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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6 The duty to investigate under the inter-American system of human rights protection

1 INTRODUCTION

This Chapter moves from the global level, to the regional. Having seen how the duty to investigate is conceptualised and applied under the ICCPR, the focus now shifts to the Inter-American system of human rights protection. As will be shown, the American Convention on Human Rights, and the interpretation thereof by the Inter-American Court of, and Commission on, Human Rights (IACtHR or Court, and IACmHR or Commission, respectively), provide a rich source for investigative obligations, also during armed conflict.

Like the ICCPR, the ACHR does not contain any express obligation to investigate. Yet, the Inter-American system is a front-runner in the context of investigative obligations. From its very first contentious judgment in *Velásquez Rodríguez v Honduras*, the Inter-American Court has interpreted the ACHR to include a duty to investigate violations of the Convention.[1] Moreover, it has held that such investigations must be followed-up by criminal prosecutions, trials and punishment where appropriate.[2] Since this first judgment, the Court has developed a rich jurisprudence, of which the majority pertains to the duty to investigate.[3] This seems to have ignited a trend in international practice. Beyond the Human Rights Committee, discussed in the previous Chapter, the European and African human rights systems have also followed in the IACtHR's footsteps.[4]

What has been a truly unique feature of the Inter-American system, is the way the Court supervises its judgments. The Court not only orders States to conduct effective investigations as part of its reparations orders, it moreover

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

2 Ibid.

3 Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford University Press 2011) 648–649.

4 The African Commission in *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, ACmHPR 1995, no. 74/92; *Zimbabwe NGO Human Rights Forum v Zimbabwe*, ACmHPR 2006, no. 245/02 [153]. The European Court for the first time in *McCann and Others v the United Kingdom*, ECtHR 27 September 1995, Appl No 18984/91 [161]. Further, see Chapter 7.

oversees these investigations as they unfold.[5] As will be shown, what drives the Inter-American Court in this respect, is the aim of preventing impunity. This has put a strong emphasis on criminal law measures to remedy violations of the Convention, and the jurisprudence therefore almost invariably refers to a duty to *investigate, prosecute, and punish*. Finally, the prevalence of armed conflict on the American continent, and the serious human rights violations committed during these conflicts, have impacted the direction of the IACtHR's case-law. All these elements, as will be seen in this Chapter, have determined how the duty to investigate is shaped in the Inter-American human rights system.

In terms of the research question, this Chapter seeks to answer *whether* States are obliged to investigate human rights violations under the ACHR, and if so, what the *scope of application* and *contents* of that obligation are. In particular, this question is examined for situations to which IHL also applies, in other words, those of armed conflict and occupation.

Section 2 of this Chapter starts out by explaining the context of the Inter-American system, providing the backdrop for the Court's case-law and informing the following discussion on its interpretation of what human rights entail, and how compliance therewith ought to be supervised. Further, it will be briefly explained how the armed conflicts that engulfed the American continent for a major part of the second half of the 20th Century have shaped the Court's case-law. Section 3 subsequently explores the foundations and aims of the duty to investigate, and sets out how the Court has justified reading investigative obligations into the ACHR. The precise scope of application of investigative obligations is subsequently addressed (§4), before moving on to the standards which guide investigations (§5). Finally, section 6 addresses the specific issue of armed conflict, and assesses whether the loss of control and the applicability of IHL alter in any way the application of the duty to investigate.

2 The Inter-American context

2.1 Endemic human rights abuses and the dawn of the fight against impunity

As is well-known, the development of a branch of international law concerned with the protection of human rights, primarily started after the events of World War II. The atrocities perpetrated by the Axis-powers provided the backdrop,

5 Alexandra Huneeus, 'International Criminal Law By Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 The American Journal of International Law 1, 11. Further, see below.

and impetus, for the international protection of individuals against the State. In the Americas, the international protection of human rights also took root by the end of the 1940s, with the establishment of the Organization of American States (OAS) in 1948,[6] and the adoption of the American Declaration of the Rights and Duties of Man in the same year,[7] preceding even the Universal Declaration by a few months.[8]

In spite of these legal developments, early practice proved much less favourable towards human rights. It was against the background of the most serious human rights atrocities by dictatorial regimes, that the Inter-American Commission on Human Rights started its work in 1959, supervising the OAS Charter and the American Declaration, and that the American Convention on Human Rights and the Inter-American Court of Human Rights first came into being some twenty years later. In fact, State-led human rights atrocities were endemic, and States even cooperated internationally to do so. A powerful illustration is 'Operation Condor',[9] a textbook example of State terror in which a number of States cooperated pursuant to a common 'national security doctrine', and in which 'State security agencies were let loose against the people at a transborder level in a coordinated manner by (…) dictatorial Governments' in order to combat 'subversive elements' within their societies.[10] Unsurprisingly then, the first contentious case to be handed down by the Court dealt with reigning impunity for an enforced disappearance, and the duty to investigate, prosecute and punish those responsible.[11] The *Velásquez Rodríguez v Honduras* case turned out to be the first of many on the subject of State-sponsored or State-led abuses and the lack of adequate investigations and the corresponding impunity, and it has proved a primary pillar within the Inter-American case-law.

The context of human rights abuses and the complete lack of State action to hold those responsible to account, has proved to be decisive in shaping the Court's case-law. The Court has taken it on itself to exercise what Alexandra

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6 Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 1609 UNTS 119 (hereinafter: OAS Charter); see in particular art 3 under l) of the OAS Charter.

7 American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992).

8 Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd edn, Cambridge University Press 2016) 263. Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

9 Similarly, see Hanna Bosdriesz, *Furthering the Fight against Impunity in Latin America – The Contributions of the Inter-American Court of Human Rights to Domestic Accountability Processes* (dissertation Leiden, Meijers Instituut 2019) 43–6; Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (Oxford University Press 2011).

10 See e.g. *Goiburú et al. v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 153 (22 September 2006) [61]-[62].

11 *Velásquez Rodríguez v Honduras* (n 1).

Huneeus has dubbed a 'quasi-criminal jurisdiction'[12] in order to end the impunity that has been endemic in the Americas both during and following the reign of dictatorial regimes, often in the context of the various past and present armed conflicts that have engulfed the continent. There is therefore also a clear transitional justice element to the Court's work, insofar as it assists States and societies in, or forces them to, acknowledge, make public and deal with their past.[13] In this context it has also had regard to the 'right to truth', for both next of kin of victims, and societies as a whole.[14] Moreover, the Court has repeatedly emphasised the importance of administering justice and ending impunity – which it defines as 'the overall lack of investigation, arrest, prosecution and conviction of those responsible for violations of the rights protected by the American Convention'.[15] Impunity 'promotes the chronic repetition of the human rights violations and the total defenselessness of the victims and their next of kin',[16] which is why the Inter-American system devotes such efforts to preventing it.

The context of rampant impunity in the Americas has led the Court to introduce an obligation for States not merely to respect the rights enshrined in the Convention, but also to investigate, prosecute and punish violations thereof. Crucially, many cases concerning the duty to investigate have sprung from States' unwillingness to investigate and prosecute violations, or their active attempts to hinder such proceedings through amnesties, prescriptions, and other means.[17] Summarising this position perfectly is the Court's consideration in the case of the *Massacres of El Mozote and Nearby Places v El Salvador*, concerning El Salvador's 'scorched earth' tactics in fighting its civil

12 Huneeus (n 5). Also discussing this subject, see e.g. Brian D Tittemore, 'Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes under International Law' (2006) 12 Southwestern Journal of Law & Trade in the Americas 429.

13 James A Sweeney, 'The Elusive Right To Truth in Transitional Human Rights Jurisprudence' (2018) 67 International and Comparative Law Quarterly 353; The Due Process of Law Foundation (ed), *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America* (Washington, DC?: Due Process of Law Foundation 2007).

14 The IACmHR did so in its *Annual Report of the Inter-American Commission on Human Rights 1985-1986*, OEA/Ser.L/V/II.68 doc. 8 rev. 1 [192]-[193], accessible at www.cidh.oas.org/annualrep/85.86eng/toc.htm. The Court held similarly in e.g. *Myrna Mack Chang v Guatemala* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 101 (25 November 2003) [274].

15 *Mapiripán Massacre v Colombia* (Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No 134 (15 September 2005) [237]; *Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 124 (15 June 2005) [203]; *the Serrano Cruz Sisters v El Salvador* (Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No 120 (1 March 2005) [170]; *Gómez Paquiyauri Brothers v Peru* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 110 (8 July 2004) [148].

16 Ibid. See also, formulated slightly differently, *Myrna Mack Chang v Guatemala* (n 14) [156]; Burgorgue-Larsen and Úbeda de Torres (n 3) 347.

17 See Tittemore (n 12).

war. This entailed targeting armed groups' life-lines: the civilian population which supported and fed them. In brief, it meant murdering civilians, destroying all their means of subsistence, and forcibly displacing them. The Court held

> 'the obligation to investigate, as a fundamental and conditioning element for the protection of certain violated rights, acquires a particular and determining importance and intensity in view of the severity of the crimes committed and the nature of the rights violated, as in cases of grave human rights violations that occur as part of a systematic pattern or practice applied or tolerated by the State or in contexts of massive, systematic or generalized attacks on any sector of the population, because the urgent need to prevent the repetition of such events depends, to a great extent, on avoiding their impunity and meeting the expectations of the victims and society as a whole to know the truth about what happened. The elimination of impunity, by all legal means available, is fundamental for the eradication of extrajudicial executions, torture and other grave human rights violations.'[18]

Thus, the duty to investigate, prosecute, and punish, takes up a central role in preventing human rights abuses, in remedying them, and in achieving justice. States must carry out this obligation, under the supervision of the Court. Bringing to light the facts, and establishing the criminal responsibility of perpetrators, must be done at the national level.[19] At the same time, the severity of the human rights abuses, their widespread nature, and the high level involvement of States therein, have led the Court to develop strong oversight over such processes. Its orders for reparations are extensive, include the duty to investigate (further), and the Court monitors the execution of its judgments.[20] The Court therefore does not shy away from ordering States to conduct investigations or reopen criminal proceedings,[21] and to supervise the way State authorities give effect to these judgments.

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18 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 252 (25 October 2012) [244], references omitted.

19 *Caesar v Trinidad and Tobago* (Merits, Reparations, and Costs), Inter-American Court of Human Rights Series C No 123 (11 March 2005) [81], and already in *Velásquez Rodríguez v Honduras* (n 1) [134].

20 See e.g. Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press 2013) 299–334; Burgorgue-Larsen and Úbeda de Torres (n 3) 171–190.

21 See e.g. *Almonacid Arellano v Chile* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 154 (26 September 2006) [154]; *Moiwana Community v Suriname* (n 15) [207]; and for the first time in *El Amparo v Venezuela* (Reparations and Costs) Inter-American Court of Human Rights Series C No 28 (14 September 1996) [64(4)-(5)]. See also Huneeus (n 5) 8.

2.2 The prevalence of civil wars and the interaction with international humanitarian law

Another, related, feature of the context on the American continent, has been the prevalence of civil wars, or non-international armed conflicts (NIACs). A number of States have struggled, and still struggle, with conflicts with non-State armed groups, paramilitary groups and organised criminal groups in a context which goes well beyond mere 'internal disturbances'. They amount to armed conflicts, which give rise to application of IHL.[22] These struggles and their aftermath have gone hand in hand with new human rights abuses, and have led to many cases before the Commission and Court – so much so, that they have to an extent shaped the case-law of these institutions. This has arguably been the reason why the Inter-American institutions frequently reference IHL, and why the Inter-American treaty bodies have proved much more open to taking rules of IHL into account when interpreting and applying the ACHR when compared to, for instance, the European Court of Human Rights.[23] In the words of former President of the Inter-American Court Cecilia Medina Quiroga, '[f]or the Court, the problem was not, for example, the length of the trials before the national court, as was frequently the case in some European States, but the absolute lack of investigation that amounted to gross human rights violations or the connivance between the authors of the violations, the rulers of the country and non-independent judiciaries'.[24]

The conflicts in Colombia, Peru, and Guatemala lie at the basis of many cases before the Court.[25] The Commission has had regard to IHL in other contexts as well, for instance as early as the end of the 1970s in its country reports.[26] Because of the high prevalence of conflict-related cases, the law

22 See Common Articles 2 and 3 to the 1949 Geneva Conventions; see also Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, '"War" in the Jurisprudence of the Inter-American Court of Human Rights' (2011) 33 Human Rights Quarterly 148, 151–156.

23 Larissa van den Herik and Helen Duffy, 'Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches' in Carla Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill Nijhoff 2017).

24 Cecilia Medina Quiroga, 'The Inter-American Court of Human Rights 35 Years' (2015) 33 Netherlands Quarterly of Human Rights 118. See also Huneeus (n 5) 5: '[w]hereas the ECHR came of age overseeing a group of well-functioning democracies committed to the rule of law, the Inter-American Court was, from its first contentious case, confronted with mass, state-sponsored violations of fundamental rights'.

25 See Burgorgue-Larsen and Úbeda de Torres (n 22) 153, footnote 18. These are not the only States who have been engulfed in non-international armed conflict, however, as for instance El Salvador was from 1980-1991; see *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18).

26 IACHR 'Chapter II, Right to Life', *Report on the Situation of Human Rights in Nicaragua,* 17 November 1978 and IACHR '*Report on the Situation of Human Rights in Argentina*, 11 April 1980 (both accessible through: www.cidh.oas.org); see also Christina M Cerna, 'The History of the Inter-American System's Jurisprudence as Regards Situations of Armed Conflict'

of armed conflict and the role for human rights during conflicts have taken up a prominent role in the Inter-American case-law. The major role of State authorities in the atrocities committed and their lack of action both in preventing and repressing such conduct, has led the Court to introduce duties of investigation and punishment in the Inter-American human rights system. This extends equally to situations of armed conflict, to which IHL applies. The fight against impunity continues, also with regard to human rights abuses committed during armed conflict. As is explored further below, the Inter-American Court has taken up a frontrunner role in striking down amnesties for abuses committed during armed conflict, and is therefore adamant that impunity is never acceptable.

The above context is crucial to understanding how and why the Inter-American institutions have shaped their interpretation of the American Convention on Human Rights. Both the context of impunity and that of armed conflict will feature again on a number of occasions below, as will the Court's active role in ordering specific reparation measures and its supervision thereof.

3 LEGAL BASIS, RATIONALE AND CONSEQUENCES OF THE DUTY TO INVESTIGATE

3.1 Introduction

Against the above background, the Chapter now gradually zooms in further on the specifics of investigative obligations under the Inter-American human rights system. The present section explores the legal basis, underlying rationale, and legal consequences of the duty to investigate, before the subsequent sections set out in detail the scope of application and contents of the obligation itself.

Despite its prominent role in the Inter-American human rights system, the duty to investigate, prosecute and punish does not have an explicit basis in the ACHR, nor in the American Declaration, or the OAS Charter. As was mentioned above, it was the Inter-American treaty bodies who have introduced the duty to the system, even finding it 'evident' that such a duty exists.[27] This section explores further *how* the Commission and Court have incorporated duties of investigation in the system, as well as the rationales for reading investigative obligations into the ACHR – which as will be shown is closely related to the context of impunity. Finally, section 3.4 addresses the legal status

(2011) 2 Journal of International Humanitarian Legal Studies 3; van den Herik and Duffy (n 23).

27 See e.g. *Gelman v Uruguay* (Merits and Reparations) Inter-American Court of Human Rights Series C No 221 (24 February 2011) [188].

of the duty within the normative hierarchy of the system, and the consequences thereof for domestic practice and legislation in contravention with the duty to investigate – in particular instruments perceived to perpetuate impunity, such as amnesty laws and statutes of limitations.

3.2 Legal basis for the duty to investigate under the ACHR

Because the duty to investigate is not explicitly included in the ACHR, it is all the more important to determine its precise legal basis in the Convention. The Court, throughout its history, has trodden slightly diverging paths in this regard. It has found (i) that the general duty to ensure all rights in the ACHR requires States to implement human rights, *inter alia*, through the setting up of an investigative machinery which must be put into use if a violation occurs;[28] (ii) that the individual rights of victims, notably the procedural rights to a fair trial and to judicial protection, include that a material violation is investigated; and (iii) finally that to provide effective *reparation* for a violation, States must investigate and remedy it.[29] The legal basis for the duty to investigate, is therefore plural.

Firstly, the Inter-American Court has held that the ACHR includes a duty to investigate violations right from its very first contentious case, the case of *Velásquez Rodríguez*. This case concerned an instance of enforced disappearance, against the background of a systemic practice of disappearances in Honduras. The Court held that Article 1(1)'s general obligation to 'ensure' ACHR rights, coupled with the substantive rights which are violated by a disappearance, together require States to investigate such violations. The Court concluded on this basis that the duty to ensure the rights to life, physical integrity and liberty

> 'implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate, and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.'[30]

Thus, the general obligation to implement the ACHR into the domestic legal order includes a duty to set up government in a human rights compliant way,

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28 *Santo Domingo Massacre v Colombia* (Preliminary Objections, Merits and Reparations) Inter-American Court of Human Rights Series C No 259 (30 November 2012) [189].

29 For an in-depth discussion, see Bosdriesz (n 9) 46–59.

30 *Velásquez Rodríguez v Honduras* (n 1) [166].

which in turn must include a machinery to investigate *any violation* of the ACHR. The Court emphasises two points: the duty to investigate, firstly, is a State obligation, which secondly attaches to all violations. In later case-law, the Court seems to have reconsidered both points – on the one hand limiting the scope of the duty to investigate to certain violations of the ACHR only,[31] and on the other shifting the emphasis to the procedural rights of victims, rather than merely duties for the State as such.[32]

Secondly, as Hanna Bosdriesz explains, the Court has later increasingly emphasised individuals' *right* to an investigation under the procedural rights to a fair trial (Article 8) and to an effective remedy for human rights violations (Article 25), rather than the State *duty*.[33] In *Blake v Guatemala*, this resulted in a finding that victims' next of kin have the *right* to an effective investigation, and the prosecution and punishment of perpetrators, as well as adequate compensation.[34] Thus, the individual procedural rights of victims were operationalised to include individual rights to justice, which in turn entail an investigation.[35]

How the duty to investigate as an individual procedural right relates to the general duty under Article 1(1) in conjunction with substantive rights, is not entirely clear from the Court's case-law. Whereas in certain cases it appeared to consider the duty to investigate under *both* the positive obligation to effectively ensure all rights, *and* the procedural right to justice, later case-law appears to shift more and more towards the individual procedural rights. Thus, in the case of the *Mapiripán Massacre v Colombia* of 2005, the Court considered the duty to investigate both as an individual procedural right,[36] and as deriving from Article 1(1), before ultimately concluding that

> 'the victims' rights to personal liberty, to humane treatment and to life (…), are aggravated as a consequence of non-fulfillment of the duty to provide protection and of the duty to investigate the facts, as a consequence of the lack of effective judicial mechanisms to this end and to punish all those responsible for the Mapi-

31 E.g. *Goiburú v Paraguay* (n 10) [88].

32 Huneeus (n 5) 8. With regard to shifting duties into rights in the context of IHL, see also Conor McCarthy, 'Human Rights and the Laws of War under the American Convention on Human Rights' (2008) 6 European Human Rights Law Review 762, 779.

33 *Genie-Lacayo v Nicaragua* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 30 (29 January 1997). More extensively, see Bosdriesz (n 9) 55–9.

34 *Blake v Guatemala* (Merits) Inter-American Court of Human Rights Series C No 36 (24 January 1998) [96]-[97]. More extensively, see Bosdriesz (n 9) 55–9.

35 Further, see Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford University Press 2009).

36 *Mapiripán Massacre v Colombia* (n 15) [195] and [233], referencing further *Case of the Moiwana Community* (n 15) [142]; *Case of the Serrano Cruz Sisters* (Merits, Reparations and Costs) (n 15) [76], and *Case of the 19 Tradesmen* (Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No 109 (5 July 2004) [194].

> ripán Massacre. Therefore, the State has violated Articles 8(1) and 25 of the Convention, in combination with Article 1(1) of that same treaty, to the detriment of the next of kin of the victims of the instant case.'[37]

Since then, however, the dominant approach has been to consider the duty to investigate under the procedural rights alone.[38] Thus, in *Goiburú v Paraguay*, the Court found that it ought to assess the 'obligation to protect the rights to life, humane treatment and personal liberty by means of a serious, complete and effective investigation into the facts' under Articles 8 and 25, rather than under the substantive rights at issue.[39]

The most notable distinction between grounding the duty in the duty to ensure substantive rights on the one hand or the right to due process and an effective remedy on the other, is whether the investigative requirements imposed on States are *individual procedural rights* conferred on victims and their next of kin, or positive State obligations in order to render effective the protection of for instance the right to life only. Discussion on this subject is ongoing.[40] The exact legal basis for the duty to investigate can prove particularly relevant in cases where the material event giving rise to the duty to investigate, an extrajudicial killing for example, falls outside the temporal scope of application of the ACHR for the State involved.[41] As is discussed further in section 4.4, even if in such cases the killing itself is not subject to the jurisdiction of the Court, it may nevertheless assess whether the State has conducted an effective investigation into the killing. But whether it can do so from a substantive right perspective or from the perspective of a procedural right to a remedy and due process only, can make the difference between a finding of a violation of (the procedural limb of) the right to life, or the rights to fair trial and an effective remedy.[42] This distinction could prove relevant for next of kin for whom the finding of a violation of the right to life, even if in its procedural aspect only, may do more justice to the loss of their loved one, and further may prove consequential for reparation orders both regarding compensation and other forms of satisfaction.

Thirdly and finally, the Inter-American Court has also regularly ordered States to conduct investigations as a form of reparation.[43] This is a noteworthy

37 *Mapiripán Massacre v Colombia* (n 15) [241].
38 Among many other authorities, see *Santo Domingo Massacre v Colombia* (n 28) [128]-[173].
39 *Goiburú v Paraguay* (n 10) [90].
40 Burgorgue-Larsen and Úbeda de Torres (n 3) 353–354.
41 For an example, see *Blake v Guatemala* (n 34).
42 Ibid.
43 When using the IACHR Project database, the 'Investigate, Prosecute and Punish Those Responsible' reparation renders 114 judgments ordering such reparations (see https://iachr.lls.edu/advanced-search, last accessed 15 July 2021). By way of example, see for the first time in 1996 in *El Amparo v Venezuela* (n 21) [64(4)-(5)]; and e.g. *Mapiripán Massacre v Colombia* (n 15) [295]-[300], especially [298]-[299]. Huneeus (n 5) 5.

feature that sets the system apart from for instance the European system, as will be seen in Chapter 7. In the Inter-American system, the Court does not shy away from setting out in great detail what type of reparation is required,[44] for current purposes most importantly to conduct investigations, and it supervises the execution of these reparation orders regularly. In fact, it does so even whilst criminal investigations and proceedings in the States in question are still unfolding, assessing whether they meet Convention standards.[45]

The duty to investigate as a form of reparation for a violation is distinct from the other two considered above, because its legal basis is different. Whereas the first two are primary obligations under the Inter-American Court's interpretation of the ACHR, the obligation to provide reparation is a secondary obligation under international law which arises as a consequence to an internationally wrongful act.[46] A State who has committed an internationally wrongful act must, under international law, provide guarantees of non-repetition, and provide reparation for the breach.[47] According to the Court, such reparation must often include investigations into a breach.[48]

In sum, the Inter-American Court has grounded the duty to investigate in three separate though connected, legal bases. The duty to investigate constitutes a primary duty under the ACHR under both a combination of Article 1(1) with substantive rights, as well as under the procedural rights to a fair trial and judicial protection. Further, it forms part of the secondary obligation to provide reparations for violations of the Convention.

3.3 Rationale of the duty to investigate under the ACHR

Now that we know what the sources for the duty to investigate are, we may consider *why* investigations are required. In line with the multiplicity of

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44 For an example, see again the *Mapiripán Massacre v Colombia* case (n 15), where in [299] the Court sets out how Colombia must investigate the massacre: 'To fulfill its obligation to investigate and punish those responsible in the instant case, Colombia must: a) remove all *de facto* and *de jure* obstacles that maintain impunity; b) use all available means to expedite the investigation and the judicial proceeding; and c) provide security guarantees to the victims, investigators, witnesses, human rights advocates, court employees, public prosecutors and other participants in the judicial process, as well as former and current inhabitants of Mapiripán.'

45 See also Huneeus (n 5) 11.

46 Compare Thordis Ingadottir, 'The Role of the ICJ in the Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level' (2014) 47 Israel Law Review 285.

47 ARSIWA, arts 30 and 31.

48 *Gutiérrez-Soler v Colombia* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 132 (12 September 2005).

sources, there are also multiple rationales for the duty to investigate. We can distinguish between a collective and individual element.

On the collective level, the duty to investigate serves multiple purposes. First, there is the interest of setting up a system that is capable of effectively protecting the rights enshrined in the ACHR, which requires certain institutions and procedures – in other words the procedural layer of human rights protection.[49] The rationale is therefore to render rights effective,[50] with the argument being that the prohibition of for instance extrajudicial executions would be rendered illusory when the occurrence of such executions were left without consequences. In addition, the fight against impunity and the right to truth have collective elements to them, insofar as they aim not merely to safeguard the individual victim's rights, but also society's interest in a human rights-compliant State that is governed by the rule of law, and getting to grips with human rights violated committed in the past, even by previous regimes.[51] As the Court has stressed, *the most important element* is to clarify whether State authorities were involved in an abuse, or whether they have contributed to impunity for such an abuse.[52] This general rationale of effectuating the rights enshrined in the ACHR by implementing it, in the form of setting up an investigative machinery, is highly similar to what was concluded under IHL. There, the general duty to ensure respect for IHL equally requires States to set up a supervisory machinery which safeguards the integrity of the system.[53]

On the individual level, victims and their next of kin have a right to reparation where their rights have been violated – which when the violation was sufficiently serious implies the criminal prosecution and punishment of those responsible. Investigations in this sense are a form of reparation in

49 Malu P Beijer, *The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations* (Intersentia 2017) 55 – who calls this the 'organisational dimension of fundamental rights protection'. For a clear reasoning on this point, see *Gelman v Uruguay* (n 27) [189]. NB: in the English version, there appears to be an interpreting error insofar as art 1(1) ACHR would imply 'the *right* of the States Parties to organize all of the governmental apparatus, and in general, all of the structures through which the exercise of public power is expressed, in a way such that they are capable of legally guaranteeing the free and full exercise of human rights' [emphasis FT], as in the Spanish text the Court does not mention a *right*, but a *duty* (*el deber*). This is undoubtedly the preferred phrasing, as the right for States to organise their governmental apparatus clearly stems from their sovereignty, whereas the duty to do so in a human rights-compliant manner stems from human rights obligations under the ACHR.

50 See Burgorgue-Larsen and Úbeda de Torres (n 3) 342, referencing 'Pueblo Bello Massacre' v Colombia (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 140 (31 January 2006) [120].

51 Generally speaking, such an obligation could be said to flow from art 1(1) of the ACHR, as it requires States to 'ensure' the rights enshrined in the Convention, and therefore to take positive action. In the three-pronged perspective of 'respect, protect, fulfil', this corresponds to the duty to fulfil rights.

52 *Santo Domingo Massacre v Colombia* (n 28) [156].

53 See Chapter 3, §2.

themselves. In addition, they form part of the procedural rights to a fair trial and an effective judicial remedy for a violation of their rights. An independent and impartial investigation into serious human rights violations constitutes such an effective remedy, and thereby forms a primary – if accessory – obligation under the ACHR. For individuals to have any meaningful recourse to judicial remedies, States must investigate *ex officio* the facts of the type of cases involved, especially where State forces have been involved in the violations themselves and the State therefore holds all the information. Any effective way for individuals to address violations of their rights then necessitates investigations. Moreover, many violations require a criminal law response from the State and must be prosecuted because such criminal proceedings constitute effective remedies for victims. Thus, the individual interest in justice and a remedy equally underlies the duty to investigate.

As this short incursion into the rationales of the duty illustrates, investigations simultaneously serve prospective and retrospective purposes. Effective criminal investigations, prosecutions, and convictions are expected to have a deterrent effect. This applies both for the specific perpetrator who will not be in a position to reoffend for as long as he or she is incarcerated, as well as the general deterrent effect of knowing certain conduct will lead to punishment.[54] The retrospective aims of the duty to investigate have more to do with retribution, and individual and collective justice for the wrongs committed. The individual right to a remedy as enshrined in Article 25 provides victims with the right to a domestic procedure to obtain justice for past violations, to address human rights violations in a meaningful way and to gain reparation for such violations. Justice and reparation, in the very serious cases in question, requires more than simply the finding of a violation or monetary compensation, and necessarily implies an *ex officio* investigation by the State, which must normally be of a criminal law nature and must moreover lead to adequate punishment.

The fight against impunity combines these prospective and retrospective rationales. According to the Court, impunity is both a very strong indicator and incentive for reoffending, and effective criminal deterrence is crucial to prevent these serious and systemic abuses.[55] At the same time, eradicating impunity is a full-fledged purpose in itself insofar as it represents the quest for justice for human rights atrocities. Because as was described in section 2 human rights atrocities with State-involvement were so widespread in the Americas, the fight against impunity has naturally become a major factor in

54 Richard Carver and Lisa Handley (eds), *Does Torture Prevention Work?* (Liverpool University Press 2017).

55 *Mapiripán Massacre v Colombia* (n 15) [237], citing further case-law.

the case-law and has largely shaped the 'quasi-criminal jurisdiction' or 'sword-function of human rights'[56] as interpreted and applied by the Court.

A final way of looking at the rationales for the duty to investigate is to assess them in light of the more general aims of the Inter-American system of human rights protection. Ariel Dulitzky has categorised these aims as (i) protecting individuals, (ii) promoting awareness of the human rights situation, (iii) creating space for democratic dialogue, (iv) legitimising actors (giving a voice to otherwise disenfranchised, primarily very poor, people), and (v) building a culture of human rights.[57] Having these broader aims in mind, reading the duty to investigate into the Convention protections appears to fit well, at least within four of the five aims mentioned here. Protecting individuals, giving legitimacy to their needs and giving them a voice, and garnering awareness of the human rights situation can all be achieved through investigations. Including next of kin of victims in the investigation stages and during subsequent proceedings legitimises their interests and gives them a formal place within the legal system, whilst outlawing impunity protects them from reprisals as well as future repetition of any atrocity crimes. Similarly, investigations bringing to light how atrocities came about and who was responsible, will shine a light on the human rights situation within a particular State. All of this falls within the broader category of building a culture of human rights, because the procedural system of human rights protection that is required to effectively investigate any serious violations is an important prerequisite for a formalised culture of human rights protection. This is even more so for ending impunity, because the way impunity undermines the rule of law, putting perpetrators of atrocities beyond the reach of the law, is the opposite of a human rights culture.

The clearest example of this is the follow-up to the case of the *19 Tradesmen v Colombia*.[58] In this case, in which the victims for whom the case was named were murdered, the Court found multiple violations and ordered the investigation of these murders. When fifteen judicial officers effectuated this judgment by mounting an investigation, they themselves were murdered for doing so. The murder of the judicial officers itself later also reached the Court, in the case of *La Rochela Massacre v Colombia*.[59] As this so clearly illustrates, if judicial officers who attempt to address serious human rights violations and

56 For this terminology, characterising the human rights obligation to employ criminal law, see F Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577, 577–578, and crediting Christine van den Wyngaert for the term.

57 Ariel E Dulitzky, 'The Inter-American Commission on Human Rights', in Due Process of Law Foundation (n 13) 130–136.

58 *Case of the 19 Tradesmen v Colombia* (n 36); see also Bosdriesz (n 9) 68–9.

59 *La Rochela Massacre v Colombia* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 163 (11 May 2007).

end impunity are themselves massacred, this is the ultimate form of perpetuating impunity and the break-down of the rule of law. If one is to 'build a human rights culture', investigating violations and preventing impunity, are therefore paramount.

3.4 Legal consequences on the international and national levels

3.4.1 Introduction

As is now abundantly clear, the fight against impunity is an overarching driving force in the Inter-American case-law, and the duty to investigate takes up a primary role in this respect. Beyond developing a powerful case-law which requires States to investigate violations of the ACHR, this has also led the Inter-American Court to assert two important legal consequences of the duty to investigate, which are as far-reaching as they are controversial. Firstly, the Court has asserted that the duty to investigate, and the right to access to justice, are norms with a *ius cogens* status. Secondly, it has held domestic law in contravention of the duty to investigate, to be *without legal effect*. Both assertions go beyond what other human rights regimes stipulate in this respect, and are therefore worth highlighting.

3.4.2 Ius cogens and the ACHR

The Inter-American Court has asserted the *ius cogens* status of many rights in the ACHR. It has found the prohibitions of torture, inhuman treatment,[60] extrajudicial executions and crimes against humanity[61] to constitute *ius cogens*, as well as the principle of equality and non-discrimination[62] and several other

60 *Fermín Ramírez v Guatemala* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 126 (20 June 2005) [117]; *Gómez Paquiyauri Brothers v Peru* (n 15) [112].

61 *Almonacid Arellano v Chile* (n 21) [99]. It also found the non-applicability of statutes of limitation for these crimes to form part of *ius cogens*, see [153].

62 Antônio Augusto Cançado Trindade, 'Enforced Disappearances of Persons as a Violation of Jus Cogens: The Contribution of the Jurisprudence of the Inter-American Court of Human Rights' (2012) 81 Nordic Journal of International Law 507, 528. See *Cantoral Benavides v Peru* (Merits), Inter-American Court of Human Rights Series C No 69 (18 August 2000), *Maritza Urrutia v Guatemala* (Merits, Reparations and Costs) Inter-American Court of Human Rights Cases Series C No 103 (27 November 2003), *Gómez Gómez Paquiyauri Brothers v Peru* (n 15), and *Tibi v Ecuador* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 114 (7 September 2004), *Juridical Condition and Rights of Undocumented Migrants* (Advisory Opinion) Inter-American Court of Human Rights Series A No 18 (17 September 2003).

rights.[63] Crucially, it has also found expressly that the duty to investigate cases of enforced disappearance, is also part of *ius cogens*.[64] In the reasoning of the Court, this likely extends also to the duty to investigate other serious abuses. It has found, for instance in the case of *the Massacres of El Mozote*, that the lack of investigation into extrajudicial executions can in and of itself violate the next of kin's right not to be treated inhumanely.[65] Because the right to be treated humanely is itself, according to the Court, of a *ius cogens* status, then a failure to investigate constitutes a breach of a *ius cogens* norm – which arguably elevates the duty to investigate itself also to a *ius cogens* level – similar to the Court's express findings in the context of disappearances.

Further, the Court has found the right to access to justice to be of a peremptory nature. In *Goiburú v Paraguay*, the Court held in the context of grave human rights violations, that:

> 'Access to justice is a peremptory norm of international law and, as such, gives rise to obligations *erga omnes* for the States to adopt all necessary measures to ensure that such violations do not remain unpunished, either by exercising their jurisdiction to apply their domestic law and international law to prosecute and, when applicable, punish those responsible, or by collaborating with other States that do so or attempt to do so.'[66]

Thus, in the Inter-American Court's view, many human rights form part of *ius cogens*, as does, in a number of cases, the right to access to justice for violations of those rights, and the duty to investigate such violations.[67] Without passing judgment on the Court's assertion of the *ius cogens* status of these

63 Ignacio Alvarez-Rio and Diana Contreras-Garduno, 'A Barren Effort? The Jurisprudence of the Inter-American Court of Human Rights on Jus Cogens' in Yves Haeck, B Burbano-Herrera and Diana Contreras-Garduno (eds), *The Realization of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwaak* (Intersentia 2013) 169; they even state the Court has identified ius cogens norms in more than ten separate rights.

64 *Goiburú v Paraguay* (n 31) [84]; *Gomes Lund et al. (Guerrilha do Araguaia) v Brazil* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 219 (24 November 2010) [137], *Gelman v Uruguay* (n 27) [183]; see also Cançado Trindade (n 62) 535.

65 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [201]; *Las Dos Erres Massacre v Guatemala* (Preliminary Objections, Merits, Reparations, and Costs), Inter-American Court of Human Rights Series C No 211 (24 November 2009) [137ff] (here in relation to enforced disappearances).

66 *Goiburú v Paraguay* (n 31) [131].

67 Some even read the case-law of the Court as recognizing the *ius cogens* status of the prohibition of crimes against humanity, and the duty to investigate and prosecute those, as well as all other grave human rights violations; see Alvarez-Rio and Contreras-Garduno (n 63) 188. As an authority they reference *La Cantuta v Peru* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 162 (29 November 2006) [157], which however pertains to enforced disappearances only.

norms,[68] we must ask ourselves, however, what the *legal consequences* of such findings are.[69]

Under international law, the *ius cogens* nature of a norm can have far-reaching consequences under the law of treaties.[70] According to the Vienna Convention on the Law of Treaties, any treaty concluded in conflict with a norm of *ius cogens*, and any treaty which conflicts with a subsequently developed norm of *ius cogens*, is automatically void.[71] Even if mitigated in the sense that only the conflicting treaty rule – if separable – and not the treaty as a whole is rendered void, this is a far-reaching consequence.[72] Thus, if the duty to investigate, prosecute, and punish certain human rights violations is of a *ius cogens* status, then any treaty rule coming into conflict therewith, is void. The consequences thereof are potentially sweeping. For instance, might it mean that general international law rules granting immunities could be rendered void, insofar as they preclude investigation, prosecution, or punishment?[73] And even within human rights law itself, if the duty to investigate, prosecute, and punish as such trumps other rules, what does this mean for those rights of the defence which bar prosecution, such as *ne bis in idem* or *nullum crimen sine lege*?

The Inter-American Court has not taken such issues to the extreme. It has not declared void conflicting rules of international law. As is shown in section 6, it has rather showcased an open approach towards IHL, and international law more generally, and has readily interpreted the ACHR in light of such norms. Insofar as rights of the defence are concerned, however, the Court *has* given precedence to the duty to investigate, over bars to prosecution which flow from the *nullum crimen sine lege* or *ne bis in idem* principles.[74] As

68 For 'assertion' as a method of finding norms of customary international law, see Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 European Journal of International Law 417.

69 Among many others, Alvarez-Rio and Contreras-Garduno (n 63); Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 European Journal of International Law 491; Ulf Linderfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2007) 18 European Journal of International Law 853.

70 Consequences under the law of State responsibility are left aside here.

71 VCLT, arts 53 and 64.

72 ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*, finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682 (2006), p. 181-93; Linderfalk (n 69) 854.

73 *Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening)*, Judgment (3 February 2012), *I.C.J. Reports* 2012, p. 99 [93].

74 '[T]he State may not apply amnesty laws or argue prescription, non-retroactivity of the criminal law, *res judicata*, the principle of *ne bis in idem*, or any other similar mechanism that excludes responsibility, in order to exempt itself from [the duty to investigate, prosecute and punish]'; *Manuel Cepeda Vargas v Colombia* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 213 (26 May 2010) [216(d)].

is explored further in section 5, the Court requires States to remove all *de facto* and *de jure* obstacles to investigation and prosecution – including these rights of the defence, which are also protected by the ACHR. What the Court has *not* done, however, is rely on the *ius cogens* status of the duty to investigate, in this respect. It has not declared *void* the principles of *nullum crimen* and *ne bis in idem*, because they conflict with the peremptory norm requiring investigation and prosecution. That likely also never was the Court's intention in declaring the duty to investigate to be of a peremptory nature. Moreover, it would lead to manifestly unreasonable outcomes, because in light of the 'indivisibility, interdependence and interrelatedness' of human rights,[75] it would likely mean that it would need to declare void the ACHR as a whole. After all, under the VCLT, a treaty coming into conflict with a *ius cogens* norm, is void. It is a good thing that the Court does not take the *ius cogens* status it asserts for the duty to investigate, to such extremes. But it does call into question the purpose of promulgating the peremptory nature of the duty to investigate. For now, it appears to be of symbolic value, more so than strictly changing the legal status of the norm.

3.4.3 *Legal effects within the domestic legal order*

A distinct but related issue pertains to the legal consequences of the duty to investigate within the Organization of American States' domestic legal regimes. Beyond imposing an obligation to criminalise conduct and to effectuate that legislation through criminal investigations, prosecutions and punishment, the question is how to deal with domestic legislation or practice that conflicts with the obligation. Under international law, rules of domestic law can never justify non-compliance with rules of international law.[76] This, the Inter-American

75 E.g. *Vienna Declaration and Programme of Action*, adopted at the World Conference on Human Rights on 25 June 1993, endorsed by UNGA Res. 20 December 1993, A/RES/48/121 [I.5]; Proclamation of Tehran, Tehran 22 April to 13 May 1968, (13 May 1968), *Final Act of the International conference on Human Rights*, A/CONF.32/41 [13]. For affirmations in scholarship, see Titia Loenen, 'Introduction to 50 Years ICCPR and ICESCR: Impact, Interplay and the Way Forward' (2016) 41 Nederlands Tijdschrift voor de Mensenrechten | NJCM-Bulletin 451, 451; Cees Flinterman, 'Freedom, Justice and Peace in the World: The Role of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights' (2016) 41 Nederlands Tijdschrift voor de Mensenrechten | NJCM-Bulletin 452, 455; Nico J Schrijver, 'Fifty Years International Human Rights Covenants. Improving the Global Protection of Human Rights by Bridging the Gap between the Two Covenants' (2016) 41 Nederlands Tijdschrift voor de Mensenrechten | NJCM-Bulletin 457, 460; Carla Edelenbos, 'Reflections on Fifty Years of ICCPR and ICESCR: A View from Geneva' (2016) 41 Nederlands Tijdschrift voor de Mensenrechten | NJCM-Bulletin 465, 465.

76 VCLT, art 27.

Court has confirmed, is equally the case for obligations under the ACHR.[77] The Court, however, has gone one step further.

As is returned to below, when discussing the standards which investigations must meet,[78] the Court requires States to remove all domestic obstacles to investigation, prosecution, and punishment. For instance, in in the case of the *Mapiripán Massacre* it found that

> 'no domestic legal provision (…) can impede compliance by a State with the obligation to investigate and punish those responsible for human rights violations. Specifically, the following are unacceptable: amnesty provisions, rules regarding extinguishment and establishment of exclusions of liability that seek to impede investigation and punishment of those responsible for grave human rights violations.'[79]

Domestic law may not impede the duty to investigate. But the Court goes further. It has held that such measures – amnesties, prescriptions, the defence of *ne bis in idem*, *nullum crimen*, or *res judicata – lack legal effect*.[80] This means that the American Convention directly invalidates domestic law when it contravenes the Convention. In the words of former president of the Court, Antônio Augusto Cançado Trindade, the effect of the duty to investigate is to 'invalidat[e] every and any legislative, administrative or judicial measure that (…) attempts to authorize or tolerate torture or any other grave breach of human rights, in the perpetration of atrocities such as enforced disappearance of persons and summary or extra-legal executions'.[81]

The Court therefore, in advancing and facilitating the fight against impunity counters States' strategies aimed at avoiding investigations, and in this process even does not shy away from limiting due process rights of the accused. In

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77 *Vargas-Areco v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 155 (26 September 2006) [81], referencing *Case of the Ituango Massacres v Colombia* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 148 (1 July 2006) [289], [299], [402]; *Case of Baldeón-García v Peru* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 147 (6 April 2006) [166], [195], [201]; and *Case of Blanco-Romero et al. v Venezuela* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 138 (28 November 2005) [98]; *Case of Montero-Aranguren et al. (Detention Center of Catia) v Venezuela* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 150 (5 July 2006) [137]; and *Case of the Pueblo Bello Massacre v Colombia*, (n 50) [171].

78 *Infra*, §5.

79 *Mapiripán Massacre v Colombia* (n 15) [304].

80 *Barrios Altos v Peru* (Merits) Inter-American Court of Human Rights Series C No 75 (14 March 2001) [44]; *Almonacid Arellano v Chile* (n 21) [154]; see also Burgorgue-Larsen and Úbeda de Torres (n 3) 356; Ezequiel Malarino, 'Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights' (2012) 12 International Criminal Law Review 665.

81 Cançado Trindade (n 62) 532–533.

terms of the 'sword' and 'shield' functions of human rights law, indicating the use of human rights both to advance criminal prosecutions for violations and as procedural rights of the accused against the State's criminal apparatus, the sword therefore appears to overpower the shield in this respect.[82] A very important aspect of the Court's case-law, is its insistence that domestic law contravening these findings *lacks legal effect* and may not be applied to frustrate criminal accountability, further showcasing the weight the fight against impunity is accorded in the Inter-American system.

4 Scope of application of the duty to investigate

4.1 Introduction

Having established the legal foundations, rationale and status of the duty to investigate, and the context in which it came into being, the focus now turns to a more detailed analysis of when States must in fact conduct investigations. Below, the various modes of application of the duty to investigate are explored with specific attention for its personal, material, temporal, and geographic scope of application. The section thereby aims to give a comprehensive overview of the applicability of the duty to investigate, before the next section turns to the substance of the obligation (§5).

4.2 The material scope of application and the investigative trigger

A first point of interest is violation of which rights brings with it investigative obligations, the material scope of application of the duty. Closely related is the question what *information* must be available to the State in order to trigger the duty to investigate. Is any allegation sufficient, or may States require individuals to substantiate their claim?

4.2.1 Distinguishing between grave violations and other violations

Let us therefore firstly explore what rights include a duty to investigate when violated. The Court's jurisprudence has often been observed to be somewhat

82 Tulkens (n 56). For critiques on this aspect of the Court's case-law, see Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 Cornell Law Review 1069; Karen Engle, 'A Genealogy of the Criminal Turn in Human Rights' in Karen L Engle, Zinaida Miller and Dennis Davis (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press 2016); Fernando Felipe Basch, 'The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers' (2007) 23 American University International Law Review 195; Tittemore (n 12).

ambiguous in this respect.[83] On the one hand, it has right from the start in *Velásquez Rodríguez* stipulated that 'States must prevent, investigate, and punish *any* violation of the rights recognized by the Convention',[84] and that they must investigate 'every situation involving a violation of the rights protected by the Convention'.[85] On the other hand, its practice in respect of the duty to investigate, prosecute, and punish has proven to be much more limited.[86] This has led a number of scholars to conclude that the duty to investigate, prosecute, and punish applies to *grave* violations only,[87] based on such pronouncements as the Court made in *Goiburú*. There, the Court ruled that

> 'in cases of extrajudicial executions, forced disappearances *and other grave violations*, the Court has considered that the realization of a prompt, serious, impartial and effective investigation *ex officio*, is a fundamental element and a condition for the protection *of certain rights* that are affected or annulled by these situations, such as the right to personal liberty, humane treatment and life.'[88]

Thus, even if the Court does not as such formulate an exhaustive list of rights which require investigations if they are alleged to be violated, it does appear to limit it beyond just any violation. Only violations of *certain rights*,[89] *grave violations*, in that view require an investigation. The Court's case-law on investigations moreover pertains almost exclusively to three particularly serious violations – 'torture, extrajudicial, summary or arbitrary execution and forced disappearance'.[90] This would seem to corroborate the conclusion that the Court has departed from its early findings in *Velásquez Rodríguez*, and now rather supports a more narrow reading of the material scope of application of the duty to investigate. Yet, it is submitted that a different reading may be more persuasive.

Despite the emphasis in the Court's case-law on investigations into grave violations, it has not departed from its finding that *any* violation must be investigated. For instance, in the 2012 case of *Santo Domingo*, the Court echoed its early findings in *Velásquez Rodríguez*, finding that States' positive obligation to guarantee rights under Article 1(1)

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83 For an overarching analysis, see Bosdriesz (n 9) 71–7.

84 *Velásquez Rodríguez v Honduras* (n 1) [166], emphasis FT.

85 Ibid [176].

86 Bosdriesz (n 9) 71–7.

87 See further Christian Tomuschat, 'Reparation for Victims of Grave Human Rights Violations' (2002) 10 Tulane Journal of International and Comparative Law 157, 166; Giovanna Maria Frisso, 'The Duty to Investigate Violations of the Right to Life in Armed Conflicts in the Jurisprudence of the Inter-American Court of Human Rights' (2018) 51 Israel Law Review 169, 173.

88 *Goiburú v Paraguay* (n 10) [88], emphasis be me.

89 For a similar formulation, see e.g. *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [244].

90 *Barrios Altos v Peru* (n 80) [41].

> 'entails the States' obligation to organize the government apparatus and, in general, all the structures through which public powers are exercised, so that they are able to ensure legally the free and full exercise of human rights. As part of this obligation, the State has the legal obligation "to prevent, within reason, the violation of human rights, to *investigate seriously any violations* that have been committed within its sphere of jurisdiction using the measures available to it in order to identify those responsible and impose *pertinent punishments* on them, and to ensure adequate reparation to the victim."'[91]

This finding may lead us to conclude two things. Firstly, the Article 1 obligation to take positive action to guarantee ACHR rights, includes a duty to organise the government apparatus in a human rights compliant way. This includes institutionalising an investigative machinery which investigates *all* violations of the ACHR, effectuating the State's duty to implement the ACHR on the domestic level, and functioning as a necessary precondition for an effective right to a remedy on the domestic level. Secondly, because the Court in this context refers to 'pertinent punishments' following an investigation, rather than its standard reference to the duty to 'investigate, *prosecute*, and punish', it would appear that non-criminal punishment may also be considered. Thus, the duty to investigate all violations as a general implementing measure may indicate a non-criminal investigation, whereas the duty to investigate, prosecute, and punish, may well be limited to what the Court has dubbed *grave* violations. Such a reading would moreover be in line with what we have seen in the previous Chapter for the ICCPR, with the Human Rights Committee finding that all violations must be investigated, but with a more limited list of violations which require criminal scrutiny.[92] This is also reminiscent of IHL, where only serious violations require a criminal response, and other investigations may be investigated administratively.[93] Finally, it would fit well with the idea that criminal law, as the State's most repressive tool, must remain an *ultimum remedium*.[94]

Support for this view can be gleaned from the Inter-American Court's findings that the duty to investigate 'acquires special intensity and importance' and 'becomes particularly compelling' depending on the 'gravity of the crimes committed and the nature of the rights infringed'.[95] The distinction is further alluded to in *Vera Vera v Ecuador*:

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91 *Santo Domingo Massacre v Colombia* (n 28) [189], further referencing omitted, emphasis FT.

92 Chapter 5, §4.2.

93 Chapter 3, §3.2 and §4.2.

94 Krešimir Kamber, 'Substantive and Procedural Criminal Law Protection of Human Rights in the Law of the European Convention on Human Rights' (2020) 20 Human Rights Law Review 75, 77–8; Piet Hein van Kempen, 'Four Concepts of Security – A Human Rights Perspective' (2013) 13 Human Rights Law Review 1, 19.

95 *Ríos et al v Venezuela* (Preliminary Objections, Merits, Reparations, and Costs), IACtHR Series C No 194 (28 January 2009) [283]; *Perozo et al v Venezuela* (Preliminary Objections, Merits Reparations and Costs), IACtHR, Series C No 195 (28 January 2009) [298].

> 'any human rights violation involves a level of severity by its own nature, because it implies a breach of certain State obligations to respect and guarantee the rights and freedoms for people. However, this should not be confused with what the Court throughout its jurisprudence has deemed to be "serious violations of human rights" which (…) have their own connotation and consequences.'[96]

Interestingly, in this case concerning the death of a detainee who had not received sufficient healthcare for a gunshot wound that was discovered by the policemen arresting him, the Court found that his case was to be distinguished from cases of serious violations, such as forced disappearance, extra-judicial killing and torture.[97] This meant that the statute of limitation, that had expired in this case, could not be set aside based on Inter-American case-law – but, the Court went on to find, the State nevertheless needed to establish 'in some manner' what happened to satisfy the next of kin's right to know.[98] This case therefore provides an important insight into the Court's view of investigations, and the need for criminal punishments: in case of serious violations, the overriding requirement of punishment can set aside domestic hurdles to prosecution, whereas in less serious cases, an investigation may still be required though the need for a criminal response is not such as to warrant setting aside domestic bars to prosecution. Nonetheless, this in no way diminishes the importance of conducting an investigation in a case where an individual had died within State custody, and where the next of kin had no way of finding out what happened if not for State information.[99]

Arguably, the material scope of application of the duty to investigate is therefore broad, encompassing *all* violations of the ACHR. A duty to furthermore prosecute, and punish those responsible, may in turn be limited to a more narrow category of violations of particular severity. It is this category of violations on which the Court's case-law has focused, and to which we therefore turn as well.

4.2.2 The selective practice to date

Looking more closely at the ACHR rights that carry with them investigative duties, the case-law thus far pertains to a quite limited number of rights. As was set out in section 3.2, certain substantive rights entail investigative duties in conjunction with the obligation to ensure all rights under Article 1(1) of the Convention. The Court has thus far ruled on investigative duties in relation to Articles 4 (right to life), 5 (right to humane treatment) and 7 (right to personal liberty), as well as Article 22 (freedom of movement and residence)

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96 *Vera Vera v Ecuador* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 226 (19 May 2011) [118].
97 Ibid [117].
98 Ibid [123].
99 Ibid [91].

in the context of forced displacement of a population during (non-international) armed conflict. These rights are described in legal literature as being of such significance that their protection necessarily requires criminal law protection.[100] It is with these rights, in conjunction with either Article 1, or the rights to a fair trial and judicial protection, that investigative obligations have been applied in the Inter-American Court's case-law thus far. The material events in question, the trigger for violations, are therefore (alleged) violations of the rights to life, humane treatment or liberty, or a case of forced displacement, regardless of whether the source of the investigative obligation is a substantive right in conjunction with Article 1, or one or both of the procedural rights.[101] Once has the Court found that violations of the freedom of expression had to be investigated, in the context of violent attacks against a media outlet, following high-ranking officials' public harassment campaign against that outlet.[102]

The case-law has moreover focused on particularly grave violations of these rights, which leaves open the question whether *any* alleged violations of these rights must be investigated, or rather only when they are 'grave' violations of those rights. As the Court's findings in *Goiburú* illustrate, extrajudicial executions and enforced disappearances clearly must be investigated, prosecuted, and punished, and fall within the category 'grave'.[103] The Court has held similarly for cases of torture and inhuman treatment.[104] Further, forced displacement has been categorised as grave, but it should be noted that in the Salvadoran context the displacement was the result of a non-international armed conflict where the State engaged in deliberate extrajudicial killings, enforced disappearances, massacres and the overall destruction of the means of subsistence of the populace – meaning that if ever a forced displacement could be thought of as a 'grave' human rights violation, this would be it.[105]

Because the type of cases reaching the Court have often been of this calibre, the lower limits of the system have not been tested, and the question whether for instance less serious right to life, physical integrity or liberty violations would require investigations, remains open for now. A close reading of the Court's reasoning does appear to suggest that the mere fact that a human rights violation forms part of a widespread context of violations, does not necessarily

100 See Bosdriesz (n 9) 71–7; Tomuschat (n 87) 166.

101 For a discussion on the autonomous/symbiotic meaning of arts 8 and 25, see Burgorgue-Larsen and Úbeda de Torres (n 3) 645–649.

102 *Perozo et al v Venezuela* (n 95).

103 See the paragraph cited above; *Goiburú v Paraguay* (n 10) [88].

104 E.g. *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [243], referencing further case-law.

105 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [243]; *Chitay Nech et al. v Guatemala* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 212 (25 May 2010) [149], referencing further international law sources, including the Rome Statute.

mean it is also a grave violation. It has on multiple occasions referred to the existence of 'a systematic pattern or practice applied or tolerated by the State or (…) massive, systematic or generalized attacks on any sector of the population' as exacerbating the need for investigations and underlining their urgency, but therefore only as a further aggravating circumstance rather than a constitutive requirement for the existence of a sufficiently grave violation.[106] From the case of *Vera Vera v Ecuador*, about the detainee who died of an untreated gunshot wound, we may surmise that not all violations of the right to life, are 'grave' as such. As we have seen above, an investigation may nonetheless be required in case of non-grave violations, although the need for criminal repression is less pressing.

4.2.3 The investigative trigger

As the above analysis shows, grave violations of the ACHR must be investigated, prosecuted, and punished. Potentially, all violations must be investigated. But, if it is a violation which triggers the duty to investigate, and a violation can normally only be uncovered through investigations, then this might give rise to a gap in legal protection. After all, what if a violation is not immediately obvious? This raises the question what starting *information*, or what indications of a violation are sufficient to trigger the duty to investigate.

What level of knowledge is required on the part of the authorities to trigger their duty to investigate, has not yet been unambiguously decided for all the various rights. Regarding the right to life, for instance, Philip Leach, Rachel Murray, and Clara Sandoval concluded in 2017 that the Court had yet to consider expressly what the investigative trigger is. One primary reason for this is that in most cases some form of a formal investigation was in fact initiated, without however any effective follow-up.[107] This has placed the emphasis of the Court's assessment in these cases on the investigative standards, rather than the exact moment when State authorities had a level of information that required them to investigate. Moreover, more than a few right to life cases have concerned massacres of entire villages, where the evidence of the crimes was so overwhelming that the question as to the precise trigger for a duty to investigate naturally did not arise.[108] Leach, Murray, and Sando-

106 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [244].

107 Philip Leach, Rachel Murray and Clara Sandoval, 'The Duty to Investigate Right to Life Violations across Three Regional Systems: Harmonisation or Fragmentation of International Human Rights Law?' in Carla Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill Nijhoff 2017) 43.

108 E.g. *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18); *Mapiripán Massacre v Colombia* (n 15); *Las Dos Erres Massacre v Guatemala* (n 65); *Case of the Ituango Massacres v Colombia* (n 77); *Case of the Pueblo Bello Massacre v Colombia*, (n 50). Interestingly,

val conclude that the duty to investigate violations of the right to life is triggered, not only in the Inter-American but also in the European and African systems, when State authorities 'know of a possible violation'.[109]

Important to add to this, is that in cases of forced disappearance, there is no need for next of kin to show that the right to life has been violated in the sense that they must provide evidence of the death of their relative; the Court has in such cases relied on a presumption of death. It has moreover on occasion accepted in a situation of systemic breaches, that an enforced disappearance could be established because the case could be linked to an established practice of enforced disappearance.[110] These findings are relevant not just for the right to life, as enforced disappearances constitute a multiple violation of the ACHR, also concerning Articles 5 and 7. For these other provisions the Court has at times been more specific in formulating the investigative trigger, and indeed in *Gelman v Uruguay* the Court found that as soon as there is 'any reason to suspect' an enforced disappearance, an investigation must be initiated.[111]

For cases of torture, the Court has separately defined a trigger for the duty to investigate, also having regard to other international law sources on this subject. In *García Lucero v Chile*, referring to the Inter-American Convention against Torture, the Court found that States must investigate 'immediately, as soon as there is well-founded reason to believe that an act of torture has been committed'.[112] In other cases it formulated this slightly differently, requiring 'sufficient reasons'.[113] These need not necessarily be complaints by the victim, but can also stem from other sources.[114]

One final remark may be made on the attribution of knowledge. Under international law, one might assume that if an act was committed by a State agent and is therefore attributable to the State, that the *knowledge* of this act must also be attributed to the State. After all, the State can only 'know' through

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in the *Moiwana Community v Suriname* (n 15) [43], the Court appears to state that the duty arises as soon as an allegation is made; see also Sweeney (n 13).

109 Leach, Murray and Sandoval (n 107) 43.

110 Sandra Krähenmann, '9. Positive Obligations in Human Rights Law during Armed Conflicts' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 173–174; Marthe Lot Vermeulen, *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance* (Intersentia 2012) 224–235. *Velásquez Rodríguez v Honduras* (n 1) [124] and [126]; *Bámaca-Velásquez v Guatemala* (Merits) Inter-American Court of Human Rights Series C No 70 (25 November 2000) [132]; *Case of the Serrano Cruz Sisters* (Merits, Reparations and Costs) (n 15) [48].

111 *Gelman v Uruguay* (n 27) [186], with further references.

112 *García Lucero et al. v Chile* (Preliminary Objection, Merits and Reparations) Inter-American Court of Human Rights Series C No 267 (28 August 2013) [124].

113 *Gutiérrez-Soler v Colombia* (n 48) [54]; *Vargas-Areco v Paraguay* (n 77) [79].

114 *Gutiérrez-Soler v Colombia* (n 48) [54]. See further Burgorgue-Larsen and Úbeda de Torres (n 3) 384.

intermediaries, its agents. Nevertheless, it appears that perpetrators' knowledge is not necessarily directly attributed to the State for the purposes of the trigger of investigative obligations. In *Cruz Sánchez*, where Peruvian armed forces had shot and killed hostage takers, the Court found that 'the hypothesis of the alleged extrajudicial executions came to light several years after the events occurred (…), therefore, it was not possible to demand from the beginning the obligation to investigate according to international standards developed in cases of extrajudicial executions'.[115] From a practical perspective, it makes sense that it is only once knowledge of a potential violation reaches others than the perpetrators themselves, that the duty to investigate is triggered. Whether this happens through genuine reporting by the State agents involved, through outside allegations, or because facts are uncovered by the State, is immaterial in this respect. But finding the State has failed its duty to investigate simply because it did not take immediate action when *the perpetrators themselves* gained knowledge of the facts, would be counterproductive.

4.3 The personal scope of application

Moving on from when an investigative obligation arises, a next question is *whose* obligation it is. A rather obvious observation in this respect is that the State will need to investigate, through its organs. Insofar as prosecutions and punishment are required, this will necessarily be criminal prosecution services, which as will be addressed further in section 5 will often moreover need to be of a civil rather than military nature, to safeguard their independence. More complicated, and related to the material scope of application, is how to assess on the one hand situations where State agents have perpetrated the violations subject to investigation, and on the other hand situations where private actors were responsible for rights abuses.

The Inter-American system has from the start embraced a generous reading of State responsibility for acts committed by private individuals, and atrocities committed by non-State actors are therefore liable to fall within the scope of application of the Convention, even if it does not expressly impose obligations on private individuals.[116] The way this works is twofold. Firstly, the Inter-American institutions take a broad reading of attribution, and therefore attribute acts by non-State actors to the State more readily than perhaps in other

115 *Cruz Sánchez et al. v Peru* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 292 (17 April 2015) [350]. Translated through Google translate, the original Spanish reads *'la hipótesis de las presuntas ejecuciones extrajudiciales salieron a la luz varios años después de ocurridos los hechos (…), por lo que no era posible exigir al Estado desde el inicio la obligación de investigar de acuerdo a los estándares internacionales desarrollados en casos de ejecuciones extrajudiciales'*.

116 Tittemore (n 12). See also Burgorgue-Larsen and Úbeda de Torres (n 3) 348.

systems.[117] Secondly, the Convention is read as including a due diligence obligation to prevent violations by private actors through criminalisation and operational action where necessary *ex ante*, and to respond to violations by investigating, prosecuting and punishing *ex post*.[118] Acts by private individuals therefore fall within the scope of application of the Convention in the sense that the duty to investigate, which is addressed to the State, also arises in cases where human rights violations were committed by actors other than the State itself.

This does not mean that whether a violation was committed by State organs directly, or by private actors, is of no relevance. In fact, the Court has on numerous occasions stated the 'extra weight' associated with State agent involvement in atrocities such as torture, extrajudicial executions and enforced disappearances.[119] This statement, however, has consequences for, and is a qualification of, the investigative standards that must be applied. The involvement of State agents in atrocities clearly signifies an extremely serious situation, and such involvement by the State undercuts the faith the public has in the State and its monopoly on the use of force.[120] Further, the rule of law demands that Government comply with the law, act within the confines of the law, and be held to account where violations occur. This is clearly at stake where State agents engage in the extremely serious human rights violations in question: torture, inhuman treatment, and deprivation of life.

A question the Inter-American institutions have not addressed thus far, is whether non-State armed groups engaged in a non-international armed conflict may also be under the duty to investigate ACHR violations. The ACHR is clearly addressed to States and the Commission and Court have jurisdiction to receive complaints raised against signatory States only.[121] Whether the limitation of the *jurisdiction* of the supervisory bodies also means the *scope of application* of the treaty is necessarily limited to signatory States is debatable; normally international conventions apply to signatory States only, but legal literature and several UN sources alike have referred to the applicability of human rights law to non-State armed groups.[122] There might therefore be

117 For an in-depth analysis, see Andrea Varga, *Establishing State Responsibility in the Absence of Effective Government* (dissertation Leiden University 2020) 137–72. *Case of the 19 Tradesmen v Colombia* (n 36) [141].

118 Ibid [140].

119 E.g. *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [243].

120 See *supra*, §2.

121 See art 1(1), 'The States Parties to this Convention undertake to respect the rights…'; art 44, 'Any person or group of persons (…) may lodge petitions with the Commission containing denunciations or complaints of violations of this Convention *by a State party*' [emphasis FT]; arts 61 and 62 similarly limit recourse to the Court to States Parties and the Commission, for States who have accepted the Court's jurisdiction. See also Burgorgue-Larsen and Úbeda de Torres (n 3) 347–348.

122 See the sources cited in Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017) 8–18.

some scope for the argument that the ACHR applies to armed groups under certain circumstances, which would conform to one of the tenets of the law of armed conflict, the principle of belligerent equality, which stipulates that all parties to the armed conflict operate under the same obligations, thereby expressly departing from differences in legal position based on for instance who is acting lawfully under the *ius ad bellum*.[123] As it stands, the Court has dealt only with cases where the State was responsible for investigations into violations committed by armed groups,[124] but should such a group rise to an organisational level where it is not only committed to complying with human rights and humanitarian law, but in practice actually investigates and punishes violations, it would be interesting to see whether the Court would accept such endeavours as discharging the duty to investigate. Assuming the quality of the investigation was up to standards and assessed in light of the rationales of uncovering the truth and combating impunity, this does not appear impossible.

The other side of the State's *duty* to investigate, is an individual *right* to have violations investigated. As was set out above, the rights to fair trial and judicial protection indeed grant an individual right to justice. In *Blake v Guatemala*, the Court found that the next of kin of Mr. Blake, who had disappeared, have 'the right (…) to have his disappearance and death effectively investigated (…); to have those responsible prosecuted for committing said unlawful acts; to have the relevant punishment, where appropriate, meted out; and to be compensated for the damages and injuries they sustained'.[125] Thus, as Hanna Bosdriesz notes, victims and their next of kin have individual rights in the investigation, as well as the criminal proceedings which follow.[126] And what is more, they have an individual right to justice, including criminal justice.[127]

4.4 The temporal scope of application

Further, the duty to investigate has certain particular characteristics when it comes to its temporal scope of application. According to the Court, it may

123 See e.g. Matthew Happold, 'International Humanitarian Law and Human Rights Law' in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law Jus ad Bellum, Jus in Bello and Jus post Bellum* (Edward Elgar 2013) 449; Nils Melzer, *International Humanitarian Law. A Comprehensive Introduction* (1st edn, International Committee of the Red Cross 2016) 17, 27; Marco Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 18–20.

124 E.g. *Mapiripán Massacre v Colombia* (n 15).

125 *Blake v Guatemala* (n 34) [96]-[97]. Bosdriesz (n 9) 57.

126 Bosdriesz (n 9) 55–9.

127 Seibert-Fohr (n 35) 66.

apply to instances of violations that precede the entry into force of the Convention for a State, in essence because either the violation can be characterised as a continuing violation, or because the duty to investigate itself persists beyond the critical date (the date of entry into force of the Convention, or the date of acceptance of jurisdiction of the Court). Thus, incidents which' effects extend after the critical date, are brought within the Court's jurisdiction.[128]

In case of enforced disappearances, the Court has held since *Velásquez Rodriguez* that they constitute 'a multiple and continuous violation'.[129] Because of the continued uncertainty as to the faith of victims, and because of the continuous anguish suffered by the next of kin and the direct victims should they still be alive, this crime cannot be satisfactorily classified as instantaneous only. Its effects continue in time, and so does the obligation to provide clarity as to what happened. This means the duty 'continues as long as there is uncertainty about the fate of the person who has disappeared'.[130] Further, in the case of *Blake v Guatemala*, the Court concluded that even though the restriction of liberty starting Blake's disappearance fell outside the temporal jurisdiction of the Court, the continuous nature of the crime allowed it to consider the investigative obligations involved, and it held Guatemala violated them.[131] This illustrates how the continuing nature of these crimes gives rise to a continuing violation, meaning that even if the disappearance itself predated the critical date, the violation in part occurred and continued after that date, therefore giving rise to investigative obligations under the American Convention.

For cases not giving rise to a continuing violation, such as extrajudicial executions or torture, the approach is slightly different. If an execution, which in itself is an instantaneous act, took place before the critical date, the question whether the right to life was substantively violated, falls outside the temporal scope of application of the ACHR. Yet, this may be different for the duty to investigate. Whereas the material violation itself here is not of a continuing nature, the obligation to investigate *is* of a continuing nature.[132] Illustrating this, in *Moiwana Community v Suriname*, where despite the massacre of a village taking place before Suriname had accepted the Court's jurisdiction, the Court nevertheless exercised jurisdiction over the question whether the duty to investigate had been complied with, because this duty extended in time and beyond the critical date.[133] It then went on to assess the massacre in light of the procedural obligation to investigate arising from Articles 8 and 25 of

128 Leach, Murray and Sandoval (n 107) 47; Burgorgue-Larsen and Úbeda de Torres (n 3) 353–354.
129 *Velásquez Rodríguez v Honduras* (n 1) [155].
130 Ibid [181].
131 *Blake v Guatemala* (Preliminary Objections) Inter-American Court of Human Rights Series C No 27 (2 July 1996) [39]-[40]; *Blake v Guatemala* (n 34) [124]; see further Sweeney (n 13).
132 Burgorgue-Larsen and Úbeda de Torres (n 3) 353–354.
133 *Moiwana Community v Suriname* (n 15) [141].

the Convention, ruling it had no jurisdiction to assess Suriname's alleged violation of Articles 4 and 5 before the acceptance of jurisdiction.[134]

Thus, the temporal applicability of the duty to investigate can bring conduct within the scope of review of the Court which would otherwise predate its jurisdiction. The Court's application in these cases of the procedural rights only, does mean it does not rule on the alleged violations of the right to life and physical integrity, not even under their 'procedural limbs'.[135]

4.5 The geographic scope of application

When it comes to the geographic scope of application of the duty to investigate, this principally follows the general remarks made in Chapter 4 as to the geographic application of IHRL as a whole.[136] Thus, States must investigate human rights violations committed 'subject to their jurisdiction'.[137] Violations committed on the territories of the State are therefore subject to investigative obligations under the ACHR.

The Inter-American institutions have yet to rule on the extraterritorial application of the duty to investigate, specifically. In fact, the case-law relating to extraterritorial conduct in individual cases stems from the Inter-American Commission, rather than the Court. The Court has only pronounced on such issues in its 2017 Advisory Opinion, on *The Environment and Human Rights*. In that Opinion, the Inter-American Court appears to adopt a relatively broad interpretation of extraterritorial jurisdiction. It found that 'the State obligation to respect and to ensure human rights applies to every person who is within the State's territory or who is in any way subject to its authority, responsibility or control'.[138] It qualified this further in the context of extraterritorial State conduct, or conduct with transboundary effects, by finding that when a State exercises 'authority' over an individual, or when they are under the State's 'effective control', this constitutes 'jurisdiction' for the purposes of the ACHR.[139] Finally, it found that 'the persons whose rights have been violated are under the jurisdiction of the State of origin [of the harmful activity], if there is a causal link between the act that originated in its territory and the infringe-

134 Ibid [142].

135 See *supra*, §3.2. See also Burgorgue-Larsen and Úbeda de Torres (n 3) 354.

136 Chapter 4, §4.5.

137 ACHR, art 1.

138 *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights)* (Advisory Opinion) Inter-American Court of Human Rights Series A No 23 (15 November 2017) [73].

139 Ibid [81].

ment of the human rights of persons outside its territory'.[140] Whereas these findings pertain to the specific situation of transboundary environmental harm, we may nonetheless attempt to abstract rules for the duty to investigate.

Principally, there is no reason why the duty to investigate would be treated any differently than any other issue of extraterritorial application under the ACHR. Thus, if a substantive violation falls within a State's jurisdiction, it will also incur the obligation to investigate that violation. If a State acts extraterritorially, for instance through its military forces, then insofar as these forces exercise effective control over individuals, this constitutes jurisdiction. This will likely be the case where individuals are taken into detention.[141] Whether more loose forms of 'control' also qualify, such as shooting and killing an individual, whether by agents on the ground or through air strikes, is not yet clear. But if the Court's approach to cross-border environmental harm can be transposed also to situations of extraterritorial use of force, then there would normally be a causal nexus between the firing of a weapon, and the death of the individual. Thus, this would trigger the duty to investigate. Further case-law on this issue will have to be awaited. One important qualification in this respect, is the Court's consideration that 'compliance with human rights (…) does not justify failing to comply with other norms of international law, including the principle of non-intervention'.[142] Even if States are indeed held to investigate extraterritorially, they cannot therefore be required to do so in a manner which would unjustifiably infringe upon the sovereignty of other States.

4.6 Résumé

This section has explored the scope of application of the duty to investigate, in its various modalities. As may be clear from the above, the case-law develops on a case-by-case basis, which means that many issues may still evolve further, also depending on the cases brought before the Court. For instance, if the Court is faced with fewer grave violations, we will likely learn more as to whether the material scope of application of the duty to investigate also encompasses less serious violations. Similarly, if more cases concerning extraterritorial violations are brought, more clarity as to the duty to investigate's applicability will emerge.

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140 Ibid [101].

141 *Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba)*, IACmHR, 41 *ILM* 532 (2002) (13 March 2002); Helen Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' in Helen Duffy, Janina Dill and Ziv Bohrer (eds), *Law Applicable to Armed Conflict* (Cambridge University Press 2020) 52.

142 *The Environment and Human Rights* (n 138) [90].

Important features of the Inter-American approach thus far, can be summarised as follows. Firstly, there is a heavy emphasis on grave violations as requiring investigations, coupled with criminal prosecution and punishment. Secondly, in contrast to other human rights systems, the Inter-American Court grants individual victims and their next of kin a right to access to criminal justice, in addition to the general obligation for States to investigate violations. Thirdly, the duty to investigate has a broad temporal scope of application. It can also apply to incidents predating the entry into force of the ACHR for the State in question. Fourthly and finally, States are likely also required to investigate violations abroad, insofar as they had jurisdiction over the violation. Further guidance will have to be awaited in this respect.

5 Substance of the duty to investigate: investigative standards

5.1 Introduction

The previous sections explained how the duty to investigate was conceived within the ACHR system, how it fits within the general context in which the Inter-American human rights system came into being, and when the duty comes into play. This section addresses what needs to happen once the investigative duty arises, in other words, what investigative standards have to be applied.

5.2 A due diligence obligation

Before moving into the precise standards to be applied, a number of overarching principles help understand the Court's approach to investigative standards. First, the duty to investigate is a *due diligence* obligation, in other words an obligation of means, not of result.[143] States must '[do] everything necessary (…) to discover the truth about what happened and to investigate, prosecute and punish, as appropriate, those eventually found responsible'.[144] If despite these efforts the aims of the investigation are not achieved, this can satisfy the Court's test if the State has met its due diligence obligation. For this to be the case, it must be a genuine investigation in the sense that it is not 'preordained to be ineffective'.[145] A further interesting element is that in fleshing out the investigative standards the Court has adopted the United Nations *Manual on the Effective Prevention and Investigation of Extrajudicial,*

143 Already in *Velásquez Rodríguez v Honduras* (n 1) [172] and [177].
144 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [242].
145 Ibid [248]; *Velásquez Rodríguez v Honduras* (n 1) [177]. See also Frisso (n 87) 174.

Arbitrary and Summary Executions,[146] holding that investigations falling foul of the standards set out therein, fail to meet the due diligence obligation.[147] Although this UN document was drafted specifically for extrajudicial executions, many of the investigative standards and principles can be applied equally to other human rights violations – except for specific stipulations for instance on autopsies, which of course only applies when a death has occurred.

5.3 Investigative standards

5.3.1 Seven standards

The due diligence obligation to conduct an effective investigation, has been concretised by means of seven investigative standards. An investigation must be (i) launched of the State's own accord (*ex officio*), (ii) carried out promptly and with reasonable expedition, (iii) serious and effective, (iv) independent and (v) impartial, and (vi) they must sufficiently involve the next of kin or the victims.[148] Further, (vii) any *de jure* or *de facto* obstacles to investigation and prosecution must be removed.[149] These standards are addressed briefly below.

5.3.2 Ex officio

Firstly, once the duty to investigate has been triggered, States may not remain passive and must (i) initiate the investigation of their own accord. In this regard, States may not wait for a complaint by victims or their next of kin, but must as soon as they have sufficient information suggesting a violation, start the investigation.[150] This obligation becomes especially important where the situation for the victims is such that they fear for their safety if they contact the authorities. For instance, in the *Mapiripán Massacre*, the Court held that it could hardly be argued that in the situation where the victims were subject to constant harassments and threats – in a situation moreover where the State armed forces were implicated in the massacre in question – that their not contacting the authorities exempted the State from investigating.[151]

146 United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, Doc. E/ST/CSDHA/.12 (1991).
147 *Mapiripán Massacre v Colombia* (n 15) [224]; Burgorgue-Larsen and Úbeda de Torres (n 3) 346.
148 Extensively, see the case-law cited below. Further, see Leach, Murray and Sandoval (n 107) 34–42.
149 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [249].
150 E.g. *Goiburú v Paraguay* (n 10) [88]. Also Leach, Murray and Sandoval (n 107) 35.
151 *Mapiripán Massacre v Colombia* (n 15) [219].

5.3.3 Promptness and reasonable expedition

Secondly and closely related, (ii) the investigation must be initiated promptly and be carried out with reasonable expedition.[152] In cases of torture, the Court has even held that once there is evidence suggesting torture has taken place, the State must investigate *immediately*.[153] Generally, the Court has insisted on the initiation *ex officio* of the investigation 'as soon as is practicable after [taking] knowledge of the facts'.[154] Promptness is of key importance in disappearance cases, because a quick and effective investigation might save the life of the victim. Moreover, and this applies also to other cases, crucial investigative steps must be taken as soon as possible to secure evidence before it is lost.[155] This counts even more in cases where there is a risk of State collusion and State agents might try to cover up their tracks, but also beyond such cases, evidence can be lost quickly and for instance witness testimony becomes less reliable the more time passes.

Beyond the prompt initiation of the investigation, it must further be carried out sufficiently speedily. Victims have a right to effective judicial protection that meets fair trial standards, meaning it must be reasonably expeditious. Assessing whether investigations were sufficiently speedy requires looking at the total duration of the proceeding until a final judgment is rendered.[156] In assessing what is reasonable, the Court takes account of 'the complexity of the matter; the procedural activity of the interested party; the conduct of the judicial authorities, and the general effects on the legal situation of the person involved in the proceeding'.[157] Importantly, the Court realises victims and their next of kin might be incapable or unwilling to complain and actively engage in the investigation due to threats, their displacement, or fear of repercussions.[158] In such cases, a lack of participation by victims cannot excuse any undue delays in the investigation. What is sufficiently expedient is therefore dependent on context, but for instance in the case of *Villamizar Durán and Others v Colombia*, the Court found that a conviction which was obtained after two and a half years complied with the Convention in a relatively uncomplicated case.[159]

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152 *Vargas-Areco v Paraguay* (n 77) [77]; *Las Dos Erres Massacre v Guatemala* (n 65) [132].
153 *García Lucero et al. v Chile* (n 112) [35].
154 *Vargas-Areco v Paraguay* (n 77) [77].
155 *Villamizar Durán and Others v Colombia* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 364 (20 November 2018) [175].
156 *Las Dos Erres Massacre v Guatemala* (n 65) [132].
157 *Santo Domingo Massacre v Colombia* (n 28) [164], numbering omitted from citation.
158 Ibid [219].
159 *Villamizar Durán and Others v Colombia* (n 155) [171]-[173].

5.3.4 Seriousness and effectiveness

Moving on to the third standard, of (iii) seriousness and effectiveness, these are the most encompassing and result-oriented criteria. The requirement that the investigation be serious, means it must be genuine, aimed at reaching a result and not preordained to be ineffective – in other words it may not be a mere sham.[160] Beyond this bare minimum for any chance of the investigation to achieve its aims, effectiveness brings with it a range of detailed case-specific requirements, which have to do with the investigative steps needed to secure sufficient evidence. When the investigation targets executions, the UN Manual is used as a yardstick, meaning

> 'an investigation must seek, at the least, *inter alia*: a) to identify the victim; b) to obtain and preserve evidence regarding the death, so as to aid any potential criminal investigation regarding those responsible; c) identify possible witnesses and receive their statements regarding the death under investigation; d) establish the cause, manner, place and time of death, as well as any pattern or practice that may have caused the death; and e) differentiate between natural death, accidental death, suicide, and homicide. It is also necessary to exhaustively investigate the crime scene, autopsies and analyses of human remains must be conducted rigorously, by competent professionals, applying the most appropriate procedures.'[161]

These criteria provide the Court with sufficient footholds to scrutinise closely the measures States have taken to uncover the truth, though in many cases the inactivity by the authorities was so blatant no further criteria were necessary to see no effective investigation had taken place – which has led a number of States to admit responsibility before the Court.[162] In other cases, the Court has looked in detail at the investigative steps taken by the State, in order to determine their effectiveness. For instance, in *Villamizar Durán and Others v Colombia*, the Court stipulated that at a very minimum, those investigating must:

> 'i) photograph [the crime] scene, any other physical evidence and the body as found and after moving it; ii) collect and keep all samples of blood, hair, fibres , threads or other tracks; iii) examine the area for shoeprints or any other natural evidence, and iv) make a report detailing any observation of the scene, the actions of the investigators and the disposition of all the evidence collected.'[163]

160 *Velásquez Rodríguez v Honduras* (n 1) [177].
161 *Mapiripán Massacre v Colombia* (n 15) [224]; *Moiwana Community v Suriname* (n 15) [149].
162 E.g. *Barrios Altos v Peru* (n 80).
163 *Villamizar Durán and Others v Colombia* (n 155) [176]. Translated through Google translate, references omitted.

The Court's examination of a case can therefore be quite detailed.[164] Though the obligation is one of means, it must at least be 'capable of producing the result for which it was designed':[165] ascertaining whether human rights had been violated, to provide redress, and to ensure criminal accountability.[166] These aims must be pursued effectively, in the sense that the conditions for the effectiveness of the investigation must be present. This means the judiciary must be sufficiently independent and impartial, and the broader conditions must be such that their judgments will be carried out and enforced.[167]

5.3.5 Independence and impartiality

The fourth and fifth standards, which are closely interconnected, are (iv) independence and (v) impartiality. In the eyes of the Court, investigators must be independent 'both from a hierarchical and institutional point of view and also in practical terms, from the individuals implicated in the facts investigated'.[168] This is meant to safeguard the investigation from bias and undue influence, and therefore includes also impartiality.[169] Thus far, the standard of independence has been fleshed out in the case-law primarily with regard to the various military justice systems tasked with investigating certain crimes. In the case of *Cruz Sánchez v Peru*, the Court reiterated its constant case-law holding that military jurisdiction over human rights violations can be accepted only exceptionally, where active military personnel has engaged in acts that directly affect interests inherent in the military system.[170] The Court has taken firm position that where military jurisdiction is exercised over facts that ought to be decided by the civil judiciary, this violates victims' right to access to justice.[171] In cases involving torture, extrajudicial execution and disappearances, the Court has rejected military jurisdiction, and in the case of *Cruz Sánchez* the Court even found the military justice system was unfit for the investigation of alleged extrajudicial executions by the military of members of armed groups who were *hors de combat*.[172] Victims' right to access to justice in conformity with fair trial standards, requires an independent investigation

164 In *Villamizar Durán and Others v Colombia*, the Court found a violation on these grounds; ibid [179].

165 *Velásquez Rodríguez v Honduras* (n 1) [66].

166 *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)* (Advisory Opinion) Inter-American Court of Human Rights Series A No 9 (6 October 1987) [24].

167 Ibid.

168 *Case of Human Rights Defender et al. v Guatemala* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 283 (28 August 2017) [227].

169 *Santo Domingo Massacre v Colombia* (n 28) [157].

170 *Cruz Sánchez et al. v Peru* (n 115) [397]; *Santo Domingo Massacre v Colombia* (n 28) [158]; see further Frisso (n 87) 188.

171 *Cruz Sánchez et al. v Peru* (n 115) [398].

172 Ibid [401]-[404]. This case will be returned to in detail, *infra*, §6.3.3, §6.4.

and an independent judiciary. Only very exceptionally will the military justice system be able to play a role in this.

5.3.6 *Involvement of victims and their next of kin*

Sixthly, (vi) victims or their next of kin must be sufficiently involved in the investigation for it to meet Convention standards. As the Court held in the *Mapiripán Massacre* case, '[d]uring the investigative and judicial processes, the victims of human rights violations, or their next of kin, must have ample opportunity to participate and be heard, both regarding elucidation of the facts and punishment of those responsible, and in seeking fair compensation'.[173] Next of kin must therefore be kept abreast of developments and be included in the various steps within the proceedings, without prejudice however to the State's self-standing duty to investigate *ex officio* independently of the initiative of the next of kin.[174] Moreover, in cases of enforced disappearances the next of kin are recognised as direct victims of inhuman treatment in their own right, through the anguish corresponding with the uncertainty of what happened to their loved one.[175]

5.3.7 *Removal of de jure and de facto obstacles to investigations*

Seventh and finally, (vi) *de jure* and *de facto* obstacles to investigations and punishments must be removed. States have relied on a number of strategies to avoid having to investigate, prosecute, and punish. The Court has found that impediments to effective investigations must be removed, whether these are practical or legal in nature. In case of grave violations of human rights, the Court has held that domestic amnesty laws lack legal effect altogether.[176] Procedural rights of the defence, such as *ne bis in idem* and *nullum crimen sine lege* have been limited, because 'the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes (*sic*) the protection of the *ne bis in idem* principle'.[177] In short, amnesties, statutes of limitations and procedural rights such as *ne bis in idem* may not be used to perpetuate impunity, and will therefore need to be repealed to ensure the effectiveness of the investigation and prosecution.[178] Further, if perpetrators are identified and prosecuted, the Court – while reiterating it cannot decide

173 *Mapiripán Massacre v Colombia* (n 15) [219].
174 Ibid.
175 *Blake v Guatemala* (n 34) [114]-[116]; Burgorgue-Larsen and Úbeda de Torres (n 3) 303–304.
176 *Barrios Altos v Peru* (n 80) [44]; see also Burgorgue-Larsen and Úbeda de Torres (n 3) 356.
177 *Almonacid Arellano v Chile* (n 21) [154]; see also Malarino (n 80).
178 For a comprehensive analysis, see Bosdriesz (n 9) 88–128.

on individual punishment, which is for the domestic judiciary to do – requires punishments to be proportionate to the gravity of the crime.[179]

In this light it may be emphasised once more that the Court places a heavy emphasis on criminal law measures. It has found that disciplinary investigations and investigations by truth commissions can *contribute* to establishing what happened, and determining State responsibility. Nevertheless, such proceedings are *complementary* to criminal proceedings, and cannot replace them.[180] As the Court has pointed out, 'in cases of brazen violations of fundamental rights, the imperious need to avoid repetition can only be satisfied by fighting impunity and by respecting the right of the victims and society as a whole to know the truth about the events'.[181]

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

6.1 Introduction

The above has determined *when* and *why* States must investigate under the ACHR, as well as *how* they must do so. The emphasis on genuine investigations into, and criminal repression of human rights atrocities is best understood when taking into account the context of repressive State regimes which have shaped the Inter-American approach to human rights. But, as section 2 explained, the context of the Inter-American human rights regime has been shaped not only by repressive regimes, but also by armed conflicts.[182] In light of this research project's research question, we must next ask ourselves how duties of investigation are applied in situations of armed conflict. To what extent, and how, do investigative obligations and the ACHR more generally, apply during such exceptional situations? More in particular, three issues are of relevance.

First, armed conflicts can be classified as 'war' or 'emergency' for the purposes of Article 27 of the ACHR, dealing with derogations, and therefore call into question whether in these types of situations States may opt to suspend investigative duties (§6.2). Second, the conflicts give rise to application of international humanitarian law, which raises questions of co-applicability, and how the Inter-American Court engages with IHL (§6.3).[183] These two

179 *Heliodoro Portugal v Panama* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 186 (12 August 2008) [203]; Burgorgue-Larsen and Úbeda de Torres (n 3) 307.

180 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [316]; *Santo Domingo Massacre v Colombia* (n 28) [167].

181 *Vargas-Areco v Paraguay* (n 77) [81].

182 *Supra* §2.2.

183 van den Herik and Duffy (n 23).

points inform the ultimate aim of establishing the applicable investigative obligations and standards for violations committed during armed conflict (§6.4).

As a preliminary point, as was shown in Chapter 4, IHRL continues to apply during armed conflict. This has been held both by the ICJ, as well as by the various human rights courts and bodies.[184] The Inter-American Court has been no exception, ruling that 'the Court is competent to decide whether any State act or omission, in times of peace or armed conflict is compatible with the American Convention',[185] and that 'international human rights law is fully in force during internal or international armed conflicts'.[186] As was pointed out above, the Inter-American Court has in fact been faced with numerous armed conflicts, and has consistently rejected arguments that it lacks jurisdiction due to the applicability of IHL.[187] Because the continued applicability of the ACHR during armed conflict is therefore settled,[188] we must concentrate on determining *how* it is applied, and whether its legal standards may accommodate the exigencies of armed conflict. In this regard, the ICJ has found that derogations are the only grounds for such.[189] These are therefore subject to discussion first, before moving on to the Inter-American Court's approach to IHL.

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

As explained in Chapter 4,[190] the derogations regime allows States in exceptional circumstances to suspend certain rights, under a number of strict conditions. By thus accommodating deviations from the normally applicable

184 See Chapter 4, §4.6. See also §6 Chapters 5 and 7, outlining the approach under the ICCPR and ECHR.

185 *Santo Domingo Massacre v Colombia* (n 28) [21]; and along the same lines, *Las Palmeras v Colombia* (Preliminary Objections) Inter-American Court of Human Rights Series C No 67 (4 February 2000) [32].

186 *Case of the Serrano Cruz Sisters v El Salvador* (Preliminary Objections) Inter-American Court of Human Rights Series C No 118 (23 November 2004) [113].

187 E.g. *Santo Domingo Massacre v Colombia* (n 28) [21].

188 See Chapter 4, §4.6. Further, see Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 International Review of the Red Cross 501; Helen Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press 2013).

189 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), *I.C.J. Reports* 1996, p. 226 [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004), *I.C.J. Reports* 2004, p. 136 [106]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment (19 December 2005), *I.C.J. Reports* 2005, p. 168 [216].

190 Chapter 4, §4.6.

rules in extreme situations, the drafters accounted for the concept of 'necessity' as a circumstance precluding wrongfulness as conceptualised under the law of State responsibility.[191] The ultimate aim of making derogations possible, is to bring emergency situations within the purview of the rule of law, whilst still providing States with a measure of flexibility when their very survival is at stake.[192] Armed conflict is one such circumstance.[193] Under the ACHR, Article 27 provides for the possibility to derogate. It provides:

> '1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.'

The possibility of derogation can therefore temporarily modify ACHR requirement, allowing States to meet the challenge of an armed conflict or other emergency. If they wish to derogate, States must furthermore meet certain formal criteria; they have to give notice, reasons, set a term for the suspension, and they must list the rights they wish to derogate from.[194] Even if they meet these conditions, a number of rights can never be derogated from under Article 27(2).[195] These include the rights to life, humane treatment, and the 'judicial guarantees essential for the protection of [these] rights'.[196]

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191 ARSIWA, art 25.

192 Jan-Peter Loof, 'On Emergency-Proof Human Rights and Emergency-Proof Human Rights Procedures' in Afshin Ellian and Gelijn Molier (eds), *The State of Exception and Militant Democracy in a Time of Terror* (Republic of Letters Publishing 2012) 146–150; Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis. Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 112. Reinforcing this point further, is the Court's finding that the judicial guarantees essential for the protection of the human rights not subject to derogation, include 'those necessary to the preservation of the rule of law'; *Judicial Guarantees in States of Emergency* (n 166) [38]. And see further *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights)* (Advisory Opinion) Inter-American Court of Human Rights Series A No 8 (30 January 1987) [24], holding that a suspension of guarantees does not imply a temporary suspension of the rule of law. See further Cançado Trindade (n 9).

193 See Chapter 4, §4.6.

194 ACHR, art 27(3).

195 *Habeas Corpus in Emergency Situations* (Advisory Opinion) (n 192) [21]; see also Cançado Trindade (n 9).

196 Art. 27(2) provides: 'The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.'

Notably, these rights are the rights *par excellence* that entail investigative obligations. As was explained above, case-law thus far concerning investigations has almost exclusively pertained to executions, torture, and disappearances. Investigations must then be mounted under the right to life or the right to humane treatment, as well as the procedural rights to fair trial and effective judicial protection. But it is precisely these rights, in this context, which are non-derogable.[197]

As was set out above, investigative duties attach to the rights to life and humane treatment, as well as certain aspects of the rights liberty and security, and freedom of movement. The event triggering the duty to investigate is an alleged violation of these rights, independent of whether the duty to ensure the substantive right itself, or the procedural right to a judicial remedy for such a violation, is at stake. Because in its Advisory Opinion on the matter, the Inter-American Court has expressly interpreted the 'judicial guarantees essential for the protection of [non-derogable] rights' to include the Article 25 and 8 rights to an effective judicial remedy conforming to fair trial standards,[198] taken together this unquestionably bestows a non-derogable status upon the duty to investigate violations of non-derogable rights. The duty to investigate violations of the rights to life and humane treatment, therefore cannot be derogated from, even in emergency situations amounting to armed conflicts.[199] This still leaves open the possibility of interpreting these rights in light of IHL, as is discussed below, but derogations are not possible.

Certain other rights which entail investigative obligations, *can* be derogated from. This pertains most pertinently to the rights to liberty and security, and the freedom of movement. These rights are not listed in Article 27(2), and can therefore in principle be derogated from during war or emergency – as can the judicial guarantees corresponding to these rights. On closer inspection, however, derogations do not seem likely for a number of reasons. First, certain safeguards are non-derogable despite their not being included in Article 27(2). The right to *habeas corpus* for instance, was found by the Court to be non-derogable, as it is well-known that prompt judicial control of detention measures is an essential safeguard against ill-treatment, or even deprivation of life and disappearance.[200] Further, the prohibition of arbitrary detention

197 The right to truth will not be alluded to further at this point, because as the Court has held it to be 'subsumed' in the procedural ACHR rights, no separate issue of derogability arises; e.g. *Bámaca-Velásquez v Guatemala* (n 110) [201]; see further Sweeney (n 13).

198 *Judicial Guarantees in States of Emergency* (Advisory Opinion) (n 166) [23].

199 Stipulating the non-derogability of the rights to life and humane treatment, beyond the Convention text itself, see e.g. *Bámaca-Velásquez v Guatemala* (n 110) [207] and [209]; *Cruz Sánchez et al. v Peru* (n 115) [217].

200 *Habeas Corpus in Emergency Situations* (Advisory Opinion) (n 192) [35]; also in binding judgments, such as *Tibi v Ecuador* (n 62) [128].

as such has been held to be non-derogable.[201] Second, insofar as the Court has requires States to investigate violations of Articles 7 and 22, this has applied to *grave* violations thereof only: forced disappearance, and forced displacement. Disappearances, insofar as not already covered by the rights to life and humane treatment, are never justifiable, regardless of the existence of a state of emergency or armed conflict. The Inter-American Convention on Forced Disappearance of Persons provides so expressly in its Article X, as does the International Convention for the Protection of All Persons from Enforced Disappearance in Article 1(2).[202] Because the Court assesses enforced disappearances 'holistically', as a violation of numerous rights that ought not be examined separately right-by-right but as one event constituting a number of human rights violations, the Article 7 violation cannot here be separated from the violations of the non-derogable rights to life and humane treatment.[203] The Court therefore interprets instances of forced disappearance in harmony with the international and especially Inter-American treaties against disappearances.[204] The conclusion that the duty to investigate forced disappearances is non-derogable, is further reinforced by the Court's finding, alluded to above, that non-investigation constitutes *ipso facto* inhumane treatment of next-of-kin.[205] The non-derogable nature of the prohibition of inhumane treatment therefore necessarily renders the duty to investigate non-derogable as well. Finally, the Article 27(1) requirement that derogations are permissible only 'to the extent (…) strictly required by the exigencies of the situation' clearly disqualifies any derogation with regard to disappearances: obviously these can never be required by whatever emergency situation.

Forced displacement falls under the in principle derogable Article 22 concerning freedom of movement. There are nevertheless indications that derogations with a view to forcibly displacing a population, are impermissible under the ACHR. First, there is the requirement under Article 27 that any derogation is 'not inconsistent with [the State's] other obligations under international law'. In this context there is a case to be made that the right not to be forcibly displaced is a non-derogable right under human rights law, as enshrined in the ICCPR. The Human Rights Committee has held Article 12 ICCPR (freedom of movement), insofar as it pertains to situations of forced displacement, to be non-derogable.[206] Thus, it would seem that OAS States may not derogate from Article 22 ACHR insofar as this would conflict with the right not to be forcibly displaced under the ICCPR – after all, that would be incon-

201 E.g. *Osorio Rivera and family members v Peru* (Preliminary Objections) Inter-American Court of Human Rights Series C No 274 (26 November 2013) [120].
202 Extensively, see Vermeulen (n 110) 64–65.
203 See *Heliodoro Portugal v Panama* (n 179) [112].
204 Ibid [112]-[117].
205 *Las Dos Erres Massacre v Guatemala* (n 65) [204].
206 *General Comment No. 29: Article 4: Derogations during a State of Emergency*, HRC 31 August 2001, CCPR/C/21/Rev.1/Add.11 [13].

sistent with their international obligations. Second and similarly, IHL also contains prohibitions of forced displacement of civilian populations.[207] Because obligations under the law of armed conflict are non-derogable full-stop,[208] these certainly form part of the international obligations Article 27(1) refers to. Based on these arguments, it would seem likely the Inter-American Court would find the prohibition of forced displacement to be non-derogable, although it has not to date ruled on this matter.

Finally, investigative duties arising from the remedial practice of the Inter-American Court, would not seem to be affected by the existence of derogations. After all, if in a certain case the Court is able to find and rule on violations of the ACHR, it must then also be assumed it has jurisdiction to order reparations. Derogations, after all, affect the legal norms States must comply with, it does not alter the legal consequences of violations of the applicable norms. Whereas the precise *standards* applied in the investigative obligation may depend on a derogation or the exigencies of a situation – which is explored further below – this question is distinct from the issue of derogating the duty to investigate.

In conclusion, although the derogations regime is meant to account for emergency situations and armed conflict, giving further leeway to States, the duty to investigate is not subject to derogations. States therefore may not deviate from their obligations merely because an emergency exists, and need to comply with their obligations under the ACHR, 'no matter how difficult' the circumstances.[209] This means Articles 25 and 8 also apply and are non-derogable insofar as the violations discussed above are concerned. Moreover, the applicability of Article 8 means that due process standards must be com-

207 GC IV, art 147; AP I, art 85(4)(a); AP II, art 17; ICC Statute, art 8(2)(a)(vii). Extensively, see Deborah Casalin, 'Prohibitions on Arbitrary Displacement in International Humanitarian Law and Human Rights: A Time and a Place For Everything' in Paul De Hert, Stefaan Smis and Mathias Holvoet (eds), *Convergences and Divergences Between International Human Rights, International Humanitarian and International Criminal Law* (Intersentia 2018) 236–240; Deborah Casalin, 'A Green Light Turning Red? The Potential Influence of Human Rights on Developing Customary Legal Protection against Conflict-Driven Displacement' (2018) 12 Human Rights & International Legal Discourse 62.

208 See the argumentation employed by the Court in *Osorio Rivera and family members v Peru* (n 201) [120]; *Rodríguez Vera et al (the disappeared from the Palace of Justice) v Colombia* (Preliminary objections, merits, reparations and costs) Inter-American Court of Human Rights Series C No 287 (14 November 2014) [402]. In these cases, the Court argues the right not to be deprived of liberty is non-derogable, precisely because it is also guaranteed under IHL, see further below in section 6.3. Similar reasoning is used by the Human Rights Committee, in arguing that because certain elements of the right to a fair trial are guaranteed under IHL, they are therefore non-derogable under the ICCPR; *General Comment No. 29: Article 4: Derogations during a State of Emergency* (n 206) [16].

209 *Mapiripán Massacre v Colombia* (n 15) [238]. See also [89].

plied with in the judicial proceedings at issue.[210] Insofar as non-grave violations also require investigations, these will likely be derogable, at least in theory. Further practice will have to be awaited. Nevertheless, the rights most relevant during armed conflict pertain to precisely those which have been adjudicated upon: life, physical integrity, and liberty, and to a lesser extent the freedom of movement.

6.3 International humanitarian law in the Inter-American human rights system

6.3.1 Introduction

As the above showed, States are unable to alter their investigative obligations in times of emergency and armed conflict by way of derogations. Because the research question asks how investigative obligations apply during armed conflict, the question then becomes how the Inter-American Court has taken account of IHL in its rulings, and to what extent this affects investigative obligations. This section provides a brief overview of the Court's approach to co-application of the ACHR with IHL, and its introduction of the 'systemic interpretation and integration' approach.[211]

6.3.2 The Inter-American Court's engagement with international law

The Inter-American Commission and Court have generally showcased an open approach towards other instruments of international law,[212] and beyond the

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210 *Judicial Guarantees in States of Emergency* (Advisory Opinion) (n 166) [30]: 'Reading Article 8 together with Articles 7(6), 25 and 27(2) of the Convention leads to the conclusion that the principles of due process of law cannot be suspended in states of exception insofar as they are necessary conditions for the procedural institutions regulated by the Convention to be considered judicial guarantees. This result is even more clear with respect to habeas corpus and amparo, which are indispensable for the protection of the human rights that are not subject to derogation and to which the Court will now refer.'

211 Alejandro Fuentes, 'Expanding the Boundaries of International Human Rights Law. The Systemic Approach of the Inter-American Court of Human Rights' [2017] European Society of International Law Conference Paper Series (SSRN Online) 3.

212 The legal basis for the inclusion of norms of international law in interpreting the ACHR, is art 29 ACHR. As one author notes, 'the Inter-American Court applies general cannons of interpretation, but it derives them from the specific rules of interpretation of Article 29, instead of the VCLT. The Vienna Convention is used by the Court as a means to establish its connection to general international law, but at the same time the Court makes it clear that the human rights system is separate from, and even arguably superior to, general international law' – Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21 European Journal of International Law 585, 602.

Court's advisory jurisdiction over international human rights treaties,[213] have incorporated these instruments into their interpretations of the American Convention.[214] An important and distinctive feature of the inclusion of international law sources is the *pro homine* approach, leading the Court to apply international law as an interpretive tool where it serves the protection of the individual.[215] It mostly does so to harness its conclusions by way of reference to further international law support,[216] though as per its mandate, the ACHR remains the document that forms the basis for its judgments, and the Court at times sets aside norms of general international law when interpreting the Convention.[217] In this context, it has emphasised the special nature of the ACHR, as the *lex specialis* to general international law.[218] The *pro homine* interpretation of the ACHR in light of norms of international law is perhaps most prevalent where a case before the Court concerns an armed conflict situation, and which therefore involves the co-applicability of IHL.[219] The interpretive

213 ACHR, art 64(1) is interpreted broadly by the Court to include any provision pertaining to the protection of human rights, whether this is the primary purpose of the treaty or not, and whether non-American States may be party or not. See *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)* (Advisory Opinion) Inter-American Court of Human Rights Series A No 1 (24 September 1982) [1]. Pasqualucci (n 20) 54–57.

214 Fuentes (n 212); Lixinski (n 213). See e.g. *Case of the Serrano Cruz Sisters v El Salvador* (Preliminary Objections) (n 132) [111], where the Court reiterates that it is 'empowered to interpret the norms of the American Convention in light of other international treaties'.

215 *Mapiripán Massacre v Colombia* (n 15) [106] with further case-law references; Fuentes (n 212) 14–16; Lixinski (n 213) 588. Cf. the Court's finding that: 'a provision of the Convention must be interpreted in good faith, according to the ordinary meaning to be given to the terms of the treaty and their context, and bearing in mind the object and purpose of the American Convention, which is the effective protection of the human person, as well as by an evolutive interpretation of international instruments for the protection of human rights', *Artavia Murillo et al ('In vitro fertilization') v Costa Rica* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 257 (28 November 2012) [173].

216 By way of example, see e.g. *Rodríguez Vera et al (the disappeared from the Palace of Justice) v Colombia* (n 208) [478], where the Court refers to rules of customary humanitarian law to support its conclusion under the ACHR, that all measures must be taken to clarify the fate of those who disappeared during a non-international armed conflict.

217 Lixinski (n 213) 590 and 602–604. He bases this assertion on extensive case-law analysis, amongst which importantly *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (Advisory Opinion) Inter-American Court of Human Rights Series A No 16 (1 October 1999) and *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 146 (29 March 2006) [140]. The Court has moreover held in this context, that it is 'competent to determine whether any norm of domestic *or international* law applied by a State, in times of peace or armed conflict, is compatible or not with the American Convention. In this activity, the Court has no normative limitation: any legal norm may be submitted to this examination of compatibility' (emphasis added), *Las Palmeras v Colombia* (n 185) [32], restated in *Santo Domingo Massacre v Colombia* (n 28) [21].

218 *Mapiripán Massacre v Colombia* (n 15) [104]-[107].

219 Cf. Lixinski (n 213) 603.

inspiration the Court draws from IHL in fact goes so far that it has even referenced IHL in cases with no nexus with an armed conflict whatsoever, to support its findings under the ACHR – further cementing its holistic approach towards international law.[220] The discussion now turn towards the Court's approach to co-application of the ACHR and IHL.

6.3.3 *The Inter-American Court's engagement with international humanitarian law*

As is well-rehearsed in legal literature,[221] despite some difference of opinion early on between the Inter-American Commission[222] and the Court, it is now settled that the Inter-American supervisory bodies do *not* have the competence to apply IHL directly.[223] The Court in *Las Palmeras* ruled unequivocally that the Commission nor the Court may hold States internationally responsible for violations of IHL,[224] and this has since become a staple in the Court's case-law.[225] Rather, the Court views IHL as a tool for the interpretation of the American Convention in armed conflict situations. The Court has in a series of cases elaborated its position.

The case of *Las Palmeras* concerned the extrajudicial execution of a number of individuals by State agents in the context of the Colombian non-international armed conflict. The Court, after declining competence to rule on violations of IHL, found that it has 'no normative limitation' in examining to what extent the legal norms applied by States are compatible with the ACHR, whether these

220 E.g. in *Caesar v Trinidad and Tobago* (n 19) [65], the Court held that '[f]urthermore, norms of international humanitarian law absolutely prohibit the use of corporal punishment in situations of armed conflict, as well as in times of peace', even though there was no armed conflict situation in this case.

221 Burgorgue-Larsen and Úbeda de Torres (n 3); van den Herik and Duffy (n 23); Elizabeth Salmón, 'Institutional Approach between IHL and IHRL: Current Trends in the Jurisprudence of the Inter-American Court of Human Rights' (2014) 5 Journal of International Humanitarian Legal Studies 152; Emiliano J Buis, 'The Implementation of International Humanitarian Law by Human Rights Courts: The Example of the Inter-American Human Rights System' in Noe?lle NR Queìnivet and Roberta Arnold (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff 2008); Duffy (n 188); Lixinski (n 213); Fuentes (n 212); Liesbeth Zegveld, 'The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case' (1998) 38 International Review of the Red Cross 505; Burgorgue-Larsen and Úbeda de Torres (n 22).

222 *Arturo Ribón Avilán and 10 Others ('The Milk') v Colombia*, IACmHR, Report No 26/97, Case 11.142 OEA/Ser.L/V/II.98, doc. 6 rev. (30 September 1997); *Juan Carlos Abella v Argentina*, IACmHR, Report No. 55/97, Case 11.137, OEA/Ser.L./V/II.98, doc. 6 rev. (18 November 1997) (also known as the *La Tablada case*). Discussing these cases extensively, see Cerna (n 26) 32–41; Buis (n 222) 277–283.

223 Taking a different position, however, see Cerna (n 26).

224 *Las Palmeras v Colombia* (n 185) [33].

225 E.g. *Bámaca-Velásquez v Guatemala* (n 110) [207]-[209]; *Mapiripán Massacre v Colombia* (n 15) [115]; *Rodríguez Vera et al (the disappeared from the Palace of Justice) v Colombia* (n 208) [39].

norms are domestic or international.[226] The Court has later clarified in *Bámaca Velasquez v Guatemala* that this means norms of IHL can be 'taken into consideration as elements for the interpretation of the American Convention'.[227] Interestingly in this case, handed down within less than a year of *Las Palmeras*, the Court went on to find that although its jurisdiction is limited to holding States responsible for violations of the ACHR and other OAS treaties conferring jurisdiction on it,[228] it may nevertheless 'observe that certain acts or omissions that violate human rights (...) also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3'.[229] This somewhat ambiguous finding[230] would seem to indicate that the Court is not competent to hold States responsible for violations of IHL directly, nor can it order reparations therefor, but that it may nevertheless find ('observe') that a violation of the ACHR simultaneously constituted a breach of norms of IHL. This would then form a sort of *obiter dictum*. Although the Court later reaffirmed its competence in this regard,[231] it has not thus far given rise to an extensive practice of 'observing' violations of IHL.

Later on, the Court focused more on the *interpretive guidance* to be derived from norms of IHL when applying the ACHR in the context of armed conflicts. Whereas its approach has been largely consistent, the exact phrasing employed by the Court has fluctuated somewhat. During armed conflict, the Court has considered it 'useful and appropriate' to use international humanitarian treaties 'to interpret [ACHR] provisions in accordance with the evolution of the inter-American system, taking into account the corresponding developments in international humanitarian law'.[232] One step further even, the Court has also found that specific rights under Common Article 3 and the ACHR 'complement each other or become integrated to specify their scope or their content',[233] and IHL thus can be used '*to give content and scope* to the provisions of the American Convention'.[234] In referring to conventional and customary rules of IHL, the Court has underlined their 'specificity' during armed conflict, compared to the ACHR.[235] This is most evident from the following considera-

226 *Las Palmeras v Colombia* (n 185) [32].
227 *Bámaca-Velásquez v Guatemala* (n 110) [209]. See also *Rodríguez Vera et al (the disappeared from the Palace of Justice) v Colombia* (n 208) [39].
228 Phrased negatively in *Bámaca-Velásquez v Guatemala* (n 110) [208], but positively in *Las Palmeras v Colombia* (n 185) [34]. Cf. Pasqualucci (n 20) 122.
229 *Bámaca-Velásquez v Guatemala* (n 110) [208].
230 van den Herik and Duffy (n 23).
231 Citing *Bámaca-Velásquez v Guatemala* (n 110) with approval, see *Santo Domingo Massacre v Colombia* (n 28) [23].
232 *Case of the Ituango Massacres v Colombia* (n 77) [179].
233 *Mapiripán Massacre v Colombia* (n 15) [115].
234 *Case of the Serrano Cruz Sisters v El Salvador* (Preliminary Objections) (n 132) [119].
235 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [141]; *Cruz Sánchez et al. v Peru* (n 115) [270].

tion in *Santo Domingo*,[236] concerning military operations carried out by Colombian aerial forces, including the use of cluster ammunition, in and around the village of Santo Domingo and resulting in numerous civilian casualties:

> '24. (…) by using IHL as a supplementary norm of interpretation to the treaty-based provisions, the Court is *not making a ranking* between normative systems, because the applicability and relevance of IHL in situations of armed conflict is evident. This only means that the Court can observe the regulations of IHL, as the *specific* law in this area, in order to make a more *specific* application of the provisions of the Convention when defining the scope of the State's obligations.'[237]

The Court, in other words, though limited in jurisdiction to ruling on State responsibility for violations of Inter-American human rights treaties, does take account of IHL in interpreting the ACHR. Moreover, its references to IHL as 'the specific law' appear to adopt the ICJ's earlier finding that in the context of armed conflict and where a situation is covered by both IHL and human rights law, IHL functions as *lex specialis*.[238] The Inter-American approach in this regard has been lauded as working towards defragmentation of international law.[239]

Nevertheless, even where cases concern the interplay between the ACHR and IHL, the outcome of a case before the ICJ and the IACtHR will likely differ. This is due to mainly two reasons.[240] First, it is important to distinguish between the *applicable law*, and the law a specific tribunal has jurisdiction to apply.[241] Even if the IACtHR views IHL as *lex specialis*, that fact in itself does not confer jurisdiction on it to apply IHL. As Emiliano Buis explains, '[a] situation might be perfectly well covered by both branches of law if the state ratified the appropriate conventions, but that over[lap] does not mean that a specific tribunal has to take into account both legal *corpora* when addressing the alleged violations'.[242] In this sense, the systemic integration approach can only go so far, within the limits of jurisdiction, and the IACtHR's findings therefore necessarily represent a somewhat limited perspective on interplay.[243] Second, the Inter-American Court's *pro homine* approach further shifts its

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236 Discussing this case extensively, see Salmón (n 222).

237 *Santo Domingo Massacre v Colombia* (n 28) [24], emphasis FT. In similar wording, see *Rodríguez Vera et al (the disappeared from the Palace of Justice) v Colombia* (n 208) [39].

238 *Legality of the Threat or Use of Nuclear weapons* (n 144) [25]; *Legal Consequences of the Construction of a* (n 144) [106]. The IACtHR explicitly references these Advisory Opinions in *Cruz Sánchez et al. v Peru* (n 115) [272].

239 Lixinski (n 213) 604.

240 Not counting the obvious distinction of ICJ cases always being of an inter-State nature, whereas IACtHR cases primarily have an individual v the State format.

241 Buis (n 222) 287.

242 Ibid.

243 Cf. Lixinski (n 213) 602–604.

perspective, to the effect that it takes onboard IHL norms primarily where they serve to strengthen individual protections.[244] As the *pro homine* principle prescribes an expansive interpretation of rights coupled with a restrictive interpretation of their limitations, this would mean IHL is solely employed to expand rights – resulting in what Elisabeth Salmón has called a 'pick and choose approach' to incorporating IHL.[245] As she noted already herself however, the Court at times grapples with IHL in more detail,[246] and the case-law appears to now be in flux. Whether the classification as 'pick and choose' still holds true, therefore, is up for debate. To flesh out the Court's approach to IHL, and to flesh out the general principles set out above, the discussion now turns to more specific application in two cases of primary importance: the cases of *Santo Domingo Massacre v Colombia* (2012),[247] and *Cruz Sánchez et al. v Peru* (2015).[248]

In *Santo Domingo*, Colombian aerial forces deployed cluster ammunition in an operation against the FARC. The bomb hit the village of Santo Domingo, and when the victims fled the village they were targeted by machine gun fire. The Court, acknowledging the existence of a non-international armed conflict in Colombia, had to decide on claims regarding both a perceived lack of investigation into the events, as well as substantive violations of *inter alia* the rights to life and physical integrity. Finding first, as will be discussed further below, that the duty to investigate is not violated, the Court in moving on to the substantive rights in question and acknowledging the existence of a non-international armed conflict in Colombia, first reiterates the importance of IHL in the interpretation of the ACHR.[249] Then, in the determination of the claims under the rights to life and physical integrity, it finds it must 'analyze the facts of the case interpreting the provisions of the American Convention in light of the pertinent norms and principles of international humanitarian law, namely: (a) the principle of distinction between civilians and combatants; (b) the principle of proportionality, and (c) the principle of precaution in attack'.[250] Interestingly, the Court therefore seems to condition a violation of the rights to life and physical integrity fully on whether or not the conduct in question complied with principles of IHL. Indeed, in its assessment, the Court then finds in a rather brief examination of the principle of distinction,[251] and a somewhat more lengthy examination of the principle of precaution in attack,[252] that these principles were not complied with – which leads it direct-

244 See (n 215) and the corresponding text.
245 Salmón (n 222) 165ff, especially 169-170.
246 Ibid 162-165.
247 *Santo Domingo Massacre v Colombia* (n 28).
248 *Cruz Sánchez et al. v Peru* (n 115).
249 *Santo Domingo Massacre v Colombia* (n 28) [187].
250 Ibid [211].
251 Ibid [212]-[213].
252 Ibid [216]-[229].

ly to find violations of the ACHR.[253] A first interesting feature of this case is therefore that the Court appears to view IHL as wholly determinative of its assessment under the ACHR.

A second point of interest is the Court's considerations as to the principle of proportionality, assessed in light of the cluster ammunition strike on Santo Domingo. Although Colombia contested a cluster bomb had hit the village, stating rather that a FARC[254] truck had been detonated, the Court found it to be established that the damage and deaths in the village had resulted from cluster ammunition. Regardless, the Court accepts that in deploying the cluster ammunition, Colombian air forces had meant to target guerrilla troops in the woods next to the village, rather than the village itself. Because proportionality refers to a balancing act between an attack's *anticipated* concrete and direct military advantage, and *expected* civilian harm,[255] one would expect the Court to engage in an examination of this anticipated advantage and the expected harms. The Court, however, finds it 'not appropriate' to consider the cluster ammunition strike on Santo Domingo under this principle, 'because an analysis of this type would involve determining whether the deceased and injured among the civilian population could be considered an "excessive" result in relation to the specific and direct military advantage expected if it had hit a military objective, which did not occur in the circumstances of the case'.[256] Because proportionality as prescribed by IHL is about projected results of an attack *beforehand*, this finding by the Court appears to skew the applicable IHL. Salmón has interpreted this finding by the Court as an attempt to distance itself from potential negative consequences of applying IHL.[257] In this interpretation, the Court intentionally applied IHL *pro homine*, only insofar as it benefits individual protection. This is definitely possible, though the Court is not express about any choice of this kind. More strikingly, the case of *Cruz Sánchez* – handed down after Salmón wrote her article – would seem to point in a different direction.

In *Cruz Sánchez*,[258] Peruvian forces ended a hostage situation at the Japanese embassy in Lima, which took place against the background of a non-inter-

253 Ibid [230].

254 The Colombian Revolutionary Armed Forces, or *Fuerzas Armadas Revolucionarias de Colombia*.

255 art 51(5)(b) AP I. See also the rule of customary IHL as identified by the ICRC, which the Court also references in [214], Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *ICRC Customary International Humanitarian Law – Volume I: Rules*, vol I (Cambridge University Press 2005) Rule 14.

256 Ibid [215].

257 Salmón (n 222) 164.

258 *Cruz Sánchez et al. v Peru* (n 115). For an elaborate discussion of the case, see Kenneth Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict* (Oxford University Press 2016) 501–510.

national armed conflict between Peru and the armed group MRTA.[259] At issue were primarily the deaths of three of the hostage takers, members of the MRTA, and whether during the storming of the embassy they had been subjected to extrajudicial execution. The Court's approach to this situation is to first set out the ACHR framework for the use of lethal force by the State, setting out standards of legality, absolute necessity and proportionality.[260] It then expressly refers to the ICJ's *lex specialis*-doctrine, stipulating that what is an *arbitrary* deprivation of life must be assessed in light of IHL as the more specific field of law,[261] and it also cites its European counterpart in support of this assertion.[262] Having regard to the specificity of IHL in the context of an ongoing NIAC, and considering that the ACHR does not define the exact scope of arbitrariness in the context of armed conflict, reference must be had to IHL, specifically the principles of distinction, proportionality and precaution.[263] Because IHL, and Common Article 3 to the Geneva Conventions specifically, grants protection to certain categories of individuals only, the Court then affords special attention to the question whether the three individuals in question were protected under IHL.[264] Having concluded that the planning of the operation did not appear defective and did not contain an order that none of the MRTA members may survive, the Court then scrutinised the status of the three individual members under IHL. Because they took a direct part in hostilities they could not be classified as civilians, meaning their protected status hinged on whether they had been placed *hors de combat* when they were killed, or whether they had still been taking a direct part in hostilities.[265]

The Court thus ventures into the realm of the IHL system of status-based targeting, where enemy combatants or civilians taking a direct part in hostilities may be targeted and killed. Moreover, the Court ultimately finds that the three were taking a direct part in hostilities during the hostage situation, and that for only one of them it could be proven that he was detained by the State when he was killed.[266] The deaths of the other two, in other words, were in compliance with the ACHR as they had taken a direct part in hostilities,[267] and were therefore lawful targets.[268] This arguably presents a shift in the Court's case-

259 The Túpac Amaru Revolutionary Movement or *Movimiento Revolucionario Túpac Amaru*, which from the early 1980s until 2000 was engaged in a non-international armed conflict with the Peruvian government, *Cruz Sánchez et al. v Peru* (n 115) [267].
260 Ibid [265].
261 Ibid [272].
262 Ibid, referencing *Varnava and Others v Turkey*, ECtHR [GC] 18 September 2009, Appl No 16064/90 and 8 others [185].
263 *Cruz Sánchez et al. v Peru* (n 115) [270] and [273].
264 Ibid [266]; [276ff]; [287].
265 Ibid [287].
266 Ibid [313]; [316].
267 The Court did not have enough evidence to find they had been detained or had otherwise stopped participating directly in hostilities, ibid [340]. See also Frisso (n 87) 183.
268 *Cruz Sánchez et al. v Peru* (n 115) [339]-[343].

law, as the interpretive guidance gained from IHL here does not bestow further protection, but rather shrinks what is to be seen as an 'arbitrary deprivation of life' during armed conflict. Human rights law too of course provides the possibility for States to intervene with lethal force where a hostage situation is at stake, especially where the hostage takers are heavily armed and demonstrably willing and able to hurt hostages.[269] Nevertheless, the status-based assessment indicates the adoption of certain IHL rules which deviate from the regular *pro homine* incorporation of rules of IHL within the ACHR framework. The case-law as it stands does not appear conclusive in how the Court approaches IHL. We therefore appear to still be in the 'grey area' Elisabeth Salmón identified in 2014, where the Court at times grapples more intensely with IHL, whereas at others IHL serves more as an afterthought or a mere supportive argument. The determinative value afforded to IHL in *Santo Domingo* and *Cruz Sánchez*, however, clearly move beyond just paying lip service, and especially in the latter case where IHL does not work in favour of the victims, might indicate a new approach to interplay.

6.3.4 Résumé

The Inter-American Court, like the Human Rights Committee, takes an open approach towards IHL. It is willing to interpret the ACHR in light of IHL norms, and even to find in *obiter* that violations of the ACHR also violated IHL. Moreover, it has referenced the ICJ's *lex specialis* approach in this context, acknowledging that IHL may be more specifically geared towards situations of armed conflict, and can therefore guide the interpretation of the ACHR. Nonetheless, the Court's approach is somewhat ambiguous. Its *pro homine* approach towards international law leads it to incorporate rules of international law primarily when they favour individual protection. This has also been the case in the context of IHL, as is illustrated by the case of *Santo Domingo*, but may have been departed from in *Cruz Sánchez*. To what extent the Court is willing to interpret the ACHR in light of IHL even where this goes to the detriment of individual protection, must be clarified further in future case-law.

Another noteworthy aspect of the Court's approach towards IHL, is that it does not engage in conflict classification itself. Rather, it chooses to rely in this respect on the findings by domestic courts. This, it is submitted, may be wise in light of the challenging and resource intensive nature of conflict classification. Nevertheless, it can lead to certain peculiarities. Thus, firstly, the Court does not distinguish between NIACs governed by Common Article 3 alone, or also by AP II – which have a separate threshold.[270] Perhaps for this very reason, it also relies almost exclusively on customary IHL in its judgments, rather than treaty provisions. Secondly, because the Court relies on domestic

269 Ibid [265] and [274]-[275]. See further Watkin (n 259) 501–510.
270 See Chapter 2, §4.2.3.

findings as to conflict classification, its case-law has some inconsistencies where domestic classifications have changed. In relation to Peru, the Court relied on a Truth and Reconciliation Commission's finding that Peru had been engaged in a NIAC, but because some cases before the Court had predated this classification, this has led to members of the MRTA in one case being classified as civilians, and later as fighters taking a direct part in hostilities.[271] Such inconsistencies can have important consequences for the applicable law and the individuals involved, and ought therefore be avoided.

6.4 Investigations into violations committed during armed conflict

6.4.1 Introduction

We now know how the duty to investigate functions during situations of normalcy, that it is non-derogable even during situations of emergency and armed conflict, and how the Court approaches interplay of the ACHR with IHL. Relying on this knowledge as a stepping stone, we can now move on to examining the duty to investigate violations committed during armed conflicts. Firstly, we may examine the scope of application of the duty to investigate in armed conflict situations (§6.4.2). Secondly, we may turn to the applicable investigative standards during conflict (§6.4.3). This examination will explore once more the case of *Santo Domingo*, which is particularly illustrative because Colombia in this case had met its investigative obligations, according to the Court. Two potential tensions with IHL are brought out, relating to military investigations, and amnesties.

6.4.2 Scope of application

The Court's starting point in assessing investigative duties for violations committed during armed conflicts, is that regardless of that context, the duty to investigate persists and States are not exempted from their obligations. The *scope of application* of the duty to investigate, therefore, is not principally limited by the existence of armed conflict.

Looking in more detail at the duty to investigate third-party conduct, a relevant question is whether during armed conflicts, States must also investigate abuses committed by NSAGs. A major strand of Inter-American case-law relates to State responsibility for conduct by paramilitary groups, with responsibility often stemming from States' support to, or acquiescence in, atro-

271 Frisso (n 87); Alonso Gurmendi Dunkelberg, 'The Era of Terrorism: The Peruvian Armed Conflict and the Temporal Scope of Application of International Humanitarian Law' [2017] SSRN. Compare *Castillo Petruzzi et al v Peru* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 52 (30 May 1999) with *Cruz Sánchez et al. v Peru* (n 115).

cities committed by such groups. In these types of situations, the Court is unequivocal in its findings that the State is responsible for such violations, and must investigate, prosecute, and punish perpetrators. Much more rare are cases involving non-investigation by the State into acts perpetrated by armed groups who are entangled in a conflict with the State.[272] Nonetheless, clear guidance for such situations can be gleaned from case-law relating to amnesties for atrocities committed during armed conflicts. The Court has been unequivocal in its denouncement of amnesties covering serious human rights violations because they interfere with the duty to investigate, prosecute, and punish, also when such amnesties cover acts by armed opposition groups.[273] The Inter-American system has been in the forefront of developments in this field, and has spurred on the 'peace versus justice' debate, because its strong emphasis on prosecution may render peace agreements impossible where parties to a conflict are unwilling to lay down their weapons unless they are guaranteed amnesty for their crimes.[274] The Court's non-compromising stance, however, leaves little to be desired in the way of clarity: even where an amnesty was confirmed by not one, but *two* referenda, the Inter-American Court reaffirmed the paramount of importance of the duty to investigate, and found the amnesty to be incompatible with the ACHR.[275] Thus, the duty to investigate infringements of ACHR rights by NSAGs is not just clearly established by the Inter-American Court, it is moreover an obligation which can trump countervailing interests, such as even the conclusion of peace processes – and clearly applies unabridged during armed conflict.

6.4.3 Investigative standards

With respect to investigative standards, the point of departure is that no matter how difficult the circumstances, States must ensure effective investigations to break the cycle of impunity that is started and perpetuated by a lack of

272 For one example, see the *Alemán Lacayo case* (Provisional Measures) Inter-American Court of Human Rights Series E No 1 (2 February 1996), where the Court ordered measures including 'to prevent violations of human rights and to investigate the events' [operative par 6], which had consisted of an attempted murder at a then presidential candidate, later elected, conducted by heavily armed men, not unlikely with ties to 'bands of ex-members of the Sandinista Popular Army and the Nicaraguan Resistance' [3], in other words, with NSAGs. See further Pasqualucci (n 20) 186.

273 *Gomes Lund et al. (Guerrilha do Araguaia) v Brazil* (n 64) [134]-[136]. See also Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 82) 1094.

274 Calling this the 'shadow effect' of the law, see Courtney Hillebrecht, Alexandra Huneeus and Sandra Borda, 'The Judicialization of Peace' (2018) 59 Harvard International Law Journal 279, 287. See further Allen S Weiner, 'Ending Wars, Doing Justice: Colombia, Transitional Justice, and the International Criminal Court' (2016) 52 Stanford Journal of International Law 211.

275 *Gelman v Uruguay* (n 27) [226].

response to violations.[276] The Court may, however, take the exigencies of such situations into account depending on the facts and circumstances of the case.[277] In cases like the *Mapiripán Massacre* and the *Massacre of El Mozote and Nearby Places*, where whole villages were massacred by paramilitary troops with collusion by State armed forces, or by the armed forces themselves, there is no room for any leniency. In *El Mozote*, El Salvador had targeted its own civilians directly in the most gruesome way, as part of a deliberate strategy to 'take the water away from the fish', meaning that they wished to take away any and all support for guerrilla fighters by literally destroying civilian populations who might support them, as well as their means of subsistence.[278] In such cases, where the State is actively and deliberately engaged in targeting its own population, it is no wonder the Court does not provide any leeway to the State when it comes to investigations into these massacres – they are of paramount importance to restore the rule of law and end impunity. Also in other cases, however, the Court has seemingly granted little leniency to States when investigating, rather stressing they must employ 'all necessary means' to ensure effective investigation.[279]

To illustrate this, we may once more examine the case of *Santo Domingo*, where there was no deliberate slaughter of civilians, but where Colombian armed forces accidentally targeted civilians in a military operation. As was set out above, the Court in this case makes extensive use of norms of IHL in its substantive assessment of the State's compliance with the rights to life and physical integrity. What is striking, as Giovanna Frisso notes, is that the Court makes no reference to IHL when ruling on States' investigative obligations.[280] This stands out even more, because the Court examines Colombia's compliance with the investigative obligations under Articles 25 and 8 ACHR *before* it moves on to the examination of compliance with substantive rights, where it does reiterate the importance of interpreting the ACHR in light of IHL.[281] Because the Court in the same case in rejecting Colombia's preliminary objections stressed that IHL is the 'specific law' regulating armed conflict,[282] this seemingly indicates it is of the opinion that IHL is of no relevance for the investigative obligations – or at least that IHL is not more specific than the ACHR in this context. In other cases the Court similarly did not refer to IHL when it assessed States' investigative obligations.[283] This also seems to transpire

276 *Mapiripán Massacre v Colombia* (n 15) [238].
277 *Cruz Sánchez et al. v Peru* (n 115) [350].
278 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [208].
279 *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 270 (20 November 2013) [440]; cf. Frisso (n 87) 189.
280 Frisso (n 87) 185–191.
281 *Santo Domingo Massacre v Colombia* (n 28) [187].
282 Ibid [24], the consideration is cited above at (n 237).
283 See *Bámaca-Velásquez v Guatemala* (n 110) [182ff]; *Cruz Sánchez et al. v Peru* (n 115) [344ff].

from a closer look at the Court's scrutiny of Colombia's investigations into what happened at Santo Domingo.

In this case, the Court restates the fundamentals of the duty to investigate without any modification in light of the armed conflict situation existing in Colombia at the time.[284] It then goes on to scrutinise the investigations mounted by Colombia, and finds the authorities have diligently investigated thus far, and are still in the process of doing so.[285] Several proceedings have been instituted (criminal, disciplinary and administrative), and certain criminal proceedings that were initially brought under the military jurisdiction, have been transferred to regular criminal prosecution services.[286] Although this has led to some delay, this does not in and of itself violate the due diligence obligation resting upon the State.[287]

What is determinative for the Court is that the investigations make clear 'whether a specific violation (...) has occurred with the support or tolerance of the public authorities, or whether the latter have acted so that the violation has been committed without any attempt at prevention or with impunity'.[288] All the various investigations initiated by the State are relevant in this regard. The Court ultimately found Colombia had met its obligation, because: (i) the ordinary criminal prosecutor had initiated a number of effective investigative measures, which had moreover resulted in the prosecution and conviction of three members of the armed forces for homicide or causing bodily injury of in total 35 victims,[289] (ii) insofar as the Commission and the victims had alleged a lack of prosecution of multinationals cooperating with the armed forces, they had provided insufficient evidence to show that investigations would have resulted in bringing to light further violations,[290] (iii) the investigations were not unduly delayed having regard to amongst others the complexity of the case,[291] and (iv) the disciplinary and administrative investigations contributed to determining State responsibility.[292] On this basis the Court concludes that

> 'the domestic organs for the administration of justice have already made an extensive determination of several implications of the State's responsibility for the facts, irrespective of the levels of individual, criminal or disciplinary responsibility of State agents or private individuals, definition of which corresponds to the domestic

284 *Santo Domingo Massacre v Colombia* (n 28) [154]-[155].
285 Ibid [171]-[173].
286 Ibid [159] and [82]-[103].
287 Ibid [159] and [164]-[165]; cf. Frisso (n 87) 188.
288 *Santo Domingo Massacre v Colombia* (n 28) [156].
289 Ibid [160]-[161].
290 Ibid [162]-[163].
291 Ibid [164]-[165].
292 Ibid [167]-[170].

jurisdiction, even if not all the facts or classifications of the facts have been sufficiently or fully investigated or clarified.'[293]

Even though Colombia had not, therefore, finalised its investigations into the events at Santo Domingo, the Court nevertheless found it was well on its way in diligently investigating the facts and the individuals responsible, and that there was therefore no violation of Articles 25 and 8 of the Convention. This goes to illustrate that although the Court does not reference IHL to loosen any investigative standards, it may nevertheless be satisfied that States have complied with their due diligence obligation. Colombia's efforts to both prosecute and convict those individuals responsible, and to establish any State responsibility for the events through disciplinary and administrative proceedings, can thus serve as an example of how to investigate gross human rights violations committed during active hostilities.[294] It should be borne in mind in this context, that whereas the Court appreciates the administrative and disciplinary proceedings and accepts their potential complementary function in establishing the facts and in expounding a certain symbolic message, it finds that they cannot wholly substitute criminal proceedings.[295]

A final point to note in the *Santo Domingo* case is that despite the Court's finding that Colombia had complied with its investigative obligations, the Court nevertheless ordered the State to investigate the events further as a reparative measure for the substantive violations it had identified.[296] The Court in this regard recalls the general obligation under Article 1(1) ACHR, and finds Colombia must continue the pending investigations and initiate others insofar as appropriate to 'determine the facts and responsibilities' for the event.[297] In large part this therefore has to do with the circumstances of this specific case, where the domestic investigations had not yet been finalised when it was brought to San José.[298]

293 Ibid [171].

294 As a contrary example, see *Cruz Sánchez et al. v Peru* (n 115) [370]-[374]. As Frisso summarises, '[a]mong the irregularities identified, the Court emphasised that the bodies were removed a day after the events and that there was no information to indicate that the crime scene had been secured; no ballistic comparison of the weapons used in the operation was carried out; no photos of the weapons or grenades allegedly involved in the events were taken; similarly no fingerprints were taken on the weapons or grenades; the autopsies took place in a facility that was not suitable for such a procedure by staff who were not accustomed to performing such procedures; no dental tests were performed; only three of the fourteen corpses were identified, and the remains of the fourteen MRTA members were buried clandestinely', Frisso (n 87) fn 113.

295 *Santo Domingo Massacre v Colombia* (n 28) [167].

296 Ibid [297].

297 Ibid.

298 Remarking on this itself, the Court found that 'in application of the principle of complementarity, it should not have been necessary for the Court to rule on the facts that resulted in the violations of the rights acknowledged and repaired at the domestic level', but that

The Court's approach to investigative obligations arising from violations during conflicts takes little account of IHL. As Giovanna Frisso puts forward, this may be most readily explained by the lack of investigative standards to be found under IHL, as well as the continuing debate on the scope and even the existence of investigative obligations during non-international armed conflicts.[299] It is certainly true that IHL provides little express guidance on investigative standards,[300] and that insofar as the Inter-American Court takes IHL into account because of its *specificity*, this would certainly explain why when looking at the duty to investigate, IHL plays no role of importance. Nevertheless, IHL does contain a number of provisions on investigations, and these in fact might conflict with the relevant standards as set out by the Court under the ACHR. Such tensions arise in particular with respect to the investigative standard of independence, in relation to military investigations, and the required criminal law follow-up, in relation to Additional Protocol II's insistence on amnesties for those who took part in the conflict.

Independence

The Inter-American Court has been consistent and adamant in excluding investigations under military jurisdictions, for violations of the ACHR. That system ought to be reserved only for those individuals who are still in active military service, and limited to cases involving crimes or infractions that by their very nature violate legal interests specific to the military order.[301] The requirement that the regular prosecution services prosecute perpetrators under regular criminal jurisdiction, can potentially be at odds with IHL however. As was explored in Chapter 3, IHL requires direct commanders to investigate any potential grave breaches perpetrated by their troops, and even holds them criminally liable when they fail to do so.[302] The International Criminal Court (ICC) has further reinforced this system in finding that the commander must 'take all necessary and reasonable measures'[303] in order to ensure effective prevention and repression.[304]

If commanders can be held criminally responsible for a lack of investigation and punishment of their subordinates for allegations of international crimes and grave breaches of IHL, whilst at the same time the ACHR requires investigations to be carried out in full independence by the regular prosecutorial

due to Colombia's shifting position during the proceedings, it nevertheless considered it necessary to decide the case on the merits; ibid [171]-[172].

299 Frisso (n 87) 185.

300 See Chapter 3, §4.

301 E.g. *Cruz Sánchez et al. v Peru* (n 115) [397]; *Santo Domingo Massacre v Colombia* (n 28) [158]; see further Frisso (n 87) 188.

302 AP I, art 86 and 87.

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

304 Ibid [170].

authorities, this could potentially put commanders in a situation where they are 'damned if they do, and damned if they don't'. If they investigate they violate IHRL, if they do not, they violate IHL and are criminally liable therefor. This potential conflict of norms has not yet been acknowledged by the Court, although this may also be explained by the cases brought before it thus far: these concern situations of non-international armed conflict where conventional IHL does not expressly provide for command responsibility. The ICC Statute, however, does cover such situations, meaning in theory commanders might be obliged to do something under international criminal law that would simultaneously violate human rights norms.

Nonetheless, the conflict may not be as hard as it seems. If 'all necessary and reasonable measures' that commanders are obliged to take, is understood to mean also prompt notification of an alleged crime to the competent prosecutorial services, as the *Guidelines* by the ICRC and Geneva Academy put forward, a conflict can be avoided.[305] Situations of active hostilities and high intensity conflict, regardless, might not allow for regular prosecutorial services to conduct investigations on the scene, and might require direct action by commanders before being able to defer a case at a later, more quiet moment. As the Court in *Santo Domingo* found Colombia's investigation to be in compliance with the ACHR despite the initial investigation under military jurisdiction, it would appear the Inter-American Court accounts for such situations without necessarily finding the State in breach of the Convention.

Criminal law follow-up and amnesties

A final point of potential normative conflict concerns amnesties for crimes committed during non-international armed conflicts. As was set out above,[306] the duty to investigate entails an obligation for States to remove all *de facto* and *de jure* obstacles for investigation, prosecution, and punishment, including a prohibition of amnesties. Meanwhile Additional Protocol II, applicable to non-international armed conflicts, requires States to provide 'the broadest possible amnesty' for those who have taken part in hostilities, thus giving rise to conflicting obligations. The Court has acknowledged the tension arising here, and this is in fact the only issue under its considerations on the duty to investigate, where the Court expressly engages with IHL. In the cases of *Gelman v Uruguay* and *El Mozote v El Salvador* this issue was discussed, with the Court opting to apply a form of harmonious interpretation of the various provisions rather than engaging in a discussion on *lex specialis* and hierarchy of norms. It found that Article 6(5) AP II, requiring States to amnesty active participants in hostilities, was to be read in light of the other rules of IHL, in

305 See Chapter 3, §4.
306 *Supra*, §3.4.3 and 5.

particular the duty to investigate war crimes.[307] Referencing the ICRC Customary IHL study,[308] it found that this obligation applied equally during armed conflict.[309] Because of these competing obligations within IHL, the Court argued, the obligation to provide amnesty must be limited to crimes that do not amount to war crimes or crimes against humanity. Thus, the Court sidesteps a potential normative conflict by interpreting IHL in a way that corresponds to the ACHR.

In conclusion, the two main contentious issues where the duty to investigate may clash with IHL – relating to the independence of investigations and to amnesties – appear to have been nimbly avoided by the Court. By providing some leeway for investigations in the sense that as long as an investigation that started out within the military jurisdiction is transferred to regular criminal prosecutorial authorities in a timely manner, a head-on clash between the IHL and ICL systems of command responsibility and the ACHR duty to investigate independently, seems to be prevented. Similarly, by interpreting the NIAC obligation to grant amnesty *pro homine* and in line with the duty to investigate war crimes, the Court sidesteps any direct conflict of norms between IHL and the duty to investigate. Whereas the Court ultimately pays little mind to IHL in the context of investigations, it therefore nevertheless succeeds in avoiding direct conflicts.

7 CONCLUSION

This Chapter set out to explore the Inter-American system's regulation of investigative obligations, in particular during armed conflict. In terms of the research question, the analysis focused on *whether* States are obliged to investigate human rights violations under the ACHR, and if so, what the *scope of application* and *contents* of that obligation are. We may now answer affirmatively that States are subject to an obligation to investigate violations of the ACHR. In fact, the Inter-American system and Court have fulfilled a pioneering role in this respect. It was arguably the Inter-American Court's engagement with the duty to investigate which has sparked a broader trend in international human rights law which focuses on the duty to investigate human rights violations. The Court's seminal judgment in *Velásquez Rodríguez*, in 1988, moreover just preceded further developments towards criminal accountability for violations of international law, which culminated in the setting up of

307 *Gelman v Uruguay* (n 27) [210]; *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [286].

308 Henckaerts and Doswald-Beck (n 256) Rule 159.

309 *Gelman v Uruguay* (n 27) [210]; *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 18) [286].

numerous *ad hoc* criminal tribunals and hybrid tribunals, as well as the permanent International Criminal Court in the Hague. Thus, the Inter-American Court's development of the sword function of the ACHR just preceded, and coincided with, the broader development of what has been called a 'criminal turn' in international law.

Much like we saw in respect of the ICCPR, the Inter-American Court has read investigative obligations into the ACHR. As was shown, it arguably envisions a duty to investigate *all* violations of the ACHR, because the Article 1 obligation to ensure rights requires the State to institutionalise a procedural layer of protection which investigates all violations. Yet, its practice has focused on *grave* violations of the ACHR, primarily extrajudicial executions, torture, and enforced disappearance. These violations, moreover, must be *criminally* investigated, prosecuted, and punished. Thus, like under the ICCPR, and like under IHL, there appears to be a general obligation for States to implement the ACHR through the setting up of a broadly applicable investigative machinery. Further, *grave* violations, like serious violations of IHL, must not only be investigated, but must moreover be prosecuted and punished, if appropriate. Because the Court's case-law has pertained almost exclusively to such serious violations, the case-law has a strong emphasis on criminal accountability, and the fight against impunity.

When it comes to *how* States must investigate violations of the ACHR, there are a number of standards which must be met. Importantly, the duty to investigate itself is a due diligence obligation. If States do what they can to bring to light what has happened and to establish responsibility, but if they ultimately cannot, this therefore does not necessarily breach their obligations. This will depend on whether they have met the applicable investigative standards. Standards set by the Court, are that an investigation must be (i) launched of the State's own accord (*ex officio*), (ii) carried out promptly and with reasonable expedition, (iii) serious and effective, (iv) independent and (v) impartial, and (vi) they must sufficiently involve the next of kin or the victims. Further, (vii) any *de jure* or *de facto* obstacles to investigation and prosecution must be removed. As was mentioned, the Inter-American Court has moreover strongly emphasised the need for ensuring criminal accountability of both direct perpetrators and intellectual authors of abuses. Interestingly, the Court has not thus far expanded on a broader requirement of transparency, the way the Human Rights Committee has. Rather, it has stressed the involvement of next of kin of victims and their role in the investigative process.

Armed conflict does not appear to play a major role in changing the scope or contents of the duty to investigate under the ACHR. Whereas the Inter-American Court is open to interpreting the ACHR in light of IHL, and has done so in a number of contexts, it does not refer to IHL at all when it comes to investigations. Because it has held that IHL may provide the more specific rules during armed conflict, this may be taken to mean that in the context of investigations, the Court considers the ACHR to provide the more specific rules. Thus

far, in applying the duty to investigate to armed conflict situations, the Court has managed to steer clear of direct conflicts with IHL. This will be explored further in particular in Chapter 10, where duties of investigation under IHL and IHRL are compared.