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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5 The duty to investigate under the global human rights systems

1 INTRODUCTION

Now that the branch of international human rights law as a whole has been sufficiently introduced, we can move on to look more specifically at the human rights part of this enquiry's research question. The sub-questions pertaining to IHRL, ask *whether* States are under an obligation to investigate (potential) violations of IHRL – and if so – what are the *scope of application* and *contents* of such an obligation, in particular during armed conflict and occupation? Because the international human rights framework is extensive, this question is answered over the course of the following three Chapters, which in turn look at duties of investigation under the global human rights systems (the present Chapter), the Inter-American human rights system (Chapter 6), and the European human rights system (Chapter 7).

The present Chapter therefore explores duties of investigation under the global human rights systems. The focus in this respect is on the International Covenant on civil and political rights (ICCPR), as interpreted by the UN Human Rights Committee (HRC).[1] Before delving into the ways investigative duties have been incorporated into the ICCPR, we will first briefly look at three other global human rights treaties. These treaties pertain to a very specific human right, or perhaps rather very specific human rights abuses. The reason for their selection is that they include *explicit* treaty obligations to investigate violations, and the clear relevance of the rights in question for situations of armed conflict. The Conventions in question are the Genocide Convention, the Convention against Torture (CAT), and the International Convention for the Protection of All Persons against Enforced Disappearance (CED). The explicit investigative obligations in these treaties provide the background for the further enquiry into the more elaborate investigative obligations under the ICCPR, as well as those under the ACHR and the ECHR, in the following Chapters.

This Chapter is structured as follows. First, the three global treaties already mentioned, are discussed in light of their explicit treaty obligations to investigate (§2). This also provides the context for our more detailed discussion of

1 For the legal authority which must be accorded to the HRC's pronouncements, see Chapter 1, §3.2.2, and Chapter 4, §5.

the ICCPR, to which the rest of the Chapter is dedicated. Section 3 then discusses the legal basis and rationale for the investigative duties as they follow from the ICCPR, before section 4 looks more specifically at the duty's scope of application: *what* must be investigated, *by whom*, *when* do such obligations begin and end, and does it matter *where* the violation occurred? The enquiry then turns to the substance of the duty to investigate: *how* must States conduct an investigation into a human rights violation, once the obligation exists (§5)? Once we have thus mapped out what the duty to investigate entails, we can look at its application to violations which stem from an armed conflict context (§6). This involves questions as to whether the duty to investigate (and the ICCPR more generally) continues to apply during armed conflicts, and whether it must perhaps be applied with a measure of flexibility, to account for the lesser measure of control States are likely to have in such situations. This also touches upon the question how the ICCPR interrelates with IHL, which this Chapter briefly discusses in light of the HRC's pronouncements on this issue. Section 7 concludes.

2 Explicit duties of investigation in global human rights treaties and the sword-function of human rights law

The focus of this study lies with duties of investigation under the ICCPR, ACHR, and ECHR. Perhaps the first thing to note is that these treaties do not contain express investigative obligations in any of their provisions. Other treaties, by contrast, do contain such obligations. It may in that light be highly informative to look at such conventions, as it may inform the way investigative obligations have been read into the treaties with which this study is most concerned.

The Genocide, Torture, and Disappearance Conventions, all explicitly require States to investigate instances of the crimes they were named for. Beyond conferring a *right* on individuals and groups, they therefore also impose a *positive obligation* on States parties, to conduct an investigation where any abuses have taken place. These investigative obligations serve a dual purpose, of *preventing* torture, enforced disappearance and genocide from occurring, and to *combat impunity* for those who have committed those crimes.[2] A third

2 On CAT, see Manfred Nowak and Elizabeth McArthur, 'Article 12. Ex Officio Investigations', *The United Nations Convention against Torture: A Commentary* (Oxford University Press 2008). On CED, see Marthe Lot Vermeulen, *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance* (Intersentia 2012) 79. On the Genocide Convention, see *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment (26 February 2007), *I.C.J. Reports* 2007, p. 43 [425]-[427].

related aim is to enable victims to obtain remedies,[3] and to assure the related right to truth.[4] These distinct aims have been codified in a number of investigative obligations. The CAT and CED distinguish between investigations which are primarily concerned with *monitoring*, and those with *ensuring accountability* after the fact. The text of the Genocide Convention does not make this distinction.

The CAT in its Articles 5-9 firstly requires States to criminalise acts of torture, to apprehend anyone alleged to have committed an act of torture, and to initiate preliminary fact-finding procedures.[5] Further, they must either prosecute or extradite such suspects.[6] The aim of these provisions is denying safe haven to perpetrators of torture, by requiring States to establish and exercise their criminal jurisdiction over such crimes.[7] Articles 12 and 13 then establish a duty of investigation wherever there is 'reasonable ground to believe' or an 'allegation' that an *occurrence* of torture has taken place in a territory under the jurisdiction of the State. This latter investigative duty is in principle geared toward *prevention*,[8] because it requires States to set up monitoring mechanisms which allow them to detect any acts of torture or to cruel, inhuman or degrading treatment or punishment (TCIDT) taking place within their territories – in particular in, for instance, their places of detention. Thus we might theoretically distinguish between *penal suppression* provisions on the one hand, and *preventive* provisions on the other. This is reminiscent of what we have observed under IHL, with State obligations to monitor their own conduct on the one hand, and obligations to implement and apply investigation mechanisms on the other.[9] Nonetheless, it has been observed that in practice, the CAT Committee does not always make a strict distinction between the investigative requirements under the penal and preventive provisions of CAT respectively, blending them into an overarching system which requires investigations, and where appropriate, prosecution and punishment.[10] Crucially, the CAT Committee has held the duty to investigate to be completely independent from the duty to abstain from torture itself – which means that the

3 See e.g. Manfred Nowak, 'Torture and Other Cruel Inhuman or Degrading Treatment or Punishment' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014).

4 See e.g. preambular paragraph 8 of the CED, '*Affirming* the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end'.

5 CAT, arts 4, 6(1) and 6(2).

6 CAT, art 7(1).

7 Nowak and McArthur (n 2) 414.

8 Nowak and McArthur (n 2) 414.

9 Chapter 3, §2.1.

10 Nowak and McArthur (n 2) 418.

duty to investigate a case of torture can be found to be violated, even if no violation of the prohibition of torture can be established.[11]

Under the CED, the investigative requirements are structured largely similarly. They also serve the dual purpose of on the one hand combating impunity and on the other, to prevent enforced disappearances – and moreover to locate those who have been disappeared or uncover their fate.[12] Whereas the former requires criminal investigations and prosecutions, the latter does not necessarily, so long as the investigatory regime allows for sufficient competences for the investigators. The provisions related to investigation are largely modelled after Articles 12 and 13 of CAT, which means that they must likely be interpreted similarly.[13] Thus far, the CED Committee's case-law has remained limited to just two views which do not pertain directly to investigative obligations,[14] so further interpretive guidance will have to be awaited. Until then, it appears likely that the CED and CAT contain largely similar investigative obligations.

The Genocide Convention, finally, generally provides that States 'undertake to *prevent* and to *punish*' genocide.[15] The duty to punish includes the obligation to criminalise genocide, to provide for effective penalties,[16] and further requires States to try those charged with genocide when it has been committed on their territory, or to extradite them to a competent international tribunal.[17] Such obligations which flow from the duty to punish, are fully contingent on investigations. Effectuating domestic criminal legislation, as well as apprehending suspects, requires States to effectively investigate. Under the duty to prevent genocide, in contrast to the CAT and CED, there does not appear to be a clear investigative obligation in this respect. The Convention does not specify how States must prevent genocide. According to the ICJ, the general duty to prevent in Article I requires that States take all measures within their power to prevent genocide, and responsibility is incurred when a State has manifestly failed to do so when its action might have contributed to preventing genocide.[18] Whether this might also include investigative obligations, however, was not decided by the Court. The Genocide Convention, in sum, requires investiga-

11 *Halimi-Nedzibi v Austria*, CtAT 18 November 1993, A/49/44 (Comm. No. 8/1991) [13.4]-[13.5]; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, Oxford University Press 2013) 295.

12 CED, arts 4-11, 12, and 24(6); See also Vermeulen (n 2) 79.

13 Vermeulen (n 2) 76 fn 107.

14 *Yrusta v Argentina*, CtED 11 March 2016, CED/C/10/D/1/2013 (Comm. No. 1/2013); *E.L.A. v France*, CtED 25 September 2020, CED/C/19/D/3/2019 (Comm. No. 3/2019).

15 Genocide Convention, art I. Emphasis FT.

16 Genocide Convention, art V.

17 Genocide Convention, art VI. The restrictive territorial scope of the duty to punish has been affirmed by the ICJ, *Genocide case (Bosnia and Herzegovina v Serbia and Montenegro)* (n 2) [422].

18 *Genocide case (Bosnia and Herzegovina v Serbia and Montenegro)* (n 2) [430].

tions in light of the duty to punish, but likely does not in the context of the duty to prevent.[19]

The above shows that the Genocide, Torture, and Disappearance Conventions all envision a coherent system of prohibition, criminalisation, investigation, prosecution and punishment of the acts mentioned in those treaties. This very clearly illustrates these Conventions' emphasis on the *sword-function of human rights*: they do not only function as a shield which protects individuals from State repression, but also require the State precisely to engage in repression by investigating, prosecuting, and punishing human rights offences.[20] The ICJ has further clarified the meaning of the penal suppression provisions of these type of conventions, holding that

> 'The obligation for the State to criminalize torture and to establish its jurisdiction over it finds its equivalent in the provisions of many international conventions for the combating of international crimes. This obligation, which has to be implemented by the State concerned as soon as it is bound by the Convention, has in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to coordinating their efforts to eliminate any risk of impunity.'[21]

It went on this obligation 'may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven',[22] thereby emphasising the aim of a coherent system to combat impunity. Although there is therefore a dual system which confers rights on the one hand, and requires repression of conduct on the other, as the ICJ clarifies, there is a strong emphasis on suppression and criminal law enforcement all in light of the object and purpose of making 'more effective the struggle against torture by avoiding impunity for the perpetrators of such acts'.[23] Combatting impunity is therefore a major aim, connected with the object and purpose of the CAT – which applies equally for the Disappearance and Genocide Conventions.

The three Conventions discussed here, in conclusion, are to an extent *hybrid* conventions, which take up a middle position between classical human rights conventions, and transnational criminal law treaties which usually aim at

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19 The ICJ has made clear that both obligations, though closely linked, impose separate requirements; *Genocide case (Bosnia and Herzegovina v Serbia and Montenegro)* (n 2) [425]-[427].

20 For this term, see Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577.

21 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment (20 July 2012), *I.C.J. Reports* 2012, p. 422 [75].

22 Ibid [91].

23 Ibid [74].

criminalising and suppressing a specific type of undesirable behaviour, such as human trafficking, drug trafficking, corruption, or terrorism. Certain human rights abuses, such as torture, enforced disappearance, and genocide, certainly also fall in that category, which has led States to conclude treaties which *both* protect the human rights in question, *and* stipulate the criminalisation, investigation, and prosecution of transgressions. But such developments have not stopped there.

The main aim of the general human rights conventions of the ICCPR, ACHR, and ECHR (as well as the ACHPR) is the protection of a catalogue of human rights, as enshrined in these treaties. This therefore differs from what was described above, as their aim is in principle unrelated to 'international crimes', criminalisation of certain acts, or criminal suppression – rather, it is often thought these conventions' main aim is to protect human dignity in its various aspects.[24] The conventions themselves do not mention criminal suppression measures, and do not explicitly require States to (criminally) investigate any transgression of their terms.

Nevertheless, these treaties' supervisory bodies and courts have held such obligations to be implied in the treaties' terms, often taken together with the general obligation to ensure or secure the rights entailed in the convention, as well as the right to a remedy. In respect of certain rights, most notably the right to life, prohibition of torture, detention when pertaining to enforced disappearance-type cases and the prohibition of slavery, these bodies have developed a jurisprudence which mirrors the explicit repressive aims of the Torture, Disappearance, and Genocide Conventions. As will be discussed in-depth in the following sections and Chapters, the Human Rights Committee and the Inter-American and European Courts all require States to criminalise acts contravening the right in question, and to investigate, prosecute and punish those acts where appropriate.[25] At times, they have even reviewed whether punishments which States had doled out, were sufficiently severe to ensure proper deterrence and accountability. In doing so, the treaties do not directly impose obligations on individuals, but bring acts committed by individuals within the purview of the responsibility of the State through their

24 E.g. Yuval Shany, 'Co-Application and Harmonization of IHL and IHRL: Are Rumours About the Death of Lex Specialis Premature?' in Robert Kolb, Gloria Gaggioli and Pavle Kilibarda (eds), *Research Handbook on Human Rights and Humanitarian Law: Further Reflections and Perspectives* (Edward Elgar 2020) section 2; Rick A Lawson, 'Si Vis Pacem, Para Bellum. Application of the European Convention on Human Rights in Situations of Armed Conflict' in Lawrence Early and others (eds), *The Right to Life under Article 2 of the European Convention on Human Rights. Twenty Years of Legal Developments since McCann v. the United Kingdom. In Honour of Michael O'Boyle* (Wolf Legal Publishers 2016) section 4; Noam Lubell, 'Human Rights Obligations in Military Occupation' (2012) 94 International Review of the Red Cross 317, 335.

25 For the ICCPR, see *infra* sections 3-6; for the ACHR, see Chapter 6; for the ECHR, see Chapter 7.

positive obligations. The obligation to protect, ensure, and render rights effective are engaged – States must prevent as far as possible the commission of certain crimes, and they must investigate, prosecute and punish them where those acts are committed.

The mechanism described here goes beyond classic conceptions of human rights, where rights primarily function as a *shield* against State interference. Rather, human rights in this context *require* State interference with human rights of 'perpetrators' to safeguard the rights of victims.[26] Thus, human rights function not only as a shield against the State, but also as a *sword* which threatens those who infringe upon individual rights. In developing this jurisprudence, human rights courts and bodies have been observed to exercise 'quasi-criminal jurisdiction'.[27]

In sum, the explicit investigative obligations in the three global human rights treaties discussed here, now have equivalents in the ICCPR, the ACHR, and the ECHR. Under these latter treaty regimes, duties of investigation take up a prominent position in the protection system. The remainder of this Chapter, as well as the subsequent two Chapters, examine this trend. The following sections do so for the ICCPR.

3 Legal basis and rationale for the duty to investigate under the ICCPR

3.1 Introduction

As will already be clear from the above, the ICCPR does not contain any explicit treaty obligation to conduct an investigation into potential violations. Yet, such obligations do flow from the Covenant. This section explores *whether* and *why* the ICCPR imposes investigative obligations on States. In other words, it looks at the legal basis, and the rationale, of the duty to investigate. The Human Rights Committee's pronouncements, as the authoritative interpretive body, will be leading in this respect.

This section, as well as the subsequent ones, draw in large part on *General Comment 36* of the HRC, on the right to life. This General Comment – although

26 Arguing this contradicts the classic function of human rights and cautioning against the use of human rights as a legitimation for State repression, see Van Kempen, more extensively in Dutch and later also in English, PHPHMC van Kempen, *Repressie Door Mensenrechten. Over Positieve Verplichtingen Tot Aanwending van Strafrecht Ter Bescherming van Fundamentele Rechten (Inaugural Address Nijmegen)* (Wolf Legal Publishers 2008); Piet Hein van Kempen, 'Four Concepts of Security – A Human Rights Perspective' (2013) 13 Human Rights Law Review 1, 18–9.

27 See Alexandra Huneeus, 'International Criminal Law By Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 The American Journal of International Law 1.

non-binding – is the most recent, extensive, and encompassing iteration of the HRC's interpretation of investigative obligations. Although its scope is limited to the right to life, many of the pronouncements made apply in a broader sense to the transversal duty to investigate as such, and may therefore be expected to be applied to other rights in the future. Where this Chapter does rely on such inferences and extrapolations, this is made explicit so readers can judge for themselves whether this is appropriate.

It should be noted that a number of States has levelled criticisms at *General Comment 36* during its drafting. A total of 23 States provided the Committee with input.[28] Out of those States,[29] six States criticised that the HRC deals with IHL,[30] while two States expressly supported the HRC's approach;[31] two States in particular considered that no investigative obligations existed under the Covenant during armed conflict;[32] four States criticised the HRC's pronouncements with respect to transparency;[33] seven States took issue with how the HRC interprets the extraterritorial applicability of the Covenant;[34] and eight States did not make any comments of relevance to this study.[35] Two States fully supported the HRC's draft.[36] Amongst those States who have made their position known, no consensus is therefore apparent – although it is clear that they do not all support the HRC's interpretation. The position of the 150 other States parties is difficult to ascertain. In interpreting the ICCPR, this raises the question what weight should be accorded to the HRC's pronouncements, and what weight should be accorded to the practice or *opinio iuris* of States. It is submitted that under the structure of the VCLT, State practice can be relied upon as an interpretive source when it constitutes 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[37] With 173 States parties to the ICCPR, this is a high threshold.[38] Insofar as practice can nevertheless be relied upon as a supplementary means of interpretation under Article 32 VCLT,[39] it is submitted that such interpretations do not carry more weight than interpretations by the HRC.

28 All comments can be found at https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx.
29 It must be noted that because Egypt's comments were only available in Arabic, the author was unable to take them into account for this analysis.
30 Australia, Canada, the Russian Federation, Turkey, UK, US.
31 Germany, Switzerland.
32 France, UK.
33 France, the Netherlands, Norway, US.
34 Austria, Canada, France, Germany, the Netherlands, Norway, US.
35 Brazil, Denmark, Japan, Namibia, New Zealand, Poland, Portugal, Sweden.
36 Finland, Malta.
37 VCLT, art 31(3)(b).
38 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.
39 *Kasikili/Sedudu Island (Botswana/Namibia)* Judgment (13 December 1999) *I.C.J. Reports* 1999, p. 1045 [79]-[80].

Neither is formally binding. But due to the indeterminate State practice in this field, this study considers that the HRC's pronouncements present the state of the art regarding investigative obligations under the ICCPR, and therefore provide a good starting point. As was set out in Chapter 1, the HRC's pronouncements are best considered as authoritative interpretations of the Covenant.[40] Nonetheless, it ought to be noted that a number of the HRC's interpretations have been received more critically than others.

3.2 Legal basis for the duty to investigate under the ICCPR

Because the ICCPR does not contain a provision explicitly outlining a duty to investigate, it is important to establish what the *legal basis* of that obligation is. As was already briefly mentioned above, the HRC relies on multiple sources to ground investigative obligations.

The legal basis for the duty to investigate, as an implicit obligation in the Covenant, is to be found in a systematic reading of a number of provisions. The HRC finds it to flow from the general Article 2(1) duty to *ensure* Covenant rights in conjunction with certain substantive rights, such as the right to life, as well as from the right to a remedy for a number of human rights violations. For a recent authority, we may take a closer look at *General Comment 36*, where the HRC found that the duty to investigate

> 'is implicit in the obligation to protect and is reinforced by the general duty to ensure the rights recognized in the Covenant, which is articulated in article 2, paragraph 1, when read in conjunction with article 6, paragraph 1 [the right to life – FT], and the duty to provide an effective remedy to victims of human rights violations and their relatives, which is articulated in article 2, paragraph 3 of the Covenant, when read in conjunction with article 6, paragraph 1.'[41]

The Human Rights Committee therefore relies, *firstly*, on the duty to ensure rights, in conjunction with certain substantive rights. As was explained in the previous Chapter,[42] this is the more general method which the various human rights bodies have relied upon to read *positive obligations* into their primarily negatively worded conventions. *Ensuring* the effective protection of rights requires more than States simply sitting back and not violating rights themselves; they must actively protect and fulfil human rights. This includes adding a procedural layer of protection for rights, through the setting up of investigative mechanisms which spring into action once a potential violations comes

40 Chapter 1, §3.2.2.

41 *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, HRC 30 October 2018, CCPR/C/GC/36 [27].

42 Chapter 4, §3.3.

to light.[43] Chapters 6 and 7 will show that this is the same approach taken by the Inter-American and European Courts, and in fact, the HRC expressly refers to the European Court's case-law in a footnote.[44] *Secondly*, as the Committee found in *Rodríguez v Uruguay*, the right of victims and their next of kin to access an effective domestic remedy is contingent on States proactively unearthing the facts of a potential violation.[45] Access to a (civil) judicial remedy is rendered moot if victims have no way to prove their claims. In the words of the HRC in *Blanco v Nicaragua*, 'Notwithstanding the possible viability of this avenue of redress, the Committee finds that the responsibility for investigations falls under the State party's obligation to grant an effective remedy'.[46] Thus, the right to an effective remedy does not only require States to provide for judicial and administrative recourses for victims. They must moreover set up administrative mechanisms for the investigation of potential human rights violations.[47] Especially where State agents are implicated in violations, it is for the State to conduct an investigation which is part and parcel of, and a crucial platform for, victims' access to an effective remedy. *Thirdly* and finally, for the right to life, the duty to investigate, according to the HRC, is moreover implied in the explicit treaty obligation to *protect* the right to life.[48]

In the HRC's view, the duty to investigate is therefore *implied* in the ICCPR. A systematic reading and interpretation of the Covenant, which allows us to read provisions in the broader context of the treaty as a whole, shows that States must not only refrain from infringing upon human rights. They must also actively protect and fulfil them, which includes deterrence through effective criminalisation, investigation, and penalisation of violations. This is also crucial for individual victims' right to an effective remedy on the domestic level. An 'essential element' of the right to a remedy is that continuing violations are stopped,[49] which requires their investigation. Finally, the HRC has found that a failure to investigate can give rise to a *separate* violation of the Covenant.[50] Thus, it is independent from the finding of a violation of a right in its substantive limb.[51]

43 This is also connected to the duty to implement human rights enshrined in art 2(2) ICCPR; See also Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford University Press 2009) 16.

44 *Calvelli and Ciglio v Italy*, ECtHR [GC] 17 January 2002, Appl No 32967/96 [51].

45 *Rodríguez v Uruguay*, HRC 19 July 1994, CCPR/C/51/D/322/1988 [6.3].

46 *Blanco v Nicaragua*, HRC 20 July 1994, CCPR/C/51/D/328/1988 [10.6]. See also Seibert-Fohr (n 43) 35.

47 *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, HRC 29 March 2004, CCPR/C/21/Rev.1/Add. 13 [15].

48 *General Comment No. 36* (n 41) [27].

49 *General Comment No. 31* (n 47) [15].

50 Ibid. See further *Sedhai v Nepal*, HRC 19 July 2013, CCPR/C/108/D/1865/2009 [8.7].

51 *Berzig v Algeria*, HRC 31 October 2011, CCPR/C/103/D/1781/2008 [8.10].

The sources for the duty to investigate outlined above, pertain to the duty to investigate as a *primary* obligation under the ICCPR.[52] That is to say, the ICCPR directly, through a combined reading of its provisions, requires States to investigate potential violations. Beyond this primary obligation, States are also under a *secondary* obligation to investigate. States are under the obligation to provide reparation for every violation of the ICCPR, and incur State responsibility for any violation attributable to them.[53] According to the HRC, reparation for violations *can* require investigation and prosecution of those responsible:

> 'Where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as *bringing to justice the perpetrators of human rights violations*.'[54]

Whereas it is not entirely clear what it means to 'bring perpetrators to justice',[55] it must by necessity include the obligation to investigate. After all, any accountability process will be contingent on proper knowledge of the facts, and a legal assessment thereof, in order to finally result in 'justice' – whether that is understood to be criminal justice, or also includes other forms of accountability. In conclusion, the duty to investigate therefore constitutes *both* a primary, and a secondary obligation under the ICCPR. It is both an obligation which flows directly from the Covenant, and an obligation which arises under the State responsibility regime, and the obligation to provide reparation for any violation.

3.3 Rationale for the duty to investigate under the ICCPR

Moving on from *how* investigative duties were read into the Covenant, we must now explore *why* the HRC has walked this path. In the context of the right to life, the HRC has formulated four aims which an investigation must serve: they need to be 'aimed at ensuring that those responsible are brought to justice, at promoting accountability and preventing impunity, at avoiding denial of justice and at drawing necessary lessons for revising practices and policies with a view to avoiding repeated violations'.[56] Generally, we can subdivide these aims further, into those which more generally relate to the effective

52 Compare the finding under IHL, see Chapter 3, §§3.3.3 and 4.2.
53 ARSIWA, art 2 and 31.
54 *General Comment No. 31* (n 47) [16].
55 Jacopo Roberti di Sarsina, *Transitional Justice and a State's Response to Mass Atrocity. Reassessing the Obligations to Investigate and Prosecute* (TMC Asser Press 2019) 66; Seibert-Fohr (n 43) 13–4.
56 *General Comment No. 36* (n 41) [27].

protection of ICCPR rights by the State, and those which are directly related to victims' rights in a specific case.[57]

Firstly, the general obligation to ensure Covenant rights and to implement them into States' domestic legal orders, requires States to institute a *procedural layer of protection* – as the HRC finds with express reference to the Inter-American Court's case-law.[58] In this context, the duty to investigate is integral to a system of effective human rights protection, which requires States to set up administrative mechanisms tasked with investigating potential violations. This, then, is a necessary condition in order to *effectively* protect and ensure human rights. This mirrors what we have seen previously under IHL.[59]

Investigations contribute to the effectiveness of rights in a number of ways. Similar to what was concluded under IHL,[60] investigations can bring to light systemic shortcomings in States' practice.[61] Investigations therefore play an important role in monitoring human rights compliance, and are crucial if States are to remedy systemic deficiencies in their practices. If, for instance, guidelines and procedures for law enforcement operatives are deficient, or if conditions of detention in a State are subpar, then such shortcomings will likely be discovered and remedied only, if they are first investigated. States must, in other words, 'take measures to prevent a recurrence of a violation of the Covenant (…) which may require changes in the State Party's laws or practices'.[62] Further, investigations contribute to countering impunity, have a deterrent effect, and can therefore help to prevent future violations.[63] Preventing future violations, which is an important State obligation,[64] is strongly linked to fighting impunity. As the HRC found in *Rodríguez v Uruguay*, impunity is a cause for human rights abuses, as well as a catalyst for the perpetuation of such abuses.[65] Preventing impunity and promoting accountability thus go hand in hand in ensuring a culture which respects and protects human rights. In fact, in the eyes of the Committee, impunity may even undermine the democratic order.[66] In this regard, the duty to investigate also plays a crucial

57 Doing so convincingly, though further distinguishing between duties to *punish* and to *investigate*, see Seibert-Fohr (n 43) 15–26 and 34–5.

58 *General Comment No. 36* (n 41) [19], fn 52, referencing *González et al. ("Cotton Field") v Mexico* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 205 (16 November 2009) [236].

59 See Chapter 3, §2.

60 See Chapter 3, §2.

61 *General Comment No. 36* (n 41) [27].

62 *General Comment No. 31* (n 47) [17].

63 Seibert-Fohr (n 30) 15–6.

64 *General Comment No. 36* (n 41) [28].

65 *Rodríguez v Uruguay* (n 45) [12.4]. See further Valeska David, 'The Expanding Right to an Effective Remedy: Common Developments at the Human Rights Committee and the Inter-American Court' [2014] The British Journal of American Legal Studies 259, 269.

66 *Rodríguez v Uruguay* (n 45) [12.4].

role in ensuring the broader societal right to truth.[67] It is thus a fundamental tenet of the effective protection of human rights that impunity be prevented, through investigation, and where appropriate, prosecution and punishment.

Secondly, the duty to investigate more specifically effectuates the rights of victims or their next of kin. The individual right to a remedy requires that perpetrators of serious human rights violations are brought to justice, and that victims are able to effectively realise their rights in domestic judicial or administrative procedures.[68] This therefore goes beyond *deterrence and prevention*, and is about *ex post facto* remedying a violation. Providing victims with appropriate redress and reparation, as well as enabling them to obtain remedies in civil proceedings, both rely on an effective State investigation.[69] In case of the most serious violations, this moreover includes a State obligation to prosecute and punish,[70] as will be returned to below.[71]

In conclusion, if we look at the underlying aims and rationale of the duty to investigate, we may observe the following. Firstly, the HRC takes account of the broader requirements of human rights protection, and does not shy away from ordering general measures in this respect. Investigative obligations in this context constitute a procedural layer of protection which enables the effective protection of human rights more broadly. Secondly, the HRC orders investigations as remedies for victims in their individual case. Here, investigations more directly aim at *ex post facto* enabling remedies, and moreover constitute a remedy in themselves as well as reparation.

4 SCOPE OF APPLICATION OF THE DUTY TO INVESTIGATE UNDER THE ICCPR

4.1 Introduction

Now that we have a better insight into the why of the duty to investigate, we may move on to a more specific examination of *when* the duty to investigate applies. In other words, what is its scope of application? The following addresses this question by looking in turn at the duty's material (§4.2), personal (§4.3), temporal (§4.4), and geographic (§4.5) scope of application.

4.2 The material scope of application and the investigative trigger

67 The HRC has not, as such, recognised the right to truth as an *autonomous* right under the ICCPR, but it nevertheless plays an important role in this respect. See David (n 65) 269–70.
68 Seibert-Fohr (n 43) 22–3.
69 *General Comment No. 31* (n 47) [16]; David (n 52) 265–8.
70 *General Comment No. 31* (n 47) [18].
71 *Infra*, §5.

A first obvious point of interest is what material event or incident triggers the duty to investigate; in other words, what type of violation or interference gives rise to investigative duties, and based on what information should States start a (preliminary) investigation? Is any allegation sufficient, or may States require individuals to substantiate their claim? These questions all have to do with the material applicability of the duty to investigate.

A first point of enquiry is to see which violations, or potential violations, require States to investigate. The Human Rights Committee's pronouncements on this point are not entirely unambiguous. On the one hand, it has found generally, that

> 'Administrative mechanisms are particularly required to give effect to *the general obligation to investigate allegations of violations* promptly, thoroughly and effectively through independent and impartial bodies. (…) A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.'[72]

The HRC's reference to 'the general obligation to investigate allegations of violations' would appear to indicate an obligation to investigate *all* violations of the Covenant. Such a finding would fit with the Committee's emphasis on Article 2's general obligations to *ensure* all Covenant rights, and to implement them into States' domestic legal orders.[73] One way of doing so, is by instituting administrative mechanisms which are tasked with investigating potential human rights violations. Nonetheless, a broad and generally applicable duty to investigate has not been fleshed out further by the Committee, which leaves rather open whether it indeed envisions such as a broad duty to investigate, and when it would apply precisely. Most of the Committee's case-law, like that of its regional counterparts, focuses especially on a number of particularly serious violations, for which it has elaborated obligations of *criminal* investigation, coupled with a duty to prosecute and punish. This also means that there is relatively little jurisprudence on what we might call the outer limits of the duty to investigate, concerning the less serious violations. The following examines the case-law on investigative duties under the ICCPR, but ultimately we will have to await whether the HRC indeed attaches investigative obligations to *all* violations of the Covenant.

The Committee has made a number of partly overlapping and partly diverging observations with respect to the contours of the duty to investigate, prosecute, and punish. On multiple occasions, such as in the case of *Bautista de Arellana v Colombia*, the HRC has found that the duty to criminally investigate and punish, applies to *particularly serious violations*, 'as in the case with violations of basic human rights', and as is particularly the case for violations of

72 *General Comment No. 31* (n 47) [15]. Emphasis FT.
73 ICCPR, art 2(1) and 2(2).

the right to life.[74] Looking more closely at what violations, and what provisions this pertains to, the Committee has found in its *General Comment 31*, that

> '18. Where the investigations (…) reveal violations of *certain Covenant rights*, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations *recognized as criminal under either domestic or international law*, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations.'[75]

Thus, *certain* violations give rise to the duty to mount a criminal investigation, notably those which are considered criminal under domestic or international law. This finding builds on earlier case-law, there the Committee found in the context of the right to life, that 'deprivation of life by criminal acts' must be punished.[76] A starting point, then, is criminalisation of violations. But this ultimately defers the question whether criminal investigations are required, to the classification of the violation under other sources of international law, or domestic law. The non-exhaustive enumeration of violations the Committee *does* give explicitly, is therefore highly informative. These concern the prohibition of TCIDT, summary and arbitrary killings, and enforced disappearances. Indeed, these are the rights and abuses on which the HRC has focused in its case-law, and – importantly for this study – they are also the rights and abuses most at issue during armed conflict. We, therefore, will equally focus on these rights.

Let us now submit these violations to more careful scrutiny, to see what conduct *specifically* triggers investigative obligations, according to the Human Rights Committee. For the right to life, in *Baboeram et al v Suriname*, the HRC found as early as 1985 that, beyond just summary and arbitrary killings, all killings, especially when perpetrated by State agents, must be investigated.[77] Moreover, in *General Comment 36*, this is broadened to all 'potentially unlawful deprivations of life (…) including allegations of excessive use of force with lethal consequences', as well as uses of potentially lethal force which ultimately

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74 *Bautista de Arellana v Colombia*, HRC 27 October 1995, CCPR/C/55/D/563/1993 [8.2]. See also *Arhuacos v Colombia*, HRC 29 July 1997, CCPR/C/60/D/612/1995 [8.2]. Seibert-Fohr (n 30) 23.

75 *General Comment No. 31* (n 47) [18]. Emphasis FT.

76 *General Comment No. 6: The Right to Life (Article 6)*, HRC 27 July 1982, HRI/GEN/1/Rev.1 [3]; Roberti di Sarsina (n 55) 67.

77 *Baboeram et al v Suriname*, HRC 4 April 1985, CCPR/C/24/D/146/1983 et al. [16]. Joseph and Castan (n 11) 176.

did not result in loss of life.[78] Furthermore, all use of firearms by State agents, or other potentially lethal force outside the immediate context of an armed conflict, must be investigated.[79] Finally, all unnatural loss of life in custody raises a presumption of arbitrary deprivation of life which must be investigated.[80] Thus, the duty to investigate establishes an encompassing control mechanism for the use of force by the State, as well as other potentially unlawful deprivations of life.

For the prohibition of torture, cruel, inhuman and degrading treatment or punishment, the HRC has found that '[t]he right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.'[81] Thus, all types of maltreatment falling within the prohibition of TCIDT are subject to investigative duties. While an allegation of maltreatment clearly triggers the duty to investigate, if the State comes across the information in another way, it is also incumbent on the State to initiate an investigation.[82] Finally, again, when someone in detention is injured, the State must investigate and actively refute allegations of maltreatment.[83] This has to do with the State's 'heightened duty of care' with respect to those deprived of their liberty.[84]

Enforced disappearances, finally, are prohibited by a number of provisions, and if they do occur, violate all of these. Crucially, these include the right to life, the prohibition of TCIDT, and the right to liberty and security. If an enforced disappearance occurs, States must investigate. As the HRC already found in 1982, 'States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life'.[85] Investigations into enforced disappearances like the investigations mentioned above strive to establish what happened as well as ensure accountability, but beyond this also aim at *protection*. After all, when someone has disappeared, it is not known whether they are still alive. Such investigations must, insofar as they are geared towards accountability, moreover be of a criminal nature – as the Committee stressed in the case of *Messaouda Grioua v Algeria*.[86]

78 *General Comment No. 36* (n 41) [27].
79 Ibid [29]. The reference to armed conflict will be returned to below, in §6.
80 Ibid.
81 *General Comment No. 20: Article 7 (Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment or Punishment)*, HRC 10 March 1992, HRI/GEN/1/Rev.9 (Vol. I) [14].
82 *Alzery v Sweden*, HRC 25 October 2006, CCPR/C/88/D/1416/2005 [11.7]; Joseph and Castan (n 11) 292–4.
83 *Eshonov v Uzbekistan*, HRC 22 July 2010, CCPR/C/99/D/1225/2003 [9.8]; *Zheikov v Russian Federation*, HRC 17 March 2006, CCPR/C/86/D/889/1999; Joseph and Castan (n 11) 291–2.
84 *General Comment No. 36* (n 41) [25].
85 *General Comment No. 6* (n 76) [4]; Joseph and Castan (n 11) 181.
86 *Messaouda Grioua v Algeria*, HRC 10 July 2007, CCPR/C/90/D/1327/2004 [9]; David (n 65) 267–8.

Beyond enforced disappearance, which is likely the most serious form of arbitrary detention imaginable, we may ask whether other violations of the Article 9 right to liberty and security also require investigation.[87] Sarah Joseph and Melissa Castan, for instance, find that the duty to investigate under Article 9 mirrors those under the rights to life and freedom from TCIDT.[88] There is, however, one difficulty in assessing this question. It is common practice for the HRC at the end of its views, once it has established a number of violations, to then address the remedies the State must provide. It does so, however, for all violations taken together, so that a regular finding, may look as such: 'In this connection, the State party should: (a) conduct an impartial, prompt and thorough investigation into the author's allegations; (b) prosecute, try and punish appropriately the persons found guilty of the violations.'[89] Because in these cases there is always more at stake than arbitrary arrest alone, but also for instance death threats or acts of torture or rape, or arbitrary arrest which is aimed at silencing someone, whether arbitrary arrest *in and of itself* also requires investigation, and potentially prosecution and punishment, is less clear.[90]

As a final point of interest, we should look at what *knowledge*, what *information* on the part of the State is required to trigger the duty to investigate. In *General Comment 36*, the HRC firstly holds that the duty to investigate arises when States *know or should have known* of potentially unlawful deprivations of life.[91] Investigative duties therefore arise where – objectively – the relevant information was in the hands of the State, or – subjectively – where the State should have been aware of the violation. This is certainly so where an allegation was made,[92] or a complaint was filed.[93] Ultimately, however, States may not simply sit still and wait until victims make an allegation. As the Committee made clear in *Alzery v Sweden*, if States through some other channel gain knowledge of a potential violation, that is sufficient to require them to investigate further.[94]

4.3 The personal scope of application

Moving on from when an investigative obligation arises, a next question is *whose* obligation it is. As the ICCPR is addressed to States, and only States can

87 Seibert-Fohr concludes so, Seibert-Fohr (n 43) 44.
88 Joseph and Castan (n 11) 343.
89 *Cacho Ribeiro v Mexico*, HRC 17 July 2018, CCPR/C/123/D/2767/2016 [11].
90 E.g. ibid; *Fulmati Nyaya v Nepal*, HRC 18 March 2019, CCPR/C/125/D/2556/2015; *Prashanta Kumar Pandey*, HRC 30 October 2018, CCPR/C/124/D/2413/2014.
91 *General Comment No. 36* (n 41) [27].
92 Ibid [28].
93 *General Comment No. 20* (n 81) [14].
94 *Alzery v Sweden* (n 82) [11.7].

become party to it, the duty to investigate is equally imposed on *States*. Whereas this is clear, certain questions nevertheless remain. Firstly, to what extent must States investigate violations and abuses which cannot be attributed to them? Especially in the context of armed conflicts, most contemporary conflicts involve at least one, and often multiple, armed groups.[95] Whether such armed groups can be the direct addressees of duties under IHRL more generally, and investigative obligations more specifically, falls outside the scope of this study.[96] What *does* fall within this study's scope, and what is of great importance, however, is to what extent States must investigate the abuses committed by armed groups.[97] That question is addressed here. Secondly, we may ask whether, if the *obligation* is addressed to States, there is also a corresponding *right* to an investigation, addressed to individuals? Both points are examined here.

On the first point, the HRC has found that States can indeed be under the obligation to investigate violations or abuses committed by others – whether they are private individuals or armed groups. As the HRC stipulates in *General Comment 36*, States must take measures to *protect* the right to life also from threats by private individuals and armed groups. With regard to investigation, the HRC finds: 'States parties must further take adequate measures of protection, including continuous supervision, in order to prevent, investigate, punish and remedy arbitrary deprivation of life by private entities, such as private transportation companies, private hospitals and private security firms.'[98] Because, then, States must *protect* the right to life also against armed groups, and must moreover investigate deaths caused by private actors, the logical conclusion is that they must equally investigate deaths caused by armed groups, and hold them to account. By way of example, the case of *Marcellana and Gumanoy v Philippines* concerned the murder of two individuals who had been investigating disappearances. The Committee found it to be established that they had been 'kidnapped, robbed and killed by an armed group', and went on to find that the Philippines had failed to effectively investigate their

95 Ward Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (2009) 7 Journal of International Criminal Justice 723, 739. For an example of the complexities with various armed groups, see e.g. Terry D Gill, 'Classifying the Conflict in Syria' (2016) 92 International Law Studies 353.

96 On this subject, see Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006); Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017).

97 On the question of reparation in this context more generally, see Cecily Rose, 'An Emerging Norm: The Duty of States to Provide Reparations for Human Rights Violations by Non-State Actors Reconceptualizing Human Rights' (2010) 33 Hastings International and Comparative Law Review 307.

98 *General Comment No. 36* (n 41) [21].

murder.[99] This clearly illustrates that States must investigate also incidents which cannot be attributed to themselves, though it should be noted that in the context of *Marcellana*, there was no armed conflict, and the term 'armed group' was not used as a term of art in the sense of IHL. As we will see in section 6.4, a careful reading of the HRC's pronouncements would appear to reveal a distinction between cases taking place during armed conflict, and those which do not.

As to the second point, is there an individual right to an investigation? Insofar as States are held to set up a procedural layer of protection which includes investigative mechanisms, this may be thought of as a general means of implementing the Covenant.[100] As such, it may be doubtful whether this would include an individual *right* to an investigation. But insofar as the right to a remedy in Article 2(3) underlies the duty to investigate, it would indeed appear that individuals have a right to an investigation. This is especially so where investigations are the only means for victims to effectuate their rights, because especially where State agents themselves have perpetrated the abuses, all relevant information will be in the hands of the State. This makes any remedy, including civil actions, fully dependent on an official, independent investigation.[101]

Indeed, in *Rodríguez v Uruguay*, the Committee found that 'the responsibility for investigations falls under the State party's obligation to grant an effective remedy', and that in order to grant Mr Rodríguez the effective remedy to which he was entitled, Uruguay had to conduct an official investigation.[102] As is examined further when discussing investigative standards, States must moreover 'disclose relevant details about the investigation to the victim's next of kin, allow them to present new evidence, afford them with legal standing in the investigation'.[103] Thus, victims have a right to an investigation. It should be noted, however, that the Committee has found explicitly, that 'that the Covenant does not provide for the right to see another person criminally prosecuted'.[104] In this respect, not all State obligations under the ICCPR are mirrored by individual rights.[105]

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99 *Marcellana and Gumanoy v Philippines*, HRC 30 October 2008, CCPR/C/94/D/1560/2007 [7.2]; Joseph and Castan (n 11) 178.

100 See *supra*, §3.2.

101 Seibert-Fohr (n 43) 20–2.

102 *Rodríguez v Uruguay* (n 45) [12.3] and [14]; Seibert-Fohr (n 43) 21.

103 *General Comment No. 36* (n 41) [28].

104 See e.g. *H.C.M.A. v Netherlands*, HRC 3 April 1989, CCPR/C/35/D/213/1986 [11.6]. Seibert-Fohr (n 43); Joseph and Castan (n 11). Further on a right to criminal justice, see Jens David Ohlin, 'The Right to Punishment for International Crimes' in Florian Jeßberger and Julia Geneuss (eds), *Why Punish Perpetrators of Mass Atrocities?: Purposes of Punishment in International Criminal Law* (Cambridge University Press 2020).

105 One may also think of the duty to submit State reports; David (n 65) 268.

In sum, it is *States* who must investigate violations of the Covenant, and they must do so for violations which were committed within their jurisdiction. This means that most violations which can be attributed directly to the State, as well as those of private actors operating within their jurisdiction, are subject to investigative obligations. What violations fall within a State's 'jurisdiction', is explored further in section 4.5. Individuals moreover have a *right* to such investigations, though they do not have a right to have someone prosecuted.

4.4 The temporal scope of application

Principally, international treaties do not apply retroactively.[106] This is equally so for the ICCPR.[107] Nonetheless, human rights practice has shown, for instance in the context of the ECHR, that claims based on abuses which occurred *prior* to the entry into force of a treaty, can sometimes nevertheless be entertained.[108] This is especially so where investigative duties are concerned, because if the obligation to investigate is considered to be a *self-standing obligation*, then the mere fact that the material incident giving rise to a violation occurred before entry into force, may be immaterial to the duty to investigate, which extends through time.

Whereas the HRC has indeed accepted that a failure to investigate can give rise to a separate violation of the Covenant, this does not mean it is 'detachable' from the material abuse as such. Thus, if the abuse took place before a State ratified the ICCPR, or before it entered into force, complaints – also under the duty to investigate – have thus far been declared inadmissible.[109] Whereas the HRC does stress that any violations 'occurring after *or continuing after* the entry into force of the Covenant' must be investigated, it therefore appears so far to set a hard limit on the temporal applicability of investigative duties.[110]

The HRC does, however, leave the door open for continuing violations, which although they started before a State ratified the ICCPR, continue until after entry into force.[111] This can for instance be the case when the incident in question was an enforced disappearance. The continued uncertainty for the next of kin of the disappeared can constitute a continuing violation of the

106 VCLT, art 28.
107 Joseph and Castan (n 11) 57–9.
108 See Chapter 7, §4.4.
109 E.g. *Inostroza et al v Chile*, HRC 23 July 1999, CCPR/C/66/D/717/1996 [6.2]-[6.4]; *S.E. v Argentina*, HRC 26 March 1990, CCPR/C/38/D/275/1988 [5.1]-[6]. See further Seibert-Fohr (n 43) 45; James A Sweeney, 'The Elusive Right To Truth in Transitional Human Rights Jurisprudence' (2018) 67 International and Comparative Law Quarterly 353, 363.
110 *S.E. v Argentina* (n 109) [5.4]. Emphasis FT.
111 *Ali Djahangir oglu Quliyev v Azerbaijan*, HRC 16 October 2014, CCPR/C/112/D/1972/2010 [8.3], with references to further case-law.

prohibition of TCIDT. And the likely continued secret detention of the disappeared persons themselves can also constitute continuing violations of the right to liberty and security.[112] Nonetheless, as one commentator cautions, the HRC's case-law is not wholly consistent in this respect, which leaves the ICCPR's *ratione temporis* application to investigative obligations somewhat obscure.[113]

4.5 The geographic scope of application

As was explained in Chapter 4,[114] States are under an obligation to respect, protect, and fulfil human rights within their jurisdiction. This applies equally to the duty to investigate: the State which has jurisdiction over a violation, is under the duty to investigate. All violations which occur on a State's territory, are therefore subject to investigative obligations under the ICCPR.

But States may be also be required to investigate violations *outside* of their territorial boundaries. Article 2(1) ICCPR provides that a State must ensure ICCPR rights to 'all individuals within its territory and subject to its jurisdiction'. This, as the HRC and the ICJ have found, means that States must also ensure the rights of those who are outside of a State's territory, but nevertheless within their jurisdiction.[115] Thus, if a State exercises jurisdiction outside its own territory, and thereby has jurisdiction over a human rights violation, it will also be held to investigate such. This will, according to the HRC, be the case for victims (i) in areas where a State exercises control over a territory, (ii) who were under the control of the State, or (iii) whose right to life is 'impacted (…) in a direct and reasonably foreseeable manner' by a State's 'military or other activities'.[116] As was set out in section 3.1 above, not all States agree with this approach.

There is, to date, one view in an individual case relating to the issue of extraterritorial investigations, although it is a rather peculiar one. In *A.S., D.I., O.I. and G.D. v Italy*, Italy was found to have failed to effectively protect the

112 *Sarma v Sri Lanka*, HRC 16 July 2003, CCPR/C/78/D/950/2000 [9.4], [9.5], [9.11]. Sweeney (n 109) 363–5.

113 Sweeney (n 109) 365–6.

114 Chapter 4, §4.5.

115 Despite the apparently cumulative phrasing that individuals are within the State's territory *and* subject to its jurisdiction, the HRC and the ICJ have interpreted the clause disjunctively. *General Comment No. 31* (n 47) [10]; The ICJ later confirmed this finding, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004), *I.C.J. Reports* 2004, p. 136 [111]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment (19 December 2005) *I.C.J. Reports* 2005, p. 168 [216].

116 *General Comment No. 36* (n 41) [63]. Further, see Marjolein Busstra and Wieteke Theeuwen, 'International Law in the Context of Cyber Operations' in Marjolein Busstra and others (eds), *International Law for a Digitalised World* (KNVIR/Asser Press 2020) 43–4; Sarah Joseph, 'Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36' (2019) 19 Human Rights Law Review 347, 348–9.

lives of over 200 migrants who drowned after their vessel capsized – outside Italian territorial waters, and in Malta's search and rescue area. The Committee considered that in the specific circumstances of the case, 'a special relationship of dependency' existed between the vessel and Italy, engaging Italy's responsibility under the ICCPR.[117] The Committee based this finding both on a combination of Italy's legal obligations under the Law of the Sea, and on the factual circumstances that the first contact the distressed vessel had made had been with Italy, that an Italian ship had been relatively close, and that Italy had remained engaged in the rescue operation.[118] Finding jurisdiction on this basis, the Committee also found that Italy was obliged to conduct an investigation into what happened, and found that the investigation had been insufficiently prompt.[119]

Further, the Committee has had occasion to expand on the issue of extraterritorial investigations in concluding observations. Thus, in the context of the UK's detention facilities in Afghanistan and Iraq, it found that the UK 'should conduct prompt and independent investigations into all allegations concerning suspicious deaths, torture or cruel, inhuman or degrading treatment or punishment inflicted by its personnel (including commanders)'.[120] The US similarly had to '[c]onduct independent, impartial, prompt and effective investigations of allegations of violations of the right to life and bring to justice those responsible', in the context of its 'practice of targeted killings in extraterritorial counter-terrorism operations using unmanned aerial vehicles'.[121] This would suggest that the duty to investigate indeed applies to violations which occur within the State's jurisdiction, even if they take place outside of a State's territory.

Finally, States may be subject to obligations also with regard to violations which took place outside of their jurisdiction, by virtue of their obligation to cooperate with a State which *is* exercising jurisdiction, and investigating the violation. The HRC has found that 'States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law'.[122] Like the European Court of Human Rights,[123] the HRC therefore potentially

117 *A.S., D.I., O.I. and G.D. v Italy*, HRC 4 November 2020, CCPR/C/130/D/3042/2017 [7.8].
118 Ibid.
119 Ibid [8.7].
120 *Concluding observations concerning the United Kingdom of Great Britain and Northern Ireland*, HRC 30 July 2008, CCPR/C/GBR/CO/6 [14].
121 *Concluding observations concerning the United States of America*, HRC 23 April 2014, CCPR/C/USA/CO/4 [9].
122 *General Comment No. 31* (n 47) [18].
123 Chapter 7, §4.5; *Romeo Castaño v Belgium*, ECtHR 9 July 2019, Appl No 8351/17 [79]-[92]; *Güzelyurtlu and Others v Cyprus and Turkey*, ECtHR [GC] 29 January 2019, Appl No 36925/07 [232]-[236].

broadens State obligations to include cooperating with other States which investigate violations of the Covenant. Further, it has found in the context of the right to life, that 'States should support and cooperate in good faith with international mechanisms of investigation and prosecutions addressing possible violations'.[124] The HRC has yet to expand on this obligation further, but it would seem likely that where States have jurisdiction over either evidence, or over the suspect of a violation, the duty to cooperate becomes of relevance.[125]

5 SUBSTANCE OF THE DUTY TO INVESTIGATE: INVESTIGATIVE STANDARDS UNDER THE ICCPR

5.1 Introduction

In the above, we have established how the applicability of the duty to investigate, in its various modalities, is shaped in the HRC's case-law. This principally tells us *when* the duty to investigate applies. If we now know *when* States must investigate, then the logical next step is to ask, *how* must they do so. This question is the subject of this section.

5.2 A due diligence obligation

As an overarching starting point, it must be emphasised that the duty to investigate (and to prosecute and punish), is a *due diligence* obligation.[126] This means States must take all reasonable measures in order to discharge the duty, but that if a State meets all investigative standards but is nonetheless unable to establish all the facts or identify all culprits, this need not necessarily fall foul of the duty to investigate.[127] In the words of the Committee, it is 'not an obligation of result, but of means (…) and it must be interpreted in a way which does not impose an impossible or disproportionate burden on the

124 *General Comment No. 36* (n 41) [28]. Further on this, see Marko Milanović, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life' (2020) 20 Human Rights Law Review 1, 43. Milanović, however, appears to overlook the Committee's earlier finding that State's must, beyond international mechanisms, also cooperate with one another.

125 Milanović (n 124) 43–4.

126 *General Comment No. 31* (n 47) [8]; See also Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 566.

127 Joseph and Castan (n 11) 871.

authorities'.[128] In this context, the HRC refers explicitly to the European Court of Human Rights' findings to the same effect, explored further in Chapter 7.[129]

5.3 Investigative standards

5.3.1 Eight standards

If we then look more specifically at what standards the HRC formulates for investigations, *General Comment 36*, on the right to life, is again our most recent and encompassing authority. There, overseeing its case-law, the HRC sums up the overarching investigative standards which States must meet. The standards in question stipulate that an investigation must be: (i) launched of the State's own accord (*ex officio*); (ii) initiated promptly; and that it must furthermore be (iii) thorough, effective, and credible; (iv) independent and (v) impartial; (vi) sufficiently involve the victims or their next of kin; and further be (vii) transparent, and (viii) where appropriate followed-up by criminal accountability processes.[130] These standards, it is submitted, are generally also applicable to investigations into violations beyond just the right to life. They must of course be applied contextually, meaning that for instance the requirement that investigations are thorough and effective, work out differently in a right to life case, and in a torture case. The investigative steps involved obviously differ, and the HRC's insistence, as we will explore below, on autopsies, of course applies only when there are mortal remains to examine. But applied contextually, the standards listed here are the benchmarks for all investigations.

5.3.2 Ex officio

Let us now take a closer look at the various investigative standards. Firstly, (i) investigations must be initiated *ex officio*.[131] As was already briefly mentioned above, this means that States may not simply await a victim complaint. On the contrary, as soon as they obtain information which allows them to know, or on the basis of which they should have known of the potential violation,

128 *Prutina and Others v Bosnia and Herzegovina*, HRC 18 June 2013, CCPR/C/107/D/1917, 1918, 1925/2009&1953/2010 [9.5]; later referred to in e.g. *Khadzhiyev and Muradova v Turkmenistan*, HRC 24 May 2018, CCPR/C/122/D/2252/2013 [7.5].

129 *Palić v Bosnia and Herzegovina*, ECtHR 15 February 2011, Appl No 4704/04 [65] and [70].

130 *General Comment No. 36* (n 41) [28].

131 Ibid. Interestingly, the HRC finds that investigations must 'where appropriate' be initiated *ex officio*. In this respect, the HRC diverges from other human rights systems' jurisprudence. Likely, the HRC refers here to cases where the potential violation is brought to life for the first time through an allegation, where one might say that technically, the prompt initiation of an investigation afterwards, is no longer *ex officio*.

they must actively unearth what happened. If the information triggering the duty to investigate *is* a victim allegation, they may still not rely on victims to furnish evidence.[132] The State must, in other words, take ownership of the investigation.

5.3.3 Promptness

Second and closely related, (ii) States must *promptly* initiate the investigation.[133] The promptness of the investigation is crucial if the investigation is to achieve its various aims. The deterrent effect, both more generally and case-specifically, relies on a prompt reaction. Furthermore, effectively establishing the facts will often require prompt action. Crime scenes can easily be contaminated and evidence lost, traces of ill-treatment such as bruises fade, witness testimony's reliability decreases overtime, and especially where State agents are implicated, there is a risk of (an appearance of) collusion, or even of intimidation or active tampering with evidence. There is not, thus far, a significant amount of case-law on the issue what is sufficiently *prompt*, as the majority of cases brought to the Committee concern the lack of investigations altogether.[134] Some guidance on what is without question insufficiently prompt, can be found in the case of *Alzery v Sweden*. This case concerned an expulsion to Egypt during which Swedish agents witnessed the victim's ill-treatment, after which Sweden only undertook action when a private criminal complaint was brought over two years later. In such circumstances, the Committee found, that delay alone led to the conclusion that Sweden had failed to carry out a prompt, independent and impartial investigation.[135]

5.3.4 Thoroughness, effectiveness, and credibility

The requirement that an investigation is (iii) *thorough, effective, and credible*, is the most substantive standard formulated by the HRC. This criterion is concerned with the investigative steps which must be taken in order to ensure that the investigation is effective, in the sense that it can achieve the aims of establishing the facts and ensuring accountability. What steps are required depends on the facts of a case, and must therefore be assessed on a case-by-case basis. Nonetheless, there are certain general guidelines. In this context, the Committee also takes onboard other international standards for effective investigations, such as the *Minnesota Protocol on the Investigation of Potentially*

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132 *Eshonov v Uzbekistan* (n 83) [9.8].

133 *General Comment No. 20* (n 81) [14]; *Novaković v Serbia*, HRC 21 October 2010, CCPR/C/100/D/1556/2007 [7.3]. See Anja Seibert-fohr, 'The Fight against Impunity under the International Covenant on Civil and Political Rights' (2002) 6 Max Planck Yearbook of United Nations Law 301, 329.

134 For an example, see e.g. *Rodríguez v Uruguay* (n 45).

135 *Alzery v Sweden* (n 82) [11.7].

Unlawful Death.[136] This document, which was concluded by the Office of the United Nations High Commissioner for Human Rights, includes a great many guidelines for investigations, including on crime-scene investigation, interviewing, excavation of graves, and autopsies. Looking at the Committee's practice, we can see, for instance, that in case of investigations into unlawful deaths, an autopsy must be carried out.[137] If mortal remains are already buried, they need to be exhumed.[138] The HRC at times goes in great detail in assessing whether all relevant steps were pursued, and whether they were carried out adequately. By way of illustration, it found in the case of *Zhumbaeva v Kyrgyzstan*:

> 'The Committee notes the author's allegations regarding the authorities failure to obtain a detailed description of the position of the victim's body, that a mock hanging was not conducted, that the exact timing and sequence of events was not established, that medical records to establish if the victim had any suicidal tendencies were not requested, that a forensic expertise of the sport trousers was not ordered, that the cash the victim allegedly carried in his pocket was never located and that it was never established if the victim's death was a result of torture or ill-treatment.'[139]

Other steps which will regularly be involved, are for instance the hearing of witnesses, and medical examinations to establish whether any ill-treatment has taken place.[140] This is, of course, context-dependent. Further, the investigation will need to look at the State's *procedures* in, for instance, law enforcement operations. Thus, the Committee has found that investigations must also bring to light 'the reasons and legal basis for targeting certain individuals and the procedures employed by State forces before, during and after the time in which the deprivation occurred, and identifying bodies of individuals who had lost their lives'.[141] Crucially, any investigation will need to be judged on its merits and contextually, and all relevant investigative steps will need to be pursued in order to render the investigation thorough and effective.

5.3.5 Independence and impartiality

136 *General Comment No. 36* (n 41) [27]; *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, Office of the United Nations High Commissioner for Human Rights, New York/Geneva, 2017.

137 *General Comment No. 36* (n 41) [28].

138 *Eshonov v Uzbekistan* (n 83) [9.6].

139 *Zhumbaeva v Kyrgyzstan*, HRC 19 July 2011, CCPR/C/102/D/1756/2008 [8.10]; Joseph and Castan (n 11) 177–8.

140 *Concluding Observations concerning Hungary*, HRC 16 November 2010, CCPR/C/HUN/CO/5 [14]; Joseph and Castan (n 11) 294.

141 *General Comment No. 36* (n 41) [28].

Then, the investigation must be (iv) independent, and (v) impartial. Whereas these two standards are often taken together, they can be distinguished from one another. Independence generally refers to the investigators being institutionally independent from those implicated in the abuse, while impartiality normally refers to a lack of bias or prejudice.[142] Impartiality is therefore more about the specific investigators working on a case, as well as potentially the judge in legal proceedings, and whether their conduct indicates bias. Independence is about an institutional separation between those implicated, and the investigating authorities. To draw an example from Concluding Observations the HRC made with regard to instances of police brutality in Hong Kong: investigations carried out by the police force themselves, which moreover hardly ever found any complaint to be substantiated, led the HRC to seriously question the independence of this investigation mechanism.[143] The Committee therefore insisted on an investigation which *was* independent, and which also did not have the *appearance* of dependence.[144] On occasion, the HRC has found that where complaints are raised as to the independence of the investigation, and the established investigative procedures are lacking, States must institute an independent commission of inquiry to carry out the investigation.[145]

5.3.6 Transparency and sufficient involvement of next of kin

If all the above investigative standards are met, this already goes a long way of ensuring an effective investigation which is capable of establishing the identify of both victim and perpetrator, and of judging the lawfulness of what happened, as well as establish accountability. But this by itself is not yet sufficient. The investigation must, in order to do justice to victims and their right to a remedy, also (vi) sufficiently *involve the victims or their next of kin*, and be (vii) *transparent*. At the investigation stage, this for instance means that victims or their representatives are present at the autopsy.[146] Further,

> 'States parties should also disclose relevant details about the investigation to the victim's next of kin, allow them to present new evidence, afford them with legal standing in the investigation, and make public information about the investigative steps taken and the investigation's findings, conclusions and recommendations, subject to absolutely necessary redactions justified by a compelling need to protect

142 David J Harris and others, *Law of the European Convention on Human Rights* (3rd edn, Oxford University Press 2014) 450.

143 *Concluding Observations concerning the United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, HRC 9 November 1995, CCPR/C/79/Add.57 [11]. Joseph and Castan (n 11) 296.

144 Ibid.

145 *Eshonov v Uzbekistan* (n 83) [9.6]-[9.7].

146 *General Comment No. 36* (n 41) [28].

> the public interest or the privacy and other legal rights of directly affected individuals.'[147]

The inclusion of the next of kin in the investigation is therefore an important element of the HRC's conception of investigations. They must be granted standing, and be included at all relevant junctions so they can effectuate their rights in the proceedings. Beyond just victims and their next of kin, there are also broader requirements of transparency. This ensures public faith in the State's use of force, adherence to the rule of law, and opens the investigation up to public scrutiny – although the HRC does allow for balancing these interests against countervailing individual or broader societal interests. We might think, for instance, of results of criminal investigations which cannot be disclosed so long as not all suspects have been apprehended, in order not to hinder the ongoing investigation. As will be seen below, the HRC crucially also applies such standards of transparency to the use of force in military operations during armed conflict.[148]

5.3.7 *Follow-up to investigations*

Finally, as was already touched upon previously, investigations must where appropriate be (viii) *followed-up by criminal accountability processes*. This is certainly the case for human rights violations which constitute international crimes, and TCIDT, summary and arbitrary killing, and enforced disappearance.[149] The same goes for all 'particularly serious' violations.[150] What this means precisely is not entirely cleared up in the Committee's case-law, but what is certain, is that potentially unlawful deprivations of life will normally fall in this category. As the HRC has found,

> 'Given the importance of the right to life, States parties must generally refrain from addressing violations of article 6 merely through administrative or disciplinary measures, and a criminal investigation is normally required, which should lead, if enough incriminating evidence is gathered, to a criminal prosecution.'[151]

This indicates a clear drive towards criminal accountability in the Committee's case-law. Further sharpening the sword-function of the ICCPR, the HRC has further found that if such a duty to prosecute and punish exists, States must remove *de jure* and *de facto* obstacles to accountability. Amnesty laws or prescriptions are unacceptable in this regard, because they perpetuate impuni-

147 Ibid.
148 *infra* section 6.
149 *General Comment No. 31* (n 47) [18].
150 *Bautista de Arellana v Colombia* (n 74) [8.2].
151 *General Comment No. 36* (n 41) [27].

ty.[152] Finally, the HRC has, in case of enforced disappearances, insisted that investigations are carried out and tried – as a rule – within the 'ordinary criminal justice system' rather than before military courts.[153]

Two qualifications must be made with regard to this duty to criminally investigate. Firstly, there remain violations of the ICCPR which do not require a criminal investigation. An effective remedy for victims does not at all times require criminal measures, and can sometimes also be satisfied through other means. In *Croes v Netherlands*, the HRC observed 'that although States parties are obliged to investigate in good faith allegations of human rights violations, criminal proceedings would not be the only available remedy.'[154] Secondly, even if there is a duty for the State to investigate, prosecute, and punish, this does not give rise to a corresponding *individual right* to have someone prosecuted.[155] In this respect, not all State obligations under the ICCPR are mirrored by individual rights.[156]

5.4 Résumé

Overseeing the above, we may conclude that although the duty to investigate is a due diligence obligation, the HRC has formulated an extensive list of standards by which the State's efforts can be gauged. Not all standards have been fleshed out in great detail, but the Committee's evolving case-law will no doubt interpret these standards further. Thus, States must investigate many human rights violations under the Covenant, and are moreover held to high standards when they do. Because States are moreover held to set up investigative mechanisms within their domestic systems, this is a crucial link in effectuating human rights in the domestic legal order. The procedural standards investigations must meet, with potential supervision by the Committee, in that respect safeguard that there all violations are seriously and genuinely examined.

6 Applicability and flexibility in conflict situations, and the role of IHL

6.1 Introduction

152 Ibid; *Rodríguez v Uruguay* (n 45) [12.4]. Extensively, Seibert-Fohr (n 43); David (n 65).
153 *General Comment No. 36* (n 41) [58]; *Coronel v Colombia*, HRC 29 November 2002, CCPR/C/76/D/778/1997 [10]; Seibert-Fohr (n 43) 23–4.
154 *Croes v The Netherlands*, HRC 16 November 1988, CCPR/C/34/D/164/1984 [10].
155 Seibert-Fohr (n 43); Joseph and Castan (n 11). See e.g. *H.C.M.A. v Netherlands* (n 104) [11.6].
156 One may also think of the duty to submit State reports; David (n 65) 268.

In the above, we have seen *why* duties of investigation are integral to the effective protection of ICCPR rights, *when* such duties apply, and *how* States must discharge such obligations. What we have yet to explore, but what is also vital for ultimately answering this study's research questions, is whether and how these investigative obligations are applied *in situations of armed conflict*. This raises questions as to the potential derogability of investigative obligations (§6.2), co-applicability with IHL (§6.3), and whether the duty to investigate can be interpreted with a measure of flexibility in light of the different, demanding, circumstances pertaining during armed conflict (§6.4).

A preliminary issue, of course, is whether the ICCPR applies at all during armed conflict. Whereas historically this was not always self-evident, it has been firmly decided that indeed, the ICCPR continues to apply during armed conflict. Both the International Court of Justice and the HRC have been crystal clear on this issue. According to the ICJ, the individual protections flowing from the ICCPR and human rights treaties more generally remain in operation during armed conflict. The only reason such protections can cease, is by way of derogation.[157] The HRC has found similarly, reaffirming that 'the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable'.[158] These findings correspond with a trend at the regional courts in the Americas and Europe,[159] and it is submitted that despite persistent objections by certain States,[160] the continued applicability of human rights law during armed conflicts is now settled.[161]

Knowing *that* the ICCPR continues to apply during armed conflict, does not yet tell us *how* it applies, and how it interacts with IHL. These issues are discussed below, starting out with a brief enquiry into the derogations regime.

157 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), *I.C.J. Reports* 1996, p. 226 [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 115)[106]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (n 115) [216].

158 *General Comment No. 31* (n 47) [11].

159 See Chapters 6 and 7.

160 The United States of America and Israel persist that IHRL does not apply during armed conflict, see e.g. Françoise J Hampson, 'The Relationship Between International Humanitarian Law and Human Rights Law From the Perspective of a Human Rights Treaty Body' (2008) 90 International Review of the Red Cross 849, 550; Larissa van den Herik and Helen Duffy, 'Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches' in Carla Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill Nijhoff 2017) 367–8, fn7. See also the criticisms leveled against the HRC's inclusion of IHL in its General Comment, *supra* (n 30).

161 See also Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 International Review of the Red Cross 501; Helen Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press 2013).

6.2 The (non-)derogability of the duty to investigate

The ICCPR contains a regime which allows States to *derogate* from certain rights, if they are faced with an emergency. A relevant question, then, is whether States can make use of this regime during the exigencies of armed conflict. Article 4 of the ICCPR grants States the possibility to 'take measures derogating from their obligations under the [ICCPR] to the extent strictly required by the exigencies of the situation', '[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'.[162] The derogations regime therefore allows States to deviate from human rights norms due to a public emergency that does not allow for the application of all human rights norms – the security of the State, or rather the survival of the State, requires it be free to combat this crisis without overly demanding human rights restrictions. Any measures taken are still subject to international proportionality review, balancing the exigencies of the situation against the fundamental rights interference.[163]

If States can derogate from certain obligations during a public emergency threatening the life of the nation, a next pertinent question is whether armed conflicts constitute such an emergency. The International Court of Justice's findings in its *Nuclear Weapons* opinion would seem to point in this direction. There, the Court found that the ICCPR's protection 'does not cease in times of war, except by operation of Article 4'.[164] Nonetheless, in the HRC's view this will depend on context: 'even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.'[165] There remains therefore some scope for discussion, as to whether each armed conflict constitutes such an existential threat. By way of example, whether States' involvement in extraterritorial armed conflicts could also fulfil this criterion is not immediately clear.[166]

Nonetheless, we need not concern ourselves too much with such questions. The reason for this, is quite simple. Under the ICCPR, not all rights and provisions may be derogated from, and the HRC has moreover interpreted this list of non-derogable rights quite broadly. Thus, as will be seen, duties of investigation cannot be derogated from as such, whether the armed conflict amounts to a threat to the life of the nation, or not.

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162 ICCPR, art 4(1).

163 *General Comment No. 29: Article 4: Derogations during a State of Emergency*, HRC 31 August 2001, CCPR/C/21/Rev.1/Add.11 [4]-[6].

164 *Nuclear Weapons* (n 157) [25].

165 *General Comment No. 29* (n 163) [3]; reaffirmed more recently in *General Comment No. 37: Article 21: right of peaceful assembly*, HRC 27 July 2020, CCPR/C/GC/37 [96].

166 On this issue, see Marko Milanović, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (Oxford University Press 2016).

A number of rights is considered to be so essential, that they may never be derogated from, even during emergencies. Under the ICCPR, these rights include, importantly, the right to life and the prohibition of torture, inhuman, cruel, and degrading treatment.[167] Crucially, the HRC has added to this that the obligation to provide an effective remedy is also non-derogable, as well as those procedural safeguards which are necessary to ensure non-derogable rights.[168] As was shown above, investigative obligations under the ICCPR arise primarily in light of a violation of the right to life, the prohibition of TCIDT, and the prohibition of enforced disappearance. In other words, the investigative obligations under the ICCPR, attach to non-derogable rights.[169] If these rights cannot be derogated from, nor can the obligations flowing from the duty to ensure these rights, and to provide an effective remedy for infringements of these rights. Thus, no derogation from the duty to investigate is possible, even during armed conflict, or a public emergency threatening the life of the nation. The HRC has found explicitly to this effect, in its *General Comment 36*. There, it considered that rights which support the right to life may not 'diminished by measures of derogation', which includes 'the duty to take appropriate measures to investigate, prosecute, punish and remedy violations of the right to life'.[170]

It may be wondered whether the application of investigative obligations may nevertheless be altered during armed conflict – not because of derogations, but because of the applicability of IHL, or because of a contextual application which takes account of the exigencies of armed conflict situations. Those possibilities are addressed in the following sections.

6.3 Applicability during armed conflict and interaction with IHL

The HRC's approach towards IHL can be characterised as relatively open. Early on, it considered that IHL 'help[s], in addition to the provisions in article 4 [ICCPR], to prevent the abuse of a State's emergency powers'.[171] This indicates a view of IHL as supplementing the ICCPR's derogations regime, as an additional restriction on States' powers during armed conflict. This interpretation aligns with Article 4's requirement that any derogation measures 'are not inconsistent with their other obligations under international law'.[172] During armed conflict,

167 ICCPR, art 4(2).
168 *General Comment No. 29* (n 163) [14]-[15].
169 Enforced disappearances, beyond violations of the right to liberty and security, also constitute violations of the prohibition of TCIDT, and often the right to life. *General Comment No. 35: Article 9 (Liberty and security of person)*, HRC 16 December 2014, CCPR/C/GC/35 [55].
170 *General Comment No. 36* (n 41) [67].
171 *General Comment No. 29* (n 163) [3].
172 ICCPR, art 4(1).

IHL naturally provides relevant 'other' international rules in this context. So IHL in this view stipulates the lower limits of what States are allowed to do, as an additional safeguard in addition to those of the ICCPR. But later on, in its *General Comment 31* on the general obligations flowing from Article 2, the Committee went a step further, and considered that

> 'the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.'[173]

Rules of IHL, then, generally *complement* protections afforded by the ICCPR. What the Committee means by this does not yet become entirely clear, but at the very least, it explains that *more specific rules of IHL* may be relevant for the *interpretation* of ICCPR rights.[174] Whereas the reference to 'more specific rules' immediately conjures images of *lex specialis*,[175] the Committee stresses the complementary nature of the relationship between IHL and the ICCPR. Thus, the HRC would appear to adhere to a 'relationship of interpretation' between both regimes,[176] with there being room for the interpretation of ICCPR rights in light of 'more specific rules of IHL'.

And indeed, in its two most recent General Comments, on the right to liberty and security, and on the right to life, the Committee has expanded further on how this interpretive relation must be shaped. Firstly, it again emphasises that rules of IHL may be relevant 'for the interpretation' of the right to liberty,[177] and 'for the interpretation and application' of the right to life[178] – and that IHL and the ICCPR are therefore complementary. Then, secondly, it explains further how we may interpret ICCPR rights in light of rules of IHL, in two absolutely crucial findings:

> 'Security detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary',[179] and '[u]se of lethal force consistent

173 *General Comment No. 31* (n 47) [11].
174 See Vito Todeschini, 'The ICCPR in Armed Conflict: An Appraisal of the Human Rights Committee's Engagement with International Humanitarian Law' (2017) 35 Nordic Journal of Human Rights 203, section 4.1.
175 The ICJ has referred to the relationship of IHRL and IHL in terms of *lex specialis*, see *Nuclear Weapons* (n 157) [25] and *The Wall* (n 157) [106].
176 Oona A Hathaway and others, 'Which Law Governs during Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law' (2012) 96 Minnesota Law Review 1883.
177 *General Comment No. 35* (n 169) [64].
178 *General Comment No. 36* (n 41) [64].
179 *General Comment No. 35* (n 169) [64].

> with international humanitarian law and other applicable international law norms is, in general, not arbitrary.'[180]

Thus, the Committee finds that the crucial determination of whether a deprivation of life or liberty is 'arbitrary' under the Covenant, can be determined by reference to rules of IHL.[181] This means that rules of IHL – which may well be more permissive of States' repressive action – shape the content of human rights. Thus, security detention which is normally outlawed under the ICCPR, can be permissible during armed conflict, and the use of lethal force which would normally be at odds with the ICCPR, is not arbitrary when it conforms to more permissive rules of IHL.[182] This reconciliatory interpretation of the term 'arbitrary', similar to approaches by the ICJ and the Inter-American Court of Human Rights,[183] are ultimately a form of 'harmonious interpretation' or 'systemic integration'.[184] As is explained in detail later in this study,[185] this means that international law is approached as a 'system', where rules of one branch of international law can be interpreted in line with rules of other branches, as set out by Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[186] Through systemic integration, the HRC thus takes IHL onboard in its interpretation of ICCPR rights, in a way which is less protective of individual rights than its regular interpretation.[187]

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180 *General Comment No. 36* (n 41) [64].

181 Similarly, see *General Comment No. 37* (n 165) [97].

182 Note that the HRC does formulate certain additional criteria, i.e. that security detention is authorised and regulated by IHL, and that the use of force is consistent with IHL and other international legal norms.

183 *Legality of the Threat or Use of Nuclear Weapons* (n 157) [25] and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 115) [106]; *Santo Domingo Massacre v Colombia* (Preliminary Objections, Merits and Reparations) Inter-American Court of Human Rights Series C No 259 (30 November 2012) [24], Emphasis FT. In similar wording, see *Rodríguez Vera et al (the disappeared from the Palace of Justice) v Colombia* (Preliminary objections, merits, reparations and costs) Inter-American Court of Human Rights Series C No 287 (14 November 2014) [39]. Further, see Chapter 6, §6.3.3, and Chapter 9.

184 Todeschini (n 174) section 4.1ff; Jean d'Aspremont and Elodie Tranchez, 'The Quest for a Non-Conflictual Coexistence of International Human Rights Law and Humanitarian Law: Which Role for the Lex Specialis Principle?' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013); Lawrence Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' in Eirik Bjorge and Mads Andenas (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015) 279.

185 Chapter 9.

186 Campbell A McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 International and Comparative Law Quarterly 279; d'Aspremont and Tranchez (n 184).

187 Hill-Cawthorne (n 184) 284–6.

The Human Rights Committee's approach to IHL can therefore be characterised as relatively open. It is willing to take IHL onboard as an interpretive tool which shapes the contents of ICCPR rights. But, in the context of the right to life, the HRC places one important restriction on the complementary role played by IHL. It stipulates that '[u]se of lethal force consistent with international humanitarian law *and other applicable international law norms* is, in general, not arbitrary',[188] which means that the use of force must also satisfy other applicable international rules. This, the HRC makes clear, includes the *ius ad bellum*. Thus, it finds – controversially – that 'States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant'.[189] In other words, the HRC distinguishes between the various parties to an armed conflict. If this approach is accepted, this means that on the one hand, a State which complies with the *ius ad bellum* can profit from a more flexible interpretation of the right to life, which can be interpreted in light of applicable IHL. But aggressor States, on the other hand, would not be able to profit from the rules of IHL, and in fact *all* deprivations of life in the context of aggression, would violate the right to life.

This interpretation admittedly has a certain attraction, as allowing States engaging in aggression to profit from a less restrictive regime would be counterintuitive.[190] But at the same time, it goes completely against IHL's guiding principles, namely those of belligerent equality, and the separation between the *ius ad bellum* and the *ius in bello*.[191] One of the foundations of IHL as a legal regime regulating warfare, is that it applies equally to all sides. This is a pragmatic approach, which is precisely meant to accept the situation that despite the prohibition of the use of force in international law, armed conflicts will continue to occur. Mitigating the suffering that goes hand in hand with such conflicts, regardless of who is in the wrong and who is in the right in the larger context of the conflict, does not allow for distinguishing between the various parties. The HRC's approach in this respect therefore diverges from IHL canon.[192]

Looking at the Human Rights Committee's approach to the use of force during armed conflict, what is clear at least is that it has an open approach towards international law. Both IHL and other rules of international law, notably the *ius ad bellum*, have a role to play in the HRC's interpretation. These

188 *General Comment No. 36* (n 41) [64]. Emphasis FT. See also *General Comment No. 37* (n 165) [97].

189 *General Comment No. 36* (n 41) [70].

190 Peter Kempees, *Thoughts on Article 15 of the European Convention on Human Rights* (Wolf Legal Publishers 2017); Adil Ahmad Haque, 'Turkey, Aggression, and the Right to Life Under the ECHR – EJIL: Talk!' (*EJIL:talk!*, 2019) <https://www.ejiltalk.org/turkey-aggression-and-the-right-to-life-under-the-echr/> (last accessed 15 July 2021).

191 Yoram Dinstein, *The Conduct of Hostilitites under the Law of International Armed Conflict* (3rd edn, Cambridge University Press 2016) 4–8.

192 Further on these fundaments of IHL, see Chapter 2, §2.

are interesting developments which deserve to be followed closely. From the perspective of investigative duties, discussed in the subsequent section, they also raise a number of issues. The HRC's approach potentially increases normative conflicts with IHL when it comes to the duty to investigate. Let us now subject this to a further examination.

6.4 Investigations into violations committed during armed conflict

6.4.1 Introduction

As was explained above, the ICCPR continues to apply during armed conflict, and so do States' investigative obligations. Armed conflicts, however, raise their own set of issues. One may question, for instance, whether it is feasible to require States to investigate all deprivations of life during armed conflict, where loss of life is – unfortunately – extremely prevalent. A relevant question is therefore whether the duty to investigate is adapted to the realities of armed conflict. As we have seen, the HRC adopts a relatively open approach towards IHL and other fields of international law, which might provide it with the interpretive tools to do so. This section examines to what extent this is so.

6.4.2 Scope of application

Concerning the scope of the duty to investigate during armed conflict, two issues in particular arise. Firstly, we may question whether the trigger for investigations remains the same. For instance, must *all* killings be investigated, despite potentially disproportionate burdens this may impose on the State?[193] Secondly, the applicability of the duty to investigate to killings committed by third actors, such as notably non-State armed groups, may prove demanding.

In *General Comment 36*, the HRC finds that States must 'investigate alleged or suspected violations of article 6 in situations of armed conflict in accordance with the relevant international standards'.[194] Whereas no individual case-law on this issue exists to date, the Committee has found in the context of its concluding observations on Colombia, which was engulfed in a non-international armed conflict, that that State needed to 'ensure that all allegations of human rights violations are promptly and impartially investigated, that the perpetrators are prosecuted, that appropriate punishment is imposed on

193 Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98 American Journal of International Law 1. France and the UK have expressed the view that investigative obligations under the ICCPR do not apply during armed conflict, *supra* (n 32).

194 *General Comment No. 36* (n 41) [64].

those convicted and that the victims are adequately compensated'.[195] Thus, potential *violations* of the right to life must be investigated. As we have just seen, what constitutes a violation of the right to life can, during armed conflict, be interpreted by reference to applicable rules of IHL. When it comes to the conduct of hostilities, this means that the targeting and killing of combatants, for instance, will not be considered 'arbitrary', and will therefore be in compliance with the right to life. This also means that no investigation is therefore required under the ICCPR, as interpreted by the HRC. As we saw above, however, the HRC also suggests in *General Comment 36* that when a State is engaged in acts of aggression, any deprivation of life will violate the right to life. Following this line of argumentation by the HRC, the State will then need to investigate *all* deprivations of life, including those of combatants lawfully targeted under IHL.

And, as will be recalled, violations of the right to life must be *criminally* investigated, prosecuted, and punished. Besides issues of feasibility which this may raise, it importantly may lead to a conflict with IHL. If killings which are considered lawful under IHL must be criminally prosecuted under the ICCPR, this potentially raises issues with combatant privilege. Members of States' armed forces are safeguarded from prosecution for lawful acts of war by States other than their own,[196] and here, the ICCPR might require precisely their prosecution for what is considered lawful under IHL. Considering a deprivation of life as simultaneously lawful under IHL and unlawful under IHRL and the *ius ad bellum* is one thing, which under a paradigm of legal pluralism might be accepted.[197] But where the consequences of such pluralism go beyond State responsibility alone, and also entail *individual criminal responsibility*, this is problematic. How the Human Rights Committee will engage with this issue remains to be seen, because beyond the General Comment, there is as yet no case-law on this issue.

The HRC gives a few further indications as to the trigger for right to life investigations during armed conflict. Where it finds generally that all use of firearms by State agents must be subject to an investigation, it qualifies this requirement by limiting it to use of firearms 'outside the immediate context of an armed conflict'.[198] In other words, *within* the context of armed conflict, *not* all use of firearms needs to be investigated – if it takes place in the *imme-*

195 *Concluding observations concerning Colombia*, HRC 3 May 1997, CCPR/C/79/Add.76 [32]; Cordula Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Israel Law Review 310, 352.

196 Sandra Krähenmann, 'Protection of Prisoners in Armed Conflict' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) 367.

197 E.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, Judgment (3 February 2015), *I.C.J. Reports* 2015, p. 3 [474]. On pluralism in international law, see Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden Journal of International Law 553.

198 *General Comment No. 36* (n 41) [29].

diate context of the conflict. The word 'immediate' appears to indicate that the HRC differentiates between incidents with a direct nexus to the armed conflict, and incidents which perhaps take place against the background of a broader conflict, but which are ultimately unrelated to it.[199] By way of example, even if a State is engaged in an armed conflict, if its police force fires their weapons to prevent an armed robbery which has no nexus to the conflict, the State will be held to investigate as normal. This makes sense, as IHL does not normally regulate the use of force which does not have a nexus to the conflict.[200]

When there *is* a nexus to the conflict, the HRC further makes clear that deprivations of life which violate IHL must normally be considered to be 'arbitrary' in the sense of the ICCPR, and therefore require an investigation.[201] This includes 'targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure to apply the principles of precaution and proportionality, and the use of human shields'.[202] It is noteworthy that violations of the principles of precaution and proportionality are included. After all, under IHL such failures (when unintentional) constitute non-serious breaches, which therefore do not require a criminal response. But under the HRC's case-law, States must 'generally refrain from addressing violations of article 6 merely through administrative or disciplinary measures, and a criminal investigation is normally required'.[203] Thus, the HRC's approach here potentially leads to a divergence between IHL and the ICCPR, where under IHL an administrative investigation would suffice, but where under the ICCPR, criminal investigations would be called for.

On the second issue, that of investigations into third-party and NSAG interferences, we must again turn towards *General Comment 36*. For peacetime situations, recall that the Committee requires States to investigate, and if appropriate, prosecute '*potentially unlawful deprivations of life* (…) including allegations of excessive use of force with lethal consequences'.[204] In the context of an armed conflict, however, the Committee notably uses a different wording, and finds that States 'must also investigate alleged or suspected *violations of article 6* in situations of armed conflict in accordance with the

199 As the Committee finds in *General Comment No. 37* (n 165) [97], 'In a situation of armed conflict, the use of force during peaceful assemblies remains regulated by the rules governing law enforcement and the Covenant continues to apply'.

200 As will be explored in Chapter 9, this is also a reason to distinguish between two paradigms during armed conflict: those of 'active hostilities', and those of 'security operations'. See Daragh Murray and others, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford University Press 2016).

201 Todeschini (n 174).

202 *General Comment No. 36* (n 41) [64].

203 Ibid [27].

204 Ibid [27]. Emphasis FT. To the same effect, see *General Comment No. 31* (n 47) [8].

relevant international standards'.[205] One interpretation of the difference in wording between 'potentially unlawful deprivations of life' and 'suspected violations of article 6', is that the Committee intends for a different scope of application of the duty to investigate during armed conflicts. After all, 'unlawful deprivations of life' is a broad term which encompasses also deprivations perpetrated by private individuals. Meanwhile, 'violations of article 6' is a more legally circumscribed phrase, which indicates a violation of the ICCPR must have taken place – and it is *only States Parties* who are formally bound to the Covenant. Thus, the Committee arguably formulated a more flexible scope of States' duty to investigate during armed conflict, which may exclude deprivations of life perpetrated by armed groups. In support, the Committee moreover refers to the Minnesota Protocol, which emphasises the practical difficulties with respect to armed conflict investigations:[206]

> 'Certain situations, such as armed conflict, may pose practical challenges for the application of some aspects of the Protocol's guidance. This is particularly the case with regard to the obligation on a State, as opposed to another actor, to investigate deaths linked to armed conflict when they occur on territory the State does not control.'[207]

Whether the Committee indeed intends to provide for a difference in the scope of application of the duty to investigate third party violations outside and during armed conflict, will need to be clarified in future case-law,[208] of which there is to date none on this particular issue. For now, however, it is submitted that insofar as the duty to investigate abuses committed by NSAG's might cause normative tension with IHL, the HRC leaves room for flexible interpretation.

6.4.3 Investigative standards

When it comes to the investigative standards, the HRC as yet has not given much guidance on any difference in application during armed conflict. The interpretive use it makes of IHL will moreover likely not amount to much, because as was seen previously in this study, IHL's rules on how investigations must be conducted do not provide much concrete and specific guidance.

As a starting point for *how* States must conduct investigations during armed conflict, we must first of all recall that the duty to investigate is a *due diligence* obligation. If the exigencies of the armed conflict situation therefore preclude the State from uncovering all facts, or from for instance carrying out an

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205 *General Comment No. 36* (n 41) [64]. Emphasis FT.

206 Ibid, fn 270.

207 *Minnesota Protocol* (n 136) [20].

208 Because the Committee moreover does not make an explicit distinction between IACs and NIACs in its General Comment, there is still some scope to argue that during NIACs, the general rule of IHRL applies, but this does not seem likely.

autopsy or hearing all witnesses, this does not necessarily violate the duty to investigate. So long as the State does what it can, and therefore complies with the obligation of means, the fact that it cannot achieve all investigative aims may be accepted. This, of course, depends on a contextual assessment, where high intensity conduct of hostilities will likely preclude effective investigations on the ground to a much larger extent, than for instance an incident during peaceful occupation. This also flows from the Minnesota Protocol, which according to the HRC, must guide the conduct of investigations.[209] The level of control exercised by the State, in other words, will likely play an important role in this context.

Generally, we may therefore expect a somewhat flexible, contextual application of investigative standards during armed conflict, if the situation calls for such. Thus far, not many cases have reached the HRC where it had to consider investigations into conflict-related violations. Even when it did, it did not often provide much guidance as to the precise investigative standards applicable during armed conflict. Let us for example take a look at the case of *Sarma v Sri Lanka*, which concerned the enforced disappearance of an alleged member of the Tamil Tigers.[210] There, after finding that Sri Lanka had violated the rights to liberty and security, and the freedom from TCIDT, it ordered the State to conduct a 'thorough and effective investigation' by way of remedy.[211] What this entails, however, is not fleshed out further. In the case of *Bautista de Arellana*, also concerning forced disappearance of alleged members of an NSAG, the HRC found that administrative or disciplinary measures could not suffice as punishment, and that criminal trials had to be expedited.[212] In concluding observations concerning drone strikes by the US, it found the US had to '[c]onduct independent, impartial, prompt and effective investigations of allegations of violations of the right to life and bring to justice those responsible'.[213] We may therefore conclude that the main investigative standards apply equally during armed conflict, and that the duty to follow-up investigations by criminal prosecutions and punishment continues to apply. No further indications of precise investigative measures, however, are provided.

One standard where the HRC has provided more guidance, is on the criterion of *transparency*. This standard, according to the HRC, also applies in contexts of armed conflict. Because this is highly relevant, and moreover goes beyond what the regional human rights courts have held, I quote the Committee here in full:

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209 *Minnesota Protocol* (n 136) [20], which stipulates that 'In the context of armed conflict, the general [investigative principles] must, however, be considered in light of both the circumstances and the underlying principles governing international humanitarian law (IHL)'.

210 *Sarma v Sri Lanka* (n 112); van den Herik and Duffy (n 160) 383.

211 *Sarma v Sri Lanka* (n 112) [11].

212 *Bautista de Arellana v Colombia* (n 74) [8.2] and [8.6].

213 *Concluding observations concerning the United States of America* (n 121) [9].

> 'States parties should, in general, *disclose* the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered.'[214]

Transparency criteria therefore clearly permeate into the applicable law during armed conflict, military operations, and targeting exercises – as the Committee also found in concluding observations with respect to the US.[215] In those observations, the Committee notably found that the US ought to do so 'subject to operational security'.[216] Disclosing targeting criteria and the processes involved in identifying military targets, is certainly not common practice. This may be the reason that the HRC prefaces this list of requirements, by stating States *should* do so. This has been interpreted to mean the HRC means to develop the law here, and encourages good practice, rather than set a hard new standard.[217] Nonetheless, the findings are very interesting indeed. The HRC even goes as far as formulating a subsidiarity criterion, which asks States to show whether they have considered less harmful alternatives. Whereas it does not find explicitly States must carry out a subsidiarity test to decide whether lethal force may be used during armed conflict, this does present a first indication the Committee might be moving in this direction.[218]

All in all, the HRC's approach to investigations during armed conflict largely builds on its approach in peacetime situations. Whereas the applicability and standards of the duty to investigate can be interpreted contextually and in light of IHL, the core would appear to remain firmly in place. This means that the duty to investigate continues, also in armed conflict, to fulfil its role in ensuring Covenant rights. It can moreover be a key instrument in providing an effective remedy to victims of war. It must be noted, however, that there is a limited amount of case-law on this issue.

7 CONCLUSION

214 *General Comment No. 36* (n 41) [64], emphasis FT.
215 *Concluding observations concerning the United States of America* (n 121) [9].
216 Ibid.
217 Joseph (n 116).
218 This links up with 'capture and kill' debates, see e.g. Ryan Goodman, 'The Power to Kill or Capture Enemy Combatants' (2013) 24 European Journal of International Law 819; Michael N Schmitt, 'Wound, Capture, or Kill: A Reply to Ryan Goodman's "The Power to Kill or Capture Enemy Combatants"' (2013) 24 European Journal of International Law 855; Ryan Goodman, 'The Power to Kill or Capture Enemy Combatants: A Rejoinder to Michael N. Schmitt' (2013) 24 European Journal of International Law 863.

This Chapter showed how the duty to investigate is a crucial element of the protection afforded by the ICCPR. It embodies the 'sword-function' of human rights,[219] similar to the Genocide, Torture, and Disappearance Conventions, even though there are no explicit investigative obligations to be found in the ICCPR's provisions. The Human Rights Committee has developed the duty to investigate as a procedural layer of protection, which serves to *ensure* rights, and which provides victims and their next of kin with an effective remedy.

It was further shown that the duty to investigate primarily follows potential violations of the right to life, the freedom from torture, cruel, inhuman and degrading treatment, and forced disappearances. Nonetheless, there are some indications that the HRC views the duty to investigate as more broadly applicable and necessary for ensuring *all* rights. If a human rights abuse has taken place, it is the State within whose jurisdiction this happened, who must investigate. Thus, they must investigate not only abuses by their own agents, but also those committed by other actors. They can even be obliged to cooperate in the investigation of human rights violations outside of their jurisdiction, by other States or international investigation mechanisms.

When it comes to *how* States must conduct their investigations, it was shown that the obligation is one of due diligence. Thus, it is ultimately an obligation of means, not of result. Nonetheless, the HRC has fleshed out what this obligation entails, by formulating eight procedural standards which investigations must meet. Those are that an investigation must be: (i) launched of the State's own accord (*ex officio*); (ii) initiated promptly; and that it must furthermore be (iii) thorough, effective, and credible; (iv) independent and (v) impartial; (vi) sufficiently involve the victims or their next of kin; and further be (vii) transparent, and (viii) where appropriate followed-up by criminal accountability processes. Together, these investigative standards safeguard that States genuinely do what they can to unearth the truth of what happened, hold to account those responsible, and change their practices if relevant. Further, it ensures that victims, and society at large, are sufficiently involved, and able to ascertain whether the investigations are carried out as they should be.

When ICCPR rights are potentially violated during armed conflict, this equally requires States to investigate. There is some scope here for a contextual approach which takes account of the context of armed conflict, and which interprets the ICCPR in light of applicable IHL, as well as other rules of international law. For cases with a direct nexus to the conflict, the scope of application of the duty to investigate may be adjusted somewhat, so that investigations into IHL-compliant uses of force are not necessary. This does not however, in

219 Tulkens (n 20); Krešimir Kamber, *Prosecuting Human Rights Offences. Rethinking the Sword Function of Human Rights Law* (Brill 2017); Huneeus (n 27); Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights – Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing 2020).

the view of the Committee, apply to aggressor States. According to the HRC, they cannot profit from any degree of leniency under the right to life, and in fact, any use of force resulting in loss of life will constitute a violation of the right to life if it is in violation of the *ius ad bellum*.

When it comes to *how* investigations must be conducted, there simply is not much guidance in the case-law. The HRC has formulated a number of guiding principles in General Comments, and there generally appears to be some scope for a flexible and contextual application of investigative requirements, in light of the Minnesota Protocol. How this will be applied when or if more cases reach the Committee, must be awaited. A point on which the Committee has provided more guidance, is on the standard of transparency. There, the Committee appears to push the development of the law, in setting new standards for openness in the conduct of military operations.

The following Chapters explore to what extent the Inter-American and European human rights systems have developed investigative requirements, both in and outside of armed conflict.