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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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.