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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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.