative duties under IHL. It was shown that IHL is a pragmatic field of law, which aims to mitigate the consequences of armed conflict. It does so by striking a constant balance between what is militarily necessary, and what humanitarian considerations require. Thus, the entirety of IHL is built on the tension between these two guiding principles. This applies equally to rules of IHL enshrined in the Geneva Conventions and their Additional Protocols, and to customary international humanitarian law – the main IHL sources relied upon in this study.

Main other points which must be taken away from this introduction to the IHL system, are that it binds States, non-State armed groups, and – crucial-

ly – individuals. All three actors are directly bound by rules of IHL, and must comply with such rules in situations of international or non-international armed conflict, as well as situations of occupation. Also, importantly, the rules applicable to these three situations to which IHL applies, vary. Thus, conflict classification is an important first step in determining the legal regime applicable to a conflict situation. Finally, obligations under IHL in principle extend to wherever and whenever the armed conflict may take place. There is no territorial restriction *per se*, and the rules remain applicable for so long as the conflict lasts. Nonetheless, in determining the contextual relevance of rules, it may be useful to determine to what extent certain conduct has a nexus to the armed conflict.

Lastly, it was shown that IHL has a weak implementation, supervision, and enforcement system. There is no dedicated and IHL specific institutionalised oversight or enforcement, and insofar as any procedures exist, these are contingent on prior State consent, and hardly – if ever – used. This leaves us with a system of self-enforcement, where States themselves are primarily responsible for ensuring compliance, and for enforcing IHL.

The next Chapter uses these fundaments of IHL as a platform, and examines to what extent States must investigate violations of IHL, and if so, how they must do so.

3 The duty to investigate violations of IHL

1 INTRODUCTION

With the previous Chapter's introduction to IHL freshly in mind, it is now time to explore to what extent IHL imposes investigative obligations on States. This Chapter does so, firstly, by drawing out how the IHL system relies on self-investigations by States for its effectiveness (§2). A second step is then to explore the specific *sources* which provide for a duty to investigate IHL violations. These sources immediately delineate the obligation's scope of application, and these are therefore discussed together (§3). After having thus outlined *what* States must investigate, *when*, and *why*, section 4 discusses *how* they must do so. It does so by determining the investigative standards States must meet.

2 THE IHL SYSTEM'S IMPLICATION OF INVESTIGATIONS

2.1 The system of self-enforcement and the duty to ensure respect for IHL

As was explained in the previous Chapter, IHL has a weak implementation, oversight, and enforcement system. It lacks an institutionalised machinery on the international level, which stresses the role of States. At the same time, States are restricted in how they can enforce IHL *externally*, with regard to other States. They may not suspend or terminate their IHL obligations in response to violations, and their recourse to countermeasures is equally restricted.

Together, this puts the emphasis of oversight and enforcement fully on *internal* enforcement by States themselves. It is States themselves who must make sure that they comply with IHL, by properly implementing it on the domestic level, supervising compliance by their armed forces, and enforcing the law where necessary. This obligation does not only derive from IHL's system, which lacks other mechanisms, but also flows from Common Article 1. That provision, which is of a customary nature,[1] stipulates that States must

1 Rule 139 of the ICRC Customary IHL Study, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *ICRC Customary International Humanitarian Law – Volume I: Rules*, vol I (Cambridge University Press 2005) 495. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment (27 June 1986), *I.C.J. Reports* 1986, p. 14 [220].

'respect and ensure respect' for the Geneva Conventions, 'in all circumstances'. Thus, States must not only 'respect' IHL, as flows from the general obligation *pacta sunt servanda*, they must moreover *ensure respect* for IHL.[2] This goes beyond refraining from violations, and requires active measures to ensure that the State acts in line with IHL, to 'do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally'.[3] This – crucially – entails also a duty to supervise the execution of own implementation measures,[4] and to induce compliance by the own armed forces and population. The duty to ensure respect for IHL, in this context, also includes an obligation to *prevent* violations,[5] and in certain circumstances, to take penal action against transgressors.[6] Rendering IHL *effective* is contingent on this.[7]

How States must supervise and enforce the law, however, is not clearly set out in IHL treaty law. IHL in large part leaves it up to States themselves to decide how they implement the law, and this also goes for how they set up oversight mechanisms.[8] So long as States therefore properly effectuate their obligation to ensure respect for IHL by their own armed forces through effective supervision and enforcement mechanisms, this is principally in line with their IHL obligations. Although States are therefore to an extent free in how they decide to shape these systems, there does appear to be a strong implication that investigations are called for.

States' obligation to actively ensure that their armed forces, as well as private individuals over whom they exercise authority,[9] comply with IHL, and to enforce the law where necessary, renders it indispensable that they are *aware* of what goes on on the ground.[10] Effective supervision and enforcement are fully contingent on a system which functions as the State's 'eyes and ears' on the ground, which monitors military operations and their effects, and so forth. Without proper knowledge of the facts, of the effects of military operations,

2 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) [143]; [154].

3 Jean S Pictet (ed), *Commentary to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1st edn, International Committee of the Red Cross 1958) 16.

4 Ibid; ICRC (n 2) [150].

5 ICRC (n 2) [164].

6 *Prosecutor v Duško Tadić*, ICTY (Appeals Chamber) Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) IT-94-1-AR72, A. Ch. [71].

7 Amichai Cohen and Yuval Shany, 'Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts' (2011) 14 Yearbook of International Humanitarian Law 37, 44.

8 ICRC (n 2) [146].

9 ICRC (n 2) [150].

10 Cohen and Shany (n 7) 44.

and of the conduct of their armed forces, any meaningful supervision and enforcement is illusory. States must therefore put a system in place which allows for them to keep abreast of their armed forces' compliance with IHL.[11]

This role is all the more pronounced if we consider that IHL does not only address obligations to States, but also imposes a number of obligations directly on individuals.[12] In their role as primary enforcers of IHL, States are in the crucial position to ensure that individuals respect their obligations, and to enforce the law if they do not. Irrespective of what this enforcement action entails exactly, in order for States to be able to take such action they must – as a matter of logic – first establish the facts to assess whether IHL violations have indeed taken place. Such assessment necessarily requires knowledge of the facts, and therefore some kind of investigation.

If we then look more closely at *how* States must shape such supervision over their armed forces, as well as over the acts of others, IHL treaty law contains relatively little guidance. Article 41(1) of AP I provides generally that the 'armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.' How to operationalise the executive supervision and enforcement is explicated mostly by setting out the role of the commander.[13] Commanders are seen as 'key' to enforcement,[14] due to their responsibility to prevent, suppress and report all breaches, to initiate disciplinary or penal sanctions where appropriate,[15] and by virtue of their own criminal liability for shortcomings in the exercise of these duties.[16] The purpose of these provisions is to render the law effective, and as the ICRC Commentary to AP I makes clear, commanders may even be required to conduct investigations and thereby function 'like an investigating magistrate'.[17]

Beyond this key role for the commander, as will be explored in-depth in section 3, IHL also refers to a role for judicial enforcement by States.[18] National courts present the main avenue for judicial enforcement of IHL;[19] these courts

11 Françoise J Hampson, 'An Investigation of Alleged Violations of the Law of Armed Conflict' (2016) 46 Israel Yearbook on Human Rights 1, 5–10.

12 See Chapter 2, §4.3.

13 Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 Harvard National Security Journal 31, 40–1.

14 Schmitt (n 13) 41; David Turns, 'The Law of Armed Conflict (International Humanitarian Law)' in Malcolm D Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 848.

15 AP I, art 87.

16 AP I, art 86(2).

17 Jean Pictet and others, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Yves Sandoz, Christophe Swinarski and Bruno Zimmermann eds, Martinus Nijhoff 1987); Schmitt (n 13).

18 Pictet and others (n 17).

19 Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford University Press 2014) 7–8.

must be involved in accordance with the duty to 'bring before their courts' perpetrators of grave breaches.[20] Should there be any competent international tribunal, national courts normally also present the last opportunity for the State to bring its domestic practice into compliance with international norms, which means these courts take up an important role in this respect.[21]

In lieu of detailed rules with regard to operationalisation, it is in principle up to States to decide for themselves how they wish to implement the general requirement to set up internal supervision and enforcement systems.[22] Nonetheless, some indications of how States should, optimally, do so can be gleaned from practice and soft law instruments.

In 2019, the ICRC together with the Geneva Academy of International Humanitarian Law and Human Rights, published *Guidelines on Investigating Violations of International Humanitarian Law* (hereinafter: *Guidelines*). This document sets out guidelines on how violations of IHL must be investigated, based on legal requirements, policy considerations, and good practice. The *Guidelines* do not, as such, aim to establish the 'agreement of the parties regarding [the treaty's] interpretation' in the sense of Article 31(3)b VCLT, and therefore do not as such propose legally binding interpretations.[23] Nonetheless, their strong basis in State practice make them of great added value in the interpretation of the relevant IHL,[24] and ensure their practicability. The following therefore explores briefly how the *Guidelines* flesh out States' obligation to institutionalise supervision and enforcement of IHL in their domestic systems.

The good practice promoted by the *Guidelines* foresees in a domestic process consisting of three principal steps before an actual in-depth investigation takes place. This includes good practice on how supervision and enforcement mechanisms can be shaped. In this context, the *Guidelines* suggest that States should set up domestic systems which ensure that they *make records* of incidents which may require investigation, and of all military operations, that relevant

20 Suspected perpetrators must be ensured at a minimum the due process rights also afforded to prisoners of war, see the last paragraph of the grave breaches provisions, GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146.

21 Weill (n 19) 8.

22 ICRC (n 2) [146].

23 Noam Lubell, Jelena Pejic and Claire Simmons, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* (The Geneva Academy of International Humanitarian Law and Human Rights & International Committee of the Red Cross 2019) 1.

24 It is submitted that State practice can nevertheless be of relevance under VCLT, art 32, as a supplementary means of interpretation – as was confirmed by the ICJ and in legal scholarship; *Kasikili/Sedudu Island (Botswana/Namibia)* Judgment (13 December 1999) *I.C.J. Reports* 1999, p. 1045 [79]-[80]; Marten Zwanenburg, 'The "External Element" of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation' (2021) 97 International Law Studies 622, 629.

incidents are *reported* to appropriate authorities, which authorities then *assess* whether, and if so what, further investigative steps are necessary.

Firstly, it is key that all military operations are *recorded*, meaning that relevant information is 'captured' by collecting, documenting, and retaining information.[25] These records serve the regular purposes of facilitating lessons-learned processes and gauging the effectiveness of military operations, but moreover provide the starting point for investigative processes.[26] Any incident which potentially violates IHL will also be recorded, and relevant information captured and stored.[27] *Secondly*, in case there is an indication of a violation, or of an incident which otherwise calls for further scrutiny – for instance an unexpectedly large number of civilian deaths following an air strike – this must then be *reported*.[28] IHL treaty rules clearly require commanders to report incidents indicating that a breach has occurred.[29] Reporting obligations, according to the *Guidelines*, should exist throughout the chain of command, so any member of the armed forces can report an incident internally, which can then be reported to the appropriate authority for assessment.[30] The same applies to external allegations, these too must be communicated to the appropriate authority for assessment.[31] At this point, *thirdly*, an appropriate authority, which can be a military or a civil authority, *assesses* and decides whether an incident requires further investigation. In doing so, it can decide (i) that no further investigation is necessary, (ii) that a criminal investigation must be opened, or that (iii) an administrative investigation must be conducted.[32]

This domestic system for the monitoring of military operations, as it is suggested by the *Guidelines*, constitutes good practice. It guides how States *can* shape the oversight of their armed forces, though they are free to choose other methods so long as they are effective. The *Guidelines*' suggestion of distinguishing between criminal and administrative investigations, however, as we shall see in the next section, flows directly from how investigative obligations are structured under IHL. Investigations under IHL are dependent on the *severity* of the violation, which also determines whether such a violation

25 Lubell, Pejic and Simmons (n 23) 14. This finding corresponds to the Turkel Report's duty to 'examine' suspected violations of IHL; The Turkel Commission, 'Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law' (2013) 73–4 <https://www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_b1-474.pdf (last acccessed 15 July 2021)>.

26 Lubell, Pejic and Simmons (n 23) 14–5.

27 Ibid.

28 Lubell, Pejic and Simmons (n 23) 16.

29 AP I, art 87.

30 Lubell, Pejic and Simmons (n 23) 19.

31 Lubell, Pejic and Simmons (n 23) 20.

32 Lubell, Pejic and Simmons (n 23) 21–3. Finally, they also stipulate that the assessment authority must be able to decide that it requires more information to take its decision.

constitutes an international crime, which requires a criminal response and investigation. This is the subject of section 3.

2.2 Rationales for investigative obligations under IHL

Much of what was said above, on how IHL's system of implementation, supervision, and enforcement *implies* a duty to investigate, also alludes to the *rationale* for investigative obligations. It was mentioned on several occasions how IHL, *for its effectiveness*, relies on States implementing and enforcing the law, and that they can do so effectively only by investigating. Commentators have even suggested that investigations are 'indispensable' in safeguarding the effectiveness of the system,[33] and as was shown above, the system is indeed reliant on State investigations. The lack of institutionalised international supervision and enforcement mechanisms, and the limited external enforcement options for States, make this so.

Effectuating IHL, thus, is a primary driving force for investigative obligations under IHL. This includes *structural*, and *incidental* aims. In order to structurally safeguard the integrity of States' implementation of IHL, recommended practice is to record *all* military operations, and report any notifiable incidents which indicate that further investigation may be called for.[34] This is meant to *ensure compliance* with the rules of IHL, *to put a stop to violations*, and to *uncover systemic shortcomings*. In other words, there is a strong *prospective*, forward-looking purpose to these requirements.[35] Procedural mechanisms must be set up and institutionalised in order to structurally safeguard States' compliance with IHL, and to improve relevant practices where applicable.

Then, investigative obligations also serve *retrospective* aims. The *ex post facto* investigation of incidents does not only safeguard the structural integrity of States' military operations, but also brings to light individual violations, facilitates and forms part of accountability processes, and provides the basis for individual remedies. *Holding those responsible to account* is an important aim of investigations – be it through measures geared towards individuals (such as disciplinary measures, reprimands, dishonourable discharge, or criminal proceedings), or towards the State (State responsibility and broader accountability structures, for instance aimed at making known the truth). Impunity is the polar opposite of accountability, and IHL's investigative requirements – insofar as concerned with *criminal* breaches of IHL – aim to prevent impunity. This includes ensuring perpetrators of war crimes are prosecuted and punished, which in turn serves the forward-looking aim of preventing

33 Cohen and Shany (n 7) 44.
34 Hampson (n 11).
35 Cf. Cohen and Shany (n 7) 46–7.

a culture in which violations can take place and be perpetuated. All this is explored in-depth in the following sections.

The pro- and retrospective sides of the duty to investigate, and in a broader sense the implementation and enforcement sides of IHL, together ensure the effectiveness of the system. The former requires States to set up a procedural mechanism to stay aware of the effects of military operations and their compliance with international norms; the latter requires the effectuation of the legislative and operational frameworks for investigation and accountability in case a norm is violated. As is explored further below, duties of investigation under IHL vary quite markedly depending on whether the (potential) violation is classified as 'serious' or not, and for serious violations IHL is much more stringent and explicit as to forms of accountability. For non-serious violations, meanwhile, investigations are not equally clearly governed by explicit rules, and the aspect of ensuring (future) compliance takes on a more prominent role here, with accountability requirements operating more in the background.

2.3 Résumé

States must implement IHL in their domestic systems, both in the law and in the practice of their armed forces, and must themselves oversee and review the actions of their armed forces in light of the applicable rules of IHL. This is reinforced by Common Article 1's obligation to 'ensure respect' for IHL. Thus, the system of IHL in itself requires States to supervise the conduct of their own armed forces, and it puts the primary responsibility for such oversight firmly on States themselves. This requirement is all the more clear if we consider that IHL does not only impose certain obligations on States, but also binds individuals directly. Ensuring individuals comply with IHL and enforcing the law where it is breached, in lieu of other mechanisms, requires States to institutionalise review and monitoring of its military operations. If these procedures bring to light potential violations, they must furthermore effectuate mechanisms for the enforcement of the law.[36] This system clearly relies on a *duty to investigate violations* by States themselves.

36 Cf. also AP I, art 41(1), which provides that 'armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict'.

3 Scope of application and sources of investigative obligations

3.1 Introduction

In the preceding section, it was concluded that an obligation to investigate IHL violations may be inherent in IHL's enforcement system. Such a general duty to investigate IHL violations has also been accepted by numerous actors on the international level, such as the UN General Assembly,[37] and the former Commission on Human Rights. The latter found, for instance, that States must 'undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law'.[38] Yet, such general declarations, nor the general system of self-enforcement in and of itself, help us in determining the scope of application or contents of such an obligation. Nor do they clarify the specific sources of investigative duties under IHL. This section therefore examines in more detail the various specific sources which stipulate investigative duties for the State, and determines their scope of application. The investigative standards to be employed once an obligation has been established are discussed in the next section (§4).

The question *whether*, and if so, *when* States are under an obligation to investigate violations of IHL is subject to ongoing debate. The absence of unequivocal treaty provisions or judgments to the effect of the existence of a duty to investigate IHL violations, has led some authors to suggest that such a duty does not yet exist under IHL in general.[39] Others have put forward that the scope must in any case be limited, as for instance an obligation conforming to the human rights obligation to investigate every death would be unfeasible during armed conflicts.[40] Yet others have made a distinction between investigations of grave breaches and war crimes on the one hand – of

37 E.g. UNGA Resolution 3074(XXVIII) (1973), *Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*, UN Doc. A/RES/3074(XXVIII); UNGA Resolution 60/147 (2005), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, under 3(b).

38 See e.g. Principle 19 of ECOSOC Commission on Human Rights, *Impunity. Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher*, UN Doc. E/CN.4/2005/102/Add.1.

39 Sandesh Sivakumaran, 'International Humanitarian Law' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (1st edn, Oxford University Press 2010) 528.

40 Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98 American Journal of International Law 1, 33.

which it appears largely accepted that they require investigatory action – and other IHL violations on the other.[41]

The following section sheds light on this discussion, by exploring the various sources for investigative obligations under IHL, and by outlining their scope of application. It will be shown that the question when States must investigate is contingent on the *type* of violation in question. The section is structured accordingly, distinguishing between 'serious' violations which constitute war crimes (§3.2), and 'non-serious' violations (§3.3).

3.2 Serious violations of IHL: war crimes

3.2.1 Introduction

'Serious violations' of IHL are violations with a certain severity to them. Because of their severity, they are considered war crimes under both customary[42] and treaty law,[43] which means that perpetrators of such crimes incur individual criminal responsibility directly under international law.

Within the broader category of serious violations, IHL distinguishes the separate sub-category of 'grave beaches'. Grave breaches are subject to a distinct treaty regime under the Geneva Conventions and AP I, which as we shall see, also gives rise to a slightly diverging investigative regime. The discussion below turns to the grave breaches first, before examining other serious violations.

3.2.2 Grave breaches

3.2.2.1 Defining grave breaches

Grave breaches, in a nutshell, are breaches of such severity that the drafters of the Geneva Conventions considered that they must be governed by a separate regime.[44] This regime comprises a number of identically worded provisions in the four universal Geneva Conventions, the 'grave breaches provisions'. Additional Protocol I supplements the regime.[45] Grave breaches

41 E.g. Cohen and Shany (n 7); Schmitt (n 13); Alon Margalit, 'The Duty to Investigate Civilian Casualties During Armed Conflict and Its Implementation in Practice' (2012) 15 Yearbook of International Humanitarian Law 155. See also Marten Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal' (2006) 24 Netherlands Quarterly of Human Rights 641, 656.

42 See Rule 156 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 1) 568.

43 ICC Statute, art 8(2)(b) and (c). See also ICRC (n 2) [2821]. The Turkel Commission (n 25) 96.

44 ICRC (n 2) [2821]. See also Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 477.

45 AP I, art 85ff.

are defined as 'wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly', when committed against protected persons or property. This list is completed by the additions made in Articles 11 and 85 AP I, which in essence provide that medical experiments on persons in the hands of the enemy, intentional violation of the distinction between civilians and combatants and miscellaneous other specific acts[46] are also to be considered as grave breaches. Thus, grave breaches comprise an exhaustive list of infractions of the most extreme severity. Importantly, only violations of the law of IAC can constitute a grave breach, as the relevant provisions in the Geneva Conventions and AP I all apply during international armed conflicts only.[47]

3.2.2.2 Sources and material scope of application of the duty to investigate grave breaches

Grave breaches are subject to a separate treaty regime, enshrined in Articles 49 of Geneva Convention I, 50 of GC II, 129 of GC III and 146 of GC IV. Because of their importance, I cite these core provisions here in full:

> 'The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
>
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.
>
> Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.
>
> In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of [Geneva Convention III].'

46 See AP I, art 85(4). These breaches have to do with (a) transferring one's own civilians into occupied territory; (b) unjustifiable delay in repatriation of POWs or civilians; (c) apartheid and other outrages based on racial discrimination; (d) targeting and destroying historical, cultural or religious monuments; and (e) depriving protected persons of the right to a fair trial.

47 ICRC (n 2) [2920]. As is discussed in section 3.2.3, violations of the law of NIAC can constitute war crimes – but the specific treaty regime for grave breaches does not apply.

The regime envisioned by the grave breaches provisions accordingly comprises three distinct, generally accepted, obligations. As the ICRC Commentary to the Conventions makes clear, these are the obligations '[1] to enact special legislation; [2] to search for persons alleged to have committed breaches of the Convention; [3] to bring such persons before its own courts or, if it prefers, [extradite them]'.[48] These obligations together have as their aim 'to prevent impunity and to deny safe haven to alleged perpetrators of grave breaches'.[49]

The obligation to enact legislation which criminalises grave breaches in the domestic legal order is a peacetime obligation, imposed on States immediately after ratification, irrespective of a concrete armed conflict.[50] In addition, the requirement that States bring suspects before their courts *regardless of their nationality*, is commonly perceived to entail an obligation to vest universal jurisdiction over grave breaches.[51] Of prime importance for this research, suspected perpetrators of grave breaches must moreover be 'searched for', and either prosecuted or extradited. In other words, the criminal legislation which was enacted must be applied and put into practice if a grave breach indeed occurs.

The obligation to *search* for suspected perpetrators of grave breaches, and to *bring them before the courts*, strongly imply a duty to *investigate* – without however explicitly using the term 'investigation'.[52] Searching without investigating is meaningless, and a prosecution and trial are unthinkable without properly investigating first. The same goes for the alternative where States extradite a suspect, rather than trying them themselves. The option given to States to either prosecute or extradite – *aut dedere aut iudicare* – means that States may fulfil their obligation in this respect by extraditing suspects rather than prosecuting them, subject to the condition that the State requesting extradition has made out a *prima facie* case.[53] But extradition can only take place once the alleged perpetrator has been apprehended, which requires a

48 Pictet (n 3) 590. See also e.g. Schmitt (n 13) 37; Stoyan Minkov Panov, 'The Obligation Aut Dedere Aut Judicare ('Extradite or Prosecute') in International Law: Scope, Content, Sources and Applicability of the Obligation "Extradite or Prosecute"' (University of Birmingham 2016) 102.

49 ICRC (n 2) [2864] and [2868].

50 Compare Common Article 2 of the Geneva Conventions.

51 Part of customary IHL, Henckaerts and Doswald-Beck (n 1) 606. See further Knut Dörmann and Robin Geiß, 'The Implementation of Grave Breaches into Domestic Legal Orders' (2009) 7 Journal of International Criminal Justice 703, 709; Paola Gaeta, 'Grave Breaches of the Geneva Conventions' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015) 638.

52 See also e.g. Schmitt (n 13) 38. Further, see Human Rights Council 23 September 2010, *Report of the Committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards*, A/HRC/15/50 [19].

53 As borne out by the grave breaches provisions themselves.

search and therefore investigation into at the very least the identity and whereabouts of the suspect.[54] A *search* is therefore always required, and not conditional on whether States ultimately prosecute themselves, or extradite the suspect.[55] Clearly then, IHL imposes on States a duty to investigate those suspected of having committed a grave breach.

Next, we may question whether beyond the *suspect*, States must also investigate the *breach itself*, the occurrence. In other words, are States merely held to investigate when there is a suspicion against an individual, or must they also investigate a grave breach when they find it, which might ultimately lead to the identification of a suspect? By way of illustration, must States investigate in a classic *whodunnit* scenario, where they find the body of someone who was apparently extrajudicially executed, even if there are no apparent suspects? The short answer is yes, they do. Although it must be conceded that the search for, and investigation into a *person* (an alleged perpetrator) can be distinguished from the investigation into an *occurrence* (a grave breach), it is nonetheless difficult to perceive of a meaningful search and subsequent prosecution without investigations into the breach itself. This view is widely accepted, in authoritative interpretations by the ICRC Commentaries[56] and the European Court of Human Rights,[57] as well as in State practice[58] and legal literature.[59] An obligation to investigate alleged grave breaches is therefore inherent in the duty to 'search' for persons alleged to have committed grave breaches, and to 'bring them before the courts'.

To sum up, in accordance with the grave breaches provisions, States are therefore under an obligation to investigate. The material scope of application of this duty extends to violations of IHL which constitute a grave breach. Both suspects of such breaches, as well as the breach itself, require an investigative response by the State. Furthermore, States must when appropriate prosecute and punish suspects, or – as a secondary obligation – extradite them. This

54 Supported by Panov, who makes clear that the obligation *aut dedere aut iudicare* applies to the *custodial* State, that is, the State who has custody over the alleged perpetrator; Panov (n 48) 243.

55 ICRC (n 2) [2859]; Panov (n 48) 102.

56 ICRC (n 2) [2859].

57 *Al-Skeini and others v United Kingdom*, ECtHR [GC] 7 July 2011, 55721/07 [92], holding that 'The Geneva Conventions also place an obligation on each High Contracting Party *to investigate and prosecute alleged grave breaches* of the Conventions, including the wilful killing of protected persons' (emphasis FT).

58 See the extensive State practice referenced in Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *ICRC Customary International Humanitarian Law – Volume II: Practice* (Cambridge University Press 2005) 3854–83 and 3941–4013.

59 Cohen & Shany find there 'is little question' about this, Cohen and Shany (n 7) 41. See also Schmitt (n 13) 38; Margalit (n 41) 157; Silja Vöneky, 'Implementation and Enforcement of International Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) 668.

system aims to render the prevention of impunity watertight – though no obligation to come to a conviction exists.[60] The duty to investigate ought therefore be seen in this respect as unconditional: the duty to search and investigate must be discharged, and the only choice States have is whether they follow-up such investigation by prosecution, or rather by extraditing the suspect.[61]

3.2.2.3 The investigative trigger

Now that we know *that* States must investigate grave breaches, we can take a closer look at *when* they must do so, precisely. The question is thus what *triggers* the duty to investigate. The grave breaches provisions do not provide much guidance in this respect, stipulating only that 'persons alleged to have committed' grave breaches must be searched for. From a solely textual perspective, the provision appears to indicate that when it is *alleged* that someone has committed a grave breach, this triggers the States' obligation to investigate. As was set out above, beyond just suspected perpetrators, States must also investigate the grave breach itself, regardless of whether there is already a suspect. If we extrapolate from the text, this indicates that States must investigate *allegations* of a grave breach. The source of the allegation is not alluded to and would seem to be immaterial, which means that allegations by States, NGOs or victims must all alike be investigated.[62]

The authoritative ICRC Commentary goes further. In the 1950s Pictet commentaries, the ICRC stated that '[t]he necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another State'.[63] This indicates that States must investigate *ex officio*, and may not await outside allegations by third States. The updated 2016 Commentary adds that the duty to investigate arises at the moment a State 'realizes' an alleged perpetrator is present on its territory or under its jurisdiction.[64] A specific allegation does not therefore appear to be required in order to trigger the duty to investigate. Rather, whenever the State has information which indicates a grave breach occurred, or a suspect is present within its jurisdiction, it must initiate an investigation of its own motion.[65]

Very rarely, the Geneva Conventions make clear what type of an 'indication' of a breach triggers the duty to investigate. Geneva Convention III and IV require States to conduct an 'official enquiry' into '[e]very death or serious injury of an internee [or prisoner of war], caused or suspected to have been

60 ICRC (n 2) [2861]. Otherwise the rights of the defence, the presumption of innocence in particular, would be impermissibly restricted (AP I, art 75(4)d and AP II, art 6(2)d AP II).

61 This choice is not completely free, see *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment (20 July 2012), *I.C.J. Reports* 2012, p. 422 [95].

62 Lubell, Pejic and Simmons (n 23) 20.

63 Pictet (n 3) 593.

64 ICRC (n 2) [2890].

65 See also Panov (n 48) 102; Vöneky (n 59) 670.

caused by a sentry, another internee or any other person, as well as any death the cause of which is unknown'.[66] The trigger for this investigative obligation, then, is when a death or serious injury was caused or was *suspected* to have been caused by a third person; or any death of an internee or POW the cause of which is unknown. Similar to the grave breaches provisions, a *suspicion*, much like an allegation, can trigger the duty to investigate. But that a death with unknown causes in and of itself also triggers the duty to investigate, goes further, because while this of course raises the *possibility* that a grave breach was committed, it does not as such raise a suspicion to this effect. Thus, in this context, States are explicitly put under an obligation to *find out* whether a violation has occurred, even if there is no clear indication to that effect. This also makes sense in the given context. When a State detains individuals, it operates under a heightened duty of care, and if a detainee passes away for unknown reasons, the State must establish what happened.[67] In these specific circumstances, therefore, any death *sec* must be investigated, and is sufficient indication that a breach may have occurred. In other situations, however, what type of 'indication' triggers the duty to investigate, is less clear.

A next relevant question is then *what information*, when available to the State, triggers the duty to investigate? Is there a certain level of information which must be met, and can a credibility test be applied to the information or its source? When it comes to deaths of POWs or internees, the simple knowledge of their death is sufficient. But in other cases, the treaty text does not address this issue. It is therefore up for debate whether the information or the allegation must be somehow substantiated or plausible, or whether States may even have an active duty to uncover potential violations irrespective of prior and specific indications of wrongdoing.

Questions as to the type and level of information, the credibility of information sources, and a duty for States to actively uncover potential violations, are therefore left unanswered by the grave breaches provisions. Some indications may however be tentatively inferred from State practice,[68] and soft law instruments.

Soft law and State practice

The most recent guidance can again be found in the 2019 *Guidelines* by the ICRC and the Geneva Academy. As we saw previously, the *Guidelines* envision a system where States set up mechanisms which ensure the *recording* of information regarding *all* military operations, coupled with an obligation to *report*

66 GC III, art 121; GC IV, art 131.

67 See also Pictet (n 3) 509.

68 Some care must be taken in how State practice is used in the interpretation of treaty norms. According to the law of treaties, 'agreement of the parties regarding [the treaty's] interpreta-

incidents to appropriate authorities.[69] Reporting has to happen regardless of the source of the information or allegation, meaning that information stemming from internal records and outside allegations are both sufficient to trigger the reporting obligation. If the authority who receives such reports finds indications of a violation, it can then order further investigation, whether this is a criminal or an administrative investigation. According to the *Guidelines*, criminal investigations must be opened in case of 'reasonable grounds to believe' a war crime was committed; administrative investigations should be initiated if circumstances 'suggest' that a non-criminal IHL violation has occurred.[70]

Crucial for the trigger of the duty to investigate, are therefore the steps between recording and reporting (when must recorded information be reported?), and between reporting and the decision to investigate further (when does reported information warrant a further investigation?). Regarding the first issue, State practice would appear to indicate that 'reportable' or 'notifiable' incidents are subject to the obligation to report. What type of incidents are 'notifiable' varies from State to State, with States like Burundi and the United States of America (US) for instance imposing reporting obligations generally with regard to *all* violations of IHL,[71] whilst others like France list

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tion' can be relied on for treaty interpretation, ex VCLT, art 31(3)b. But because all States are party to the Geneva Conventions, this would necessarily require a comprehensive study of State practice which then ought to indicate 'agreement' between them. It is submitted that State practice can nevertheless be of relevance under VCLT, art 32, as a supplementary means of interpretation – as was confirmed by the ICJ and in legal scholarship; *Kasikili/ Sedudu Island (Botswana/Namibia)* Judgment (13 December 1999) *I.C.J. Reports* 1999, p. 1045 [79]-[80]; Zwanenburg (n 24) 629. Also if State practice is relied upon more loosely, care must be taken as to what conclusions are drawn from it, and whether those are used to confirm one's normatively preferred outcome. By way of example, two studies into investigative obligations have been carried out, by Schmitt on the one hand, and Cohen & Shany on the other. They have both relied on the practice by the same States, but their analysis of the IHL treaty framework, diverges. Then, when gauging the practice of the very same States against their normative yardsticks, their conclusions adapted to their normative analysis. Schmitt found that practice went beyond what was required of States, that this constituted best practice, which did not indicate what States though the law required of them. Cohen & Shany found the very same State practice did not meet the demands they found in their normative analysis, and concluded that State practice in this regard 'lagged behind' legal developments, but that this did not undercut the normative framework. Thus, while both scholarly endeavours are of very high quality and study the same State practice, they use this practice to confirm their diverging legal analyses. Compare Schmitt (n 13) 77–8; Cohen and Shany (n 7) 52.

69 See *supra*, §2.1.

70 Lubell, Pejic and Simmons (n 23) 22.

71 Règlement sur le DIH, 2007, para VIII.2.1; Chairman of the Joint Chief of Staff Instruction, Implementation of the DOD Law of War Program, CJCSI 5810.01D (2010) para 6(f)(4)(e)(2)CJCS; DoD Instruction 6055.07, "Accident Investigation, Reporting, and Record Keeping" (3 October 2000) Table 10 "Special Reporting Group Notification Requirements"]. As referred to in Lubell, Pejic and Simmons (n 23) 17–8, fn 51.

a number of specific infractions which must be reported,[72] and with yet others like Peru indicating reporting obligations with regard to war crimes only.[73] Certain States refer explicitly to international humanitarian law or the law of armed conflict, whilst others simply list offences without distinguishing whether those acts are prohibited pursuant to international law, or pursuant to domestic policy considerations.

As illustration of what could be considered 'good practice',[74] a number of States such as Australia, the United Kingdom (UK) and the US employ a fact-finding mechanism with a low threshold – as envisioned by the *Guidelines* – which is responsible for referring cases to either military or civil prosecutorial services when indications of criminal wrongdoings emerge.[75] In Australian practice, all Defence personnel are required to report 'notifiable incidents', which pertain to, in short, cases that give rise to a reasonable suspicion that an IHL violation has occurred – excluding minor disciplinary matters.[76] Commanders must determine whether an incident is notifiable as soon as they become aware of them, and if so – including when in doubt – report these incidents to the Defence Investigative Authority.[77] All other personnel are required to report such incidents to their commander or to the investigative authority directly if they have a reasonable suspicion of such an incident.[78] A suspicion is reasonable when the established facts 'objectively seen by a reasonable person [are] sufficient to give rise to a belief that an incident occurred'.[79] Commanders must therefore immediately after becoming aware of an incident assess the facts of the case, determining whether a reason-

72 Bulletin Officiel des Armées, Instruction N° 1950/DEF/CAB/SDBC/CPAG fixant la conduite à tenir par les autorités militaires et civiles en cas d'accidents ou d'incidents survenus au sein du ministère de la défense ou des établissements publics qui en dépendent (6 February 2004). As referred to in Lubell, Pejic and Simmons (n 23) 17–8, fn 51.

73 Manual para las fuerzas armadas, 2010, p. 222. As referred to in Lubell, Pejic and Simmons (n 23) 17–8, fn 51.

74 Cf. Schmitt, who considers these 'best practices'; Schmitt (n 13) 77–8.

75 It should be noted that this enquiry concerns legislative practice, and military manuals – not 'enforcement action' in the sense of prosecutions. Such practices can be somewhat difficult to assess, as Ferdinandusse explains, because it is often unclear whether specific instances of prosecution pertain to application of IHL because they oftentimes prosecute war crimes as domestic offences; Ward Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (2009) 7 Journal of International Criminal Justice 723, 725. Further, not all instances of alleged violations of IHL are investigated and prosecuted; Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' 738. For examples see Ward Ferdinandusse, 'Improving Inter-State Cooperation for the National Prosecution of International Crimes: Towards a New Treaty?' (*ASIL Insights*, 2014) 3 <www.asil.org/insights/volume/18/issue/15/improving-inter-state-cooperation-national-prosecution-international> (last accessed 15 July 2021).

76 Australian Department of Defence, *Defence Instructions (General)*, 26 March 2010 [3] and [6].

77 Ibid [7].

78 Ibid [9].

79 Ibid, Annex A, section 1(q).

able suspicion of an IHL violation exists, and if so report it to an investigative authority. On receipt of a report, the Defence Investigative Authority decides whether to initiate an independent investigation,[80] and in case of deaths, serious injuries, or disappearance (excluding enemy combatants) must provide immediate assistance and contact civilian police, as well as secure the area of the incident and preserve evidence.[81]

In UK practice, officers must communicate to service police any circumstance or allegation of which they are aware, that to a 'reasonable person' would indicate a 'Schedule 2 offence' has been committed.[82] Schedule 2 offences concern a list of various serious offences, some against military discipline, such as mutiny, and others against the law of armed conflict, including grave breaches of the Geneva Conventions.[83] Officers must involve service police – a form of military police[84] – as soon as reasonably practicable. Service police subsequently carry out an investigation, which if it renders 'sufficient evidence' to charge a grave breach, refers the case to an independent 'Director of Service Prosecutions', who decides on whether or not prosecution takes place.[85] The trigger for investigations is therefore one of reasonableness; officers must involve investigative services in all cases which to a reasonable person indicates a grave breach. Upon sufficient evidence, this must then be submitted to the authority which decides on prosecution.

US practice shows, similar to Australian practice, that reports must be drawn up and investigations instigated for all 'reportable incidents',[86] further defined as those giving rise to a 'possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict'.[87] Any 'credible' IHL violation must therefore be reported and investigated. What is credible information has been elaborated upon by the US Army Special Assistant for Law of War Matters, who has in addition made clear the system is explicitly meant to be over-inclusive.[88]

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80 Ibid [17].
81 Ibid [20] in conjunction with [6].
82 UK Armed Forces Act 2006, section 113(1) and (2). See also Cohen and Shany (n 7) 52–3.
83 UK Armed Forces Act 2006, Schedule 2 under 12(t), in conjunction with the UK Geneva Conventions Act 1957, section 1.
84 UK Armed Forces Act 2006, Explanatory note 12; see Schmitt (n 13) 67.
85 UK Armed Forces Act 2006, section 116(1) and (2) in conjunction with section 120, see also Explanatory note 18.
86 Schmitt (n 13) 69.
87 Department of Defence Directive 2311.01E, DoD Law of War Program, 9 May 2006 [4.4]-[4.5].
88 Sean Watts, 'Domestic Investigation of Suspected Law of Armed Conflict Violations: United States Procedures, Policies, and Practices' (2011) 14 Yearbook of International Humanitarian Law 85, 95.

> 'Information, although incomplete, is deemed credible when considering the source and nature of the information and totality of the circumstances the information leads a prudent person to suspect that a law of war violation may have occurred and investigate the allegation further. The severity of the alleged offense, the source of the information, and corroboration (if any) are all factors in determining whether the allegation is credible. In case of doubt, the information must be presumed credible.'[89]

US practice therefore employs, similar to Australian and UK practice, a test of reasonableness in assessing whether an IHL violation exists, which again similar to Australian practice advocates investigation in cases of doubt. The trigger for investigations is therefore an incident, not necessarily an allegation, that reasonably indicates an IHL violation.

Conclusion

The practice of these States reveals a low threshold fact-finding mechanism, which relies on internal reporting of notifiable incidents, and which in case of a 'reasonable suspicion' of a grave breach – or of a violation of IHL more broadly – triggers an obligation of further investigation, and if appropriate, prosecution. A good practice of monitoring military conduct, then, is to institute extensive reporting obligations, coupled with the recording of the effects of all military operations. Whether there is also hard legal obligation to uncover grave breaches – in the sense that States must actively look for such breaches even if no indications of such have reached it – is still subject to debate.[90] Any case giving rise to the suspicion of a violation is then investigated further, and remitted to prosecutorial services where appropriate. US practice further shows that allegations of a violation may be submitted to a credibility check, though this check must not be used to raise an unreasonable threshold for investigation. The *Guidelines* confirm this, in setting out that internal reports and outside allegations can be 'vetted for credibility', whilst also stressing that this must remain a low threshold, which ought not to be equated with the criminal law standard of 'reasonable grounds to believe a criminal offence has been committed'.[91] In other words, the threshold for investigating must remain low, so that all evidence is gathered. Only once this is done, can it be properly assessed whether there are indeed reasonable grounds to initiate further (criminal) investigation.

This modest enquiry into State practice, and the ICRC's and Geneva Academy's *Guidelines*, therefore help cultivate the relatively vague guidance provided by the grave breaches provisions. The trigger for an investigation would appear to be a 'notifiable incident' reaching a commander, who must

89 See Dick Jackson, 'Reporting and Investigation of Possible, Suspected, or Alleged Violations of the Law of War' (2010) 1 The Army Lawyer 95.

90 Gaeta (n 51) 630; Schmitt (n 13) 39.

91 Lubell, Pejic and Simmons (n 23) 23.

then report this to appropriate authorities who decide how to proceed, and whether to investigate further. What is a 'notifiable incident' varies among States, but in all cases includes grave breaches of the Geneva Conventions, as well as other war crimes. Thus, any information – regardless of whether it stems from internal reports or external allegations – which reasonably indicates a grave breach may have been committed, triggers the duty to investigate. Good practice will err on the safe side, and investigate in case of doubt.

Finally, investigations are not limited to a State's own armed forces. The grave breaches provisions make clear that investigations must take place regardless of the nationality of the alleged perpetrator, which must also be taken to mean that investigations must be conducted into allegations of grave breaches regardless of the perpetrator's allegiance, be it their own, allied or enemy forces, or civilians for that matter.[92]

3.2.2.4 Personal and geographic scope of application

A next relevant question to consider, in delineating the scope of application of the duty to investigate under IHL, is to look at *who* must investigate. The obligation to investigate under the grave breaches provisions is clearly addressed to States: '*Each High Contracting Party* shall be under the obligation to search (…)'.[93] This, however, does not answer *which* State is subject to this obligation in a concrete case. A starting point must be, in light of the system of self-enforcement explained previously, that States must investigate grave breaches perpetrated by their own armed forces and civilian population, as well as those of other actors which can be attributed to the State, or over which they exercise authority.[94] To this, there is principally no territorial limitation – all grave breaches attributable to the State are also subject to investigative obligations.[95] This also corresponds to the duty to *ensure respect* for the Geneva Conventions, which is addressed 'first and foremost' to States themselves for their own conduct,[96] and moreover flows from the State practice discussed above, as well as the ICRC and Geneva Academy *Guidelines*.

Yet, in the context of the duty to investigate grave breaches, the scope of States' obligations would appear to be markedly broader. The reference to 'each' State party indicates that the obligation is not limited to the parties to the conflict, but applies to *all States*. This corresponds to the idea that States must vest universal jurisdiction over such crimes, in line with their duty to

92 Compare Vöneky (n 59) 670.
93 GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146 (emphasis FT).
94 *Supra* §2.1.
95 See Chapter 2, §4.4.
96 ICRC (n 2) [118]. Arguing that CA1 applies exclusively to the State itself, see Carlo Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?' (2010) 21 European Journal of International Law 125.

search for perpetrators 'regardless of their nationality'.[97] The underlying aim of preventing impunity for these extremely serious war crimes would also support such an understanding.

Nonetheless, State practice shows that in most cases, States require there to be an additional jurisdictional link before they exercise universal jurisdiction.[98] Whether this practice has to do with pragmatic reasons or also purveys their *opinio iuris* in this regard is not completely clear,[99] though it has been observed that an obligation for every State to search for any alleged perpetrator of grave breaches across the globe is unfeasible.[100] This is also what the initial Pictet ICRC Commentaries seemed to envision: '[a]s soon as a Contracting Party realizes that there is *on its territory* a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed.'[101] Interpretation in light of the object and purpose of the grave breaches regime – preventing impunity and denying perpetrators a safe haven – might *prima facie* be thought to require true universal jurisdiction. But in fact, an obligation to investigate and prosecute applicable only to the State on whose territory the alleged perpetrator is present could be argued to already prevent impunity. After all, given the universal ratification of the Geneva Conventions, no safe haven is left as long as the State on the territory of which the alleged perpetrator is present, exercises jurisdiction.

In light of the lack of clarity on this point, one commentator has argued that the *primary* obligation to investigate and prosecute rests on the State the perpetrator 'belongs to', the State of nationality: 'That state has the main opportunity and, therefore, the first duty to punish.'[102] Taking into account which State is in the optimal position to effectuate IHL's insistence on investigation and prosecution indeed seems a promising avenue for interpretation. It is submitted that in addition to the State of nationality, the territorial State is equally in a primary position to investigate. Thus the State *on whose territory or under whose jurisdiction* the alleged perpetrator is,[103] is under the primary

97 ICRC (n 2) [2866]. *Supra* §3.2.2.2.

98 ICRC (n 2) [2889]. See e.g. the Netherlands International Crimes Act 2003, *Stb.* 2003, 270, art 2(1)(a).

99 Engaging at length with what conclusions ought to be drawn from how States have and have not vested universal jurisdiction in their domestic legislation, see *Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal*, appended to *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment (14 February 2002), *I.C.J. Reports* 2002, p. 3 [19]-[58], and [45] in particular.

100 ICRC (n 2) [2889]. Compare *mutatis mutandis* Vöneky (n 59) 651.

101 Pictet (n 3) 593 (emphasis FT).

102 Vöneky (n 59) 668.

103 Compare the inclusion of 'under its jurisdiction' in ICRC (n 2) 2890.

obligation of investigation and prosecution.[104] This corresponds better with the grave breaches provisions' imposition of the explicit obligation to investigate perpetrators 'regardless of their nationality', whilst also ensuring that the State with the 'main opportunity' is the one who is primarily responsible for carrying out the investigation. Further, as the obligation comprises also the investigation of the *occurrence*, the State with territorial jurisdiction over the breach itself must equally be under the primary obligation to investigate.

A 'secondary' obligation then applies to other States, as can also be derived from the ICRC Commentary, insofar as it holds that

> 'a State Party should take action when it is in a position to investigate and collect evidence, anticipating that either (…) itself at a later time or a third State, through legal assistance, might benefit from this evidence, even if an alleged perpetrator is not present on its territory or under its jurisdiction.'[105]

This would seem to indicate a duty to cooperate with other States, who conduct the primary investigation. Nonetheless, insofar as it involves the collection and preservation of evidence, this certainly requires investigative steps. Together, this system of States who operate under a 'primary' obligation to investigate because they are in the best position to do so, and other States who are under a 'secondary' obligation to cooperate with such investigations, seemingly creates a system which at the same time ensures accountability, and remains feasible.

Nonetheless, a problem not solved by a distinction between States which operate under a 'primary' and 'secondary' obligation, is the extent to which States *incur responsibility* for a failure to investigate. Theoretically, in every case in which an alleged grave breach is not investigated, all States are responsible for not fulfilling their duty.[106] As one commentator notes, '[t]he classic theory of international responsibility, built upon the reciprocity of rights and obligations of states, can prove rather inadequate in addressing cases where collective values such as peace, or basic human rights, need to be protected'.[107] This situation would present a type of mirror image of the obligation *erga omnes* – owed to all – in which the obligation is owed *by* all. If this

104 Compare Helen Duffy, *The 'War on Terror'' and the Framework of International Law'* (Cambridge University Press 2015) 155, with further referencing. *Mutatis mutandis*, see William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (1st edn, Oxford University Press 2010) 340–1.

105 ICRC (n 2) [2871].

106 The failure to fulfil the duty to investigate representing the internationally wrongful act. Responsibility further requires the act to be attributable to the State, see ARSIWA, art 2.

107 Gentian Zyberi, 'Responsibility of States and Individuals for Mass Atrocity Crimes' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017) 249.

is a shared responsibility of the international community as a whole, however, there is a real risk of States ducking their responsibility, passing the buck as it were,[108] and establishing a State's international responsibility in light of the failure of all States to act is a difficult proposition.[109]

One way to potentially solve this issue is by analogous reasoning having to do with the nature of the duty to investigate. The duty to investigate is a due diligence obligation, which requires States to do what they can without however holding them to an obligation of result, and serves to fulfil an interest of the international community as a whole: preventing impunity for war crimes.[110] There would, in this context, appear to be a clear parallel with the duty to prevent genocide as interpreted by the ICJ. According to the ICJ, in preventing genocide, States do not act out of their own interests, but act to safeguard interests of the international community as a whole.[111] In the *Bosnian Genocide case*, the ICJ held that the duty to prevent is a due diligence obligation which applies from the moment the State has knowledge of a serious risk of genocide, and which depends on its capacity to influence the (potential) genocidaires.[112] States must use the influence they have, and can be held liable if they fail to do so, and genocide ultimately occurs.[113] By analogy,[114] it is submitted that States without a territorial or personal nexus to grave breaches equally operate under a due diligence obligation in the name of the international community as a whole, and that their international responsibility is engaged only if they fail to employ the means they have at their disposal

108 Emma Irving, *Multi-Actor Human Rights Protection at the International Criminal Court* (Cambridge University Press 2020).

109 Extensively on this issue of shared responsibility, see André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 Michigan Journal of International Law 360; Andreì Nollkaemper and others (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017).

110 Marco Longobardo, 'The Contribution of International Humanitarian Law to the Development of the Law of International Responsibility Regarding Obligations Erga Omnes and Erga Omnes Partes' (2018) 23 Journal of Conflict & Security Law 383, 398–9; Dieter Fleck, 'International Accountability for Violations of the Ius in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law' (2006) 11 Journal of Conflict and Security Law 179, 181. See also, in the context of the Convention Against Torture, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment (20 July 2012), *I.C.J. Reports* 2012, p. 422 [68]-[70].

111 *Reservations to the Convention on Genocide*, Advisory Opinion (28 May 1951), *I.C.J. Reports* 1951, p. 15, 23: 'In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention.'

112 *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment (26 February 2007), *I.C.J. Reports* 2007, p. 43 [430]-[431].

113 Ibid.

114 The duty to punish before domestic courts, as enshrined in the Genocide Convention, is dependent on a territorial nexus and therefore did not apply in this case (with the genocide being perpetrated outside the territory of Serbia and Montenegro); ibid [442].

– and those responsible for grave breaches are ultimately not held to account. Thus, States who are under a secondary obligation to investigate can only be held liable in specific circumstances, while those under a primary obligation – those with territorial and personal jurisdiction – will always incur liability if they fail to conduct an effective investigation.

A final point which merits attention in the context of the addressees of the obligation to conduct investigations, is the position of the military commander. Additional Protocol I requires States to impose on commanders the duty to supervise their troops and investigate alleged or potential violations when necessary.[115] This individual obligation is backed up further by a system providing for the individual criminal responsibility of commanders should they omit to carry out this duty.[116] Nevertheless, the obligation to conduct investigations into grave breaches must be viewed to lie with the State,[117] who through implementation measures may, and is required to, bestow their military commanders with the competence and obligation to report and carry out investigations. While commanders are therefore to an extent subjected directly to obligations and criminal liability under international law, this of course in no way shifts the responsibility away from the State. The function awarded to commanders is a means of operationalising the repression system,[118] and if commanders fail to investigate, both they themselves and the State will be liable for such a failure.[119] State responsibility and individual criminal responsibility must in this context be viewed as distinct, though complementary.[120]

The position of the commander is discussed further in the context of a duty to investigate also non-serious breaches (§3.3.3), and when discussing the standards investigations must meet (§4.3) – which necessarily also examines who must carry out such an investigation. This, after all, is closely linked with requirements such as independence and impartiality, and equally with the effectiveness and practicality of the investigation. For this moment, the research turns towards the temporal scope of application of the duty to investigate.

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115 AP I, art 87.

116 AP I, art 86(2).

117 See Schmitt (n 13); Pictet and others (n 17).

118 Schmitt (n 13) 40.

119 The State responsibility regime at any rate attributes acts and omissions by commanders to the State; ARSIWA, art 4 (and 7).

120 Compare Thordis Ingadottir, 'The ICJ Armed Activity Case – Reflections on States' Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions' (2009) 78 Nordic Journal of Human Rights 581, 586; Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 European Journal of International Law 2, 4.

3.2.2.5 Temporal scope of application

Finally, the temporal scope of application of the duty to investigate grave breaches must be briefly considered. As was remarked in the previous Chapter, the applicability of IHL in principle begins and ends with the outbreak and cessation of an armed conflict, but certain obligations can pre- and postdate the conflict itself. Thus, implementation obligations must be discharged in peacetime,[121] which clearly comprise the duty to criminalise grave breaches, and to set up effective recording, reporting, and assessment procedures, including an investigative machinery.[122] Doing so only once hostilities have begun would be ineffective, and irrational.

As was discussed above, the duty to investigate springs into life from the moment the State has information indicating a grave breach. When it concerns grave breaches perpetrated by its own troops, this will likely be an internal report or an outside allegation. When it comes to grave breaches perpetrated by third parties, this is as soon as the State 'realizes that a [suspected perpetrator] is on its territory or under its jurisdiction'.[123] The temporal scope of the duty to investigate grave breaches therefore stretches from the first moment the State gains knowledge of a grave breach, and ends only once the investigation is completed, resulting in prosecution, extradition, or a thoroughly reasoned decision to discontinue the investigation.

Finally, investigative obligations can persist after an armed conflict comes to a close. The search for, and prosecution of, perpetrators of grave breaches certainly does not stop when hostilities cease and peace is achieved.[124] As is illustrated by the prohibition of prescriptions for war crimes,[125] the fight against impunity does not stop at the moment the armed conflict concludes. Sadly, that is often only when the struggle against impunity starts, and it is often long years before it is concluded – if ever. The object and purpose of preventing impunity and denying perpetrators a safe haven would clearly be impeded if investigative obligations would cease at the close of hostilities.

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121 Common Article 2 to the Geneva Conventions; ICRC (n 2) [2839].

122 Dörmann and Geiß (n 51) 707.

123 ICRC (n 2) [2868].

124 This is illustrated most clearly by the fact that peace negotiations regularly include how to deal with war criminals and atrocities committed by both sides to the conflict – and the rule that even at the end of hostilities, amnesties may be not be granted for war crimes; Rule 159 of the ICRC's Customary IHL Study, Henckaerts and Doswald-Beck (n 1) 611.

125 Rule 160 of the ICRC's Customary IHL Study stipulates that 'Statutes of limitation may not apply to war crimes'; Henckaerts and Doswald-Beck (n 1) 614. Compare ICC Statute, art 29; UNGA Resolution 60/147 (2005), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147 [6]. Not all agree that there is indeed a generally applicable prohibition of prescriptions for war crimes, see Claus Kreß, 'Reflections on the Iudicare Limb of the Grave Breaches Regime' (2009) 7 Journal of International Criminal Justice 789, 806–7.

The duty to investigate therefore continues to apply when the conflict is concluded.

3.2.3 Serious violations that are not grave breaches

3.2.3.1 Defining serious violations as distinct from grave breaches

As was introduced above, the category of 'serious violations' of IHL encompasses the grave breaches regime, but goes further than exhaustively enumerated grave breaches only. Serious violations are a broader category of war crimes, which can be committed in both IACs and NIACs.[126] A formal treaty definition of what serious violations entail remains elusive,[127] also because the term is not used in the Geneva conventions, and only sparsely in AP I.[128] Rather, it has been developed primarily by the *ad hoc* criminal tribunals, with the ICTY defining serious violations to be those which breach 'a rule protecting important values, and [involving] grave consequences for the victim' and which moreover 'entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule'.[129] Serious violations are thus synonymous with 'war crimes',[130] for which perpetrators incur individual criminal responsibility directly under international law.[131] Serious violations have developed into a widely accepted feature of IHL and international criminal law (ICL), as is illustrated by their inclusion in the ICRC

126 *Prosecutor v Duško Tadić*, ICTY (Appeals Chamber) Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) IT-94-1-AR72, A. Ch. [94]; ICC Statute, art 8. See further William A Schabas, 'Atrocity Crimes (Genocide, Crimes against Humanity and War Crimes)' in William A Schabas (ed), *The Cambridge Companion to International Criminal Law* (Cambridge University Press 2016) 210; Terry D Gill and Dieter Fleck, 'The Prosecution of International Crimes in Relation to the Conduct of Military Operations' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (2nd edn, Oxford University Press 2015) 547–8.

127 Theo van Boven, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines' in Carla Ferstman (ed), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff 2009) 33.

128 AP I, art 89 and 90(2)(c) under (i).

129 *Prosecutor v Duško Tadić*, ICTY (Appeals Chamber) Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) IT-94-1-AR72, A. Ch. [94]. See also Paola Gaeta, 'The Interplay Between the Geneva Conventions and International Criminal Law' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (Oxford University Press 2015) 741–6; Zwanenburg (n 41) 656.

130 Rule 156 of the ICRC Customary IHL Study, which stipulates that 'Serious violations of international humanitarian law constitute war crimes', Henckaerts and Doswald-Beck (n 1) 568. I leave aside here the *mens rea* element required to prove a war crime under ICL, a concept which is foreign to IHL; Robert Kolb, *Advanced Introduction to International Humanitarian Law* (Edward Elgar 2014) 188.

131 Rule 151 and 156 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 1) 551; 568.

Customary IHL Study,[132] the various international criminal law documents and decisions,[133] as well as numerous UN body Resolutions.[134]

As has been noted by others, compiling an exhaustive list of serious violations is difficult and not immediately useful, because the list will necessarily vary depending on the type of conflict, and the precise treaty obligations of each party.[135] Nonetheless, the ICC Statute contains a helpful list in Article 8(2), which besides grave breaches includes a list of additional IAC violations, and a number of violations of the law of NIAC.[136] The expansion of the reach of war crimes to NIACs is therefore the most important addition this system makes as compared to the grave breaches regime.

As was mentioned, serious violations are not as such alluded to in conventional IHL. The recognition of serious violations as war crimes therefore largely stems from customary international law, as well as the Statutes and decisions of various international criminal tribunals. The following examines to what extent States are under a *legal obligation to investigate* serious violations.

3.2.3.2 Sources and material scope of application of the duty to investigate serious violations

The starting point of the search for an international law duty to investigate serious violations, as was explained, must be in customary law. No IHL treaty obligation explicitly requires the prosecution or extradition of perpetrators of war crimes, outside of grave breaches.[137] According to the ICRC Study, customary international law does provide for such:

> 'Rule 158. States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.'[138]

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132 E.g. Rule 156, Henckaerts and Doswald-Beck (n 1) 568.

133 E.g. ICC Statute art 8(2)(b) and (c); ICTY and ICTR Statutes, art 1; Statute of the Special Court for Sierra Leone, UNSC Res. 1315, UN Doc. S/RES/1315 (2000), 14 August 2000 (hereinafter: SCSL Statute), art 1(1); *Prosecutor v Akayesu*, ICTR (Chamber I) Judgment (2 September 1998) ICTR-96-4-T [611].

134 E.g. UNSC Resolution 1894 (2009), UN Doc. S/RES/1894 [10]; UNGA Resolution 60/147 (2005), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147.

135 Gill and Fleck (n 126) 548.

136 Art 8(2)(a) lists grave breaches of the Geneva Conventions only, the grave breaches of AP I being included under the serious violations under 8(2)(b), in addition to other violations.

137 'Final Report on The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)' (2014) www.legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf, fn 446.

138 Rule 158 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 1) 607 (bold in original).

The ICRC Study provides an abundance of evidence of both State practice and *opinio iuris* for this rule, which is held to apply in both IACs and NIACs.[139] The existence of this customary obligation is confirmed in the judicial practice of the Inter-American Court of Human Rights,[140] as well as the International Criminal Court,[141] and is given further credence by practice of the UN General Assembly. That organ, where virtually all States of the world are assembled, has adopted a number of resolutions affirming the customary obligation to investigate and prosecute war crimes, with few or no States voting against.[142] Most prominently, the UNGA in 2005 adopted without a dissenting vote[143] the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.[144] These Principles and Guidelines *inter alia* stipulate that States have a duty to investigate serious IHL violations constituting international crimes,[145] and expressly intend to be declaratory of pre-existing State obligations.[146] This, it is submitted, is a powerful signal of *opinio iuris*.[147] Finally, legal scholarship overwhelmingly supports the customary nature of the rule.[148]

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139 Henckaerts and Doswald-Beck (n 58) 3941ff. See further Sivakumaran, *The Law of Non-International Armed Conflict* (n 44) 475–510; Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) 173–204.

140 For IACs: *Gelman v Uruguay* (Merits and Reparations) Inter-American Court of Human Rights Series C No 221 (24 February 2011) [210]. Also for NIACs: *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 252 (25 October 2012) [286].

141 *The Prosecutor v Saif Al-Islam Gaddafi*, ICC (Pre-Trial Chamber I) Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute' (5 April 2019) ICC-01/11-01/11 [77]. The Court held: 'It follows that granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights. Amnesties and pardons intervene with *States' positive obligations to investigate, prosecute and punish perpetrators of core crimes*.' (emphasis FT)

142 See UNGA Resolution 2712 (1970), *Question of the punishment of war criminals and of persons who have committed crimes against humanity*, UN Doc. A/RES/2721(XXV); UNGA Resolution 2840 (1971), *Question of the punishment of war criminals and of persons who have committed crimes against humanity*, UN Doc. A/RES/2840(XXVI).

143 van Boven (n 127) 32. See the procedural history of the Resolution on the website of the UN Audiovisual Library of International Law, www.un.org/law/avl/, last sentence.

144 UNGA Resolution 60/147 (2005), UN Doc. A/RES/60/147 (2005).

145 UNGA Resolution 60/147 (2005), UN Doc. A/RES/60/147 (2005) [4].

146 Preambular paragraph 7. van Boven (n 127) 32. Finding the Principles and Guidelines go beyond customary law, see Zwanenburg (n 41) 653.

147 Further, see Panov (n 48) 240.

148 E.g. Alon Margalit, *Investigating Civilian Casualties in Time of Armed Conflict and Belligerent Occupation. Manoeuvring between Legal Regimes and Paradigms for the Use of Force* (Brill Nijhoff 2018) 28; Vito Todeschini, 'Investigations in Armed Conflict: Understanding the Interaction between International Humanitarian Law and Human Rights Law' in Paul De Hert, Stefaan Smis and Mathias Holvoet (eds), *Convergences and Divergences Between International Human Rights, International Humanitarian and International Criminal Law* (Intersentia 2018) section

The existence of a State duty to investigate war crimes, it is submitted, is moreover a logical necessity for the system to function. That serious violations of IHL constitute war crimes, which are subject to direct criminalisation under customary international law, is beyond reasonable controversy and has been affirmed time and again in judicial practice.[149] The retributive and deterrent effects of criminalisation would be illusory if States are *not* under the obligation to investigate and prosecute, because States are the primary enforcers of international law and IHL, and are the only ones in the position to forge the rules of international law into reality.[150] This flows from the IHL system of implementation, supervision, and enforcement as set out above.

The system's reliance on investigations, also in the context of war crimes, is operationalised in AP I. Article 87 of that Protocol stipulates that when commanders have knowledge of violations by their subordinates, they must 'initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof'.[151] If they fail to take 'all feasible measures' of pre-

2.1; Katharine Fortin, 'How to Cope with Diversity While Preserving Unity in Customary International Law? Some Insights from International Humanitarian Law' (2018) 23 Journal of Conflict & Security Law 337, 346; Giovanna Maria Frisso, 'The Duty to Investigate Violations of the Right to Life in Armed Conflicts in the Jurisprudence of the Inter-American Court of Human Rights' (2018) 51 Israel Law Review 169, 186; Amy ML Tan, 'The Duty to Investigate Alleged Violations of International Humanitarian Law: Outdated Deference to an Intentional Accountability Problem' (2016) 49 NYU Journal of International Law and Politics 181, 206–10; Gaeta (n 129) 741–6; Karen Engle, 'A Genealogy of the Criminal Turn in Human Rights' in Karen L Engle, Zinaida Miller and Dennis Davis (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press 2016) 15; Duffy (n 104) 381; Schmitt (n 13); Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press 2008) 15–6. Of a contrary view (before the 2005 Customary IHL Study), see Christian Tomuschat, 'The Duty to Prosecute International Crimes Committed by Individuals' in Helmut Steinberger and Hans-Joachim Cremer (eds), *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger* (Springer 2002).

149 E.g. *Prosecutor v Duško Tadić*, ICTY (Appeals Chamber) Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) IT-94-1-AR72, A. Ch. [94]; [128]; [134]; *Prosecutor v Akayesu*, ICTR (Chamber I) Judgment (2 September 1998) ICTR-96-4-T [611]-[615]. *Kononov v Latvia*, ECtHR [GC] 17 May 2010, Appl No 36376/04 [205]-[213]. See further, already in the Charters of the International Military Tribunals for Germany and the Far East; Charter of the International Military Tribunal for Germany, concluded by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics, acting in the interests of all the United Nations and by their representatives duly authorized thereto, annexed to the London Agreement, London, 8 August 1945, art 6(b); Charter of the International Military Tribunal for the Far East, approved by an Executive Order, General Douglas MacArthur, Supreme Commander for the Allied Powers in Japan, Tokyo, 19 January 1946, amended on 26 April 1946. Jean-Marie Henckaerts, 'The Grave Breaches Regime as Customary International Law' (2009) 7 Journal of International Criminal Justice 683, 690.

150 See *supra*, §2.1.

151 AP I, art 87(3).

vention and repression, they are criminally liable therefor under Article 86(2) AP I. The necessary steps in the context of disciplinary and penal action, and repression, have in the context of war crimes been developed by the international criminal tribunals. In the case of *Popović et al*, the ICTY Appeals Chamber found that 'it is well accepted that a superior's duty to punish the perpetrators of a crime includes at least an obligation to investigate possible crimes, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities'.[152] Thus, the responsibility of the commander includes a duty to investigate war crimes. Whether this duty is discharged depends on the circumstances of the case and the commander's level of control. If commanders, rather than investigate themselves, report the incident, the ICTY has found that 'in order to constitute a necessary and reasonable measure to punish, the commander's report must be sufficient to trigger the action of the competent authorities'.[153]

The duty to investigate war crimes under IHL is therefore confirmed in international criminal law. As is the case for IHL, the logical structure of ICL moreover relies heavily on a domestic duty to investigate war crimes. The International Criminal Court (ICC) has jurisdiction to investigate and prosecute international crimes perpetrated by nationals of, or on the territories of, States parties to the ICC Statute.[154] But, for an international court with universal aspirations to function, it must logically perform a *subsidiary* function. One court cannot prosecute all international crimes committed all over the world, and it is States who must primarily do so, with the ICC functioning as a safety net when States are unwilling or unable to take up their investigative and prosecutorial obligations. In fact, international criminal tribunals have arguably only come into being in light of the failure of States as primary actors to discharge their investigative duties.[155] In the words of the ICC's first Prosecutor, 'the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but also a duty of States'.[156]

There is therefore a heavy *implication* of an investigative obligation for States, though it is not explicitly contained in the operative provisions of the ICC Statute.[157] Under the principle of complementarity, the prosecution of

152 *Prosecutor v Popović et al.*, ICTY (Appeals Chamber) Judgment (30 January 2015) IT-05-88-A [1932]; *Prosecutor v Halilović*, ICTY (Appeals Chamber) Judgment (16 October 2007) IT-01-48-A [182].

153 *Prosecutor v Popović et al.*, ICTY (Appeals Chamber) Judgment (30 January 2015) IT-05-88-A [1932].

154 ICC Statute, art 12(2) (a) and (b).

155 Richard Burchill, 'Regional Approaches to International Humanitarian Law' (2010) 41 Victoria University of Wellington Law Review 205.

156 Paper on some policy issues before the Office of the Prosecutor, 5; William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, Oxford University Press 2016) 447.

157 Tan (n 148) 199; Duffy (n 104) 381.

a case is admissible only when States have failed to carry out a 'genuine' investigation or prosecution themselves.[158] This arguably presupposes an obligation for States to investigate, and to do so genuinely. This has been argued in legal scholarship, most prominently so by Jann Kleffner in 2008. He contends that whereas the complementarity of ICC prosecutions does not in and of itself constitute an *obligation* for States to investigate,[159] it does when it is read in conjunction with the Statute's preamble.[160] The preamble to the ICC Statute first affirms that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level', and subsequently recalls that it 'is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes', thereby pointing towards an obligation for States to employ their national criminal law instruments in prosecuting *inter alia* war crimes.[161] Read in conjunction with Article 17's system of complementarity, this leads Kleffner to conclude that an obligation to investigate and prosecute ICC crimes indeed exists. In this view, the preamble represents a primary norm providing for the obligation to exercise criminal jurisdiction, with the complementary jurisdiction of the ICC functioning in a subsidiary role.[162]

The attraction of this argument is evident: the system as it is *relies* on State investigations and prosecutions, and cannot function properly without it. An international court cannot investigate and prosecute all international crimes,[163] which means that the goal of preventing impunity can only be met primarily by way of national prosecutions. Nevertheless, the attribution of binding force to the preambular paragraphs is controversial.[164] It is undeniable that many States have implemented criminal legislation in order to effectuate their undertakings under the ICC Statute, but whether investigations and prosecutions take place because States consider themselves to be legally obliged to do so, or rather as a consequence of the indirect pressure that flows from a potential ICC investigation, or simply because of other policy considerations, is difficult to gauge.[165] Besides, a further hurdle in assessing State practice in this field is that many States decide to prosecute for 'ordinary' domestic crimes or

158 ICC Statute, art 17(1)a.
159 Compare Dörmann & Geiß, who classify it as indirect pressure on States to prosecute; Dörmann and Geiß (n 51) 718.
160 Kleffner (n 148) 248.
161 Preambular paragraphs 4 and 6.
162 Kleffner (n 148) 248–54.
163 See also Rod Rastan, 'The Responsibility to Enforce – Connecting Justice with Unity' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2009) 164.
164 For his line of reasoning on this point, see Kleffner (n 148) 237–40.
165 Dörmann and Geiß (n 51) 718.

terrorist crimes, rather than war crimes.[166] This makes fully a conclusive answer difficult, but there is a definite implication of investigative obligations under the ICC Statute.

Beyond the customary and treaty rules obliging States to investigate war crimes, finally, such duties also flow from decisions by the UN Security Council. In addition to general calls to respect IHL, the UNSC as at times stipulated a duty for States to investigate serious IHL violations or war crimes. Further, it in general terms

> '*Affirms* its strong opposition to impunity for serious violations of international humanitarian law and human rights law, and *emphasizes* in this context the responsibility of States to comply with their relevant obligations to end impunity and to thoroughly investigate and prosecute persons responsible for war crimes, genocide, crimes against humanity or other serious violations of international humanitarian law in order to prevent violations, avoid their recurrence and seek sustainable peace, justice, truth and reconciliation.'[167]

Thus, in 'affirming' and 'emphasising' these obligations, the Security Council clearly considers these obligations to be pre-existing, likely under customary international law. Further, even if this were not the case, the Security Council has later itself provided a binding nature to these stipulations. Acting under Chapter VII of the Charter, binding under international law, it has relied on the above-cited Resolution to call upon the Central African Republic (CAR) to investigate alleged abuses pertaining to children (including recruitment) and sexual violence, and in setting up an international commission of inquiry to investigate IHL violations committed in the CAR.[168] UNSC Resolutions have therefore also provided a basis to a duty to investigate war crimes.

In conclusion, the obligation to investigate serious IHL violations appears clearly established as a norm of customary international law, with further evidence of this obligation flowing from the ICC Statute and several UN body resolutions. Its material scope of application is broader than that of the grave breaches regime, because a number of additional war crimes is included, crucially including also war crimes committed during non-international armed conflicts.

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166 Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (n 75) 725; Hanne Cuyckens and Christophe Paulussen, 'The Prosecution of Foreign Fighters in Western Europe: The Difficult Relationship Between Counter-Terrorism and International Humanitarian Law' (2019) 24 Journal of Conflict and Security Law 537.

167 UNSC Resolution 1894 (2009), UN Doc. S/RES/1894 [10] (emphasis in original). Somewhat confusingly, the Security Council appears to distinguish 'other serious violations of international humanitarian law' from war crimes, although as was discussed above, each 'serious violation' of IHL is best viewed as constituting a war crime.

168 UNSC Resolution 2127 (2013), UN Doc. S/RES/2127, preamble and [22]-[24].

3.2.3.3 The investigative trigger

The question *when* States must investigate war crimes – the question as to the investigative trigger – does not appear to differ from what was established under the grave breaches regime. The customary rule requiring investigations pertains to 'war crimes *allegedly* committed', which similar to the grave breaches regime requires an examination of the level of information required before the obligation arises. The wording 'allegedly committed' does make clear that the *occurrence* of the war crime must be investigated, and that allegations need not necessarily levelled against an *individual*, although this is of course possible.

The interpretation given to the investigative trigger for grave breaches as derived from the ICRC and Geneva Academy *Guidelines* as well as corroborating State practice, equally applies to the broader category of serious violations. As the *Guidelines* set out, all incidents indicating a possible violation of IHL, must be reported.[169] State practice supports this, with military manuals indicating that the 'notifiable' or 'reportable' incidents for which States impose reporting obligations, include at the minimum war crimes. Many States, such as Argentina and South Africa, require reporting of all IHL violations.[170] This also goes for the practice of Australia and the US, discussed above.[171] Other States have compiled lists of reportable incidents, which do not as such refer to IHL. This for instance applies to France,[172] and the UK, but these lists include – at the minimum – war crimes. Thus, the list of 'Schedule 2 offences' under UK law, includes war crimes.[173]

Like in case of grave breaches, the trigger for an investigation would appear to be a 'notifiable incident' reaching a commander, who must then report this to appropriate authorities who decide whether further investigation is called for. War crimes are without a doubt 'notifiable'. Any information – internal or external – which reasonably indicates a serious violation may have been committed, triggers the duty to investigate. Good practice will err on the safe side, record the effects of all military operations, and investigate in case of doubt. Commanders are key figures, who operate as the main channel for the discovery and reporting of misconduct.

169 Lubell, Pejic and Simmons (n 23) 10; 16.

170 Manual de Derecho Internacional de los Conflictos Armados, 2010, 37 [2.06]; Revised Civic Education Manual, 2004 [58]. Lubell, Pejic and Simmons (n 23) 17.

171 See *supra* section 3.2.2.3. Under Australian law, minor disciplinary infractions are excluded.

172 Bulletin Officiel des Armées, Instruction N° 1950/DEF/CAB/SDBC/CPAG fixant la conduite à tenir par les autorités militaires et civiles en cas d'accidents ou d'incidents survenus au sein du ministère de la défense ou des établissements publics qui en dépendent (6 February 2004). Lubell, Pejic and Simmons (n 23) 17.

173 UK Armed Forces Act 2006, Schedule 2 under 12(aq), in conjunction with the UK International Criminal Court Act 2001, section 51.

3.2.3.4 Personal and geographic scope of application

When asking *who* must investigate serious violations of IHL, the answer must be similar to that under the grave breaches regime. It is *States* who must investigate. The customary rule as identified by the ICRC leaves no doubt as to this, finding that 'States must investigate war crimes'.[174] In order to properly determine the obligation's personal scope of application, we must, however, look further, and examine *which State* is under the obligation to investigate. This is closely tied to the obligation's geographic scope of application (is it only the territorial State?), and the two are therefore addressed together.

According to the ICRC's Customary IHL Study 'States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, [as well as] other war crimes over which they have jurisdiction (…)'.[175] This indicates, *firstly*, that in line with IHL's self-enforcement system, States must investigate serious violations of IHL by their own armed forces or nationals, and over which they therefore have personal jurisdiction.[176] There is in principle no geographic limitation to such obligations, because IHL is meant to govern a State's conduct during armed conflict regardless of where it operates.[177] Thus, war crimes by a State's armed forces or nationals abroad, must be investigated by that State nonetheless.[178] This could be of relevance also for the issue of 'foreign fighters', which concerns nationals of many countries who travelled to join the Islamic State in Syria and Iraq.[179] Insofar as these individuals committed war crimes, the State of nationality is under a duty to investigate, and if appropriate, prosecute them. *Secondly*, States must investigate serious violations which were committed on their territories, and over which they therefore have territorial jurisdiction. This therefore includes war crimes committed by non-nationals, and by enemy forces. *Thirdly*, States must investigate such other war crimes over which they have jurisdiction. Here, however, the customary rule as identified by the ICRC does not oblige States to *vest* other modes of jurisdiction over war crimes, and only stipulates that *if* States have jurisdiction, they must exercise it. This has been taken to mean that, in contradistinction with grave breaches, States are *not obliged* to

174 Rule 158 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 1) 607 (bold in original).

175 Ibid.

176 *Supra* §2.1.

177 See Chapter 2, §4.4.

178 The investigative means available to the State when operating outside its own territory may vary which can influence *how* a State must or can discharge its investigative obligations, but this in no way affects the existence of the obligation itself.

179 Further, see e.g. Cuyckens and Paulussen (n 166).

vest universal jurisdiction over serious violations, though they do have a *right* to do so.[180]

Insofar as an obligation to investigate war crimes flows from the ICC Statute, only States who have ratified the Statute are bound by it.[181] The follow-up question regarding *which* State party must investigate and prosecute, is best answered based on the wording of Article 17 of the Statute (pertaining to complementarity) and the preamble, both referring to the State who 'has jurisdiction' or who must exercise 'its criminal jurisdiction'.[182] Because the ICC's jurisdiction is limited to crimes committed on the territories of, or by nationals of States parties, the duty to investigate and prosecute is likely – like under customary law – limited to crimes over which States have personal or territorial jurisdiction. With regard to the question who has the primary duty to conduct investigations, the ICC Statute does not provide any answers, though the same logic as under the grave breaches regime appears to apply. The State on whose territory the alleged war crime took place and the State on whose territory or within the jurisdiction of which the alleged perpetrator is present should be under the primary obligation to investigate and prosecute.

With regard to the UN system, finally, the General Assembly and the Security Council either in general terms call upon all parties to armed conflict or States to comply with 'their obligation' to investigate,[183] and when seized of a specific matter will normally call upon the specific State in question to carry out its obligation.[184] Subjects are therefore explicitly outlined in the respective resolutions, which more generally is of course the States who are in a particular position to investigate and prosecute.

3.2.3.5 Temporal scope of application

For the temporal scope of application of the duty to investigate serious violations, considerations are again similar as those under the grave breaches regime.[185] Implementing obligations regarding criminalisation and the setting up of investigative machinery predate the existence of an armed conflict, and the duty to investigate and prosecute continues to apply also after the armed conflict concludes.

The duty to investigate serious violations is triggered at the moment the State has information indicating a war crime, whether through internal reports

180 ICRC (n 2) [2821]; Henckaerts and Doswald-Beck (n 1) 607. On the right to vest universal jurisdiction, see further *Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal*, appended to *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment (14 February 2002), *I.C.J. Reports* 2002, p. 3 [19]-[58].

181 VCLT, art 34.

182 Kleffner (n 148) 273.

183 E.g. UNSC Resolution 1894 (2009), UN Doc. S/RES/1894 [10]; UNSC Resolution 1960 (2010), UN Doc. S/RES/1960 (2010) [5].

184 UNSC Resolution 2127 (2013), UN Doc. S/RES/2127 [22]-[23].

185 See *supra*, §3.2.2.5.

or outside allegations. It ends once the duty has been fully discharged by way of a thorough investigation and decision to prosecute or to discontinue the investigation. There is no explicit *aut dedere aut iudicare* treaty regime,[186] which has led the ICRC Commentaries to conclude that this obligation does not apply to the duty to prosecute war crimes.[187] Indeed, it must be agreed that there is no treaty basis for extradition. Nonetheless, it is submitted that the international fight against impunity is equally served by extradition, so long as the extraditing State continues to cooperate with the prosecuting State, and if it provides the necessary assistance in investigating, or granting access to investigators.

3.2.4 Conclusion

IHL obliges States to investigate grave breaches of the Geneva Conventions and AP I, as well as the broader category of serious violations of IHL. Although grave breaches are subject to a more specialised regime under the Geneva Conventions and AP I, insofar as the obligation to investigate is concerned, States are equally obligated to conduct investigations into other serious violations of IHL. This, crucially, brings war crimes committed in the context of non-international armed conflicts within States' investigative obligations. Apart from a number of relatively minor points, the procedural duty to investigate violations appears therefore largely the same under the grave breaches regime, and the broader war crimes regime.

The trigger for the duty to investigate both grave breaches and other serious violations hinges on the information available. Whenever a commander is in possession of information that reasonably leads to the suspicion that a serious violation has occurred, investigations must be instigated. The source of the information has no bearing on the obligation. It is good practice to have a system in place which records the effects of all military operations, and extensive reporting obligations which ensure that appropriate authorities assess the incident, and decide whether further investigation, and prosecution, are necessary.

The recording, reporting, and assessment obligations with regard to all serious violations apply *internally*. States are therefore under the primary obligation to investigate the conduct of their own armed forces, whether at home or abroad. The obligation to investigate all serious violations must be held to lie first and foremost with the territorial State, and the State under whose jurisdiction the alleged perpetrator resides. These States are in the best

186 'Final Report on The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)' (2014) www.legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf, fn 446.

187 ICRC (n 2) [2821]; Robert Cryer, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) 69; Theodor Meron, 'Is International Law Moving towards Criminalization?' (1998) 9 European Journal of International Law 18, 23.

position to investigate both the occurrence of the breach itself, and search for the alleged perpetrator. While other States are also under an obligation to investigate, it is submitted that States without a territorial or personal nexus operate under more limited obligations. They are under a due diligence obligation in the name of the international community as a whole, and their international responsibility is engaged only if they fail to employ the means they have at their disposal – and those responsible for grave breaches are ultimately not held to account. In practice, this likely takes the form of the *cooperation* in the investigation and prosecution by other States. The grave breaches regime furthermore obliges States to vest universal jurisdiction over such crimes, whereas for other war crimes this is not mandatory, but a right.

The geographical and temporal scope of application of the duty to investigate, are broad. IHL is not principally limited in its geographic scope of application, and if a State's armed forces commit any type of serious violation, the State must investigate this no matter where it occurred. For the obligations of third States a territorial nexus is relevant, though even without it, investigative obligations can exist if the perpetrator has the nationality of the State involved. Temporally, the implementation obligations entailed by the duty to investigate – the criminalisation of war crimes in domestic law, and the setting up of a monitoring and investigative machinery – apply at all times, also in peacetime. Once triggered, the duty to investigate persists until it is discharged, or accountability of perpetrators is achieved. The end of the armed conflict therefore does not mean the end of the duty to investigate. This shows how obligations under IHL, and the duty to investigate in particular, is not limited to wartime application only.

3.3 Other IHL violations

3.3.1 Introduction

Having seen that IHL requires States to investigate grave breaches and serious violations, and what the scope of application of that obligation is, the research now turns to the question whether other, 'simple' IHL violations also require State investigations. A distinguishing feature setting aside this type of violations from grave breaches and serious violations, is that they are not considered international crimes.[188] This has kept these types of breaches largely out of the spotlight,[189] and the existence of a duty to investigate these violations is therefore somewhat hazy. Certain soft law instruments, however, do indicate

188 Cf. Margalit (n 41) 160. This does not prejudice criminalisation on the domestic level.

189 Jesse Medlong, 'All Other Breaches: State Practice and the Geneva Conventions' Nebulous Class of Less Discussed Prohibitions' (2013) 34 Michigan Journal of International Law 829, 830.

investigative obligations also for these non-criminal breaches of IHL. The UN General Assembly, for instance, in the Basic Principles and Guidelines on the Right to a Remedy include a duty to investigate all IHL violations,[190] although it has been called into question whether the Principles and Guidelines do not go beyond what the law requires.[191] The General Assembly is not alone, however, in its view that all violations of IHL must be investigated. The Security Council has similarly called upon States to investigate all violations of IHL,[192] and the more recent *Guidelines* published by the ICRC and the Geneva Academy equally recognise a duty to investigate 'simple' violations of IHL. The *Guidelines*, however, clearly distinguish between criminal investigations, called for in case of war crimes, and administrative investigations, which suffice to address non-criminal breaches.[193]

What the precise *source* of a legal obligation to investigate all IHL violations is, however, remains unclear in these documents. Legal scholarship on the issue is divided. On the one side, there are those authors who find that no duty to investigate simple breaches of IHL can be derived from IHL as it stands.[194] They rely primarily on the lack of *explicit* treaty obligations referring to investigations for these types of breaches, as well as the lack of judicial findings to that effect. On the other side of the debate, there are those authors who find that contemporary IHL *does* impose a duty on States to investigate all breaches.[195] In support, they cite a variety of sources, ranging from the general duty to ensure respect for IHL, to the duty to suppress all breaches of IHL, the institution of command responsibility, the duty to take precautionary measures, and the duty to provide reparations for violations of international law.

In light of the various pronouncements on investigative obligations into all violations of IHL, and the legal debate on the subject, this section queries whether IHL indeed imposes such a broad duty to investigate. In doing so, it first briefly addresses what type of violations are at issue here (§3.3.2). It then goes on to examine sources for a duty to investigate all IHL violations (§3.3.3), and provides an outline of its scope of application in its various modalities (§§3.3.3-3.3.6).

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190 UNGA Resolution 60/147 (2005), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, principle 3(b). This principle appears to apply to all violations of IHL and IHRL, whether they are 'serious' or 'gross' or not. See also Zwanenburg (n 41) 648.

191 Zwanenburg (n 41) 653.

192 UNSC Resolution 1556 (2004), UN Doc. S/RES/1556 (2004) [1].

193 Lubell, Pejic and Simmons (n 23).

194 Schmitt (n 13) 31; Sivakumaran, 'International Humanitarian Law' (n 39) 528.

195 Cohen and Shany (n 7); Margalit (n 41); Tan (n 148) 203.

3.3.2 *Defining 'simple' IHL violations*

Giving a clear definition of 'simple' IHL violations is not easy, because they are essentially a leftover category. They can therefore best be defined negatively, as non-serious violations: all violations which are not serious, and which are therefore not war crimes, constitute 'simple' violations.[196] This means that it consists of a large variety of breaches. Whereas war crimes concern such issues as indiscriminate attacks, and the wilful killing, injuring, torturing, or performing medical experiments on protected persons, non-serious breaches are – rather obviously – less severe. Nonetheless, the type of breach varies. Examples of simple violations can range from ostensibly rather trivial situations, such as selling soap and tobacco to POWs above local market price,[197] or failing to post a copy of the Geneva Conventions in a POW camp,[198] to breaches with more serious consequences. If States fail to take all feasible precautions in attack, for instance, this constitutes a non-serious breach, even if it results in the loss of civilian life.[199] Thus, even relatively serious situations, where potentially large numbers of civilian deaths occurred, do not as such indicate a war crime was committed.

3.3.3 *Sources and material scope of application of a duty to investigate all IHL violations*

In the context of the duty to investigate non-serious violations of IHL, the heavy implication of investigations inherent in the IHL system is of enhanced importance.[200] The duty to ensure respect for IHL as enshrined in Common Article 1 of the Geneva Conventions, and as reflected in customary international law,[201] places States under a due diligence obligation to *internally* ensure compliance by their own armed forces, and those under their authority. This requires implementation and enforcement measures. States' role in this process is all the more important in light of the lack of international supervision and enforcement mechanisms, and as was explained above, the only way for States to keep track of whether their armed forces have violated IHL, is by instituting oversight. Good practice in this regard is to record *all* military operations. Any

196 Medlong (n 189) 832–9.
197 GC III, art 28.
198 GC III, art 41. Sivakumaran, *The Law of Non-International Armed Conflict* (n 44) 477.
199 AP I, art 57 and 58. When concerning military operations more broadly (i.e. not just attacks), the obligation is one of 'constant care' towards civilians and civilian objects, AP I, art 57(1). See also Vöneky, who finds that 'A serious breach of AP I is committed (…) when knowledge of the disproportionality of collateral damage exists'; Vöneky (n 59) 677.
200 *Supra*, §2.1.
201 Rule 139 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 1) 495. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment (27 June 1986), *I.C.J. Reports* 1986, p. 14 [220].

indication of a violation can then be reported and investigated. This system safeguards that States are in a position to 'ensure respect', because it deters violations, allows for the remedying of systemic shortcomings, and allows for establishing State responsibility for violations. This system is in no way restricted to war crimes, and applies to *all* breaches of IHL. After all, the duty to ensure respect applies to IHL in the broad sense, applies in both IACs and NIACs,[202] and does not distinguish between the gravity of the rule involved. In sum, the proper effectuation of IHL is fully contingent on the correct implementation of IHL, and entails a duty to supervise the execution of own implementation measures, through a system of supervision and investigation.[203]

The heavy implication of investigations in the IHL system forms the backdrop of this section's examination of sources of a duty to investigate simple IHL violations. It is principally up to States to decide how they implement their IHL obligations, if this is not stipulated explicitly in the law. Nevertheless, there are clear indications that indeed, investigative obligations extend also to simple violations.

Firstly, the Geneva Conventions contain an obligation to 'suppress' all IHL breaches. The grave breaches provisions quoted above, beyond the penal obligations discussed, also require that

> 'Each High Contracting Party shall take measures necessary for the suppression of *all acts* contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.'[204]

Pursuant to this paragraph common to the Geneva Conventions, States are under an obligation to suppress all violations, including breaches of AP I,[205] and including breaches which result from omissions.[206] Within the structure of the Geneva Conventions, this obligation is placed in Chapter IX, called 'Repression of Abuses and Infractions'. Thus, States' obligations with regard to the enforcement of IHL clearly extend to all breaches of IHL.

What 'measures necessary for the suppression' of violations entails, however, and whether this includes investigations is not readily apparent from the treaty text. Although some have argued the duty to suppress entails only an obligation to make sure the violations cease,[207] the 2016 ICRC Commentary

202 Ibid.
203 Pictet (n 3) 16.
204 Third paragraphs of GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146. Emphasis FT.
205 AP I, art 85(1).
206 AP I, art 86(1).
207 Yves Sandoz, 'The History of the Grave Breaches Regime' (2009) 7 Journal of International Criminal Justice 657, 673–4. This is seemingly in line with the French text, requiring '*les mesures nécessaires pour faire cesser les actes contraires aux dispositions de la présente Convention*'.

makes clear that States are required to 'address' all violations, which could include judicial, disciplinary, administrative or other measures, as long as the punishment is proportionate to the severity of the violation.[208] In the view of the ICRC Commentary, punishment is therefore important, which also presupposes implementing legislation.[209] The 2019 *Guidelines* published by the ICRC and Geneva Academy distinguish in this regard between breaches which indicate individual wrongdoing, and those resulting from systemic issues.[210] The former may very well indeed require (non-criminal) punishment, whereas the latter primarily require the identification relevant shortcomings in order to remedy them.

The open-ended requirement of taking measures to suppress breaches is certainly broad enough to also include investigations.[211] Insofar as a form of punishment is required – be it criminal or disciplinary in nature – an investigation into the facts and an assessment of responsibility preceding such punishment must be considered a 'necessary measure'.[212] The type of investigation may, however, differ from the strict requirement of criminal investigations under the regime for serious IHL violations. In this respect, the duty to 'repress' grave breaches must be distinguished from the duty to 'supress' other breaches. While the former indicates criminal law measures are in order, the latter allows States leeway in their reaction.[213] Administrative investigations may very well be sufficient,[214] especially for relatively 'mundane' violations such as selling soap and tobacco to prisoners of war above local market price.[215] Insofar as breaches indicate systemic shortcomings in States' compliance with IHL, for instance because a pattern of breaches can be discerned, the investigation ought to be aimed at identification of the source, and remedying it.[216] Regardless of whether the investigation examines a 'one off' or a systemic breach, it should facilitate the determination of State responsibility for the breach.[217] *How* States must shape their investigations, exactly, is returned to in section 4, pertaining to the exact standards to be employed in the investigation.

A second strong indication of the IHL system's insistence on investigations of all breaches, is to be found in the AP I provisions concerning the responsibil-

208 ICRC (n 2) [2896].
209 Pictet (n 3) 594.
210 Lubell, Pejic and Simmons (n 23) 32.
211 See also Cohen and Shany (n 7) 41–4.
212 Compare Margalit (n 41) 161.
213 Michael Bothe, Karl Joseph Partsch and Waldemar A Solf, *New Rules for Victims of Armed Conflicts. Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff 2013) 594–5.
214 See also Vöneky (n 59) 661.
215 GC III, art 28. GC III art 41.
216 Lubell, Pejic and Simmons (n 23) 35–6.
217 Lubell, Pejic and Simmons (n 23) 32–6.

ity and function of the commander.[218] Command responsibility for war crimes was briefly alluded to above,[219] and is also relevant for the duty to investigate other breaches. Article 87 of AP I places on commanders the duty to prevent, suppress and report 'breaches of the [Geneva] Conventions and of this Protocol'. The general and unqualified reference to 'breaches' must be taken to mean *all* breaches.[220] A commander's duty to suppress and report these breaches must, similar to what was concluded above, be interpreted as including the duty to investigate such violations, as is also illustrated by the third paragraph of Article 87:

> 'The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.'

Initiating disciplinary or penal action must, by necessity, involve investigation.[221] The ICRC Commentaries clarify the role of the commander in this context, explaining that commanders 'are in a position to establish or ensure the establishment of the facts, which would be the starting point for any action to suppress or punish a breach', with the commander in the role of an 'investigative magistrate'.[222] They are tasked with bridging the gap between treaty obligations and operational reality,[223] meant to ensure the effective enforcement of IHL.[224] Commanders, in other words, must take disciplinary or penal action in case of IHL violations 'when appropriate', which appropriateness must be established by the commander through investigations.[225] The only other way for commanders to discharge their obligation, is by reporting a breach to the appropriate authorities – who will then decide on the further investigation. Should commanders fail to carry out their duties, they are criminally

218 AP I, art 86 and 87. These provisions are part of customary IHL according to the ICRC Study, Rule 139 and 153, Henckaerts and Doswald-Beck (n 1) 495; 558.

219 *Supra*, §3.2.3.2.

220 Compare for AP I, art 86(2), Pictet and others (n 17) 1012 [3542].

221 *Mutatis mutandis*, in the context of serious violations, see *Prosecutor v Popović et al.*, ICTY (Appeals Chamber) Judgment (30 January 2015) IT-05-88-A [1932]; *Prosecutor v Halilović*, ICTY (Appeals Chamber) Judgment (16 October 2007) IT-01-48-A [182].

222 Pictet and others (n 17) 1022-3 [3560]-[3562].

223 The ICRC Commentary to AP I, art 87 puts forward that 'In fact the role of commanders is decisive. Whether they are concerned with the theatre of military operations, occupied territories or places of internment, the necessary measures for the proper application of the Conventions and the Protocol must be taken at the level of the troops, so that a fatal gap between the undertakings entered into by Parties to the conflict and the conduct of individuals is avoided'; Pictet and others (n 17).

224 *Prosecutor v Halilović*, ICTY (Trial Chamber) Judgment (16 November 2005) IT-01-48-T [39].

225 See also Cohen and Shany (n 7) 46; Margalit (n 41) 162.

liable therefor under Article 86(2) AP I. The picture is therefore one of a robust system of investigative obligations for States – through their commanders – and criminal liability for non-compliance with those obligations.[226]

A third avenue worth exploring does not concern in general the investigation of all non-serious breaches, but pertains to a more specific situation – the obligation to take precautionary measures set out in Article 57 of AP I. Violations of this provision do not in themselves constitute serious violations.[227] Article 57 provides that '[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects'[228] and that States are required to 'take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects'.[229] Based on this duty of 'constant care' and taking 'all feasible precautions', an argument can be made that States are required to investigate the effects of their actions, so they may optimise their conduct in the future.[230] Investigating past military operations and attacks therefore classifies as a feasible precaution for future operations and attacks.[231]

The scope of an obligation to investigate a lack of precautionary measures does not extend to all situations and violations. The duty of constant care is limited to military operations; the duty to take all feasible precautions is limited to attacks.[232] Clearly then, not all breaches are subject to investigations under this provision. To a certain extent however, within this scope precautionary obligations could be argued to go beyond the investigation of violations, as the investigation of all military conduct to assess its effects is in itself separate from a *prima facie* or potential violation of IHL. This corresponds to the duty to record the results of all military operations alluded to above.[233] As was shown above, a number of States rely on such a low-threshold fact-finding mechanism.[234] The *obligation* to conduct a further investigation beyond just the recording of the effects of military operations, however, is contingent on a suspected violation of the law.[235] This is an important limitation, especially as even cases of civilian deaths do not necessarily indicate a potential

226 Pictet and others (n 17) 1022 [3562].
227 Margalit (n 41) 158–60. See also Vöneky (n 59) 677.
228AP I, art 57(1).
229 AP I, art 57(2)(a) under (ii).
230 Cohen and Shany (n 7) 47.
231 Also to this effect, see William H Boothby, *The Law of Targeting* (Oxford University Press 2012) 548.
232 For the definition of attack, see AP I, art 49.
233 *Supra*, §2.1.
234 Ibid. See further Margalit (n 41) 167; see also Watts (n 88) 96 on the US practice of 'after-action reviews'.
235 Margalit (n 41) 169.

violation of IHL, as long as the expected casualties were proportionate to the anticipated military advantage.[236]

Fourthly and finally, an argument has been advanced that a duty to investigate is a *secondary* obligation under international law, in consequence to any breach of IHL.[237] Under the law of State responsibility, any breach of an international obligation which is attributable to the State, gives rise to State responsibility.[238] And, crucially, States must ensure the breach ceases, provide guarantees of non-repetition, and provide reparation.[239] Reparation can consist of restitution, satisfaction, and compensation.[240] Arguably, the duty to cease breaches, provide guarantees of non-repetition, and the duty to provide satisfaction for a breach, could all entail a duty to investigate.[241] After all, to be able to effectively stop a breach, the cause must be known, especially where violations are born out of systemic issues. The best way to make sure that such breaches do not repeat, is to identify root causes, and to remedy them. Deterrence of violations is one important way to do so, and ensuring individuals responsible for violations are held to account. This, as was argued above, requires investigations. Finally, insofar as a breach cannot be undone, and restitution is therefore not an option, the duty to provide satisfaction for a breach can, arguably, include investigation and prosecution of breaches.[242] The ILC's Commentary to the ARSIWA explicitly refers to 'due inquiry into the causes of an accident resulting in harm or injury' or 'disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act' as a form of satisfaction.[243] If, for example, a lack of precautions in

236 Margalit (n 41) 158. For arguments to nevertheless require the recording of civilian casualties, see Susan Breau and Rachel Joyce, 'The Responsibility to Record Civilian Casualties' (2013) 5 Global Responsibility to Protect 28, 34–6; Liesbeth Zegveld, 'Body Counts and Masking Wartime Violence' (2015) 6 Journal of International Humanitarian Legal Studies 443.

237 Most prominently, see Ingadottir (n 120); Thordis Ingadottir, 'The Role of the ICJ in the Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level' (2014) 47 Israel Law Review 285. *Case Concerning the Factory at Chorzów*, Judgment (26 July 1927), *P.C.I.J. Series A. No. 9*, p. 21.

238 ARSIWA, art 2.

239 ARSIWA, art 30-31.

240 ARSIWA, art 34.

241 Lubell, Pejic and Simmons (n 23) 5.

242 An early draft of the ARWSIWA in fact stipulated that 'Satisfaction may take the form of one or more of the following: (…) In cases where the international wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible'; see S Rosenne, 'War Crimes and State Responsibility' in Yoram Dinstein and M Tabory (eds), *War Crimes in International Law* (Martinus Nijhoff 1996) 96–7.

243 *Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), A/56/10, *Yearbook of the International Law Commission* 2001, vol. II, Part Two, 106. Ingadottir (n 120) 588.

attack causes an unexpectedly large amount of civilian casualties, this breaches IHL.[244] If such an occurrence is followed-up by a thorough investigation identifying the causes for the breach, coupled with a public apology, or perhaps an accountability process, this can provide satisfaction for an injured State,[245] as well as for individual victims.[246] This argumentation may be more powerful when pertaining to serious violations, because their consequences are often more severe, but as the example illustrates, non-serious breaches can also entail loss of civilian life, which calls for an investigation in response.

In sum, the IHL framework for simple breaches quite clearly includes investigative obligations on the part of the State. The general system of implementation, supervision, and enforcement, together with the more specific obligations to suppress all breaches, command responsibility, the obligation to take precautionary measures, and the duty to provide reparation indicate States must act to counter all IHL violations, *inter alia* by investigating. The investigative trigger, and the duty's scope of application in its various modalities are considered below.

3.3.4 The investigative trigger

As was shown above, any violation of IHL triggers the duty to investigate. But this does not yet answer *from what moment on* States must investigate, precisely. Do States, like in the case of war crimes, only need to act once information regarding the breach reaches them? For simple violations, this is not easy to determine. The treaty texts do not reveal much. The Geneva Conventions indicate no more than that all violations must be subject to suppression. The operationalisation in AP I by means of the commander is more informative, stipulating that commanders must initiate sanctions when they are 'aware' of someone under their control who has committed or intends to commit a breach of IHL.[247] The criminal liability of commanders extends to those cases in which they knew or were in the possession of information on the basis of which they should have known of the (imminent) breach, and did not take all feasible measures of repression.[248] A certain subjective element, knowledge, is therefore required to trigger the commander's duty to investigate. They need not investigate what they have no way of knowing. The ICC Statute supports such an interpretation, requiring in Article 28 that the commander

244 AP I, art 57(2).
245 Margalit (n 41) 162–3.
246 Naomi Roht-Arriaza, 'Nontreaty Sources of the Obligation to Investigate and Prosecute' in Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (Oxford University Press 1995) 48–9; Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85; Weill (n 19) 173.
247 AP I, art 87(3).
248 AP I, art 86(2).

knew or 'should have known', 'owing to the circumstances at the time', of the (intended) offences.[249] Similar to the regime for grave breaches and serious violations, the trigger therefore appears to hinge on the available information. The nature of this information or its plausibility, however, are not expanded upon, although the 'reasonable commander-criterion' seems to be decisive in determining the commander's criminal responsibility.

The precautionary obligation to investigate military operations and attacks, as explained above, might suggest all military operations must be *recorded*. Further *investigation*, however, would appear to be contingent on a suspected violation.[250] In this view the suspicion of a violation remains the guiding principle, similar to the other prongs of investigatory obligations into non-serious violations.

When it comes to investigative obligations flowing from State responsibility, the trigger is not entirely clear. State responsibility ensues following a breach of an international obligation, but how to determine whether a breach has occurred, is not foreseen in the system. State practice and soft law may therefore be instructive in identifying the precise investigative trigger.

Soft law and State practice

If we once more take the *Guidelines* as recent authority, these as already discussed propose the recording of *all* military operations and their effects, and to report all 'incidents'.[251] Incidents are defined broadly, as 'any event, situation, or set of circumstances that has the potential to require an investigation because it raises concern about a possible violation of international humanitarian law'.[252] Thus, the reporting obligation is very extensive. Any *concern* of a *possible* violation, *regardless of what type of violation*, requires reports to be drawn up, which must then be assessed by the appropriate authority for the need for further investigation. The *Guidelines*, therefore, plead in favour of a very low threshold for fact-finding. Further investigations into non-criminal breaches of IHL must take place if circumstances 'suggest' such a breach has occurred.[253]

State practice in the context of simple IHL violations appears diverse. As was shown above, States impose reporting obligations for 'notifiable incidents', with some States indicating *all* violations of IHL as notifiable, whereas others limit this category to war crimes.[254] As it was shown above that IHL requires investigations in case of all violations of IHL, State practice which only requires

249 See also *Prosecutor v Jean-Pierre Bemba Gombo* (Situation in the Central African Republic), ICC (Appeals Chamber) Judgment (8 June 2018), ICC-01/05-01/08 A [168].
250 Margalit (n 41) 169.
251 Lubell, Pejic and Simmons (n 23) 19.
252 Ibid 10.
253 Lubell, Pejic and Simmons (n 23) 22.
254 *Supra* §3.2.2.3.

reports in case of war crimes would appear to fall short of the international standards.

If we once more consider the good practice of a few States, Australian practice requires reporting all IHL violations. Commanders must assess whether a reasonable suspicion of such a violation exists. US practice similarly does not distinguish between various categories of violations,[255] and requires all credible IHL violations to be reported and investigated. The trigger for investigations is information that would lead a 'prudent person' to the conclusion that an IHL violation may have occurred. UK practice does make a distinction between serious violations and non-serious violations, though the trigger for investigations is similar. Officers are required to act on any circumstance or allegation of which they are aware, that to a reasonable person would indicate a 'service offence' has been committed.[256] Service offences are a very broad category, including many non-serious breaches of IHL.[257] Officers must then either ensure that an appropriate investigation is conducted, or involve service police – a form of military police[258] – as soon as reasonably practicable.[259] The trigger for investigations is therefore, similar to Australian law, one of reasonableness; officers must involve investigative services in all cases which to a reasonable person indicates a violation.

In sum, 'good practice' is to include reporting obligations for *all* violations. If an incident reasonably indicates a simple breach of IHL, this must lead to further investigation. As is explored further in section 4.2, in case of non-serious breaches IHL does not require this to be a criminal investigation. Whereas States are free to decide to criminalise simple breaches of IHL, they may, under international law, suffice with administrative investigations.

3.3.5 Personal and geographic scope of application

Having established the existence of an obligation to investigate non-serious IHL violations, the research now aims to assess *who* is under this obligation to investigate, and *where*. In other words the personal and geographical scope of application of the duty.

The obligation to investigate 'simple' breaches falls to the State, or directly the State's commanders. After all, the duty to suppress violations is addressed

255 As pointed out by Watts, the US system is focused on efficiency and necessity, rather than compliance with international law. This is not to say that US practice does not comply with IHL standards, but the influence of international law cannot be easily discerned; Watts (n 88) 104.

256 UK Armed Forces Act 2006, section 113(1) and (2). See also Cohen and Shany (n 7) 52–3.

257 Schmitt (n 13) 67.

258 UK Armed Forces Act 2006, Explanatory note 12; see Schmitt (n 13) 67.

259 UK Armed Forces Act 2006, section 115(4).

to the 'High Contracting Parties' and their commanders.[260] If we ask *which* State must investigate, the Pictet Commentaries indicate the State 'on which those committing such breaches depend or the Power to which they belong'.[261] In other words, there must be a direct link between that State and the perpetrators.[262] In such instances, the duty to investigate is not subject to geographical limitations, and States must therefore equally investigate their armed forces' conduct extraterritorially. The 2016 ICRC Commentary to Common Article 1 adds that a duty to prevent and repress breaches may extend to violations committed by 'private persons over which a State exercises authority'.[263] What that entails, the Commentary adds, depends *inter alia* on 'the gravity of the breach', as well as the State's influence over the perpetrators and its knowledge.[264] This would seem to indicate that the diligence required of States is lessened in case of simple breaches. If we take the nature of the breaches in question into account, this makes logical sense. These breaches are often much more directly linked with the operational practices of militaries, which means supervision over these kinds of offences must lie with the State whose forces are involved. Further, because simple violations can concern such relatively minor issues as an officer forgetting to post a copy of the Geneva Conventions in a POW camp, the rationale of international crimes being a concern for the international community as a whole, does not apply in these situations.[265] This also explains why simple IHL violations are not subject to the regime of universal jurisdiction.

In sum, when it comes to simple breaches, States must investigate *their own* violations, and commanders must report and investigate breaches by their own forces.[266] This is especially clear for measures of precaution, which can only be taken by the State carrying out the operation in question.

3.3.6 Temporal scope of application

The temporal scope of application of the duty to investigate simple IHL violations, finally, in broad strokes coincides with that of serious violations. Implementation obligations of course predate the existence of armed conflict, and the duty to investigate is triggered from the moment that there is a reasonable indication of a breach. The duty ends when it is fully discharged through an effective investigation. Whether investigative obligations persist also after the armed conflict has come to an end, is less clear. The strong rationale for continued application which applies to war crimes does not apply equally

260 GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146; AP I, art 86-87.
261 Pictet and others (n 17) 1011 [3539].
262 Medlong (n 189) 831.
263 ICRC (n 2) 45–6 [150].
264 Ibid.
265 Compare ICC Statute, preambular paragraph 4.
266 Pictet and others (n 17) 1019-20 [3554]-[3555].

to these investigations, because the fight against impunity is concerned with international crimes, rather than relatively minor violations. Nonetheless, the purposes of the duty to suppress, the need for reliable facts in the context of precautions, and the duty to provide reparation for breaches, all persist after the conflict comes to an end. The need to deter violations, to uncover systemic shortcomings, to improve procedures in order to ensure future compliance, and to guarantee non-repetition and provide satisfaction, in no way dissipate after the end of a conflict. It is submitted, therefore, that the duty to investigate simple IHL violations ought to continue to apply after an armed conflict comes to an end.

3.4 Investigations in non-international armed conflicts

Above, it was shown that IHL imposes clear investigative duties on States with regard to grave breaches, other serious violations, as well as simple violations. Thus, all IHL investigations must be investigated. What may still be questioned, however, is whether this finding also applies to non-international armed conflicts. After all, the treaty law applicable in NIACs is much more limited,[267] and for many of the treaty rules in the Geneva Conventions and AP I relied upon above, it may be questioned whether these (can) apply also during NIACs. This section briefly shows that indeed, States must also investigate violations of IHL during NIACs.

Firstly, it must be reiterated that the grave breaches regime does not apply in NIACs.[268] The law of non-international armed conflict does not encompass a grave breaches regime, meaning that the specific treaty rules requiring States to enact legislation, search for alleged perpetrators and to try or extradite them, do not apply. Insofar as the rules found above derive from the grave breaches regime, therefore, they do not apply to situations of non-international armed conflict.[269]

The rules pertaining to serious violations, and therefore war crimes, *are* applicable in NIACs. The ICRC's Customary IHL Study identifies the rule that war crimes must be prosecuted to be applicable in both IACs and NIACs.[270]

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267 See Chapter 2, §4.2.

268 ICRC (n 2) [2903]-[2905]; Lindsay Moir, 'Grave Breaches and Internal Armed Conflicts' (2009) 7 Journal of International Criminal Justice 763, 769–84.

269 It has been argued that a development in customary law is taking place, extending the grave breaches regime, though this development does not appear to have culminated in binding legal norms and accepted practice. See *Prosecutor v Delacić, Mucić and Landžo*, ICTY (Trial Chamber), Judgment (16 November 1998), IT-96-21-T. See further Moir (n 268) 769–84.

270 'State practice establishes this rule [duty to investigate and prosecute war criminals] as a norm of customary international law applicable in both international and non-international armed conflicts'; Henckaerts and Doswald-Beck (n 1) 607.

This view is widely accepted, especially following the establishment of the *ad hoc* tribunals for Rwanda and the former Yugoslavia.[271] The Statutes of these tribunals provided the first authoritative definition of war crimes as including violations of Common Article 3, and a number of violations of AP II.[272] The ICC Statute similarly includes serious violations committed during NIACs as war crimes.[273] Command responsibility for war crimes, and the commander's individual criminal liability for failing to take measures to prevent and repress such breaches, also apply during NIACs.[274] Insofar as suspected war crimes are concerned, States are therefore under an equal obligation to investigate these in NIACs, as they are in international armed conflicts. This has been further confirmed in regional human rights courts' jurisprudence, stipulating that granting amnesties[275] is prohibited for war crimes, as IHL requires their investigation and prosecution.[276]

Pertaining to the duty to investigate non-serious IHL violations, the sources for this duty outlined above primarily pertain to obligations applicable in IACs. After all, the majority of the Geneva Conventions, as well as the entirety of AP I, are applicable in IACs only.[277] Nonetheless, it would appear that most of the relevant rules do also apply during NIACs. Above, the main sources which entail a duty to investigate were shown to be the duty to ensure respect for the Geneva Conventions and the system of self-enforcement, the duty to suppress all breaches of the Geneva Conventions, the responsibility of commanders, and the principle of precautions. The duty to investigate violations under the State responsibility regime of course applies equally during NIACs, as it is the breach of an international obligation which give rise to the secondary obligation to provide reparation, and this is in no way altered by the nature of the conflict.

The duty to ensure respect for IHL, beyond its conventional basis in Common Article 1, also reflects a norm of customary international law, equally

271 Sivakumaran, *The Law of Non-International Armed Conflict* (n 44) 478.
272 Dinstein (n 139) 175.
273 ICC Statute, art 8. The Statute was meant to codify existing international law, see e.g. Cryer (n 187) 151.
274 The applicability of provisions of AP I is restricted to IACs, as set out in its art 1. Nonetheless, the judicial practice of the international criminal tribunals shows its application during NIACs.
275 Under AP II, art 6(5).
276 *Gelman v Uruguay* (Merits and Reparations) Inter-American Court of Human Rights Series C No 221 (24 February 2011) [210]; *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 252 (25 October 2012) [286]; *Marguš v Croatia*, ECtHR [GC] 27 May 2014, Appl No 4455/10 [132].
277 See *supra*, Chapter 2, §4.2.

applicable in NIACs.[278] Further, the supervision and enforcement structure in this context relies perhaps even more heavily on self-enforcement by the State, given the potential lack of involvement of other States. This in principle prevents recourse to such supervision and enforcement mechanisms IHL *does* have – although they are rarely ever used – such as a procedure before the ICJ, requesting the International Humanitarian Fact-Finding Commission to investigate, or requesting an enquiry.[279] This is reinforced further if we consider that the duty to suppress breaches of IHL, applies to *all breaches* of the Geneva Conventions.[280] This, crucially, therefore includes breaches of Common Article 3, which regulates NIACs.[281] States must therefore suppress, and by implication investigate, all breaches of Common Article 3. To what extent the duties of commanders also extend to NIACs, is less clear. From the judicial practice of the international criminal tribunals, it flows that commanders are also criminally responsible for failing to prevent and punish war crimes committed during NIACs.[282] Whether this is also the case for non-criminal breaches is not clear, though it is submitted that if States organise their armed forces according to the rules applicable in IACs, then their command structures and responsibilities will normally apply also when those armed forces are deployed in a situation of NIAC. The duty to take precautions in military operations and attack, finally, are principally derived from AP I. Nonetheless, these also form part of customary international law, equally applicable during NIACs. This has been confirmed by the ICTY,[283] as well as the ICRC's Customary IHL Study,[284] and in legal scholarship.[285]

In sum, the duty to investigate applies equally in non-international and international armed conflict. The main difference is that the specific regime governing grave breaches, applies during IACs only. Finally, NIACs of course concern also non-State armed groups. As was set out in the Introductory

278 Rule 139 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 1) 495. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment (27 June 1986), *I.C.J. Reports* 1986, p. 14 [220].

279 See *supra*, Chapter 2, §5.

280 Third paragraphs of GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146.

281 Schmitt (n 13) 47.

282 *Prosecutor v Jean-Pierre Bemba Gombo* (Situation in the Central African Republic), ICC (Appeals Chamber) Judgment (8 June 2018), ICC-01/05-01/08 A [168]; *Prosecutor v Akayesu*, ICTR (Chamber I) Judgment (2 September 1998) ICTR-96-4-T [486ff].

283 *Prosecutor v Hadžihasanović and Kubura*, ICTY (Trial Chamber) Judgment (15 March 2006) IT-01-47-T [45].

284 Rule 14 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 1) 46.

285 Dinstein (n 139) 218; Sandesh Sivakumaran, 'Re-Envisaging the International Law of Internal Armed Conflict' (2011) 22 European Journal of International Law 219, 239–40.

Chapter, the potential investigative obligations of NSAGs fall outside the scope of this study, and are therefore left aside.[286]

3.5 Résumé

In terms of the questions this enquiry set out to answer, this section has, firstly, addressed the question 'Are States under an obligation to investigate (potential) violations of IHL?' This question can be firmly answered in the affirmative: States must certainly investigate IHL violations. Secondly, this section has explored *when* this obligation applies. This has resulted in a relatively circumscribed outline of the investigative trigger, and the obligation's scope of application in its material, personal, geographical, and temporal dimensions. Together, these steps are meant to take a first step in resolving the problem identified in the Introductory Chapter, that investigative obligations during armed conflict are insufficiently clear.

The research shows that within IHL, we must distinguish between various categories of violations, namely 'serious', and 'simple' violations. First, there are the *serious* violations, which are criminal violations of IHL. They constitute war crimes, and are subject to individual criminal responsibility directly under international law. Within this category of criminal violations, we can distinguish further, between the grave breaches, which are covered by a specialised treaty regime under the law of IAC, and other serious violations, which must be investigated and prosecuted under customary international law.

Despite the variety in sources, the research shows that criminal violations of IHL form a relatively unambiguous, univocal category of breaches when it comes to their investigative regimes. All serious violations are directly

286 There is some precedent for investigations being carried out by NSAGs, see Mark Lattimer, 'The Duty in International Law to Investigate Civilian Deaths in Armed Conflict' in Mark Lattimer and Philippe Sands (eds), *The Grey Zone: Civilian Protection between Human Rights and the Laws of War* (Hart Publishing 2018) 54. He observes that 'an example of practice by both state and non-state actors in an internal conflict is the 1992 agreement by the parties to the non-international conflict in Bosnia and Herzegovina to undertake, when informed of an allegation of IHL violations, "to open and enquiry promptly and pursue it conscientiously" and to punish those responsible' ["Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina" (London, 27 August 1992) art 5]. Currently, discussions are ongoing whether Kurdish forces who fought the Islamic State ought to prosecute foreign fighters, or whether States ought to take back their nationals and prosecute them domestically; see Dan Sabbagh, 'Syrian Kurds to Put Isis Fighters from Dozens of Countries on Trial' (*The Guardian*, 2020) <https://www.theguardian.com/world/2020/feb/06/syrian-kurds-to-put-isis-fighters-from-dozens-of-countries-on-trial> (last accessed 15 July 2021). Further, see e.g. Emma Broches, 'Accountability for Islamic State Fighters: What Are the Options?' (*Lawfare*, 2019) <https://www.lawfareblog.com/accountability-islamic-state-fighters-what-are-options> (last accessed 15 July 2021).

criminalised under international law, and must be investigated as soon as information which indicates such a crime reaches the State. Most IHL obligations are addressed to States themselves, and must be implemented by States with regard to their own armed forces. Thus, States must supervise the conduct of their forces, in line with their general obligation to ensure respect for IHL, and must investigate war crimes attributable to their armed forces wherever they are committed. But, because these are criminal violations of such severity that they are of a common concern to the international community as a whole, obligations do not stop there. States must also investigate war crimes by others, if they are committed by their nationals or on their territories. This is formalised further under the grave breaches regime, where States must further vest *universal* jurisdiction over such crimes, and operate under an explicit *aut dedere aut iudicare* obligation. For other war crimes, there is only a right, rather than an obligation, to vest universal jurisdiction. In practice, the difference in universal jurisdiction may not be overly great. Whereas the duty to *vest* universal jurisdiction exists only for grave breaches, the duty to *exercise* that jurisdiction in practice appears to be limited to cases where States have territorial or personal jurisdiction over the perpetrator. This is complemented by a duty of cooperation by other States. Finally, the duty to investigate war crimes is not temporally limited to the armed conflict, and continues to apply even after hostilities cease.

The regime for criminal violations of IHL is therefore relatively uniform. This corresponds to the rationale of preventing impunity, and denying a safe haven to war criminals. Wherever they go, and whenever they surface, IHL does not allow them to remain unpunished. This clearly conveys also the interest of the international community as a whole in their prosecution.

This is different for the *second* category of violations, the simple violations. These are non-criminal breaches of IHL, which can range in severity from omitting to post a copy of the Geneva Conventions in prisoners of war camp, to failing to take the necessary precautions in attack, causing civilian casualties. The range of obligations at play is therefore broad, but what they have in common is that violations are not of such gravity that IHL requires a criminal law response. Nonetheless, IHL *does* require that States investigate these violations, whenever circumstances suggest a violation has occurred. The research shows that the obligation is not explicit in treaty law, but derives from a systematic interpretation of a number of treaty and customary rules which together add up to a duty to investigate non-criminal breaches of IHL. Thus, the duty to ensure respect for IHL, the duty to suppress all violations, the responsibility of the commander, the duty to take all feasible precautions, and the duty to provide reparation for violations, all rely on, and require, State investigations.

This obligation corresponds directly with the overarching rationale of *effectuating* IHL. Effectively ensuring compliance, supervising, and enforcing the rules of IHL, cannot happen without investigations. This applies similarly

for all violations. Where simple violations differ from serious violations, however, is their severity. This means that criminal accountability is not required, and that the rationale of preventing impunity does not apply.[287] This directly translates to the obligation's scope of application, which is limited to States' own armed forces and others under their authority. Suppression of these less serious breaches is not a concern of the international community as such, and it is States themselves who must ensure that their militaries live up to international standards. They must do so wherever their forces operate, and it is submitted they must continue investigations also after the armed conflict comes to a close.

4 SUBSTANCE OF THE OBLIGATION: INVESTIGATIVE STANDARDS

4.1 Introduction

Having concluded in section 3 *that* States must investigate violations of IHL, the present section explores *how* they must do so. What type of enquiry fulfils the duty to 'investigate', what exactly must States do once it is established that they must start an investigation? Establishing a clear answer to this question is a precondition for the effectiveness of the obligation to conduct investigations in practice.[288] In terms of the sub-question guiding this Chapter, this section therefore answers what the 'contents' of the duty to investigate IHL amount to.

As this section shows, establishing how States must conduct IHL investigations, is no easy task. IHL contains very few – if any – indications on what the contents of the duty to investigate are.[289] A number of soft law instruments and contributions to legal scholarship have made efforts to establish a list of investigative standards, such as independence, impartiality, thoroughness, effectiveness, promptness and transparency.[290] This sections aims to

287 See *infra*, §4.2.

288 For the necessity of a legal concept, sufficiently developed to be communicated clearly, see Paul F Diehl, Charlotte Ku and Daniel Zamora, 'The Dynamics of International Law: The Interaction of Normative and Operating Systems' (2003) 57 International Organization 43, 43.

289 Compare Cohen and Shany (n 7) 56; Hampson (n 11) 17. See also Human Rights Council 23 September 2010, A/HRC/15/50 [19].

290 E.g. Human Rights Council 23 September 2010, *Report of the Committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards*, A/HRC/15/50 [21] and [33]; Goldstone Report (2009) UN fact-finding mission on the Gaza conflict (25 Sept 2009), UN Doc. A/HRC/12/48 [1814]; UNGA Resolution 60/147 (2005), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International*

determine whether such standards can indeed be derived from IHL itself, in spite of its lack of explicit rules, or whether such standards rather derive from the incorporation of standards of international human rights law. Whereas there is no principled objection against looking towards IHRL for inspiration, it is submitted that the interplay between IHL and IHRL must be approached by way of a specific methodology – as set out in Chapter 9 of this study. That approach requires the determination of what IHL and IHRL require separately. This section does so for IHL.

The examination first turns to the distinction already made in the previous section, between serious and simple IHL violations. As this distinction is decisive for the question whether the violation amounts to an international crime, it is argued this distinction also determines the *type* of investigation required (§4.2). Section 4.3 subsequently addresses the investigation of serious violations (i.e. war crimes), section 4.4 sets out the standards investigations into non-serious violations must adhere to. Finally, section 4.5 assesses whether general investigative standards may be derived from the previous sections.

4.2 The nature and purpose of the investigation: criminal or administrative

One way of establishing the standards applicable to investigations, is to *infer* them from the nature and purpose of the investigation. Because IHL itself says so little about how investigations must be conducted, this is one of the most promising avenues for establishing the standards which guide investigations. The main difference in the nature of investigations, has to do with whether the breach in question concerns a *criminal* breach, or rather a simple breach, which is not criminal in nature. This also has to do with the nature of IHL itself, which as a body of international law principally leads to *State responsibility* when it is breached, not criminal responsibility.

International humanitarian law is not criminal law. It is not comprised of penal provisions, rather it is concerned with obligations for the State which – when violated – in principle lead to State responsibility.[291] State responsibility is not criminal in nature,[292] which was made explicit in the drafting of the ILC

Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, principle 3(b); The Turkel Commission (n 25) 114–5. See further Michelle Lesh, 'A Critical Discussion of the Second Turkel Report and How It Engages with the Duty to Investigate under International Law' (2013) 16 Yearbook of International Humanitarian Law 119, 131.

291 Cf. ARSIWA, art 2.

292 *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment (26 February 2007), *I.C.J. Reports* 2007, p. 43 [403]. Further on the distinction between State responsibility and individual criminal responsibility, see Ingadottir (n 120) 586; Rosenne (n 242).

Articles on the Responsibility of States for Internationally Wrongful Acts – rejecting any form of criminal liability of States.[293] If a State breaches its international obligations, including those of IHL, this therefore principally leads to international State responsibility, which is more akin to 'civil' responsibility.[294] The international responsibility which flows from any breach of IHL, is therefore *not* criminal in nature.[295] Further, because they are not concerned with establishing individual responsibility, they do not need to identify individual perpetrators. These are relevant distinctions in how investigations must be conducted.

An important point to make with regard to the *nature* of the duty to investigate, comes back to the distinction between primary and secondary obligations under international law. The obligations to cease a violation, guarantee non-repetition, and provide reparation, are *secondary* obligations under international law.[296] Such secondary obligations arise in case a *primary* norm of international law has been breached.[297] Thus, if a norm of IHL is violated, this triggers the secondary obligations under the State responsibility regime.

Crucially, *the duty to investigate IHL violations, is a primary norm*. IHL establishes the obligation to investigate violations, as was explored in-depth in the previous section. This obligation entails the duty to *criminally* investigate war crimes, and to conduct *administrative* investigations into simple violations.[298] These are primary obligations under international law. This is not changed by the fact that they are in a sense 'accessory', and triggered only if other norms of IHL have been breached. This also means that if a State fails to conduct an investigation pursuant to its primary duty to do so under IHL, it will incur State responsibility for this failure, *in addition* to the State responsibility which already follows the initial violation. For example, if a POW was mistreated, the responsible State will have to provide reparation for this. Further, it will be under a duty to investigate. If it also fails to investigate, it will have to provide reparation for this omission as well.

Although IHL itself is not criminal law, it nevertheless distinguishes criminal and non-criminal breaches. This distinction affects the duty to investigate as

293 The first reading in 1996 of the Draft Articles included in Art. 19(2) the concept of crimes committed by the State (*Report of the International Law Commission on the work of its forty-eighth session 6 May-26 July 1996*, General Assembly Official Record, Fifty-first Session Supplement No. 10, UN Doc. A/51/10), 131. This concept was later rejected, see André Nollkaemper, *Kern van Het Internationaal Publiekrecht* (6th edn, Boom Juridisch 2016) 211.

294 Hampson (n 11).

295 Lubell, Pejic and Simmons (n 23) 5–6.

296 *Supra* §3.3.3.

297 See *Case Concerning the Factory at Chorzów*, Judgment (26 July 1927), *P.C.I.J. Series A. No. 9*, p. 21.

298 Lubell, Pejic and Simmons (n 23).

a primary obligation, because the *substance* of the investigative obligation changes. When it comes to criminal breaches, States must employ their criminal justice systems in order to discharge their investigative obligations, whereas for non-criminal breaches, other types of investigation may be equally suitable.[299]

The distinction between criminal and non-criminal breaches can be derived from conventional IHL. Both the grave breaches provisions in the Geneva Conventions and AP I make a clear distinction in the required response regarding grave breaches and other violations. Whereas grave breaches require 'effective penal sanctions'[300] and must be 'repressed', other violations must be 'suppressed'. Article 86(1) AP I is perhaps most explicit in the distinction, providing: 'The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol (…).' In this context, 'repression' denotes a criminal law response, whereas 'suppression' leaves room for other methods of implementation, such as disciplinary measures.[301] Although the treaties are not fully consistent in their use of these terms,[302] there can be no doubt that certain breaches are subject to direct criminalisation under international law and must be criminally repressed, while others do not.

All serious violations – war crimes – are of such gravity that they *must* be redressed by means of criminal accountability. Thus, when a war crime is committed by a State's armed forces, this *both* leads to State responsibility, *and* criminal accountability for the individual perpetrators, and potentially their commanders.[303] An airstrike deliberately targeting a hospital would, for instance, be both a war crime and lead to international State responsibility. Investigations will therefore need to focus equally on establishing individual criminal accountability, and on establishing the responsibility of the State. This can be achieved through separate investigations. If the investigation shows that violations may occur pursuant to a State policy, this will also need to be addressed.[304]

Other violations of IHL, simple violations, do not give rise to individual criminal responsibility under international law. Whereas States are free to choose to criminalise all IHL violations in their domestic legal systems – as some have[305] – this is not a requirement, and States may choose to adopt

299 ICRC (n 2) 1033 [2896].
300 GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146.
301 See Pictet and others (n 17) 1010-1 [3538]-[3539]; Bothe, Partsch and Solf (n 213) 494–5.
302 See e.g. AP I, art 86(2), and 87; Lesh (n 290) 124.
303 Cf. Ingadottir (n 120) 586. See also Nollkaemper (n 293) 232.
304 Lubell, Pejic and Simmons (n 23) 38.
305 As noted by the ICRC, ICRC (n 2) 1034, fn 181; e.g. Ireland, Nigeria, and South Africa. See Ireland's Geneva Conventions Act 1962; Nigeria's Geneva Conventions Act 1960; and South Africa's Geneva Conventions Act 2012.

other measures in response to simple violations. Thus, administrative, rather than criminal investigations suffice to satisfy the international requirements. On the level of individual perpetrators, there may be a need for punishment, but this may very well be disciplinary punishment.[306] The severity of the offence, such as omitting to post a copy of the Geneva Conventions in a POW camp, does not as such require criminal law measures. Deterrence and prevention can be achieved through other means. On the State level, State responsibility still ensues, also from relatively minor breaches. An investigation will therefore have to be capable of establishing State responsibility. Further, in order to serve its preventive and precautionary aims, it will need to enable an evaluation of military operations and procedures. This facilitates uncovering systemic shortcomings.

In conclusion, whilst all serious IHL violations entail an obligation for the State to conduct criminal investigations, non-serious violations leave States free to choose how to investigate. Because the investigation, no matter the gravity of the breach, will need to establish the responsibility of the State, it will necessarily have to establish the facts, and determine the lawfulness of the incident in question. Beyond establishing State responsibility, investigations pursue further aims. They also seek to contribute to prevention and deterrence. This, firstly, requires the examination of broader structures to uncover whether broader, systemic issues are the cause of a violation. Secondly, this requires individual measures which punish transgressors. In order for such individual punishment to be administered, a necessary step is obviously to *identify* individual members of the armed forces who were involved in a transgression. The *type* of sanction, penal or disciplinary, is then contingent on the breach in question. Grave breaches and other war crimes must at all times be subject to criminal investigation and punishment. Simple violations require a response in proportion to the transgression, but need not be criminal. States are more free in how they choose to sanction simple violations, and while they may criminalise such violations, they do not need to.

4.3 Standards for investigations into serious IHL violations (war crimes)

Let us now explore more in-depth what standards guide IHL investigations, starting with war crimes investigations. Such investigations must be criminal in nature, as was explained in the previous section. IHL itself does not provide much by way of guidance as to the further substantive and procedural requirements these investigations must adhere to. It has been suggested this leads to accountability concerns, because it leaves States free to decide how they

306 Pictet (n 3) 394; Lattimer (n 286) 56.

proceed with an investigation.[307] If we wish to flesh out further what investigative obligations entail, we may therefore proceed by *inferring* from the requirement of criminal prosecution and punishment, how the investigation must take shape. In doing so, this section firstly examines what little guidance IHL *does* provide, secondly looks towards ICL to determine how the criminal enforcement of IHL is shaped there, and thirdly interweaves this examination with the guidance provided by the *Guidelines on Investigating Violations of International Humanitarian Law*[308] and State practice.

If we turn firstly towards IHL itself, the Geneva Conventions provide no more than that the Contracting States must 'provide effective penal sanctions' and 'search for persons alleged to have committed (…) grave breaches'.[309] Additional Protocol I adds to this that grave breaches must be repressed.[310] Criminal punishment is, therefore, required. But, IHL provides no other indications of *how* States must conduct their investigations. The only further requirements set, are the grave breaches provisions' insistence that: 'In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of [Geneva Convention III].'[311] These provisions provide a number of procedural rights for defendants, which are complemented by the fundamental guarantees summed up in Article 75 of AP I.[312] These fair trial guarantees in part also govern the investigative process, insofar as for instance the rule that convictions must be based on individual criminal responsibility, the presumption of innocence, and the privilege against self-incrimination are concerned.[313] From these requirements, we may surmise that the investigation will have to be capable of establishing the *individual guilt* of the accused. This means, by necessity, that the investigation must establish the facts, and identify the suspected perpetrator. Further, it must garner sufficient evidence to *prove* the guilt of the accused, in line with the presumption of innocence. Finally, the accused may not be compelled to testify against themselves. These requirements guide the trial against, but also the investigation of those suspected of war crimes.[314] If we read these requirements in light of the overarching aim of preventing impunity and ensuring criminal accountability, this therefore requires highly effective investigations. They must not only lead to the conviction and punishment of those responsible, but they

307 Tan (n 148) 210.
308 Lubell, Pejic and Simmons (n 23).
309 GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146.
310 AP I, art 86 and 87.
311 Paragraph 4 of GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146.
312 ICRC (n 2) 1035–7 [2902].
313 AP I, art 75(4)(b), (d), and (f).
314 AP I, art 75(7) explicitly extends its protection to those accused of war crimes and crimes against humanity. See further Pictet and others (n 17) 887–9; Bothe, Partsch and Solf (n 213) 523.

must moreover do so without unduly relying on a presupposition of guilt, or by coercing confessions. This implies the gathering of solid evidence.

If we consider *how* evidence must be gathered, some guidance is provided by the responsibilities of the commander as set out in AP I. As was explained above, commanders are tasked with preventing, repressing, and reporting war crimes. The Pictet Commentaries clarify that commanders 'are in a position to establish or ensure the establishment of the facts, which would be the starting point for any action to suppress or punish a breach', with the commander in the role of an 'investigative magistrate'.[315] Various ICL bodies have further developed what the commander's responsibilities entail in this context. Firstly, they are themselves criminally liable if they 'failed to take all necessary and reasonable measures within [their] power to prevent or repress the commission of crimes by [their] subordinates (…) or to submit the matter to the competent authorities'.[316] What 'all necessary and reasonable measures' are must be determined contextually, on a case-by-case basis.[317] According to the ICTY, it must be examined 'what steps were taken to secure an adequate investigation capable of leading to the criminal prosecution of the perpetrators',[318] and at a minimum the duty entails an 'obligation to investigate possible crimes in order to establish the facts'.[319] These findings clearly corroborate the idea that an investigation must be *capable of leading to prosecution and punishment*. The *Guidelines* support this finding based on their survey of State practice.[320]

At the same time, the duty to investigate, and if appropriate, prosecute, and punish, must remain a *due diligence* obligation, an obligation of means. In line with the presumption of innocence, there can be no obligation to come to a conviction. All *reasonable* means must be used, but according to the ICC, commanders are not required 'to employ every single conceivable measure within his or her arsenal, irrespective of considerations of proportionality and feasibility'.[321] 'Operational realities on the ground' may influence what commanders can achieve by way of investigation, and they are allowed to make a 'cost/benefit analysis' in determining appropriate investigative measures which do not unduly disrupt military operations.[322] Whether these findings

315 Pictet and others (n 17) 1022-3 [3560]-[3562].

316 See also *Prosecutor v Jean-Pierre Bemba Gombo* (Situation in the Central African Republic), ICC (Appeals Chamber) Judgment (8 June 2018), ICC-01/05-01/08 A [166] and [168].

317 Ibid. See further Martha M Bradley and Aniel de Beer, '"All Necessary and Reasonable Measures" – The Bemba Case and the Threshold for Command Responsibility' (2020) 20 International Criminal Law Review 163.

318 *Prosecutor v Popović et al.*, ICTY (Appeals Chamber) Judgment (30 January 2015) IT-05-88-A [1932].

319 Ibid.

320 Lubell, Pejic and Simmons (n 23) 7.

321 *Prosecutor v Jean-Pierre Bemba Gombo* (Situation in the Central African Republic), ICC (Appeals Chamber) Judgment (8 June 2018), ICC-01/05-01/08 A [169].

322 Ibid [170].

on the *individual criminal responsibility* of commanders by the ICC can be transposed one on one to the *responsibility of the State* under IHL, is not clear. After all, the responsibility of the State may well exceed the more narrowly circumscribed individual responsibility of the commander. What is considered 'reasonable' may be assessed somewhat differently from the perspective of the individual commander or the State as a whole. Nonetheless, it is submitted that the duty to investigate is indeed a due diligence obligation which requires States to take all *reasonable* investigative measures.

The requirement that investigations are *capable* of leading to prosecution and punishment, clearly connote a standard of *effectiveness*.[323] If an investigation is not thorough, and does not pursue the relevant steps in gathering and securing evidence, criminal prosecutions are doomed to fail. It is submitted that this also requires an investigation to be conducted *promptly*. In the gathering of evidence, especially during armed conflict, a speedy reaction is key. If potential crime scenes are not secured as soon as possible, and potential witnesses not identified, the means for effectively investigating an incident deteriorate quickly. Forensic evidence is lost, witnesses cannot be found (or do not survive the armed conflict), the reliability of their memories decreases, bodily injuries heal, and mortal remains are buried. Promptness is therefore recognised universally as a crucial standard for the effectiveness of investigations.[324]

As was alluded to above, in order to be able to result in a criminal conviction, certain procedural guarantees must furthermore be respected. The rights of the accused must be respected insofar as the violation of these rights would impair the fairness of the trial to such an extent that a criminal conviction is no longer possible.[325]

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323 Compare the jurisprudence of the European Court of Human Rights, also requiring investigations to be capable of leading to the identification and punishment of those responsible – all under the umbrella of effectiveness and adequacy; see e.g. *Ramsahai v Netherlands*, ECtHR [GC] 15 May 2007, Appl No 52391/99 [321]. See further Chapters 5-8.

324 E.g. Human Rights Council 23 September 2010, *Report of the Committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards*, A/HRC/15/50 [21] and [33]; Goldstone Report (2009) UN fact-finding mission on the Gaza conflict (25 Sept 2009), UN Doc. A/HRC/12/48 [1814]; UNGA Resolution 60/147 (2005), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, principle 3(b); The Turkel Commission (n 25) 114–5. See further Lesh (n 290) 131; Schmitt (n 13); Cohen and Shany (n 7); Tan (n 148); Todeschini (n 148); Margalit (n 148); Hampson (n 11); Lubell, Pejic and Simmons (n 23).

325 Not all human rights violations during the investigative stage give rise to fair trial issues, see e.g. *Khan v United Kingdom*, ECtHR 12 May 2000, Appl No 35394/97. Further, not all fair trial violations lead to a bar to prosecution and conviction, as e.g. reasonable time violations can be remedied through a recognition of the unreasonable length of proceedings,

A second avenue worth exploring, is the complementarity mechanism which determines jurisdiction of the ICC. Pursuant to Article 17(1)(a) of the ICC Statute, a prosecution can be admissible only if the case was not genuinely investigated and prosecuted at the national level. In determining the admissibility of a prosecution before it, the ICC must therefore decide whether any domestic investigations have been 'genuine'. Any criteria formulated in that regard, can assist in deciding what a duty to investigate war crimes must entail.[326] Although ICC criteria cannot be transposed directly to requirements under IHL,[327] it certainly provides a source of inspiration given the lack of indications in IHL documents. The ICC, however, has yet to give a clear and coherent view on what it considers a *genuine* investigation. This issue has not played a role of importance in case-law thus far, because the Prosecutor has focused on those cases where States have remained *inactive*, and where no investigation whatsoever had taken place. If States fail to investigate or prosecute, this is sufficient for the ICC to find a case admissible for complementarity purposes.[328] This has allowed it to avoid treading into the question whether an investigation or prosecution carried out by a State has been 'genuine' – which is of course a much more delicate matter.[329] What constitutes a genuine investigation, therefore, is still in the process of crystallisation.[330]

The ICC has provided some more guidance in the context of the related question whether a national investigation or prosecution is *ongoing*. On this subject, Bill Schabas observes:[331]

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combined with a reduced sentence; see *Pietiläinen v Finland*, ECtHR 5 November 2002, Appl No 35999/97 [44] and *Eckle v Germany*, ECtHR 15 July 1982, 8130/78 [66] and [87]; Stefan Trechsel, *Human Rights in Criminal Proceedings* (Sarah J Summers ed, Oxford University Press 2005) 148.

326 See also e.g. Cohen and Shany (n 7) 57–8.

327 After all, ICL and IHL cannot be equated with one another. Further, see Sivakumaran, 'Re-Envisaging the International Law of Internal Armed Conflict' (n 285) 238–42. Moreover, the international crimes within the jurisdiction of the ICC extend beyond war crimes, to e.g. crimes against humanity not covered by IHL.

328 *Prosecutor v Lubanga Dyilo* (Situation in the Democratic Republic of the Congo), ICC (Pre-Trial Chamber I) Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo (24 February 2006), ICC-01/04-01/06 [29]; *Prosecutor v Katanga* (Situation in the Democratic Republic of the Congo), ICC (Appeals Chamber) Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case (25 September 2009), ICC-01/04-01/07 OA 8 [79].

329 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (n 156) 449.

330 For a case where a conviction (*in absentia*) was put to the test, also in light of amnesty laws, see *Prosecutor v Saif Al-Islam Gaddafi* (Situation in Lybia), ICC (Pre-Trial Chamber I) Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute' (5 April 2019) ICC-01/11-01/11. The Court ultimately decided the issue by finding that a prior conviction must be *final* before it leads to inadmissibility before the ICC. It did not, therefore, decide on the 'genuineness' of the investigation.

331 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (n 156) 459.

> 'The expression "the case is being investigated" requires evidence of "concrete and progressive investigative steps".[332] These may involve "interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses".[333] This consists of assessing both the quantity and the quality of the alleged investigative steps. In practice, it is very similar to the examination of the genuineness of the investigation.'

The criterion of a 'genuine' and 'thorough' investigation, can therefore be fleshed out further in light of a number of concrete measures, such as conducting interviews, collecting evidence and forensic analyses are therefore expected of States. The 'genuineness' of the investigation can moreover be linked to the requirement that an investigation, prosecution, or trial, is not merely conducted to shield the accused from justice.[334] Sham investigations and trials, in other words, do not meet the criterion of a 'genuine' investigation. This requirement could, loosely, be equated to one of 'impartiality'. The investigators may not have a personal interest in the outcome of the investigation, nor may they be biased or operate under the presupposition that no crime was committed.[335] Further guidance will have to be awaited.[336]

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332 *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Situation in Libya) ICC (Appeals Chamber) Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" (21 May 2014) ICC-01/11-01/11 OA 4 [54]-[55]; *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Situation in Libya) ICC (Pre-Trial Chamber I) Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi (7 December 2012) ICC-01/11-01/11 [11]; *Prosecutor v Simone Gbagbo* (Situation in the Republic of Côte d'Ivoire) ICC (Pre-Trial Chamber I) Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo (11 December 2014) ICC-02/11-01/12 [30].

333 *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Situation in the Republic of Kenya) ICC (Appeals Chamber) Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" (30 August 2011) ICC-01/09-02/11 OA [1] and [40]; *Prosecutor v Simone Gbagbo* (Situation in the Republic of Côte d'Ivoire) ICC (Appeals Chamber) Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo" (27 May 2015) ICC-02/11-01/12 [128].

334 Compare ICC Statute, art 17(2)(a) and 20(3)(a).

335 Lubell, Pejic and Simmons (n 23) 24.

336 Such guidance may remain relatively limited in light of the ICC Appeals Chamber's finding that because the complementarity mechanism aims to safeguard State sovereignty, strict scrutiny by the ICC and its Prosecutor of State investigations is not appropriate beyond clear-cut cases ('The purpose of article 17(1)(b) of the Statute is to ensure that the Court respects genuine decisions of a State not to prosecute a given case, thereby protecting the State's sovereignty', *Prosecutor v Katanga* (Situation in the Democratic Republic of the Congo) ICC (Appeals Chamber) Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case (25 September 2009) ICC-01/04-01/07 OA 8 [83]). Likely, this means that whenever a State is investigating a case, this will lead to the strong presumption that the investigation is genuine. Insofar

From the legal framework, we can therefore conclude that investigations must meet a standard of *effectiveness*. When fleshed out further, this standard indicates that the investigation must be *thorough* and *genuine*. All necessary and reasonable investigative measures must be taken, to ensure that the investigation is capable of leading to a prosecution and punishment. Examples of such steps are the collection and analysis of forensic evidence, and the hearing of witnesses. This must moreover be done *promptly*, in order to ensure that evidence is not lost, and the investigators must be *impartial*. Finally, the investigation must respect a number of *fundamental due process guarantees*. These relate to the fairness of the trial, and importantly include the presumption of innocence and the privilege against self-incrimination.

For further guidance, we must turn towards soft law and State practice. The *Guidelines* may once more serve as a recent and authoritative outline of investigative practice and requirements.

The entry into force of the Rome Statute constituting the ICC has had a significant effect on States' domestic legislation. Many States, not unlikely wary of the ICC's complementary jurisdiction, have gone on to pass domestic International Crimes Acts, criminalising amongst others war crimes.[337] Although many international crimes have been prosecuted as 'ordinary crimes' under domestic criminal law,[338] and the number of international crimes that have not been prosecuted greatly exceeds the ones that have,[339] the domestic legislation provides insight into how States have implemented their international obligations. Further, the way they have operationalised their investigative practice with regard to international crimes is particularly instructive.

As the *Guidelines* illustrate, States often grant the competence to investigate crimes of a certain severity – notably war crimes – to their military police when their armed forces are implicated in the event.[340] As was already explained, it is normally the relevant commander who reports the case, though this need not necessarily be so. Certain systems require *all* members of the armed forces to report breaches of IHL.[341] The exact status of military police can differ amongst States, with varying levels of independence from the military chain

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as such a deferential approach is inherent in the structure of the ICC Statute, this need not, of course, be applied equally to investigative standards under IHL itself. See further Dörmann and Geiß (n 51) 719; see also Michael A Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court' (2001) 167 Military Law Review 20.

337 E.g. Dörmann and Geiß (n 51) 718–9.

338 Sivakumaran, *The Law of Non-International Armed Conflict* (n 44) 488.

339 Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (n 75).

340 Lubell, Pejic and Simmons (n 23) 24.

341 E.g. Australian Department of Defence, *Defence Instructions (General)*, 26 March 2010 [3] and [6].

of command.[342] Nonetheless, normally such police authorities will enjoy a measure of independence from those they investigate. These types of investigators do not have any concrete personal interests in the situations they investigate, which also safeguards to an extent their impartiality. This all depends on perspective, however, as victims of alleged war crimes may very well feel that any investigation carried out by the State that committed the war crime, can never be impartial.[343] In light of such complaints, it is important that the investigation also considers a potential systemic problem, or even a State policy, which causes the breach.

The follow-up to military police investigations, when they bring to light potential crimes, largely differs between common law countries and civil law countries. Common law countries generally employ a court martial system, a separate branch of military justice for the trial of members of the armed forces.[344] Civil law countries usually try their armed forces in civil courts,[345] although a State such as the Netherlands does still have a separate Military Chamber within its civil courts.[346] The prosecution services charged with the prosecution of the armed forces similarly vary, with civil law countries using regular (though specialised) public prosecutors, and common law countries employing separate military prosecutors. Although all are outside the chain of command, the degree of independence of these institutions does appear to vary. These are, of course, generalisations. Nonetheless, a uniform practice with regard to investigation does not appear to exist at this time.

Any attempt to abstract general standards from this practice, must remain tenuous. According to the *Guidelines*, beyond the standard of thoroughness, promptness, impartiality, and respect for the fundamental rights of the accused, States must also ensure standards of independence, and transparency.[347] With regard to independence, they find that 'an independent (…) investigative authority *must* be available to carry out criminal investigations (…)'.[348] With regard to transparency, they rather state that 'a criminal investigation *should* be as transparent as possible taking into account the circumstances'.[349] This indicates that the *Guidelines* consider transparency to be 'good practice' rather than a hard requirement, whereas independence is absolutely required when it comes to criminal investigations.

342 Compare *Al-Skeini and others v United Kingdom*, ECtHR [GC] 7 July 2011, 55721/07 with *Jaloud v the Netherlands*, ECtHR [GC] 20 November 2014, Appl No 47708/08.

343 E.g. https://www.msf.org/kunduz-hospital-attack-depth (last accessed 15 July 2021); http://www.reuters.com/article/us-afghanistan-attack-idUSKCN0RW0HC20151004 (last accessed 15 July 2021).

344 See e.g. The Turkel Commission (n 25) 154–5.

345 Cohen and Shany (n 7) 66–70; Margalit (n 148) Chapters 6-8; Tan (n 148) 229–32.

346 Wet op de rechterlijke organisatie, *Stb*. 1827, 20, last modified *Stb*. 2015, 460, art 55.

347 Lubell, Pejic and Simmons (n 23) 24–31.

348 Lubell, Pejic and Simmons (n 23) 24. Emphasis FT.

349 Lubell, Pejic and Simmons (n 23) 28. Emphasis FT.

Whether independence could indeed be said to be an investigative standard imposed by IHL remains up for debate. Although it is an oft-mentioned criterion, its precise basis in IHL remains unclear. In fact, the operationalisation of the grave breaches regime in Additional Protocol I relies heavily *on the military commander* for investigations, rather than a fully independent investigative authority. Commanders must prevent, supress and report breaches, initiate disciplinary or penal action against perpetrators, and are criminally liable should they fail to do so.[350] Initial reliance on military commanders is unavoidable, as is also recognised by the *Guidelines*.[351] As the ICRC Commentary makes clear,

> 'military commanders are not without the means for ensuring respect for the rules of the Conventions. In the first place, they are on the spot and able to exercise control over the troops and the weapons which they use. They have the authority, and more than anyone else they can prevent breaches by creating the appropriate frame of mind, ensuring the rational use of the means of combat and by maintaining discipline. Their role obliges them to be constantly informed of the way in which their subordinates carry out the tasks entrusted them, and to take the necessary measures for this purpose. Finally, they are in a position to establish or ensure the establishment of the facts, which would be the starting point for any action to suppress or punish a breach.'[352]

IHL, therefore, considers commanders to be instrumental in the investigation of violations. This would appear to be at odds with the finding that IHL, in fact, requires independent investigations. The *Guidelines* indicate that, in case of a criminal breach of IHL, commanders must report the breach to an assessment authority, which must in case of war crimes be independent. This, indeed, seems to be good practice. This is also in no way precluded by applicable rules of IHL and ICL, which allow for commanders to report breaches, rather than investigate them themselves. Nevertheless, the claim that *IHL itself* requires independence, when treaty law would rather suggest that it is commanders who *must* investigate, appears to be good practice, rather than a strict legal requirement. At the very least the starting point for an investigation envisioned by AP I is the commander, and as further guidance in *lex scripta* is absent, abstracting a standard of independence appears to stretch the law too far.

With regard to transparency, finally, the *Guidelines* find that criminal investigations should be transparent towards next of kin, as well as society at large. IHL is largely silent on this issue. Only with regard to the dead and missing, the Geneva Conventions impose specific obligations on States to

350 AP I, art 87(1) and (2) in conjunction with art 86(2).
351 Lubell, Pejic and Simmons (n 23) 16.
352 Pictet and others (n 17) 1022 [3560].

record casualties, insofar as possible including an identity and place of burial.[353] This information must be transmitted to an 'Information Bureau', which in turn transmits the information to the Protecting Power or Central Prisoners of War/Tracking Agency. These intermediaries then convey the information to the adverse party to the conflict, who communicates the news to next of kin.[354] Whether a broader standard of transparency can be derived from this limited obligation, is questionable. It is submitted that it is indeed good practice for investigations to be transparent, and that they should not be unduly classified. Nevertheless, military necessities may militate against making public certain information, and restrict publicity.

In sum, whereas IHL does not contain much guidance on how States must conduct investigations, this must not be taken to mean that it is fully within States' discretion to decide how they fulfil their investigate duties. Standards of effectiveness, thoroughness, genuineness, promptness, impartiality, and fundamental due process guarantees can be inferred from IHL and practice. Standards of independence and transparency, however often mentioned in this context, appear more tenuously linked to contemporary IHL. It is submitted these standards constitute 'good practice', rather than hard requirements under the *lex lata*.

4.4 Standards for investigations into simple IHL violations

Non-serious violations of IHL do not amount to international crimes. Whether they are crimes at all is therefore a matter of domestic law. As was explained above, international law does not require States to employ their penal systems in response to these types of violations, though they are under an obligation to ensure their own armed forces comply with the entirety of IHL.[355] The duty to investigate is instrumental in this regard. This is arguably even more so for simple violations, because as was shown above, it is only in case of war crimes that States must also enforce the law externally. This places the onus fully on States to internally supervise and enforce the non-criminal rules of IHL. Yet, IHL provides no guidance on how such investigations must be carried out. This leaves a large measure of discretion to States in deciding *how* they investigate non-criminal breaches of IHL.[356]

353 GC IV, art 16; AP I, art 33; GC I, art 17; and Rules 112-116 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 1). See further Breau and Joyce (n 236) 34–6; Zegveld (n 236) 458–9.
354 Extensively, see ICRC (n 2) [1585]-[1600].
355 *Supra*, §4.2.
356 Compare Tan (n 148) 210.

Guidance on what non-criminal investigations must entail, must again be based on inferences, as well as soft law and State practice. Further, recourse cannot be had to the ICL bodies in this context, because simple IHL violations fall outside of their jurisdiction.[357] The *Guidelines on Investigating Violations of International Humanitarian Law* indicate that non-criminal breaches of IHL should be submitted to an administrative investigation.[358] Generally, the aim of any investigation must be to establish the facts, and include a legal assessment of those facts. Investigations into simple violations must moreover 'suppress' the breach, which has a strong connection with prevention of breaches, and of their repetition.[359] This requires an investigation to uncover root causes for a breach, whether the cause is individual, or systemic.[360] For instance, was a breach caused by individual misconduct, by a (one off) technical malfunction, or was it the result of policy, or the incorrect implementation of IHL in operational codes of conduct? Importantly, in contradistinction with criminal investigations, the primary objective of administrative investigations is not as such to achieve individual accountability and retribution. Rather, it is to be found in prevention, and deterrence.

These aims do not directly assist in formulating clear investigative standards. It is submitted that, regardless, the structure of self-enforcement, the duty to respect and ensure respect for IHL, and the duty to effectuate IHL in good faith, must together entail a standard of *effectiveness*. This interpretation has wide support in soft law instruments and legal scholarship.[361] If IHL imposes an investigative obligation, then this obligation must be rendered effective through its application and interpretation. In the words of the *Guidelines*, the investigation must be '*capable* of enabling a determination of whether there was a non-criminal violation of international humanitarian law, of identifying the individual and systemic factors that caused or contributed to the incident, and of laying the ground for any remedial action that may be required'.[362] The standard of effectiveness, which also applies to criminal

357 They may adjudicate war crimes, in addition to certain other international crimes, only.
358 Lubell, Pejic and Simmons (n 23) 32.
359 ICRC (n 2) [2894]-[2898].
360 Cf. Lubell, Pejic and Simmons (n 23) 32–6.
361 Human Rights Council 23 September 2010, *Report of the Committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards*, A/HRC/15/50 [21] and [33]; Goldstone Report (2009) UN fact-finding mission on the Gaza conflict (25 Sept 2009), UN Doc. A/HRC/12/48 [1814]; UNGA Resolution 60/147 (2005), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, principle 3(b); The Turkel Commission (n 25) 114–5 [63]; Lesh (n 290) 131–2; Cohen and Shany (n 7) 60; Hampson (n 11) 17.
362 Lubell, Pejic and Simmons (n 23) 32.

investigations, is therefore modified slightly, to take account of the different aim of administrative investigations.

To establish what an effective investigation requires, we must look further. *A contrario* reasoning may provide some indications of what an investigation into non-serious violations need *not* entail. As there is no *prima facie* indication of criminal behaviour, an investigation need not meet criminal law standards, nor be focused on identifying individual perpetrators or establishing accountability.[363] Reasoning from the point of view of the precautionary obligations resting on States, the facts must be established in order to prevent future transgressions of the law. This signifies a 'lessons learned'-approach usually implemented through 'after action reviews', 'after action reports', or 'post-attack reviews'.[364] Such methods primarily aim to improve the operational capacities of militaries by gathering all the facts and fine-tuning procedures and operations, although they may be followed by *ex gratia* payments to (relatives of) victims.[365] In these kinds of investigations, there is no need to identify individual perpetrators; the focus is rather on the *occurrence*. In fact, many States employ these kinds of review concerning *all* military operations in which enemy forces have been engaged, regardless of any indication of a breach of the law whatsoever. This corresponds to the good practice identified in the *Guidelines*, which recommends recording all military operations, and to report any potential breach of IHL.

Existing practices of recording operational results and processes, ought therefore be complemented by a review mechanism which identifies potential breaches of IHL. Practice shows such investigations are often informal, and conducted by the military chain of command.[366] The extension in practice to all military operations can be explained as the military simply aims to optimise its operations and to operate as efficient as possible; the aim here is not to identify individual culprits or to hold individuals accountable. Further, this appears to be one of the most promising means of ensuring compliance by the armed forces. It has been shown that IHL violations are most often caused by 'depersonalisation' experienced by combatants.[367] This leads to their not feeling individually responsible for their actions, shifting their sense of responsibility to either their superior or the group as a whole. At the same time, militaries *need* their troops to experience such depersonalisation. Victor Hansen explains this:

363 Compare Margalit (n 41) 175–6.

364 States such as the US and the Netherlands employ these mechanisms.

365 As US practice illustrates; US Government Accountability Office, 'The Department of Defense's Use of Solatia and Condolence Payments in Iraq and Afghanistan' (2007), online at https://www.gao.gov/assets/gao-07-699.pdf (last accessed 15 July 2021).

366 Lubell, Pejic and Simmons (n 23) 33; Pictet (n 3) 594; Pictet and others (n 17) [3560]-[3563].

367 Daniel Muñoz-Rojas and Jean-Jacques Frésard, 'The Roots of Behaviour in War: Understanding and Preventing IHL Violations' (2004) 86 Revue Internationale de la Croix-Rouge/ International Review of the Red Cross 189, 193–4.

> 'The success of any military organization depends in large part on the ability of the organization to subordinate the desires of the individual to the greater needs and goals of the organization. When individuals subordinate their individuality, it allows them to disassociate their personal responsibility for their actions, claiming instead that they were merely acting as a part of a larger military unit. In the individual soldiers' eyes, any responsibility for their conduct is based on collective responsibility and on the directions and orders of their superiors within the chain of command.'[368]

If this is true, and militaries require their troops to subordinate their own will to that of the organisation of which they form part, and this allows for them to disassociate from their own responsibility, then the soundness of the military system itself is of paramount importance in preventing violations of the law. Reviewing military operations through after action reports then takes up a major part in ensuring compliance, as it optimises the military's insight in the consequences of its operations and the conduct of its troops in certain situations.

Disciplinary measures seem sufficient to safeguard compliance with relatively minor obligations and prohibitions, such as the prohibition of selling tobacco to prisoners of war above local market price.[369] Non-penal responses in the form of disciplinary action have the necessary individual deterrent effect associated with suppressing a certain action. Absent in such a system is an outside, independent investigator who conducts the fact-finding and investigative work, as the entire process takes place within the military itself. Given the non-criminal nature of the behaviour in question, however, this does not appear to be problematic. Should the review bring to light any facts that give rise to a suspicion of criminal behaviour, one may then initiate the procedure for a criminal investigation.

Looking at the aim and the practice of investigations into simple breaches, it would seem that *prompt* and *impartial* investigative responses are crucial. As was explained above, the effectiveness of gathering facts progressively diminishes the more time passes. Further, if those tasked with gathering the facts have an own interest in the outcome, or are themselves implicated in an incident, this might harm the integrity of the investigation.[370] Additional investigative standards which have been proposed, such as independence and transparency,[371] do not seem to have a clear basis in IHL. Whereas they will

368 Victor M Hansen, 'Developing Empirical Methodologies to Study Law of War Violations' (2008) 16 Willamette Journal of International Law & Dispute Resolution 342, 344.

369 GC III, art 28.

370 Lubell, Pejic and Simmons (n 23) 32–4; Hampson (n 11) 17.

371 Human Rights Council 23 September 2010, *Report of the Committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light*

certainly contribute to the investigatory process as such, they do not appear to be required under *lex lata*. It has been rightly observed that the more severe the incident in question, the more demanding the investigation will need to be.[372] If the administrative investigation raises a suspicion of a war crime, the investigation will have to be remitted to the appropriate authorities to conduct a criminal investigation.

In sum, States enjoy a wider discretion in how they conduct investigations into simple breaches of IHL. The law would appear to require them to ensure an *effective* investigation, which is *prompt* and *impartial*. This obligation is best implemented through the recording of all military operations, as a number of States already do in 'after action reviews'. Any indication of a breach of IHL, must then be submitted to further assessment. This may be done within the chain of command, and can result in disciplinary measures, as well as the adjustment of how military operations are conducted (e.g. targeting operations), and can facilitate procedures establishing State responsibility, or provide the basis for the acknowledgement of such responsibility. All in all, the investigation must be capable of establishing the facts and determining the legality of the State's action.

4.5 Résumé

Having determined in the previous section *that* breaches of IHL must be investigated, this section has examined *how* States must do so. Because IHL does not explicitly formulate any investigative standards, it might be assumed that it is up to the discretion of States to decide how they investigate breaches. Whereas there is some truth to this, IHL nonetheless imposes a number of concrete investigative standards States must comply with.

How the investigation must take shape, is in large part determined by the nature of the breach: is it a criminal or a non-criminal breach of IHL? War crime investigations are bound by stricter standards than those into simple breaches. The aim of preventing impunity, ensuring criminal accountability, and thereby exacting retribution, to a large extent determine the shape of the investigation. A thorough analysis of IHL, of the judicial practice of ICL bodies, as well as of State practice and soft law instruments, shows that investigations into war

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of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards, A/HRC/15/50 [21] and [33]; Goldstone Report (2009) UN fact-finding mission on the Gaza conflict (25 Sept 2009), UN Doc. A/HRC/12/48 [1814]; UNGA Resolution 60/147 (2005), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, principle 3(b); The Turkel Commission (n 25) 114–5 [63]; Lesh (n 290) 131–2; Cohen and Shany (n 7) 60.

372 Lubell, Pejic and Simmons (n 23) 32; Hampson (n 11) 17.

crimes must meet standards of effectiveness, thoroughness, genuineness, promptness, impartiality, and fundamental due process guarantees. Even in lieu of specific treaty guidance in IHL, a robust set of investigative standards therefore guides the criminal investigation into serious violations of IHL.

Simple violations of IHL, in contrast, are more loosely governed by international standards, which leaves States a measure of discretion in how they conduct administrative investigations. Standards which can be derived from IHL, State practice, and soft law instruments, would appear to pertain to an effective investigation, which is prompt and impartial. Such investigations may take place within the military procedures of the armed forces themselves, and can be largely informal. In case of individual transgressions, disciplinary measures can sufficiently ensure a deterrent effect, and whereas States are free to criminalise simple breaches of IHL, they are not obligated to do so. Beyond individual measures, administrative investigations should also, where appropriate, take into account any potential systemic shortcomings which may be the root cause for a breach.

From a legal perspective, criminal and non-criminal breaches of IHL are therefore subject to different investigative regimes and standards. Yet, one important overarching aim of investigations, is to establish the facts and facilitate a legal assessment. This ostensibly leads to a certain circularity: the legal assessment (serious or non-serious violation) determines the investigative regime, while it is the investigation which must show whether an incident constitutes a serious breach, a simple violation, or no violation at all. Practice may therefore very well be that the *triggering process* for the duty to investigate is the same for all violations: constant recording, reporting, and assessing, of military operations and incidents. This creates a comprehensive monitoring mechanism. After action reviews are one way of shaping this obligation, where incidents which indicate a war crime are remitted to authorities tasked with criminal investigations, whereas simple breaches are investigated within the chain of command. This system ensures that no cases fall through the cracks, and that potential breaches are investigated according to the seriousness of the incident.

Finally, the *Guidelines on Investigating Violations of International Humanitarian Law*, as well as certain other soft law instruments, identify further investigative standards, either as a legal requirement, or as good practice. These standards primarily concern independence, and transparency. This study does not corroborate these standards as being legally required by IHL, though their inclusion as 'good practice' must certainly be supported. The independence and transparency of an investigation will contribute to their ultimate effectiveness, and to their being perceived as effective. If such standards do not, however, derive from IHL, we should query where they do originate. It is submitted that these standards are inspired by international human rights law, where

such standards have indeed been formulated by various courts and supervisory bodies. Part II of this study engages in-depth with this field.

5 Conclusion: The duty to investigate IHL violations

The Introductory Chapter to this study identified a marked lack of clarity pertaining to investigative obligations under IHL. Because IHL does not provide fully explicit obligations for States to conduct an investigation into breaches, there has been scope for debate on whether such obligations even exist. In this light, this Chapter – and Part I of this study – have sought to answer two questions:

> *Are States under an obligation to investigate (potential) violations of IHL?*
> *If so, what are the scope of application and contents of such an obligation?*

The first question, whether States must investigate violations of IHL, can be answered with a firm and unequivocal 'yes'. As was shown, the IHL system of supervision, implementation, and enforcement, fully relies on State investigations for its effectiveness. The lack of institutionalised international means of supervision and enforcement, place the task of effectuating IHL fully on States. In order to take up this task, and in light of the duty to respect and ensure respect for IHL, investigations are instrumental. States cannot discharge their obligations if they do not institute monitoring mechanisms which allow them to keep tabs on the conduct of their armed forces on the ground, and the effects of their military operations, followed-up by further investigations where those are indicated. A duty to investigate is, in light of this, engrained in IHL's DNA.

Indeed, a more in-depth examination of the sources of IHL shows that investigative obligations exist for *all* breaches of IHL. Nonetheless, IHL makes a sharp distinction in the obligations pertaining to criminal, and non-criminal breaches. A violation of IHL is 'criminal' when it falls within the exhaustive list of 'grave breaches', or when it is otherwise classified as a 'serious' violation. Such violations are war crimes, and constitute international crimes. Investigative obligations for these types of violations are broad-ranging, as is required by the rationale of preventing impunity. This means that States must not only investigate and prosecute war crimes committed by their own armed forces, wherever they commit them, but also those committed by others, if they have territorial or personal jurisdiction over the crime. In case of grave breaches this is expanded further, into a duty to vest universal jurisdiction. Thus, wherever war criminals go, the system for investigating and prosecuting them, is watertight. This system is strengthened further because States must continue such investigations after the armed conflict comes to an end, and in light of certain international obligations prohibiting statutes of limitations for war crimes, these may extend indefinitely.

Simple violations of IHL, which are all breaches which are not 'serious', are subject to a less extensive investigative regime. For these 'lighter' transgressions, the rationale of preventing impunity does not apply as such. That States must nevertheless investigate these breaches, corresponds with the overarching rationale of *effectuating* IHL. Investigations are instrumental in effectively ensuring compliance, supervising, and enforcing the rules of IHL. Because ensuring the effectuation of non-criminal rules of IHL is not a concern of the international community as a whole, a State is only obligated to investigate breaches of these rules when its own armed forces, or others under their authority, are involved. Thus, the duty to investigate simple breaches has an internal focus, whereas the duty to investigate criminal breaches also has an external limb. Finally, States must investigate simple breaches no matter where their forces operate, and it is submitted that they must continue to do so after the armed conflict ends.

The trigger for the duty to investigate, appears to be very similar for all breaches. Whenever the State has information which reasonably leads to a suspicion of a violation, it must start an investigation. The source of the information is immaterial. Whether States should *actively uncover* such information, through monitoring, is not explicitly provided for under IHL. The system of self-supervision and enforcement would, however, strongly suggest it. It is good practice to have a system in place which records the effects of all military operations, and extensive reporting obligations which ensure that appropriate authorities assess the incident, and decide whether further investigation (and prosecution), are necessary. Such a system best effectuates States' obligation to ensure respect for IHL, because it picks up all potential violations through a low-threshold fact-finding mechanism, coupled with further investigations where called for.

Employing such a system also assists in determining the applicable *standards* which must guide the investigation. The assessment authority will, based on the reported information, be able to judge whether an incident indicates a war crime, or rather a non-criminal breach. The severity of the incident plays a role in the standards the investigation must meet. War crimes require criminal investigations, meeting standards of effectiveness, thoroughness, genuineness, promptness, impartiality, and fundamental due process guarantees. Simple violations of IHL require administrative investigations, which leave more discretion to States in how they shape the investigative process. Nonetheless, such investigations will need to be effective, prompt, and impartial. Because criminal punishment and retribution are not the aim of such investigations, they regularly take place within the chain of command, and can result in disciplinary measures. Further, they ought to identify potential systemic issues which caused a breach, and facilitate the establishment of, or acknowledgment of, State responsibility for the breach.

While the above conclusions answer the sub-questions which guided Part I of the study, other questions remain. For instance, various soft law instruments and scholars have asserted that investigations must be guided by 'universal' standards, including independence and transparency. This study does not corroborate these standards as forming part of IHL – though they must certainly be supported as good investigative practice. This does beg the question, however: where *do* these standards derive from? It is submitted they are likely inspired by international human rights law, where independence and transparency are indeed corner stones of an effective investigation.

Human rights law, in addition to IHL, equally governs States' conduct during armed conflict. Human rights compliant investigations during armed conflict may well impose further obligations than IHL does, and into human rights violations – such as killings – which are perfectly in line with IHL. In order to properly set out the law governing investigative obligations during armed conflict, we must therefore answer two further questions. Firstly, what investigative obligations does IHRL impose, and how must these be applied during armed conflicts? And, secondly, how do IHL and IHRL relate, and how must States operate when both apply? What must they do if rules diverge? The first question is addressed in Part II of this study, concerning duties of investigation under IHRL. The second question is the subject of Part III, on interplay.

PART II

International human rights law

Part I of this study explored investigative obligations under IHL, and answered *whether*, *when*, and *how* States must investigate violations of IHL. Beyond IHL, international human rights law also requires States to investigate human rights violations committed during armed conflicts. Part II aims to clarify the law surrounding armed conflict investigations, by answering the second sub-question identified in the Introduction:

> *Are States under an obligation to investigate (potential) violations of IHRL? If so, what are the scope of application and contents of such an obligation, in particular during armed conflict and occupation?*

'International human rights law', however, despite continuous affirmations of the 'indivisibility, interdependence and interrelatedness' of human rights,[1] is not one coherent and uniform legal system. Rather, it consists of many partly overlapping treaty regimes and rules of customary international law. Many of these systems are in many ways similar, though they all have their own accents and emphases. This study, as was explained in the Introduction, in particular focuses on three treaty regimes: the global International Covenant on Civil and Political Rights (ICCPR), and the regional American Convention on Human Rights (ACHR), and the European Convention on Human Rights (ECHR). These systems have the most refined and developed case-law on the duty to investigate, and it is submitted that they are for that reason – for now –

1 E.g. *Vienna Declaration and Programme of Action*, adopted at the World Conference on Human Rights on 25 June 1993, endorsed by UNGA Res. 20 December 1993, A/RES/48/121 [I.5]; Proclamation of Tehran, Tehran 22 April to 13 May 1968, (13 May 1968), *Final Act of the International conference on Human Rights*, A/CONF.32/41 [13]. For affirmations in scholarship, see Titia Loenen, 'Introduction to 50 Years ICCPR and ICESCR: Impact, Interplay and the Way Forward' (2016) 41 Nederlands Tijdschrift voor de Mensenrechten | NJCM-Bulletin 451, 451; Cees Flinterman, 'Freedom, Justice and Peace in the World: The Role of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights' (2016) 41 Nederlands Tijdschrift voor de Mensenrechten | NJCM-Bulletin 452, 455; Nico J Schrijver, 'Fifty Years International Human Rights Covenants. Improving the Global Protection of Human Rights by Bridging the Gap between the Two Covenants' (2016) 41 Nederlands Tijdschrift voor de Mensenrechten | NJCM-Bulletin 457, 460; Carla Edelenbos, 'Reflections on Fifty Years of ICCPR and ICESCR: A View from Geneva' (2016) 41 Nederlands Tijdschrift voor de Mensenrechten | NJCM-Bulletin 465, 465.

the most relevant regimes to study. The question how 'IHRL' regulates investigations, is therefore answered by reference to these three systems.

Part II ultimately serves two aims. Firstly, it aims to clarify the law governing investigative obligations under IHRL, during armed conflict. This is accomplished through the study of the three systems, and by drawing conclusions based on a comparison between them. Secondly, this Part aims to facilitate the answer to the overarching research question. The law governing investigative obligations during armed conflict can be clarified only if three legal fields are taken into consideration, namely IHL, IHRL, and their interplay. Part II therefore presents an essential element of that assessment, and a stepping stone, in ultimately answering the research question.

Part II comprises five Chapters. Firstly, Chapter 4 introduces certain basic characteristics of the IHRL system, with a view to facilitating the subsequent enquiry into the duty to investigate. Chapters 5 (global systems and the ICCPR), 6 (Inter-American system), and 7 (European system), then examine for each of these regimes *whether* States are under an obligation to investigate human rights violations arising from armed conflict, and if so, what the scope of application of that obligation is, and what investigative standards apply. They do so by firstly assessing the scope and contents of the duty to investigate in situations of 'normalcy', to then determine to what extent these findings also apply in situations of armed conflict. Chapter 8 brings the findings under the various regimes together. It adopts an overarching comparative approach, in drawing out commonalities and divergences in how the various systems regulate investigations in situations of armed conflict.

4 Introduction to the IHRL system

1 INTRODUCTION

Chapter 4 introduces the basics of the IHRL system, in order to facilitate the more in-depth examinations of investigative duties in the Chapters to come. In that light, this Chapter examines the aims, purposes, and main sources of IHRL (§2), and looks at the nature of human rights and obligations (§3). Next, IHRL's scope of application is discussed, in its material, personal, temporal, and geographic dimensions (§4). IHRL's application to situations which are governed by IHL, are also explored at that junction (§4.6). Finally, the discussion turns to the implementation, supervision, and enforcement mechanisms of IHRL (§5). Together, this sets the scene for the subsequent Chapters, discussing the global, Inter-American, and European systems of human rights protection (Chapters 5-7). For readers with an advanced knowledge of IHRL, much of what is set out in this Chapter will be familiar. They may wish to focus their attention on sections 4.5 and 4.6 of this Chapter, and the exploration of investigative obligations in Chapters 5, 6, and 7.

2 THE AIMS, PURPOSES, AND MAIN SOURCES OF IHRL

The international law of human rights, as a branch of public international law (PIL),[1] aims to protect the fundamental human rights of individuals and groups.[2] Such aims are relatively novel under international law. Historically,

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1 E.g *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment (19 December 2005), *I.C.J. Reports* 2005, p. 168 [217]. See Menno T Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law' in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press 2009) 2, reflecting the finding by the Committee on International Human Rights Law and Practice of the ILA, thereby rejecting the approach of a 'self-contained regime'.

2 Antoine C Buyse, 'A Lifeline in Time – Non-Retroactivity and Continuing Violations under the ECHR' (2006) 75 Nordic journal of international law 63, 69. Buyse references the Preamble to the ECHR, which stipulates that it seeks to ensure 'the collective enforcement of certain of the rights stated in the [UDHR]', as well as the IACtHR's finding that the object and purpose of human rights treaties is 'the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States'; *The Effect of Reservations on the Entry Into Force of the*

the exertion of State power against individuals, was a matter of domestic constitutional law, not international law.[3] This was only different where there was somehow an international element to the exercise of State power over individuals – for instance where a State takes repressive action against foreign nationals. In such situations, individuals were reliant on the exercise of diplomatic protection by their State of nationality on their behalf.[4] In this classical view, the protection of individuals against the State is a wholly internal affair which is best regulated through constitutional law and constitutional rights, whilst international law – the Law of Nations – is concerned exclusively with the relations *between* States.[5] The Second World War became a watershed moment in the development of international law. The atrocities committed during that war 'shocked the conscience of humankind',[6] and led to the acute realisation that the protection of fundamental rights is not just a domestic concern.[7] On the global level, this momentum resulted in the 1948 Universal Declaration of Human Rights (UDHR).[8]

The object and purpose of international human rights law are closely interlinked with this historical development. This is reflected particularly

American Convention on Human Rights (Arts. 74 and 75) (Advisory Opinion) Inter-American Court of Human Rights Series A No 2 (24 September 1982) [29].

3 Robert Kolb, 'The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions' (1998) 38 International Review of the Red Cross 409, 410; Gerald L Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 Stanford Law Review 1863, 1863–4.

4 See also Robert K Goldman, 'History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 Human Rights Law Review 856, 866. For diplomatic protection carried out by non-national States, see Menno T Kamminga, *Inter-State Accountability for Violations of Human Rights* (dissertation Leiden University 1990) 7–62.

5 According to Wolfers the classic public international law perspective is best described by the following analogy. The international community can be compared to a billiard table, where states are represented by billiard balls. International law regulates the clashes between these balls, but does not deal with what is inside the balls themselves; Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* (Johns Hopkins Press 1962) 19–24. See also Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press 2013) 5.

6 Theo van Boven, '50 Years of the UN Human Rights Covenants' (2016) 34 Netherlands Quarterly of Human Rights 108, 108.

7 Ed P Bates, 'History' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (1st edn, Oxford University Press 2010) 27–37.

8 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)). Developments in the Americas went even quicker, with the American Declaration of the Rights and Duties of Man being adopted a number of months before the UDHR; American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992); Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd edn, Cambridge University Press 2016) 263.

clearly in for instance the Preamble of the UDHR, which stipulates that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.[9] Thus, human rights are, on the one hand, a legal expression of an inherent quality in human beings, and they protect human dignity in its various aspects.[10] The protection of human dignity, in itself, is the primary object and purpose of the international protection of human rights. Beyond this primary aim, human rights are further put forward as 'the foundation of freedom, justice and peace in the world', indicating that beyond their inherent value, human rights can also be a means to an end. Peace in the world is one of those ends, in line with the UN Charter's prohibition on the use of force.[11]

A main characteristic of international human rights law is that it bestows rights directly on individuals. This allows individuals to directly invoke international law, and to moreover do so against their own State – as well as against other States. Individuals and their inherent dignity are therefore put centre-stage, in a move away from the system where only *States* could invoke and enforce rights vis-à-vis other States.[12] This aspect of human rights law is a distinguishing feature within the broader body of international law, which has arguably influenced the development of the international legal system more broadly.[13] Further, the protection of the individual is under many human rights regimes coupled with an avenue for individual redress *on the international level*. Thus, as is explored further below,[14] individuals can complain to an international court of treaty body if their rights have not been sufficiently respected and protected at the national level. This too has been revolutionary for the international legal system, which as is so obvious in the context of IHL, does not normally grant such recourse.[15] This also explains why recourse is often had to human rights law when addressing for example

9 Ibid, preambular para 1.
10 Neuman (n 3) 1868–9.
11 UN Charter, art 2(4) and art 1(3).
12 See e.g. Frédéric Mégret, 'Nature of Obligations' in Daniel Moeckli and others (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014) 97; Naomi Roht-Arriaza, 'Nontreaty Sources of the Obligation to Investigate and Prosecute' in Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (Oxford University Press 1995) 47.
13 Generally, see Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press 2009). In particular, see the chapter by Sandesh Sivakumaran, 'Impact on the Structure of International Obligations' in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press 2009) 134–50.
14 *Infra* §5.
15 See Chapter 2, §5.

human suffering during armed conflicts.[16] The conferral of individual rights, that are moreover justiciable on the international level, makes them an appealing option for rights protection and advocacy.

The aim of protecting the human person is expressed in a variety of ways on the international level. Human beings' fundamental dignity, and peace and justice in the world, were thought to be best protected through a binding treaty with universal aspiration.[17] This treaty would then legally bind all States to respect, protect, and fulfil, all rights as enshrined in the UDHR. Putting this into practice proved difficult, however, and partly because of the Cold War divide, this ultimately resulted in two separate globally binding treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[18] They only entered into force in 1976, shortly followed by the American Convention on Human Rights, which entered into force two years later. Meanwhile, developments in Europe had overtaken those at the global level, and the European Convention on Human Rights had entered into force more than 20 years prior, in 1953. The African Charter on Human and Peoples' Rights, finally, entered into force in 1986. Whereas there are of course many more developments which could be discussed in this context, as was set out in the Introductory Chapter, the treaties of primary importance for this study are the ICCPR, ACHR, and ECHR. They are general human rights catalogues, aimed at protecting a range of civil and political rights.

Beyond human rights treaties of a general character, there are also those which set out to protect a specific right. Three such treaties are of special relevance to this study, namely the Genocide Convention), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the International Convention for the Protection of All Persons from Enforced Disappearance (CED). Whereas the rights protected in these treaties strongly overlap with the broader catalogues of general human rights treaties, the abuses central to these three conventions were considered to be so heinous that they require separate regulation. Beyond the protection of

16 Jean-Marie Henckaerts and Ellen Nohle, 'Concurrent Application of International Humanitarian Law and International Human Rights Law Revisited' (2018) 12 Human Rights & International Legal Discourse 23, 24.

17 Kolb (n 3) 413.

18 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (hereinafter: ICESCR); see UNGA Res. 543 (VI), 5 February 1952; Nico J Schrijver, 'Fifty Years International Human Rights Covenants. Improving the Global Protection of Human Rights by Bridging the Gap between the Two Covenants' (2016) 41 Nederlands Tijdschrift voor de Mensenrechten | NJCM-Bulletin 457.

rights, this includes, crucially, duties to investigate and prosecute perpetrators of genocide, torture, and enforced disappearance.[19]

Customary international law plays a relatively modest role in the context of the protection of human rights, compared to other fields of international law. Whereas theoretically it could be an important unifying factor in light of the patchwork of treaty regimes, the highly developed implementation and supervision systems of human rights treaties have rendered those treaties the preferred means of protection in practice. Customary law, of course, does not have specific implementation and enforcement mechanisms,[20] and barring exceptions in domestic practice[21] customary law has therefore remained of relatively limited practical use in the context of human rights.

In sum, international human rights law is the branch of international law concerned with the protection of individual human rights. In order to achieve this aim, it has moved away from the classical fully State-centred approach to international law. A large number of treaties has been concluded, which grant rights directly to individuals, which they can invoke against the State under whose jurisdiction they find themselves – including their own. IHRL is, therefore, concerned with the relationship between the State and those under its control, and in this sense is certainly an extension of classical domestic constitutional protection, which forbids governments from treading in the sphere of fundamental rights of their subjects.[22] Developments, however, have not stopped there. As is explored in the following section, the nature of human rights and corresponding State obligations go well beyond restricting States in what they may do, and include many positive duties to actively protect and fulfil rights.

19 Further, see Chapter 5, §2.

20 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment (27 June 1986), *I.C.J. Reports* 1986, p. 14 [178].

21 E.g. Netherlands Supreme Court (*Hoge Raad*) 6 September 2013, ECLI:NL:HR:2013:BZ9228, *Nederlandse Jurisprudentie* 2015/376 (*Netherlands v Mustafić c.s.*) [3.15.2], confirming the Court of Appeal's judgment in Court of Appeal the Hague (*Gerechtshof 's-Gravenhage*) 5 July 2011, ECLI:NL:GHSGR:2011:BR0132 (*Mustafić c.s. v Netherlands*) [6.3].

22 Further, see Stephen Gardbaum, 'The Structure and Scope of Constitutional Rights' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011).

3 THE NATURE OF HUMAN RIGHTS OBLIGATIONS

3.1 Introduction

As was explained above, human rights law presents a divergence from classic PIL in conferring international rights directly on individuals (and groups). In this respect, human rights law has advanced thinking through a rights-based perspective, which has to an extent also permeated other branches of international law.[23] This section provides a brief explanation of the distinction between rights and obligations, and to what extent the *rights* which are conferred on individuals, also entail *obligations* for States (§3.2). It thereby serves as an introduction into the relationship between the investigative *duties* imposed on States, flowing from individual *rights* such as the right to life and freedom from torture and inhuman and degrading treatment. In doing so, the section also discusses 'positive' and 'procedural' obligations of the State in the context of IHRL (§3.3). The aim is therefore not to exhaustively set out the nature of the rights and obligations flowing from IHRL, but to lay the groundwork for the further research into investigative duties in the coming Chapters.

3.2 Rights and obligations

Under international law, rights can be held only, and obligations can be borne only, by subjects with international legal personality.[24] Traditionally, public international law only recognised the international legal personality of States (and not even necessarily all States),[25] later joined among others by international governmental organisations, and certain non-State actors – for example armed groups in the context of the law of non-international armed conflict.[26] States nevertheless remained the primary actors on the international level, and international law was concerned primarily with governing the relations between these States. In doing so, international law provided the entitlements and obligations States had regarding one another, creating a State-centred

23 See Kamminga and Scheinin (n 13).

24 This is the definition of international legal personality, 'the capacity to be the bearer of rights and duties under international law', James Crawford, *The Creation of States in International Law* (Clarendon Press 2006) 28.

25 In certain periods of time, the application of the *ius gentium* was limited to 'Christian', and later 'civilised' nations only; see BVA Röling, *International Law in an Expanded World* (Djambatan 1960); Nico J Schrijver, *Internationaal Publiekrecht Als Wereldrecht* (Boom Juridische Uitgevers 2014) 22–3.

26 See e.g. Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017).

paradigm that was founded on the obligations States had consented to uphold in relation to other States.

Human rights law is different in this respect, because it puts individuals centre-stage, and recognises their position as subjects of international law. A system of reciprocal State obligations alone does not appear fitting where the aim is the protection of individuals, regardless of their nationality, and especially where the protection of citizens against their own State is concerned. This is all the more so because the protection of individuals or groups is a shared goal of the States parties to human rights treaties. States could even be said not to have individualised interests under these treaties, which makes a system based on reciprocity particularly ill-suited.[27] Rather, it is about individual human beings, who are recognised as rights-holders under international human rights law (and also as duty bearers, for instance under international criminal law). The conferral of rights on individuals is an important step in assuring State accountability for violations of the law, as well as in ensuring ownership of rights for individuals and victims of human rights violations. Nevertheless, focusing on rights alone cannot suffice for this body of law to function.

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27 *Reservations to the Convention on Genocide*, Advisory Opinion (28 May 1951), *I.C.J. Reports* 1951, p. 15, 23: 'In such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'etre* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.' The ICJ later held this to be similar for the CAT, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment (20 July 2012), *I.C.J. Reports* 2012, p. 422 [68]. See further *Austria v Italy*, ECmHR 11 January 1961, Appl No 788/60, 19: 'it follows that the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves'; as quoted also by EW Vierdag, 'Some Remarks about Special Features of Human Rights Treaties' (1994) 25 Netherlands Yearbook of International Law 119, 124–5. See also Helen Keller and Geir Ulfstein, 'Introduction' in Geir Ulfstein and Helen Keller (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 2. Under the Inter-American system, see *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75)* (n 2) [29]: 'The Court must emphasize, however, that modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.'; Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013).

Each right must always be coupled with a corresponding obligation for this right to be effective and obtain practical relevance.[28] A minimum requirement for the effectiveness of a right must be the obligation for the State to *respect* this right, which is primarily the case for freedom rights. The right to freedom from torture, for instance, would be rendered illusory and meaningless if there were no corresponding obligation for States *not* to torture. Similarly, the right to freedom of demonstration must be coupled with an obligation for States to refrain from interfering with such demonstrations for it to be effective. In this sense, each right must at least be coupled with the obligation for others not to interfere with that right, which is the foundation of most civil and political rights as a bulwark against abusive powers of the State.[29] These types of obligations are classified as 'negative' obligations, because they require States to refrain from interferences.[30]

Most rights in general human rights treaties, such as the ICCPR, are phrased negatively, and thereby emphasise States' negative obligation to abstain from certain action. For instance, the ICCPR provides, in its Article 7, that 'No one shall be subjected to torture (…)'. This clearly imposes the negative obligation on States to refrain from torture. But beyond the obligation to *respect* rights, it is now generally accepted that States are also obliged to *protect and fulfil* them, by taking positive action.[31]

3.3 Positive and procedural obligations

Positive human rights obligations, as opposed to negative ones, require States to *act* in order to protect or fulfil rights. *Protecting* rights means States must not only refrain from violating rights, but must also protect their subjects from abuses by *others*.[32] *Fulfilling* rights requires States to take up a facilitating role,

28 The importance of obligations has been stressed by several authors, e.g. from a theoretical and theological perspective by Robert M Cover, 'Obligation?: A Jewish Jurisprudence of the Social Order' (1987) 5 Journal of Law and Religion 65; from a philosophical perspective and as a matter of logic by Onora O'Neill, *Bounds of Justice* (Cambridge University Press 2000) 98ff; and from a legal perspective by Ziv Bohrer, 'Human Rights vs Humanitarian Law or Rights vs Obligations: Reflections Following the Rulings in Hassan and Jaloud' (2015) 16 Questions of International Law 5.

29 To the same effect, see Laurens Lavrysen, 'Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights' (2014) 7 Inter-american and European Human Rights Journal 94, 95; Sandra Krähenmann, '9. Positive Obligations in Human Rights Law during Armed Conflicts' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 170.

30 Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013).

31 Shelton and Gould (n 30) 566.

32 Ibid.

which allows individuals to effectuate their rights.[33] Rather than protecting *against* State interference, these obligations therefore *require* the State to step into the realm of the fundamental rights of individuals.

Sometimes the positive obligation to act is set out explicitly in treaty law. For instance, one may think of the CAT's stipulation that 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction',[34] or somewhat less directly under the ECHR, where it provides that 'Everyone's right to life shall be protected by law'.[35] These provisions explicitly place States parties under an obligation to take action in effectuating those respective rights.

The ICCPR, ACHR, and ECHR, however, are for the most part phrased negatively – recall the example above of the prohibition of torture. Yet, all three treaties *do* contain a general obligation for States to 'respect and ensure'[36] or 'secure'[37] all rights contained in them. These treaties' supervisory bodies have interpreted this general obligation to include positive obligations to render these rights effective – much like the duty to 'ensure respect' for IHL enshrined in Common Article 1, as we have seen previously.[38] In the example of torture, this has for instance led these bodies to require States to criminalise acts of torture, to prevent them, and to investigate, prosecute, and punish any such acts which do occur.[39] Other rights have been interpreted similarly, with varying positive obligations flowing from them.[40]

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33 Ibid.

34 CAT, art 2(1).

35 ECHR, art 2(1).

36 ICCPR, art 2(1); ACHR, art 1.

37 ECHR, art 1.

38 See Chapter 2, §5; and Chapter 3, §2.

39 For the ICCPR, see e.g. *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, HRC 29 March 2004, CCPR/C/21/Rev.1/Add. 13 [18]. For the American system, see e.g. *Gutiérrez-Soler v Colombia* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 132 (12 September 2005) [54]; *Vargas-Areco v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 155 (26 September 2006) [79]; Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford University Press 2011) 386. For the European system, see e.g. *A v United Kingdom*, ECtHR 23 September 1998, Appl No 25599/94 [22]; *Opuz v Turkey*, ECtHR 9 June 2009, Appl No 33401/02; and *Gäfgen v Germany*, ECtHR [GC] 1 June 2010, Appl No 22978/05 [117]. See further David J Harris and others, *Law of the European Convention on Human Rights* (3rd edn, Oxford University Press 2014) 274–4; Alastair R Mowbray, 'Duties of Investigation under the European Convention on Human Rights' (2002) 51 International and Comparative Law Quarterly 437, 443–6.

40 See Eva Brems, 'Procedural Protection. An Examination of Procedural Safeguards Read into Substantive Convention Rights' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2013); Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford University Press 2009); Krešimir Kamber, *Prosecuting Human Rights*

The effect of such positive obligations is a substantial expansion of State obligations under IHRL. One element of this expansion, is that States are no longer responsible only for violations perpetrated by their own State agents. The preventive and investigative obligations flowing from negatively formulated provisions bring the conduct of private actors within the purview of the human rights obligations.[41] In the words of the Inter-American Court of Human Rights (IACtHR):

> '[a]n illegal act which violates human rights and which is initially not directly imputable to a State (…) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.'[42]

States are no longer simply accountable and responsible for not interfering with rights, but must ensure – through *ex ante* regulatory frameworks and *ex post* investigations, prosecutions and punishments – that individual human rights are protected against anyone, including private actors.

Within the broader category of positive human rights obligations, States are subject to substantive and procedural obligations. *Substantive* positive obligations have to do with the fulfilment of certain rights by the State, which encompasses a wide range of measures, such as taking protective measures for individuals whose lives are under direct threat, organising healthcare for detainees, and providing the means for a minimum level of subsistence in cases of extreme poverty.[43] *Procedural* positive obligations, on the other hand, have to do with the 'organisational dimension of fundamental rights protection'.[44] In addition to explicit procedural rights entailed in the various conventions, such as the right to a fair trial and the right to a (judicial) remedy, negative rights have been held to require States to take certain procedural actions, such as notably carrying out investigations into alleged substantive violations, and if appropriate prosecute and punish perpetrators of such violations.[45] The procedural standards which States must meet in this regard '[add] a procedural layer to the scope of substantive rights'.[46] This, again, is comparable to IHL's

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Offences. Rethinking the Sword Function of Human Rights Law (Brill 2017). Further, see Chapters 5, 6, and 7.

41 See also Malu P Beijer, *The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations* (Intersentia 2017) 47.

42 *Velásquez Rodríguez v Honduras* (Merits) Inter-American Court of Human Rights Series C No 4 (29 July 1988) [172].

43 More extensively, see Janneke H Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019) 109–35.

44 Beijer (n 41) 55.

45 Extensively, see Chapters 5-7.

46 Brems (n 40) 138. For an in-depth and encompassing analsys of the role of procedural standards and process-based review in human rights cases, see Leonie M Huijbers, *Process-based Fundamental Rights Review. Practice, Concept, and Theory* (Intersentia 2019).

implementing obligations with regard to, for instance, the criminalisation and investigation of serious violations.[47] The procedural mechanisms have to be institutionalised *ex ante*, as a general implementing obligation, which then have to be used and effectuated, if an alleged human rights abuse occurs – *ex post*.

In sum, the negative and positive State obligations to respect, protect, and fulfil human rights, aim to safeguard their effectiveness. In the words of the European Court of Human Rights, 'procedural obligations have been implied in varying contexts under the Convention where this has been perceived as necessary to ensure that the rights guaranteed under the Convention are not theoretical or illusory, but practical and effective'.[48]

4 IHRL'S SCOPE OF APPLICATION

4.1 Introduction

Now that the aims, purposes, and main sources of IHRL, as well as the nature of its rights and obligations have been alluded to, we may take a closer look at its scope of application. Applicability of treaties is usually cast in terms of material, personal, temporal, geographic scope of application, and therefore concerns the questions *to what* (§4.2), *to whom* (§4.3), *when* (§4.4), and *where* (§4.5) IHRL applies. This discussion only sketches out the contours, to provide the basics which facilitate the research into the duty to investigate in the coming Chapters. It is in the context of those Chapters, that certain issues of applicability are highlighted, such as for instance whether the duty to investigate can apply to incidents which occurred *before* the entry into force of the human rights convention in question. A matter which is crucial for this research which *is* discussed separately in this section, is IHRL's applicability during armed conflicts and occupation, to which IHL applies (§4.6).

4.2 IHRL's material scope of application

The material scope of application of IHRL, its subject-matter, concerns human rights. Thus, IHRL's material scope is limited to those issues falling within the scope of a certain human right. Thus, any duty to investigate human rights violations will necessarily be limited to rights protected under IHRL. As was pointed out above, IHRL consists of a large variety of treaty regimes, and it is therefore important to determine whether a specific interference with an individual's freedom, indeed falls within the human rights protected by a certain instrument. If individuals complain of violations of rights which are

47 See Chapter 3, §3.

48 *Šilih v Slovenia*, ECtHR [GC] 9 April 2009, Appl No 71463/01 [153], references omitted.

not part of the convention in question, they will be inadmissible *ratione materiae*.[49]

Further, for a complaint to fall within the material scope of IHRL, it must address an issue which is actually protected by the right invoked. It is difficult to delineate the precise scope of rights in the abstract, but borderline cases have for instance concerned whether a prohibition to grow a moustache whilst in detention falls within the right to respect for private life,[50] or the question whether incitement of violence can fall within the scope of the freedom of expression.[51] More pertinent to this study, this is also the case if individuals assert an *individual right* to have someone prosecuted who has abused their human rights. As we shall see in the coming Chapters, even though there is a *duty* for States to investigate and prosecute certain human rights abuses, it does not necessarily follow under all systems that there is also a *right* to have someone prosecuted, under for instance the right to a fair trial and the right to a remedy.[52]

4.3 IHRL's personal scope of application

IHRL's personal scope of application encompasses two separate issues. On the one hand, it determines who are *duty-bearers* under human rights law, on the other it determines who are *rights-holders*.[53] Firstly, human rights treaties bind the States party to them. States are therefore the primary subjects of duties under these treaties, and the general obligation enshrined in human rights treaties imposes upon them the duty to respect and ensure,[54] to recognise and give effect to,[55] and to secure[56] the rights enshrined in the various

49 E.g. ECtHR cases where applicants invoke the right of *ne bis in idem* (double jeopardy), which is not part of the Convention, against a State who has not ratified the optional protocol providing for this right (No. 7); *Üner v Netherlands*, ECtHR 26 November 2002 (dec.), Appl No 46410/99 [3]; *Blokker v Netherlands*, ECtHR 7 November 2000 (dec.), Appl No 45282/99.

50 *Biržietis v Lithuania*, ECtHR 14 June 2016, Appl No 49304/09.

51 Further, see Janneke H Gerards and Hanneke Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights' (2009) 7 International Journal of Constitutional Law 619; Antoine C Buyse, 'Contested Contours. The Limits of Freedom of Expression from an Abuse of Rights Perspective – Articles 10 and 17 ECHR' in Eva Brems and Janneke H Gerards (eds), *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2013).

52 E.g. *Perez v France*, ECtHR 12 February 2004, Appl No 47287/99 [70], the Court holding this assertion to fall outside the scope *ratione materiae* of the Convention (and in particular art 6).

53 Further, see Helen Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' in Helen Duffy, Janina Dill and Ziv Bohrer (eds), *Law Applicable to Armed Conflict* (Cambridge University Press 2020) 40–4.

54 ICCPR, art 2(1); ACHR, art 1.

55 ACHPR, art 1.

human rights documents. It is therefore States who are duty-bearers under IHRL. For the purposes of the duty to investigate, it is therefore *States* who are placed under this obligation, as the primary duty-bearers under IHRL.

Nonetheless, and as was touched upon briefly above, through States' positive obligations, human rights do have certain 'horizontal effects'.[57] For instance, States must investigate a murder perpetrated by a private individual, and must respect human rights in adjudicating cases between private individuals.[58] Such human rights obligations, however, are effectuated through State responsibility, which maintains States' position as the primary bearer of duties under human rights law.[59]

Whether other actors can also be the direct subjects of obligations under IHRL, such as non-State actors and importantly non-State armed groups, is the subject of ongoing controversy.[60] Whereas a number of soft law instruments have stressed the obligation for NSAGs to respect human rights, the precise basis for such claims often remains less than clear.[61] This broad ranging discussion is left aside here, because it falls outside this study's research questions. Where the actions of NSAGs can nonetheless be of interest, is in the context of the responsibility of States for violations committed on their territory (or within their jurisdiction), by non-State armed groups. States' positive obligations to protect rights, and their obligation to investigate, prosecute, and punish human rights abuses committed on their territories and within their jurisdiction, *can* entail obligations concerning conduct by non-State actors. This issue is explored further in the coming Chapters, where it is shown how the ICCPR, the ACHR, and the ECHR regulate such issues.

Secondly, IHRL confers *rights* on individuals, and at times groups or collectives. They are rights-holders. As was explained above, this is a crucial and revolutionary element of IHRL, because it considers individuals as subjects of international law. Beyond their status as rights-holders, IHRL moreover grants individuals standing before international tribunals. All 'members of the human family' are equally holders of rights, which corresponds to the idea that human dignity is *inherent* in being human.[62] Importantly, in case a human rights violation cost the life of the victim, their next-of-kin have standing to bring

56 ECHR, art 1.
57 See e.g. John H Knox, 'Horizontal Human Rights Law' (2008) 203 American Journal of International Law 1. For more explicit private duties corresponding to human rights, see the ACHPR, e.g. art 27-29.
58 Gerards (n 43) 136–59.
59 Duffy (n 53) 40–3.
60 For an authoritative source, see Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006).
61 Fortin (n 26).
62 UDHR, preambular para 1.

a claim.[63] Certain rights moreover confer rights on groups or peoples, such as the right to self-determination.[64] The extent to which legal persons can be recipients of rights depends on the right and system in question.[65] As this issue is not material to the present study, it is not explored further. For the purposes of the duty to investigate, it is victims or their next of kin who have a right to have a violation of their rights investigated, as is explored in-depth in the coming Chapters.

4.4 IHRL's temporal scope of application

Temporal scope of application relates to the question from what moment in time onward, IHRL rights and obligations apply. Generally, treaties provide when they enter into force; for bilateral treaties this may often be immediately after signatures or instruments of ratification have been exchanged, whereas multilateral treaties usually require a specific number of ratifications or other methods of conveying consent to be bound.[66] As soon as the treaty enters into force, it then applies and binds parties from that moment on. Retroactive effects of treaties are in principle excluded unless otherwise provided in, or intended by, the treaty.[67]

Although these rules appear relatively straightforward, practice has shown remaining controversies regarding retroactivity of human rights treaties, especially in the context of the duty to investigate. For example, the major human rights treaties providing for supervision on the international level were all concluded after the end of World War II, yet survivors have found their way to these bodies to assert their rights, pertaining to human rights violations committed well before these treaties entered into force. Human rights bodies normally affirm the non-retroactive operation of substantive human rights

63 See the many cases concerning violations of the right to life and enforced disappearance in Chapters 5-7.

64 ICCPR, art 1.

65 The capacity to bring a claim before international tribunals, for instance, differs. Legal persons can bring claims before the ECtHR, but not the HRC. See e.g. *Sunday Times v United Kingdom*, ECtHR 26 April 1979, Appl No 6538/74; Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 1. See also Joseph and Fletcher, who claim '[corporations] and artificial entities do not have rights under the UN treaties', referencing various Human Rights Committee views in which legal persons were denied standing; Sarah Joseph and A Fletcher, 'Scope of Application' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, Oxford University Press 2014) 122.

66 VCLT, art 24.

67 VCLT, art 28. See also *Heliodoro Portugal v Panama* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 186 (12 August 2008) [23] and *Varnava and Others v Turkey*, ECtHR [GC] 18 September 2009, Appl No 16064/90 etc. [130]. For the competence of the Committee on Enforced Disappearances under the CED, see CED, art 35.

provisions, though they have also found that certain violations constitute 'ongoing violations' that continue even after entry into force of the treaty.[68] A prime example in this regard are enforced disappearances – the abduction of individuals by States or with State collusion or acquiescence, followed by placing the person outside the protection of the law by denying any deprivation of liberty[69] – as the resulting uncertainty that is so characteristic of this practice continues as long as the truth of what happened is not brought to light.[70]

Further, and of immediate relevance to the present study, procedural obligations flowing from substantive obligations, such as the duty to investigate, have in some system been held to apply equally to violations committed before entry into force of the human rights treaty in question.[71] The reason for this is that the obligation to take investigative steps *does* continue beyond the date of entry into force. This matter will be returned to in the coming Chapters, which outline the distinct approaches to the scope of application of the duty to investigate under the various IHRL systems.[72]

4.5 IHRL's geographic scope of application

4.5.1 Introduction

Outlining the geographical scope of application of 'international human rights law' as such, is complicated because of the divergence of approach between the various treaty regimes. The 'extraterritorial applicability' of human rights treaties has been a particularly contentious issue in legal practice and scholarship,[73] but it is also of particular interest to this study. Armed conflicts and

68 For the ACHR, see e.g. *Blake v Guatemala* (Merits) Inter-American Court of Human Rights Series C No 36 (24 January 1998) [53]-[67]; *Heliodoro Portugal v Panama* (n 67) [27]-[53]. For the ACHPR, see *J.E. Zitha & P.J.L. Zitha v Mozambique*, ACmHPR 1 April 2011, Comm. 361/08 [80]-[94]. For the ECHR, see e.g. *Šilih v Slovenia* (n 48) [139]-[167]; *Varnava and Others v Turkey* (n 67) [130]; and *Janowiec v Russia*, ECtHR [GC] 21 October 2013, Appl No 55508/07, 29520/09 [128]-[161]. For the ICCPR, see *R.A.V.N. et al. v Argentina*, HRC 26 March 1990, CCPR/C/38/D/344/1988 [5.3] and *Mariam Sankara et al. v Burkina Faso*, HRC 11 April 2006, CCPR/C/86/D/1159/2003 [6.3], Bantekas and Oette (n 8) 309.

69 See the definition of enforced disappearances in CED, art 2.

70 See Dinah L Shelton, *Advanced Introduction to International Human Rights Law* (Edward Elgar 2014) 196.

71 See the case law referenced *supra* (n 68).

72 §4.4 of Chapters 5, 6, and 7.

73 E.g. Michael J Dennis, 'Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict' (2007) 40 Israel Law Review 453; Marko Milanović, *Extraterritorial Application of Human Rights Treaties – Law, Principles, and Policy* (Oxford University Press 2011); Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25 Leiden Journal of International Law 857; Maarten den

military operations regularly cross national borders, and as the previous Chapters showed, IHL is not principally limited in its geographical reach.[74] Wherever the State engages in or operates in connection with an armed conflict, through its armed forces or otherwise, it must comply with IHL. Whether IHRL equally covers such operations, is more complex.[75] The three major human rights treaties central to this study, the ICCPR, ACHR, and ECHR, all in one way or another prescribe that States must respect and ensure respect for human rights of everyone *within their jurisdiction*.[76] Whether or not a victim was within the *jurisdiction* of the State, therefore determines whether a State was held to respect and ensure respect for their human rights, or not.

Before delving further in the specificities of the geographical applicability of IHRL, three preliminary points may be cleared up. *Firstly*, the term 'jurisdiction' can mean different things under international law, and as a number of commentators have put forward, the meaning under international human rights law is to be distinguished from that under general international law.[77] Under general international law, the term 'jurisdiction' normally refers either to the competence of an international court or the exercise by the State of legislative, executive or judicial powers.[78] Under IHRL, States are normally held to ensure the human rights of those 'within their jurisdiction'. Jurisdiction, in this context,

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Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press 2012). Further, see the case-law references below.

74 See Chapter 2, §4.4, and Chapter 3, §3.2.2.4, §3.2.3.4, §3.3.5.

75 Further on this issue, see Duffy (n 53) 48–54.

76 Their jurisdictional clauses require States to ensure rights to everyone: 'within its territory and subject to its jurisdiction' (ICCPR, art 2(1)), 'subject to their jurisdiction' (ACHR, art 1), and 'within their jurisdiction' (ECHR, art 1). Although the ICCPR appears to require cumulatively that individuals are within the State's territory *and* subject to its jurisdiction, the HRC and the ICJ have interpreted the clause disjunctively. *General Comment No. 31* (n 39) [10]; The ICJ later confirmed this finding, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004) *I.C.J. Reports* 2004, p. 136 [111]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (n 1) [216].

77 Milanović, *Extraterritorial Application of Human Rights Treaties – Law, Principles, and Policy* (n 73); Besson (n 73); den Heijer and Lawson (n 73); Aurel Sari, 'Untangling Extra-Territorial Jurisdiction from International Responsibility in Jaloud v. Netherlands: Old Problem, New Solutions?' (2014) 53 Military Law and Law of War Review 287; Jane M Rooney, 'The Relationship between Jurisdiction and Attribution after Jaloud v. Netherlands' (2015) 62 Netherlands International Law Review 407. This in contravention with the ECtHR's insistence that '"jurisdiction" for the purposes of Article 1 of the Convention must be considered to reflect the term's meaning in public international law'; *Banković and Others v Belgium and Others*, ECtHR [GC] 12 December 2001 (dec.), Appl No 52207/99 [70]-[71]; *Ilaşcu and Others v Moldova and Russia*, ECtHR [GC] 8 July 2004, Appl No 48787/99 [312].

78 E.g. ICJ Statute, art 36, and *The Case of the S.S. 'Lotus'*, Judgment (7 September 1927) *P.C.I.J. Series A. No. 10* [47].

is concerned with whether a State had *control* over the victim and their rights, when it was violated. These distinct uses of the term 'jurisdiction', should not be confused.

Secondly, jurisdiction must be distinguished from issues of attribution of conduct. Because both issues involve a test of State 'control', they are at times conflated.[79] Attribution determines whether a specific act by individuals must from a legal perspective be viewed as an act of the State, in the context of the law of State responsibility.[80] In the context of *attribution*, the conduct of private actors can be attributed to the State, if the State exercises 'effective control' over them.[81] In the context of establishing *jurisdiction*, however, the question is whether a State had control over *victims* and their rights, thereby bringing them within the State's jurisdiction. Both control tests therefore concern opposing sides in the context of a specific violation. Put simply, for attribution purposes one looks at State control over the 'perpetrator', whereas for human rights jurisdiction purposes one looks at control over the victim.

Thirdly, the extraterritorial application of human rights treaties *can* coincide with its co-application with IHL, but this need not be the case. For this study, those cases concerning the extraterritorial use of military force by States, are of course the most relevant. But issues of extraterritorial application of human rights can also arise in a range of other situations, such as in the context of maritime rescue operations,[82] arrests abroad or at sea,[83] or in the context of transboundary environmental harm.[84] Further, the reverse is also true. Human rights law can co-apply with IHL without any extraterritorial nexus, such as where an armed group is engaged in a conflict with the government, on the territory of the State.[85]

79 There have been many contributions on this topic, see e.g. Sari (n 77); Rooney (n 77).

80 ARSIWA, art 4-11.

81 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (n 20) [115]; *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment (26 February 2007), *I.C.J. Reports* 2007, p. 43 [400].

82 *A.S., D.I., O.I. and G.D. v Italy*, HRC 4 November 2020, CCPR/C/130/D/3042/2017; *A.S, D.I., O.I., and G.D. v Malta*, HRC 13 March 2020, CCPR/C/128/D/3043/2017.

83 *Medvedyev and Others v France*, ECtHR [GC] 29 March 2010, Appl No 3394/03 [67].

84 *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights)* (Advisory Opinion) Inter-American Court of Human Rights Series A No 23 (15 November 2017).

85 E.g. *Isayeva v Russia*, ECtHR 24 February 2005, Appl No 57950/00; *Santo Domingo Massacre v Colombia* (Preliminary Objections, Merits and Reparations) Inter-American Court of Human Rights Series C No 259 (30 November 2012).

4.5.2 Territorial application

The question whether a victim of a human rights violation was within the jurisdiction of a State, can be answered in a number of ways. First and foremost, there is a presumption that States exercise jurisdiction throughout their territory, which means that they must respect and ensure respect of everyone inside their territories.[86] Only exceptional circumstances may counter this presumption.[87] Such exceptional circumstances may be present when a State's territory is subject to belligerent occupation, preventing a State from exercising jurisdiction.[88] In all other situations, however, States will have to respect, protect, and fulfil the rights of those within their territories.

4.5.3 Extraterritorial application

Secondly, States can – exceptionally[89] – also be held to exercise jurisdiction *extraterritorially*. If they do, they are then responsible for the effectuation of human rights of those who are outside their territories, but who are nevertheless within their jurisdiction. International jurisprudence has recognised States to exercise extraterritorial jurisdiction for IHRL purposes in a number of situations, which it is submitted, can be distinguished into three 'models'.[90] Not all models have found support in the practice of all treaty bodies and courts. The three models are briefly introduced here, and Chapters 5-7 explore further to what extent States are under an obligation to investigate violations outside their territories, and under what models they must do so under the various systems.

The three models for extraterritorial jurisdiction are the well-established 'spatial' and 'personal' models, which are supplemented – it is argued by the present author – by the emerging 'foreseeable impact model'. Firstly, under

86 See VCLT, art 29. The ECHR does contain an exception to this rule in the so-called 'colonial clause' of art 56, allowing for exceptions of applicability to overseas territories, ie (former) colonies. The same can be said for other Council of Europe (CoE) human rights treaties, see Milanović, *Extraterritorial Application of Human Rights Treaties – Law, Principles, and Policy* (n 73) 13–7; Harris and others (n 39) 100–2.

87 See *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, HRC 30 October 2018, CCPR/C/GC/36 [63]; *The Environment and Human Rights* (n 84) [73]; *Ilaşcu and Others v Moldova and Russia* (n 77) [312]; *Sargsyan v Azerbaijan*, ECtHR [GC] 16 June 2015, Appl No 40167/06 [126ff].

88 *Ilaşcu and Others v Moldova and Russia*, ibid [312]. The State will, however, be under the continuing obligation to 'endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign states and international organizations, to continue to guarantee the enjoyment of the rights and freedoms guaranteed by the Convention', ibid [333].

89 *The Environment and Human Rights* (n 84) [81]; *Banković and Others v Belgium and Others* (n 77) [59]; *Mohammed Abdullah Saleh Al-Asad v the Republic of Djibouti*, ACmHPR 14 October 2014, 383/10 [134].

90 Compare Milanović, *Extraterritorial Application of Human Rights Treaties – Law, Principles, and Policy* (n 73) 119. Writing in 2011, he distinguished two models.

the 'spatial model', if States exercise effective control over a territory outside their borders, this brings individuals within that territory under their jurisdiction.[91] The primary example of this are situations of occupation.[92] Secondly, under the 'personal model', if State agents exercise authority and control over individuals outside their own territory, this brings individuals within the State's jurisdiction.[93] Principal examples are the operation of State agents abroad, for instance in detaining individuals, or where they exercise control through military patrols or military checkpoints.[94] These two models are fairly well-established.[95] Finally, this section shows that a third 'foreseeable impact model' appears to be developing, which stipulates that States exercise jurisdiction over individuals if a State's actions abroad reasonably foreseeably, and directly, impact their rights.[96]

The three models

The European Court of Human Rights has been faced with issues of extraterritorial application more than its counterparts under the ACHR and ICCPR. The European Court has developed a refined yet complicated case-law which relies on the spatial and personal models of jurisdiction.[97] It has found that the ECHR applies when States exercise 'effective control' over territory, where States

91 Further, see Stuart Wallace, *The Application of the European Convention on Human Rights to Military Operations* (Cambridge University Press 2019) 43–72; den Heijer and Lawson (n 73); Besson (n 73).

92 E.g. the occupation by Israel of Palestine (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 76); *Concluding Observations of the Human Rights Committee: Israel*, HRC 18 August 1998, CCPR/C/79/Add.93 [10]); the occupation by the US and UK of Iraq (*Al-Skeini v the United Kingdom*, ECtHR [GC] 7 July 2011, Appl No 55721/07 [138]); the occupation by Turkey of parts of Cyprus (*Loizidou v Turkey*, ECtHR [GC] 18 December 1996, Appl No 15318/89); the occupation by Uganda of Congo (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (n 1) [216]). In general terms, see *General Comment No. 36* (n 87) [63].

93 The precise test for such jurisdiction may vary. Under the Inter-American and European systems, the relevant test is one of 'authority or control', whereas under the ICCPR the relevant criterion is 'power or effective control'; *Victor Saldaño v Argentina*, IACmHR 11 March 1999, 38/99 [21]; *Al-Skeini v UK* (n 92) [137]; *Jaloud v Netherlands*, ECtHR [GC] 20 November 2014, Appl No 47708/08 [139]; *General Comment No. 31* (n 39) [10]; *Delia Saldias de Lopez (on behalf of Lopez Burgos) v Uruguay*, HRC 29 July 1981, CCPR/C/13/D/52/1979 [12.2]; *Celiberti de Casariego v Uruguay*, HRC 29 July 1981, CCPR/C/13/D/56/1979 [10.2].

94 Ibid.

95 E.g. Milanović, *Extraterritorial Application of Human Rights Treaties – Law, Principles, and Policy* (n 73).

96 *General Comment No. 36* (n 87) [63]; *The Environment and Human Rights* (n 84) [101]; *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, ACmHPR November 2015 [14].

97 As the Court found in *Georgia v Russia (II)*, ECtHR [GC] 21 January 2021, Appl No 38263/08 [115], 'The two main criteria established by the Court in this regard are that of "effective control" by the State over an area (spatial concept of jurisdiction) and that of "State agent authority and control" over individuals (personal concept of jurisdiction)'; *Al-Skeini v UK* (n 92) [130]-[132].

administer a territory through a 'subordinate administration',[98] where diplomatic and consular agents exert authority and control over others whilst abroad, where a State exercises in a foreign territory all or some of the public powers normally to be exercised by a government, through consent, invitation or acquiescence, and where the use of force by State agents bring an individual under the control of State authorities.[99]

The European Court makes a crucial distinction between extraterritorial application under the spatial, or under the personal models, which other courts and bodies do not appear to make thus far. It has found that the *extent to which* the ECHR governs such extraterritorial situations, varies depending on the applicable model of extraterritorial jurisdiction. According to the European Court, if States have territorial control, they must respect and ensure the 'entire range of substantive rights' enshrined in the Convention.[100] But if they exercise control through the personal model, rights may be 'divided and tailored', and only those rights 'that are relevant to the situation of that individual', must be secured by the State.[101] Which model of jurisdiction is perceived to apply in a particular case may therefore have significant consequences for the State's obligations, and the range of rights it must protect and ensure. In the context of the duty to investigate, however, it appears unlikely that the distinction will have any significant impact.[102] As is explored in the coming Chapters, investigative obligations often arise if someone is killed, tortured, or disappeared, which is obviously at all times 'relevant' to the individual's situation.[103]

Finally, it must be noted that the European Court has recently formulated an important limitation to the extraterritorial applicability of the Convention, which is of potential importance to this study. In *Georgia v Russia (II)*,[104] it found that the 'context of chaos' ensuing from the 'active phase of hostilities' during an international armed conflict, where fighting and military operations are carried out in order to establish control over an area, 'means that there is no control over an area', and 'excludes any form of "State agent authority and control" over individuals'.[105] How the Court defines an 'active phase of hostilities' and a 'context of chaos' remains to be further defined, but what

98 See *Ilaşcu and Others v Moldova and Russia* (n 77) [314].
99 *Al-Skeini v UK* (n 92) [134]-[136].
100 Ibid [138]; *Cyprus v Turkey*, ECtHR [GC] 10 May 2001, Appl No 25781/94 [77].
101 *Al-Skeini v UK* (n 92) [137].
102 In fact, the European Court appears to have developed a specific test for the applicability of the duty to investigate to extraterritorial situations. Further, see Chapter 7, §4.5.
103 Under the spatial model, see e.g. *Cyprus v Turkey* (n 100) [131]-[136]; under the personal model, see e.g. *Al-Skeini v UK* (n 92) [161]-[167].
104 For an extensive analysis of the case, see Chapter 7, §4.5 and §6.3.2; and further Floris Tan and Marten Zwanenburg, 'One Step Forward, Two Steps Back? Georgia v Russia (II), European Court of Human Rights, Appl. No. 38263/08' (2022) 22 Melbourne Journal of International Law.
105 *Georgia v Russia (II)* (n 97) [126] and [137].

seems evident is that this interpretation of jurisdiction limits the applicability of the ECHR to extraterritorially fought inter-State conflicts. This issue is returned to in Chapter 7. Again, however, it will be shown that the duty to investigate appears to take up a special position in this respect, which can apply to contexts of chaos and active hostilities.

The Human Rights Committee and the Inter-American Court of Human Rights, as well as the African Commission on Human and Peoples' Rights, have in recent years developed a third model for extraterritorial application.[106] This model is more extensive than the other two, because it does not require 'boots on the ground'. Rather, it is contingent on whether a State ought to have reasonably foreseen that its actions would have an *impact* on the rights of individuals outside their territory. In their respective General Comments on the right to life, of 2015 and 2018, the African Commission and the HRC take up very similar positions. According to the ACmHPR, if a State's conduct 'could reasonably be foreseen to result in an unlawful deprivation of life', this brings it within its obligations under the African Charter.[107] The HRC similarly finds that States have jurisdiction over individuals 'whose right to life is (…) impacted by its military or other activities in a direct and reasonably foreseeable manner'.[108] Thus, these bodies clearly find that if States act extraterritorially, in a way which in a reasonably foreseeable manner impacts the right to life, or leads to loss of life, this brings it within the State's human rights responsibilities.

The Inter-American Court, in a 2017 Advisory Opinion, came to somewhat similar conclusions. In the context of a State's human rights obligations regarding transboundary environmental harm, it found that 'the persons whose rights have been violated are under the jurisdiction of the State of origin [of the harmful activity], if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory'.[109] Whether this finding, like those of the African Commission and Human Rights Committee, also apply to States' military conduct abroad, is not yet clear. Further, the Inter-American Court requires a *causal link* between the conduct and the human rights violation, but how such causality ought to be assessed, is not expanded upon. Whether similar considerations of foreseeability therefore play a role, whether a mere *condicio sine qua non* nexus is sufficient, or whether some other criterion is used, must be awaited. Nevertheless, in the Inter-American Court's first pronouncement on the extraterri-

106 *General Comment No. 36* (n 87) [63]; *The Environment and Human Rights* (n 84) [101]; *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)* (n 96) [14].

107 *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)* (n 96) [14].

108 *General Comment No. 36* (n 87) [63].

109 *The Environment and Human Rights* (n 84) [101].

torial application of the ACHR, and despite many express references to its European counterpart's case-law, it already shows a willingness to go beyond the spatial and personal models as relied upon by the Strasbourg Court.

In sum, a third model of extraterritorial jurisdiction, which it is submitted could be called a 'foreseeable impact model', appears to be developing. The African and Inter-American systems, as well as the ICCPR, have taken first steps in this regard. Further case-law, also in individual decisions, will have to be awaited. Meanwhile, the European Court – despite earlier flirtations with such an approach[110] – for now sticks to the spatial and personal models of jurisdiction. The 2021 case of *Georgia v Russia (II)*, in which the Court found that Russia did not exercise jurisdiction during the active phase of hostilities in the interstate conflict with Georgia, appears to underline that for now the Court does not consider the use of kinetic force as such sufficient to constitute the exercise of jurisdiction.[111] Whether a 'foreseeable impact' test will nonetheless in the future be adopted by the Court, may be determined in the pending case of *Duarte Agostinho and Others v Portugal and Others*, in which the Court will need to determine whether States exercise jurisdiction over applicants outside their territories, by virtue of their contribution to climate change.[112] This case is unique in many respects also apart from the issue of jurisdiction, and its outcome is keenly awaited.[113]

4.6 IHRL's applicability during armed conflict and occupation

Having determined the contours of how IHRL applies, one major question which is yet to be answered, is to what extent IHRL also applies alongside IHL during armed conflict and occupation – in other words, situations governed

110 See *Issa and Others v Turkey*, ECtHR 16 November 2004, Appl No 31821/96 [71], where it found that 'Article 1 of the Convention cannot be interpreted so as to allow a State Party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'. See also *Pad and Others v Turkey*, ECtHR 28 June 2007 (dec.), Appl No 60167/00 [54]-[55]. Further on this subject, see den Heijer and Lawson (n 73); Rick A Lawson, 'Si Vis Pacem, Para Bellum. Application of the European Convention on Human Rights in Situations of Armed Conflict' in Lawrence Early and others (eds), *The Right to Life under Article 2 of the European Convention on Human Rights. Twenty Years of Legal Developments since McCann v. the United Kingdom. In Honour of Michael O'Boyle* (Wolf Legal Publishers 2016).

111 *Georgia v Russia (II)*, (n 97) [126] and [137]. This case is discussed further in §4.6 and Chapter 7.

112 Appl No 39371/20.

113 See e.g. Corina Heri, 'The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got To Do With It?' (*EJIL:talk!*, 2020) <https://www.ejiltalk.org/the-ecthrs-pending-climate-change-case-whats-ill-treatment-got-to-do-with-it/> (last accessed 15 July 2021); Ole W Pedersen, 'The European Convention of Human Rights and Climate Change – Finally!' (*EJIL:talk!*, 2020) <https://www.ejiltalk.org/the-european-convention-of-human-rights-and-climate-change-finally/> (last accessed 15 July 2021).

by IHL. This section focuses on answering this question as a necessary pre-requisite for the discussion of the duty to investigate human rights violations during armed conflict in Chapters 5-7. These Chapters, which consider the global, Inter-American, and European human rights systems respectively, also explore in more depth *how* human rights are applied during armed conflict under these various regimes. The question how IHRL interrelates with IHL, and how this shapes investigative obligations, is addressed in Chapters 9 and 10. Thus, at present, we may focus simply on the question *whether* IHRL continues to apply during armed conflict.

An important reason why it is necessary to address the question whether IHRL applies during armed conflict, is the dominant narrative that historically, IHRL was never meant to govern such situations.[114] In this narrative, as Katharine Fortin explains, the laws of war and the laws of peace were meant to be fully separate regimes.[115] The laws of war, IHL, therefore governed armed conflict *to the exclusion* of the laws of peace – importantly including international human rights law.[116] Only more recently, the narrative goes, has IHRL been applied to situations of armed conflict. In 1968, the Tehran conference for the first time proclaimed that human rights continue to apply during armed conflict, and from then onwards, the two legal regimes have converged.[117]

Fortin has convincingly shown, however, that this dominant narrative has shortcomings. The idea that the drafters of the UDHR in 1948 – in the immediate aftermath of World War II – had not intended for human rights to apply during armed conflict, is not accurate.[118] The same can be said for the binding civil and political rights treaties at the heart of this study, the ICCPR, ACHR, and ECHR, all three of which contain the possibility for States to derogate from their human rights obligations in emergency situations.[119] Under the ACHR and ECHR, States may derogate in 'time of war [, public danger] or other

114 Marko Milanović, 'The Lost Origins of Lex Specialis' in Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge University Press 2016) 103–5.

115 Katharine Fortin, 'Complementarity between the ICRC and the United Nations and International Humanitarian Law and International Human Rights Law, 1948-1968' (2012) 94 International Review of the Red Cross 1433, 1435–9.

116 Most often cited in this regard, see GIAD Draper, 'Humanitarian Law and Human Rights' [1979] Acta Juridica 193; see also Michael N Schmitt, 'Foreword' (2018) 23 Journal of Conflict & Security Law 321.

117 Resolution XXIII by the International Conference on Human Rights, Tehran 1968.

118 Fortin (n 115) 1440–4; Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (Oxford University Press 2016) 112. Showing the close connections between human rights and the Geneva Conventions more from the IHL side, see Boyd Van Dijk, 'Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions' (2018) 112 The American Journal of International Law 553.

119 Insofar as legal scholarship considered the applicability of IHRL during armed conflicts before the ICJ's pronouncement in *Nuclear Weapons*, it also did so through the lens of the derogations regime; see Milanović, 'The Lost Origins of Lex Specialis' (n 114).

[public] emergency'[120] threatening 'the life of the nation', or 'the independence or security of a State party'. The ICCPR allows for derogation in 'time of public emergency which threatens the life of the nation'.[121] Thus, these treaties account for their applicability during armed conflict, and they have in fact been drafted in a way which accommodates for such situations. The reference to 'war' in the ACHR and ECHR makes this explicit, but the same applies to the ICCPR[122] as has been confirmed by the International Court of Justice, as well as the Human Rights Committee.[123] The International Law Commission (ILC) has equally found that human rights treaties continue to apply during armed conflict, in its 2011 *Draft articles on the effects of armed conflicts on treaties*.[124]

From an international law perspective, the conclusion that IHRL continues to apply appears undeniable, also in light of the particular nature of human rights obligations. Human rights treaties, as was explained above, do not aim to create a 'contractual balance' between States.[125] The interests served, those of protecting human rights and human dignity, are a common interest of all States parties. Thus, human rights treaties create obligations *erga omnes partes*, owed to all States parties.[126] This allows all States to invoke a breach of a human rights obligation by another State, independent of an own individualised interest.[127] This also means that two States cannot bilaterally 'contract out' from human rights obligations, because that would go against their obligations with regard to the other States parties, and the *erga omnes* nature of their commitments.[128] If we translate this situation to that of the eruption of armed conflict, it must follow that States must continue to respect their human rights obligations. After all, the mere fact that two States engage in an armed conflict, cannot 'bilaterally' change human rights obligations they

120 ACHR, art 27(1); ECHR, art 15(1).
121 ICCPR, art 4(1).
122 Hill-Cawthorne, *Detention in Non-International Armed Conflict* (n 118) 114–5.
123 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), *I.C.J. Reports* 1996, p. 226 [25]; *General Comment No. 29: Article 4: Derogations during a State of Emergency*, HRC 31 August 2001, CCPR/C/21/Rev.1/Add.11 [3]. The HRC does still require the armed conflict to constitute a threat to the life of the nation for States to be allowed to derogate.
124 Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10 [100]); *Yearbook of the International Law Commission, 2011*, vol. II, Part Two, art 6-7, and Annex under (f).
125 *Reservations to the Convention on Genocide*, p. 23 and *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [68], both quoted *supra*, n 27.
126 See further *Austria v Italy*, p. 19 and *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75)* [29], both quoted *supra*, n 27.
127 ARSIWA, art 48.
128 Lawrence Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' in Eirik Bjorge and Mads Andenas (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015) 290–1.

owe to *all* – including all those States who are not involved in the armed conflict.[129] Thus, the automatic disapplication of IHRL simply because an armed conflict arises, must be rejected.

The continued applicability of IHRL during armed conflict is confirmed in the judicial practice of all relevant international courts and bodies. Thus, the International Court of Justice has found, in two Advisory Opinions and one contentious case, that 'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation (...)'.[130] It thereby set aside an exclusionary approach towards human rights in armed conflict, and this practice finds further support in the constant case-law of various human rights bodies and regional courts.[131] For instance, the Inter-American Court has found that 'international human rights law is fully in force during internal or international armed conflicts',[132] and the European Court that 'international humanitarian law and international human rights law are not mutually exclusive collections of law',[133] and that 'even in situations of international armed conflict, the safeguards under the Convention continue to apply'.[134] Domestic courts have held to the same effect.[135] There is also overwhelming scholarly support for continued application.[136] In light of all of this, and despite the insistence of a small number

129 Compare Hill-Cawthorne's argument, ibid.

130 I cite here the *Wall* opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 76) [106]; the Court later cites this verbatim in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (n 1) [216]. In very similar wording see the earlier *Legality of the Threat or Use of Nuclear Weapons* (n 123) [25]. For a detailed analysis, see Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' (n 128).

131 The UN Human Rights Committee in *General Comment No. 31* (n 39) [11]; and *General Comment No. 36* (n 87) [64]. The IACtHR in *Santo Domingo Massacre v Colombia* (n 85) [21]; and along the same lines, *Las Palmeras v Colombia* (Preliminary Objections) Inter-American Court of Human Rights Series C No 67 (4 February 2000) [32]; *Case of the Serrano Cruz Sisters v El Salvador* (Preliminary Objections) Inter-American Court of Human Rights Series C No 118 (23 November 2004) [113]. The ECtHR in *Al-Skeini v UK* (n 92) [164]; and for violent clashes in the context of NIACs in *Kaya v Turkey*, ECtHR 19 February 1998, Appl No 22729/93 [91]. The African Commission in *Article 19 v Eritrea*, ACmHPR 30 May 2007, 275/03 [87].

132 *Case of the Serrano Cruz Sisters v El Salvador*, ibid [113].

133 *Saribekyan and Balyan v Azerbaijan*, ECtHR 30 January 2020, Appl No 35746/11 [36].

134 *Hassan v the United Kingdom*, ECtHR [GC] 16 September 2014, Appl No 29750/09 [104]; *Georgia v Russia (II)* (n 97) [93].

135 E.g. in the UK, Court of Appeal (Civil Division), *Serdar Mohammed & Others v Secretary of State for Defence*; and in the Netherlands, Netherlands Supreme Court (*Hoge Raad*) 19 July 2019, ECLI:NL:HR:2019:1223, *Nederlandse Jurisprudentie* 2019/356 (*Mothers of Srebrenica*).

136 Helen Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press 2013); Larissa van den Herik and Helen Duffy, 'Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches' in Carla Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence*

of States to the contrary,[137] it is submitted that the question *whether* IHRL applies during armed conflict, as a question of principle, is therefore settled.[138]

Rather, the question has shifted to *how* rules of IHRL apply during armed conflict. This is addressed in-depth in the remainder of this study, with attention for the contextual interpretation of IHRL in light of the extenuating circumstances of armed conflict, interpretation of human rights norms in conjunction with applicable norms of IHL, and the potential functioning of derogations. Chapter 7 will in this respect also address how the case of *Georgia v Russia (II)* handed down by the European Court in 2021, affects such issues. The present section only explains briefly how derogations, as an institutionalised accommodation mechanism, can function to modify human rights obligations during armed conflict.

General international law has since long recognised the need for States to diverge from their international law obligations in a state of necessity. As such, 'necessity' has been listed as a circumstance precluding wrongfulness by the International Law Commission in the Articles on the Responsibility of States for Internationally Wrongful Acts in 2001 (ARSIWA).[139] Under IHRL, however, a specific regime regulating emergency situations, and therefore states of necessity, has been drafted, which operates to the exclusion of the defence

in International Human Rights Law: Approaches of Regional and International Systems (Brill Nijhoff 2017); Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 International Review of the Red Cross 501; Nancie Prud'homme, 'International Humanitarian Law and International Human Rights Law: From Separation to Complementary Application' (National University of Ireland, Galway 2012); Françoise J Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' in Scott Sheeran and Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013); Lawrence Hill-Cawthorne, 'Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict' (2015) 64 International and Comparative Law Quarterly 293; Christopher Greenwood, 'Human Rights and Humanitarian Law – Conflict or Convergence' (2015) 43 Case Western Reserve Journal of International Law 491; Derek Jinks, 'International Human Rights Law in Time of Armed Conflict' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014); Andrew Clapham, 'The Complex Relationship Between the Geneva Conventions and International Human Rights Law' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (Oxford University Press 2015).

137 Israel and the US being the most prominent ones, see Françoise J Hampson, 'Other Areas of Customary Law in Relation to the Study' in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007) 68–72. The US, though, appear to have changed their position.

138 Duffy (n 53) 19–20.

139 ARSIWA, art 25. For an insightful assessment of 'necessity', see Gelijn Molier, 'The State of Exception and Necessity under International Law' in Afshin Ellian and Gelijn Molier (eds), *The State of Exception and Militant Democracy in a Time of Terror* (Republic of Letters Publishing 2012), primarily in the context of *ius ad bellum*.

of necessity under general international law.[140] In addition to the limitation clauses included in many human rights provisions, allowing for limitations of those rights when proportionate to the pursuit of a legitimate aim, most general human rights conventions also allow for a regime of derogations in special circumstances.

The regime for derogations envisioned in specific provisions of the various treaties,[141] allows States to deviate from human rights norms due to a public emergency which does not allow for the application of all human rights norms – the security of the State, or rather the survival of the State, requires it be free to combat this crisis without overly demanding human rights restrictions. As was explained above, armed conflicts normally constitute a ground for derogation,[142] although States in practice are reluctant to do so.[143] Human rights courts and treaty bodies have moreover generally been very deferential in reviewing State's assertion that a public emergency exists.[144] States must provide notification of any measures derogating from their human rights obligations.[145] Any measures taken are still subject to international proportionality review, balancing the exigencies of the situation against the

140 VCLT, art 55. See Jan-Peter Loof, 'On Emergency-Proof Human Rights and Emergency-Proof Human Rights Procedures' in Afshin Ellian and Gelijn Molier (eds), *The State of Exception and Militant Democracy in a Time of Terror* (Republic of Letters Publishing 2012) 146–50; and more extensively Jan-Peter Loof, *Mensenrechten En Staatsveiligheid: Verenigbare Grootheden? Opschorting En Beperking van Mensenrechtenbescherming Tijdens Noodtoestanden En Andere Situaties Die de Staatsveiligheid Bedreigen* (Wolf Legal Publishers 2005) 134–73.

141 ICCPR, art 4; ACHR, art 27; ECHR, art 15.

142 Discussion remains, however, whether the threat to the 'life of the nation' is satisfied when States are engaged in armed conflicts halfway across the world, as e.g. the United Kingdom in Iraq. Extraterritorial derogations therefore raise some outstanding questions, see on this Marko Milanović, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (Oxford University Press 2016); Jane M Rooney, 'Extraterritorial Derogation from the European Convention on Human Rights in Armed Conflict' [2016] European Human Rights Law Review 656. Further, the HRC has expressed doubts as to whether the existence of armed conflict in and of itself necessarily present a threat to the life of the nation: 'The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation'; *General Comment No. 29* (n 123) [3].

143 For examples where States *did* derogate, one may think of Peru and Ukraine. See *Case of Osorio Rivera and family members v Peru* (Preliminary Objections) Inter-American Court of Human Rights Series C No 274 (26 November 2013); Benedikt Harzl and Oleksii Plotnikov, 'Ukraine's Derogation from the European Convention on Human Rights' (2017) 22 Austrian Review of International and European Law 29.

144 Loof, 'On Emergency-Proof Human Rights and Emergency-Proof Human Rights Procedures' (n 140) 150–8; Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis. Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 265.

145 ICCPR, art 4(3); ACHR, art 27(3); ECHR, art 15(3).

fundamental rights interference.[146] The aim of the derogations regime is to give States leeway in averting crises endangering the 'life of the nation',[147] thereby bringing crisis situations within the purview of the rule of law.[148] The ultimate goal is the return to a situation of normalcy once the crisis has subsided.[149]

If a State lawfully derogates, two consequences must be highlighted here. Firstly, the *effects* of derogations are to lower relevant human rights standards *to the extent strictly required* to cope with an emergency or conflict – they do not invalidate the human right (let alone the human rights treaty) as such.[150] Further, they remain subject to proportionality review by supervisory bodies, whose supervisory jurisdiction is not affected by derogations.[151] Secondly, a number of human rights cannot be derogated from, because they are of such importance that they may never be deviated from, even in armed conflict. The list of non-derogable rights varies somewhat among treaties, with as a common core the right to life, freedom from torture, freedom from slavery and the *nullum crimen sine lege* principle.[152] The ICCPR, ACHR, and additional protocols further add to this list,[153] supplemented by the HRC's and IACtHR's case-

146 *General Comment No. 29* (n 123) [4]-[6]; *Lawless v Ireland*, ECtHR 1 July 1961, Appl No 332/57 [31]-[38]; *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights)* (Advisory Opinion) Inter-American Court of Human Rights Series A No 8 (30 January 1987) [22] and [38].

147 ICCPR, art 4(1); ECHR, art 15(1).

148 See also *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)* (n 146) [24].

149 *General Comment No. 29* (n 123) [1]. Loof, 'On Emergency-Proof Human Rights and Emergency-Proof Human Rights Procedures' (n 140) 143–5; Mégret (n 12) 113.

150 Françoise J Hampson, 'The Relationship Between International Humanitarian Law and Human Rights Law From the Perspective of a Human Rights Treaty Body' (2008) 90 International Review of the Red Cross 849, 562.

151 *General Comment No. 29* (n 123) [4]-[6]; *Lawless v Ireland* (n 146) [31]-[38]; *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)* (n 146) [22] and [38].

152 ICCPR, art 4(2); ACHR, art 27(2); ECHR, art 15(2).

153 ACHR, art 27(2): 'The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.' ICCPR, art 4: 'No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision', containing in addition to the rights already mentioned, freedom from imprisonment for the inability to fulfil a contractual obligation, right to recognition before the law, and the freedom of thought, conscience and religion. art 6 Second Optional Protocol ICCPR adds to this the abolition of the death penalty. Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 22 November 1984, entered into force 1 November 1988) ETS 117 (hereinafter: Protocol 7 ECHR), art 4(3) adds to this list the *ne bis in idem* principle (double jeopardy).

law.[154] Crucially, the HRC has held the obligation to provide an effective remedy to be non-derogable, as well as the procedural safeguards required to ensure non-derogable rights.[155] Under the ACHR it is similarly provided that 'the judicial guarantees essential for the protection of [non-derogable] rights' may not be derogated from.[156] Likewise, the Genocide, Torture, and Disappearance Conventions do not allow for derogations, as the heinous acts prohibited in those conventions can never be justified.[157] This creates a 'core' of rights which are not affected by derogations, and as will be shown in the coming Chapters, these are precisely the rights most relevant for the duty to investigate.

5 IHRL'S IMPLEMENTATION, SUPERVISION, AND ENFORCEMENT MECHANISMS

As was explained in Part I, the international law system does not provide for a general enforcement or supervision system, but for the most part relies on self-compliance and enforcement by States. The previous Chapter further showed that IHL, with a few additions, adheres to this system, despite the shortcomings associated with its diffuse nature and lack of centralisation – which has been characterised as the 'Achilles heel' of IHL.[158] IHRL is different in this regard, because it *does* have institutionalised mechanisms for supervision, monitoring, and judicial enforcement.[159] Whereas States of course remain instrumental in the effectuation of human rights, there is scrutiny of States' compliance on the international level. The primary avenue for the international supervision of States' IHRL obligations, is through the treaty bodies and courts established under the various human rights regimes.[160]

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154 *General Comment No. 29* (n 123) [13], non-exhaustively granting such status to the humane treatment of detainees, the prohibition of taking hostages, abductions, or unacknowledged detention, elements of the rights of minorities, art 12 insofar as it protects against the crime against humanity of enforced displacement, and war propaganda prohibited in art 20. The IACtHR adds those rights 'necessary to the preservation of the rule of law', *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)* (Advisory Opinion) Inter-American Court of Human Rights Series A No 9 (6 October 1987) [38].

155 *General Comment No. 29* (n 123) [14]-[15].

156 ACHR, art 27(2); *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)* (n 146) [25]; *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)* (n 154) [25]-[33].

157 See CAT, art 2(2) and CED, art 1(2). Besides, these practices are also prohibited under IHL.

158 Robert Kolb, *Advanced Introduction to International Humanitarian Law* (Edward Elgar 2014) 187–8.

159 See also e.g. Thomas Buergenthal, 'The Advisory Practice of the Inter-American Human Rights Court' (1985) 79 American Journal of International Law 1, 20.

160 Illustrative of the advancement of supervisory bodies is the total of ten committees that have been set up under the UN human rights conventions, www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx (last accessed 15 July 2021).

IHRL's mechanisms for supervision and enforcement differ between systems, but commonly perform four primary roles.[161] Firstly, they structurally supervise compliance by States. This primarily takes shape through State reporting procedures, which reports are reviewed by treaty bodies. This results in treaty bodies adopting 'Concluding Observations', in which they make recommendations as to the human rights situation in that State. Secondly, they engage in judicial enforcement, through decisions on individual complaints and in inter-State procedures. In the context of human rights courts these take the form of judgments and decisions; treaty bodies rather adopt 'views'. Thirdly, these decisions are regularly supervised, in various ways, on the international level. Finally, an important role of the human rights mechanisms, is to provide authoritative interpretations to their treaties. The interpretive guidance flows from the Concluding Observations, judgments, decisions, and views mentioned above. Moreover, they may also flow from Advisory Opinions, or General Comments.

A number of human rights treaties, for present purposes most importantly the ICCPR and the CAT, require States to periodically report on their practice and compliance with those treaties. Their treaty body then reviews this practice, encouraging good practice, whilst also identifying shortcomings. This, these bodies do through adopting *Concluding Observations*. Because reporting is a continuous, periodical, process, States will need to show in subsequent reports how they have adapted their practices in light of the bodies' findings.

A further crucial role of treaty bodies and courts, is their supervision of State compliance through complaint procedures. Thus, if States accept the competence of the treaty bodies to do so, the HRC and the CAT Committee may receive both individual and inter-State complaints. Treaty body decisions on such complaints, 'views', may identify individual violations of rights, and suggest the proper way to remedy such violations. Under the ACHR and ECHR, the Inter-American and European Courts have the competence to render binding judgments in individual cases. Under the European system, individuals can complain to the European Court directly, complaints must be brough through the Inter-American Commission, or a State. Through their judgments, these Courts provide a form of judicial enforcement of the rights enshrined in their treaties. They find individual violations in respect of the cases brought before them, may also identify in the context of such cases more structural or systemic human rights issues, and to varying degrees order how such shortcomings must be remedied on the domestic level.

Once judgments or views have been rendered, there is moreover a degree of international supervision over such decisions. How such supervision of the execution of decisions is shaped, varies among the systems. The CAT and ICCPR

161 See Bantekas and Oette (n 8) 194–8.

have relatively informal procedures for follow-up, requesting States to inform them on how they have executed the decision, and engaging in dialogue with the State in this respect. Under the Inter-American system, it is the Court itself which supervises the execution of its judgments, and it does so in great detail. In this context, it decides whether the State has fully executed its judgment, as well as what further action is needed – both to remedy the individual situation, and potential systemic causes for it.[162] Under the European system, supervision of execution of judgments is not done by the Court itself, but by the Committee of Ministers of the Council of Europe.[163] This political organ through regular meetings reviews States' execution of judgments, decides how States ought to give effect to judgments, and supervises both the individual and general measures States must take to fully effectuate the Court's findings.

Finally, through these various decisions, the courts and treaty bodies give authoritative interpretation to their treaties. The case-specific decisions by the various human rights courts are binding on the parties thereto.[164] Treaty body decisions regarding individual petitions are not,[165] nor are the *Concluding Observations* adopted by these treaty bodies. Decisions in individual cases are relevant principally for the parties to the case at hand. Yet, they also have broader implications for the interpretation of the treaty as a whole. Both the courts and treaty bodies are tasked with the interpretation of their constitutive treaties,[166] which interpretation they provide *inter alia* by way of binding judgments and authoritative views in individual cases.[167] The accumulated

162 See Burgorgue-Larsen and Úbeda de Torres (n 39) Chapter 8.

163 ECHR, art 46(2), providing the Council of Ministers of the CoE supervises execution of judgments.

164 ACHR, art 68(1); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004), Doc. OAUILEGIEXPIAFCHPR/PROT(III), art 30; (1) ECHR, art 46.

165 Wouter Vandenhole, *The Procedures Before the UN Human Rights Treaty Bodies* (Intersentia 2004) 229.

166 E.g. for the ECtHR, see ECHR, art 32; Janneke H Gerards, *EVRM – Algemene Beginselen* (Sdu 2011) 19; Harris and others (n 39) 20. The HRC fulfils its task in four distinct ways, described as follows by Joseph and Castan: 'it (1) conducts dialogues and draws conclusions from States' reports; (2) issues General Comments which explain the meaning of ICCPR provisions; (3) hears inter-State complaints under article 41; and (4) makes decisions under the First Optional Protocol'; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, Oxford University Press 2013) 15.

167 For the ECHR, see art 46 and *Ireland v the United Kingdom*, ECtHR 18 January 1978, Appl No 5310/71 [154], in which the Court held that '[t]he Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention'. For the ICCPR, see Optional Protocol, art 1 and ICCPR, art 40(4); Joseph and Castan (n 166) 17; Gerard Coffey, 'Resolving Conflicts of Jurisdiction in Criminal Proceedings: Interpreting Ne Bis in Idem in Conjunction with the Principle of Complementarity' (2013) 4 New Journal of European Criminal Law 59, 72.

effect of such efforts can result in, and has resulted in, a large body of jurisprudence authoritatively interpreting the various treaties. Although the bodies in question are not bound by the doctrine of *stare decisis*, they nevertheless do not lightly diverge from their earlier decisions.[168] This practice reinforces the relevance of such rulings and decisions beyond the facts of the case itself.

Beyond decisions in individual cases, treaty bodies and courts can also interpret their treaties *in abstracto*, in General Comments and Advisory Opinions. In Advisory Opinions, courts may render an advice independently from the facts of a specific case when requested to do so. A prime example is the Inter-American Court, with broad jurisdiction to give advisory opinions, that goes beyond even the American Convention and the OAS Charter, to cover all treaties 'concerning the protection of human rights in the American States'.[169] Insofar as States have ratified Protocol 16 to the ECHR, such opinions may also be requested under the ECHR.[170] The treaty bodies can render General Comments that provide general, *in abstracto* interpretations of certain rights. The most important difference with advisory opinions, is that the treaty bodies may render General Comments of their own accord, without being requested to do so. Moreover, as the competence to give General Comments is not strictly circumscribed in their treaties,[171] depending on the members

168 The ECtHR does not consider itself formally bound to its previous judgments, but nevertheless 'it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law', *Cossey v the United Kingdom*, ECtHR 27 September 1990, Appl No 10843/84 [35]. The Court does not deviate from its previous case law unless it has good reasons to do so, see *Christine Goodwin v the United Kingdom*, ECtHR [GC] 11 July 2002, Appl No 28957/95 [74]. Gerards (n 166) 25; Harris and others (n 39) 21. More recently, see *Muršić v Croatia*, ECtHR [GC] 20 October 2016, Appl No 7334/13 [109]. The HRC similarly tends to follow its earlier decisions, see Joseph and Castan (n 166) 29–30. For the Inter-American system, see Pasqualucci (n 5) 48.

169 ACHR, art 64(1), interpreted broadly by the Court to include any provision pertaining to the protection of human rights, whether this is the primary purpose of the treaty or not, and whether non-American States may be party or not. See *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)* (Advisory Opinion) Inter-American Court of Human Rights Series A No 1 (24 September 1982) [1]. Pasqualucci (n 5) 54–7.

170 Under the Protocol, the State's highest courts may request the ECtHR 'to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms in the Convention or the protocols thereto' (art 1). A very limited advisory jurisdiction also exists under ECHR, art 47(2). This provides that 'Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.'

171 For example, ICCPR, art 40(4) provides the basis for General Comments rendered by the HRC. It provides: 'The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties.' As Alston explains, whether this provision was meant for general views on the interpretation of rights has been subject to substantial debate; Philip Alston, 'The Historical Origins of the Concept of "General Comments" in Human

of the committee such comments may be quite far-reaching and pioneer new developments. Such development is evident for instance in the joint adoption by the committees under the Convention on the Rights of the Child and the Convention on the Elimination of Discrimination against Women of a joint comment/recommendation, establishing the first shared general comment to date.[172]

The legal significance of these *in abstracto* interpretations is subject to debate. Advisory opinions nor General Comments have binding legal force as such.[173] Nevertheless they form important tools in the development and the interpretation of international human rights law.[174] Though on their merits advisory opinions are at times called into question, their interpretive value is subject to little debate. Regarding General Comments adopted by treaty bodies, their importance has been widely acknowledged,[175] notwithstanding detractors citing their perceived unsystematic nature, and even finding them 'not deserving of being accorded any particular weight in legal settings'.[176] Nevertheless, as Helen Keller and Leena Grover explain, General Comments and States' acquiescence therein can be viewed as 'subsequent practice' in the sense of Article 31(3)(b) VCLT, and as an authoritative inter-

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Rights Law' in Laurence Boisson de Chazournes and Vera Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality. L'Ordre Juridique International, un Système en quête d'équité et d'universalité. Liber Amicorum Georges Abi-Saab* (Martinus Nijhoff 2001). Keller and Grover indicate some have also argued the competence to adopt General Comments is an inherent or implied competence à la *Reparations for Injuries*, Advisory Opinion (11 April 1949) *I.C.J. Reports* 1949, p. 147); Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and Their Legitimacy' in Geir Ulfstein and Helen Keller (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 127–8. That option is not explored further at this junction. The HRC itself has interpreted its competence to render General Comments to cover four types of issues: 'The implementation of the obligation to submit reports (...); The implementation of the obligation to guarantee the rights set forth in the Covenant; Questions related to the application and the content of individual articles of the Covenant; Suggestions concerning co-operation between States Parties (...).' UN Doc. CCPR/C/SR.260 (1980), as cited by Alston 775; see also Keller and Grover 123.

172 *Joint general comment/recommendation by the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women*, CtRC & CtEDAW 14 November 2014, CEDAW/C/GC/31-CRC/C/GC/18; Bantekas and Oette (n 8) 210.

173 As, for advisory opinions, is evident from their name. See e.g. H Thirlway, 'The International Court of Justice' in Malcolm Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 610–3 explaining this in the context of the ICJ. 'Advice', 'opinion', nor the term 'consult' used in the ACHR indicate any binding force. For General Comments, see the ILA's Committee on International Human Rights Law and Practice, *Final Report on the Impact of the Findings of the United Nations Human Rights Treaty Bodies*, Berlin Conference (2004).

174 E.g. Buergenthal (n 159) 2.

175 Having been characterised as a 'vital tool for the interpretation', 'authoritative interpretation' and 'authoritative guidance' of the treaties. See Bantekas and Oette (n 8) 209; Schrijver (n 18) 431; Markus Schmidt, 'United Nations' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press 2010) 409.

176 As summarised by Alston (n 171) 764.

pretation of the treaty in question,[177] or in Rodley's words 'something close to a codification of evolving practice'.[178] This point is driven home most prominently by the ICJ's referencing treaty body General Comments on a number of occasions.[179]

The legal significance of the findings of treaty bodies is more contentious than those of the Inter-American and European Courts. The legal status of a court is simply different than that of a treaty body, as is clear from the Courts' competence to hand down binding judgments.[180] Nevertheless, the interpretive value of treaty body decisions ought not to be understated. The ICJ has referred to the Human Rights Committee's views, General Comments, and Concluding Observations, thereby underlining their clear interpretive force.[181] It found, in this respect:

> 'Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its "General Comments".
>
> Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.'[182]

Thus, the legal significance of HRC findings should not be underestimated. They do not constitute binding case-law, like the decisions of the Inter-American and European Courts do, but they do provide an authoritative interpretation to the ICCPR. Although not to the same extent, the ICJ has also referenced the CAT Committee's views.[183] Although the weight to be accorded

177 Keller and Grover (n 171) 128–33.

178 Nigel S Rodley, 'The Role and Impact of Treaty Bodies' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 631.

179 E.g. *Judgment No.2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion (1 February 2012) *I.C.J. Reports* 2012, p. 10 [39]; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* Judgment (30 November 2010) *I.C.J. Reports* 2010, p. 639 [66] and [77]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 76) [136].

180 ACHR, art 68(1); ECHR, art 46(1).

181 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 76) [109]-[111]. See also Rodley (n 178) 640.

182 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (n 179) [66].

183 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (n 27) [101].

to treaty body pronouncements may vary somewhat, they are highly relevant for the interpretation of human rights treaties.

The pronouncements by the various human rights courts and treaty bodies provide a rich source for the research in this Part. As compared to IHL, this presents both opportunities and challenges. Of course, the authoritative interpretations of the human rights treaties provide much guidance and clarity to otherwise relatively terse treaty provisions. At the same time, the case-by-case development of human rights law, and the large body of case-law, render it very complicated to determine the 'state of the law', or the *lex lata*, at any particular moment in time. Moreover, the various courts and treaty bodies interpret their own human rights treaty. Whereas they at times refer to the case-law of other regimes, thus contributing to the unity of IHRL as a legal regime,[184] there are nonetheless also many differences between the various systems. Thus, a detailed analysis per regime is required, in order to provide a sufficiently clearly overview of what the law requires in terms of investigations. That is what Chapters 5-7 set out to do.

6 Conclusion

This Chapter set out to introduce the field of international human rights law, to facilitate the enquiry into the duty to investigate under IHRL in the Chapters to follow. It was shown that IHRL is a unique branch of international law, in that it puts individuals and their rights centre stage. Moreover, individuals can, under a number of human rights regimes, even have recourse to international mechanisms which can decide on claims that their human rights were violated. In correspondence to the rights conferred on individuals, States are subject to a number of obligations. They must refrain from interfering with rights, and must moreover actively protect and fulfil rights. This, as is explored further in the coming Chapters, includes the obligation to institutionalise a procedural layer of protection, which fully ensures rights on the domestic level. One aspect thereof, as we shall see in-depth, is the obligation to investigate human rights violations.

Further, it was shown that human rights norms are spread across a variety of treaty regimes. Certain treaties, such as the Genocide Convention, CAT, and CED, regulate one human right only. Others, such as the ICCPR, ACHR, and ECHR,

184 On the American system, see Pasqualucci (n 5) 13; Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21 European Journal of International Law 585, 604. On the European system, see Adamantia Rachovitsa, 'Fragmentation of International Law Revisited: Insights, Good Practices, and Lessons to Be Learned from the Case Law of the European Court of Human Rights' (2015) 28 Leiden Journal of International Law 863, 883.

guarantee a whole catalogue of (primarily) civil and political rights. Whereas the bodies overseeing these regimes do also look beyond their own systems, they remain separate, and their development has not been wholly uniform. The regional systems have a court which renders binding judgments, whilst the ICCPR has a treaty body. In the Inter-American system, the Court supervises compliance with its own judgments, whilst in the European system, the Committee of Ministers of the Council of Europe takes up this task. And, of course, the treaty texts the various bodies interpret, are different too. Thus, in the Chapters to come, the three regimes are addressed separately, before Chapter 8 draws out commonalities and divergencies.

As was shown, IHRL differs in a number of important ways from IHL. Thus, IHRL's explicit conferral of rights on individuals, and its international mechanisms for the supervision and (judicial) enforcement of human rights – often with individual rights of petition – stand in stark contrast to IHL. Further, its scope of application is at the same time wider and more narrow than that of IHL. On the one hand, IHRL applies at all times, and is not contingent on the existence of an armed conflict, the way IHL is. On the other hand, IHRL's applicability outside a State's territory is more limited than that of IHL. Likewise, IHL's direct binding force for non-State armed groups extends beyond IHRL's limits.

Crucially though, it was shown that IHRL continues to apply during armed conflict. In such situations, the contents of human rights obligations may be modified through State derogations, or through the contextual interpretation of rights in light of the extreme circumstances of armed conflict, but the continued application of IHRL is beyond reasonable dispute. This also means that IHRL's institutional system for protection, most prominently individuals' recourse to effective domestic remedies, and to international mechanisms, also extends to IHRL violations committed during armed conflict. As was shown in Part I, such mechanisms do not exist under IHL. This has been one of the reasons that the interplay of IHL and IHRL has garnered increased and continued attention: IHRL courts and bodies are increasingly asked to adjudicate cases arising from armed conflict, although their jurisdiction is limited to the application of their own human rights treaty. This issue will be examined in-depth in Part III of this study. For now, we must turn our attention towards investigative duties under IHRL, under the ICCPR, the ACHR, and the ECHR.

5 The duty to investigate under the global human rights systems

1 INTRODUCTION

Now that the branch of international human rights law as a whole has been sufficiently introduced, we can move on to look more specifically at the human rights part of this enquiry's research question. The sub-questions pertaining to IHRL, ask *whether* States are under an obligation to investigate (potential) violations of IHRL – and if so – what are the *scope of application* and *contents* of such an obligation, in particular during armed conflict and occupation? Because the international human rights framework is extensive, this question is answered over the course of the following three Chapters, which in turn look at duties of investigation under the global human rights systems (the present Chapter), the Inter-American human rights system (Chapter 6), and the European human rights system (Chapter 7).

The present Chapter therefore explores duties of investigation under the global human rights systems. The focus in this respect is on the International Covenant on civil and political rights (ICCPR), as interpreted by the UN Human Rights Committee (HRC).[1] Before delving into the ways investigative duties have been incorporated into the ICCPR, we will first briefly look at three other global human rights treaties. These treaties pertain to a very specific human right, or perhaps rather very specific human rights abuses. The reason for their selection is that they include *explicit* treaty obligations to investigate violations, and the clear relevance of the rights in question for situations of armed conflict. The Conventions in question are the Genocide Convention, the Convention against Torture (CAT), and the International Convention for the Protection of All Persons against Enforced Disappearance (CED). The explicit investigative obligations in these treaties provide the background for the further enquiry into the more elaborate investigative obligations under the ICCPR, as well as those under the ACHR and the ECHR, in the following Chapters.

This Chapter is structured as follows. First, the three global treaties already mentioned, are discussed in light of their explicit treaty obligations to investigate (§2). This also provides the context for our more detailed discussion of

1 For the legal authority which must be accorded to the HRC's pronouncements, see Chapter 1, §3.2.2, and Chapter 4, §5.

the ICCPR, to which the rest of the Chapter is dedicated. Section 3 then discusses the legal basis and rationale for the investigative duties as they follow from the ICCPR, before section 4 looks more specifically at the duty's scope of application: *what* must be investigated, *by whom*, *when* do such obligations begin and end, and does it matter *where* the violation occurred? The enquiry then turns to the substance of the duty to investigate: *how* must States conduct an investigation into a human rights violation, once the obligation exists (§5)? Once we have thus mapped out what the duty to investigate entails, we can look at its application to violations which stem from an armed conflict context (§6). This involves questions as to whether the duty to investigate (and the ICCPR more generally) continues to apply during armed conflicts, and whether it must perhaps be applied with a measure of flexibility, to account for the lesser measure of control States are likely to have in such situations. This also touches upon the question how the ICCPR interrelates with IHL, which this Chapter briefly discusses in light of the HRC's pronouncements on this issue. Section 7 concludes.

2 Explicit duties of investigation in global human rights treaties and the sword-function of human rights law

The focus of this study lies with duties of investigation under the ICCPR, ACHR, and ECHR. Perhaps the first thing to note is that these treaties do not contain express investigative obligations in any of their provisions. Other treaties, by contrast, do contain such obligations. It may in that light be highly informative to look at such conventions, as it may inform the way investigative obligations have been read into the treaties with which this study is most concerned.

The Genocide, Torture, and Disappearance Conventions, all explicitly require States to investigate instances of the crimes they were named for. Beyond conferring a *right* on individuals and groups, they therefore also impose a *positive obligation* on States parties, to conduct an investigation where any abuses have taken place. These investigative obligations serve a dual purpose, of *preventing* torture, enforced disappearance and genocide from occurring, and to *combat impunity* for those who have committed those crimes.[2] A third

2 On CAT, see Manfred Nowak and Elizabeth McArthur, 'Article 12. Ex Officio Investigations', *The United Nations Convention against Torture: A Commentary* (Oxford University Press 2008). On CED, see Marthe Lot Vermeulen, *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance* (Intersentia 2012) 79. On the Genocide Convention, see *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment (26 February 2007), *I.C.J. Reports* 2007, p. 43 [425]-[427].

related aim is to enable victims to obtain remedies,[3] and to assure the related right to truth.[4] These distinct aims have been codified in a number of investigative obligations. The CAT and CED distinguish between investigations which are primarily concerned with *monitoring*, and those with *ensuring accountability* after the fact. The text of the Genocide Convention does not make this distinction.

The CAT in its Articles 5-9 firstly requires States to criminalise acts of torture, to apprehend anyone alleged to have committed an act of torture, and to initiate preliminary fact-finding procedures.[5] Further, they must either prosecute or extradite such suspects.[6] The aim of these provisions is denying safe haven to perpetrators of torture, by requiring States to establish and exercise their criminal jurisdiction over such crimes.[7] Articles 12 and 13 then establish a duty of investigation wherever there is 'reasonable ground to believe' or an 'allegation' that an *occurrence* of torture has taken place in a territory under the jurisdiction of the State. This latter investigative duty is in principle geared toward *prevention*,[8] because it requires States to set up monitoring mechanisms which allow them to detect any acts of torture or to cruel, inhuman or degrading treatment or punishment (TCIDT) taking place within their territories – in particular in, for instance, their places of detention. Thus we might theoretically distinguish between *penal suppression* provisions on the one hand, and *preventive* provisions on the other. This is reminiscent of what we have observed under IHL, with State obligations to monitor their own conduct on the one hand, and obligations to implement and apply investigation mechanisms on the other.[9] Nonetheless, it has been observed that in practice, the CAT Committee does not always make a strict distinction between the investigative requirements under the penal and preventive provisions of CAT respectively, blending them into an overarching system which requires investigations, and where appropriate, prosecution and punishment.[10] Crucially, the CAT Committee has held the duty to investigate to be completely independent from the duty to abstain from torture itself – which means that the

3 See e.g. Manfred Nowak, 'Torture and Other Cruel Inhuman or Degrading Treatment or Punishment' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014).

4 See e.g. preambular paragraph 8 of the CED, '*Affirming* the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end'.

5 CAT, arts 4, 6(1) and 6(2).

6 CAT, art 7(1).

7 Nowak and McArthur (n 2) 414.

8 Nowak and McArthur (n 2) 414.

9 Chapter 3, §2.1.

10 Nowak and McArthur (n 2) 418.

duty to investigate a case of torture can be found to be violated, even if no violation of the prohibition of torture can be established.[11]

Under the CED, the investigative requirements are structured largely similarly. They also serve the dual purpose of on the one hand combating impunity and on the other, to prevent enforced disappearances – and moreover to locate those who have been disappeared or uncover their fate.[12] Whereas the former requires criminal investigations and prosecutions, the latter does not necessarily, so long as the investigatory regime allows for sufficient competences for the investigators. The provisions related to investigation are largely modelled after Articles 12 and 13 of CAT, which means that they must likely be interpreted similarly.[13] Thus far, the CED Committee's case-law has remained limited to just two views which do not pertain directly to investigative obligations,[14] so further interpretive guidance will have to be awaited. Until then, it appears likely that the CED and CAT contain largely similar investigative obligations.

The Genocide Convention, finally, generally provides that States 'undertake to *prevent* and to *punish*' genocide.[15] The duty to punish includes the obligation to criminalise genocide, to provide for effective penalties,[16] and further requires States to try those charged with genocide when it has been committed on their territory, or to extradite them to a competent international tribunal.[17] Such obligations which flow from the duty to punish, are fully contingent on investigations. Effectuating domestic criminal legislation, as well as apprehending suspects, requires States to effectively investigate. Under the duty to prevent genocide, in contrast to the CAT and CED, there does not appear to be a clear investigative obligation in this respect. The Convention does not specify how States must prevent genocide. According to the ICJ, the general duty to prevent in Article I requires that States take all measures within their power to prevent genocide, and responsibility is incurred when a State has manifestly failed to do so when its action might have contributed to preventing genocide.[18] Whether this might also include investigative obligations, however, was not decided by the Court. The Genocide Convention, in sum, requires investiga-

11 *Halimi-Nedzibi v Austria*, CtAT 18 November 1993, A/49/44 (Comm. No. 8/1991) [13.4]-[13.5]; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, Oxford University Press 2013) 295.

12 CED, arts 4-11, 12, and 24(6); See also Vermeulen (n 2) 79.

13 Vermeulen (n 2) 76 fn 107.

14 *Yrusta v Argentina*, CtED 11 March 2016, CED/C/10/D/1/2013 (Comm. No. 1/2013); *E.L.A. v France*, CtED 25 September 2020, CED/C/19/D/3/2019 (Comm. No. 3/2019).

15 Genocide Convention, art I. Emphasis FT.

16 Genocide Convention, art V.

17 Genocide Convention, art VI. The restrictive territorial scope of the duty to punish has been affirmed by the ICJ, *Genocide case (Bosnia and Herzegovina v Serbia and Montenegro)* (n 2) [422].

18 *Genocide case (Bosnia and Herzegovina v Serbia and Montenegro)* (n 2) [430].

tions in light of the duty to punish, but likely does not in the context of the duty to prevent.[19]

The above shows that the Genocide, Torture, and Disappearance Conventions all envision a coherent system of prohibition, criminalisation, investigation, prosecution and punishment of the acts mentioned in those treaties. This very clearly illustrates these Conventions' emphasis on the *sword-function of human rights*: they do not only function as a shield which protects individuals from State repression, but also require the State precisely to engage in repression by investigating, prosecuting, and punishing human rights offences.[20] The ICJ has further clarified the meaning of the penal suppression provisions of these type of conventions, holding that

> 'The obligation for the State to criminalize torture and to establish its jurisdiction over it finds its equivalent in the provisions of many international conventions for the combating of international crimes. This obligation, which has to be implemented by the State concerned as soon as it is bound by the Convention, has in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to coordinating their efforts to eliminate any risk of impunity.'[21]

It went on this obligation 'may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven',[22] thereby emphasising the aim of a coherent system to combat impunity. Although there is therefore a dual system which confers rights on the one hand, and requires repression of conduct on the other, as the ICJ clarifies, there is a strong emphasis on suppression and criminal law enforcement all in light of the object and purpose of making 'more effective the struggle against torture by avoiding impunity for the perpetrators of such acts'.[23] Combatting impunity is therefore a major aim, connected with the object and purpose of the CAT – which applies equally for the Disappearance and Genocide Conventions.

The three Conventions discussed here, in conclusion, are to an extent *hybrid* conventions, which take up a middle position between classical human rights conventions, and transnational criminal law treaties which usually aim at

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19 The ICJ has made clear that both obligations, though closely linked, impose separate requirements; *Genocide case (Bosnia and Herzegovina v Serbia and Montenegro)* (n 2) [425]-[427].

20 For this term, see Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577.

21 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment (20 July 2012), *I.C.J. Reports* 2012, p. 422 [75].

22 Ibid [91].

23 Ibid [74].

criminalising and suppressing a specific type of undesirable behaviour, such as human trafficking, drug trafficking, corruption, or terrorism. Certain human rights abuses, such as torture, enforced disappearance, and genocide, certainly also fall in that category, which has led States to conclude treaties which *both* protect the human rights in question, *and* stipulate the criminalisation, investigation, and prosecution of transgressions. But such developments have not stopped there.

The main aim of the general human rights conventions of the ICCPR, ACHR, and ECHR (as well as the ACHPR) is the protection of a catalogue of human rights, as enshrined in these treaties. This therefore differs from what was described above, as their aim is in principle unrelated to 'international crimes', criminalisation of certain acts, or criminal suppression – rather, it is often thought these conventions' main aim is to protect human dignity in its various aspects.[24] The conventions themselves do not mention criminal suppression measures, and do not explicitly require States to (criminally) investigate any transgression of their terms.

Nevertheless, these treaties' supervisory bodies and courts have held such obligations to be implied in the treaties' terms, often taken together with the general obligation to ensure or secure the rights entailed in the convention, as well as the right to a remedy. In respect of certain rights, most notably the right to life, prohibition of torture, detention when pertaining to enforced disappearance-type cases and the prohibition of slavery, these bodies have developed a jurisprudence which mirrors the explicit repressive aims of the Torture, Disappearance, and Genocide Conventions. As will be discussed in-depth in the following sections and Chapters, the Human Rights Committee and the Inter-American and European Courts all require States to criminalise acts contravening the right in question, and to investigate, prosecute and punish those acts where appropriate.[25] At times, they have even reviewed whether punishments which States had doled out, were sufficiently severe to ensure proper deterrence and accountability. In doing so, the treaties do not directly impose obligations on individuals, but bring acts committed by individuals within the purview of the responsibility of the State through their

24 E.g. Yuval Shany, 'Co-Application and Harmonization of IHL and IHRL: Are Rumours About the Death of Lex Specialis Premature?' in Robert Kolb, Gloria Gaggioli and Pavle Kilibarda (eds), *Research Handbook on Human Rights and Humanitarian Law: Further Reflections and Perspectives* (Edward Elgar 2020) section 2; Rick A Lawson, 'Si Vis Pacem, Para Bellum. Application of the European Convention on Human Rights in Situations of Armed Conflict' in Lawrence Early and others (eds), *The Right to Life under Article 2 of the European Convention on Human Rights. Twenty Years of Legal Developments since McCann v. the United Kingdom. In Honour of Michael O'Boyle* (Wolf Legal Publishers 2016) section 4; Noam Lubell, 'Human Rights Obligations in Military Occupation' (2012) 94 International Review of the Red Cross 317, 335.

25 For the ICCPR, see *infra* sections 3-6; for the ACHR, see Chapter 6; for the ECHR, see Chapter 7.

positive obligations. The obligation to protect, ensure, and render rights effective are engaged – States must prevent as far as possible the commission of certain crimes, and they must investigate, prosecute and punish them where those acts are committed.

The mechanism described here goes beyond classic conceptions of human rights, where rights primarily function as a *shield* against State interference. Rather, human rights in this context *require* State interference with human rights of 'perpetrators' to safeguard the rights of victims.[26] Thus, human rights function not only as a shield against the State, but also as a *sword* which threatens those who infringe upon individual rights. In developing this jurisprudence, human rights courts and bodies have been observed to exercise 'quasi-criminal jurisdiction'.[27]

In sum, the explicit investigative obligations in the three global human rights treaties discussed here, now have equivalents in the ICCPR, the ACHR, and the ECHR. Under these latter treaty regimes, duties of investigation take up a prominent position in the protection system. The remainder of this Chapter, as well as the subsequent two Chapters, examine this trend. The following sections do so for the ICCPR.

3 Legal basis and rationale for the duty to investigate under the ICCPR

3.1 Introduction

As will already be clear from the above, the ICCPR does not contain any explicit treaty obligation to conduct an investigation into potential violations. Yet, such obligations do flow from the Covenant. This section explores *whether* and *why* the ICCPR imposes investigative obligations on States. In other words, it looks at the legal basis, and the rationale, of the duty to investigate. The Human Rights Committee's pronouncements, as the authoritative interpretive body, will be leading in this respect.

This section, as well as the subsequent ones, draw in large part on *General Comment 36* of the HRC, on the right to life. This General Comment – although

26 Arguing this contradicts the classic function of human rights and cautioning against the use of human rights as a legitimation for State repression, see Van Kempen, more extensively in Dutch and later also in English, PHPHMC van Kempen, *Repressie Door Mensenrechten. Over Positieve Verplichtingen Tot Aanwending van Strafrecht Ter Bescherming van Fundamentele Rechten (Inaugural Address Nijmegen)* (Wolf Legal Publishers 2008); Piet Hein van Kempen, 'Four Concepts of Security – A Human Rights Perspective' (2013) 13 Human Rights Law Review 1, 18–9.

27 See Alexandra Huneeus, 'International Criminal Law By Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 The American Journal of International Law 1.

non-binding – is the most recent, extensive, and encompassing iteration of the HRC's interpretation of investigative obligations. Although its scope is limited to the right to life, many of the pronouncements made apply in a broader sense to the transversal duty to investigate as such, and may therefore be expected to be applied to other rights in the future. Where this Chapter does rely on such inferences and extrapolations, this is made explicit so readers can judge for themselves whether this is appropriate.

It should be noted that a number of States has levelled criticisms at *General Comment 36* during its drafting. A total of 23 States provided the Committee with input.[28] Out of those States,[29] six States criticised that the HRC deals with IHL,[30] while two States expressly supported the HRC's approach;[31] two States in particular considered that no investigative obligations existed under the Covenant during armed conflict;[32] four States criticised the HRC's pronouncements with respect to transparency;[33] seven States took issue with how the HRC interprets the extraterritorial applicability of the Covenant;[34] and eight States did not make any comments of relevance to this study.[35] Two States fully supported the HRC's draft.[36] Amongst those States who have made their position known, no consensus is therefore apparent – although it is clear that they do not all support the HRC's interpretation. The position of the 150 other States parties is difficult to ascertain. In interpreting the ICCPR, this raises the question what weight should be accorded to the HRC's pronouncements, and what weight should be accorded to the practice or *opinio iuris* of States. It is submitted that under the structure of the VCLT, State practice can be relied upon as an interpretive source when it constitutes 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[37] With 173 States parties to the ICCPR, this is a high threshold.[38] Insofar as practice can nevertheless be relied upon as a supplementary means of interpretation under Article 32 VCLT,[39] it is submitted that such interpretations do not carry more weight than interpretations by the HRC.

28 All comments can be found at https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx.
29 It must be noted that because Egypt's comments were only available in Arabic, the author was unable to take them into account for this analysis.
30 Australia, Canada, the Russian Federation, Turkey, UK, US.
31 Germany, Switzerland.
32 France, UK.
33 France, the Netherlands, Norway, US.
34 Austria, Canada, France, Germany, the Netherlands, Norway, US.
35 Brazil, Denmark, Japan, Namibia, New Zealand, Poland, Portugal, Sweden.
36 Finland, Malta.
37 VCLT, art 31(3)(b).
38 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.
39 *Kasikili/Sedudu Island (Botswana/Namibia)* Judgment (13 December 1999) *I.C.J. Reports* 1999, p. 1045 [79]-[80].

Neither is formally binding. But due to the indeterminate State practice in this field, this study considers that the HRC's pronouncements present the state of the art regarding investigative obligations under the ICCPR, and therefore provide a good starting point. As was set out in Chapter 1, the HRC's pronouncements are best considered as authoritative interpretations of the Covenant.[40] Nonetheless, it ought to be noted that a number of the HRC's interpretations have been received more critically than others.

3.2 Legal basis for the duty to investigate under the ICCPR

Because the ICCPR does not contain a provision explicitly outlining a duty to investigate, it is important to establish what the *legal basis* of that obligation is. As was already briefly mentioned above, the HRC relies on multiple sources to ground investigative obligations.

The legal basis for the duty to investigate, as an implicit obligation in the Covenant, is to be found in a systematic reading of a number of provisions. The HRC finds it to flow from the general Article 2(1) duty to *ensure* Covenant rights in conjunction with certain substantive rights, such as the right to life, as well as from the right to a remedy for a number of human rights violations. For a recent authority, we may take a closer look at *General Comment 36*, where the HRC found that the duty to investigate

> 'is implicit in the obligation to protect and is reinforced by the general duty to ensure the rights recognized in the Covenant, which is articulated in article 2, paragraph 1, when read in conjunction with article 6, paragraph 1 [the right to life – FT], and the duty to provide an effective remedy to victims of human rights violations and their relatives, which is articulated in article 2, paragraph 3 of the Covenant, when read in conjunction with article 6, paragraph 1.'[41]

The Human Rights Committee therefore relies, *firstly*, on the duty to ensure rights, in conjunction with certain substantive rights. As was explained in the previous Chapter,[42] this is the more general method which the various human rights bodies have relied upon to read *positive obligations* into their primarily negatively worded conventions. *Ensuring* the effective protection of rights requires more than States simply sitting back and not violating rights themselves; they must actively protect and fulfil human rights. This includes adding a procedural layer of protection for rights, through the setting up of investigative mechanisms which spring into action once a potential violations comes

40 Chapter 1, §3.2.2.

41 *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, HRC 30 October 2018, CCPR/C/GC/36 [27].

42 Chapter 4, §3.3.

to light.[43] Chapters 6 and 7 will show that this is the same approach taken by the Inter-American and European Courts, and in fact, the HRC expressly refers to the European Court's case-law in a footnote.[44] *Secondly*, as the Committee found in *Rodríguez v Uruguay*, the right of victims and their next of kin to access an effective domestic remedy is contingent on States proactively unearthing the facts of a potential violation.[45] Access to a (civil) judicial remedy is rendered moot if victims have no way to prove their claims. In the words of the HRC in *Blanco v Nicaragua*, 'Notwithstanding the possible viability of this avenue of redress, the Committee finds that the responsibility for investigations falls under the State party's obligation to grant an effective remedy'.[46] Thus, the right to an effective remedy does not only require States to provide for judicial and administrative recourses for victims. They must moreover set up administrative mechanisms for the investigation of potential human rights violations.[47] Especially where State agents are implicated in violations, it is for the State to conduct an investigation which is part and parcel of, and a crucial platform for, victims' access to an effective remedy. *Thirdly* and finally, for the right to life, the duty to investigate, according to the HRC, is moreover implied in the explicit treaty obligation to *protect* the right to life.[48]

In the HRC's view, the duty to investigate is therefore *implied* in the ICCPR. A systematic reading and interpretation of the Covenant, which allows us to read provisions in the broader context of the treaty as a whole, shows that States must not only refrain from infringing upon human rights. They must also actively protect and fulfil them, which includes deterrence through effective criminalisation, investigation, and penalisation of violations. This is also crucial for individual victims' right to an effective remedy on the domestic level. An 'essential element' of the right to a remedy is that continuing violations are stopped,[49] which requires their investigation. Finally, the HRC has found that a failure to investigate can give rise to a *separate* violation of the Covenant.[50] Thus, it is independent from the finding of a violation of a right in its substantive limb.[51]

43 This is also connected to the duty to implement human rights enshrined in art 2(2) ICCPR; See also Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford University Press 2009) 16.

44 *Calvelli and Ciglio v Italy*, ECtHR [GC] 17 January 2002, Appl No 32967/96 [51].

45 *Rodríguez v Uruguay*, HRC 19 July 1994, CCPR/C/51/D/322/1988 [6.3].

46 *Blanco v Nicaragua*, HRC 20 July 1994, CCPR/C/51/D/328/1988 [10.6]. See also Seibert-Fohr (n 43) 35.

47 *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, HRC 29 March 2004, CCPR/C/21/Rev.1/Add. 13 [15].

48 *General Comment No. 36* (n 41) [27].

49 *General Comment No. 31* (n 47) [15].

50 Ibid. See further *Sedhai v Nepal*, HRC 19 July 2013, CCPR/C/108/D/1865/2009 [8.7].

51 *Berzig v Algeria*, HRC 31 October 2011, CCPR/C/103/D/1781/2008 [8.10].

The sources for the duty to investigate outlined above, pertain to the duty to investigate as a *primary* obligation under the ICCPR.[52] That is to say, the ICCPR directly, through a combined reading of its provisions, requires States to investigate potential violations. Beyond this primary obligation, States are also under a *secondary* obligation to investigate. States are under the obligation to provide reparation for every violation of the ICCPR, and incur State responsibility for any violation attributable to them.[53] According to the HRC, reparation for violations *can* require investigation and prosecution of those responsible:

> 'Where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as *bringing to justice the perpetrators of human rights violations*.'[54]

Whereas it is not entirely clear what it means to 'bring perpetrators to justice',[55] it must by necessity include the obligation to investigate. After all, any accountability process will be contingent on proper knowledge of the facts, and a legal assessment thereof, in order to finally result in 'justice' – whether that is understood to be criminal justice, or also includes other forms of accountability. In conclusion, the duty to investigate therefore constitutes *both* a primary, and a secondary obligation under the ICCPR. It is both an obligation which flows directly from the Covenant, and an obligation which arises under the State responsibility regime, and the obligation to provide reparation for any violation.

3.3 Rationale for the duty to investigate under the ICCPR

Moving on from *how* investigative duties were read into the Covenant, we must now explore *why* the HRC has walked this path. In the context of the right to life, the HRC has formulated four aims which an investigation must serve: they need to be 'aimed at ensuring that those responsible are brought to justice, at promoting accountability and preventing impunity, at avoiding denial of justice and at drawing necessary lessons for revising practices and policies with a view to avoiding repeated violations'.[56] Generally, we can subdivide these aims further, into those which more generally relate to the effective

52 Compare the finding under IHL, see Chapter 3, §§3.3.3 and 4.2.
53 ARSIWA, art 2 and 31.
54 *General Comment No. 31* (n 47) [16].
55 Jacopo Roberti di Sarsina, *Transitional Justice and a State's Response to Mass Atrocity. Reassessing the Obligations to Investigate and Prosecute* (TMC Asser Press 2019) 66; Seibert-Fohr (n 43) 13–4.
56 *General Comment No. 36* (n 41) [27].

protection of ICCPR rights by the State, and those which are directly related to victims' rights in a specific case.[57]

Firstly, the general obligation to ensure Covenant rights and to implement them into States' domestic legal orders, requires States to institute a *procedural layer of protection* – as the HRC finds with express reference to the Inter-American Court's case-law.[58] In this context, the duty to investigate is integral to a system of effective human rights protection, which requires States to set up administrative mechanisms tasked with investigating potential violations. This, then, is a necessary condition in order to *effectively* protect and ensure human rights. This mirrors what we have seen previously under IHL.[59]

Investigations contribute to the effectiveness of rights in a number of ways. Similar to what was concluded under IHL,[60] investigations can bring to light systemic shortcomings in States' practice.[61] Investigations therefore play an important role in monitoring human rights compliance, and are crucial if States are to remedy systemic deficiencies in their practices. If, for instance, guidelines and procedures for law enforcement operatives are deficient, or if conditions of detention in a State are subpar, then such shortcomings will likely be discovered and remedied only, if they are first investigated. States must, in other words, 'take measures to prevent a recurrence of a violation of the Covenant (…) which may require changes in the State Party's laws or practices'.[62] Further, investigations contribute to countering impunity, have a deterrent effect, and can therefore help to prevent future violations.[63] Preventing future violations, which is an important State obligation,[64] is strongly linked to fighting impunity. As the HRC found in *Rodríguez v Uruguay*, impunity is a cause for human rights abuses, as well as a catalyst for the perpetuation of such abuses.[65] Preventing impunity and promoting accountability thus go hand in hand in ensuring a culture which respects and protects human rights. In fact, in the eyes of the Committee, impunity may even undermine the democratic order.[66] In this regard, the duty to investigate also plays a crucial

57 Doing so convincingly, though further distinguishing between duties to *punish* and to *investigate*, see Seibert-Fohr (n 43) 15–26 and 34–5.

58 *General Comment No. 36* (n 41) [19], fn 52, referencing *González et al. ("Cotton Field") v Mexico* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 205 (16 November 2009) [236].

59 See Chapter 3, §2.

60 See Chapter 3, §2.

61 *General Comment No. 36* (n 41) [27].

62 *General Comment No. 31* (n 47) [17].

63 Seibert-Fohr (n 30) 15–6.

64 *General Comment No. 36* (n 41) [28].

65 *Rodríguez v Uruguay* (n 45) [12.4]. See further Valeska David, 'The Expanding Right to an Effective Remedy: Common Developments at the Human Rights Committee and the Inter-American Court' [2014] The British Journal of American Legal Studies 259, 269.

66 *Rodríguez v Uruguay* (n 45) [12.4].

role in ensuring the broader societal right to truth.[67] It is thus a fundamental tenet of the effective protection of human rights that impunity be prevented, through investigation, and where appropriate, prosecution and punishment.

Secondly, the duty to investigate more specifically effectuates the rights of victims or their next of kin. The individual right to a remedy requires that perpetrators of serious human rights violations are brought to justice, and that victims are able to effectively realise their rights in domestic judicial or administrative procedures.[68] This therefore goes beyond *deterrence and prevention*, and is about *ex post facto* remedying a violation. Providing victims with appropriate redress and reparation, as well as enabling them to obtain remedies in civil proceedings, both rely on an effective State investigation.[69] In case of the most serious violations, this moreover includes a State obligation to prosecute and punish,[70] as will be returned to below.[71]

In conclusion, if we look at the underlying aims and rationale of the duty to investigate, we may observe the following. Firstly, the HRC takes account of the broader requirements of human rights protection, and does not shy away from ordering general measures in this respect. Investigative obligations in this context constitute a procedural layer of protection which enables the effective protection of human rights more broadly. Secondly, the HRC orders investigations as remedies for victims in their individual case. Here, investigations more directly aim at *ex post facto* enabling remedies, and moreover constitute a remedy in themselves as well as reparation.

4 SCOPE OF APPLICATION OF THE DUTY TO INVESTIGATE UNDER THE ICCPR

4.1 Introduction

Now that we have a better insight into the why of the duty to investigate, we may move on to a more specific examination of *when* the duty to investigate applies. In other words, what is its scope of application? The following addresses this question by looking in turn at the duty's material (§4.2), personal (§4.3), temporal (§4.4), and geographic (§4.5) scope of application.

4.2 The material scope of application and the investigative trigger

67 The HRC has not, as such, recognised the right to truth as an *autonomous* right under the ICCPR, but it nevertheless plays an important role in this respect. See David (n 65) 269–70.
68 Seibert-Fohr (n 43) 22–3.
69 *General Comment No. 31* (n 47) [16]; David (n 52) 265–8.
70 *General Comment No. 31* (n 47) [18].
71 *Infra*, §5.

A first obvious point of interest is what material event or incident triggers the duty to investigate; in other words, what type of violation or interference gives rise to investigative duties, and based on what information should States start a (preliminary) investigation? Is any allegation sufficient, or may States require individuals to substantiate their claim? These questions all have to do with the material applicability of the duty to investigate.

A first point of enquiry is to see which violations, or potential violations, require States to investigate. The Human Rights Committee's pronouncements on this point are not entirely unambiguous. On the one hand, it has found generally, that

> 'Administrative mechanisms are particularly required to give effect to *the general obligation to investigate allegations of violations* promptly, thoroughly and effectively through independent and impartial bodies. (…) A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.'[72]

The HRC's reference to 'the general obligation to investigate allegations of violations' would appear to indicate an obligation to investigate *all* violations of the Covenant. Such a finding would fit with the Committee's emphasis on Article 2's general obligations to *ensure* all Covenant rights, and to implement them into States' domestic legal orders.[73] One way of doing so, is by instituting administrative mechanisms which are tasked with investigating potential human rights violations. Nonetheless, a broad and generally applicable duty to investigate has not been fleshed out further by the Committee, which leaves rather open whether it indeed envisions such as a broad duty to investigate, and when it would apply precisely. Most of the Committee's case-law, like that of its regional counterparts, focuses especially on a number of particularly serious violations, for which it has elaborated obligations of *criminal* investigation, coupled with a duty to prosecute and punish. This also means that there is relatively little jurisprudence on what we might call the outer limits of the duty to investigate, concerning the less serious violations. The following examines the case-law on investigative duties under the ICCPR, but ultimately we will have to await whether the HRC indeed attaches investigative obligations to *all* violations of the Covenant.

The Committee has made a number of partly overlapping and partly diverging observations with respect to the contours of the duty to investigate, prosecute, and punish. On multiple occasions, such as in the case of *Bautista de Arellana v Colombia*, the HRC has found that the duty to criminally investigate and punish, applies to *particularly serious violations*, 'as in the case with violations of basic human rights', and as is particularly the case for violations of

72 *General Comment No. 31* (n 47) [15]. Emphasis FT.
73 ICCPR, art 2(1) and 2(2).

the right to life.[74] Looking more closely at what violations, and what provisions this pertains to, the Committee has found in its *General Comment 31*, that

> '18. Where the investigations (…) reveal violations of *certain Covenant rights*, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations *recognized as criminal under either domestic or international law*, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations.'[75]

Thus, *certain* violations give rise to the duty to mount a criminal investigation, notably those which are considered criminal under domestic or international law. This finding builds on earlier case-law, there the Committee found in the context of the right to life, that 'deprivation of life by criminal acts' must be punished.[76] A starting point, then, is criminalisation of violations. But this ultimately defers the question whether criminal investigations are required, to the classification of the violation under other sources of international law, or domestic law. The non-exhaustive enumeration of violations the Committee *does* give explicitly, is therefore highly informative. These concern the prohibition of TCIDT, summary and arbitrary killings, and enforced disappearances. Indeed, these are the rights and abuses on which the HRC has focused in its case-law, and – importantly for this study – they are also the rights and abuses most at issue during armed conflict. We, therefore, will equally focus on these rights.

Let us now submit these violations to more careful scrutiny, to see what conduct *specifically* triggers investigative obligations, according to the Human Rights Committee. For the right to life, in *Baboeram et al v Suriname*, the HRC found as early as 1985 that, beyond just summary and arbitrary killings, all killings, especially when perpetrated by State agents, must be investigated.[77] Moreover, in *General Comment 36*, this is broadened to all 'potentially unlawful deprivations of life (…) including allegations of excessive use of force with lethal consequences', as well as uses of potentially lethal force which ultimately

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74 *Bautista de Arellana v Colombia*, HRC 27 October 1995, CCPR/C/55/D/563/1993 [8.2]. See also *Arhuacos v Colombia*, HRC 29 July 1997, CCPR/C/60/D/612/1995 [8.2]. Seibert-Fohr (n 30) 23.

75 *General Comment No. 31* (n 47) [18]. Emphasis FT.

76 *General Comment No. 6: The Right to Life (Article 6)*, HRC 27 July 1982, HRI/GEN/1/Rev.1 [3]; Roberti di Sarsina (n 55) 67.

77 *Baboeram et al v Suriname*, HRC 4 April 1985, CCPR/C/24/D/146/1983 et al. [16]. Joseph and Castan (n 11) 176.

did not result in loss of life.[78] Furthermore, all use of firearms by State agents, or other potentially lethal force outside the immediate context of an armed conflict, must be investigated.[79] Finally, all unnatural loss of life in custody raises a presumption of arbitrary deprivation of life which must be investigated.[80] Thus, the duty to investigate establishes an encompassing control mechanism for the use of force by the State, as well as other potentially unlawful deprivations of life.

For the prohibition of torture, cruel, inhuman and degrading treatment or punishment, the HRC has found that '[t]he right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.'[81] Thus, all types of maltreatment falling within the prohibition of TCIDT are subject to investigative duties. While an allegation of maltreatment clearly triggers the duty to investigate, if the State comes across the information in another way, it is also incumbent on the State to initiate an investigation.[82] Finally, again, when someone in detention is injured, the State must investigate and actively refute allegations of maltreatment.[83] This has to do with the State's 'heightened duty of care' with respect to those deprived of their liberty.[84]

Enforced disappearances, finally, are prohibited by a number of provisions, and if they do occur, violate all of these. Crucially, these include the right to life, the prohibition of TCIDT, and the right to liberty and security. If an enforced disappearance occurs, States must investigate. As the HRC already found in 1982, 'States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life'.[85] Investigations into enforced disappearances like the investigations mentioned above strive to establish what happened as well as ensure accountability, but beyond this also aim at *protection*. After all, when someone has disappeared, it is not known whether they are still alive. Such investigations must, insofar as they are geared towards accountability, moreover be of a criminal nature – as the Committee stressed in the case of *Messaouda Grioua v Algeria*.[86]

78 *General Comment No. 36* (n 41) [27].
79 Ibid [29]. The reference to armed conflict will be returned to below, in §6.
80 Ibid.
81 *General Comment No. 20: Article 7 (Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment or Punishment)*, HRC 10 March 1992, HRI/GEN/1/Rev.9 (Vol. I) [14].
82 *Alzery v Sweden*, HRC 25 October 2006, CCPR/C/88/D/1416/2005 [11.7]; Joseph and Castan (n 11) 292–4.
83 *Eshonov v Uzbekistan*, HRC 22 July 2010, CCPR/C/99/D/1225/2003 [9.8]; *Zheikov v Russian Federation*, HRC 17 March 2006, CCPR/C/86/D/889/1999; Joseph and Castan (n 11) 291–2.
84 *General Comment No. 36* (n 41) [25].
85 *General Comment No. 6* (n 76) [4]; Joseph and Castan (n 11) 181.
86 *Messaouda Grioua v Algeria*, HRC 10 July 2007, CCPR/C/90/D/1327/2004 [9]; David (n 65) 267–8.

Beyond enforced disappearance, which is likely the most serious form of arbitrary detention imaginable, we may ask whether other violations of the Article 9 right to liberty and security also require investigation.[87] Sarah Joseph and Melissa Castan, for instance, find that the duty to investigate under Article 9 mirrors those under the rights to life and freedom from TCIDT.[88] There is, however, one difficulty in assessing this question. It is common practice for the HRC at the end of its views, once it has established a number of violations, to then address the remedies the State must provide. It does so, however, for all violations taken together, so that a regular finding, may look as such: 'In this connection, the State party should: (a) conduct an impartial, prompt and thorough investigation into the author's allegations; (b) prosecute, try and punish appropriately the persons found guilty of the violations.'[89] Because in these cases there is always more at stake than arbitrary arrest alone, but also for instance death threats or acts of torture or rape, or arbitrary arrest which is aimed at silencing someone, whether arbitrary arrest *in and of itself* also requires investigation, and potentially prosecution and punishment, is less clear.[90]

As a final point of interest, we should look at what *knowledge*, what *information* on the part of the State is required to trigger the duty to investigate. In *General Comment 36*, the HRC firstly holds that the duty to investigate arises when States *know or should have known* of potentially unlawful deprivations of life.[91] Investigative duties therefore arise where – objectively – the relevant information was in the hands of the State, or – subjectively – where the State should have been aware of the violation. This is certainly so where an allegation was made,[92] or a complaint was filed.[93] Ultimately, however, States may not simply sit still and wait until victims make an allegation. As the Committee made clear in *Alzery v Sweden*, if States through some other channel gain knowledge of a potential violation, that is sufficient to require them to investigate further.[94]

4.3 The personal scope of application

Moving on from when an investigative obligation arises, a next question is *whose* obligation it is. As the ICCPR is addressed to States, and only States can

87 Seibert-Fohr concludes so, Seibert-Fohr (n 43) 44.
88 Joseph and Castan (n 11) 343.
89 *Cacho Ribeiro v Mexico*, HRC 17 July 2018, CCPR/C/123/D/2767/2016 [11].
90 E.g. ibid; *Fulmati Nyaya v Nepal*, HRC 18 March 2019, CCPR/C/125/D/2556/2015; *Prashanta Kumar Pandey*, HRC 30 October 2018, CCPR/C/124/D/2413/2014.
91 *General Comment No. 36* (n 41) [27].
92 Ibid [28].
93 *General Comment No. 20* (n 81) [14].
94 *Alzery v Sweden* (n 82) [11.7].

become party to it, the duty to investigate is equally imposed on *States*. Whereas this is clear, certain questions nevertheless remain. Firstly, to what extent must States investigate violations and abuses which cannot be attributed to them? Especially in the context of armed conflicts, most contemporary conflicts involve at least one, and often multiple, armed groups.[95] Whether such armed groups can be the direct addressees of duties under IHRL more generally, and investigative obligations more specifically, falls outside the scope of this study.[96] What *does* fall within this study's scope, and what is of great importance, however, is to what extent States must investigate the abuses committed by armed groups.[97] That question is addressed here. Secondly, we may ask whether, if the *obligation* is addressed to States, there is also a corresponding *right* to an investigation, addressed to individuals? Both points are examined here.

On the first point, the HRC has found that States can indeed be under the obligation to investigate violations or abuses committed by others – whether they are private individuals or armed groups. As the HRC stipulates in *General Comment 36*, States must take measures to *protect* the right to life also from threats by private individuals and armed groups. With regard to investigation, the HRC finds: 'States parties must further take adequate measures of protection, including continuous supervision, in order to prevent, investigate, punish and remedy arbitrary deprivation of life by private entities, such as private transportation companies, private hospitals and private security firms.'[98] Because, then, States must *protect* the right to life also against armed groups, and must moreover investigate deaths caused by private actors, the logical conclusion is that they must equally investigate deaths caused by armed groups, and hold them to account. By way of example, the case of *Marcellana and Gumanoy v Philippines* concerned the murder of two individuals who had been investigating disappearances. The Committee found it to be established that they had been 'kidnapped, robbed and killed by an armed group', and went on to find that the Philippines had failed to effectively investigate their

95 Ward Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (2009) 7 Journal of International Criminal Justice 723, 739. For an example of the complexities with various armed groups, see e.g. Terry D Gill, 'Classifying the Conflict in Syria' (2016) 92 International Law Studies 353.

96 On this subject, see Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006); Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017).

97 On the question of reparation in this context more generally, see Cecily Rose, 'An Emerging Norm: The Duty of States to Provide Reparations for Human Rights Violations by Non-State Actors Reconceptualizing Human Rights' (2010) 33 Hastings International and Comparative Law Review 307.

98 *General Comment No. 36* (n 41) [21].

murder.[99] This clearly illustrates that States must investigate also incidents which cannot be attributed to themselves, though it should be noted that in the context of *Marcellana*, there was no armed conflict, and the term 'armed group' was not used as a term of art in the sense of IHL. As we will see in section 6.4, a careful reading of the HRC's pronouncements would appear to reveal a distinction between cases taking place during armed conflict, and those which do not.

As to the second point, is there an individual right to an investigation? Insofar as States are held to set up a procedural layer of protection which includes investigative mechanisms, this may be thought of as a general means of implementing the Covenant.[100] As such, it may be doubtful whether this would include an individual *right* to an investigation. But insofar as the right to a remedy in Article 2(3) underlies the duty to investigate, it would indeed appear that individuals have a right to an investigation. This is especially so where investigations are the only means for victims to effectuate their rights, because especially where State agents themselves have perpetrated the abuses, all relevant information will be in the hands of the State. This makes any remedy, including civil actions, fully dependent on an official, independent investigation.[101]

Indeed, in *Rodríguez v Uruguay*, the Committee found that 'the responsibility for investigations falls under the State party's obligation to grant an effective remedy', and that in order to grant Mr Rodríguez the effective remedy to which he was entitled, Uruguay had to conduct an official investigation.[102] As is examined further when discussing investigative standards, States must moreover 'disclose relevant details about the investigation to the victim's next of kin, allow them to present new evidence, afford them with legal standing in the investigation'.[103] Thus, victims have a right to an investigation. It should be noted, however, that the Committee has found explicitly, that 'that the Covenant does not provide for the right to see another person criminally prosecuted'.[104] In this respect, not all State obligations under the ICCPR are mirrored by individual rights.[105]

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99 *Marcellana and Gumanoy v Philippines*, HRC 30 October 2008, CCPR/C/94/D/1560/2007 [7.2]; Joseph and Castan (n 11) 178.

100 See *supra*, §3.2.

101 Seibert-Fohr (n 43) 20–2.

102 *Rodríguez v Uruguay* (n 45) [12.3] and [14]; Seibert-Fohr (n 43) 21.

103 *General Comment No. 36* (n 41) [28].

104 See e.g. *H.C.M.A. v Netherlands*, HRC 3 April 1989, CCPR/C/35/D/213/1986 [11.6]. Seibert-Fohr (n 43); Joseph and Castan (n 11). Further on a right to criminal justice, see Jens David Ohlin, 'The Right to Punishment for International Crimes' in Florian Jeßberger and Julia Geneuss (eds), *Why Punish Perpetrators of Mass Atrocities?: Purposes of Punishment in International Criminal Law* (Cambridge University Press 2020).

105 One may also think of the duty to submit State reports; David (n 65) 268.

In sum, it is *States* who must investigate violations of the Covenant, and they must do so for violations which were committed within their jurisdiction. This means that most violations which can be attributed directly to the State, as well as those of private actors operating within their jurisdiction, are subject to investigative obligations. What violations fall within a State's 'jurisdiction', is explored further in section 4.5. Individuals moreover have a *right* to such investigations, though they do not have a right to have someone prosecuted.

4.4 The temporal scope of application

Principally, international treaties do not apply retroactively.[106] This is equally so for the ICCPR.[107] Nonetheless, human rights practice has shown, for instance in the context of the ECHR, that claims based on abuses which occurred *prior* to the entry into force of a treaty, can sometimes nevertheless be entertained.[108] This is especially so where investigative duties are concerned, because if the obligation to investigate is considered to be a *self-standing obligation*, then the mere fact that the material incident giving rise to a violation occurred before entry into force, may be immaterial to the duty to investigate, which extends through time.

Whereas the HRC has indeed accepted that a failure to investigate can give rise to a separate violation of the Covenant, this does not mean it is 'detachable' from the material abuse as such. Thus, if the abuse took place before a State ratified the ICCPR, or before it entered into force, complaints – also under the duty to investigate – have thus far been declared inadmissible.[109] Whereas the HRC does stress that any violations 'occurring after *or continuing after* the entry into force of the Covenant' must be investigated, it therefore appears so far to set a hard limit on the temporal applicability of investigative duties.[110]

The HRC does, however, leave the door open for continuing violations, which although they started before a State ratified the ICCPR, continue until after entry into force.[111] This can for instance be the case when the incident in question was an enforced disappearance. The continued uncertainty for the next of kin of the disappeared can constitute a continuing violation of the

106 VCLT, art 28.
107 Joseph and Castan (n 11) 57–9.
108 See Chapter 7, §4.4.
109 E.g. *Inostroza et al v Chile*, HRC 23 July 1999, CCPR/C/66/D/717/1996 [6.2]-[6.4]; *S.E. v Argentina*, HRC 26 March 1990, CCPR/C/38/D/275/1988 [5.1]-[6]. See further Seibert-Fohr (n 43) 45; James A Sweeney, 'The Elusive Right To Truth in Transitional Human Rights Jurisprudence' (2018) 67 International and Comparative Law Quarterly 353, 363.
110 *S.E. v Argentina* (n 109) [5.4]. Emphasis FT.
111 *Ali Djahangir oglu Quliyev v Azerbaijan*, HRC 16 October 2014, CCPR/C/112/D/1972/2010 [8.3], with references to further case-law.

prohibition of TCIDT. And the likely continued secret detention of the disappeared persons themselves can also constitute continuing violations of the right to liberty and security.[112] Nonetheless, as one commentator cautions, the HRC's case-law is not wholly consistent in this respect, which leaves the ICCPR's *ratione temporis* application to investigative obligations somewhat obscure.[113]

4.5 The geographic scope of application

As was explained in Chapter 4,[114] States are under an obligation to respect, protect, and fulfil human rights within their jurisdiction. This applies equally to the duty to investigate: the State which has jurisdiction over a violation, is under the duty to investigate. All violations which occur on a State's territory, are therefore subject to investigative obligations under the ICCPR.

But States may be also be required to investigate violations *outside* of their territorial boundaries. Article 2(1) ICCPR provides that a State must ensure ICCPR rights to 'all individuals within its territory and subject to its jurisdiction'. This, as the HRC and the ICJ have found, means that States must also ensure the rights of those who are outside of a State's territory, but nevertheless within their jurisdiction.[115] Thus, if a State exercises jurisdiction outside its own territory, and thereby has jurisdiction over a human rights violation, it will also be held to investigate such. This will, according to the HRC, be the case for victims (i) in areas where a State exercises control over a territory, (ii) who were under the control of the State, or (iii) whose right to life is 'impacted (…) in a direct and reasonably foreseeable manner' by a State's 'military or other activities'.[116] As was set out in section 3.1 above, not all States agree with this approach.

There is, to date, one view in an individual case relating to the issue of extraterritorial investigations, although it is a rather peculiar one. In *A.S., D.I., O.I. and G.D. v Italy*, Italy was found to have failed to effectively protect the

112 *Sarma v Sri Lanka*, HRC 16 July 2003, CCPR/C/78/D/950/2000 [9.4], [9.5], [9.11]. Sweeney (n 109) 363–5.

113 Sweeney (n 109) 365–6.

114 Chapter 4, §4.5.

115 Despite the apparently cumulative phrasing that individuals are within the State's territory *and* subject to its jurisdiction, the HRC and the ICJ have interpreted the clause disjunctively. *General Comment No. 31* (n 47) [10]; The ICJ later confirmed this finding, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004), *I.C.J. Reports* 2004, p. 136 [111]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment (19 December 2005) *I.C.J. Reports* 2005, p. 168 [216].

116 *General Comment No. 36* (n 41) [63]. Further, see Marjolein Busstra and Wieteke Theeuwen, 'International Law in the Context of Cyber Operations' in Marjolein Busstra and others (eds), *International Law for a Digitalised World* (KNVIR/Asser Press 2020) 43–4; Sarah Joseph, 'Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36' (2019) 19 Human Rights Law Review 347, 348–9.

lives of over 200 migrants who drowned after their vessel capsized – outside Italian territorial waters, and in Malta's search and rescue area. The Committee considered that in the specific circumstances of the case, 'a special relationship of dependency' existed between the vessel and Italy, engaging Italy's responsibility under the ICCPR.[117] The Committee based this finding both on a combination of Italy's legal obligations under the Law of the Sea, and on the factual circumstances that the first contact the distressed vessel had made had been with Italy, that an Italian ship had been relatively close, and that Italy had remained engaged in the rescue operation.[118] Finding jurisdiction on this basis, the Committee also found that Italy was obliged to conduct an investigation into what happened, and found that the investigation had been insufficiently prompt.[119]

Further, the Committee has had occasion to expand on the issue of extraterritorial investigations in concluding observations. Thus, in the context of the UK's detention facilities in Afghanistan and Iraq, it found that the UK 'should conduct prompt and independent investigations into all allegations concerning suspicious deaths, torture or cruel, inhuman or degrading treatment or punishment inflicted by its personnel (including commanders)'.[120] The US similarly had to '[c]onduct independent, impartial, prompt and effective investigations of allegations of violations of the right to life and bring to justice those responsible', in the context of its 'practice of targeted killings in extraterritorial counter-terrorism operations using unmanned aerial vehicles'.[121] This would suggest that the duty to investigate indeed applies to violations which occur within the State's jurisdiction, even if they take place outside of a State's territory.

Finally, States may be subject to obligations also with regard to violations which took place outside of their jurisdiction, by virtue of their obligation to cooperate with a State which *is* exercising jurisdiction, and investigating the violation. The HRC has found that 'States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law'.[122] Like the European Court of Human Rights,[123] the HRC therefore potentially

117 *A.S., D.I., O.I. and G.D. v Italy*, HRC 4 November 2020, CCPR/C/130/D/3042/2017 [7.8].
118 Ibid.
119 Ibid [8.7].
120 *Concluding observations concerning the United Kingdom of Great Britain and Northern Ireland*, HRC 30 July 2008, CCPR/C/GBR/CO/6 [14].
121 *Concluding observations concerning the United States of America*, HRC 23 April 2014, CCPR/C/USA/CO/4 [9].
122 *General Comment No. 31* (n 47) [18].
123 Chapter 7, §4.5; *Romeo Castaño v Belgium*, ECtHR 9 July 2019, Appl No 8351/17 [79]-[92]; *Güzelyurtlu and Others v Cyprus and Turkey*, ECtHR [GC] 29 January 2019, Appl No 36925/07 [232]-[236].

broadens State obligations to include cooperating with other States which investigate violations of the Covenant. Further, it has found in the context of the right to life, that 'States should support and cooperate in good faith with international mechanisms of investigation and prosecutions addressing possible violations'.[124] The HRC has yet to expand on this obligation further, but it would seem likely that where States have jurisdiction over either evidence, or over the suspect of a violation, the duty to cooperate becomes of relevance.[125]

5 SUBSTANCE OF THE DUTY TO INVESTIGATE: INVESTIGATIVE STANDARDS UNDER THE ICCPR

5.1 Introduction

In the above, we have established how the applicability of the duty to investigate, in its various modalities, is shaped in the HRC's case-law. This principally tells us *when* the duty to investigate applies. If we now know *when* States must investigate, then the logical next step is to ask, *how* must they do so. This question is the subject of this section.

5.2 A due diligence obligation

As an overarching starting point, it must be emphasised that the duty to investigate (and to prosecute and punish), is a *due diligence* obligation.[126] This means States must take all reasonable measures in order to discharge the duty, but that if a State meets all investigative standards but is nonetheless unable to establish all the facts or identify all culprits, this need not necessarily fall foul of the duty to investigate.[127] In the words of the Committee, it is 'not an obligation of result, but of means (…) and it must be interpreted in a way which does not impose an impossible or disproportionate burden on the

124 *General Comment No. 36* (n 41) [28]. Further on this, see Marko Milanović, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life' (2020) 20 Human Rights Law Review 1, 43. Milanović, however, appears to overlook the Committee's earlier finding that State's must, beyond international mechanisms, also cooperate with one another.

125 Milanović (n 124) 43–4.

126 *General Comment No. 31* (n 47) [8]; See also Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 566.

127 Joseph and Castan (n 11) 871.

authorities'.[128] In this context, the HRC refers explicitly to the European Court of Human Rights' findings to the same effect, explored further in Chapter 7.[129]

5.3 Investigative standards

5.3.1 Eight standards

If we then look more specifically at what standards the HRC formulates for investigations, *General Comment 36*, on the right to life, is again our most recent and encompassing authority. There, overseeing its case-law, the HRC sums up the overarching investigative standards which States must meet. The standards in question stipulate that an investigation must be: (i) launched of the State's own accord (*ex officio*); (ii) initiated promptly; and that it must furthermore be (iii) thorough, effective, and credible; (iv) independent and (v) impartial; (vi) sufficiently involve the victims or their next of kin; and further be (vii) transparent, and (viii) where appropriate followed-up by criminal accountability processes.[130] These standards, it is submitted, are generally also applicable to investigations into violations beyond just the right to life. They must of course be applied contextually, meaning that for instance the requirement that investigations are thorough and effective, work out differently in a right to life case, and in a torture case. The investigative steps involved obviously differ, and the HRC's insistence, as we will explore below, on autopsies, of course applies only when there are mortal remains to examine. But applied contextually, the standards listed here are the benchmarks for all investigations.

5.3.2 Ex officio

Let us now take a closer look at the various investigative standards. Firstly, (i) investigations must be initiated *ex officio*.[131] As was already briefly mentioned above, this means that States may not simply await a victim complaint. On the contrary, as soon as they obtain information which allows them to know, or on the basis of which they should have known of the potential violation,

128 *Prutina and Others v Bosnia and Herzegovina*, HRC 18 June 2013, CCPR/C/107/D/1917, 1918, 1925/2009&1953/2010 [9.5]; later referred to in e.g. *Khadzhiyev and Muradova v Turkmenistan*, HRC 24 May 2018, CCPR/C/122/D/2252/2013 [7.5].

129 *Palić v Bosnia and Herzegovina*, ECtHR 15 February 2011, Appl No 4704/04 [65] and [70].

130 *General Comment No. 36* (n 41) [28].

131 Ibid. Interestingly, the HRC finds that investigations must 'where appropriate' be initiated *ex officio*. In this respect, the HRC diverges from other human rights systems' jurisprudence. Likely, the HRC refers here to cases where the potential violation is brought to life for the first time through an allegation, where one might say that technically, the prompt initiation of an investigation afterwards, is no longer *ex officio*.

they must actively unearth what happened. If the information triggering the duty to investigate *is* a victim allegation, they may still not rely on victims to furnish evidence.[132] The State must, in other words, take ownership of the investigation.

5.3.3 Promptness

Second and closely related, (ii) States must *promptly* initiate the investigation.[133] The promptness of the investigation is crucial if the investigation is to achieve its various aims. The deterrent effect, both more generally and case-specifically, relies on a prompt reaction. Furthermore, effectively establishing the facts will often require prompt action. Crime scenes can easily be contaminated and evidence lost, traces of ill-treatment such as bruises fade, witness testimony's reliability decreases overtime, and especially where State agents are implicated, there is a risk of (an appearance of) collusion, or even of intimidation or active tampering with evidence. There is not, thus far, a significant amount of case-law on the issue what is sufficiently *prompt*, as the majority of cases brought to the Committee concern the lack of investigations altogether.[134] Some guidance on what is without question insufficiently prompt, can be found in the case of *Alzery v Sweden*. This case concerned an expulsion to Egypt during which Swedish agents witnessed the victim's ill-treatment, after which Sweden only undertook action when a private criminal complaint was brought over two years later. In such circumstances, the Committee found, that delay alone led to the conclusion that Sweden had failed to carry out a prompt, independent and impartial investigation.[135]

5.3.4 Thoroughness, effectiveness, and credibility

The requirement that an investigation is (iii) *thorough, effective, and credible*, is the most substantive standard formulated by the HRC. This criterion is concerned with the investigative steps which must be taken in order to ensure that the investigation is effective, in the sense that it can achieve the aims of establishing the facts and ensuring accountability. What steps are required depends on the facts of a case, and must therefore be assessed on a case-by-case basis. Nonetheless, there are certain general guidelines. In this context, the Committee also takes onboard other international standards for effective investigations, such as the *Minnesota Protocol on the Investigation of Potentially*

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132 *Eshonov v Uzbekistan* (n 83) [9.8].

133 *General Comment No. 20* (n 81) [14]; *Novaković v Serbia*, HRC 21 October 2010, CCPR/C/100/D/1556/2007 [7.3]. See Anja Seibert-fohr, 'The Fight against Impunity under the International Covenant on Civil and Political Rights' (2002) 6 Max Planck Yearbook of United Nations Law 301, 329.

134 For an example, see e.g. *Rodríguez v Uruguay* (n 45).

135 *Alzery v Sweden* (n 82) [11.7].

Unlawful Death.[136] This document, which was concluded by the Office of the United Nations High Commissioner for Human Rights, includes a great many guidelines for investigations, including on crime-scene investigation, interviewing, excavation of graves, and autopsies. Looking at the Committee's practice, we can see, for instance, that in case of investigations into unlawful deaths, an autopsy must be carried out.[137] If mortal remains are already buried, they need to be exhumed.[138] The HRC at times goes in great detail in assessing whether all relevant steps were pursued, and whether they were carried out adequately. By way of illustration, it found in the case of *Zhumbaeva v Kyrgyzstan*:

> 'The Committee notes the author's allegations regarding the authorities failure to obtain a detailed description of the position of the victim's body, that a mock hanging was not conducted, that the exact timing and sequence of events was not established, that medical records to establish if the victim had any suicidal tendencies were not requested, that a forensic expertise of the sport trousers was not ordered, that the cash the victim allegedly carried in his pocket was never located and that it was never established if the victim's death was a result of torture or ill-treatment.'[139]

Other steps which will regularly be involved, are for instance the hearing of witnesses, and medical examinations to establish whether any ill-treatment has taken place.[140] This is, of course, context-dependent. Further, the investigation will need to look at the State's *procedures* in, for instance, law enforcement operations. Thus, the Committee has found that investigations must also bring to light 'the reasons and legal basis for targeting certain individuals and the procedures employed by State forces before, during and after the time in which the deprivation occurred, and identifying bodies of individuals who had lost their lives'.[141] Crucially, any investigation will need to be judged on its merits and contextually, and all relevant investigative steps will need to be pursued in order to render the investigation thorough and effective.

5.3.5 *Independence and impartiality*

136 *General Comment No. 36* (n 41) [27]; *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, Office of the United Nations High Commissioner for Human Rights, New York/Geneva, 2017.

137 *General Comment No. 36* (n 41) [28].

138 *Eshonov v Uzbekistan* (n 83) [9.6].

139 *Zhumbaeva v Kyrgyzstan*, HRC 19 July 2011, CCPR/C/102/D/1756/2008 [8.10]; Joseph and Castan (n 11) 177–8.

140 *Concluding Observations concerning Hungary*, HRC 16 November 2010, CCPR/C/HUN/CO/5 [14]; Joseph and Castan (n 11) 294.

141 *General Comment No. 36* (n 41) [28].

Then, the investigation must be (iv) independent, and (v) impartial. Whereas these two standards are often taken together, they can be distinguished from one another. Independence generally refers to the investigators being institutionally independent from those implicated in the abuse, while impartiality normally refers to a lack of bias or prejudice.[142] Impartiality is therefore more about the specific investigators working on a case, as well as potentially the judge in legal proceedings, and whether their conduct indicates bias. Independence is about an institutional separation between those implicated, and the investigating authorities. To draw an example from Concluding Observations the HRC made with regard to instances of police brutality in Hong Kong: investigations carried out by the police force themselves, which moreover hardly ever found any complaint to be substantiated, led the HRC to seriously question the independence of this investigation mechanism.[143] The Committee therefore insisted on an investigation which *was* independent, and which also did not have the *appearance* of dependence.[144] On occasion, the HRC has found that where complaints are raised as to the independence of the investigation, and the established investigative procedures are lacking, States must institute an independent commission of inquiry to carry out the investigation.[145]

5.3.6 Transparency and sufficient involvement of next of kin

If all the above investigative standards are met, this already goes a long way of ensuring an effective investigation which is capable of establishing the identify of both victim and perpetrator, and of judging the lawfulness of what happened, as well as establish accountability. But this by itself is not yet sufficient. The investigation must, in order to do justice to victims and their right to a remedy, also (vi) sufficiently *involve the victims or their next of kin*, and be (vii) *transparent*. At the investigation stage, this for instance means that victims or their representatives are present at the autopsy.[146] Further,

> 'States parties should also disclose relevant details about the investigation to the victim's next of kin, allow them to present new evidence, afford them with legal standing in the investigation, and make public information about the investigative steps taken and the investigation's findings, conclusions and recommendations, subject to absolutely necessary redactions justified by a compelling need to protect

142 David J Harris and others, *Law of the European Convention on Human Rights* (3rd edn, Oxford University Press 2014) 450.

143 *Concluding Observations concerning the United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, HRC 9 November 1995, CCPR/C/79/Add.57 [11]. Joseph and Castan (n 11) 296.

144 Ibid.

145 *Eshonov v Uzbekistan* (n 83) [9.6]-[9.7].

146 *General Comment No. 36* (n 41) [28].

> the public interest or the privacy and other legal rights of directly affected individuals.'[147]

The inclusion of the next of kin in the investigation is therefore an important element of the HRC's conception of investigations. They must be granted standing, and be included at all relevant junctions so they can effectuate their rights in the proceedings. Beyond just victims and their next of kin, there are also broader requirements of transparency. This ensures public faith in the State's use of force, adherence to the rule of law, and opens the investigation up to public scrutiny – although the HRC does allow for balancing these interests against countervailing individual or broader societal interests. We might think, for instance, of results of criminal investigations which cannot be disclosed so long as not all suspects have been apprehended, in order not to hinder the ongoing investigation. As will be seen below, the HRC crucially also applies such standards of transparency to the use of force in military operations during armed conflict.[148]

5.3.7 *Follow-up to investigations*

Finally, as was already touched upon previously, investigations must where appropriate be (viii) *followed-up by criminal accountability processes*. This is certainly the case for human rights violations which constitute international crimes, and TCIDT, summary and arbitrary killing, and enforced disappearance.[149] The same goes for all 'particularly serious' violations.[150] What this means precisely is not entirely cleared up in the Committee's case-law, but what is certain, is that potentially unlawful deprivations of life will normally fall in this category. As the HRC has found,

> 'Given the importance of the right to life, States parties must generally refrain from addressing violations of article 6 merely through administrative or disciplinary measures, and a criminal investigation is normally required, which should lead, if enough incriminating evidence is gathered, to a criminal prosecution.'[151]

This indicates a clear drive towards criminal accountability in the Committee's case-law. Further sharpening the sword-function of the ICCPR, the HRC has further found that if such a duty to prosecute and punish exists, States must remove *de jure* and *de facto* obstacles to accountability. Amnesty laws or prescriptions are unacceptable in this regard, because they perpetuate impuni-

147 Ibid.
148 *infra* section 6.
149 *General Comment No. 31* (n 47) [18].
150 *Bautista de Arellana v Colombia* (n 74) [8.2].
151 *General Comment No. 36* (n 41) [27].

ty.[152] Finally, the HRC has, in case of enforced disappearances, insisted that investigations are carried out and tried – as a rule – within the 'ordinary criminal justice system' rather than before military courts.[153]

Two qualifications must be made with regard to this duty to criminally investigate. Firstly, there remain violations of the ICCPR which do not require a criminal investigation. An effective remedy for victims does not at all times require criminal measures, and can sometimes also be satisfied through other means. In *Croes v Netherlands*, the HRC observed 'that although States parties are obliged to investigate in good faith allegations of human rights violations, criminal proceedings would not be the only available remedy.'[154] Secondly, even if there is a duty for the State to investigate, prosecute, and punish, this does not give rise to a corresponding *individual right* to have someone prosecuted.[155] In this respect, not all State obligations under the ICCPR are mirrored by individual rights.[156]

5.4 Résumé

Overseeing the above, we may conclude that although the duty to investigate is a due diligence obligation, the HRC has formulated an extensive list of standards by which the State's efforts can be gauged. Not all standards have been fleshed out in great detail, but the Committee's evolving case-law will no doubt interpret these standards further. Thus, States must investigate many human rights violations under the Covenant, and are moreover held to high standards when they do. Because States are moreover held to set up investigative mechanisms within their domestic systems, this is a crucial link in effectuating human rights in the domestic legal order. The procedural standards investigations must meet, with potential supervision by the Committee, in that respect safeguard that there all violations are seriously and genuinely examined.

6 Applicability and flexibility in conflict situations, and the role of IHL

6.1 Introduction

152 Ibid; *Rodríguez v Uruguay* (n 45) [12.4]. Extensively, Seibert-Fohr (n 43); David (n 65).
153 *General Comment No. 36* (n 41) [58]; *Coronel v Colombia*, HRC 29 November 2002, CCPR/C/76/D/778/1997 [10]; Seibert-Fohr (n 43) 23–4.
154 *Croes v The Netherlands*, HRC 16 November 1988, CCPR/C/34/D/164/1984 [10].
155 Seibert-Fohr (n 43); Joseph and Castan (n 11). See e.g. *H.C.M.A. v Netherlands* (n 104) [11.6].
156 One may also think of the duty to submit State reports; David (n 65) 268.

In the above, we have seen *why* duties of investigation are integral to the effective protection of ICCPR rights, *when* such duties apply, and *how* States must discharge such obligations. What we have yet to explore, but what is also vital for ultimately answering this study's research questions, is whether and how these investigative obligations are applied *in situations of armed conflict*. This raises questions as to the potential derogability of investigative obligations (§6.2), co-applicability with IHL (§6.3), and whether the duty to investigate can be interpreted with a measure of flexibility in light of the different, demanding, circumstances pertaining during armed conflict (§6.4).

A preliminary issue, of course, is whether the ICCPR applies at all during armed conflict. Whereas historically this was not always self-evident, it has been firmly decided that indeed, the ICCPR continues to apply during armed conflict. Both the International Court of Justice and the HRC have been crystal clear on this issue. According to the ICJ, the individual protections flowing from the ICCPR and human rights treaties more generally remain in operation during armed conflict. The only reason such protections can cease, is by way of derogation.[157] The HRC has found similarly, reaffirming that 'the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable'.[158] These findings correspond with a trend at the regional courts in the Americas and Europe,[159] and it is submitted that despite persistent objections by certain States,[160] the continued applicability of human rights law during armed conflicts is now settled.[161]

Knowing *that* the ICCPR continues to apply during armed conflict, does not yet tell us *how* it applies, and how it interacts with IHL. These issues are discussed below, starting out with a brief enquiry into the derogations regime.

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157 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), *I.C.J. Reports* 1996, p. 226 [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 115)[106]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (n 115) [216].

158 *General Comment No. 31* (n 47) [11].

159 See Chapters 6 and 7.

160 The United States of America and Israel persist that IHRL does not apply during armed conflict, see e.g. Françoise J Hampson, 'The Relationship Between International Humanitarian Law and Human Rights Law From the Perspective of a Human Rights Treaty Body' (2008) 90 International Review of the Red Cross 849, 550; Larissa van den Herik and Helen Duffy, 'Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches' in Carla Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill Nijhoff 2017) 367–8, fn7. See also the criticisms leveled against the HRC's inclusion of IHL in its General Comment, *supra* (n 30).

161 See also Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 International Review of the Red Cross 501; Helen Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press 2013).

6.2 The (non-)derogability of the duty to investigate

The ICCPR contains a regime which allows States to *derogate* from certain rights, if they are faced with an emergency. A relevant question, then, is whether States can make use of this regime during the exigencies of armed conflict. Article 4 of the ICCPR grants States the possibility to 'take measures derogating from their obligations under the [ICCPR] to the extent strictly required by the exigencies of the situation', '[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'.[162] The derogations regime therefore allows States to deviate from human rights norms due to a public emergency that does not allow for the application of all human rights norms – the security of the State, or rather the survival of the State, requires it be free to combat this crisis without overly demanding human rights restrictions. Any measures taken are still subject to international proportionality review, balancing the exigencies of the situation against the fundamental rights interference.[163]

If States can derogate from certain obligations during a public emergency threatening the life of the nation, a next pertinent question is whether armed conflicts constitute such an emergency. The International Court of Justice's findings in its *Nuclear Weapons* opinion would seem to point in this direction. There, the Court found that the ICCPR's protection 'does not cease in times of war, except by operation of Article 4'.[164] Nonetheless, in the HRC's view this will depend on context: 'even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.'[165] There remains therefore some scope for discussion, as to whether each armed conflict constitutes such an existential threat. By way of example, whether States' involvement in extraterritorial armed conflicts could also fulfil this criterion is not immediately clear.[166]

Nonetheless, we need not concern ourselves too much with such questions. The reason for this, is quite simple. Under the ICCPR, not all rights and provisions may be derogated from, and the HRC has moreover interpreted this list of non-derogable rights quite broadly. Thus, as will be seen, duties of investigation cannot be derogated from as such, whether the armed conflict amounts to a threat to the life of the nation, or not.

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162 ICCPR, art 4(1).

163 *General Comment No. 29: Article 4: Derogations during a State of Emergency*, HRC 31 August 2001, CCPR/C/21/Rev.1/Add.11 [4]-[6].

164 *Nuclear Weapons* (n 157) [25].

165 *General Comment No. 29* (n 163) [3]; reaffirmed more recently in *General Comment No. 37: Article 21: right of peaceful assembly*, HRC 27 July 2020, CCPR/C/GC/37 [96].

166 On this issue, see Marko Milanović, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (Oxford University Press 2016).

A number of rights is considered to be so essential, that they may never be derogated from, even during emergencies. Under the ICCPR, these rights include, importantly, the right to life and the prohibition of torture, inhuman, cruel, and degrading treatment.[167] Crucially, the HRC has added to this that the obligation to provide an effective remedy is also non-derogable, as well as those procedural safeguards which are necessary to ensure non-derogable rights.[168] As was shown above, investigative obligations under the ICCPR arise primarily in light of a violation of the right to life, the prohibition of TCIDT, and the prohibition of enforced disappearance. In other words, the investigative obligations under the ICCPR, attach to non-derogable rights.[169] If these rights cannot be derogated from, nor can the obligations flowing from the duty to ensure these rights, and to provide an effective remedy for infringements of these rights. Thus, no derogation from the duty to investigate is possible, even during armed conflict, or a public emergency threatening the life of the nation. The HRC has found explicitly to this effect, in its *General Comment 36*. There, it considered that rights which support the right to life may not 'diminished by measures of derogation', which includes 'the duty to take appropriate measures to investigate, prosecute, punish and remedy violations of the right to life'.[170]

It may be wondered whether the application of investigative obligations may nevertheless be altered during armed conflict – not because of derogations, but because of the applicability of IHL, or because of a contextual application which takes account of the exigencies of armed conflict situations. Those possibilities are addressed in the following sections.

6.3 Applicability during armed conflict and interaction with IHL

The HRC's approach towards IHL can be characterised as relatively open. Early on, it considered that IHL 'help[s], in addition to the provisions in article 4 [ICCPR], to prevent the abuse of a State's emergency powers'.[171] This indicates a view of IHL as supplementing the ICCPR's derogations regime, as an additional restriction on States' powers during armed conflict. This interpretation aligns with Article 4's requirement that any derogation measures 'are not inconsistent with their other obligations under international law'.[172] During armed conflict,

167 ICCPR, art 4(2).
168 *General Comment No. 29* (n 163) [14]-[15].
169 Enforced disappearances, beyond violations of the right to liberty and security, also constitute violations of the prohibition of TCIDT, and often the right to life. *General Comment No. 35: Article 9 (Liberty and security of person)*, HRC 16 December 2014, CCPR/C/GC/35 [55].
170 *General Comment No. 36* (n 41) [67].
171 *General Comment No. 29* (n 163) [3].
172 ICCPR, art 4(1).

IHL naturally provides relevant 'other' international rules in this context. So IHL in this view stipulates the lower limits of what States are allowed to do, as an additional safeguard in addition to those of the ICCPR. But later on, in its *General Comment 31* on the general obligations flowing from Article 2, the Committee went a step further, and considered that

> 'the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.'[173]

Rules of IHL, then, generally *complement* protections afforded by the ICCPR. What the Committee means by this does not yet become entirely clear, but at the very least, it explains that *more specific rules of IHL* may be relevant for the *interpretation* of ICCPR rights.[174] Whereas the reference to 'more specific rules' immediately conjures images of *lex specialis*,[175] the Committee stresses the complementary nature of the relationship between IHL and the ICCPR. Thus, the HRC would appear to adhere to a 'relationship of interpretation' between both regimes,[176] with there being room for the interpretation of ICCPR rights in light of 'more specific rules of IHL'.

And indeed, in its two most recent General Comments, on the right to liberty and security, and on the right to life, the Committee has expanded further on how this interpretive relation must be shaped. Firstly, it again emphasises that rules of IHL may be relevant 'for the interpretation' of the right to liberty,[177] and 'for the interpretation and application' of the right to life[178] – and that IHL and the ICCPR are therefore complementary. Then, secondly, it explains further how we may interpret ICCPR rights in light of rules of IHL, in two absolutely crucial findings:

> 'Security detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary',[179] and '[u]se of lethal force consistent

173 *General Comment No. 31* (n 47) [11].
174 See Vito Todeschini, 'The ICCPR in Armed Conflict: An Appraisal of the Human Rights Committee's Engagement with International Humanitarian Law' (2017) 35 Nordic Journal of Human Rights 203, section 4.1.
175 The ICJ has referred to the relationship of IHRL and IHL in terms of *lex specialis*, see *Nuclear Weapons* (n 157) [25] and *The Wall* (n 157) [106].
176 Oona A Hathaway and others, 'Which Law Governs during Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law' (2012) 96 Minnesota Law Review 1883.
177 *General Comment No. 35* (n 169) [64].
178 *General Comment No. 36* (n 41) [64].
179 *General Comment No. 35* (n 169) [64].

> with international humanitarian law and other applicable international law norms is, in general, not arbitrary.'[180]

Thus, the Committee finds that the crucial determination of whether a deprivation of life or liberty is 'arbitrary' under the Covenant, can be determined by reference to rules of IHL.[181] This means that rules of IHL – which may well be more permissive of States' repressive action – shape the content of human rights. Thus, security detention which is normally outlawed under the ICCPR, can be permissible during armed conflict, and the use of lethal force which would normally be at odds with the ICCPR, is not arbitrary when it conforms to more permissive rules of IHL.[182] This reconciliatory interpretation of the term 'arbitrary', similar to approaches by the ICJ and the Inter-American Court of Human Rights,[183] are ultimately a form of 'harmonious interpretation' or 'systemic integration'.[184] As is explained in detail later in this study,[185] this means that international law is approached as a 'system', where rules of one branch of international law can be interpreted in line with rules of other branches, as set out by Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[186] Through systemic integration, the HRC thus takes IHL onboard in its interpretation of ICCPR rights, in a way which is less protective of individual rights than its regular interpretation.[187]

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180 *General Comment No. 36* (n 41) [64].

181 Similarly, see *General Comment No. 37* (n 165) [97].

182 Note that the HRC does formulate certain additional criteria, i.e. that security detention is authorised and regulated by IHL, and that the use of force is consistent with IHL and other international legal norms.

183 *Legality of the Threat or Use of Nuclear Weapons* (n 157) [25] and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 115) [106]; *Santo Domingo Massacre v Colombia* (Preliminary Objections, Merits and Reparations) Inter-American Court of Human Rights Series C No 259 (30 November 2012) [24], Emphasis FT. In similar wording, see *Rodríguez Vera et al (the disappeared from the Palace of Justice) v Colombia* (Preliminary objections, merits, reparations and costs) Inter-American Court of Human Rights Series C No 287 (14 November 2014) [39]. Further, see Chapter 6, §6.3.3, and Chapter 9.

184 Todeschini (n 174) section 4.1ff; Jean d'Aspremont and Elodie Tranchez, 'The Quest for a Non-Conflictual Coexistence of International Human Rights Law and Humanitarian Law: Which Role for the Lex Specialis Principle?' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013); Lawrence Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' in Eirik Bjorge and Mads Andenas (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015) 279.

185 Chapter 9.

186 Campbell A McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 International and Comparative Law Quarterly 279; d'Aspremont and Tranchez (n 184).

187 Hill-Cawthorne (n 184) 284–6.

The Human Rights Committee's approach to IHL can therefore be characterised as relatively open. It is willing to take IHL onboard as an interpretive tool which shapes the contents of ICCPR rights. But, in the context of the right to life, the HRC places one important restriction on the complementary role played by IHL. It stipulates that '[u]se of lethal force consistent with international humanitarian law *and other applicable international law norms* is, in general, not arbitrary',[188] which means that the use of force must also satisfy other applicable international rules. This, the HRC makes clear, includes the *ius ad bellum*. Thus, it finds – controversially – that 'States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant'.[189] In other words, the HRC distinguishes between the various parties to an armed conflict. If this approach is accepted, this means that on the one hand, a State which complies with the *ius ad bellum* can profit from a more flexible interpretation of the right to life, which can be interpreted in light of applicable IHL. But aggressor States, on the other hand, would not be able to profit from the rules of IHL, and in fact *all* deprivations of life in the context of aggression, would violate the right to life.

This interpretation admittedly has a certain attraction, as allowing States engaging in aggression to profit from a less restrictive regime would be counterintuitive.[190] But at the same time, it goes completely against IHL's guiding principles, namely those of belligerent equality, and the separation between the *ius ad bellum* and the *ius in bello*.[191] One of the foundations of IHL as a legal regime regulating warfare, is that it applies equally to all sides. This is a pragmatic approach, which is precisely meant to accept the situation that despite the prohibition of the use of force in international law, armed conflicts will continue to occur. Mitigating the suffering that goes hand in hand with such conflicts, regardless of who is in the wrong and who is in the right in the larger context of the conflict, does not allow for distinguishing between the various parties. The HRC's approach in this respect therefore diverges from IHL canon.[192]

Looking at the Human Rights Committee's approach to the use of force during armed conflict, what is clear at least is that it has an open approach towards international law. Both IHL and other rules of international law, notably the *ius ad bellum*, have a role to play in the HRC's interpretation. These

188 *General Comment No. 36* (n 41) [64]. Emphasis FT. See also *General Comment No. 37* (n 165) [97].

189 *General Comment No. 36* (n 41) [70].

190 Peter Kempees, *Thoughts on Article 15 of the European Convention on Human Rights* (Wolf Legal Publishers 2017); Adil Ahmad Haque, 'Turkey, Aggression, and the Right to Life Under the ECHR – EJIL: Talk!' (*EJIL:talk!*, 2019) <https://www.ejiltalk.org/turkey-aggression-and-the-right-to-life-under-the-echr/> (last accessed 15 July 2021).

191 Yoram Dinstein, *The Conduct of Hostilitites under the Law of International Armed Conflict* (3rd edn, Cambridge University Press 2016) 4–8.

192 Further on these fundaments of IHL, see Chapter 2, §2.

are interesting developments which deserve to be followed closely. From the perspective of investigative duties, discussed in the subsequent section, they also raise a number of issues. The HRC's approach potentially increases normative conflicts with IHL when it comes to the duty to investigate. Let us now subject this to a further examination.

6.4 Investigations into violations committed during armed conflict

6.4.1 Introduction

As was explained above, the ICCPR continues to apply during armed conflict, and so do States' investigative obligations. Armed conflicts, however, raise their own set of issues. One may question, for instance, whether it is feasible to require States to investigate all deprivations of life during armed conflict, where loss of life is – unfortunately – extremely prevalent. A relevant question is therefore whether the duty to investigate is adapted to the realities of armed conflict. As we have seen, the HRC adopts a relatively open approach towards IHL and other fields of international law, which might provide it with the interpretive tools to do so. This section examines to what extent this is so.

6.4.2 Scope of application

Concerning the scope of the duty to investigate during armed conflict, two issues in particular arise. Firstly, we may question whether the trigger for investigations remains the same. For instance, must *all* killings be investigated, despite potentially disproportionate burdens this may impose on the State?[193] Secondly, the applicability of the duty to investigate to killings committed by third actors, such as notably non-State armed groups, may prove demanding.

In *General Comment 36*, the HRC finds that States must 'investigate alleged or suspected violations of article 6 in situations of armed conflict in accordance with the relevant international standards'.[194] Whereas no individual case-law on this issue exists to date, the Committee has found in the context of its concluding observations on Colombia, which was engulfed in a non-international armed conflict, that that State needed to 'ensure that all allegations of human rights violations are promptly and impartially investigated, that the perpetrators are prosecuted, that appropriate punishment is imposed on

193 Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98 American Journal of International Law 1. France and the UK have expressed the view that investigative obligations under the ICCPR do not apply during armed conflict, *supra* (n 32).

194 *General Comment No. 36* (n 41) [64].

those convicted and that the victims are adequately compensated'.[195] Thus, potential *violations* of the right to life must be investigated. As we have just seen, what constitutes a violation of the right to life can, during armed conflict, be interpreted by reference to applicable rules of IHL. When it comes to the conduct of hostilities, this means that the targeting and killing of combatants, for instance, will not be considered 'arbitrary', and will therefore be in compliance with the right to life. This also means that no investigation is therefore required under the ICCPR, as interpreted by the HRC. As we saw above, however, the HRC also suggests in *General Comment 36* that when a State is engaged in acts of aggression, any deprivation of life will violate the right to life. Following this line of argumentation by the HRC, the State will then need to investigate *all* deprivations of life, including those of combatants lawfully targeted under IHL.

And, as will be recalled, violations of the right to life must be *criminally* investigated, prosecuted, and punished. Besides issues of feasibility which this may raise, it importantly may lead to a conflict with IHL. If killings which are considered lawful under IHL must be criminally prosecuted under the ICCPR, this potentially raises issues with combatant privilege. Members of States' armed forces are safeguarded from prosecution for lawful acts of war by States other than their own,[196] and here, the ICCPR might require precisely their prosecution for what is considered lawful under IHL. Considering a deprivation of life as simultaneously lawful under IHL and unlawful under IHRL and the *ius ad bellum* is one thing, which under a paradigm of legal pluralism might be accepted.[197] But where the consequences of such pluralism go beyond State responsibility alone, and also entail *individual criminal responsibility*, this is problematic. How the Human Rights Committee will engage with this issue remains to be seen, because beyond the General Comment, there is as yet no case-law on this issue.

The HRC gives a few further indications as to the trigger for right to life investigations during armed conflict. Where it finds generally that all use of firearms by State agents must be subject to an investigation, it qualifies this requirement by limiting it to use of firearms 'outside the immediate context of an armed conflict'.[198] In other words, *within* the context of armed conflict, *not* all use of firearms needs to be investigated – if it takes place in the *imme-*

195 *Concluding observations concerning Colombia*, HRC 3 May 1997, CCPR/C/79/Add.76 [32]; Cordula Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Israel Law Review 310, 352.

196 Sandra Krähenmann, 'Protection of Prisoners in Armed Conflict' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) 367.

197 E.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, Judgment (3 February 2015), *I.C.J. Reports* 2015, p. 3 [474]. On pluralism in international law, see Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden Journal of International Law 553.

198 *General Comment No. 36* (n 41) [29].

diate context of the conflict. The word 'immediate' appears to indicate that the HRC differentiates between incidents with a direct nexus to the armed conflict, and incidents which perhaps take place against the background of a broader conflict, but which are ultimately unrelated to it.[199] By way of example, even if a State is engaged in an armed conflict, if its police force fires their weapons to prevent an armed robbery which has no nexus to the conflict, the State will be held to investigate as normal. This makes sense, as IHL does not normally regulate the use of force which does not have a nexus to the conflict.[200]

When there *is* a nexus to the conflict, the HRC further makes clear that deprivations of life which violate IHL must normally be considered to be 'arbitrary' in the sense of the ICCPR, and therefore require an investigation.[201] This includes 'targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure to apply the principles of precaution and proportionality, and the use of human shields'.[202] It is noteworthy that violations of the principles of precaution and proportionality are included. After all, under IHL such failures (when unintentional) constitute non-serious breaches, which therefore do not require a criminal response. But under the HRC's case-law, States must 'generally refrain from addressing violations of article 6 merely through administrative or disciplinary measures, and a criminal investigation is normally required'.[203] Thus, the HRC's approach here potentially leads to a divergence between IHL and the ICCPR, where under IHL an administrative investigation would suffice, but where under the ICCPR, criminal investigations would be called for.

On the second issue, that of investigations into third-party and NSAG interferences, we must again turn towards *General Comment 36*. For peacetime situations, recall that the Committee requires States to investigate, and if appropriate, prosecute '*potentially unlawful deprivations of life* (…) including allegations of excessive use of force with lethal consequences'.[204] In the context of an armed conflict, however, the Committee notably uses a different wording, and finds that States 'must also investigate alleged or suspected *violations of article 6* in situations of armed conflict in accordance with the

199 As the Committee finds in *General Comment No. 37* (n 165) [97], 'In a situation of armed conflict, the use of force during peaceful assemblies remains regulated by the rules governing law enforcement and the Covenant continues to apply'.

200 As will be explored in Chapter 9, this is also a reason to distinguish between two paradigms during armed conflict: those of 'active hostilities', and those of 'security operations'. See Daragh Murray and others, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford University Press 2016).

201 Todeschini (n 174).

202 *General Comment No. 36* (n 41) [64].

203 Ibid [27].

204 Ibid [27]. Emphasis FT. To the same effect, see *General Comment No. 31* (n 47) [8].

relevant international standards'.[205] One interpretation of the difference in wording between 'potentially unlawful deprivations of life' and 'suspected violations of article 6', is that the Committee intends for a different scope of application of the duty to investigate during armed conflicts. After all, 'unlawful deprivations of life' is a broad term which encompasses also deprivations perpetrated by private individuals. Meanwhile, 'violations of article 6' is a more legally circumscribed phrase, which indicates a violation of the ICCPR must have taken place – and it is *only States Parties* who are formally bound to the Covenant. Thus, the Committee arguably formulated a more flexible scope of States' duty to investigate during armed conflict, which may exclude deprivations of life perpetrated by armed groups. In support, the Committee moreover refers to the Minnesota Protocol, which emphasises the practical difficulties with respect to armed conflict investigations:[206]

> 'Certain situations, such as armed conflict, may pose practical challenges for the application of some aspects of the Protocol's guidance. This is particularly the case with regard to the obligation on a State, as opposed to another actor, to investigate deaths linked to armed conflict when they occur on territory the State does not control.'[207]

Whether the Committee indeed intends to provide for a difference in the scope of application of the duty to investigate third party violations outside and during armed conflict, will need to be clarified in future case-law,[208] of which there is to date none on this particular issue. For now, however, it is submitted that insofar as the duty to investigate abuses committed by NSAG's might cause normative tension with IHL, the HRC leaves room for flexible interpretation.

6.4.3 Investigative standards

When it comes to the investigative standards, the HRC as yet has not given much guidance on any difference in application during armed conflict. The interpretive use it makes of IHL will moreover likely not amount to much, because as was seen previously in this study, IHL's rules on how investigations must be conducted do not provide much concrete and specific guidance.

As a starting point for *how* States must conduct investigations during armed conflict, we must first of all recall that the duty to investigate is a *due diligence* obligation. If the exigencies of the armed conflict situation therefore preclude the State from uncovering all facts, or from for instance carrying out an

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205 *General Comment No. 36* (n 41) [64]. Emphasis FT.

206 Ibid, fn 270.

207 *Minnesota Protocol* (n 136) [20].

208 Because the Committee moreover does not make an explicit distinction between IACs and NIACs in its General Comment, there is still some scope to argue that during NIACs, the general rule of IHRL applies, but this does not seem likely.

autopsy or hearing all witnesses, this does not necessarily violate the duty to investigate. So long as the State does what it can, and therefore complies with the obligation of means, the fact that it cannot achieve all investigative aims may be accepted. This, of course, depends on a contextual assessment, where high intensity conduct of hostilities will likely preclude effective investigations on the ground to a much larger extent, than for instance an incident during peaceful occupation. This also flows from the Minnesota Protocol, which according to the HRC, must guide the conduct of investigations.[209] The level of control exercised by the State, in other words, will likely play an important role in this context.

Generally, we may therefore expect a somewhat flexible, contextual application of investigative standards during armed conflict, if the situation calls for such. Thus far, not many cases have reached the HRC where it had to consider investigations into conflict-related violations. Even when it did, it did not often provide much guidance as to the precise investigative standards applicable during armed conflict. Let us for example take a look at the case of *Sarma v Sri Lanka*, which concerned the enforced disappearance of an alleged member of the Tamil Tigers.[210] There, after finding that Sri Lanka had violated the rights to liberty and security, and the freedom from TCIDT, it ordered the State to conduct a 'thorough and effective investigation' by way of remedy.[211] What this entails, however, is not fleshed out further. In the case of *Bautista de Arellana*, also concerning forced disappearance of alleged members of an NSAG, the HRC found that administrative or disciplinary measures could not suffice as punishment, and that criminal trials had to be expedited.[212] In concluding observations concerning drone strikes by the US, it found the US had to '[c]onduct independent, impartial, prompt and effective investigations of allegations of violations of the right to life and bring to justice those responsible'.[213] We may therefore conclude that the main investigative standards apply equally during armed conflict, and that the duty to follow-up investigations by criminal prosecutions and punishment continues to apply. No further indications of precise investigative measures, however, are provided.

One standard where the HRC has provided more guidance, is on the criterion of *transparency*. This standard, according to the HRC, also applies in contexts of armed conflict. Because this is highly relevant, and moreover goes beyond what the regional human rights courts have held, I quote the Committee here in full:

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209 *Minnesota Protocol* (n 136) [20], which stipulates that 'In the context of armed conflict, the general [investigative principles] must, however, be considered in light of both the circumstances and the underlying principles governing international humanitarian law (IHL)'.

210 *Sarma v Sri Lanka* (n 112); van den Herik and Duffy (n 160) 383.

211 *Sarma v Sri Lanka* (n 112) [11].

212 *Bautista de Arellana v Colombia* (n 74) [8.2] and [8.6].

213 *Concluding observations concerning the United States of America* (n 121) [9].

> 'States parties should, in general, *disclose* the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered.'[214]

Transparency criteria therefore clearly permeate into the applicable law during armed conflict, military operations, and targeting exercises – as the Committee also found in concluding observations with respect to the US.[215] In those observations, the Committee notably found that the US ought to do so 'subject to operational security'.[216] Disclosing targeting criteria and the processes involved in identifying military targets, is certainly not common practice. This may be the reason that the HRC prefaces this list of requirements, by stating States *should* do so. This has been interpreted to mean the HRC means to develop the law here, and encourages good practice, rather than set a hard new standard.[217] Nonetheless, the findings are very interesting indeed. The HRC even goes as far as formulating a subsidiarity criterion, which asks States to show whether they have considered less harmful alternatives. Whereas it does not find explicitly States must carry out a subsidiarity test to decide whether lethal force may be used during armed conflict, this does present a first indication the Committee might be moving in this direction.[218]

All in all, the HRC's approach to investigations during armed conflict largely builds on its approach in peacetime situations. Whereas the applicability and standards of the duty to investigate can be interpreted contextually and in light of IHL, the core would appear to remain firmly in place. This means that the duty to investigate continues, also in armed conflict, to fulfil its role in ensuring Covenant rights. It can moreover be a key instrument in providing an effective remedy to victims of war. It must be noted, however, that there is a limited amount of case-law on this issue.

7 CONCLUSION

214 *General Comment No. 36* (n 41) [64], emphasis FT.
215 *Concluding observations concerning the United States of America* (n 121) [9].
216 Ibid.
217 Joseph (n 116).
218 This links up with 'capture and kill' debates, see e.g. Ryan Goodman, 'The Power to Kill or Capture Enemy Combatants' (2013) 24 European Journal of International Law 819; Michael N Schmitt, 'Wound, Capture, or Kill: A Reply to Ryan Goodman's "The Power to Kill or Capture Enemy Combatants"' (2013) 24 European Journal of International Law 855; Ryan Goodman, 'The Power to Kill or Capture Enemy Combatants: A Rejoinder to Michael N. Schmitt' (2013) 24 European Journal of International Law 863.

This Chapter showed how the duty to investigate is a crucial element of the protection afforded by the ICCPR. It embodies the 'sword-function' of human rights,[219] similar to the Genocide, Torture, and Disappearance Conventions, even though there are no explicit investigative obligations to be found in the ICCPR's provisions. The Human Rights Committee has developed the duty to investigate as a procedural layer of protection, which serves to *ensure* rights, and which provides victims and their next of kin with an effective remedy.

It was further shown that the duty to investigate primarily follows potential violations of the right to life, the freedom from torture, cruel, inhuman and degrading treatment, and forced disappearances. Nonetheless, there are some indications that the HRC views the duty to investigate as more broadly applicable and necessary for ensuring *all* rights. If a human rights abuse has taken place, it is the State within whose jurisdiction this happened, who must investigate. Thus, they must investigate not only abuses by their own agents, but also those committed by other actors. They can even be obliged to cooperate in the investigation of human rights violations outside of their jurisdiction, by other States or international investigation mechanisms.

When it comes to *how* States must conduct their investigations, it was shown that the obligation is one of due diligence. Thus, it is ultimately an obligation of means, not of result. Nonetheless, the HRC has fleshed out what this obligation entails, by formulating eight procedural standards which investigations must meet. Those are that an investigation must be: (i) launched of the State's own accord (*ex officio*); (ii) initiated promptly; and that it must furthermore be (iii) thorough, effective, and credible; (iv) independent and (v) impartial; (vi) sufficiently involve the victims or their next of kin; and further be (vii) transparent, and (viii) where appropriate followed-up by criminal accountability processes. Together, these investigative standards safeguard that States genuinely do what they can to unearth the truth of what happened, hold to account those responsible, and change their practices if relevant. Further, it ensures that victims, and society at large, are sufficiently involved, and able to ascertain whether the investigations are carried out as they should be.

When ICCPR rights are potentially violated during armed conflict, this equally requires States to investigate. There is some scope here for a contextual approach which takes account of the context of armed conflict, and which interprets the ICCPR in light of applicable IHL, as well as other rules of international law. For cases with a direct nexus to the conflict, the scope of application of the duty to investigate may be adjusted somewhat, so that investigations into IHL-compliant uses of force are not necessary. This does not however, in

219 Tulkens (n 20); Krešimir Kamber, *Prosecuting Human Rights Offences. Rethinking the Sword Function of Human Rights Law* (Brill 2017); Huneeus (n 27); Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights – Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing 2020).

the view of the Committee, apply to aggressor States. According to the HRC, they cannot profit from any degree of leniency under the right to life, and in fact, any use of force resulting in loss of life will constitute a violation of the right to life if it is in violation of the *ius ad bellum*.

When it comes to *how* investigations must be conducted, there simply is not much guidance in the case-law. The HRC has formulated a number of guiding principles in General Comments, and there generally appears to be some scope for a flexible and contextual application of investigative requirements, in light of the Minnesota Protocol. How this will be applied when or if more cases reach the Committee, must be awaited. A point on which the Committee has provided more guidance, is on the standard of transparency. There, the Committee appears to push the development of the law, in setting new standards for openness in the conduct of military operations.

The following Chapters explore to what extent the Inter-American and European human rights systems have developed investigative requirements, both in and outside of armed conflict.

6 The duty to investigate under the inter-American system of human rights protection

1 INTRODUCTION

This Chapter moves from the global level, to the regional. Having seen how the duty to investigate is conceptualised and applied under the ICCPR, the focus now shifts to the Inter-American system of human rights protection. As will be shown, the American Convention on Human Rights, and the interpretation thereof by the Inter-American Court of, and Commission on, Human Rights (IACtHR or Court, and IACmHR or Commission, respectively), provide a rich source for investigative obligations, also during armed conflict.

Like the ICCPR, the ACHR does not contain any express obligation to investigate. Yet, the Inter-American system is a front-runner in the context of investigative obligations. From its very first contentious judgment in *Velásquez Rodríguez v Honduras*, the Inter-American Court has interpreted the ACHR to include a duty to investigate violations of the Convention.[1] Moreover, it has held that such investigations must be followed-up by criminal prosecutions, trials and punishment where appropriate.[2] Since this first judgment, the Court has developed a rich jurisprudence, of which the majority pertains to the duty to investigate.[3] This seems to have ignited a trend in international practice. Beyond the Human Rights Committee, discussed in the previous Chapter, the European and African human rights systems have also followed in the IACtHR's footsteps.[4]

What has been a truly unique feature of the Inter-American system, is the way the Court supervises its judgments. The Court not only orders States to conduct effective investigations as part of its reparations orders, it moreover

1 *Velásquez Rodríguez v Honduras* (Merits) Inter-American Court of Human Rights Series C No 4 (29 July 1988) [166].

2 Ibid.

3 Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford University Press 2011) 648–649.

4 The African Commission in *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, ACmHPR 1995, no. 74/92; *Zimbabwe NGO Human Rights Forum v Zimbabwe*, ACmHPR 2006, no. 245/02 [153]. The European Court for the first time in *McCann and Others v the United Kingdom*, ECtHR 27 September 1995, Appl No 18984/91 [161]. Further, see Chapter 7.

oversees these investigations as they unfold.[5] As will be shown, what drives the Inter-American Court in this respect, is the aim of preventing impunity. This has put a strong emphasis on criminal law measures to remedy violations of the Convention, and the jurisprudence therefore almost invariably refers to a duty to *investigate, prosecute, and punish*. Finally, the prevalence of armed conflict on the American continent, and the serious human rights violations committed during these conflicts, have impacted the direction of the IACtHR's case-law. All these elements, as will be seen in this Chapter, have determined how the duty to investigate is shaped in the Inter-American human rights system.

In terms of the research question, this Chapter seeks to answer *whether* States are obliged to investigate human rights violations under the ACHR, and if so, what the *scope of application* and *contents* of that obligation are. In particular, this question is examined for situations to which IHL also applies, in other words, those of armed conflict and occupation.

Section 2 of this Chapter starts out by explaining the context of the Inter-American system, providing the backdrop for the Court's case-law and informing the following discussion on its interpretation of what human rights entail, and how compliance therewith ought to be supervised. Further, it will be briefly explained how the armed conflicts that engulfed the American continent for a major part of the second half of the 20th Century have shaped the Court's case-law. Section 3 subsequently explores the foundations and aims of the duty to investigate, and sets out how the Court has justified reading investigative obligations into the ACHR. The precise scope of application of investigative obligations is subsequently addressed (§4), before moving on to the standards which guide investigations (§5). Finally, section 6 addresses the specific issue of armed conflict, and assesses whether the loss of control and the applicability of IHL alter in any way the application of the duty to investigate.

2 The Inter-American context

2.1 Endemic human rights abuses and the dawn of the fight against impunity

As is well-known, the development of a branch of international law concerned with the protection of human rights, primarily started after the events of World War II. The atrocities perpetrated by the Axis-powers provided the backdrop,

5 Alexandra Huneeus, 'International Criminal Law By Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 The American Journal of International Law 1, 11. Further, see below.

and impetus, for the international protection of individuals against the State. In the Americas, the international protection of human rights also took root by the end of the 1940s, with the establishment of the Organization of American States (OAS) in 1948,[6] and the adoption of the American Declaration of the Rights and Duties of Man in the same year,[7] preceding even the Universal Declaration by a few months.[8]

In spite of these legal developments, early practice proved much less favourable towards human rights. It was against the background of the most serious human rights atrocities by dictatorial regimes, that the Inter-American Commission on Human Rights started its work in 1959, supervising the OAS Charter and the American Declaration, and that the American Convention on Human Rights and the Inter-American Court of Human Rights first came into being some twenty years later. In fact, State-led human rights atrocities were endemic, and States even cooperated internationally to do so. A powerful illustration is 'Operation Condor',[9] a textbook example of State terror in which a number of States cooperated pursuant to a common 'national security doctrine', and in which 'State security agencies were let loose against the people at a transborder level in a coordinated manner by (…) dictatorial Governments' in order to combat 'subversive elements' within their societies.[10] Unsurprisingly then, the first contentious case to be handed down by the Court dealt with reigning impunity for an enforced disappearance, and the duty to investigate, prosecute and punish those responsible.[11] The *Velásquez Rodríguez v Honduras* case turned out to be the first of many on the subject of State-sponsored or State-led abuses and the lack of adequate investigations and the corresponding impunity, and it has proved a primary pillar within the Inter-American case-law.

The context of human rights abuses and the complete lack of State action to hold those responsible to account, has proved to be decisive in shaping the Court's case-law. The Court has taken it on itself to exercise what Alexandra

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6 Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 1609 UNTS 119 (hereinafter: OAS Charter); see in particular art 3 under l) of the OAS Charter.

7 American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992).

8 Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd edn, Cambridge University Press 2016) 263. Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

9 Similarly, see Hanna Bosdriesz, *Furthering the Fight against Impunity in Latin America – The Contributions of the Inter-American Court of Human Rights to Domestic Accountability Processes* (dissertation Leiden, Meijers Instituut 2019) 43–6; Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (Oxford University Press 2011).

10 See e.g. *Goiburú et al. v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 153 (22 September 2006) [61]-[62].

11 *Velásquez Rodríguez v Honduras* (n 1).

Huneeus has dubbed a 'quasi-criminal jurisdiction'[12] in order to end the impunity that has been endemic in the Americas both during and following the reign of dictatorial regimes, often in the context of the various past and present armed conflicts that have engulfed the continent. There is therefore also a clear transitional justice element to the Court's work, insofar as it assists States and societies in, or forces them to, acknowledge, make public and deal with their past.[13] In this context it has also had regard to the 'right to truth', for both next of kin of victims, and societies as a whole.[14] Moreover, the Court has repeatedly emphasised the importance of administering justice and ending impunity – which it defines as 'the overall lack of investigation, arrest, prosecution and conviction of those responsible for violations of the rights protected by the American Convention'.[15] Impunity 'promotes the chronic repetition of the human rights violations and the total defenselessness of the victims and their next of kin',[16] which is why the Inter-American system devotes such efforts to preventing it.

The context of rampant impunity in the Americas has led the Court to introduce an obligation for States not merely to respect the rights enshrined in the Convention, but also to investigate, prosecute and punish violations thereof. Crucially, many cases concerning the duty to investigate have sprung from States' unwillingness to investigate and prosecute violations, or their active attempts to hinder such proceedings through amnesties, prescriptions, and other means.[17] Summarising this position perfectly is the Court's consideration in the case of the *Massacres of El Mozote and Nearby Places v El Salvador*, concerning El Salvador's 'scorched earth' tactics in fighting its civil

12 Huneeus (n 5). Also discussing this subject, see e.g. Brian D Tittemore, 'Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes under International Law' (2006) 12 Southwestern Journal of Law & Trade in the Americas 429.

13 James A Sweeney, 'The Elusive Right To Truth in Transitional Human Rights Jurisprudence' (2018) 67 International and Comparative Law Quarterly 353; The Due Process of Law Foundation (ed), *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America* (Washington, DC?: Due Process of Law Foundation 2007).

14 The IACmHR did so in its *Annual Report of the Inter-American Commission on Human Rights 1985-1986*, OEA/Ser.L/V/II.68 doc. 8 rev. 1 [192]-[193], accessible at www.cidh.oas.org/annualrep/85.86eng/toc.htm. The Court held similarly in e.g. *Myrna Mack Chang v Guatemala* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 101 (25 November 2003) [274].

15 *Mapiripán Massacre v Colombia* (Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No 134 (15 September 2005) [237]; *Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 124 (15 June 2005) [203]; *the Serrano Cruz Sisters v El Salvador* (Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No 120 (1 March 2005) [170]; *Gómez Paquiyauri Brothers v Peru* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 110 (8 July 2004) [148].

16 Ibid. See also, formulated slightly differently, *Myrna Mack Chang v Guatemala* (n 14) [156]; Burgorgue-Larsen and Úbeda de Torres (n 3) 347.

17 See Tittemore (n 12).

war. This entailed targeting armed groups' life-lines: the civilian population which supported and fed them. In brief, it meant murdering civilians, destroying all their means of subsistence, and forcibly displacing them. The Court held

> 'the obligation to investigate, as a fundamental and conditioning element for the protection of certain violated rights, acquires a particular and determining importance and intensity in view of the severity of the crimes committed and the nature of the rights violated, as in cases of grave human rights violations that occur as part of a systematic pattern or practice applied or tolerated by the State or in contexts of massive, systematic or generalized attacks on any sector of the population, because the urgent need to prevent the repetition of such events depends, to a great extent, on avoiding their impunity and meeting the expectations of the victims and society as a whole to know the truth about what happened. The elimination of impunity, by all legal means available, is fundamental for the eradication of extrajudicial executions, torture and other grave human rights violations.'[18]

Thus, the duty to investigate, prosecute, and punish, takes up a central role in preventing human rights abuses, in remedying them, and in achieving justice. States must carry out this obligation, under the supervision of the Court. Bringing to light the facts, and establishing the criminal responsibility of perpetrators, must be done at the national level.[19] At the same time, the severity of the human rights abuses, their widespread nature, and the high level involvement of States therein, have led the Court to develop strong oversight over such processes. Its orders for reparations are extensive, include the duty to investigate (further), and the Court monitors the execution of its judgments.[20] The Court therefore does not shy away from ordering States to conduct investigations or reopen criminal proceedings,[21] and to supervise the way State authorities give effect to these judgments.

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18 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 252 (25 October 2012) [244], references omitted.

19 *Caesar v Trinidad and Tobago* (Merits, Reparations, and Costs), Inter-American Court of Human Rights Series C No 123 (11 March 2005) [81], and already in *Velásquez Rodríguez v Honduras* (n 1) [134].

20 See e.g. Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press 2013) 299–334; Burgorgue-Larsen and Úbeda de Torres (n 3) 171–190.

21 See e.g. *Almonacid Arellano v Chile* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 154 (26 September 2006) [154]; *Moiwana Community v Suriname* (n 15) [207]; and for the first time in *El Amparo v Venezuela* (Reparations and Costs) Inter-American Court of Human Rights Series C No 28 (14 September 1996) [64(4)-(5)]. See also Huneeus (n 5) 8.

2.2 The prevalence of civil wars and the interaction with international humanitarian law

Another, related, feature of the context on the American continent, has been the prevalence of civil wars, or non-international armed conflicts (NIACs). A number of States have struggled, and still struggle, with conflicts with non-State armed groups, paramilitary groups and organised criminal groups in a context which goes well beyond mere 'internal disturbances'. They amount to armed conflicts, which give rise to application of IHL.[22] These struggles and their aftermath have gone hand in hand with new human rights abuses, and have led to many cases before the Commission and Court – so much so, that they have to an extent shaped the case-law of these institutions. This has arguably been the reason why the Inter-American institutions frequently reference IHL, and why the Inter-American treaty bodies have proved much more open to taking rules of IHL into account when interpreting and applying the ACHR when compared to, for instance, the European Court of Human Rights.[23] In the words of former President of the Inter-American Court Cecilia Medina Quiroga, '[f]or the Court, the problem was not, for example, the length of the trials before the national court, as was frequently the case in some European States, but the absolute lack of investigation that amounted to gross human rights violations or the connivance between the authors of the violations, the rulers of the country and non-independent judiciaries'.[24]

The conflicts in Colombia, Peru, and Guatemala lie at the basis of many cases before the Court.[25] The Commission has had regard to IHL in other contexts as well, for instance as early as the end of the 1970s in its country reports.[26] Because of the high prevalence of conflict-related cases, the law

22 See Common Articles 2 and 3 to the 1949 Geneva Conventions; see also Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, '"War" in the Jurisprudence of the Inter-American Court of Human Rights' (2011) 33 Human Rights Quarterly 148, 151–156.

23 Larissa van den Herik and Helen Duffy, 'Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches' in Carla Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill Nijhoff 2017).

24 Cecilia Medina Quiroga, 'The Inter-American Court of Human Rights 35 Years' (2015) 33 Netherlands Quarterly of Human Rights 118. See also Huneeus (n 5) 5: '[w]hereas the ECHR came of age overseeing a group of well-functioning democracies committed to the rule of law, the Inter-American Court was, from its first contentious case, confronted with mass, state-sponsored violations of fundamental rights'.

25 See Burgorgue-Larsen and Úbeda de Torres (n 22) 153, footnote 18. These are not the only States who have been engulfed in non-international armed conflict, however, as for instance El Salvador was from 1980-1991; see *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18).

26 IACHR 'Chapter II, Right to Life', *Report on the Situation of Human Rights in Nicaragua,* 17 November 1978 and IACHR '*Report on the Situation of Human Rights in Argentina*, 11 April 1980 (both accessible through: www.cidh.oas.org); see also Christina M Cerna, 'The History of the Inter-American System's Jurisprudence as Regards Situations of Armed Conflict'

of armed conflict and the role for human rights during conflicts have taken up a prominent role in the Inter-American case-law. The major role of State authorities in the atrocities committed and their lack of action both in preventing and repressing such conduct, has led the Court to introduce duties of investigation and punishment in the Inter-American human rights system. This extends equally to situations of armed conflict, to which IHL applies. The fight against impunity continues, also with regard to human rights abuses committed during armed conflict. As is explored further below, the Inter-American Court has taken up a frontrunner role in striking down amnesties for abuses committed during armed conflict, and is therefore adamant that impunity is never acceptable.

The above context is crucial to understanding how and why the Inter-American institutions have shaped their interpretation of the American Convention on Human Rights. Both the context of impunity and that of armed conflict will feature again on a number of occasions below, as will the Court's active role in ordering specific reparation measures and its supervision thereof.

3 LEGAL BASIS, RATIONALE AND CONSEQUENCES OF THE DUTY TO INVESTIGATE

3.1 Introduction

Against the above background, the Chapter now gradually zooms in further on the specifics of investigative obligations under the Inter-American human rights system. The present section explores the legal basis, underlying rationale, and legal consequences of the duty to investigate, before the subsequent sections set out in detail the scope of application and contents of the obligation itself.

Despite its prominent role in the Inter-American human rights system, the duty to investigate, prosecute and punish does not have an explicit basis in the ACHR, nor in the American Declaration, or the OAS Charter. As was mentioned above, it was the Inter-American treaty bodies who have introduced the duty to the system, even finding it 'evident' that such a duty exists.[27] This section explores further *how* the Commission and Court have incorporated duties of investigation in the system, as well as the rationales for reading investigative obligations into the ACHR – which as will be shown is closely related to the context of impunity. Finally, section 3.4 addresses the legal status

(2011) 2 Journal of International Humanitarian Legal Studies 3; van den Herik and Duffy (n 23).

27 See e.g. *Gelman v Uruguay* (Merits and Reparations) Inter-American Court of Human Rights Series C No 221 (24 February 2011) [188].

of the duty within the normative hierarchy of the system, and the consequences thereof for domestic practice and legislation in contravention with the duty to investigate – in particular instruments perceived to perpetuate impunity, such as amnesty laws and statutes of limitations.

3.2 Legal basis for the duty to investigate under the ACHR

Because the duty to investigate is not explicitly included in the ACHR, it is all the more important to determine its precise legal basis in the Convention. The Court, throughout its history, has trodden slightly diverging paths in this regard. It has found (i) that the general duty to ensure all rights in the ACHR requires States to implement human rights, *inter alia*, through the setting up of an investigative machinery which must be put into use if a violation occurs;[28] (ii) that the individual rights of victims, notably the procedural rights to a fair trial and to judicial protection, include that a material violation is investigated; and (iii) finally that to provide effective *reparation* for a violation, States must investigate and remedy it.[29] The legal basis for the duty to investigate, is therefore plural.

Firstly, the Inter-American Court has held that the ACHR includes a duty to investigate violations right from its very first contentious case, the case of *Velásquez Rodríguez*. This case concerned an instance of enforced disappearance, against the background of a systemic practice of disappearances in Honduras. The Court held that Article 1(1)'s general obligation to 'ensure' ACHR rights, coupled with the substantive rights which are violated by a disappearance, together require States to investigate such violations. The Court concluded on this basis that the duty to ensure the rights to life, physical integrity and liberty

> 'implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate, and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.'[30]

Thus, the general obligation to implement the ACHR into the domestic legal order includes a duty to set up government in a human rights compliant way,

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28 *Santo Domingo Massacre v Colombia* (Preliminary Objections, Merits and Reparations) Inter-American Court of Human Rights Series C No 259 (30 November 2012) [189].

29 For an in-depth discussion, see Bosdriesz (n 9) 46–59.

30 *Velásquez Rodríguez v Honduras* (n 1) [166].

which in turn must include a machinery to investigate *any violation* of the ACHR. The Court emphasises two points: the duty to investigate, firstly, is a State obligation, which secondly attaches to all violations. In later case-law, the Court seems to have reconsidered both points – on the one hand limiting the scope of the duty to investigate to certain violations of the ACHR only,[31] and on the other shifting the emphasis to the procedural rights of victims, rather than merely duties for the State as such.[32]

Secondly, as Hanna Bosdriesz explains, the Court has later increasingly emphasised individuals' *right* to an investigation under the procedural rights to a fair trial (Article 8) and to an effective remedy for human rights violations (Article 25), rather than the State *duty*.[33] In *Blake v Guatemala*, this resulted in a finding that victims' next of kin have the *right* to an effective investigation, and the prosecution and punishment of perpetrators, as well as adequate compensation.[34] Thus, the individual procedural rights of victims were operationalised to include individual rights to justice, which in turn entail an investigation.[35]

How the duty to investigate as an individual procedural right relates to the general duty under Article 1(1) in conjunction with substantive rights, is not entirely clear from the Court's case-law. Whereas in certain cases it appeared to consider the duty to investigate under *both* the positive obligation to effectively ensure all rights, *and* the procedural right to justice, later case-law appears to shift more and more towards the individual procedural rights. Thus, in the case of the *Mapiripán Massacre v Colombia* of 2005, the Court considered the duty to investigate both as an individual procedural right,[36] and as deriving from Article 1(1), before ultimately concluding that

> 'the victims' rights to personal liberty, to humane treatment and to life (…), are aggravated as a consequence of non-fulfillment of the duty to provide protection and of the duty to investigate the facts, as a consequence of the lack of effective judicial mechanisms to this end and to punish all those responsible for the Mapi-

31 E.g. *Goiburú v Paraguay* (n 10) [88].

32 Huneeus (n 5) 8. With regard to shifting duties into rights in the context of IHL, see also Conor McCarthy, 'Human Rights and the Laws of War under the American Convention on Human Rights' (2008) 6 European Human Rights Law Review 762, 779.

33 *Genie-Lacayo v Nicaragua* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 30 (29 January 1997). More extensively, see Bosdriesz (n 9) 55–9.

34 *Blake v Guatemala* (Merits) Inter-American Court of Human Rights Series C No 36 (24 January 1998) [96]-[97]. More extensively, see Bosdriesz (n 9) 55–9.

35 Further, see Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford University Press 2009).

36 *Mapiripán Massacre v Colombia* (n 15) [195] and [233], referencing further *Case of the Moiwana Community* (n 15) [142]; *Case of the Serrano Cruz Sisters* (Merits, Reparations and Costs) (n 15) [76], and *Case of the 19 Tradesmen* (Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No 109 (5 July 2004) [194].

> ripán Massacre. Therefore, the State has violated Articles 8(1) and 25 of the Convention, in combination with Article 1(1) of that same treaty, to the detriment of the next of kin of the victims of the instant case.'[37]

Since then, however, the dominant approach has been to consider the duty to investigate under the procedural rights alone.[38] Thus, in *Goiburú v Paraguay*, the Court found that it ought to assess the 'obligation to protect the rights to life, humane treatment and personal liberty by means of a serious, complete and effective investigation into the facts' under Articles 8 and 25, rather than under the substantive rights at issue.[39]

The most notable distinction between grounding the duty in the duty to ensure substantive rights on the one hand or the right to due process and an effective remedy on the other, is whether the investigative requirements imposed on States are *individual procedural rights* conferred on victims and their next of kin, or positive State obligations in order to render effective the protection of for instance the right to life only. Discussion on this subject is ongoing.[40] The exact legal basis for the duty to investigate can prove particularly relevant in cases where the material event giving rise to the duty to investigate, an extrajudicial killing for example, falls outside the temporal scope of application of the ACHR for the State involved.[41] As is discussed further in section 4.4, even if in such cases the killing itself is not subject to the jurisdiction of the Court, it may nevertheless assess whether the State has conducted an effective investigation into the killing. But whether it can do so from a substantive right perspective or from the perspective of a procedural right to a remedy and due process only, can make the difference between a finding of a violation of (the procedural limb of) the right to life, or the rights to fair trial and an effective remedy.[42] This distinction could prove relevant for next of kin for whom the finding of a violation of the right to life, even if in its procedural aspect only, may do more justice to the loss of their loved one, and further may prove consequential for reparation orders both regarding compensation and other forms of satisfaction.

Thirdly and finally, the Inter-American Court has also regularly ordered States to conduct investigations as a form of reparation.[43] This is a noteworthy

37 *Mapiripán Massacre v Colombia* (n 15) [241].
38 Among many other authorities, see *Santo Domingo Massacre v Colombia* (n 28) [128]-[173].
39 *Goiburú v Paraguay* (n 10) [90].
40 Burgorgue-Larsen and Úbeda de Torres (n 3) 353–354.
41 For an example, see *Blake v Guatemala* (n 34).
42 Ibid.
43 When using the IACHR Project database, the 'Investigate, Prosecute and Punish Those Responsible' reparation renders 114 judgments ordering such reparations (see https://iachr.lls.edu/advanced-search, last accessed 15 July 2021). By way of example, see for the first time in 1996 in *El Amparo v Venezuela* (n 21) [64(4)-(5)]; and e.g. *Mapiripán Massacre v Colombia* (n 15) [295]-[300], especially [298]-[299]. Huneeus (n 5) 5.

feature that sets the system apart from for instance the European system, as will be seen in Chapter 7. In the Inter-American system, the Court does not shy away from setting out in great detail what type of reparation is required,[44] for current purposes most importantly to conduct investigations, and it supervises the execution of these reparation orders regularly. In fact, it does so even whilst criminal investigations and proceedings in the States in question are still unfolding, assessing whether they meet Convention standards.[45]

The duty to investigate as a form of reparation for a violation is distinct from the other two considered above, because its legal basis is different. Whereas the first two are primary obligations under the Inter-American Court's interpretation of the ACHR, the obligation to provide reparation is a secondary obligation under international law which arises as a consequence to an internationally wrongful act.[46] A State who has committed an internationally wrongful act must, under international law, provide guarantees of non-repetition, and provide reparation for the breach.[47] According to the Court, such reparation must often include investigations into a breach.[48]

In sum, the Inter-American Court has grounded the duty to investigate in three separate though connected, legal bases. The duty to investigate constitutes a primary duty under the ACHR under both a combination of Article 1(1) with substantive rights, as well as under the procedural rights to a fair trial and judicial protection. Further, it forms part of the secondary obligation to provide reparations for violations of the Convention.

3.3 Rationale of the duty to investigate under the ACHR

Now that we know what the sources for the duty to investigate are, we may consider *why* investigations are required. In line with the multiplicity of

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44 For an example, see again the *Mapiripán Massacre v Colombia* case (n 15), where in [299] the Court sets out how Colombia must investigate the massacre: 'To fulfill its obligation to investigate and punish those responsible in the instant case, Colombia must: a) remove all *de facto* and *de jure* obstacles that maintain impunity; b) use all available means to expedite the investigation and the judicial proceeding; and c) provide security guarantees to the victims, investigators, witnesses, human rights advocates, court employees, public prosecutors and other participants in the judicial process, as well as former and current inhabitants of Mapiripán.'

45 See also Huneeus (n 5) 11.

46 Compare Thordis Ingadottir, 'The Role of the ICJ in the Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level' (2014) 47 Israel Law Review 285.

47 ARSIWA, arts 30 and 31.

48 *Gutiérrez-Soler v Colombia* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 132 (12 September 2005).

sources, there are also multiple rationales for the duty to investigate. We can distinguish between a collective and individual element.

On the collective level, the duty to investigate serves multiple purposes. First, there is the interest of setting up a system that is capable of effectively protecting the rights enshrined in the ACHR, which requires certain institutions and procedures – in other words the procedural layer of human rights protection.[49] The rationale is therefore to render rights effective,[50] with the argument being that the prohibition of for instance extrajudicial executions would be rendered illusory when the occurrence of such executions were left without consequences. In addition, the fight against impunity and the right to truth have collective elements to them, insofar as they aim not merely to safeguard the individual victim's rights, but also society's interest in a human rights-compliant State that is governed by the rule of law, and getting to grips with human rights violated committed in the past, even by previous regimes.[51] As the Court has stressed, *the most important element* is to clarify whether State authorities were involved in an abuse, or whether they have contributed to impunity for such an abuse.[52] This general rationale of effectuating the rights enshrined in the ACHR by implementing it, in the form of setting up an investigative machinery, is highly similar to what was concluded under IHL. There, the general duty to ensure respect for IHL equally requires States to set up a supervisory machinery which safeguards the integrity of the system.[53]

On the individual level, victims and their next of kin have a right to reparation where their rights have been violated – which when the violation was sufficiently serious implies the criminal prosecution and punishment of those responsible. Investigations in this sense are a form of reparation in

49 Malu P Beijer, *The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations* (Intersentia 2017) 55 – who calls this the 'organisational dimension of fundamental rights protection'. For a clear reasoning on this point, see *Gelman v Uruguay* (n 27) [189]. NB: in the English version, there appears to be an interpreting error insofar as art 1(1) ACHR would imply 'the *right* of the States Parties to organize all of the governmental apparatus, and in general, all of the structures through which the exercise of public power is expressed, in a way such that they are capable of legally guaranteeing the free and full exercise of human rights' [emphasis FT], as in the Spanish text the Court does not mention a *right*, but a *duty* (*el deber*). This is undoubtedly the preferred phrasing, as the right for States to organise their governmental apparatus clearly stems from their sovereignty, whereas the duty to do so in a human rights-compliant manner stems from human rights obligations under the ACHR.

50 See Burgorgue-Larsen and Úbeda de Torres (n 3) 342, referencing 'Pueblo Bello Massacre' v Colombia (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 140 (31 January 2006) [120].

51 Generally speaking, such an obligation could be said to flow from art 1(1) of the ACHR, as it requires States to 'ensure' the rights enshrined in the Convention, and therefore to take positive action. In the three-pronged perspective of 'respect, protect, fulfil', this corresponds to the duty to fulfil rights.

52 *Santo Domingo Massacre v Colombia* (n 28) [156].

53 See Chapter 3, §2.

themselves. In addition, they form part of the procedural rights to a fair trial and an effective judicial remedy for a violation of their rights. An independent and impartial investigation into serious human rights violations constitutes such an effective remedy, and thereby forms a primary – if accessory – obligation under the ACHR. For individuals to have any meaningful recourse to judicial remedies, States must investigate *ex officio* the facts of the type of cases involved, especially where State forces have been involved in the violations themselves and the State therefore holds all the information. Any effective way for individuals to address violations of their rights then necessitates investigations. Moreover, many violations require a criminal law response from the State and must be prosecuted because such criminal proceedings constitute effective remedies for victims. Thus, the individual interest in justice and a remedy equally underlies the duty to investigate.

As this short incursion into the rationales of the duty illustrates, investigations simultaneously serve prospective and retrospective purposes. Effective criminal investigations, prosecutions, and convictions are expected to have a deterrent effect. This applies both for the specific perpetrator who will not be in a position to reoffend for as long as he or she is incarcerated, as well as the general deterrent effect of knowing certain conduct will lead to punishment.[54] The retrospective aims of the duty to investigate have more to do with retribution, and individual and collective justice for the wrongs committed. The individual right to a remedy as enshrined in Article 25 provides victims with the right to a domestic procedure to obtain justice for past violations, to address human rights violations in a meaningful way and to gain reparation for such violations. Justice and reparation, in the very serious cases in question, requires more than simply the finding of a violation or monetary compensation, and necessarily implies an *ex officio* investigation by the State, which must normally be of a criminal law nature and must moreover lead to adequate punishment.

The fight against impunity combines these prospective and retrospective rationales. According to the Court, impunity is both a very strong indicator and incentive for reoffending, and effective criminal deterrence is crucial to prevent these serious and systemic abuses.[55] At the same time, eradicating impunity is a full-fledged purpose in itself insofar as it represents the quest for justice for human rights atrocities. Because as was described in section 2 human rights atrocities with State-involvement were so widespread in the Americas, the fight against impunity has naturally become a major factor in

54 Richard Carver and Lisa Handley (eds), *Does Torture Prevention Work?* (Liverpool University Press 2017).

55 *Mapiripán Massacre v Colombia* (n 15) [237], citing further case-law.

the case-law and has largely shaped the 'quasi-criminal jurisdiction' or 'sword-function of human rights'[56] as interpreted and applied by the Court.

A final way of looking at the rationales for the duty to investigate is to assess them in light of the more general aims of the Inter-American system of human rights protection. Ariel Dulitzky has categorised these aims as (i) protecting individuals, (ii) promoting awareness of the human rights situation, (iii) creating space for democratic dialogue, (iv) legitimising actors (giving a voice to otherwise disenfranchised, primarily very poor, people), and (v) building a culture of human rights.[57] Having these broader aims in mind, reading the duty to investigate into the Convention protections appears to fit well, at least within four of the five aims mentioned here. Protecting individuals, giving legitimacy to their needs and giving them a voice, and garnering awareness of the human rights situation can all be achieved through investigations. Including next of kin of victims in the investigation stages and during subsequent proceedings legitimises their interests and gives them a formal place within the legal system, whilst outlawing impunity protects them from reprisals as well as future repetition of any atrocity crimes. Similarly, investigations bringing to light how atrocities came about and who was responsible, will shine a light on the human rights situation within a particular State. All of this falls within the broader category of building a culture of human rights, because the procedural system of human rights protection that is required to effectively investigate any serious violations is an important prerequisite for a formalised culture of human rights protection. This is even more so for ending impunity, because the way impunity undermines the rule of law, putting perpetrators of atrocities beyond the reach of the law, is the opposite of a human rights culture.

The clearest example of this is the follow-up to the case of the *19 Tradesmen v Colombia*.[58] In this case, in which the victims for whom the case was named were murdered, the Court found multiple violations and ordered the investigation of these murders. When fifteen judicial officers effectuated this judgment by mounting an investigation, they themselves were murdered for doing so. The murder of the judicial officers itself later also reached the Court, in the case of *La Rochela Massacre v Colombia*.[59] As this so clearly illustrates, if judicial officers who attempt to address serious human rights violations and

56 For this terminology, characterising the human rights obligation to employ criminal law, see F Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577, 577–578, and crediting Christine van den Wyngaert for the term.

57 Ariel E Dulitzky, 'The Inter-American Commission on Human Rights', in Due Process of Law Foundation (n 13) 130–136.

58 *Case of the 19 Tradesmen v Colombia* (n 36); see also Bosdriesz (n 9) 68–9.

59 *La Rochela Massacre v Colombia* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 163 (11 May 2007).

end impunity are themselves massacred, this is the ultimate form of perpetuating impunity and the break-down of the rule of law. If one is to 'build a human rights culture', investigating violations and preventing impunity, are therefore paramount.

3.4 Legal consequences on the international and national levels

3.4.1 Introduction

As is now abundantly clear, the fight against impunity is an overarching driving force in the Inter-American case-law, and the duty to investigate takes up a primary role in this respect. Beyond developing a powerful case-law which requires States to investigate violations of the ACHR, this has also led the Inter-American Court to assert two important legal consequences of the duty to investigate, which are as far-reaching as they are controversial. Firstly, the Court has asserted that the duty to investigate, and the right to access to justice, are norms with a *ius cogens* status. Secondly, it has held domestic law in contravention of the duty to investigate, to be *without legal effect*. Both assertions go beyond what other human rights regimes stipulate in this respect, and are therefore worth highlighting.

3.4.2 Ius cogens and the ACHR

The Inter-American Court has asserted the *ius cogens* status of many rights in the ACHR. It has found the prohibitions of torture, inhuman treatment,[60] extrajudicial executions and crimes against humanity[61] to constitute *ius cogens*, as well as the principle of equality and non-discrimination[62] and several other

60 *Fermín Ramírez v Guatemala* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 126 (20 June 2005) [117]; *Gómez Paquiyauri Brothers v Peru* (n 15) [112].

61 *Almonacid Arellano v Chile* (n 21) [99]. It also found the non-applicability of statutes of limitation for these crimes to form part of *ius cogens*, see [153].

62 Antônio Augusto Cançado Trindade, 'Enforced Disappearances of Persons as a Violation of Jus Cogens: The Contribution of the Jurisprudence of the Inter-American Court of Human Rights' (2012) 81 Nordic Journal of International Law 507, 528. See *Cantoral Benavides v Peru* (Merits), Inter-American Court of Human Rights Series C No 69 (18 August 2000), *Maritza Urrutia v Guatemala* (Merits, Reparations and Costs) Inter-American Court of Human Rights Cases Series C No 103 (27 November 2003), *Gómez Gómez Paquiyauri Brothers v Peru* (n 15), and *Tibi v Ecuador* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 114 (7 September 2004), *Juridical Condition and Rights of Undocumented Migrants* (Advisory Opinion) Inter-American Court of Human Rights Series A No 18 (17 September 2003).

rights.[63] Crucially, it has also found expressly that the duty to investigate cases of enforced disappearance, is also part of *ius cogens*.[64] In the reasoning of the Court, this likely extends also to the duty to investigate other serious abuses. It has found, for instance in the case of *the Massacres of El Mozote*, that the lack of investigation into extrajudicial executions can in and of itself violate the next of kin's right not to be treated inhumanely.[65] Because the right to be treated humanely is itself, according to the Court, of a *ius cogens* status, then a failure to investigate constitutes a breach of a *ius cogens* norm – which arguably elevates the duty to investigate itself also to a *ius cogens* level – similar to the Court's express findings in the context of disappearances.

Further, the Court has found the right to access to justice to be of a peremptory nature. In *Goiburú v Paraguay*, the Court held in the context of grave human rights violations, that:

> 'Access to justice is a peremptory norm of international law and, as such, gives rise to obligations *erga omnes* for the States to adopt all necessary measures to ensure that such violations do not remain unpunished, either by exercising their jurisdiction to apply their domestic law and international law to prosecute and, when applicable, punish those responsible, or by collaborating with other States that do so or attempt to do so.'[66]

Thus, in the Inter-American Court's view, many human rights form part of *ius cogens*, as does, in a number of cases, the right to access to justice for violations of those rights, and the duty to investigate such violations.[67] Without passing judgment on the Court's assertion of the *ius cogens* status of these

63 Ignacio Alvarez-Rio and Diana Contreras-Garduno, 'A Barren Effort? The Jurisprudence of the Inter-American Court of Human Rights on Jus Cogens' in Yves Haeck, B Burbano-Herrera and Diana Contreras-Garduno (eds), *The Realization of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwaak* (Intersentia 2013) 169; they even state the Court has identified ius cogens norms in more than ten separate rights.

64 *Goiburú v Paraguay* (n 31) [84]; *Gomes Lund et al. (Guerrilha do Araguaia) v Brazil* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 219 (24 November 2010) [137], *Gelman v Uruguay* (n 27) [183]; see also Cançado Trindade (n 62) 535.

65 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [201]; *Las Dos Erres Massacre v Guatemala* (Preliminary Objections, Merits, Reparations, and Costs), Inter-American Court of Human Rights Series C No 211 (24 November 2009) [137ff] (here in relation to enforced disappearances).

66 *Goiburú v Paraguay* (n 31) [131].

67 Some even read the case-law of the Court as recognizing the *ius cogens* status of the prohibition of crimes against humanity, and the duty to investigate and prosecute those, as well as all other grave human rights violations; see Alvarez-Rio and Contreras-Garduno (n 63) 188. As an authority they reference *La Cantuta v Peru* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 162 (29 November 2006) [157], which however pertains to enforced disappearances only.

norms,[68] we must ask ourselves, however, what the *legal consequences* of such findings are.[69]

Under international law, the *ius cogens* nature of a norm can have far-reaching consequences under the law of treaties.[70] According to the Vienna Convention on the Law of Treaties, any treaty concluded in conflict with a norm of *ius cogens*, and any treaty which conflicts with a subsequently developed norm of *ius cogens*, is automatically void.[71] Even if mitigated in the sense that only the conflicting treaty rule – if separable – and not the treaty as a whole is rendered void, this is a far-reaching consequence.[72] Thus, if the duty to investigate, prosecute, and punish certain human rights violations is of a *ius cogens* status, then any treaty rule coming into conflict therewith, is void. The consequences thereof are potentially sweeping. For instance, might it mean that general international law rules granting immunities could be rendered void, insofar as they preclude investigation, prosecution, or punishment?[73] And even within human rights law itself, if the duty to investigate, prosecute, and punish as such trumps other rules, what does this mean for those rights of the defence which bar prosecution, such as *ne bis in idem* or *nullum crimen sine lege*?

The Inter-American Court has not taken such issues to the extreme. It has not declared void conflicting rules of international law. As is shown in section 6, it has rather showcased an open approach towards IHL, and international law more generally, and has readily interpreted the ACHR in light of such norms. Insofar as rights of the defence are concerned, however, the Court *has* given precedence to the duty to investigate, over bars to prosecution which flow from the *nullum crimen sine lege* or *ne bis in idem* principles.[74] As

68 For 'assertion' as a method of finding norms of customary international law, see Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 European Journal of International Law 417.

69 Among many others, Alvarez-Rio and Contreras-Garduno (n 63); Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 European Journal of International Law 491; Ulf Linderfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2007) 18 European Journal of International Law 853.

70 Consequences under the law of State responsibility are left aside here.

71 VCLT, arts 53 and 64.

72 ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*, finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682 (2006), p. 181-93; Linderfalk (n 69) 854.

73 *Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening)*, Judgment (3 February 2012), *I.C.J. Reports* 2012, p. 99 [93].

74 '[T]he State may not apply amnesty laws or argue prescription, non-retroactivity of the criminal law, *res judicata*, the principle of *ne bis in idem,* or any other similar mechanism that excludes responsibility, in order to exempt itself from [the duty to investigate, prosecute and punish]'; *Manuel Cepeda Vargas v Colombia* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 213 (26 May 2010) [216(d)].

is explored further in section 5, the Court requires States to remove all *de facto* and *de jure* obstacles to investigation and prosecution – including these rights of the defence, which are also protected by the ACHR. What the Court has *not* done, however, is rely on the *ius cogens* status of the duty to investigate, in this respect. It has not declared *void* the principles of *nullum crimen* and *ne bis in idem*, because they conflict with the peremptory norm requiring investigation and prosecution. That likely also never was the Court's intention in declaring the duty to investigate to be of a peremptory nature. Moreover, it would lead to manifestly unreasonable outcomes, because in light of the 'indivisibility, interdependence and interrelatedness' of human rights,[75] it would likely mean that it would need to declare void the ACHR as a whole. After all, under the VCLT, a treaty coming into conflict with a *ius cogens* norm, is void. It is a good thing that the Court does not take the *ius cogens* status it asserts for the duty to investigate, to such extremes. But it does call into question the purpose of promulgating the peremptory nature of the duty to investigate. For now, it appears to be of symbolic value, more so than strictly changing the legal status of the norm.

3.4.3 *Legal effects within the domestic legal order*

A distinct but related issue pertains to the legal consequences of the duty to investigate within the Organization of American States' domestic legal regimes. Beyond imposing an obligation to criminalise conduct and to effectuate that legislation through criminal investigations, prosecutions and punishment, the question is how to deal with domestic legislation or practice that conflicts with the obligation. Under international law, rules of domestic law can never justify non-compliance with rules of international law.[76] This, the Inter-American

75 E.g. *Vienna Declaration and Programme of Action*, adopted at the World Conference on Human Rights on 25 June 1993, endorsed by UNGA Res. 20 December 1993, A/RES/48/121 [I.5]; Proclamation of Tehran, Tehran 22 April to 13 May 1968, (13 May 1968), *Final Act of the International conference on Human Rights*, A/CONF.32/41 [13]. For affirmations in scholarship, see Titia Loenen, 'Introduction to 50 Years ICCPR and ICESCR: Impact, Interplay and the Way Forward' (2016) 41 Nederlands Tijdschrift voor de Mensenrechten | NJCM-Bulletin 451, 451; Cees Flinterman, 'Freedom, Justice and Peace in the World: The Role of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights' (2016) 41 Nederlands Tijdschrift voor de Mensenrechten | NJCM-Bulletin 452, 455; Nico J Schrijver, 'Fifty Years International Human Rights Covenants. Improving the Global Protection of Human Rights by Bridging the Gap between the Two Covenants' (2016) 41 Nederlands Tijdschrift voor de Mensenrechten | NJCM-Bulletin 457, 460; Carla Edelenbos, 'Reflections on Fifty Years of ICCPR and ICESCR: A View from Geneva' (2016) 41 Nederlands Tijdschrift voor de Mensenrechten | NJCM-Bulletin 465, 465.

76 VCLT, art 27.

Court has confirmed, is equally the case for obligations under the ACHR.[77] The Court, however, has gone one step further.

As is returned to below, when discussing the standards which investigations must meet,[78] the Court requires States to remove all domestic obstacles to investigation, prosecution, and punishment. For instance, in in the case of the *Mapiripán Massacre* it found that

> 'no domestic legal provision (…) can impede compliance by a State with the obligation to investigate and punish those responsible for human rights violations. Specifically, the following are unacceptable: amnesty provisions, rules regarding extinguishment and establishment of exclusions of liability that seek to impede investigation and punishment of those responsible for grave human rights violations.'[79]

Domestic law may not impede the duty to investigate. But the Court goes further. It has held that such measures – amnesties, prescriptions, the defence of *ne bis in idem*, *nullum crimen*, or *res judicata – lack legal effect*.[80] This means that the American Convention directly invalidates domestic law when it contravenes the Convention. In the words of former president of the Court, Antônio Augusto Cançado Trindade, the effect of the duty to investigate is to 'invalidat[e] every and any legislative, administrative or judicial measure that (…) attempts to authorize or tolerate torture or any other grave breach of human rights, in the perpetration of atrocities such as enforced disappearance of persons and summary or extra-legal executions'.[81]

The Court therefore, in advancing and facilitating the fight against impunity counters States' strategies aimed at avoiding investigations, and in this process even does not shy away from limiting due process rights of the accused. In

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77 *Vargas-Areco v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 155 (26 September 2006) [81], referencing *Case of the Ituango Massacres v Colombia* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 148 (1 July 2006) [289], [299], [402]; *Case of Baldeón-García v Peru* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 147 (6 April 2006) [166], [195], [201]; and *Case of Blanco-Romero et al. v Venezuela* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 138 (28 November 2005) [98]; *Case of Montero-Aranguren et al. (Detention Center of Catia) v Venezuela* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 150 (5 July 2006) [137]; and *Case of the Pueblo Bello Massacre v Colombia*, (n 50) [171].

78 *Infra*, §5.

79 *Mapiripán Massacre v Colombia* (n 15) [304].

80 *Barrios Altos v Peru* (Merits) Inter-American Court of Human Rights Series C No 75 (14 March 2001) [44]; *Almonacid Arellano v Chile* (n 21) [154]; see also Burgorgue-Larsen and Úbeda de Torres (n 3) 356; Ezequiel Malarino, 'Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights' (2012) 12 International Criminal Law Review 665.

81 Cançado Trindade (n 62) 532–533.

terms of the 'sword' and 'shield' functions of human rights law, indicating the use of human rights both to advance criminal prosecutions for violations and as procedural rights of the accused against the State's criminal apparatus, the sword therefore appears to overpower the shield in this respect.[82] A very important aspect of the Court's case-law, is its insistence that domestic law contravening these findings *lacks legal effect* and may not be applied to frustrate criminal accountability, further showcasing the weight the fight against impunity is accorded in the Inter-American system.

4 Scope of application of the duty to investigate

4.1 Introduction

Having established the legal foundations, rationale and status of the duty to investigate, and the context in which it came into being, the focus now turns to a more detailed analysis of when States must in fact conduct investigations. Below, the various modes of application of the duty to investigate are explored with specific attention for its personal, material, temporal, and geographic scope of application. The section thereby aims to give a comprehensive overview of the applicability of the duty to investigate, before the next section turns to the substance of the obligation (§5).

4.2 The material scope of application and the investigative trigger

A first point of interest is violation of which rights brings with it investigative obligations, the material scope of application of the duty. Closely related is the question what *information* must be available to the State in order to trigger the duty to investigate. Is any allegation sufficient, or may States require individuals to substantiate their claim?

4.2.1 Distinguishing between grave violations and other violations

Let us therefore firstly explore what rights include a duty to investigate when violated. The Court's jurisprudence has often been observed to be somewhat

82 Tulkens (n 56). For critiques on this aspect of the Court's case-law, see Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 Cornell Law Review 1069; Karen Engle, 'A Genealogy of the Criminal Turn in Human Rights' in Karen L Engle, Zinaida Miller and Dennis Davis (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press 2016); Fernando Felipe Basch, 'The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers' (2007) 23 American University International Law Review 195; Tittemore (n 12).

ambiguous in this respect.[83] On the one hand, it has right from the start in *Velásquez Rodríguez* stipulated that 'States must prevent, investigate, and punish *any* violation of the rights recognized by the Convention',[84] and that they must investigate 'every situation involving a violation of the rights protected by the Convention'.[85] On the other hand, its practice in respect of the duty to investigate, prosecute, and punish has proven to be much more limited.[86] This has led a number of scholars to conclude that the duty to investigate, prosecute, and punish applies to *grave* violations only,[87] based on such pronouncements as the Court made in *Goiburú*. There, the Court ruled that

> 'in cases of extrajudicial executions, forced disappearances *and other grave violations*, the Court has considered that the realization of a prompt, serious, impartial and effective investigation *ex officio*, is a fundamental element and a condition for the protection *of certain rights* that are affected or annulled by these situations, such as the right to personal liberty, humane treatment and life.'[88]

Thus, even if the Court does not as such formulate an exhaustive list of rights which require investigations if they are alleged to be violated, it does appear to limit it beyond just any violation. Only violations of *certain rights*,[89] *grave violations*, in that view require an investigation. The Court's case-law on investigations moreover pertains almost exclusively to three particularly serious violations – 'torture, extrajudicial, summary or arbitrary execution and forced disappearance'.[90] This would seem to corroborate the conclusion that the Court has departed from its early findings in *Velásquez Rodríguez*, and now rather supports a more narrow reading of the material scope of application of the duty to investigate. Yet, it is submitted that a different reading may be more persuasive.

Despite the emphasis in the Court's case-law on investigations into grave violations, it has not departed from its finding that *any* violation must be investigated. For instance, in the 2012 case of *Santo Domingo*, the Court echoed its early findings in *Velásquez Rodríguez*, finding that States' positive obligation to guarantee rights under Article 1(1)

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83 For an overarching analysis, see Bosdriesz (n 9) 71–7.

84 *Velásquez Rodríguez v Honduras* (n 1) [166], emphasis FT.

85 Ibid [176].

86 Bosdriesz (n 9) 71–7.

87 See further Christian Tomuschat, 'Reparation for Victims of Grave Human Rights Violations' (2002) 10 Tulane Journal of International and Comparative Law 157, 166; Giovanna Maria Frisso, 'The Duty to Investigate Violations of the Right to Life in Armed Conflicts in the Jurisprudence of the Inter-American Court of Human Rights' (2018) 51 Israel Law Review 169, 173.

88 *Goiburú v Paraguay* (n 10) [88], emphasis be me.

89 For a similar formulation, see e.g. *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [244].

90 *Barrios Altos v Peru* (n 80) [41].

> 'entails the States' obligation to organize the government apparatus and, in general, all the structures through which public powers are exercised, so that they are able to ensure legally the free and full exercise of human rights. As part of this obligation, the State has the legal obligation "to prevent, within reason, the violation of human rights, to *investigate seriously any violations* that have been committed within its sphere of jurisdiction using the measures available to it in order to identify those responsible and impose *pertinent punishments* on them, and to ensure adequate reparation to the victim."'[91]

This finding may lead us to conclude two things. Firstly, the Article 1 obligation to take positive action to guarantee ACHR rights, includes a duty to organise the government apparatus in a human rights compliant way. This includes institutionalising an investigative machinery which investigates *all* violations of the ACHR, effectuating the State's duty to implement the ACHR on the domestic level, and functioning as a necessary precondition for an effective right to a remedy on the domestic level. Secondly, because the Court in this context refers to 'pertinent punishments' following an investigation, rather than its standard reference to the duty to 'investigate, *prosecute*, and punish', it would appear that non-criminal punishment may also be considered. Thus, the duty to investigate all violations as a general implementing measure may indicate a non-criminal investigation, whereas the duty to investigate, prosecute, and punish, may well be limited to what the Court has dubbed *grave* violations. Such a reading would moreover be in line with what we have seen in the previous Chapter for the ICCPR, with the Human Rights Committee finding that all violations must be investigated, but with a more limited list of violations which require criminal scrutiny.[92] This is also reminiscent of IHL, where only serious violations require a criminal response, and other investigations may be investigated administratively.[93] Finally, it would fit well with the idea that criminal law, as the State's most repressive tool, must remain an *ultimum remedium*.[94]

Support for this view can be gleaned from the Inter-American Court's findings that the duty to investigate 'acquires special intensity and importance' and 'becomes particularly compelling' depending on the 'gravity of the crimes committed and the nature of the rights infringed'.[95] The distinction is further alluded to in *Vera Vera v Ecuador*:

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91 *Santo Domingo Massacre v Colombia* (n 28) [189], further referencing omitted, emphasis FT.

92 Chapter 5, §4.2.

93 Chapter 3, §3.2 and §4.2.

94 Krešimir Kamber, 'Substantive and Procedural Criminal Law Protection of Human Rights in the Law of the European Convention on Human Rights' (2020) 20 Human Rights Law Review 75, 77–8; Piet Hein van Kempen, 'Four Concepts of Security – A Human Rights Perspective' (2013) 13 Human Rights Law Review 1, 19.

95 *Ríos et al v Venezuela* (Preliminary Objections, Merits, Reparations, and Costs), IACtHR Series C No 194 (28 January 2009) [283]; *Perozo et al v Venezuela* (Preliminary Objections, Merits Reparations and Costs), IACtHR, Series C No 195 (28 January 2009) [298].

> 'any human rights violation involves a level of severity by its own nature, because it implies a breach of certain State obligations to respect and guarantee the rights and freedoms for people. However, this should not be confused with what the Court throughout its jurisprudence has deemed to be "serious violations of human rights" which (…) have their own connotation and consequences.'[96]

Interestingly, in this case concerning the death of a detainee who had not received sufficient healthcare for a gunshot wound that was discovered by the policemen arresting him, the Court found that his case was to be distinguished from cases of serious violations, such as forced disappearance, extra-judicial killing and torture.[97] This meant that the statute of limitation, that had expired in this case, could not be set aside based on Inter-American case-law – but, the Court went on to find, the State nevertheless needed to establish 'in some manner' what happened to satisfy the next of kin's right to know.[98] This case therefore provides an important insight into the Court's view of investigations, and the need for criminal punishments: in case of serious violations, the overriding requirement of punishment can set aside domestic hurdles to prosecution, whereas in less serious cases, an investigation may still be required though the need for a criminal response is not such as to warrant setting aside domestic bars to prosecution. Nonetheless, this in no way diminishes the importance of conducting an investigation in a case where an individual had died within State custody, and where the next of kin had no way of finding out what happened if not for State information.[99]

Arguably, the material scope of application of the duty to investigate is therefore broad, encompassing *all* violations of the ACHR. A duty to furthermore prosecute, and punish those responsible, may in turn be limited to a more narrow category of violations of particular severity. It is this category of violations on which the Court's case-law has focused, and to which we therefore turn as well.

4.2.2 The selective practice to date

Looking more closely at the ACHR rights that carry with them investigative duties, the case-law thus far pertains to a quite limited number of rights. As was set out in section 3.2, certain substantive rights entail investigative duties in conjunction with the obligation to ensure all rights under Article 1(1) of the Convention. The Court has thus far ruled on investigative duties in relation to Articles 4 (right to life), 5 (right to humane treatment) and 7 (right to personal liberty), as well as Article 22 (freedom of movement and residence)

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96 *Vera Vera v Ecuador* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 226 (19 May 2011) [118].
97 Ibid [117].
98 Ibid [123].
99 Ibid [91].

in the context of forced displacement of a population during (non-international) armed conflict. These rights are described in legal literature as being of such significance that their protection necessarily requires criminal law protection.[100] It is with these rights, in conjunction with either Article 1, or the rights to a fair trial and judicial protection, that investigative obligations have been applied in the Inter-American Court's case-law thus far. The material events in question, the trigger for violations, are therefore (alleged) violations of the rights to life, humane treatment or liberty, or a case of forced displacement, regardless of whether the source of the investigative obligation is a substantive right in conjunction with Article 1, or one or both of the procedural rights.[101] Once has the Court found that violations of the freedom of expression had to be investigated, in the context of violent attacks against a media outlet, following high-ranking officials' public harassment campaign against that outlet.[102]

The case-law has moreover focused on particularly grave violations of these rights, which leaves open the question whether *any* alleged violations of these rights must be investigated, or rather only when they are 'grave' violations of those rights. As the Court's findings in *Goiburú* illustrate, extrajudicial executions and enforced disappearances clearly must be investigated, prosecuted, and punished, and fall within the category 'grave'.[103] The Court has held similarly for cases of torture and inhuman treatment.[104] Further, forced displacement has been categorised as grave, but it should be noted that in the Salvadoran context the displacement was the result of a non-international armed conflict where the State engaged in deliberate extrajudicial killings, enforced disappearances, massacres and the overall destruction of the means of subsistence of the populace – meaning that if ever a forced displacement could be thought of as a 'grave' human rights violation, this would be it.[105]

Because the type of cases reaching the Court have often been of this calibre, the lower limits of the system have not been tested, and the question whether for instance less serious right to life, physical integrity or liberty violations would require investigations, remains open for now. A close reading of the Court's reasoning does appear to suggest that the mere fact that a human rights violation forms part of a widespread context of violations, does not necessarily

100 See Bosdriesz (n 9) 71–7; Tomuschat (n 87) 166.

101 For a discussion on the autonomous/symbiotic meaning of arts 8 and 25, see Burgorgue-Larsen and Úbeda de Torres (n 3) 645–649.

102 *Perozo et al v Venezuela* (n 95).

103 See the paragraph cited above; *Goiburú v Paraguay* (n 10) [88].

104 E.g. *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [243], referencing further case-law.

105 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [243]; *Chitay Nech et al. v Guatemala* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 212 (25 May 2010) [149], referencing further international law sources, including the Rome Statute.

mean it is also a grave violation. It has on multiple occasions referred to the existence of 'a systematic pattern or practice applied or tolerated by the State or (…) massive, systematic or generalized attacks on any sector of the population' as exacerbating the need for investigations and underlining their urgency, but therefore only as a further aggravating circumstance rather than a constitutive requirement for the existence of a sufficiently grave violation.[106] From the case of *Vera Vera v Ecuador*, about the detainee who died of an untreated gunshot wound, we may surmise that not all violations of the right to life, are 'grave' as such. As we have seen above, an investigation may nonetheless be required in case of non-grave violations, although the need for criminal repression is less pressing.

4.2.3 The investigative trigger

As the above analysis shows, grave violations of the ACHR must be investigated, prosecuted, and punished. Potentially, all violations must be investigated. But, if it is a violation which triggers the duty to investigate, and a violation can normally only be uncovered through investigations, then this might give rise to a gap in legal protection. After all, what if a violation is not immediately obvious? This raises the question what starting *information*, or what indications of a violation are sufficient to trigger the duty to investigate.

What level of knowledge is required on the part of the authorities to trigger their duty to investigate, has not yet been unambiguously decided for all the various rights. Regarding the right to life, for instance, Philip Leach, Rachel Murray, and Clara Sandoval concluded in 2017 that the Court had yet to consider expressly what the investigative trigger is. One primary reason for this is that in most cases some form of a formal investigation was in fact initiated, without however any effective follow-up.[107] This has placed the emphasis of the Court's assessment in these cases on the investigative standards, rather than the exact moment when State authorities had a level of information that required them to investigate. Moreover, more than a few right to life cases have concerned massacres of entire villages, where the evidence of the crimes was so overwhelming that the question as to the precise trigger for a duty to investigate naturally did not arise.[108] Leach, Murray, and Sando-

106 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [244].

107 Philip Leach, Rachel Murray and Clara Sandoval, 'The Duty to Investigate Right to Life Violations across Three Regional Systems: Harmonisation or Fragmentation of International Human Rights Law?' in Carla Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill Nijhoff 2017) 43.

108 E.g. *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18); *Mapiripán Massacre v Colombia* (n 15); *Las Dos Erres Massacre v Guatemala* (n 65); *Case of the Ituango Massacres v Colombia* (n 77); *Case of the Pueblo Bello Massacre v Colombia*, (n 50). Interestingly,

val conclude that the duty to investigate violations of the right to life is triggered, not only in the Inter-American but also in the European and African systems, when State authorities 'know of a possible violation'.[109]

Important to add to this, is that in cases of forced disappearance, there is no need for next of kin to show that the right to life has been violated in the sense that they must provide evidence of the death of their relative; the Court has in such cases relied on a presumption of death. It has moreover on occasion accepted in a situation of systemic breaches, that an enforced disappearance could be established because the case could be linked to an established practice of enforced disappearance.[110] These findings are relevant not just for the right to life, as enforced disappearances constitute a multiple violation of the ACHR, also concerning Articles 5 and 7. For these other provisions the Court has at times been more specific in formulating the investigative trigger, and indeed in *Gelman v Uruguay* the Court found that as soon as there is 'any reason to suspect' an enforced disappearance, an investigation must be initiated.[111]

For cases of torture, the Court has separately defined a trigger for the duty to investigate, also having regard to other international law sources on this subject. In *García Lucero v Chile*, referring to the Inter-American Convention against Torture, the Court found that States must investigate 'immediately, as soon as there is well-founded reason to believe that an act of torture has been committed'.[112] In other cases it formulated this slightly differently, requiring 'sufficient reasons'.[113] These need not necessarily be complaints by the victim, but can also stem from other sources.[114]

One final remark may be made on the attribution of knowledge. Under international law, one might assume that if an act was committed by a State agent and is therefore attributable to the State, that the *knowledge* of this act must also be attributed to the State. After all, the State can only 'know' through

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in the *Moiwana Community v Suriname* (n 15) [43], the Court appears to state that the duty arises as soon as an allegation is made; see also Sweeney (n 13).

109 Leach, Murray and Sandoval (n 107) 43.

110 Sandra Krähenmann, '9. Positive Obligations in Human Rights Law during Armed Conflicts' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 173–174; Marthe Lot Vermeulen, *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance* (Intersentia 2012) 224–235. *Velásquez Rodríguez v Honduras* (n 1) [124] and [126]; *Bámaca-Velásquez v Guatemala* (Merits) Inter-American Court of Human Rights Series C No 70 (25 November 2000) [132]; *Case of the Serrano Cruz Sisters* (Merits, Reparations and Costs) (n 15) [48].

111 *Gelman v Uruguay* (n 27) [186], with further references.

112 *García Lucero et al. v Chile* (Preliminary Objection, Merits and Reparations) Inter-American Court of Human Rights Series C No 267 (28 August 2013) [124].

113 *Gutiérrez-Soler v Colombia* (n 48) [54]; *Vargas-Areco v Paraguay* (n 77) [79].

114 *Gutiérrez-Soler v Colombia* (n 48) [54]. See further Burgorgue-Larsen and Úbeda de Torres (n 3) 384.

intermediaries, its agents. Nevertheless, it appears that perpetrators' knowledge is not necessarily directly attributed to the State for the purposes of the trigger of investigative obligations. In *Cruz Sánchez*, where Peruvian armed forces had shot and killed hostage takers, the Court found that 'the hypothesis of the alleged extrajudicial executions came to light several years after the events occurred (…), therefore, it was not possible to demand from the beginning the obligation to investigate according to international standards developed in cases of extrajudicial executions'.[115] From a practical perspective, it makes sense that it is only once knowledge of a potential violation reaches others than the perpetrators themselves, that the duty to investigate is triggered. Whether this happens through genuine reporting by the State agents involved, through outside allegations, or because facts are uncovered by the State, is immaterial in this respect. But finding the State has failed its duty to investigate simply because it did not take immediate action when *the perpetrators themselves* gained knowledge of the facts, would be counterproductive.

4.3 The personal scope of application

Moving on from when an investigative obligation arises, a next question is *whose* obligation it is. A rather obvious observation in this respect is that the State will need to investigate, through its organs. Insofar as prosecutions and punishment are required, this will necessarily be criminal prosecution services, which as will be addressed further in section 5 will often moreover need to be of a civil rather than military nature, to safeguard their independence. More complicated, and related to the material scope of application, is how to assess on the one hand situations where State agents have perpetrated the violations subject to investigation, and on the other hand situations where private actors were responsible for rights abuses.

The Inter-American system has from the start embraced a generous reading of State responsibility for acts committed by private individuals, and atrocities committed by non-State actors are therefore liable to fall within the scope of application of the Convention, even if it does not expressly impose obligations on private individuals.[116] The way this works is twofold. Firstly, the Inter-American institutions take a broad reading of attribution, and therefore attribute acts by non-State actors to the State more readily than perhaps in other

115 *Cruz Sánchez et al. v Peru* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 292 (17 April 2015) [350]. Translated through Google translate, the original Spanish reads *'la hipótesis de las presuntas ejecuciones extrajudiciales salieron a la luz varios años después de ocurridos los hechos (…), por lo que no era posible exigir al Estado desde el inicio la obligación de investigar de acuerdo a los estándares internacionales desarrollados en casos de ejecuciones extrajudiciales'*.

116 Tittemore (n 12). See also Burgorgue-Larsen and Úbeda de Torres (n 3) 348.

systems.[117] Secondly, the Convention is read as including a due diligence obligation to prevent violations by private actors through criminalisation and operational action where necessary *ex ante*, and to respond to violations by investigating, prosecuting and punishing *ex post*.[118] Acts by private individuals therefore fall within the scope of application of the Convention in the sense that the duty to investigate, which is addressed to the State, also arises in cases where human rights violations were committed by actors other than the State itself.

This does not mean that whether a violation was committed by State organs directly, or by private actors, is of no relevance. In fact, the Court has on numerous occasions stated the 'extra weight' associated with State agent involvement in atrocities such as torture, extrajudicial executions and enforced disappearances.[119] This statement, however, has consequences for, and is a qualification of, the investigative standards that must be applied. The involvement of State agents in atrocities clearly signifies an extremely serious situation, and such involvement by the State undercuts the faith the public has in the State and its monopoly on the use of force.[120] Further, the rule of law demands that Government comply with the law, act within the confines of the law, and be held to account where violations occur. This is clearly at stake where State agents engage in the extremely serious human rights violations in question: torture, inhuman treatment, and deprivation of life.

A question the Inter-American institutions have not addressed thus far, is whether non-State armed groups engaged in a non-international armed conflict may also be under the duty to investigate ACHR violations. The ACHR is clearly addressed to States and the Commission and Court have jurisdiction to receive complaints raised against signatory States only.[121] Whether the limitation of the *jurisdiction* of the supervisory bodies also means the *scope of application* of the treaty is necessarily limited to signatory States is debatable; normally international conventions apply to signatory States only, but legal literature and several UN sources alike have referred to the applicability of human rights law to non-State armed groups.[122] There might therefore be

117 For an in-depth analysis, see Andrea Varga, *Establishing State Responsibility in the Absence of Effective Government* (dissertation Leiden University 2020) 137–72. *Case of the 19 Tradesmen v Colombia* (n 36) [141].

118 Ibid [140].

119 E.g. *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [243].

120 See *supra*, §2.

121 See art 1(1), 'The States Parties to this Convention undertake to respect the rights…'; art 44, 'Any person or group of persons (…) may lodge petitions with the Commission containing denunciations or complaints of violations of this Convention *by a State party*' [emphasis FT]; arts 61 and 62 similarly limit recourse to the Court to States Parties and the Commission, for States who have accepted the Court's jurisdiction. See also Burgorgue-Larsen and Úbeda de Torres (n 3) 347–348.

122 See the sources cited in Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017) 8–18.

some scope for the argument that the ACHR applies to armed groups under certain circumstances, which would conform to one of the tenets of the law of armed conflict, the principle of belligerent equality, which stipulates that all parties to the armed conflict operate under the same obligations, thereby expressly departing from differences in legal position based on for instance who is acting lawfully under the *ius ad bellum*.[123] As it stands, the Court has dealt only with cases where the State was responsible for investigations into violations committed by armed groups,[124] but should such a group rise to an organisational level where it is not only committed to complying with human rights and humanitarian law, but in practice actually investigates and punishes violations, it would be interesting to see whether the Court would accept such endeavours as discharging the duty to investigate. Assuming the quality of the investigation was up to standards and assessed in light of the rationales of uncovering the truth and combating impunity, this does not appear impossible.

The other side of the State's *duty* to investigate, is an individual *right* to have violations investigated. As was set out above, the rights to fair trial and judicial protection indeed grant an individual right to justice. In *Blake v Guatemala*, the Court found that the next of kin of Mr. Blake, who had disappeared, have 'the right (…) to have his disappearance and death effectively investigated (…); to have those responsible prosecuted for committing said unlawful acts; to have the relevant punishment, where appropriate, meted out; and to be compensated for the damages and injuries they sustained'.[125] Thus, as Hanna Bosdriesz notes, victims and their next of kin have individual rights in the investigation, as well as the criminal proceedings which follow.[126] And what is more, they have an individual right to justice, including criminal justice.[127]

4.4 The temporal scope of application

Further, the duty to investigate has certain particular characteristics when it comes to its temporal scope of application. According to the Court, it may

123 See e.g. Matthew Happold, 'International Humanitarian Law and Human Rights Law' in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law Jus ad Bellum, Jus in Bello and Jus post Bellum* (Edward Elgar 2013) 449; Nils Melzer, *International Humanitarian Law. A Comprehensive Introduction* (1st edn, International Committee of the Red Cross 2016) 17, 27; Marco Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 18–20.

124 E.g. *Mapiripán Massacre v Colombia* (n 15).

125 *Blake v Guatemala* (n 34) [96]-[97]. Bosdriesz (n 9) 57.

126 Bosdriesz (n 9) 55–9.

127 Seibert-Fohr (n 35) 66.

apply to instances of violations that precede the entry into force of the Convention for a State, in essence because either the violation can be characterised as a continuing violation, or because the duty to investigate itself persists beyond the critical date (the date of entry into force of the Convention, or the date of acceptance of jurisdiction of the Court). Thus, incidents which' effects extend after the critical date, are brought within the Court's jurisdiction.[128]

In case of enforced disappearances, the Court has held since *Velásquez Rodriguez* that they constitute 'a multiple and continuous violation'.[129] Because of the continued uncertainty as to the faith of victims, and because of the continuous anguish suffered by the next of kin and the direct victims should they still be alive, this crime cannot be satisfactorily classified as instantaneous only. Its effects continue in time, and so does the obligation to provide clarity as to what happened. This means the duty 'continues as long as there is uncertainty about the fate of the person who has disappeared'.[130] Further, in the case of *Blake v Guatemala*, the Court concluded that even though the restriction of liberty starting Blake's disappearance fell outside the temporal jurisdiction of the Court, the continuous nature of the crime allowed it to consider the investigative obligations involved, and it held Guatemala violated them.[131] This illustrates how the continuing nature of these crimes gives rise to a continuing violation, meaning that even if the disappearance itself predated the critical date, the violation in part occurred and continued after that date, therefore giving rise to investigative obligations under the American Convention.

For cases not giving rise to a continuing violation, such as extrajudicial executions or torture, the approach is slightly different. If an execution, which in itself is an instantaneous act, took place before the critical date, the question whether the right to life was substantively violated, falls outside the temporal scope of application of the ACHR. Yet, this may be different for the duty to investigate. Whereas the material violation itself here is not of a continuing nature, the obligation to investigate *is* of a continuing nature.[132] Illustrating this, in *Moiwana Community v Suriname*, where despite the massacre of a village taking place before Suriname had accepted the Court's jurisdiction, the Court nevertheless exercised jurisdiction over the question whether the duty to investigate had been complied with, because this duty extended in time and beyond the critical date.[133] It then went on to assess the massacre in light of the procedural obligation to investigate arising from Articles 8 and 25 of

128 Leach, Murray and Sandoval (n 107) 47; Burgorgue-Larsen and Úbeda de Torres (n 3) 353–354.
129 *Velásquez Rodríguez v Honduras* (n 1) [155].
130 Ibid [181].
131 *Blake v Guatemala* (Preliminary Objections) Inter-American Court of Human Rights Series C No 27 (2 July 1996) [39]-[40]; *Blake v Guatemala* (n 34) [124]; see further Sweeney (n 13).
132 Burgorgue-Larsen and Úbeda de Torres (n 3) 353–354.
133 *Moiwana Community v Suriname* (n 15) [141].

the Convention, ruling it had no jurisdiction to assess Suriname's alleged violation of Articles 4 and 5 before the acceptance of jurisdiction.[134]

Thus, the temporal applicability of the duty to investigate can bring conduct within the scope of review of the Court which would otherwise predate its jurisdiction. The Court's application in these cases of the procedural rights only, does mean it does not rule on the alleged violations of the right to life and physical integrity, not even under their 'procedural limbs'.[135]

4.5 The geographic scope of application

When it comes to the geographic scope of application of the duty to investigate, this principally follows the general remarks made in Chapter 4 as to the geographic application of IHRL as a whole.[136] Thus, States must investigate human rights violations committed 'subject to their jurisdiction'.[137] Violations committed on the territories of the State are therefore subject to investigative obligations under the ACHR.

The Inter-American institutions have yet to rule on the extraterritorial application of the duty to investigate, specifically. In fact, the case-law relating to extraterritorial conduct in individual cases stems from the Inter-American Commission, rather than the Court. The Court has only pronounced on such issues in its 2017 Advisory Opinion, on *The Environment and Human Rights*. In that Opinion, the Inter-American Court appears to adopt a relatively broad interpretation of extraterritorial jurisdiction. It found that 'the State obligation to respect and to ensure human rights applies to every person who is within the State's territory or who is in any way subject to its authority, responsibility or control'.[138] It qualified this further in the context of extraterritorial State conduct, or conduct with transboundary effects, by finding that when a State exercises 'authority' over an individual, or when they are under the State's 'effective control', this constitutes 'jurisdiction' for the purposes of the ACHR.[139] Finally, it found that 'the persons whose rights have been violated are under the jurisdiction of the State of origin [of the harmful activity], if there is a causal link between the act that originated in its territory and the infringe-

134 Ibid [142].

135 See *supra*, §3.2. See also Burgorgue-Larsen and Úbeda de Torres (n 3) 354.

136 Chapter 4, §4.5.

137 ACHR, art 1.

138 *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights)* (Advisory Opinion) Inter-American Court of Human Rights Series A No 23 (15 November 2017) [73].

139 Ibid [81].

ment of the human rights of persons outside its territory'.[140] Whereas these findings pertain to the specific situation of transboundary environmental harm, we may nonetheless attempt to abstract rules for the duty to investigate.

Principally, there is no reason why the duty to investigate would be treated any differently than any other issue of extraterritorial application under the ACHR. Thus, if a substantive violation falls within a State's jurisdiction, it will also incur the obligation to investigate that violation. If a State acts extraterritorially, for instance through its military forces, then insofar as these forces exercise effective control over individuals, this constitutes jurisdiction. This will likely be the case where individuals are taken into detention.[141] Whether more loose forms of 'control' also qualify, such as shooting and killing an individual, whether by agents on the ground or through air strikes, is not yet clear. But if the Court's approach to cross-border environmental harm can be transposed also to situations of extraterritorial use of force, then there would normally be a causal nexus between the firing of a weapon, and the death of the individual. Thus, this would trigger the duty to investigate. Further case-law on this issue will have to be awaited. One important qualification in this respect, is the Court's consideration that 'compliance with human rights (…) does not justify failing to comply with other norms of international law, including the principle of non-intervention'.[142] Even if States are indeed held to investigate extraterritorially, they cannot therefore be required to do so in a manner which would unjustifiably infringe upon the sovereignty of other States.

4.6 Résumé

This section has explored the scope of application of the duty to investigate, in its various modalities. As may be clear from the above, the case-law develops on a case-by-case basis, which means that many issues may still evolve further, also depending on the cases brought before the Court. For instance, if the Court is faced with fewer grave violations, we will likely learn more as to whether the material scope of application of the duty to investigate also encompasses less serious violations. Similarly, if more cases concerning extraterritorial violations are brought, more clarity as to the duty to investigate's applicability will emerge.

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140 Ibid [101].

141 *Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba)*, IACmHR, 41 *ILM* 532 (2002) (13 March 2002); Helen Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' in Helen Duffy, Janina Dill and Ziv Bohrer (eds), *Law Applicable to Armed Conflict* (Cambridge University Press 2020) 52.

142 *The Environment and Human Rights* (n 138) [90].

Important features of the Inter-American approach thus far, can be summarised as follows. Firstly, there is a heavy emphasis on grave violations as requiring investigations, coupled with criminal prosecution and punishment. Secondly, in contrast to other human rights systems, the Inter-American Court grants individual victims and their next of kin a right to access to criminal justice, in addition to the general obligation for States to investigate violations. Thirdly, the duty to investigate has a broad temporal scope of application. It can also apply to incidents predating the entry into force of the ACHR for the State in question. Fourthly and finally, States are likely also required to investigate violations abroad, insofar as they had jurisdiction over the violation. Further guidance will have to be awaited in this respect.

5 SUBSTANCE OF THE DUTY TO INVESTIGATE: INVESTIGATIVE STANDARDS

5.1 Introduction

The previous sections explained how the duty to investigate was conceived within the ACHR system, how it fits within the general context in which the Inter-American human rights system came into being, and when the duty comes into play. This section addresses what needs to happen once the investigative duty arises, in other words, what investigative standards have to be applied.

5.2 A due diligence obligation

Before moving into the precise standards to be applied, a number of overarching principles help understand the Court's approach to investigative standards. First, the duty to investigate is a *due diligence* obligation, in other words an obligation of means, not of result.[143] States must '[do] everything necessary (…) to discover the truth about what happened and to investigate, prosecute and punish, as appropriate, those eventually found responsible'.[144] If despite these efforts the aims of the investigation are not achieved, this can satisfy the Court's test if the State has met its due diligence obligation. For this to be the case, it must be a genuine investigation in the sense that it is not 'preordained to be ineffective'.[145] A further interesting element is that in fleshing out the investigative standards the Court has adopted the United Nations *Manual on the Effective Prevention and Investigation of Extrajudicial,*

143 Already in *Velásquez Rodríguez v Honduras* (n 1) [172] and [177].
144 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [242].
145 Ibid [248]; *Velásquez Rodríguez v Honduras* (n 1) [177]. See also Frisso (n 87) 174.

Arbitrary and Summary Executions,[146] holding that investigations falling foul of the standards set out therein, fail to meet the due diligence obligation.[147] Although this UN document was drafted specifically for extrajudicial executions, many of the investigative standards and principles can be applied equally to other human rights violations – except for specific stipulations for instance on autopsies, which of course only applies when a death has occurred.

5.3 Investigative standards

5.3.1 Seven standards

The due diligence obligation to conduct an effective investigation, has been concretised by means of seven investigative standards. An investigation must be (i) launched of the State's own accord (*ex officio*), (ii) carried out promptly and with reasonable expedition, (iii) serious and effective, (iv) independent and (v) impartial, and (vi) they must sufficiently involve the next of kin or the victims.[148] Further, (vii) any *de jure* or *de facto* obstacles to investigation and prosecution must be removed.[149] These standards are addressed briefly below.

5.3.2 Ex officio

Firstly, once the duty to investigate has been triggered, States may not remain passive and must (i) initiate the investigation of their own accord. In this regard, States may not wait for a complaint by victims or their next of kin, but must as soon as they have sufficient information suggesting a violation, start the investigation.[150] This obligation becomes especially important where the situation for the victims is such that they fear for their safety if they contact the authorities. For instance, in the *Mapiripán Massacre*, the Court held that it could hardly be argued that in the situation where the victims were subject to constant harassments and threats – in a situation moreover where the State armed forces were implicated in the massacre in question – that their not contacting the authorities exempted the State from investigating.[151]

146 United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, Doc. E/ST/CSDHA/.12 (1991).
147 *Mapiripán Massacre v Colombia* (n 15) [224]; Burgorgue-Larsen and Úbeda de Torres (n 3) 346.
148 Extensively, see the case-law cited below. Further, see Leach, Murray and Sandoval (n 107) 34–42.
149 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [249].
150 E.g. *Goiburú v Paraguay* (n 10) [88]. Also Leach, Murray and Sandoval (n 107) 35.
151 *Mapiripán Massacre v Colombia* (n 15) [219].

5.3.3 Promptness and reasonable expedition

Secondly and closely related, (ii) the investigation must be initiated promptly and be carried out with reasonable expedition.[152] In cases of torture, the Court has even held that once there is evidence suggesting torture has taken place, the State must investigate *immediately*.[153] Generally, the Court has insisted on the initiation *ex officio* of the investigation 'as soon as is practicable after [taking] knowledge of the facts'.[154] Promptness is of key importance in disappearance cases, because a quick and effective investigation might save the life of the victim. Moreover, and this applies also to other cases, crucial investigative steps must be taken as soon as possible to secure evidence before it is lost.[155] This counts even more in cases where there is a risk of State collusion and State agents might try to cover up their tracks, but also beyond such cases, evidence can be lost quickly and for instance witness testimony becomes less reliable the more time passes.

Beyond the prompt initiation of the investigation, it must further be carried out sufficiently speedily. Victims have a right to effective judicial protection that meets fair trial standards, meaning it must be reasonably expeditious. Assessing whether investigations were sufficiently speedy requires looking at the total duration of the proceeding until a final judgment is rendered.[156] In assessing what is reasonable, the Court takes account of 'the complexity of the matter; the procedural activity of the interested party; the conduct of the judicial authorities, and the general effects on the legal situation of the person involved in the proceeding'.[157] Importantly, the Court realises victims and their next of kin might be incapable or unwilling to complain and actively engage in the investigation due to threats, their displacement, or fear of repercussions.[158] In such cases, a lack of participation by victims cannot excuse any undue delays in the investigation. What is sufficiently expedient is therefore dependent on context, but for instance in the case of *Villamizar Durán and Others v Colombia*, the Court found that a conviction which was obtained after two and a half years complied with the Convention in a relatively uncomplicated case.[159]

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152 *Vargas-Areco v Paraguay* (n 77) [77]; *Las Dos Erres Massacre v Guatemala* (n 65) [132].
153 *García Lucero et al. v Chile* (n 112) [35].
154 *Vargas-Areco v Paraguay* (n 77) [77].
155 *Villamizar Durán and Others v Colombia* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 364 (20 November 2018) [175].
156 *Las Dos Erres Massacre v Guatemala* (n 65) [132].
157 *Santo Domingo Massacre v Colombia* (n 28) [164], numbering omitted from citation.
158 Ibid [219].
159 *Villamizar Durán and Others v Colombia* (n 155) [171]-[173].

5.3.4 *Seriousness and effectiveness*

Moving on to the third standard, of (iii) seriousness and effectiveness, these are the most encompassing and result-oriented criteria. The requirement that the investigation be serious, means it must be genuine, aimed at reaching a result and not preordained to be ineffective – in other words it may not be a mere sham.[160] Beyond this bare minimum for any chance of the investigation to achieve its aims, effectiveness brings with it a range of detailed case-specific requirements, which have to do with the investigative steps needed to secure sufficient evidence. When the investigation targets executions, the UN Manual is used as a yardstick, meaning

> 'an investigation must seek, at the least, *inter alia*: a) to identify the victim; b) to obtain and preserve evidence regarding the death, so as to aid any potential criminal investigation regarding those responsible; c) identify possible witnesses and receive their statements regarding the death under investigation; d) establish the cause, manner, place and time of death, as well as any pattern or practice that may have caused the death; and e) differentiate between natural death, accidental death, suicide, and homicide. It is also necessary to exhaustively investigate the crime scene, autopsies and analyses of human remains must be conducted rigorously, by competent professionals, applying the most appropriate procedures.'[161]

These criteria provide the Court with sufficient footholds to scrutinise closely the measures States have taken to uncover the truth, though in many cases the inactivity by the authorities was so blatant no further criteria were necessary to see no effective investigation had taken place – which has led a number of States to admit responsibility before the Court.[162] In other cases, the Court has looked in detail at the investigative steps taken by the State, in order to determine their effectiveness. For instance, in *Villamizar Durán and Others v Colombia*, the Court stipulated that at a very minimum, those investigating must:

> 'i) photograph [the crime] scene, any other physical evidence and the body as found and after moving it; ii) collect and keep all samples of blood, hair, fibres , threads or other tracks; iii) examine the area for shoeprints or any other natural evidence, and iv) make a report detailing any observation of the scene, the actions of the investigators and the disposition of all the evidence collected.'[163]

160 *Velásquez Rodríguez v Honduras* (n 1) [177].
161 *Mapiripán Massacre v Colombia* (n 15) [224]; *Moiwana Community v Suriname* (n 15) [149].
162 E.g. *Barrios Altos v Peru* (n 80).
163 *Villamizar Durán and Others v Colombia* (n 155) [176]. Translated through Google translate, references omitted.

The Court's examination of a case can therefore be quite detailed.[164] Though the obligation is one of means, it must at least be 'capable of producing the result for which it was designed':[165] ascertaining whether human rights had been violated, to provide redress, and to ensure criminal accountability.[166] These aims must be pursued effectively, in the sense that the conditions for the effectiveness of the investigation must be present. This means the judiciary must be sufficiently independent and impartial, and the broader conditions must be such that their judgments will be carried out and enforced.[167]

5.3.5 Independence and impartiality

The fourth and fifth standards, which are closely interconnected, are (iv) independence and (v) impartiality. In the eyes of the Court, investigators must be independent 'both from a hierarchical and institutional point of view and also in practical terms, from the individuals implicated in the facts investigated'.[168] This is meant to safeguard the investigation from bias and undue influence, and therefore includes also impartiality.[169] Thus far, the standard of independence has been fleshed out in the case-law primarily with regard to the various military justice systems tasked with investigating certain crimes. In the case of *Cruz Sánchez v Peru*, the Court reiterated its constant case-law holding that military jurisdiction over human rights violations can be accepted only exceptionally, where active military personnel has engaged in acts that directly affect interests inherent in the military system.[170] The Court has taken firm position that where military jurisdiction is exercised over facts that ought to be decided by the civil judiciary, this violates victims' right to access to justice.[171] In cases involving torture, extrajudicial execution and disappearances, the Court has rejected military jurisdiction, and in the case of *Cruz Sánchez* the Court even found the military justice system was unfit for the investigation of alleged extrajudicial executions by the military of members of armed groups who were *hors de combat*.[172] Victims' right to access to justice in conformity with fair trial standards, requires an independent investigation

164 In *Villamizar Durán and Others v Colombia*, the Court found a violation on these grounds; ibid [179].

165 *Velásquez Rodríguez v Honduras* (n 1) [66].

166 *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)* (Advisory Opinion) Inter-American Court of Human Rights Series A No 9 (6 October 1987) [24].

167 Ibid.

168 *Case of Human Rights Defender et al. v Guatemala* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 283 (28 August 2017) [227].

169 *Santo Domingo Massacre v Colombia* (n 28) [157].

170 *Cruz Sánchez et al. v Peru* (n 115) [397]; *Santo Domingo Massacre v Colombia* (n 28) [158]; see further Frisso (n 87) 188.

171 *Cruz Sánchez et al. v Peru* (n 115) [398].

172 Ibid [401]-[404]. This case will be returned to in detail, *infra*, §6.3.3, §6.4.

and an independent judiciary. Only very exceptionally will the military justice system be able to play a role in this.

5.3.6 *Involvement of victims and their next of kin*

Sixthly, (vi) victims or their next of kin must be sufficiently involved in the investigation for it to meet Convention standards. As the Court held in the *Mapiripán Massacre* case, '[d]uring the investigative and judicial processes, the victims of human rights violations, or their next of kin, must have ample opportunity to participate and be heard, both regarding elucidation of the facts and punishment of those responsible, and in seeking fair compensation'.[173] Next of kin must therefore be kept abreast of developments and be included in the various steps within the proceedings, without prejudice however to the State's self-standing duty to investigate *ex officio* independently of the initiative of the next of kin.[174] Moreover, in cases of enforced disappearances the next of kin are recognised as direct victims of inhuman treatment in their own right, through the anguish corresponding with the uncertainty of what happened to their loved one.[175]

5.3.7 *Removal of de jure and de facto obstacles to investigations*

Seventh and finally, (vi) *de jure* and *de facto* obstacles to investigations and punishments must be removed. States have relied on a number of strategies to avoid having to investigate, prosecute, and punish. The Court has found that impediments to effective investigations must be removed, whether these are practical or legal in nature. In case of grave violations of human rights, the Court has held that domestic amnesty laws lack legal effect altogether.[176] Procedural rights of the defence, such as *ne bis in idem* and *nullum crimen sine lege* have been limited, because 'the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes (*sic*) the protection of the *ne bis in idem* principle'.[177] In short, amnesties, statutes of limitations and procedural rights such as *ne bis in idem* may not be used to perpetuate impunity, and will therefore need to be repealed to ensure the effectiveness of the investigation and prosecution.[178] Further, if perpetrators are identified and prosecuted, the Court – while reiterating it cannot decide

173 *Mapiripán Massacre v Colombia* (n 15) [219].
174 Ibid.
175 *Blake v Guatemala* (n 34) [114]-[116]; Burgorgue-Larsen and Úbeda de Torres (n 3) 303–304.
176 *Barrios Altos v Peru* (n 80) [44]; see also Burgorgue-Larsen and Úbeda de Torres (n 3) 356.
177 *Almonacid Arellano v Chile* (n 21) [154]; see also Malarino (n 80).
178 For a comprehensive analysis, see Bosdriesz (n 9) 88–128.

on individual punishment, which is for the domestic judiciary to do – requires punishments to be proportionate to the gravity of the crime.[179]

In this light it may be emphasised once more that the Court places a heavy emphasis on criminal law measures. It has found that disciplinary investigations and investigations by truth commissions can *contribute* to establishing what happened, and determining State responsibility. Nevertheless, such proceedings are *complementary* to criminal proceedings, and cannot replace them.[180] As the Court has pointed out, 'in cases of brazen violations of fundamental rights, the imperious need to avoid repetition can only be satisfied by fighting impunity and by respecting the right of the victims and society as a whole to know the truth about the events'.[181]

6 Applicability and flexibility in conflict situations, and the role of IHL

6.1 Introduction

The above has determined *when* and *why* States must investigate under the ACHR, as well as *how* they must do so. The emphasis on genuine investigations into, and criminal repression of human rights atrocities is best understood when taking into account the context of repressive State regimes which have shaped the Inter-American approach to human rights. But, as section 2 explained, the context of the Inter-American human rights regime has been shaped not only by repressive regimes, but also by armed conflicts.[182] In light of this research project's research question, we must next ask ourselves how duties of investigation are applied in situations of armed conflict. To what extent, and how, do investigative obligations and the ACHR more generally, apply during such exceptional situations? More in particular, three issues are of relevance.

First, armed conflicts can be classified as 'war' or 'emergency' for the purposes of Article 27 of the ACHR, dealing with derogations, and therefore call into question whether in these types of situations States may opt to suspend investigative duties (§6.2). Second, the conflicts give rise to application of international humanitarian law, which raises questions of co-applicability, and how the Inter-American Court engages with IHL (§6.3).[183] These two

179 *Heliodoro Portugal v Panama* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 186 (12 August 2008) [203]; Burgorgue-Larsen and Úbeda de Torres (n 3) 307.

180 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [316]; *Santo Domingo Massacre v Colombia* (n 28) [167].

181 *Vargas-Areco v Paraguay* (n 77) [81].

182 *Supra* §2.2.

183 van den Herik and Duffy (n 23).

points inform the ultimate aim of establishing the applicable investigative obligations and standards for violations committed during armed conflict (§6.4).

As a preliminary point, as was shown in Chapter 4, IHRL continues to apply during armed conflict. This has been held both by the ICJ, as well as by the various human rights courts and bodies.[184] The Inter-American Court has been no exception, ruling that 'the Court is competent to decide whether any State act or omission, in times of peace or armed conflict is compatible with the American Convention',[185] and that 'international human rights law is fully in force during internal or international armed conflicts'.[186] As was pointed out above, the Inter-American Court has in fact been faced with numerous armed conflicts, and has consistently rejected arguments that it lacks jurisdiction due to the applicability of IHL.[187] Because the continued applicability of the ACHR during armed conflict is therefore settled,[188] we must concentrate on determining *how* it is applied, and whether its legal standards may accommodate the exigencies of armed conflict. In this regard, the ICJ has found that derogations are the only grounds for such.[189] These are therefore subject to discussion first, before moving on to the Inter-American Court's approach to IHL.

6.2 The (non-)derogability of the duty to investigate

As explained in Chapter 4,[190] the derogations regime allows States in exceptional circumstances to suspend certain rights, under a number of strict conditions. By thus accommodating deviations from the normally applicable

184 See Chapter 4, §4.6. See also §6 Chapters 5 and 7, outlining the approach under the ICCPR and ECHR.

185 *Santo Domingo Massacre v Colombia* (n 28) [21]; and along the same lines, *Las Palmeras v Colombia* (Preliminary Objections) Inter-American Court of Human Rights Series C No 67 (4 February 2000) [32].

186 *Case of the Serrano Cruz Sisters v El Salvador* (Preliminary Objections) Inter-American Court of Human Rights Series C No 118 (23 November 2004) [113].

187 E.g. *Santo Domingo Massacre v Colombia* (n 28) [21].

188 See Chapter 4, §4.6. Further, see Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 International Review of the Red Cross 501; Helen Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press 2013).

189 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), *I.C.J. Reports* 1996, p. 226 [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004), *I.C.J. Reports* 2004, p. 136 [106]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment (19 December 2005), *I.C.J. Reports* 2005, p. 168 [216].

190 Chapter 4, §4.6.

rules in extreme situations, the drafters accounted for the concept of 'necessity' as a circumstance precluding wrongfulness as conceptualised under the law of State responsibility.[191] The ultimate aim of making derogations possible, is to bring emergency situations within the purview of the rule of law, whilst still providing States with a measure of flexibility when their very survival is at stake.[192] Armed conflict is one such circumstance.[193] Under the ACHR, Article 27 provides for the possibility to derogate. It provides:

> '1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.'

The possibility of derogation can therefore temporarily modify ACHR requirement, allowing States to meet the challenge of an armed conflict or other emergency. If they wish to derogate, States must furthermore meet certain formal criteria; they have to give notice, reasons, set a term for the suspension, and they must list the rights they wish to derogate from.[194] Even if they meet these conditions, a number of rights can never be derogated from under Article 27(2).[195] These include the rights to life, humane treatment, and the 'judicial guarantees essential for the protection of [these] rights'.[196]

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191 ARSIWA, art 25.

192 Jan-Peter Loof, 'On Emergency-Proof Human Rights and Emergency-Proof Human Rights Procedures' in Afshin Ellian and Gelijn Molier (eds), *The State of Exception and Militant Democracy in a Time of Terror* (Republic of Letters Publishing 2012) 146–150; Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis. Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 112. Reinforcing this point further, is the Court's finding that the judicial guarantees essential for the protection of the human rights not subject to derogation, include 'those necessary to the preservation of the rule of law'; *Judicial Guarantees in States of Emergency* (n 166) [38]. And see further *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights)* (Advisory Opinion) Inter-American Court of Human Rights Series A No 8 (30 January 1987) [24], holding that a suspension of guarantees does not imply a temporary suspension of the rule of law. See further Cançado Trindade (n 9).

193 See Chapter 4, §4.6.

194 ACHR, art 27(3).

195 *Habeas Corpus in Emergency Situations* (Advisory Opinion) (n 192) [21]; see also Cançado Trindade (n 9).

196 Art. 27(2) provides: 'The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.'

Notably, these rights are the rights *par excellence* that entail investigative obligations. As was explained above, case-law thus far concerning investigations has almost exclusively pertained to executions, torture, and disappearances. Investigations must then be mounted under the right to life or the right to humane treatment, as well as the procedural rights to fair trial and effective judicial protection. But it is precisely these rights, in this context, which are non-derogable.[197]

As was set out above, investigative duties attach to the rights to life and humane treatment, as well as certain aspects of the rights liberty and security, and freedom of movement. The event triggering the duty to investigate is an alleged violation of these rights, independent of whether the duty to ensure the substantive right itself, or the procedural right to a judicial remedy for such a violation, is at stake. Because in its Advisory Opinion on the matter, the Inter-American Court has expressly interpreted the 'judicial guarantees essential for the protection of [non-derogable] rights' to include the Article 25 and 8 rights to an effective judicial remedy conforming to fair trial standards,[198] taken together this unquestionably bestows a non-derogable status upon the duty to investigate violations of non-derogable rights. The duty to investigate violations of the rights to life and humane treatment, therefore cannot be derogated from, even in emergency situations amounting to armed conflicts.[199] This still leaves open the possibility of interpreting these rights in light of IHL, as is discussed below, but derogations are not possible.

Certain other rights which entail investigative obligations, *can* be derogated from. This pertains most pertinently to the rights to liberty and security, and the freedom of movement. These rights are not listed in Article 27(2), and can therefore in principle be derogated from during war or emergency – as can the judicial guarantees corresponding to these rights. On closer inspection, however, derogations do not seem likely for a number of reasons. First, certain safeguards are non-derogable despite their not being included in Article 27(2). The right to *habeas corpus* for instance, was found by the Court to be non-derogable, as it is well-known that prompt judicial control of detention measures is an essential safeguard against ill-treatment, or even deprivation of life and disappearance.[200] Further, the prohibition of arbitrary detention

197 The right to truth will not be alluded to further at this point, because as the Court has held it to be 'subsumed' in the procedural ACHR rights, no separate issue of derogability arises; e.g. *Bámaca-Velásquez v Guatemala* (n 110) [201]; see further Sweeney (n 13).

198 *Judicial Guarantees in States of Emergency* (Advisory Opinion) (n 166) [23].

199 Stipulating the non-derogability of the rights to life and humane treatment, beyond the Convention text itself, see e.g. *Bámaca-Velásquez v Guatemala* (n 110) [207] and [209]; *Cruz Sánchez et al. v Peru* (n 115) [217].

200 *Habeas Corpus in Emergency Situations* (Advisory Opinion) (n 192) [35]; also in binding judgments, such as *Tibi v Ecuador* (n 62) [128].

as such has been held to be non-derogable.[201] Second, insofar as the Court has requires States to investigate violations of Articles 7 and 22, this has applied to *grave* violations thereof only: forced disappearance, and forced displacement. Disappearances, insofar as not already covered by the rights to life and humane treatment, are never justifiable, regardless of the existence of a state of emergency or armed conflict. The Inter-American Convention on Forced Disappearance of Persons provides so expressly in its Article X, as does the International Convention for the Protection of All Persons from Enforced Disappearance in Article 1(2).[202] Because the Court assesses enforced disappearances 'holistically', as a violation of numerous rights that ought not be examined separately right-by-right but as one event constituting a number of human rights violations, the Article 7 violation cannot here be separated from the violations of the non-derogable rights to life and humane treatment.[203] The Court therefore interprets instances of forced disappearance in harmony with the international and especially Inter-American treaties against disappearances.[204] The conclusion that the duty to investigate forced disappearances is non-derogable, is further reinforced by the Court's finding, alluded to above, that non-investigation constitutes *ipso facto* inhumane treatment of next-of-kin.[205] The non-derogable nature of the prohibition of inhumane treatment therefore necessarily renders the duty to investigate non-derogable as well. Finally, the Article 27(1) requirement that derogations are permissible only 'to the extent (…) strictly required by the exigencies of the situation' clearly disqualifies any derogation with regard to disappearances: obviously these can never be required by whatever emergency situation.

Forced displacement falls under the in principle derogable Article 22 concerning freedom of movement. There are nevertheless indications that derogations with a view to forcibly displacing a population, are impermissible under the ACHR. First, there is the requirement under Article 27 that any derogation is 'not inconsistent with [the State's] other obligations under international law'. In this context there is a case to be made that the right not to be forcibly displaced is a non-derogable right under human rights law, as enshrined in the ICCPR. The Human Rights Committee has held Article 12 ICCPR (freedom of movement), insofar as it pertains to situations of forced displacement, to be non-derogable.[206] Thus, it would seem that OAS States may not derogate from Article 22 ACHR insofar as this would conflict with the right not to be forcibly displaced under the ICCPR – after all, that would be incon-

201 E.g. *Osorio Rivera and family members v Peru* (Preliminary Objections) Inter-American Court of Human Rights Series C No 274 (26 November 2013) [120].
202 Extensively, see Vermeulen (n 110) 64–65.
203 See *Heliodoro Portugal v Panama* (n 179) [112].
204 Ibid [112]-[117].
205 *Las Dos Erres Massacre v Guatemala* (n 65) [204].
206 *General Comment No. 29: Article 4: Derogations during a State of Emergency*, HRC 31 August 2001, CCPR/C/21/Rev.1/Add.11 [13].

sistent with their international obligations. Second and similarly, IHL also contains prohibitions of forced displacement of civilian populations.[207] Because obligations under the law of armed conflict are non-derogable full-stop,[208] these certainly form part of the international obligations Article 27(1) refers to. Based on these arguments, it would seem likely the Inter-American Court would find the prohibition of forced displacement to be non-derogable, although it has not to date ruled on this matter.

Finally, investigative duties arising from the remedial practice of the Inter-American Court, would not seem to be affected by the existence of derogations. After all, if in a certain case the Court is able to find and rule on violations of the ACHR, it must then also be assumed it has jurisdiction to order reparations. Derogations, after all, affect the legal norms States must comply with, it does not alter the legal consequences of violations of the applicable norms. Whereas the precise *standards* applied in the investigative obligation may depend on a derogation or the exigencies of a situation – which is explored further below – this question is distinct from the issue of derogating the duty to investigate.

In conclusion, although the derogations regime is meant to account for emergency situations and armed conflict, giving further leeway to States, the duty to investigate is not subject to derogations. States therefore may not deviate from their obligations merely because an emergency exists, and need to comply with their obligations under the ACHR, 'no matter how difficult' the circumstances.[209] This means Articles 25 and 8 also apply and are non-derogable insofar as the violations discussed above are concerned. Moreover, the applicability of Article 8 means that due process standards must be com-

207 GC IV, art 147; AP I, art 85(4)(a); AP II, art 17; ICC Statute, art 8(2)(a)(vii). Extensively, see Deborah Casalin, 'Prohibitions on Arbitrary Displacement in International Humanitarian Law and Human Rights: A Time and a Place For Everything' in Paul De Hert, Stefaan Smis and Mathias Holvoet (eds), *Convergences and Divergences Between International Human Rights, International Humanitarian and International Criminal Law* (Intersentia 2018) 236–240; Deborah Casalin, 'A Green Light Turning Red? The Potential Influence of Human Rights on Developing Customary Legal Protection against Conflict-Driven Displacement' (2018) 12 Human Rights & International Legal Discourse 62.

208 See the argumentation employed by the Court in *Osorio Rivera and family members v Peru* (n 201) [120]; *Rodríguez Vera et al (the disappeared from the Palace of Justice) v Colombia* (Preliminary objections, merits, reparations and costs) Inter-American Court of Human Rights Series C No 287 (14 November 2014) [402]. In these cases, the Court argues the right not to be deprived of liberty is non-derogable, precisely because it is also guaranteed under IHL, see further below in section 6.3. Similar reasoning is used by the Human Rights Committee, in arguing that because certain elements of the right to a fair trial are guaranteed under IHL, they are therefore non-derogable under the ICCPR; *General Comment No. 29: Article 4: Derogations during a State of Emergency* (n 206) [16].

209 *Mapiripán Massacre v Colombia* (n 15) [238]. See also [89].

plied with in the judicial proceedings at issue.[210] Insofar as non-grave violations also require investigations, these will likely be derogable, at least in theory. Further practice will have to be awaited. Nevertheless, the rights most relevant during armed conflict pertain to precisely those which have been adjudicated upon: life, physical integrity, and liberty, and to a lesser extent the freedom of movement.

6.3 International humanitarian law in the Inter-American human rights system

6.3.1 Introduction

As the above showed, States are unable to alter their investigative obligations in times of emergency and armed conflict by way of derogations. Because the research question asks how investigative obligations apply during armed conflict, the question then becomes how the Inter-American Court has taken account of IHL in its rulings, and to what extent this affects investigative obligations. This section provides a brief overview of the Court's approach to co-application of the ACHR with IHL, and its introduction of the 'systemic interpretation and integration' approach.[211]

6.3.2 The Inter-American Court's engagement with international law

The Inter-American Commission and Court have generally showcased an open approach towards other instruments of international law,[212] and beyond the

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210 *Judicial Guarantees in States of Emergency* (Advisory Opinion) (n 166) [30]: 'Reading Article 8 together with Articles 7(6), 25 and 27(2) of the Convention leads to the conclusion that the principles of due process of law cannot be suspended in states of exception insofar as they are necessary conditions for the procedural institutions regulated by the Convention to be considered judicial guarantees. This result is even more clear with respect to habeas corpus and amparo, which are indispensable for the protection of the human rights that are not subject to derogation and to which the Court will now refer.'

211 Alejandro Fuentes, 'Expanding the Boundaries of International Human Rights Law. The Systemic Approach of the Inter-American Court of Human Rights' [2017] European Society of International Law Conference Paper Series (SSRN Online) 3.

212 The legal basis for the inclusion of norms of international law in interpreting the ACHR, is art 29 ACHR. As one author notes, 'the Inter-American Court applies general cannons of interpretation, but it derives them from the specific rules of interpretation of Article 29, instead of the VCLT. The Vienna Convention is used by the Court as a means to establish its connection to general international law, but at the same time the Court makes it clear that the human rights system is separate from, and even arguably superior to, general international law' – Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21 European Journal of International Law 585, 602.

Court's advisory jurisdiction over international human rights treaties,[213] have incorporated these instruments into their interpretations of the American Convention.[214] An important and distinctive feature of the inclusion of international law sources is the *pro homine* approach, leading the Court to apply international law as an interpretive tool where it serves the protection of the individual.[215] It mostly does so to harness its conclusions by way of reference to further international law support,[216] though as per its mandate, the ACHR remains the document that forms the basis for its judgments, and the Court at times sets aside norms of general international law when interpreting the Convention.[217] In this context, it has emphasised the special nature of the ACHR, as the *lex specialis* to general international law.[218] The *pro homine* interpretation of the ACHR in light of norms of international law is perhaps most prevalent where a case before the Court concerns an armed conflict situation, and which therefore involves the co-applicability of IHL.[219] The interpretive

213 ACHR, art 64(1) is interpreted broadly by the Court to include any provision pertaining to the protection of human rights, whether this is the primary purpose of the treaty or not, and whether non-American States may be party or not. See *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)* (Advisory Opinion) Inter-American Court of Human Rights Series A No 1 (24 September 1982) [1]. Pasqualucci (n 20) 54–57.

214 Fuentes (n 212); Lixinski (n 213). See e.g. *Case of the Serrano Cruz Sisters v El Salvador* (Preliminary Objections) (n 132) [111], where the Court reiterates that it is 'empowered to interpret the norms of the American Convention in light of other international treaties'.

215 *Mapiripán Massacre v Colombia* (n 15) [106] with further case-law references; Fuentes (n 212) 14–16; Lixinski (n 213) 588. Cf. the Court's finding that: 'a provision of the Convention must be interpreted in good faith, according to the ordinary meaning to be given to the terms of the treaty and their context, and bearing in mind the object and purpose of the American Convention, which is the effective protection of the human person, as well as by an evolutive interpretation of international instruments for the protection of human rights', *Artavia Murillo et al ('In vitro fertilization') v Costa Rica* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 257 (28 November 2012) [173].

216 By way of example, see e.g. *Rodríguez Vera et al (the disappeared from the Palace of Justice) v Colombia* (n 208) [478], where the Court refers to rules of customary humanitarian law to support its conclusion under the ACHR, that all measures must be taken to clarify the fate of those who disappeared during a non-international armed conflict.

217 Lixinski (n 213) 590 and 602–604. He bases this assertion on extensive case-law analysis, amongst which importantly *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (Advisory Opinion) Inter-American Court of Human Rights Series A No 16 (1 October 1999) and *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 146 (29 March 2006) [140]. The Court has moreover held in this context, that it is 'competent to determine whether any norm of domestic *or international* law applied by a State, in times of peace or armed conflict, is compatible or not with the American Convention. In this activity, the Court has no normative limitation: any legal norm may be submitted to this examination of compatibility' (emphasis added), *Las Palmeras v Colombia* (n 185) [32], restated in *Santo Domingo Massacre v Colombia* (n 28) [21].

218 *Mapiripán Massacre v Colombia* (n 15) [104]-[107].

219 Cf. Lixinski (n 213) 603.

inspiration the Court draws from IHL in fact goes so far that it has even referenced IHL in cases with no nexus with an armed conflict whatsoever, to support its findings under the ACHR – further cementing its holistic approach towards international law.[220] The discussion now turn towards the Court's approach to co-application of the ACHR and IHL.

6.3.3 The Inter-American Court's engagement with international humanitarian law

As is well-rehearsed in legal literature,[221] despite some difference of opinion early on between the Inter-American Commission[222] and the Court, it is now settled that the Inter-American supervisory bodies do *not* have the competence to apply IHL directly.[223] The Court in *Las Palmeras* ruled unequivocally that the Commission nor the Court may hold States internationally responsible for violations of IHL,[224] and this has since become a staple in the Court's case-law.[225] Rather, the Court views IHL as a tool for the interpretation of the American Convention in armed conflict situations. The Court has in a series of cases elaborated its position.

The case of *Las Palmeras* concerned the extrajudicial execution of a number of individuals by State agents in the context of the Colombian non-international armed conflict. The Court, after declining competence to rule on violations of IHL, found that it has 'no normative limitation' in examining to what extent the legal norms applied by States are compatible with the ACHR, whether these

220 E.g. in *Caesar v Trinidad and Tobago* (n 19) [65], the Court held that '[f]urthermore, norms of international humanitarian law absolutely prohibit the use of corporal punishment in situations of armed conflict, as well as in times of peace', even though there was no armed conflict situation in this case.

221 Burgorgue-Larsen and Úbeda de Torres (n 3); van den Herik and Duffy (n 23); Elizabeth Salmón, 'Institutional Approach between IHL and IHRL: Current Trends in the Jurisprudence of the Inter-American Court of Human Rights' (2014) 5 Journal of International Humanitarian Legal Studies 152; Emiliano J Buis, 'The Implementation of International Humanitarian Law by Human Rights Courts: The Example of the Inter-American Human Rights System' in Noe?lle NR Queìnivet and Roberta Arnold (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff 2008); Duffy (n 188); Lixinski (n 213); Fuentes (n 212); Liesbeth Zegveld, 'The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case' (1998) 38 International Review of the Red Cross 505; Burgorgue-Larsen and Úbeda de Torres (n 22).

222 *Arturo Ribón Avilán and 10 Others ('The Milk') v Colombia*, IACmHR, Report No 26/97, Case 11.142 OEA/Ser.L/V/II.98, doc. 6 rev. (30 September 1997); *Juan Carlos Abella v Argentina*, IACmHR, Report No. 55/97, Case 11.137, OEA/Ser.L./V/II.98, doc. 6 rev. (18 November 1997) (also known as the *La Tablada case*). Discussing these cases extensively, see Cerna (n 26) 32–41; Buis (n 222) 277–283.

223 Taking a different position, however, see Cerna (n 26).

224 *Las Palmeras v Colombia* (n 185) [33].

225 E.g. *Bámaca-Velásquez v Guatemala* (n 110) [207]-[209]; *Mapiripán Massacre v Colombia* (n 15) [115]; *Rodríguez Vera et al (the disappeared from the Palace of Justice) v Colombia* (n 208) [39].

norms are domestic or international.[226] The Court has later clarified in *Bámaca Velasquez v Guatemala* that this means norms of IHL can be 'taken into consideration as elements for the interpretation of the American Convention'.[227] Interestingly in this case, handed down within less than a year of *Las Palmeras*, the Court went on to find that although its jurisdiction is limited to holding States responsible for violations of the ACHR and other OAS treaties conferring jurisdiction on it,[228] it may nevertheless 'observe that certain acts or omissions that violate human rights (...) also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3'.[229] This somewhat ambiguous finding[230] would seem to indicate that the Court is not competent to hold States responsible for violations of IHL directly, nor can it order reparations therefor, but that it may nevertheless find ('observe') that a violation of the ACHR simultaneously constituted a breach of norms of IHL. This would then form a sort of *obiter dictum*. Although the Court later reaffirmed its competence in this regard,[231] it has not thus far given rise to an extensive practice of 'observing' violations of IHL.

Later on, the Court focused more on the *interpretive guidance* to be derived from norms of IHL when applying the ACHR in the context of armed conflicts. Whereas its approach has been largely consistent, the exact phrasing employed by the Court has fluctuated somewhat. During armed conflict, the Court has considered it 'useful and appropriate' to use international humanitarian treaties 'to interpret [ACHR] provisions in accordance with the evolution of the inter-American system, taking into account the corresponding developments in international humanitarian law'.[232] One step further even, the Court has also found that specific rights under Common Article 3 and the ACHR 'complement each other or become integrated to specify their scope or their content',[233] and IHL thus can be used '*to give content and scope* to the provisions of the American Convention'.[234] In referring to conventional and customary rules of IHL, the Court has underlined their 'specificity' during armed conflict, compared to the ACHR.[235] This is most evident from the following considera-

226 *Las Palmeras v Colombia* (n 185) [32].
227 *Bámaca-Velásquez v Guatemala* (n 110) [209]. See also *Rodríguez Vera et al (the disappeared from the Palace of Justice) v Colombia* (n 208) [39].
228 Phrased negatively in *Bámaca-Velásquez v Guatemala* (n 110) [208], but positively in *Las Palmeras v Colombia* (n 185) [34]. Cf. Pasqualucci (n 20) 122.
229 *Bámaca-Velásquez v Guatemala* (n 110) [208].
230 van den Herik and Duffy (n 23).
231 Citing *Bámaca-Velásquez v Guatemala* (n 110) with approval, see *Santo Domingo Massacre v Colombia* (n 28) [23].
232 *Case of the Ituango Massacres v Colombia* (n 77) [179].
233 *Mapiripán Massacre v Colombia* (n 15) [115].
234 *Case of the Serrano Cruz Sisters v El Salvador* (Preliminary Objections) (n 132) [119].
235 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [141]; *Cruz Sánchez et al. v Peru* (n 115) [270].

tion in *Santo Domingo*,[236] concerning military operations carried out by Colombian aerial forces, including the use of cluster ammunition, in and around the village of Santo Domingo and resulting in numerous civilian casualties:

> '24. (…) by using IHL as a supplementary norm of interpretation to the treaty-based provisions, the Court is *not making a ranking* between normative systems, because the applicability and relevance of IHL in situations of armed conflict is evident. This only means that the Court can observe the regulations of IHL, as the *specific* law in this area, in order to make a more *specific* application of the provisions of the Convention when defining the scope of the State's obligations.'[237]

The Court, in other words, though limited in jurisdiction to ruling on State responsibility for violations of Inter-American human rights treaties, does take account of IHL in interpreting the ACHR. Moreover, its references to IHL as 'the specific law' appear to adopt the ICJ's earlier finding that in the context of armed conflict and where a situation is covered by both IHL and human rights law, IHL functions as *lex specialis*.[238] The Inter-American approach in this regard has been lauded as working towards defragmentation of international law.[239]

Nevertheless, even where cases concern the interplay between the ACHR and IHL, the outcome of a case before the ICJ and the IACtHR will likely differ. This is due to mainly two reasons.[240] First, it is important to distinguish between the *applicable law*, and the law a specific tribunal has jurisdiction to apply.[241] Even if the IACtHR views IHL as *lex specialis*, that fact in itself does not confer jurisdiction on it to apply IHL. As Emiliano Buis explains, '[a] situation might be perfectly well covered by both branches of law if the state ratified the appropriate conventions, but that over[lap] does not mean that a specific tribunal has to take into account both legal *corpora* when addressing the alleged violations'.[242] In this sense, the systemic integration approach can only go so far, within the limits of jurisdiction, and the IACtHR's findings therefore necessarily represent a somewhat limited perspective on interplay.[243] Second, the Inter-American Court's *pro homine* approach further shifts its

236 Discussing this case extensively, see Salmón (n 222).

237 *Santo Domingo Massacre v Colombia* (n 28) [24], emphasis FT. In similar wording, see *Rodríguez Vera et al (the disappeared from the Palace of Justice) v Colombia* (n 208) [39].

238 *Legality of the Threat or Use of Nuclear weapons* (n 144) [25]; *Legal Consequences of the Construction of a* (n 144) [106]. The IACtHR explicitly references these Advisory Opinions in *Cruz Sánchez et al. v Peru* (n 115) [272].

239 Lixinski (n 213) 604.

240 Not counting the obvious distinction of ICJ cases always being of an inter-State nature, whereas IACtHR cases primarily have an individual v the State format.

241 Buis (n 222) 287.

242 Ibid.

243 Cf. Lixinski (n 213) 602–604.

perspective, to the effect that it takes onboard IHL norms primarily where they serve to strengthen individual protections.[244] As the *pro homine* principle prescribes an expansive interpretation of rights coupled with a restrictive interpretation of their limitations, this would mean IHL is solely employed to expand rights – resulting in what Elisabeth Salmón has called a 'pick and choose approach' to incorporating IHL.[245] As she noted already herself however, the Court at times grapples with IHL in more detail,[246] and the case-law appears to now be in flux. Whether the classification as 'pick and choose' still holds true, therefore, is up for debate. To flesh out the Court's approach to IHL, and to flesh out the general principles set out above, the discussion now turns to more specific application in two cases of primary importance: the cases of *Santo Domingo Massacre v Colombia* (2012),[247] and *Cruz Sánchez et al. v Peru* (2015).[248]

In *Santo Domingo*, Colombian aerial forces deployed cluster ammunition in an operation against the FARC. The bomb hit the village of Santo Domingo, and when the victims fled the village they were targeted by machine gun fire. The Court, acknowledging the existence of a non-international armed conflict in Colombia, had to decide on claims regarding both a perceived lack of investigation into the events, as well as substantive violations of *inter alia* the rights to life and physical integrity. Finding first, as will be discussed further below, that the duty to investigate is not violated, the Court in moving on to the substantive rights in question and acknowledging the existence of a non-international armed conflict in Colombia, first reiterates the importance of IHL in the interpretation of the ACHR.[249] Then, in the determination of the claims under the rights to life and physical integrity, it finds it must 'analyze the facts of the case interpreting the provisions of the American Convention in light of the pertinent norms and principles of international humanitarian law, namely: (a) the principle of distinction between civilians and combatants; (b) the principle of proportionality, and (c) the principle of precaution in attack'.[250] Interestingly, the Court therefore seems to condition a violation of the rights to life and physical integrity fully on whether or not the conduct in question complied with principles of IHL. Indeed, in its assessment, the Court then finds in a rather brief examination of the principle of distinction,[251] and a somewhat more lengthy examination of the principle of precaution in attack,[252] that these principles were not complied with – which leads it direct-

244 See (n 215) and the corresponding text.
245 Salmón (n 222) 165ff, especially 169-170.
246 Ibid 162-165.
247 *Santo Domingo Massacre v Colombia* (n 28).
248 *Cruz Sánchez et al. v Peru* (n 115).
249 *Santo Domingo Massacre v Colombia* (n 28) [187].
250 Ibid [211].
251 Ibid [212]-[213].
252 Ibid [216]-[229].

ly to find violations of the ACHR.[253] A first interesting feature of this case is therefore that the Court appears to view IHL as wholly determinative of its assessment under the ACHR.

A second point of interest is the Court's considerations as to the principle of proportionality, assessed in light of the cluster ammunition strike on Santo Domingo. Although Colombia contested a cluster bomb had hit the village, stating rather that a FARC[254] truck had been detonated, the Court found it to be established that the damage and deaths in the village had resulted from cluster ammunition. Regardless, the Court accepts that in deploying the cluster ammunition, Colombian air forces had meant to target guerrilla troops in the woods next to the village, rather than the village itself. Because proportionality refers to a balancing act between an attack's *anticipated* concrete and direct military advantage, and *expected* civilian harm,[255] one would expect the Court to engage in an examination of this anticipated advantage and the expected harms. The Court, however, finds it 'not appropriate' to consider the cluster ammunition strike on Santo Domingo under this principle, 'because an analysis of this type would involve determining whether the deceased and injured among the civilian population could be considered an "excessive" result in relation to the specific and direct military advantage expected if it had hit a military objective, which did not occur in the circumstances of the case'.[256] Because proportionality as prescribed by IHL is about projected results of an attack *beforehand*, this finding by the Court appears to skew the applicable IHL. Salmón has interpreted this finding by the Court as an attempt to distance itself from potential negative consequences of applying IHL.[257] In this interpretation, the Court intentionally applied IHL *pro homine*, only insofar as it benefits individual protection. This is definitely possible, though the Court is not express about any choice of this kind. More strikingly, the case of *Cruz Sánchez* – handed down after Salmón wrote her article – would seem to point in a different direction.

In *Cruz Sánchez*,[258] Peruvian forces ended a hostage situation at the Japanese embassy in Lima, which took place against the background of a non-inter-

253 Ibid [230].

254 The Colombian Revolutionary Armed Forces, or *Fuerzas Armadas Revolucionarias de Colombia*.

255 art 51(5)(b) AP I. See also the rule of customary IHL as identified by the ICRC, which the Court also references in [214], Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *ICRC Customary International Humanitarian Law – Volume I: Rules*, vol I (Cambridge University Press 2005) Rule 14.

256 Ibid [215].

257 Salmón (n 222) 164.

258 *Cruz Sánchez et al. v Peru* (n 115). For an elaborate discussion of the case, see Kenneth Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict* (Oxford University Press 2016) 501–510.

national armed conflict between Peru and the armed group MRTA.[259] At issue were primarily the deaths of three of the hostage takers, members of the MRTA, and whether during the storming of the embassy they had been subjected to extrajudicial execution. The Court's approach to this situation is to first set out the ACHR framework for the use of lethal force by the State, setting out standards of legality, absolute necessity and proportionality.[260] It then expressly refers to the ICJ's *lex specialis*-doctrine, stipulating that what is an *arbitrary* deprivation of life must be assessed in light of IHL as the more specific field of law,[261] and it also cites its European counterpart in support of this assertion.[262] Having regard to the specificity of IHL in the context of an ongoing NIAC, and considering that the ACHR does not define the exact scope of arbitrariness in the context of armed conflict, reference must be had to IHL, specifically the principles of distinction, proportionality and precaution.[263] Because IHL, and Common Article 3 to the Geneva Conventions specifically, grants protection to certain categories of individuals only, the Court then affords special attention to the question whether the three individuals in question were protected under IHL.[264] Having concluded that the planning of the operation did not appear defective and did not contain an order that none of the MRTA members may survive, the Court then scrutinised the status of the three individual members under IHL. Because they took a direct part in hostilities they could not be classified as civilians, meaning their protected status hinged on whether they had been placed *hors de combat* when they were killed, or whether they had still been taking a direct part in hostilities.[265]

The Court thus ventures into the realm of the IHL system of status-based targeting, where enemy combatants or civilians taking a direct part in hostilities may be targeted and killed. Moreover, the Court ultimately finds that the three were taking a direct part in hostilities during the hostage situation, and that for only one of them it could be proven that he was detained by the State when he was killed.[266] The deaths of the other two, in other words, were in compliance with the ACHR as they had taken a direct part in hostilities,[267] and were therefore lawful targets.[268] This arguably presents a shift in the Court's case-

259 The Túpac Amaru Revolutionary Movement or *Movimiento Revolucionario Túpac Amaru*, which from the early 1980s until 2000 was engaged in a non-international armed conflict with the Peruvian government, *Cruz Sánchez et al. v Peru* (n 115) [267].
260 Ibid [265].
261 Ibid [272].
262 Ibid, referencing *Varnava and Others v Turkey*, ECtHR [GC] 18 September 2009, Appl No 16064/90 and 8 others [185].
263 *Cruz Sánchez et al. v Peru* (n 115) [270] and [273].
264 Ibid [266]; [276ff]; [287].
265 Ibid [287].
266 Ibid [313]; [316].
267 The Court did not have enough evidence to find they had been detained or had otherwise stopped participating directly in hostilities, ibid [340]. See also Frisso (n 87) 183.
268 *Cruz Sánchez et al. v Peru* (n 115) [339]-[343].

law, as the interpretive guidance gained from IHL here does not bestow further protection, but rather shrinks what is to be seen as an 'arbitrary deprivation of life' during armed conflict. Human rights law too of course provides the possibility for States to intervene with lethal force where a hostage situation is at stake, especially where the hostage takers are heavily armed and demonstrably willing and able to hurt hostages.[269] Nevertheless, the status-based assessment indicates the adoption of certain IHL rules which deviate from the regular *pro homine* incorporation of rules of IHL within the ACHR framework. The case-law as it stands does not appear conclusive in how the Court approaches IHL. We therefore appear to still be in the 'grey area' Elisabeth Salmón identified in 2014, where the Court at times grapples more intensely with IHL, whereas at others IHL serves more as an afterthought or a mere supportive argument. The determinative value afforded to IHL in *Santo Domingo* and *Cruz Sánchez*, however, clearly move beyond just paying lip service, and especially in the latter case where IHL does not work in favour of the victims, might indicate a new approach to interplay.

6.3.4 Résumé

The Inter-American Court, like the Human Rights Committee, takes an open approach towards IHL. It is willing to interpret the ACHR in light of IHL norms, and even to find in *obiter* that violations of the ACHR also violated IHL. Moreover, it has referenced the ICJ's *lex specialis* approach in this context, acknowledging that IHL may be more specifically geared towards situations of armed conflict, and can therefore guide the interpretation of the ACHR. Nonetheless, the Court's approach is somewhat ambiguous. Its *pro homine* approach towards international law leads it to incorporate rules of international law primarily when they favour individual protection. This has also been the case in the context of IHL, as is illustrated by the case of *Santo Domingo*, but may have been departed from in *Cruz Sánchez*. To what extent the Court is willing to interpret the ACHR in light of IHL even where this goes to the detriment of individual protection, must be clarified further in future case-law.

Another noteworthy aspect of the Court's approach towards IHL, is that it does not engage in conflict classification itself. Rather, it chooses to rely in this respect on the findings by domestic courts. This, it is submitted, may be wise in light of the challenging and resource intensive nature of conflict classification. Nevertheless, it can lead to certain peculiarities. Thus, firstly, the Court does not distinguish between NIACs governed by Common Article 3 alone, or also by AP II – which have a separate threshold.[270] Perhaps for this very reason, it also relies almost exclusively on customary IHL in its judgments, rather than treaty provisions. Secondly, because the Court relies on domestic

269 Ibid [265] and [274]-[275]. See further Watkin (n 259) 501–510.
270 See Chapter 2, §4.2.3.

findings as to conflict classification, its case-law has some inconsistencies where domestic classifications have changed. In relation to Peru, the Court relied on a Truth and Reconciliation Commission's finding that Peru had been engaged in a NIAC, but because some cases before the Court had predated this classification, this has led to members of the MRTA in one case being classified as civilians, and later as fighters taking a direct part in hostilities.[271] Such inconsistencies can have important consequences for the applicable law and the individuals involved, and ought therefore be avoided.

6.4 Investigations into violations committed during armed conflict

6.4.1 Introduction

We now know how the duty to investigate functions during situations of normalcy, that it is non-derogable even during situations of emergency and armed conflict, and how the Court approaches interplay of the ACHR with IHL. Relying on this knowledge as a stepping stone, we can now move on to examining the duty to investigate violations committed during armed conflicts. Firstly, we may examine the scope of application of the duty to investigate in armed conflict situations (§6.4.2). Secondly, we may turn to the applicable investigative standards during conflict (§6.4.3). This examination will explore once more the case of *Santo Domingo*, which is particularly illustrative because Colombia in this case had met its investigative obligations, according to the Court. Two potential tensions with IHL are brought out, relating to military investigations, and amnesties.

6.4.2 Scope of application

The Court's starting point in assessing investigative duties for violations committed during armed conflicts, is that regardless of that context, the duty to investigate persists and States are not exempted from their obligations. The *scope of application* of the duty to investigate, therefore, is not principally limited by the existence of armed conflict.

Looking in more detail at the duty to investigate third-party conduct, a relevant question is whether during armed conflicts, States must also investigate abuses committed by NSAGs. A major strand of Inter-American case-law relates to State responsibility for conduct by paramilitary groups, with responsibility often stemming from States' support to, or acquiescence in, atro-

271 Frisso (n 87); Alonso Gurmendi Dunkelberg, 'The Era of Terrorism: The Peruvian Armed Conflict and the Temporal Scope of Application of International Humanitarian Law' [2017] SSRN. Compare *Castillo Petruzzi et al v Peru* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 52 (30 May 1999) with *Cruz Sánchez et al. v Peru* (n 115).

cities committed by such groups. In these types of situations, the Court is unequivocal in its findings that the State is responsible for such violations, and must investigate, prosecute, and punish perpetrators. Much more rare are cases involving non-investigation by the State into acts perpetrated by armed groups who are entangled in a conflict with the State.[272] Nonetheless, clear guidance for such situations can be gleaned from case-law relating to amnesties for atrocities committed during armed conflicts. The Court has been unequivocal in its denouncement of amnesties covering serious human rights violations because they interfere with the duty to investigate, prosecute, and punish, also when such amnesties cover acts by armed opposition groups.[273] The Inter-American system has been in the forefront of developments in this field, and has spurred on the 'peace versus justice' debate, because its strong emphasis on prosecution may render peace agreements impossible where parties to a conflict are unwilling to lay down their weapons unless they are guaranteed amnesty for their crimes.[274] The Court's non-compromising stance, however, leaves little to be desired in the way of clarity: even where an amnesty was confirmed by not one, but *two* referenda, the Inter-American Court reaffirmed the paramount of importance of the duty to investigate, and found the amnesty to be incompatible with the ACHR.[275] Thus, the duty to investigate infringements of ACHR rights by NSAGs is not just clearly established by the Inter-American Court, it is moreover an obligation which can trump countervailing interests, such as even the conclusion of peace processes – and clearly applies unabridged during armed conflict.

6.4.3 Investigative standards

With respect to investigative standards, the point of departure is that no matter how difficult the circumstances, States must ensure effective investigations to break the cycle of impunity that is started and perpetuated by a lack of

272 For one example, see the *Alemán Lacayo case* (Provisional Measures) Inter-American Court of Human Rights Series E No 1 (2 February 1996), where the Court ordered measures including 'to prevent violations of human rights and to investigate the events' [operative par 6], which had consisted of an attempted murder at a then presidential candidate, later elected, conducted by heavily armed men, not unlikely with ties to 'bands of ex-members of the Sandinista Popular Army and the Nicaraguan Resistance' [3], in other words, with NSAGs. See further Pasqualucci (n 20) 186.

273 *Gomes Lund et al. (Guerrilha do Araguaia) v Brazil* (n 64) [134]-[136]. See also Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 82) 1094.

274 Calling this the 'shadow effect' of the law, see Courtney Hillebrecht, Alexandra Huneeus and Sandra Borda, 'The Judicialization of Peace' (2018) 59 Harvard International Law Journal 279, 287. See further Allen S Weiner, 'Ending Wars, Doing Justice: Colombia, Transitional Justice, and the International Criminal Court' (2016) 52 Stanford Journal of International Law 211.

275 *Gelman v Uruguay* (n 27) [226].

response to violations.[276] The Court may, however, take the exigencies of such situations into account depending on the facts and circumstances of the case.[277] In cases like the *Mapiripán Massacre* and the *Massacre of El Mozote and Nearby Places*, where whole villages were massacred by paramilitary troops with collusion by State armed forces, or by the armed forces themselves, there is no room for any leniency. In *El Mozote*, El Salvador had targeted its own civilians directly in the most gruesome way, as part of a deliberate strategy to 'take the water away from the fish', meaning that they wished to take away any and all support for guerrilla fighters by literally destroying civilian populations who might support them, as well as their means of subsistence.[278] In such cases, where the State is actively and deliberately engaged in targeting its own population, it is no wonder the Court does not provide any leeway to the State when it comes to investigations into these massacres – they are of paramount importance to restore the rule of law and end impunity. Also in other cases, however, the Court has seemingly granted little leniency to States when investigating, rather stressing they must employ 'all necessary means' to ensure effective investigation.[279]

To illustrate this, we may once more examine the case of *Santo Domingo*, where there was no deliberate slaughter of civilians, but where Colombian armed forces accidentally targeted civilians in a military operation. As was set out above, the Court in this case makes extensive use of norms of IHL in its substantive assessment of the State's compliance with the rights to life and physical integrity. What is striking, as Giovanna Frisso notes, is that the Court makes no reference to IHL when ruling on States' investigative obligations.[280] This stands out even more, because the Court examines Colombia's compliance with the investigative obligations under Articles 25 and 8 ACHR *before* it moves on to the examination of compliance with substantive rights, where it does reiterate the importance of interpreting the ACHR in light of IHL.[281] Because the Court in the same case in rejecting Colombia's preliminary objections stressed that IHL is the 'specific law' regulating armed conflict,[282] this seemingly indicates it is of the opinion that IHL is of no relevance for the investigative obligations – or at least that IHL is not more specific than the ACHR in this context. In other cases the Court similarly did not refer to IHL when it assessed States' investigative obligations.[283] This also seems to transpire

276 *Mapiripán Massacre v Colombia* (n 15) [238].
277 *Cruz Sánchez et al. v Peru* (n 115) [350].
278 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [208].
279 *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 270 (20 November 2013) [440]; cf. Frisso (n 87) 189.
280 Frisso (n 87) 185–191.
281 *Santo Domingo Massacre v Colombia* (n 28) [187].
282 Ibid [24], the consideration is cited above at (n 237).
283 See *Bámaca-Velásquez v Guatemala* (n 110) [182ff]; *Cruz Sánchez et al. v Peru* (n 115) [344ff].

from a closer look at the Court's scrutiny of Colombia's investigations into what happened at Santo Domingo.

In this case, the Court restates the fundamentals of the duty to investigate without any modification in light of the armed conflict situation existing in Colombia at the time.[284] It then goes on to scrutinise the investigations mounted by Colombia, and finds the authorities have diligently investigated thus far, and are still in the process of doing so.[285] Several proceedings have been instituted (criminal, disciplinary and administrative), and certain criminal proceedings that were initially brought under the military jurisdiction, have been transferred to regular criminal prosecution services.[286] Although this has led to some delay, this does not in and of itself violate the due diligence obligation resting upon the State.[287]

What is determinative for the Court is that the investigations make clear 'whether a specific violation (...) has occurred with the support or tolerance of the public authorities, or whether the latter have acted so that the violation has been committed without any attempt at prevention or with impunity'.[288] All the various investigations initiated by the State are relevant in this regard. The Court ultimately found Colombia had met its obligation, because: (i) the ordinary criminal prosecutor had initiated a number of effective investigative measures, which had moreover resulted in the prosecution and conviction of three members of the armed forces for homicide or causing bodily injury of in total 35 victims,[289] (ii) insofar as the Commission and the victims had alleged a lack of prosecution of multinationals cooperating with the armed forces, they had provided insufficient evidence to show that investigations would have resulted in bringing to light further violations,[290] (iii) the investigations were not unduly delayed having regard to amongst others the complexity of the case,[291] and (iv) the disciplinary and administrative investigations contributed to determining State responsibility.[292] On this basis the Court concludes that

> 'the domestic organs for the administration of justice have already made an extensive determination of several implications of the State's responsibility for the facts, irrespective of the levels of individual, criminal or disciplinary responsibility of State agents or private individuals, definition of which corresponds to the domestic

284 *Santo Domingo Massacre v Colombia* (n 28) [154]-[155].
285 Ibid [171]-[173].
286 Ibid [159] and [82]-[103].
287 Ibid [159] and [164]-[165]; cf. Frisso (n 87) 188.
288 *Santo Domingo Massacre v Colombia* (n 28) [156].
289 Ibid [160]-[161].
290 Ibid [162]-[163].
291 Ibid [164]-[165].
292 Ibid [167]-[170].

jurisdiction, even if not all the facts or classifications of the facts have been sufficiently or fully investigated or clarified.'[293]

Even though Colombia had not, therefore, finalised its investigations into the events at Santo Domingo, the Court nevertheless found it was well on its way in diligently investigating the facts and the individuals responsible, and that there was therefore no violation of Articles 25 and 8 of the Convention. This goes to illustrate that although the Court does not reference IHL to loosen any investigative standards, it may nevertheless be satisfied that States have complied with their due diligence obligation. Colombia's efforts to both prosecute and convict those individuals responsible, and to establish any State responsibility for the events through disciplinary and administrative proceedings, can thus serve as an example of how to investigate gross human rights violations committed during active hostilities.[294] It should be borne in mind in this context, that whereas the Court appreciates the administrative and disciplinary proceedings and accepts their potential complementary function in establishing the facts and in expounding a certain symbolic message, it finds that they cannot wholly substitute criminal proceedings.[295]

A final point to note in the *Santo Domingo* case is that despite the Court's finding that Colombia had complied with its investigative obligations, the Court nevertheless ordered the State to investigate the events further as a reparative measure for the substantive violations it had identified.[296] The Court in this regard recalls the general obligation under Article 1(1) ACHR, and finds Colombia must continue the pending investigations and initiate others insofar as appropriate to 'determine the facts and responsibilities' for the event.[297] In large part this therefore has to do with the circumstances of this specific case, where the domestic investigations had not yet been finalised when it was brought to San José.[298]

293 Ibid [171].

294 As a contrary example, see *Cruz Sánchez et al. v Peru* (n 115) [370]-[374]. As Frisso summarises, '[a]mong the irregularities identified, the Court emphasised that the bodies were removed a day after the events and that there was no information to indicate that the crime scene had been secured; no ballistic comparison of the weapons used in the operation was carried out; no photos of the weapons or grenades allegedly involved in the events were taken; similarly no fingerprints were taken on the weapons or grenades; the autopsies took place in a facility that was not suitable for such a procedure by staff who were not accustomed to performing such procedures; no dental tests were performed; only three of the fourteen corpses were identified, and the remains of the fourteen MRTA members were buried clandestinely', Frisso (n 87) fn 113.

295 *Santo Domingo Massacre v Colombia* (n 28) [167].

296 Ibid [297].

297 Ibid.

298 Remarking on this itself, the Court found that 'in application of the principle of complementarity, it should not have been necessary for the Court to rule on the facts that resulted in the violations of the rights acknowledged and repaired at the domestic level', but that

The Court's approach to investigative obligations arising from violations during conflicts takes little account of IHL. As Giovanna Frisso puts forward, this may be most readily explained by the lack of investigative standards to be found under IHL, as well as the continuing debate on the scope and even the existence of investigative obligations during non-international armed conflicts.[299] It is certainly true that IHL provides little express guidance on investigative standards,[300] and that insofar as the Inter-American Court takes IHL into account because of its *specificity*, this would certainly explain why when looking at the duty to investigate, IHL plays no role of importance. Nevertheless, IHL does contain a number of provisions on investigations, and these in fact might conflict with the relevant standards as set out by the Court under the ACHR. Such tensions arise in particular with respect to the investigative standard of independence, in relation to military investigations, and the required criminal law follow-up, in relation to Additional Protocol II's insistence on amnesties for those who took part in the conflict.

Independence

The Inter-American Court has been consistent and adamant in excluding investigations under military jurisdictions, for violations of the ACHR. That system ought to be reserved only for those individuals who are still in active military service, and limited to cases involving crimes or infractions that by their very nature violate legal interests specific to the military order.[301] The requirement that the regular prosecution services prosecute perpetrators under regular criminal jurisdiction, can potentially be at odds with IHL however. As was explored in Chapter 3, IHL requires direct commanders to investigate any potential grave breaches perpetrated by their troops, and even holds them criminally liable when they fail to do so.[302] The International Criminal Court (ICC) has further reinforced this system in finding that the commander must 'take all necessary and reasonable measures'[303] in order to ensure effective prevention and repression.[304]

If commanders can be held criminally responsible for a lack of investigation and punishment of their subordinates for allegations of international crimes and grave breaches of IHL, whilst at the same time the ACHR requires investigations to be carried out in full independence by the regular prosecutorial

due to Colombia's shifting position during the proceedings, it nevertheless considered it necessary to decide the case on the merits; ibid [171]-[172].

299 Frisso (n 87) 185.

300 See Chapter 3, §4.

301 E.g. *Cruz Sánchez et al. v Peru* (n 115) [397]; *Santo Domingo Massacre v Colombia* (n 28) [158]; see further Frisso (n 87) 188.

302 AP I, art 86 and 87.

303 *The Prosecutor v Jean-Pierre Bemba Gombo (Situation in the Central African Republic)*, ICC Appeals Chamber (Judgment) ICC-01/05-01/08 A (8 June 2018) [168ff].

304 Ibid [170].

authorities, this could potentially put commanders in a situation where they are 'damned if they do, and damned if they don't'. If they investigate they violate IHRL, if they do not, they violate IHL and are criminally liable therefor. This potential conflict of norms has not yet been acknowledged by the Court, although this may also be explained by the cases brought before it thus far: these concern situations of non-international armed conflict where conventional IHL does not expressly provide for command responsibility. The ICC Statute, however, does cover such situations, meaning in theory commanders might be obliged to do something under international criminal law that would simultaneously violate human rights norms.

Nonetheless, the conflict may not be as hard as it seems. If 'all necessary and reasonable measures' that commanders are obliged to take, is understood to mean also prompt notification of an alleged crime to the competent prosecutorial services, as the *Guidelines* by the ICRC and Geneva Academy put forward, a conflict can be avoided.[305] Situations of active hostilities and high intensity conflict, regardless, might not allow for regular prosecutorial services to conduct investigations on the scene, and might require direct action by commanders before being able to defer a case at a later, more quiet moment. As the Court in *Santo Domingo* found Colombia's investigation to be in compliance with the ACHR despite the initial investigation under military jurisdiction, it would appear the Inter-American Court accounts for such situations without necessarily finding the State in breach of the Convention.

Criminal law follow-up and amnesties

A final point of potential normative conflict concerns amnesties for crimes committed during non-international armed conflicts. As was set out above,[306] the duty to investigate entails an obligation for States to remove all *de facto* and *de jure* obstacles for investigation, prosecution, and punishment, including a prohibition of amnesties. Meanwhile Additional Protocol II, applicable to non-international armed conflicts, requires States to provide 'the broadest possible amnesty' for those who have taken part in hostilities, thus giving rise to conflicting obligations. The Court has acknowledged the tension arising here, and this is in fact the only issue under its considerations on the duty to investigate, where the Court expressly engages with IHL. In the cases of *Gelman v Uruguay* and *El Mozote v El Salvador* this issue was discussed, with the Court opting to apply a form of harmonious interpretation of the various provisions rather than engaging in a discussion on *lex specialis* and hierarchy of norms. It found that Article 6(5) AP II, requiring States to amnesty active participants in hostilities, was to be read in light of the other rules of IHL, in

305 See Chapter 3, §4.
306 *Supra*, §3.4.3 and 5.

particular the duty to investigate war crimes.[307] Referencing the ICRC Customary IHL study,[308] it found that this obligation applied equally during armed conflict.[309] Because of these competing obligations within IHL, the Court argued, the obligation to provide amnesty must be limited to crimes that do not amount to war crimes or crimes against humanity. Thus, the Court sidesteps a potential normative conflict by interpreting IHL in a way that corresponds to the ACHR.

In conclusion, the two main contentious issues where the duty to investigate may clash with IHL – relating to the independence of investigations and to amnesties – appear to have been nimbly avoided by the Court. By providing some leeway for investigations in the sense that as long as an investigation that started out within the military jurisdiction is transferred to regular criminal prosecutorial authorities in a timely manner, a head-on clash between the IHL and ICL systems of command responsibility and the ACHR duty to investigate independently, seems to be prevented. Similarly, by interpreting the NIAC obligation to grant amnesty *pro homine* and in line with the duty to investigate war crimes, the Court sidesteps any direct conflict of norms between IHL and the duty to investigate. Whereas the Court ultimately pays little mind to IHL in the context of investigations, it therefore nevertheless succeeds in avoiding direct conflicts.

7 CONCLUSION

This Chapter set out to explore the Inter-American system's regulation of investigative obligations, in particular during armed conflict. In terms of the research question, the analysis focused on *whether* States are obliged to investigate human rights violations under the ACHR, and if so, what the *scope of application* and *contents* of that obligation are. We may now answer affirmatively that States are subject to an obligation to investigate violations of the ACHR. In fact, the Inter-American system and Court have fulfilled a pioneering role in this respect. It was arguably the Inter-American Court's engagement with the duty to investigate which has sparked a broader trend in international human rights law which focuses on the duty to investigate human rights violations. The Court's seminal judgment in *Velásquez Rodríguez*, in 1988, moreover just preceded further developments towards criminal accountability for violations of international law, which culminated in the setting up of

307 *Gelman v Uruguay* (n 27) [210]; *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [286].

308 Henckaerts and Doswald-Beck (n 256) Rule 159.

309 *Gelman v Uruguay* (n 27) [210]; *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [286].

numerous *ad hoc* criminal tribunals and hybrid tribunals, as well as the permanent International Criminal Court in the Hague. Thus, the Inter-American Court's development of the sword function of the ACHR just preceded, and coincided with, the broader development of what has been called a 'criminal turn' in international law.

Much like we saw in respect of the ICCPR, the Inter-American Court has read investigative obligations into the ACHR. As was shown, it arguably envisions a duty to investigate *all* violations of the ACHR, because the Article 1 obligation to ensure rights requires the State to institutionalise a procedural layer of protection which investigates all violations. Yet, its practice has focused on *grave* violations of the ACHR, primarily extrajudicial executions, torture, and enforced disappearance. These violations, moreover, must be *criminally* investigated, prosecuted, and punished. Thus, like under the ICCPR, and like under IHL, there appears to be a general obligation for States to implement the ACHR through the setting up of a broadly applicable investigative machinery. Further, *grave* violations, like serious violations of IHL, must not only be investigated, but must moreover be prosecuted and punished, if appropriate. Because the Court's case-law has pertained almost exclusively to such serious violations, the case-law has a strong emphasis on criminal accountability, and the fight against impunity.

When it comes to *how* States must investigate violations of the ACHR, there are a number of standards which must be met. Importantly, the duty to investigate itself is a due diligence obligation. If States do what they can to bring to light what has happened and to establish responsibility, but if they ultimately cannot, this therefore does not necessarily breach their obligations. This will depend on whether they have met the applicable investigative standards. Standards set by the Court, are that an investigation must be (i) launched of the State's own accord (*ex officio*), (ii) carried out promptly and with reasonable expedition, (iii) serious and effective, (iv) independent and (v) impartial, and (vi) they must sufficiently involve the next of kin or the victims. Further, (vii) any *de jure* or *de facto* obstacles to investigation and prosecution must be removed. As was mentioned, the Inter-American Court has moreover strongly emphasised the need for ensuring criminal accountability of both direct perpetrators and intellectual authors of abuses. Interestingly, the Court has not thus far expanded on a broader requirement of transparency, the way the Human Rights Committee has. Rather, it has stressed the involvement of next of kin of victims and their role in the investigative process.

Armed conflict does not appear to play a major role in changing the scope or contents of the duty to investigate under the ACHR. Whereas the Inter-American Court is open to interpreting the ACHR in light of IHL, and has done so in a number of contexts, it does not refer to IHL at all when it comes to investigations. Because it has held that IHL may provide the more specific rules during armed conflict, this may be taken to mean that in the context of investigations, the Court considers the ACHR to provide the more specific rules. Thus

far, in applying the duty to investigate to armed conflict situations, the Court has managed to steer clear of direct conflicts with IHL. This will be explored further in particular in Chapter 10, where duties of investigation under IHL and IHRL are compared.

7 The duty to investigate under the European system of human rights protection

1 INTRODUCTION

In the preceding two Chapters, the investigative obligations under the ICCPR and ACHR were explored. Both systems were shown to entail very similar obligations for States to investigate (potential) violations, with both showcasing a strong emphasis in practice on the obligation to *criminally* investigate certain serious violations. Both the Human Rights Committee and the Inter-American Court of Human Rights, at the same time, have also indicated that *any* violation of the ICCPR or ACHR might require an investigation, but the cases they have decided as yet pertain to serious violations only. This Chapter now turns to the European system of human rights protection, where it is explored whether the European Court of Human Rights has similarly read investigative obligations into the ECHR. Thus, the Chapter seeks to answer *whether* States are under an obligation to investigate (potential) violations of the ECHR – and if so – what are the *scope of application* and *contents* of such an obligation, in particular during armed conflict and occupation? Chapter 8 will compare the findings under the various systems, which will ultimately facilitate the discussion on duties of investigation under the interplay of IHRL and IHL.

Like the Chapters on the ICCPR and the ACHR, this Chapter starts out by briefly setting out the context to the European system of human rights protection (§2). It then goes on to examine the legal basis and rationale for investigative duties under the ECHR (§3), before discussing the scope of application of the duty to investigate in its various modalities (§4). The next step is to explore what standards States must meet when investigating (§5), before finally addressing whether, when, and how States must conduct investigations during armed conflict (§6).

2 THE EUROPEAN CONTEXT

Like in the Americas, the European system of human rights protection came into being after the Second World War. The atrocities experienced then provided the impetus for the development of human rights law as a branch of international law. The Council of Europe (CoE) was set up in 1949, one year after the adoption of the Universal Declaration of Human Rights. This inter-

national organisation, which now has 47 States Parties, seeks to protect the rule of law, democracy, and human rights in Europe.[1] Its most well-known and most important contribution in this respect, has been the adoption of the European Convention on Human Rights in 1950, which entered into force in 1953 as the first binding international human rights catalogue. In the words of the Preamble, it takes 'the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration [of Human Rights]'.[2]

At the pinnacle of the collective enforcement of ECHR rights is the right of individuals to bring an application directly before the European Court of Human Rights.[3] The Court, in a binding judgment,[4] decides whether a State has sufficiently secured the rights of applicants, and establishes State responsibility for a violation. It moreover orders States to pay 'just satisfaction' for violations.[5] After the Court renders a judgment, it is a political organ within the Council of Europe, the Committee of Ministers, which supervises the execution of the Court's pronouncements.[6] In contrast with the Inter-American system, the Court does not, therefore, supervise compliance with its judgments itself. Rather, it is in the dialogue between the State in question and the Committee, that it is decided what exact measures are required to execute a judgment fully.[7] These normally include individual measures to remedy the violation in the case at hand, as well as general measures required to bring the State's broader practice in line with its obligations under the ECHR, and to prevent similar violations in the future.[8]

Unlike the Inter-American Court, the European Court of Human Rights therefore does not supervise criminal investigations and processes which follow its judgments, as they unfold. Nevertheless, as will be explored below,[9] the Court does sometimes provide indications of the types of reparation requires to execute a judgment, which can include investigations. Moreover, in its supervision of judgments, the Committee of Ministers does often insist on certain specific measures, which may also include investigations and ensuring accountability for violations.

The European context also differs from the Inter-American one where it concerns the prevalence of armed conflict. Whereas European States have been

1 Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) ETS No. 001.
2 Preamble to the ECHR, final paragraph.
3 ECHR, art 34.
4 ECHR, art 46(1).
5 ECHR, art 41.
6 ECHR, art 46(2).
7 See *Tagayeva and Others v Russia*, ECtHR 13 April 2017, Appl No 26562/07 and 6 others [637]-[638]; see further *Assanidze v Georgia*, ECtHR [GC] 8 April 2004, Appl No 71503/01, ECHR 2004-II [198].
8 *Tagayeva and Others v Russia*, ibid [637].
9 *Infra*, §3.2.

involved in a number of both international and non-international armed conflicts since the coming into force of the ECHR, such conflicts have only had a marginal impact on the Court's case-law as a whole. Where the Inter-American Court's case-law is arguably shaped by the struggle against impunity, in part following violations committed during NIACs, the European case-law has largely developed in situations of normalcy.[10] To illustrate, the Inter-American Court's case-law save for one or two lone exceptions relates to the duty to investigate serious violations, whereas the large majority of the European Court's case-law pertains to the right to a fair trial.[11] Because the European Court's case-law has largely developed in situations of 'normalcy', cases relating to armed conflict have become more of a 'niche'. Rather than shaping the Court's case-law as a whole, the Court when faced with cases arising out of armed conflict, could rely on its established case-law, potentially with certain allowances for the conflict situation.

Looking a little bit more closely, the armed conflicts in which Contracting Parties to the ECHR have been involved, include NATO Member State involvement in the conflicts in the former Yugoslavia,[12] Afghanistan,[13] and Iraq,[14] the internal conflicts involving Russia (Chechnya),[15] Turkey (south-east Turkey),[16] and the United Kingdom (Northern Ireland),[17] the conflicts concerning

10 Cecilia Medina Quiroga, 'The Inter-American Court of Human Rights 35 Years' (2015) 33 Netherlands Quarterly of Human Rights 118, 119.

11 As the statistics of the ECtHR from 1959-2019 show, the numbers of both violations of the right to a fair trial generally (5.086) and of the length of proceedings (5.884) greatly exceed any other type of violation. See https://echr.coe.int/Documents/Stats_violation_1959_2019_ENG.pdf (last accessed 15 July 2021).

12 E.g. *Banković and Others v Belgium and Others*, ECtHR [GC] 12 December 2001 (dec), Appl No 52207/99.

13 *Hanan v Germany*, ECtHR [GC] 16 February 2021, Appl No 4871/16.

14 E.g. *Al-Skeini v the United Kingdom*, ECtHR [GC] 7 July 2011, Appl No 55721/07.

15 E.g. *Isayeva v Russia*, ECtHR 24 February 2005, Appl No 57950/00.

16 E.g. *Kaya v Turkey*, ECtHR 19 February 1998, Appl No 22729/93. Whether the conflict in south-east Turkey, between the Turkish government and the Kurdish Worker's Party (PKK) can be classified as a non-international armed conflict under international humanitarian law, remains subject to debate. See K Yildiz and Susan Breau, *The Kurdish Conflict. International Humanitarian Law and Post-Conflict Mechanisms* (Routledge 2010).

17 E.g. *Cummins and Others v the United Kingdom*, ECtHR 13 December 2005 (dec.), Appl No 27306/05. There is some discussion on whether this conflict constituted a NIAC, and the UK itself maintained that it was not; see William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 European Journal of International Law 741, 756; Stuart Wallace, *The Application of the European Convention on Human Rights to Military Operations* (Cambridge University Press 2019) 88. Concluding that it was a NIAC after in-depth analysis, see Steven Haines, 'Northern Ireland 1968-1998' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 133–6. Also agreeing it was a NIAC, see Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) 1–2, fn 1.

Northern Cyprus[18] and Georgia,[19] and the ongoing conflicts in the east of Ukraine,[20] the Nagorno-Karabakh,[21] and Syria. Besides individual victims of warfare, States also increasingly bring inter-State applications before the Court which stem from such conflicts. Thus, a Grand Chamber case concerning the conflict between Georgia and Russia was handed down in 2021,[22] and inter-State applications have similarly been filed by Ukraine against Russia,[23] as well as by the Netherlands for the downing of flight MH17 over Ukraine.[24] More recently even, the Court has granted interim measures in relation to Armenia, Azerbaijan and Turkey, in the context of the conflict in Nagorno-Karabakh.[25] Thus, the conflicts which took place on European soil, or in which European States were involved, are quite numerous, and inter-State applications appear to be brought more frequently.[26] Yet, they remain a minority in the case-law with armed conflict related cases constituting a niche rather than a factor shaping the case-law as such.

3 Legal basis and rationale of the duty to investigate under the ECHR

3.1 Introduction

Before addressing the scope of application of, and standards for investigations, the present section sets out the legal basis and rationales of investigations. How and why have investigative obligations been interpreted to form part of the European Convention on Human Rights, despite there being no treaty provision explicitly providing for such?

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18 E.g. *Cyprus v Turkey*, ECtHR [GC] 10 May 2001, Appl No 25781/94 and *Loizidou v Turkey*, ECtHR [GC] 18 December 1996, Appl No 15318/89.

19 *Georgia v Russia (II)*, ECtHR [GC] 21 January 2021, Appl No 38263/08.

20 *Ukraine v Russia (Re Crimea)*, ECtHR [GC] 16 December 2020 (dec.), Appl Nos 20958/14 and 38334/18.

21 E.g. *Saribekyan and Balyan v Azerbaijan*, ECtHR 30 January 2020, Appl No 35746/11; see also the pending interstate cases *Azerbaijan v Armenia*, Appl No 47319/20, and *Armenia v Azerbaijan*, Appl No 42521/20.

22 *Georgia v Russia (II)* (n 19).

23 *Ukraine v Russia (Re Crimea)* (n 20); *Ukraine v Russia (II)*, Appl No 43800/14; *Ukraine v Russia (III)*, Appl No 49537/14.

24 *The Netherlands v Russia*, Appl No 28525/20.

25 *Armenia v Azerbaijan* (interim measure), ECtHR 29 September 2020, Appl No 42521/20 (http://hudoc.echr.coe.int/eng-press?i=003-6809725-9108584); *Armenia v Turkey* (interim measure), ECtHR 6 October 2020, Appl No 43517/20 (http://hudoc.echr.coe.int/eng-press?i=003-6816855-9120472). See also the pending inter-State applications, n 21.

26 Isabella Risini, Justine Batura and Lukas Kleinert, 'A "Golden Age" of Inter-State Complaints? An Interview with Isabella Risini' (*Völkerrechtsblog*, 2020) <https://voelkerrechtsblog.org/articles/a-golden-age-of-inter-state-complaints/> (last accessed 15 July 2021).

3.2 Legal basis for the duty to investigate under the ECHR

Like the ICCPR and the ACHR, the treaty text of the ECHR does not reference investigations. Nevertheless, investigative obligations play an important role in the European Court of Human Rights' interpretations of the ECHR. In 1995, the Court for the first time ruled, in *McCann v the United Kingdom*, that where individuals have died as a result of the use of force, States must investigate whether a wrongful killing has occurred.[27] Soon afterwards, the Court held similarly for alleged violations of the prohibition of torture and inhuman and degrading treatment,[28] the right not to be arbitrarily deprived of one's liberty, especially in the context of incommunicado detention and disappearances,[29] and the right not to be subjected to slavery or forced labour.[30] As is explored further below,[31] it could now even be said to be a corollary of most substantive rights under the ECHR.[32] Because this obligation is by no means self-evident when reading the ECHR, this section explores how the Court has nevertheless found investigative duties to be incorporated in the Convention.

Like the Human Rights Committee and the Inter-American Court of Human Rights,[33] the European Court has, as a basis for investigative obligations, relied on a number of sources. First and foremost, the Court has applied a systematic reading of the Convention. It has read the general Article 1 obligation to 'secure' rights in combination with substantive rights such as the right to life. The duty to actively secure rights, as was set out more extensively in Chapter 4, requires States to do more than refrain from infringing upon human rights.[34] It additionally requires them to actively protect and fulfil rights, which includes unearthing the facts surrounding potential violations, establish-

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27 *McCann and Others v the United Kingdom*, ECtHR [GC] 27 September 1995, Appl No 18984/91 [161].

28 *Assenov and Others v Bulgaria*, ECtHR 28 October 1998, Appl No 24760/94 [102].

29 *Kurt v Turkey*, ECtHR 25 May 1998, Appl No 24276/94 [123]-[124]. Further, see Krešimir Kamber, *Prosecuting Human Rights Offences. Rethinking the Sword Function of Human Rights Law* (Brill 2017) 330–1.

30 *Siliadin v France*, ECtHR 26 July 2005, Appl No 73316/01 [112]; *Rantsev v Cyprus and Russia*, ECtHR 7 January 2010, Appl No 25965/04 [288]; *S.M. v Croatia*, ECtHR [GC] 25 June 2020, Appl No 60561/14 [304]-[320].

31 See *infra*, §4.2.2.

32 Eva Brems, 'Procedural Protection. An Examination of Procedural Safeguards Read into Substantive Convention Rights' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2013) 141–4. Brems shows there are investigative obligations under Articles 2, 3, 4, 5, 8, 10, 11 and 14 ECHR, and Article 3 Protocol 1 ECHR. To appreciate the ongoing developments in this field, compare with Alastair R Mowbray, 'Duties of Investigation under the European Convention on Human Rights' (2002) 51 International and Comparative Law Quarterly 437.

33 See Chapters 5 and 6.

34 See Chapter 4, §3.3.

ing responsibility for them, and ensuring accountability. Secondly, the Court has found that individual victims' right to a remedy may require States to conduct an investigation, and to afford them adequate reparation for any violation. Thirdly and finally, in a small number of cases, the Court has indicated that the duty to provide reparation for violations, also requires States to conduct (or reopen) an effective investigation. In its supervision of the execution of the Court's judgments, the Committee of Ministers has indeed insisted on effective investigations by way of execution of judgments. Thus, there are three legal bases for investigations in the European Court's case-law, addressed in turn below.

Firstly, the systematic reading of the Article 1 obligation to secure rights in conjunction with other substantive rights, was relied upon to read investigative obligations into the Convention for the very first time in 1995, in the case of *McCann v the United Kingdom*. This case concerned lethal action by British Special Air Service (SAS) forces against Irish Republican Army (IRA) operatives in Gibraltar. The British forces operated under the – later found to be wrong – assumption that the IRA members were armed, had detonating devices on their person, and had placed a bomb which was liable to cause death and destruction on a large scale.[35] Faced with the intentional killing of individuals by State agents, the Court held that

> 'The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.'[36]

Thus, the Court for the first time introduced the obligation to conduct an effective investigation into potential human rights violations, in this case the use of lethal force by State agents. In the present case, the Court ultimately concluded that the public inquest which had been carried out by the UK had been sufficient in this respect, although it did find fault with the planning of the operation – which had ultimately led to the false assumption that the IRA members had explosive devices on their person, and which ultimately led the SAS members to immediately resort to the use of lethal force.[37]

Thus, according to the Court, the general obligation under Article 1 of the Convention to *secure* all ECHR rights *implies* that States are under a duty to investigate wrongful killings. This reasoning is highly reminiscent of what

35 *McCann and Others v UK* (n 27) [195]-[214].
36 Ibid [161].
37 Ibid [195]-[214].

we have seen under the ICCPR and the ACHR, where the Human Rights Committee and Inter-American Court also relied on the general obligation to ensure respect for human rights, to read investigative obligations into their respective treaties.[38] As we shall see below, the Court has applied this reasoning beyond wrongful killings, to many other cases including torture and inhuman treatment,[39] forced disappearance and incommunicado detention. In fact, reading investigative obligations into negatively phrased rights has become such common ground, that the Court has found them to be included in the freedom from slavery and forced labour without even referencing Article 1, rather simply referring to its case-law under the rights to life and physical integrity.[40]

Thus, like under the ICCPR and the ACHR, and much like under IHL, the duty to actively secure rights (or ensure respect for them), requires States to set up a machinery for the effective protection and enforcement of rights. In the terminology of the Court, rights must be rendered 'practical and effective', not 'theoretical and illusory'.[41] Interpreted as such, investigations are an essential element for the realisation of human rights, and form part of the broader system of positive obligations which the Convention and Court impose on States in order to effectuate rights.[42]

Secondly, the Court has – as we have seen for the Human Rights Committee and the Inter-American Court – found that a duty to investigate stems from the individual right to a remedy under Article 13 of the ECHR. The right to a remedy is a procedural right providing individuals with a possibility to obtain relief for ECHR violations at the national level. Somewhat similar to Article 1 of the Convention, Article 13 is therefore accessory in nature in the sense that the right to a remedy can only be invoked where at least an arguable claim exists that one of the other Convention rights has been violated.[43] The type of remedy required depends on the substantive right in question. Serious violations such as killings, torture, and disappearances, however, have been held to require States to mount an effective official investigation into what happened. In the context of Articles 2 and 3,[44] the Court held that

38 See Chapter 5, §3.2 and Chapter 6, §3.2.

39 *Assenov and Others v Bulgaria* (n 28) [102].

40 *Rantsev v Cyprus and Russia* (n 30) [288].

41 E.g. *Christine Goodwin v the United Kingdom*, ECtHR [GC] 11 July 2002, Appl No 28957/95 [74]; Janneke H Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019) 52.

42 Further, see *infra*, §3.3.

43 *Silver and Others v the United Kingdom*, ECtHR 15 March 1983, Appl No 5947/72 etc. [113].

44 For art 5, see *Kurt v Turkey* (n 29) [140]. It is difficult to say so conclusively for art 4, as cases alleging violations of art 13 in conjunction with art 4 are rare (the HUDOC database does not even give the option of filtering for this combination). For an example see *C.N. v the United Kingdom*, ECtHR 13 November 2012, Appl No 4239/08 [86], where the Court however concluded that no separate issue arose under art 13 after having found a violation under art 4's investigative obligations.

> '[w]here a right of such fundamental importance as the right to life or the prohibition against torture, inhuman and degrading treatment is at stake, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure.'[45]

Thus, similarly to the Court's reasoning described above, if individuals are to have a genuine prospect of effectuating a domestic legal remedy, then they must have sufficient access to the facts. In many cases, including many cases relating to armed conflict, such prospects are nil if the State does not cooperate in bringing facts to light. Oftentimes, the State holds all the information, and if it does not share it, victims have no chance of obtaining redress because without cooperation of the State, they cannot prove what happened. This is particularly so in cases of death or disappearance, where victims can no longer give testimony.

Unlike the Human Rights Committee and the Inter-American Court, the European Court has not given much emphasis to the right to a remedy as a source for investigative obligations. Its practice in this regard, moreover, has not been very consistent. On the one hand, the Court has on many occasions found no separate issue to arise under Article 13 once it established investigative deficiencies under the substantive provisions.[46] On the other hand, it has in other cases found separate violations simply by referring to the findings under the substantive provisions.[47] Only extremely rarely has it found a violation of Article 13 but not of the investigative obligations under substantive rights.[48] Yet, the Court appears to see a distinction between both sources for

45 *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*, ECtHR [GC] 17 July 2014, Appl No 47848/08 [149].

46 E.g. *C.N. v UK* (n 44) [86]; *Ramsahai and Others v the Netherlands*, ECtHR [GC] 15 May 2007, Appl No 52391/99 [363].

47 E.g. *Husayn (Abu Zubaydah) v Poland*, ECtHR 24 July 2014, Appl 7511/13 [544]-[545]; *Al-Nashiri v Poland*, ECtHR 24 July 2014, Appl No 28761/11 [550]-[551]; *Kaya v Turkey* (n 16) [108].

48 For one example, see *O'Keeffe v Ireland*, ECtHR [GC] 28 January 2014, Appl No 35810/09, although the reason for finding a violation of art 13 had to do more with the lack of civil remedies for holding the State to account for alleged failures, where only remedies against private individuals were open to the applicant. More pertinent perhaps is the case of *İlhan v Turkey*, with the Grand Chamber holding that for allegations of ill-treatment, the requirement of investigations under art 13 ought normally be sufficient, rather than using the procedural limb of art 3 (ECtHR 27 June 2000, Appl No 22277/93 [92]). This approach appears to have been abandoned, however, as in *Mocanu v Romania* the Grand Chamber held explicitly that the investigative obligations under Articles 2 and 3 could be assessed together, as they are subject to converging principles (*Mocanu and Others v Romania*, ECtHR [GC] 17 September 2014, Appl No 10865/09 etc. [314]).

investigative obligations, holding that the requirements under Article 13 are broader than those under the substantive provisions.[49]

From a close reading of the case-law, it would seem that the distinction is that Article 13 is geared more towards remedies and compensation for the applicant, whereas investigations under the substantive provisions are aimed at protecting life, physical integrity and liberty, and ensuring accountability for violations thereof.[50] In this respect it is relevant under Article 13 whether avenues for redress were available besides criminal investigations, and whether the applicant was able to use those effectively even in the absence of a State-led investigation.[51] This will not be the case where all relevant information is State-held, which is most prominently so in instances of enforced disappearance or extraordinary rendition,[52] but also in other cases where the State was involved in serious human rights violations.[53] In such cases, the Court has found that

> 'in circumstances where, as here, the criminal investigation into the disappearance and probable death was ineffective (…), and where the effectiveness of any other remedy that may have existed, including the civil remedies suggested by the Government, was *consequently* undermined, the Court finds that the State has failed in its obligation under Article 13 of the Convention.'[54]

Thus, the Court requires States to investigate human rights violations both as a procedural guarantee which is meant to safeguard substantive rights more generally, and as a means for ensuring that individuals have sufficient access to a remedy at the domestic level. Although this is somewhat similar to the approaches of the HRC and IACtHR, for the European Court, the right to a remedy plays a significantly less prominent role than under the other systems.[55] For individual cases, it does not appear to matter whether a duty to investigate is grounded in Article 13, or in substantive provisions under the Convention – the 'thorough and effective investigation' required must live up to the same standards.[56]

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49 E.g. *El-Masri v the Former Yugoslav Republic of Macedonia (FYROM),* ECtHR 13 December 2012, Appl No 39630/09 [256].

50 See also Brems (n 32) 157. By way of example, see *Hanan v Germany* (n 13) [155].

51 See also Alastair R Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) 219–20.

52 *Bazorkina v Russia*, ECtHR 27 July 2006, Appl No 69481/01 [163].

53 E.g. *Isayeva v Russia* (n 15) [229]. See also *İlhan v Turkey* (n 48), where the Grand Chamber emphasised the circumstance of relevant information being confined to State officials.

54 See, among many others, *Bazorkina v Russia* (n 52) [163], italics FT.

55 James A Sweeney, 'The Elusive Right To Truth in Transitional Human Rights Jurisprudence' (2018) 67 International and Comparative Law Quarterly 353, 378;384.

56 *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* (n 45) [149]; Brems (n 32) 157.

Thirdly and finally, States may be required to investigate violations of the ECHR as a means of *reparation*. As was alluded to above,[57] the European Court does not normally order specific forms of reparation, other than compensation. Nevertheless, on relatively rare occasions, the Court indicates explicitly how States must give effect to its judgments.[58] For instance, in *Tagayeva v Russia*, concerning an extremely violent hostage rescue operation which ended up costing 330 lives, the Court found that remedies should include furthering the domestic investigations in line with the investigative standards formulated by the Court, as well as the pursuance of particular lines of investigation. The use of indiscriminatory weaponry, for instance, must be elucidated if Russia is to remedy the violations found.[59] Another example is the case of *Abu Zubaydah v Lithuania*, which concerned Lithuania's responsibility for hosting a secret detention site operated by the Central Intelligence Agency (CIA). In this case, the Court found that the lack of an effective investigation into the torture of the applicant could only be remedied by Lithuania taking 'all necessary steps to reactivate' pending investigations.[60] This had to include further clarifying the facts of the applicant's maltreatment, as well as the identification and punishment of the culprits.[61]

Thus, in the European system the execution of judgments is principally supervised by the Committee of Ministers, not the Court. Nonetheless, the Court on occasion indicates what specific remedial measures are necessary to execute its judgment, including investigations. According to the Department for the Execution of Judgments of the ECtHR of the CoE, if the Court finds a violation of the duty to investigate, 'this entails an obligation on the respondent State *ex officio* to reopen, resume or continue investigations, and to ensure that they are conducted in a Convention-compliant manner'.[62] According to the Court, this obligation 'persists as long as such an investigation remains feasible but has not been carried out or has not met the Convention standards'.[63] Thus, like in the Inter-American system, reparation for violations found by the Court will often require that the State carry out an effective investigation. There is consistent practice by States under the supervision of the Committee of Ministers in this respect, which in conjunction with the Court's occasional

57 *Supra*, §2.

58 Alice Donald and Anne-Katrin Speck, 'The European Court of Human Rights' Remedial Practice and Its Impact on the Execution of Judgments' (2019) 19 Human Rights Law Review 83.

59 *Tagayeva and Others v Russia* (n 7) [641].

60 *Abu Zubaydah v Lithuania*, ECtHR 31 May 2018, Appl No 46454/11 [683].

61 Ibid.

62 Department for the Execution of Judgments of the European Court of Human Rights, *Thematic Factsheet on Effective Investigations into Death or Ill-treatment caused by Security Forces*, Strasbourg: July 2020 (accessible at https://rm.coe.int/thematic-factsheet-effective-investigations-eng/16809ef841 (last accessed 15 July 2021)).

63 *Abu Zubaydah v Lithuania* (n 60) [682]; *Association "21 December 1989" and Others v Romania*, ECtHR 24 May 2011, Appl No 33810/07 [202].

indications to that effect, show that the obligation to ensure adequate reparation for violations, can also entail a duty to investigate.

It may, in short, be concluded that the basis for the duty to investigate under the ECHR is to be found in the obligation to secure the rights enshrined in the ECHR, in combination with substantive provisions, as well as in the right to a remedy for violations of substantive rights. Finally, the duty to provide adequate reparation may also entail a duty to investigate.

3.3 Rationale of the duty to investigate under the ECHR

Having now determined on what basis the European Court has held investigative obligations to be implicit in the ECHR, we may consider *why* it has done so. What are the aims and rationale for requiring States to investigate human rights violations, in the view of the European Court?

As was shown in Chapter 4, in order to meet their obligations under IHRL, States must not only respect human rights, but they must also actively ensure and fulfil them. In this context, the European Court has found that States must institutionalise a procedural mechanism which ensures rights. In its jurisprudence on the rights to life, physical integrity and freedom from slavery, it has fleshed this out further, identifying four main obligations: (i) the negative obligation not to interfere with these rights (arbitrarily), and the positive obligations to (ii) put in place an appropriate legislative and administrative framework, (iii) *ex ante* protect individuals from interferences with these rights through operational measures, and (iv) *ex post* to investigate, and where appropriate, prosecute and punish those responsible.[64] These obligations are closely intertwined, as the Court has consistently noted. In the context of the right to life, the Court held this right in conjunction with Article 1 to impose

> 'a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.'[65]

This already speaks to the deterrent, preventive effects which are meant to emanate from the criminal legislation, and the threat of enforcement. As the

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64 E.g. *Mahmut Kaya v Turkey*, ECtHR 28 March 2000, Appl No 22535/93 [85] (art 2); *El-Masri v FYROM* (n 49) [182] and [198] (art 3); *Rantsev v Cyprus and Russia* (n 30) [284]-[288] (art 4). Under art 5, specific safeguards against disappearances are listed in paragraphs (2)-(4) of the provision itself, aimed to protect against disappearances for instance by granting the right of *habeas corpus*.

65 *Mahmut Kaya v Turkey*, ibid [85]; *Kiliç v Turkey*, ECtHR 28 March 2000, Appl No 22492/93 [62].

Court has indicated, the 'essential purpose' of investigations, is 'to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility'.[66] In the Court's view, rendering rights practical and effective, States Parties must actively protect a number of rights through the protection of their criminal law systems.[67] Should there be any transgression, they must then effectuate these criminal law provisions by mounting investigations, and where appropriate prosecute and punish those responsible. This reasoning, that the effective protection of human rights requires penal suppression of violations of those rights, is the key factor that has led the Court to develop its case law on duties of investigation.

If effectuating the criminal legislation which secures rights, and ensuring accountability for violations, are the primary purposes of investigations, then it may be concluded that investigations play a crucial role in both the proper institutionalisation of a procedural mechanism for ensuring rights, as well as in the *ex post* enforcement of rights. The former is generally required for the proper protection and implementation of the ECHR within a State. The latter ensures that in individual cases, the truth about what happened is brought to light, which allows for an assessment of whether human rights were violated, and if so, ensures that perpetrators are held to account.

Beyond these overarching aims, depending on the case before it, the Court has also identified certain other aims of investigations. Such aims have been to combat impunity in case of grave violations,[68] to grant victims or their relatives an effective remedy,[69] to safeguard the public's faith in the State's monopoly on the use of force,[70] and – arguably – to guarantee the right to truth especially in the context of extraordinary rendition.[71] In disappearance

66 *Nachova and Others v Bulgaria*, ECtHR [GC] 6 July 2005, Appl No 43577/98 and 43579/98 [110].

67 For a list of conduct subject to criminalisation under the ECHR, see §4.2 below.

68 *Marguš v Croatia*, ECtHR [GC] 27 May 2014, Appl No 4455/10 [127]; *Ould Dah v France*, ECtHR 17 March 2009 (dec), Appl No 13113/03.

69 *Anguelova v Bulgaria*, ECtHR 13 June 2002, Appl No 38361/97 [161]-[162].

70 *Ramsahai and Others v the Netherlands* (n 46) [325].

71 *El-Masri v FYROM* (n 49) [191] and [193]. The Court was more reluctant in accepting the right to truth in *Janowiec and Others v Russia* (ECtHR [GC] 21 October 2013, Appl No 55508/07 and 29520/09), but has later referenced this right again, see e.g. the extraordinary rendition cases of *Al-Nashiri v Poland* (n 47) and *Husayn (Abu Zubaydah) v Poland* (n 47). On this subject, see more extensively Philip Leach, Rachel Murray and Clara Sandoval, 'The Duty to Investigate Right to Life Violations across Three Regional Systems: Harmonisation or Fragmentation of International Human Rights Law?' in Carla Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill Nijhoff 2017) 56–8; Olga Chernishova, 'Right to the Truth in the Case-Law of the European Court of Human Rights' in Lawrence Early and others (eds), *The Right to Life under Article 2 of the European Convention on Human Rights.*

cases under Article 5, there is moreover the aim of ensuring the victim's safety, by finding and freeing them.[72] As a final more practical matter, it has been observed that the Court employs the investigative duties under the various provisions when it has insufficient evidence to find substantive violations of the right concerned, and fact-finding missions are either unlikely to be successful or too costly.[73] In cases where there was any State involvement in the interference with the victim's rights, the aim of ensuring public confidence in the State's adherence to the rule of law and preventing any appearance of collusion are of increased importance,[74] as is ensuring the accountability of State agents involved.[75]

Whereas a number of aims of investigations can therefore be distinguished, the overarching aim is the practical and effective protection of the rights in question. In the eyes of the Court, such effective protection requires both *ex ante* action that prevents violations from occurring, as well as *ex post* repression and remedies where violations have taken place.

4 SCOPE OF APPLICATION OF THE DUTY TO INVESTIGATE UNDER THE ECHR

4.1 Introduction

Above we have seen why, and on what basis, the duty to investigate has been found to be implied in the ECHR. The next pertinent question to ask is *when* States must conduct an investigation. This question, which is central to the study's overarching research question, essentially requires us to determine the scope of application of the duty to investigate. This section, similar to those on the ICCPR and ACHR, explores the various modes of application of the duty to investigate, in its material (§4.2), personal (§4.3), temporal (§4.4), and geographic (§4.5)dimensions.

Twenty Years of Legal Developments since McCann v. the United Kingdom. In Honour of Michael O'Boyle (Wolf Legal Publishers 2016).

72 *Kurt v Turkey* (n 29) [123].

73 Egbert Myjer, 'Investigation into the Use of Lethal Force: Standards of Independence and Impartiality' in Lawrence Early and others (eds), *The Right to Life under Article 2 of the European Convention on Human Rights. Twenty Years of Legal Developments since McCann v. the United Kingdom. In Honour of Michael O'Boyle* (2016); Michael O'Boyle and Natalia Brady, 'Investigatory Powers of the European Court of Human Rights' [2013] European Human Rights Law Review 378. For an example, see e.g. *Fedorchenko and Lozenko v Ukraine*, ECtHR 20 September 2012, Appl No 387/03 [44]-[49].

74 See *Anguelova v Bulgaria* (n 69).

75 See the paragraph in *Nachova and Others v Bulgaria,* cited *supra*.

4.2 The material scope of application and the investigative trigger

4.2.1 Introduction

Looking at the material scope of application of the duty to investigate, we must principally ask ourselves two things. Firstly, violation of *what rights* gives rise to investigative obligations? Is it a limited number of rights, or must all violations be investigated? As we have seen, this question gave rise to some controversy under the ICCPR and ACHR, where although both the HRC and IACtHR had ruled in general that all violations had to be investigated, their practice had rather focused on certain serious violations only – which required criminal accountability. Secondly, it must be queried what type of information *triggers* the duty to investigate. Is just any allegation of a violation sufficient, must there be a *prima facie* violation, and must States actively uncover violations? These issues are addressed in this section.

4.2.2 Material scope of application – which rights require investigation?

As a starting point, it must be noted that – contrary to the Human Rights Committee and Inter-American Court – the European Court has never generally pronounced on what rights entail a duty to investigate when violated. Because the Court develops its case-law incrementally,[76] on a case-by-case basis, it will also likely refrain from such general pronouncements. Rather, it will decide cases which come before it, and decide in those cases whether States are held to investigate.

Although this characteristic of the Court's case-law makes it more difficult to establish the precise contours of the investigative obligations which flow from the ECHR, there is nevertheless an extensive body of case-law which guides when States must investigate. As was already touched upon above, the Court in 1995 held for the first time that investigations are implied in the right to life. Afterwards, it expanded this approach first to 'core' rights related to the protection of the physical and mental integrity of individuals, but developments have not stopped there.[77] As Eva Brems convincingly shows, investigative obligations have been read into most substantive rights under the ECHR. She has identified investigative obligations under Articles 2, 3, 4, 5, 8, 10, 11 and 14 ECHR, and Article 3 Protocol 1 ECHR,[78] and in light of the Court's case-by-case approach, there appears no reason of principle why it could not expand on this list yet further.

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76 Janneke H Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (2018) 18 Human Rights Law Review 495.

77 See the discussion by Mowbray in 2002, which was then justifiably limited to Articles 2, 3 and 5; Mowbray (n 32).

78 Brems (n 32) 141–4. Further in-depth, see Kamber (n 29).

Although there is therefore no principled limitation as far as the rights which require investigation are concerned, insofar as it pertains to criminal investigations, Piet Hein van Kempen has shown the duty to be dependent on the requirement under the ECHR to protect a certain right through criminal legislation.[79] He identifies a large number of instances where such obligations exist, such as in case of violent killings, non-intentional deaths, torture and ill-treatment in contravention with Article 3, instances of slavery and forced labour, enforced disappearances and kidnappings, sexual abuse, defamation, unlawful entry contravening the right to a home, and arson and vandalising a home.[80] This list too is not limited as a matter of principle and it is non-exhaustive.

The European Court therefore appears to require criminal law measures, and investigations, in an increasing number of cases in order to protect the rights enshrined in the Convention. This development mirrors that under the ICCPR and ACHR, and underlines that human rights mechanisms are developing their 'sword' function through the 'quasi-criminal jurisdiction' exercised by human rights bodies and courts.[81]

For the purposes of this study, the duty to investigate core rights, the rights to life, freedom from torture and ill-treatment, freedom from slavery and forced labour, and the right to liberty, are most pertinent. After all, these rights are for the most part non-derogable, and they moreover have – to a certain extent – counterparts under IHL. This Chapter will therefore focus on the duty to investigate violations of these rights, on which the Court has moreover developed an extensive case-law.

4.2.3 The investigative trigger

The above analysis has shown that violations of Articles 2, 3, 4, and 5 must be investigated, as well as violations of a number of other rights which are less pertinent to this study. But, this does not yet answer the question *when* a State's obligation arises. A first issue addressed below, is whether that information must pertain to a *violation*, or also to other *interferences*. Secondly, it is addressed what information on the part of the State triggers the duty.

Firstly, it must be noted that it is not only violations, in the strict legal sense, which give rise to a duty to investigate. States must criminalise certain conduct contravening ECHR rights, and they must operationalise their invest-

79 PHPHMC van Kempen, *Repressie Door Mensenrechten. Over Positieve Verplichtingen Tot Aanwending van Strafrecht Ter Bescherming van Fundamentele Rechten (Inaugural Address Nijmegen)* (Wolf Legal Publishers 2008) 43.

80 van Kempen (n 79) 29–37 with further referencing.

81 Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577; Kamber (n 29); Alexandra Huneeus, 'International Criminal Law By Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 The American Journal of International Law 1.

igative machinery whenever such legislation is violated.[82] Thus, as is explored further in the next section, conduct by private parties – for example murder – is equally subject to investigative obligations. This may not come as a surprise. Yet, 'private' instances of murder do not constitute violations of the right to life on the part of the State, unless the State ought to have known of a real and immediate risk to the individual victim, triggering the State's duty to *protect* the victim.[83] If States can be under the obligation to investigate killings for which it had no responsibility, and of it which it had no knowledge,[84] then the duty to investigate in this sense is not contingent on a prior *violation* of a Convention right. Rather, it would appear to be concerned with an infringement of the right's underlying value, such as human life.

In this respect, the Court has classified the duty to investigate as a 'separate and autonomous duty', and a 'detachable obligation'.[85] In doing so, the Court has underlined that the duty to investigate can arise, and can be violated, independent of any other violation on the part of the State. Investigations in this sense are not simply a method of establishing whether substantive violations of the Convention have taken place, but of protecting the values protected by those rights – life, physical integrity and liberty[86] – through investigation and holding accountable those who have harmed those values. The trigger for the duty to investigate is therefore conduct harming life, physical integrity, or liberty, whether by State agents or private parties.

It ought to be noted, at this point, that the right to a remedy under Article 13 appears to deviate somewhat from the above. The Court's case-law indicates that the right to a remedy requires a criminal investigation where State agents were involved in the alleged violation only,[87] or where there was at least some special duty of care for the State – such as in cases of violence between prisoners.[88] In this respect, the material scope of application of the duty to investigate under the right to a remedy, is therefore more limited than under substantive rights. Why the Court makes this distinction is not entirely clear, and for the purposes of this study it does not make much of a difference. States must investigate interferences with life, physical integrity, and liberty, and

82 See the case-law cited (n 27-30).

83 *Osman v the United Kingdom*, ECtHR [GC] 28 October 1998, Appl No 23452/94 [116].

84 *Menson v the United Kingdom*, ECtHR 6 May 2003 (dec), Appl No 47916/99.

85 *Šilih v Slovenia*, ECtHR [GC] 9 April 2009, Appl No 71463/01 [159] (art 2) and *Sorokins and Sorokina v Latvia*, ECtHR 28 May 2013, Appl No 45476/04 [71] (art 3); *Mocanu and Others v Romania* (n 48) [206] (Articles 2 and 3).

86 For the sake of brevity, the term liberty is used broadly here, to connote both the right not to be arbitrarily deprived of one's liberty, and the right not to be subjected to slavery or forced labour.

87 E.g. *Z. and Others v the United Kingdom*, ECtHR [GC] 10 May 2001, Appl No 29392/95 [109]. See further Mowbray (n 51) 217–8.

88 *Paul and Audrey Edwards v the United Kingdom*, ECtHR 14 March 2002, Appl No 46477/99.

whether such is the case under substantive rights only, or also the procedural right to a remedy, has no bearing on the investigative standards.[89]

Beyond the question what conduct or incidents trigger the duty to investigate, is, secondly, the question what knowledge of such an incident the State must have had, in order to trigger its obligation. This can be the case where a victim or other individual brings an 'arguable claim'[90] or 'credible assertion'[91] of an incident, or, alternatively, if there are 'other sufficiently clear indications' of such an incident.[92] The duty exists independent from an individual complaint, and comes into existence when, through whatever source, 'it has come to the attention of the authorities' the conduct has taken place.[93]

In the context of Article 2, the duty is triggered in case of any violent death,[94] or life-threatening injury,[95] disappearance,[96] as well as certain accidental deaths resulting from risky State activities,[97] or in a private (medical) sphere.[98] In certain cases, where an individual has disappeared in life-threatening circumstances, the duty is triggered even though there is no certainty the individual died.[99] In the context of Article 3, the 'arguable claim' must relate to ill-treatment in breach of Article 3, whether committed by State agents or private parties.[100] Article 4 requires States to act once 'the matter' indicating slavery or forced labour comes to their attention.[101] Under Article 5 the duty thus far remains limited to situations of disappearance and unacknowledged detention, which is partly also covered by Articles 2 and 3, and where the arguable claim must relate to a suspicious disappearance often at the hands of the State, but not necessarily so.[102]

89 The standards for investigations are discussed further in §5.
90 *Cyprus v Turkey* (n 18) [132] (art 2) and [147] (art 5).
91 *Hassan v the United Kingdom*, ECtHR [GC] 16 September 2014, Appl No 29750/09 [62] (art 3); *Silver and Others v the United Kingdom* (n 43) [113] (art 13).
92 Ibid [62] (art 3).
93 *Rantsev v Cyprus and Russia* (n 30) [288] (art 4).
94 *Menson v UK* (n 84).
95 *Makaratzis v Greece*, ECtHR 20 December 2004, Appl No 50385/99 [55] and [73]-[79].
96 *Cyprus v Turkey* (n 18) [132].
97 *Öneryıldız v Turkey*, ECtHR [GC] 30 November 2004, Appl No 48939/99.
98 *Calvelli and Ciglio v Italy*, ECtHR [GC] 17 January 2002, Appl No 32967/96.
99 *Cyprus v Turkey* (n 18) [132]; David J Harris and others, *Law of the European Convention on Human Rights* (3rd edn, Oxford University Press 2014) 214.
100 *O'Keeffe v Ireland* (n 48) [172].
101 *Rantsev v Cyprus and Russia* (n 30) [288].
102 *Storck v Germany*, ECtHR 16 June 2005, Appl No 61603/00 [102].

4.3 Personal scope of application

Now that we know what triggers the duty to investigate, we may ask who are the subjects of that obligation, whether incidents which are not attributable to the State must be investigated, and whether there is an individual *right* to an investigation.

First of all, as was also shown in the Chapters on the ICCPR and ACHR, it is States who are under the duty to investigate. Quite clearly, the addressees of obligations under the ECHR, are States. They are the ones who have signed up to the ECHR, and they are the ones who must effectuate it. In the context of the duty to investigate, this means that States are primarily responsible for conducting such investigations. This is so, obviously, whenever States' own agents engage in the serious human rights violations at stake here. In order to safeguard the rule of law, States must conduct effective investigations and prosecute and punish those responsible. But, as was already touched upon above, States can also be held to investigate abuses committed by others. If an incident as identified above takes place within the jurisdiction of a State, it is obliged to investigate.[103] As States are under a positive obligation to secure Convention rights, wrongdoing by private individuals may be brought within the scope of the Convention when States have failed to take the necessary measures to protect a certain right, or when they have failed to conduct adequate investigations into such conduct.[104] In these types of cases, the wrongdoing itself, e.g. a wrongful killing, is not attributed to the State, rather the State is reprimanded for having failed to prevent, investigate or punish such act. Nevertheless, it remains the State who is under an ECHR obligation to conduct investigations, even if this obligation may be triggered by conduct of private individuals.

An as yet outstanding question, is whether States can also be held to investigate abuses committed by non-State armed groups (NSAGs), engaged in a NIAC with the State. This question may in practice be closely intertwined with the question whether a State exercised jurisdiction in the territory where such abuses took place, to be discussed below, but also raises issues of personal

103 This is one of the effects of the 'horizontalisation' of human rights, see e.g. Malu P Beijer, *The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations* (Intersentia 2017) 147. On horizontal effect more generally, see Gerards (n 41) 136–59; John H Knox, 'Horizontal Human Rights Law' (2008) 203 American Journal of International Law 1.

104 *Cyprus v Turkey* (n 18) [131]; *Ergi v Turkey*, ECtHR 28 July 1998, Appl No 23818/94 [82] (right to life). See also Silvia Borelli, 'Domestic Investigation and Prosecution of Atrocities Committed during Military Operations: The Impact of Judgments of the European Court of Human Rights' (2013) 46 Israel Law Review 369, 373. For a case of ill-treatment, see *M.C. v Bulgaria*, ECtHR 4 December 2003, Appl No 39272/98 [151] and more recently the Grand Chamber in *O'Keeffe v Ireland* (n 48) [172]. Pertaining to the prohibition of slavery and forced labour, see *Siliadin v France* (n 30) [89]; for the right to liberty and security, see *Storck v Germany*, ibid [102].

applicability. As was remarked in the context of the ACHR,[105] under international law, it is the States parties to a treaty which are under the obligation to execute it in good faith. Non-State armed groups are not and cannot become parties to the ECHR. Although positive obligations may bring the conduct of NSAGs within the purview of the Convention, it does so always through the responsibility of the State for either preventing such conduct, or ensuring accountability for it. An interesting test case will be whether genuine investigations carried out by NSAGs, which ensure accountability, can discharge the duty to investigate.[106] For now, the Court's case-law has focused on State obligations, and this will likely remain so.

It is therefore States who are under the obligation to conduct an investigation. But a relevant question is whether individuals have a corollary *right* to an investigation. As we have seen, the duty to investigate, according to the Court, is *inherent* in certain rights, such as the right to life.[107] If one's individual right to life implicitly encompasses a duty to investigate, then it would follow as a matter of logic that indeed, there is also an individual right to an investigation.[108] The same applies to the individual right to a remedy and reparation.[109] And indeed, in the Court's practice, it finds individual rights, such as the right to life, or the right to a remedy, to be violated if the State has failed to conduct an effective investigation. Victims must, as will be seen below, moreover be allowed sufficient access to the investigation, in order to allow them to effectuate their legitimate interests.[110] Reparative measures required if the Court finds the violations discussed here, such as killings by State agents, must moreover include effective investigations which hold perpetrators to account.[111] The Committee of Ministers considers such investigations to be *individual* measures, required to give effect to the Court's judgments.[112] Indi-

105 See Chapter 6, §4.3.

106 Another issue which may arise in this context, is whether States could be held to be under an obligation to cooperate with NSAGs in the investigation of human rights abuses. The duty to cooperate with other States is addressed *infra*, §4.5.

107 *Armani Da Silva v the United Kingdom*, ECtHR [GC] 30 March 2016, Appl No 5878/08 [231].

108 See e.g. Vito Todeschini, 'Investigations in Armed Conflict: Understanding the Interaction between International Humanitarian Law and Human Rights Law' in Paul De Hert, Stefaan Smis and Mathias Holvoet (eds), *Convergences and Divergences Between International Human Rights, International Humanitarian and International Criminal Law* (Intersentia 2018) section 3; Brems (n 32) 141–4.

109 Brems (n 32) 144–5.

110 *Anguelova v Bulgaria* (n 69) [140].

111 Department for the Execution of Judgments of the European Court of Human Rights, *Thematic Factsheet on Effective Investigations into Death or Ill-treatment caused by Security Forces*, Strasbourg: July 2020 (accessible at https://rm.coe.int/thematic-factsheet-effective-investigations-eng/16809ef841 (last accessed 15 July 2021)).

112 E.g. *Finogenov and Others v Russia*, Committee of Ministers, Decision of 20-21 September 2016, Appl No 18299/03 [2].

viduals therefore certainly have a right to an investigation, if they are victim of the types of abuses which trigger the duty to investigate.

Beyond the right to an investigation, the Court has been very explicit in finding that individuals do *not* have 'the right to have third parties prosecuted or sentenced for a criminal offence'.[113] Whereas individuals therefore have the right to have the facts surrounding an abuse of their rights clarified, and the right to have a court determine whether their rights were violated, and if so, a right to reparation, they cannot as such rely on the ECHR to have third parties prosecuted. As will be seen below, in section 5, States may be obligated to initiate criminal investigations, and to prosecute and punish offenders. But an individual right to have someone prosecuted, cannot be derived from the ECHR.

4.4 Temporal scope of application

The temporal applicability of the duty to investigate stretches from the moment the duty is triggered until the moment it has been fully discharged. Because the duty to investigate is an obligation of means rather than of result, it can be satisfied when all facts have been clarified, even if ultimately no perpetrators were identified and tried.[114] In certain circumstances, the duty to investigate can be revived, upon discovery of new facts – sometimes even related to incidents which took place a long time ago.[115] An example is the discovery of a mass grave, which renewed the obligation to account for the fate of disappeared persons.[116]

In the case-law of the Court, there are a number of other noteworthy temporal dimensions to the duty to investigate. Two points are of particular interest. First, the 'detachable' nature of the duty to investigate has led the Court to decide that even if the material event giving rise to an interference with individual rights, for instance a killing, falls outside the temporal scope of the Convention because it had not entered into force yet for the responding State, the duty to investigate may nevertheless apply under certain conditions.[117] Second and closely related, the Court has held that the duty to

113 *Armani Da Silva v the United Kingdom* (n 107) [238].
114 Further, see *infra*, §5.
115 *Charalambous and Others v Turkey*, ECtHR 3 April 2012 (dec), Appl No 46744/07 etc. [55].
116 *Janowiec and Others v Russia* (n 71) [185]. See also Sebastian Răduleţu, 'National Prosecutions as the Main Remedy in Cases of Massive Human Rights Violations: An Assessment of the Approach of the European Court of Human Rights' (2015) 9 International Journal of Transitional Justice 449, 459–60.
117 *Mocanu and Others v Romania* (n 48) [206] (art 2 and 3).

investigate can be a continuous obligation that extends in time, again under certain conditions only.[118] Both issues are briefly addressed.[119]

First, the temporal applicability of the Convention is principally limited to events after the entry into force of the Convention for a specific State – the 'critical date' – which applies similarly to extremely grave cases as far as any substantive violations are concerned.[120] The procedural obligation to conduct an investigation under Articles 2 and 3, however, according to the Court, applies even where the incident took place before the critical date, under the following conditions: (1) the only procedural steps or omissions that can be reviewed are those falling *after* the critical date, in combination with either (2) a 'genuine connection' between the event giving rise to the investigative duty under Article 2 or 3, meaning a 'significant proportion' of the required investigative steps was taken, or ought to have taken place, after the critical date; or (3) if the so-called Convention values-test is met, which means that although the connection is not genuine, the Court's jurisdiction is nevertheless 'needed to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective way'.[121] In clarifying the second and third criteria, the Court has ruled that for there to be a genuine connection there must be a sufficient proximity in time between the material event and the entry into force of the Convention, which ought normally not exceed ten years.[122] If this criterion is not met, under the Convention values-test the investigation – or lack thereof – can nevertheless be reviewed where the material event in question 'was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention', which the Court explicitly links to the concept of international crimes.[123] Such crimes must be investigated and prosecuted under the ECHR, even before it entered into force for the party in question, though the absolute limit of this temporal extension is the coming into force of the Convention itself on 4 November 1950 – any act before that date falling outside the temporal scope of application full stop.[124] Thus, the duty to investigate can extend States' responsibility to events which itself fall outside the Convention's temporal scope of application.

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118 *Varnava and Others v Turkey*, ECtHR [GC] 18 September 2009, 16064/90 etc. [194] (art 2) and [208] (art 5).

119 For excellent in-depth analyses, see Antoine C Buyse, 'A Lifeline in Time – Non-Retroactivity and Continuing Violations under the ECHR' (2006) 75 Nordic journal of international law 63; Harriet Moynihan, 'Regulating the Past: The European Court of Human Rights' Approach to the Investigation of Historical Deaths under Article 2 ECHR' (2017) 86 British Yearbook of International Law 68.

120 Moynihan (n 119).

121 *Šilih v Slovenia* (n 85) [162]-[163]; *Janowiec and Others v Russia* (n 71) [141].

122 *Varnava and Others v Turkey* (n 118) [166].

123 *Janowiec and Others v Russia* (n 71) [150].

124 Ibid [151].

Second, where the triggering event is not 'merely' a death or ill-treatment but a disappearance, the disappearance taking place before the critical date is of no consequence for the duty to investigate as it is an 'ongoing obligation'.[125] A defining element of disappearances is the continuing uncertainty as to the fate of the disappeared, exacerbated by the State's lack of investigation or deliberate concealment, leading the Court to hold that 'the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation'.[126] As the violation therefore extends in time, such violations will often fall within the temporal scope of application of the Convention, subject however to one limitation: the uncertainty characteristic of disappearances must extend past the critical date, which is not so where the lapse of time is such that the case becomes one of 'confirmed death'. The Court held this to be the case for the Katyn massacre, which took place in 1940, 58 years before the Convention entered into force for Russia.[127]

4.5 Geographic scope of application

The final mode of application which is discussed here, is the geographic scope of application of the duty to investigate. It draws the limits on the applicability of the duty to investigate, based on the *location* where an incident took place. As was shown in Chapter 4, States must respect, protect, and fulfil rights of 'everyone *within their jurisdiction*'.[128] When it comes to investigations, this means that if an incident which gives rise to an investigative obligation occurred within the State's jurisdiction, it will be required to investigate.

As explained in Chapter 4, States are presumed to exercise jurisdiction throughout their territories and are held to exercise jurisdiction extraterritorially if they exercise effective control over territory or persons.[129] Thus, States will need to investigate if an incident such as a killing takes place within a State's territory, or within territory under its effective control, or if someone who is under the effective control of a State's agents is killed.

The Court's case-law provides a number of examples where States had to investigate incidents which took place outside their territories. In fact, leading cases on the duty to investigate, such as *Al-Skeini v the United Kingdom* and *Jaloud v the Netherlands*, have been cases of extraterritorial application in Iraq. The Court held in these cases that the Convention applies extraterritorially in two separate sets of circumstances. Firstly, under the 'spatial model' of

125 Buyse (n 119) 73–8.
126 *Varnava and Others v Turkey* (n 118) [148].
127 *Janowiec and Others v Russia* (n 71) [185].
128 ECHR, art 1, italics FT.
129 Chapter 4, §4.5.

jurisdiction, States have jurisdiction for the purposes of the ECHR when they exercise 'effective control' over an area.[130] Once it has been established that effective control over an area exists – for instance when the State classifies as an occupying power, or when it administers the area through a subordinate administration – States are then under an obligation to secure 'the entire range of substantive rights' under the ECHR within that area.[131] Secondly, under the 'personal model' of jurisdiction, States are held to have jurisdiction in three sets of circumstances, the most important of which is when the use of force by State agents brings an individual under the authority and control of State authorities.[132] Under this model, however, the State need only secure those rights 'that are relevant to the situation of that individual'.[133] Although there is a potentially significant difference in the rights States must secure under both models of extraterritorial jurisdiction, it appears from the *Jaloud* case the investigative duties under Article 2 apply also where States exercise jurisdiction under the personal model.[134] In that case, Netherlands armed forces were involved in the shooting of an Iraqi citizen at a vehicle check-point. The Court found that the Netherlands 'exercised its "jurisdiction" within the limits of its (…) mission and for the purpose of asserting authority and control over persons passing through the checkpoint'.[135] Given the grave nature of the human rights violations giving rise to investigative duties as discussed in this study, it is moreover difficult to imagine how these rights could ever *not* be relevant to the situation of the individual under the State's control. One would imagine that one's right to life, right not to be tortured, enslaved or disappeared is always relevant, especially where the control exercised over individuals stems from the use of force by State agents. This leads to the conclusion that States must equally investigate credible assertions of violations within their jurisdiction when operating extraterritorially, whether through personal or territorial control.[136]

Finally, an important development with respect to the extraterritorial applicability of the duty to investigate has taken place in the Court's case-law more recently. The Court has found that even where States did not exercise jurisdiction over an incident outside their territories, they may nevertheless be under an obligation to take investigative action. Initially, this obligation

130 E.g. *Al-Skeini v UK* (n 14) [138].
131 Ibid; *Cyprus v Turkey* (n 18) [77]; *Ukraine v Russia (Re Crimea)* (n 20) [303]-[352].
132 *Al-Skeini v UK* (n 14) [134]-[136].
133 Ibid [137].
134 See *Jaloud v Netherlands*, ECtHR [GC] 20 November 2014, Appl No 47708/08, although whether the Court in this case applies the territorial or personal model for jurisdiction, or rather a mix of the two, remains somewhat unclear. See [152]. Further, see Wallace (n 17) 62–3.
135 Ibid [152].
136 See also Peter Kempees, *'Hard Power' and the European Convention on Human Rights* (Brill Nijhoff 2020) 240.

pertained not to a self-standing duty to investigate as such, but rather a *duty to cooperate*.[137] In the case of *Güzelyurtlu and Others v Cyprus and Turkey*, a family was murdered in Cyprus, but the suspects fled across the border into the Turkey controlled 'Turkish Republic of Northern Cyprus' (TRNC).[138] Despite the murders taking place outside of Turkey's jurisdiction, the Court found that Turkey was nonetheless under an obligation to *cooperate* with the investigation by Cyprus – which *was* under a direct duty to investigate, as the murders had taken place within Cyprus' jurisdiction. The duty to cooperate is a two-way obligation, requiring the territorial State to 'seek assistance', and the State with jurisdiction over the offenders to 'afford assistance'.[139] In imposing this obligation on Turkey, the Court referred to the 'Convention's special character as a collective enforcement treaty', which requires States parties to 'cooperate effectively with each other in order to elucidate the circumstances of the killing and to bring the perpetrators to justice'.[140] Despite the murders and the victims having been outside of Turkey's jurisdiction, the Court therefore found that Turkey had certain obligations to cooperate in the investigation by another ECHR State, namely Cyprus. The fact that the perpetrators were present within territory controlled by Turkey, constituted a 'special feature' which,[141] according to the Court, created a 'jurisdictional link' between it, and the human rights violation in question – sufficient to require it to cooperate in ensuring accountability for it.[142] The duty to cooperate then constitutes a duty of means to cooperate in good faith, and to employ avenues for mutual legal assistance, such as extradition or other assistance, applicable between the States in question.[143]

Beyond a duty to cooperate in investigations, the Grand Chamber has in a number of recent findings extended this approach to the duty to investigate as such. If 'special features' are present, States must investigate incidents even if they fell outside their jurisdiction *ratione loci* – irrespective of another State's

137 Further, see Marko Milanović, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life' (2020) 20 Human Rights Law Review 1, 41–4; Stefan AG Talmon, 'The Procedural Obligation under Article 2 ECHR to Investigate and Cooperate with Investigations of Unlawful Killings in a Cross-Border Context' (2019) 13 Diritti Umani e Diritto Internazionale 99.

138 *Güzelyurtlu and Others v Cyprus and Turkey*, ECtHR [GC] 29 January 2019, Appl No 36925/07.

139 *Güzelyurtlu and Others v Cyprus and Turkey* (n 138) [233] (art 2); *Nasr and Ghali v Italy*, ECtHR 23 February 2016, Appl No 44883/09 [270]-[272] (art 3); *Rantsev v Cyprus and Russia* (n 30).

140 Ibid [232]; Milanović, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life' (n 137) 42.

141 Further on these 'special features', see Talmon (n 137).

142 *Güzelyurtlu and Others v Cyprus and Turkey* (n 138) [191]-[197]; Milanović, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life' (n 137) 41.

143 *Güzelyurtlu and Others v Cyprus and Turkey* (n 138) [235]; *Rantsev v Cyprus and Russia* (n 30) [241], [246], [307]. Besides classical treaties for extradition and mutual legal assistance, the Court has also applied this doctrine to the European Arrest Warrant, see *Romeo Castaño v Belgium*, ECtHR 9 July 2019, Appl No 8351/17 [79]-[92]. For an earlier example of a duty to cooperate, see *Cummins v UK* (n 17), discussed further in §6.4.2.

investigative obligations therefore. The Court found to this effect in the important cases *Georgia v Russia (II)* and *Hanan v Germany*, which are discussed further in section 6. In *Georgia v Russia (II)*, the Court found that although Russia did not exercise jurisdiction in Georgia during the 'active phase of hostilities' of the inter-State conflict, it nevertheless was under an obligation to investigate allegations of war crimes committed by its troops during this phase.[144] This, the Court found, stemmed from the fact that Russia had in fact instituted some limited form of investigation, and due to the 'special features' of the case.[145] In *Hanan*, the Court similarly reasoned that based on the 'special features' of the case, Germany had to investigate an air strike carried out by its forces in the non-international armed conflict in Afghanistan, which had led to a number of civilian casualties.[146]

What constitutes such 'special features' giving rise to a 'jurisdictional link', the Court finds, cannot be established *in abstracto*.[147] From its case-law thus far, it appears relevant whether (i) the State in question has instituted an investigation,[148] (ii) whether the State was obliged to investigate the incident under domestic law or international law (including under IHL),[149] and (iii) whether pursuant to an international agreement, the State accepted to conduct such an investigation or to enforce a punishment,[150] (iv) whether the suspects were present on the State's territory or under its jurisdiction,[151] and (v) whether the territorial State was prevented from conducting an effective investigation (for instance because another State occupied its territory, or because a Status of Forces Agreement prevents such).[152] As the cases of *Georgia v Russia (II)* and *Hanan* illustrate, this likely brings most military operations carried out abroad within the purview of the investigative obligations under the ECHR. After all, if its armed forces violate IHL, this will give rise to investigative obligations under that body of law (as well as under domestic law, if the State has correctly implemented IHL), and members of the armed forces will in almost all situations be within the jurisdiction of their own State for the purposes of prosecution, while territorial States will often be prevented from effectively investigating, due to alleged perpetrators either having returned to their own State, or because a Status of Forces Agreement prevents them from exercising criminal jurisdiction.

144 *Georgia v Russia (II)* (n 19) [328]-[332].
145 Ibid.
146 *Hanan v Germany* (n 13) [134]-[142].
147 *Güzelyurtlu and Others v Cyprus and Turkey* (n 138) [190].
148 Ibid [191]; *Georgia v Russia (II)* (n 19) [330]-[331]; *Hanan v Germany* (n 13) [135].
149 *Georgia v Russia (II)* (n 19) [331]; *Hanan v Germany* (n 13) [137], [139]-[140]; *Romeo Castaño v Belgium* (n 143) [41].
150 *Makuchyan and Minasyan v Azerbaijan and Hungary*, ECtHR 26 May 2020, Appl No 17247/13 [50].
151 *Güzelyurtlu and Others v Cyprus and Turkey* (n 138) [194]; *Georgia v Russia (II)* (n 19) [331].
152 *Güzelyurtlu and Others v Cyprus and Turkey* (n 138) [193]-[195]; *Georgia v Russia (II)* (n 19) [331]; *Hanan v Germany* (n 13) [138].

In sum, the duty to investigate applies extraterritorially under the spatial and personal models, but can extend even to situations where other Convention obligations do not apply under those models. The procedural duty to investigate therefore appears to have given rise to a separate strand in the Court's case-law on extraterritorial obligations. In fact, this appears to be recognised as a third strand in its case-law on extraterritorial jurisdiction, in addition to the spatial and personal models of jurisdiction. The Grand Chamber found in its decision in *M.N. and Others v Belgium*, that beyond those two models, 'specific circumstances of a procedural nature have been used to justify the application of the Convention in relation to events which occurred outside the respondent State's territory'.[153] Thus, the duty to investigate is subject to special rules which extend its scope of application geographically, similar to its special status relating to its temporal scope of application. The extension of ECHR obligations to incidents which fall outside of the jurisdiction of States, under either the spatial or personal model, is certainly an important development which potentially expands the scope of the duty to investigate, and cooperate, yet further. The European Court is in the forefront of these developments, going beyond what the Human Rights Committee or the Inter-American Court have thus far required.

4.6 Résumé

This section has explored the scope of application of the duty to investigate, in its various modalities. Whereas the case-law develops on a case-by-case basis, a number of conclusion may nonetheless be drawn at this point.

Firstly, like the other systems, most cases brought before the European Court of Human Rights, pertain to serious violations of the rights to life and liberty, and the freedom from torture and slavery. Yet, the European Court has had occasion to rule on investigative duties in the context of other rights as well, such as for instance the freedom of expression. In contrast to the HRC and IACtHR, however, it has refrained from pronouncing generally on the rights which potentially bring with them investigative obligations. Secondly, the right to a remedy plays a relatively modest role in the Court's case-law on investigations, especially when compared with the ICCPR and ACHR. Thirdly, States must investigate abuses committed by third parties as well those by their own agents, so long as the abuse took place within their jurisdiction. Fourthly, the duty to investigate has a broad temporal scope of application. It can also apply to incidents predating the entry into force of the ECHR for the State in question. Fifthly and finally, States are also required to investigate violations extraterritorially, insofar as they had jurisdiction over the violation. In fact, they are

153 *M.N. and Others v Belgium* (dec.), ECtHR [GC] 5 March 2020, Appl No 3599/18 [107].

at times held to take investigative steps even if they had no jurisdiction over a violation, if due to 'special features' of a case, there existed a 'jurisdictional link' – requiring States both to conduct an investigation themselves, and to cooperate in the investigation of another ECHR State. Taken together, the duty to investigate therefore has a broad scope of application under the ECHR – and is at the cutting edge of human rights developments when it comes to the temporal scope of application, and the duty to conduct and cooperate in extraterritorial investigations.

5 SUBSTANCE OF THE DUTY TO INVESTIGATE: INVESTIGATIVE STANDARDS UNDER THE ECHR

5.1 Introduction

Having established the scope of the duty to investigate, the Chapter now turns to the applicable investigative standards – how ought States give shape to investigations to comply with the Convention? These standards are in large part identical under the four substantive provisions discussed, as well as under Article 13, and they are therefore discussed in an integrated manner.[154]

5.2 An obligation of means, not of result

A first important characteristic of the duty to investigate, is that it is an obligation of means, not of result[155] – like under the ICCPR and ACHR.[156] This means that States cannot be held to have violated the Convention simply for not having been able to identify a perpetrator or to uncover the fate or whereabouts of a disappeared person, but rather must conduct an investigation

154 The Grand Chamber has held explicitly that the investigative obligations under Articles 2 and 3 could be assessed together, as they are subject to converging principles. *Mocanu and Others v Romania* (n 48) [314]. The same standards apply under art 5, as is illustrated by the Grand Chamber's finding in *Varnava v Russia*, that art 5's investigative obligations had been violated by virtue of the shortcomings identified under art 2 ((n 118) [208]). Under art 4, the Court in *Rantsev v Cyprus and Russia* set the standards for investigation by reference to cases concerning the right to life (n 30) [288]).

155 E.g. *Mustafa Tunç and Fecire Tunç v Turkey*, ECtHR [GC] 14 April 2015, Appl No 24014/05 [173] (right to life); *Abdu v Bulgaria*, ECtHR 11 March 2014, Appl No 26827/08 [43] (right to physical integrity); *Rantsev v Cyprus and Russia* (n 30) [288] (prohibition of slavery and forced labour). To my knowledge, this has not been ruled explicitly for investigations under Article 5 (right to liberty and security), as the duty to investigate under this right is largely limited to cases of disappearances, and these are often first assessed under Articles 2 and/or 3, with the Court under Article 5 merely referencing its findings under those provisions. See e.g. *El-Masri v FYROM* (n 49) [242]-[243].

156 See Chapters 5 and 6.

'capable of leading to the identification and punishment of those responsible'.[157] Rather than judging whether a State has met its obligations only by looking at the result of the investigation, the Court has therefore developed a number of standards which investigations must meet.

The Court decides cases on a case-by-case basis, and as it found in *Velikova v Bulgaria*, 'it is not possible to reduce the variety of situations which might occur to a bare check list of acts of investigations or other simplified criteria'.[158] Nevertheless, the Court has developed an extensive body of case-law pertaining to the duty to investigate. This has resulted in a list of principles to assess the compatibility of investigations with the ECHR, which are sufficiently broad to allow for a case-by-case assessment of an investigation's compliance with the Convention in the specific circumstances of a case.

5.3 Investigative standards

5.3.1 Eight standards

As the Court has stated many times, the overarching standard is that there must be some form of thorough, effective official investigation.[159] The components of such an investigation, are eight in number. Investigations must be (i) launched of the State's own accord (*ex officio*), (ii) initiated promptly and carried out with reasonable expediency, and must furthermore be (iii) adequate, (iv) independent and (v) impartial, and (vi) must contain a sufficient element of public scrutiny, including (vii) sufficient involvement of the victims or their next of kin.[160] Finally, (viii) follow-up to the investigation may be required, which depending on the case may require either criminal accountability processes, or the availability of civil remedies. In the case of *Tunç and Tunç v Turkey*, the Grand Chamber characterised the adequacy, promptness, independence, and involvement of next of kin, as the 'essential parameters' of investigations, and clarified that together they allow assessing the overall effectiveness of the investigation.[161] The approach is therefore a holistic one, comparable to the approach under the right to a fair trial – assessing the fairness of the trial as a whole – although a manifest disregard for one of the 'parameters' may still lead to the finding of a violation if the negative consequences for the investigation are such that it is no longer effective.[162] The

157 *Ramsahai and Others v the Netherlands* (n 46) [324].
158 *Velikova v Bulgaria*, ECtHR 18 May 2000, Appl No 41488/98 [80].
159 *McCann and Others v UK* (n 27) [161]; *Abu Zubaydah v Lithuania* (n 60) [607].
160 Compare *Al-Skeini v UK* (n 14) [165]-[167] and Myjer (n 73) 157.
161 *Mustafa Tunç and Fecire Tunç v Turkey* (n 155) [225].
162 See also the case note by Janneke Gerards in *European Human Rights Cases* 2015/150.

exact weight to be given to each element in this approach may vary on a case-by-case basis.

5.3.2 Ex officio

The first standard investigations must meet, is that they are (i) initiated of the State's own accord, as soon as the duty to investigate is triggered. States may not remain passive and await a complaint by victims or their next of kin, but must actively start an investigation.[163] This standard gains added weight, in cases concerning violations of the right to life and disappearances, because there are no victims alive and well, capable of giving their account.[164] This circumstance puts additional emphasis on the obligation for States to initiate investigations of their own accord, and to bring to light the facts and circumstances leading to the victim's death or disappearance. In cases concerning torture or ill-treatment, the Court is cognisant of victims' vulnerable position,[165] and the potential impact of such treatment on their will or capacity to bring a claim.[166] This too adds to the importance of States initiating investigations as soon as they have sufficiently clear indications of a violation.

5.3.3 Promptness

The second standard is that of (ii) promptness. All necessary investigative steps must be taken to secure crucial evidence as soon as possible, in order to prevent irreparable deficiencies in the investigation.[167] The evidence to be secured has a bearing on what is considered sufficiently prompt, as for instance eyewitness testimonies are more reliable when taken quickly, and in cases of ill-treatment, medical examinations cannot be postponed as bruises will fade and injuries will heal. Promptness similarly, and logically, also plays a major role in cases of investigations where for instance a disappearance under suspicious circumstances has just taken place, and where the safety of the victim – more so than establishing *ex post facto* accountability – is of chief

163 E.g. *Abu Zubaydah v Lithuania* (n 60) [608].

164 In cases of disappearance, the victim in rare cases survives to give his account, see *El-Masri v FYROM* (n 49).

165 *İlhan v Turkey* (n 48) [92].

166 *Aksoy v Turkey*, ECtHR 18 December 1996, Appl No 21987/93 [97].

167 See also Philip Leach, 'The Right to Life – Interim Measures and the Preservation of Evidence in Conflict Situations' in Lawrence Early and others (eds), *The Right to Life under Article 2 of the European Convention on Human Rights. Twenty Years of Legal Developments since McCann v. the United Kingdom. In Honour of Michael O'Boyle* (Wolf Legal Publishers 2016) 171.

significance,[168] though this also ventures into the area of operational measures taken to protect rights, rather than investigative duties.

Whether the initiation of an investigation was sufficiently prompt, will depend on the circumstances of the case. Any delays, however, will have to be justified. To give an example, in the case of *Damayev v Russia*, which concerned an aerial bombardment killing six people, Russian authorities had started the investigation eight days after the incident. The Court found this to be significant, and 'prone to hampering the overall effectiveness of the investigation'.[169] The delay could not be justified, and was a factor in the investigation's ultimate lack of effectiveness.

5.3.4 Adequacy

The most demanding, substantive, yardstick, is that it must be (iii) 'adequate'. An investigation is adequate in the eyes of the Court, when it is 'capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible'.[170] Further, it must enable the determination of whether any force used was justified.[171] To this effect, the investigative authorities must 'take whatever reasonable steps they can to secure the evidence concerning the incident'.[172] What constitutes a 'reasonable step' is dependent on the case at hand, but can include a wide range of potentially effective methods of investigation – and the Court has in its case-law demanded very specific means and processes of inquiry.[173]

Investigations must often include, *inter alia*, securing eyewitness testimony – including from military personnel[174] – and forensic evidence, conducting autopsies or medical examinations, establishing bullet trajectories, and preventing the suspect from colluding with witnesses.[175] Which methods must be employed depends on the circumstances of the case, though any deficiency in an investigative method that renders the investigation ineffective will violate the Convention, and all obvious lines of inquiry must be followed.[176] As was explained above, States must in this context also seek cooperation by other States if necessary for collecting evidence.[177] The Court often looks in great detail at the investigative steps taken, and has for instance scrutinised closely

168 *Kurt v Turkey* (n 29) [123].
169 *Damayev v Russia*, ECtHR 29 May 2012, Appl No 36150/04 [81].
170 *Mustafa Tunç and Fecire Tunç v Turkey* (n 155) [172].
171 *Jaloud v Netherlands* (n 134) [200].
172 *Mustafa Tunç and Fecire Tunç v Turkey* (n 155) [174].
173 Mowbray (n 32) 440.
174 *Damayev v Russia* (n 169) [84].
175 *Armani Da Silva v the United Kingdom* (n 107) [233].
176 *Mustafa Tunç and Fecire Tunç v Turkey* (n 155) [175]; *Ramsahai and Others v the Netherlands* (n 46) [324].
177 *Rantsev v Cyprus and Russia* (n 30) [245]. See further *supra*, section 4.5.

the medical expertise of doctors in conducting examinations of rape victims,[178] or the precise steps taken during an autopsy. To illustrate the level of detail of the investigation, in *Tanlı v Turkey* the Court found an autopsy deficient, as

> 'the organs were not removed or weighed; the heart was not dissected; the neck area had not been dissected; no histopathological samples were taken or analyses conducted which might discover signs of electrical or other forms of torture and ill-treatment; no toxicological analyses were undertaken; no photographs were taken and the finding of the emboli was not adequately described or analysed. It also appears that the doctors who signed the post mortem report were not qualified forensic pathologists.'[179]

This at times painstaking review by the Court of the investigative measures aims to safeguard that all necessary evidence was gathered, which the Court sometimes also examines in terms of its 'thoroughness'. This has to do with the 'genuineness' of the investigation, and the question whether the authorities made a serious effort to establish what happened, and did not lightly decide to close the investigation on the basis of ill-founded conclusions.[180]

Finally, the Court requires additional efforts in cases where violence may have had racist or discriminatory motives.[181] In such cases, States must investigate specifically whether such racist or discriminatory motives existed.[182] Establishing such motives can be extremely difficult,[183] but is required in order not to 'turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights'.[184] This is all the more so where State agents are implicated in allegedly racist violence, and underlines the State's duty to uncover the facts and prevent any appearance of collusion in racist violence.

5.3.5 Independence and impartiality

Moving on to the standards of (iv) independence and (v) impartiality, these aim – together with the requirement of public scrutiny – to maintain public confidence in the State's adherence to the rule of law and to prevent any

178 *Aydin v Turkey*, ECtHR [GC] 25 September 1997, Appl No 23178/94 [107].
179 *Tanlı v Turkey*, ECtHR 10 April 2001, Appl No 26129/95 [150].
180 *Mocanu and Others v Romania* (n 48) [325].
181 For a recent authority, see *Aghdgomelashvili and Japaridze v Georgia*, ECtHR 8 October 2020, Appl No 7224/11 [38].
182 *Nachova and Others v Bulgaria* (n 66) [160]; *Aghdgomelashvili and Japaridze v Georgia* (ibid) [38].
183 On this subject, see Jasmina Mačkić, *Proving Discriminatory Violence at the European Court of Human Rights* (Brill 2018).
184 *Nachova and Others v Bulgaria* (n 66) [160].

appearance of State collusion in human rights abuses.[185] To this effect, the Court assesses the investigating authorities' institutional and practical independence, in relation to those whose responsibility is likely to be engaged.[186] Where statutory or institutional independence is open to question, this will lead the Court to assess more strictly whether the concrete investigation in question was carried out in an independent manner, the determination of which in the end hinges on 'whether and to what extent the disputed circumstance has compromised the investigation's effectiveness and its ability to shed light on the circumstances of the death and to punish those responsible'.[187] Any indications of a personal or professional connection between the subject of the investigation and the investigators, or any apparent lack of objectivity in the investigation, is relevant in this regard. Elements to be taken into account include

> 'the fact that the investigators were potential suspects, that they were direct colleagues of the persons subject to investigation or likely to be so, that they were in a hierarchical relationship with the potential suspects or that the specific conduct of the investigative bodies indicated a lack of independence, such as the failure to carry out certain measures that were called for in order to elucidate the case and, if appropriate, punish those responsible, the excessive weight given to the suspects' statements, the failure to explore certain lines of inquiry which were clearly required.'[188]

Independence is one of the 'essential parameters' of an effective investigation, because any real or perceived partiality or lack of independence, calls into question the genuineness of the investigation, and therefore its results. This is especially so where State agents are implicated in an incident. One of the aims of investigations is to ensure the public's faith in the State's monopoly on the use of force and its compliance with the rule of law, and any lack of independence in the investigation will strike at the heart of that aim.

Independence can also be of importance with respect to the follow-up given to the investigation, in the form of prosecution and trial. The leading consideration when the Court assesses independence in this context is whether in the concrete case under examination, there were indications calling independence into question. Importantly, this means that the simple fact that military prosecutors and courts are not fully independent from the executive, does not in and of itself violate the ECHR – although it is one factor influencing overall independence.[189] The Court has, consequently, in certain cases accepted criminal prosecutions and trials were sufficiently independent, even though

185 *Al-Skeini v UK* (n 14) [167].
186 *Ramsahai and Others v the Netherlands* (n 46) [343]-[344].
187 *Mustafa Tunç and Fecire Tunç v Turkey* (n 155) [224].
188 Ibid [222], references omitted.
189 Ibid [217]-[254].

they were conducted by military prosecutors and courts,[190] whereas in others it found fault with military prosecutions and trials, where circumstances were such that the independence of the investigation was not guaranteed.[191] Under the European system, the mere fact that the military justice system is used to prosecute and try human rights violations does not in and of itself violate the independence of the proceedings from the perspective of the duty to investigate, although it can together with other contextual factors, lead to such a conclusion.

5.3.6 Public scrutiny and involvement of victims and their next of kin

Equally crucial to these aims, are the requirements that (vi) there is a sufficient element of public scrutiny of the investigation, and that (vii) victims or their next of kin are sufficiently involved. Opening investigations up to a level of public scrutiny is an important way of safeguarding the public's confidence in the State's monopoly on the use of force, and has also been associated with the right to truth.[192] It requires that certain investigation reports or certain parts of the investigation be made public, to ensure transparency and counter any appearance of collusion.[193] There are limits to what is required of the State in terms of transparency of the investigation. According to the Court, there is no 'automatic requirement' of disclosing police reports, because of sensitive materials which may be included therein.[194] It therefore requires a '*sufficient* element of public scrutiny', the degree of which can vary on a case-by-case basis.[195]

This does not apply to the position of the victims or their next of kin, which must always be guaranteed so they may effectuate their legal interests.[196] Although this requirement can be met by divulging information in various stages of the investigation, not necessarily requiring authorities to constantly keep victims abreast of any progress made, victims must at a minimum be able to realise their legal interests. These interests are closely related to the right to an effective remedy under Article 13, and require States to grant the information needed to initiate civil proceedings against the State, and according to some, even require a possibility for victims to submit decisions not to

190 *Mantog v Romania*, ECtHR 11 October 2007, Appl No 2893/02 [70ff]; *Stefan v Romania*, ECtHR 29 November 2011 (dec.), Appl No 5650/04 [48].

191 *Mustafa Tunç and Fecire Tunç v Turkey* (n 155) [227] cites further case-law: *Barbu Anghelescu v Romania*, ECtHR 5 October 2004, Appl No 46430/99; *Soare and Others*, ECtHR 22 February 2011, Appl No 24329/02 [71]; *Dumitru Popescu v Romania (no. 1)*, ECtHR 26 April 2007, Appl No 49234/99 [75ff]; *Bursuc v Romania*, ECtHR 12 October 2004, Appl No 42066/98 [107]-[109].

192 *El-Masri v FYROM* (n 49) [191]-[193].

193 *Anguelova v Bulgaria* (n 69) [140].

194 *Armani Da Silva v the United Kingdom* (n 107) [236].

195 *Al-Skeini v UK* (n 14) [167].

196 Ibid.

prosecute to judicial review.[197] It indeed appears that State authorities must at least disclose sufficient information for the victim, and to an extent the public at large, to assess the investigation's reliability, especially in cases where the facts 'cried out for an explanation' and yet no prosecution was initiated – such as where State agents shot and killed an unarmed man.[198]

5.3.7 Follow-up to investigations

As was alluded to earlier, the aim of investigations is not just fact-finding, but also ensuring accountability and rendering the protection of rights effective. As was set out above, States must

> 'have in place an effective independent judicial system so as to secure legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim. Such a system may, and under certain circumstances must, include recourse to the criminal law.'[199]

This is similar to what we have seen under the ICCPR and ACHR, with the HRC and IACtHR similarly insisting on prosecution and punishment, where appropriate. Yet, the European Court appears to leave a little more leeway for other, non-criminal, follow-up:

> 'The form of investigation required by this obligation varies according to the nature of the infringement of life: although a criminal investigation is generally necessary where death is caused intentionally, civil or even disciplinary proceedings may satisfy this requirement where death occurs as a result of negligence.'[200]

Thus, whereas in certain cases the Court will require States to prosecute and punish those responsible, in others, it may be satisfied with non-criminal measures.[201] Normally, where the outcome of the investigation showcases serious harm to life, physical integrity or liberty and security, the investigation must be followed by prosecution and punishment. This is the case when such harm was caused intentionally, as well as in certain other cases where the consequences of negligence were particularly serious.[202] For instance, in the case of *Öneryıldız v Turkey*, the Court found that the deaths of 39 individuals due to a gas explosion which could have been prevented if it were not for the negligence of the authorities, had to have a criminal response.[203]

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197 Borelli (n 104) 374.
198 *Hugh Jordan v the United Kingdom*, ECtHR 4 May 2001, Appl No 24746/94 [124].
199 *Sinim v Turkey*, ECtHR 6 June 2017, Appl No 9441/10 [59].
200 Ibid [170]; *Güzelyurtlu and Others v Cyprus and Turkey* (n 138) [219].
201 Further, see Harris and others (n 99) 215.
202 *Lopes de Sousa Fernandes v Portugal*, ECtHR [GC] 19 December 2017, Appl No 56080/13 [215].
203 *Öneryıldız v Turkey* (n 97) [111].

Criminal follow-up to investigations

Where criminal responses must certainly follow, and take on particular prominence, is when State agents are involved in an incident. The Court has held that it is 'imperative' that where State agents have resorted to lethal force, 'strict accountability' is ensured.[204] This means that criminal investigations are the only option which satisfies the demands under the right to life, and as the Court found, 'civil proceedings (…) cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2'.[205] Furthermore, 'particularly stringent scrutiny' is required in the investigation.[206] This does not mean that there is ever a right to have someone convicted, or prosecuted, but if the investigation has identified a violation and a perpetrator, then a criminal prosecution and trial are required. Further, once criminal proceedings are instituted, such proceedings are subject to the demands of the procedural obligations flowing from the right to life.[207]

Like the HRC and IACtHR, the Court has dismissed impediments to criminal accountability. It has declared amnesties to be incompatible with the duty to investigate and prosecute,[208] found the *nullum crimen sine lege* principle of Article 7 not to prevent prosecutions for international crimes even in the absence of domestic criminalisation prior to the acts in question,[209] and ruled statutory limitations to be inapplicable to international crimes.[210] There is therefore a clear parallel here with what we have seen under the ICCPR and ACHR, and in fact, in the case of *Marguš v Croatia* the Court even references the Inter-American Court's case-law explicitly.[211] As Sebastian Răduleţu explains, this has provided willing States with tools to remove any impediments to criminal accountability.[212] Indeed, it has even gone so far – in cases where States *did* investigate and punish – as to hold States responsible for doling out punishment that were in the Court's view insufficiently severe for the violation.[213] The sword function of human rights, it may be observed, is therefore equally developed under the ECHR, as it is under the other systems.[214]

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204 *Tagayeva and Others v Russia* (n 7) [525].
205 *Hugh Jordan v the United Kingdom* (n 198) [141].
206 *Armani Da Silva v the United Kingdom* (n 107) [234].
207 Ibid [239].
208 *Marguš v Croatia* (n 68) [127].
209 *Kononov v Latvia*, ECtHR [GC] 17 May 2010, Appl No 36376/04 [205]-[213] and [245].
210 Ibid [230]-[233].
211 *Marguš v Croatia* (n 68) [138].
212 Răduleţu (n 116) 454–7.
213 *Öneryıldız v Turkey* (n 97) [96] and [116]-[118].
214 Of a contrary view, see SC Grover, *The European Court of Human Rights as a Pathway to Impunity for International Crimes* (Springer 2010). Others criticise the Court's approach for going too far. Van Kempen explains how the duty to employ criminal law signifies a fundamental shift in the concept of human rights law, as it requires States to infringe individuals' human rights, whereas these were initially conceived to protect individuals from the State. Human rights law therefore provides a legitimating factor for repression

Despite the Court's emphasis on criminal law remedies, if investigations live up to Convention standards, it has left a measure of discretion to States in deciding whether prosecution is called for. This is especially so where the investigation into the facts has been particularly thorough. In the admissibility decision *Mustafić-Mujić and Others v the Netherlands*, the Court was asked to rule on the decision not to prosecute the commanders of the Dutch United Nations peacekeepers for their role in the deaths of three victims of the Srebrenica genocide.[215] In this case, the Court appears to award decisive importance to the rigorous fact-finding that had been carried out into the Srebrenica genocide, both on the international and the domestic level – in the contexts of cases before the International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia, UN inquiries, domestic parliamentary inquiries and domestic civil proceedings.[216] As these investigations left no uncertainty as to the fate of the victims, nor to the role of the commanders therein, the Court found the investigation to be effective and adequate, and subsequently left the decision whether or not to prosecute to the State, as the Convention does not confer an individual right to revenge, or to have third parties prosecuted or sentenced for a criminal offence.[217] In this respect, the Grand Chamber held in *Armani Da Silva v UK*, that

> '[t]o date, the Court has not faulted a prosecutorial decision which flowed from an investigation which was in all other respects Article 2 compliant. In fact, it has shown deference to Contracting States both in organising their prosecutorial systems and in taking individual prosecutorial decisions.'[218]

This finding also underlines the requirement of a thorough investigation, which when genuinely carried out satisfies Convention standards, prevents appearances of collusion, and therefore leaves up to States whether they then employ repressive criminal law measures.

Civil or disciplinary follow-up to investigations

In cases where human rights are infringed not intentionally, but due to negligence, the Court does not necessarily insist upon criminal law remedies.[219]

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by States interfering with other human rights; Piet Hein van Kempen, 'Four Concepts of Security – A Human Rights Perspective' (2013) 13 Human Rights Law Review 1, 18–9. See also Frédéric Mégret and Jean-Paul S Calderón, 'The Move Towards a Victim-Centred Concept of Criminal Law and the "Criminalization" of Inter-American Human Rights Law. A Case of Human Rights Law Devouring Itself?' in Yves Haeck, Oswaldo Ruiz-Chiriboga and Clara Burbano-Herrera (eds), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia 2015).

215 *Mustafić-Mujić and Others v the Netherlands*, ECtHR 30 August 2016 (dec), Appl No 49037/15.

216 Ibid [103]-[106].

217 Ibid [106]-[107].

218 *Armani Da Silva v the United Kingdom* (n 107) [259].

219 Harris and others (n 99) 215.

Whereas the investigation must still establish the facts, ensure accountability, and provide redress, the form of accountability may in this context also consist of civil remedies, or disciplinary proceedings – depending on the circumstances of the case.[220] Principally, the same investigative standards as described above, still apply to such cases. Yet, the Court has found in a case concerning a death resulting from negligence in the medical sphere, that the requirement that the investigation be initiated *ex officio*, did not apply as strictly.[221] Where the alleged violation is sufficiently serious, however, the requirements for penal follow-up to investigations as described above, fully apply.[222]

5.4 Résumé

In the terms of the research question, we have now determined both the scope of application of the duty to investigate under the ECHR, as well as the standards applicable to such investigations. States must criminalise certain serious ECHR violations, institutionalise an investigative mechanism, and if an arguable claim exists that a violation has occurred, they must conduct an effective investigation. This is an obligation of means, not of result. In order for an investigation to be effective, it must meet eight standards. These standards are highly similar to those identified in the previous Chapters on the ICCPR and ACHR.

Investigations must be (i) launched of the State's own accord (*ex officio*), (ii) initiated promptly and carried out with reasonable expediency, and must furthermore be (iii) adequate, (iv) independent and (v) impartial, and (vi) must contain a sufficient element of public scrutiny, including (vii) sufficient involvement of the victims or their next of kin. Finally, (viii) follow-up to the investigation may be required, which depending on the case may require either criminal accountability processes, or the availability of civil remedies. In case of intentional infringements on human rights, or where State agents have resorted to the use of force, criminal law remedies will normally be required. It is precisely these types of cases which are at the heart of this study, pertaining as it does to cases arising out of armed conflict and which are regulated by IHL. The following section examines how the Court has dealt precisely with those types of issues.

220 *Sinim v Turkey* (n 199) [59].

221 *Calvelli and Ciglio v Italy* (n 98) [49] and [51]. See Harris and others (n 99) 206–7; 214–5.

222 See e.g. *Khashiyev and Akayeva v Russia*, ECtHR 24 February 2005, Appl No 57942/00 and 57945/00 [121].

6 Applicability and flexibility in conflict situations, and the role of IHL

6.1 Introduction

The above has shown *when* and *why* States must investigate under the ECHR, as well as *how* they must do so. Because this research project seeks to answer how investigative obligations operate *during armed conflict*, what is left is to explore how the ECHR applies during such conflicts, and how it interrelates with the other applicable legal regime – IHL. More in particular, three issues are of relevance.

First, a pertinent question is whether armed conflicts give rise to the possibility to *derogate* from the ECHR, and to what extent derogations may affect the State's duty to investigate violations of the ECHR (§6.2). Second, because the existence of an armed conflict gives rise to application of IHL, it must be asked how the ECHR interrelates with that body of law. Because Chapter 9 engages with the question how IHRL and IHL interrelate under general international law, this Chapter explores in particular how the Strasbourg Court has applied the Convention during armed conflict, and to what extent it has had recourse to IHL (§6.3). These two points inform the ultimate aim of establishing the scope and investigative standards applicable with respect to violations committed during armed conflict (§6.4).

Before going into these issues, it must be recalled that Chapter 4 has shown that IHRL continues to apply during armed conflict. The ICJ as well as the various human rights courts and bodies have held to this effect.[223] The European Court, for its part, has found that 'international humanitarian law and international human rights law are not mutually exclusive collections of law',[224] and that 'even in situations of international armed conflict, the safeguards under the Convention continue to apply'.[225] Illustrating this finding, the Court has applied the Convention in numerous conflicts in which European States have been involved. Thus, the Court has applied the ECHR to territorial IACs (Cyprus),[226] as well as to high-intensity NIACs on a State's own territory (Chechnya, East Turkey, Northern Ireland).[227] Similar to what we have seen under the Inter-American system, any arguments to the effect that the ECHR does not apply due to the existence of armed conflict, or that

223 See Chapter 4, §4.6. See also §6 of Chapters 5 and 6, outlining the approach under the ICCPR and ACHR.

224 *Saribekyan and Balyan v Azerbaijan* (n 21) [36].

225 *Hassan v UK* (n 91) [104]; *Georgia v Russia (II)* (n 19) [93].

226 *Çakir and Others v Cyprus*, ECtHR 29 April 2010 (dec), Appl No 7864/06, where the Court – although declaring the application inadmissible *ratione temporis* – held Cyprus to be under a duty to investigate killings that took place during the conflict with Turkey in 1974.

227 E.g. *Isayeva v Russia* (n 15); *Ergi v Turkey* (n 104); *McCaughey and Other v the United Kingdom*, ECtHR 16 July 2013, Appl No 43098/09.

the Court lacks jurisdiction because IHL regulates situations of armed conflict, have been dismissed.[228] Yet, the Court has recently taken an ambiguous approach to the *extraterritorial* applicability of the ECHR during international armed conflicts. Whereas it has previously considered the Convention to apply to situations of both extraterritorial occupation and international armed conflict in Iraq,[229] it ruled in *Georgia v Russia (II)* that during the 'active phase of hostilities' of the IAC, which gave rise to a 'context of chaos', Russia could not be held to have exercised jurisdiction extraterritorially for the purposes of Article 1.[230] This may signal an important restriction of the extraterritorial applicability of the Convention during (international) armed conflict, although it must be stressed that the Court does not overturn, and rather reiterates, its previous finding that the Convention continues to apply during armed conflicts. This issue is addressed further in section 6.3.

Because the ECHR therefore principally continues to apply during armed conflicts,[231] our focus is on determining *how* it is applied, and whether its legal standards may accommodate the exigencies of armed conflict. A first point of interest in this respect, in line with the ICJ's findings,[232] is the possibility of derogation.

6.2 The (non-)derogability of the duty to investigate

As Chapter 4 showed,[233] derogations allow States to suspend certain rights in exceptional circumstances, under a number of strict conditions. The drafters of the Convention foresaw that full application of all the rights enshrined in the ECHR might be rendered difficult in crisis situations such as armed conflict.[234] The ultimate aim of making derogations possible, is to bring emerg-

228 E.g. *Saribekyan and Balyan v Azerbaijan* (n 21) [36]-[41]; *Hassan v UK* (n 91) [76]-[77]; *Georgia v Russia (II)* (n 19) [86], [92]-[95].

229 *Al-Skeini v UK* (n 14) [164]; *Hassan v UK* (n 91) [76]-[77].

230 *Georgia v Russia (II)* (n 19) [126] and [137].

231 See Chapter 4, §4.6. Further, see Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 International Review of the Red Cross 501; Helen Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press 2013).

232 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), *I.C.J. Reports* 1996, p. 226 [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004), *I.C.J. Reports* 2004, p. 136 [106]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment (19 December 2005), *I.C.J. Reports* 2005, p. 168 [216]. Further on this, see Chapter 9, §3.3.

233 Chapter 4, §4.6.

234 See further Jan-Peter Loof, 'On Emergency-Proof Human Rights and Emergency-Proof Human Rights Procedures' in Afshin Ellian and Gelijn Molier (eds), *The State of Exception and Militant Democracy in a Time of Terror* (Republic of Letters Publishing 2012).

ency situations within the purview of the rule of law, whilst still providing States with a measure of flexibility when their very survival is at stake.[235] Article 15 ECHR provides for this:

> '1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'

The ECHR therefore explicitly accounts for the possibility of derogation in situations of 'war'. The Court has thus far been very deferential in assessing whether a 'public emergency threatening the life of the nation' exists.[236] If States wish to derogate, they will have to give notification and reasons for doing so.[237] Even if they do, this lowers the State's obligations under the ECHR, but does not lead to the disapplication of such obligations.[238] The Court will supervise whether any measures derogating from the Convention, are proportionate in the light of the emergency.[239] Further, Article 15(2) provides for a number of rights which may never be derogated from. This list – which is more limited than under the ICCPR and ACHR – includes the freedom from torture and slavery, and the right to life 'except in respect of deaths resulting from lawful acts of war'.[240]

As was shown in the above, it is precisely these rights which most prominently require States to investigate, and these are also the rights which are most relevant during armed conflict. Despite the exigencies of high intensity armed conflicts, these provisions may therefore not be derogated from. Because the duty to investigate flows directly from these provisions, read in conjunction with Article 1, the duty to investigate violations of these rights is therefore

235 Loof (n 234) 146–150; Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis. Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 112. See further Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (Oxford University Press 2011).

236 Loof (n 234) 150–8; Gross and Ní Aoláin (n 235) 265. On the question whether extraterritorial conflicts may threaten the life of the nation domestically, see Marko Milanović, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (Oxford University Press 2016); Jane M Rooney, 'Extraterritorial Derogation from the European Convention on Human Rights in Armed Conflict' [2016] European Human Rights Law Review 656.

237 ECHR, art 15(3).

238 Françoise J Hampson, 'The Relationship Between International Humanitarian Law and Human Rights Law From the Perspective of a Human Rights Treaty Body' (2008) 90 International Review of the Red Cross 849, 562.

239 *Lawless v Ireland*, ECtHR 1 July 1961, Appl No 332/57 [31]-[38]; *A. and Others v United Kingdom*, ECtHR [GC] 19 February 2009, Appl No 3455/05.

240 ECHR, art 15(2).

equally non-derogable.[241] Hence, it may be concluded that the duties of investigation with regard to instances of torture, inhuman, or degrading treatment or punishment, and of slavery and servitude, are absolutely non-derogable and applicable at all times.

This leaves us with the question whether, during armed conflict, States may be allowed to derogate from their obligation to investigate under its other sources: the right to life, the right to liberty, and the right to an effective remedy.

Because Article 15(2) stipulates that the right to life may not be derogated from, 'except in respect of deaths resulting from lawful acts of war', it must be presumed that States *are* allowed to derogate from the right to life.[242] But, the Convention already stipulates the minimum level of protection which remains: the protection of the right to life remains for all deprivations of life which do not stem from lawful acts of war. What constitutes a 'lawful act of war' is subject to some scholarly debate – for instance relating to the question whether it encompasses both the law of IAC and NIAC, or the former only.[243] The Court has never pronounced on this issue, as no State to date has ever derogated from the right to life.[244] If a State were to derogate from the right to life, this may impact on its obligation to investigate. After all, insofar as the duty to investigate requires States to investigate potentially *unlawful* deprivations of life, insofar as a derogation changes what must be considered to be lawful to conform to IHL standards, then deprivations of life which are lawful under IHL will likely no longer require an investigation. Derogations may therefore impact on the duty to investigate in this respect, as is addressed further below.[245]

As far as Article 5 is concerned, derogations are permissible under Article 15, and States have made use of this possibility in practice. Nonetheless, the Court's proportionality review of such measures, shows there are limitations to how States may lawfully derogate. For instance, the Court has found – even after a lawful derogation – that holding an individual for fourteen days without judicial intervention, was not proportionate.[246] As investigative duties under Article 5 relate to cases of unacknowledged detention and enforced disappearances, these will at all times fall foul of the proportionality test under

241 *Al-Skeini v UK* (n 14) [162]; Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' (n 231) 518.

242 E.g. Kempees (n 136) 123–6.

243 Milanović, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' (n 236) section 2.C.

244 Lindsay Moir, 'The European Court of Human Rights and International Humanitarian Law' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 483.

245 *Infra*, §6.4.

246 *Aksoy v Turkey* (n 166) [76]-[78].

Articles 15 and 5, regardless of potential derogations, and given that such cases must be investigated also under the non-derogable prohibition of torture and inhuman and degrading treatment, derogations are in this respect without any consequence.[247] Further, although the Court has yet to pronounce on this issue, the prohibition of enforced disappearances is non-derogable under the International Convention for the Protection of All Persons from Enforced Disappearance.[248] In light of the Article 15 requirement that any derogation must not be inconsistent with the State's other international obligations, any State party to the Disappearance Convention will therefore be prevented from any derogation regarding such practices on this ground as well.

Finally, Article 13 – the right to a remedy – may be lawfully derogated from under the ECHR. Even if the Court, in line with Article 15, decides that the right to a remedy may be lawfully derogated from, as was explained above, this need not affect the investigative duties resting on States as those obligations flow directly from the obligation to secure the substantive provisions in question. Further, there are again international law developments prohibiting derogations from the right to a remedy, under the ICCPR as interpreted by the HRC. The HRC has interpreted the right to a remedy to be non-derogable, as well as any procedural safeguard required to ensure non-derogable rights.[249] Although the Court has not ruled on this issue explicitly, it appears already in *Aksoy v Turkey* to have taken a similar approach, as it found a violation of Article 13 in conjunction with Article 3, without even considering Turkey's derogation from Article 13.[250]

Even if States do derogate from their ECHR obligations, this therefore is unlikely to have significant consequences for their obligation to investigate. It is only under the right to life that States can – arguably – shrink their obligations, and therefore thereby the scope of what they must investigate. States have not, however, readily resorted to derogations when engaged in armed conflicts,[251] and no State has ever derogated from the right to life.

247 E.g. *Varnava and Others v Turkey* (n 118).

248 CED, art 1(2).

249 *General Comment No. 29: Article 4: Derogations during a State of Emergency*, HRC 31 August 2001, CCPR/C/21/Rev.1/Add.11 [14]-[15]. Further, see Chapter 5, §6.2.

250 *Aksoy v Turkey* (n 166) [95]-[100].

251 Helen Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' in Helen Duffy, Janina Dill and Ziv Bohrer (eds), *Law Applicable to Armed Conflict* (Cambridge University Press 2020) 65.

6.3 Applicability during armed conflict and interaction with IHL

6.3.1 Introduction

As the above showed, States are largely unable to alter their investigative obligations in times of emergency and armed conflict by way of derogations. The question then becomes how the European Court has taken account of IHL in its rulings, and to what extent this affects investigative obligations. This section provides a brief overview of the Court's approach to co-application of the ECHR with IHL as well as to the extraterritorial applicability of the Convention during armed conflicts, before the next section addresses how the duty to investigate is applied during conflict.

6.3.2 Extraterritorial application of the Convention during armed conflict

The ECHR's applicability during armed conflict has been confirmed time and again by the Court, both implicitly by simply applying the Convention in contexts of armed conflict, and expressly when rejecting respondent States' arguments that during armed conflict IHL applies to the exclusion of the Convention. In cases relating to the IACs in Northern Cyprus and Iraq, the Court has applied the Convention also during extraterritorial military operations carried out by Contracting States. Thus, it found that 'in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities',[252] and that the Convention applied to the UK's detention of an individual during the IAC in Iraq, while 'major combat operations' were still ongoing.[253] Yet, in 2021, the Grand Chamber of the Court – after reiterating its finding in *Hassan v UK* that ECHR protection does not cease during international armed conflict[254] – formulated an important limitation to the extraterritorial applicability of the Convention during armed conflict.

In the case of *Georgia v Russia (II)*,[255] concerning the 2008 international armed conflict between the two Council of Europe States, the Court had to decide whether Russia had exercised jurisdiction extraterritorially, on Georgian soil. It considered that

> 'a distinction needs to be made between the military operations carried out during the active phase of hostilities and the other events which it is required to examine in the context of the present international armed conflict, including those which

252 *Varnava and Others v Turkey* (n 118) [185].
253 *Hassan v UK* (n 91) [9], [76]-[77].
254 *Hassan v UK* (n 91) [104]; *Georgia v Russia (II)* (n 19) [93].
255 For an extensive analysis of the case, see Floris Tan and Marten Zwanenburg, 'One Step Forward, Two Steps Back? Georgia v Russia (II), European Court of Human Rights, Appl. No. 38263/08' (2022) 22 Melbourne Journal of International Law.

> occurred during the "occupation" phase after the active phase of hostilities had ceased, and the detention and treatment of civilians and prisoners of war, freedom of movement of displaced persons, the right to education and the obligation to investigate.'[256]

Thus, the Court for the first time considered that a distinction had to be made between the 'active phase of hostilities', and – in the context of this case – a phase of occupation. In considering whether Russia exercised jurisdiction, either under the spatial or the personal model for jurisdiction, the Court then made a number of sweeping statements which are worth citing in full. It found that

> '126. (…) in the event of military operations – including, for example, armed attacks, bombing or shelling – carried out during an international armed conflict one cannot generally speak of "effective control" over an area. The very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no control over an area. (…)'

And with respect to the spatial model:

> '137. In this connection, the Court attaches decisive weight to the fact that the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos not only means that there is no "effective control" over an area as indicated above (…), but also excludes any form of "State agent authority and control" over individuals.
>
> 138. The Court therefore considers that the conditions it has applied in its case-law to determine whether there was an exercise of extraterritorial jurisdiction by a State have not been met in respect of the military operations that it is required to examine in the instant case during the active phase of hostilities in the context of an international armed conflict.'

Thus, the Court appears to exclude the exercise of extraterritorial jurisdiction during the active phase of hostilities, under both the spatial and personal models for jurisdiction. Its main argument to this effect appears to be that the test of whether States exercised effective *control* over an area, or authority and *control* over victims, cannot be satisfied in the 'context of chaos' which ensues from military operations carried out during the active phase of hostilities of an IAC. This is an important departure from its previous finding in *Hassan v UK*, where the Court – citing the ICJ – had rejected the UK's argument that

256 *Georgia v Russia (II)* (n 19) [83].

during the 'active hostilities phase' of an IAC, jurisdiction could not be exercised.[257]

The Court's reasoning with respect to this restrictive reading of extraterritorial jurisdiction during the active phase of hostilities of an IAC appears to find a basis in considerations of legal policy. The Court considered that 'it is not in a position to develop its case-law beyond the understanding of the notion of "jurisdiction" as established to date' due to a number of circumstances particular to the context of armed conflict.[258] From a practical perspective, it considered 'the large number of alleged victims and contested incidents, the magnitude of the evidence produced, [and] the difficulty in establishing the relevant circumstances',[259] which may admittedly (significantly) increase the caseload of the Court with complex cases.[260] From a legal perspective, the Court moreover referred to 'the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict)', to which it finally added that if the Court was to rule on 'acts of war and active hostilities in the context of an international armed conflict outside the territory of a respondent State', then the Contracting Parties would have to 'provide the necessary legal basis for such a task'.[261] Thus, whereas the Court saw a number of practical difficulties in deciding cases which result from IACs, it ultimately considered there to be a lack of *legal basis* for it to consider such cases.

The implications of these findings are potentially far-reaching, although it will have to be awaited how the Court will grapple with this issue in future case-law. It remains to be seen how the Court will define an 'active phase of hostilities' and a 'context of chaos', whether it will restrict these findings to IACs, whether territorial States *can* exercise jurisdiction in such situations, whether there can be exceptions to the sweeping statements by the Court, and – as Marko Milanović has remarked – whether the judgment will be a lasting precedent, given the many dissenters on the bench.[262]

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257 *Hassan v UK* (n 91) [76]-[77].

258 *Georgia v Russia (II)* (n 19) [141].

259 Ibid.

260 On 1 January 2019, individual applications arising out of inter-State conflict numbered 8,500, amounting to 17% of pending applications before the Court. See Council of Europe Steering Committee for Human Rights (CDDH), *The Development of the Court's Case-Load over Ten Years. Statistical Data for the CDDH*, CDDH(2019)08 (11 February 2019), p. 7. Further, see Geir Ulfstein and Isabella Risini, 'Inter-State Applications under the European Convention on Human Rights: Strengths and Challenges' (*EJIL:talk!*, 2020) <https://www.ejiltalk.org/inter-state-applications-under-the-european-convention-on-human-rights-strengths-and-challenges/> (last accessed 15 July 2021).

261 *Georgia v Russia (II)* (n 19) [141]-[142].

262 Marko Milanović, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos' (*EJIL:talk!*, 2021) <https://www.ejiltalk.org/georgia-v-russia-no-2-

A fundamental problem in the Court's approach is that, as Helen Duffy has commented, it appears to conflate issues of jurisdiction with the applicable law – with the applicability of IHL somehow affecting the applicability of the Convention.[263] The Court's consideration that IHL 'predominantly' regulates active hostilities during an IAC, and its call for a 'legal basis' for considering such situations, showcase that the Court does not want to apply IHL directly. Whether one agrees with this position or not can be subject to reasonable discussion. But why and how the applicability of IHL affects the question whether a State exercised *jurisdiction*, which according the Court's established case-law is a question of *fact*, is unclear. The applicability of IHL can certainly change *how* the Convention is applied and interpreted, but this is a consideration relating to the merits of the case, not an issue of jurisdiction. This finding not only goes against the Court's established case-law as well as ICJ jurisprudence, it also leads to an incongruity in the Court's approach. After all, if the *extraterritorial* jurisdiction of the Convention is limited during the active phase of hostilities of an IAC, however that is defined, then the State conducting military operations *on its own territory* will nevertheless be subject to ECHR obligations. There is no logical justification for this distinction, with in the case of the Georgian conflict the Georgian armed forces having to conduct their operations in accordance with the ECHR, and with the Russian invading forces fighting under the more permissive IHL regime – over which there is, crucially, no institutionalised international oversight.[264] This also leads to an arbitrary distinction for victims of warfare, with those having fallen victim to the use of force by Georgia having recourse to the ECHR and ultimately the European Court of Human Rights, and with those having fallen victim to Russian use of force falling outside the protections of the Convention. This therefore harms the equality of belligerents, an important cornerstone of IHL, as well as the effective protection of ECHR rights, an important cornerstone of IHRL.

More gradual issues arise in how the Court can delineate the 'active phase of hostilities', because as the Court reiterated in *Georgia v Russia (II)*, the Convention did apply extraterritorially during the 'occupation phase' of a conflict. Defining the threshold for such hostilities gives rise to complex problems. In the *Georgia v Russia (II)* case, the Court could relatively easily distinguish both phases in the conflict, because the initial hostilities in which

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the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/> (last accessed 15 July 2021).

263 Helen Duffy, 'Georgia v. Russia: Jurisdiction, Chaos and Conflict at the European Court of Human Rights' (*Just Security*, 2021) <https://www.justsecurity.org/74465/georgia-v-russia-jurisdiction-chaos-and-conflict-at-the-european-court-of-human-rights/> (last accessed 15 July 2021).

264 Further (in Dutch), see Marten Zwanenburg and Floris Tan, 'Georgië t. Rusland (II) (EHRM, Nr. 38263/08) – Toepasselijkheid van Het EVRM Tijdens Extraterritoriale Interstatelijke Conflicten' (*EHRC Updates*, 2021) <https://www.ehrc-updates.nl/commentaar/211205> (last accessed 15 July 2021).

Russian forces invaded Georgian territory lasted for five days, and ended with a ceasefire agreement.[265] In many conflicts, however, no clear distinction can be made between both phases. Further, in a conflict such as the one in the east of Ukraine where the armed conflict has lasted for years rather than days, with many shifts taking place overtime between periods of relative calm and renewed flaring up of hostilities,[266] drawing a line between two 'phases' of a conflict risks becoming arbitrary, and can leave victims of warfare outside the protection of the ECHR for years on end. This is an outstanding issue which the Court will need to tackle in the cases brought by Ukraine against Russia.

As a final point, it must be asked whether the Court's sweeping statements will be subject to mitigation in future case-law. In the Court's established case-law, the question whether a State has exercised 'jurisdiction' extraterritorially, is a question of fact.[267] Yet, in *Georgia v Russia (II)*, the Court considered that during the active phase of hostilities of an IAC, there 'is no control over an area', and that this situation 'excludes any form of "State agent authority and control" over individuals'.[268] Thus, the Court in such situations does not apply a factual test whether the respondent State exercised control, but rather finds that control is not possible in such a 'context of chaos'. Moreover, the Court has not formulated this as a legal presumption. It rather phrases it as a logical impossibility of control. It remains to be seen whether, if applicants are able to make a strong case that control was in fact present, the Court will take the – more appropriate – approach that even if there is a presumption of a lack of control, this presumption can be rebutted through factual evidence. This would, at the very least, mitigate the Court's findings somewhat, and bring the question of jurisdiction back to a question of fact, as the Court itself finds it must be.

Certain signs of mitigation are present in the Court's findings in *Georgia v Russia* itself. The Court considered that Russia *did* exercise jurisdiction, also during the active phase of hostilities, with respect to the detention and treatment of civilians and prisoners of war, freedom of movement of displaced persons, the right to education and the obligation to investigate. There does therefore appear to be some scope for mitigating the sweeping statement that jurisdiction is excluded, though the reasoning for this remains vague. The Court simply considered, with respect to prisoners of war and civilian internees that because they were 'mostly' or 'inter alia' detained after the cessation of

265 *Georgia v Russia (II)* (n 19).

266 Anastasiia Moiseieva, 'The ECtHR in Georgia v. Russia – a Farewell to Arms? The Effects of the Court's Judgment on the Conflict in Eastern Ukraine' (*EJIL:talk!*, 2021) <https://www.ejiltalk.org/the-ecthr-in-georgia-v-russia-a-farewell-to-arms-the-effects-of-the-courts-judgment-on-the-conflict-in-eastern-ukraine/> (last accessed 15 July 2021).

267 *Georgia v Russia (II)* (n 19) [164]; *Al-Skeini v UK* (n 14) [139]; *Ilaşcu and Others v Moldova and Russia*, ECtHR [GC] 8 July 2004, Appl No 48787/99 [387].

268 *Georgia v Russia (II)* (n 19) [126] and [137].

active hostilities, all detainees fell within the jurisdiction of Russia.[269] With respect to the duty to investigate, as is set out further below,[270] the Court considered that if 'special features' are present, it will apply even to incidents over which there was no jurisdiction under Article 1.

Precisely delineating extraterritorial applicability of the ECHR during armed conflict is rendered difficult by the many questions the Court's most recent judgment on this issue has raised. An important limitation has been made for the 'active phase of hostilities' during *international* armed conflict, but what that means precisely, and whether extraterritorial NIACs will be subject to the same rules, remains to be seen. It should be stressed, however, that it is not the applicability of IHL as such which displaces the applicability of the ECHR, but rather that in certain situations, States cannot be held to exercise the level of control required for them to be seen as exercising jurisdiction for the purposes of Article 1 ECHR. It should further be stressed that the applicability of the Convention during situations of occupation was reaffirmed, and that the Convention was applied with respect to a number of rights – though not all. Thus, even if the Court's findings may limit the number of situations in which this so, the question remains how the Convention must be applied during armed conflict and in co-application with IHL.

6.3.3 The European Court's engagement with international humanitarian law

The Strasbourg Court has for a long time been more reticent towards IHL than its counterparts in San José and Geneva.[271] The European Court has long insisted on an exclusive human rights approach towards cases arising out of armed conflict, although there are indications that it is in the process of overhauling its case-law.[272] Initially, in cases concerning NIACs, the Court held that if no derogation was entered, it would assess cases against a 'normal legal background'.[273] It did develop some flexibility in its case-law, taking account of the exigencies of a specific situation, and at times also incorporated 'IHL vocabulary' into its judgments,[274] but never through explicit reliance on rules

269 *Georgia v Russia (II)* (n 19) [239] and [269].
270 See §6.4.2.
271 For their respective approaches, see Chapters 5 and 6.
272 Larissa van den Herik and Helen Duffy, 'Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches' in Carla Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill Nijhoff 2017) 389.
273 *Isayeva v Russia* (n 15) [191]; Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' (n 231) 502.
274 Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 European Journal of International Law 161, 173–4; Moir (n 244) 484–5; Françoise J Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' in Scott

of IHL to ground its judgments. For instance, in relation to the NIAC in Chechnya, the Court has referred to IHL concepts such as the 'incidental loss of civilian life',[275] 'legitimate targets',[276] 'use of indiscriminate weapons',[277] and 'disproportionality in the weapons used'.[278] And in the case of *Isayeva, Yusupova and Bazayeva v Russia*, the Court ruled that a military operation 'was [not] planned and executed with the requisite care for the lives of the civilian population'.[279] Despite these apparent nods towards the law of armed conflict,[280] as William Abresch rightly explains, this vocabulary is not exclusive to IHL.[281] What is more, the Court appears to use it in a human rights context, rather than interpreting these terms the way they would be under IHL[282] – as we have seen the Inter-American Court do.[283] Thus, even if the Strasbourg Court incidentally used what seems to be IHL terminology, it in actuality relied upon a human rights assessment, not an IHL assessment.[284]

Rather than engaging explicitly with the law of armed conflict, the European Court has opted for a 'contextual' application of the ECHR.[285] This means it takes the factual circumstances, and exigencies of a situation, into account when interpreting the State's obligations, mindful that it ought not impose unrealistic demands.[286] One potential explanation for the Court's reticence in relying on IHL, is the definition of the Court's task in ensuring that States observe their engagements *under the Convention*, not under any other regime of international law.[287] Nevertheless, even if the *application* in the sense of

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Sheeran and Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 208–9.

275 *Isayeva v Russia* (n 15) [176]; *Ergi v Turkey* (n 104) [79].

276 *Isayeva, Yusupova and Bazayeva v Russia*, ECtHR 24 February 2005, Appl No 57947/00 57948/00 57949/00 [175].

277 *Isayeva v Russia* (n 15) [191].

278 *Isayeva, Yusupova and Bazayeva v Russia* (n 276) [197].

279 Ibid [199].

280 Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' (n 251) 67.

281 Abresch (n 17) 746; see also Moir (n 244) 485–6.

282 Ibid.

283 See Chapter 6, §6.3.3, outlining the Inter-American Court's application of the IHL principles of distinction, proportionality, and precautions in attack.

284 van den Herik and Duffy (n 272).

285 Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' (n 231) 514–5; Noëlle Quénivet, 'The Obligation to Investigate After a Potential Breach of Article 2 ECHR in an Extra-Territorial Context: Mission Impossible for the Armed Forces?' (2019) 37 Netherlands Quarterly of Human Rights 119, 135.

286 *McCann and Others v UK* (n 27) [200]; *Al-Skeini v UK* (n 14) [168]; Juliet Chevalier-Watts, 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?' (2010) 21 European Journal of International Law 701, 709.

287 ECHR, art 19; *Brannigan and McBride v the United Kingdom*, ECtHR 25 May 1993, Appl No 14554/89 [72]; *Jersild v Denmark*, ECtHR 23 September 1994, Appl No 15890/89 [30].

establishing States' responsibility for breaches of other rules of international law falls outside the purview of the Court, it is submitted that it can – and indeed must, under the rules of treaty interpretation – take other applicable rules of international law into account in its *interpretation* of the Convention.[288] Another explanation is that the text of the ECHR restricts the European Court's possibilities of taking IHL onboard, especially with regard to the two rights which give rise to the majority of issues: the rights to life and liberty. In contrast to the ICCPR and the ACHR, which prohibit States from depriving individuals of their lives and liberty *arbitrarily*,[289] the ECHR forbids States from doing so *unless when pursuant to an exhaustive list of legitimate aims*.[290] Because the permissive rules of IHL are not included in such lists, this has, perhaps, restricted the European Court in taking a more open stance towards IHL – at least so long as States do not derogate from the Convention.[291]

There are, however, indications of a shift in the Court's approach. In an apparent move towards more overt reliance on IHL, the Grand Chamber of the Court held in 2009, in *Varnava and Others v Turkey*, that the right to life 'must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict'.[292] Whereas this has yet to lead to the clear application of IHL rules pertaining to targeting under the right to life, a new step does appear to have been taken in 2014, when the Grand Chamber handed down its judgment in *Hassan v the United Kingdom*.[293] In this case, the Court had to rule on the lawfulness of internment measures applied by the United Kingdom during its occupation of Iraq. It was clear the internment for reasons of the conflict could not be brought under Article 5's exhaustive list of grounds for detention, and the UK invoked IHL as nevertheless permitting the internment. Thus, the stage was set for a real conflict of norms between the IHL rule permitting internment, and the ECHR rule prohibiting it. The Court then, going well beyond its previous reliance on IHL, decided to open up the permissible grounds for detention in case of international armed conflict, to

288 VCLT, art 31(3)(c). See further Chapter 6, §6.3.3, detailing how the Inter-American Court has overruled the Inter-American Commission's direct application of IHL, and has rather found that the ACHR must be interpreted in light of applicable rules of IHL.

289 See Chapters 5 and 6.

290 This leaves less interpretive room for taking IHL into account, and does not allow for a *renvoi* to IHL; Giulia Pinzauti, 'The European Court of Human Rights' Incidental Application of International Criminal Law and Humanitarian Law. A Critical Discussion of Kononov v. Latvia' (2008) 6 Journal of International Criminal Justice 1043.

291 Further, see e.g. Marko Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2010) 14 Journal of Conflict and Security Law 459, 477–80.

292 *Varnava and Others v Turkey* (n 118) [185].

293 *Hassan v UK* (n 91).

include internment permitted under Geneva Conventions III and IV. Interestingly, in doing so it relied on an 'implicit derogation', which the Court derived from States' consistent practice of not derogating in case of IACs.[294] Moreover, it insisted that this was possible only in light of IHL's explicit rules on detention, and of the UK's invocation of IHL.[295]

Then, in *Georgia v Russia (II)*, the Grand Chamber took yet further steps of engaging with IHL. Whereas the Court found, as was set out above, that Russia did not exercise jurisdiction during the 'active phase of hostilities', it ruled differently for the occupation phase of the conflict. During that phase the Convention applied, therefore, alongside rules of IHL. The Court expressly acknowledged this fact, and citing *Hassan*, considered it had to 'examine the interrelation between the two legal regimes with regard to each aspect of the case and each Convention Article alleged to have been breached'.[296] This required an examination under each applicable provision, considering whether the ECHR and IHL conflicted, or not. Ultimately, in considering complaints of an administrative practice of 'the killing of civilians and the torching and looting of houses', the Court found that there was no conflict between Articles 2, 3, and 8 ECHR and Article 1 of Protocol 1, and the applicable rules of IHL under the law of occupation.[297] It found similarly for the detention and treatment in detention of both civilians and prisoners of war, freedom of movement, the right to education, and the duty to investigate.[298] Thus, the Court expressly cited provisions of IHL and considered whether potential conflicts between the Convention and IHL existed. Based on a rather rudimentary assessment, however, it did not find any instance of conflict, on the facts of the case. As a consequence, the Court also did not address how it might resolve normative conflict should such arise.

It may be observed that in ruling that the ECHR was not applicable to the active phase of hostilities (at least insofar as Russia's conduct was concerned), the Court sidestepped the most prominent normative conflict between the Convention and IHL: where it concerns deprivations of life.[299] It therefore remains to be seen whether, like in *Hassan*, the right to life can also be subject to 'implicit derogations' with a view to justifying deprivations of life 'resulting from lawful acts of war'. The Court will likely need to answer this question in future case-law, and such cases as the inter-State applications brought in the conflict between Armenia and Azerbaijan will likely require the Court to settle this issue.

294 Ibid [101]-[104].
295 Ibid [101]-[104] and [107].
296 *Georgia v Russia (No. 2)* (n 19) [95].
297 Ibid [220]-[222].
298 Ibid [235]-[237], [267], [291], [311], [323]-[325].
299 Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' (n 251) 90–2.

In *Hanan v Germany*, finally, the Court engaged in a somewhat more detailed examination of IHL. Faced with the question whether and how Germany had to investigate an airstrike which had caused civilian casualties in the context of the NIAC in Afghanistan, the Court took express account of IHL. Three full pages of the judgment are devoted to summing up the relevant rules of IHL,[300] and in examining the complaint, the Court considered IHL relevant at four different junctions. Firstly, for establishing that Germany exercised jurisdiction for the purposes of the investigation, the Court considered it a relevant 'special feature' that Germany had been required to conduct an investigation under applicable rules of IHL – referencing in particular the ICRC's Customary IHL Study and the UN Basic Principles and Guidelines.[301] Secondly, like in *Georgia v Russia (II)*, it considered that there was 'no substantive normative conflict in respect of the requirements of an effective investigation between the rules of international humanitarian law applicable to the present case (…) and those under the Convention'.[302] It did not, therefore, engage with the respondent and intervening Governments' arguments that IHL 'provided the appropriate yardstick' or even the '*lex specialis*' for deciding the case, nor did it answer whether an implicit derogation could be used to resort to IHL as it had done in *Hassan*.[303]

Thirdly, in determining the adequacy of the investigation, the Court examined whether the investigative steps were sufficient to establish the legality of the use of force, and consequently the criminal liability of those involved in ordering the airstrike. The German prosecutor had determined the lawfulness of the attack in light of the applicable rules of IHL, for which the *mens rea* of the commander ordering the strike is ultimately decisive. A breach of IHL will only occur where civilians are made the direct target of attack, where the expected civilian casualties are excessive in light of the anticipated military advantage, where the necessary precautions of attack were not taken, or where an attack was indiscriminate.[304] The *ex ante* expectations and intentions of the commander are therefore of decisive importance in determining lawfulness, and the German prosecutor had determined that all necessary precautions had been taken, and that the commander had been convinced that there had been no civilians present at the target. The Court, crucially, went along with this assessment. It accepted not only that it had been difficult under the circumstances to determine the exact number of civilian casualties, but moreover that the number of victims 'did not have any bearing on the legal assessment in respect of the criminal liability of Colonel K., which focused on his

300 *Hanan v Germany* (n 13) [80]-[85].
301 Ibid [137].
302 Ibid [199].
303 Ibid [193]-[195], [198]-[199].
304 See AP I, art 48, 51(1), (2) and (4), 57(2).

subjective assessment at the time of ordering the airstrike'.[305] This means that in order to determine the *legality* of the use of force, which according to the Court must be established in the investigation, it defers to legality *under IHL*. This may well have to do with the fact that the applicants complained under the duty to investigate only, and that Germany had likely not exercised jurisdiction under Article 1 for the purposes of a substantive assessment of the lawfulness of the use of force under the Convention.[306] If the substantive limb of Article 2 therefore did not apply, there was no real issue of interplay here, as IHL was the only legal framework regulating the lawfulness of the use of force. Still, this is the first time that the Court has deferred to an assessment of lawfulness under IHL.

Fourthly and finally, when examining the independence of the investigation, the Court considered that it cannot be the case that 'commanders must be excluded from investigations against their subordinates entirely, having regard also to the duty assigned to commanders in this respect under international humanitarian law'.[307] Thus, once again the Court takes express account of IHL in interpreting the Convention – where it was previously reticent in doing so.

To sum up, the European Court appears to be moving towards a more open approach to IHL. The cases of *Hassan v UK*, *Georgia v Russia (II)* and *Hanan v Germany* illustrate that it is willing to take express account of IHL in interpreting the Convention, when respondent Governments invoke IHL during the proceedings. In the latter two cases, this led the Court to assess on a right by right basis whether a conflict between the Convention and IHL existed. On the facts of those cases, however, it considered no conflict to exist, meaning it could follow its more general approach in which diverging international obligations must 'be harmonised as far as possible so that they produce effects that are fully in accordance with existing law'.[308] Likely, the Court will sooner rather than later be faced with cases in which a conflict between IHL and the Convention is unavoidable. The *Hassan* case illustrates that the Court has been willing to open up the exhaustive list of justifications for deprivations of liberty, but whether it will do so also for deprivations of life – as was argued by respondent and intervening Governments in *Hanan* – remains a pressing question.

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305 *Hanan v Germany* (n 13) [218].

306 The Court itself notes in this respect that the fact that it found a jurisdictional link to exist between Germany and the applicants with respect to the duty to investigate, this does not mean that the airstrike itself also fell within the jurisdiction of the State in the context of a substantive assessment, ibid [143]. The dissenters note that in their view, there indeed was no jurisdiction under the personal or spatial models for jurisdiction, ibid, *Jointly partly dissenting opinion of Judges Grozev, Ranzoni and Eicke* [25]-[31].

307 Ibid [224].

308 *Nada v Switzerland*, ECtHR [GC] 12 September 2012, Appl No 10593/08 [170].

6.4 Investigations into violations committed during armed conflict

6.4.1 Introduction

In the above, it was determined how the duty to investigate applies during situations of normalcy, that the ECHR continues to apply during armed conflicts, and how the European Court takes account of IHL. Based on these findings, this section aims at answering what, under the ECHR, States' investigative duties during armed conflicts amount to. One may question, for instance, whether it is feasible to require States to investigate all deprivations of life during armed conflict, as well as whether it is realistic to require States to conduct investigations the same way they must outside of conflict. In addressing these issues, this section first discusses the scope of application of the duty to investigate during armed conflict, to secondly examine any flexibility in the standards applied during conflicts.

6.4.2 Scope of application

The scope of the duty investigate in armed conflicts and occupation is principally the same as during situations of 'normalcy' – with a number of nuances. The Court has held that 'the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict',[309] as well as during 'violent armed clashes' in the context of NIACs.[310] A selection of cases from the numerous conflicts that have taken place in Europe shows this to be the case where States operate in international armed conflicts both extraterritorially[311] and within their territory,[312] as well as in high intensity non-international armed conflicts on their own territory,[313] and recently also abroad.[314] It is therefore clear that the duty to investigate continues to apply in situations of armed conflict.

This is no different when States engage in extraterritorial IACs or NIACs, even during the 'active phase of hostilities', and even insofar as such hostilities give rise to a 'context of chaos' which otherwise prevents it from exercising

309 Ibid [164].

310 *Kaya v Turkey* (n 16) [91]. See also the many Chechen cases, concerning Articles 2, 3 and 5, discussed by Philip Leach, 'The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights' [2008] European Human Rights Law Review 732; Philip Leach, 'Egregious Human Rights Violations in Chechnya: Appraising the Pursuit of Justice' in Lauri Mälksoo and Wolfgang Benedek (eds), *Russia and the European Court of Human Rights*, vol 1 (Cambridge University Press 2017).

311 *Al-Skeini v UK* (n 14) [164]; *Georgia v Russia (II)* (n 19) [328]-[332].

312 *Çakir and Others v Cyprus* (n 226).

313 E.g. *Isayeva v Russia* (n 15).

314 *Hanan v Germany* (n 13).

control, according to the Court. As was explained above, the Court has held in *Georgia v Russia (II)* that in such situations States cannot principally exercise the control necessary for them to exercise jurisdiction extraterritorially.[315] Nevertheless, the case-law shows that an exception in this respect must be made for the duty to investigate. As was set out in section 4.5, if the 'special features' of a case are such that a 'jurisdictional link' exists between the State and an incident, the duty to investigate will apply extraterritorially. This, the Court held in *Georgia v Russia (II)*, is also the case during the 'active phase of hostilities' of an IAC.[316] In *Hanan v Germany*, it held to the same effect with respect to the 'active hostilities phase' of an extraterritorial NIAC, which meant Germany had to investigate an airstrike carried out in the context of the NIAC taking place in Afghanistan.[317] Because, as was set out above, the 'special features' relevant to these cases related *inter alia* to the duty to investigate under IHL, the presence of suspects within the State's jurisdiction, and the territorial State being prevented from conducting an effective investigation, this likely brings many incidents involving a State's armed forces within the investigative jurisdiction of the State – at least insofar as such incidents violated IHL. As the Court found in *Hanan*,

> 'The Court does not overlook the restrictions on Germany's legal powers to investigate in Afghanistan, nor the fact that the deaths to be investigated occurred in the context of active hostilities. However, such circumstances do not *per se* exclude the determination that further investigatory measures, including in Afghanistan, may have been necessary, including through the use of international legal assistance and modern technology. The specific challenges to the investigation relate to the scope and content of the procedural obligation under Article 2 incumbent on the German authorities and thus to the merits of the case.'[318]

In sum, the geographic scope of the duty to investigate is not limited with respect to armed conflict.

Two further issues remain which may influence the *scope* of the duty to investigate during conflicts. The first is whether the scope of the duty to investigate under the right to life can be altered, through derogation. If 'deaths resulting from lawful acts of war' are permitted under the ECHR by virtue of a derogation, then the scope of the duty to investigate is arguably similarly reduced to credible assertions of deaths which are unlawful under the law of armed conflict. The second issue is whether during armed conflicts, States are held to investigate deaths caused by third parties – including non-State armed groups.

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315 *Georgia v Russia (II)* (n 19) [126] and [137].
316 *Georgia v Russia (II)* (n 19) [328]-[332].
317 *Hanan v Germany* (n 13) [136]-[142].
318 Ibid [145].

First, the question whether the scope of investigative obligations under the right to life narrows to only those deaths that appear to be unlawful under the law of armed conflict. Much has been written on the right to life during armed conflict, and the interplay between human rights law and IHL in this context. This discussion is not repeated here, although Chapter 10 of this study does engage with it to a certain extent.[319] At this point, it is merely submitted that, despite its finding that Article 2 ought to be interpreted in line with IHL,[320] the Court has thus far not applied rules of IHL to assess the lawfulness of deaths. Rather, it has developed its own test of absolute necessity and applied this contextually – which remains far-removed from the status-based targeting rules of IHL.[321] It is submitted that likely, the lack of derogations by States have restricted the Court's possibilities of resorting to IHL in this context[322] – which has instead applied the Convention 'against a normal legal background'.[323] This may change if the Court applies its approach in *Hassan* to right to life cases – thereby allowing 'implicit derogations' of the right to life – at least when States argue before the Court that it should take account of the rules of international armed conflict.[324] It was asked to do so in the case of *Hanan v Germany*, but ultimately, the Court did not find it necessary to rule on this issue.[325] Whether it will take a similar approach under the right to life therefore remains to be determined.

Should the Court indeed allow for implied derogations, or should States choose to derogate from their obligations under Article 2, then presumably investigative obligations will be limited to credible assertions of the unlawfulness of deaths under IHL, or the absolute necessity test under the ECHR would at least be modified to take account of IHL.[326] Insofar as the deaths of combatants are concerned, this appears no more than reasonable, as the criterion of investigating every death caused by State agents would appear unfeasible and untenable during active hostilities in armed conflicts,[327] where a State's

319 Chapter 10, §3.4.2.1.
320 *Varnava and Others v Turkey* (n 118) [185].
321 At least insofar as non-international armed conflicts are concerned, see Abresch (n 17).
322 E.g. Milanović, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' (n 236). On the competence to apply international humanitarian and criminal law by the ECtHR, be it incidentally, see Pinzauti (n 290) 1045–8.
323 *Isayeva v Russia* (n 15) [191]; Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' (n 231) 502.
324 *Hassan v UK* (n 91) [101]-[103], [107].
325 *Hanan v Germany* (n 13) [173], [195], [199].
326 On necessity, see further Lawrence Hill-Cawthorne, 'The Role of Necessity in International Humanitarian and Human Rights Law' (2014) 47 Israel Law Review 225; Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 Virginia Journal of International Law 796.
327 See also Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98 American Journal of International Law 1, 33.

aim is precisely to weaken the military forces of the enemy by incapacitating or killing as many of the enemy's armed forces as possible.[328]

Interestingly, in the cases of *Georgia v Russia (II)* and *Hanan v Germany*, the Court considered that with respect to the duty to investigate, there is no conflict between the requirements under the Convention, and those under IHL. In *Georgia v Russia (II)*, in the context of an IAC, the Court found that 'In general, it may be observed that the obligation to carry out an effective investigation under Article 2 of the Convention is broader than the corresponding obligation in international humanitarian law', but that '[o]therwise, there is no conflict' between them.[329] In *Hanan*, it considered that 'there is no substantive normative conflict in respect of the requirements of an effective investigation between the rules of international humanitarian law applicable to the present case (…) and those under the Convention'.[330] This may be taken to indicate that the Court does not view the broader scope of investigative obligations under the Convention as conflicting with IHL. Yet, both cases were concerned with potential violations of IHL or war crimes, which indeed require an investigation under that body of law as well.[331] This leaves open the question how the Court will deal with complaints with respect to intentionally caused deaths which are uncontrovertibly lawful under IHL – for instance the targeted use of force against combatants in an IAC, or where a civilian casualty is caused which was foreseen, but which was clearly proportionate to the anticipated military advantage. In such cases, the Convention would normally require an investigation as a death is caused through the use of force by State agents, whereas IHL would not as the use of force was clearly lawful.

If the Court is indeed to interpret the right to life in light of IHL, based on either implicit or explicit derogations, then a reading down of the scope of application of the duty to investigate appears inevitable. This will reduce the material scope of application, to such deaths which are unlawful under IHL, only.

Secondly, another potentially onerous obligation is that of investigating deaths which are not attributable to the State itself. After all, during armed conflicts, loss of life occurs on a large scale. The starting point here must be the Court's finding that investigations 'should take place in every case of a killing resulting from the use of force, regardless of whether the alleged perpetrators are State agents or third persons'.[332] The Court has never watered down this require-

328 *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, opened for signature 29 November 1869, 18 Martens Nouveau Recueil (ser. 1) 474, 138 Consol. T.S (hereinafter 1868 St. Petersburg Declaration).

329 *Georgia v Russia (II)* (n 19) [325].

330 *Hanan v Germany* (n 13) [199].

331 Further, see Chapter 3.

332 *Tahsin Acar v Turkey*, ECtHR [GC] 8 April 2004, Appl No 26307/95 [220].

ment of investigations into third-party conduct even in conflict situations. In fact, it has held to this effect in NIACs,[333] and has confirmed it in the context of the occupation of Iraq.[334] It has, however, explicitly noted the difficult conditions for investigations in such circumstances, finding that '[t]he nature and degree of scrutiny which satisfies the minimum threshold of an investigation's effectiveness depends on the circumstances of the particular case'.[335] Thus, any leeway provided by the Court would seem to relate to investigative *standards* – discussed below – rather than applicability of the duty to investigate as such.

There are a number of examples in the European Court's case-law which illustrate how it requires States to investigate also instances of third-party and NSAG killings during armed conflicts. The leading cases of *Al-Skeini* and *Jaloud* provide some indication for such. Both cases concerned the occupation of Iraq, and the respective roles of the UK and the Netherlands therein. In *Al-Skeini*, relatives of the applicants had been killed during UK security patrols. Five out of the six victims represented in that case were killed directly by UK security soldiers, which was not contested.[336] Interestingly, however, the one remaining victim had died during an exchange of fire between UK forces and unidentified gunmen, and it was unclear from what side the fatal shot had originated.[337] The Court considered that 'since the death occurred in the course of a [UK] security operation, when British soldiers carried out a patrol in the vicinity of the applicant's home and joined in the fatal exchange of fire, there was a jurisdictional link between the United Kingdom and this deceased'.[338] Thus, the Court here at least potentially finds the UK responsible for an investigation into a death caused by third-party gunmen, though admittedly the link with the UK's own operations was very close. This was similar in *Jaloud*, where the applicant's son had been shot and killed when passing through a vehicle check-point in Iraq, which was at the time manned by both Iraqi and Dutch personnel. The investigation never established whether the fatal bullet had been fired by the Dutch lieutenant who had been subject to investigation, and who was known to have fired an entire magazine worth of rounds at the car, or by Iraqi personnel, who denied having fired.[339] Bullet holes, however, seemed to indicate at least two different types of rounds had been used. Here too, the Court required an investigation into a death which was potentially caused by a third-party, though even if this was the case, the link with the Netherlands own operations was very close indeed. A final case concerning Iraq is the case of *Miller v UK*, which incontrovertibly concerned

333 Ibid, concerning the NIAC between Turkey and the PKK in South-East Turkey.
334 *Miller v the United Kingdom*, ECtHR 2 July 2019 (dec.), Appl No 32001/18 [80].
335 Ibid [90].
336 *Al-Skeini v UK* (n 14) [150].
337 Ibid [151].
338 Ibid.
339 *Jaloud v Netherlands* (n 134) [184].

a death caused by private actors.[340] Unique to this case, however, was that the victim was a member of the UK Royal Military Police, which perhaps in and of itself engaged the UK's responsibility to investigate his death.[341] Nonetheless, this is a clear instance where the Court considered a death caused by private individuals to require investigation in a context of conflict.

Finally, and perhaps most explicitly, the European Court has found similarly in cases concerning deaths resulting from armed conflicts in the former Yugoslavia and North Ireland. In the *Palić* case, the Court found that Bosnia and Herzegovina was under the obligation to investigate the disappearance of the applicant's husband, who during the Yugoslav conflict had last been seen when negotiating with a non-State armed group, the VRS (the army of the Republika Srpska).[342] Thus, the State was tasked with investigating potential abuses committed by an armed group operating during an armed conflict, and the Court found that ultimately and in light of the extremely difficult circumstances of the post-conflict situation, Bosnia and Herzegovina had made sufficient efforts to investigate the applicant's husband's death. In *Cummins v UK*, the case concerned an attack in Ireland, carried out by IRA operatives who subsequently fled to the UK. The Court in this case observed that the right to life might require States on whose territory suspects or evidence were located to investigate, and to do so of their own motion.[343] Ultimately, however, the Court declared the application manifestly ill-founded because the UK had sufficiently cooperated with Ireland in its investigation. Here too, then, the European Court confirmed the applicability of the duty to investigate conduct by NSAGs.

In conclusion, the ECHR duty to investigate continues to apply during armed conflict, also in respect of third-party infringements, and also where concerning violations committed by NSAGs. If the State can no longer be held to exercise jurisdiction because it has lost control this might be different, though once it resumes control over its territory or if other 'special features' indicate a jurisdictional link, it will likely need to investigate at that point.

It can be concluded that the scope of investigative duties during armed conflicts is largely similar to the scope of such duties in times of peace. In right to life cases, the material scope of application of the duty requires further clarification. The starting point, as the case-law stands, must be that any credible assertion of unlawful deprivations of life requires an investigative response. However, whether the Court may open up the definition of what

340 *Miller v the United Kingdom* (n 334) [6].

341 Although the Court is ambiguous about this, finding that the question whether the UK exercised art 1 jurisdiction was 'potentially complex', but did not require an answer because the application was in any case manifestly ill-founded; ibid [78].

342 *Palić v Bosnia and Herzegovina*, ECtHR 15 February 2011, Appl No 4704/04 [11].

343 *Cummins and Others v the United Kingdom* (n 17). Summarised in *Güzelyurtlu and Others v Cyprus and Turkey* (n 138) [182].

constitutes an 'unlawful' deprivation of life to interpretation in light of IHL – whether or not following a derogation – remains to be seen. Thus far, it appears that when States are engaged in non-international conflicts on their own territory, the scope of their investigative duties is unaltered, at least in current practice where States do not derogate in these types of conflict. In international armed conflicts, the scope of investigative obligations may be altered depending on whether the Court extends its approach of 'implied derogations' to right to life cases as well.

6.4.3 Investigative standards

Finally, let us now turn to the standards investigations must meet, during armed conflict. As was alluded to above, the Court has repeatedly stressed the importance of applying the investigative obligations under the ECHR in a practical and realistic manner. It is an obligation of means, not of result. In this light, it may therefore be expected that there is some room for leniency in the application of investigative standards to violations stemming from armed conflict. Indeed, in the context of the UK's involvement in Iraq, it found:

> 'It is clear that where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and (…) concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed. Nonetheless, the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.'[344]

The Court therefore takes account of the practical constraints of investigations in these types of situations – both IACs and NIACs[345] – though it in principle applies the same standards. Especially in cases which concern post-conflict societies, the Court indeed appears to apply a somewhat relaxed standard of review. By way of example, the Court found in *Palić v Bosnia and Herzegovina* that although the applicant's husband's remains had only been uncovered after fourteen years, and although a perpetrator had not been identified, in the context of the post-conflict society grappling with the deaths of over 100,000 people, and 30,000 missing, simply the recovery and identification of the body had been a significant effort. The Court found the State had done all it could, having provided compensation for the applicant and having carried out a

344 *Al-Skeini v UK* (n 14) [164]. References omitted.

345 In the case of *Tagayeva*, the Court 'acknowledged the difficulties faced by the Russian Federation in maintaining law and order in the North Caucasus and the restrictions that may be placed on certain aspects of the investigation' *Tagayeva and Others v Russia* (n 7) [504].

criminal investigation, even if ultimately unable to identify the perpetrator.[346] It has found similarly in cases concerning Croatia.[347] This goes to underline that States must do what they can to investigate, but are not held to do the impossible.

Looking more in particular at the various standards the Court has formulated, the standards of promptness, adequacy, independence, and involvement of next of kin in particular warrant further discussion, because the Court has addressed them in an armed conflict context.

Let us first consider the requirement of promptness. This criterion appears to be applied with some leniency, for instance – again – where the circumstances in a post-conflict society simply do not allow for many complex investigations to be conducted.[348] There may therefore be some room for an investigation to be less prompt than otherwise, in a situation of conflict. Yet, promptness is crucial in ensuring the effectiveness of an investigation. To illustrate, in a number of cases where applicants sought remedies in the form of the Court ordering States to carry out investigations, it found that such investigations would be futile given the passage of time since the incidents, inhibiting any fruitful fact-finding.[349] This apparent contradiction reveals a major dilemma the Court must deal with on a case-by-case basis when judging investigations in conflict situations: on the one hand a realistic approach to situations of active hostilities where States are not in full control clearly militates against requiring immediate investigation, as in those situations States can in no way safeguard the safety of their investigators. On the other hand, promptness is of crucial importance for establishing what happened, especially in armed conflict situations where forensic evidence may be lost quickly due to ongoing shelling, and where witnesses might not even survive the conflict to give their account.[350] The Court appears to have approached this issue thus far by looking also at the other criteria for investigations, especially whether the authorities have genuinely attempted to establish the truth. If so the Court has accepted delays, whereas the shielding of State agents by conducting tardy and half-hearted investigations has been penalised consistently.[351] By way of illustration of the former, in *Hanan*, the Court considered that due to an armed conflict investigations may be 'delayed', stressing that its standards must be applied realistically. On the facts of the case, this meant that the Court accepted that on-site reconnaissance by German forces, under protection of Afghan security forces, could not have taken place any sooner than approxima-

346 *Palić v Bosnia and Herzegovina* (n 342) [70]-[71]. See further Chernishova (n 71) 153–4.
347 *Zdjelar and Others v Croatia*, ECtHR 6 July 2017, Appl No 80960/12 [91]-[94].
348 *Palić v Bosnia and Herzegovina* (n 342) [70]-[71]; *Zdjelar and Others v Croatia*, ibid.
349 *Musayeva v Russia*, ECtHR 3 July 2008, Appl No 12703/02 [166].
350 Addressing this in the context of interim measures, see Leach, 'The Right to Life – Interim Measures and the Preservation of Evidence in Conflict Situations' (n 167).
351 E.g. *Damayev v Russia* (n 169) [81].

tely 12 hours after the airstrike. This had to do with the active hostilities taking place, and with the investigators coming under fire despite their 100 man strong protection force.[352] With respect to the criminal investigation, the chief legal officer had informed the public prosecutor on the day of the airstrike, and the prosecutor and the Federal Prosecutor General had initiated preliminary investigations three and four days after the strike – which the Court considered sufficiently prompt.[353]

Secondly, the standard that investigations must be 'adequate'. This criterion, it will be recalled, relates to the investigative steps States must take in order to bring all relevant facts to light, and with a view to identifying those responsible. The Court has handed down a number of cases relating to the question how investigations must be shaped during conflict, relating to armed conflicts both on the State's own territory, as well as conflicts fought extraterritorially. Both are considered in turn.

In the context of *territorial* NIACs, the sheer number of violations found by the Court may call into question whether it indeed makes allowances for the difficulties arising out of an armed conflict situation. A significant number of cases, however, stems from the conflicts concerning Chechnya and South East Turkey, where often no investigations into suspicious deaths, disappearances or allegations of torture and ill-treatment were conducted at all – or with such significant delays that actually establishing the truth and ensuring accountability was illusory.[354] Violations found in these cases of glaring shortcomings or a complete absence of investigations do not necessarily give much insight in what the Court would find satisfactory, as often there simply was no investigation to review. The criterion of a 'thorough' and 'genuine' investigation is clearly not met in such cases where the State authorities are shielded from accountability.[355]

Nevertheless, a number of Chechen and Turkish cases provide some insight in the investigative measures the Court would have liked to see, in the context of these non-international armed conflicts on the respondent States' own territories. The Court on occasion indicated why investigations did not meet the adequacy criterion, for instance in *Kaya v Turkey*, concerning the shooting by security forces of an alleged PKK (Kurdistan Workers' Party) member. The Court reproached the Turkish authorities for not having carried out examinations of gunpowder residue on the deceased's hands, not having dusted the weapon perceived to be his for fingerprints, not having analysed the bullets

352 *Hanan v Germany* (n 13) [27], [223].

353 *Hanan v Germany* (n 13) [228].

354 See further the in-depth analyses of the Chechen conflict Leach, 'The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights' (n 310); and for Turkey Borelli (n 104) 382–5.

355 See e.g. *Mihdi Perinçek v Turkey*, ECtHR 29 May 2018, Appl No 54915/09 [80], where the investigation was 'so manifestly inadequate' that it clearly violated the Convention.

lodged from his body, having come up with an incomplete autopsy report and having handed over the body to villagers, in this context also expressing its surprise the body was not moved to a more secure location where further examinations could have taken place.[356] In addition, the Court condemned the absence of the taking of witness testimonies, or seeking confirmation of the deceased's membership of the PKK.[357] Philip Leach carried out an extensive analysis of cases concerning the Chechen conflict, concluding that investigations were deficient due to

> 'the failure to question the applicants or delays in doing so; the failure to identify and question witnesses, or delays in doing so, or the failure to raise particular pertinent questions; the failure to identify other victims and witnesses of an attack, including those identified and named by the applicants; the failure to initiate criminal proceedings or to specify what investigative steps were taken following the discovery of a body; the failure to carry out an appropriate autopsy or forensic report, or delays in doing so; the failure to carry out a ballistics report or delays in doing so; the failure to draw up a map or plan; and the delay in drawing up an inventory of real evidence.'[358]

Taken together, the investigative steps which the Court requires – and found to be lacking – do not appear to be quite so different from those applied during situations of normalcy. As the Court made clear in *Tagayeva*, States must gather forensic evidence from victims' bodies in order to establish the cause of death, and secure and collect evidence.[359] All 'reasonable steps' must be taken in this regard, and although what is reasonable is subject to a contextual determination,[360] the Court does not appear to loosen its test by virtue of the existence of a NIAC.

In relation to *extraterritorial IACs*, the Court has dealt with a number of cases arising out of the occupation of Iraq. In *Jaloud v the Netherlands*, the Court applied similar criteria, finding fault in handing over the remains of an Iraqi civilian to an Iraqi doctor for autopsy, after he had been shot at a military checkpoint presumably by a member of the Netherlands armed forces.[361] Further, the Court stressed the importance of separating the subject of investigations from witnesses to prevent collusion and interviewing him promptly to prevent any risk or appearance of collusion, even though he was in this case the highest ranking officer present.[362] Finally, it was equally detailed

356 *Kaya v Turkey* (n 16) [90].
357 Ibid [91].
358 Leach, 'The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights' (n 310) 751–2, footnote references omitted.
359 *Tagayeva and Others v Russia* (n 7) [500]-[516].
360 Ibid [511].
361 *Jaloud v Netherlands* (n 134) [212]-[216].
362 Ibid [206]-[208].

in requiring the prompt gathering of witness testimonies and disclosing those to the prosecutorial and judicial authorities, as well as concerning the storing of the bullet fragments collected.[363] One might surmise, therefore, that the requirements are not necessarily much less strict than in a situation of normalcy – despite the Court's insistence that it must apply the Convention realistically, in light of the obstacles arising out of the context of armed conflict.

Finally, however, in the context of the *extraterritorial* NIAC considered in *Hanan*, the Court appears to have made more allowances with respect to the investigative steps taken. Emphasising that the duty to investigate 'must be applied realistically', it considered:

> 'that the challenges and constraints for the investigation authorities stemming from the fact that the deaths occurred in active hostilities in an (extraterritorial) armed conflict pertained to the investigation as a whole and continued to influence the feasibility of the investigative measures that could be undertaken throughout the investigation, including by the civilian prosecution authorities in Germany.'[364]

The Court therefore assessed the German investigative efforts contextually, pointing out that active hostilities were going on which rendered the collection of evidence on the ground difficult. The Court accepted that because the airstrike had taken place during hostilities and at night, and because locals had removed the bodies before investigators were on site, a number of investigative steps had not been available.[365] 'Under normal circumstances', the fact that the investigation had been unable to establish the precise number and status of the victims would have been crucial.[366] Yet, the Court took two factors into consideration for finding differently in this case. Firstly, important investigative aims had already been achieved at the start of the investigation, as the cause of death of the applicant's relatives had been established, and those responsible had been identified.[367] Secondly, the Court crucially deferred to the standards for the legality of the use of force *under* IHL. It considered that the fact that the investigation could not establish the precise number of civilian casualties 'did not have any bearing on the legal assessment in respect of the criminal liability of Colonel K.', because IHL legality hinges on an *ex ante* assessment and on the knowledge of those involved.[368] This justified the investigation's focus on establishing the commander's *mens rea*, beyond the on-site reports by the German military police,

363 Ibid [202]-[203]; [209]-[211]; [217]-[220].
364 *Hanan v Germany* (n 13) [200], references omitted.
365 Ibid [218].
366 Ibid.
367 Ibid [211].
368 Ibid [218].

Afghan authorities, and the NATO and UN.[369] The Court was therefore mindful of the obstacles to an investigation in this situation of extraterritorial conflict and active hostilities, and accepted that it could not meet the same standards it would normally impose – in which IHL played an implicit role as the yardstick for the legality of the use of force.

Thirdly, the Court has also considered the standard of independence, also in cases arising out of armed conflict. In the context of the Chechnyan NIAC, the Court has held that

> 'where decisions to terminate proceedings in situations involving civilian casualties are taken by the military prosecutor's office on the basis of expert reports prepared by army officers, this may raise serious doubts about the independence of the investigation from those implicated in the events at issue.'[370]

Further, the case law pertaining to the occupation in Iraq also provides some guidance on the standard of independence. In *Al-Skeini*, the Court found that the command investigations carried out by the UK were lacking.[371] The investigating authority ought to have been operationally independent from the chain of command, which was not the case, as the British government had conceded. In *Jaloud*, an investigation mounted by the military police did meet this requirement as they were institutionally outside the chain of command, and were also found to be sufficiently independent in practice, despite sharing living quarters with the military in Iraq.[372] These findings as to the required independence of investigators are especially relevant when compared to the relevant norms under the law of armed conflict, as there it is normally precisely the direct commander who is tasked with the immediate investigation of alleged breaches, and who is in fact criminally liable should they fail to mount such investigations.[373] In the case of *Hanan*, the Court took account of this fact. There, it had to assess the independence of an investigation into an airstrike, with the initial on-site investigation taking place by forces under the command of Colonel K, who had ordered the strike. The Court found that while it would have been 'preferable' for others to have conducted the investigation, it was justified due to the ongoing hostilities. Further, it found that commanders need not be excluded from investigations involving their subordinates, 'having regard also to the duty assigned to commanders in this

369 More specifically, the international investigations were carried out by ISAF, the International Security Assistance Force which was at that stage under control of NATO, and by the United Nations Assistance Mission in Afghanistan, UNAMA.

370 *Tagayeva and Others v Russia* (n 7) [536].

371 *Al-Skeini v UK* (n 14) [169]-[177].

372 *Jaloud v Netherlands* (n 134) [189]-[190].

373 AP I, art 86 and 87. See Chapter 3, §4.

respect under international humanitarian law'.[374] Commanders who are themselves implicated in an incident, however, must not be involved in its investigation. Although this had been the case in *Hanan*, the Court considered that because those responsible had been identified and because to determine their criminal liability an assessment of their *mens rea* was decisive, this defect had not rendered the investigation ineffective.[375] Thus, it interpreted the requirement of independence both contextually – in light of the extraterritorial NIAC, and the active ongoing hostilities – and in light of IHL. The Court's approach therefore mitigates the potential conflict between IHL and the ECHR with respect to the independence of investigations.

Fourthly and finally, the Court has briefly alluded to the involvement of next of kin in the investigation in respect of investigations into incidents in a context of armed conflict. In *Hanan*, the Court considered that the 'investigative material contained sensitive information concerning a military operation in an ongoing armed conflict', in respect of which 'it cannot be regarded as an automatic requirement (…) that a deceased's victim's surviving next-of-kin be granted access to the ongoing investigation'.[376] Certain restrictions on transparency are therefore permissible, in the Court's view, with respect to investigations into the operations of armed forces during armed conflicts.

Both in case of territorial NIACs and of extraterritorial IACs, it would appear therefore that whereas the Court stresses it must take account of the circumstances of conflict to ensure investigative requirements are realistic, its test remains strict. The close scrutiny exercised in *Jaloud* has been widely criticised both by academics[377] and from within the Court itself, because of its perceived lack of realism in for instance separating the potential wrongdoer, who as a Lieutenant was the highest in command, and whose separation would therefore clearly harm operational capabilities in a tense security situation. Seven Judges opined they 'respectfully regret that the Grand Chamber also found it appropriate to scrutinise the investigations in Iraq in such a painstaking way that eyebrows may be raised about the role and competence of our Court.'[378] This may have driven the Court's approach in *Hanan*, where it applied the standards for investigations in a significantly loosened fashion. It even took express account of IHL in this respect – which is something the

374 *Hanan v Germany* (n 13) [223]-[224].
375 Ibid [226].
376 Ibid [233].
377 E.g. Friederycke Haijer and Cedric Ryngaert, 'Reflections on Jaloud v. the Netherlands. Jurisdictional Consequences and Resonance in Dutch Society' (2015) 19 Journal of International Peacekeeping 174, 182–4.
378 Joint concurring opinion to *Jaloud* of Judges Casadevall, Berro-Lefevre, Šikuta, Hirvelä, López Guerra, Sajó and Silvis [5]-[7].

Human Rights Committee and the Inter-American Court have not done in this context.

7 CONCLUSION

This Chapter has explored the contours of the duty to investigate under the ECHR. In the terms of the research question, it examined *whether* the ECHR requires States to investigate violations, as well as the *scope of application* and *contents* of that obligation, with particular attention for its application during armed conflict. Like we have seen under the ICCPR and ACHR, the European Court has found investigative obligations to be implied in the Convention, and the question whether States must investigate potential violations, can therefore be answered firmly in the affirmative.

In order to render rights practical and effective, States must institutionalise a procedural layer of protection, including an investigative mechanism which they must operationalise whenever an arguable claim of an infringement is brought. The Court has never pronounced generally on violation of *which rights* requires an investigation, though it most certainly includes the rights central to this study – the rights to life and liberty, and the freedom from torture and slavery. These rights, in conjunction with the Article 1 obligation to secure rights, requires them to investigate potential violations. Further, the rights to a remedy and reparation, may also call for an investigation.

The duty to investigate applies broadly. It applies both to violations committed by State agents and abuses committed by private individuals and armed groups, it can apply to incidents which occurred before the ECHR even entered into force for the State in question, and it can apply outside States' territories. This is the case if States exercise control over territory or victims, or if 'special features' of a case lead to the existence of a jurisdictional link between the State and the victim. In a number of respects, the duty to investigate is therefore at the forefront of developments of human rights law. This is particularly so in respect of a duty to cooperate, which the Court has found to apply even in situations where an incident fell outside of a State's jurisdiction. Even in such cases, States can be held to cooperate in the investigation of other States, for instance if the suspect is present in their territory, or if they have access to material evidence.

The duty to investigate is an obligation of means, not of result. States must therefore take all reasonable steps to clarify the facts, and to identify those responsible. The Court has formulated eight standards for investigations, which are highly similar to those formulated under the ICCPR and ACHR. Investigations must be (i) launched of the State's own accord (*ex officio*), (ii) initiated promptly and carried out with reasonable expediency, and must furthermore be (iii) adequate, (iv) independent and (v) impartial, and (vi) must contain a sufficient element of public scrutiny, including (vii) sufficient involvement of the victims

or their next of kin. Finally, (viii) follow-up to the investigation may be required, which depending on the case may require either criminal accountability processes, or the availability of civil remedies. Intentional infringements or use of force by State agents will normally require criminal law measures.

In the context of armed conflict, the Court has made it very clear that the duty to investigate continues to apply, regardless of the circumstances. Nevertheless, it has found that the difficult circumstances which pertain during armed conflicts, must be taken into account when judging whether the State has taken all reasonable steps to ensure the effectiveness of the investigation. It thus applies a contextual approach, and has recently also had recourse to IHL in such contexts. Whereas the Court has historically been more reticent towards IHL than the HRC and the IACtHR, a shift appears to be taking place in which the Court relies on IHL as an interpretive tool.

The Court's practice relating to investigations in armed conflict appears to be going in different directions. In territorial NIACs and cases of extraterritorial occupation, it has reviewed in detail the investigative steps taken by States, and found them wanting. Whereas it applied a standard which is able to accommodate the exigencies of armed conflict, practice has thus far proved demanding. In the extraterritorial NIAC in *Hanan*, where active hostilities were ongoing, the Court applied a much more lenient approach taking account of the context and of IHL. The flexible standard of requiring all reasonable investigative steps, and allowing for less effective measures where dictated by the circumstances, may therefore lead to a more accommodating approach – although States will have to show that circumstances were such that more effective measures were not feasible.

8 Duties of investigation under international human rights law – conclusions

1 Duties of investigation under the international law of human rights

1.1 Bringing the human rights research together

Part II of this study, in Chapters 4-7, examined *whether* and *how* States are bound to investigate violations of IHRL during armed conflict. Going back to the overarching research question, it addressed

> *What are the scope of applicability and contents of States' duty to investigate (potential) violations during armed conflicts, under (…), international human rights law (…)?*

This question was answered by looking in the various Chapters at duties of investigation under the ICCPR, the ACHR, and the ECHR – as well as briefly at the Genocide, Torture, and Disappearance Conventions. This Chapter brings these findings together, and draws conclusions on duties of investigation under the international law of human rights. In other words, this Chapter synthesises the findings of Part II.

To facilitate the synthesis, this Chapter takes a comparative approach. This way, relevant commonalities and divergences are drawn out, which inform how the various systems incorporate a duty to investigate. The points of comparison relate to the rationale, scope of application, and standards for investigative obligations.[1] In other words, the *why*, *when*, and *how* of investigations. As will be seen, the investigative obligations under the various human rights regimes *converge* in most respects. Although all systems place their own accents and emphases, they conceptualise the duty to investigate in a very similar way, clearly drawing inspiration from the other systems – at times explicitly. Insofar as there are relevant divergences in how the three systems approach investigative duties, these are drawn out in this Chapter.

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1 These are the elements of comparison required for a comparative approach. Cf. Esin Örücü, 'Methodology of Comparative Law' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012) 561; Sue Farran, 'Comparative Approaches to Human Rights' in Lee McConnell and Rhona Smith (eds), *Research Methods in Human Rights* (1st edn, Routledge 2018) 134–5.

It ought to be restated at this point that it is in the nature of human rights law that it develops on a case-by-case basis, dependent on the cases which are brought before the HRC and the Inter-American and European Courts. The conclusions set out here are grounded in an extensive case-law analysis, such as the case-law stands. Under the ACHR and ECHR, both Courts have developed a highly detailed jurisprudence, which develops incrementally through binding pronouncements. Under the ICCPR, the HRC has similarly produced a significant amount of case-law, but much of its guidance also flows from general comments. It must be awaited whether views in individual cases will further strengthen and anatomise its findings in this respect.

1.2 The sword-function of IHRL and explicit investigative obligations

The duty to investigate forms an important part of many different human rights regimes. A number of global human rights conventions explicitly require States to criminalise and investigate human rights abuses in their treaty provisions. This is so in particular in the Genocide, Torture, and Disappearance Conventions. The simultaneous protection of human rights and emphasis on criminal repression, renders these treaties a sort of hybrid between human rights treaties, and transnational criminal law conventions. This combination of functions can be best understood through the 'sword and shield' metaphor. In their most basic form, human rights were conceptualised to protect individuals against State repression, and they therefore form a *shield*. This shield protects a sphere around individuals in which the State may not tread. But then we have the provisions which require States to repress human rights abuses, which corresponds to the *sword*. Quite contrary to the aim of protecting individuals against State repression, human rights here function to *invite and require* the State to take repressive action. This has also been termed the 'coercive side' of human rights law, because it requires States to use the most repressive tools at their disposal – their criminal justice systems – to investigate, prosecute, and punish human rights abuses.

If we then shift our attention to the human rights regimes which are the main focus of this study, the ICCPR, the ACHR and the ECHR, their provisions *prima facie* correspond to the shield. They grant certain rights, prohibit States from interfering with them, and are largely phrased as *negative obligations*, setting out what States may *not* do. Yet, through the interpretation and application of the HRC and the Inter-American and European Courts, the sword-function which we can see so explicitly in the Genocide, Torture, and Disappearance Conventions, has been incorporated into these more general human rights catalogues. According to these bodies, investigative obligations take up an important place within these human rights regimes. Their case-law recognises the duty to investigate to be essential to effectively protect and ensure human rights, by adding a procedural layer of protection to substantive

rights. This layer then importantly includes the investigation of potential violations. In other words, despite the lack of explicit investigative obligations under the ICCPR, ACHR, and ECHR, they have been interpreted to include precisely the type of sword-related obligations which the Genocide, Torture, and Disappearance Conventions provide for explicitly. Despite the variety in sources, this study shows that investigative obligations under IHRL largely converge: apart from certain particularities of the various systems, the duty to investigate is conceptualised and applied in broadly similar ways, as a tool to effectuate protection of human rights and ensure accountability for violations.

1.3 The *why* of investigations: rationale, legal basis, and place within the system

In reading investigative obligations into the ICCPR, ACHR, and ECHR, their supervisory bodies have taken very similar approaches. Firstly, they have all relied on a systematic interpretation of their treaties. This means that they interpret specific treaty provisions in light of the larger treaty as a whole. Importantly, they have in that respect all relied on the duty to *ensure* (or secure) human rights, which together with substantive rights such as the right to life, give rise to the obligation to institute a procedural layer of protection. This procedural layer includes the criminalisation in domestic law of certain human rights abuses, the institutionalisation of an investigation mechanism, and the effectuation of such laws and mechanisms when human rights are indeed infringed, by conducting investigations, where appropriate followed-up by a criminal prosecution and punishment. Secondly, all three systems have found that the individual right to a remedy gives rise to investigative obligations on the part of the State, and thirdly, that the obligation to provide reparation can require an investigation. For these last two sources, the approach between the various bodies shows some small degree of variation.

As the previous Chapters have shown, the procedural right to a remedy is given the most weight under the ICCPR. The HRC consistently finds that a failure to investigate constitutes a violation of the right to a remedy, which requires such investigation. The Inter-American Court's case-law shows a trend which also moves in this direction. Historically it placed more emphasis on the duty to ensure substantive rights, but it has for some time now shifted its focus to the procedural right to a (judicial) remedy. The European Court, finally, continues to find violations primarily under the procedural limb of substantive rights, and only less frequently also finds violations of the right to a remedy. The European Court does not appear to have come to a fully consistent approach thus far, but continues with some regularity to find that when it has already found a violation of the duty to investigate under a

substantive right, that it is not necessary for it to examine separately the right to a remedy.

Investigations as a form of reparation, similarly, have been subject to slightly diverging approaches. The Inter-American Court leads the way here, regularly finding that States must investigate, prosecute, and punish as a form of reparation for material violations. It moreover goes on to closely oversee investigations and criminal trials, even whilst they are still ongoing, in the context of its supervisory role in the execution of its judgments. The HRC similarly regularly recommends States conduct investigations if it finds substantive violations. The European Court is historically reticent in ordering specific forms of reparation, normally leaving this up to the State, under the supervision of the Committee of Ministers of the Council of Europe. Nonetheless, there is a recent trend where the Court exceptionally *does* provide what specific forms of reparation are required, which have, at times, included that States must conduct an effective investigation. This remains an exception, however, and it is primarily for the Council of Europe's political organs, together with the respondent State, to decide what forms of reparation are required to properly execute the Court's judgments. Like the Inter-American Court, the Committee of Ministers too, has emphasised on many occasions that in order to execute the ECtHR's judgments, investigations must be conducted.[2]

In sum, whereas the HRC, Inter-American Court, and European Court all recognise three separate sources for investigate duties, they have put different *emphases* in doing so. These do not appear to be differences of principle; when and how all bodies apply the duty to investigate is largely similar.

The ICCPR, ACHR, and ECHR strive to achieve very similar aims through their investigative requirements. Through the authoritative interpretations of the HRC and the Inter-American and European Courts, obligations to criminalise certain human rights abuses have been read into the various treaty provisions, coupled with the duty to set up procedural mechanisms which execute such legislation. If a potential abuse comes to light, States must then effectuate these mechanisms through investigation, and where appropriate prosecution. The specific aims the duty to investigate strives to achieve, have been formulated differently depending on the specific context of the case. Aims mentioned range from bringing perpetrators to justice, advancing accountability, and combating impunity, to ensuring the right to a remedy and granting reparation, drawing lessons to prevent future violations, effectuating the legislation protecting the rights in question, safeguarding the public's faith in the State's monopoly on

2 See e.g. Department for the Execution of Judgments of the European Court of Human Rights, *Thematic Factsheet on Effective Investigations into Death or Ill-treatment caused by Security Forces*, Strasbourg: July 2020 (accessible at https://rm.coe.int/thematic-factsheet-effective-investigations-eng/16809ef841 (last accessed 15 July 2021)).

the use of force, and guaranteeing the right to truth. Proper State investigations into potential abuses can achieve, or contribute to achieve, all these aims. The main overarching aims of the duty to investigate are to render the protection of rights effective through the effectuation of domestic legislation safeguarding those rights, and in a sense to create the necessary conditions for proper respect for human rights. By this, it is meant that the duty to investigate aims to have States take up their roles as primary guardians of human rights, and to create a domestic context in which this can be achieved. The duty to investigate in this respect also plays a major role in maintaining or restoring public confidence in the State's monopoly on the use of force, and ensuring its respect for the rule of law. To do so, as is illustrated so strongly by the Inter-American Court's work, there can be absolutely no room for a culture of impunity. In this sense, ensuring accountability of perpetrators ensures individual justice for direct victims, but also contributes to a culture where human rights are respected, and where abuses are not tolerated.

The above also touched already on the place which the duty to investigate takes up within the IHRL system. The duty to investigate, similar to its place within the IHL system, emphasises States' role as guardian of the law. It is for States to respect, protect, and fulfil human rights, and to provide effective remedies on the domestic level for any infringements. Supervisory human rights mechanisms take up a secondary role in this respect. If a violation potentially occurred, States must take up their roles as primary guardians of human rights by investigating, of their own motion, what happened, whether a violation has taken place, and to decide on the proper course of action. This very clearly places States under the obligation to remedy any human rights violations on the domestic level, and thereby reinforces States' primary responsibility in this regard. That States must investigate of their own motion as soon as they become aware of the potential breach is significant, because in many cases it will be impossible for victims themselves to gather the evidence required. This also explains why the right to a remedy includes an obligation for the State to investigate – victims' right to obtain a remedy is fully contingent on States bringing to light the facts of a case. Only once the facts are brought to light, can victims hope to be successful in bringing action against the State, and thereby obtaining a remedy.

Finally, the duty to investigate additionally informs the relationship between States and supervisory mechanisms in another way. Beyond placing the primary responsibility on States, which reinforces the subsidiary role of international mechanisms, it also provides international human rights bodies with a tool to handle recalcitrant States. In cases where State agents have (allegedly) committed violations, and where the State simply denies any involvement without investigating or furnishing any evidence, it can be very difficult for international bodies to find a violation. There is not enough evidence to find a violation because the State holds all information and evid-

ence, but the State refuses to cooperate. Whether international bodies are nevertheless able to find a violation will depend on the evidentiary standards they employ, how they divide the burden of proof, and to what extent they are willing to make inferences from a State's refusal to furnish further evidence. The Inter-American Court, for instance, has proved more willing to find substantive violations in such instances, because it more readily draws inferences from States' lack of cooperation. The European Court has been more troubled by such practices, and this has in fact been one of the reasons for the introduction of the duty to investigate in the European system: if States do not take up their role as guardians of human rights through investigations into allegations, then this will constitute a separate human rights violation in itself. Thus, international bodies need not simply send victims away because the State has frustrated proceedings, nor do they need to lower their evidentiary standards. The duty to investigate then serves as a big stick, sanctioning recalcitrant States where they fail to produce evidence. Further, it provides international proceedings with the necessary facts, because international bodies themselves do not have the resources to regularly conduct fact-finding missions of their own.

1.4 The *when* of investigations: scope of application and knowledge triggering the duty to investigate

Having presented these main findings as to the aims of the duty to investigate, and its place within the international system of human rights protection, we may now move on to some conclusions on more specific investigative obligations. As was already touched upon earlier, investigative obligations under IHRL flow from States' general obligation to actively ensure human rights, coupled with specific provisions safeguarding human rights. All three systems under discussion have recognised that the active protection of rights, and victims' right to a remedy for violations, requires States to investigate potential abuses. When looking more closely at violation of *which* rights must be investigated, in other words the material scope of application of the duty to investigate, it is however difficult to provide a clear-cut answer. It has been suggested by the HRC that the ICCPR attaches investigative duties to violations of those rights which are recognised as criminal under either domestic or international law[3] – though it has at the same time been suggested that all violations must be investigated.[4] In Inter-American case-law there are similar

3 *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, HRC 29 March 2004, CCPR/C/21/Rev.1/Add. 13 [18].

4 *General Comment No. 31* (ibid) [15].

suggestions both that the duty to investigate encompasses *all* violations,[5] or that it attaches to *grave* violations, only.[6] Because IHRL develops case by case, it is difficult to circumscribe the exact scope of the duty to investigate. Whereas it is, of course, possible to list what violations have been made subject to investigative obligations thus far, no definitive answer is possible at this time.

What is clear, crucially, is that violations of the right to life, the prohibition of torture, cruel, inhuman, and degrading treatment, the prohibition of slavery, and cases of unacknowledged detention and enforced disappearance, are subject to investigative obligations. These rights are crucial also during armed conflict, which makes them the most relevant for this study. The emphasis in the vast majority of cases is on criminal investigations, which might also explain that thus far, investigative obligations have almost exclusively been held to arise in case of the most serious human rights violations. It may cautiously be concluded that, thus far, IHRL attaches duties of criminal investigation in case of serious, or grave, human rights violations – very similar therefore to IHL.

This study has opted to focus on those rights with the strongest nexus to, and relevance for, armed conflict. The duty to investigate violations of the right to life, the prohibition of torture, cruel, inhuman, and degrading treatment, the prohibition of slavery, and cases of unacknowledged detention and enforced disappearance, and the prohibition of genocide, therefore form the core focus of this study. This is not to say that the duty to investigate IHRL violations is limited to these rights. Especially under the ECHR, the material scope of the duty to investigate appears to include also violations of other rights when there is an element of violence to it, and the case by case development of the law may see further developments in the future.

When it comes to the personal scope of application of the duty to investigate, this is clearly addressed to States. It is States, as primary guardians of IHRL, who must conduct investigations into potential violations. Moreover, it is States who are the primary addressees of obligations under IHRL. This study has not engaged with debates surrounding human rights obligations of non-State actors, such as non-State armed groups.

This being said, this study does more indirectly address conduct by non-State actors. Such conduct, however, is approached through the lens of State obligations. Thus, the State obligation to investigate human rights violations and abuses includes all such instances which fall within the *jurisdiction* of the State. The duty to investigate is therefore not limited to violations by State agents, but includes abuses by all, including non-State armed groups during

5 *Velásquez Rodríguez v Honduras* (Merits) Inter-American Court of Human Rights Series C No 4 (29 July 1988) [166].

6 *Goiburú et al. v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 153 (22 September 2006) [88].

armed conflict, so long as it was within the State's jurisdiction. This is especially clear in the Inter-American and European Courts' case-law. Under the ICCPR, the HRC has been somewhat ambiguous in this respect.[7] Nevertheless, this is an example where IHRL's investigative obligations go beyond those of IHL, because under IHL, it is only in case of war crimes that States must investigate conduct of third parties. Under IHRL, on the other hand, this is part and parcel of the human rights regime. IHRL's aim of a society governed by the rule of law and human rights includes an obligation for States to actively protect and fulfil individuals' rights, also against interferences by third actors. In situations of normalcy, this means that if human remains are found with a suspicion of a violent death, the State must investigate, regardless of any indications of State involvement. In situations of armed conflict, this similarly means that whenever there is a potential violation listed above, within the jurisdiction of the State, that it must investigate, regardless of the suspected author of the violation.

Beyond the *obligation* for the State to investigate, individuals also have a *right* to an investigation. This is especially clear under the ICCPR and ACHR, because under those systems, the individual right to a remedy, and thus the right to justice, is such a strong driving force behind the case-law. Under the ECHR, this drive is not quite as strong, but the ECHR nonetheless confers a right to an investigation on individuals. Where the various systems diverge, however, is the question whether individuals also have a *right to have someone prosecuted*, or a right to criminal justice. The HRC and European Court have both held explicitly that no such right can be derived from their respective treaties, while the Inter-American Court has recognised such a right.

A unique feature, where the duty to investigate pushes the boundaries of the regular interpretation of IHRL, concerns its temporal scope of application. The duty to investigate, as a positive obligation which requires States to take action, can apply to incidents which took place before a human rights convention entered into force for a State – at least according to the European Court of Human Rights. The European Court has found the duty to investigate to be 'detachable' from the material violation, which means that even if a material violation, for instance a killing, took place before the ECHR entered into force for the State in question, the duty to investigate can nevertheless apply, and be violated. After all, even if the killing itself may not be subject to the ECHR, the investigative obligations – which extend through time – are. This applies even more strongly to enforced disappearances, in regard to which the duty to investigate constitutes a continuing obligation. The continued importance of saving the life of the disappeared, and of relieving the suffering of their next of kin which is exacerbated by their being left in the dark as to the fate

7 See the discussion in Chapter 5, §6.4.2.

of their loved one, also render a lack of investigation a continuing violation which extends through time, and therefore normally falls within the temporal scope of application of IHRL. The Inter-American Court has found similarly. The HRC has not been fully consistent on this issue, but it has left the door open for investigative obligations with respect to continuing violations. Although it remains relevant to distinguish between the various systems, here too the duty to investigate expands the normally applicable boundaries of human rights law.

The geographic reach of the duty to investigate extends first and foremost to those violations which occurred in States' jurisdiction. Thus, they must investigate violations within their territories, as well as those which were committed outside their territories, but nevertheless fell within their jurisdiction. This is the case, under all three systems, when States exercise control over the territory in question, or over the victim. Beyond these spatial and personal conceptions of jurisdiction, this study has shown that a third model is developing, a 'reasonably foreseeable impact' model. According to the HRC, investigations must also be conducted when States' extraterritorial conduct has a reasonably foreseeable impact on the right to life of victims. The Inter-American Court may also support this view, though further case-law on this issue will need to be awaited.

The European Court has not ventured into this direction, rather reaffirming that extraterritorial jurisdiction follows from control over either an area, or over an individual. With respect to the extraterritorial applicability of the duty to investigate, however, the Court has formulated a separate basis for jurisdiction, when there are 'special features' establishing a jurisdictional link. Such features may relate to the presence of suspects on the State's territory, its international or domestic obligations with respect to investigation, or whether the territorial State is prevented from investigating effectively – for instance when a State's armed forces are involved.[8] As was set out in Chapter 7, this approach based on the special features of a case applies also where no control over an area or persons was present, even if – pursuant to the controversial finding by the Court – no such control *could* be exercised, during the 'active phase of hostilities' and in a 'context of chaos' of an international armed conflict.

Finally, States can be subject to a duty to cooperate in the investigation by another State, if the suspect, or evidence, is within their jurisdiction. The precise contours of this obligation have yet to materialise, but it would appear that IHRL obliges States to make use of international mechanisms for cooperation, if they are party to such. Although we must await further developments, this obligation may prove a significant strand in the effectuation of IHRL which

8 For a full discussion, see Chapter 7, §4.5.

pushes the boundaries of IHRL obligations beyond the orthodoxy that for IHRL obligations to arise, a State must have jurisdiction over a violation.

Information triggering the duty to investigate

If, therefore, the right to life, or the prohibitions of TCIDT, slavery, and enforced disappearance or unacknowledged detention have potentially been violated, States must conduct an investigation. There must, in other words, be knowledge, or an indication, of a violation. But the duty to investigate precisely aims to uncover what exactly happened, and to establish whether a violation has taken place. This raises the question, what threshold of information the State must have, before the duty to investigate is triggered?

This study finds that IHRL requires investigations whenever States have knowledge of a potential violation, whether they have come to this information through a complaint by a victim or their next of kin, or otherwise. A relevant point to note is that there is *some* qualification of the trigger: there needs to be an *arguable* claim, a *credible* assertion, a *well-founded* or *sufficient* reason to suspect a violation may have occurred. Complaints with no level of credibility whatsoever thus do not as such trigger the duty to investigate, though it must be kept in mind that one of the main aims of the duty to investigate is to require *States* to clarify the facts, precisely because victims are not in a position to do so. The credibility of a complaint, therefore, must not be interpreted in a way which would render it an inordinate hurdle to investigations – after all, the point is precisely that victims do *not* need to prove their case, it is for the State to gather the facts. It must moreover be kept in mind that States are under the obligation to investigate *ex officio*: they may not simply wait and see whether victims or others file a complaint, they must investigate of their own motion. Further, according to the HRC, States must investigate when they know, or *should have known* of a potential violation. In other words, States cannot hide behind a lack of evidence that they knew, if circumstances are such that they should have known. Objective reasons for suspecting a violation, such as for instance uncovering a body of someone who appears to have died a violent death, would therefore also trigger the duty, also irrespective of any allegation.

1.5 The *how* of investigations: investigative standards

This finally brings us to the question *how* States must conduct an investigation according to human rights law. IHRL sets very specific standards for how investigations must be conducted. An extensive case-law analysis shows that States must observe eight standards in order for their investigations to be human rights compliant. The case-law analysis also reveals that the ICCPR, ACHR, and ECHR, in large measure require very similar things, with a few small variations. As was mentioned previously, these bodies largely develop the

law on a case by case basis. This also means that the supervisory bodies and courts are dependent on exactly which cases reach them. The Inter-American context of massive State-led human rights atrocities, for instance, has led the Court in San José to develop a very strong anti-impunity strand in its case-law, which has arguably shaped its jurisprudence as a whole. The European Court, on the other hand, has developed its case-law regarding the duty to investigate in what by comparison can be viewed as tranquil circumstances. This difference in context has meant that many cases reaching the European Court have considered incidents where things had gone wrong, rather than situations where there was a larger State policy of disappearing its own citizens. Whereas the European Court has over time had its share of cases related to systemic and conflict-related human rights abuses, these cases have always remained a small minority in the Court's overall caseload. This explains why the fight against impunity has been perhaps the major driving force in the Inter-American Court's case-law, while it has a much smaller role in the case-law of its European counterpart. This has also led the European Court to develop a jurisprudence on deaths resulting from negligence, for which an investigation resulting in private law responsibility can be sufficient[9] – cases which thus far have not frequently reached the Court in San José.[10]

So let us now examine what a human rights compliant investigation looks like. First of all, all courts and treaty bodies agree that the duty to investigate is an *obligation of means, a due diligence obligation*, and that therefore the simple fact that ultimately those responsible for a violation could not be identified or that a conviction was not obtained, does not mean an investigation was ineffective. Nonetheless, the State's efforts must be such that the investigation is *capable* of identifying culprits, and must be *genuine*: an investigation which is 'preordained to be ineffective' will clearly not suffice. The criterion of a 'genuine' or 'credible' investigation moreover entails that it is not carried out in bad faith, used merely to shield the accused from *actual* investigation and prosecution. Bringing all case-law together, this study shows that there is a very large measure of convergence as to the investigative standards formulated under the three human rights conventions.

Summing up, States must (i) launch the investigation of their own accord (*ex officio*), and do so (ii) promptly. Thus, States cannot leave it up to the initiative of victims, and must as soon as practicable when information has reached it, start an investigation, and carry it out with reasonable expediency. Further, the investigation must be (iii) serious and effective, thorough, and adequate. This third criterion imposes the most concrete requirements. It entails that States must take those investigative steps which are called for by the circumstances of the case, which can range from taking witness statements,

9 E.g. *Calvelli and Ciglio v Italy*, ECtHR [GC] 17 January 2002, Appl No 32967/96.

10 Moreover, the Inter-American Commission functions as a filter for the cases which reach the Court. ACHR, art 61(1).

to establishing bullet trajectories, carrying out autopsies, collecting further forensic evidence, and so on. What is required is obviously highly contextual, but States will need to take all reasonable steps to establish the facts, and to identify potential perpetrators. Next, the investigation will need to be conducted (iv) independently and (v) impartially. This means that investigators may not be guided by bias or prejudice, and that they must be both objectively and subjectively independent from those who are subject of the investigation. Investigations into conduct by the armed forces, for instance, must be carried out by investigators outside the chain of command. Then, the investigation must also (vi) sufficiently involve the victims or their next of kin, so they can exercise their rights. According to the HRC, this even means that next of kin must be afforded legal standing in the investigation, and must be allowed to bring evidence.[11]

Then, for the final two standards, there is some degree of divergence between the various human rights systems. All human rights regimes require investigations to be (vii) transparent, but what they require precisely in this context, varies somewhat. The European Court has interpreted this as requiring a sufficient element of public scrutiny, the precise contents of which are contextual. An important goal in this respect, is to ensure public confidence in the State's monopoly on the use of force, and to show that it in no way colludes with human rights violations. Under the ICCPR, the HRC requires more, insofar as it finds that States should

> 'in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered.'[12]

Whereas the various human rights regimes therefore all require investigations to be transparent, what this entails precisely varies: from relatively flexible, to very demanding. It will be very interesting to see how the law develops on this issue, which is moreover highly relevant for the law of interplay – the requirement of transparency is likely to cause tension with IHL.[13]

Finally, investigations must be (viii) followed-up by criminal accountability processes, when appropriate, and *de jure* and *de facto* obstacles to such accountability must be removed. All three systems require investigation, and in many cases also criminal investigation. Under the ACHR, there is even a right to criminal justice and thus a prosecution, though the ICCPR and ECHR do not

11 *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, HRC 30 October 2018, CCPR/C/GC/36 [28].
12 Ibid [64], references omitted.
13 See Chapter 10, §4.3.3.

confer an individual right to prosecution. The European Court and the HRC have equally found that serious human rights violations require a criminal response, but that in other cases, a civil or administrative remedy may suffice. The Inter-American Court, on the other hand, has thus far insisted on criminal prosecution and punishment. In the Inter-American system, there is hardly room to break apart the duty to 'investigate, prosecute, and punish', whereas in the other two systems, there are (some) cases which can be remedied through other types of investigation.

If a criminal investigation *is* required, all three systems very similarly limit the extent to which prescriptions, amnesties, and rights of the defence such as *ne bis in idem* and *nullum crimen sine lege* can impede criminal accountability processes in the context of serious human rights violations. But the Inter-American Court has moreover insisted that such cases are prosecuted and tried before the regular criminal justice system – outright prohibiting military justice systems from hearing such cases. The HRC has similarly found that enforced disappearances, as a rule, must be investigated and tried within the ordinary criminal justice system. The European Court takes a more graduated approach in this context, insisting that the overall independence of the trial must be sufficiently safeguarded, which *can* also be the case in the military justice system.

1.6 The duty to investigate and armed conflict

Turning now to investigative obligations during armed conflict, this study has first confirmed that IHRL continues to apply during armed conflict, and co-applies with IHL. The HRC, the Inter-American Court, and the European Court have all been resolute in declaring the continued application of their convention in situations of armed conflict and occupation – in line with the International Court of Justice's pronouncement to the same effect. The ICJ worded it as such, that 'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation (…)'.[14] The same goes for the duty to investigate. It was further shown that the various human rights courts and treaty bodies have taken varying approaches to the role of IHL when faced with armed conflict situations. While the Human Rights Committee and Inter-American Court have proved very open to taking IHL into account in their pronouncements, the

14 I cite here the *Wall* opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ (Advisory Opinion) 9 July 2004, *I.C.J. Reports* 2004, p. 136 [106]; the Court later cites this verbatim in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment (19 December 2005), *I.C.J. Reports* 2005, p. 168 [216]. In very similar wording see the earlier *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), *I.C.J. Reports* 1996, p. 226 [25].

European Court has historically been much more reticent in its reliance on IHL. More recently, however, the European Court appears to have started revising its approach, with an increased role for IHL. The most prominent way the various courts and bodies take account of IHL, is by interpreting open human rights norms in light of IHL, for instance by finding that what constitutes an 'arbitrary' deprivation of life must be determined in light of applicable rules of IHL. The European Court in addition ascertains whether the ECHR comes into conflict with rules of IHL, although the precise consequences it attaches to a finding of conflict remain uncertain.

Looking at investigative obligations, this study finds that insofar as human rights courts and treaty bodies have been faced with cases relating to investigations during armed conflict, they have not developed an approach which differs in any significant way from their regular approach outside of conflict. The duty to investigate under IHRL, as a due diligence obligation, includes a measure of flexibility which is maximised when applied in a context of armed conflict, but the applicability of the obligation, and the standards applied, are principally the same – whether a violation took place in or outside of armed conflict.

Derogations do not and cannot exclude States' obligation to investigate, as such. Derogations can shrink a State's human rights obligations in emergencies or armed conflict, if such a situation requires that the State is free to combat this crisis without overly demanding human rights restrictions. Nonetheless, it was shown that States cannot derogate from the duty to investigate. All treaties contain a list of non-derogable rights, which has moreover been interpreted extensively by certain supervisory bodies. Thus, the HRC and the Inter-American Court have held that such procedural and judicial safeguards which are necessary to guarantee non-derogable rights, are also non-derogable themselves. This includes, notably, the right to a remedy. Thus, the non-derogable character of the right to life, the prohibition of TCIDT, and the prohibition of slavery, is extended to the duty to investigate. Insofar as the right to liberty can be derogated from, this clearly does not pertain to unacknowledged detention and enforced disappearance: no matter the crisis to which States must respond, they may never resort to such measures, and the right to *habeas corpus* has been viewed as non-derogable as well. It is only under the ECHR that the right to life *is* derogable, 'in respect of deaths resulting from lawful acts of war'.[15] Even if such a derogation was entered, which no State has done to date, what such a derogation arguably achieves is to shrink the substance of the right to life, to the point it coincides with the protections afforded by IHL. This therefore alters whether and when a deprivation of life is to be considered as *unlawful*. Because the duty to investigate has an accessory

15 ECHR, art 15(2).

nature, the material scope of application of the duty to investigate then equally shrinks: to those deaths which potentially did *not* result from lawful acts of war. In other words, the duty to investigate continues to apply and cannot be derogated as such. But in case of derogation it becomes of relevance where a deprivation of life may have violated IHL. Thus, the scope of application of the duty to investigate can be altered depending on the interplay of *substantive* law, and on derogations, because these determine whether a potential violation has occurred. But armed conflict does not affect the applicability of the duty to investigate as such.

When it comes to *investigative standards*, the duty to investigate is approached with a measure of flexibility during armed conflict, under all three regimes. As was set out above, the duty to investigate is an obligation of means, not of result. States are therefore under an obligation to take all reasonable steps to investigate, but what is reasonably possible is affected by the circumstances pertaining during an armed conflict. The difference within and outside armed conflict, is therefore one of degree, rather than principle. To give an example of a flexible interpretation of investigative standards, the European Court has found that whether an investigation was conducted sufficiently 'promptly' must be determined in light of the circumstances of the case. This means that during active hostilities, it may need to be accepted that immediately securing the scene and hearing witnesses may not be possible, or that in a post-conflict context, the legal and investigative system may be overwhelmed leading to delays. Whether all investigative steps have been taken to render an investigation 'serious and effective' is similarly dependent on the context of the armed conflict. It will however depend on a case-by-case assessment whether the steps taken are sufficient. The European Court appears to have been more lenient in this respect in cases relating to active hostilities during an IAC, than those relating to situations of occupation or NIAC – likely because States have more control in such situations. Unfolding practice at the various human rights courts and bodies shows how even during armed conflict, the applicable standards can be quite strict.

Finally, regardless of how receptive the HRC and Inter-American Court have been to IHL, they have not relied on IHL when it comes to the duty to investigate. Even in cases where the Inter-American Court, for instance, determines the lawfulness of the lethal use of force in light of IHL, its subsequent assessment of investigations is based solely on IHRL. This, it is submitted, may very well have to do with the lack of detail in IHL's investigative rules. Yet, the European Court in more recent cases in 2021 *has* taken account of IHL in its findings with respect to the duty to investigate. Whereas it is too early to tell where such developments are headed, it goes to show that there is scope for recourse to IHL in interpreting human rights investigative requirements. When all is said and done, regardless of how open IHRL bodies may be towards IHL, the duty to investigate has thus far been interpreted in a largely independent manner. Further, it has been given a measure of flexibility which is

able to account for the context of armed conflict, without however departing from regular case-law in any fundamental way.

1.7 Conclusion

As was shown above, duties of investigation under IHRL converge in almost all respects. The various regimes' supervisory bodies have clearly drawn inspiration from each other's work. The Inter-American Court was first to anatomise the obligation, and the duty to investigate remains a main trend, if not *the* main trend, in its case-law. The Inter-American Court continues to spearhead the fight against impunity, which has made a major contribution to human rights protection in the Americas. Meanwhile, the HRC and the European Court have caught up, and in certain aspects are now at the forefront of developments. The Human Rights Committee now operates at the cutting edge of the development of requirements of transparency in investigations. It has moreover, together with the European Court of Human Rights, introduced the newest addition to the *corpus juris* regarding investigations: the duty to cooperate. Requiring States to cooperate with investigations into human rights violations over which they had no jurisdiction is a truly novel development, which is still evolving. The European Court, finally, arguably has the most refined case-law, with the greatest level of detail. Further, it is at the forefront of developing the temporal scope of the duty to investigate. All three systems, despite some difference in accents, clearly drive in the same direction. In this respect, there can certainly be said to be an 'international law of human rights', with very little, if any, fragmentation.

PART III

Interplay

Parts I and II of this study have clarified the scope and contents of investigative obligations under IHL and IHRL, respectively. Yet, this does not in and of itself suffice to answer the research question. Whereas IHL and IHRL apply simultaneously, how they interrelate has been subject to controversy. Especially where rules under both regimes diverge, this potentially obscures what States must do in order to live up to their obligations under international law, and equally leads to legal insecurity for individuals attempting to effectuate their rights, and for members of States' armed forces who may become the subject of investigation.

The research outcomes in Parts I and II show that indeed, certain rules in respect of the duty to investigate diverge under IHL and IHRL. Such divergences relate, for instance, to *when* States must investigate – with IHRL potentially requiring investigations into deaths caused by third parties and even armed groups who are in conflict with the State, whilst IHL appears to require an investigation into third party conduct only when war crimes are concerned. Whether and how investigations must be conducted when lethal force is used during armed conflict then depends on the interplay of IHL and IHRL. This is equally the case with respect to *how* investigations are conducted, because IHRL's rules with respect to the independence of investigators appear to be at odds with IHL's reliance on command investigations. These are examples of potential tensions in respect of the duty to investigate, which can only be resolved by reference to the interplay of IHL and IHRL.

Part III engages with interplay, and sets out to answer the third and fourth sub-questions guiding this study, 'how do norms of IHL and IHRL interact, and how can instances of normative overlap be resolved under the interplay of both regimes?'; and 'how are normative overlaps between investigative obligations under IHL and IHRL resolved under the interplay of both regimes?' Chapter 9 tackles the former, engaging with the secondary rules of international law which guide the interaction of norms of various branches of international law. Chapter 10 engages with the latter question, by applying the legal framework set out in Chapter 9 to the rules relating to the duty to investigate.

9 The interplay between IHL and IHRL – a roadmap

1 INTRODUCTION

This Chapter aims to provide a roadmap for issues of interplay. Not only as a stepping stone for resolving the interplay with respect to duties of investigation, but also for other instances where both IHL and IHRL apply. In order to do so, the Chapter delves into the secondary rules under general international law, which guide the interaction of two branches of international law.

To facilitate the discussion on interplay, section 2 starts out by briefly explaining the background to the discussion, being the fragmentation of international law. Section 3 translates this discussion to the IHL – IHRL context, and sets out the state of the debate and the most controversial issues which are now at the heart of the discussion on interplay. Section 4 develops a step-by-step methodology for resolving issues of interplay, based primarily on secondary rules of international law regulating normative overlap. Section 5 starts fleshing out this methodology by determining the various normative relations that may arise out of situations of interplay, and it articulates three such situations: situations of convergence, of conflict, and of competition. Section 6 then explains how normative overlap in each of these situations can be resolved, through harmonious interpretation, systemic integration, and conflict resolution – and potentially combinations thereof.

2 CONTEXT AND BACKGROUND: THE NATURE OF INTERNATIONAL LAW

2.1 A polycentric legal system

The international legal system lacks centralised legislative, judiciary, and executive powers. Instead, rules are enacted by sovereign States, not uncommonly on an *ad hoc* basis, dependent on States' needs at that specific time, and between varying States and groups of States.[1] It is, in a word, polycentric.[2]

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1 ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the ILC, finalised by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682 (hereafter: 'ILC Report 2006'), p. 10-17; Christopher Greenwood, 'Unity and Diversity in International Law' in Eirik Bjorge and Mads Andenas

The absence of a central legislative power has given rise to an extensive patchwork of partly overlapping treaty regimes: some are bilateral, others multilateral, and some overlap in parties and subject-matter, others not. Groups of States may come up with multilateral regulations with varying levels of ratification, sometimes with global aspirations and at other times meant for regional ratification only – giving rise to competing normative solutions to similar issues. If a State for instance wishes to restrict trade in fossil fuel to reduce its carbon footprint, it will be bound simultaneously by norms of international environmental law, and of international trade law.[3] Such overlap in rules dealing with the same subject-matter is very common under international law, and is a form of legal pluralism.

Crucially, the pluralism in the international legal system is *not coupled with a formal hierarchy of norms*, meaning that any primary source of law is in principle valued the same.[4] With the exceptions of *ius cogens* and the UN Charter, any rule of international law is therefore afforded the same status, and in case of overlapping obligations, there is no *a priori* solution as normally exists in domestic legal systems.[5] In such systems, a hierarchy normally prescribes the precedence of the Constitution over Acts of Parliament for instance, with the Constitution trumping any lower legislation conflicting therewith. No such equivalent exists on the international plane. With legal norms flowing from numerous different actors often also on the same subject-matter, as is for instance the case for the various systems of human rights protection, and with no formal hierarchy of norms to resolve issues of overlap or conflict, this has given rise to what is often termed the fragmentation of international law.[6]

Fragmentation, moreover, goes beyond the mere plurality of rules with no formal hierarchical relationship between them (substantive fragmentation).[7] It permeates the international legal system as a whole, because similar to the applicable rules, there is also a multitude of legal institutions and adjudicators,

(eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015) 40.

2 See Joost Pauwelyn, 'Fragmentation of International Law', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2006).

3 ILC Report 2006, p. 17ff.

4 E.g. Cordula Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Israel Law Review 310, 339.

5 Cf. Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis' (2005) 74 Nordic Journal of International Law 27.

6 This is also understood as 'substantive fragmentation', see Mads Andenas and Eirik Bjorge, 'Introduction: From Fragmentation to Convergence in International Law' in Eirik Bjorge and Mads Andenas (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015) 4–5.

7 Andenas and Bjorge (n 6) 4–5.

between which no hierarchy exists (institutional fragmentation).[8] This means that decisions by various international courts in principle carry equal weight, which potentially leads to further fragmentation when their decisions diverge. A case in point is the famous divergence between the ICJ's and the ICTY's approach in the context of State responsibility, and whether the standard of 'effective control' or of 'overall control' determines the attributability of conduct of a non-State actor to a State.[9] Because formally there is no hierarchy between the ICJ and the ICTY and despite the ICJ's status as principal organ of the UN, both interpretations therefore strictly speaking carry equal weight.

Whether fragmentation is to be viewed as problematic or not, is subject to debate. Whereas to some it threatens the nature of international law as a legal 'system',[10] to others it simply presents a form of plurality which has formed part of international law since its inception.[11] Interestingly, as Martti Koskenniemi and Päivi Leino describe, a number of presidents of the ICJ has warned against fragmentation, and stressed the importance of unity in international law.[12] In line with this strong view of the unity of international law, one may point to the ICJ's finding in 1957, that: 'it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it'.[13] This finding by the Court would seem to indicate a propensity towards unity, even going so far as identifying a rule of interpretation stipulating the legal fiction that governmental statements are made in full awareness of, and in line with, international law. Perhaps more importantly, the finding can also be read as supporting the idea that *when enacting*

8 Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden Journal of International Law 553. Further on 'institutional fragmentation', see Andenas and Bjorge (n 6) 6–7.

9 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment (27 June 1986), *I.C.J. Reports* 1986, p. 14 [115]; *Prosecutor v Duško Tadić*, ICTY (Appeals Chamber) Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) IT-94-1-AR72, A. Ch. [131], [137]. Further, see ILC Report 2006, p. 31; further Andrea Varga, *Establishing State Responsibility in the Absence of Effective Government* (dissertation Leiden University 2020) 124–37.

10 For an insightful discussion, see Carsten Stahn and Larissa van den Herik, '"Fragmentation", Diversification and "3D" Legal Pluralism: International Criminal Law as the Jack-in-the-Box?' in Carsten Stahn and Larissa van den Herik (eds), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff 2012).

11 See Greenwood (n 1); Koskenniemi and Leino (n 8). Emphasising the positive side of institutional fragmentation, see Lucas Lixinski, 'Choice of Forum in International Human Rights Adjudication and the Unity/Fragmentation Debate: Is Plurality the Way Forward?' (2008) 18 Italian Yearbook of International Law 183, 197.

12 Koskenniemi and Leino (n 8).

13 *Case concerning the Right of Passage over Indian Territory (Portugal v. India)*, Preliminary Objects (26 November 1957), *I.C.J. Reports* 1957, p. 125, p. 142.

new rules, States are presumed to act in full awareness of international law, and presumed not to derogate therefrom.[14]

At the time of this pronouncement, admittedly international law was less prolific than it is now. Contemporary scholarship has pointed out a problem of 'non-absorption' in international law, indicating actors cannot keep up with the 'uncontrolled' expansion of primary norms in the international legal system.[15] In the same vein, and in seeming contrast with its previous finding, is the ICJ's more recent 2015 judgment in the *Genocide (Croatia v Serbia) case*, where it held:

> 'There can be no doubt that, as a general rule, a particular act may be perfectly lawful under one body of legal rules and unlawful under another. Thus it cannot be excluded in principle that an act carried out during an armed conflict and lawful under international humanitarian law can at the same time constitute a violation by the State in question of some other international obligation incumbent upon it.'[16]

Thus, the Court appears to accept pluralism in international law, subscribing to the idea that State responsibility may arise from actions which are simultaneously lawful and unlawful under international law. In fact, it views this situation as 'a general rule'.

There is an ostensible tension between both findings by the ICJ. On the one hand, States must when contracting into new obligations be presumed to be fully aware of existing rules of international law, and to remain within the confines of such rules. On the other hand, the ICJ fully accepts that States may be subject to divergent obligations, and that their conduct may therefore be simultaneously lawful and unlawful under different rules of international law. It is submitted that there is, however, no contradiction between these findings. The presumption that States do not mean to derogate from their previous international obligations when taking on new obligations, is strengthened by the finding that States may simultaneously be bound by legal regimes viewing the same conduct simultaneously as lawful and unlawful. This view accepts the reality that the international legal order as essentially pluralistic. Yet, it also conforms to the international practice which, according to the International Law Commission, carries 'a strong presumption against normative conflict'.[17]

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14 ILC Report 2006, p. 26, para. 38. See also Campbell A McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 International and Comparative Law Quarterly 279, 311.

15 Jean d'Aspremont and Elodie Tranchez, 'The Quest for a Non-Conflictual Coexistence of International Human Rights Law and Humanitarian Law: Which Role for the Lex Specialis Principle?' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013) 229.

16 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment (3 February 2015), *I.C.J. Reports* 2015, p. 3 [474].

17 ILC Report 2006, p. 25.

In brief, the international legal system consists of a multitude of norms which can apply simultaneously to the same situations. This legal pluralism, and fragmentation, has been embraced by some, and is combated by others. Yet, whether efforts are expended to interpret rules of international law in harmony with one another and as part of a 'unified' system of international law, or whether pluralism is accepted as an intrinsic characteristic of the international legal order which might therefore more readily give rise to conflicts of norms, the fact remains that the simultaneous applicability of rules between which no hierarchy exists, can give rise to practical problems. It leads to uncertainty for both those who must apply the law, as well as those who the law is meant to protect.

2.2 Of trees and octopuses: articulating the nature of the international legal system

The above paints the picture of various branches and sub-branches of international law operating semi-autonomously, with the system of general international law functioning to loosely bind these systems together. General international law thus sets limits to what the specialised branches may do and provides the secondary rules and general framework, whilst the substantive legal regimes at times operate largely autonomously, and at times fall back on the general system. This is what makes international law into a pluralistic legal order: multiple lawmakers operate on multiple levels to create multiple legal regimes, which operate partially autonomously and partially as part of a larger system.[18] The pluralistic nature of the legal order makes it difficult to comprehend at times, because various legal fields and regimes are both at once connected and separate, and interact in various and dynamic ways. In this sense, the analogy of the 'branches of international law', which would indicate that general international law is akin to a tree trunk with various branches, has a somewhat more static feel to it than the dynamic nature of international law represents.

A better, more dynamic, analogy may be found by moving beyond flora. There is one animal who perfectly fits the somewhat schizophrenic sense of having to constantly shift between various perspectives. Octopuses. Biologists have found that an octopus' tentacles are 'curiously divorced' from its brain; that they operate semi-autonomously, with the brain only partly aware of what its tentacles are up to.[19] Each arm thus has a sensory system and a 'will' of

18 Marjan Ajevski, 'Fragmentation in International Human Rights Law – Beyond Conflict of Laws' (2014) 32 Nordic Journal of Human Rights 87.

19 Roger T Hanlon and John B Messenger, *Cephalopod Behaviour* (2nd edn, Cambridge University Press 2018).

its own, though there is some guidance from the central brain. As put by Peter Godfrey-Smith,

> 'There may be a mixture of two forms of control here: central control of the arm's general path and fine-tuning of the search by the arm itself. Another possibility is that, by means of attention of some kind, the octopus is exerting control over all the details of movements that might usually be more autonomous. (...) In the octopus, if the mixed-control interpretation is right, central guidance of the movements is never complete, and the peripheral system always has its say.'[20]

This creature therefore consists of eight semi-autonomous arms, wriggling about and finding their way in the ocean, with the central brain being semi-aware and partly in control, though never being able to fully overrule the peripheral system. It is almost impossible to understand how a creature like an octopus functions, if rather than having one consciousness, it has nine which are in important aspects autonomous. Yet, this is eerily similar to the interaction between general international law and its various 'arms',[21] all seeking their way autonomously though remaining part of a larger 'creature', but often lacking the awareness of this bigger picture. As will be seen below, a coherent understanding of interplay requires the constant shifting of perspectives, from IHL, to IHRL, to general international law, to all at once.

Admittedly, the analogy has its limits. Likely, an octopus' various tentacles do not normally clash and arm-wrestle for precedence. Also, the peripheral system's autonomy in octopuses is guided by their own sensory abilities, meaning they use the chemical sensors in their suckers to 'taste' the world around them – which it must be admitted does not immediately come to mind when thinking of the 'peripheral' branches of international law, such as international humanitarian and human rights law. Still, the schizophrenic sense of trying to understand how a creature works who consists of nine parts who are only partly aware of each other, would seem to correspond perfectly with the attempt to penetrate the pluralistic nature of general international law and its various specialised regimes.

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20 Peter Godfrey-Smith, 'On Being an Octopus: Deep Diving in Search of the Human Mind' *Boston Review* (3 June 2013) http://bostonreview.net/books-ideas/peter-godfrey-smith-being-octopus (last accessed 15 July 2021).

21 For an in-depth exploration of how for instance IHL has influenced general international law, see the special issue on 'The Relationship between International Humanitarian Law and General International Law' of the *Journal of Conflict & Security Law* (2018) 321ff.

3 FROM FRAGMENTATION TO INTERPLAY: CONCURRENT APPLICATION OF IHL AND IHRL

3.1 IHL and IHRL against the background of fragmentation

The fragmentation and pluralism of international law provide the background for the debate on the interplay between international humanitarian law and international human rights law, which is the subject of this Chapter. Protection of the individual has thus become the subject-matter of multiple branches of law, in part due to the decentralised nature of law-making on the international level. In fact, it has been remarked that protection of the individual may be subject to 'too many rules' compared with the previous dearth of regulation,[22] and indeed we now have a plurality of legal branches concerned with individual protections. Beyond IHL and IHRL, one might also point to international refugee law, and other branches which at the very least have as a subsidiary aim the protection of individuals, such as international criminal law.[23]

Whereas both IHL and IHRL have the protection of individuals as their subject-matter, they remain separate branches of international law. While the 1948 Universal Declaration of Human Rights and 1949 Geneva Conventions were drafted simultaneously in Geneva, there was only relatively limited cross-fertilisation between the two.[24] IHL ultimately is a pragmatic field of law, which acknowledges the existence of armed conflict and is concerned with regulating such conflicts.[25] Still, there is undoubtedly a humanising factor to IHL, in the protection it grants to combatants and civilians.[26] Importantly though, these protections under IHL form part of the inter-State relationship, expressed in the granting of protection to *enemy* combatants and civilians.[27] IHRL, on the other hand, has veered away from the traditionally heavy inter-

22 d'Aspremont and Tranchez (n 15) 223.

23 Cf. Antônio Augusto Cançado Trindade, 'Reflections on the International Adjudication of Cases of Grave Violations of Rights of the Human Person' (2018) 9 Journal of International Humanitarian Legal Studies 98, 122–5.

24 Boyd Van Dijk, 'Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions' (2018) 112 The American Journal of International Law 553; Lawrence Hill-Cawthorne, 'Rights under International Humanitarian Law' (2017) 28 European Journal of International Law 1187.

25 See e.g. Karima Bennoune, 'Toward a Human Rights Approach to Armed Conflict: Iraq 2003' (2004) 11 University of California Davis Journal of International Law & Policy 171, 174.

26 Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 American Journal of International Law 239.

27 Lawrence Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' in Eirik Bjorge and Mads Andenas (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015).

State focus of international law,[28] and primarily regulates the intra-State relation of States with their own citizens – and any other (group of) individuals under their jurisdiction.[29] Thus we are faced with two branches of international law which partly overlap in their granting of individual protection, though with distinct geneses and protective regimes.[30]

The co-existence of multiple bodies of law partially regulating the same subject-matter, is the core of fragmentation and is also at the core of the debate underlying the interplay between IHL and IHRL. As was demonstrated in Chapter 4,[31] IHRL continues to apply during armed conflict. It was shown that the dominant narrative that IHRL was not initially meant to govern during armed conflict, is incorrect. IHRL *is* meant to govern during armed conflict, and international judicial practice moreover overwhelmingly supports this view. Thus, we may move on from the question *whether* IHL and IHRL co-apply, to the question *how* they do.

Two developments in particular have put the overlap between IHL and IHRL at the forefront of the debate. Firstly, the instances where IHL and IHRL indeed apply simultaneously have increased. This obviously has to do with the finding *that* human rights law continues to apply during armed conflict, but is also the consequence of a widening of the scope of application of IHRL through extraterritorial application.[32] Perceiving human rights as applying outside States' territories brings within the scope of application many situations of armed conflict which previously did not, such as many situations of international armed conflict and occupation.[33] This is potentially also the case for extraterritorial non-international armed conflicts where States engage non-State armed groups abroad, such as the involvement of Russia, Iran and various NATO members in the conflict in Syria.[34] Secondly, the interplay debate has

28 Compare Arnold Wolfers' 'billiard ball model', where he compares the international community to a billiard table. The States represent the balls, and international law traditionally regulates the clashes between these balls, without however delving into the inner workings of the balls themselves. See Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* (Johns Hopkins Press 1962) 19–24.

29 Dinah Shelton, 'Introduction' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 1–2.

30 David Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflicts' (2009) 42 Israel Law Review 8, 15.

31 Chapter 4, §4.6.

32 Jean-Marie Henckaerts and Ellen Nohle, 'Concurrent Application of International Humanitarian Law and International Human Rights Law Revisited' (2018) 12 Human Rights & International Legal Discourse 23, 24–7.

33 Françoise J Hampson, 'Article 2 of the Convention and Military Operations during Armed Conflict' in Lawrence Early and others (eds), *The Right to Life under Article 2 of the European Convention on Human Rights. Twenty Years of Legal Developments since McCann v. the United Kingdom. In Honour of Michael O'Boyle* (Wolf Legal Publishers 2016) 192.

34 Further on the extraterritorial application of IHRL, see Chapter 4, §4.5. On the various conflicts in Syria, see Terry D Gill, 'Classifying the Conflict in Syria' (2016) 92 International Law Studies 353.

come to the forefront because individual victims of wartime violence and abuses increasingly find their way to domestic and international courts, basing their claims primarily on violations of their human rights.[35] This has to do with a difference in the institutional context of both legal regimes: IHRL has set up judicial enforcement mechanisms with a right of individual petition, whereas IHL does not provide recourse to such. Further, IHRL explicitly confers rights on individuals, which they can claim against the State, whereas under IHL there is a complete absence of judicial enforcement mechanisms, and there is moreover continued discussion on whether IHL confers rights on individuals in the first place.[36] Thus individuals searching for a legal remedy naturally frame their claims as human rights violations, which again due to the lack of judicial avenues under IHL, has meant IHRL courts and bodies have increasingly shaped the interplay debate.[37] This to the discontent of a number of IHL and military lawyers and practitioners.

3.2 The fear of co-existing and co-applying: a polarised debate

The discourse on interplay is seemingly divided by those approaching it from a law of armed conflict perspective, and those approaching it from a human rights perspective. The varying backgrounds of scholars and practitioners has resulted in heated discussions, because for both parties there is a lot at stake. Jean-Marie Henckaerts and Ellen Nohle explain how for both, it can appear their field of law is at risk of being diluted and rendered obsolete:[38]

> 'There are risks both to ignoring humanitarian law and the realities of armed conflict and to watering down the requirements of human rights law in an effort to make them practicable in time of armed conflict. The former could result in unrealistic obligations on States in situations of armed conflict. This could, in the

35 Henckaerts and Nohle (n 32) 24–7; Jean-Marie Henckaerts, 'Concurrent Application of International Humanitarian Law and Human Rights Law: A Victim Perspective' in Noelle NR Quenivet and Roberta Arnold (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Brill Nijhoff 2008).

36 For recent contributions, see Hill-Cawthorne, 'Rights under International Humanitarian Law' (n 24); Anne Peters, 'Direct Rights of Individuals in the International Law of Armed Conflict' (2019) 2019–23 <https://ssrn.com/abstract=3506742> (last accessed 15 July 2021); Christián Correa, Shuichi Furuya and Clara Sandoval, *Reparation for Victims of Armed Conflict* (Cambridge University Press 2020). This discussion has a longer pedigree however, see e.g. Meron (n 26).

37 The classic fear of institutional fragmentation is that several institutions can pronounce on an issue without any hierarchy between them, which potentially leads to divergent interpretations of international law. Interestingly, the problem here is not that there are too many institutions dealing with interplay, but that it is (almost) exclusively human rights courts and bodies dealing with these issues, thus not so much giving rise to fragmentation, rather than a lopsided interpretation of the issue.

38 Henckaerts and Nohle (n 32) 35.

> long run, make States 'less inclined to comply with the law, and possibly with more basic rules of other branches of law, in particular IHL'.[39] The latter could undermine the critical protections of human rights law in time of armed conflict and could, moreover, have reverberating effects on its protective force in peace time.'[40]

To illustrate these fears, two Grand Chamber cases at the European Court of Human Rights – already discussed in Chapter 7 – come to mind. Firstly, in the case of *Hassan v UK*, the Court had to consider whether the UK's recourse to security detention during the conflict in Iraq had been in compliance with the right to liberty and security, with Article 5 of the ECHR listing exhaustively the permissible grounds for detention.[41] It was clear that internment for reasons of the conflict could not be brought under such grounds, and the UK relied on the Geneva Conventions in justification. The Court then famously decided to open up the permissible grounds for detention in case of international armed conflict and under a number of conditions, and therefore accommodated the legal basis that IHL provides for detention in these situations. Interestingly and tellingly, the judgment has been equally reviled and hailed, with many on the one hand chastising the Court for watering down fundamental human rights standards,[42] and with others applauding the Court's reconciliatory and pragmatic approach.[43] In the case of *Jaloud v the Netherlands*, also concerning the conflict in Iraq, it was the other way around.[44] The Court found the Netherlands had failed to effectively investigate the death of an Iraqi citizen, allegedly at the hands of a Dutch lieutenant, because it had handed the body over to Iraqi authorities for autopsy, and because it had not conformed to all the investigative standards normally applicable when State agents use lethal force. Following this case, IHL lawyers lamented the Court

39 Claire Landais and Léa Bass, 'Reconciling the Rules of International Humanitarian Law with the Rules of European Human Rights Law' [2015] International Review of the Red Cross 1295, 1296.

40 Marko Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2010) 14 Journal of Conflict and Security Law 459; Oona A Hathaway and others, 'Which Law Governs during Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law' (2012) 96 Minnesota Law Review 1883.

41 *Hassan v the United Kingdom*, ECtHR [GC] 16 September 2014, Appl No 29750/09.

42 Rick A Lawson, 'Si Vis Pacem, Para Bellum. Application of the European Convention on Human Rights in Situations of Armed Conflict' in Lawrence Early and others (eds), *The Right to Life under Article 2 of the European Convention on Human Rights. Twenty Years of Legal Developments since McCann v. the United Kingdom. In Honour of Michael O'Boyle* (Wolf Legal Publishers 2016); Peter Kempees, *'Hard Power' and the European Convention on Human Rights* (Brill Nijhoff 2020). See in particular also the partly dissenting opinion of Judge Spano, joined by Judges Niclaou, Bianku, and Kalaydjieva, appended to *Hassan v UK* (ibid).

43 Françoise J Hampson, 'An Investigation of Alleged Violations of the Law of Armed Conflict' (2016) 46 Israel Yearbook on Human Rights 1, 26–7.

44 *Jaloud v the Netherlands*, ECtHR [GC] 20 November 2014, Appl No 47708/08.

applied unrealistic standards to a high pressure and high intensity situation, and human rights standards which are not meant for conflict situations.[45]

These cases illustrate why the stakes are perceived to be high by the various stakeholders, and discussions have at times been heated. So heated in fact, that certain commentators wishing to provide an overview of the debate, have focused on describing the dialogue between both groups in equal measure to their assessment of the legal issues at stake.[46] In the heat of these exchanges, shots are at times fired at the opposing camp. Marko Milanović captures the sentiment particularly well, in dividing both parties into sceptics and enthusiasts, respectively, who make caricatures out of each other's positions:

> 'the enthusiasts accuse the sceptics of being morally inconsistent apologists for state power who only wish to facilitate the exercise of that power by making wholly arbitrary distinctions with regard to who is protected by human rights and who is not. The sceptics, on the other hand, accuse the enthusiasts of being a utopian, dovish bunch of fluffy, mushy-wushy do-gooders, who know nothing about the realities on the ground in wartime and who risk compromising both human rights and IHL with their relentless and illegitimate action.'[47]

With such polarised positions in the debate and such opposing outlooks, it should come as no surprise that satisfactory solutions for situations of interplay have proved out of reach. Nevertheless, caricatures aside, many very insightful contributions to the debate have been made, with some scholars and practitioners on both sides showing a willingness to go beyond their traditional doctrinal positions. In this light, an often used analogy for the two camps has been to describe them as a couple who although they have had their differences, have learned to live together and depend on one another.[48]

Finally, an interesting addition to the debate has been the involvement of scholars belonging to neither of the camps, who prefer to approach the

45 See e.g Friederycke Haijer and Cedric Ryngaert, 'Reflections on Jaloud v. the Netherlands. Jurisdictional Consequences and Resonance in Dutch Society' (2015) 19 Journal of International Peacekeeping 174; Noëlle Quénivet, 'The Obligation to Investigate After a Potential Breach of Article 2 ECHR in an Extra-Territorial Context: Mission Impossible for the Armed Forces?' (2019) 37 Netherlands Quarterly of Human Rights 119.

46 Andrew Clapham, 'Human Rights in Armed Conflict: Metaphors, Maxims, and the Move to Interoperability' (2018) 12 Human Rights & International Legal Discourse 9.

47 Marko Milanović, 'The Lost Origins of Lex Specialis' in Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge University Press 2016).

48 Clapham (n 46) 10; Noam Lubell, 'Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate' (2007) 40 Israel Law Review 648; Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 International Review of the Red Cross 501.

interplay puzzle from a general international law perspective.[49] If IHL and IHRL are indeed 'branches' of law, then general international law must be the tree which has grown them, and to see how the two are connected, how they have become intertwined, and how they branch out in different directions, it may therefore prove useful to have a closer look at the trunk rather than to focus solely on the branches themselves. Similarly if the pluralistic international legal order is more akin to an octopus, then it makes sense to not concern ourselves only with instances of the arms bumping into one another when feeling their way around, but to also view them as forming part of a larger being, which normally coordinates them well enough to prevent clashes from happening. Before moving on to such perspectives in section 4, section 3.3 explores the state of the debate.

3.3 Contemporary controversies

3.3.1 The ICJ and lex specialis

Readers may wonder why the interplay debate between IHL and IHRL remains so controversial. After all, hasn't the International Court of Justice resolved this issue, by ruling on it no less than three times? Indeed, the ICJ in two Advisory Opinions and one contentious case, ruled on issues of interplay. And indeed, the ICJ's findings still present the starting point for discussions, even twenty-five years after the ICJ's opinion in *Nuclear Weapons* and fifteen years after its judgment in *Armed Activities on the Territory of the Congo*. What seems now most uncontroversial in these rulings is that the ICJ found that the ICCPR, and human rights treaties more generally, continue to apply during armed conflicts. A main reason the debate has not subsided, however, is that the ICJ's introduction of *lex specialis* as the key for deciding how IHL and IHRL are then to relate, is open to multiple interpretations.

In its Opinion on *Nuclear Weapons* the Court, after affirming the continued application of the ICCPR during armed conflict, famously framed the question of what is to be considered an 'arbitrary deprivation of life' under Article 6 of the ICCPR, as one that 'falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities'.[50] Thus the ICJ read the IHRL right to life in light of IHL, and determined the meaning of an arbitrary deprivation thereof by reference

49 See, amongst others, Christopher Greenwood, 'Human Rights and Humanitarian Law – Conflict or Convergence' (2015) 43 Case Western Reserve Journal of International Law 491; Lawrence Hill-Cawthorne, 'Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict' (2015) 64 International and Comparative Law Quarterly 293.

50 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996) *I.C.J. Reports* 1996, p. 226 [25].

of IHL, the *lex specialis*. Eight years later, in its Opinion on *The Wall*, the Court phrased its approach to interplay somewhat more generally, pronouncing that 'the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law'.[51] In other words, the Court seemed to expand the application of IHL as *lex specialis* from the context of the right to life only, to the operation between both legal regimes as a whole.[52] This raises the question whether *lex specialis* operates on the level of norms, or of regimes in their entirety. Nonetheless, in *The Wall* Opinion, the Court went on to examine the compatibility of the construction of the wall with both IHL and IHRL, and found violations of both.[53] Meanwhile, the exact legal effects of the application of *lex specialis* were not alluded to, leaving open whether the principle is to be used as a method of conflict resolution, or rather as an interpretive tool which ultimately harmonises both branches. It also did not explain further any methodology for deciding which norm is to be viewed as *specialis* and which as *generalis*, other than its general reference to the law *designed to regulate* a certain situation. How to determine this, however, remains undecided and has spawned new scholarly debate.[54]

Further fanning the flames of the discussion, is the Court's selective citation of *The Wall* opinion in the contentious *Armed Activities* case.[55] There, the Court cited verbatim its earlier opinion in *The Wall* on the co-application of human rights and international humanitarian law, reiterating that three situations may be envisioned: situations governed exclusively by IHL, situations governed exclusively by IHRL, and situations governed by both. It then, however, conspicuously left out the last sentence of this consideration in *The Wall*, thereby omitting the reference to *lex specialis*. How the Court ultimately considers the interplay between IHL and IHRL therefore remains somewhat obscure. This is also because the facts of the case led it to find violations of both IHL and IHRL, since the killings, torture, destruction of villages and massacres in question clearly violated both[56] – leaving it unnecessary for the Court to attempt to resolve any normative conflict.[57] Both bodies of law in this case, after all, prohibited the conduct in question, as simple as that.

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51 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004) *I.C.J. Reports* 2004, p. 136 [106].

52 See further Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' (n 27).

53 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 51) [137].

54 E.g. Lindroos (n 5); Milanović, 'The Lost Origins of Lex Specialis' (n 47).

55 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment (19 December 2005) *I.C.J. Reports* 2005, p. 168 [216].

56 Ibid [206]-[221].

57 See also Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' (n 27).

3.3.2 *Theoretical models for interplay*

The ambiguities flowing from the ICJ's case-law have left scholars and practitioners theorising over the various ways the interplay between IHL and IHRL can be conceived. Essentially, three main views or models have been put forward, though some variations exist. Initially, a strict separation between both bodies of law was widely considered to be the most apt approach.[58] In this view, IHRL is considered the law of peace, IHL the law of war;[59] both operating on a mutually exclusive basis.[60] This approach has also been dubbed the displacement model, because in this view, once IHL is applicable, it displaces IHRL in its entirety.[61] On the other end of the spectrum, an 'integrationist' approach has been proposed. In this model, the rule that applies is the one providing the most extensive protection in a specific case regardless of whether it is a rule of IHL or IHRL,[62] because both are predicated on protecting human dignity.[63] Taking up a middle ground is the complementarity model, which posits that both bodies of law apply concurrently, with harmonious interpretation or systemic integration as the key factor for interplay.[64] Several variations and nuances exist within this model, but the essence would appear to be a situation-by-situation assessment of interplay, interpreting both bodies of law in light of one another, and determining on the facts of the situation which body of law is to serve as the primary frame of reference, and which remains to operate in the background. This also means that which norm is to be considered 'more specific' can vary,[65] with for instance in the abovementioned examples of the ICJ, the rules on the deprivation of life under IHL informing and 'colouring in' the meaning of an 'arbitrary' deprivation of life under IHRL. In other situations this could be the other way around, with for instance IHL's requirements of 'judicial guarantees which are recognized as

58 E.g. GIAD Draper, 'Humanitarian Law and Human Rights' [1979] Acta Juridica 193.

59 Nehal Bhuta, 'States of Exception: Regulated Targeted Killing in a "Global Civil War"' in Philip Alston and Euan McDonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford University Press 2008) 245–6.

60 Hans-Joachim Heintze, 'Theories on the Relationship between International Humanitarian Law and Human Rights Law' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013) 55.

61 Hathaway and others (n 40) 1894–7.

62 Bhuta (n 59) 251–2.

63 E.g. Meron (n 26); Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012). See also *Prosecutor v Anto Furundžija*, ICTY (Trial Chamber) Judgment (10 December 1998) IT-95-17/1 [183].

64 Heintze (n 60) 57; Bhuta (n 59) 252; Greenwood (n 49) 503–8.

65 Marco Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 439.

indispensable by civilized peoples',[66] being coloured in by the more specific fair trial requirements as formulated under human rights law.[67]

The basis of the complementarity model is thus the harmonious interpretation of IHL and IHRL, without necessarily a predetermined relationship between the two. Depending on the situation, either the one or the other provides the primary frame of reference. What the model of harmonious interpretation does not solve, however, is situations of 'unavoidable normative conflict',[68] in other words cases where both legal regimes require opposite things. An example of this is the requirement under Geneva Convention III, that prisoners of war *must* be repatriated as soon as hostilities end,[69] whereas in certain situations IHRL will prohibit such pursuant to the principle of *non-refoulement*.[70] In such situations, there is a clear-cut conflict between a positive obligation under IHL, and a prohibition under IHRL, which harmonious interpretation cannot solve without resorting to *contra legem* interpretations.[71] The same could be said for situations of occupation, where on the one hand the law of occupation requires States to keep in force domestic legislation unless insofar they threaten security,[72] whereas such legislation may well clash with a State's human rights obligations for instance to abolish discriminatory practices.[73] In such situations of unavoidable conflict, there is therefore still a need for conflict resolution, which certain authors have distinguished as a separate model, dubbed the 'conflict resolution model'.[74]

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66 See AP I, art 75(4) and 85(4)(e), as well as more generally, Common Article 3.

67 See also Droege (n 4); Greenwood (n 49); Milanović, 'The Lost Origins of Lex Specialis' (n 47).

68 Terminology based on Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40) 470. I opt for the term 'unavoidable' over the ILC's use of 'genuine normative conflict' (see ILC Report 2006, p. 27), because that to me would intimate other conflicts not being genuine, or perhaps even disingenuous.

69 GC III, art 118.

70 Marco Sassòli, 'Le Droit International Humanitaire, Une Lex Specialis Par Rapport Aux Droits Humains?' in Andreas Auer, Alexandre Flückiger and Michel Hottelier (eds), *Les Droits de l'Homme et la Constitution. Etudes en l'Honneur du Professeur Giorgio Malinverni* (Schulthess 2007) 392.

71 It has been submitted that IHL has developed in this field, no longer strictly requiring repatriation against the will of the individual and in cases where the individual would be at risk of inhuman treatment or unfair trial on their return. The example is merely meant to illustrate a situation of unresolvable conflict. See further Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (n 65) 271.

72 GC IV, art 64; see also 1907 Hague Regulations, art 43.

73 Also giving this example, see Marko Milanović, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford University Press 2011) 121–3; Greenwood (n 49) 507.

74 Hathaway and others (n 40).

3.3.3 *Resolving conflicts and the move towards operational law*

When deciding how to resolve normative conflict, recourse must normally be had to general international law. Within a certain legal regime, specialised rules and methods for conflict resolution may exist,[75] but as this situation concerns a conflict between norms belonging to two branches of international law, and unless these branches regulate how to resolve such conflicts between themselves, a solution must be found under general international law.[76] Perhaps ironically, however, this brings us back to the maxim of *lex specialis derogat legi generali*, the model espoused by the ICJ in its Advisory Opinions to mould the relationship between IHL and IHRL, and thus also brings us back to the controversies briefly alluded to above. This is all the more clear when one considers that the complementarity model, in attempting to reconcile IHL and IHRL, already makes use of a form of *lex specialis* (as an interpretive tool) to decide which rule provides the 'primary frame of reference' in a certain situation – after all, the primary rule will normally be the one most specifically meant to govern the situation in question. All of this will be explored further in-depth in the remainder of this Chapter, but it is precisely because of these various meanings of *lex specialis*, that one strand of contemporary scholarship is moving away from the maxim. Such scholars argue that resorting to *lex specialis* is more likely to obfuscate the issues at hand than to present a clear-cut resolution.[77] In fact, because of its various meanings, and because most lawyers have at least some sort of understanding of what the term means, *lex specialis* provides a false sense of resolving the issues, when very likely everyone is not talking about the same thing.[78] This also informs a tendency by some contemporary scholars to move away from the *lex specialis* terminology, even if they do not argue doing away with the *method*, they oppose the *terminology*.[79]

A shift in contemporary thinking about interplay goes beyond the use of *lex specialis* terminology only. Scholarship also showcases a move towards

75 Under the ECHR, for instance, the ECtHR has relied on a systematic interpretation of the Convention to read the scope of application of the *ne bis in idem* rule in line with the duty to investigate under the right to life and the prohibition of torture, see *Marguš v Croatia*, ECtHR [GC] 27 May 2014, Appl No 4455/10 [128ff].

76 Jan B Mus, 'Conflicts between Treaties in International Law' (1998) 45 Netherlands International Law Review 208, 211.

77 Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40) 476.

78 See also Françoise J Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' in Scott Sheeran and Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013).

79 Milanović, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law' (n 73) 113–6; Nancie Prud'homme, 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40 Israel Law Review 356; d'Aspremont and Tranchez (n 15) 242.

operational law,[80] and the interoperability of both legal regimes, to find solutions in a very practical way – and in a clear attempt to move beyond the swamp of theoretical discussion.[81] Whereas such an endeavour does not remove the necessity of a theory on interplay *per se*, the focus on specific practical issues in all sorts of operational situations does advance the discussion beyond the realm of theory alone. In doing so, the *Practitioners' Guide to Human Rights Law in Armed Conflict* advances a model consisting of two paradigms: 'active hostilities' and 'security operations'.[82] When applying the former paradigm, IHL is the primary frame of reference, with human rights law informing its application, but ultimately playing a secondary role. In the latter, it is the other way around, with human rights law providing the primary frame of reference and with IHL operating in the background. Whereas this approach is not necessarily completely new,[83] the move towards an assessment based on the type of operational situation one might encounter, does lift the discussion to a new level.

A final complicating factor in the interplay debate, is the concept of 'normative conflict'. How IHL and IHRL relate naturally depends on the extent to which they are thought to conflict. Whereas contemporary debates have moved away from perceiving both legal regimes as conflictual *as such* towards a more norm-by-norm and situation-by-situation assessment, determining whether two specific norms conflict in a specific situation, remains crucial. Whether to view a certain situation as one of normative conflict, decides in large measure the toolbox for further defining, refining, and resolving this situation. When there is a conflict of norms, certain tools for conflict resolution become available, such as conflict clauses in treaties, and the conflict resolution mechanisms of *lex superior derogat legi inferiori*, *lex specialis derogat legi generali* and *lex posterior derogat legi priori*.[84] These maxims, in their capacity as tools for conflict resolution,[85] resolve normative conflict by derogating one norm in favour of the

80 Clapham (n 46) 18–20.

81 Daragh Murray and others, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford University Press 2016).

82 Murray and others (n 81) Chapter 4.

83 See e.g. Lawrence Hill-Cawthorne, 'The Role of Necessity in International Humanitarian and Human Rights Law' (2014) 47 Israel Law Review 225; Terry D Gill, 'Some Thoughts on the Relationship Between International Humanitarian Law and International Human Rights Law: A Plea for Mutual Respect and a Common-Sense Approach' (2013) 16 Yearbook of International Humanitarian Law 251; Kenneth Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict* (Oxford University Press 2016); Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98 American Journal of International Law 1.

84 Mus (n 76).

85 On the various capacities of e.g. *lex specialis* also in the context of conflict avoidance, harmonious interpretation and systemic integration, see below. For further analysis, see

other, and thus grant precedence to the higher norm over the lower, the special norm over the general, and the newer norm over the older one.[86] These tools cannot in principle be used when no conflict of norms exists. Moreover, the determination of the existence of a conflict determines when a potential attempt of harmonious interpretation and systemic integration ends, and resort must be had to conflict resolution.

What precisely constitutes a normative conflict, however, remains subject to debate. Views vary from a very strict approach recognising normative conflict only where complying with one norm necessarily violates the other,[87] and wider approaches where conflict is also thought to exist where two norms pull in different directions.[88] What conception of conflict is used is crucial for a proper understanding of the interplay of IHL and IHRL, precisely because many of the more controversial divergences between both bodies might *not* qualify as a conflict of norms in the strict sense. This is explored in-depth in section 5.1, but to give the clearest example of this: the *main* issues in the interplay debate, deprivation of life and liberty, do not lead to normative conflict in the strict conception of that term. The prohibitions under human rights law of depriving individuals of their lives or liberty subject to certain strict conditions strictly speaking do not conflict with IHL *permitting* States to kill and capture combatants and under certain circumstances civilians. After all, one can simply comply with both norms, by *not* killing and capturing, as IHL in no way *obligates* States to do so. This illustrates the difficulties in resolving issues of interplay where both legal regimes clearly pull in different directions, but the rules for the resolution of normative conflict are not available because strictly speaking, there is no conflict.

The above illustrates the many controversies surrounding interplay of IHL and IHRL. Not only has the ICJ's submission of using *lex specialis* proved unable to resolve the debate on the various theoretical models of interplay, even if one is able to choose a model to apply, new controversies lie in waiting. Especially the important role played by the lens of 'normative conflict' is determinative of how interplay is shaped, but with the definition of normative conflict perhaps proving too narrow to be of much help. The present chapter aims to shed light on the debate, by further exploring the types of situations where IHL and IHRL overlap based on a typology of *how their norms interact*, that is, whether they converge, conflict, or perhaps rather fall somewhere in-between the two.

Milanović, 'The Lost Origins of Lex Specialis' (n 47); d'Aspremont and Tranchez (n 15); Lindroos (n 5).

86 ILC Report 2006.

87 C Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 British Yearbook of International Law 401.

88 ILC Report 2006, para. 25.

4 DEVELOPING AN INTERPLAY METHODOLOGY

4.1 Introduction

Given the controversies surrounding the interplay debate as outlined above, there is a manifest need for clarity. With two overlapping fields of law which at times pull in different directions, States are left uncertain how to instruct their agents and courts are equally faced with complex issues of interplay. This complexity may moreover provide disingenuous States with an excuse to take a somewhat 'looser' approach to the law, or to abuse uncertainties under applicable law, under the pretext that what the law requires is simply unclear.[89] At the same time, State agents and armed forces are also in dire need of clarity, as they need to be able to react immediately in situations of conflict, without having the luxury of pondering the precise interplay of IHL and IHRL for their situation. Moreover, State forces are best served by clarity also because of the increased tendency to pursue *ex post facto* accountability for violations of the law. The uncertainty of retroactive investigations and enforcement measures looming when the law itself lacks clarity could clearly harm morale, and in the context of potential criminal accountability could also give rise to fair trial issues.[90] The interests of all involved in armed conflict, whether they are State authorities, individual members of armed forces, insurgents or civilians and war victims, are therefore served with a clear articulation of the interplay regime.

Finding solutions for the problems raised by situations of interplay requires a methodology which takes account of the specific context of a case. This section sets out how such a methodology can be derived from the international legal system. Section 4.2 sets out the regulation of overlapping legal regimes under international law, and section 4.3 a step-by-step approach to solve issues of interplay. The outline of the methodology, at this junction, remains a framework only, which is fleshed out further in the subsequent sections.

4.2 Interaction of norms in the international legal system

Inevitable clashes of norms resulting from the fragmentation of international law, are not unambiguously regulated by international law. First and foremost, general international law functions as a 'fall-back system', meaning that specialised legal regimes such as IHL and IHRL are free to deviate from general international law, and in regulating conflicts amongst them.[91] If they do not,

89 Henckaerts and Nohle (n 32) 35; Landais and Bass (n 39) 1296.
90 Hampson, 'An Investigation of Alleged Violations of the Law of Armed Conflict' (n 43) 3.
91 Mus (n 76) 211. Further, see ILC Report 2006, p. 135ff.

general international law does contain rules and principles for the regulation of concurrently applicable legal regimes, but these are nowhere near as developed as is often the case in domestic legal systems.[92]

The International Law Commission has convincingly set out that the relationship between two applicable norms stemming from different branches of international law, can be divided into relationships of interpretation, and relationships of conflict.[93] The former indicates normative overlaps where both norms can be applied in conjunction, with one norm serving as an interpretive aid for the other.[94] The latter indicates a normative overlap where 'two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them'.[95] This means there are in essence two paradigms for normative overlaps under international law, which therefore also apply to the relationship between IHL and IHRL: either there is a situation of conflict, or there is not, and the existence of normative conflict determines what tools are available to harmonise both norms, or to resolve a conflict between them.

Section 6 delves deeper into what both types of relations mean, but a brief overview is helpful here. *Situations of interpretation* concern those where there is normative overlap, but where both norms can be applied concurrently without leading to conflicting outcomes. To give but one example in the field of the interplay of IHL and IHRL, both prohibit torture. Even if the meaning of the term 'torture' is not precisely the same under both regimes,[96] States are not faced with contrary obligations, and can therefore easily comply with both norms. In such instances, there is in a fact a form of convergence between both legal regimes.[97] When two norms prescribe the exact same conduct, such as not to torture those deprived of their liberty, there is no normative tension whatsoever and no real questions of interplay arise. This may be different where whereas both legal regimes prescribe a certain conduct, the exact requirements under both fields diverge. So long as both norms do not require directly opposite things, however, often resort can be had to treaty interpretation to interpret both norms as pointing in the same direction, without violating one of the two norms in the process. A famous example of such is the already

92 Jenks (n 87).

93 Report of the International Law Commission, Fifty-eights session (1 May-9 June and 3 July-11 August 2006), *General Assembly Official Records, Sixty-first session,* Supplement No. 10, A/61/10, p. 407-8.

94 Ibid 407.

95 Ibid 408.

96 Manfred Nowak, 'Torture and Other Cruel Inhuman or Degrading Treatment or Punishment' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014).

97 Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015).

mentioned finding by the International Court of Justice that in the context of armed conflict, the meaning of what is an 'arbitrary' deprivation of life falls to be determined by the applicable IHL.[98] Even though there is an ostensible divergence in the rules, with IHL allowing the targeting and killing of combatants and civilians taking a direct part in hostilities, and IHRL forbidding any intentional deprivation of life save in case of absolute necessity, the Court thus through *harmonious interpretation* resolved this instance of normative overlap.[99]

The legal basis for such harmonious interpretation is to be found in the concept of 'systemic integration', as enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). Article 31, which is reflective of customary international law,[100] provides that a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. It then expands on this, with paragraph (3) stating circumstances that must be 'taken into account' together with the context, which according to sub (c) includes 'any relevant rules of international law applicable in the relations between the parties'. The exact meaning of the interpretive principle is difficult to determine from its brief wording alone, but it is apparent that in situations where IHL and IHRL both apply, it can serve to alleviate discrepancies between the two. In fact, international practice has been to interpret two norms in line with one another, and in a way that they do not conflict, as much as possible. As the International Law Commission has noted in its Fragmentation Report, '[i]n international law, there is a strong presumption against normative conflict'.[101] This has meant that in most instances, if there is any possible interpretation which does not give rise to normative conflict and can be solved through harmonious interpretation, such approach has been preferred. Harmonious interpretation and systemic integration are thus also referred to as methods of *conflict avoidance*, as opposed to conflict resolution, and this interpretive tool thus in part has served to advance the unity of international law. In this context it has even been referred to as a 'constitutional norm within the international legal system',[102] because of the capacity of the principle to tie together all the various sources within the system.

When it comes to *situations of conflict*, the international legal system provides for a number of ways to resolve such conflict. If two obligations under international law, binding on the same legal subject (often a State), cannot be

98 *Legality of the Threat or Use of Nuclear Weapons* (n 50) [25].
99 d'Aspremont and Tranchez (n 15).
100 *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment (13 December 1999), *I.C.J. Reports* 1999, p. 1045 [18]. See further Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties' in Malcolm D Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 170.
101 ILC Report 2006, p. 25.
102 McLachlan (n 14).

obeyed at the same time because they are mutually exclusive, a choice has to be made between the two.[103] This means one norm must be given priority over the other.[104] As will be explored below there are also broader conceptions of what constitutes a normative conflict, but the archetype is where we have two obligations which are mutually exclusive. The international legal system provides some guidance as to how to determine which norm will have to give way, and which takes precedence.

First, as was mentioned above, specialised regimes may themselves regulate how normative conflicts with norms from other regimes must be resolved. Provisions referred to as 'conflict clauses' can regulate the relationship with other legal fields. Many treaties for instance provide the treaty applies 'without prejudice to', or 'subject to' other international obligations, meaning that in case of conflicting obligations, this treaty will give way to the other obligations.[105] Also the other way around, treaties can claim priority in case of conflict, the most famous example being Article 103 of the UN Charter, providing as it does that obligations under the Charter prevail over other international obligations of the UN's members. Many treaties, however, do not provide for a conflict clause, in which case general international law regulates the conflict of norms.

In the absence of a conflict clause, international law provides three main avenues for the resolution of normative conflict: a rule of a higher normative status trumps the lower (*lex superior derogat legi inferiori*), a rule more specifically tailored to the situation trumps the more general rule (*lex specialis derogat legi generali*), and the later rule trumps the older rule (*lex posterior derogat legi priori*).[106] The first principle is of a limited scope, as it principally applies to conflicts involving a rule of *ius cogens* or Article 103 of the UN Charter.[107] *Lex specialis*, as was explained, takes up a major role in the debate on the interplay between IHL and IHRL, and will therefore be explored further below.[108] *Lex posterior*, meanwhile, provides that newer rules take precedence over older ones, though this ought not to be seen as too absolute. The ILC has explored the principles of conflict resolution in-depth in 2006, and has concluded their application relies primarily on context. For instance, the *lex posterior* rule – as stipulated in Article 30 VCLT – applies primarily in cases where all States party to a treaty decide to adopt a new treaty, meant to regulate the same subject-matter. It does *not* mean that in case of conflict, for instance, between the 1951 ECHR and the 1966 ICCPR, the ICCPR must be con-

103 Stahn and van den Herik (n 10).
104 Mus (n 76) 227.
105 Mus (n 76) 214–5. See also VCLT, art 30(2), which provides: 'When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.'
106 ILC Report 2006, p. 16. See further Lindroos (n 5).
107 ILC Report 2006, p. 205; Lindroos (n 5).
108 See in particular §6.3.2.

sidered to derogate the ECHR, or that the adoption of the ICCPR must be considered to have repealed the ECHR.

The precise effects of resorting to these principles of conflict resolution remains subject to debate. As the Latin maxims reveal, they rely on *derogation*. According to Hans Kelsen, to resolve a conflict between two norms, a third norm must exist providing for the derogation of one norm in favour of the other. Derogation itself is then taken to mean the *repealing* or *invalidation* of a norm.[109] Whereas our three maxims indeed present secondary rules providing for derogation, they do not do so, in principle, in a Kelsenian sense. According to the ILC, only in the operation of the *lex superior* rule, when a norm of international law clashes with a norm of *ius cogens*, is the norm repealed as such.[110] In fact, according to the VCLT, the entire treaty of which the inferior norm forms part is void.[111] In other situations, however, the methods for conflict resolution merely provide for *precedence*, meaning that in the specific context of that conflict, one norm takes precedence over the other, without however invalidating the other norm. How this works precisely depends on the context in which these tools are applied. In the context of *lex specialis*, we may for instance distinguish between situations where the special law merely articulates a specific application of the general law, and situations where the special law truly contradicts the general law. The first situation can be exemplified by the case-law of the European Court of Human Rights, when it considers the right to compensation for unlawful detention to be a specific iteration of the more general right to an effective remedy enshrined in Article 13.[112] The second situation concerns for instance the unavoidable conflict between the IHL obligation to respect the laws of an occupied State and the IHRL obligation to effectively protect and fulfil the right to equal treatment to everyone within their jurisdiction. Should it be decided in this situation that a law conditioning the admittance to schools on sex, for instance, must be upheld due to the specific situation of occupation, which is more closely and particularly regulated by the applicable IHL, then this would not mean that the IHRL right to non-discriminatory treatment is thereby invalidated. It merely means that *in this specific instance*, IHL takes precedence, though IHRL remains applicable, and might take precedence in other cases of normative conflict.

109 Hans Kelsen, 'Derogation' in Ralph A Newman (ed), *Essays in Jurisprudence in Honor of Roscoe Pound* (Bobbs-Merill 1962).
110 ILC Report 2006, p. 184-8.
111 VCLT, artt 53 and 64.
112 *A. and Others v United Kingdom*, ECtHR [GC] 19 February 2009, Appl No 3455/05 [202].

4.3 Articulating a methodology for interplay: a step-by-step approach

The international legal system, as set out above, provides generally that in cases potentially falling under both IHL and IHRL, a number of steps must be taken to determine the exact relationship between the two. First, it must be determined whether both legal regimes indeed apply to the situation at hand. This step requires first a determination of the applicability of both legal regimes (based on the criteria for applicability as set out in Chapters 2 and 4), and second a determination of whether the specific *incident* at issue is governed by both IHL and IHRL.[113] There is an important difference between a *situation* and a specific *incident*, and applicability of IHL and IHRL must be assessed for both.[114] The broader situation concerns the broader applicability of these legal regimes, for instance the existence of a non-international armed conflict (NIAC) on the territory of the State, which gives rise to applicability of IHL. Even if such is the case, this does not mean that IHL regulates each and every incident – many aspects of the State's conduct do not have a nexus with the armed conflict. As Andrew Clapham explains, if the incident in question is violence used against a checkpoint, this could be covered by IHL if it is carried out by armed insurgents, whereas it is covered by IHRL if it is a demonstration turned violent, by civilians.[115] Thus, the incident must be distinguished from the broader situation.

If IHL and IHRL are indeed applicable to the situation and the incident, second, the existence and operation of a conflict clause must be explored. The relevance of conflict clauses for the relationship between IHL and IHRL is explored further in section 6.2. If a conflict clause does regulate the relationship between IHL and IHRL, the solutions provided by this system have to be followed. If not, or if no conflict clause is in operation, the third step is to assess whether the various applicable norms of IHL and IHRL conflict. If they do not, step 4, the overlap may be solved through harmonious interpretation and systemic integration, pursuant to Article 30(3)(c) VCLT. If they do, resort must be had to methods of conflict resolution.

Shown schematically, this means that in analysing the relationship between IHL and IHRL, we can discern the following steps:[116]

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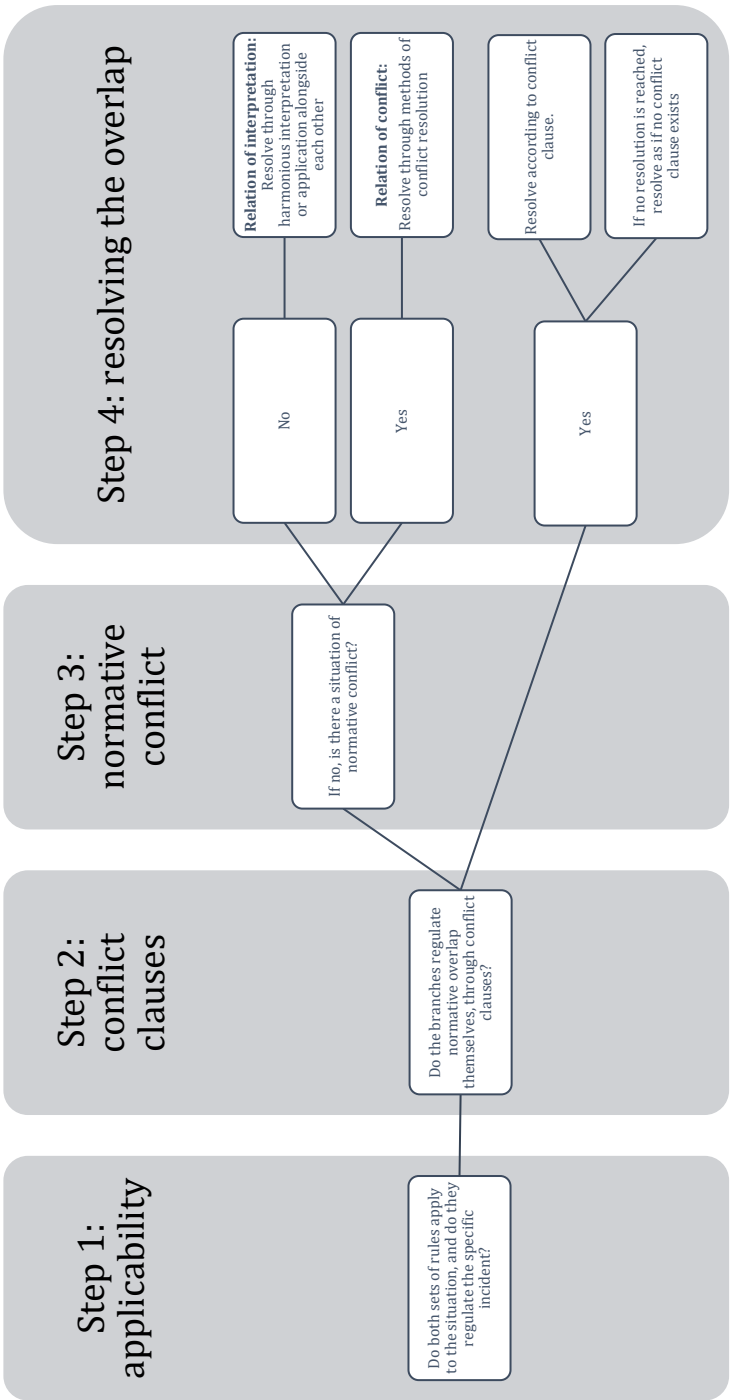
113 On the distinction between applicability to a *situation* and to an *incident*, see Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' (n 78) 209.

114 Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' (n 78) 209.

115 Clapham (n 46) 19.

116 This schematic overview in part coincides with the 'conflict resolution model' as proposed by Hathaway and others (n 40) 1905.

Figure 1: A bare bones methodology for interplay



This figure is hoped to provide insight in the various steps involved when assessing the applicable legal regime in case of interplay. It does not yet show *how* conflicts of norms can be resolved, or *how* harmonious interpretation can serve to come to a coherent outcome for a case of normative overlap. The subsequent sections are dedicated to further fleshing out steps 3 and 4 in the flowchart: section 5 discusses what constitutes a normative conflict under international law and articulates the various factual and contextual situations giving rise to interplay in terms of whether they conflict, converge, or perhaps compete without necessarily conflicting. Section 6 then explores how harmonious interpretation and conflict resolution solve issues of normative overlap.

5 Articulating situations of interplay in normative terms

5.1 Conflicting conceptions of conflict

As transpires from the secondary rules of international law regulating normative overlaps, much depends on whether a normative conflict is found to exist or not. If there is a conflict, this means recourse may be had to the various methods for conflict resolution, whereas if there is not, the only available method to regulate interplay is systemic integration and harmonious interpretation. Thus, a strong emphasis is placed on the existence or not of conflict, which brings us to the question what is to be understood as 'conflict'. This is a contentious issue, with some supporting a very narrow conception of a conflict of norms, in line with the ILC's finding that 'there is a strong presumption against normative conflict' under international law.[117] Yet, if such an approach is adopted, this leads to the awkward conclusion that certain main points of tension between IHL and IHRL, such as IHL's permission to deprive individuals of their lives and liberty, do not conflict with IHRL's rights to life and liberty. This section explores such discussions, in order to come up with a useful definition of normative conflict.

5.1.1 The strict approach

The classical view, which has garnered support in both practice and academia,[118] is a strict interpretation of conflict. This in essence means that two norms only conflict when it is logically impossible to comply with both norms

117 ILC Report 2006, p. 25.

118 E.g. WTO Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS59/R, WT/DS64/R, adopted on 23 July 1998, at note 649; *Al-Jedda v the United Kingdom*, ECtHR [GC] 7 July 2011, Appl No 27021/08 [101]-[105]; *Netherlands Supreme Court (Hoge Raad) 14 December 2012, ECLI:NL:HR:2012:BX8351 (Sanctions against Iran)* [3.6.1]-[3.7.6].

at the same time; when complying with the one norm necessarily violates the other. This was phrased particularly clearly in a WTO Panel Report concerning *Indonesia – Certain Measures Affecting the Automobile Industry*, finding that for two provisions to conflict, they 'must impose mutually exclusive obligations (…) there is conflict when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously'.[119] This is the case where one norm requires a State to do something which the other norm prohibits, such as in the example of the IHL obligation to repatriate POWs, which is under certain circumstances prohibited by IHRL. Such a conception of normative conflict renders conflicts rare, and thus leaves wide margins for methods of conflict avoidance. This is sometimes thought to also support the unity of international law as a legal system, because a coherent legal system ought not contain an excessive amount of internal conflicts.[120]

The central issue in the strict approach to normative conflict is thus whether it is materially impossible to comply with both norms. To illustrate, the Grand Chamber of the European Court of Human Rights in *Al-Jedda v the United Kingdom* was faced with a situation where the UK had detained individuals during the conflict in Iraq, according to the UK pursuant to a UN Security Council Resolution which under Article 103 of the UN Charter ought to be prioritised over obligations flowing from the ECHR.[121] The Court, rather than engaging with the question whether Article 103 indeed took priority, looked in detail at the Security Council Resolution, and concluded that the Resolution granting 'the authority to take all necessary measures' did not *oblige* the UK, or any other State for that matter, to engage in indefinite internment.[122] Moreover, because one of the main aims of the UN Charter is to protect human rights, it held that the Resolution must be interpreted insofar as possible in line with IHRL.[123] Given the lack of an *obligation*, and given the opportunity for harmonious interpretation, it found that there was no normative conflict in this situation. This thus prevented the operation of Article 103, and ultimately led to a finding of a violation of the right to liberty by the UK.

A strict approach to what constitutes normative conflict provides relative clarity, because the definition is relatively simple. Moreover, it fits well with the ICJ's presumption of States acting in full knowledge of the applicable international law when entering into new international obligations. If a State is fully conscious of all its obligations whenever entering into new ones, then it is surely reasonable to require States whenever possible to comply with all

119 *Indonesia – Certain Measures Affecting the Automobile Industry* (ibid) 1428 at note 649. Also referencing this Panel Report, see ILC Report 2006, p. 43 and Erich Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory' (2006) 17 European Journal of International Law 395, 399–400.

120 To an extent combating this idea, see Greenwood (n 1).

121 *Al-Jedda v the United Kingdom* (n 118) [101]-[105].

122 Ibid [104]-[105].

123 Ibid [102].

their obligations, and not to let them derogate certain obligations by virtue of 'conflicting' other obligations. Nevertheless, this approach has its shortcomings.

5.1.2 *The underinclusiveness of the strict approach*

The strict approach of restricting normative conflict to norms which are mutually exclusive, may render it overly strict, and therefore underinclusive. It excludes many situations from consideration, and from the application of the tools for conflict resolution. Perceiving of conflict as two or more *mutually exclusive* norms, means that conflict can exist only between an obligation to do something, and a prohibition to do this same thing. An example would be the IHRL obligation to ensure non-discriminatory treatment and legislation to all within a State's jurisdiction, and the prohibition under the law of occupation to alter applicable domestic law. Other situations of normative overlap, however, are likely to fall outside the scope of the narrow definition of conflict. Where for instance IHL requires an 'administrative board' or 'competent body' to review the necessity of the internment of civilians,[124] and IHRL requires a 'court' to review the lawfulness of detention measures, strictly speaking there is no conflict as these obligations are not mutually exclusive: simply having a court carry out the review in no way *violates* IHL.[125] Strict application of the conflict paradigm then means States must simply comply with the higher IHRL standards, with IHL being pushed to the background – despite a potential claim it presents the law meant specifically to govern such situations. Even if in this situation the two obligations to an extent drive in the same direction, there is therefore definite tension.

Similarly, a major argument against the narrow conception of conflict is that it prevents a *permissive norm* from conflicting with any other norm, as it will never in the strict sense clash with a norm prescribing or proscribing certain conduct.[126] For example, the main issues in the interplay debate such as deprivation of life and liberty, do not lead to normative conflict between both regimes in the strict conception of that term. The prohibitions under human rights law of depriving individuals of their lives or liberty subject to certain strict conditions do not conflict with IHL permitting States to kill and capture combatants and under certain circumstances civilians in the sense that these norms are *mutually exclusive*. After all, one can simply comply with both norms, by *not* killing and capturing, as IHL in no way *obligates* States to do

124 GC IV, art 43 and 78.

125 Helen Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press 2013).

126 Vranes (n 119) 403–15; Kelsen (n 109).

so. This is a relatively absurd conclusion in light of the object and purpose of IHL. It shows the obvious shortcomings of a very narrow conception of normative conflict: even in case of the archetype situation where IHL and IHRL pull in different directions, they would not qualify as conflictual. This approach would therefore on most occasions prioritise IHRL over IHL, because complying with the IHRL standard does not violate IHL. As C. Wilfred Jenks has noted, such tensions not covered by the strict definition, 'may render inapplicable provisions designed to give one of the divergent instruments a measure of flexibility of operation which was thought necessary to its practicability', which may be equally serious as other conflicts.[127] This certainly holds true for the relationship between IHL and IHRL, where IHL often means to provide a certain flexibility, which simple recourse to IHRL standards may frustrate, even if it does not technically violate IHL.

What the strict approach thus fails to take into account is the *balance* IHL means to strike between humanitarian considerations and military necessity. If that body of law indeed strikes this balance in a way which is meant to safeguard human dignity *and* the practical necessities of waging war, then finding that 'the rules do not conflict' does not at all help in solving the issues raised by interplay. Simply importing higher IHRL standards because they do not strictly speaking conflict with those under IHL in this sense misses the point. A true non-conflictual approach may be viable for situations where either IHRL already accounts for the exigencies of a particular situation, or where both bodies of law simply point in the same direction, but the strict approach to normative conflict leaves out many situations of genuine tension between the two. Several authors have therefore argued IHL and IHRL conflict also beyond the strict conception of conflict: 'a relationship of conflict can be said to exist not only when two applicable rules require different courses of action, but also when a particular conduct is lawful under [IHL] but unlawful under [IHRL].'[128]

Viewing permissive norms as irrelevant when it comes to the determination of the existence of normative conflict, renders them obsolete whenever there is a multitude of rules regulating the same subject matter because obligatory and prohibitive rules will always trump permissive rules. This calls for a broader conception of what constitutes a normative conflict, which the International Law Commission for instance has simply defined as 'a situation where two rules or principles suggest different ways of dealing with a problem'.[129]

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127 Jenks (n 87).

128 Henckaerts and Nohle (n 32); Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40). Also employing a broader conception of conflict, see, among many others, Sean Aughey and Aurel Sari, 'Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence' (2015) 91 International Law Studies 60; Gill (n 83).

129 ILC Report 2006, para. 25.

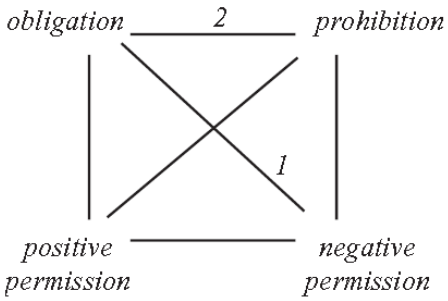
Conflict then becomes much more an issue of actual tension between norms,[130] because '[a] treaty may sometimes frustrate the goals of another treaty without there being any strict incompatibility between their provisions. Two treaties or sets of rules may possess different background justifications or emerge from different legislative policies or aim at divergent ends'.[131] This therefore calls for the formulation of a broader concept of normative conflict.

5.1.3 Expanding the scope of conflict

If the strict approach to normative conflict is unsatisfactory because it does not account for the normative tension and conflict involving permissive norms, as well as diverging obligations such as in the case of the review of detention measures, then a broader conception must include such situations. Erich Vranes has come up with a broader definition of normative conflict in a 2006 article in *The European Journal of International Law*, for which he draws from legal theory and 'deontic logic'. His account is briefly summarised below, with as an important remark that he distinguishes between three functions of norms: obligating, prohibiting and permitting.[132] This means that where he speaks about 'obligation' or 'obligating', he refers to obligations *to act*, which can be distinguished from prohibitions and permissions.

Vranes uses a deontic square[133] to show the various relations between prohibitive, obligatory and permissive norms:

Figure 2: The 'deontic square'



130 On the distinction between conflict and competition, see d'Aspremont and Tranchez (n 15).

131 ILC Report 2006, para. 24.

132 Vranes (n 119) 398. These three categories of norms are based on Jeremy Bentham's reduction of complex sets of norms to these three basic sets of conduct. See Jeremy Bentham, *Of Laws in General* (HLA Hart ed, University of London, Athlone Press 1970). Further, see Valentin Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma* (Oxford University Press 2017) 28–30.

133 Similarly see Jeutner, who moreover explains that whereas the use of deontic logic in law is disputed, it is viewed as essential even by critics for defining normative conflict; Jeutner (n 132) 28-30 and fn93.

> 'The relation between the obligation to adopt a given conduct C and the permission not to adopt this conduct (designated as *1* in the graph) is commonly referred to as a *contradictory conflict* in legal theory, since negating the obligation to do C yields a permission not to do C, i.e. its contradictory opposite, and *vice versa*. The same is true for the relation between a prohibition to do C and a permission to do C: negating either modality yields the contradictory opposite (…).
>
> The relation between obligation and prohibition (designated as *2* in the square) is termed *contrary conflict*, since both norms cannot be applied at the same time. There is no conflict between a permission to adopt a given conduct and a permission to adopt the opposite conduct: the conjunction of positive and negation permission (permission to do something and to refrain from doing the same thing) can be defined as liberty in the legal sense.'[134]

He explains how deontic logic dictates that a conflict must exist between a permissive norm and an obligatory/prohibitive norm when it can be shown they are each other's opposites through negation. Norms are each other's opposite if when negating the one norm, it becomes the other. This is the case for the relationships between an obligation and a negative permission (a permission not to do something), and for a prohibition and a positive permission (permission to do something). Take by way of example the IHRL prohibition to kill, and the IHL permission to do so. They are one another's contradictory opposites, which can be shown through an exercise of negation. Negating the logical construction of the prohibition to take life, turns it into a non-prohibition to take life, in other words a positive permission to do so.[135] The same goes for the relationship between obligations and negative permissions. By way of example, the IHRL obligation to provide *habeas corpus* is the contradictory opposite of the IHL permission not to do so, because when negated, the obligation to provide *habeas corpus* becomes a non-obligation, which amounts to a permission not to do so. If, then, these norms are one another's opposites, this must according to deontic logic mean they *conflict*.[136] Such an approach including permissive norms into the definition of normative conflict, accounts for the very real tensions which can and do arise, in the IHL – IHRL relationship, as stipulated above.

Moreover, in Vranes' view, the definition of conflict also encompasses situations of what he terms 'unilateral incompatibilities'.[137] This concerns situations where two norms require a certain, similar conduct, but to different degrees – for example where one norm sets higher standards than the other. This may often be the case where IHL and IHRL regulate the same situation or conduct, and where IHRL might impose higher standards than IHL. The example introduced above, of IHL prescribing review of internment of civilians

134 Vranes (n 119) 409.
135 Vranes (n 119) 408.
136 Jeutner (n 132) 28–30.
137 Vranes (n 119) 414.

must be carried out by a 'competent body', or an 'appropriate court or administrative board', while IHRL strictly requires such review to be carried out by courts, would be an instance of such 'unilateral incompatibility'. Such instances constitute normative conflicts, because the norm setting the *lower* standard, *implicitly permits* doing no more than what it requires. In other words, in *requiring* an administrative board, IHL also implicitly *permits* not doing more than organising review through administrative boards.[138] Conceiving of the norm setting a lower standard as a simultaneously obligatory and *implicitly permissive* norm, brings such situations within the paradigm of normative conflict as it was set out above: the positive permission to do no more than have an administrative board review internment measures, conflicts with the IHRL obligation to have courts review such measures. The contours of 'normative conflict' thus include most situations of actual normative tension between IHL and IHRL, and allow for the resolution of such tensions through conflict resolution mechanisms.

Beyond the deontic, logical argument underlying the broader definition, Vranes relies on the *telos* of norms to come to the conclusion that these situations ought in legal practice to be considered as conflicts. The *telos* of norms generally is to regulate behaviour, and the simultaneous prohibition and permission of the same behaviour is ultimately contradictory and does not achieve the aim of unequivocal regulation of conduct.[139] This is certainly true, and the continuous attention in scholarship, at conferences and in legal practice shows that the divergences between IHL and IHRL, even if not conflicting in the strict definition, raise numerous issues which obfuscate the clear and unequivocal regulation of State behaviour.[140] Because contradictory conflicts, just like contrary conflicts, stand in the way of effective regulation of behaviour, they ought to be recognised as conflicting, so mechanisms for conflict resolution can be operationalised.

This broader conceptualisation of normative conflict better accounts for the realities of interplay. After all, there are very real tensions between permissive rules on the one hand, and obligatory and prohibitive rules on the other hand. It does not make sense to conceive of conflict in an artificially narrow way, which denies and camouflages actual normative tensions.[141] Employing this

138 Vranes uses the example of two obligations, where one requires an individual to pay an indemnity of 100 USD, whereas another norm requires a sum of $200. The norm setting the lower amount *permits* paying *no more* than 100 USD, Vranes (n 119) 398.

139 Vranes (n 119) 410.

140 See e.g. the special issue in the *Journal of Human Rights and International Legal Discourse* 2018, vol. 12, issue 1, edited by Steven Dewulf and Katharine Fortin; Mark Lattimer and Philippe Sands (eds), *The Grey Zone: Civilian Protection between Human Rights and the Laws of War* (Hart Publishing 2018); Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford University Press 2011).

141 See also ILC Report 2006, p. 17-20.

broader concept of normative conflict allows for the resolution of tensions between such norms through tools for conflict resolution. Thus, the IHL permission to engage in status-based targeting in this conception conflicts with the IHRL right to life (except insofar as what constitutes an 'arbitrary' deprivation of life can be read in light of applicable IHL), and such conflict can be resolved through derogating one norm in favour of the other. Moreover, another archetype situation where there is tension between IHL and IHRL, where they both explicitly regulate a situation, but where one of the two (often IHRL) sets higher standards, can also fall under the definition of 'conflict'. This approach therefore recognises the realities of normative tensions between IHL and IHRL.

5.2 A typology of normative overlap: conflict, convergence and competition

5.2.1 The ICJ's categorisation of normative overlap

There are numerous ways to articulate the relationship between IHL and IHRL in normative terms. The main idea is to come to a typology of situations which *usefully* distinguishes between different situations, and which informs the subsequent assessment of the applicable law. In its Advisory Opinion on *The Wall*, the ICJ articulated three different situations when it comes to the application of IHL and IHRL. It held

> 'the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. (…)'[142]

Thus, the International Court envisages three situations. Situations covered solely by IHRL, situations covered solely by IHL, and situations covered by both. Crucially though, this consideration concerns situations where *both bodies of law have already been found to apply*. *Within* the situation where both IHL and IHRL apply, the Court finds, one can still distinguish between situations where there is actual normative overlap, and situations where although both legal regimes apply, the *right* in question is enshrined in one of the two alone. The Court thus also seemingly considers we ought to consider the normative relationship between the two legal regimes on the level of *specific norms*, rather

142 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 51) [106].

than as two legal fields as such.[143] Further, the Court apparently accepts the idea of situations of 1) normative overlap, and 2) 'normative neutrality', where although both bodies of law apply, only one regulates the specific situation. In the *Armed Activities* case, the Court cites this consideration, thereby confirming the distinction into the three categories, namely those of 1) normative overlap, and 2) exclusive regulation by IHL or 3) IHRL.[144] The International Court of Justice thus provides a basis, a starting point, for articulating the precise normative overlap in a specific situation, but its typology of situations remains rather rudimentary.

Broken down to the logical possibilities for co-application, what the Court finds comes down to the following. For both IHL and IHRL, there are two possibilities: either they regulate a situation and incident (or a 'right'), or they do not. This leads to four potential situations, or normative relations:

Figure 3:

All the ICJ therefore does, in its categorisation, is explain that these four options lead to three situations of interplay: either both regulate, or one of the two does. The option where both do not regulate is ultimately irrelevant for interplay, as there will then be discretion for the State to act as it sees fit within the confines of potential other international obligations. This very rudimentary way of breaking down interplay certainly makes sense, but because the situation the ICJ describes as rights that are 'matters of both these branches of international law' remains very broad and abstract, a further in-depth analysis of such situations is necessary to inform a useful model for interplay.

5.2.2 *Beyond conflict and convergence: the competition of norms*

Legal scholarship has attempted to complement this rudimentary categorisation of types of overlap, by dividing them into categories depending on their

143 Emphasising the importance of an assessment on the level of norms rather than regimes, see e.g. Helen Duffy, 'International Human Rights Law and Terrorism: An Overview' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar 2014); Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40).

144 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (n 55) [216].

normative relationship. In line with the ILC's finding that international norms can be either in a relationship of interpretation, or a relationship of conflict, many scholars have looked in particular at two categories: conflict, and convergence.[145] Above, it was shown that the definition of what constitutes a normative conflict, is often construed as overly narrow. Even if it is expanded, however, it may be wondered whether all other situations ought to be construed as 'convergence', or 'harmonious'. After all, as the ICJ's categorisation shows, there are many situations in which either IHL or IHRL may not provide any rules, or may not regulate a situation in detail. This is most often the case when IHL does not regulate a certain situation, or does so only on a very rudimentary level. In such situations, if IHRL does regulate a situation, and moreover does so in a more detailed manner, then a 'gap-filling' approach might seem logical: simply apply IHRL to fill in the gaps left by IHL.[146] And as IHL does not provide anything, or does not regulate a situation in detail, there is moreover no conflict when IHRL is simply applied. As will be explored further below, this may however still distort the equilibrium IHL means to strike between humanitarian considerations and military necessity. There may thus be a *competition of norms* in such instances, because there is a real tension between what IHL purports to achieve, and what IHRL requires – even though IHL does not specifically regulate the situation. This reality militates against a 'gap-filling' approach, where IHRL fills gaps left by IHL, because if IHRL does

145 Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' (n 125); Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40); Eirik Bjorge and Mads Andenas (eds), 'A Farewell to Fragmentation', *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015); Frans Viljoen, 'The Relationship between International Human Rights and Humanitarian Law in the African Human Rights System: An Institutional Approach' in Erika De Wet and Jann K Kleffner (eds), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations* (Pretoria University Law Press (PULP) 2014); Andrea Carcano, 'On the Relationship between International Humanitarian Law and Human Rights Law in Times of Belligerent Occupation: Not yet a Coherent Framework' in Erika De Wet and Jann K Kleffner (eds), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations* (Pretoria University Law Press (PULP) 2014); Vito Todeschini, 'Investigations in Armed Conflict: Understanding the Interaction between International Humanitarian Law and Human Rights Law' in Paul De Hert, Stefaan Smis and Mathias Holvoet (eds), *Convergences and Divergences Between International Human Rights, International Humanitarian and International Criminal Law* (Intersentia 2018); Karin Oellers-Frahm, 'A Regional Perspective on the Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations: The European Court of Human Rights' in Erika de Wet and Jann K Kleffner (eds), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations* (Pretoria University Law Press (PULP) 2014); Greenwood (n 49); Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 European Journal of International Law 161.

146 See e.g. Robert Kolb, 'Human Rights and Humanitarian Law', *Max Planck Encyclopdia of Public International Law* (Edward Elgar Publishing 2013).

so in an unqualified manner, it may very well impose IHRL standards which conform much more to the 'humanitarian considerations' side of the equation than it does the military necessity side.

The *Practitioners' Guide to Human Rights Law in Armed Conflict* therefore moves beyond the categories of conflict and convergence, and distinguishes the following situations: 'First, [(i) IHL and IHRL] may establish complementary obligations. Second, [ii] one body of law may be silent with respect to an issue addressed by the other body of law. Third, [iii] there may be circumstances where one body of law specifically allows a course of action that may, at first sight, appear to be prohibited by the other body of law.' In a footnote, a fourth situation is alluded to, where '[iv] one body of law may require a party to do something prohibited by the other body of law'.[147] What the *Guide* therefore describes in its categories, are (i) situations of normative harmony and convergence, a (ii) category which is in principle non-conflictual because one body does not regulate the situation, and two types of situations of normative conflict ((iii) and (iv)).

It is submitted that based on this categorisation, and accounting for situations in which one body of law may regulate a situation in more detail than the other, or where the other may be silent altogether, that three overarching situations of normative overlap cast in terms of normative tensions must be distinguished. They conflict, they converge (or are in harmony), or they are in competition. This basic typology is illustrated by examples, and fleshed out further by exploring the various potential situations of overlap in light of this typology.

'*Conflict*' means that two norms are in conflict in the way that was explained in the previous section: they point in different directions, because the requirements under both norms are mutually exclusive, because one norm (implicitly) permits what the other prohibits, or because one norm (implicitly) permits not to do what the other requires. '*Convergence*' means that the norms in IHL and IHRL are in harmony with one another – they point in the same direction. It may be the case that they regulate the same situation in different degrees of detail, or even that one of the two contains no explicit rules, but either way there is no real tension between both norms. The idea of harmony here presupposes more than the simple absence of conflict: application of a norm also does not frustrate the object and purpose of the other. '*Competition*' means that whereas the two norms do not conflict, IHL and IHRL nevertheless pull in different directions. As was explained above, filling gaps in IHL through reliance on IHRL may readily lead to such tensions because it may distort IHL's balance between humanitarian considerations, and military necessity. The

147 Murray and others (n 81) 100–1, fn 101.

competition paradigm thus takes up a middle ground between conflict and convergence.

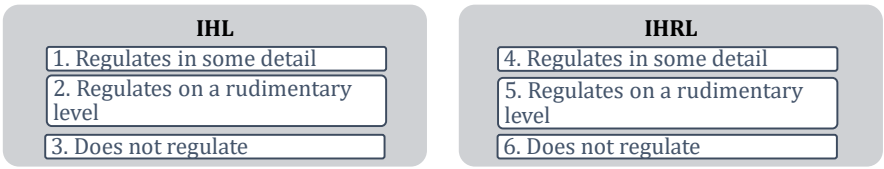
5.2.3 Theoretical situations of overlap

Typifying the normative relationship between norms of IHL and IHRL as 'converging', 'conflicting', or 'competing' provides an important, yet abstract understanding of interplay. In order to make this understanding more concrete, it must be applied to practical situations of interplay. In order to ensure the typology is sufficiently comprehensive, this requires an overview of the various ways in which norms can overlap. It is submitted there are eight relevant ways in which IHL and IHRL can co-regulate a situation – as opposed to the ICJ's three general categories.

It is submitted this rudimentary idea can be refined further, by accounting for the *level of specificity* with which a field regulates a situation. Taking account of situations where IHL or IHRL regulates a situation on a rudimentary level only, is important to meaningfully address many instances of interplay. After all, even though IHL is generally characterised by a high level of codification and detail,[148] IHRL's institutional supervision through human rights courts and bodies has given rise to a rich body of case-law which goes beyond any treaty regime. This means that in more than a few situations, both bodies do regulate a situation, but one does so in more detail than the other. By *rudimentary*, I thus mean relatively vague or open norms, which have not been fleshed out in any great detail. A prominent example of this would be investigations, where IHRL sets investigative standards in some degree of specificity, whilst IHL only provides very rudimentary instructions. The reality of interplay therefore makes it useful and necessary to take account of such situations – and therefore to come up with a slightly more refined categorisation than that proposed by the ICJ.

In broad strokes, this means we can sketch out situations where IHL and IHRL i) regulate a situation in detail, ii) regulate a situation in a more rudimentary fashion, and iii) where they do not regulate a situation:

Figure 4:



148 Robert Kolb, *Advanced Introduction to International Humanitarian Law* (Edward Elgar 2014) 76–7.

Logically, this means that there are a total of nine situations when combining each of these potential forms of regulation. If we list these situations, it looks as such:

i.	IHL regulates in some detail	– IHRL regulates in some detail
ii.	IHL regulates in some detail	– IHRL regulates on a rudimentary level
iii.	IHL regulates in some detail	– IHRL does not regulate
iv.	IHL regulates on a rudimentary level	– IHRL regulates in some detail
v.	IHL regulates on a rudimentary level	– IHRL regulates on a rudimentary level
vi.	IHL regulates on a rudimentary level	– IHRL does not regulate
vii.	IHL does not regulate	– IHRL regulates in some detail
viii.	IHL does not regulate	– IHRL regulates on a rudimentary level
ix.	IHL does not regulate	- IHRL does not regulate

Not all of these situations, however, are equally relevant to establishing a model for interplay. Situation ix, where neither regime regulates a situation, is irrelevant. Equally however, we may wonder whether the category of 'regulates on a rudimentary level' is really applicable to human rights law. Whereas human rights treaties certainly regulate most situations only in a very rudimentary fashion, the case-law of treaty bodies and courts fleshes out these obligations in great detail and arguably covers most issues of human rights law. The category of rudimentary regulation by IHRL is thus less relevant in practice, though as will be seen below, there are certainly situations in which IHL specifies obligations to be found in IHRL.[149]

Of course, it is possible to refine this categorisation even further. The distinction 'regulates in some detail' and 'regulates on a rudimentary level' is relatively vague, and the grey area between these categories could be subdivided into further categories. As the next section will show, however, for a useful typology of situations according to the extent to which they conflict, the present groupings suffice. What is left now, is to combine this list of potential situations of interplay with our typology of normative relations, in other words whether they conflict, converge, or compete. In doing so, examples are also provided to make these rather theoretical contemplations more concrete.

149 See also Sassòli, 'Le Droit International Humanitaire, Une Lex Specialis Par Rapport Aux Droits Humains?' (n 70) 385–95; Marco Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford University Press 2011) 72–8.

5.2.4 *Putting the framework together: situations of interplay articulated in normative terms*

Conflict

Normative conflicts between IHL and IHRL can arise roughly in three situations. First, quite obviously, when IHL and IHRL both regulate a situation in some matter of detail but in diverging ways, this can lead to conflict. An example is detention, where IHL in IACs provides a permission to detain combatants for the duration of hostilities, and where especially the ECHR contrarily prohibits deprivations of liberty, regulating exhaustively when such deprivation may exceptionally be lawful, which does not include internment. As explained, such tensions between positive permissions and prohibitions constitute a normative conflict. Similarly, instances where both legal regimes set similar standards but to different degrees, the situation of unilateral incompatibility, conflicts can arise. For instance, in the example of the administrative body reviewing internment measures, this would appear to be a system deliberately set up by IHL to regulate civilian internment during international armed conflict and occupation. There is then a lot to say for finding such regulation to conflict with the IHRL requirement of review by a regularly constituted and independent court, because IHL deliberately sets a lower threshold which accommodates the combat reality of detainees regularly numbering in excess of 100.000 individuals.[150] Viewing IHL as not only obligating review by an administrative board, but also as implicitly permitting not doing more than that, allows for the recognition of a conflict in such situations. If the situation is classified as conflictual, it can be resolved through the application of tools for conflict resolution which *can* (though not necessarily) provide precedence of the IHL standard over the more demanding IHRL requirement of a regularly constituted court.[151]

Second, instances of conflict can also arise where both bodies of law regulate a situation, and one does so in detail and the other does so in a more rudimentary fashion. This is in essence the situation where normally one body of law is used to specify open norms in the other legal regime. This has for instance been the case where the right not to be *arbitrarily* deprived of life as it is codified in the ICCPR and the ACHR, was interpreted during armed conflict to fall to be determined by rules of IHL. The ICJ thus held that what is an

150 Ashley S Deeks, 'Predicting Enemies' (2018) 104 Virginia Law Review 1529, 1534.

151 Cf. the Grand Chamber of the ECtHR's ruling in *Hassan v UK*, where it held that whereas a 'competent body' under IHL may satisfy the standards under art 5 ECHR, the body will need to provide 'sufficient guarantees of impartiality and fair procedure', *Hassan v UK* (n 41) [106]. IHRL standards can therefore still inform the application of IHL, even if the IHL norm here is given precedence.

'arbitrary' deprivation during armed conflict is dependent on IHL,[152] but as Lawrence Hill-Cawthorne explains, in doing so set aside the Human Rights Committee's case-law stipulating when deprivations of life are lawful.[153] Thus, even if this approach can formally be viewed as one of harmonious interpretation[154] – an open norm is interpreted in light of other applicable law – this may camouflage the actual conflict between the standards for the protection of the right to life *as fleshed out in jurisprudence* and the rules for status-based targeting under IHL. Thus in certain instances, where IHL informs the interpretation of an open treaty norm in IHRL, this may in fact concern a situation of conflict. This may similarly be the case where IHRL regulates a situation in more detail, such as is the case for torture.[155] While torture is prohibited under both IHL and IHRL, under IHRL there is a large body of case-law interpreting that prohibition and defining it subject to strict criteria. It may seem that the more detailed rules of IHRL ought to then be used to interpret the IHL prohibition of torture, but as it turns out this could lead to normative conflict. Under IHRL, torture is generally defined as requiring the involvement or presence of a State agent,[156] whereas under IHL it is important not to exclude conduct perpetrated by non-State armed groups.[157] Simply applying the IHRL standards, which arguably are more detailed than IHL on the issue of torture, may thus conflict with what IHL aims to achieve: binding all parties to a conflict, equally.

Third and finally, conflicts may also arise when IHL is silent on a certain subject which is regulated by IHRL. Normally, one might assume that in such situations IHRL can simply be used to fill the gaps left by IHL, and no conflict arises. And in fact, an example thereof will follow below, when explaining the model of convergence. But in other situations, a silence in IHL may rather

152 *Legality of the Threat or Use of Nuclear Weapons* (n 50) [25]. The Inter-American Court has similarly interpreted 'arbitrary' to fall to be determined by reference to IHL: IHL can be used 'to give content and scope to the provisions of the American Convention', *Case of the Serrano Cruz Sisters v El Salvador* (Preliminary Objections) Inter-American Court of Human Rights Series C No 118 (23 November 2004) [119]. Applying this to the right to life, see *Cruz Sánchez et al. v Peru* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 292 (17 April 2015) [272]. Further, see Chapter 6, §6.3.3.

153 Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' (n 27).

154 d'Aspremont and Tranchez (n 15); Todeschini (n 145).

155 Sivakumaran (n 63) 88–9.

156 CAT, art 1, see further Nowak (n 96). The CtAT has, however, opened up this definition somewhat through due diligence obligations, see *General Comment No. 2*, CtAT 24 January 2008, CAT/C/GC/2 [18].

157 Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' (n 149); Nowak (n 96).

be viewed as a *qualified* silence.[158] What is meant by this, is that IHL *means* to leave it open for States to decide how they wish to act, and therefore *purposefully* leaves discretion for the State. In essence, this viewpoint relies on the classic position that sovereign States enjoy freedom of action unless and insofar as restricted by international law.[159] If IHL intentionally does not regulate a situation, or does not flesh out the exact way *how* an obligation must be fulfilled, this may be intended to leave States free (subject of course to the Martens clause which at least obliges States to observe minimum levels of humanity).[160] In certain situations, IHL's silence on a matter may therefore reflect the fact that military necessity dictates States be left wide discretion to handle a situation, or to flesh out a more general obligation. Simply supplanting this discretion by detailed rules of IHRL may then in practice conflict with IHL, as IHL in such situations means to provide for an *implicit permission*. An example of this might be found in the context of the right to life and investigations, with regard to the IHRL requirement of *transparency*. In the words of the Human Rights Committee, this requires States to establish the truth regarding deprivations of life by *inter alia* making public the 'reasons and legal basis for targeting certain individuals and the procedures employed by State forces before, during and after the time in which the deprivation occurred', as well as the criteria for the use of lethal force, both generally and for specific cases, and details of the decision-making process leading to the application of force.[161] IHL, meanwhile, provides nothing as regards transparency,[162] but as State practice shows, States are very reluctant when it comes to giving clarity on their military strategies, citing national security interests.[163] It is certainly arguable that in leaving this open, IHL meant to leave States free to decide what level of transparency they wish to achieve, though there is some speculation in estimating the extent to which IHL *purposefully* leaves certain issues open.

158 Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' (n 149) 77. Similarly, see Sivakumaran (n 63) 92; Sandesh Sivakumaran, 'Re-Envisaging the International Law of Internal Armed Conflict' (2011) 22 European Journal of International Law 219, 240.

159 *The Case of the S.S. 'Lotus'*, Judgment (7 September 1927) *P.C.I.J. Series A. No. 10* [44].

160 See further Chapter 2, §3.

161 *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, HRC 30 October 2018, CCPR/C/GC/36 [28] and [64]. Further, see Chapter 5, §5.3.6 and 6.4.3.

162 Beyond obligations to collect dead combatants, see GC I, art 15-17; GC II, art 18-21; GC III, art 120-121. Further, see Susan Breau and Rachel Joyce, 'The Responsibility to Record Civilian Casualties' (2013) 5 Global Responsibility to Protect 28, 34ff.

163 Liesbeth Zegveld, 'Body Counts and Masking Wartime Violence' (2015) 6 Journal of International Humanitarian Legal Studies 443.

Convergence

Convergence between IHL and IHRL can be observed where norms of these bodies ultimately drive in the same direction. In such situations, both norms strive to achieve largely the same aim – though sometimes in different ways – with no conflict between them. They are, in other words, in harmony. Situations of convergence can again, roughly, be subdivided into three categories.

First, IHL and IHRL can converge where both contain detailed regulations. A prime example are the standards of treatment of detainees set by both legal regimes. Whereas as was explained before the legal basis for deprivation of liberty may give rise to normative conflict, conditions of treatment of detainees largely converge. Both legal regimes here aim to safeguard humane detention conditions, and both do so in a matter of detail.[164] Thus, IHL requires POWs are treated humanely, that their conditions of detention meet standards of human dignity, that they are provided medical care, and are ensured protection against threats to life or ill-treatment.[165] IHRL sets similar standards through the right to physical integrity and humane treatment, as fleshed out by the various courts and treaty bodies.[166] The detailed rules in both regimes in this context are complementary and they reinforce each other. Insofar as they diverge, both norms can easily be applied concurrently without any conflict arising. Take for example the very specific IHL safeguard requiring that soap and tobacco may not be sold to prisoners of war above local market price.[167] IHRL does not have any equivalent to this, but simply applying it in no way goes against what IHRL aims to achieve. The relationship is thus harmonious.

Second, when IHL contains only rudimentary rules as compared to IHRL's detailed jurisprudentially fleshed-out standards, the two may also converge. Typically, these are situations where IHL contains an open norm which aims to achieve the same result as the more detailed IHRL norm, and where the open norm is thus interpreted in light of detailed IHRL standards. A textbook example of this is the interpretation of Common Article 3's requirement of a 'judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples' for sentences or executions. IHL provides no further details for this obligation, but the aim of safeguarding judicial guarantees fully converges with IHRL's refined body of fair trial standards.[168] This applies similarly to the IHL

164 Further, see Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (Oxford University Press 2016).

165 Murray and others (n 81) 180–89.

166 Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, Oxford University Press 2013).

167 GC III, art 28.

168 Duffy, 'International Human Rights Law and Terrorism: An Overview' (n 143); Heintze (n 60); Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40).

requirement of a 'fair and regular trial' during IACs.[169] Thus, because the aim of safeguarding fair criminal trials is shared between both fields, IHL's rudimentary guidelines converge with the more elaborate standards set by IHRL, which allows for application of both in harmony.

This can also be the case the other way around, where IHL provides more specific guidance than IHRL's open norms, such as those regarding humane treatment. IHRL does not specifically regulate the use of weapons beyond its general protections of life and physical integrity, whereas IHL very specifically outlaws or restricts the use of certain types of weaponry, such as landmines and incendiary weapons.[170] Because IHRL does not normally specifically address the use of such weapons, IHL here fleshes out and specifies the more general IHRL norms covering the use of force. IHL outlaws such weaponry because of its 'excessively injurious' or indiscriminate nature, and thus serves a humanising purpose. IHL and IHRL thus converge on this point, and are in harmony.[171]

Third, IHL and IHRL can converge where one of the two regulates, and the other does not. This is the case where IHL is silent, but where this does not, as was touched upon earlier, constitute a qualified silence. Such situations, viewed from the ICJ's conceptualisation in its *Wall* Opinion, fall in the category where even during armed conflict a situation is exclusively a matter of human rights law.[172] A case in point is the freedom of expression, which is not generally covered by IHL.[173] Because IHL does not regulate this issue, and because no tension arises by simply applying IHRL, this issue is an oft-cited example where no real tension exists between IHL and IHRL: IHL does not regulate expressions, and there is no reason to diverge from regular human

169 Murray and others (n 81) 182–3.

170 See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211, art 1; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (adopted 10 October 1980, entered into force 2 December 1983), Protocol III to Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 137.

171 It ought to be noted that although the presumption may be that any weaponry outlawed under IHL must therefore *ipso facto* also be unlawful under (the more protective) IHRL, this is not so. Law-enforcement and riot-control weaponry such as tear gas is outlawed under IHL, but is legal under IHRL, and its use may in fact be required by IHRL – concerned as it is with restricting lethal force. See Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' (n 78) fn 18.

172 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 51) [106].

173 For an arguable exception where IHL does have something to say on this topic, see GC III, art 76, which allows censorship of POW correspondence. Daniel Bethlehem, 'The Relationship between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2013) 2 Cambridge Journal of International and Comparative Law 180, 191.

rights practice.[174] The right to marry is equally governed by IHRL only, with IHL being silent and in no way militating against simple application of IHRL.[175] This works the same the other way around, where IHL regulates a situation which is not governed by IHRL. IHL contains many such rules, as it regulates in detail many technical aspects of warfare and the organisation of States' armed forces. An example of a rule with no counterpart under IHRL would be the rules concerning the ICRC's distinctive emblem. The respect for and protection of those emblems under IHL in no way raise tension with IHRL, which means they can be applied under a paradigm of convergence. In other words, the law is in harmony in these situations.

Competition

Competition of norms takes up a middle ground between conflict and convergence. It concerns situations where although norms do not conflict, not even in the broader definition articulated above, they nevertheless pull in different directions and thus result in normative *tension*.

By way of example, first of situations where IHL provides rudimentary rules, one may think of investigations. Whereas both IHL and IHRL provide for a duty to investigate and these legal regimes in this broader sense converge, when it comes to investigative *standards*, IHL provides very rudimentary guidance only, and IHRL prescribes detailed rules of conduct. Simple application of human rights standards of investigation may, nevertheless, raise tensions with the IHL system. As is exemplified by the European Court case of *Jaloud v the Netherlands*, the application of detailed investigative standards as to the independence and effectiveness of the investigation may lead to results which are at odds with operational realities and military necessity. The Court stressed the importance of separating the subject of investigations from witnesses to prevent collusion and interviewing him promptly to prevent any risk or appearance of collusion,[176] but the suspect in this case was the highest ranking officer present. Separating him from the other troops would have significantly impacted the military's operational capabilities on the ground in a tense security situation where the Iraqi checkpoint had in fact been attacked earlier that very evening. Whereas IHL does not provide rules *explicitly* opposing this approach, it is submitted that military necessities nevertheless quite clearly pull in a different direction. Section 6.5 proposes a way to address such issues of competition.

174 E.g. Milanović, 'The Lost Origins of Lex Specialis' (n 47); Droege (n 4); Françoise J Hampson, 'The Relationship Between International Humanitarian Law and Human Rights Law From the Perspective of a Human Rights Treaty Body' (2008) 90 International Review of the Red Cross 849.

175 Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' (n 27).

176 *Jaloud v the Netherlands* (n 44) [206]-[208].

Finally, an example of a situation where IHL does not provide rules but where application of IHRL may nevertheless result in normative competition, can be found in the context of internment in non-international armed conflict. IHL treaty rules in this field are rudimentary, and whether IHL provides any authority for States or non-State armed groups to intern is subject to heated debate, which raises issues under the IHRL requirement of a *legal basis* for any deprivation of liberty.[177] Even if such a legal basis *is* provided for by IHL, or by domestic law for that matter, IHL only provides for certain standards of treatment for internees, but no procedural guarantees.[178] IHRL on the other hand, does provide for procedural protections, such as importantly the right to *habeas corpus*.[179] A firm argument can be made why IHRL ought to fill the gap left by IHL here, but this may still cause tension with IHL even if it does not as such regulate this issue. After all, detention is part and parcel of armed conflict, which is why under the framework of international armed conflicts, combatants may be detained simply for their taking part in the conflict, until the end of hostilities.[180] The same interest, the same military necessity, exists in NIACs for the internment of civilians taking a direct part in hostilities (or for internment by non-State armed groups). The sheer number of individuals detained in such conflicts can be argued to militate against providing full procedural guarantees, especially if the legal basis for the detention is simply their taking part in hostilities. Thus, there is at least an arguable case why despite IHL's silence, the application of the procedural guarantees provided by IHRL gives rise to competition with IHL. It must be stressed here that this potential normative competition in no way justifies the indefinite detention without review of individuals as takes place in Guantánamo Bay. This practice is legally untenable for a plethora of reasons,[181] and it ought to be recalled that the United States' justifications for this practice rely on a combination of denial of extraterritorial application of human and constitutional rights, and a denial of IHL status because they would classify as 'unlawful combatants'.[182] Section 6.5 explains how such competition *should* be resolved, in a way which does justice to both IHL and IHRL.

177 Daragh Murray, 'Non-State Armed Groups, Detention Authority in Non-International Armed Conflict, and the Coherence of International Law: Searching for a Way Forward' (2017) 30 Leiden Journal of International Law 435; Hill-Cawthorne, *Detention in Non-International Armed Conflict* (n 164).

178 See CA 3 and AP II, art 5.

179 ICCPR, art 9; ACHR, art 7; ECHR, art 5.

180 Hill-Cawthorne, *Detention in Non-International Armed Conflict* (n 164).

181 Helen Duffy, *The 'War on Terror'' and the Framework of International Law'* (Cambridge University Press 2015) 665–746.

182 Cf. Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (n 65) 441.

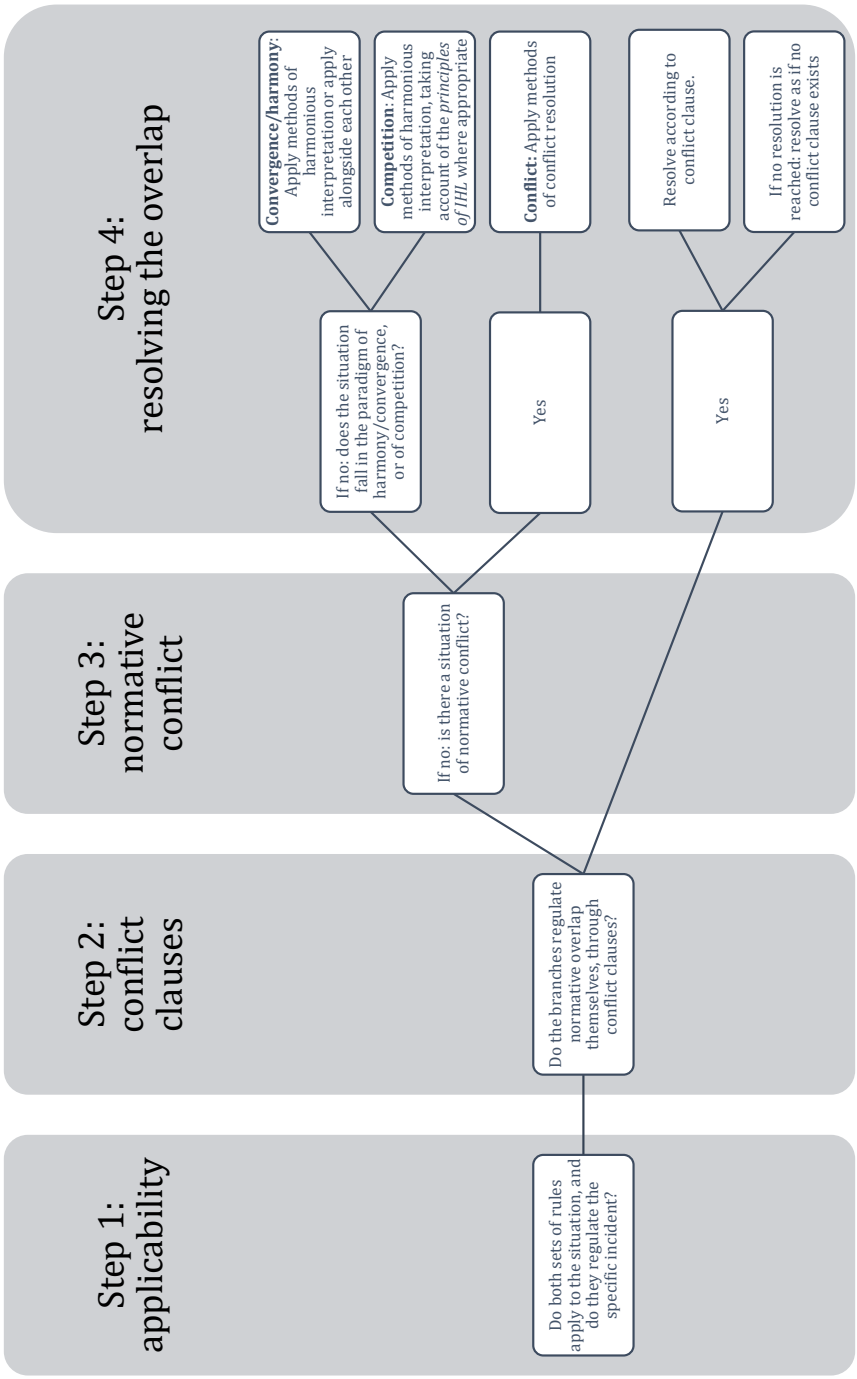
5.3 Résumé: refining the methodology for interplay

The aim of this section has been to come up with a typology which usefully distinguishes between various situations of normative overlap between IHL and IHRL. Because it was determined that the regulation or resolution of overlap of norms in the international legal system hinges on the existence or not of *normative conflict*, a typology of situations was devised which puts the relation between norms centre stage. It was shown how a narrow conception of what constitutes conflict, is ultimately underinclusive and therefore unhelpful. Drawing on legal theory, a broader conception of conflict was therefore proposed.

When taking stock of the various practical situations in which issues of interplay arise, it turned out that even under the broader conception of conflict, certain situations falling outside its scope nevertheless give rise to real tensions between IHL and IHRL. A binary distinction between situations of conflict and harmony were therefore thought to be inconsistent with the more multi-layered and nuanced reality of interplay. This ultimately led to embracing a third category of overlap, that of normative competition, in addition to the situations of conflict and harmony or convergence.

It was further shown how the various theoretical situations of overlap fit within the normative typology of conflict, convergence and competition. Whether a specific situation concerns conflict, convergence, or competition, ultimately determines how the overlap of norms is resolved. Before turning to this issue in the next section, the step-by-step flowchart for interplay can now be further refined to account for situations of normative competition. This involves one additional step to be taken if it is determined there is no normative conflict. A situation can then still fall under the paradigm of convergence or that of competition. This will determine the precise way to resolve the instance of interplay, as is explained in the next section.

Figure 5: a refined methodology for interplay



6 SOLVING SITUATIONS OF INTERPLAY

6.1 Introduction

The methodology developed thus far, shows that it is key to decide whether a specific instance of normative overlap between IHL and IHRL, concerns a situation of conflict, convergence, or competition. What is left to determine now, once it has been determined how the overlap must be categorised, is how the overlap can actually be *resolved*. That is the aim of this section.

To do so, this section examines in turn how conflict, harmony and competition shape the end result when it comes to the law as it must be applied by States. Before doing so, it also looks at the situation when a relevant derogation has been made by the State, modifying its human rights obligations (signified as a preliminary step in the methodology for interplay).

6.2 The limited role of conflict clauses and derogations

6.2.1 Introduction

The interplay decision tree sets out how, after having determined IHL and IHRL apply both to a situation and to a specific incident, it must be assessed whether a conflict clause regulates the relevant interplay between IHL and IHRL. A conflict clause is a secondary norm, which directly regulates how a conflict of norms with another body of law must be resolved. IHL does not contain such conflict clauses; certain IHRL treaties do to a certain extent. Such clauses generally provide for the continued applicability of the treaty in light of armed conflict, though they may give precedence to (certain provisions of) the Geneva Conventions should any conflict arise. Andrew Clapham has listed these treaties, as discussed below.[183]

A case in point is the International Convention against the Taking of Hostages (1979), which remains applicable during armed conflicts, but stipulates it is not applicable to acts of hostage-taking covered by the *aut dedere aut iudicare* obligation under the grave breaches provisions of the Geneva Conventions.[184] It thus gives precedence to the pre-existing obligation to extradite or prosecute under the Geneva Conventions over its own system of similar obligations. The Convention against Enforced Disappearance (2006) similarly provides it applies 'without prejudice to' provisions of IHL, the

183 Andrew Clapham, 'The Complex Relationship Between the Geneva Conventions and International Human Rights Law' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (Oxford University Press 2015).

184 International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205, art 12; Clapham (n 183).

Geneva Conventions and the Additional Protocols.[185] This wording indicates that although the CED applies concurrently with IHL, it must not be interpreted in ways which conflict with IHL, meaning any potential conflict ought to be resolved by reference to the applicable IHL.[186] Of a different nature is the Inter-American Convention on Forced Disappearance of Persons (1994), which explicitly excludes applicability to international armed conflicts covered by the Geneva Conventions and AP I.[187] It thus avoids normative conflict by simply precluding application to situations of IAC – though it does apply concurrently with the IHL governing NIACs, and does not provide for a conflict clause for such situations.[188]

Beyond these treaties, IHRL does not provide for explicit conflict clauses regulating the relationship with IHL.[189] IHL and IHRL thus do not regulate in any sort of comprehensive manner how they interrelate. There is, however, another mechanism which can alleviate tensions between the two regimes: the derogations regime under human rights law.

6.2.2 *Derogations and conflict clauses*

As was set out in Chapter 4, the ICCPR, ACHR and ECHR contain derogation clauses, providing States with the right to derogate from certain human rights obligations in case of armed conflict or national emergency.[190] If States were to make use of such clauses whenever an armed conflict arose, this would allow for a calibration between both bodies of law, as the stringencies of what is required under IHRL during peace time, would then be loosened and recourse could more readily be had to the oftentimes more lenient standards for individual protection under IHL. It is submitted, however, that derogations clauses ultimately cannot classify as conflict clauses, for a number of reasons.

Firstly, the existence of an armed conflict is a *factual* circumstance, divorced from whether parties to the conflict acknowledge its existence and from formal declarations of war.[191] As soon as an armed conflict exists, IHL becomes applicable. IHRL applies full stop, whenever a State has jurisdiction. As soon as as a matter of fact an armed conflict arises, both therefore apply as a matter of law. The derogations regime, in contradistinction with IHL, is contingent on a State's formal derogation from certain human rights obligations through

185 CED, art 43; Clapham (n 183).
186 Further on the meaning of the phrase 'without prejudice to', see Mus (n 76) 214–5.
187 Inter-American Convention on Forced Disappearance of Persons (adopted 9 June 1994, entered into force 28 March 1996), E/CN.4/2003/WG.22/Misc.1, art XV.
188 Clapham (n 183).
189 As Clapham explains, there are further human rights treaties which refer explicitly or implicitly to situations of armed conflict, but without any rules alluding to the regulation of interplay – meaning they are not conflict clauses. See Clapham (n 183).
190 ICCPR, art 4(1); ACHR, art 27(1); ECHR, art 15(1). See the discussion in Chapter 4, §4.6.
191 See Chapter 2, §4.2.

notification. If the derogations regime is meant to regulate the interplay between IHL and IHRL, this is therefore a logical gap: whereas the existence of an armed conflict and the applicability of IHL are automatic once the conflict erupts, if derogations are to regulate interplay, a formal recognition and notification by States is necessary, in fact perhaps both of the existence of the conflict, *and* of a wish to derogate.[192] The applicability of a conflict clause, and a properly calibrated interplay regime, is then conditioned on a State's formal response, which is precisely what IHL aims to avoid: it is conditioned on a *factual situation* only, not on formalities.[193] If a system is used where derogations clauses are meant to operate as conflict clauses, there will necessarily be a period of time where IHL and IHRL apply without the derogations regime being applicable.

Secondly, in cases where States are not willing to derogate – which is often the case[194] – this effectively prevents the derogation clause from operating as a conflict clause.[195] An often used counterargument is that if States *choose* not to derogate, they therefore *choose* to apply the more demanding system that is IHRL, which is certainly open to them (operating under the presumption that IHRL is indeed more protective and more demanding, which is not always the case).[196] Whether it makes sense to perceive of such an optional clause as a proper conflict clause, must, however, be questioned. After all, this would mean that unless States derogate, IHRL automatically takes primacy over IHL, which as was pointed out above is not in line with general international law. In fact, it would mean that derogations clauses are conflict clauses *claiming*

192 The ECtHR in *Hassan* partly remedied the imperfection in the derogations regime as a conflict clause, by accepting the existence of 'implied derogations'. This remedies the gap between the (sudden) eruption of an armed conflict and the possibility to formally derogate, but this applies to *international* armed conflicts only; *Hassan v UK* (n 41) [101]-[104] and [107]; further see Chapter 7, §6.3. Moreover, the Court accepts this only if States invoke IHL. As such invocation of IHL will take place during proceedings before the Court only, this clearly does not solve any issue of applicable law during the conflict. As a final limitation on the ECtHR's acceptance of implied derogations, it has done so thus far under the right to liberty and security enshrined in Article 5 of the ECHR only.

193 Hampson, 'The Relationship Between International Humanitarian Law and Human Rights Law From the Perspective of a Human Rights Treaty Body' (n 174) 565.

194 Hampson, 'Article 2 of the Convention and Military Operations during Armed Conflict' (n 33) 191; Daniel Bethlehem, 'When Is an Act of War Lawful?', *The Right to Life under Article 2 of the European Convention on Human Rights. Twenty Years of Legal Developments since McCann v. the United Kingdom. In Honour of Michael O'Boyle* (Wolf Legal Publishers 2016) 234.

195 States may opt not to derogate for political reasons, as particularly during NIACs, the recognition of the existence of a NIAC may be perceived as providing some sort of legitimacy and at the very least legal standing to a non-State armed group engaging the State. Moreover, derogations signify a loss of control, an image States may also wish to avoid.

196 Ziv Bohrer, 'Human Rights vs Humanitarian Law or Rights vs Obligations: Reflections Following the Rulings in Hassan and Jaloud' (2015) 16 Questions of International Law 5. An example might be IHL's prohibition of law-enforcement and riot-control weaponry such as tear gas, which is legal under IHRL; see Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' (n 78) fn 18.

primacy over conflicting rules, *unless* States notify they wish to derogate. If IHRL were indeed to claim priority through derogations clauses, thereby deviating from international law, one would expect this to be formulated explicitly and unequivocally. However, it is the complete opposite: *if* we want to perceive derogations clauses as such, this must be based on inferences and remains entirely implicit. Moreover, as a matter of practice, derogations are hardly ever used for armed conflict situations, illustrating States do *not* view them as conflict clauses.[197]

Thirdly and relatedly, conditioning the interplay regime on derogations will readily lead to belligerent inequality, because in inter-State conflicts both parties will have the *possibility* to derogate, and the possibility to do so from *certain rights* only. They are likely not to do so identically, meaning they will have diverging legal obligations, in contravention with the principle of belligerent equality.

Fourthly, relying on the derogations regime is liable to import through the backdoor issues under the *ius ad bellum*. As Peter Kempees argues, the initiator of an aggressive war cannot presume to invoke a derogations provision. He explains how, by way of example, the national socialist regime during World War II would not have been in the position to derogate from their human rights obligations because they had started a war of aggression.[198] If this is indeed so, then the strict separation of *ius ad bellum* and *ius in bello* could be jeopardised by making the interplay between IHL and IHRL reliant on derogations which only one party to the conflict can use. This would, again, also put at risk the belligerent equality between the parties to the conflict.

Finally, a number of rights has been recognised as non-derogable, meaning these rights are not subject to derogations clauses and when such rights are at issue, no recourse to a conflict clause is foreseen. Some of the human rights which are non-derogable, are precisely the ones which are most contentious under interplay, namely the rights not to be deprived arbitrarily of life and liberty. Whereas derogations clauses can therefore affect interplay, this is best viewed as affecting a State's substantive human rights obligations, which may very well affect the question whether a normative conflict with IHL exists, but it cannot be viewed as a conflict clause which solves the relationship with IHL. If States do derogate this can certainly alleviate normative tensions,[199] but derogations clauses must not be perceived as conflict clauses as such.

197 See e.g. Hampson, 'Article 2 of the Convention and Military Operations during Armed Conflict' (n 33) 191.

198 Peter Kempees, *Thoughts on Article 15 of the European Convention on Human Rights* (Wolf Legal Publishers 2017); Kempees (n 42) 85–6.

199 Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40).

6.2.3 *The effects and relevance of derogations*

If derogation clauses cannot be perceived of as conflict clauses, what is then to be the legal effect of a derogation is one is entered? Derogations from human rights potentially influence the interplay between IHL and human rights law by allowing States to deviate from the stringencies of human rights law when a public emergency or armed conflict 'threatening the life of the nation' erupts.[200] In such situations, they may deviate from human rights obligations (1) insofar as strictly required by the emergency, and (2) insofar as such deviations are in line with other international obligations of the State, only (3) if they notify the relevant institution of such derogation. States moreover have to make clear from which rights they derogate.[201]

The *effects* of derogations are to lower relevant human rights standards *to the extent strictly required* to cope with an emergency or conflict – they do not invalidate the human right (let alone the human rights treaty) as such. Further, they remain subject to proportionality review by supervisory bodies, whose supervisory jurisdiction is not affected by derogations.[202] This means that as far as interplay is concerned, human rights, even when lawfully derogated, still apply and regulate a situation. Derogations *lower* the applicable standard, which may very well alleviate normative tensions between IHL and IHRL, because the human rights standard under such circumstances likely no longer requires more than IHL does. This is liable to alter the nature of normative overlap – where two norms in principle conflict, derogations can bring IHRL in harmony with IHL. By way of example, where IHL allows for the internment of combatants for no other reason than their participation in hostilities, this in principle results in normative conflict with the European Convention's exhaustive list of grounds for deprivation of liberty. If a State derogates from the right to liberty, it can avoid such conflict as this lowers the applicable standards under the right to liberty, bringing them in line with

200 ICCPR, art 4(1); ACHR, art 27(1); ECHR, art 15(1).

201 Ibid. See further Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis. Emergency Powers in Theory and Practice* (Cambridge University Press 2006); Jan-Peter Loof, 'Crisis Situations, Counter Terrorism and Derogation from the European Convention of Human Rights. A Threat Analysis' in Antoine C Buyse (ed), *Margins of Conflict. The ECHR and Transitions to and from Armed Conflict* (Intersentia 2009); Jan-Peter Loof, 'On Emergency-Proof Human Rights and Emergency-Proof Human Rights Procedures' in Afshin Ellian and Gelijn Molier (eds), *The State of Exception and Militant Democracy in a Time of Terror* (Republic of Letters Publishing 2012).

202 *General Comment No. 29: Article 4: Derogations during a State of Emergency*, HRC 31 August 2001, CCPR/C/21/Rev.1/Add.11 [4]-[6]; *Lawless v Ireland*, ECtHR 1 July 1961, Appl No 332/57 [31]-[38]; *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights)* (Advisory Opinion) Inter-American Court of Human Rights Series A No 8 (30 January 1987) [22] and [38]. Further, see Chapter 4, §4.6.

IHL.[203] The essence of the derogation is thus to alter the substance of the human rights obligation, or to bring it down to its core, to provide the necessary level of realism to human rights protection in situations of emergency and armed conflict. This can also lead to *avoidance* of conflicts with IHL – without however directly addressing the relationship between IHL and human rights law.

In terms of the decision tree on interplay as articulated in this chapter, however, this does not fundamentally change anything: the interaction of the IHL norm and the now less demanding human rights norm still needs to be articulated in terms of conflict, harmony or competition. Whereas conflicts can thus be more readily avoided when derogations are used, they do not as such regulate the interaction between IHL and IHRL, and they do not for instance provide for deferral to IHL as the relevant legal standard.

In conclusion, whereas the reliance of States on derogations during armed conflicts can go a long way to alleviate conflicts between IHL and IHRL, they do not as such address the relationship between the two legal regimes. They are not, therefore, conflict clauses. This means that even if a derogation has been made, the additional steps in the decision tree have to be followed to assess whether a situation concerns conflict, competition or convergence.

6.3 Conflicting norms

6.3.1 Introduction

In situations of conflict, which should be understood as rules which are each other's contradictory or contrary opposites, a choice has to be made. Where a contrary obligation to act and a prohibition apply simultaneously, or where a positive permission and a prohibition apply simultaneously, the law is in conflict, and tools for conflict resolution have to be applied. As explained above,[204] the international legal system acknowledges three tools for the resolution of normative conflict: *lex superior*, *lex posterior*, and *lex specialis*.[205] *Lex superior* is a method which resolves normative conflict by reference to the hierarchy of norms: the higher norm prevails. As was explained above, the international legal system is not principally hierarchical in nature, and the

203 See *Hassan v UK* (n 41), where the Grand Chamber notably held to this effect based on *implicit* derogations.

204 See section 4.2, *supra*.

205 ILC Report 2006, p. 208 and 249, where the ILC stipulates that 'The techniques of *lex specialis* and *lex posterior*, of *inter se* agreements and of the superior position given to peremptory norms and the (so far under-elaborated) notion of "obligations owed to the international community as a whole" provide a basic professional tool-box that is able to respond in a flexible way to most substantive fragmentation problems'.

only norms with superior status to others are those of *ius cogens*.[206] The effect of *ius cogens* norms, according to the Vienna Convention on the Law of Treaties, is to invalidate not just a treaty rule conflicting with such a hierarchically superior norm,[207] but to invalidate the conflicting treaty as a whole.[208] Moreover, according to the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, all States must cooperate to put any violations of *ius cogens* norms to an end.[209] In practice, however, *ius cogens* takes up a modest place in the international legal system and it does not feature prominently in discussions on the interplay of IHL and IHRL. Insofar as *ius cogens* obligations exist in this field, they likely overlap, such as is the case for the prohibition of torture.[210] Because of this, conflicts between IHL or IHRL on one side, and a *ius cogens* obligation of the other regime on the other, are therefore likely non-existent. And this may be for the better, because even though *lex superior* potentially provides a clear-cut way of resolving normative conflict, the VCLT's rather radical solution of voiding an entire treaty which conflicts with *ius cogens*, could lead to the complete invalidation of an IHL or IHRL treaty – which hardly seems to be a solution.[211]

Lex posterior is a rule of precedence, favouring the more recent rule over the older one. As Article 30 of the VCLT stipulates, when all parties to a treaty subsequently become party to a later treaty relating to the same subject-matter, and these treaties do not regulate their interrelationship amongst themselves, the older treaty 'applies only to the extent that its provisions are compatible with those of the later treaty'.[212] In other words, the younger treaty takes precedence in case the way they regulate a certain subject, diverges. This rule does not, however, readily regulate the relationship between IHL and IHRL.[213] It cannot reasonably be argued that because the ECHR was concluded after the Geneva Conventions, it therefore takes precedence, nor can it reasonably be argued that because the Additional Protocols were concluded after that, that they take precedence over the ECHR. The prior/subsequent relation between various IHL and IHRL treaties simply does not logically regulate how IHL and IHRL interrelate. Similarly, even within the branch of human rights law such arguments do not hold sway, as the entry into force of the ICCPR

206 See Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 European Journal of International Law 491, 494–6.

207 If a norm of *ius cogens* emerges *after* a treaty norm already existed, it might however be separable pursuant to VCLT, art 44, under further conditions. See Ulf Linderfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2007) 18 European Journal of International Law 853, 861, fn 37.

208 VCLT, art 53 and 64.

209 ARSIWA, art 41.

210 On the relationship between the IHL and IHRL prohibitions of torture, see Nowak (n 96).

211 See further Linderfalk (n 207).

212 VCLT, art 30(3).

213 Milanović, 'The Lost Origins of Lex Specialis' (n 47) 112.

in 1976 in no way takes precedence over the 1954 ECHR.[214] For IHL and IHRL such conclusion moreover follows from the applicability requirement of *lex posterior* that *all parties to a treaty* become party to the subsequent treaty; levels of ratification between IHL and IHRL diverge strongly, and no human rights convention can boast the same level of universality as the Geneva Conventions can.[215]

This leaves us with the principle of *lex specialis derogat legi generali*, the principle the ICJ relied on in its *Nuclear Weapons* Opinion as the method to solve issues of interplay. Since then, this principle has garnered the large majority of scholarly attention when discussing interplay.[216] The basic functioning of *lex specialis* as a method for conflict resolution is that when a conflict of norms arises, the law which most specifically governs the situation giving rise to the conflict, takes precedence.[217] However, care must be taken to distinguish this operation of *lex specialis* from its function as a method for *interpretation* and conflict *avoidance*, in which case it operates within the paradigm of systemic integration and guides how non-conflictual co-application is shaped.[218] As Marko Milanović explains, 'Unlike avoidance, which interprets away any incompatibility, norm conflict resolution requires one conflicting norm to prevail, or have priority over, the other.'[219] In its conflict resolution capacity, the *lex specialis* principle thus prioritises the more specific rule over the general. What this means precisely, however, remains subject to debate.[220]

6.3.2 Lex specialis derogat legi generali

6.3.2.1 Legal consequences of the application of lex specialis derogat legi generali

The operation of *lex specialis*, in its conflict resolution capacity, has been proposed in two distinct ways: one is that it gives precedence to one norm over the other when on a norm-by-norm basis it was established normative conflict exists, the other that it works on the level of *regimes*, that in case of conflict *lex specialis* displaces the other legal regime completely.[221] It was explained already why the latter interpretation cannot hold true, and why we must assess

214 ILC Report 2006, p. 24.
215 Further, see Jeutner (n 132) 31.
216 Marko Milanović has shown how before the Court's Advisory Opinion, legal practice and scholarship did not normally conceive of the relation through the *lex specialis* lens; rather it focused on continued application of IHRL and the derogations regime. Milanović, 'The Lost Origins of Lex Specialis' (n 47).
217 ILC Report 2006, p. 34-5.
218 ILC Report 2006, p. 34-5.
219 Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40).
220 Lindroos (n 5).
221 For a discussion, see Milanović, 'The Lost Origins of Lex Specialis' (n 47); Prud'homme (n 79).

the interplay between IHL and IHRL on a norm-by-norm basis, and based on an assessment of whether there is a conflict between two or more norms applicable in a specific situation and to a specific incident. We must thus turn to *lex specialis* as a conflict resolution mechanism which operates on the level of norms, and which gives precedence to one norm over the other in case of conflict.

Whereas *lex specialis* gives precedence to one norm over the other, the effect of application of the principle is not to derogate the *generalis*, in the sense of invalidating the general norm.[222] Whereas the more specific norm takes precedence in that specific situation, the general norm remains applicable in the background, and may influence further application of the special rule – and in any case can become relevant again in other situations.[223] For instance in the example of the right to life and the use of lethal force, whereas the IHL permission to use lethal force based on status-based targeting can have precedence over the IHRL prohibition to deprive individuals of their lives, this does not mean this therefore *invalidates* the right to life, not even when looked at in the context of a specific incident. There is more to the normative tension between these norms than the black and white distinction between a permission and a prohibition, and the right to life may further govern the precise use of force, the precautions taken, and could arguably oblige States to use less harmful means to neutralise a threat even during armed conflicts.[224] In the *Targeted Killings* case, for instance, the Israel Supreme Court found that whereas IHL allows the targeting of civilians taking direct part in hostilities, if in a position to capture them without excessive risks to the armed forces, they may not simply be targeted and killed.[225] Another important consequence of the continued application of the *generalis* in the background, is that even if IHL were to qualify as the *lex specialis* in such situations, *IHL provides the primary frame of reference for the use of force*, but insofar as procedural protections are concerned, IHRL still applies. This means for instance that individuals may still rely on their right to an effective remedy before a court, and

222 Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' (n 125).

223 ILC Report 2006, p. 47-53. See also Sivakumaran (n 63) 89.

224 For a discussion, see Charles Garraway, ''To Kill or Not to Kill?'-Dilemmas on the Use of Force' (2010) 14 Journal of Conflict and Security Law 499; Amichai Cohen and Yuval Shany, 'A Development of Modest Proportions. The Application of the Principle of Proportionality in the Targeted Killings Case' (2007) 5 Journal of International Criminal Justice 310.

225 Supreme Court of Israel sitting as the High Court of Justice 11 December 2006 (Judgment), HCJ 769/02, 46 ILM 375 (2007) (*Targeted Killings (The Public Committee against Torture in Israel et al v The Government of Israel et al)*) [40]. See further e.g. Helen Keller and Magdalena Forowicz, 'A Tightrope Walk between Legality and Legitimacy: An Analysis of the Israeli Supreme Court's Judgment on Targeted Killing' (2019) 21 Leiden Journal of International Law 185; Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40) 479.

complain before international human rights courts and treaty bodies of violations. Theoretically, it might also mean that the *procedural* duty to investigate deaths still applies,[226] because insofar as there is a conflict, this principally relates to the material side of the right to life, not to the investigations side. This issue will be returned to in Chapter 10, which also discusses the relationship between substantive rules, and their procedural corollaries.[227]

The legal consequence of application of the *lex specialis derogat legi generali* principle, is therefore to resolve a conflict by letting the more specific rule prevail over the more general rule. This leaves us with the question how then to determine which rule is general and which is specific, a question to which we shall turn now.

6.3.2.2 Contents of the lex specialis principle

The principle of *lex specialis* is a subsidiary rule, a third rule, which determines how a conflict between two primary rules can be resolved,[228] by virtue of their speciality. It does not, however, in all its generality, specify how to determine which rule is the *specialis* and which is the *generalis*. According to some, because *lex specialis* is devoid of clear normative content, it can be filled in according to the normative preference of whoever applies the rule, and thus provides a guise of legality and objectivity which in fact is absent.[229] Depending on one's normative preferences, one can then use *lex specialis* to argue towards a certain outcome, namely that IHL or IHRL is more specific to a given situation, and must therefore take precedence. There is a certain truth to the lack of direction provided by *lex specialis*, because the very core to the solution of normative conflict is left up to an undefined classification of rules into 'general' and 'specific'. Nonetheless, several suggestions have been made to fill in this normative void, by taking account of a number of factors in deciding which norm is to be qualified as *specialis*, and which as *generalis*.

An ostensibly simple way of deciding which norm is specific and which is general, is simply that because IHL was meant to govern armed conflict and occupation, it is *ipso facto* the *lex specialis* in such situations.[230] This reasoning somewhat goes back to the idea that *lex specialis* can regulate the relationship between the two legal regimes as a whole, which was rejected above, but merits attention here because there is an intuitive attraction in appointing IHL

226 Extensively on the procedural obligations, see Droege (n 48); Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' (n 125).

227 Chapter 10, §3.2.

228 Cf. Kelsen (n 109).

229 Lindroos (n 5). See also ILC Report 2006, p. 36.

230 For an example, see Michael J Dennis, 'Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict' (2007) 40 Israel Law Review 453. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 51) [106].

as *lex specialis*. After all, it is the law meant to govern situations of armed conflict.

Normally, the starting point is to perceive IHRL as the *generalis*, applicable at all times, and IHL as the *specialis*, applicable to, and designed to govern, armed conflict.[231] This also aligns with the ICJ's findings, putting IHL forward as *lex specialis*: 'the law applicable in armed conflict which is designed to regulate the conduct of hostilities.'[232] It ought to be born in mind though, that this finding in *Nuclear Weapons* pertained specifically to the right to life and the conduct of hostilities, an issue, in other words, which may be thought naturally to fall within the 'more specific' law of armed conflict as regulating deprivations of life during armed conflict. Moreover, the Opinion meant to answer questions concerning the legality of the use of nuclear weapons, and therefore the use of particular types of weaponry, which again intuitively falls in the sphere of the law governing armed conflict and the conduct of hostilities. We ought to therefore be careful in attaching overly broad conclusions to this finding; it may very well be limited to the conduct of hostilities and deprivation of life, where IHL will more readily constitute the *specialis* to IHRL's *generalis*.[233] In *The Wall* Opinion, even insofar as the Court's finding would intimate that IHL operates as *specialis* more generally in relation to IHRL, its subsequent application of the law appears to tell a different story. After finding that it must take into account '[IHRL] and, as *lex specialis*, [IHL]',[234] the Court goes on to find numerous violations of human rights – rights which were therefore clearly not displaced by IHL, nor was their application altered in any way.[235]

As the International Law Commission explains in its 2006 Report on Fragmentation, the rule regarded as 'special' in the *lex specialis* context, is 'the rule with a more precisely delimited scope of application (…), [t]hat is, when the description of the scope of application in one provision contains at least one quality that is not singled out in the other'.[236] The regulation of armed conflict is certainly one such 'quality', but it is not the only relevant factor in determining which rule is the more specific, which *can* be human rights law. Marco Sassòli echoes this approach when he argues in favour of the rule with the 'largest common contact surface area' to be considered *specialis*: 'Speciality, in the logical sense, implies that the norm that applies to a certain set of facts must give way to the norm that applies to that same set of fact

231 Michael J Dennis, 'Application of Human Rights Treaties Extraterritorially During Times of Armed Conflict and Military Occupation' (2006) 100 Proceedings of the Annual Meeting (American Society of International Law) 86, 132ff.

232 *Legality of the Threat or Use of Nuclear Weapons* (n 50) [25].

233 Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' (n 27).

234 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 51) [106].

235 Ibid [137].

236 ILC Report 2006, p. 35, and fn 60.

as well as to an additional fact that is present in a given situation.'[237] By way of example, think of a demonstration held in a situation of occupation.[238] Demonstrations are primarily covered by rules of IHRL, providing a right to demonstrate peacefully, and allowing for State restrictions of that right only when necessary in light of for instance public security. IHL remains applicable of course, as it concerns a situation of occupation. Now if the demonstration turns violent, and the State needs to use force to maintain security, this does not suddenly make IHL the more specific regime, with the use of force governed by the principle of distinction. Human rights law is very specific in its regulation of demonstrations as well as the use of proportionate force in the maintenance of security, also when demonstrations turn violent. So long as the violence therefore does not reach the level of an actual resumption of hostilities, IHRL then provides the rules *more specifically geared* to regulating the incident – the incident has the larger 'common contact surface area' with IHRL's rules governing demonstrations, than with IHL's rules governing the use of force.[239] This goes to underline the importance of a context-specific assessment, which is not simply based on the abstract relationship between IHL and IHRL, nor simply on interaction on the norm-specific level, but taking account of the specific context.

As this brief incursion may illustrate, there is no predetermined relation between IHL and IHRL, with one always functioning as *specialis*, the other as *generalis*. Moreover, even on the level of a specific norm there is no solution which applies in all circumstances. Both regimes can provide the more specific rule, depending on context. This has to do with the nature of these legal regimes: they are both specialised regimes, branches, of the more general field of international law. They are in a horizontal relationship.[240]

6.3.2.3 Determining the specialis

The task at hand when resolving a normative conflict between IHL and IHRL, is therefore to determine which norm is the more specific. The ILC has suggested this can be the case wherever a rule's scope of application contains at least one quality which the other does not. What qualities these are, however, is debatable and outcomes may vary depending on the perspective with which one approaches interplay. For instance, the inherent 'quality' of IHL is that its

237 Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (n 65) 439.

238 Also using this example, see Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' (n 78) 209ff.

239 It may be noted the application of IHRL in this situation is not by definition more protective, as IHL prohibits the use of tear gas and the like. See Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' (n 78) 191, fn 18.

240 Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' (n 78).

application is limited to situations of armed conflict and occupation, and is therefore meant specifically to govern such situations. Nevertheless, if one approaches the issue from a different angle, namely that IHRL is meant specifically to protect individuals and human dignity, and if a situation concerns the protection of civilians from State authorities, then IHRL may very well be thought of as more specifically regulating such situations.

Ultimately, what is therefore clear under general international law and the ICJ's case-law, is that the principle of *lex specialis derogat legi generali* must be used to resolve normative conflict between IHL and IHRL. How to determine which rule is the more specific, however, does not flow from that case-law, and as Anja Lindroos explains, the principle is in this sense 'descriptive', and 'has little independent normative force'.[241] Moreover, no codification of the principle exists in international law, which means little guidance exists to establish how the distinction between the 'special' and the 'general' is best made. The lack of fleshed out criteria could in turn, according to Lindroos, open application of the principle up to subjective choices.[242] In order to render such choices more objective, criteria can be developed. A number of legal scholars have made contributions in this respect.

Oona Hathaway et al. have come up with five factors to take into account when deciding which norm is to be viewed as the most specific in the context of the interplay between IHL and IHRL: '(1) the wording and content of the norms themselves; (2) the nature of the norms in question, (3) whether a State exercises effective control, (4) expressions of intent by parties to relevant treaties, and (5) state practice.'[243] Interestingly, they have therefore formulated four factors which primarily depend on a *legal assessment*, and one of a more *contextual* nature. Only the question to what extent a State exercises effective control fully depends on context, and with regard to the first factor they also submit that the wording and content of a norm can determine the *lex specialis* where those are 'uniquely relevant' to the situation – which therefore requires an examination of both the norms themselves, as well as the situation to which they are applied.[244] All other factors, however, depend on a solely legal assessment. Helen Duffy has also found that the factors for deciding the *specialis*, must depend on a contextual element, the relevance or appropriateness of a rule to regulate the specific situation, and a purely legal element, looking at the wording of the norm itself, particularly how explicit, direct and precise the provision is.[245]

241 Lindroos (n 5) 66.
242 Ibid.
243 Hathaway and others (n 40) 1917.
244 Hathaway and others (n 40) 1913–23.
245 Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' (n 125).

Similarly, the *Practitioners' Guide to Human Rights Law in Armed Conflict* also provides a number of factors to help determine whether IHL or IHRL in a specific context constitutes the primary frame of reference. The Guide does so without explicit reliance on the *lex specialis* principle, as it proposes two frameworks regulating the co-application of IHL and IHRL: 'active hostilities' and 'security operations', with the former primarily regulated by IHL with a background function for IHRL, and the latter regulated the other way around, with IHRL as the primary frame of reference, and IHL functioning in the background.[246] The Guide proposes this distinction in order to move beyond the abstractions of the interaction between legal regimes as such, by looking at how the law must be applied in several practical situations, such as for instance the conduct of hostilities, use of weaponry, situations of detention, and investigations. It moreover does not apply *lex specialis* as such, as it proposes the two frameworks of active hostilities and security operations as applicable throughout interplay, not dependent on whether a normative conflict exists. Nevertheless, for situations where there *is* normative conflict, the model proposed by the Guide comes to the same result, that is an application of the law more specifically geared to regulate the situation, with a background role for the other – with such background role likely smaller where the law is in direct conflict and where the primary framework thus overrides the secondary framework.[247]

To determine whether a situation is governed by the framework of active hostilities or security operations, the Guide suggests this is to be

> 'determined in light of the existence of [1] explicit rules [2] which are designed for the situation under consideration. (…) In situations where a body of law establishes explicit rules *and* these rules are designed for the situation at hand, this body of law must constitute the primary framework. In other situations, where the applicability of certain rules is unclear, or where conflicting rules are brought into play, the situation will play an increased role, and the rules most closely designed for the situation will provide the primary framework.'[248]

To answer whether the rules are designed to govern a situation, regard must be had to (1) whether the situation concerns one of IAC, NIAC, or occupation, (2) whether there is active fighting going on, (3) the status of individuals concerned and their activities, and (4) the level of control the State has over the situation.[249] 'Active hostilities' then connote situations where IHL is the primary framework, due to the explicit rules of IHL applicable to a situation, such as is the case for status-based targeting in IACs, or the detention of

246 Murray and others (n 81) 88–92.
247 Murray and others (n 81) 103.
248 Murray and others (n 81) 88–9.
249 Murray and others (n 81) 89.

prisoners of war.[250] Because of the active fighting going on, for instance, IHL is then better fit to be the primary frame of reference. This is the other way around in the 'security operations' framework, which connotes situations which are more akin to regular law enforcement, although they take place against the background of an armed conflict.[251]

These two paradigms provide a useful tool for the determination of whether IHL or IHRL is *lex specialis* in a given situation. Nonetheless, they provide no absolute answers, and situations in which classification is difficult, may remain. It must further be stressed that the *Guide's* reliance on an 'active hostilities' framework must not be confused with the European Court of Human Rights' finding that no extraterritorial jurisdiction can be exercised during the 'active phase of hostilities' because in a 'context of chaos', the required control over territory or over persons cannot be exercised. The *Guide* in no way proposes that under an 'active hostilities' framework, IHRL does not apply – it merely looks to IHL as the primary frame of reference. Further, the *Guide* looks to the frameworks of active hostilities and security operations in order to contextually decide which norm must provide the primary frame of reference, which depends on a norm-by-norm and situation-by-situation assessment. The European Court, on the contrary, considered that it could distinguish the Georgian-Russian conflict in two phases which were neatly separated temporally: a phase of active hostilities, and a phase of occupation. Russia, the Court found, exercised extraterritorial jurisdiction during the latter phase, but not the former. This is very different from what the *Guide* proposes, and even if the Court did define what it means by a phase of active hostilities – which so far it does not – this must not be confused with the active hostilities framework which helps determine which norm is the *lex specialis*.

6.3.2.4 Conclusion

Whereas the application of *lex specialis* itself is by no means a solve-all solution, it also does not allow for arbitrary choices as to the prevailing norm based purely on normative preferences – as is sometimes suggested.[252] We have a number of factors to rely on when determining which norm represents *lex specialis* in a specific situation, which as Marco Sassòli summarises, depends on which norm has the larger 'common contact surface area' with a situation.[253] The analysis must be made on a norm-by-norm basis, with account being taken of both a purely legal element, as well as a contextual element.[254]

250 Murray and others (n 81) 90.
251 Murray and others (n 81) 91.
252 Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40).
253 Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (n 65).
254 Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' (n 125).

Generally, the norm which is both explicit and meant to regulate a specific incident, must be considered the *specialis*. Other factors listed largely serve to further clarify these two main categories, and illustrate through State practice or expressions of intent which norm States find to be the most specific and therefore applicable. Importantly, the level of control exercised by the State can shift the balance towards IHRL. By way of example, this means that if a State exercises sufficient control during a NIAC on its own territory, it will potentially need to carry out 'law enforcement' operations to capture insurgents, with stricter rules for the use of force, even though the law of NIAC would allow for the lethal targeting of such individuals. In case hostilities are increasingly active in such situations, IHL then takes over again as the primary framework which does allow for the direct targeting of such individuals. Thus, even though the norms regulating the use of force under IHRL and IHL remain the same, context decides which serves as the *specialis* in a specific situation.

Although the factors listed assist in fleshing out the application of *lex specialis*, normative choices remain to be made in deciding which norm is the more specific in a particular situation. Whereas part of the *specialis – generalis* equation can be solved in the abstract by looking at two applicable treaty provisions only, to see how explicitly and comprehensively they regulate a certain situation, the other part of the assessment is context-dependent. If it is determined what rule constitutes the *specialis*, this rule has precedence over the conflicting more general norm, though that general norm continues to apply and may guide interpretation of the special rule. Any meaningful assessment of interplay in case of normative conflict ultimately therefore depends on a contextual assessment of the applicable norms. The next chapter will do so for the duty to investigate.

6.4 Converging norms

In most cases where IHL and IHRL overlap there is no conflict between them – they are in harmony, and they converge.[255] In principle, the paradigm of convergence does not raise difficult issues of interplay, as States (and other actors) may simply apply both, without any tension arising between the two fields. For instance, insofar as human rights law guarantees the right to marry, simply complying with such right during armed conflict in no way raises any tension with IHL.[256] Application alongside one another is therefore the norm within the category of converging norms. An example of such application of norms of both regimes alongside one another, can be found in the ICJ's *The*

255 Milanović, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law' (n 73).

256 Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' (n 27).

Wall Opinion, and its judgment in *Armed Activities*. In both cases, which were discussed previously, the Court found that both IHL and IHRL were applicable, to go on and find violations of both. In *The Wall*, it found that the Israeli settlements in the Occupied Palestinian Territory breached international law, and then went on to list which norms of IHL and IHRL were violated – without engaging in a comparison of the two.[257] In *Armed Activities*, the Court similarly found that the killings, torture, destruction of villages and massacres perpetrated by Uganda clearly violated norms of both IHL and IHRL, and therefore applied both alongside each other.[258]

Nevertheless, even where norms of IHL and IHRL are in harmony, their concurrent interpretation sometimes more than simple application as one normally would, independently from the other legal regime. After all, that no tension arises, does not mean both fields require the exact same thing, and a fully harmonious application may require further harmonious interpretation. Such interpretation is based on the principle of systemic integration, as enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties. This provision provides, when it comes to the interpretation of treaty rules, that 'There shall be taken into account, together with the context: (…) (c) any relevant rules of international law applicable in the relations between the parties.' Systemic integration relies on the idea that there is a coherent inter-*national legal system and according to the International Law Commission, it requires treaty norms to be interpreted in light of other applicable rules of international law, as well as against the background of general rules making up the international legal system.[259] This means for instance that treaty rules must also be interpreted against the background of applicable custom, and that where two specialised treaty rules apply such as is the case in the context of IHL and IHRL, their interaction must moreover be examined in light of applicable custom as well as general principles of law.[260]

Examples drawn from the converging norms of interplay between IHL and IHRL can serve to make this a little bit more concrete. Where for instance IHL prescribes a fair and regular trial for criminal proceedings against civilians, such requirements must be interpreted and read in light of the IHRL fair trial standards.[261] Thus, whereas IHL and IHRL align and converge, systemic integration here requires IHL is read in light of the more specific rules of human

257 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 51) [120]-[137].

258 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (n 55) [206]-[221].

259 ILC Report 2006, p. 206-43, especially at 243.

260 ILC Report 2006, p. 232-9.

261 See also Droege (n 4); Greenwood (n 49); Milanović, 'The Lost Origins of Lex Specialis' (n 47).

rights law.[262] Similarly, where IHL explicitly prohibits the use of landmines, and where IHRL only generally protects the rights to life and physical integrity, such IHRL standards must be interpreted in light of the specific IHL requirements to include a prohibition on the use of landmines. Thus, systemic integration serves to mould converging rules of IHL and IHRL into a truly harmonious set of rules of conduct.

As these examples illustrate, also in this context of systemic integration, there is an aspect of reasoning based on the relationship between the general and the specific. More general, more vague, rules of IHL and IHRL are interpreted in light of more concrete provisions of the other field. As the ILC finds, systemic integration

> 'call[s] upon a dispute-settlement body – or a lawyer seeking to find out "what the law is" – to situate the rules that are being invoked by those concerned in the context of other rules and principles that might have bearing upon a case. In this process the more concrete or immediately available sources are read against each other and against the general law "in the background".'[263]

Insofar as the examples here are concerned, determining the 'specialis' depends only on the level of detail provided in the legal norm, not on the context as was stipulated above in the context of conflict resolution. Nevertheless, this relation between general and specific rules is often also typified as one of *lex specialis*,[264] which as was alluded to above, is one of the reasons why the ICJ's finding that *lex specialis* governs interplay has not resulted in an unambiguous understanding of interplay.

Lex specialis, in tandem with its function as a tool for conflict resolution, also functions as an interpretive tool.[265] In this context, it has been described as a principle of legal logic,[266] because it is an interpretive principle which is applied intuitively. When confronted with a case, lawyers always and necessarily determine the law which is most pertinent for the assessment of the case, which has become a natural part of the study and application of law. In my teaching experience, first year law students can find this confusing because from an ostensibly limitless number of rules which in some way or another are applicable, a *choice* is then made to decide which must be applied to the facts of the case. No clearly articulated rules exist to decide which rules apply *most pertinently*, yet experienced lawyers will seamlessly pick them out.

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262 Sassòli, 'Le Droit International Humanitaire, Une Lex Specialis Par Rapport Aux Droits Humains?' (n 70) 385–95; Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' (n 149) 72–8.

263 ILC Report 2006, p. 243.

264 See Marko Milanović' call for a clear articulation of *which* form of *lex specialis* one is invoking; Milanović, 'The Lost Origins of Lex Specialis' (n 47) 117.

265 ILC Report 2006, p. 54-9.

266 ILC Report 2006, p. 243.

In essence a selection takes place here which is based on the *lex specialis* principle, favouring the rules *most specifically meant* for a situation over more general rules which operate in the background, but which only come into play if the more specific rules for whatever reason do not provide a solution. *Lex specialis* is thus part and parcel of a lawyer's toolbox, already in any interpretation of the law or in the selection the relevant legal rules. In its role as a principle of interpretation, *lex specialis* signifies the relationship between general rules, and specific rules *which are a more specific iteration of the general rule for a certain context*.[267] In other words, in contradistinction with the role of *lex specialis* as described above as a tool for conflict resolution, as an interpretive tool, *lex specialis* governs relations between non-conflictual norms. Because application of *lex specialis* in this context in no way involves setting aside the general rule through a form of precedence or derogation, it must be strictly distinguished from *lex specialis* as a tool for conflict resolution. When it operates as a conflict resolution mechanism, *lex specialis* signifies an *exception* to general law, whereas as an interpretive tool, the *specialis* is a specific iteration of the *generalis*.[268]

In conclusion, where two norms of IHL and IHRL converge and are in harmony, they are in a mutually supporting relation and their relationship is governed by the principle of systemic integration. The two rules can thus be applied alongside one another, or interpreted in light of one another, to come to a fully harmonious interpretation and application of the rules. This does not give rise to particularly problematic issues, though it may require practitioners to deepen their knowledge and familiarity with the other field of law to ensure a truly harmonious interpretation – and to facilitate a coherent assessment of whether two rules are *genuinely* in harmony, or whether, perhaps, their application leads to some sort of tension.[269] In such cases, they are better examined from the perspective of normative *competition*.

6.5 Competing norms

In instances of normative competition, rules of IHL and IHRL do not conflict in the sense that they lead to contrary or contradictory opposing results, but their application nevertheless results in normative tension. This can be the case in several situations, primarily where IHRL regulates a situation and where IHL remains silent, but where the rationale of IHL, the object and purpose of IHL, would seem to pull in a different direction. As was explained above, the

267 See e.g. *A. and Others v United Kingdom* (n 112) [202].
268 ILC Report 2006, p. 21.
269 Cf. Hampson, 'Article 2 of the Convention and Military Operations during Armed Conflict' (n 33) 197.

applicability of tools for conflict resolution depends strictly on the existence of a conflict, meaning the normative tension exposed here cannot be solved by simply giving precedence to the one over the other, based on conflict resolution mechanisms. The simplest solution would of course be to simply apply IHRL, as this would not lead to a violation of IHL. By way of example, all internees in NIACs could simply be granted *habeas corpus* pursuant to IHRL, and any investigation can be conducted in full transparency as called for by human rights standards, without *violating* IHL in any way, shape, or form. Nevertheless, as was explained above, this may still cause *tension* with IHL, as military interests and necessity pull in a different direction, and because IHL at all times seeks to strike a *balance* between military necessity and other considerations, primarily humanitarian ones. This raises the question: does international law provide any way of alleviating the tensions in such situations, and to reconcile competing norms?

In the absence of tools for conflict resolution, the rules in situations of competition must fall in what the ILC calls the paradigm of 'relations of interpretation'.[270] This means that as principal means for reconciling the rules under IHL and IHRL, we must again look towards the principle of systemic integration and harmonious interpretation. Applying this principle, however, has its natural limits. In the interpretation of a treaty rule, it allows taking into account other applicable *rules of international law*. In other words, where IHL provides for a rule which competes with a rule of IHRL, systemic integration may then be used to harmonise such situations. For instance, where investigations are concerned – which is explored in-depth in the following chapter – IHL provides for a duty to investigate, but where investigative standards are concerned this does not fully coincide with IHRL, and arguably the application of human rights standards can cause tension with IHL and the balance it aims to strike with military necessity. Recall the *Jaloud* case, where human rights law required separating the highest in command from his troops to facilitate an investigation, whereas military necessity certainly pulled in a different direction.

Potentially, because IHL does provide a rule in this context, but one which does not specifically flesh out how States are supposed to investigate, systemic integration could be employed in this context to relieve normative tension. If, for instance, IHL's more general and unspecified duty to investigate is understood as granting a certain discretion to States in how they investigate, and thus as *permissive* of looser investigative standards, then such discretion must be accounted for in any exercise of harmonious interpretation. This, in turn, could prevent the discretion granted to States from being supplanted by IHRL investigative standards. In fact, if viewed as (implicitly) permissive, in its broad conception this could be viewed as constituting a normative

270 ILC Report 2006, p. 20ff.

conflict between an obligation and a negative permission (not to carry out an investigation conforming to all human rights standards). Thus, in situations where IHL provides for general rules, the balance of IHL can be preserved through systemic integration and potentially conflict resolution, if a conflict is brought to light.

Where this is different, are situations where IHL is completely silent. Here, there is no 'other applicable rule of international law' with which IHRL can be harmonised. Systemic integration therefore seemingly does not provide a way out of simply applying the human rights norm as is. In the example of *habeas corpus*, this would mean allowing all internees in NIACs *habeas corpus*, also if they are civilians taking a direct part in hostilities and may be interned for reasons of the conflict.[271] This exposes the limits of systemic integration:[272] no integration or harmonious interpretation is possible with a lack of regulation. I would submit there might nonetheless be a way to come to a balanced outcome in such cases, which leaves IHL's equilibrium intact: the principles of IHL.

The principles of IHL operate in the background and represent the framework of IHL.[273] Because, as the ILC puts it, international law relies on an 'informal hierarchy', the more specific treaty rules are always applied first, before the more general rules of custom, and finally principles of law.[274] Yet, the function of principles remains to guide the law, and in the words of Erik Koppe,

> 'Together [the] principles form a general and systematic legal framework and a frame of reference for the law of armed conflict. Most rules of the law of armed conflict, both conventional and customary, are reflections of these principles, give expression to these principles, or are the result of a compromise between these principles, in particular the principles of necessity and humanity.'[275] (references omitted)

Where there are no specific rules of IHL, or where the rules remain very vague, the principles can guide the interpretation of the law. Because the principles of IHL provide the framework for IHL, this could in fact be viewed as a form

271 It is assumed here that no customary rule of IHL regulates this particular issue.

272 At least insofar as situations are concerned where the argument that IHL provides a 'qualified silence' and intentionally leaves discretion for the State, is strained. Otherwise, if the IHL silence can be read as constituting a negative permission, mechanisms for conflict resolution may be applied.

273 See Chapter 2, §3.

274 ILC Report 2006, p. 233.

275 Erik Vincent Koppe, 'The Principle of Ambituity and the Prohibition against Excessive Collateral Damage to the Environment during Armed Conflict' (2013) 82 Nordic Journal of International Law 53, 57. Further, see Craig Eggett, 'The Role of Principles and General Principles in the "Constitutional Processes" of International Law' (2019) 66 Netherlands International Law Review 197.

of systematic interpretation – of interpretation of rules in light of the broader system of the legal regime.[276] This function of the principles of IHL is well-accepted.[277] The principles are commonly interpreted as guiding interpretation, though they can never as such set aside rules of IHL, which conforms with the ILC's conception of an informal hierarchy of norms: principles do not set aside rules.[278] Moreover, the Martens clause makes explicit that in case IHL is silent, the principles of IHL have a role to play: 'civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'.[279]

If applied to the specific situations at issue here, where IHL is vague or silent, and IHRL provides more detailed rules, the following line of reasoning may apply. Vague, indeterminate rules of IHL must normally be interpreted in light of the principles of IHL.[280] Thus, when engaging in systemic integration with human rights norms, it makes sense to take account of the principles of IHL as providing guidance to interpretation and as safeguarding the object and purpose of IHL. Because the principles function in the background of the IHL system, there is no reason why they could not come to the fore when the specific rules do not regulate a situation, or do not do so in a detailed manner. The Martens clause makes this explicit. Such an approach could moreover mitigate tensions arising between IHRL and IHL, because by viewing the principles of IHL as direct sources of law which can provide interpretive guidance to the interpretation of norms of IHRL, a nuanced and well-rounded solution can be reached for situations of normative tension.

An important pillar of support for the suggested approach is the case-law of the ICJ, especially in the *Corfu Channel* case. There, the Court clearly envisioned principles of law applicable throughout international law, the contents of which can vary depending on the specific context. In having to decide on the responsibility of Albania for mines found in the Channel, the Court made reference to 'elementary considerations of humanity, even more exacting in peace than in war',[281] which illustrates the Court's view of the principle of humanity (as it is contemporarily referred to) as a permanently applicable

276 In line with VCLT, art 31.

277 E.g. Kolb (n 148) 75.

278 Mary Ellen O'Connell, 'Historical Development and Legal Basis' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press 2013) 36–7.

279 As quoted from the modern version of the Martens clause, enshrined in AP I, art 1(2). See also the Preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land. See Chapter 2, §3.

280 Koppe (n 275) 64; Kolb (n 148) 75. See also ILC Report 2006, p. 234: 'parties are taken "to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way"', referring to *Georges Pinson* case (France/United Mexican States) Award of 13 April 1928, UNRIAA, vol. V, p. 422. Further, see Chapter 2, §3.

281 *Corfu Channel case*, Judgment (9 April 1949), *I.C.J. Reports* 1949, p. 4, p. 22.

principle of law. If the principle of humanity is permanently applicable, in a more or less exacting manner depending on context and because of the countervailing interest of military necessity during armed conflicts, then it makes sense that the 'considerations of humanity' underlying human rights law can during armed conflicts also be balanced with other applicable principles of law. None of this is to say that rules of IHRL may simply be set aside by principles of IHL – as is universally accepted amongst IHL lawyers, principles cannot set aside rules.[282] Where IHRL, however, allows flexibility, and where IHL ostensibly provides little by way of explicit rules but where principles of IHL would compete with the normal application of IHRL, then the inherent flexibility of IHRL can be used to make sure that its 'even more exacting' considerations of humanity sufficiently account for countervailing principles of IHL. Others have also advocated relying on the flexibility of IHRL to come to a contextual approach which takes account of the factual circumstance of armed conflict,[283] to which my approach adds a further *legal tool* to come to balanced solutions.

A potential stumbling-block in this approach, is whether the principle of systemic integration strictly speaking allows for the interpretation of treaty rules of one body of law, in light of principles of the other. After all, Article 31(3)(c) VCLT refers to 'any relevant *rules* of international law applicable between the parties' (emphasis added), which may guide interpretation. Rules can be principally distinguished from principles,[284] which could be taken to mean that systemic integration is meant to remain limited to harmonisation with *rules* of international law. According to the ILC, this ought not to pose a problem. General principles of international law, as well as general principles of law recognised by civilized nations, according to the ILC, apply generally and *ipso facto* provide the framework and background against which rules are interpreted.[285] Article 31(3)(c) VCLT is not needed to provide a legal basis for this. Especially if the principles of IHL are considered to be principles of international law and therefore an autonomous source of international law,[286] their application is automatic and not conditioned on a treaty rule. Even under the Article 31(3)(c) VCLT itself, moreover, it has been submitted that the reference to 'rules' notwithstanding, it allows for the interpretation of treaty rules in light of principles and general principles of law.[287]

282 See Chapter 2, §3.
283 E.g. Helen Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' in Helen Duffy, Janina Dill and Ziv Bohrer (eds), *Law Applicable to Armed Conflict* (Cambridge University Press 2020) 77ff.
284 See Eggett (n 275) 202–4.
285 ILC Report 2006, p. 243.
286 Under ICJ Statute, art 38; see Koppe (n 275) 62.
287 McLachlan (n 14) 313.

The practical solution arising from the use of principles of IHL in systematic integration, is that where IHL is indeterminate or silent, but nevertheless pulls in a different direction than IHRL, IHRL is then 'balanced with', interpreted in light of, the principles of IHL. Where IHL does not provide clear rules, the reason tension can nevertheless arise, is to be found in the underlying rationale and the objects and purposes of IHL. These are, in fact, precisely represented by the principles of IHL. Thus, when balanced with these principles, a nuanced and balanced approach to interplay in case of normative competition can be reached. This way, the application of human rights law, which in large part conforms to the principle of humanity, can be balanced with the countervailing principle of military necessity. The inherent flexibility which is often part of human rights law, can then be utilised to accommodate to a certain extent the tension with the principles of IHL. This should take the edge off situations of competition and reconcile IHL and IHRL in such situations. If this exercise should bring to light a genuine normative conflict, recourse can then be had to the tools for conflict resolution as discussed in section 6.3.

7 Conclusion

This chapter has explored the interplay of IHL and IHRL from a public international law perspective, because as both IHL and IHRL are branches of international law, their interaction must also be regulated by that legal regime. It was found that the international legal system regulates the interaction between various legal regimes based on whether they conflict, converge, or potentially compete. A careful contextual analysis, on a case-by-case basis, can thus solve complex issues of interplay when it comes to the primary addressees of international norms, States. State action where both IHL and IHRL apply must be guided by a thorough understanding of interplay deriving from the interaction of norms under international law. This way, States can conduct military operations in compliance with all their obligations under international law, under both IHL and IHRL.

Interplay gives rise to complex issues, which has also spawned a wide-ranging debate in legal scholarship. This Chapter makes four proposals for a way forward.

First, a methodology was developed to decide how IHL and IHRL interrelate in a specific situation, and relating to a specific incident. This involves (1) a determination of whether both regimes indeed apply in a specific situation and to a specific incident. If they do, (2) the existence and operation of a conflict clause must be explored. If a conflict clause does not resolve the issue or if no conflict clause is in operation, the third – crucial – step (3) is to assess whether the various applicable norms of IHL and IHRL conflict. (4) If they do, resort must be had to methods of conflict resolution, in particular *lex specialis*.

If they do not, the overlap may be solved through harmonious interpretation and systemic integration, pursuant to Article 31(3)(c) VCLT. How to do so precisely, however, depends on whether the relevant norms of IHL and IHRL are 'genuinely' in harmony, or whether they are rather in a relationship of competition.

Second, it is submitted that contemporary practice defines normative conflict in such a narrow way that it is of no use for the resolution of actual normative tensions. Based on legal theory, it was therefore argued to widen this definition, so that it encompasses conflicts which lie at the heart of the tensions between IHL and IHRL: those between obligations or prohibitions on the one hand, and permissions on the other. It was shown that as a matter of deontic logic, conflicts between a positive permission and a prohibition, such as exists between the IHL permission to use lethal force based on status alone and the IHRL prohibition to use lethal force unless strictly justified, must be considered as normative conflicts. If such conflict indeed exists, the *lex specialis derogat legi generali* principle regulates which norm must be given precedence. Importantly, whether IHL or IHRL constitutes the *lex specialis*, depends on both a legal analysis of the norms at issue, as well as on a contextual analysis of which norm was meant to regulate the specific situation and incident at issue.

Third, a category of *normative competition* was proposed, to add to the paradigms of conflict and convergence. It was shown that even if no normative conflict exists, this does not mean that IHL and IHRL genuinely drive in the same direction. Especially where IHL is silent on an issue, it may nonetheless militate against the simple application of IHRL. In such situations, the principle of systemic integration can guide an interpretation which strikes a balance between a norm under IHRL, and the interests of IHL. To do so, it was proposed that the principles of IHL can play an important role in the interpretation of the inherent flexibility which is part of most human rights norms. This allows for a legal tool for the harmonious interpretation of both regimes, in addition to the contextual interpretation of IHRL which already takes account of the factual circumstance of armed conflict.

Finally, it is proposed that in situations of normative convergence and harmony, both regimes are simply applied alongside each other – and where necessary interpreted in light of one another based on the principle of systemic integration. This conforms to contemporary practice by for instance the ICJ.

The step-by-step methodology for resolving issues of interplay has necessarily remained abstract – meant as it is to provide a guide for all instances of interplay. A more concrete determination of what is required of States under the interplay of IHL and IHRL, requires an analysis of specific norms. Chapter 10 aims to do so in the context of the duty to investigate.

10 The duty to investigate under the interplay of IHL and IHRL

1 Putting together the pieces of the puzzle: a roadmap

This Chapter puts the pieces of the puzzle together. It synthesises the research results in the previous Chapters by conducting a comparative analysis of the duty to investigate under IHL and IHRL, and by analysing those through the methodology for interplay developed in Chapter 9. Chapter 9 showed that a proper understanding of interplay ultimately hinges on the existence, or not, of normative conflict between the various applicable norms of IHL and IHRL. A comparative analysis of the scope and contents of the duty to investigate under IHL and IHRL is therefore carried out, to assess to what extent they diverge, and to what extent they conflict.

As was explained in the previous Chapter, the relationship between IHL and IHRL ought not to be evaluated on the level of these legal regimes as such, but rather on the level of specific norms. This is put into practice by taking a closer look at those norms prescribing a duty to investigate. The key to determining how a situation of interplay unfolds in practice, is to ascertain whether the norms are in harmony, or whether they are rather in conflict or competition. To ascertain such, an examination of the applicable *legal norms* is required. Only once this has been done, does the specific context of a case, in other words the broader situation and the specific incident in question, play a role. As was shown in the previous Chapter, such contextual factors come into play in instances of normative conflict, to decide which norm is the *specialis* which must take precedence.

This Chapter must therefore show whether the duties of investigation as they flow from IHL and IHRL conflict, converge or compete. Even when already looking at the level of individual norms, however, care must be taken to take a sufficiently nuanced approach to any potential conflict between them. As was shown in the previous parts of this research, a meaningful examination of the duty to investigate requires one to distinguish between the duty's scope and the investigative trigger (§3), and the applicable investigative standards (§4). This separating out of the various aspects of investigations is equally

important when assessing whether any potential conflict between the IHL and IHRL duties of investigation exists.[1]

To illustrate, if a conflict potentially exists regarding the independence of investigations, this would not merit the conclusion that 'the IHL and IHRL duty to investigate conflict' in their entirety – and thus that if IHL were *lex specialis* the IHL duty to investigate in all its aspects takes precedence over that under IHRL. If the conflict is limited to one aspect of investigations, or to one investigative standard, then only on this particular point does *lex specialis* regulate the resolution of the normative conflict. In our example, the precedence of IHL over IHRL would likely only concern the requirement of independence.

All this means that even when the *lex specialis* approach is applied only on the level of norms (rather than regimes), even then further specification may be required to decide what element of norms conflict, and how this must be resolved. As was explained in Chapter 9, even once *lex specialis* operates to resolve a conflict of norms, the *lex generalis* remains operative and regulates a situation from the background. No full displacement therefore occurs, and a detailed examination is always required. This also means that in examining whether the duties of investigation under IHL and IHRL conflict, converge, or compete, a distinction must be made between the various aspects of the duty to investigate: the scope, the trigger, and the standards.[2]

2 The aims of investigations under IHL and IHRL

As a precursor to the detailed comparison between investigative obligations under IHL and IHRL in the subsequent section, the aims of investigations are first briefly compared here. Parts I and II of this study have shown an important convergence with respect to such aims.

Under IHL, investigations are firstly an important mechanism for the effectiveness of the legal regime. There is no institutionalised international oversight, nor is there another external enforcement mechanism for States. This largely renders IHL dependent on States' own efforts to comply with the law, and to monitor to what extent their military operations and structures conform to it. In this respect, investigative mechanisms are meant to ensure a lessons-learned process, to put a stop to violations, and to uncover systemic shortcomings – in other words, to 'ensure respect' for IHL for the purposes of

1 They are the elements of comparison required for a comparative approach, see Chapter 1, §3.2.2.

2 Making a similar distinction, see Alon Margalit, *Investigating Civilian Casualties in Time of Armed Conflict and Belligerent Occupation. Manoeuvring between Legal Regimes and Paradigms for the Use of Force* (Brill Nijhoff 2018) 80.

Common Article 1 of the Geneva Conventions. Also after they have implemented most international obligations into their domestic legislative and operational systems, have ingrained IHL in their militaries through training, and have adapted their military manuals, rules of engagement and the like, there remains a necessity to follow-up on such means of implementation. States must know the *consequences* of their military operations. After all, gauging compliance and keeping track of whether the law may have been violated is impossible without knowledge of what has been going on the ground. They therefore need to set up and institutionalise ways of monitoring the actions of their armed forces and reviewing them. A solid mechanism for monitoring and supervision requires it to be institutionally imbedded into the system, and requires the setting up of a procedural oversight mechanism. Such review and oversight are already embedded into many military systems because armed forces have a great interest in gauging the effectiveness of their operations. In the context of the duty to investigate, these further need to be coupled with a legal assessment of compliance with IHL. Finally, keeping tabs on the consequences of military operations on the ground will bring to light any potential systemic issues which hinder compliance, and which can be remedied on the basis of the outcomes of monitoring and investigation exercises.[3]

A second purpose served by investigations under IHL is to ensure accountability for violations. It is about making sure that those responsible are held to account – be it through measures geared towards individuals (such as disciplinary measures, reprimands, dishonourable discharge, or criminal proceedings), or towards the State (State responsibility and broader accountability structures, for instance aimed at making known the truth). In case of grave breaches and other war crimes, this will necessarily imply criminal prosecution of perpetrators. In case of 'simple', non-serious breaches, other forms of accountability such as disciplinary measures may suffice, in addition to the acknowledgement of State responsibility. When implementing its obligations, States set up the legislative framework and procedural mechanisms which allow for monitoring and investigations to take place. Once there is information that a violation has potentially occurred, this broader legislative framework and procedural mechanism must be applied in the case at hand, which will provide the basis for further accountability processes where appropriate. Criminal accountability processes, or reparations procedures, can then have their proper course.

Under IHRL, the duty to investigate similarly aims to render rights practical and effective. Like under IHL, this requires States to enact legislation which criminalises offences against these rights, and to set up an investigative mechanism and machinery in order to investigate, and where appropriate prosecute

3 Françoise J Hampson, 'An Investigation of Alleged Violations of the Law of Armed Conflict' (2016) 46 Israel Yearbook on Human Rights 1.

and punish such offences. The effectiveness of rights hinges on such procedures, as they ensure that potential violations are investigated and addressed domestically. Proper implementation of human rights obligations requires here too that States train their police forces so they are aware of, and comply with, the rules regarding *inter alia* the use of force. A complicating factor under human rights law, however, is that States must also investigate violations committed by third parties.[4] If there is a suspicion that a death did not have natural causes, the State will need to investigate regardless of the question whether a State agent is implicated. This also means that training and monitoring its own agents is just one strand of the State's obligations; it will necessarily also need a proper investigative mechanism, and effectively investigate, when there arises any credible information or any arguable claim of an infringement, also when caused by private parties.[5]

The second purpose served by investigations is bringing perpetrators to justice, advancing accountability, and combating impunity. For many human rights violations or abuses, this will require criminal investigation and prosecution. Such accountability is important both for individual victims, and for fighting a broader culture of impunity. Beyond criminal accountability, investigations may also serve to ensure accountability in other fora. Especially where information with respect to a violation is in the hands of the State, an investigation will be a condition for victims to be able to effectuate any other remedies.

Third and closely related, is the purpose of ensuring victims have an effective recourse to domestic remedies, and can obtain reparation. Investigations are an essential element thereof, because victims will often not be in a position to establish the facts themselves with respect to the use of force by State agents – especially so during armed conflict. Especially when considering the establishment of the facts and the truth of what happened as both a perquisite for, *and* an element of accountability, investigations serve an essential purpose in this respect.

The purposes and rationale of the duty to investigate are therefore very similar under IHL and IHRL. Investigations fulfil a highly similar function in ensuring

4 *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, HRC 30 October 2018, CCPR/C/GC/36 [21]; *Alemán Lacayo case* (Provisional Measures) Inter-American Court of Human Rights Series E No 1 (2 February 1996); *Tahsin Acar v Turkey*, ECtHR [GC] 8 April 2004, Appl No 26307/95 [220]. See Chapter 8, §1.4.

5 For the sake of completeness: the investigation here might not as such target a 'violation' of IHRL. If we stick with our example of the right to life, if the death in question, caused by a third party, was completely unforeseeable, then the State was not under an obligation specifically to prevent it. No violation of the *right to life* thus took place, though a violation of *life* certainly did. The duty to investigate in such case thus attaches to the interference with the interest or value protected by a right, rather than the right itself.

the effectiveness of the system, and in achieving accountability for violations. This is a strong indication that there is no incompatibility as such between the duty to investigate under IHL and IHRL, and it may rather be thought that because they serve the same aims, the obligations under IHL and IHRL mutually reinforce one another in this respect.

Insofar as tensions do arise between the investigative obligations under both regimes, this then has to do with a divergence in the *substance* of the law: where the scope of the obligation diverges because IHRL prohibits and requires investigations into certain behaviour, whilst IHL permits such behaviour and therefore does not require an investigation, and where both impose diverging standards with respect to *how* an investigation must be conducted.

3 SCOPE AND TRIGGERS OF THE DUTY TO INVESTIGATE UNDER INTERPLAY

3.1 Introduction

The scope of the duty to investigate is a hot topic where IHL and IHRL potentially diverge, and where issues of interplay arise. The scope of the duty to investigate under the interplay of IHL and IHRL is determined through a comparative analysis. Determining the material scope of applicability of the duty to investigate ultimately comes down to establishing violation of which norms brings with it a corresponding duty to investigate that violation. Thus, the scope of application of the duty to investigate is heavily interlinked with substantive law, in other words, with the question whether an incident violated the law. Issues of interplay under substantive law, and the lack of clarity regarding rules of conduct where both IHL and IHRL apply, thus seep into the debate on the duty to investigate under interplay. This issue is addressed in section 3.2, where it is explained how substantive law relates to the procedural obligation to investigate. The subsequent sections (§§3.3-3.4) then take a closer look at where the duties of investigation under IHL and IHRL converge, compete, or conflict. This includes an examination of situations where IHL and IHRL appear to converge because both require investigation, but where they in fact may conflict or compete, because IHRL requires a criminal investigation geared towards establishing accountability, while IHL requires a compliance-geared investigation, but no criminal accountability. This in a sense anticipates already the discussion in section 4, which considers investigative standards applicable under both regimes. Before moving on to that issue, however, section 3.5 addresses what knowledge on the part of State authorities triggers the duty to investigate.

3.2 The relationship between the duty to investigate and substantive issues of interplay

3.2.1 Interplay and substantive law

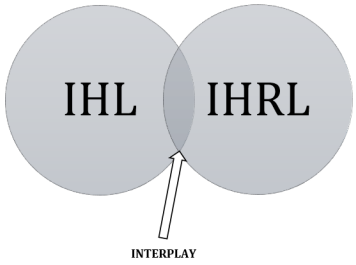
In Chapter 9 of this study, the various modalities of interplay were examined. It was concluded that rules of IHL and IHRL can converge, conflict, or compete. In these latter two scenarios, they vie for precedence due to normative tensions or outright conflict between them; in the former scenario the rules can be interpreted in harmony.[6] The primary examples of each of these paradigms of normative overlap concern issues of *substantive law*. Recall for instance the conflict and competition between the IHL system of status-based targeting for the use of lethal force, and IHRL's insistence on respect for anyone's right to life, limiting the use of lethal force to stringently interpreted exceptions which can render a deprivation of life not arbitrary. This major example of divergence of IHL and IHRL concerns *regulation of the same conduct, differently*, and is in other words an issue of substantive law. Substantive law, given this study's focus on the procedural duty to investigate, is not at the heart of our attention. How precisely to resolve conflict and competition between the rules governing lethal force, for instance, falls beyond the scope of this research.

Nonetheless, the procedural obligation to investigate is not self-standing, it is *accessory* in the sense that only (potential) violations of some other primary obligation require an investigative response. Substantive law therefore feeds into the duty to investigate as the *trigger* for investigations: a potentially *unlawful* use of lethal force requires an investigation, which means that how one interprets the interplay of the substantive rules governing the use of force determines whether an investigation into a death is required. Substantive law is therefore most certainly of relevance for determining *the scope* of the duty to investigate. Moreover, which rule of substantive law was violated may be reflected in the *standards* investigations must meet. IHL attaches quite different consequences to war crimes, which require a criminal investigation, as compared to simple violations, where States are largely free to decide how they shape their investigations. On the whole, therefore, whereas issues of substantive law do not lie at the heart of this research project, they must have their proper place.

The following aims to clarify the relationship between substantive law, and the interplay of IHL and IHRL in that context, with the procedural duty to investigate. In order to map the scope of the duty to investigate, and thus whether IHL and IHRL converge or diverge, it may be useful to visualise these situations of interplay as presented in the figures below.

6 See Chapter 9, §4 and §5.

Figure 6: Substantive law during armed conflict



As figure 1 shows, IHL and IHRL can be viewed as partly overlapping bodies of law. Both legal regimes apply at the same time, and partly also regulate the same conduct. The darker part in the figure, where both circles overlap, is then where 'interplay' occurs. As the figure also shows, the area of overlap is relatively slim: most subjects are regulated exclusively by the one or the other. After all, any IHL rules which do not pertain to individual protection normally do not have an equivalent under IHRL. IHRL similarly regulates many issues which simply do not have a counterpart under IHL, such as the right to marry, the right to respect for private life, and the right to free elections.[7] This moreover does not even take into consideration that IHRL applies also in the absence of armed conflict, instances in which IHL does not apply, and where there is therefore no co-application or interplay at all. Thus, when IHL and IHRL are visualised as conjoining circles, there is certainly overlap between them, but there remains a larger area where they govern autonomously.

It was concluded in Chapter 9 that 'interplay' does not concern one coherent and unambiguous whole; it is indeterminate and any proper understanding of interplay hinges on an assessment of how overlapping norms interrelate on a case-by-case basis. The rules of both regimes interact in a variety of ways, with the precise outcome dependent on context.

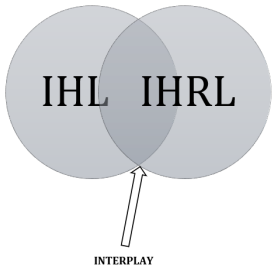
3.2.2 Interplay and the procedural duty to investigate

When it comes to procedural obligations, the overlap between IHL and IHRL is more pronounced. Both regimes insist on effective investigations into violations, and where both fields regulate certain conduct, both often point in the

7 Lawrence Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' in Eirik Bjorge and Mads Andenas (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015).

direction of investigation. There is thus clear convergence between IHL and IHRL on the point of the duty to investigate.

Figure 7: The procedural duty to investigate



Looking in more detail, human rights law contains clear investigative duties when it comes to violations of i) the right to life, and the right not to be subjected to ii) torture, cruel, inhuman and degrading treatment, iii) slavery and forced labour, iv) enforced disappearance and unacknowledged detention, and v) genocide.[8] If such a violation had a discriminatory motive, this aspect must also be part of the investigation.[9] Potential violations of these rights must be effectively investigated by the State, of their own accord. Because violations of core rights are the focal point of the duty to investigate under IHRL, most conduct violating these rights will equally violate IHL when committed during armed conflict. There is no question that torture, enforced disappearance, and genocide are equally prohibited under IHL, constitute war crimes, and are subject to investigative obligations under IHL.[10]

Yet, there remain large areas where investigative duties arise exclusively under IHL, or exclusively under IHRL. IHL, for its part, requires investigation into *any* violation of that body of law, no matter how serious, or how trivial. Because it is also a very technical field of law, this means that in quite a few cases it sets rules and requirements which have no direct bearing on human rights. Examples include the rules on the use of the distinctive emblem of the ICRC, the prohibition of perfidy, and the requirement that all soap and tobacco must be sold to POWs at local market price. If violated, IHL requires an investigation, with no counterpart under IHRL, clear and simple. IHRL similarly requires investigations into violations which do not under IHL. Examples include investigations into deaths which are the result of lawful acts of war,

8 See Chapter 8, §1.4. There is no reason of principle investigative duties are limited to these rights, though human rights jurisprudence thus far sticks primarily to these core rights having to do with physical integrity and freedom.

9 See Chapter 8, §1.4.

10 See the grave breaches provisions, artt 50 GC I; 51 GC II; 130 GC III; 147 GC IV; and 85 AP I; and ICC Statute, art 8.

and certain instances of slavery, human trafficking or forced labour which are not covered by the IHL rules on putting POWs and civilians to work.[11] Further, 'regular' human rights violations with no nexus to the armed conflict may not be governed by IHL, but still require an investigation under IHRL. For example, a death resulting from a poorly planned but otherwise regular police operation, may certainly amount to a violation of the right to life and thus require an investigation, while IHL does not govern the use of force in this situation despite the existence of an armed conflict at the time.[12] Finally, the Inter-American Court and Human Rights Committee have hinted at broader duties of investigation concerning all rights, and the European Court's case-by-case approach equally does not exclude broader investigative obligations without a counterpart under IHL.[13]

As is explored in-depth in the subsequent sections, when it comes to the scope of the duty to investigate, there are roughly three situations of interplay. One where IHL requires an investigation but IHRL does not, one where IHRL requires an investigation but IHL does not, and one where both IHL and IHRL require an investigation.[14] These three situations cut across the paradigms of normative convergence, conflict or competition – and care must be taken not to assume that where both regimes require investigation there is convergence, and that where only one of the two does, there is conflict or competition. A more nuanced approach is necessary. To illustrate, when looking more in-depth at the situation of overlapping investigative duties, variations occur. In a number of cases, the obligations will likely be very similar, because when a violation of the right to life also constitutes a war crime, both IHL and IHRL call for criminal investigation. In other situations, IHRL may require a criminal investigation, whereas IHL requires a more compliance-geared investigation. An example could be deaths caused by an air strike which was based on incomplete information. Under IHRL, when State agents cause loss of life, an investigation is warranted, and this must moreover principally be a criminal investigation.[15] Under IHL, the situation described likely constitutes a violation of the duty to take precautionary measures, but if there were no other de-

11 For POWs, see GC III, arts 49-57; see further Silvia Sanna, 'Treatment of Prisoners of War' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (Oxford University Press 2015) 1002–6; Nils Melzer, *International Humanitarian Law. A Comprehensive Introduction* (1st edn, International Committee of the Red Cross 2016) 185. For civilians, see GC IV, arts 40 and 51; see further Marco Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019).

12 Cordula Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Israel Law Review 310, 346; Daragh Murray and others, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford University Press 2016) 113.

13 See Chapter 8, §1.4.

14 The fourth situation where neither requires investigation is not discussed.

15 See Chapter 8, §1.5.

ficiencies or indications of the attack having been intentionally directed against civilians, there will be no need for a criminal investigation because violations of the principle of precautions in attack do not amount to war crimes.[16] All three situations are explored further in the subsequent sections, subdivided by their raising issues of convergence, conflict, or competition.

An important point to make here is that not all situations which raise controversy under the substantive rules of interplay, also lead to difficulties when it comes to the procedural duty to investigate. Whereas one of the major fields of controversy and potential conflict between the substantive rules of IHL and IHRL relates to detention and the right to liberty,[17] this appears to have limited effects under the procedural duty to investigate. Reason for this is that thus far IHRL has primarily required investigation into *enforced disappearances and unacknowledged detention*, not 'simple' violations of the right to liberty.[18] The divergence regarding whether detention is allowed for reasons of the conflict only or not, thus likely does not lead to difficulties when it comes to the duty to investigate, because even if detention solely for reasons of the conflict were to violate IHRL (but not IHL), such a violation of the right to liberty does not require investigation.

In sum, the scope of the duty to investigate is closely interlinked with substantive law. Clearly outlining the scope of the duty to investigate under interplay therefore requires a look also at substantive norms, and the way interplay works out for those norms. The following sections engage with these issues.

3.3 Convergence in the scope of investigative duties

Let us now return to the scope of the duty to investigate under the interplay of IHL and IHRL. The main narrative regarding investigations during armed conflict focuses on divergence and normative conflict, and the perceived lack of realism of requiring human rights investigations during armed conflicts. Nonetheless, as this section will show, the majority of cases which require an investigation under IHRL, also do so under IHL. And often, even in the absence of an investigative counterpart under IHL, a duty to investigate a human rights violation does not conflict or compete with IHL. In other words, despite aca-

16 Wilful killing and indiscriminate attacks do constitute war crimes, but a lack of precautions does not. See AP I, art 57 and 85.

17 Together with the right to life and regulation of situations of occupation, see e.g. Marko Milanović, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford University Press 2011).

18 See Chapter 5, §4.2; Chapter 6, §4.2; Chapter 7, §4.2; Chapter 8, §1.4. Further, see Krešimir Kamber, *Prosecuting Human Rights Offences. Rethinking the Sword Function of Human Rights Law* (Brill 2017) 330–1.

demia's strong focus on divergences between IHL and IHRL, when it comes to the scope of the duty to investigate, there is in large part convergence. It must be pointed out, however, that human rights law develops on a case-by-case basis, and that the scope of the duty to investigate may therefore be expanded in future. This could give rise to new tensions and competition not yet covered in this study.

Convergence and harmony between IHL and IHRL regarding the scope of investigative duties, can concern all three situations of overlap distinguished above – those where 1) both IHL and IHRL require an investigation because the same conduct violated substantive norms of both regimes, or where 2) only IHL, or 3) only IHRL requires an investigation. Below follow examples for all three situations.

First, if the same conduct gives rise to a violation of both IHL and IHRL, and both require an investigation, the two are in harmony – at least insofar as the *scope* of the duty to investigate is concerned. This is for instance the case for wilful killings of civilians, which clearly violate both IHL and IHRL, and which must be investigated under both. Another example would be standards of treatment for detainees, with both IHL and IHRL setting standards, and requiring investigations into violations thereof. In such cases, where IHL and IHRL require the same from States, and where they both attach investigative obligations to violations of the law, they are in harmony as it was defined in the previous Chapter: 'Convergence between IHL and IHRL can be observed where norms of these bodies ultimately drive in the same direction. In such situations, both norms strive to achieve largely the same aim – though sometimes in different ways – with no conflict between them.'

Second, if IHL does require an investigation but IHRL does not, this will not normally give rise to any conflict or competition between them. As an example the perfidious use of the ICRC's distinctive emblem again comes to mind, which constitutes a violation of IHL, but not of IHRL. When an investigation into such conduct is instigated, this raises no tensions with human rights law. After all, so long as IHRL does not implicitly or explicitly *permit* certain conduct (the perfidious use of the emblem), it does not conflict with IHL's prohibitions and corresponding investigative obligations. Human rights law does not principally affect States' discretion to criminalise or otherwise regulate conduct which does not impinge upon human rights, so if States choose to criminalise violations of IHL, they are well within their rights from a human rights perspective. Of course, such investigation will need to respect human rights.[19] Moreover, when IHL requires non-criminal investigations, this will normally have a limited impact om human rights, so human rights standards

19 On this, see Stefan Trechsel, *Human Rights in Criminal Proceedings* (Sarah J Summers ed, Oxford University Press 2005).

may be less demanding or even not at all applicable.[20] Considering once again the example of the sale of tobacco and soap to POWs above local market price, the non-criminal investigation required under IHL will in no way give pause under human rights law,[21] meaning that the duty to investigate under IHL is in harmony with IHRL's silence on this point. The substantive divergence between IHL and IHRL does not lead to tensions, because IHRL remains neutral towards such regulations and investigations. This is an important finding, because as was concluded previously, IHL requires investigations into each and every violation no matter the severity, and the many technical regulations of IHL often have no direct counterpart under human rights law.

Third and finally, conduct may violate and require investigation under IHRL, but not under IHL. This *can* give rise to conflict or competition between the two where IHL (implicitly) permits that conduct, but this is not necessarily so. For instance, IHRL has more extensive rules on the prohibition of slavery and forced labour, which when violated require investigation.[22] Even though IHL does not contain an explicit prohibition of slavery, at least not in *lex scripta*,[23] rule nor *ratio* of IHL militates against investigating instances of slavery. Clearly, also, IHL most certainly does not permit slavery, meaning there is no conflict or competition here, and IHRL's duty to investigate slavery is in harmony with IHL.

Most other conduct which violates IHRL but not IHL, has not yet been held to entail a duty to investigate. So far, therefore, these do not raise issues with respect to investigations – although this may change subject to developments in the case-law. Examples of this category of conduct concern, for instance, issues where IHL and IHRL are in a relation of harmony in any case, for instance concerning the right to freedom of expression, and the right to marry. IHL does not regulate these issues, and their application is not at odds with either rules or object and purpose of IHL, which means they can be applied without trouble. If they are nonetheless violated during armed conflicts, this does not normally require States to investigate, because the duty to investigate under IHRL is not

20 The applicability of the right to a fair trial is limited under the ECHR to civil and criminal proceedings, and thus not applicable to administrative proceedings; see ECHR, art 6. This is not the case under the ACHR; see ACHR, art 8.

21 Any coercive measures which interfere with human rights, such as the right to privacy, will of course need to meet human rights standards.

22 See Chapter 5, §4.2; Chapter 6, §4.2; Chapter 7, §4.2; Chapter 8, §1.4.

23 The ICRC has discerned a customary prohibition of slavery applicable in both IAC and NIAC, see Rule 94 in Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *ICRC Customary International Humanitarian Law – Volume I: Rules*, vol I (Cambridge University Press 2005). The Rome Statute of the ICC does not recognise slavery as a war crime (sexual slavery only), though it does criminalise 'enslavement' as a crime against humanity; art 7(1)(c), 8(2)(b)(xxii) and 8(2)(e)(vi).

normally applied when these rights are violated.[24] In fact, there may even be a situation of harmony with respect to issues which *do* lead to conflict under the substantive rules of IHL and IHRL. It was already explained above that despite the conflicting rules under IHL and IHRL regarding detention, when it comes to the duty to investigate, both legal regimes appear to be in a relationship of harmony. Even if lawful security detention under IHL violates the human right to liberty, this has not yet been found to require States to investigate and punish, because the duty to investigate in this context has thus far been applied to cases of *enforced disappearance* and *unacknowledged* detention. Even in this situation of clear-cut conflict between IHL and IHRL on substance, then, there is no conflict with respect to investigative obligations – at least so long as human rights courts and treaty bodies do not expand their case-law in this respect.

Hence, in all three situations of 1) overlapping duties of investigation, and exclusive investigative obligations under 2) IHL and 3) IHRL, there can be convergence. When the law is thus in harmony, which as was mentioned is the case for the majority of investigative obligations during armed conflict, there is no reason, and no *lex specialis* argument, to diverge from the obligation to carry out an investigation. No tension between IHL and IHRL exists *regarding the scope of the duty to investigate*, in other words the simple fact *that an investigation must be carried out*. This is not to say that conflicts cannot arise when it comes to *how* the investigation must be carried out, which is addressed in section 4.

3.4 Divergence in the scope of investigative duties

3.4.1 Introduction

This section addresses situations in which the scope of investigative duties does give rise to tensions, leading to conflict and competition. It must be recalled at this junction that normative conflict was defined previously as two norms which 'point in different directions, because [i] the requirements under both norms are mutually exclusive, because [ii] one norm (implicitly) permits what the other prohibits, or because [iii] one norm (implicitly) permits not

24 See Chapter 5, §4.2; Chapter 6, §4.2; Chapter 7, §4.2; Chapter 8, §1.4. Under the ECHR, there can be an exception to this where violence has been used to hinder the freedom of expression, such as was the case where a violent campaign had been levelled against a newspaper in *Özgür Gündem v Turkey*, ECtHR 16 March 2000, Appl No 23144/93 [45]-[46]. Eva Brems, 'Procedural Protection. An Examination of Procedural Safeguards Read into Substantive Convention Rights' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2013) 144.

to do what the other requires'.[25] The prime example thereof in the context of the scope of the duty to investigate, addressed further in section 3.4.2, is a killing which is lawful under IHL, but requires an investigation under IHRL. Normative competition is addressed in section 3.4.3, and connotes the situation where although two norms do not strictly speaking conflict, they nonetheless pull in different directions.[26] This may occur most regularly when one regime regulates a situation and the other remains silent on the issue, but nonetheless militates against full and unabridged application of the other regime's rules. The prime example here is IHRL's insistence on investigations into interferences by third parties, including private individuals, which IHL does to a limited extent only. The subsequent sections address these issues.

3.4.2 Normative conflict

There are three primary issues where IHL and IHRL prescribe divergent rules. Such divergence in substantive norms reverberates into the investigative counterparts of such norms, because duties of investigation are accessory to *violations* of substantive law. This section therefore turns to the primary junctions where the substantive rules of IHL and IHRL conflict, to then explore how such conflicts translate to the existence or not of a duty to investigate. In doing so, the section turns first to the major conflict between IHL and IHRL, namely where the rules concerning the use of lethal force are concerned (§3.4.2.1). It then explores another such conflict, regarding transformative occupation (§3.4.2.2). The other main area of conflict between IHL and IHRL, relating to deprivation of liberty, does not appear to give rise to conflicts when it comes to the duty to investigate, as was explained above, and is therefore not addressed further. It ought to be noted that this section does not seek to set out exhaustively the conflicts between substantive norms of IHL and IHRL; rather, it has selected the conflicts most pertinent for practice, and giving rise to the most acute issues also under investigative obligations.[27]

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25 Chapter 9, §5.2.2.

26 Chapter 9, §5.2.2.

27 That deprivation of life, liberty and the issue transformative occupation are the main avenues for conflict is based on previous research; Marko Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2010) 14 Journal of Conflict and Security Law 459; Marco Sassòli and Laura M Olson, 'The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 International Review of the Red Cross 599; Sean Aughey and Aurel Sari, 'Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence' (2015) 91 International Law Studies 60; Andrea Carcano, 'On the Relationship between International Humanitarian Law and Human Rights Law in Times of Belligerent Occupation: Not yet a Coherent Framework' in Erika De Wet and Jann K Kleffner (eds), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations* (Pretoria University Law Press (PULP) 2014); Noam

In this section, a choice has been made to present the selected issues as 'hard' conflicts; conflicts which are unavoidable, or where the norms are irreconcilable.[28] The discussion below is therefore not to say that there is no way, depending on the applicable human rights regime, to potentially *avoid* the normative conflict with IHL. The aim of this section is to show where conflicts in the scope of application of the duty to investigate *can* arise, and because much has been written on the interplay of substantive norms of IHL and IHRL, that aim is better achieved by mapping out potential conflicts than by restating the nuanced debate on interplay with respect to the right to life. Whether conflicts arise in practice must be determined on a case-by-case basis. By way of example, under the ICCPR, there is a potential conflict between the right to life and IHL's status-based targeting rules. Whether this conflict can be avoided must be determined contextually. On the one hand, what constitutes an 'arbitrary' deprivation of life can be interpreted in light of IHL. On the other hand, the HRC has found that if deprivations of life result from 'acts of aggression', this *ipso facto* violates the right to life.[29] For a State engaging in acts of aggression, all potential conflicts between the right to life and IHL are therefore unavoidable conflicts, because in the HRC's view, there is no scope for harmonious interpretation with IHL. Whereas some of the conflicts presented below may therefore be avoided, they can depending on the circumstances and the applicable human rights regime, also lead to unavoidable conflicts which have implications for the duty to investigate.

3.4.2.1 Normative conflict with regard to deprivations of life

Normative conflict regarding the scope of the duty to investigate, as explained, is most likely to arise where there is a conflict in substantive norms of conduct. Regarding the duty to investigate, this is most pertinently so with respect to the regulation of lethal force and deprivations of life. If we deconstruct the lines of conflict between the IHRL right to life and the IHL rules on targeting and the conduct of hostilities, four principal conflicts with a bearing on the duty to investigate materialise. They pertain to IHL's more permissive rules with respect to (1) the use of lethal force against combatants in IACs, (2) the use of lethal force against fighters and those directly participating in hostilities in NIACs, and (3) the use of force directed against lawful military objectives, causing 'collateral damage' – all bound to more restrictive rules under the right to life under IHRL. A final conflict relates to (4) the planning of operations which include the use of lethal force, where IHL requires precautions which are less demanding than those under IHRL. All of these conflicts with respect

Lubell, 'Human Rights Obligations in Military Occupation' (2012) 94 International Review of the Red Cross 317, 328–9.

28 Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 27).

29 *General Comment No. 36* (n 4) [70]; further, see Chapter 5, §6.3.

to the substantive rules relating to the use of force can give rise to conflicting investigative obligations.

The *first* instance of conflict, regarding the targeting of combatants, constitutes a conflict between a permissive norm of IHL on the one hand, and a prohibitive norm of IHRL on the other. IHRL principally requires an investigation into any lethal use of force by State agents. Investigations into deaths caused intentionally by State agents must moreover principally be *criminal* investigations.[30] Human rights courts and treaty bodies have not yet ruled on the applicability of this obligation to lethal force used against combatants, and they may decide to interpret IHRL in light of IHL on this issue. Nonetheless, based on existing case-law, IHRL thus a positive obligation on the State to investigate any lethal force used by State agents. IHL, meanwhile, regards the killing of combatants as lawful, and therefore does not require an investigation.[31] Moreover, IHL bestows 'combatant privilege' on combatants, which protects them against prosecution for military conduct which is lawful under IHL by any State other than their own – a prohibition, in other words, of prosecution for lawful acts of war.[32] Thus, a direct conflict can arise between the IHRL obligation to conduct a criminal investigation on the one hand, and the IHL prohibition to prosecute on the other, resulting in a conflict between two mutually exclusive obligations. There may be some scope for human rights courts and bodies to avoid this conflict by interpreting the right to life in light of IHL, but case-law thus far has not addressed this issue directly.

The *second* form of conflict, that of targeting NSAG fighters[33] and civilians directly participating in hostilities, leads to similar though slightly distinct problems. Neither civilians taking a direct part in hostilities, whether in a NIAC or an IAC,[34] nor NSAG fighters, can invoke combatant privilege.[35] Combatant privilege in IACs is reserved for combatants meeting the standards identified

30 See Chapter 8, §1.5.

31 See also Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 92–3. Importantly, however, IHL does require States to make an effort to record casualties, GC IV, art 16; AP I, art 33, and to make a record of burial and identities, GC I, art 17; and Rules 112-116 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 23). See further Susan Breau and Rachel Joyce, 'The Responsibility to Record Civilian Casualties' (2013) 5 Global Responsibility to Protect 28, 34–6; Liesbeth Zegveld, 'Body Counts and Masking Wartime Violence' (2015) 6 Journal of International Humanitarian Legal Studies 443, 458–9.

32 Sandra Krähenmann, 'Protection of Prisoners in Armed Conflict' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) 367; Sassòli (n 11) 20–3.

33 Following the example of Sassòli and Olson, the term 'fighter' is used here for want of a better term. The law of NIAC does not recognise 'combatants', and classifying members of an armed group who fulfil a continuous combat function as 'civilians directly participating in hostilities', can be problematic; Sassòli and Olson (n 27).

34 With the exception of those taking part in a lawful *levée en masse* under GC III, art 4(A)(6).

35 Sassòli (n 11) 29–30, 503, 585.

in GC III,[36] and when it concerns NIACs, combatant privilege does not apply at all.[37] IHL, under the majority position,[38] still permits the use of lethal force against fighters and civilians directly participating in hostilities, which means that no violation of IHL occurs and that no investigation is necessary under IHL. Nor does IHL, however, explicitly oppose investigation and prosecution, as it does in case of IAC. This seemingly removes the sharp edges of the conflict – but looks may be deceiving. The reason IHL does not grant combatant privilege in NIACs, and the reason why it does not recognise combatant status in NIACs at all, is that States do not wish to confer upon non-State armed groups the *right* to lawfully take part in hostilities against the State.[39] Under domestic law, States classify members of NSAGs as terrorists or rebels, who their armed forces may kill without facing criminal charges, but who may also be called to account for their participation in hostilities in a criminal trial. As compensation for this lack of combatant privilege, AP II requires States to 'endeavour' to grant amnesty to those who took part in the conflict.[40] This obligation is typically interpreted as excluding amnesties for war crimes, meaning that deprivations of life in line with IHL but in violation of the right to life still require an amnesty.[41] Thus, IHRL's insistence on criminal investigation and its prohibition of amnesties for serious human rights violations potentially conflicts with IHL's permission of targeting and killing NSAG fighters and civilians directly participating in hostilities, and its call for amnesties. Here too, then, IHL permits not doing, or perhaps even prohibits, what IHRL requires – conducting an investigation.

The *third* type of conflict relates to how both regimes regard collateral civilian damage. Here too, IHL will more readily consider such civilian harm lawful and therefore as not requiring an investigation, while IHRL takes a stricter view. The divergence between both regimes hinges on two principal issues. Firstly, IHL is concerned with a purely *ex ante* assessment of the expected results of an attack and even if civilian costs may *ex post* turn out to be excessive in light of the anticipated or actual military advantage, this in principle

36 GC III, art 4. Further, see Yoram Dinstein, *The Conduct of Hostilitites under the Law of International Armed Conflict* (3rd edn, Cambridge University Press 2016) 41–5; Sassòli (n 11) 20–3.

37 Sassòli and Olson (n 27) 606.

38 E.g. Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) 59; Sassòli (n 11) 20–3. The applicable IHL here is less clear, mostly because treaty law is terse at best, and scholars and practitioners continue to debate the exact definition of direct participation, and whether members of NSAGs may be targeted at all times merely by virtue of their membership; Sassòli and Olson (n 27) 606–8; Aughey and Sari (n 27) 98–103. The ICRC has attempted to clarify what constitutes direct participation in hostilities, Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009).

39 Aughey and Sari (n 27) 94.

40 AP II, art 6(5). See also Sivakumaran (n 31) 507. Cf. Dinstein, *Non-International Armed Conflicts in International Law* (n 38) 200.

41 More extensively, see Sivakumaran (n 31) 505–9.

does not violate the principle of proportionality.[42] Under IHRL, determining the lawfulness of an attack will also have regard to the planning of the operation, but may also include an element of *ex post* determination of proportionality. Secondly, what is weighed in the proportionality test under IHL and IHRL, is fundamentally different.[43] Under IHRL, the lives of both combatants and civilians are weighed against the absolute necessity of protecting the lives of others. In other words, is there really no other option but to use lethal force? Under IHL, expected civilian costs are weighed against anticipated military advantage – and the advantage *is precisely* the damage dealt to enemy forces and military properties.[44] In other words, IHL counts the lives of combatants and the destruction of military property *in favour* of attack,[45] while IHRL requires absolute necessity for both the deaths of combatants and the resultant deaths of civilians. If we envision a proportionality test as a scale, weighing one interest against the other, IHL and IHRL place the lives of combatants on opposite side of the scale.[46] The lawfulness of the use of force causing collateral damage may therefore be considered lawful under IHL but potentially unlawful under IHRL, due to a different appreciation of proportionality under both regimes, or because the *ex ante* assessment differed led to very different results than the *ex post* determination. In such instances, IHRL will require an investigation – as human rights courts have held for instance in relation to the excessive use of force where (numerous) hostages died during rescue operations, and have called for stringent investigations into such cases[47] – while IHL does not, and potentially even grants combatant privilege for.

The *fourth* and final case of conflict, regarding the planning of operations and the precautions in attack, potentially leads to a more subtle conflict in investigative obligations. The planning of operations involving potential use of force under IHRL, and precautions in attack under IHL, are of a similar

42 AP I, art 57(2)(a)(iii). For an in-depth analysis, see Jeroen van den Boogaard, *Proportionality in International Humanitarian Law. Principle, Rule and Practice* (Dissertation University of Amsterdam 2019). It ought to be noted that if, at whatever stage, it becomes apparent that the civilian costs *are* excessive in light of military advantage, the attack must be cancelled or suspended, see AP I, art 57(2)(b).

43 Nehal Bhuta, 'States of Exception: Regulated Targeted Killing in a "Global Civil War"' in Philip Alston and Euan McDonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford University Press 2008) 271.

44 AP I, artt 51(5)(b) and 57(2)(a)(iii); see further Sassòli and Olson (n 27) 606.

45 Dinstein explains further how there is no requirement of proportionality between combatant losses between warring parties – which further underscores that the lives of combatants do not count for proportionality purposes (except insofar as killing them leads to a military advantage); Yoram Dinstein, 'The Principle of Proportionality' in Camilla Guldahl Cooper, Gro Nystuen and Kjetil Mujezinović Larsen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge University Press 2012) 80.

46 Further, see Bhuta (n 43).

47 E.g. *Tagayeva and Others v Russia*, ECtHR 13 April 2017, Appl No 26562/07 et al.

nature. IHRL principally requires high-level planning of operations, geared towards maximum protection of human life, and with the use of lethal force as a means of last resort only.[48] This thus indicates a graduated use of force,[49] escalating to lethal force only when no other options remain.[50] IHL precautions, in contrast, again hinge on minimising *civilian* costs, but do not account for the lives of combatants and fighters.[51] Moreover, everything *feasible* must be done, all *feasible* precautions must be taken,[52] but if ultimately action is taken based on incomplete information, this need not lead to a violation where the State was justified in relying on such information, was not in a position to obtain better intelligence, and did not become aware that there was reason to halt the attack whilst carrying it out.[53] The requirement of taking all necessary precautions to minimise civilian injury relates not only to the selection of targets, but also the type of weaponry used, and if possible, a warning to civilians in advance of the attack.[54] When looking at the investigative corollaries of these *ex ante* obligations, IHL considers a lack of precautions (which does not amount to an indiscriminate attack) a 'non-serious' violation, which therefore does not constitute a war crime. This is an important qualification, because it means that attacks leading to excessive civilian losses *by accident*, even if due to a lack of precautions, require a *non-criminal* investigation under IHL.[55] Under IHRL, meanwhile, criminal investigations into the planning of an operation may be required depending on the context of the case.

By way of example, comparing the European Court cases of *McCann and Others* and *Tagayeva and Others* may be of use. In *McCann*, the European Court of Human Rights found that UK forces' use of lethal force against IRA operatives was absolutely necessary in the circumstances, but found fault with the planning of the operation which had led to the situation where no other

48 See *Cruz Sánchez et al. v Peru* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 292 (17 April 2015) [283]; *General Comment No. 36* (n 4) [12]. In particular, see the European Court in *Tagayeva and Others v Russia*, ibid [562]: 'In particular, it is necessary to examine whether the operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force. The authorities must take appropriate care to ensure that any risk to life is minimised. The Court must also examine whether the authorities were not negligent in their choice of action. The same applies to an attack where the victim survives but which, because of the lethal force used, amounted to an attempt on life'.

49 Murray and others (n 12) 125.

50 *Cruz Sánchez et al. v Peru* (n 48) [265].

51 AP I, art 57(2)(a).

52 AP I, art 57(2)(a)(i) and (ii).

53 AP I, art 57(2)(b).

54 See Rule 20 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 23); see further Stefan Oeter, 'Methods and Means of Combat' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press 2013) 179.

55 Unless of course there are indications of wilful targeting of civilians, or of indiscriminate attacks.

option was left than to shoot to kill.[56] No criminal investigation and procedure against UK troops was therefore necessary, though an investigation aimed to ensure civil accountability and State responsibility, was called for. In *Tagayeva and Others v Russia*, concerning a hostage rescue operation ultimately killing 330 including 186 children, the European Court contrarily considered that the investigation by Russia had to include lines of inquiry regarding accountability of State agents in their failure to take the necessary precautions and adequately plan and control the operation – for which investigations establishing 'strict accountability' are 'imperative'.[57] How the operation was planned, to what extent every effort was made to minimise loss of life, and whether for instance orders were given that none must be left alive (that 'no quarter shall be given'),[58] obviously weigh into the assessment of the criminal accountability of those involved in controlling the operation. Thus, IHRL can require a criminal investigation into the lack of planning which went into an operation, where under IHL there would arguably be a violation of the precautionary rule, but where a criminal investigation might not be required. Under such circumstances, a conflict may arise between IHL and IHRL, because IHRL's insistence on criminal investigations may clash with IHL's obligation to conduct an investigation, and its permission to do so in a non-criminal way.

3.4.2.2 Normative conflict with regard to transformative occupation

Another field where substantive norms of IHL and IHRL may clash, concerns transformative occupation.[59] This issue is – very briefly – examined here, to see whether it gives rise also to conflicts regarding investigative obligations. As was explained in Chapter 9, the substantive conflict of norms regarding occupation lies in IHL's prohibition for occupying States to respect, 'unless absolutely prevented' applicable law,[60] and to leave in place 'penal laws (…) with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of [GC IV]'.[61] This obligation to leave legislation in place in order to preserve the existing *status quo* in the occupied territory,[62] can clash with the positive obligation to ensure human rights which conflict with existing legislation in the occupied territory. An example could be legislation in certain

56 Further, see Chapter 7, §3.2.
57 *Tagayeva and Others v Russia* (n 47) [525].
58 See *Cruz Sánchez et al. v Peru* (n 48) [284]-[286].
59 Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 27) 480–1.
60 1907 Hague Regulations, art 43.
61 GC IV, art 64.
62 Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 228.

States which prescribe stoning as punishment for adultery.[63] Other examples would include discriminatory legislation, for instance restricting access to education based on sex, or restricting access to public places when wearing religious garb. For present purposes, it is sufficient to consider conflicts with human rights which require investigation when infringed. Should domestic legislation permit torture, slavery, or arbitrary deprivation of life, for instance, this would give rise to a normative conflict.

Marko Milanović considers the stoning example to give rise to an unavoidable conflict between IHL and IHRL, because one would have to 'forcibly read down' either IHL or IHRL to sufficiently accommodate the other.[64] Others have contended differently. The ICJ in the *Armed Activities* case explained that the Occupying Power must 'secure respect' for both IHL and IHRL in the occupied territory, entailing both negative and positive obligations.[65] In line with this finding, several authors have construed arguments to show that there is no normative conflict in this context. Gerd Oberleitner argues that what 'domestic law' requires ought to already be read in light of the occupied State's own human rights obligations (also under customary international law), rendering stoning illegal in any case.[66] Andrea Carcano considers compliance with human rights law to be 'essential to secure security', meaning any modifications to legislation which violates human rights is permissible under IHL.[67] Hans-Peter Gasser and Knut Dörmann argue that GC IV allows for the disapplication of domestic law when it conflicts with humanitarian law,[68] which in their view includes other rules of international law, including human rights.[69] Views as to whether transformative occupation gives rise to irreconcilable conflicts between IHL and IHRL thus differ. The discussion now turns to what this means for the duty to investigate in situations of occupation.

If one supports the view that the IHL governing belligerent occupation does not conflict with human rights law because it allows for the alteration of legislation which is incompatible with human rights, no problems arise when it comes to the duty to investigate. Occupying States will then simply, by virtue

63 Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 27) 480–1.

64 Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 27) 480–1.

65 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment (19 December 2005), *I.C.J. Reports* 2005, p. 168 [178]-[179]; Lubell (n 27) 327.

66 Oberleitner (n 62) 228–31.

67 Carcano (n 27) 148.

68 Based on GC IV, art 64, insofar as its second paragraph states that 'The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention [GC IV] (…)'.

69 Hans-Peter Gasser and Knut Dörmann, 'Protection of the Civilian Population' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd (pb), Oxford University Press 2013) 284.

of the jurisdiction they exercise through control over the occupied territory, enact criminal legislation with regard to deprivations of life, torture, cruel, inhuman and degrading treatment, slavery, forced labour, genocide, and enforced disappearance. When violated, they must then effectuate such legislation through criminal investigations, similar to cases arising within their own territories. If one does perceive IHL and IHRL to conflict on this point, because IHL prohibits altering legislation, then this conflict under substantive law also extends to the duty to investigate. If IHL prohibits altering existing legislation and enacting criminal legislation, then effectuating the IHRL duty to investigate will not be possible without violating IHL – thus leading to a normative conflict between a prohibition on the one hand, and a positive obligation on the other. How such a conflict may be resolved is explored further, below.

3.4.2.3 Resolving normative conflicts

The normative conflicts with respect to investigations into the use of lethal force and issues of transformative occupation uncovered above, raise the question how they can be resolved. Following the roadmap for interplay as developed in Chapter 9, steps 1 through 3 have been completed: both IHL and IHRL apply, there are no relevant conflict clauses regulating the relationship between both regimes,[70] and there is a normative conflict. The remaining step, then, is to assess how to resolve the normative conflict, through available tools for conflict resolution.

Transformative occupation and lex superior

Firstly, the normative conflict arising in situations of transformative occupation. This may prove a relatively rare normative conflict, in the sense that it may (at least in part) be resolved by recourse to the *lex superior derogat legi inferiori* rule. Recall that this tool for conflict resolution solves conflicts by way of reference to the status of norms within the hierarchy of norms, and that the only rules of a 'higher' status than others, are peremptory norms of international law, or *ius cogens*. Whereas it was submitted in Chapter 9 that *lex superior* is unlikely to be very useful in resolving conflicts because norms of peremptory status are rare and moreover likely overlap between both regimes, in the context of transformative occupation, it may nevertheless be key in the situation at hand.

The conflict outlined above essentially concerns the IHL rule prohibiting Occupying Powers to deviate from domestic law, and IHRL's insistence on precisely the abolishment of laws which breach human rights, and the enact-

70 Should a derogation have been made, insofar as allowed under the various human rights treaties, this will alter the human rights obligations owed by the State. Thus, because the *contents* of the right under IHRL are changed, this may align the right in question with IHL, thus alleviating the normative conflict. In such cases, the normative overlap must be assessed under the 'convergence' paradigm.

ment of laws protecting those rights – coupled with investigative action where required to effectuate such legislation. The existence of a conflict thus hinges on the non-compliance of the existing domestic law in the occupied State, with IHRL norms. If, however, those norms of IHRL concern norms of *ius cogens*, then their application must prevail over rules of IHL which insist on leaving domestic law intact. Considering once more the example of domestic legislation stipulating stoning as punishment, this clearly constitutes a punishment in violation of the right not to be subjected to torture, cruel, inhuman and degrading treatment and punishment.[71] This right has been broadly accepted to constitute a norm of *ius cogens* – at the very least insofar as torture is concerned[72] – and stoning likely constitutes torture. Thus, an occupying State's duty to ensure the right not to be tortured is of a higher rank than the IHL obligation to leave the punishment of stoning intact. According to the principle of *lex superior derogat legi inferiori*, IHRL must in this instance prevail over IHL, thus resolving the conflict in favour of the peremptory prohibition of torture. In turn, once the substantive conflict has been resolved because the IHRL obligations prevail over those under IHL, the duty to investigate naturally follows, and the IHRL duty to investigate applies. As will be explored below, investigative standards may be somewhat loosened depending on the exact circumstances and the level of control exercised by the State (is it a case of quiet occupation, or are there constant smaller or larger armed clashes, and so forth), but the *applicability* of the duty to investigate has then been established.

Many of the other human rights which go in hand in hand with investigative obligations, also arguably form part of *ius cogens*. The prohibitions of genocide, slavery and enforced disappearance have all been referred to as such,[73] and it is in any case difficult to imagine domestic legislation which requires or considers lawful such practices, which amount to international crimes. Thus, *lex superior* can be used to resolve conflicts regarding the scope of application of the duty to investigate during transformative occupation.

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71 Cf. *General Comment No. 36* (n 4) [40] and [52].

72 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment (20 July 2012), *I.C.J. Reports* 2012, p. 422 [99]; *Al-Adsani v the United Kingdom*, ECtHR [GC] 21 November 2001, Appl No 35763/97 [61]; *Almonacid Arellano v Chile* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 154 (26 September 2006) [99]. Also including cruel, inhuman and degrading treatment or punishment, see *General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, HRC 4 November 1994, CCOR/C/21/Rev.1/Add.6 [8].

73 *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment (26 February 2007), *I.C.J. Reports* 2007, p. 43 [161] (genocide); *General Comment No. 24*, ibid [8] (slavery, TCIDT, arbitrary deprivations of life and liberty, as well as others).

The right to life and lex specialis

Let us now move on to the conflict arising from deprivations of life, regarding investigations into the deaths of combatants, of NSAG fighters and civilians directly participating in hostilities, into deaths of civilians as 'collateral damage', and into the planning of operations leading to loss of life. In this context, the answer must be found by application of the *lex specialis derogat legi generali* rule. Deciding which rule prevails then hinges on which norm is the more specific in the given situation and regarding a specific incident. Determining which norm functions as *lex specialis* depends on both a legal and a contextual assessment.

The legal side of the test is concerned with the wording of the various norms, looking at how explicit, direct, and precise the relevant provision is.[74] When it comes to the duty to investigate deaths, this assessment does not lead to an apparent result as to the more specific nature of either regime's norms. Both provide relatively little by way of treaty law. Combatant privilege and immunity, for instance, are not explicitly provided for in the Geneva Conventions. Nor does IHRL's duty to investigate and prosecute flow explicitly from general IHRL treaties – it is only included in the texts of the Torture, Genocide, and Disappearance conventions, and under the other systems was developed in human rights jurisprudence. What may be a relevant element to note is that IHL's non-requirement of investigation into conduct which it considers lawful, is – obviously – not explicit. No norm of IHL stipulates that what is lawful does not require investigation. In that sense, IHRL's requirement of investigation, as included in the treaties referred to above and in the various treaty bodies' and regional courts' case-law, is certainly more direct and explicit than IHL's non-requirement of investigation. Thus, this assessment may tentatively point in the direction of IHRL being the more specific,[75] with the exception of the law of NIAC's explicit reliance on amnesties for taking part in hostilities.

The contextual aspect of the *specialis* determination, as is implied in the term, cannot be assessed in the abstract. Generally, the more control the State has, the more likely it is that IHRL constitutes the *lex specialis*.[76] When a State operates extraterritorially, for instance, and when engaged in active hostilities, this element works in favour of the *specialis* function of IHL – such as in cases

74 See Chapter 9, §6.3.2.

75 Note, however, that Hathaway et al. consider the nature of the norm to also have a bearing on what norm constitutes the *specialis*. Thus, they argue that obligations are more likely to be *specialis* than permissions, although they qualify this argument by stating that IHL obligations are likely to be *specialis*, whereas the question whether IHRL obligations prevail over IHL permissions must be answered based on the other factors; Oona A Hathaway and others, 'Which Law Governs during Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law' (2012) 96 Minnesota Law Review 1883, 1918.

76 Hathaway and others (n 75) 1918–21.

like *Hanan v Germany* therefore.[77] Nonetheless, other considerations also play a role, such as the status of the individuals involved in an incident. For instance, when a State takes individuals into detention, this provides the State with a large measure of control which ostensibly leads to a determination of IHRL as *lex specialis*. When, however, a combatant is taken prisoner, the IHL rules pertaining to POWs must be considered to be *specialis*, due to the status of these individuals, and the specificity with which IHL governs POWs.[78] This illustrates how the various factors identified in Chapter 9 may influence which norm must prevail over the other as *specialis*. To say in the abstract whether IHRL is to prevail over IHL, or rather the other way around, also in the context of investigative obligations, is therefore impossible. Generally, however, it may be observed in line with the *Practitioners' Guide to Human Rights Law in Armed Conflict*'s approach that during active hostilities IHL is likely to prevail, meaning that conduct which complies with IHL will not give rise to a duty to investigate. Where States operate under the security operations paradigm, the IHRL duty to investigate applies and prevails over potentially conflicting IHL obligations.[79]

The *Practitioners' Guide* contends that once it is determined whether an incident falls into the 'active hostilities' or the 'security operations' paradigm, this not only determines the rules governing the incident itself, but also the investigative response thereto.[80] Thus, if a combatant is killed in a situation falling under the active hostilities paradigm, the leading frame of reference is IHL, which determines that i) the killing is lawful, and ii) no investigation is required into conduct without any indication of a violation. Thus, no investigation is required when IHL is the leading frame of reference, and IHL itself does not require an investigation. If, in contrast, an incident falls within a security operations paradigm, IHRL takes the lead, determines the lawfulness of any operations involving lethal force, and any potential violation will need to be investigated pursuant to IHRL, even if IHL would not require investigation. This approach must be agreed with, although as was set out in the roadmap for interplay in Chapter 9, the dichotomy between active hostilities and security operations only becomes relevant once a normative conflict has been found, because then it determines which of both legal regimes constitutes the *lex specialis*. In sum, where a situation concerns active hostilities and IHL therefore governs the use of lethal force as *lex specialis*, then the applicability of the accessory duty to investigate equally depends on IHL as *specialis*: if no (potential) violation of IHL has occurred, no investigation is required. IHL's non-requirement of an investigation therefore prevails over IHRL's duty to invest-

77 Further, see Chapter 7, §6.3.3.
78 Murray and others (n 12) 89–90.
79 Such as IHL either not requiring investigation, or requiring amnesties instead of investigation.
80 Murray and others (n 12) 330–4.

igate, because the normative conflict is resolved in favour of IHL. If, on the other hand, an incident takes place within a security operations paradigm, IHRL will be the *specialis*, and its requirement of investigation will prevail over IHL's non-requirement or prohibition of an investigation.

A final remark may be made here to illustrate that the normative conflicts between IHL and IHRL in the context of the applicability of the duty to investigate, need not be as stark as sometimes portrayed. Think for instance of situations where indeed IHL prevails over IHRL as *lex specialis*, such as where during active hostilities, State armed forces shoot and kill enemy combatants. This is clearly lawful under IHL, and therefore does not require an investigation. The IHRL obligation to conduct an investigation into any lethal force employed by State agents is then trumped by IHL. However, the reason IHRL requires investigation is not just assessing the lawfulness of conduct, and if unlawful, to ensure the accountability of those responsible. It also has to do with the next of kin's interests in knowing what happened to their loved one, and whether they are alive or dead. Despite the duty to investigate being inapplicable, these interests remain – in seeming contrast with IHL's prevailing norm of non-investigation. But in fact, this conflict may be less pressing than it seems at first sight. IHL also acknowledges these interests, stipulating obligations to search for the dead, to register them, or to allow the ICRC to do so.[81] Through such obligations, IHL means to ensure the dead are not left unaccounted for. An investigation completely geared to establishing what happened in order to ensure the rights of next of kin, thus does not conflict with IHL and in fact converges with obligations already established under that body of law itself. IHRL in this sense reinforces IHL's obligations in this field, and the perceived divide between the two is thus not as deep as it might seem.

3.4.3 Normative competition

3.4.3.1 The paradigm of normative competition and investigations into non-State conduct

The scope of applicability of the duty to investigate can also give rise to normative competition, with regard to one issue in particular. As was explained in Part I,[82] IHL essentially sets up a system of *self-enforcement*, where the State enforces the law by applying it to its own armed forces, and taking action where the law is violated. The duty to investigate falls squarely within this system, as it requires States to investigate their own violations, committed by their own troops. The IHL investigative regime only moves beyond this

81 On this subject, see Breau and Joyce (n 31); Zegveld (n 31); Mark Lattimer, 'The Duty in International Law to Investigate Civilian Deaths in Armed Conflict' in Mark Lattimer and Philippe Sands (eds), *The Grey Zone: Civilian Protection between Human Rights and the Laws of War* (Hart Publishing 2018).

82 See Chapter 2, §5 and Chapter 3, §2.

system of self-enforcement in two situations. This is the case firstly where it concerns grave breaches over which States must vest universal jurisdiction, and are under the *aut dedere aut judicare* obligation – to either extradite, or prosecute.[83] Secondly, other war crimes (serious violations which are not grave breaches) must be investigated primarily by the territorial State or the State of nationality, which again emphasises the responsibility of the State for its own armed forces, and only secondarily must other States *who have jurisdiction* investigate and prosecute.[84] For such other serious violations, there is, however, no obligation to vest universal jurisdiction. Thus, IHL relies heavily on States investigating the conduct of their own armed forces: for non-serious violations it is solely their obligation, for serious violations it is primarily their obligation, with only secondary obligations for third States.[85]

Human rights law, meanwhile, envisages a much broader duty to investigate, which encompasses also deaths, instances of torture, and so forth, *perpetrated by third parties*, when committed within the jurisdiction of the State. In situations of normalcy, this duty is the logical procedural corollary of the duty to protect the human rights of those within their jurisdiction: if there is a positive obligation to, for instance, protect individuals from (lethal) domestic violence, then if such violence nonetheless occurs, States must investigate it and hold to account those responsible, as well as potentially failures on the part of the State in ensuring protection. All this is now a well-entrenched part of the effective protection of human rights, also through criminal law.[86]

In situations of armed conflict, however, the duty to investigate potential IHRL violations committed by third parties goes well beyond what is required under IHL. Moreover, especially in situations where States operate extraterritorially, such as when they operate as Occupying Power, such obligations can become extremely demanding. After all, to require States to investigate any transgressions committed by their troops in the course of the occupation is one thing, but to require them to investigate each and every death, instance of torture or degrading treatment, and so forth, throughout the entirety of an occupied territory even without any nexus with the State's agents, is quite another.[87] Such obligations likely go beyond IHL's obligation for Occupying Powers to 'ensure public order and civil life', which must normally be ef-

83 Chapter 3, §3.2.2. GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146.

84 Chapter 3, §3.2.3. Rule 158 ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 23) 607.

85 See Chapter 3, §§2 and 3.

86 Alexandra Huneeus, 'International Criminal Law By Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 The American Journal of International Law 1.

87 Cf. Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002) 166ff.

fectuated through support for local authorities which administer the territory.[88] Similarly, in situations of NIAC, where a NSAG controls a part of the territory and/or population of the State, requiring States to investigate all violations perpetrated by such armed group is a tough ask, which moreover has no equivalent in IHL.[89]

The normative competition between IHL and IHRL is, in light of the above, encapsulated in IHRL's duty to investigate third-party infringements,[90] and IHL's silence on this issue. As was set out in Chapter 9,[91] normative competition entails a situation where although two norms do not conflict, they do pull in different directions. IHL's normative silence when it comes to investigations into third-party infringements is a case in point: in no way does it explicitly militate against such investigations. But, at the same time, IHL's equilibrium between military necessity and humanitarian considerations may be distorted by such a requirement, because it is highly resource-intensive, therefore potentially or likely interfering with other military operations. The duty to investigate third-party violations may prove overly burdensome and unrealistic in situations of extraterritoriality, because normally military police will make up only a small portion of forces present. To then investigate all third-party infringements of human rights becomes an overly burdensome task, which is at variance with military necessity, because allocating a huge portion of resources to policing goes at the cost of other military operations. Thus, a balancing of the IHRL duty to investigate with the principles of IHL, in particular the principle of military necessity, may be called for. Moreover, investigations into violations committed by NSAGs may be impossible for States to carry out, as they are fighting tooth and nail to defeat such groups, rendering it unlikely that they have sufficient control at least until territory is retaken, to send in on-site investigators. A normative competition between IHL and IHRL therefore exists with respect to the duty to investigate third-party interferences.

3.4.3.2 Resolving normative competition

Resolving this situation of competition, it was suggested in Chapter 9, requires an innovative approach. The *lex specialis* rule cannot be relied upon, because

88 1907 Hague Regulations, art 43; Sassòli (n 11) 334.

89 See, however, the discussion whether under Common Article 1 GC, the 'duty to ensure respect' includes an obligation to coerce others into compliance, Carlo Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?' (2010) 21 European Journal of International Law 125; Marten Zwanenburg, 'The "External Element" of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation' (2021) 97 International Law Studies 622.

90 I use here the term 'infringement', because technically speaking, the third-party conducting interfering with, for instance, life or physical integrity, does not constitute a 'violation' of IHRL.

91 Chapter 9, §5.2.2.

it only applies (in its capacity as a tool for conflict resolution) once a normative conflict has been established, and that is not the case here. Further, the solution for situations of convergence is equally unsatisfactory, because 'applying alongside one another' results in simple application of IHRL, due to IHL's silence on this matter. Moreover, harmonious interpretation is difficult because again, IHL is silent. What remains, IHL's normative silence or indeterminacy notwithstanding, are the principles of IHL, which guide interpretation, and which provide the general framework of the 'system' of IHL. IHL's lack of explicit rules ought therefore not be viewed as a vacuum *per se*, because the principles of IHL remain to guide conduct. The solution proposed is therefore to interpret the applicable human rights norms in light of the principles of IHL, to thus come to a balanced and well-rounded solution.[92]

This leaves the question how we may 'balance' the duty to investigate third-party interferences with the principles of IHL, especially the principle of military necessity. It was proposed in Chapter 9 to rely on IHRL's inherent flexibility to take IHL principles into account in specific application and interpretation of IHRL rules. This, moreover, is as far as such interpretation *can* go, because principles by themselves cannot set aside rules. When applied to our specific instance of normative competition, military necessity may certainly oppose the investigation of, for instance, unlawful killings carried out by third parties, the more so where the level of control exercised by the State is minimal. But the question is to what extent IHRL's rule that third-party killings must be investigated actually *allows* for flexibility.

Exploring flexibility in the case-law of the various IHRL systems

Whereas human rights courts and bodies have proved susceptible to arguments that certain investigative measures cannot be expected of them in the extenuating circumstances pertaining during armed conflicts, they have as yet not been forthcoming in dispensing with the applicability of the duty to investigate itself. Whereas some leniency is apparent when it comes to *how* States conduct their investigations where the conflict situation simply does not allow for full-fledged application of all investigative standards, the applicability of the duty to investigate itself has consistently been reaffirmed in case-law. Nonetheless, human rights case-law might not be settled yet on this issue. Cases thus far have pertained almost exclusively to situations where State armed forces were implicated in killings, thus leaving the issue of investigations into third-party infringements during armed conflicts, not yet settled. Moreover, the issue has proved controversial in extraterritorial contexts, where States have argued vehemently against unfettered application of IHRL norms, especially against the demanding positive obligations to act, such as the duty to investigate. Scholars such as Marko Milanović have therefore argued that

92 See Chapter 9, §6.5.

when it comes to extraterritorial application IHRL, a distinction ought to be made between negative obligations, which States must comply with also in such instances, and positive obligations, which are meant for territorial application.[93] Such an approach has not been adopted by the relevant human rights courts and treaty bodies. As was shown in Part II,[94] however, case-law under the ACHR and ECHR appears to diverge somewhat from that under the ICCPR.[95]

Under the ACHR and ECHR, the Inter-American and European Courts have affirmed the unabridged applicability of the duty to investigate during armed conflicts. This, as was set out in Chapters 6 and 7,[96] pertains also to investigations into conduct by third-parties, including NSAGs. The Inter-American Court did so most prominently in cases relating to peace process related amnesties, where it found that amnesties for NSAGs went counter to the ACHR's requirement of fighting impunity – even if they were instrumental to a peace process, and confirmed in referenda.[97] The European Court has also dealt with cases relating to abuses committed by NSAGs during armed conflict, confirming that the duty to investigate continues to apply. In cases related to the Yugoslav and North Ireland conflicts, it found Bosnia Herzegovina and the UK to be under duties of investigation, even in respect of abuses committed by armed groups. In sum, the Inter-American and European Courts have not as yet left a lot of flexibility when it comes to the duty to investigate third-party infringements. To what extent an interpretation in light of the principles of IHL could change this outlook, is therefore questionable.

Under the ICCPR, the Human Rights Committee may have left more leeway – as was shown in Chapter 5.[98] It ostensibly makes a distinction between peacetime situations in which States must investigate all '*potentially unlawful deprivations of life* (…) including allegations of excessive use of force with lethal consequences',[99] and situations of armed conflict when States 'must also investigate alleged or suspected *violations of article 6* [the right to life – FT]'.[100] As was set out in Chapter 5, this may indicate a deliberate decision by the Committee to restrict the duty to investigate during armed conflict to *State conduct* (which after all can *violate* the Covenant), and thereby to exclude third-party conduct. Whether this difference in application of the duty to investigate

93 Marko Milanović, *Extraterritorial Application of Human Rights Treaties – Law, Principles, and Policy* (Oxford University Press 2011) 209–22.
94 Chapter 5, §6.4.2; Chapter 6, §6.4.2; Chapter 7, §6.4.2.
95 Chapter 8, §1.4.
96 Chapter 6, §6.4.2; Chapter 7, §6.4.2.
97 The Inter-American Court has dealt with cases related to NSAG abuses very frequently, but such groups often acted with acquiescence or connivance of the State.
98 Chapter 5, §6.4.2.
99 *General Comment No. 36* (n 4) [27]. Emphasis FT. To the same effect, see *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, HRC 29 March 2004, CCPR/C/21/Rev.1/Add. 13 [8].
100 *General Comment No. 36* (n 4) [64]. Emphasis FT.

is truly what the Committee intends will need to be clarified in future case-law.[101] Based on the Committee's wording, however, it can at least be concluded that there is scope for flexibility, which ought to allow for taking account of the principles of IHL.

Alleviating the normative competition

Based on the above, it is now time to answer whether and how the principles of IHL can play a role in the interpretation of the IHRL duty to investigate third-party conduct, in a way which alleviates tensions without going against the core of the IHRL rule. The Human Rights Committee seemingly leaves leeway for a more narrow understanding of the duty to investigate third-party infringements during armed conflicts, because in such contexts, it first of all interprets what constitutes an 'arbitrary' deprivation of life in light of IHL,[102] and secondly limits the duty to investigate to 'suspected violations of article 6' (the right to life).[103] Thus, IHL plays a role in the substantive question whether the right to life was potentially violated, and because suspected *violations* can only be committed by States, tensions with IHL are already alleviated when it comes to third-party infringements. Of course, a violation of the right to life can also consist in a State's failure to actively protect life, also against force used by armed groups,[104] so third-party conduct can still be brought within the sphere of investigative obligations, though the scope of such obligations is more narrow. For instance, not every suspicious death will then be subject to investigative obligations, but rather only those where the State was under an obligation to protect life, because it knew or ought to have known of a specific threat.[105] Insofar as military necessity presents an obstacle for States to investigate third-party infringements, because they cannot allocate sufficient resources to sending in large numbers of military police, or because the risks for the well-being of the investigators is simply too large in a tense security situation which potentially involves territories outside the State's effective control, the ICCPR thus appears to leave sufficient leeway to take such interests into account. The principle of military necessity can thus tip the scale in favour of non-investigation into third-party infringements during armed conflicts, on a case-by-case basis, in line with the Human Rights Committee's own finding that the positive obligations stemming from the right to life ought not impose a disproportionate burden on the State.[106]

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101 Because the Committee moreover does not make an explicit distinction between IACs and NIACs in its General Comment, there is still some scope to argue that during NIACs, the general rule of IHRL applies, but this does not seem likely.

102 *General Comment No. 36* (n 4) [64].

103 Ibid.

104 Ibid [21].

105 Ibid.

106 Ibid.

For the American and European Conventions, there appears to be less scope to make use of the principles of IHL to mitigate tensions. Both the Inter-American and the European Court have reaffirmed the applicability of the duty to investigate in cases involving third-party infringements during armed conflict, and they have in fact dealt specifically with cases where States needed to investigate deaths caused by armed groups. This approach is in line with the more general continued applicability of human rights law during armed conflict.[107] It is in *how* the duty to investigate is applied, in the standards investigations must meet, that the Courts take account of the difficulties arising out of conflict situations, but not in the applicability of the duty itself. Thus, there appears little flexibility to rely on principles of IHL to mitigate tensions between military necessities and the duty to investigate third-party infringements.

This finding notwithstanding, there are of course restrictions on what is required of States. First of all, especially in situations where States operate outside their own territories, their human rights obligations extend only insofar as they have jurisdiction. Even where they operate within their own territories, if another State assumes control over part of their territory as Occupying Power, or if an armed group manages to take such control, this can limit States' obligations to ensure effective protection of human rights in those territories.[108] Secondly, even if the duty to investigate third-party infringements applies, the leeway offered to States when it comes to investigative standards can significantly reduce the demands on States, which in turn can relieve tensions with military necessities. Even if the applicability of the duty to investigate third-party infringements causes tensions with IHL and the principle of military necessity, such tensions may therefore in practice be relatively mild when the investigative standards are sufficiently loosened to account for operational and practical needs and constraints on States' armed forces.

3.5 Information triggering the duty to investigate

One remaining issue is what *information* precisely triggers a State's duty to investigate. The above, and the previous Chapters, have addressed what conduct, what type of (potential) violations, require an investigative response by the State, to unearth what has happened and to ensure accountability. The final piece of the puzzle in determining when States need to investigate, is then what information concretely triggers the duty: when is there a 'potential' violation? When are States considered to have had sufficient knowledge to

107 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996) *I.C.J. Reports* 1996, p. 226 [25].

108 *Ilaşcu and Others v Moldova and Russia*, ECtHR [GC] 8 July 2004, Appl No 48787/99 [333]-[334].

require them to find out more, and properly investigate? As transpires from the outcomes of Parts I and II of this study, the answer to this question varies among the systems of IHL and IHRL, and even within these respective regimes themselves.

As was shown in Chapter 3, the information triggering the duty to investigate under IHL varies slightly depending on whether a grave breach or war crime is at stake on the one hand, or whether a case concerns simple violations on the other.[109] For war crimes, the criterion appears to be that a serious violation was 'allegedly committed', which means States must investigate whenever they 'realize' an alleged perpetrator is present on their territory or within their jurisdiction.[110] In their practice, States interpret the triggering moment to be when the commander on the ground obtains knowledge of an incident or allegation which indicates a serious violation.[111] It is moreover the criterion of the 'reasonable commander' which is determinative of what they must have known or understood in light of the information in their possession. There is, therefore, some guidance, though what level of information precisely triggers the duty to investigate is not entirely clear. For simple, non-serious violations, the investigative trigger is less clear yet. Chapter 3 showed that the duty to investigate is triggered when a commander 'is aware' that someone under their control has committed or intends to commit a breach, with any information which would lead a prudent person to the conclusion a breach was committed, being sufficient to trigger the duty.[112]

Under IHRL, Part II has shown that States must investigate when they have knowledge of a potential violation, no matter the source. Once they have such knowledge, they must investigate *ex officio*, and may not sit on their hands and wait for victims to furnish evidence. Yet, there are some qualifications with respect to the information triggering the duty to investigate: there needs to be an *arguable* claim, a *credible* assertion, a *well-founded* or *sufficient* reason to suspect a violation may have occurred. Because the aim of the duty to investigate is to ensure that violations are brought to light by the State's authorities, this ought not be interpreted in a way which would impose an unrealistic burden on victims. Under the ICCPR, the Human Rights Committee has found that States must also investigate when they '*should have known* of potentially unlawful deprivations of life'.[113]

109 Chapter 3, §3.2.2.3, §3.2.3.3, §3.3.4.

110 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) [2890].

111 Chapter 3, §3.2.3.3.

112 Chapter 3, §3.3.4.

113 *General Comment No. 36* (n 4) [27].

Comparing both standards, the trigger for the duty to investigate does not seem to diverge too much when compared between IHL and IHRL. The criterion of when a reasonable commander or prudent individual would consider there was potentially a violation, and IHRL's requirement of 'arguable' or 'credible' complaints, or 'sufficient reasons', largely overlap and do not lead to major difficulties in their application alongside one another. Issues which arise pertain rather to what type of conduct potentially amounts to a violation under interplay, the issue which was addressed in the previous sub-sections. The trigger for investigations, however, converges.

One interesting remaining issue, which to date has never been addressed in case-law, is how precisely to assess the attribution of knowledge to the State. After all, in situations where State armed forces and other State agents commit violations of the law, they operate as organs of the State whose conduct is directly attributable to the State.[114] Because 'the State' is an abstract entity which in effect is a legal fiction, the same must go for knowledge: what 'the State knows', must be assessed through attribution of knowledge by its organs. Where, however, it is State agents committing violations and concealing such conduct to avoid being held to account, there would seem to be a snag. Whereas it is beyond doubt that these agents' conduct can be attributed to the State, engaging its responsibility for the substantive violation of the law,[115] whether these agents' knowledge of their own wrongdoing ought also be considered to trigger the duty to investigate, is a different matter. Whereas this might make sense from a general international law perspective, from a practical point of view, it does not. Finding that a State has violated its obligation to promptly investigate whenever it does not take action because the perpetrators themselves conceal evidence, does not contribute to the aims of the obligation. Rather, in the circumstances at issue it is for any other who becomes aware of the facts to bring it to the attention of the competent authorities. Anyone up the chain of command, or responsible for further investigating or referring the case who then decides not to pursue the issue will be criminally liable themselves under the doctrine of command responsibility, for failure to investigate and repress violations. Also in such cases, therefore, the duty is triggered when information reaches the relevant authorities. Of course depending on the exact circumstances, this may always be the case, for instance where military operations are constantly monitored for their effectiveness and compliance with the law, any potential violation will immediately become known up the chain of command (or at least upon debriefing).

114 ARSIWA, art 4.

115 Either under ARSIWA, art 4, or if they operate outside their competence, under art 7 (*ultra vires* acts).

3.6 Résumé

Above, it was shown how in most cases, the duty to investigate is an example of where IHL and IHRL converge, and thus operate in harmony and mutually reinforce each other. This is also the case for the information triggering the duty to investigate. In some areas, however, there is normative conflict – primarily in the contexts of the use of force and transformative occupation. Resolving these conflicts, it was shown, requires a case-by-case analysis taking account of context to determine whether an incident took place in a situation of 'active hostilities', or of 'security operations'. This, in turn, determines whether IHL or IHRL functions as *lex specialis*, and thus whether the investigative norms of IHL or IHRL prevail. Normative competition exists with respect to investigations into third-party infringements, which can partly be mitigated by using the flexibility provided by the IHRL duty to investigate such conduct, although not all human rights regimes allow for such interpretive flexibility.

The conclusion that the scope of the duty to investigate in many and perhaps even the majority of cases does not give rise to conflict under interplay, but rather harmony, may partially debunk complaints that the duty to investigate human rights violations during armed conflicts is 'mission impossible',[116] and that it leads to 'vexatious claims' against armed forces.[117] After all, the law of armed conflict similarly contains a duty to investigate, the scope of which can moreover be broader than under IHRL. Nevertheless, this conclusion should not be overstated. The scope of the duty to investigate *can* give rise to normative conflict and competition, and such normative tensions can – as was shown – have important practical implications.

4 PROCEDURAL STANDARDS OF THE DUTY TO INVESTIGATE UNDER INTERPLAY

4.1 Introduction

Turning now towards the question *how* States must conduct investigations under the interplay of IHL and IHRL, this section again engages in a comparative analysis of both regimes. It classifies investigative standards under both regimes as converging, conflicting, or competing. Once the nature of the normative overlap has thus been mapped out, the roadmap for interplay as

116 Noëlle Quénivet, 'The Obligation to Investigate After a Potential Breach of Article 2 ECHR in an Extra-Territorial Context: Mission Impossible for the Armed Forces?' (2019) 37 Netherlands Quarterly of Human Rights 119.

117 See Ministry of Defence & The Rt Hon Sir Michael Fallon, 'Government to Protect Armed Forces from Persistent Legal Claims in Future Overseas Operations', www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations (last accessed 15 July 2021).

articulated in Chapter 9 can be applied to decide how to co-apply the two legal regimes, and how to resolve any potential conflicts between them.

In general terms, the standards governing investigations are relatively vague and underdeveloped under IHL, whereas under IHRL a coherent set of standards has been identified by courts and supervisory bodies across all systems in some level of detail. Under IHL, good practice is to monitor military operations, to report incidents up the chain of command, and for an appropriate authority to assess whether further investigation is necessary.[118] If there are indications of a serious violation, this gives rise to an obligation to conduct a criminal investigation, whereas indications of non-serious violations require an administrative investigation in response. Despite a lack of clarity in IHL treaty law, Chapter 3 showed through a thorough analysis of IHL, of the judicial practice of ICL bodies, as well as of State practice and soft law instruments, that investigations into war crimes must meet standards of effectiveness, thoroughness, genuineness, promptness, impartiality, and fundamental due process guarantees.[119] With respect to investigations into non-serious violations, States have significant discretion although it would appear they must ensure the investigation is effective prompt, and impartial. Such investigations may take place within the military procedures of the armed forces themselves, and can be largely informal. In case of individual transgressions, disciplinary measures can sufficiently ensure a deterrent effect.[120]

Under IHRL, the investigative standards developed under the various systems are highly similar – with only few small nuances across the systems. First of all, all courts and treaty bodies agree that the duty to investigate is an obligation of means, a due diligence obligation, and therefore that the simple fact that an investigation was unable to identify those responsible for a violation or to obtain a conviction, does not mean that it was ineffective. Nonetheless, the State's efforts must be such that the investigation is *capable* of identifying culprits, and must be *genuine*: if it is 'preordained to be ineffective', it will fall foul of human rights standards. The criterion of a 'genuine' or 'credible' investigation moreover entails that it is not carried out in bad faith, used merely to shield the accused from *actual* investigation and prosecution. As was set out in Part II, according to human rights courts and treaty bodies, relevant standards concern that the investigation is: (i) launched of the State's own accord (*ex officio*); (ii) initiated promptly and carried out with reasonable expediency; and that it must furthermore be (iii) independent and (iv) impartial; (v) serious and effective, thorough, and adequate; and (vi)

118 Noam Lubell, Jelena Pejic and Claire Simmons, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* (The Geneva Academy of International Humanitarian Law and Human Rights & International Committee of the Red Cross 2019). Further, see Chapter 3, §2.1.

119 See Chapter 3, §4.3.

120 See Chapter 3, §4.4.

sufficiently involve the victims or their next of kin. Further, the various systems require somewhat differing levels of (vii) transparency to the investigation, in the sense that it must contain a sufficient element of public scrutiny. Finally, (viii) the follow-up process to investigations often requires measures ensuring criminal accountability.[121]

As is apparent from these brief summaries of investigative requirements and standards, IHL and IHRL regulate investigations differently, or at least in varying levels of detail. The following categorises the various investigative requirements along the lines of their normative convergence and divergence, and explores how States must carry out investigations under this normative overlap. For certain standards, as will become clear, the harmony or competition between rules depends on the exact interpretation of flexible norms. For instance, human rights courts and treaty bodies have formulated flexible tests for the effectiveness of investigative measures taking account of the exigencies of armed conflict. This allows for a harmonious interpretation of this requirement, and thus is an example of normative convergence. Whether this conclusion holds true in practice, however, depends on the precise application of a rule, and as we have seen earlier, despite human rights courts' and bodies' emphasis on flexibility, their application of investigative standards in practice has at times been quite stringent. Such stringency is liable to transform the categorisation of normative overlap from harmony, to competition, because there is now real tension between IHRL's requirements and IHL's call for leniency. Where such issues arise, where an investigative standard could be interpreted harmoniously but could equally be interpreted in a way such as to cause normative competition, this Chapter categorises them as falling under the 'competition' paradigm. Whereas the norms in question, after all, leave room for harmonious interpretation, such harmony is contingent on an interpretation taking account of IHL and its guiding principles. This, then, falls within the paradigm of normative competition as was articulated in the previous Chapter. Pursuant to this methodology, section 4.2 examines investigative standards where IHL and IHRL converge, and section 4.3 shows where normative conflict and competition arise.

4.2 Convergence in the investigative standards

As was set out above, the simple fact that States must conduct investigations is a point where the requirements of IHL and IHRL largely converge. Although there are some notable situations where conflict and competition may arise, the duty to investigate itself is very much entrenched in *both* legal regimes, and is in that sense a point of convergence between them. When it comes to

121 See Chapter 5, §5, Chapter 6, §5, Chapter 7, §5, and for a synthesis, see Chapter 8, §1.5.

investigative standards, there are also points of convergence and harmony between IHL and IHRL, which are set out in this section.

4.2.1 *Ex officio investigations*

First, the requirement that an investigation must be launched of the State's own accord (*ex officio*) as soon as there is sufficient information to trigger the duty, would appear to be a clear case of convergence and harmony between IHL and IHRL. Human rights courts and treaty bodies have been very explicit in this requirement,[122] the more so where State agents and armed forces are involved in potential violations, because in such situations, what is at stake is nothing less than public confidence in the State's monopoly on the use of force.[123] Effectuating human rights in good faith then quite clearly requires States do not take a 'wait and see'-approach and hope no allegations of violations will be brought; as soon as there is sufficient information of a potential violation, they must actively uncover the truth and investigate.

This is no different under IHL. As was set out previously, IHL requires States to monitor their military operations and evaluate them in light of compliance with IHL. These are clearly obligations imposed on the State independently from any outside allegation of misconduct; rather, they are self-standing obligations which attach to the conduct of any military operation. If any potential breach is brought to light through such monitoring, then clearly, it is for the State of its own motion to investigate and potentially ensure accountability – whether through acknowledgement of State responsibility, through administrative investigations, disciplinary measures, or criminal investigation and prosecution. The duty to repress grave breaches, and to suppress all other breaches of IHL implies an active obligation, not contingent on any outside allegation. This is encapsulated particularly well in Articles 86 and 87 of AP I, which hold commanders and superiors liable for a failure to take all feasible measures to prevent or repress a breach which they knew, or should have known, was going to occur. They moreover clarify the spectrum of commanders' obligations, ranging from prevention of breaches to their suppression and repression – which indicates their continuous and active role. Finally, these obligations are even coupled with criminal liability for commanders if they fail to fulfil their active role.

In other words, that investigations must be carried out of the State's own accord is clearly enshrined equally in IHRL and IHL, and in fact, IHL might be more adamant in this respect through commanders' individual responsibility for investigations. This raises no particular issues with respect to resolving

122 See Chapter 5, §5.3.2, Chapter 6, §5.3.2, Chapter 7, §5.3.2, for a synthesis see Chapter 8, §1.5.

123 *Ramsahai and Others v the Netherlands*, ECtHR [GC] 15 May 2007, Appl No 52391/99 [325]; *Al-Skeini v the United Kingdom*, ECtHR [GC] 7 July 2011, Appl No 55721/07 [167].

normative overlap, because both norms converge and can therefore be applied in parallel.

4.2.2 Impartiality

A second point where IHL and IHRL converge, is the impartiality of investigations. Impartiality connotes the absence of 'prejudice or bias'.[124] This investigative requirement has not been given much attention in case-law. Impartiality has to do with the existence, or appearance, of bias.[125] In other words, investigators may not have strong preconceived ideas of what happened, whether this constituted a violation, and who must (or must not) be held accountable. This IHRL requirement, which is also a commonly cited standard for IHL investigations,[126] does not appear to differ under both legal regimes. Any investigation where right from the start, the investigators are already fully convinced nothing untoward has taken place, is predetermined to be ineffective. This also means, and this already comes close to the separate criterion of independence, that investigators may not have an own stake in the outcome of the investigation. Because both IHL and IHRL equally insist on impartiality, this again is an instance of convergence between them, which does not require any reconciliation through interpretation or conflict resolution.

Beyond the *ex officio* instigation and the impartiality of investigations, investigative standards would appear to diverge as between IHL and IHRL. As is explored below, a number of these divergences is not necessarily problematic, but nonetheless, many aspects of how States must carry out investigations lead to a competition between IHL and IHRL.

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124 David J Harris and others, *Law of the European Convention on Human Rights* (3rd edn, Oxford University Press 2014) 450; Lubell, Pejic and Simmons (n 118) 24.

125 This criterion has been outlined in jurisprudence primarily in the context of the right to a fair trial. See *Micallef v Malta*, ECtHR [GC] 15 October 2009, Appl No 17056/06 [93]: 'Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the Court's constant case-law, the existence of impartiality for the purposes of Article 6 §1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.' Further, see William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 294–6; Lubell, Pejic and Simmons (n 118) 24.

126 The Turkel Commission, 'Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law' (2013) 125–7, 140 <https://www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_b1-474.pdf (last acccessed 15 July 2021)>; Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 Harvard National Security Journal 31, 55; Lubell, Pejic and Simmons (n 118) 24.

4.3 Divergence in the investigative standards

4.3.1 Introduction

This section looks at those investigative standards under IHRL which diverge from what IHL requires or permits. In terms of the roadmap for interplay, as developed in Chapter 9, this concerns situations of conflict and competition. As will be shown, a number of investigative standards under IHL and IHRL constitute each other's contrary opposite, setting standards which are at least *prima facie* incompatible. Those standards, which give rise to normative conflict, are addressed first (§4.3.2). Those standards which do not strictly speaking conflict, but can nevertheless give rise to tensions and therefore compete, are the subject of section 4.3.3.

4.3.2 Conflict between investigative standards

Of the eight investigative standards formulated by human rights courts and treaty bodies, two give rise to potential conflicts with IHL's regulation of investigations. As we shall see, certain of these conflicts can potentially be avoided through interpretation. But because of the potential for conflict, it is addressed here how such conflicts can be resolved.

4.3.2.1 Independence

The first potential conflict between investigative requirements under IHL and IHRL, concerns the standard of independence. IHRL requires an investigation to be carried out independently, which means that investigators must be statutorily and institutionally independent from those whose responsibility is likely to be engaged.[127] In an armed conflict context, this has been interpreted to mean that investigators must be operationally independent from the chain of command.[128] In other words, military police are sufficiently independent, but direct commanders are not. Moreover, investigations by military prosecutors have been found lacking due to their lack of independence. The Inter-American Court has found military jurisdiction over human rights violations to be acceptable only highly exceptionally, and in case of serious human rights violations has rejected this approach outright.[129] The European Court has similarly found that the investigation into civilian

127 See Chapter 5, §5.3.5, Chapter 6, §5.3.5, Chapter 7, §5.3.5, for a synthesis see Chapter 8, §1.5.

128 See Chapter 5, §6.4.3, Chapter 6, §6.4.3, Chapter 7, §6.4.3. Further, see *Al-Skeini v the United Kingdom* (n 123) [169]-[177]; *Jaloud v the Netherlands*, ECtHR [GC] 20 November 2014, Appl No 47708/08 [189]-[190].

129 Chapter 6, §5.3.5; *Cruz Sánchez et al. v Peru* (n 48) [398]; [401]-[404].

deaths by a military prosecutor on the basis of witness testimonies by military servicemen is problematic in light of the requirement of independence.[130]

IHL, meanwhile, places heavy emphasis on the role of military commanders in the prevention, suppression, repression, and thus investigation, of breaches. Additional Protocol I clearly envisions the commanders as an 'investigative magistrate', who is first on the scene, and first responsible for investigation.[131] Thus, military commanders are under the *obligation* to investigate, pursuant to IHL. And that is not all, they are even *criminally liable* if they fail to do so – both under IHL and ICL.[132]

IHL and IHRL therefore require wholly different things: IHL requires commanders to investigate, and holds them criminally liable if they do not, whereas IHRL effectively prohibits commanders from investigating, because this breaches the independence of the investigation – a case of contrary conflict. Such conflict must, in principle, be resolved by reliance on the *lex specialis derogat legi generali* rule, meaning that the rule which is explicit and meant to govern a situation, takes precedence. Because the contents of both rules are specific, and both are moreover attuned to situations of armed conflict – either because the rule itself is part of the law of armed conflict, or because the rule was modified by supervisory bodies for armed conflict situations – this method does not lead to an immediately apparent answer.

But perhaps, resolving the issue through application of *lex specialis* is not necessary in this specific situation. Despite the apparent contrary conflict between both rules, there appears to be some room to interpret the two harmoniously. IHL's requirement for commanders to investigate is sensible precisely because it is the commander who is the first on the scene, and the first who is in a position to react effectively to a potential violation. Moreover, as Michael Schmitt explains, the requirement to investigate *effectively* also means the investigator will need to have the expertise to do so:

> 'While impartiality and independence are investigatory requirements, so too is effectiveness. An investigator who does not understand, for example, weapons options, fuzing, guidance systems, angle of attack, optimal release altitudes, command and control relationships, communications capabilities, tactical options, available intelligence options, enemy practices, pattern of life analysis, collateral damage estimate methodology, human factors in a combat environment, and so forth, will struggle to effectively scrutinize an air strike.'[133]

130 *Abuyeva and Others v Russia*, ECtHR 2 December 2010, Appl No 27065/05 [212]; *Tagayeva and Others v Russia* (n 47) [536].

131 See Chapter 3, §4.3. Further, see Jean Pictet and others, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Yves Sandoz, Christophe Swinarski and Bruno Zimmermann eds, Martinus Nijhoff 1987) 1023, [3562]; Schmitt (n 126) 44.

132 AP I, art 86(2); see further Chapter 3, §4.3.

133 Schmitt (n 126) 84.

In other words, where the military expertise of a commander is absolutely necessary to effectively investigate, human rights courts and treaty bodies likely should take this into account. After all, the various investigative standards as formulated by human rights courts and bodies ultimately serve to ensure the effectiveness of the investigation, which effectiveness must be assessed holistically: did all investigative measures taken together amount to a proper investigation. Moreover, IHL would seem to leave some leeway for situations where commanders who become aware of a potential violation immediately take action to prevent further violations, who then report the incident up the chain of command, or to competent investigative authorities, such as military police or prosecutorial services. In fact, the ICRC and Geneva Academy have identified this as good practice in their *Guidelines on Investigating Violations of International Humanitarian Law* (hereinafter: *Guidelines*).[134] If indeed commanders take the very first required steps, such as securing the scene of an incident for further investigation, which they alone are arguably in a position to do,[135] before remitting the case for further investigation to other, independent investigators, this would seem to satisfy both IHL and IHRL criteria. IHL also allows for such, if we read 'all feasible measures (…) to prevent or repress the breach' to be taken by commanders,[136] as being satisfied when they report incidents. This reading is in line with Article 87(1) AP I, which further specifies commanders' duties 'to suppress *and report to competent authorities* breaches of the Conventions and of this Protocol'.[137] Thus, despite the ostensible conflict between IHL and IHRL on the criterion of independence, it would seem that both rules can be satisfied by having commanders take certain preliminary investigative steps only, necessary to ensure the further effectiveness of the investigation, and having them report incidents as soon as reasonably possible to competent authorities outside the chain of command.[138]

This approach which reconciles the requirements of IHL and IHRL, was supported by the European Court of Human Rights in the case of *Hanan v Germany*. As was set out in Chapter 7, the Court there found that whereas it is 'preferable' for investigations to take place outside the chain of command, this may not be feasible during active hostilities. Taking this context and the applicable IHL into account, this led the Court to the conclusion that commanders should not be excluded from having a role in on-site investigations.[139] On the facts of the case, the investigation had moreover been reported promptly to independent authorities which conducted a further investiga-

134 Lubell, Pejic and Simmons (n 118) 16–23.
135 Ibid.
136 AP I, art 86(2).
137 AP I, art 87(1). Emphasis FT.
138 Lubell, Pejic and Simmons (n 118) 16–23.
139 *Hanan v Germany*, ECtHR [GC] 16 February 2021, Appl No 4871/16 [223]-[224]. Further, see Chapter 7, §6.4.3.

tion. Thus, the approach outlined above with commanders operating to secure the further effective investigation before remitting the case as soon as possible to competent and independent authorities, can be accepted by IHRL courts and treaty bodies, and is feasible under IHL, *when concerning war crimes*. As was set out previously, war crimes require a criminal investigation, for which IHL too advises independent investigators, outside the chain of command.[140] State practice also confirms that many States require their commanders to report potential war crimes to investigatory authorities outside the chain of command.[141] It may therefore be concluded that the requirement that investigations be independent, can be interpreted harmoniously such that no conflict arises and no application of *lex specialis* is necessary.

Whether the above approach is also feasible for simple violations, however, which require an 'administrative investigation' only, can be questioned. There, IHL does not require a criminal response, and the aim of guaranteeing non-repetition through a lessons-learned approach, coupled potentially with acknowledgement of State responsibility and disciplinary measures, can be equally satisfied through command investigations. As the *Guidelines* also clarify, such administrative investigations are sufficient under IHL.[142] But if the incident giving rise to a non-serious violation also requires an investigation under IHRL, such as is likely the case when a lack of precautionary measures results in civilian casualties, such internal military investigations do not satisfy IHRL's standard of independence. Requiring States to submit also such incidents to independent investigative authorities likely clashes with what IHL aims to do: set strict requirements for war crime investigations, and leave a wide margin of discretion to States in how they address non-serious violations. If this margin of discretion left to States is read as implying an IHL *permission* to do no more than institute an investigation which is able to determine State responsibility and a potentially administrative sanction, then we are faced here with a normative conflict which must be resolved through application of *lex specialis*.

Let us therefore look at the two determinatives of *lex specialis*, specificity of the rules, and the extent to which they were meant to govern a situation. Arguably, IHRL is more specific in its requirement of independent investigations, as human rights courts and treaty bodies have been explicit and clear in their requirements, while IHL provides rudimentary guidance only when it comes to how States should conduct investigations into non-serious violations.[143] Nevertheless, if IHL's norms are interpreted as being *permissive*, as

140 Lubell, Pejic and Simmons (n 118) 16–23.
141 Chapter 3, §4.3; see further Margalit (n 2) Chapter 6; Lubell, Pejic and Simmons (n 118) fn 51.
142 Lubell, Pejic and Simmons (n 118) 32–6.
143 Murray and others (n 12) 334–9.

intentionally leaving discretion to States,[144] then it does not lack specificity. Which rule is designed to govern a situation depends on the precise context of the incident, which as was set out above also in the context of precautions in attack,[145] must depend on the exact circumstances pertaining during the use of force, and whether the incident thus falls within an 'active hostilities', or rather a 'security operations' paradigm. During active hostilities, IHL must then take the lead, meaning that a lack of precautions resulting in civilian deaths, constitutes a 'regular' IHL violation, which requires an administrative investigation only. Under a security operations paradigm, conversely, IHRL provides the main frame of reference, and where precautionary measures were lacking leading to incidental loss of civilian life, this will need to be investigated independently, conforming to human rights standards.[146]

4.3.2.2 Follow-up to investigations

A further potential conflict between IHL and IHRL when it comes to investigative standards, is the IHRL requirement that investigations must be followed, if appropriate, by prosecution and punishment. This emphasis, which has been particularly strong under the ACHR,[147] but which also features quite prominently under the ICCPR and ECHR,[148] can under certain circumstances clash with IHL. For instance, the IHL governing NIACs requires States to endeavour to enact the broadest possible amnesty at the end of the conflict, which would absolve those responsible from investigation and prosecution.[149] Also, closely intertwined with the requirement of independence discussed above, many States if they do prosecute their own armed forces, rely on military prosecutors and courts. IHRL, however, on many occasions stresses the importance of independent civil courts to oversee and adjudge perpetrators of human rights violations, especially where civilians fell victim to such conduct. These two issues are addressed here.

Firstly, the IHRL duty to investigate entails an obligation for States to remove all *de facto* and *de jure* obstacles for investigation, prosecution and

144 Also explained as constituting a *qualified* silence; Marco Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford University Press 2011) 77. Similarly, see Sivakumaran (n 31) 92.

145 *Supra*, §3.4.2.1.

146 For a contrary reading, assuming IHL's rudimentary rules on how investigations must be carried out ought to always be given substance by way of reference to IHRL, see Murray and others (n 12) 334–9.

147 See Chapter 6, §3.4 and §5.3.7.

148 See Chapter 5, §5.3.7; Chapter 7, §5.3.7.

149 AP II, art 6(5).

punishment, including a prohibition of amnesties.[150] Meanwhile Additional Protocol II, applicable to non-international armed conflicts, requires States to 'endeavour' to grant 'the broadest possible amnesty' for those who have taken part in hostilities,[151] thus giving rise to contrary obligations. Moreover, the ICRC has identified this rule to be part of customary law,[152] which means that the rule applies to all NIACs, and all States.[153] Amnesties absolve those involved in a conflict from their criminal responsibility, which conflicts directly with IHRL's insistence on criminal measures for certain human rights violations committed during the conflict. A potential way of reconciling these two norms is to be found in the ICRC's formulation of an exception to the customary rule requiring amnesties, which is not part of AP II: war crimes should not be made subject of amnesties.[154] This exception goes a long way of bringing IHL and IHRL closer together, and human rights courts have gratefully relied on this exception,[155] but it does not solve all issues. There remain human rights violations which do not amount to war crimes, but which nevertheless require criminal prosecution. Thus, on the issue of the use of lethal force against fighters and civilians directly participating in hostilities during NIACs, which was already touched upon above,[156] IHRL would require an investigation and a criminal follow-up thereto, while IHL prescribes the granting of amnesty. Similarly, a lack of precautions in attack resulting in civilian deaths would require criminal investigations under IHRL, whereas as a non-war crime, the IHL of NIACs prescribes 'endeavouring' the granting of amnesty. Interestingly, the Inter-American and European Courts have qualified the prohibition of amnesties as relating to 'serious violations'[157] and 'grave breaches'[158] of (fundamental) human rights – without however defining what this means precisely, and with both formulations not being legal terms of art. Arguably however, the regional courts thus leave some flexibility for less grave violations, such as might be the case where conduct during armed conflict is not viewed as a war crime, and perhaps even as not unlawful at all. The key to

150 *General Comment No. 36* (n 4) [27]; *Gelman v Uruguay* (Merits and Reparations) Inter-American Court of Human Rights Series C No 221 (24 February 2011) [226]; *Marguš v Croatia*, ECtHR [GC] 27 May 2014, Appl No 4455/10 [127]. Further, see Chapter 5, §5.3.7; Chapter 6, §5.3.7; Chapter 7, §5.3.7; and for a synthesis see Chapter 8, §1.5.

151 AP II, art 6(5).

152 Henckaerts and Doswald-Beck (n 23) 611, Rule 159.

153 After all, AP II is limited in applicability both *ratione personae* (to signatories), and *ratione materiae* (to NIACs meeting the threshold defined in AP II, art 1(1)). Customary law does not have such limitations.

154 Henckaerts and Doswald-Beck (n 23) 611, Rule 159.

155 *Gelman v Uruguay* (n 150) [210]; *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 252 (25 October 2012) [286]; *Marguš v Croatia* (n 150) [129]-[139].

156 *Supra*, §3.4.2.1.

157 *Gelman v Uruguay* (n 150) [226].

158 *Marguš v Croatia* (n 150) [139].

solving the issue must ultimately be found in a nuanced application of *lex specialis*, with the lawfulness of conduct depending on whether it was committed during active hostilities, or during security operations. One way for States to tackle this issue might be to enact amnesty laws which explicitly exclude application to 1) war crimes, 2) serious violations of human rights (however defined), and 3) human rights violations committed outside active hostilities. This way, it can be ensured that for active hostilities, IHL's amnesty rule prevails, whilst for all situations falling short of active hostilities, IHRL's duty to investigate, prosecute, and punish is applied.[159]

Secondly, once criminal prosecution and trial is initiated, IHRL sets further norms. On the one hand, these concern fair trial rights of the accused, which guide how prosecution and trial may be conducted fairly. These rights are not addressed further here. On the other hand, the duty to investigate, prosecute, and punish also governs such proceedings to a certain extent.[160] The duty to investigate is an obligation of means, a due diligence obligation, and there is therefore no obligation for a trial to end in a conviction[161] – a requirement which would quite obviously violate the presumption of innocence. Rather, IHRL requires the investigation and subsequent trial to be 'genuine', not just a show trial 'preordained to be ineffective',[162] and conducted before an independent and impartial tribunal. This also means that prosecution and trial before military courts is potentially problematic – although the various human rights regimes appear to take somewhat varying approaches to this issue. The *Inter-American Court* has been consistent and adamant in excluding investigations under military jurisdictions, for violations of the ACHR.[163] That

159 I leave aside here the issue whether the duty to investigate, prosecute, and punish can be balanced against the interests of peace, if the conclusion of a peace agreement (seemingly) requires the granting of amnesties to members of NSAGs. There is extensive literature on this 'peace versus justice'-debate, to which I do not aim to add. See, for instance, Courtney Hillebrecht, Alexandra Huneeus and Sandra Borda, 'The Judicialization of Peace' (2018) 59 Harvard International Law Journal 279; Karen L Engle, Zinaida Miller and Dennis Davis (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press 2016); Jacopo Roberti di Sarsina, *Transitional Justice and a State's Response to Mass Atrocity. Reassessing the Obligations to Investigate and Prosecute* (TMC Asser Press 2019).

160 In the words of the European Court, 'Where the official investigation leads to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect the right to life through the law. In this regard, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished', *Armani Da Silva v the United Kingdom*, ECtHR [GC] 30 March 2016, Appl No 5878/08 [239].

161 Ibid [238] and [259]; *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 155) [242] and [248]; see also Giovanna Maria Frisso, 'The Duty to Investigate Violations of the Right to Life in Armed Conflicts in the Jurisprudence of the Inter-American Court of Human Rights' (2018) 51 Israel Law Review 169, 174.

162 *Velásquez Rodríguez v Honduras* (Merits) Inter-American Court of Human Rights Series C No 4 (29 July 1988) [177].

163 See Chapter 6, §6.4.3.

system ought to be reserved only for those individuals who are still in active military service, and limited to cases involving crimes or infractions that by their very nature violate legal interests specific to the military order.[164] The *European Court* is less stringent, and applies a more holistic test to ascertain investigators' and courts' independence from the perspective of the duty to investigate. The leading consideration when it assesses independence in this context is whether in the concrete case under examination, there were indications calling independence into question. This means that under the European system, the mere fact that the military justice system is used to prosecute and try human rights violations does not in and of itself violate the independence of the proceedings from the perspective of the duty to investigate, although other contextual factors can lead to that conclusion.[165] Moreover, it must be noted that the Court itself attaches weight to whether State agents are implied in ill-treatment or unlawful killings, in which case a military justice system may be less suitable.[166] The European Court thus takes a relatively nuanced approach, and leaves more leeway for States to conduct prosecution and trial through a military justice system than the Inter-American Court. The *Human Rights Committee* has not yet developed an extensive jurisprudence on this matter, but has in the context of disappearances found that the system of investigation, prosecution, and adjudication, must 'operate, as a rule, within the ordinary criminal justice system'.[167] Whereas the various IHRL systems thus all stress the independence of the investigation and the follow-up proceedings thereto, they have interpreted this criterion in varying ways. The ordinary criminal justice system is the preferred method for all systems, because it guarantees the best safeguards for independence, but at least under the European system there is some leeway for military proceedings so long as in the concrete circumstances of the case, there are no signals that the independence of the proceedings was compromised.

Compared with the human rights concerns for the independence of the proceedings following investigation, IHL is markedly less pronounced. For prisoners of war, GC III stipulates that POWs shall be tried by military courts, unless insofar as the State's own forces would also be tried by civil courts – and the independence and impartiality of such a court must in any case be ensured.[168] For prosecution and trial of a State's own armed forces, however,

164 E.g. *Cruz Sánchez et al. v Peru* (n 48) [397]; *Santo Domingo Massacre v Colombia* (Preliminary Objections, Merits and Reparations) Inter-American Court of Human Rights Series C No 259 (30 November 2012) [158]; see further Frisso (n 161) 188.

165 *Mustafa Tunç and Fecire Tunç v Turkey*, ECtHR [GC] 14 April 2015, Appl No 24014/05 [217]-[254]. See Chapter 7, §5.3.5.

166 Ibid [228].

167 *General Comment No. 36* (n 4) [58].

168 GC III, art 84. Questioning whether this provision really safeguards POW rights, see Derek Jinks, 'The Declining Significance of POW Status' (2004) 45 Harvard International Law Journal 367, 434–6; generally, see Peter Rowe, 'Penal or Disciplinary Proceedings Brought

IHL sets no standards whatsoever. Even though IHL therefore requires States to monitor their military operations, ensure they have effective systems of supervision, implementation and enforcement of the rules, and requires States to investigate any potential breaches in this context, it does not regulate how subsequent proceedings must be conducted. This, arguably, leaves room for application of human rights norms, which as was explained, *do* govern this situation. However, IHRL's emphasis on civil rather than military jurisdiction over serious human rights violations can clash with State practice which relies quite heavily on military prosecutors and courts.[169]

There appears to be some middle ground between military proceedings and IHRL's requirement of independence. As the European system illustrates, it is practical independence in a concrete case which is ultimately decisive of whether an investigation and subsequent trial meets the requirements set to ensure the effective protection of victims' rights. Meanwhile, the Inter-American Court's stricter stance on this issue is understandable and justified. As was explained in Chapter 6,[170] the context on the American continent has shaped the San José Court's case-law. In this context of rampant impunity and State-sponsored and State-led atrocities, which were subsequently covered up by the State, a certain mistrust of prosecutors and judges who form part of the military and who are therefore not fully independent from the executive, is justified. The European Court would no doubt find similarly in cases where the military is completely and absolutely involved in widespread and systematic atrocities. This makes it difficult to abstract a more general code of conduct when it comes to military proceedings, however. Whereas State reliance thereon does not appear to be out of the question altogether, where a State's military is implicated in atrocities to an extent where there appears to be a systematic failure, or rather even a policy which prescribes such atrocities, then clearly a military justice system which is not completely separate from the chain of command and the executive, can no longer be perceived as sufficiently independent. In less extreme circumstances, however, there does appear to be leeway for military justice systems operating to adjudicate IHL and IHRL violations committed by State armed forces during armed conflicts.

4.3.3 Competition between investigative standards

Of the eight investigative standards as applied by human rights courts and bodies, it was shown above that the requirements of an *impartial* and *ex officio* investigation converge under IHL and IHRL, while the requirements of *independence*, and a sufficiently independent *criminal law follow-up* lead to potential

against a Prisoner of War' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (Oxford University Press 2015) 1028–9.

169 Margalit (n 2) 153.

170 Chapter 6, §2.

conflicts. This leaves four investigative standards which fall under the paradigm of normative competition. The requirements that investigations are (i) prompt and carried out with reasonable expedition, (ii) serious, effective, adequate, and thorough, (iii) sufficiently involve victims or their next of kin, and are (iv) transparent and subject to public scrutiny, do not lead to conflicts with norms of IHL. Nonetheless, simple application of these standards may raise tensions with IHL's object and purpose, and can therefore give rise to normative competition. The following discusses these criteria for the effectiveness of investigations in turn, explains why these standards raise tensions with IHL, and how such tensions can be resolved.

4.3.3.1 Prompt and carried out with reasonable expedition

If an investigation is to have any hopes of being effective, it must be initiated promptly after an incident.[171] This is crucial because certain evidence will simply be lost if it is not secured immediately, if the scene of events is not cordoned off, and witnesses will be more difficult to find, and their testimonies will be less reliable, if too much time is allowed to pass. Thus, the effectiveness of many of the concrete investigative steps required which make an investigation serious, effective, adequate and thorough, hinge on the promptness of the investigation. These considerations apply to all investigations, whether they are carried out under IHRL or IHL. Human rights courts and treaty bodies have found to this effect expressly, with the European Court of Human Rights recognising promptness as one of the 'essential parameters' for an effective investigation,[172] and stressing its importance for safeguarding 'public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts'.[173] Under IHL, the standard of promptness is implicit in the requirement that an investigation is capable of leading to prosecution and punishment. Despite the role of promptness as an investigative standard under both regimes, tensions can nevertheless arise in its application.

What 'prompt' entails precisely is difficult to say in the abstract, and will depend on the exact moment State authorities become aware of a potential violation, and whether an immediate response is called for. As the Inter-American Court formulates it, States must initiate the investigation 'as soon

171 Philip Leach, 'The Right to Life – Interim Measures and the Preservation of Evidence in Conflict Situations' in Lawrence Early and others (eds), *The Right to Life under Article 2 of the European Convention on Human Rights. Twenty Years of Legal Developments since McCann v. the United Kingdom. In Honour of Michael O'Boyle* (Wolf Legal Publishers 2016) 171.

172 *Mustafa Tunç and Fecire Tunç v Turkey* (n 165) [225].

173 *Armani Da Silva v the United Kingdom* (n 160) [237]; Philip Leach, Rachel Murray and Clara Sandoval, 'The Duty to Investigate Right to Life Violations across Three Regional Systems: Harmonisation or Fragmentation of International Human Rights Law?' in Carla Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill Nijhoff 2017) 40.

as is practicable after [taking] knowledge of the facts'.[174] In case of enforced disappearance, for instance, any hope of saving the life of the disappeared person hinges on an immediate and effective response.[175] In other situations, it will depend more on context. In situations of armed conflict, what is 'as soon as practicable' is influenced by the exigencies of the situation. As the Human Rights Committee has found, an 'unexplained delay' can undercut the effectiveness of the investigation.[176]

Under IHL, there are no explicit norms governing what the 'promptness' of an investigation entails.[177] Some inferences can be drawn from the duties to 'repress' grave breaches and 'suppress' all other breaches, which according to Additional Protocol I requires superiors to 'take all feasible measures within their power to prevent or repress' a violation.[178] Although there are no further clarifications on the promptness of such action, at least for the duty to prevent, there can be no question that effective prevention requires prompt action on the part of superiors as soon as they find out their subordinates intend to commit a breach. Soft law moreover reinforces this point.[179] Yet, in the absence of explicit rules guiding when States must initiate investigations, there is a measure of leeway here for States. This is all the more so in case of administrative investigations into non-serious breaches, which likely do not warrant an equally prompt response. Ultimately, IHL treaty law is therefore silent, and how the standard of promptness must be construed has not yet crystallised.

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174 *Vargas-Areco v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 155 (26 September 2006) [77].

175 See Chapter 6, §5.3.3.

176 It found a violation of the right to life because of unexplained 'delay in initiating and completing the criminal investigation and proceedings on Mr. Novaković's death' (*Novaković v Serbia*, HRC 21 October 2010, CCPR/C/100/D/1556/2007 [7.3]) and found in the context of the Chechnyan conflict, that Russia must 'Ensure prompt and impartial investigation by an independent body of all human rights violations allegedly committed or instigated by State agents and suspend or reassign the agents concerned during the process of investigation' (*Concluding Observations on Russia*, HRC 24 November 2009, CCPR/C/RUS/CO/6 [14]).

177 Chapter 3, §§4.3 and 4.4; further, see Murray and others (n 12) 334–7.

178 AP I, art 86(2).

179 E.g. Human Rights Council 23 September 2010, *Report of the Committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards*, A/HRC/15/50 [21] and [33]; Goldstone Report (2009) UN fact-finding mission on the Gaza conflict (25 Sept 2009), UN Doc. A/HRC/12/48 [1814]; UNGA Resolution 60/147 (2005), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, principle 3(b); Lubell, Pejic and Simmons (n 118).

IHL's somewhat unspecified criterion of promptness potentially leads to tensions with IHRL's harder requirement that States initiate investigations 'as soon as practicable', without delays. It may be thought that one can simply apply the IHRL requirement of promptness, and thus rely on IHRL to fill gaps left by IHL. Nonetheless, there is at least a potential for normative tension here, insofar as IHRL places demands on States which go at the cost of their operational capabilities. The European Court's jurisprudence illustrates best how such tensions can arise, as it tries to walk a balanced path. In *Al-Skeini*, it held that whereas it is cognisant that the exigencies of armed conflict may hamper a State's possibilities of investigating, a prompt response is nonetheless essential.[180] In the same vein, in *Damayev*, it held that the Russian authorities' instigation of an investigation into an airstrike which had killed the applicant's wife and two children, eight days after the event and at the very least four days after the prosecutor had become aware of the incident, was 'unjustifiably long and inevitably contributed to the ineffectiveness of the investigation'.[181] In *Hanan*, it considered that a situation of armed conflict may lead to an investigation being 'delayed', and accepted that in the context of active hostilities in an extraterritorial conflict, on-site investigators arrived 12 hours after an airstrike, and that preliminary investigations were started by respective prosecutors three and four days after the incident.[182] At the same time, in a number of cases relating to the Yugoslav conflict, the Court has shown leniency in assessing the promptness of investigations, taking account of exigencies of armed conflict, and the difficulties for newly independent States who simply needed time to set up a proper investigative system.[183] Thus, there is some flexibility under the ECHR as to the promptness of investigations where circumstances, such as those arising out of armed conflict, render an immediate investigative response difficult. This showcases how in the European case-law, promptness is essential for the effectiveness of the investigation, and yet is a flexible context-sensitive criterion which can take account of the exigencies of armed conflict situations, and which feeds into the more general criterion of investigating 'as soon as is practicable after [taking] knowledge of the facts'.

The potential tension between IHL and IHRL may therefore be alleviated, as was suggested before, by relying on IHL's principle of military necessity. Even though IHL may be silent on the specific issue of promptness, that does not mean that there is a complete normative vacuum; its principles guide the interpretation of any vague norm and apply also to issues not explicitly covered by its provisions. Thus, if IHRL's requirement that States investigate

180 *Al-Skeini v the United Kingdom* (n 123) [167].
181 *Damayev v Russia*, ECtHR 29 May 2012, Appl No 36150/04 [81].
182 *Hanan v Germany* (n 139) [223], [227].
183 *Palić v Bosnia and Herzegovina*, ECtHR 15 February 2011, Appl No 4704/04 [70]-[71]; *Zdjelar and Others v Croatia*, ECtHR 6 July 2017, Appl No 80960/12 [91]-[94].

as soon as practicable is interpreted in light of military necessity, this can relieve tensions, and ensure that the investigative requirements placed on States remain practicable and feasible. This may also allow for perhaps a more graduated approach, with certain investigative steps which can be taken immediately being required, and further follow-up as soon as this is feasible. For instance, if military operations are monitored through video surveillance, any footage can be reviewed as soon as possible, together with any intelligence and data gathered by the State, and witness statements can be taken from military personnel involved. If active hostilities are ongoing, or if the State lacks territorial control, sending investigators to secure the scene of an incident and to gather evidence may not yet be feasible, but first steps such as those outlined above can be taken regardless of further circumstances. Further follow-up can then be carried out as soon as this is feasible, taking account of military necessities.

4.3.3.2 A serious and effective, adequate and thorough investigation

Whereas the duty to investigate is an obligation of means, the State's investigative efforts must nevertheless be *capable* of achieving the aims of establishing what happened, identifying those responsible, determining whether use of force was justified and thus whether the law was breached, and that ultimately redress is offered.[184] Practically, this means States must take a number of investigative steps, primarily with respect to fact-finding. Human rights courts and treaty bodies have been very explicit in what this entails, although they have done so under various phrasings – with the Inter-American Court referring to the criterion that an investigation is 'serious and effective', the European Court insisting on the 'adequacy' of the investigation, and the Human Right Committee holding that it must be 'thorough, effective, and credible'. They have moreover fleshed out this standard in their case-law, at times establishing in great detail what is required of States, for instance with respect to establishing bullet trajectories, separating suspects from potential witnesses, gathering witness testimonies, conducting autopsies, and so forth. Any deficiency in such steps, or an obvious line of inquiry which was not pursued, will lead to a violation of IHRL if it is such as to undermine the aim of establishing the facts and those responsible.[185] IHL, meanwhile, equally requires investigations to be effective and capable of leading to prosecution and punishment, or to establishing responsibility, but does not outline expressly what this amounts to in practice. This arguably leaves leeway for States

184 *Mustafa Tunç and Fecire Tunç v Turkey* (n 165) [172]; *Jaloud v the Netherlands* (n 128) [200]; *Velásquez Rodríguez v Honduras* (n 162) [177]; *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)* (Advisory Opinion) Inter-American Court of Human Rights Series A No 9 (6 October 1987). Further, see Chapter 5, §5, Chapter 6, §5, Chapter 7, §5, Chapter 8, §1.5.

185 E.g. *Hanan v Germany* (n 139) [202].

to decide how they conduct investigations, which potentially causes tensions with IHRL's specific and detailed requirements. Thus, much like the situation regarding the standard of promptness, we are faced with an IHRL demand which – although allowing for some flexibility – may cause friction with IHL's rather indeterminate norms.

IHL merely provides, in case of serious violations, that the investigation must be *capable* of leading to prosecution and punishment of the accused.[186] *How* the investigation is carried out, then, and what avenues must be pursued, is left up to States themselves. This leaves a lot of discretion to State authorities when they conduct investigations, and arguably leaves more leeway for practical constraints borne out by the exigencies of the situation, and countervailing military necessities. Because IHL, however, does not explicitly formulate the standards investigations must meet, and to what extent the feasibility of such measures plays a role, there is no *conflict* here between IHL and IHRL. Tensions may nonetheless arise if IHRL's requirements go against military necessities by placing undue burdens on the State. A case in point is *Jaloud*, where a Dutch lieutenant shot and killed a civilian at a vehicle checkpoint in Iraq during an extraterritorial military operation. The European Court in this case stressed the importance of separating the subject of investigations from witnesses to prevent collusion and interviewing him promptly to prevent any risk or appearance of collusion.[187] Crucially though, the lieutenant was the highest ranking officer present at the checkpoint, meaning that separating him from 'witnesses', namely the other troops, would have significantly impacted the military's operational capabilities on the ground in a tense security situation where the checkpoint had in fact been attacked earlier that very evening. Moreover, the Court took issue with deficiencies in the autopsy which was carried out later by an Iraqi doctor. It found that the Dutch troops ought to have taken responsibility for the autopsy themselves, or at the very least should have monitored it. The Dutch State, meanwhile, had argued that it did not have the proper facilities in Iraq, and that the troops which had brought Mr. Jaloud's remains to hospital had been forced to leave; the situation had been sufficiently hostile for these forces to fear for their lives. This goes to illustrate that the requirement that investigations be 'effective' can give rise to normative competition.

In order to resolve this normative competition, the flexibility in the applicable IHRL norms must be considered. Human rights jurisprudence on this point shows that what constitutes an 'effective' investigation is a relatively open norm. What lines of inquiry must be pursued can only be determined on a contextual, case-by-case basis. Nonetheless, the extensive case-law on what constitutes an 'effective' investigation does give some guidance. Both the Inter-

186 See Chapter 3, §4.3.
187 *Jaloud v the Netherlands* (n 128) [206]-[208].

American Court and the Human Rights Committee have relied heavily on the United Nations *Manual on the Effective Prevention and Investigation of Extra-judicial, Arbitrary and Summary Executions*,[188] meaning

> 'an investigation must seek, at the least, *inter alia*: a) to identify the victim; b) to obtain and preserve evidence regarding the death, so as to aid any potential criminal investigation regarding those responsible; c) identify possible witnesses and receive their statements regarding the death under investigation; d) establish the cause, manner, place and time of death, as well as any pattern or practice that may have caused the death; and e) differentiate between natural death, accidental death, suicide, and homicide. It is also necessary to exhaustively investigate the crime scene, autopsies and analyses of human remains must be conducted rigorously, by competent professionals, applying the most appropriate procedures.'[189]

The European Court's case-law closely mirrors such requirements.[190] States must therefore take a variety of concrete investigative steps, which are capable of bringing the truth to light, and which demonstrate the State's genuine effort to do so. In situations of armed conflict, and especially during active hostilities, States may not have all investigative means at their disposal which they normally do when they exercise full control. In principle, the duty to investigate effectively is able to accommodate such difficulties, because it is an obligation *of means*, a due diligence obligation, and there is no obligation to ultimately solve all cases, and to prosecute and punish all perpetrators. Thus, as a starting point, so long as the State does everything *feasible* by way of investigative steps, this is likely to satisfy the duty to investigate effectively.[191] As the European Court has made clear, during armed conflict 'obstacles may be placed in the way of investigators and (…) concrete constraints may compel the use of less effective measures of investigation'.[192] Nevertheless, 'all reasonable steps' must be taken. The Inter-American Court has found similarly, simultaneously acknowledging investigative difficulties, and stressing the continued application of the duty to investigate to break the cycle of impun-

188 United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, Doc. E/ST/CSDHA/.12 (1991).

189 *Mapiripán Massacre v Colombia* (Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No 134 (15 September 2005) [224]; *Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 124 (15 June 2005) [149]. Further, see Chapter 5, §5.3.4; Chapter 6, §5.3.4.

190 *Damayev v Russia* (n 181) [84]; *Armani Da Silva v the United Kingdom* (n 160) [233]. Further, see Chapter 7, §5.3.4.

191 See Chapter 5, §6.4.3; Chapter 6, §6.4.3; Chapter 7, §6.4.3.

192 *Jaloud v the Netherlands* (n 128) [186]; *Al-Skeini v the United Kingdom* (n 123) [164]. References omitted. For a case of NIAC, see *Tagayeva and Others v Russia* (n 47) [504], 'The Court has acknowledged the difficulties faced by the Russian Federation in maintaining law and order in the North Caucasus and the restrictions that may be placed on certain aspects of the investigation'.

ity.[193] It would appear, therefore, that there is some measure of flexibility in this respect.

As human rights jurisprudence from the various systems shows, however, this 'relaxation' of investigative standards in name, does not always translate to practice. The Inter-American Court appears to apply its case-law on the duty to investigate equally during armed conflict, as it does in cases pertaining to normalcy,[194] and has in fact stated that States must employ 'all necessary means' to ensure effective investigation.[195] The European Court, similarly and despite its awareness of practical constraints, has proved demanding. This was already illustrated above in relation to the case of *Jaloud*. More recently, it proved more sensitive to constraints on investigators in the case of *Hanan*, concerning the investigation into an airstrike taking place during the active hostilities of an extraterritorial NIAC. There it accepted, in light of the situation, that on-site investigators had arrived approximately 12 hours after the airstrike, after locals had already removed the physical remains of victims. It therefore also accepted that the investigation was ultimately unable to establish the precise amount of casualties as well as the status of those killed, although 'under normal circumstances' that would have proved critical.[196] It further deferred to the German prosecutors' focus on *mens rea* as determinative for the lawfulness of the strike, which was the first time the Court deferred to an IHL standard for determining lawfulness.[197] The Court was therefore mindful of the obstacles to an investigation in this situation of extraterritorial conflict and active hostilities, and accepted that it could not meet the same standards it would normally impose – in which IHL plays an implicit role as the yardstick for the legality of the use of force.

It would therefore appear that the IHRL criterion that all reasonable investigative steps must be taken, is in principle sufficiently flexible to take the realities of armed conflict into account, and to take the principles of IHL onboard. The Inter-American and European Courts have both formulated relatively flexible tests which allow for taking practical constraints into account. The way to resolve tension, then, may be to interpret IHRL's requirement of 'effectiveness' in light of IHL's principles, most pertinently that of military necessity. Whereas the overarching standard then remains that all reasonable steps must be taken to carry out an effective investigation, the idea of employing 'all necessary

193 See *Cruz Sánchez et al. v Peru* (n 48) [350]; *Mapiripán Massacre v Colombia* (n 189) [238].
194 See Chapter 6, §6.4.
195 *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 270 (20 November 2013) [440]; cf. Frisso (n 161) 189.
196 *Hanan v Germany* (n 139) [218].
197 Ibid.

means',[198] would be more seriously counterbalanced by necessities arising out of the conflict situation. This therefore does not necessarily mean IHRL courts and treaty bodies need to alter their tests, as these already allow for taking into account the practical constraints placed on investigative measures. This is illustrated by the European Court's approach in *Hanan*. Furthermore, taking military necessity into account more explicitly, not merely as an issue of practicality and feasibility, but also as a legitimate interest, may allow it to serve as a counterweight for the interest of effective investigation. This would therefore mean that it is not only practical impossibility which inhibits certain investigative steps, but also an unreasonable burden placed on a State's military and operational capacities.[199] In the case of *Jaloud*, this might arguably have led the European Court to depart from its insistence on separating suspects from witnesses, and have therefore mitigated tensions between IHRL and IHL.

4.3.3.3 Involvement of victims and transparency

Finally, investigations must, according to human rights jurisprudence, guarantee a certain level of transparency, and sufficiently involve victims or their next of kin. This means there must be a certain level of public scrutiny of the case, which has to do with ensuring public confidence in a State's adherence to the rule of law, as well as ensuring the broader right to truth. In addition, more closely related to victims' individual rights, victims and their next of kin must be put in a position to effectuate their procedural rights in the investigation, which means they must be kept abreast of how the investigation progresses, especially at crucial junctions such as before a potential decision to discontinue the investigation.[200] This can lead to tensions with IHL, insofar as that regime does not require transparency, and where interests of State security may point in a different direction. Because IHL is not explicit in this respect, a situation of normative competition arises – with both regimes pulling in different directions whilst falling short of conflict.

What is required precisely under IHRL, varies from system to system. The Human Rights Committee appears to go furthest, also finding that States should allow victims to present evidence, and 'make public information about the investigative steps taken and the investigation's findings, conclusions and recommendations, subject to absolutely necessary redactions (…)'.[201] And in fact its emphasis on transparency goes further, where it finds that during armed conflicts,

198 *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (n 195) [440]; cf. Frisso (n 161) 189.

199 *Al-Skeini v the United Kingdom* (n 123) [152]; Quénivet (n 116) 138.

200 *Mapiripán Massacre v Colombia* (n 189) [219]; *Anguelova v Bulgaria*, ECtHR 13 June 2002, Appl No 38361/97 [140].

201 *General Comment No. 36* (n 4) [28], references omitted.

> 'States parties should, in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered.'[202]

Although the Committee qualifies this statement in its General Comment by saying States *should* guarantee transparency this way, which indicates this is a point of progressive development rather than a fully crystallised legal standard,[203] the Committee's case-law will likely develop in this direction.

The Inter-American and European Courts, meanwhile, set similar standards when it comes to the involvement of victims or their next of kin, emphasising that their interests and legal position must be secured. As far as broader transparency goes, the European Court takes a more nuanced position. It finds that there is no 'automatic requirement' of disclosing police reports, because of sensitive materials which may be included therein.[204] It therefore requires a '*sufficient* element of public scrutiny', the degree of which can vary on a case-by-case basis.[205] This does not apply to the position of the victims or their next of kin, which must always be guaranteed so they may effectuate their legal interests.[206]

IHL is not equally concerned directly with the rights and position of victims. State obligations form the core of IHL, with a more modest position for individualised rights for victims.[207] Nonetheless, IHL does not explicitly militate against notifying victims and their next of kin of the progress of an investigation, insofar as feasible. In fact, when it comes to the dead and missing, the Geneva Conventions impose specific obligations on States to record casualties, insofar as possible including an identity and place of burial.[208] This information must moreover be transmitted, through appropriate channels, to the adverse party to the conflict. Whereas the Geneva

202 Ibid [64], references omitted.

203 For an explanation of the HRC's use of the wording 'should', cf. Sarah Joseph, 'Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36' (2019) 19 Human Rights Law Review 347, 349.

204 *Armani Da Silva v the United Kingdom* (n 160) [236].

205 *Al-Skeini v the United Kingdom* (n 123) [167].

206 Ibid.

207 Silja Vöneky, 'Implementation and Enforcement of International Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) 684; contrary, however, see Lawrence Hill-Cawthorne, 'Rights under International Humanitarian Law' (2017) 28 European Journal of International Law 1187.

208 GC IV, art 16; AP I, art 33; GC I, art 17; and Rules 112-116 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 23). See further Breau and Joyce (n 31) 34–6; Zegveld (n 31) 458–9.

Conventions do not explicitly require the adverse party to in turn forward this information to victims' next of kin, the clear objective of these provisions cannot be otherwise.[209] Thus, IHL is certainly not indifferent towards this issue of informing next of kin. IHRL, however, goes one step further: next of kin must be involved 'to the extent necessary to safeguard [their] legal interests'.[210] This may well go beyond simply reverting the death of their loved one and the place they lie buried, because at relevant junctions during the investigation, next of kin must be informed so they can effectuate any procedural rights they have, for instance to give input or appeal any formal decisions taken – for instance a decision to discontinue the investigation, or not to prosecute.[211] Such obligations are not enshrined in IHL, and are moreover complicated by the specific avenues IHL opens for transmitting information. It requires States to forward information to an 'Information Bureau', which in turn transmits the information to the Protecting Power or Central Prisoners of War/Tracking Agency. These intermediaries then convey the information to the adverse party to the conflict, who finally brings the news to the next of kin.[212] Likely, this system falls short of IHRL requirements because at crucial junctions during a potential investigation, next of kin may not be aware of what is going on, and thus cannot exercise their procedural rights.

Arguably, then, IHL does not oppose involvement of victims or their next of kin in investigations. Nonetheless, there are practical constraints on what States can do during armed conflicts. IHL has set up a system to tackle a number of such issues, but this system seems equally concerned with setting up a line of communication at least on this issue of casualties, because warring States are likely to have cut diplomatic relations. Thus, this system is more complex and more time-consuming than would be envisioned under IHRL where the norm is that States keep next of kin up-to-date at least sufficiently to safeguard their legal position. The extent of this normative tension will to a large extent depend on the precise circumstances of the case. For instance, in cases of peaceful occupation, States are likely quite capable of being in direct contact with next of kin regarding investigative results. If a State is involved in active hostilities, such as extraterritorial aerial bombardments, identifying and contacting victims and their next of kin might be next to impossible. IHL equally does not address this issue, as its rules seem geared primarily to a

209 ICRC (n 110) [1599]-[1600].
210 *Anguelova v Bulgaria* (n 200) [140].
211 See *General Comment No. 36* (n 4) [28], which moreover adds that States must allow next of kin 'to present new evidence, [and] afford them with legal standing in the investigation'.
212 Extensively, see ICRC (n 110) [1585]-[1600].

'right to know' the fate of loved ones,[213] which would classically involve soldiers who perish whilst sent abroad, and where news of their fate is therefore reliant on the opposing State. Whereas cases where States have full territorial control would then arguably allow for more strict application of IHRL's criterion of involvement of next of kin, IHL considerations, practical constraints, and military necessity may alter the balance when it comes to situations where States lack such control, such as where they operate outside their territorial control, or in situations of active hostilities.

Finally, when it comes to the element of transparency and public scrutiny, IHL does not contain rules requiring transparency as such. Nor does it explicitly prohibit such. Nonetheless, military necessity, arguments of State and national security, and military strategy would argue against divulging the information required. IHRL's insistence on transparency, especially as formulated by the Human Rights Committee, thus causes tensions with IHL. The normative competition which ensues is again best solved by interpreting IHRL in light of the principle of military necessity. The European Court already accounts for limitations on transparency due to the sensitivity of information, finding that 'it cannot be regarded as an automatic requirement' to divulge sensitive materials with respect to military operations.[214] This flexible norm thus allows for giving sufficient weight to countervailing military considerations. For the ICCPR, the Human Rights Committee's far-reaching requirements appear less open to balancing, although the finding that States 'should' make public information *inter alia* regarding targeting, does leave some leeway for interpretation.

The requirements of involvement of next of kin and transparency, in sum, while giving rise to normative competition can potentially be brought into harmony by taking the guiding principles of IHL into account in their interpretation. The IHRL norms are relatively flexible and allow for such, which can alleviate tensions between both regimes.

4.4 Résumé

This section has subjected the investigative standards prescribed by IHL and IHRL to a comparative analysis. Whereas it is sometimes assumed that IHL's lack of detailed investigative standards allows for 'gap-filling' by IHRL, a more

213 Further, see Anna Petrig, 'Search for Missing Persons' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (Oxford University Press 2015); Daniela Gavshon, 'The Dead' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (Oxford University Press 2015).

214 *Hanan v Germany* (n 139) [233].

nuanced examination reveals a wide variety of normative convergence, conflict, and competition regarding investigative standards. Making use of the roadmap for interplay developed in Chapter 9, this section resolved these issues of normative overlap. Thus, it showed how the requirements of *ex officio* and *impartial* investigations, are equally important under IHL and IHRL, meaning both regimes can be applied alongside one another without giving rise to serious issues of interpretation. Meanwhile, requirements of strict *independence*, as well as *independent criminal proceedings following up to investigations*, can lead to normative conflict with IHL's reliance on command investigations, and its requirement of amnesties for those having taken part in NIACs. Section 4.3.2 has shown how such conflicts can be resolved, making use of the *lex specialis* rule. Finally, the requirements that an investigation be carried out *promptly and with reasonable expedition*, *effectively*, and *transparently and involving victims' next of kin*, do not conflict with rules of IHL, but nevertheless give rise to tensions with that regime. Such situations of normative competition can be remedied by reading IHRL norms in light of the principles of IHL, especially the principle of military necessity. This leads to an interpretation of IHRL which balances its requirements with IHL's basic tenets, thus resulting in a well-rounded and feasible investigative obligation for the State. This obligation moreover simultaneously works towards establishing what happened and who is responsible, as well as safeguarding operational and military necessities, thereby avoiding placing an unreasonable burden on the State.

5 Conclusion

This Chapter has shown to what extent investigative duties under IHL and IHRL overlap, and where and how they diverge or lead to normative tensions. This was done through a comparative analysis of the aims of investigations, their scope of application, and the standards they must adhere to. Investigative obligations under both regimes, it turns out, in many respects closely mirror one another. Their purposes are highly alike, in that they serve to ensure the effectiveness of their legal regime as such, requiring States to set up implementing mechanisms. Further, both regimes insist on ensuring the accountability of perpetrators and the establishment of State responsibility in respect of violations, which shows that IHL and IHRL drive in the same direction. In consequence, tensions do not normally arise with respect to the question which incidents require an investigation, even if only one regime requires an investigation, and the other does not. Finally, IHL and IHRL are very similar in requiring States to investigate impartially and of their own accord.

Yet, there are also conflicts between the rules of both legal fields. Where substantive norms of IHL and IHRL conflict, this also gives rise to conflicts with respect to the applicability of the duty to investigate. If incidents must be investigated if they were (potentially) unlawful, then of course, if an incident

is considered lawful under IHL but unlawful under IHRL, this leads to divergences in investigative obligations. This, the comparative analysis shows, is most prominently the case for the use of lethal force. If a use of lethal force is lawful under IHL but potentially unlawful under IHRL, whether States must conduct an investigation or not must be decided through application of *lex specialis*, which is a context-dependent test. Under an 'active hostilities paradigm', IHL will then be determinative of lawfulness and an investigation will be required only if the use of force was potentially unlawful *under IHL*. If an incident rather fell under a 'security operations paradigm', IHRL will take the lead, and determine whether an investigation is required.

Also controversial, but not giving rise to conflict, is the question whether States must investigate abuses by non-State actors during armed conflict. IHRL's requirement of such investigations would rather appear to give rise to *tension* with IHL's more restrictive stipulation of investigative obligations, leading to normative competition. This competition, it was shown, can be mitigated by interpreting the flexible norms under the ICCPR to accommodate the IHL principle of military necessity. Yet, under the ACHR and ECHR such flexibility does not as yet appear to exist – which means that unless the Inter-American and European Courts revise their positions, this tension cannot be alleviated and States will need to investigate human rights infringements caused by third parties under their jurisdiction – even if they concern abuses by non-State armed groups during an armed conflict.

With respect to the question *how* States must conduct an investigation, IHL and IHRL appear to diverge on a number of issues. Conflicts may arise with respect to the independence of investigations, as well as their criminal law follow-up. Yet, it would also appear that such conflicts are not as hard as they may seem. Whereas command investigations are insufficiently independent under IHRL, it would seem that a system where direct commanders take the initial investigative steps like securing the site of an incident, but immediately report the case to an investigative authority outside the chain of command who takes over the investigation, can satisfy IHRL's standards whilst also complying with IHL's rules on command investigations. With respect to IHL's insistence on amnesties for those having participated in NIACs, it would appear that so long as a caveat is made for war crimes, serious human rights violations, and human rights violations committed outside an active hostilities paradigm, both IHL and IHRL can be satisfied.

The requirements that an investigation is conducted promptly, adequately, transparently, and involves the victims' next of kin, may also give rise to tensions between both regimes. Under a paradigm of normative competition, the comparative analysis showed that most such tensions can be alleviated by interpreting the flexible human rights standards in light of the principles of IHL, thereby taking account of the exigencies of armed conflict situations. Thus, human rights standards are sufficiently flexible to take account of

obstacles which render an immediate on-site investigation impossible, which do not allow for pursuing all regular lines of inquiry, or interests of State security which preclude full transparency with respect to all military operations. The precise measure of flexibility may diverge somewhat under the various human rights regimes, which potentially also has to do with the case-by-case development of human rights law. It will be interesting to see how human rights case-law develops on this point.

In light of this comparative analysis, and the resolution of normative convergence, conflict, and competition pursuant to the roadmap for interplay, Chapter 11 can now provide an answer to the research question formulated in the Introduction.

11 Drawing conclusions

1 Answering the research question

This study has explored investigative obligations arising in respect of incidents during armed conflict, under IHL, IHRL, and their interplay. The inspiration for doing so, as identified in the introductory Chapter 1, was twofold. Firstly, what is required of States by way of investigating potential violations of the law during armed conflict lacks clarity – in part because the rules of IHL and IHRL diverge in this respect. Secondly, how IHL and IHRL interrelate is not clear, further obscuring when and how States must conduct investigations into incidents during armed conflict.[1] In order to clarify these issues, the following question has guided this study:

> *What are the scope of application and contents of States' duty to investigate (potential) violations during armed conflicts, under international humanitarian law, international human rights law, and their interplay?*

Based on this research question, it was mapped out in Parts I and II *when* and *how* States must conduct an investigation into an incident during armed conflict, under IHL and IHRL, respectively. Part III developed the normative framework for determining how norms of IHL and IHRL interact, how normative overlaps are to be resolved, and how this plays out for investigative obligations.

This Chapter first summarises this study's findings with respect to duties of investigation under IHL (Part I, §2), under IHRL (Part II, §3), and with respect to the secondary rules of international guiding the interplay between IHL and IHRL (Part III, §4). In presenting these findings, each section will start out by presenting a number of major takeaways from the research in that area, before presenting the findings as they relate to the scope of application and contents of the duty to investigate. Section 5 then provides an answer to the research question. The study concludes with a final reflection (§6).

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1 Chapter 1, §§1.2.2-1.2.3.

2 Overarching conclusions on the duty to investigate under IHL

Part I's examination of investigative obligations under IHL has brought clarity in a number of respects. First, the vague and indeterminate IHL treaty norms were fleshed out, based on an analysis of treaty law and the system of IHL, State practice, and soft law. In doing so, a clear legal obligation was identified, requiring States to investigate all serious *and* non-serious violations of IHL.[2] Second, it was shown that that States must conduct criminal investigations into serious breaches of IHL, whilst they may choose to stick to an administrative investigation when non-serious breaches are concerned.[3] Whether IHL requires a criminal or a non-criminal investigation to a large degree determines *how* an investigation must be conducted – and ultimately therefore how the standards an investigation must meet, relate to those under IHRL. Third, IHL requires investigations into violations during both IACs and NIACs.[4] Whereas the grave breaches regime applies during IACs only, investigative obligations which relate to other serious breaches (war crimes) and non-serious breaches do apply during NIACs. Fourth, the IHL system was shown to *rely* to a large extent on an obligation for States to investigate.[5] It is set up in a way which leaves the primary responsibility for implementation and enforcement of the law up to States themselves, with its effectiveness wholly dependent on States investigating their own conduct. This is all the more so because other forms of oversight are largely absent.

Based on these takeaways, the study provides clarity in respect of a number of controversial issues under IHL. It shows that the ongoing discussion as to *whether* IHL requires investigations, must now be considered to be settled. It further shows that whereas a distinction must be made between serious and non-serious breaches of IHL for the purposes of corresponding investigative duties, this is relevant only for the question *how* a State must investigate – not *whether* it must do so. Finally and crucially, the study provides clarity as to *when* and *how* States must investigate under IHL, by mapping out the scope, trigger, and contents of the duty to investigate under IHL.[6]

The following provides a brief overview of the conclusions of Part I of this study, thereby answering the first sub-question of this study's research question:

> *Are States under an obligation to investigate (potential) violations of IHL? If so, what are the scope of application and contents of such an obligation?*

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2 Chapter 3, §3. For the definition of 'serious' and 'non-serious' breaches, see Chapter 3, §3.2 and §3.3.
3 Chapter 3, §4.2.
4 Chapter 3, §3.4.
5 Chapter 3, §2.
6 Chapter 3, §3 and §4.

IHL's system of self-enforcement

Using a purposive and systematic interpretation method, based on three characteristics of the IHL treaty regime, the study concludes that the system set up is ultimately one of *self-enforcement*: it is the subjects of the law themselves – States – who must not only implement the rules in their domestic systems, but who must moreover supervise their own compliance, and enforce the rules in respect of their own conduct.[7] This is so because, *firstly*, under IHL there are no institutionalised oversight, implementation, or enforcement mechanisms. Insofar as any mechanisms do exist, they are not institutionalised in the sense that they are either dependent on prior *ad hoc* consent (for instance the International (Humanitarian) Fact-Finding Commission), on discretionary powers (such as the Security Council's powers of enforcement), or are principally limited in their jurisdiction to apply IHL, as applies to for instance human rights courts, as well as international criminal tribunals. This leads, *secondly*, to the conclusion that it is *States* who are the primary enforcers of IHL. In lieu of specific enforcement mechanisms, general international law normally leaves it up to States to enforce the law through unilateral (or coordinated) sanctions. There is, however, a *third* factor in play, which limits the regular operation of unilateral enforcement measures. States' countermeasures may not deviate from their humanitarian obligations, and they are equally prevented from suspending or terminating IHL treaties in response to breaches by others. This restricts the functioning of reciprocity, further underlining States' primary responsibility with respect to ensuring respect for IHL by their own armed forces.[8]

This strongly implies a duty to investigate.[9] The system of self-enforcement entails that States must implement IHL in their domestic systems, both in the law and in the practice of their armed forces, and must themselves oversee and review the actions of their armed forces in light of the applicable rules of IHL. This moreover ties in with the obligation to 'ensure respect' for IHL, pursuant to Common Article 1 to the Geneva Conventions. Thus, the system of IHL in itself requires States to supervise the conduct of their own armed forces, and it puts the primary responsibility for such oversight firmly on States themselves. This requirement is all the more clear if we consider that IHL does not only impose certain obligations on States, but also binds individuals directly. Ensuring individuals comply with IHL and enforcing the law where it is breached, in lieu of other mechanisms, requires States to institutionalise review and monitoring of their own military operations, and if these procedures bring to light potential violations, to effectuate mechanisms for the

7 Chapter 2, §5; Chapter 3, §2.
8 Chapter 2, §5.
9 Chapter 3, §2.

enforcement of the law.[10] The duty to investigate, in other words, is engrained in IHL's DNA.

In conclusion, *enforcement by States* is crucial for the proper working of IHL's implementation and enforcement system.[11] It is good practice to do so by institutionalising supervision which provides for the recording, reporting, and assessment of all incidents potentially violating IHL.[12] The lack of oversight and enforcement mechanisms, and the individual obligations imposed by IHL coupled with States' obligation to in good faith ensure respect for IHL, render the duty to investigate key in such State enforcement. Beyond implementation of the rules of IHL, and the institutionalisation of proper review and monitoring mechanisms for their military operations, States must therefore also *enforce* these rules and *effectuate* these mechanisms wherever they uncover facts which indicate a violation. The entire framework of IHL therefore strongly relies on State investigations into their own conduct.

The scope of the duty to investigate under IHL

Against the backdrop of this pivotal role of States in self-enforcing IHL, the study has shown that three categories of violations must be distinguished: grave breaches, other serious violations, and non-serious violations.

The duty to investigate is most explicit, and most extensive, for those violations of IHL known as grave breaches.[13] Grave breaches are, in essence, the most egregious violations of the law of IAC, as listed in the Geneva Conventions and AP I.[14] When a State gains information that such a breach may have occurred, whether it is through its own review and monitoring system, or through an outside allegation or media reports, it must conduct an investigation. Because of the seriousness of such breaches, this must moreover be a *criminal investigation*. The Geneva Conventions and AP I require that States criminalise grave breaches, search for alleged perpetrators, and either prosecute or extradite them. Moreover, States are even under a duty to vest universal jurisdiction over these crimes.

When reading these various obligations together, this clearly requires States to investigate both (i) *perpetrators* of grave breaches, who must be brought to justice, as well as (ii) the *grave breach itself*, as an occurrence. The study has shown how, despite the duty to vest universal jurisdiction, there is a practical

10 Cf. also AP I, art 41(1), which provides that 'armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict'.

11 Chapter 2, §5; Chapter 3, §2.

12 Noam Lubell, Jelena Pejic and Claire Simmons, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* (The Geneva Academy of International Humanitarian Law and Human Rights & International Committee of the Red Cross 2019).

13 Chapter 3, §3.2.2.

14 GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146; AP I, art 11 and 85.

distinction to be made between States who are firstly responsible for such investigations, and those which operate under a 'secondary' obligation.[15] First responsible for an investigation are (i) the State on whose territory the breach has occurred, (ii) the State whose nationality the perpetrator has, and (iii) the State on whose territory or within whose jurisdiction the perpetrator is present. States without such nexus must vest universal jurisdiction, but may in practice not be in a position to take investigative steps because both the perpetrator and the evidence are outside of their control. Their obligations therefore appear to concern primarily the cooperation in the investigation by other States. State practice also shows that numerous States have opted for vesting a limited form of universal jurisdiction which requires the perpetrator's presence on their territory for any prosecution to take place.

When it comes to other serious violations of IHL – war crimes not constituting grave breaches – States' investigative obligations are similar.[16] States must conduct criminal investigations into such breaches. Three points can be made where the duty to investigate war crimes differs from the specific duty to investigate grave breaches. Firstly, the legal basis for the duty to investigate war crimes lies in customary international law and ICL, rather than IHL treaty law. This also means, secondly, that the duty to investigate equally extends to war crimes committed in NIACs – both under the customary norm as identified by the ICRC and the *ad hoc* tribunals, as well as under the Rome Statute.[17] Thirdly, States do not have the *obligation* to vest universal jurisdiction over all war crimes – they only have the *right* to do so.[18] Nonetheless, the obligation to actually investigate is again limited to cases where they have territorial jurisdiction over the crime or over the suspect, or where they have personal jurisdiction over the suspect.

The study finally shows that non-serious violations, that is, all breaches of IHL which do not amount to war crimes, also require investigations – albeit subject to different rules.[19] Examples of non-serious violations can pertain to ostensibly rather trivial situations, such as selling soap and tobacco to POWs above local market price, or failing to post a copy of the Geneva Conventions in a POW camp. They can, however, also be more directly linked to the use of lethal force, such as where States fail to take all feasible precautions in attack, which even when leading to the loss of civilian life does not rise to the level of a war crime unless the attack is indiscriminate or directed against civilians. IHL nor ICL requires States to conduct a *criminal* investigation into such violations. Nonetheless, it was shown that States *are* under the obligation

15 Chapter 3, §3.2.2.4.
16 Chapter 3, §3.2.3.
17 As is explained in Chapter 3, the Rome Statute arguably includes an implicit obligation for States to investigate war crimes. See Chapter 3, §3.2.3.2.
18 Chapter 3, §3.2.3.4.
19 Chapter 3, §3.3.

to investigate such breaches. This obligation flows from IHL's system of self-enforcement, coupled with a combined reading of the *duty to ensure respect* for IHL, *the duty to suppress* all violations, *commanders' specific obligations to repress and suppress* violations, and the *precautionary principle's* obligation to take 'constant care' in military operations, and to take 'all feasible precautions' in attack, to spare the civilian population.[20] Because international law does not consider such non-serious violations as crimes, States have discretion in deciding whether they wish to couple an investigation with criminal prosecution and punishment, or rather with, for instance, a disciplinary measure.[21] An important aim of such investigations must be that they establish whether the conduct in question was lawful, so that State responsibility can be established, and potential systemic shortcomings can be remedied.

Knowledge triggering the duty to investigate

States must thus investigate violations of IHL. But they must equally investigate 'alleged' violations of IHL, and incidents which *potentially* violated IHL. In order to satisfactorily answer *when* States must investigate, it was therefore also determined *what level of knowledge* is required to trigger the duty to investigate.

This study has shown that this question is best answered by looking at State practice. Such practice, it was determined, relies on a criterion of knowledge which would lead a 'reasonable commander' or 'prudent individual' to consider there was potentially a violation.[22] Moreover, IHL relies on a system of self-enforcement, for which it is good practice to set up a system of recording, reporting, and assessment of military operations.[23] This ensures an active system of keeping tabs on the effects of military operations, which in turn safeguards that incidents which potentially violated IHL are in practice submitted to a commander. If this commander determines IHL was potentially violated, and that therefore an incident was 'notifiable', they must then either report the incident to an investigative authority, or conduct an investigation. It must be stressed that the criterion of the reasonable commander does not mean that whether or not the duty to investigate is triggered, is fully contingent on a subjective decision by a commander. Ultimately, whether information originates from the State's own monitoring activities, from outside allegations, media reporting, or yet other sources makes no difference for triggering the duty to investigate. In case of outside allegations, the State should be able to check its own records and reports easily enough to establish whether there is any merit to the complaint, and can then make use of the regular system of military review. In case potentially serious violations are uncovered, this will need to be upscaled to a criminal investigation. As soon as a *reasonable*

20 Chapter 3, §3.3.3.
21 Chapter 3, §4.2.
22 Chapter 3, §3.2.2.3, §3.2.3.3, 3.3.4.
23 Chapter 3, §2.

commander, or a *prudent* individual would consider such information to indicate a breach, this triggers the duty to investigate.

Investigative standards and the question how States must conduct an investigation
With respect to the crucial question *how* States must carry out an investigation, the study has shown that IHL is largely silent. Beyond requiring an investigation, treaty law does not go into the details of what is required of States. To flesh out further what it means when States must investigate, other sources were therefore explored. State practice and soft law – in particular the ICRC and Geneva Academy 2019 *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* – are instrumental in this respect.[24] Finally, IHL's guiding principles provide a framework for interpreting the duty to investigate, though the principles are largely indeterminate when it comes to fleshing out *how* States must investigate.

The study was able to determine a number of standards which must guide investigations. War crimes investigations require strict criminal accountability. The aim of preventing impunity, ensuring criminal accountability, and thereby exacting retribution, to a large extent determine the shape of the investigation. A thorough analysis of IHL, of the judicial practice of ICL bodies, as well as of State practice and soft law instruments, shows that investigations into war crimes must meet standards of effectiveness, thoroughness, genuineness, promptness, impartiality, and fundamental due process guarantees.[25] It must be borne in mind that the obligation imposed here is one of *conduct*, not of result, and that there is therefore no requirement that the investigation result in a criminal conviction. Thus, whereas States must do what they can to ensure the investigation results in establishing the facts and the identification of those responsible, if they ultimately cannot, this need not violate the duty to investigate.

Whereas IHL does not explicitly formulate standards of thoroughness, promptness, and the importance of fair trial guarantees, the requirement that the investigation is capable of leading to prosecution and punishment nonetheless implies these standards. If an investigation is not initiated promptly, this clearly harms its capability of gathering the required evidence, as evidence is lost quickly, especially in a situation of armed conflict. Equally, if an investigation is not thorough in the sense that relevant lines of enquiry are pursued in a way which is suitable to uncover what happened, and moreover in a way which respects fair trial guarantees and due process rights, it is difficult to see how the effectiveness criterion could be satisfied.

Other oft-mentioned standards, those of independence and transparency, were not corroborated by this study.[26] With respect to transparency, it was

24 Lubell, Pejic and Simmons (n 12).
25 Chapter 3, §4.3.
26 Chapter 3, §4.3.

shown that elements of public scrutiny and the involvement of next of kin can certainly contribute to the effectiveness of the investigation, because this safeguards the investigation is carried out genuinely, and ensures public confidence in the State's review of its own use of force. Nevertheless, they appear to be further removed from what IHL itself requires, and cannot at this stage be read as inherent requirements of IHL itself. Also when it comes to independence, which is so often mentioned as a cornerstone for effective investigations, this study does not support the unequivocal inclusion of independence as an investigative standard under IHL. State practice concerning war crimes investigations has shown a varied level of independence of investigators, such as military police. Their precise status, however, differs from State to State, and so does their independence. IHL treaty law, moreover, appears to contradict a strict legal requirement of independence. It emphasises the role of the commander in the investigation, which indicates an important role for investigators who are part of the chain of command. Thus, independence, although important, does not appear to be strictly required by IHL as it stands. Of course, these conclusions are notwithstanding potential developments of the law with respect to transparency and independence, and the ICRC and Geneva Academy *Guidelines* may certainly influence evolving practice in this regard. Yet, as a matter of *lex lata* this study finds that transparency and independence are good practice rather than required by IHL. These findings will be returned to when discussing interplay, because IHRL *does* clearly require investigations to be transparent and independent.

Non-serious violations of IHL, in contrast, are more loosely governed by international standards, which leaves States a measure of discretion in how they conduct them.[27] As these investigations need not be criminal, States have a measure of discretion in how they conduct such investigations. Nonetheless, because of the importance awarded under IHL to States enforcing the law in respect of their own armed forces, and because the investigation must at least be capable of determining whether a State bears State responsibility for a breach, States will need to establish the facts, and determine lawfulness. Standards which can be derived from IHL, State practice, and soft law instruments would appear to pertain to an effective investigation, which is prompt and impartial.[28] Such investigations may take place within the military procedures of the armed forces themselves, and can be largely informal. State practice shows a varied approach. On one extreme, there are those who in their domestic legislation consider all breaches of IHL to constitute war crimes which require a criminal response.[29] Amongst those States which take a more

27 Chapter 3. §4.4.
28 Chapter 3, §4.4.
29 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *ICRC Customary International Humanitarian Law – Volume II: Practice* (Cambridge University Press 2005) Chapter 44.

graduated approach towards such violations, practice varies. Many, however, take a 'lessons learned'-approach which is usually implemented through 'after action reviews', 'after action reports', or 'post-attack reviews'. In case of individual transgressions, disciplinary measures can sufficiently ensure a deterrent effect, and whereas States are free to criminalise simple breaches of IHL, they are not obligated to do so. Beyond individual measures, administrative investigations should also, where appropriate, take into account any potential systemic shortcomings which may be the root cause for a breach.

In sum, IHL clearly imposes investigative obligations on States, and moreover does so for all violations of IHL. When it comes to investigative standards, a number can be derived from IHL – but such standards are not explicit in treaty law, and are relatively rudimentary.

3 Overarching conclusions on the duty to investigate during armed conflict under IHRL

Part II of the study brought clarity with respect to States' obligation to investigate human rights violations during armed conflict. It was shown that across human rights regimes, States are required to investigate potential human rights violations – among them violations of some of the core rights most relevant to situations of armed conflict, such as the rights to life and liberty and security, the prohibitions of torture and slavery.[30] Further, it was shown that States are bound to comply with eight investigative standards.[31] Although the various courts and bodies sometimes use slight variations in phrasing and accentuate different aspects of the duty to investigate, it was shown through an extensive case-law analysis that these standards apply in all systems. Finally, the case-law of the various courts and bodies shows that the duty to investigate continues to apply during armed conflict.[32] Beyond these conclusions, a number of findings stands out which are highlighted here, before further exploring the study's findings with respect to investigative duties during armed conflicts, under IHRL.

First, an analysis and systematisation of the vast amount of case-law under the ICCPR, the ACHR, and the ECHR, showcases a large measure of convergence between the various systems when it comes to investigative obligations.[33] They all require investigations into potential violations of rights, such obligations are coupled under all systems with a duty to prosecute and punish in case of serious violations, and all systems arguably also require investigations

30 See §4 of Chapters 5, 6, and 7; Chapter 8, §1.4.
31 See §5 of Chapters 5, 6, and 7; Chapter 8, §1.5.
32 See Chapter 4, §4.6; §6 of Chapters 5, 6, and 7; Chapter 8, §1.6.
33 Further, see Chapter 8.

into less serious violations, although jurisprudence on that issue is sparse. It was further demonstrated that the investigative standards which must guide States' investigations are almost identical under the three systems, with only relatively slight differences in accent. Second, the study has shown that IHRL continues to apply during armed conflict, and that the duty to investigate is no exception in this respect.[34] Based on a close reading of the case-law, it was shown that the duty to investigate is a flexible obligation, which can be interpreted contextually to take account of the circumstances of conflict to somewhat loosen otherwise strict investigative requirements – for instance with respect to the precise investigative steps which States must take in order to establish the facts.[35] Third, the study has clarified the controversial issue of the extraterritorial applicability of the duty to investigate.[36] It is well-accepted under all systems that human rights apply when States exercise control over territory or over individuals through their State agents. Beyond such instances, it was shown that under the ICCPR and ACHR, a model for the extraterritorial exercise of jurisdiction appears to be developing, which hinges on the 'reasonably foreseeable impact' of States' conduct on the rights of individuals – even if they are outside the territory of a State.[37] This is likely to bring States' conduct abroad during an armed conflict, such as the use of force, within the scope of investigative obligations. Under the ECHR, it was shown that the duty to investigate may also apply irrespective of whether States exercise control under the spatial or personal concepts of jurisdiction, so long as 'special features' of the case establish a 'jurisdictional link' between the State and the victim.[38] This is likely to include most armed conflict related violations. A fourth and final takeaway worthy of mention here, is that human rights courts and treaty bodies have been reticent in relying on IHL in the context of investigative obligations.[39] This is noteworthy especially for the Inter-American Court, which has been very open to interpreting the ACHR in light of IHL. The European Court has been the first – and has only done so for the first time in 2021 – to take account of IHL's rules with respect to the duty to investigate. This means that the primary method for courts and treaty bodies to take account of the exigencies of armed conflict, has been to apply the duty to investigate *contextually*, in light of the circumstances, rather than taking express account of IHL in the interpretation of the legal obligations.

The following briefly recapitulates Part II's findings with a view to answering the second sub-question which guided this study:

34 See Chapter 4, §4.6; §6 of Chapters 5, 6, and 7; Chapter 8, §1.6.
35 See §6.4 of Chapters 5, 6, and 7; Chapter 8, §1.6.
36 See §4.5 of Chapters 4, 5, 6, and 7; Chapter 8, §1.4.
37 Chapter 4, §4.5.
38 Chapter 7, §4.5 and §6.3.2.
39 See §6.4 of Chapters 5, 6, and 7; Chapter 8, §1.6.

Are States under an obligation to investigate (potential) violations of IHRL? If so, what are the scope of application and contents of such an obligation, in particular during armed conflict and occupation?

The focus in this respect is on investigative obligations during armed conflict. For a more comprehensive overview, readers are directed to Chapter 8, and to the Chapters 5, 6, and 7, which discuss investigative obligations under the ICCPR, ACHR, and ECHR.

Legal basis of investigative obligations

The research question can be answered affirmatively – States are under the obligation to investigate human rights violations, also during armed conflict. Certain human rights treaties, in particular the Genocide, Torture, and Disappearance Conventions, explicitly include investigative obligations in their provisions.[40] Others, which are the main focus of this study – namely the ICCPR, the ACHR, and the ECHR – do not include explicit investigative duties. Yet, according to their supervisory bodies and courts, such obligations nevertheless take up an important place within these human rights regimes.[41] Human rights case-law recognises the duty to investigate to be essential to effectively protect and ensure human rights, by adding a procedural layer of protection to substantive rights. This procedural layer includes the criminalisation in domestic law of certain human rights abuses, and the effectuation of such laws when human rights are indeed infringed by conducting investigations, where appropriate followed-up by a criminal prosecution and punishment. The legal basis for the duty to investigate can therefore vary from an explicit treaty obligation in certain treaties, to a more purposive and systematic interpretation of various treaty provisions in conjunction with each other, which finds investigative obligations to be implicit in the duty to actively ensure human rights. The right to a remedy and the obligation to provide reparation can also include investigative obligations. Despite the variety in sources, this study has shown that investigative obligations under IHRL largely converge: apart from certain particularities of the various systems, the duty to investigate is conceptualised and applied in broadly similar ways, as a tool to effectuate protection of human rights and ensure accountability for violations.

Rationale and place of investigations within the IHRL framework

The duty to investigate under IHRL, this study has found, corresponds to the 'sword' function of human rights.[42] Beyond simply *protecting* individuals against repression by the State (the shield), human rights in this context invite

40 See Chapter 5, §2.
41 See §3.2 of Chapters 5, 6, and 7; Chapter 8, §1.3.
42 See Chapter 5, §2; Chapter 8, §1.2.

and require the State to actively interfere with individual rights (the sword). Human rights jurisprudence recognises the duty to investigate to be essential to effectively protect and ensure human rights, by adding a procedural layer of protection to substantive rights.[43] This layer then importantly includes the investigation of potential violations. Further, investigations are often considered indispensable for victims to be able to exercise their right to a remedy – because the State is the only one capable of establishing what has befallen them.

A main purpose for the duty to investigate is to ensure that States assume their roles as principal guardians of human rights, and to create a domestic context in which this can be accomplished. This also means that a culture of impunity, as the Inter-American Court's case-law makes so abundantly clear, is absolutely unacceptable. In this sense, ensuring accountability of perpetrators ensures individual justice for direct victims, but also contributes to a culture where human rights are respected, and where abuses are not tolerated. Establishing and making known the facts of what happened moreover forms part of accountability in and of itself, and is closely intertwined with the right to truth. The duty to investigate therefore, like under IHL, forms an important part of the implementation and enforcement system of human rights, requiring States to bring to light and remedy violations at the domestic level. In stark contrast to IHL, however, such obligations are subject to international supervision by courts and treaty bodies, who take up a secondary role in this respect.

The scope and contents of investigative obligations under IHRL

Outside of armed conflict, the study has shown that under the case-law as it stands, States must investigate potential violations of core rights such as the rights to life, liberty and security, and the prohibitions of torture and slavery.[44] It would appear that although the duty to investigate is not necessarily limited to these rights, the focus in the case-law thus far has clearly been on these rights. Furthermore, violations of these core rights must normally be subject to criminal investigations – similar to IHL, where grave breaches also require a criminal response.

Further, States must conduct investigations not only when it is State agents who have violated such rights.[45] The State obligation to investigate encompasses all of the above human rights violations and abuses which fall within the jurisdiction of the State. The duty to investigate is therefore not limited to violations by State agents, but includes abuses by all, including non-State actors. Importantly, individuals have a *right* to an investigation under IHRL – although a right to have someone prosecuted exists only under the ACHR.

43 See §3.3 of Chapters 5, 6, and 7; Chapter 8, §1.3.
44 See §4.2 of Chapters 5, 6, and 7; Chapter 8, §1.4.
45 See §4.3 of Chapters 5, 6, and 7; Chapter 8, §1.4.

Especially noteworthy with respect to the applicability of the duty to investigate, are its temporal and geographic scope of application.[46] The study has shown that States may be required to investigate even if an incident took place outside a State's territory, or when the incident predated the entry into force of the treaty for the State in question, depending on the applicable treaty regime. Beyond such cases where States exercised effective control over territory or individual victims, it would appear that under the ICCPR and ACHR, States may also be required to investigate incidents where the State's conduct had a reasonably foreseeable impact on rights. Under the ECHR, case-law has affirmed the applicability of investigative obligations whenever 'special features' of a case give rise to a 'jurisdictional link' – also going well beyond the spatial and personal models for extraterritorial jurisdiction. Temporally, it appears that States may be required to investigate incidents predating their accession to a treaty – at least under the ACHR and ECHR – where violations are of a continuing nature, as is the case with respect to enforced disappearances.

Finally, States are held to investigate in case there is an *arguable* claim, a *credible* assertion, a *well-founded* or *sufficient* reason to suspect a violation may have occurred.[47] States therefore need not investigate any allegation no matter how far-fetched, although it must be stressed that they may not create overly burdensome hurdles in this respect. Whenever information reaches State authorities, no matter the source, which indicates a violation has occurred, they will be held to investigate of their own accord.

If States are required to investigate, IHRL also regulates *how* they must do so. First and foremost, the duty to investigate is a *duty of means*, not of result.[48] States must therefore diligently establish the facts and identify perpetrators, and if they have attempted such properly, this can discharge their obligation even if their efforts ultimately prove futile. In order to gauge whether States have met their obligation, eight standards have been formulated.[49] These standards stipulate that the investigation is: (i) launched of the State's own accord (*ex officio*); (ii) initiated promptly and carried out with reasonable expediency; and that it must furthermore be (iii) independent and (iv) impartial. In effect, States must therefore initiate investigations promptly when information reaches them, not leaving it up to the initiative of victims, and must furthermore ensure that that investigators may not be guided by bias or prejudice, and that they must be both objectively and subjectively independent from those who are the subject of the investigation. In addition, the investigation must be (v) serious and effective, thorough, and adequate. This

46 See §4.4-§4..5 of Chapters 5, 6, and 7; Chapter 8, §1.4.
47 See §4.2 of Chapters 5, 6, and 7; Chapter 8, §1.4.
48 See §5.2 of Chapters 5, 6, and 7; Chapter 8, §1.5.
49 See §5.3 of Chapters 5, 6, and 7; Chapter 8, §1.5.

is the most substantive criterion formulated for investigations, and stipulates that States must take the necessary investigative steps which a situation calls for, in order to establish the facts and identify perpetrators. In case of a death through the use of force, for instance, States will – depending on the facts of the case – need to gather witness testimonies and forensic evidence, conduct an autopsy, establish bullet trajectories, dust for fingerprints, check for gun powder residue, and so forth. In case of torture or ill-treatment, testimony by the victim will of course be instrumental, as well as a medical examination of the victim. If States fail to utilise one such investigative step or line of inquiry, leading the investigation to fail to establish the facts or to identify perpetrators, this may render the investigation as a whole ineffective and therefore as falling short of human rights standards. Investigations must further (vi) sufficiently involve the victims or their next of kin. They must be kept abreast of developments in the investigation, and must at the very least be informed to the extent necessary for them to effectuate their rights in the procedure. In addition, the various human rights regimes require somewhat varying levels of (vii) transparency to the investigation. All systems require a sufficient element of public scrutiny, which allows the public to gauge the genuineness of the investigation, and is meant to ensure the public's confidence in the State's monopoly on the use of force. The Human Rights Committee further adds that States should be transparent with respect to the process leading up to the use of force, including by disclosing criteria for targeting, and whether less harmful alternatives were considered. Finally, (viii) the follow-up process to investigations often requires measures ensuring criminal accountability. This is often phrased in a way that a potential violation must be investigated and that those responsible must where appropriate be prosecuted and punished. This includes a duty to remove *de jure* and *de facto* obstacles to accountability such as amnesties and prescriptions. Further, it can require States to restrict or limit certain rights of the defence, such as *ne bis in idem* and *nullum crimen*.[50]

The scope and contents of the duty of investigative obligations under IHRL during armed conflict

Turning now to IHRL investigations during armed conflict, an important preliminary finding is that IHRL continues to apply during armed conflicts which give rise to the applicability of IHL. This was set out in Chapter 4, and finds support in case-law by the ICJ and human rights courts and treaty

50 '[T]he State may not apply amnesty laws or argue prescription, non-retroactivity of the criminal law, *res judicata*, the principle of *ne bis in idem,* or any other similar mechanism that excludes responsibility, in order to exempt itself from [the duty to investigate, prosecute and punish]'; *Manuel Cepeda Vargas v Colombia* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 213 (26 May 2010) [216(d)].

bodies.[51] Looking in particular at the duty to investigate, a finding which stands out is that the scope and contents of investigative obligations do not principally differ inside and outside of armed conflict.[52] Human rights courts and bodies have not developed a separate approach, nor have they declared certain standards to be inapplicable during armed conflict. They have rather applied their regular approach, taking account of the armed conflict and the exigencies of the situation by relying on the measure of flexibility included in investigative obligations. They thus apply the duty to investigate contextually, maximising its flexibility where circumstances call for such.

The Inter-American Court of Human Rights and the Human Rights Committee, despite their overall openness towards applying rules of international law and IHL, have not had recourse to IHL in interpreting the duty to investigate during armed conflict.[53] They have not given any principled reasons for refraining from doing so, which may lead one to conclude that it has to do with the relative lack of specificity in IHL investigative obligations. The European Court of Human Rights until 2021 equally did not refer to IHL in the context of the duty to investigate. In 2021, however, it has had recourse to IHL in the two Grand Chamber judgments of *Georgia v Russia (II)* and *Hanan v Germany*,[54] assessing whether any conflict exists between the IHL and ECHR duties of investigation. In both cases, it found that no such conflicts existed, and that it could therefore apply its normal case-law – although it did attempt to incorporate the role of commanders under IHL through a form of harmonious interpretation.[55]

Further, importantly, this study finds that derogations do not and cannot exclude State's obligation to investigate, as such.[56] While derogations can shrink a State's human rights obligations in emergencies or armed conflict, the duty to investigate pertains in particular to rights which are non-derogable. The HRC and the Inter-American Court have furthermore held that procedural and judicial safeguards which are necessary to guarantee non-derogable rights, are also non-derogable themselves.[57] This includes, notably, the right to a remedy. Thus, the non-derogable character of the right to life, the prohibition of torture and ill-treatment, and the prohibition of slavery, is extended to the duty to investigate. The ECHR is the only treaty in which the right to life *is* derogable, 'in respect of deaths resulting from lawful acts of war'.[58] Nevertheless, even if such a derogation was entered, which no State has done to date,

51 Chapter 4, §4.6.
52 See §6.4 of Chapters 5, 6, and 7; Chapter 8, §1.6.
53 See §6.3-§6.4 of Chapters 5 and 6.
54 *Georgia v Russia (II)*, ECtHR [GC] 21 January 2021, Appl No 38263/08; *Hanan v Germany*, ECtHR [GC] 16 February 2021, Appl No 4871/16.
55 See Chapter 7, §6.4.
56 See §6.2 of Chapters 5, 6, and 7; Chapter 8, §1.6.
57 See Chapter 4, §4.6.
58 ECHR, art 15(2).

it will not as such derogate the duty to investigate. Rather, it will shrink the substance of the right to life, to coincide with the protections afforded by IHL.[59] This therefore determines the lawfulness of deprivations of life, which means that deprivations of life which are lawful under IHL will be lawful under the ECHR – in turn limiting the scope of application of the duty to investigate, which is principally concerned with unlawful deprivations of life. Investigations will then, therefore, only be required into deaths potentially in contravention with IHL. Derogations may in this light, at least under the ECHR, influence the scope of application of the duty to investigate, though that duty cannot be derogated as such and will remain applicable to any potentially unlawful deprivation of life.

The *scope of application* of the duty to investigate is therefore principally the same during armed conflict as during situations of normalcy, and its applicability has been confirmed by all human rights courts and treaty bodies. It is worth underscoring that this also applies to the European Court of Human Rights, which despite adopting a limited interpretation of the extraterritorial exercise of jurisdiction during active hostilities, has accepted that the duty to investigate does apply in such situations if certain 'special features' are present.[60] Another notable feature of the duty to investigate during armed conflict, is that it continues to apply also to incidents attributable to *third parties*, such as killings perpetrated by armed groups.[61] Insofar as such incidents took place within the jurisdiction of the State, it will need to investigate – also during armed conflict. The HRC may leave some leeway for a different interpretation, but the Inter-American and European Courts have been clear in this respect. Whereas the exigencies of the situation may influence what steps States can realistically take with respect to such situations, of which both regional courts are aware, the applicability of the duty itself is not affected.

When it comes to *investigative standards*, the duty to investigate is applied flexibly during armed conflict under the ICCPR, ACHR, and ECHR.[62] Because the duty to investigate is an obligation of means, what means are available to the State can be interpreted in light of the circumstances prevailing during an armed conflict. A contextual interpretation of the duty to investigate therefore determines what is precisely required, but the standards applied are the same eight as those set out above. The unfolding judicial practice of human rights courts and treaty bodies shows that a flexible interpretation can lead to a measure of leniency with respect to the promptness of the investigation, the precise investigative steps which were pursued, and the independence and transparency of the investigation. Some variations exist in the case-law on this point, which is also heavily influenced by the case-by-case and con-

59 See Chapter 7, §6.2 and §6.4.
60 See Chapter 7, §6.4.2.
61 See §6.4.2 of Chapters 5, 6, and 7; Chapter 8, §1.6.
62 See §6.4.3 of Chapters 5, 6, and 7; Chapter 8, §1.6.

textual nature of human rights jurisprudence. For instance, the HRC appears to be more demanding with respect to the transparency of the investigation, and the Inter-American Court is more strict with respect to the independence of the investigation and the criminal prosecution and trial of perpetrators.

When all is said and done, regardless of how open IHRL bodies may be towards IHL, the duty to investigate has thus far been interpreted in a largely independent manner. Further, it has been given a measure of flexibility which is able to account for the context of armed conflict, without however departing from regular case-law in any fundamental way.

4 OVERARCHING CONCLUSIONS ON THE INTERPLAY BETWEEN IHL AND IHRL

In terms of this study's research question, Parts I and II answered the first two prongs: *What are the scope of application and contents of States' duty to investigate (potential) violations during armed conflicts, under international humanitarian law, international human rights law, and their interplay?* In order to answer the last part, relating to interplay, Part III of this study has clarified how IHL and IHRL interrelate. Having shown that IHRL and IHL apply simultaneously, it has delved into general international law to set up a methodology for dealing with cases of interplay. It was shown how despite the many controversies and discussions in relation to interplay, a step-by-step methodology can be derived from international law's secondary rules – regulating the interaction of norms.[63]

First, it must be determined whether both legal regimes indeed apply to the situation at hand.[64] This step requires first a determination of the applicability of both legal regimes (based on the criteria for applicability as set out in Chapters 2 and 4), and second a determination of whether those regimes do not only apply to the broader *situation*, but also govern the specific *incident* in question (i.e. a specific use of force). If IHL and IHRL are indeed applicable to the situation and the incident, second, the existence and operation of a conflict clause must be explored.[65] If a conflict clause does regulate the relationship between IHL and IHRL, the solutions provided by such clauses must be followed. Chapter 9 showed, however, that IHL nor IHRL regularly contains such conflict clauses – and that derogation clauses in human rights treaties are *not* conflict clauses.[66] If a conflict clause cannot resolve the conflict, or – more likely – if no conflict clause is in operation, the third step is to assess whether the various applicable norms of IHL and IHRL conflict.[67] Step four

63 See Chapter 9, §4, §5, and §6 for the reasoning underlying these conclusions.
64 Chapter 9, §4.
65 Chapter 9, §4.
66 Chapter 9, §6.2.
67 Chapter 9, §5.

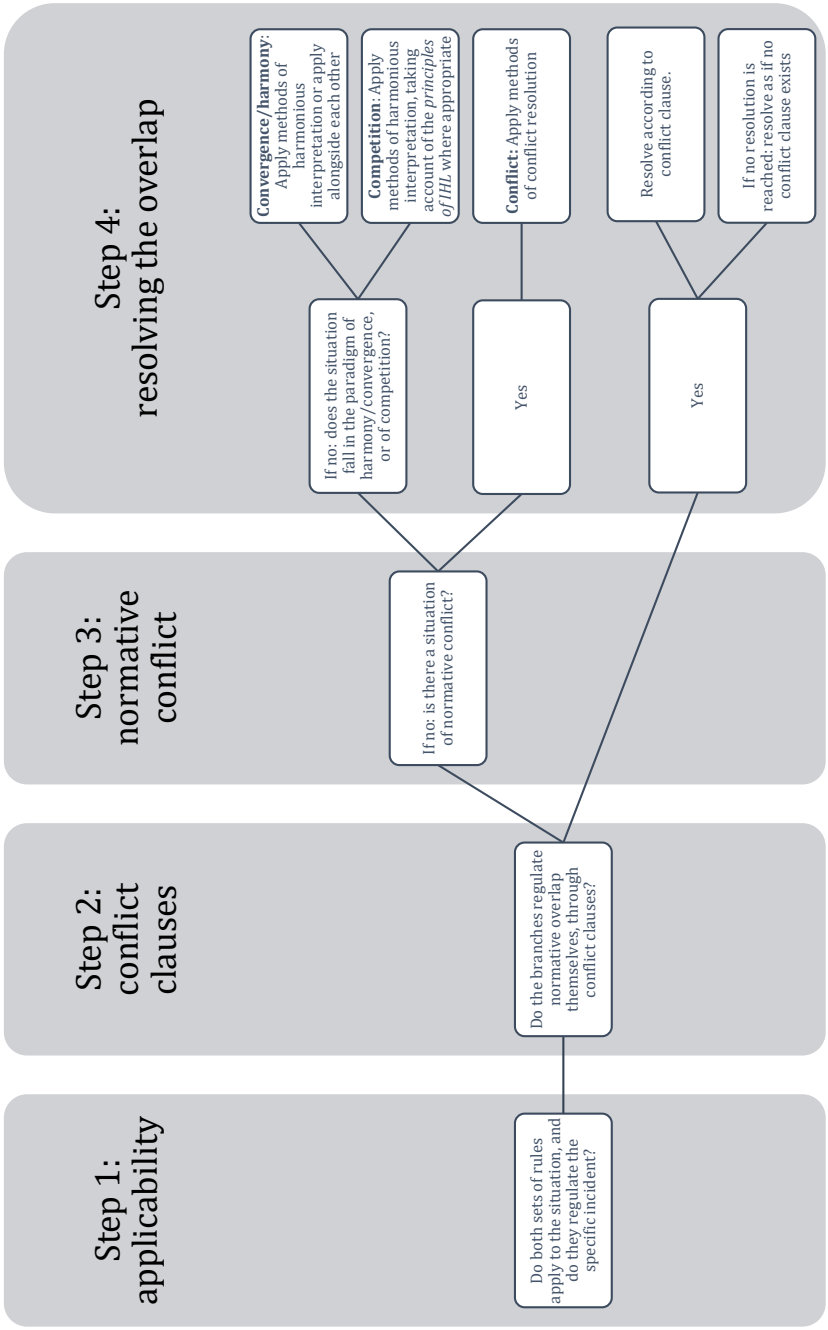
then resolves the normative overlap.[68] In case of normative conflict, resort must be had to methods of conflict resolution, in particular *lex specialis*.[69] If they do not, the overlap may be solved through harmonious interpretation and systemic integration, pursuant to Article 31(3)(c) VCLT.[70] How to do so precisely, however, depends on whether the relevant norms of IHL and IHRL are 'genuinely' in harmony, or whether they are rather in a relationship of competition.

This results in the following figure 8. The below step-by-step methodology showcases a number of this study's main takeaways with respect to the interplay of IHL and IHRL. The study finds first that we must look beyond the 'magic solution' that is supposedly presented by the ICJ's finding that *lex specialis* governs the relationship.[71] *Lex specialis* is not, as some have aptly pointed out, a Harry Potter spell which solves issues of normative overlap.[72] *Second*, we must look beyond the 'macro' relationship between IHL and IHRL as such. Discussions on how the two regimes interact as a whole, are generally unhelpful.[73] *Third*, on the level of interaction of norms, international law attaches decisive importance to the question whether norms *conflict*. This determines what legal tools for resolving normative overlap are available.[74] *Fourth*, we must look beyond a purely black-and-white assessment of either 'conflict' or 'convergence', when we classify the interplay of specific norms of IHL and IHRL. Not all situations falling outside the paradigm of normative conflict point towards a fully harmonious relationship between the norms. We must therefore acknowledge that norms can also be in a *relationship of competition*.[75] These four findings give rise to the following conclusions.

Firstly, *lex specialis* must be defined clearly. To this effect, it is necessary to strictly distinguish between the principle's role as an *interpretive tool* in the context of systemic integration, and as a *tool for conflict resolution*.[76] As a tool for conflict resolution, *lex specialis*: (i) applies on a norm-by-norm basis, meaning it does not displace a legal regime as such; (ii) must be applied contextual-

68 Chapter 9, §6.
69 Chapter 9, §6.3.
70 Chapter 9, §6.4 and §6.5.
71 Chapter 9, §3.
72 Helen Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' in Helen Duffy, Janina Dill and Ziv Bohrer (eds), *Law Applicable to Armed Conflict* (Cambridge University Press 2020) 74–7.
73 Chapter 9, §3.3.3, §6.3.2.
74 Chapter 9, §5.
75 Chapter 9, §5.2.
76 Chapter 9, §6.3.2.

Figure 8: A step-by-step methodology for interplay



ly, which means practically that even during armed conflict, the precise factual and legal context determine whether IHL or IHRL is *lex specialis*;[77] (iii) must be applied in a *nuanced* manner, meaning that one regime does not displace the other, nor does even a norm fully displace another if it is found to be *specialis*. It merely provides *precedence* of one norm over the other in that specific situation and for that specific incident. In order to decide which norm functions as *lex specialis*, regard must be had to a contextual element – the relevance or appropriateness of a rule to regulate the specific situation – and a purely legal element, looking at the wording of the norm itself, particularly how explicit, direct and precise the provision is. Thus, the rule with the 'largest common contact surface area' with the specific situation and incident, operates as *specialis*.[78] The contextual element of the *specialis* determination asks whether rules are designed to govern a situation. This depends on (1) whether the situation concerns one of IAC, NIAC, or occupation, (2) whether there is active fighting going on, (3) the status of individuals concerned and their activities, and (4) the level of control the State has over the situation.[79] Once it is decided, based on these factors, whether IHL or IHRL provides the more specific norm, the *specialis* then takes precedence over the conflicting *generalis*.

As an interpretive tool, *lex specialis* helps to interpret a norm in light of another norm, under a paradigm of relationships of interpretation.[80] This is therefore ultimately a form of systemic integration, in the sense of Article 31(3)(c) VCLT. Thus, the ICJ's application of *lex specialis* in the *Nuclear Weapons* Advisory Opinion is a classic example of its use as an interpretive tool: what constitutes an *arbitrary* deprivation of life in the context of the ICCPR, must during armed conflict be interpreted in light of the rules of IHL which regulate the conduct of hostilities. The more general rule is therefore interpreted in light of the more specific, but neither is given precedence over the other.

Secondly, interplay must be examined on a norm-by-norm basis. 'International humanitarian law' and 'international human rights law' do not as such conflict, converge, or compete. Only once looking at more specific norms, such as those concerning the duty to investigate, can the normative relationship between the two be usefully articulated. And even within this more detailed examination, one must do so (i) contextually and (ii) for each *facet* of a norm.[81] In other words, the relationship between two norms is not necessarily the same in each and every context, but must be determined in light of the circumstances

77 This pertains to the specificity of the norms, and the extent to which they are meant to govern the specific situation, i.e. are we dealing with active hostilities, or with security operations?

78 Marco Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 439. Chapter 9, §6.3.2.

79 Daragh Murray and others, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford University Press 2016) 89. Chapter 9, §6.3.2.

80 Chapter 9, §6.4.

81 Chapter 9, §6.3; Chapter 10, §4.3.

of the case. Further, even within the norm-by-norm determination, we must sometimes look in even more detail, on a facet-by-facet level. For example, it must be determined for each investigative standard whether a potential conflict exists, rather than to look at 'the duty to investigate' under IHL and IHRL as such.

Thirdly, a clear definition of normative conflict is required. This ultimately decides, under international law, whether tools for conflict resolution can be relied upon to give precedence to one norm over the other.[82] In the context of IHL and IHRL, the applicable tool will be that of *lex specialis derogat legi generali*.[83] In order for tools of conflict resolution to play a meaningful role in the resolution of normative overlap between various legal regimes, the existence of normative conflict must be acknowledged also beyond situations of mutually exclusive obligations. Notably, conflicts must be included between permissive norms on the one hand, and obligatory or prohibitive rules on the other – or, in terms of legal theory, contradictory conflicts must be included within the definition of conflict.[84] To illustrate, under a strict definition of conflict as two obligations which are mutually exclusive even the rules of IHL which permit the use of lethal force and the detention of combatants and civilians do not conflict with rules of IHRL which forbid such conduct unless certain restrictive conditions are met. After all, one can comply with both sets of rules by simply applying the IHRL standard, which in no way violates IHL. This, however, in no way does justice to the purposes served by IHL, and potentially renders permissive rules obsolete as such. The study therefore argues for including such normative clashes within the definition of normative conflict.

Fourthly and finally, beyond convergence and conflict, a relationship of normative *competition* must be acknowledged.[85] Perceiving the relationship between IHL and IHRL as binary – either in conflict or in harmony – is an oversimplification of the interplay between rules under both regimes. The absence of normative conflict need not mean there is actual harmony, because real harmony only exists when IHL and IHRL drive in the same direction. Yet, very real normative tensions can exist even in the absence of conflict. For instance, as this study shows, IHL is only rudimentary in regulating *how* investigations must be conducted, whereas IHRL is much more detailed. Yet, the simple filling of gaps in IHL by relying on IHRL can cause tensions with IHL's aim of balancing humanitarian considerations against military necessities. The IHRL requirement that investigations are transparent, by way of example, does not conflict with any rules of IHL, as IHL simply does not provide any

82 Chapter 9, §4.
83 Chapter 9, §6.3.
84 Chapter 9, §5.1.
85 Chapter 9, §5.2.2.

rules in this respect.[86] Nevertheless, requirements that States disclose all targeting procedures and the circumstances of an attack, may well cause very real tensions with operational requirements and military necessities. In such situations, a paradigm of normative harmony in which rules of one regime can simply fill the gaps in the other because there is no conflict, does not do justice to the existing tensions. If, however, we acknowledge that there can also be normative *competition*, meaning that despite the absence of conflict, IHL and IHRL nevertheless pull in different directions, this deepens the analysis of interplay, and allows for a better resolution of such situations.

When it comes to the resolution of normative tensions, no recourse can be had to *lex specialis*, because the applicability of that rule is contingent on the existence of normative conflict. The available tools are therefore those of systemic integration and harmonious interpretation. In situations of normative competition, these tools can serve to interpret the flexible norms of IHRL, insofar as they are flexible, in light of the applicable *principles of IHL*.[87] These principles at all times guide State conduct during armed conflict, and if norms of IHL are indeterminate or are lacking altogether, the principles still apply. Thus, they provide a legal source with which norms of IHRL can be balanced, although principles cannot set aside rules. If applicable rules of IHRL do not allow for flexibility, the rules must therefore be applied as they are. This can only be different when IHL and IHRL *conflict*, because then, depending on the context, IHL may prevail over conflicting norms of IHRL.

5 Duties of investigation under the interplay of IHL and IHRL

Based on the foregoing, Chapter 10 has answered the last prong of the research question – relating to the scope of application and contents of the duty to investigate under the interplay of IHL and IHRL. The study has applied the methodology for interplay to investigative duties under IHL and IHRL, engaging in a comparative analysis which showed whether aspects of the duty to investigate under both regimes converge, conflict, or compete.

Rationale

An important finding, firstly, is that the rationale of investigative obligations under both IHL and IHRL converges.[88] The role of investigations is highly similar under both regimes, as it is meant as a procedural mechanism which is used for the effectuation of the law. It obliges States to set up institutional oversight over their own conduct, to investigate when an incident potentially violated the law, and to ensure accountability of perpetrators where appro-

86 See Chapter 9, §5.2.4; Chapter 10, §4.3.3.3.
87 See Chapter 9, §6.5.
88 See Chapter 10, §2.

priate. Further, they must establish State responsibility for violations of international law. By finding that investigations under both regimes serve similar aims, the study debunks the idea that investigative obligations under IHRL are as such incompatible with the object and purpose of IHL. IHL has similar obligations, which serve similar purposes – and investigations are a crucial aspect in the effectuation of both IHRL and IHL.

Scope of application

Under the interplay of IHL and IHRL, the study concludes that the *scope of application* of the duty to investigate depends primarily on the lawfulness of an incident under substantive law.[89] If an incident violates IHL, States will be required to investigate it under that regime. War crimes require criminal investigations, administrative investigations suffice in case of non-serious violations. Under IHRL, investigations have to be conducted at the very least into suspected violations of the right to life, the prohibition of torture and cruel, inhuman, or degrading treatment or punishment, the prohibition of slavery and forced labour, the right to liberty, the prohibition of genocide, and the prohibition of enforced disappearance – which require criminal investigations. Investigations beyond such 'serious' human rights violations are subject to further legal developments. Because IHRL develops on a case-by-case basis it is dependent on the facts brought before a court, and such cases have to date been scarce. Further guidance must therefore be awaited on this issue.

In line with the coinciding aims of investigations, the study's comparative analysis showed that there is a large degree of convergence in the *scope of application* of the duty to investigate.[90] During an armed conflict, many incidents will trigger investigative obligations under both IHL and IHRL. An obvious example is an extrajudicial execution of a captive, which is prohibited under both legal regimes, and must be criminally investigated under both. In such situations, the law is in harmony. Both obligations then drive in the same direction, that of effectuating the law and ensuring accountability, which does not as such give rise to any issues. The same goes for certain situations where only IHL, or only IHRL, requires an investigation. So long as the other regime does not militate against an investigation, there is no normative tension. For example, if IHL is violated because the State's armed forces make perfidious use of the ICRC's distinctive emblem, this is subject to an investigative obligation under IHL only, not under IHRL. Yet, IHRL in no way opposes such investigation, and the law is therefore in harmony. The same goes the other way around. IHL and IHRL can, in such instances, be applied alongside one another without any need to have recourse to tools for the resolution of normative conflict, or harmonious interpretation.[91]

89 See Chapter 10, §3.
90 See Chapter 10, §3.3.
91 See Chapter 10, §3.3.

Yet, divergences between IHL and IHRL can arise where both hold different views on the lawfulness of the same incident. This is most prominently so with respect to the use of lethal force, where IHL is more permissive than IHRL. Chapter 10 has set out four situations in which the rules on the use of lethal force under IHL and IHRL potentially clash, which in turn lead to a situation in which IHRL does require an investigation because it regards the use of force as unlawful, while IHL considers it to be lawful and therefore does not require an investigation.[92] In such situations, whether or not a duty to investigate applies is contingent on how the normative conflict between the substantive norms of IHL and IHRL is resolved. This essentially means that where IHL functions as *lex specialis*, it will prevail over more restrictive rules of IHRL for judging the lawfulness of that particular use of force. IHL will then determine the lawfulness of the use of force, and whether an investigation is required. Where IHRL functions as *lex specialis*, IHRL's determination of lawfulness will prevail over IHL's more permissive rules, and IHRL therefore determines whether an investigation is called for.

A further tension giving rise to normative competition was uncovered with respect to the investigation of incidents perpetrated by non-State actors.[93] IHRL requires such investigations where the State exercised jurisdiction over the incident – most prominently so when the incident took place in an area falling within the State's territory, or over which it exercised effective control. While not providing any expressly conflicting rules, IHL does not require such except where war crimes are concerned, giving rise to normative tensions. This competition, the study has shown, can be mitigated by interpreting the flexible norms under the ICCPR to accommodate the IHL principle of military necessity. Yet, under the ACHR and ECHR such flexibility does not currently appear to exist – which means that unless the Inter-American and European Courts revise their positions, this tension cannot be alleviated and States will need to investigate human rights infringements caused by third parties under their jurisdiction – even if they concern abuses by non-State armed groups during an armed conflict. Because IHL does not contain explicit rules on this issue – it simply does not provide anything – there is no normative conflict, and recourse to *lex specialis* is therefore excluded. Insofar as IHRL does not leave room for flexibility to account for the military necessities which oppose such extensive investigative obligations, these obligations must nonetheless be met. International law does not provide further options to alleviate this tension, although this tension ought perhaps not be overstated. If States operate abroad without controlling territory, or if another State or a NSAG takes control over a territory, this may have consequences for the State's jurisdiction under IHRL, which may mean its obligations under IHRL are not applicable, or loosened. Moreover, as is discussed below, even if the IHRL duty to investigate third

92 See Chapter 10, §3.4.2.1.
93 See Chapter 10, §3.4.3.

party conduct *is* applicable, the applicable standards of investigation may yet be loosened insofar as the situation calls for such. This may significantly lower demands placed on States, and therefore mitigate tensions in this respect.

Knowledge triggering the duty to investigate

The information which triggers the duty to investigate does not seem to diverge too much when compared between IHL and IHRL.[94] IHL relies on a criterion of when a reasonable commander or prudent individual would consider there was potentially a violation. Moreover, as was shown, IHL relies on a system of self-enforcement through review and monitoring of military operations. Thus, there is an active system of keeping tabs on the effects of military operations, of review, and of reporting. This ought to also ensure that there will, in practice, be a reasonable commander who at some point reviews the information.

IHRL is not completely uniform in the information required to trigger the duty to investigate. What seems determinative is a requirement of 'arguable' or 'credible' complaints, or 'sufficient reasons' to suspect a violation has occurred. This largely overlaps with IHL's standard of information, and does not lead to major difficulties in co-application of IHL and IHRL. Issues which arise pertain rather to what type of conduct potentially amounts to a violation under interplay, the issue which was addressed above.

It should be noted that whereas the concept of an 'arguable claim' or 'credible complaint' may carry a connotation of the State being the passive recipient of information which then triggers the duty to investigate, it must be stressed that States are under an obligation to investigate of their own motion whenever certain information reaches them. The source of this information is immaterial, and whether there is thus an actual 'claim' or 'complaint' by victims, or rather information stemming from a State's own monitoring activities or media reports, thus does not matter: all can trigger the duty to investigate.

The applicable investigative standards under interplay

Based on a comparison of the results in Parts I and II, this study showed that the investigative standards formulated by both regimes vary quite strongly.[95] The standards governing investigations are relatively vague and underdeveloped under IHL, whereas under IHRL a coherent set of standards has been identified by courts and treaty bodies in some level of detail. Under both regimes, however, what is clear is that the duty to investigate is an obligation of conduct, not of result. Thus, the simple fact that ultimately those responsible for a violation could not be identified or that a conviction was not obtained, does not mean an investigation was ineffective. The various standards are

94 See Chapter 10, §3.5.
95 See Chapter 10, §4.

procedural yardsticks meant to ensure that investigations are, at the very least, *capable* of achieving the aims of establishing the facts and determining the lawfulness of an incident. If appropriate, and depending on the violation in question, this may include identifying perpetrators, and to prosecute and punish them.

Turning then towards the applicable standards when IHL and IHRL interplay, three situations must be distinguished. The *first* concerns situations where, although both IHL and IHRL apply to the broader situation, only IHL requires an investigation because the conduct in question violated IHL only, not IHRL. This may be the case both for a war crime or for a non-serious violation. To give an example of both, the war crimes of unjustifiable delay in repatriation of POWs or civilians, or of occupying States transferring parts of their own civilian population into occupied territory,[96] do not require an investigation under IHRL – or there is no case-law to that effect. The same goes for many non-serious violations of IHL, which simply do not have any equivalent under IHRL – such as failing to post a copy of the Geneva Conventions in a POW camp.[97] When such violations occur, despite the general applicability of IHRL to a situation, the investigation is governed by IHL alone. Thus, such investigations are subject to IHL standards only – similar to situations where IHRL is inapplicable full stop. The *second* situation is the mirror image of the first, with this time IHRL requiring an investigation and IHL not governing an incident in particular. An example would be a violation of the prohibition of slavery, which as such is not regulated by IHL, but which requires a criminal investigation under IHRL. Because IHL is neutral in this respect, this means that IHRL's extensive investigative standards apply. Such standards will, under contemporary case-law, be interpreted in light of the exigencies of the armed conflict situation. They may therefore be somewhat more flexible than when applied in situations of normalcy, but it is simply the IHRL standards which apply. The *third* situation, and the one this study has afforded most attention to, is where both IHL and IHRL govern an incident. This can pertain to situations where both IHL and IHRL require an investigation, or where IHL governs an incident but does *not* require an investigation. In such situations, the interplay of IHL and IHRL is relevant for determining the applicable investigative standards, and therefore also calls for an analysis of how the various investigative standards relate to one another.

The study showed that the standards that an investigation be carried out *ex officio* and impartially fall under a paradigm of normative harmony;[98] the standards that an investigation be carried out promptly and with reasonable expedition, seriously, effectively, adequately and thoroughly, transparently,

96 AP I, art 85(4)(a) and (b).
97 GC III, art 41.
98 See Chapter 10, §4.2.

and with sufficient involvement of next of kin, fall under a paradigm of normative competition;[99] and the standards that an investigation be carried out independently, and followed-up by a criminal prosecution, fall (potentially) under a paradigm of normative conflict.[100]

This means, *firstly*, that no matter the circumstances, investigations will need to be initiated *ex officio*, and be conducted impartially. IHL and IHRL are in complete harmony on these points.[101] *Secondly*, the standards of promptness, seriousness, effectiveness, adequacy, thoroughness, sufficient involvement of next of kin, and transparency, must be applied contextually under a paradigm of normative competition.[102] Because there is no normative conflict, *lex specialis* cannot be relied upon in order to give IHL precedence. Nevertheless, these standards can – to a certain extent – be interpreted flexibly, taking the principles of IHL into account. By way of example, although promptness is essential to secure evidence which may otherwise be lost, if there is a certain delay in the investigation because military necessities do not allow for the immediate deployment of investigators in light of ongoing hostilities, a flexible and contextual interpretation of what is sufficiently prompt may alleviate any tensions between IHL and IHRL. Such solutions are of course reliant on the extent to which IHRL's standards include a measure of flexibility. The same applies to the investigative steps which States must take. If under normal circumstances the immediate separation of a suspect from potential witnesses is required, taking account of military necessities may lead to a loosened requirement if a suspect is the highest in command who during a military operation cannot be separated from his forces.

Thirdly, the applicability of the standards of independence and criminal follow-up may be subject to a *lex specialis* determination.[103] The requirements that an investigation be carried out fully independently, outside the chain of command, and that they are followed-up by criminal prosecutions before civil courts, *can* conflict with IHL.[104] If they do, whether the IHRL standard prevails and must therefore be applied, hinges on the question whether IHRL is the *lex specialis* in the specific circumstances of the case. This, once more, calls for a contextual analysis, which hinges on whether a situation falls under the active hostilities or security operations paradigms. Depending on the applicable paradigm, the norm which applies as *specialis* therefore takes precedence over the other. If IHL must be considered the *specialis*, then an investigation by the commander may suffice, at least insofar as non-serious IHL violations are concerned. In case of war crimes, it is likely that IHL also requires that the

99 Chapter 10, §4.3.3.
100 Chapter 10, §4.3.2.
101 Chapter 10, §4.2.1 and §4.2.2.
102 Chapter 10, §4.3.3.1, §4.3.3.2, and §4.3.3.3.
103 Chapter 10, §4.3.2.
104 Chapter 10, §4.3.2.1 and §4.3.2.2.

commander, though potentially taking the first investigative measures, remits the case to an independent investigative body. This approach was adopted by the European Court of Human Rights, when it was faced with an airstrike during active hostilities in an extraterritorial military operation in Afghanistan.[105] Further, if IHL is *specialis*, IHL's insistence that States 'endeavour' to grant the broadest possible amnesty at the end of a NIAC may take precedence over IHRL's requirement that the investigation be followed by a criminal prosecution and trial. This study has suggested that States, in such circumstances, ought formulate amnesties such that they explicitly exclude application to 1) war crimes, 2) serious violations of human rights (however defined), and 3) human rights violations committed outside active hostilities.[106] Finally, if a criminal trial is conducted, application of IHRL as *lex specialis* will mean that demands of independence and criminal prosecution and trial following the investigation must be complied with fully. If, however, IHL constitutes *lex specialis*, there may be scope for relying on military prosecutors and courts insofar as the genuineness and overall independence of the proceedings are sufficiently safeguarded.

6 Investigations and armed conflict: a final reflection

This final section of the study brings out a number of broader implications which follow from the above conclusions.

Legal scholarship has suggested that the duty to investigate – especially as conceptualised under IHRL – imposes an unrealistic burden on States who are engaged in armed conflict. This problem is moreover brought to the fore due to the expanding reach of IHRL. This study has shown that this narrative needs to be changed. It is true that the scope of application of IHRL, and of the duty to investigate in particular, has been subject to expansion. As the study has shown, whereas the scope of application of the duty to investigate is drawn by courts and treaty bodies on case-by-case basis, the material, temporal, and geographic scope of application are extensive. Under the ECHR, the duty to investigate may arguably be in the process of taking up a more prominent role during armed conflict if the Court continues on the pathway of restricting the material applicability of the Convention to active extraterritorial hostilities, but at the same time confirming the duty to investigate for such situations. This expansion, however, need not raise any problems.

The duty to investigate under IHRL is not contrary to IHL. IHL itself requires investigations in many cases, and serves highly similar purposes. Investigations safeguard the proper application of the law, and accountability where appro-

105 *Hanan v Germany* (n 54); Chapter 7, §6.4.3; Chapter 10, §4.3.2.1.
106 Chapter 10, §4.3.2.2.

priate. So long as a nuanced and contextual assessment is made of whether any conflict or tension exists between norms of IHL and IHRL, and if a careful determination is made of which rule constitutes *lex specialis* in case of conflict, investigative obligations need not lead to excessive burdens for the State. Rather, this study considers the duty to investigate to be a realistic tool for the effectuation of the international law governing armed conflict. It has the necessary level of flexibility to account for the difficult circumstances which are inherent in investigations into violations taking place in war zones. Although the starting points for IHL and IHRL could be said to be very different – with IHL's constant balancing act between military necessities and humanitarian considerations and aim of realistically regulating armed conflicts and with State obligations in that respect, and with IHRL's basis in protecting human dignity and bestowing individually justiciable rights on all human beings – they find each other when it comes to the duty to investigate, the aim of effectuating the law, and the aim of ensuring accountability.

Both IHL and IHRL have institutionalised investigations as a crucial aspect for the effectuation of the law. It forces States to take up their primary role as guardian and enforcer of the law. A proper effectuation of the duty to investigate is to the benefit of all actors involved. Victims of armed conflict can obtain justice and remedies, and the truth of what has befallen them. Members of armed forces obtain certainty as to their legal position and potential criminal liability, and they are safeguarded from the harmful effects of a continuous looming threat of investigation or reinvestigation. States equally gain certainty as to their obligations and potential legal liability, and if investigations bring to light any systemic deficiencies, they are able to remedy them. Further, the more general aim of accountability – both of the State and of individuals – can be achieved through proper investigations. Finally, the State and the armed forces as a whole gain credibility when they genuinely investigate potential violations committed by the armed forces, which contributes to the protection of the rule of law, and the broader societal right to the truth about armed force used in their name.

The duty to investigate acknowledges the central importance of States in enforcing international law, by obliging them to set up a procedural framework which effectuates the international law governing armed conflict, and to apply that framework if any potential violations take place. Because they must moreover, under certain circumstances, do so for violations which took place outside of their control, this effectively creates a domestic enforcement mechanism of international law which spans the globe. This could, therefore, theoretically achieve the aims of the fight against impunity by ensuring accountability for violations, and by providing victims with the truth and a remedy.

Yet, the obligation remains realistic because it is one of *means, not of result*. Furthermore, because it is a flexible obligation which can be applied contextually, and because international law provides for a framework for the relationship between both norms, a careful application of the obligation need not impose

obligations going beyond what is realistic. As this study has shown, *lex specialis* can resolve normative conflicts – which can alleviate tensions with respect to investigations into the use of force which is considered to be lawful under IHL, or with respect to command investigations which are not fully independent. Beyond normative conflict, however, the study has also shown that other normative tensions can be alleviated by acknowledging them under a paradigm of normative competition, and by incorporating the principles of IHL in the interpretation of flexible norms of IHRL. This ensures that the duty to investigate incidents during armed conflict is interpreted in ways which take account both of the exigencies of the situation, and of the norms of both IHL and IHRL which regulate the situation.

The *realism* rooted in the duty to investigate ensures it can remain applicable in all circumstances of conflict, even in high intensity active hostilities, whilst at the same time tempering the precise investigative requirements which apply in extreme circumstances. Thus, the legal obligations flowing from the duty to investigate oscillate between *effectiveness* and *realism*. States must fulfil their obligations to effectuate the international law governing armed conflict and take up their roles as guardians of the international legal system. But the factual context of a case and the State's capacity to actually investigate will equally determine how the investigation is ultimately carried out. A balance must thus be struck, with the effectuation of the law ultimately dependent on what is realistically possible in the circumstances of the case. This also means that the precise application of investigative standards to a particular incident is dependent on a case-specific analysis.

Secondly, this study has sought to clarify the interplay of IHL and IHRL. Ultimately, it was shown that 'interplay' does not concern one coherent and unambiguous whole; it is indeterminate and any proper understanding of interplay hinges on an assessment of how overlapping norms interrelate on a norm-by-norm and case-by-case basis. Nonetheless, general international law does provide the necessary guidance for their co-application. The rules of both regimes interact in a variety of ways, with the precise outcome dependent on context. This analysis is precisely what has driven a project such as the *Practitioners' Guide to Human Rights Law in Armed Conflict* to select a number of the most important issues from an operational perspective, and to set out how interplay works out for those situations. This study has done so for the duty to investigate violations committed during armed conflict.

These findings on the interaction of IHL and IHRL aim to contribute to our understanding of the law of interplay, which is of potentially much broader interest than for the duty to investigate alone. The approach developed in this study can be applied to all other norms of IHL and IHRL, which can assist in determining the contents of the international law governing armed conflict. In fact, from the perspective of the broader debate on interplay, this study's enquiry into the duty to investigate is merely an important *example* of how

issues of interplay ought to be resolved. It is suggested that the law of interplay could be mapped out by rigorously applying the same method to other relevant instances of normative overlap. Herein lies an important task for States, who must properly instruct their armed forces as to the legal framework they must operate under. If this is done diligently, it is hypothesised, this will also remove certain misgivings States have with regard to human rights courts and bodies' engagement with IHL and situations of armed conflict. If States come up with a coherent framework of interplay, this will provide human rights courts and bodies who are faced with cases arising out of armed conflict with a solid starting point. It might also contribute to States' perception of having a sufficiently prominent role in shaping the international law governing armed conflict. If they develop the law of interplay through their domestic practices, they will not only influence international law through their own State practice, but will also inform domestic proceedings,[107] which in turn provides the basis for international proceedings after the exhaustion of domestic remedies. Such a practice could benefit the dialogue between States human rights courts and treaty bodies. This, it is submitted, does justice to the role States have in shaping international law, whilst also contributing to the quality of IHRL bodies' judicial role in this field. If States continue to argue that IHRL does not apply to armed conflict, or does not apply extraterritorially, this is not helpful, and it fully leaves it up to IHRL bodies to shape the law of interplay without any useful input from the experts on the ground – States. If, on the other hand, States argue on the substance how the law of interplay has shaped their operations, this will greatly assist IHRL bodies in their findings. This, it is submitted, will lead to the most balanced interpretation of interplay – to the benefit of victims, armed forces, States, and international law as a whole.

107 Domestic court judgments constitute both State practice, and a subsidiary means of determining international law, and thus play a dual role in the development of international law. See Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 International and Comparative Law Quarterly 57.

Summary

THE DUTY TO INVESTIGATE IN SITUATIONS OF ARMED CONFLICT
An Examination under International Humanitarian Law, International Human Rights Law, and their Interplay

Investigations have a crucial role to play during armed conflicts and in their aftermath. The so-called 'fog of war' obfuscates what happens on the ground. This can render it almost impossible for victims of war violence to find out what has happened to them, why it happened, who is responsible, and whether they may have a right to reparation and some form of legal recourse. Victims are, in this respect, highly dependent on State investigations. Accountability efforts similarly rely on knowledge of the facts, because without such knowledge, there is no way to establish whether the law may have been violated, let alone who was responsible for such a violation. Larger aims such as justice for victims and accountability of perpetrators then remain out of reach. In addition, because thorough investigations will be able to substantiate or disprove allegations of violations of international law, they equally serve to safeguard the integrity of States' armed forces, and can protect the armed forces from lingering aspersions or the looming risk of investigation and re-investigation in the future. This underscores the vital nature of investigations for all involved.

International humanitarian law (IHL) and international human rights law (IHRL) both regulate to what extent States must investigate incidents during and after armed conflict, and how they must do so. Both regimes, however, regulate *what* States must investigate, and *when* and *how* they must do so, in very different levels of detail, and moreover appear (at least *prima facie*) to do so in diverging ways. This leads to uncertainty in the law, which puts the effectuation of individual rights, the fight against impunity, and of States' rights and interests, in jeopardy. A common narrative moreover holds that to require States to conduct human rights investigations during armed conflict would impose inordinate burdens on them, and would be wholly unrealistic in light of the realities of hostilities.

In light of the importance of investigations for achieving justice, accountability, and legal certainty, this study seeks to answer the following question:

> *What are the scope of application and contents of States' duty to investigate (potential) violations during armed conflicts, under international humanitarian law, international human rights law, and their interplay?*

In doing so, it aims to clarify the law with respect to States' investigative obligations during armed conflicts. This search for clarity is conducted through the means of a doctrinal research method.

Under IHL (Part I, Chapters 2 and 3), the search for clarity takes the shape of an analysis of treaty law, custom, State practice, and soft law, in order to identify investigative obligations and to flesh out what they entail. This study finds that the IHL system of supervision, implementation, and enforcement, fully relies on State investigations for its effectiveness. The lack of institutionalised international means of supervision and enforcement, place the task of effectuating IHL fully on States. In order to take up this task, and in light of the duty to respect and ensure respect for IHL, investigations are crucial. An analysis of IHL treaty law shows that this applies to *all* breaches of IHL – both serious and non-serious violations.

IHL does, however, make a sharp distinction between the obligations pertaining to criminal, and non-criminal breaches. War crimes (grave breaches and other serious violations) entail broad-ranging investigative obligations, including the investigation of such crimes when they are committed by others than States' own armed forces. Preventing impunity for these crimes is an important driving force behind such obligations. Simple violations of IHL, which are all breaches which are not 'serious', are subject to a less extensive investigative regime. The focus of investigative obligations with respect to such breaches is internal, on breaches committed by a State's own forces, because the interests of the international community are less directly at stake here. Non-serious breaches, after all, are not outrages against humanity, nor are they crimes under international law.

The IHL norms with respect to investigative obligations are often terse and require further interpretation to map out *what* States must investigate, as well as *when* and *how* they must do so. Soft law instruments and State practice play an important role in this respect. This study shows that war crimes require criminal investigations, meeting standards of effectiveness, thoroughness, genuineness, promptness, impartiality, and fundamental due process guarantees. Simple violations of IHL require administrative investigations, which leave more discretion to States in how they shape the investigative process. Nonetheless, such investigations will need to be effective, prompt, and impartial. Because criminal punishment and retribution are not the aim of such investigations, they regularly take place within the chain of command, and

can result in disciplinary measures. These investigations should moreover identify potential systemic issues which caused a breach, and facilitate the establishment of, or acknowledgment of, State responsibility for the breach. Finally, the trigger for the duty to investigate appears to be very similar for all breaches. Whenever the State has information which reasonably leads to a suspicion of a violation, it must start an investigation. The source of the information is immaterial.

In Part II (Chapters 4-8), the study outlines the contours of the duty to investigate human rights violations under the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (ACHR), and the European Convention on Human Rights (ECHR). It does so by establishing the material, personal, temporal, and geographic scope of application of the obligation, as well as the standards investigations must meet. It thereby establishes *when* States must investigate (potential) violations of human rights, and *how* they must do so. It first maps these elements in general, and then examines to what extent the obligation is altered during armed conflict.

It is shown that investigative obligations pertain primarily to potential violations of the right to life, the prohibition of torture and other cruel, inhuman, and degrading treatment and punishment, the prohibition of slavery, and enforced disappearances. Investigative obligations can and do attach to other violations, but case-law is still developing on this issue. It is further shown that States must also investigate abuses by non-State actors within their jurisdiction, and that individuals have a right to an investigation. Temporally and geographically, the applicability of the duty to investigate is shown to be broad, potentially encompassing incidents which predated the entry into force of the human rights treaty in question, and extending extraterritorially in a broad range of circumstances.

The study further clarified what information triggers States' duty to investigate. As soon as information – no matter the source – reaches the State which indicates a potential violation of the rights listed above, and raises an arguable claim that a violation has occurred, an investigation must be conducted.

With respect to how States must conduct their investigations, an important starting point is that the duty to investigate is not an obligation of result, but rather an obligation of means, a due diligence obligation. Procedural standards have been developed in case-law which provide the yardstick for the overall effectiveness of the investigation, numbering eight in total, which when they are observed discharge the State's obligation – even if the investigation ultimately failed to clarify the facts or the identity of perpetrators. The eight standards formulated by the Human Rights Committee (HRC), Inter-American Court of Human Rights (IACtHR), and European Court of Human Rights (ECtHR) alike, stipulate that the investigations must be (i) launched of the State's own accord (*ex officio*); (ii) initiated promptly and carried out with reasonable expediency; and that it must furthermore be (iii) independent and (iv) im-

partial. The last two criteria entail that investigators may not to be guided by bias or prejudice, and that they must be both objectively and subjectively independent from those who are the subject of the investigation. In addition, the investigation must be (v) serious and effective, thorough, and adequate. This is the most substantive criterion formulated for investigations, and stipulates that States must take the necessary investigative steps which a situation calls for, in order to establish the facts and identify perpetrators. In case of a death through the use of force, for instance, States will – depending on the facts of the case – need to gather witness testimonies and forensic evidence, conduct an autopsy, establish bullet trajectories, dust for fingerprints, check for gun powder residue, and so forth. In case of torture or ill-treatment, testimony by the victim will of course be instrumental, as well as a medical examination of the victim. If States fail to utilise one such investigative step or line of inquiry, leading the investigation to fail to establish the facts or to identify perpetrators, this may render the investigation as a whole ineffective and therefore as falling short of human rights standards. Investigations must further (vi) sufficiently involve the victims or their next of kin. They must be kept abreast of developments in the investigation, and must at the very least be informed to the extent necessary for them to effectuate their rights in the procedure. In addition, the various human rights regimes require somewhat varying levels of (vii) transparency to the investigation. All systems require a sufficient element of public scrutiny, which allows the public to gauge the genuineness of the investigation, and is meant to ensure the public's confidence in the State's monopoly on the use of force. The Human Rights Committee further adds that States should be transparent with respect to the process leading up to the use of force, including by disclosing criteria for targeting, and whether less harmful alternatives were considered. Finally, (viii) the follow-up process to investigations often requires measures ensuring criminal accountability. This is often phrased in a way that a potential violation must be investigated and that those responsible must where appropriate be prosecuted and punished. This includes a duty to remove *de jure* and *de facto* obstacles to accountability such as amnesties and prescriptions. Further, it can require States to restrict or limit certain rights of the defence, such as *ne bis in idem* and *nullum crimen sine lege*.

Crucially for this study, it is found that human rights continue to apply during armed conflict. Beyond the International Court of Justice, judgments and decisions were also rendered to this effect by the HRC, and the Inter-American and European Courts. Investigative obligations equally continue to apply during armed conflict. When applying the duty to investigate during armed conflict, regional courts and treaty bodies have followed their regular approach, without as such altering the scope of application or standards of investigative obligations. Rather, they have applied the obligation contextually, meaning they take the exigencies of the situation into account when interpreting what could reasonably be required of the State by ways of, for instance,

a prompt or effective investigation. The HRC and IACtHR have, in contrast with their usual openness to IHL, not relied on IHL in interpreting the duty to investigate in such situations. The European Court until recently equally relied on contextual interpretation alone to shape the contours of the duty to investigate during armed conflict, but has in 2021 for the first time incorporated IHL in its application of the duty to investigate. This divergence in approaches indicates that the interplay of IHL and IHRL, also in the context of the duty to investigate, is in flux and requires continued attention.

In respect of the interplay between IHL and IHRL (Part III, Chapters 9 and 10), the study first sets out the relationship between both regimes *in abstracto*. Based on the secondary rules of general international law, a step-by-step approach is developed for the analysis of issues of interplay. This involves four steps. First, step 1, it must be determined whether both legal regimes indeed apply to the situation at hand. This step requires a determination of the applicability of both legal regimes, and, subsequently, a determination of whether those regimes do not only apply to the broader *situation*, but also govern the specific *incident* in question (i.e., a specific use of force). If this is the case, step 2 is to explore the existence and operation of a conflict clause. This is a clause which expressly provides how potential conflicts with other legal regimes must be resolved. If a conflict clause does regulate the relationship between IHL and IHRL, the solutions provided by such clauses must be followed. Chapter 9 shows, however, that IHL nor IHRL regularly contains such conflict clauses – and that derogation clauses in human rights treaties are *not* conflict clauses. If a conflict clause cannot resolve the conflict, or – more likely – if no conflict clause is in operation, step 3 is to assess whether the various applicable norms of IHL and IHRL conflict. Step 4 then resolves the normative overlap. In case of normative conflict, resort must be had to methods of conflict resolution, in particular *lex specialis*. If they do not, the overlap may be solved through harmonious interpretation and systemic integration, pursuant to Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties (VCLT).

Looking further at steps 3 and 4, under the rules of general international law, it was found that the existence or not of normative *conflict* is decisive for how normative overlap can be resolved because it determines whether recourse can be had to tools for conflict resolution. This brings to the fore two issues. The first pertains to the definition of normative conflict, which is – in common international practice – so strict that it is underinclusive. Under this definition, normative conflict exists only where two norms are mutually exclusive, meaning that in order to meet the one, the other is necessarily violated. With respect to the interplay of IHL and IHRL, this is especially evident when it comes to rules under IHL that *permit* certain conduct which is simultaneously *prohibited* by IHRL, for instance the use of lethal force or deprivation of liberty. Under a strict definition, IHL and IHRL do not conflict in this context because both rules can be complied with by simply refraining from killing or detaining.

Such an approach, however, completely disregards the opposite directions in which both rules pull, and would render rules of IHL obsolete. This study therefore proposes to widen the definition to include conflicts between obligatory norms on the one hand, and permissive norms on the other hand. This allows for the resolution of these types of normative conflict through the use of *lex specialis*, which grants precedence to the rule which is more specific, and is more specifically geared towards the context of a situation and incident. The second issue that arises when establishing whether there is a normative conflict, is that even when a broader definition of normative conflict is used, there remain many instances of normative overlap which cannot genuinely be categorised as convergence because both regimes still pull in different directions. Very real tensions between IHL and IHRL are overlooked, especially where IHL is silent – arguably because it intentionally leaves discretion to States. Simply applying rules of IHRL because IHL is silent would then disregard the existing tensions. This study therefore submits that beyond paradigms of conflict and convergence, normative *competition* must be recognised as a third category of normative overlap. Under a paradigm of normative competition, tools for the resolution of normative conflict cannot be relied upon, but it is submitted that in such situations, rules of IHRL must be interpreted flexibly insofar as such rules allow, in light of the principles of IHL. This should ensure a more balanced outcome, whilst acknowledging that there are limits to harmonious interpretation and that principles cannot set aside rules.

The study further concludes that the resolution of normative overlap must take place on a highly contextual basis. Beyond a strictly legal analysis of the specificity of norms and the extent to which they conflict, converge, or compete, the resolution to such interactions must equally be based on a contextual analysis which takes the circumstances of the case into account.

The study in Chapter 10 finally applies the step-by-step approach to investigative obligations under IHL and IHRL, to determine their relationship and interaction. Because it was concluded that it is decisive whether norms conflict, compete, or converge, a comparative analysis is carried out. The points for comparison are the scope of application of the duty to investigate, and the standards guiding investigations as they were identified in Parts I and II.

What stands out is that there is a large measure of convergence between investigative obligations under IHL and IHRL, and that common claims that IHRL imposes inordinate investigative burdens on States therefore appear to be unfounded. With respect to the scope of application of investigative obligations, many incidents during armed conflicts will trigger investigative obligations under both IHL and IHRL. An obvious example is an extrajudicial execution of a captive, which is prohibited under both legal regimes, and must be criminally investigated under both. In such situations, the law is in harmony. Both obligations then drive in the same direction, that of effectuating the law and ensuring accountability, which does not as such give rise to any

issues. The same goes for certain situations where only IHL, or only IHRL, requires an investigation. So long as the other regime does not militate against an investigation, there is no normative tension. For example, if IHL is violated because the State's armed forces make perfidious use of the International Committee of the Red Cross' (ICRC) distinctive emblem, this is subject to an investigative obligation under IHL only, not under IHRL. Yet, IHRL in no way opposes such investigation, and the law is therefore in harmony.

This is not to say that there are no instances of competition and conflict regarding the scope of application of investigative obligations under IHL and IHRL. *Conflicts* may arise in particular in respect of the use of lethal force. This study has identified a number of situations in which the rules on the use of lethal force under IHL and IHRL potentially clash, which in turn lead to a situation in which IHRL does require an investigation because it regards the use of force as unlawful, while IHL considers it to be lawful and therefore does not require an investigation. Whether or not the duty to investigate applies then becomes dependent on how this conflict of substantive norms is resolved – meaning that if IHL constitutes *lex specialis* no investigation will be required, whereas if IHRL functions as *lex specialis*, an investigation must follow. Which norm constitutes the *specialis* will depend on the context of the use of force. Normative *competition*, next, exists in respect of incidents perpetrated by non-State actors for which IHRL requires investigations when the incident took place within the State's jurisdiction, while IHL does not (except where war crimes are at issue). The study shows that this competition can be resolved through flexible interpretation of the norms of the ICCPR, but that the case-law of the Inter-American and European Courts does not leave scope for such flexibility. This means that under those regimes, investigations will be required of States in spite of potential tensions with military necessities.

How investigations must be conducted, this study shows, varies quite strongly under IHL and IHRL. Under both regimes, however, it is clear that the duty to investigate is an obligation of conduct, not of result. Thus, the simple fact that those responsible for a violation could not ultimately be identified or that a conviction was not obtained, need not mean an investigation fell short. The various standards are procedural yardsticks meant to ensure that investigations are, at the very least, *capable* of achieving the aims of establishing the facts and determining the lawfulness of an incident. If appropriate, and depending on the violation in question, this may include identifying perpetrators, and to prosecute and punish them.

Turning then towards the applicable standards when IHL and IHRL interplay, three situations must be distinguished. The *first* concerns situations where, although both IHL and IHRL apply to the broader situation, only IHL requires an investigation because the conduct in question violated IHL only, not IHRL. This may be the case both for a war crime or for a non-serious violation. To give an example of both, the war crimes of unjustifiable delay in repatriation of prisoners of war (POWs) or civilians, or of occupying States

transferring parts of their own civilian population into occupied territory, do not require an investigation under IHRL – or there is at least no case-law to that effect. The same goes for many non-serious violations of IHL, which simply do not have any equivalent under IHRL – such as failing to post a copy of the Geneva Conventions in a POW camp. When such violations occur, despite the general applicability of IHRL to a situation, the investigation is governed by IHL alone, and thus subject to IHL standards only – similar to situations where IHRL is inapplicable full stop. The *second* situation is the mirror image of the first, with this time IHRL requiring an investigation and IHL not governing an incident in particular. An example would be a violation of the prohibition of slavery, which as such is not regulated by IHL, but which requires a criminal investigation under IHRL. Because IHL is neutral in this respect, this means that IHRL's extensive investigative standards apply. Such standards will, under contemporary case-law, be interpreted in light of the exigencies of the armed conflict situation. They may therefore be somewhat more flexible than when applied in situations of normalcy, but it is simply the IHRL standards which apply. The *third* situation, and the one this study has afforded most attention to, is where both IHL and IHRL govern an incident. This can pertain to situations where both IHL and IHRL require an investigation, or where IHL governs an incident but does *not* require an investigation. In such situations, the interplay of IHL and IHRL is relevant for determining the applicable investigative standards, and therefore calls for an analysis of how the various investigative standards relate to one another.

The study showed that the standards that an investigation be carried out (i) *ex officio* and (iv) impartially fall under a paradigm of normative harmony. This means that no matter the circumstances, investigations will need to be initiated *ex officio*, and be conducted impartially. IHL and IHRL are in complete harmony on these points. The standards that an investigation be carried out (ii) promptly and with reasonable expedition, (v) seriously, effectively, adequately and thoroughly, (vii) transparently, and (vi) with sufficient involvement of next of kin, fall under a paradigm of normative competition. These standards must be applied contextually under a paradigm of normative competition. Because there is no normative conflict, *lex specialis* cannot be relied upon in order to give IHL precedence. Nevertheless, the IHRL standards can – to a certain extent – be interpreted flexibly, taking the principles of IHL into account. Finally, the standards that an investigation be carried out (iii) independently, and (viii) followed-up by a criminal prosecution, fall (potentially) under a paradigm of normative conflict. These standards may be subject to a *lex specialis* determination. The requirements that an investigation be carried out fully independently, outside the chain of command, and that they are followed-up by criminal prosecutions before civil courts, *can* conflict with IHL. If they do, whether the IHRL standard prevails and must therefore be applied, hinges on the question whether IHRL is the *lex specialis* in the specific circumstances of the case. This, once more, calls for a contextual analysis, which requires a

determination of whether an incident falls under the active hostilities or security operations paradigms. Contingent on the applicable paradigm, the norm which applies as *specialis* therefore takes precedence over the *generalis*. If IHL must be considered the *specialis*, then an investigation by the commander may suffice, at least insofar as non-serious IHL violations are concerned. Further, if IHL is *specialis*, IHL's insistence that States 'endeavour' to grant the broadest possible amnesty at the end of a non-international armed conflict (NIAC) may take precedence over IHRL's requirement that the investigation be followed by a criminal prosecution and trial. This study has suggested that States, in such circumstances, ought to formulate amnesties in such a way that they explicitly exclude application to 1) war crimes, 2) serious violations of human rights (however defined), and 3) human rights violations committed outside active hostilities. Finally, if a criminal trial is conducted, in the event that IHRL is *lex specialis*, demands of independence and criminal prosecution and trial following the investigation must be complied with fully. If, however, IHL constitutes *lex specialis*, there may be scope for relying on military prosecutors and courts insofar as the genuineness and overall independence of the proceedings are sufficiently safeguarded.

In sum, this study finds that the duty to investigate forms an integral part of both IHL and IHRL. Both regimes have institutionalised investigations as a crucial aspect of the effectuation of their rules, and of ensuring accountability for violations. The *rationale* for investigative obligations under both legal regimes is therefore similar, and they are highly compatible. The narrative that the duty to investigate human rights violations during armed conflicts imposes an inordinate burden on States and is unrealistic, is in need of change. This obligation is in large part mirrored in IHL. Moreover, the duty to investigate is flexible and can be applied contextually, which safeguards that its application remains realistic. States must fulfil their obligations to effectuate the international law governing armed conflict and take up their roles as guardians of the international legal system. But the factual context of a case and the State's capacity to actually investigate will equally determine how the investigation is ultimately carried out. A balance must thus be struck, with the effectuation of the law ultimately dependent on what is realistically possible in the circumstances of the case. This also means that the precise application of investigative standards to a particular incident is dependent on a case-specific analysis.

Samenvatting (Dutch summary)

DE VERPLICHTING TOT HET DOEN VAN ONDERZOEK IN SITUATIES VAN GEWAPEND CONFLICT

Een beschouwing onder internationaal humanitair recht, internationaal mensenrechtenrecht en hun samenspel

Onderzoek speelt een cruciale rol tijdens gewapend conflict, en in de nasleep ervan. De nevelen van de oorlog, de zogenaamde 'fog of war', verhullen wat zich op de grond afspeelt. Dit kan het welhaast onmogelijk maken voor oorlogsslachtoffers om te achterhalen wat hen is overkomen, waarom dat is gebeurd, wie er verantwoordelijk is, en of ze een recht op rechtsherstel en toegang tot een rechtsmiddel hebben. In dat opzicht zijn slachtoffers in hoge mate afhankelijk van onderzoek door de Staat. Hetzelfde geldt voor pogingen de verantwoordelijken ter verantwoording te roepen, en rekenschap te laten afleggen. Dergelijke pogingen zijn afhankelijk van kennis van de feiten, zonder hetwelk het onmogelijk is vast te stellen of het recht geschonden is, laat staan wie er verantwoordelijk was voor een dergelijke schending. Achterliggende doelen zoals het bewerkstelligen van rechtvaardigheid voor slachtoffers en de berechting van daders blijven dan buiten bereik. Omdat gedegen onderzoek bovendien in staat is beschuldigingen van schendingen van internationaal recht te bevestigen of weerleggen, beschermt het ook de integriteit van de strijdkrachten van Staten, en kan het leden van de strijdkrachten behoeden voor voortdurende verdachtmakingen en het dreigende gevaar van toekomstig onderzoek en heronderzoek. Dit onderstreept het vitale belang van onderzoek voor alle betrokken partijen.

Het humanitair oorlogsrecht (*international humanitarian law*; IHL) en internationale mensenrechten (*international human rights law*; IHRL) reguleren beide in hoeverre Staten incidenten tijdens en na gewapende conflicten moeten onderzoeken, en hoe ze dat moeten doen. Maar beide rechtsregimes reguleren in verschillende maten van detail, en ogenschijnlijk ook verschillend, *wat*, *wanneer* en *hoe* Staten onderzoek moeten doen. Dit leidt tot rechtsonzekerheid, die de effectuering van individuele rechten, de strijd tegen straffeloosheid en de rechten en belangen van Staten in gevaar brengt. Een veelgehoord narratief in deze context is dat het volledig onrealistisch zou zijn en een excessieve last

op Staten zou leggen, als zij tijdens gewapende conflicten mensenrechtenschendingen zouden moeten onderzoeken.

Tegen de achtergrond van het belang dat onderzoek dient om gerechtigheid, rechtszekerheid en rekenschap en verantwoordelijkheid te bewerkstelligen, beoogt deze studie de volgende vraag te beantwoorden:

> *Wat zijn de reikwijdte en inhoud van de onderzoeksplicht van Staten ten aanzien van (potentiële) schendingen gedurende gewapende conflicten, onder het humanitair oorlogsrecht, internationale mensenrechten, en hun samenspel?*

Hiermee streeft de studie ernaar het recht betreffende onderzoeksverplichtingen van Staten tijdens gewapende conflicten te verhelderen. Dit is vormgegeven door middel van een doctrinaire onderzoeksmethode.

Onder IHL (Deel I, Hoofdstukken 2 en 3) vertaalt deze methode zich in een analyse van verdragsrecht, gewoonterecht, statenpraktijk en *soft law*, aan de hand waarvan onderzoeksverplichtingen worden geïdentificeerd en uitgewerkt. Geconcludeerd wordt dat het IHL systeem van toezicht, implementatie en handhaving voor zijn effectiviteit volledig afhankelijk is van onderzoek door Staten. Het gebrek aan geïnstitutionaliseerde wijzen van toezicht en handhaving op internationaal niveau, maakt dat de last van het effectueren van IHL volledig op de schouders van Staten rust. Om deze taak te verwezenlijken zijn onderzoeken cruciaal, ook in het licht van de verplichting IHL te respecteren en daarvoor respect te verzekeren. Een analyse van IHL verdragsrecht wijst uit dat dit geldt voor *alle* schending van IHL – zowel ernstige (*serious*) als niet-ernstige schendingen. Niettemin maakt IHL een scherp onderscheid tussen strafrechtelijke schendingen enerzijds, en niet-strafrechtelijke schendingen anderzijds. Oorlogsmisdrijven (*grave breaches* en andere ernstige schendingen) brengen wijduiteenlopende onderzoeksverplichtingen met zich, waaronder bijvoorbeeld het doen van onderzoek naar dergelijke misdrijven ook als zij zijn begaan door anderen dan de strijdkrachten van de Staat zelf. Het bestrijden van straffeloosheid voor dergelijke misdrijven is een belangrijke drijvende kracht achter dergelijke verplichtingen. Niet-ernstige schendingen van IHL zijn aan een minder vergaand en gedetailleerd regime onderhevig. De nadruk van onderzoeksverplichtingen met betrekking tot dergelijke schendingen ligt op schendingen die door de strijdkrachten van de Staat zelf zijn begaan en is daarmee intern. Dit komt omdat de belangen van de internationale gemeenschap als zodanig minder direct in het spel zijn. Niet-ernstige schendingen zijn geen wandaden tegen de menselijkheid en het zijn ook geen misdrijven onder internationaal recht.

Verplichtingen tot het doen van onderzoek, zoals vervat in internationaalrechtelijke regels in verdragen- en gewoonterecht, zijn summier van aard. Zij vereisen daarom verdere interpretatie om vast te kunnen stellen *wat* Staten

moeten onderzoeken, en *wanneer* en *hoe* zij dat moeten doen. *Soft law* en statenpraktijk spelen een belangrijke rol om deze interpretatie vorm te geven. Deze studie laat zien dat oorlogsmisdrijven strafrechtelijk onderzoek vereisen, dat voldoet aan maatstaven van effectiviteit, grondigheid, oprechtheid, spoed, onpartijdigheid en fundamentele waarborgen voor een eerlijk proces. Nieternstige schendingen van IHL vereisen administratieve of bestuurlijke onderzoeken, die meer discretie aan de Staat laten in hoe zij het onderzoeksproces vormgeven. Niettemin zullen zulke onderzoeken effectief, spoedig en onpartijdig moeten worden uitgevoerd. Strafrechtelijke bestraffing en vergelding zijn niet het doel van dergelijke onderzoek, hetgeen betekent dat zij vaak binnen de commandostructuur (*chain of command*) plaatsvinden en resulteren in disciplinaire maatregelen. Zulk onderzoek zal ook potentiële systemische of structurele tekortkomingen moeten blootleggen voor zover die ten grondslag liggen aan een schending, en het vaststellen of erkennen van staatsaansprakelijkheid moeten faciliteren. Welke informatie voorhanden moet zijn om de onderzoeksplicht een aanvang te laten nemen, ten slotte, is voor alle schendingen gelijk. Wanneer de Staat informatie heeft die redelijkerwijs tot een verdenking van een schending leidt, moet een onderzoek worden gestart. De bron van de informatie is hiervoor niet van belang.

In Deel II (Hoofdstukken 4-8) zet de studie de contouren van onderzoeksplichten uiteen onder het Internationaal verdrag inzake burgerrechten en politieke rechten (IVBPR), het Amerikaans verdrag voor de rechten van de mens (AVRM) en het Europees verdrag voor de rechten van de mens (EVRM). Dit wordt gedaan door de materiële, personele, temporele en geografische reikwijdte van de verplichting, en de toepasselijke onderzoeksstandaarden in kaart te brengen. Zodoende wordt bepaald *wanneer* Staten onderzoek moeten doen naar (potentiële) schendingen van mensenrechten, en *hoe* zij dergelijk onderzoek moeten uitvoeren. Dit doet de studie allereerst in zijn algemeenheid, alvorens in te gaan op hoe deze verplichting geldt tijdens gewapende conflicten.

De studie wijst uit dat onderzoeksplichten hoofdzakelijk gelden voor potentiële schendingen van het recht op leven, het verbod op foltering en andere wrede, onmenselijke of onterende behandeling of bestraffing, het verbod op slavernij, en op gedwongen verdwijningen. Onderzoeksverplichtingen kunnen zich ook uitstrekken tot andere schendingen, maar de jurisprudentie op dit vlak is nog in ontwikkeling. Verder laat de studie zien dat Staten ook onderzoek moeten doen naar inbreuken op deze rechten door niet-Statelijke actoren binnen hun rechtsmacht, en dat individuen er recht op hebben dat de Staat dit onderzoek uitvoert. Temporeel en geografisch is de reikwijdte van de onderzoeksplicht veelomvattend. Daaronder vallen in potentie ook incidenten die plaatshadden vóór inwerkingtreding van het mensenrechtenverdrag in kwestie, en deze plicht geldt in een veelheid aan gevallen ook voor incidenten die plaatshadden buiten de landsgrenzen.

Ook schept deze studie helderheid over welke informatie de onderzoeksverplichting doet ontstaan. Zodra de Staat bekend wordt met informatie die wijst op een potentiële schending van bovengenoemde rechten, die dusdanig is dat hieruit een verdedigbare klacht voortvloeit, ontstaat de plicht om onderzoek te doen – ongeacht uit welke bron deze komt.

Beziend hoe Staten onderzoek moeten uitvoeren, geldt als belangrijk startpunt dat het geen resultaatsverplichting betreft, maar een inspanningsverplichting, een *due diligence* verplichting. In de jurisprudentie zijn procedurele standaarden ontwikkeld die een maatstaf vormen voor de algehele effectiviteit van het onderzoek. Het betreft acht standaarden, en als Staten deze in acht nemen voldoen zij daarmee aan hun verplichtingen – ook als het onderzoek er uiteindelijk niet in slaagt alle feiten boven tafel te krijgen, of daders te identificeren. De acht standaarden, die door het VN-Mensenrechtencomité, het Inter-Amerikaans Hof voor de Rechten van de Mens (IAHRM) en het Europees Hof voor de Rechten van de Mens (EHRM) gelijkluidend zijn geformuleerd, behelzen dat een onderzoek: (i) door de Staat wordt gestart uit eigen beweging (*ex officio*); (ii) prompt geïnitieerd en met voldoende spoed wordt uitgevoerd; en dat het (iii) onafhankelijk en (iv) onpartijdig is. De laatste twee standaarden houden in dat Staten moeten verzekeren dat onderzoekers zich niet laten leiden door vooroordelen en dat ze zowel objectief als subjectief onafhankelijk zijn van degenen die voorwerp van onderzoek zijn. Verder moet het onderzoek (v) serieus en effectief, grondig en adequaat zijn. Dit is het meest inhoudelijke criterium, dat voorschrijft dat Staten de noodzakelijke en door de situatie vereiste onderzoeksstappen nemen om feiten vast te stellen en daders te identificeren. Waar dodelijke slachtoffers zijn gevallen door geweldgebruik moeten Staten, bij wijze van voorbeeld en afhankelijk van de feiten, getuigenverklaringen en forensisch bewijs verzamelen, autopsies uitvoeren, kogelbanen vaststellen, vingerafdrukken en kruitsporen zoeken, etc. In geval van foltering of mishandeling zijn slachtofferverklaringen cruciaal, net als medisch onderzoek van slachtoffers. Als Staten een dergelijke onderzoeksstap of -lijn onbenut laten, kan dat, als dat tot gevolg heeft dat de feiten niet worden vastgesteld of daders niet worden geïdentificeerd, leiden tot de conclusie dat het onderzoek als geheel ineffectief was en tekortschoot in het licht van de geldende mensenrechtenstandaarden. Een onderzoek moet verder (vi) in voldoende mate slachtoffers of hun naasten betrekken. Zij moeten op de hoogte worden gehouden van ontwikkelingen in het onderzoek, en moeten op zijn minst zodanig geïnformeerd worden dat zij hun procedurele rechten kunnen uitoefenen. Daarnaast vereisen de verschillende mensenrechtenregimes een licht variërende mate van (vii) transparantie in het onderzoek. Onder alle regimes moet voldoende informatie openbaar zijn zodat het publiek de oprechtheid van het onderzoek kan beoordelen, en zodat het maatschappelijk vertrouwen in het geweldsmonopolie van de Staat gewaarborgd is. Het VN-Mensenrechtencomité voegt daar nog aan toe dat Staten transparant moeten zijn ten aanzien van het beslisproces dat voorafgaat aan gebruik van geweld, waarbij de criteria

voor het selecteren van doelwitten openbaar moeten worden gemaakt, en ook vermeld moet worden in hoeverre minder schadelijke alternatieven zijn overwogen. Ten slotte is in de (viii) opvolging van onderzoek vaak een vorm van strafrechtelijke maatregelen vereist. Dit wordt doorgaans zo geformuleerd dat potentiële schendingen onderzocht moeten worden, en dat degenen die daarvoor verantwoordelijk zijn waar gepast vervolgd en bestraft moeten worden. Dit omvat een verplichting om *de jure* en *de facto* drempels voor rekenschap weg te nemen, waaronder amnestieën en verjaring. Het kan ook zo ver gaan dat Staten bepaalde verdedigingsrechten zoals *ne bis in idem* en *nullum crimen sine lege* moeten beperken.

Cruciaal voor deze studie is bovendien dat mensenrechten van toepassing blijven gedurende gewapend conflict. Dit is geoordeeld door het Internationaal Gerechtshof, maar daarnaast ook door het VN-Mensenrechtencomité en het IAHRM en EHRM. Ook onderzoeksverplichtingen blijven van toepassing tijdens gewapend conflict. Waar verdragsorganen en regionale mensenrechtenhoven onderzoeksverplichtingen hebben toegepast tijdens gewapend conflict, hebben zij hun normale aanpak verkozen zonder de reikwijdte of inhoud van de verplichting als zodanig aan te passen. In plaats daarvan hebben ze de verplichting contextueel toegepast, hetgeen inhoudt dat de moeilijke omstandigheden in aanmerking worden genomen bij de uitleg van wat redelijkerwijs van Staten kan worden verwacht – bijvoorbeeld waar het aankomt op een prompt of effectief onderzoek. Het VN-Mensenrechtencomité en IAHRM hebben, in afwijking van hun meer gangbare open houding ten aanzien van IHL, IHL in dit type situaties niet gebruikt voor de uitleg van onderzoeksverplichtingen. Het Europese Hof baseerde zijn oordelen tot voor kort al evenzeer louter op een contextuele uitleg om de contouren van de onderzoeksverplichting tijdens gewapend conflict vorm te geven, maar heeft in 2021 voor het eerst IHL geïncorporeerd in zijn toepassing van die verplichting. Deze uiteenlopende aanpak laat zien dat het samenspel van IHL en IHRL, ook in de context van onderzoeksverplichtingen, in beweging is en voortdurende aandacht behoeft.

Ten aanzien van het samenspel van IHL en IHRL (Deel III, Hoofdstukken 9 en 10), zet deze studie allereerst de relatie tussen beide *in abstracto* uiteen. Op basis van de secundaire regels van het internationaal publiekrecht wordt een stap-voor-stap methode ontwikkeld om samenspelsituaties te benaderen. Deze methode behelst vier stappen. Ten eerste moet onder stap 1 worden bepaald of beide rechtsregimes inderdaad van toepassing zijn op de situatie in kwestie. Dat vereist een analyse van de vraag of IHL en IHRL van toepassing zijn, en daarnaast moet bepaald worden of die regimes behalve op de bredere *situatie*, ook het specifieke *incident* in kwestie reguleren (bijvoorbeeld een specifiek gebruik van geweld). Als dat het geval is, schrijft stap 2 voor dat bezien wordt of een conflictclausule bestaat. Dat is een bepaling die expliciet voorschrijft hoe een potentieel conflict met andere rechtsregimes moet worden opgelost. Als zo'n clausule bestaat die de relatie tussen IHL en IHRL reguleert, moet die

worden toegepast. Hoofdstuk 9 laat echter zien dat IHL en IHRL normaliter niet zulke conflictclausules bevatten – en dat opschortingsbepalingen (*derogation clauses*) *geen* conflictclausules zijn. Indien een conflictclausule het normatieve conflict niet kan oplossen, of als er geen conflictclausule is, vereist stap 3 dat bezien wordt of er een conflict bestaat tussen de toepasselijke normen van IHL en IHRL. Stap 4 omvat ten slotte de wijze waarop de normatieve overlap opgelost moet worden. In geval van normatief conflict moeten methoden van conflictresolutie worden toegepast, in het bijzonder *lex specialis*. Als er geen normatief conflict is, moet de normatieve overlap worden opgelost door harmonieuze interpretatie en systemische integratie, onder artikel 31(3)(c) van het Weens Verdragenverdrag 1969 (WVV).

Stap 3 en 4 nader beschouwend, brengt deze studie aan het licht dat voor de oplossing van normatieve overlap onder de regels van internationaal publiekrecht beslissend is in hoeverre regels met elkaar in *conflict* komen, omdat dit bepaalt of de regels van conflictresolutie gebruikt kunnen worden. Dit brengt twee problemen aan het licht. Het eerste ziet op de definitie van normatief conflict, dat in de gangbare internationale praktijk zo strikt wordt uitgelegd dat het onderinclusief is. Normatief conflict behelst in deze definitie dat twee normen elkaar uitsluiten, hetgeen alleen zo is wanneer toepassing van de ene regel noodzakelijkerwijs de ander schendt. Met betrekking tot het samenspel van IHL en IHRL is het gebrek van deze definitie vooral evident in relatie tot regels van IHL die bepaald handelen *toestaan* dat gelijktijdig *verboden* is onder IHRL, zoals bijvoorbeeld het gebruik van dodelijk geweld of vrijheidsbeneming. Onder de strikte definitie is er in dergelijke gevallen geen sprake van normatief conflict, omdat beide regels nageleefd kunnen worden als een Staat er simpelweg voor kiest geen geweld te gebruiken, en niet te detineren. Maar dit gaat volledig voorbij aan de diametraal tegengestelde posities van beide rechtsregimes, en zou regels van IHL van ieder nut ontdoen. Deze studie stelt daarom voor om een bredere definitie van normatief conflict te hanteren, die ook conflicten omvat tussen normen die bepaald handelen verbieden of voorschrijven, en normen die dat gedrag toestaan (of toestaan niet te handelen). Zodoende kunnen dergelijke conflicten worden opgelost door middel van *lex specialis*, op basis waarvan de meer specifieke regel, die meer specifiek de precieze situatie en het incident reguleert, voorrang krijgt. Het tweede probleem in relatie tot het vaststellen van normatief conflict, is dat zelfs onder de bredere definitie een categorie gevallen van overlap overblijft die niet als echte normatieve harmonie kan worden geclassificeerd omdat het doel dat de normen nastreven, uiteenloopt. Zeer pertinente spanningen tussen IHL en IHRL worden daarbij over het hoofd gezien, in het bijzonder waar IHL zwijgt – wellicht met de intentie om beslissingsvrijheid te laten aan Staten. Het simpelweg toepassen van de regels van IHRL omdat IHL zwijgt, zou dan volledig voorbij zien aan deze spanning. In deze studie wordt daarom voorgesteld om naast de categorieën van normatief conflict en harmonie, ook een categorie van normatieve *competitie* te erkennen. Onder deze categorie kunnen geen

regels voor conflictresolutie worden toegepast, maar in zulke situaties kunnen de regels van IHRL wel voor zover mogelijk flexibel worden uitgelegd, in het licht van de beginselen van IHL. Dit kan leiden tot een meer evenwichtige uitkomst, die gelijktijdig erkent dat er grenzen zijn aan harmonieuze uitleg van normen, en dat rechts*beginselen* rechts*regels* niet opzij kunnen zetten.

Deze studie concludeert verder dat bij het oplossen van normatieve overlap, context een zeer belangrijke rol speelt. Naast een strikt juridische analyse van hoe specifiek de normen zijn, en de mate waarin zij conflicteren, samenlopen of in competitie zijn, zal de oplossing van de normatieve interactie ook gebaseerd moeten worden op een contextuele analyse die de omstandigheden van het geval in acht nemen.

In Hoofdstuk 10 wordt ten slotte de stap-voor-stap methode toegepast op onderzoeksverplichtingen onder IHL en IHRL, om hun relatie en interactie nader te bepalen. Dit krijgt de vorm van een rechtsvergelijkende analyse, omdat eerder is vastgesteld dat voor de relatie beslissend is of normen in conflict, in competitie, of in harmonie zijn. De punten van vergelijking zijn daarbij de reikwijdte van de onderzoeksplicht, en de onderzoeksstandaarden die in Delen I en II zijn geïdentificeerd.

Wat opvalt, is dat er een grote mate van overeenstemming is tussen onderzoeksplichten onder IHL en IHRL, en dat veelgehoorde kritieken dat mensenrechtenonderzoeken een excessieve last zouden betekenen voor Staten, daarmee ongefundeerd lijken. Vele incidenten tijdens gewapende conflicten doen een verplichting tot onderzoek ontstaan, onder zowel IHL als IHRL. Een duidelijk voorbeeld is een buitengerechtelijke executie van een gevangene, hetgeen onder beide rechtsregimes verboden is en bovendien onder beide strafrechtelijk onderzocht moet worden. In dergelijke situaties is het recht in harmonie. Beide verplichtingen beogen hetzelfde, namelijk het effectueren van het recht en het verzekeren van rekenschap, zonder dat dit tot problemen leidt. Hetzelfde geldt voor sommige situaties waarin alleen IHL of alleen IHRL een onderzoek vereist. Zolang het andere regime zich niet tegen onderzoek verzet zal dit niet leiden tot normatieve spanningen. Bij wijze van voorbeeld, als IHL wordt geschonden omdat de krijgsmacht van een Staat op verraderlijke wijze gebruikmaakt van het embleem van het Internationale Comité van het Rode Kruis, dan vereist IHL een onderzoek, maar IHRL niet. Niettemin bestaan onder IHRL geen bezwaren tegen een onderzoek, hetgeen betekent dat het recht in harmonie is.

Een en ander betekent niet dat er geen competitie en conflict kan bestaan ten aanzien van de reikwijdte van onderzoeksverplichtingen onder IHL en IHRL. *Conflict* kan met name ontstaan in de context van dodelijk geweldgebruik. Deze studie heeft een aantal situaties geïdentificeerd waarin conflicten kunnen bestaan tussen de regels van IHL en IHRL op het gebied van geweldgebruik, waarin IHRL een onderzoek vereist omdat geweldgebruik als onrechtmatig moet worden bestempeld, terwijl IHL geen onderzoek vereist omdat het geweld als rechtmatig wordt geclassificeerd. De toepasselijkheid van de onderzoeks-

plicht is dan afhankelijk van de oplossing van het normatieve conflict tussen de materiële normen – hetgeen betekent dat als IHL *lex specialis* is geen onderzoek vereist is, terwijl als IHRL *lex specialis* is, wel onderzoek moet worden gedaan. Welke norm als de *specialis* heeft te gelden hangt af van de context van het geweldgebruik. Normatieve *competitie*, ten slotte, bestaat in relatie tot incidenten gepleegd door niet-Statelijke actoren die onder IHRL een onderzoek vereisen voor zover ze binnen de rechtsmacht van een Staat vielen, maar onder IHL niet (behalve voor zover het oorlogsmisdaden betreft). Deze competitie kan, zo laat de studie zien, onder het IVBPR verholpen worden door een flexibele uitleg van de mensenrechtelijke normen. Onder de jurisprudentie van het IAHRM en EHRM is dit echter niet mogelijk, en bestaat deze flexibiliteit niet. Dit betekent dat Staten onder deze regimes wel onderzoek zullen moeten doen, potentiële spanningen met militaire noodzaak ten spijt.

Hoe Staten onderzoek moeten uitvoeren, zo laat deze studie zien, loopt onder IHL en IHRL sterk uiteen. Onder beide rechtsregimes is het wel helder dat de onderzoeksplicht een inspanningsverplichting is, geen resultaatsverplichting. Dit betekent dat ook wanneer het onderzoek niet leidt tot de identificatie of veroordeling van daders, dit niet per definitie betekent dat het onderzoek als zodanig tekort is geschoten. De verschillende procedurele standaarden zijn zo geformuleerd dat deze moeten verzekeren dat een onderzoek op zijn minst geschikt en in staat is om alle feiten boven tafel te krijgen en om de rechtmatigheid van een incident te kunnen beoordelen. Waar gepast, en mede afhankelijk van de schending in kwestie, kan dit ook de plicht omvatten daders te identificeren en hen te vervolgen en bestraffen.

De onderzoeksstandaarden onder het samenspel van IHL en IHRL in meer detail beziend, moeten drie situaties worden onderscheiden. Ten *eerste* bestaan situaties waarin IHL en IHRL weliswaar van toepassing zijn op de bredere *situatie*, maar waar alleen IHL een onderzoek vergt omdat een incident wel in strijd was met IHL, maar niet met IHRL. Dit kan voor zowel oorlogsmisdrijven als niet-ernstige schendingen gelden. Om van beide een voorbeeld te noemen, kan worden gedacht aan het oorlogsmisdrijf van ongerechtvaardigde vertraging in de repatriatie van krijgsgevangenen of burgers, of het door een bezettende Staat verplaatsen van zijn eigen bevolking naar het bezette gebied. Dergelijke handelingen leveren geen schending op van IHRL, of er bestaat in elk geval geen jurisprudentie die dat zou bevestigen. Hetzelfde geldt voor veel niet-ernstige schendingen van IHL die simpelweg geen evenknie hebben onder IHRL – zoals wanneer in een krijgsgevangenenkamp geen exemplaar van de Geneefse Conventies wordt opgehangen. Als dergelijke schendingen zich voordoen worden deze, en het vereiste onderzoek, alleen door IHL gereguleerd, ondanks de algemene toepasselijkheid van IHRL op de bredere situatie. De *tweede* situatie is het spiegelbeeld van de eerste, waarbij IHRL een onderzoek vereist en IHL een incident niet specifiek reguleert. Een voorbeeld is een schending van het slavernijverbod, dat als zodanig niet in IHL is opgenomen, maar hetgeen wel een onderzoek vereist onder IHRL. Omdat IHL neutraal is betekent dit dat de

meer uitgebreide onderzoeksstandaarden van IHRL van toepassing zijn. Dergelijke standaarden zullen onder geldende jurisprudentie uitgelegd worden in het licht van de oorlogsomstandigheden. Daarmee kunnen ze wat flexibeler worden uitgelegd dan in 'normale' gevallen, maar het is louter de IHRL standaard die van toepassing is. De *derde* situatie, waaraan deze studie de meeste aandacht heeft besteed, betreft situaties waarin zowel IHL als IHRL een incident reguleert. Het kan dan gaan om situaties waarin zowel IHL als IHRL een onderzoek vereist, of gevallen waarin IHL een incident weliswaar reguleert, maar geen onderzoek vereist. Het samenspel van IHL en IHRL is dan relevant om de toepasselijke onderzoeksstandaarden vast te stellen, en dit vereist een nadere analyse van hoe deze standaarden onder beide rechtsregimes zich tot elkaar verhouden.

De studie wijst uit dat de standaarden die vereisen dat een onderzoek (i) *ex officio* en (iv) onpartijdig wordt uitgevoerd, onder een raamwerk van normatieve harmonie vallen. Dit betekent dat onderzoek te allen tijde en ongeacht de omstandigheden *ex officio* en onpartijdig moet worden uitgevoerd. IHL en IHRL zijn volledig in harmonie op deze punten. De vereisten dat een onderzoek (ii) prompt wordt geïnitieerd en voldoende vlot wordt uitgevoerd, (v) serieus, effectief, grondig, adequaat en (vii) transparant is, en (vi) in voldoende mate de naasten van slachtoffers betrekt, vallen onder een raamwerk van normatieve competitie. Deze standaarden moeten daarom contextgevoelig toegepast worden. Omdat er geen normatief conflict bestaat kan *lex specialis* niet worden toegepast om voorrang te verlenen aan regels uit het ene of het andere rechtsregime. Niettemin kunnen mensenrechtenstandaarden, tot op zekere hoogte, flexibel worden uitgelegd op zodanige wijze dat de beginselen van IHL in acht worden genomen. Ten slotte vallen de standaarden dat een onderzoek (iii) onafhankelijk wordt uitgevoerd, en (viii) waar gepast wordt opgevolgd door strafrechtelijke maatregelen, potentieel onder een raamwerk van normatief conflict. *Lex specialis* kan in de context van deze standaarden daarom worden toegepast. De vereisten van een volledig onafhankelijk onderzoek, buiten de commandostructuur, en van een strafrechtelijke vervolging voor een burgerrechtbank, *kunnen* in conflict komen met IHL. Wanneer dat zo is, hangt de vraag of de mensenrechtenstandaard toegepast dient te worden, ervan af of IHRL de *lex specialis* is in de specifieke omstandigheden van het geval. Dat hangt wederom af van een contextgevoelige analyse die bovendien vergt dat wordt vastgesteld of een incident onder een paradigma van actieve gevechten (*active hostilities*) of veiligheidsoperaties (*security operations*) viel. Afhankelijk van welk paradigma toepassing vindt, zal de norm die als *specialis* geldt voorrang krijgen boven de *generalis*. Wanneer IHL als *specialis* geldt, zal een onderzoek door de commandant kunnen volstaan, in elk geval voor zover niet-ernstige IHL schendingen in het geding zijn. Verder zal, als IHL *specialis* is, de IHL bepaling die voorschrijft dat Staten ernaar streven de breedst mogelijke amnestie te verlenen aan het eind van een niet-internationaal gewapend conflict voorrang kunnen krijgen boven het IHRL vereiste dat een onderzoek wordt opgevolgd door

strafrechtelijke vervolging en berechting. Deze studie stelt in dit licht voor dat Staten in deze situatie een amnestie zo moeten formuleren dat deze expliciet niet van toepassing is op 1) oorlogsmisdrijven, 2) ernstige schendingen van mensenrechten (hoe die ook precies worden gedefinieerd), en 3) mensenrechtenschendingen die zijn gepleegd buiten actieve gevechten. Als een strafproces gevoerd wordt, ten slotte, zal wanneer IHRL als *specialis* geldt het vereiste van onafhankelijkheid en strafrechtelijke vervolging en berechting onverkort gelden. Wanneer IHL *specialis* is kan er ruimte bestaan voor militaire aanklagers en rechtbanken voor zover de onafhankelijkheid en oprechtheid van het proces voldoende gewaarborgd zijn.

Alles overziend concludeert deze studie dat onderzoeksverplichtingen een onmisbaar onderdeel vormen van zowel IHL als IHRL. Beide rechtsregimes hebben onderzoeken geïnstitutionaliseerd als essentieel element van de effectuering van hun rechtsregels, en voor het verzekeren van rekenschap voor schendingen van het recht. De rationale voor onderzoeksverplichtingen is daarmee ook vergelijkbaar onder beide regimes, en ze zijn in hoge mate met elkaar in overeenstemming. Het narratief waarin de plicht om mensenrechtenschendingen tijdens gewapende conflicten te onderzoeken een excessieve last oplegt aan Staten en onrealistisch is, is daarom aan herziening toe. Deze verplichting vindt grotendeels een evenknie in IHL. Bovendien wordt de onderzoeksplicht contextueel toegepast en is deze flexibel, hetgeen een realistische toepassing verzekert. Staten moeten hun verplichtingen om het internationale recht te effectueren nakomen en hun rol als beschermheren van de internationale rechtsorde waarmaken. Tegelijk weegt de feitelijke context van een zaak en de mogelijkheid van de Staat om daadwerkelijk een gedegen onderzoek te doen evenzeer mee in een beoordeling van hoe een onderzoek is uitgevoerd. Daarin moet een balans worden gevonden, waarbij de effectuering van het recht uiteindelijk ook afhankelijk is van wat realistischerwijs mogelijk is in de omstandigheden van het geval. Dit betekent ook dat de toepassing van onderzoeksstandaarden in specifieke gevallen afhankelijk is van een zaaksspecifieke analyse.

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Curriculum vitae

Floris Tan (Roosendaal en Nispen, 1988) obtained a VWO degree (preparatory academic education) from the Grotius College in Heerlen, the Netherlands, in 2006. He pursued his bachelor studies in Dutch Law and International and European Law at the Radboud University Nijmegen (2007-2011) and subsequently obtained LL.M. degrees in Dutch Law (with a specialisation in Criminal Law) and International & European Law, graduating *cum laude* in both, also in Nijmegen (2014). He conducted part of his studies at the University of Sydney in Australia (2012), as part of an exchange programme, and interned at Amsterdam-based law firm 'Böhler Advocaten' (now: Prakken d'Oliveira Human Rights Lawyers) (2013).

Following his graduation, Floris worked for six months as a junior university lecturer at the Willem Pompe Institute, Utrecht University (2015). During this time he taught tutorial groups in Dutch criminal law and supervised bachelor theses.

In 2015, Floris started as a PhD candidate at the Grotius Centre for International Legal Studies of Leiden Law School, Leiden University. There, he lectured in international law, supervised LL.B. and (Advanced) LL.M. theses, and conducted PhD research. He wrote his dissertation, entitled *The Duty to Investigate in Situations of Armed Conflict – An Examination under International Humanitarian Law, International Human Rights Law, and their Interplay*, under supervision of Professors Helen Duffy and Titia Loenen. Floris presented his research in Jerusalem, Geneva, Amsterdam, the Hague, and Leiden, and has published on the subject in various Dutch and international journals. During his time in Leiden, Floris was a regular author for *European Human Rights Cases* and *Ars Aequi KwartaalSignaal*, was managing editor for the *Nederlands Tijdschrift voor de Mensenrechten | NJCM-Bulletin* from 2015-2018, and was seconded to the European Court of Human Rights, Strasbourg, where he co-authored the *Case-Law Guide on Article 18 ECHR*. Beyond the topic of his PhD, he has published in the field of the European Convention on Human Rights, in particular with respect to the prohibition of limitation of rights for ulterior purposes, and the *ne bis in idem* principle.

In 2020 Floris started a position as legal officer at the International Law Division of the Netherlands Ministry of Foreign Affairs, where he works on a variety of issues relating to human rights and international law.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2020, 2021 and 2022

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