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

Tan, F.

7 The duty to investigate under the European system of human rights protection

1 INTRODUCTION

In the preceding two Chapters, the investigative obligations under the ICCPR and ACHR were explored. Both systems were shown to entail very similar obligations for States to investigate (potential) violations, with both showcasing a strong emphasis in practice on the obligation to *criminally* investigate certain serious violations. Both the Human Rights Committee and the Inter-American Court of Human Rights, at the same time, have also indicated that *any* violation of the ICCPR or ACHR might require an investigation, but the cases they have decided as yet pertain to serious violations only. This Chapter now turns to the European system of human rights protection, where it is explored whether the European Court of Human Rights has similarly read investigative obligations into the ECHR. Thus, the Chapter seeks to answer *whether* States are under an obligation to investigate (potential) violations of the ECHR – and if so – what are the *scope of application* and *contents* of such an obligation, in particular during armed conflict and occupation? Chapter 8 will compare the findings under the various systems, which will ultimately facilitate the discussion on duties of investigation under the interplay of IHRL and IHL.

Like the Chapters on the ICCPR and the ACHR, this Chapter starts out by briefly setting out the context to the European system of human rights protection (§2). It then goes on to examine the legal basis and rationale for investigative duties under the ECHR (§3), before discussing the scope of application of the duty to investigate in its various modalities (§4). The next step is to explore what standards States must meet when investigating (§5), before finally addressing whether, when, and how States must conduct investigations during armed conflict (§6).

2 THE EUROPEAN CONTEXT

Like in the Americas, the European system of human rights protection came into being after the Second World War. The atrocities experienced then provided the impetus for the development of human rights law as a branch of international law. The Council of Europe (CoE) was set up in 1949, one year after the adoption of the Universal Declaration of Human Rights. This inter-

national organisation, which now has 47 States Parties, seeks to protect the rule of law, democracy, and human rights in Europe.[1] Its most well-known and most important contribution in this respect, has been the adoption of the European Convention on Human Rights in 1950, which entered into force in 1953 as the first binding international human rights catalogue. In the words of the Preamble, it takes 'the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration [of Human Rights]'.[2]

At the pinnacle of the collective enforcement of ECHR rights is the right of individuals to bring an application directly before the European Court of Human Rights.[3] The Court, in a binding judgment,[4] decides whether a State has sufficiently secured the rights of applicants, and establishes State responsibility for a violation. It moreover orders States to pay 'just satisfaction' for violations.[5] After the Court renders a judgment, it is a political organ within the Council of Europe, the Committee of Ministers, which supervises the execution of the Court's pronouncements.[6] In contrast with the Inter-American system, the Court does not, therefore, supervise compliance with its judgments itself. Rather, it is in the dialogue between the State in question and the Committee, that it is decided what exact measures are required to execute a judgment fully.[7] These normally include individual measures to remedy the violation in the case at hand, as well as general measures required to bring the State's broader practice in line with its obligations under the ECHR, and to prevent similar violations in the future.[8]

Unlike the Inter-American Court, the European Court of Human Rights therefore does not supervise criminal investigations and processes which follow its judgments, as they unfold. Nevertheless, as will be explored below,[9] the Court does sometimes provide indications of the types of reparation requires to execute a judgment, which can include investigations. Moreover, in its supervision of judgments, the Committee of Ministers does often insist on certain specific measures, which may also include investigations and ensuring accountability for violations.

The European context also differs from the Inter-American one where it concerns the prevalence of armed conflict. Whereas European States have been

1 Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) ETS No. 001.
2 Preamble to the ECHR, final paragraph.
3 ECHR, art 34.
4 ECHR, art 46(1).
5 ECHR, art 41.
6 ECHR, art 46(2).
7 See *Tagayeva and Others v Russia*, ECtHR 13 April 2017, Appl No 26562/07 and 6 others [637]-[638]; see further *Assanidze v Georgia*, ECtHR [GC] 8 April 2004, Appl No 71503/01, ECHR 2004-II [198].
8 *Tagayeva and Others v Russia*, ibid [637].
9 *Infra*, §3.2.

involved in a number of both international and non-international armed conflicts since the coming into force of the ECHR, such conflicts have only had a marginal impact on the Court's case-law as a whole. Where the Inter-American Court's case-law is arguably shaped by the struggle against impunity, in part following violations committed during NIACs, the European case-law has largely developed in situations of normalcy.[10] To illustrate, the Inter-American Court's case-law save for one or two lone exceptions relates to the duty to investigate serious violations, whereas the large majority of the European Court's case-law pertains to the right to a fair trial.[11] Because the European Court's case-law has largely developed in situations of 'normalcy', cases relating to armed conflict have become more of a 'niche'. Rather than shaping the Court's case-law as a whole, the Court when faced with cases arising out of armed conflict, could rely on its established case-law, potentially with certain allowances for the conflict situation.

Looking a little bit more closely, the armed conflicts in which Contracting Parties to the ECHR have been involved, include NATO Member State involvement in the conflicts in the former Yugoslavia,[12] Afghanistan,[13] and Iraq,[14] the internal conflicts involving Russia (Chechnya),[15] Turkey (south-east Turkey),[16] and the United Kingdom (Northern Ireland),[17] the conflicts concerning

10 Cecilia Medina Quiroga, 'The Inter-American Court of Human Rights 35 Years' (2015) 33 Netherlands Quarterly of Human Rights 118, 119.

11 As the statistics of the ECtHR from 1959-2019 show, the numbers of both violations of the right to a fair trial generally (5.086) and of the length of proceedings (5.884) greatly exceed any other type of violation. See https://echr.coe.int/Documents/Stats_violation_1959_2019_ENG.pdf (last accessed 15 July 2021).

12 E.g. *Banković and Others v Belgium and Others*, ECtHR [GC] 12 December 2001 (dec), Appl No 52207/99.

13 *Hanan v Germany*, ECtHR [GC] 16 February 2021, Appl No 4871/16.

14 E.g. *Al-Skeini v the United Kingdom*, ECtHR [GC] 7 July 2011, Appl No 55721/07.

15 E.g. *Isayeva v Russia*, ECtHR 24 February 2005, Appl No 57950/00.

16 E.g. *Kaya v Turkey*, ECtHR 19 February 1998, Appl No 22729/93. Whether the conflict in south-east Turkey, between the Turkish government and the Kurdish Worker's Party (PKK) can be classified as a non-international armed conflict under international humanitarian law, remains subject to debate. See K Yildiz and Susan Breau, *The Kurdish Conflict. International Humanitarian Law and Post-Conflict Mechanisms* (Routledge 2010).

17 E.g. *Cummins and Others v the United Kingdom*, ECtHR 13 December 2005 (dec.), Appl No 27306/05. There is some discussion on whether this conflict constituted a NIAC, and the UK itself maintained that it was not; see William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 European Journal of International Law 741, 756; Stuart Wallace, *The Application of the European Convention on Human Rights to Military Operations* (Cambridge University Press 2019) 88. Concluding that it was a NIAC after in-depth analysis, see Steven Haines, 'Northern Ireland 1968-1998' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 133–6. Also agreeing it was a NIAC, see Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) 1–2, fn 1.

Northern Cyprus[18] and Georgia,[19] and the ongoing conflicts in the east of Ukraine,[20] the Nagorno-Karabakh,[21] and Syria. Besides individual victims of warfare, States also increasingly bring inter-State applications before the Court which stem from such conflicts. Thus, a Grand Chamber case concerning the conflict between Georgia and Russia was handed down in 2021,[22] and inter-State applications have similarly been filed by Ukraine against Russia,[23] as well as by the Netherlands for the downing of flight MH17 over Ukraine.[24] More recently even, the Court has granted interim measures in relation to Armenia, Azerbaijan and Turkey, in the context of the conflict in Nagorno-Karabakh.[25] Thus, the conflicts which took place on European soil, or in which European States were involved, are quite numerous, and inter-State applications appear to be brought more frequently.[26] Yet, they remain a minority in the case-law with armed conflict related cases constituting a niche rather than a factor shaping the case-law as such.

3 Legal basis and rationale of the duty to investigate under the ECHR

3.1 Introduction

Before addressing the scope of application of, and standards for investigations, the present section sets out the legal basis and rationales of investigations. How and why have investigative obligations been interpreted to form part of the European Convention on Human Rights, despite there being no treaty provision explicitly providing for such?

18 E.g. *Cyprus v Turkey*, ECtHR [GC] 10 May 2001, Appl No 25781/94 and *Loizidou v Turkey*, ECtHR [GC] 18 December 1996, Appl No 15318/89.

19 *Georgia v Russia (II)*, ECtHR [GC] 21 January 2021, Appl No 38263/08.

20 *Ukraine v Russia (Re Crimea)*, ECtHR [GC] 16 December 2020 (dec.), Appl Nos 20958/14 and 38334/18.

21 E.g. *Saribekyan and Balyan v Azerbaijan*, ECtHR 30 January 2020, Appl No 35746/11; see also the pending interstate cases *Azerbaijan v Armenia*, Appl No 47319/20, and *Armenia v Azerbaijan*, Appl No 42521/20.

22 *Georgia v Russia (II)* (n 19).

23 *Ukraine v Russia (Re Crimea)* (n 20); *Ukraine v Russia (II)*, Appl No 43800/14; *Ukraine v Russia (III)*, Appl No 49537/14.

24 *The Netherlands v Russia*, Appl No 28525/20.

25 *Armenia v Azerbaijan* (interim measure), ECtHR 29 September 2020, Appl No 42521/20 (http://hudoc.echr.coe.int/eng-press?i=003-6809725-9108584); *Armenia v Turkey* (interim measure), ECtHR 6 October 2020, Appl No 43517/20 (http://hudoc.echr.coe.int/eng-press?i=003-6816855-9120472). See also the pending inter-State applications, n 21.

26 Isabella Risini, Justine Batura and Lukas Kleinert, 'A "Golden Age" of Inter-State Complaints? An Interview with Isabella Risini' (*Völkerrechtsblog*, 2020) <https://voelkerrechtsblog.org/articles/a-golden-age-of-inter-state-complaints/> (last accessed 15 July 2021).

3.2 Legal basis for the duty to investigate under the ECHR

Like the ICCPR and the ACHR, the treaty text of the ECHR does not reference investigations. Nevertheless, investigative obligations play an important role in the European Court of Human Rights' interpretations of the ECHR. In 1995, the Court for the first time ruled, in *McCann v the United Kingdom*, that where individuals have died as a result of the use of force, States must investigate whether a wrongful killing has occurred.[27] Soon afterwards, the Court held similarly for alleged violations of the prohibition of torture and inhuman and degrading treatment,[28] the right not to be arbitrarily deprived of one's liberty, especially in the context of incommunicado detention and disappearances,[29] and the right not to be subjected to slavery or forced labour.[30] As is explored further below,[31] it could now even be said to be a corollary of most substantive rights under the ECHR.[32] Because this obligation is by no means self-evident when reading the ECHR, this section explores how the Court has nevertheless found investigative duties to be incorporated in the Convention.

Like the Human Rights Committee and the Inter-American Court of Human Rights,[33] the European Court has, as a basis for investigative obligations, relied on a number of sources. First and foremost, the Court has applied a systematic reading of the Convention. It has read the general Article 1 obligation to 'secure' rights in combination with substantive rights such as the right to life. The duty to actively secure rights, as was set out more extensively in Chapter 4, requires States to do more than refrain from infringing upon human rights.[34] It additionally requires them to actively protect and fulfil rights, which includes unearthing the facts surrounding potential violations, establish-

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27 *McCann and Others v the United Kingdom*, ECtHR [GC] 27 September 1995, Appl No 18984/91 [161].

28 *Assenov and Others v Bulgaria*, ECtHR 28 October 1998, Appl No 24760/94 [102].

29 *Kurt v Turkey*, ECtHR 25 May 1998, Appl No 24276/94 [123]-[124]. Further, see Krešimir Kamber, *Prosecuting Human Rights Offences. Rethinking the Sword Function of Human Rights Law* (Brill 2017) 330–1.

30 *Siliadin v France*, ECtHR 26 July 2005, Appl No 73316/01 [112]; *Rantsev v Cyprus and Russia*, ECtHR 7 January 2010, Appl No 25965/04 [288]; *S.M. v Croatia*, ECtHR [GC] 25 June 2020, Appl No 60561/14 [304]-[320].

31 See *infra*, §4.2.2.

32 Eva Brems, 'Procedural Protection. An Examination of Procedural Safeguards Read into Substantive Convention Rights' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2013) 141–4. Brems shows there are investigative obligations under Articles 2, 3, 4, 5, 8, 10, 11 and 14 ECHR, and Article 3 Protocol 1 ECHR. To appreciate the ongoing developments in this field, compare with Alastair R Mowbray, 'Duties of Investigation under the European Convention on Human Rights' (2002) 51 International and Comparative Law Quarterly 437.

33 See Chapters 5 and 6.

34 See Chapter 4, §3.3.

ing responsibility for them, and ensuring accountability. Secondly, the Court has found that individual victims' right to a remedy may require States to conduct an investigation, and to afford them adequate reparation for any violation. Thirdly and finally, in a small number of cases, the Court has indicated that the duty to provide reparation for violations, also requires States to conduct (or reopen) an effective investigation. In its supervision of the execution of the Court's judgments, the Committee of Ministers has indeed insisted on effective investigations by way of execution of judgments. Thus, there are three legal bases for investigations in the European Court's case-law, addressed in turn below.

Firstly, the systematic reading of the Article 1 obligation to secure rights in conjunction with other substantive rights, was relied upon to read investigative obligations into the Convention for the very first time in 1995, in the case of *McCann v the United Kingdom*. This case concerned lethal action by British Special Air Service (SAS) forces against Irish Republican Army (IRA) operatives in Gibraltar. The British forces operated under the – later found to be wrong – assumption that the IRA members were armed, had detonating devices on their person, and had placed a bomb which was liable to cause death and destruction on a large scale.[35] Faced with the intentional killing of individuals by State agents, the Court held that

> 'The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.'[36]

Thus, the Court for the first time introduced the obligation to conduct an effective investigation into potential human rights violations, in this case the use of lethal force by State agents. In the present case, the Court ultimately concluded that the public inquest which had been carried out by the UK had been sufficient in this respect, although it did find fault with the planning of the operation – which had ultimately led to the false assumption that the IRA members had explosive devices on their person, and which ultimately led the SAS members to immediately resort to the use of lethal force.[37]

Thus, according to the Court, the general obligation under Article 1 of the Convention to *secure* all ECHR rights *implies* that States are under a duty to investigate wrongful killings. This reasoning is highly reminiscent of what

35 *McCann and Others v UK* (n 27) [195]-[214].
36 Ibid [161].
37 Ibid [195]-[214].

we have seen under the ICCPR and the ACHR, where the Human Rights Committee and Inter-American Court also relied on the general obligation to ensure respect for human rights, to read investigative obligations into their respective treaties.[38] As we shall see below, the Court has applied this reasoning beyond wrongful killings, to many other cases including torture and inhuman treatment,[39] forced disappearance and incommunicado detention. In fact, reading investigative obligations into negatively phrased rights has become such common ground, that the Court has found them to be included in the freedom from slavery and forced labour without even referencing Article 1, rather simply referring to its case-law under the rights to life and physical integrity.[40]

Thus, like under the ICCPR and the ACHR, and much like under IHL, the duty to actively secure rights (or ensure respect for them), requires States to set up a machinery for the effective protection and enforcement of rights. In the terminology of the Court, rights must be rendered 'practical and effective', not 'theoretical and illusory'.[41] Interpreted as such, investigations are an essential element for the realisation of human rights, and form part of the broader system of positive obligations which the Convention and Court impose on States in order to effectuate rights.[42]

Secondly, the Court has – as we have seen for the Human Rights Committee and the Inter-American Court – found that a duty to investigate stems from the individual right to a remedy under Article 13 of the ECHR. The right to a remedy is a procedural right providing individuals with a possibility to obtain relief for ECHR violations at the national level. Somewhat similar to Article 1 of the Convention, Article 13 is therefore accessory in nature in the sense that the right to a remedy can only be invoked where at least an arguable claim exists that one of the other Convention rights has been violated.[43] The type of remedy required depends on the substantive right in question. Serious violations such as killings, torture, and disappearances, however, have been held to require States to mount an effective official investigation into what happened. In the context of Articles 2 and 3,[44] the Court held that

38 See Chapter 5, §3.2 and Chapter 6, §3.2.

39 *Assenov and Others v Bulgaria* (n 28) [102].

40 *Rantsev v Cyprus and Russia* (n 30) [288].

41 E.g. *Christine Goodwin v the United Kingdom*, ECtHR [GC] 11 July 2002, Appl No 28957/95 [74]; Janneke H Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019) 52.

42 Further, see *infra*, §3.3.

43 *Silver and Others v the United Kingdom*, ECtHR 15 March 1983, Appl No 5947/72 etc. [113].

44 For art 5, see *Kurt v Turkey* (n 29) [140]. It is difficult to say so conclusively for art 4, as cases alleging violations of art 13 in conjunction with art 4 are rare (the HUDOC database does not even give the option of filtering for this combination). For an example see *C.N. v the United Kingdom*, ECtHR 13 November 2012, Appl No 4239/08 [86], where the Court however concluded that no separate issue arose under art 13 after having found a violation under art 4's investigative obligations.

> '[w]here a right of such fundamental importance as the right to life or the prohibition against torture, inhuman and degrading treatment is at stake, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure.'[45]

Thus, similarly to the Court's reasoning described above, if individuals are to have a genuine prospect of effectuating a domestic legal remedy, then they must have sufficient access to the facts. In many cases, including many cases relating to armed conflict, such prospects are nil if the State does not cooperate in bringing facts to light. Oftentimes, the State holds all the information, and if it does not share it, victims have no chance of obtaining redress because without cooperation of the State, they cannot prove what happened. This is particularly so in cases of death or disappearance, where victims can no longer give testimony.

Unlike the Human Rights Committee and the Inter-American Court, the European Court has not given much emphasis to the right to a remedy as a source for investigative obligations. Its practice in this regard, moreover, has not been very consistent. On the one hand, the Court has on many occasions found no separate issue to arise under Article 13 once it established investigative deficiencies under the substantive provisions.[46] On the other hand, it has in other cases found separate violations simply by referring to the findings under the substantive provisions.[47] Only extremely rarely has it found a violation of Article 13 but not of the investigative obligations under substantive rights.[48] Yet, the Court appears to see a distinction between both sources for

45 *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*, ECtHR [GC] 17 July 2014, Appl No 47848/08 [149].

46 E.g. *C.N. v UK* (n 44) [86]; *Ramsahai and Others v the Netherlands*, ECtHR [GC] 15 May 2007, Appl No 52391/99 [363].

47 E.g. *Husayn (Abu Zubaydah) v Poland*, ECtHR 24 July 2014, Appl 7511/13 [544]-[545]; *Al-Nashiri v Poland*, ECtHR 24 July 2014, Appl No 28761/11 [550]-[551]; *Kaya v Turkey* (n 16) [108].

48 For one example, see *O'Keeffe v Ireland*, ECtHR [GC] 28 January 2014, Appl No 35810/09, although the reason for finding a violation of art 13 had to do more with the lack of civil remedies for holding the State to account for alleged failures, where only remedies against private individuals were open to the applicant. More pertinent perhaps is the case of *İlhan v Turkey*, with the Grand Chamber holding that for allegations of ill-treatment, the requirement of investigations under art 13 ought normally be sufficient, rather than using the procedural limb of art 3 (ECtHR 27 June 2000, Appl No 22277/93 [92]). This approach appears to have been abandoned, however, as in *Mocanu v Romania* the Grand Chamber held explicitly that the investigative obligations under Articles 2 and 3 could be assessed together, as they are subject to converging principles (*Mocanu and Others v Romania*, ECtHR [GC] 17 September 2014, Appl No 10865/09 etc. [314]).

investigative obligations, holding that the requirements under Article 13 are broader than those under the substantive provisions.[49]

From a close reading of the case-law, it would seem that the distinction is that Article 13 is geared more towards remedies and compensation for the applicant, whereas investigations under the substantive provisions are aimed at protecting life, physical integrity and liberty, and ensuring accountability for violations thereof.[50] In this respect it is relevant under Article 13 whether avenues for redress were available besides criminal investigations, and whether the applicant was able to use those effectively even in the absence of a State-led investigation.[51] This will not be the case where all relevant information is State-held, which is most prominently so in instances of enforced disappearance or extraordinary rendition,[52] but also in other cases where the State was involved in serious human rights violations.[53] In such cases, the Court has found that

> 'in circumstances where, as here, the criminal investigation into the disappearance and probable death was ineffective (…), and where the effectiveness of any other remedy that may have existed, including the civil remedies suggested by the Government, was *consequently* undermined, the Court finds that the State has failed in its obligation under Article 13 of the Convention.'[54]

Thus, the Court requires States to investigate human rights violations both as a procedural guarantee which is meant to safeguard substantive rights more generally, and as a means for ensuring that individuals have sufficient access to a remedy at the domestic level. Although this is somewhat similar to the approaches of the HRC and IACtHR, for the European Court, the right to a remedy plays a significantly less prominent role than under the other systems.[55] For individual cases, it does not appear to matter whether a duty to investigate is grounded in Article 13, or in substantive provisions under the Convention – the 'thorough and effective investigation' required must live up to the same standards.[56]

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49 E.g. *El-Masri v the Former Yugoslav Republic of Macedonia (FYROM),* ECtHR 13 December 2012, Appl No 39630/09 [256].

50 See also Brems (n 32) 157. By way of example, see *Hanan v Germany* (n 13) [155].

51 See also Alastair R Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) 219–20.

52 *Bazorkina v Russia*, ECtHR 27 July 2006, Appl No 69481/01 [163].

53 E.g. *Isayeva v Russia* (n 15) [229]. See also *İlhan v Turkey* (n 48), where the Grand Chamber emphasised the circumstance of relevant information being confined to State officials.

54 See, among many others, *Bazorkina v Russia* (n 52) [163], italics FT.

55 James A Sweeney, 'The Elusive Right To Truth in Transitional Human Rights Jurisprudence' (2018) 67 International and Comparative Law Quarterly 353, 378;384.

56 *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* (n 45) [149]; Brems (n 32) 157.

Thirdly and finally, States may be required to investigate violations of the ECHR as a means of *reparation*. As was alluded to above,[57] the European Court does not normally order specific forms of reparation, other than compensation. Nevertheless, on relatively rare occasions, the Court indicates explicitly how States must give effect to its judgments.[58] For instance, in *Tagayeva v Russia*, concerning an extremely violent hostage rescue operation which ended up costing 330 lives, the Court found that remedies should include furthering the domestic investigations in line with the investigative standards formulated by the Court, as well as the pursuance of particular lines of investigation. The use of indiscriminatory weaponry, for instance, must be elucidated if Russia is to remedy the violations found.[59] Another example is the case of *Abu Zubaydah v Lithuania*, which concerned Lithuania's responsibility for hosting a secret detention site operated by the Central Intelligence Agency (CIA). In this case, the Court found that the lack of an effective investigation into the torture of the applicant could only be remedied by Lithuania taking 'all necessary steps to reactivate' pending investigations.[60] This had to include further clarifying the facts of the applicant's maltreatment, as well as the identification and punishment of the culprits.[61]

Thus, in the European system the execution of judgments is principally supervised by the Committee of Ministers, not the Court. Nonetheless, the Court on occasion indicates what specific remedial measures are necessary to execute its judgment, including investigations. According to the Department for the Execution of Judgments of the ECtHR of the CoE, if the Court finds a violation of the duty to investigate, 'this entails an obligation on the respondent State *ex officio* to reopen, resume or continue investigations, and to ensure that they are conducted in a Convention-compliant manner'.[62] According to the Court, this obligation 'persists as long as such an investigation remains feasible but has not been carried out or has not met the Convention standards'.[63] Thus, like in the Inter-American system, reparation for violations found by the Court will often require that the State carry out an effective investigation. There is consistent practice by States under the supervision of the Committee of Ministers in this respect, which in conjunction with the Court's occasional

57 *Supra*, §2.

58 Alice Donald and Anne-Katrin Speck, 'The European Court of Human Rights' Remedial Practice and Its Impact on the Execution of Judgments' (2019) 19 Human Rights Law Review 83.

59 *Tagayeva and Others v Russia* (n 7) [641].

60 *Abu Zubaydah v Lithuania*, ECtHR 31 May 2018, Appl No 46454/11 [683].

61 Ibid.

62 Department for the Execution of Judgments of the European Court of Human Rights, *Thematic Factsheet on Effective Investigations into Death or Ill-treatment caused by Security Forces*, Strasbourg: July 2020 (accessible at https://rm.coe.int/thematic-factsheet-effective-investigations-eng/16809ef841 (last accessed 15 July 2021)).

63 *Abu Zubaydah v Lithuania* (n 60) [682]; *Association "21 December 1989" and Others v Romania*, ECtHR 24 May 2011, Appl No 33810/07 [202].

indications to that effect, show that the obligation to ensure adequate reparation for violations, can also entail a duty to investigate.

It may, in short, be concluded that the basis for the duty to investigate under the ECHR is to be found in the obligation to secure the rights enshrined in the ECHR, in combination with substantive provisions, as well as in the right to a remedy for violations of substantive rights. Finally, the duty to provide adequate reparation may also entail a duty to investigate.

3.3 Rationale of the duty to investigate under the ECHR

Having now determined on what basis the European Court has held investigative obligations to be implicit in the ECHR, we may consider *why* it has done so. What are the aims and rationale for requiring States to investigate human rights violations, in the view of the European Court?

As was shown in Chapter 4, in order to meet their obligations under IHRL, States must not only respect human rights, but they must also actively ensure and fulfil them. In this context, the European Court has found that States must institutionalise a procedural mechanism which ensures rights. In its jurisprudence on the rights to life, physical integrity and freedom from slavery, it has fleshed this out further, identifying four main obligations: (i) the negative obligation not to interfere with these rights (arbitrarily), and the positive obligations to (ii) put in place an appropriate legislative and administrative framework, (iii) *ex ante* protect individuals from interferences with these rights through operational measures, and (iv) *ex post* to investigate, and where appropriate, prosecute and punish those responsible.[64] These obligations are closely intertwined, as the Court has consistently noted. In the context of the right to life, the Court held this right in conjunction with Article 1 to impose

> 'a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.'[65]

This already speaks to the deterrent, preventive effects which are meant to emanate from the criminal legislation, and the threat of enforcement. As the

64 E.g. *Mahmut Kaya v Turkey*, ECtHR 28 March 2000, Appl No 22535/93 [85] (art 2); *El-Masri v FYROM* (n 49) [182] and [198] (art 3); *Rantsev v Cyprus and Russia* (n 30) [284]-[288] (art 4). Under art 5, specific safeguards against disappearances are listed in paragraphs (2)-(4) of the provision itself, aimed to protect against disappearances for instance by granting the right of *habeas corpus*.

65 *Mahmut Kaya v Turkey*, ibid [85]; *Kiliç v Turkey*, ECtHR 28 March 2000, Appl No 22492/93 [62].

Court has indicated, the 'essential purpose' of investigations, is 'to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility'.[66] In the Court's view, rendering rights practical and effective, States Parties must actively protect a number of rights through the protection of their criminal law systems.[67] Should there be any transgression, they must then effectuate these criminal law provisions by mounting investigations, and where appropriate prosecute and punish those responsible. This reasoning, that the effective protection of human rights requires penal suppression of violations of those rights, is the key factor that has led the Court to develop its case law on duties of investigation.

If effectuating the criminal legislation which secures rights, and ensuring accountability for violations, are the primary purposes of investigations, then it may be concluded that investigations play a crucial role in both the proper institutionalisation of a procedural mechanism for ensuring rights, as well as in the *ex post* enforcement of rights. The former is generally required for the proper protection and implementation of the ECHR within a State. The latter ensures that in individual cases, the truth about what happened is brought to light, which allows for an assessment of whether human rights were violated, and if so, ensures that perpetrators are held to account.

Beyond these overarching aims, depending on the case before it, the Court has also identified certain other aims of investigations. Such aims have been to combat impunity in case of grave violations,[68] to grant victims or their relatives an effective remedy,[69] to safeguard the public's faith in the State's monopoly on the use of force,[70] and – arguably – to guarantee the right to truth especially in the context of extraordinary rendition.[71] In disappearance

66 *Nachova and Others v Bulgaria*, ECtHR [GC] 6 July 2005, Appl No 43577/98 and 43579/98 [110].

67 For a list of conduct subject to criminalisation under the ECHR, see §4.2 below.

68 *Marguš v Croatia*, ECtHR [GC] 27 May 2014, Appl No 4455/10 [127]; *Ould Dah v France*, ECtHR 17 March 2009 (dec), Appl No 13113/03.

69 *Anguelova v Bulgaria*, ECtHR 13 June 2002, Appl No 38361/97 [161]-[162].

70 *Ramsahai and Others v the Netherlands* (n 46) [325].

71 *El-Masri v FYROM* (n 49) [191] and [193]. The Court was more reluctant in accepting the right to truth in *Janowiec and Others v Russia* (ECtHR [GC] 21 October 2013, Appl No 55508/07 and 29520/09), but has later referenced this right again, see e.g. the extraordinary rendition cases of *Al-Nashiri v Poland* (n 47) and *Husayn (Abu Zubaydah) v Poland* (n 47). On this subject, see more extensively Philip Leach, Rachel Murray and Clara Sandoval, 'The Duty to Investigate Right to Life Violations across Three Regional Systems: Harmonisation or Fragmentation of International Human Rights Law?' in Carla Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill Nijhoff 2017) 56–8; Olga Chernishova, 'Right to the Truth in the Case-Law of the European Court of Human Rights' in Lawrence Early and others (eds), *The Right to Life under Article 2 of the European Convention on Human Rights.*

cases under Article 5, there is moreover the aim of ensuring the victim's safety, by finding and freeing them.[72] As a final more practical matter, it has been observed that the Court employs the investigative duties under the various provisions when it has insufficient evidence to find substantive violations of the right concerned, and fact-finding missions are either unlikely to be successful or too costly.[73] In cases where there was any State involvement in the interference with the victim's rights, the aim of ensuring public confidence in the State's adherence to the rule of law and preventing any appearance of collusion are of increased importance,[74] as is ensuring the accountability of State agents involved.[75]

Whereas a number of aims of investigations can therefore be distinguished, the overarching aim is the practical and effective protection of the rights in question. In the eyes of the Court, such effective protection requires both *ex ante* action that prevents violations from occurring, as well as *ex post* repression and remedies where violations have taken place.

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

4.1 Introduction

Above we have seen why, and on what basis, the duty to investigate has been found to be implied in the ECHR. The next pertinent question to ask is *when* States must conduct an investigation. This question, which is central to the study's overarching research question, essentially requires us to determine the scope of application of the duty to investigate. This section, similar to those on the ICCPR and ACHR, explores the various modes of application of the duty to investigate, in its material (§4.2), personal (§4.3), temporal (§4.4), and geographic (§4.5)dimensions.

Twenty Years of Legal Developments since McCann v. the United Kingdom. In Honour of Michael O'Boyle (Wolf Legal Publishers 2016).

72 *Kurt v Turkey* (n 29) [123].

73 Egbert Myjer, 'Investigation into the Use of Lethal Force: Standards of Independence and Impartiality' in Lawrence Early and others (eds), *The Right to Life under Article 2 of the European Convention on Human Rights. Twenty Years of Legal Developments since McCann v. the United Kingdom. In Honour of Michael O'Boyle* (2016); Michael O'Boyle and Natalia Brady, 'Investigatory Powers of the European Court of Human Rights' [2013] European Human Rights Law Review 378. For an example, see e.g. *Fedorchenko and Lozenko v Ukraine*, ECtHR 20 September 2012, Appl No 387/03 [44]-[49].

74 See *Anguelova v Bulgaria* (n 69).

75 See the paragraph in *Nachova and Others v Bulgaria,* cited *supra*.

4.2 The material scope of application and the investigative trigger

4.2.1 Introduction

Looking at the material scope of application of the duty to investigate, we must principally ask ourselves two things. Firstly, violation of *what rights* gives rise to investigative obligations? Is it a limited number of rights, or must all violations be investigated? As we have seen, this question gave rise to some controversy under the ICCPR and ACHR, where although both the HRC and IACtHR had ruled in general that all violations had to be investigated, their practice had rather focused on certain serious violations only – which required criminal accountability. Secondly, it must be queried what type of information *triggers* the duty to investigate. Is just any allegation of a violation sufficient, must there be a *prima facie* violation, and must States actively uncover violations? These issues are addressed in this section.

4.2.2 Material scope of application – which rights require investigation?

As a starting point, it must be noted that – contrary to the Human Rights Committee and Inter-American Court – the European Court has never generally pronounced on what rights entail a duty to investigate when violated. Because the Court develops its case-law incrementally,[76] on a case-by-case basis, it will also likely refrain from such general pronouncements. Rather, it will decide cases which come before it, and decide in those cases whether States are held to investigate.

Although this characteristic of the Court's case-law makes it more difficult to establish the precise contours of the investigative obligations which flow from the ECHR, there is nevertheless an extensive body of case-law which guides when States must investigate. As was already touched upon above, the Court in 1995 held for the first time that investigations are implied in the right to life. Afterwards, it expanded this approach first to 'core' rights related to the protection of the physical and mental integrity of individuals, but developments have not stopped there.[77] As Eva Brems convincingly shows, investigative obligations have been read into most substantive rights under the ECHR. She has identified investigative obligations under Articles 2, 3, 4, 5, 8, 10, 11 and 14 ECHR, and Article 3 Protocol 1 ECHR,[78] and in light of the Court's case-by-case approach, there appears no reason of principle why it could not expand on this list yet further.

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76 Janneke H Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (2018) 18 Human Rights Law Review 495.

77 See the discussion by Mowbray in 2002, which was then justifiably limited to Articles 2, 3 and 5; Mowbray (n 32).

78 Brems (n 32) 141–4. Further in-depth, see Kamber (n 29).

Although there is therefore no principled limitation as far as the rights which require investigation are concerned, insofar as it pertains to criminal investigations, Piet Hein van Kempen has shown the duty to be dependent on the requirement under the ECHR to protect a certain right through criminal legislation.[79] He identifies a large number of instances where such obligations exist, such as in case of violent killings, non-intentional deaths, torture and ill-treatment in contravention with Article 3, instances of slavery and forced labour, enforced disappearances and kidnappings, sexual abuse, defamation, unlawful entry contravening the right to a home, and arson and vandalising a home.[80] This list too is not limited as a matter of principle and it is non-exhaustive.

The European Court therefore appears to require criminal law measures, and investigations, in an increasing number of cases in order to protect the rights enshrined in the Convention. This development mirrors that under the ICCPR and ACHR, and underlines that human rights mechanisms are developing their 'sword' function through the 'quasi-criminal jurisdiction' exercised by human rights bodies and courts.[81]

For the purposes of this study, the duty to investigate core rights, the rights to life, freedom from torture and ill-treatment, freedom from slavery and forced labour, and the right to liberty, are most pertinent. After all, these rights are for the most part non-derogable, and they moreover have – to a certain extent – counterparts under IHL. This Chapter will therefore focus on the duty to investigate violations of these rights, on which the Court has moreover developed an extensive case-law.

4.2.3 The investigative trigger

The above analysis has shown that violations of Articles 2, 3, 4, and 5 must be investigated, as well as violations of a number of other rights which are less pertinent to this study. But, this does not yet answer the question *when* a State's obligation arises. A first issue addressed below, is whether that information must pertain to a *violation*, or also to other *interferences*. Secondly, it is addressed what information on the part of the State triggers the duty.

Firstly, it must be noted that it is not only violations, in the strict legal sense, which give rise to a duty to investigate. States must criminalise certain conduct contravening ECHR rights, and they must operationalise their invest-

79 PHPHMC van Kempen, *Repressie Door Mensenrechten. Over Positieve Verplichtingen Tot Aanwending van Strafrecht Ter Bescherming van Fundamentele Rechten (Inaugural Address Nijmegen)* (Wolf Legal Publishers 2008) 43.

80 van Kempen (n 79) 29–37 with further referencing.

81 Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577; Kamber (n 29); Alexandra Huneeus, 'International Criminal Law By Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 The American Journal of International Law 1.

igative machinery whenever such legislation is violated.[82] Thus, as is explored further in the next section, conduct by private parties – for example murder – is equally subject to investigative obligations. This may not come as a surprise. Yet, 'private' instances of murder do not constitute violations of the right to life on the part of the State, unless the State ought to have known of a real and immediate risk to the individual victim, triggering the State's duty to *protect* the victim.[83] If States can be under the obligation to investigate killings for which it had no responsibility, and of it which it had no knowledge,[84] then the duty to investigate in this sense is not contingent on a prior *violation* of a Convention right. Rather, it would appear to be concerned with an infringement of the right's underlying value, such as human life.

In this respect, the Court has classified the duty to investigate as a 'separate and autonomous duty', and a 'detachable obligation'.[85] In doing so, the Court has underlined that the duty to investigate can arise, and can be violated, independent of any other violation on the part of the State. Investigations in this sense are not simply a method of establishing whether substantive violations of the Convention have taken place, but of protecting the values protected by those rights – life, physical integrity and liberty[86] – through investigation and holding accountable those who have harmed those values. The trigger for the duty to investigate is therefore conduct harming life, physical integrity, or liberty, whether by State agents or private parties.

It ought to be noted, at this point, that the right to a remedy under Article 13 appears to deviate somewhat from the above. The Court's case-law indicates that the right to a remedy requires a criminal investigation where State agents were involved in the alleged violation only,[87] or where there was at least some special duty of care for the State – such as in cases of violence between prisoners.[88] In this respect, the material scope of application of the duty to investigate under the right to a remedy, is therefore more limited than under substantive rights. Why the Court makes this distinction is not entirely clear, and for the purposes of this study it does not make much of a difference. States must investigate interferences with life, physical integrity, and liberty, and

82 See the case-law cited (n 27-30).

83 *Osman v the United Kingdom*, ECtHR [GC] 28 October 1998, Appl No 23452/94 [116].

84 *Menson v the United Kingdom*, ECtHR 6 May 2003 (dec), Appl No 47916/99.

85 *Šilih v Slovenia*, ECtHR [GC] 9 April 2009, Appl No 71463/01 [159] (art 2) and *Sorokins and Sorokina v Latvia*, ECtHR 28 May 2013, Appl No 45476/04 [71] (art 3); *Mocanu and Others v Romania* (n 48) [206] (Articles 2 and 3).

86 For the sake of brevity, the term liberty is used broadly here, to connote both the right not to be arbitrarily deprived of one's liberty, and the right not to be subjected to slavery or forced labour.

87 E.g. *Z. and Others v the United Kingdom*, ECtHR [GC] 10 May 2001, Appl No 29392/95 [109]. See further Mowbray (n 51) 217–8.

88 *Paul and Audrey Edwards v the United Kingdom*, ECtHR 14 March 2002, Appl No 46477/99.

whether such is the case under substantive rights only, or also the procedural right to a remedy, has no bearing on the investigative standards.[89]

Beyond the question what conduct or incidents trigger the duty to investigate, is, secondly, the question what knowledge of such an incident the State must have had, in order to trigger its obligation. This can be the case where a victim or other individual brings an 'arguable claim'[90] or 'credible assertion'[91] of an incident, or, alternatively, if there are 'other sufficiently clear indications' of such an incident.[92] The duty exists independent from an individual complaint, and comes into existence when, through whatever source, 'it has come to the attention of the authorities' the conduct has taken place.[93]

In the context of Article 2, the duty is triggered in case of any violent death,[94] or life-threatening injury,[95] disappearance,[96] as well as certain accidental deaths resulting from risky State activities,[97] or in a private (medical) sphere.[98] In certain cases, where an individual has disappeared in life-threatening circumstances, the duty is triggered even though there is no certainty the individual died.[99] In the context of Article 3, the 'arguable claim' must relate to ill-treatment in breach of Article 3, whether committed by State agents or private parties.[100] Article 4 requires States to act once 'the matter' indicating slavery or forced labour comes to their attention.[101] Under Article 5 the duty thus far remains limited to situations of disappearance and unacknowledged detention, which is partly also covered by Articles 2 and 3, and where the arguable claim must relate to a suspicious disappearance often at the hands of the State, but not necessarily so.[102]

89 The standards for investigations are discussed further in §5.
90 *Cyprus v Turkey* (n 18) [132] (art 2) and [147] (art 5).
91 *Hassan v the United Kingdom*, ECtHR [GC] 16 September 2014, Appl No 29750/09 [62] (art 3); *Silver and Others v the United Kingdom* (n 43) [113] (art 13).
92 Ibid [62] (art 3).
93 *Rantsev v Cyprus and Russia* (n 30) [288] (art 4).
94 *Menson v UK* (n 84).
95 *Makaratzis v Greece*, ECtHR 20 December 2004, Appl No 50385/99 [55] and [73]-[79].
96 *Cyprus v Turkey* (n 18) [132].
97 *Öneryıldız v Turkey*, ECtHR [GC] 30 November 2004, Appl No 48939/99.
98 *Calvelli and Ciglio v Italy*, ECtHR [GC] 17 January 2002, Appl No 32967/96.
99 *Cyprus v Turkey* (n 18) [132]; David J Harris and others, *Law of the European Convention on Human Rights* (3rd edn, Oxford University Press 2014) 214.
100 *O'Keeffe v Ireland* (n 48) [172].
101 *Rantsev v Cyprus and Russia* (n 30) [288].
102 *Storck v Germany*, ECtHR 16 June 2005, Appl No 61603/00 [102].

4.3 Personal scope of application

Now that we know what triggers the duty to investigate, we may ask who are the subjects of that obligation, whether incidents which are not attributable to the State must be investigated, and whether there is an individual *right* to an investigation.

First of all, as was also shown in the Chapters on the ICCPR and ACHR, it is States who are under the duty to investigate. Quite clearly, the addressees of obligations under the ECHR, are States. They are the ones who have signed up to the ECHR, and they are the ones who must effectuate it. In the context of the duty to investigate, this means that States are primarily responsible for conducting such investigations. This is so, obviously, whenever States' own agents engage in the serious human rights violations at stake here. In order to safeguard the rule of law, States must conduct effective investigations and prosecute and punish those responsible. But, as was already touched upon above, States can also be held to investigate abuses committed by others. If an incident as identified above takes place within the jurisdiction of a State, it is obliged to investigate.[103] As States are under a positive obligation to secure Convention rights, wrongdoing by private individuals may be brought within the scope of the Convention when States have failed to take the necessary measures to protect a certain right, or when they have failed to conduct adequate investigations into such conduct.[104] In these types of cases, the wrongdoing itself, e.g. a wrongful killing, is not attributed to the State, rather the State is reprimanded for having failed to prevent, investigate or punish such act. Nevertheless, it remains the State who is under an ECHR obligation to conduct investigations, even if this obligation may be triggered by conduct of private individuals.

An as yet outstanding question, is whether States can also be held to investigate abuses committed by non-State armed groups (NSAGs), engaged in a NIAC with the State. This question may in practice be closely intertwined with the question whether a State exercised jurisdiction in the territory where such abuses took place, to be discussed below, but also raises issues of personal

103 This is one of the effects of the 'horizontalisation' of human rights, see e.g. Malu P Beijer, *The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations* (Intersentia 2017) 147. On horizontal effect more generally, see Gerards (n 41) 136–59; John H Knox, 'Horizontal Human Rights Law' (2008) 203 American Journal of International Law 1.

104 *Cyprus v Turkey* (n 18) [131]; *Ergi v Turkey*, ECtHR 28 July 1998, Appl No 23818/94 [82] (right to life). See also Silvia Borelli, 'Domestic Investigation and Prosecution of Atrocities Committed during Military Operations: The Impact of Judgments of the European Court of Human Rights' (2013) 46 Israel Law Review 369, 373. For a case of ill-treatment, see *M.C. v Bulgaria*, ECtHR 4 December 2003, Appl No 39272/98 [151] and more recently the Grand Chamber in *O'Keeffe v Ireland* (n 48) [172]. Pertaining to the prohibition of slavery and forced labour, see *Siliadin v France* (n 30) [89]; for the right to liberty and security, see *Storck v Germany*, ibid [102].

applicability. As was remarked in the context of the ACHR,[105] under international law, it is the States parties to a treaty which are under the obligation to execute it in good faith. Non-State armed groups are not and cannot become parties to the ECHR. Although positive obligations may bring the conduct of NSAGs within the purview of the Convention, it does so always through the responsibility of the State for either preventing such conduct, or ensuring accountability for it. An interesting test case will be whether genuine investigations carried out by NSAGs, which ensure accountability, can discharge the duty to investigate.[106] For now, the Court's case-law has focused on State obligations, and this will likely remain so.

It is therefore States who are under the obligation to conduct an investigation. But a relevant question is whether individuals have a corollary *right* to an investigation. As we have seen, the duty to investigate, according to the Court, is *inherent* in certain rights, such as the right to life.[107] If one's individual right to life implicitly encompasses a duty to investigate, then it would follow as a matter of logic that indeed, there is also an individual right to an investigation.[108] The same applies to the individual right to a remedy and reparation.[109] And indeed, in the Court's practice, it finds individual rights, such as the right to life, or the right to a remedy, to be violated if the State has failed to conduct an effective investigation. Victims must, as will be seen below, moreover be allowed sufficient access to the investigation, in order to allow them to effectuate their legitimate interests.[110] Reparative measures required if the Court finds the violations discussed here, such as killings by State agents, must moreover include effective investigations which hold perpetrators to account.[111] The Committee of Ministers considers such investigations to be *individual* measures, required to give effect to the Court's judgments.[112] Indi-

105 See Chapter 6, §4.3.

106 Another issue which may arise in this context, is whether States could be held to be under an obligation to cooperate with NSAGs in the investigation of human rights abuses. The duty to cooperate with other States is addressed *infra*, §4.5.

107 *Armani Da Silva v the United Kingdom*, ECtHR [GC] 30 March 2016, Appl No 5878/08 [231].

108 See e.g. Vito Todeschini, 'Investigations in Armed Conflict: Understanding the Interaction between International Humanitarian Law and Human Rights Law' in Paul De Hert, Stefaan Smis and Mathias Holvoet (eds), *Convergences and Divergences Between International Human Rights, International Humanitarian and International Criminal Law* (Intersentia 2018) section 3; Brems (n 32) 141–4.

109 Brems (n 32) 144–5.

110 *Anguelova v Bulgaria* (n 69) [140].

111 Department for the Execution of Judgments of the European Court of Human Rights, *Thematic Factsheet on Effective Investigations into Death or Ill-treatment caused by Security Forces*, Strasbourg: July 2020 (accessible at https://rm.coe.int/thematic-factsheet-effective-investigations-eng/16809ef841 (last accessed 15 July 2021)).

112 E.g. *Finogenov and Others v Russia*, Committee of Ministers, Decision of 20-21 September 2016, Appl No 18299/03 [2].

viduals therefore certainly have a right to an investigation, if they are victim of the types of abuses which trigger the duty to investigate.

Beyond the right to an investigation, the Court has been very explicit in finding that individuals do *not* have 'the right to have third parties prosecuted or sentenced for a criminal offence'.[113] Whereas individuals therefore have the right to have the facts surrounding an abuse of their rights clarified, and the right to have a court determine whether their rights were violated, and if so, a right to reparation, they cannot as such rely on the ECHR to have third parties prosecuted. As will be seen below, in section 5, States may be obligated to initiate criminal investigations, and to prosecute and punish offenders. But an individual right to have someone prosecuted, cannot be derived from the ECHR.

4.4 Temporal scope of application

The temporal applicability of the duty to investigate stretches from the moment the duty is triggered until the moment it has been fully discharged. Because the duty to investigate is an obligation of means rather than of result, it can be satisfied when all facts have been clarified, even if ultimately no perpetrators were identified and tried.[114] In certain circumstances, the duty to investigate can be revived, upon discovery of new facts – sometimes even related to incidents which took place a long time ago.[115] An example is the discovery of a mass grave, which renewed the obligation to account for the fate of disappeared persons.[116]

In the case-law of the Court, there are a number of other noteworthy temporal dimensions to the duty to investigate. Two points are of particular interest. First, the 'detachable' nature of the duty to investigate has led the Court to decide that even if the material event giving rise to an interference with individual rights, for instance a killing, falls outside the temporal scope of the Convention because it had not entered into force yet for the responding State, the duty to investigate may nevertheless apply under certain conditions.[117] Second and closely related, the Court has held that the duty to

113 *Armani Da Silva v the United Kingdom* (n 107) [238].
114 Further, see *infra*, §5.
115 *Charalambous and Others v Turkey*, ECtHR 3 April 2012 (dec), Appl No 46744/07 etc. [55].
116 *Janowiec and Others v Russia* (n 71) [185]. See also Sebastian Răduleţu, 'National Prosecutions as the Main Remedy in Cases of Massive Human Rights Violations: An Assessment of the Approach of the European Court of Human Rights' (2015) 9 International Journal of Transitional Justice 449, 459–60.
117 *Mocanu and Others v Romania* (n 48) [206] (art 2 and 3).

investigate can be a continuous obligation that extends in time, again under certain conditions only.[118] Both issues are briefly addressed.[119]

First, the temporal applicability of the Convention is principally limited to events after the entry into force of the Convention for a specific State – the 'critical date' – which applies similarly to extremely grave cases as far as any substantive violations are concerned.[120] The procedural obligation to conduct an investigation under Articles 2 and 3, however, according to the Court, applies even where the incident took place before the critical date, under the following conditions: (1) the only procedural steps or omissions that can be reviewed are those falling *after* the critical date, in combination with either (2) a 'genuine connection' between the event giving rise to the investigative duty under Article 2 or 3, meaning a 'significant proportion' of the required investigative steps was taken, or ought to have taken place, after the critical date; or (3) if the so-called Convention values-test is met, which means that although the connection is not genuine, the Court's jurisdiction is nevertheless 'needed to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective way'.[121] In clarifying the second and third criteria, the Court has ruled that for there to be a genuine connection there must be a sufficient proximity in time between the material event and the entry into force of the Convention, which ought normally not exceed ten years.[122] If this criterion is not met, under the Convention values-test the investigation – or lack thereof – can nevertheless be reviewed where the material event in question 'was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention', which the Court explicitly links to the concept of international crimes.[123] Such crimes must be investigated and prosecuted under the ECHR, even before it entered into force for the party in question, though the absolute limit of this temporal extension is the coming into force of the Convention itself on 4 November 1950 – any act before that date falling outside the temporal scope of application full stop.[124] Thus, the duty to investigate can extend States' responsibility to events which itself fall outside the Convention's temporal scope of application.

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118 *Varnava and Others v Turkey*, ECtHR [GC] 18 September 2009, 16064/90 etc. [194] (art 2) and [208] (art 5).

119 For excellent in-depth analyses, see Antoine C Buyse, 'A Lifeline in Time – Non-Retroactivity and Continuing Violations under the ECHR' (2006) 75 Nordic journal of international law 63; Harriet Moynihan, 'Regulating the Past: The European Court of Human Rights' Approach to the Investigation of Historical Deaths under Article 2 ECHR' (2017) 86 British Yearbook of International Law 68.

120 Moynihan (n 119).

121 *Šilih v Slovenia* (n 85) [162]-[163]; *Janowiec and Others v Russia* (n 71) [141].

122 *Varnava and Others v Turkey* (n 118) [166].

123 *Janowiec and Others v Russia* (n 71) [150].

124 Ibid [151].

Second, where the triggering event is not 'merely' a death or ill-treatment but a disappearance, the disappearance taking place before the critical date is of no consequence for the duty to investigate as it is an 'ongoing obligation'.[125] A defining element of disappearances is the continuing uncertainty as to the fate of the disappeared, exacerbated by the State's lack of investigation or deliberate concealment, leading the Court to hold that 'the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation'.[126] As the violation therefore extends in time, such violations will often fall within the temporal scope of application of the Convention, subject however to one limitation: the uncertainty characteristic of disappearances must extend past the critical date, which is not so where the lapse of time is such that the case becomes one of 'confirmed death'. The Court held this to be the case for the Katyn massacre, which took place in 1940, 58 years before the Convention entered into force for Russia.[127]

4.5 Geographic scope of application

The final mode of application which is discussed here, is the geographic scope of application of the duty to investigate. It draws the limits on the applicability of the duty to investigate, based on the *location* where an incident took place. As was shown in Chapter 4, States must respect, protect, and fulfil rights of 'everyone *within their jurisdiction*'.[128] When it comes to investigations, this means that if an incident which gives rise to an investigative obligation occurred within the State's jurisdiction, it will be required to investigate.

As explained in Chapter 4, States are presumed to exercise jurisdiction throughout their territories and are held to exercise jurisdiction extraterritorially if they exercise effective control over territory or persons.[129] Thus, States will need to investigate if an incident such as a killing takes place within a State's territory, or within territory under its effective control, or if someone who is under the effective control of a State's agents is killed.

The Court's case-law provides a number of examples where States had to investigate incidents which took place outside their territories. In fact, leading cases on the duty to investigate, such as *Al-Skeini v the United Kingdom* and *Jaloud v the Netherlands*, have been cases of extraterritorial application in Iraq. The Court held in these cases that the Convention applies extraterritorially in two separate sets of circumstances. Firstly, under the 'spatial model' of

125 Buyse (n 119) 73–8.
126 *Varnava and Others v Turkey* (n 118) [148].
127 *Janowiec and Others v Russia* (n 71) [185].
128 ECHR, art 1, italics FT.
129 Chapter 4, §4.5.

jurisdiction, States have jurisdiction for the purposes of the ECHR when they exercise 'effective control' over an area.[130] Once it has been established that effective control over an area exists – for instance when the State classifies as an occupying power, or when it administers the area through a subordinate administration – States are then under an obligation to secure 'the entire range of substantive rights' under the ECHR within that area.[131] Secondly, under the 'personal model' of jurisdiction, States are held to have jurisdiction in three sets of circumstances, the most important of which is when the use of force by State agents brings an individual under the authority and control of State authorities.[132] Under this model, however, the State need only secure those rights 'that are relevant to the situation of that individual'.[133] Although there is a potentially significant difference in the rights States must secure under both models of extraterritorial jurisdiction, it appears from the *Jaloud* case the investigative duties under Article 2 apply also where States exercise jurisdiction under the personal model.[134] In that case, Netherlands armed forces were involved in the shooting of an Iraqi citizen at a vehicle check-point. The Court found that the Netherlands 'exercised its "jurisdiction" within the limits of its (…) mission and for the purpose of asserting authority and control over persons passing through the checkpoint'.[135] Given the grave nature of the human rights violations giving rise to investigative duties as discussed in this study, it is moreover difficult to imagine how these rights could ever *not* be relevant to the situation of the individual under the State's control. One would imagine that one's right to life, right not to be tortured, enslaved or disappeared is always relevant, especially where the control exercised over individuals stems from the use of force by State agents. This leads to the conclusion that States must equally investigate credible assertions of violations within their jurisdiction when operating extraterritorially, whether through personal or territorial control.[136]

Finally, an important development with respect to the extraterritorial applicability of the duty to investigate has taken place in the Court's case-law more recently. The Court has found that even where States did not exercise jurisdiction over an incident outside their territories, they may nevertheless be under an obligation to take investigative action. Initially, this obligation

130 E.g. *Al-Skeini v UK* (n 14) [138].
131 Ibid; *Cyprus v Turkey* (n 18) [77]; *Ukraine v Russia (Re Crimea)* (n 20) [303]-[352].
132 *Al-Skeini v UK* (n 14) [134]-[136].
133 Ibid [137].
134 See *Jaloud v Netherlands*, ECtHR [GC] 20 November 2014, Appl No 47708/08, although whether the Court in this case applies the territorial or personal model for jurisdiction, or rather a mix of the two, remains somewhat unclear. See [152]. Further, see Wallace (n 17) 62–3.
135 Ibid [152].
136 See also Peter Kempees, *'Hard Power' and the European Convention on Human Rights* (Brill Nijhoff 2020) 240.

pertained not to a self-standing duty to investigate as such, but rather a *duty to cooperate*.[137] In the case of *Güzelyurtlu and Others v Cyprus and Turkey*, a family was murdered in Cyprus, but the suspects fled across the border into the Turkey controlled 'Turkish Republic of Northern Cyprus' (TRNC).[138] Despite the murders taking place outside of Turkey's jurisdiction, the Court found that Turkey was nonetheless under an obligation to *cooperate* with the investigation by Cyprus – which *was* under a direct duty to investigate, as the murders had taken place within Cyprus' jurisdiction. The duty to cooperate is a two-way obligation, requiring the territorial State to 'seek assistance', and the State with jurisdiction over the offenders to 'afford assistance'.[139] In imposing this obligation on Turkey, the Court referred to the 'Convention's special character as a collective enforcement treaty', which requires States parties to 'cooperate effectively with each other in order to elucidate the circumstances of the killing and to bring the perpetrators to justice'.[140] Despite the murders and the victims having been outside of Turkey's jurisdiction, the Court therefore found that Turkey had certain obligations to cooperate in the investigation by another ECHR State, namely Cyprus. The fact that the perpetrators were present within territory controlled by Turkey, constituted a 'special feature' which,[141] according to the Court, created a 'jurisdictional link' between it, and the human rights violation in question – sufficient to require it to cooperate in ensuring accountability for it.[142] The duty to cooperate then constitutes a duty of means to cooperate in good faith, and to employ avenues for mutual legal assistance, such as extradition or other assistance, applicable between the States in question.[143]

Beyond a duty to cooperate in investigations, the Grand Chamber has in a number of recent findings extended this approach to the duty to investigate as such. If 'special features' are present, States must investigate incidents even if they fell outside their jurisdiction *ratione loci* – irrespective of another State's

137 Further, see Marko Milanović, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life' (2020) 20 Human Rights Law Review 1, 41–4; Stefan AG Talmon, 'The Procedural Obligation under Article 2 ECHR to Investigate and Cooperate with Investigations of Unlawful Killings in a Cross-Border Context' (2019) 13 Diritti Umani e Diritto Internazionale 99.

138 *Güzelyurtlu and Others v Cyprus and Turkey*, ECtHR [GC] 29 January 2019, Appl No 36925/07.

139 *Güzelyurtlu and Others v Cyprus and Turkey* (n 138) [233] (art 2); *Nasr and Ghali v Italy*, ECtHR 23 February 2016, Appl No 44883/09 [270]-[272] (art 3); *Rantsev v Cyprus and Russia* (n 30).

140 Ibid [232]; Milanović, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life' (n 137) 42.

141 Further on these 'special features', see Talmon (n 137).

142 *Güzelyurtlu and Others v Cyprus and Turkey* (n 138) [191]-[197]; Milanović, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life' (n 137) 41.

143 *Güzelyurtlu and Others v Cyprus and Turkey* (n 138) [235]; *Rantsev v Cyprus and Russia* (n 30) [241], [246], [307]. Besides classical treaties for extradition and mutual legal assistance, the Court has also applied this doctrine to the European Arrest Warrant, see *Romeo Castaño v Belgium*, ECtHR 9 July 2019, Appl No 8351/17 [79]-[92]. For an earlier example of a duty to cooperate, see *Cummins v UK* (n 17), discussed further in §6.4.2.

investigative obligations therefore. The Court found to this effect in the important cases *Georgia v Russia (II)* and *Hanan v Germany*, which are discussed further in section 6. In *Georgia v Russia (II)*, the Court found that although Russia did not exercise jurisdiction in Georgia during the 'active phase of hostilities' of the inter-State conflict, it nevertheless was under an obligation to investigate allegations of war crimes committed by its troops during this phase.[144] This, the Court found, stemmed from the fact that Russia had in fact instituted some limited form of investigation, and due to the 'special features' of the case.[145] In *Hanan*, the Court similarly reasoned that based on the 'special features' of the case, Germany had to investigate an air strike carried out by its forces in the non-international armed conflict in Afghanistan, which had led to a number of civilian casualties.[146]

What constitutes such 'special features' giving rise to a 'jurisdictional link', the Court finds, cannot be established *in abstracto*.[147] From its case-law thus far, it appears relevant whether (i) the State in question has instituted an investigation,[148] (ii) whether the State was obliged to investigate the incident under domestic law or international law (including under IHL),[149] and (iii) whether pursuant to an international agreement, the State accepted to conduct such an investigation or to enforce a punishment,[150] (iv) whether the suspects were present on the State's territory or under its jurisdiction,[151] and (v) whether the territorial State was prevented from conducting an effective investigation (for instance because another State occupied its territory, or because a Status of Forces Agreement prevents such).[152] As the cases of *Georgia v Russia (II)* and *Hanan* illustrate, this likely brings most military operations carried out abroad within the purview of the investigative obligations under the ECHR. After all, if its armed forces violate IHL, this will give rise to investigative obligations under that body of law (as well as under domestic law, if the State has correctly implemented IHL), and members of the armed forces will in almost all situations be within the jurisdiction of their own State for the purposes of prosecution, while territorial States will often be prevented from effectively investigating, due to alleged perpetrators either having returned to their own State, or because a Status of Forces Agreement prevents them from exercising criminal jurisdiction.

144 *Georgia v Russia (II)* (n 19) [328]-[332].
145 Ibid.
146 *Hanan v Germany* (n 13) [134]-[142].
147 *Güzelyurtlu and Others v Cyprus and Turkey* (n 138) [190].
148 Ibid [191]; *Georgia v Russia (II)* (n 19) [330]-[331]; *Hanan v Germany* (n 13) [135].
149 *Georgia v Russia (II)* (n 19) [331]; *Hanan v Germany* (n 13) [137], [139]-[140]; *Romeo Castaño v Belgium* (n 143) [41].
150 *Makuchyan and Minasyan v Azerbaijan and Hungary*, ECtHR 26 May 2020, Appl No 17247/13 [50].
151 *Güzelyurtlu and Others v Cyprus and Turkey* (n 138) [194]; *Georgia v Russia (II)* (n 19) [331].
152 *Güzelyurtlu and Others v Cyprus and Turkey* (n 138) [193]-[195]; *Georgia v Russia (II)* (n 19) [331]; *Hanan v Germany* (n 13) [138].

In sum, the duty to investigate applies extraterritorially under the spatial and personal models, but can extend even to situations where other Convention obligations do not apply under those models. The procedural duty to investigate therefore appears to have given rise to a separate strand in the Court's case-law on extraterritorial obligations. In fact, this appears to be recognised as a third strand in its case-law on extraterritorial jurisdiction, in addition to the spatial and personal models of jurisdiction. The Grand Chamber found in its decision in *M.N. and Others v Belgium*, that beyond those two models, 'specific circumstances of a procedural nature have been used to justify the application of the Convention in relation to events which occurred outside the respondent State's territory'.[153] Thus, the duty to investigate is subject to special rules which extend its scope of application geographically, similar to its special status relating to its temporal scope of application. The extension of ECHR obligations to incidents which fall outside of the jurisdiction of States, under either the spatial or personal model, is certainly an important development which potentially expands the scope of the duty to investigate, and cooperate, yet further. The European Court is in the forefront of these developments, going beyond what the Human Rights Committee or the Inter-American Court have thus far required.

4.6 Résumé

This section has explored the scope of application of the duty to investigate, in its various modalities. Whereas the case-law develops on a case-by-case basis, a number of conclusion may nonetheless be drawn at this point.

Firstly, like the other systems, most cases brought before the European Court of Human Rights, pertain to serious violations of the rights to life and liberty, and the freedom from torture and slavery. Yet, the European Court has had occasion to rule on investigative duties in the context of other rights as well, such as for instance the freedom of expression. In contrast to the HRC and IACtHR, however, it has refrained from pronouncing generally on the rights which potentially bring with them investigative obligations. Secondly, the right to a remedy plays a relatively modest role in the Court's case-law on investigations, especially when compared with the ICCPR and ACHR. Thirdly, States must investigate abuses committed by third parties as well those by their own agents, so long as the abuse took place within their jurisdiction. Fourthly, the duty to investigate has a broad temporal scope of application. It can also apply to incidents predating the entry into force of the ECHR for the State in question. Fifthly and finally, States are also required to investigate violations extraterritorially, insofar as they had jurisdiction over the violation. In fact, they are

153 *M.N. and Others v Belgium* (dec.), ECtHR [GC] 5 March 2020, Appl No 3599/18 [107].

at times held to take investigative steps even if they had no jurisdiction over a violation, if due to 'special features' of a case, there existed a 'jurisdictional link' – requiring States both to conduct an investigation themselves, and to cooperate in the investigation of another ECHR State. Taken together, the duty to investigate therefore has a broad scope of application under the ECHR – and is at the cutting edge of human rights developments when it comes to the temporal scope of application, and the duty to conduct and cooperate in extraterritorial investigations.

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

5.1 Introduction

Having established the scope of the duty to investigate, the Chapter now turns to the applicable investigative standards – how ought States give shape to investigations to comply with the Convention? These standards are in large part identical under the four substantive provisions discussed, as well as under Article 13, and they are therefore discussed in an integrated manner.[154]

5.2 An obligation of means, not of result

A first important characteristic of the duty to investigate, is that it is an obligation of means, not of result[155] – like under the ICCPR and ACHR.[156] This means that States cannot be held to have violated the Convention simply for not having been able to identify a perpetrator or to uncover the fate or whereabouts of a disappeared person, but rather must conduct an investigation

154 The Grand Chamber has held explicitly that the investigative obligations under Articles 2 and 3 could be assessed together, as they are subject to converging principles. *Mocanu and Others v Romania* (n 48) [314]. The same standards apply under art 5, as is illustrated by the Grand Chamber's finding in *Varnava v Russia*, that art 5's investigative obligations had been violated by virtue of the shortcomings identified under art 2 ((n 118) [208]). Under art 4, the Court in *Rantsev v Cyprus and Russia* set the standards for investigation by reference to cases concerning the right to life (n 30) [288]).

155 E.g. *Mustafa Tunç and Fecire Tunç v Turkey*, ECtHR [GC] 14 April 2015, Appl No 24014/05 [173] (right to life); *Abdu v Bulgaria*, ECtHR 11 March 2014, Appl No 26827/08 [43] (right to physical integrity); *Rantsev v Cyprus and Russia* (n 30) [288] (prohibition of slavery and forced labour). To my knowledge, this has not been ruled explicitly for investigations under Article 5 (right to liberty and security), as the duty to investigate under this right is largely limited to cases of disappearances, and these are often first assessed under Articles 2 and/or 3, with the Court under Article 5 merely referencing its findings under those provisions. See e.g. *El-Masri v FYROM* (n 49) [242]-[243].

156 See Chapters 5 and 6.

'capable of leading to the identification and punishment of those responsible'.[157] Rather than judging whether a State has met its obligations only by looking at the result of the investigation, the Court has therefore developed a number of standards which investigations must meet.

The Court decides cases on a case-by-case basis, and as it found in *Velikova v Bulgaria*, 'it is not possible to reduce the variety of situations which might occur to a bare check list of acts of investigations or other simplified criteria'.[158] Nevertheless, the Court has developed an extensive body of case-law pertaining to the duty to investigate. This has resulted in a list of principles to assess the compatibility of investigations with the ECHR, which are sufficiently broad to allow for a case-by-case assessment of an investigation's compliance with the Convention in the specific circumstances of a case.

5.3 Investigative standards

5.3.1 Eight standards

As the Court has stated many times, the overarching standard is that there must be some form of thorough, effective official investigation.[159] The components of such an investigation, are eight in number. Investigations must be (i) launched of the State's own accord (*ex officio*), (ii) initiated promptly and carried out with reasonable expediency, and must furthermore be (iii) adequate, (iv) independent and (v) impartial, and (vi) must contain a sufficient element of public scrutiny, including (vii) sufficient involvement of the victims or their next of kin.[160] Finally, (viii) follow-up to the investigation may be required, which depending on the case may require either criminal accountability processes, or the availability of civil remedies. In the case of *Tunç and Tunç v Turkey*, the Grand Chamber characterised the adequacy, promptness, independence, and involvement of next of kin, as the 'essential parameters' of investigations, and clarified that together they allow assessing the overall effectiveness of the investigation.[161] The approach is therefore a holistic one, comparable to the approach under the right to a fair trial – assessing the fairness of the trial as a whole – although a manifest disregard for one of the 'parameters' may still lead to the finding of a violation if the negative consequences for the investigation are such that it is no longer effective.[162] The

157 *Ramsahai and Others v the Netherlands* (n 46) [324].
158 *Velikova v Bulgaria*, ECtHR 18 May 2000, Appl No 41488/98 [80].
159 *McCann and Others v UK* (n 27) [161]; *Abu Zubaydah v Lithuania* (n 60) [607].
160 Compare *Al-Skeini v UK* (n 14) [165]-[167] and Myjer (n 73) 157.
161 *Mustafa Tunç and Fecire Tunç v Turkey* (n 155) [225].
162 See also the case note by Janneke Gerards in *European Human Rights Cases* 2015/150.

exact weight to be given to each element in this approach may vary on a case-by-case basis.

5.3.2 Ex officio

The first standard investigations must meet, is that they are (i) initiated of the State's own accord, as soon as the duty to investigate is triggered. States may not remain passive and await a complaint by victims or their next of kin, but must actively start an investigation.[163] This standard gains added weight, in cases concerning violations of the right to life and disappearances, because there are no victims alive and well, capable of giving their account.[164] This circumstance puts additional emphasis on the obligation for States to initiate investigations of their own accord, and to bring to light the facts and circumstances leading to the victim's death or disappearance. In cases concerning torture or ill-treatment, the Court is cognisant of victims' vulnerable position,[165] and the potential impact of such treatment on their will or capacity to bring a claim.[166] This too adds to the importance of States initiating investigations as soon as they have sufficiently clear indications of a violation.

5.3.3 Promptness

The second standard is that of (ii) promptness. All necessary investigative steps must be taken to secure crucial evidence as soon as possible, in order to prevent irreparable deficiencies in the investigation.[167] The evidence to be secured has a bearing on what is considered sufficiently prompt, as for instance eyewitness testimonies are more reliable when taken quickly, and in cases of ill-treatment, medical examinations cannot be postponed as bruises will fade and injuries will heal. Promptness similarly, and logically, also plays a major role in cases of investigations where for instance a disappearance under suspicious circumstances has just taken place, and where the safety of the victim – more so than establishing *ex post facto* accountability – is of chief

163 E.g. *Abu Zubaydah v Lithuania* (n 60) [608].

164 In cases of disappearance, the victim in rare cases survives to give his account, see *El-Masri v FYROM* (n 49).

165 *İlhan v Turkey* (n 48) [92].

166 *Aksoy v Turkey*, ECtHR 18 December 1996, Appl No 21987/93 [97].

167 See also Philip Leach, 'The Right to Life – Interim Measures and the Preservation of Evidence in Conflict Situations' in Lawrence Early and others (eds), *The Right to Life under Article 2 of the European Convention on Human Rights. Twenty Years of Legal Developments since McCann v. the United Kingdom. In Honour of Michael O'Boyle* (Wolf Legal Publishers 2016) 171.

significance,[168] though this also ventures into the area of operational measures taken to protect rights, rather than investigative duties.

Whether the initiation of an investigation was sufficiently prompt, will depend on the circumstances of the case. Any delays, however, will have to be justified. To give an example, in the case of *Damayev v Russia*, which concerned an aerial bombardment killing six people, Russian authorities had started the investigation eight days after the incident. The Court found this to be significant, and 'prone to hampering the overall effectiveness of the investigation'.[169] The delay could not be justified, and was a factor in the investigation's ultimate lack of effectiveness.

5.3.4 Adequacy

The most demanding, substantive, yardstick, is that it must be (iii) 'adequate'. An investigation is adequate in the eyes of the Court, when it is 'capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible'.[170] Further, it must enable the determination of whether any force used was justified.[171] To this effect, the investigative authorities must 'take whatever reasonable steps they can to secure the evidence concerning the incident'.[172] What constitutes a 'reasonable step' is dependent on the case at hand, but can include a wide range of potentially effective methods of investigation – and the Court has in its case-law demanded very specific means and processes of inquiry.[173]

Investigations must often include, *inter alia*, securing eyewitness testimony – including from military personnel[174] – and forensic evidence, conducting autopsies or medical examinations, establishing bullet trajectories, and preventing the suspect from colluding with witnesses.[175] Which methods must be employed depends on the circumstances of the case, though any deficiency in an investigative method that renders the investigation ineffective will violate the Convention, and all obvious lines of inquiry must be followed.[176] As was explained above, States must in this context also seek cooperation by other States if necessary for collecting evidence.[177] The Court often looks in great detail at the investigative steps taken, and has for instance scrutinised closely

168 *Kurt v Turkey* (n 29) [123].
169 *Damayev v Russia*, ECtHR 29 May 2012, Appl No 36150/04 [81].
170 *Mustafa Tunç and Fecire Tunç v Turkey* (n 155) [172].
171 *Jaloud v Netherlands* (n 134) [200].
172 *Mustafa Tunç and Fecire Tunç v Turkey* (n 155) [174].
173 Mowbray (n 32) 440.
174 *Damayev v Russia* (n 169) [84].
175 *Armani Da Silva v the United Kingdom* (n 107) [233].
176 *Mustafa Tunç and Fecire Tunç v Turkey* (n 155) [175]; *Ramsahai and Others v the Netherlands* (n 46) [324].
177 *Rantsev v Cyprus and Russia* (n 30) [245]. See further *supra*, section 4.5.

the medical expertise of doctors in conducting examinations of rape victims,[178] or the precise steps taken during an autopsy. To illustrate the level of detail of the investigation, in *Tanlı v Turkey* the Court found an autopsy deficient, as

> 'the organs were not removed or weighed; the heart was not dissected; the neck area had not been dissected; no histopathological samples were taken or analyses conducted which might discover signs of electrical or other forms of torture and ill-treatment; no toxicological analyses were undertaken; no photographs were taken and the finding of the emboli was not adequately described or analysed. It also appears that the doctors who signed the post mortem report were not qualified forensic pathologists.'[179]

This at times painstaking review by the Court of the investigative measures aims to safeguard that all necessary evidence was gathered, which the Court sometimes also examines in terms of its 'thoroughness'. This has to do with the 'genuineness' of the investigation, and the question whether the authorities made a serious effort to establish what happened, and did not lightly decide to close the investigation on the basis of ill-founded conclusions.[180]

Finally, the Court requires additional efforts in cases where violence may have had racist or discriminatory motives.[181] In such cases, States must investigate specifically whether such racist or discriminatory motives existed.[182] Establishing such motives can be extremely difficult,[183] but is required in order not to 'turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights'.[184] This is all the more so where State agents are implicated in allegedly racist violence, and underlines the State's duty to uncover the facts and prevent any appearance of collusion in racist violence.

5.3.5 Independence and impartiality

Moving on to the standards of (iv) independence and (v) impartiality, these aim – together with the requirement of public scrutiny – to maintain public confidence in the State's adherence to the rule of law and to prevent any

178 *Aydin v Turkey*, ECtHR [GC] 25 September 1997, Appl No 23178/94 [107].
179 *Tanlı v Turkey*, ECtHR 10 April 2001, Appl No 26129/95 [150].
180 *Mocanu and Others v Romania* (n 48) [325].
181 For a recent authority, see *Aghdgomelashvili and Japaridze v Georgia*, ECtHR 8 October 2020, Appl No 7224/11 [38].
182 *Nachova and Others v Bulgaria* (n 66) [160]; *Aghdgomelashvili and Japaridze v Georgia* (ibid) [38].
183 On this subject, see Jasmina Mačkić, *Proving Discriminatory Violence at the European Court of Human Rights* (Brill 2018).
184 *Nachova and Others v Bulgaria* (n 66) [160].

appearance of State collusion in human rights abuses.[185] To this effect, the Court assesses the investigating authorities' institutional and practical independence, in relation to those whose responsibility is likely to be engaged.[186] Where statutory or institutional independence is open to question, this will lead the Court to assess more strictly whether the concrete investigation in question was carried out in an independent manner, the determination of which in the end hinges on 'whether and to what extent the disputed circumstance has compromised the investigation's effectiveness and its ability to shed light on the circumstances of the death and to punish those responsible'.[187] Any indications of a personal or professional connection between the subject of the investigation and the investigators, or any apparent lack of objectivity in the investigation, is relevant in this regard. Elements to be taken into account include

> 'the fact that the investigators were potential suspects, that they were direct colleagues of the persons subject to investigation or likely to be so, that they were in a hierarchical relationship with the potential suspects or that the specific conduct of the investigative bodies indicated a lack of independence, such as the failure to carry out certain measures that were called for in order to elucidate the case and, if appropriate, punish those responsible, the excessive weight given to the suspects' statements, the failure to explore certain lines of inquiry which were clearly required.'[188]

Independence is one of the 'essential parameters' of an effective investigation, because any real or perceived partiality or lack of independence, calls into question the genuineness of the investigation, and therefore its results. This is especially so where State agents are implicated in an incident. One of the aims of investigations is to ensure the public's faith in the State's monopoly on the use of force and its compliance with the rule of law, and any lack of independence in the investigation will strike at the heart of that aim.

Independence can also be of importance with respect to the follow-up given to the investigation, in the form of prosecution and trial. The leading consideration when the Court assesses independence in this context is whether in the concrete case under examination, there were indications calling independence into question. Importantly, this means that the simple fact that military prosecutors and courts are not fully independent from the executive, does not in and of itself violate the ECHR – although it is one factor influencing overall independence.[189] The Court has, consequently, in certain cases accepted criminal prosecutions and trials were sufficiently independent, even though

185 *Al-Skeini v UK* (n 14) [167].
186 *Ramsahai and Others v the Netherlands* (n 46) [343]-[344].
187 *Mustafa Tunç and Fecire Tunç v Turkey* (n 155) [224].
188 Ibid [222], references omitted.
189 Ibid [217]-[254].

they were conducted by military prosecutors and courts,[190] whereas in others it found fault with military prosecutions and trials, where circumstances were such that the independence of the investigation was not guaranteed.[191] Under the European system, the mere fact that the military justice system is used to prosecute and try human rights violations does not in and of itself violate the independence of the proceedings from the perspective of the duty to investigate, although it can together with other contextual factors, lead to such a conclusion.

5.3.6 Public scrutiny and involvement of victims and their next of kin

Equally crucial to these aims, are the requirements that (vi) there is a sufficient element of public scrutiny of the investigation, and that (vii) victims or their next of kin are sufficiently involved. Opening investigations up to a level of public scrutiny is an important way of safeguarding the public's confidence in the State's monopoly on the use of force, and has also been associated with the right to truth.[192] It requires that certain investigation reports or certain parts of the investigation be made public, to ensure transparency and counter any appearance of collusion.[193] There are limits to what is required of the State in terms of transparency of the investigation. According to the Court, there is no 'automatic requirement' of disclosing police reports, because of sensitive materials which may be included therein.[194] It therefore requires a '*sufficient* element of public scrutiny', the degree of which can vary on a case-by-case basis.[195]

This does not apply to the position of the victims or their next of kin, which must always be guaranteed so they may effectuate their legal interests.[196] Although this requirement can be met by divulging information in various stages of the investigation, not necessarily requiring authorities to constantly keep victims abreast of any progress made, victims must at a minimum be able to realise their legal interests. These interests are closely related to the right to an effective remedy under Article 13, and require States to grant the information needed to initiate civil proceedings against the State, and according to some, even require a possibility for victims to submit decisions not to

190 *Mantog v Romania*, ECtHR 11 October 2007, Appl No 2893/02 [70ff]; *Stefan v Romania*, ECtHR 29 November 2011 (dec.), Appl No 5650/04 [48].

191 *Mustafa Tunç and Fecire Tunç v Turkey* (n 155) [227] cites further case-law: *Barbu Anghelescu v Romania*, ECtHR 5 October 2004, Appl No 46430/99; *Soare and Others*, ECtHR 22 February 2011, Appl No 24329/02 [71]; *Dumitru Popescu v Romania (no. 1)*, ECtHR 26 April 2007, Appl No 49234/99 [75ff]; *Bursuc v Romania*, ECtHR 12 October 2004, Appl No 42066/98 [107]-[109].

192 *El-Masri v FYROM* (n 49) [191]-[193].

193 *Anguelova v Bulgaria* (n 69) [140].

194 *Armani Da Silva v the United Kingdom* (n 107) [236].

195 *Al-Skeini v UK* (n 14) [167].

196 Ibid.

prosecute to judicial review.[197] It indeed appears that State authorities must at least disclose sufficient information for the victim, and to an extent the public at large, to assess the investigation's reliability, especially in cases where the facts 'cried out for an explanation' and yet no prosecution was initiated – such as where State agents shot and killed an unarmed man.[198]

5.3.7 Follow-up to investigations

As was alluded to earlier, the aim of investigations is not just fact-finding, but also ensuring accountability and rendering the protection of rights effective. As was set out above, States must

> 'have in place an effective independent judicial system so as to secure legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim. Such a system may, and under certain circumstances must, include recourse to the criminal law.'[199]

This is similar to what we have seen under the ICCPR and ACHR, with the HRC and IACtHR similarly insisting on prosecution and punishment, where appropriate. Yet, the European Court appears to leave a little more leeway for other, non-criminal, follow-up:

> 'The form of investigation required by this obligation varies according to the nature of the infringement of life: although a criminal investigation is generally necessary where death is caused intentionally, civil or even disciplinary proceedings may satisfy this requirement where death occurs as a result of negligence.'[200]

Thus, whereas in certain cases the Court will require States to prosecute and punish those responsible, in others, it may be satisfied with non-criminal measures.[201] Normally, where the outcome of the investigation showcases serious harm to life, physical integrity or liberty and security, the investigation must be followed by prosecution and punishment. This is the case when such harm was caused intentionally, as well as in certain other cases where the consequences of negligence were particularly serious.[202] For instance, in the case of *Öneryıldız v Turkey*, the Court found that the deaths of 39 individuals due to a gas explosion which could have been prevented if it were not for the negligence of the authorities, had to have a criminal response.[203]

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197 Borelli (n 104) 374.
198 *Hugh Jordan v the United Kingdom*, ECtHR 4 May 2001, Appl No 24746/94 [124].
199 *Sinim v Turkey*, ECtHR 6 June 2017, Appl No 9441/10 [59].
200 Ibid [170]; *Güzelyurtlu and Others v Cyprus and Turkey* (n 138) [219].
201 Further, see Harris and others (n 99) 215.
202 *Lopes de Sousa Fernandes v Portugal*, ECtHR [GC] 19 December 2017, Appl No 56080/13 [215].
203 *Öneryıldız v Turkey* (n 97) [111].

Criminal follow-up to investigations

Where criminal responses must certainly follow, and take on particular prominence, is when State agents are involved in an incident. The Court has held that it is 'imperative' that where State agents have resorted to lethal force, 'strict accountability' is ensured.[204] This means that criminal investigations are the only option which satisfies the demands under the right to life, and as the Court found, 'civil proceedings (…) cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2'.[205] Furthermore, 'particularly stringent scrutiny' is required in the investigation.[206] This does not mean that there is ever a right to have someone convicted, or prosecuted, but if the investigation has identified a violation and a perpetrator, then a criminal prosecution and trial are required. Further, once criminal proceedings are instituted, such proceedings are subject to the demands of the procedural obligations flowing from the right to life.[207]

Like the HRC and IACtHR, the Court has dismissed impediments to criminal accountability. It has declared amnesties to be incompatible with the duty to investigate and prosecute,[208] found the *nullum crimen sine lege* principle of Article 7 not to prevent prosecutions for international crimes even in the absence of domestic criminalisation prior to the acts in question,[209] and ruled statutory limitations to be inapplicable to international crimes.[210] There is therefore a clear parallel here with what we have seen under the ICCPR and ACHR, and in fact, in the case of *Marguš v Croatia* the Court even references the Inter-American Court's case-law explicitly.[211] As Sebastian Răduleţu explains, this has provided willing States with tools to remove any impediments to criminal accountability.[212] Indeed, it has even gone so far – in cases where States *did* investigate and punish – as to hold States responsible for doling out punishment that were in the Court's view insufficiently severe for the violation.[213] The sword function of human rights, it may be observed, is therefore equally developed under the ECHR, as it is under the other systems.[214]

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204 *Tagayeva and Others v Russia* (n 7) [525].
205 *Hugh Jordan v the United Kingdom* (n 198) [141].
206 *Armani Da Silva v the United Kingdom* (n 107) [234].
207 Ibid [239].
208 *Marguš v Croatia* (n 68) [127].
209 *Kononov v Latvia*, ECtHR [GC] 17 May 2010, Appl No 36376/04 [205]-[213] and [245].
210 Ibid [230]-[233].
211 *Marguš v Croatia* (n 68) [138].
212 Răduleţu (n 116) 454–7.
213 *Öneryıldız v Turkey* (n 97) [96] and [116]-[118].
214 Of a contrary view, see SC Grover, *The European Court of Human Rights as a Pathway to Impunity for International Crimes* (Springer 2010). Others criticise the Court's approach for going too far. Van Kempen explains how the duty to employ criminal law signifies a fundamental shift in the concept of human rights law, as it requires States to infringe individuals' human rights, whereas these were initially conceived to protect individuals from the State. Human rights law therefore provides a legitimating factor for repression

Despite the Court's emphasis on criminal law remedies, if investigations live up to Convention standards, it has left a measure of discretion to States in deciding whether prosecution is called for. This is especially so where the investigation into the facts has been particularly thorough. In the admissibility decision *Mustafić-Mujić and Others v the Netherlands*, the Court was asked to rule on the decision not to prosecute the commanders of the Dutch United Nations peacekeepers for their role in the deaths of three victims of the Srebrenica genocide.[215] In this case, the Court appears to award decisive importance to the rigorous fact-finding that had been carried out into the Srebrenica genocide, both on the international and the domestic level – in the contexts of cases before the International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia, UN inquiries, domestic parliamentary inquiries and domestic civil proceedings.[216] As these investigations left no uncertainty as to the fate of the victims, nor to the role of the commanders therein, the Court found the investigation to be effective and adequate, and subsequently left the decision whether or not to prosecute to the State, as the Convention does not confer an individual right to revenge, or to have third parties prosecuted or sentenced for a criminal offence.[217] In this respect, the Grand Chamber held in *Armani Da Silva v UK*, that

> '[t]o date, the Court has not faulted a prosecutorial decision which flowed from an investigation which was in all other respects Article 2 compliant. In fact, it has shown deference to Contracting States both in organising their prosecutorial systems and in taking individual prosecutorial decisions.'[218]

This finding also underlines the requirement of a thorough investigation, which when genuinely carried out satisfies Convention standards, prevents appearances of collusion, and therefore leaves up to States whether they then employ repressive criminal law measures.

Civil or disciplinary follow-up to investigations

In cases where human rights are infringed not intentionally, but due to negligence, the Court does not necessarily insist upon criminal law remedies.[219]

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by States interfering with other human rights; Piet Hein van Kempen, 'Four Concepts of Security – A Human Rights Perspective' (2013) 13 Human Rights Law Review 1, 18–9. See also Frédéric Mégret and Jean-Paul S Calderón, 'The Move Towards a Victim-Centred Concept of Criminal Law and the "Criminalization" of Inter-American Human Rights Law. A Case of Human Rights Law Devouring Itself?' in Yves Haeck, Oswaldo Ruiz-Chiriboga and Clara Burbano-Herrera (eds), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia 2015).

215 *Mustafić-Mujić and Others v the Netherlands*, ECtHR 30 August 2016 (dec), Appl No 49037/15.

216 Ibid [103]-[106].

217 Ibid [106]-[107].

218 *Armani Da Silva v the United Kingdom* (n 107) [259].

219 Harris and others (n 99) 215.

Whereas the investigation must still establish the facts, ensure accountability, and provide redress, the form of accountability may in this context also consist of civil remedies, or disciplinary proceedings – depending on the circumstances of the case.[220] Principally, the same investigative standards as described above, still apply to such cases. Yet, the Court has found in a case concerning a death resulting from negligence in the medical sphere, that the requirement that the investigation be initiated *ex officio*, did not apply as strictly.[221] Where the alleged violation is sufficiently serious, however, the requirements for penal follow-up to investigations as described above, fully apply.[222]

5.4 Résumé

In the terms of the research question, we have now determined both the scope of application of the duty to investigate under the ECHR, as well as the standards applicable to such investigations. States must criminalise certain serious ECHR violations, institutionalise an investigative mechanism, and if an arguable claim exists that a violation has occurred, they must conduct an effective investigation. This is an obligation of means, not of result. In order for an investigation to be effective, it must meet eight standards. These standards are highly similar to those identified in the previous Chapters on the ICCPR and ACHR.

Investigations must be (i) launched of the State's own accord (*ex officio*), (ii) initiated promptly and carried out with reasonable expediency, and must furthermore be (iii) adequate, (iv) independent and (v) impartial, and (vi) must contain a sufficient element of public scrutiny, including (vii) sufficient involvement of the victims or their next of kin. Finally, (viii) follow-up to the investigation may be required, which depending on the case may require either criminal accountability processes, or the availability of civil remedies. In case of intentional infringements on human rights, or where State agents have resorted to the use of force, criminal law remedies will normally be required. It is precisely these types of cases which are at the heart of this study, pertaining as it does to cases arising out of armed conflict and which are regulated by IHL. The following section examines how the Court has dealt precisely with those types of issues.

220 *Sinim v Turkey* (n 199) [59].

221 *Calvelli and Ciglio v Italy* (n 98) [49] and [51]. See Harris and others (n 99) 206–7; 214–5.

222 See e.g. *Khashiyev and Akayeva v Russia*, ECtHR 24 February 2005, Appl No 57942/00 and 57945/00 [121].

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

6.1 Introduction

The above has shown *when* and *why* States must investigate under the ECHR, as well as *how* they must do so. Because this research project seeks to answer how investigative obligations operate *during armed conflict*, what is left is to explore how the ECHR applies during such conflicts, and how it interrelates with the other applicable legal regime – IHL. More in particular, three issues are of relevance.

First, a pertinent question is whether armed conflicts give rise to the possibility to *derogate* from the ECHR, and to what extent derogations may affect the State's duty to investigate violations of the ECHR (§6.2). Second, because the existence of an armed conflict gives rise to application of IHL, it must be asked how the ECHR interrelates with that body of law. Because Chapter 9 engages with the question how IHRL and IHL interrelate under general international law, this Chapter explores in particular how the Strasbourg Court has applied the Convention during armed conflict, and to what extent it has had recourse to IHL (§6.3). These two points inform the ultimate aim of establishing the scope and investigative standards applicable with respect to violations committed during armed conflict (§6.4).

Before going into these issues, it must be recalled that Chapter 4 has shown that IHRL continues to apply during armed conflict. The ICJ as well as the various human rights courts and bodies have held to this effect.[223] The European Court, for its part, has found that 'international humanitarian law and international human rights law are not mutually exclusive collections of law',[224] and that 'even in situations of international armed conflict, the safeguards under the Convention continue to apply'.[225] Illustrating this finding, the Court has applied the Convention in numerous conflicts in which European States have been involved. Thus, the Court has applied the ECHR to territorial IACs (Cyprus),[226] as well as to high-intensity NIACs on a State's own territory (Chechnya, East Turkey, Northern Ireland).[227] Similar to what we have seen under the Inter-American system, any arguments to the effect that the ECHR does not apply due to the existence of armed conflict, or that

223 See Chapter 4, §4.6. See also §6 of Chapters 5 and 6, outlining the approach under the ICCPR and ACHR.

224 *Saribekyan and Balyan v Azerbaijan* (n 21) [36].

225 *Hassan v UK* (n 91) [104]; *Georgia v Russia (II)* (n 19) [93].

226 *Çakir and Others v Cyprus*, ECtHR 29 April 2010 (dec), Appl No 7864/06, where the Court – although declaring the application inadmissible *ratione temporis* – held Cyprus to be under a duty to investigate killings that took place during the conflict with Turkey in 1974.

227 E.g. *Isayeva v Russia* (n 15); *Ergi v Turkey* (n 104); *McCaughey and Other v the United Kingdom*, ECtHR 16 July 2013, Appl No 43098/09.

the Court lacks jurisdiction because IHL regulates situations of armed conflict, have been dismissed.[228] Yet, the Court has recently taken an ambiguous approach to the *extraterritorial* applicability of the ECHR during international armed conflicts. Whereas it has previously considered the Convention to apply to situations of both extraterritorial occupation and international armed conflict in Iraq,[229] it ruled in *Georgia v Russia (II)* that during the 'active phase of hostilities' of the IAC, which gave rise to a 'context of chaos', Russia could not be held to have exercised jurisdiction extraterritorially for the purposes of Article 1.[230] This may signal an important restriction of the extraterritorial applicability of the Convention during (international) armed conflict, although it must be stressed that the Court does not overturn, and rather reiterates, its previous finding that the Convention continues to apply during armed conflicts. This issue is addressed further in section 6.3.

Because the ECHR therefore principally continues to apply during armed conflicts,[231] our focus is on determining *how* it is applied, and whether its legal standards may accommodate the exigencies of armed conflict. A first point of interest in this respect, in line with the ICJ's findings,[232] is the possibility of derogation.

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

As Chapter 4 showed,[233] derogations allow States to suspend certain rights in exceptional circumstances, under a number of strict conditions. The drafters of the Convention foresaw that full application of all the rights enshrined in the ECHR might be rendered difficult in crisis situations such as armed conflict.[234] The ultimate aim of making derogations possible, is to bring emerg-

228 E.g. *Saribekyan and Balyan v Azerbaijan* (n 21) [36]-[41]; *Hassan v UK* (n 91) [76]-[77]; *Georgia v Russia (II)* (n 19) [86], [92]-[95].

229 *Al-Skeini v UK* (n 14) [164]; *Hassan v UK* (n 91) [76]-[77].

230 *Georgia v Russia (II)* (n 19) [126] and [137].

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

232 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), *I.C.J. Reports* 1996, p. 226 [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004), *I.C.J. Reports* 2004, p. 136 [106]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment (19 December 2005), *I.C.J. Reports* 2005, p. 168 [216]. Further on this, see Chapter 9, §3.3.

233 Chapter 4, §4.6.

234 See further Jan-Peter Loof, 'On Emergency-Proof Human Rights and Emergency-Proof Human Rights Procedures' in Afshin Ellian and Gelijn Molier (eds), *The State of Exception and Militant Democracy in a Time of Terror* (Republic of Letters Publishing 2012).

ency situations within the purview of the rule of law, whilst still providing States with a measure of flexibility when their very survival is at stake.[235] Article 15 ECHR provides for this:

> '1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'

The ECHR therefore explicitly accounts for the possibility of derogation in situations of 'war'. The Court has thus far been very deferential in assessing whether a 'public emergency threatening the life of the nation' exists.[236] If States wish to derogate, they will have to give notification and reasons for doing so.[237] Even if they do, this lowers the State's obligations under the ECHR, but does not lead to the disapplication of such obligations.[238] The Court will supervise whether any measures derogating from the Convention, are proportionate in the light of the emergency.[239] Further, Article 15(2) provides for a number of rights which may never be derogated from. This list – which is more limited than under the ICCPR and ACHR – includes the freedom from torture and slavery, and the right to life 'except in respect of deaths resulting from lawful acts of war'.[240]

As was shown in the above, it is precisely these rights which most prominently require States to investigate, and these are also the rights which are most relevant during armed conflict. Despite the exigencies of high intensity armed conflicts, these provisions may therefore not be derogated from. Because the duty to investigate flows directly from these provisions, read in conjunction with Article 1, the duty to investigate violations of these rights is therefore

235 Loof (n 234) 146–150; Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis. Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 112. See further Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (Oxford University Press 2011).

236 Loof (n 234) 150–8; Gross and Ní Aoláin (n 235) 265. On the question whether extraterritorial conflicts may threaten the life of the nation domestically, see Marko Milanović, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (Oxford University Press 2016); Jane M Rooney, 'Extraterritorial Derogation from the European Convention on Human Rights in Armed Conflict' [2016] European Human Rights Law Review 656.

237 ECHR, art 15(3).

238 Françoise J Hampson, 'The Relationship Between International Humanitarian Law and Human Rights Law From the Perspective of a Human Rights Treaty Body' (2008) 90 International Review of the Red Cross 849, 562.

239 *Lawless v Ireland*, ECtHR 1 July 1961, Appl No 332/57 [31]-[38]; *A. and Others v United Kingdom*, ECtHR [GC] 19 February 2009, Appl No 3455/05.

240 ECHR, art 15(2).

equally non-derogable.[241] Hence, it may be concluded that the duties of investigation with regard to instances of torture, inhuman, or degrading treatment or punishment, and of slavery and servitude, are absolutely non-derogable and applicable at all times.

This leaves us with the question whether, during armed conflict, States may be allowed to derogate from their obligation to investigate under its other sources: the right to life, the right to liberty, and the right to an effective remedy.

Because Article 15(2) stipulates that the right to life may not be derogated from, 'except in respect of deaths resulting from lawful acts of war', it must be presumed that States *are* allowed to derogate from the right to life.[242] But, the Convention already stipulates the minimum level of protection which remains: the protection of the right to life remains for all deprivations of life which do not stem from lawful acts of war. What constitutes a 'lawful act of war' is subject to some scholarly debate – for instance relating to the question whether it encompasses both the law of IAC and NIAC, or the former only.[243] The Court has never pronounced on this issue, as no State to date has ever derogated from the right to life.[244] If a State were to derogate from the right to life, this may impact on its obligation to investigate. After all, insofar as the duty to investigate requires States to investigate potentially *unlawful* deprivations of life, insofar as a derogation changes what must be considered to be lawful to conform to IHL standards, then deprivations of life which are lawful under IHL will likely no longer require an investigation. Derogations may therefore impact on the duty to investigate in this respect, as is addressed further below.[245]

As far as Article 5 is concerned, derogations are permissible under Article 15, and States have made use of this possibility in practice. Nonetheless, the Court's proportionality review of such measures, shows there are limitations to how States may lawfully derogate. For instance, the Court has found – even after a lawful derogation – that holding an individual for fourteen days without judicial intervention, was not proportionate.[246] As investigative duties under Article 5 relate to cases of unacknowledged detention and enforced disappearances, these will at all times fall foul of the proportionality test under

241 *Al-Skeini v UK* (n 14) [162]; Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' (n 231) 518.

242 E.g. Kempees (n 136) 123–6.

243 Milanović, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' (n 236) section 2.C.

244 Lindsay Moir, 'The European Court of Human Rights and International Humanitarian Law' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 483.

245 *Infra*, §6.4.

246 *Aksoy v Turkey* (n 166) [76]-[78].

Articles 15 and 5, regardless of potential derogations, and given that such cases must be investigated also under the non-derogable prohibition of torture and inhuman and degrading treatment, derogations are in this respect without any consequence.[247] Further, although the Court has yet to pronounce on this issue, the prohibition of enforced disappearances is non-derogable under the International Convention for the Protection of All Persons from Enforced Disappearance.[248] In light of the Article 15 requirement that any derogation must not be inconsistent with the State's other international obligations, any State party to the Disappearance Convention will therefore be prevented from any derogation regarding such practices on this ground as well.

Finally, Article 13 – the right to a remedy – may be lawfully derogated from under the ECHR. Even if the Court, in line with Article 15, decides that the right to a remedy may be lawfully derogated from, as was explained above, this need not affect the investigative duties resting on States as those obligations flow directly from the obligation to secure the substantive provisions in question. Further, there are again international law developments prohibiting derogations from the right to a remedy, under the ICCPR as interpreted by the HRC. The HRC has interpreted the right to a remedy to be non-derogable, as well as any procedural safeguard required to ensure non-derogable rights.[249] Although the Court has not ruled on this issue explicitly, it appears already in *Aksoy v Turkey* to have taken a similar approach, as it found a violation of Article 13 in conjunction with Article 3, without even considering Turkey's derogation from Article 13.[250]

Even if States do derogate from their ECHR obligations, this therefore is unlikely to have significant consequences for their obligation to investigate. It is only under the right to life that States can – arguably – shrink their obligations, and therefore thereby the scope of what they must investigate. States have not, however, readily resorted to derogations when engaged in armed conflicts,[251] and no State has ever derogated from the right to life.

247 E.g. *Varnava and Others v Turkey* (n 118).

248 CED, art 1(2).

249 *General Comment No. 29: Article 4: Derogations during a State of Emergency*, HRC 31 August 2001, CCPR/C/21/Rev.1/Add.11 [14]-[15]. Further, see Chapter 5, §6.2.

250 *Aksoy v Turkey* (n 166) [95]-[100].

251 Helen Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' in Helen Duffy, Janina Dill and Ziv Bohrer (eds), *Law Applicable to Armed Conflict* (Cambridge University Press 2020) 65.

6.3 Applicability during armed conflict and interaction with IHL

6.3.1 Introduction

As the above showed, States are largely unable to alter their investigative obligations in times of emergency and armed conflict by way of derogations. The question then becomes how the European Court has taken account of IHL in its rulings, and to what extent this affects investigative obligations. This section provides a brief overview of the Court's approach to co-application of the ECHR with IHL as well as to the extraterritorial applicability of the Convention during armed conflicts, before the next section addresses how the duty to investigate is applied during conflict.

6.3.2 Extraterritorial application of the Convention during armed conflict

The ECHR's applicability during armed conflict has been confirmed time and again by the Court, both implicitly by simply applying the Convention in contexts of armed conflict, and expressly when rejecting respondent States' arguments that during armed conflict IHL applies to the exclusion of the Convention. In cases relating to the IACs in Northern Cyprus and Iraq, the Court has applied the Convention also during extraterritorial military operations carried out by Contracting States. Thus, it found that 'in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities',[252] and that the Convention applied to the UK's detention of an individual during the IAC in Iraq, while 'major combat operations' were still ongoing.[253] Yet, in 2021, the Grand Chamber of the Court – after reiterating its finding in *Hassan v UK* that ECHR protection does not cease during international armed conflict[254] – formulated an important limitation to the extraterritorial applicability of the Convention during armed conflict.

In the case of *Georgia v Russia (II)*,[255] concerning the 2008 international armed conflict between the two Council of Europe States, the Court had to decide whether Russia had exercised jurisdiction extraterritorially, on Georgian soil. It considered that

> 'a distinction needs to be made between the military operations carried out during the active phase of hostilities and the other events which it is required to examine in the context of the present international armed conflict, including those which

252 *Varnava and Others v Turkey* (n 118) [185].
253 *Hassan v UK* (n 91) [9], [76]-[77].
254 *Hassan v UK* (n 91) [104]; *Georgia v Russia (II)* (n 19) [93].
255 For an extensive analysis of the case, see Floris Tan and Marten Zwanenburg, 'One Step Forward, Two Steps Back? Georgia v Russia (II), European Court of Human Rights, Appl. No. 38263/08' (2022) 22 Melbourne Journal of International Law.

> occurred during the "occupation" phase after the active phase of hostilities had ceased, and the detention and treatment of civilians and prisoners of war, freedom of movement of displaced persons, the right to education and the obligation to investigate.'[256]

Thus, the Court for the first time considered that a distinction had to be made between the 'active phase of hostilities', and – in the context of this case – a phase of occupation. In considering whether Russia exercised jurisdiction, either under the spatial or the personal model for jurisdiction, the Court then made a number of sweeping statements which are worth citing in full. It found that

> '126. (…) in the event of military operations – including, for example, armed attacks, bombing or shelling – carried out during an international armed conflict one cannot generally speak of "effective control" over an area. The very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no control over an area. (…)'

And with respect to the spatial model:

> '137. In this connection, the Court attaches decisive weight to the fact that the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos not only means that there is no "effective control" over an area as indicated above (…), but also excludes any form of "State agent authority and control" over individuals.
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> 138. The Court therefore considers that the conditions it has applied in its case-law to determine whether there was an exercise of extraterritorial jurisdiction by a State have not been met in respect of the military operations that it is required to examine in the instant case during the active phase of hostilities in the context of an international armed conflict.'

Thus, the Court appears to exclude the exercise of extraterritorial jurisdiction during the active phase of hostilities, under both the spatial and personal models for jurisdiction. Its main argument to this effect appears to be that the test of whether States exercised effective *control* over an area, or authority and *control* over victims, cannot be satisfied in the 'context of chaos' which ensues from military operations carried out during the active phase of hostilities of an IAC. This is an important departure from its previous finding in *Hassan v UK*, where the Court – citing the ICJ – had rejected the UK's argument that

256 *Georgia v Russia (II)* (n 19) [83].

during the 'active hostilities phase' of an IAC, jurisdiction could not be exercised.[257]

The Court's reasoning with respect to this restrictive reading of extraterritorial jurisdiction during the active phase of hostilities of an IAC appears to find a basis in considerations of legal policy. The Court considered that 'it is not in a position to develop its case-law beyond the understanding of the notion of "jurisdiction" as established to date' due to a number of circumstances particular to the context of armed conflict.[258] From a practical perspective, it considered 'the large number of alleged victims and contested incidents, the magnitude of the evidence produced, [and] the difficulty in establishing the relevant circumstances',[259] which may admittedly (significantly) increase the caseload of the Court with complex cases.[260] From a legal perspective, the Court moreover referred to 'the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict)', to which it finally added that if the Court was to rule on 'acts of war and active hostilities in the context of an international armed conflict outside the territory of a respondent State', then the Contracting Parties would have to 'provide the necessary legal basis for such a task'.[261] Thus, whereas the Court saw a number of practical difficulties in deciding cases which result from IACs, it ultimately considered there to be a lack of *legal basis* for it to consider such cases.

The implications of these findings are potentially far-reaching, although it will have to be awaited how the Court will grapple with this issue in future case-law. It remains to be seen how the Court will define an 'active phase of hostilities' and a 'context of chaos', whether it will restrict these findings to IACs, whether territorial States *can* exercise jurisdiction in such situations, whether there can be exceptions to the sweeping statements by the Court, and – as Marko Milanović has remarked – whether the judgment will be a lasting precedent, given the many dissenters on the bench.[262]

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257 *Hassan v UK* (n 91) [76]-[77].

258 *Georgia v Russia (II)* (n 19) [141].

259 Ibid.

260 On 1 January 2019, individual applications arising out of inter-State conflict numbered 8,500, amounting to 17% of pending applications before the Court. See Council of Europe Steering Committee for Human Rights (CDDH), *The Development of the Court's Case-Load over Ten Years. Statistical Data for the CDDH*, CDDH(2019)08 (11 February 2019), p. 7. Further, see Geir Ulfstein and Isabella Risini, 'Inter-State Applications under the European Convention on Human Rights: Strengths and Challenges' (*EJIL:talk!*, 2020) <https://www.ejiltalk.org/inter-state-applications-under-the-european-convention-on-human-rights-strengths-and-challenges/> (last accessed 15 July 2021).

261 *Georgia v Russia (II)* (n 19) [141]-[142].

262 Marko Milanović, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos' (*EJIL:talk!*, 2021) <https://www.ejiltalk.org/georgia-v-russia-no-2-

A fundamental problem in the Court's approach is that, as Helen Duffy has commented, it appears to conflate issues of jurisdiction with the applicable law – with the applicability of IHL somehow affecting the applicability of the Convention.[263] The Court's consideration that IHL 'predominantly' regulates active hostilities during an IAC, and its call for a 'legal basis' for considering such situations, showcase that the Court does not want to apply IHL directly. Whether one agrees with this position or not can be subject to reasonable discussion. But why and how the applicability of IHL affects the question whether a State exercised *jurisdiction*, which according the Court's established case-law is a question of *fact*, is unclear. The applicability of IHL can certainly change *how* the Convention is applied and interpreted, but this is a consideration relating to the merits of the case, not an issue of jurisdiction. This finding not only goes against the Court's established case-law as well as ICJ jurisprudence, it also leads to an incongruity in the Court's approach. After all, if the *extraterritorial* jurisdiction of the Convention is limited during the active phase of hostilities of an IAC, however that is defined, then the State conducting military operations *on its own territory* will nevertheless be subject to ECHR obligations. There is no logical justification for this distinction, with in the case of the Georgian conflict the Georgian armed forces having to conduct their operations in accordance with the ECHR, and with the Russian invading forces fighting under the more permissive IHL regime – over which there is, crucially, no institutionalised international oversight.[264] This also leads to an arbitrary distinction for victims of warfare, with those having fallen victim to the use of force by Georgia having recourse to the ECHR and ultimately the European Court of Human Rights, and with those having fallen victim to Russian use of force falling outside the protections of the Convention. This therefore harms the equality of belligerents, an important cornerstone of IHL, as well as the effective protection of ECHR rights, an important cornerstone of IHRL.

More gradual issues arise in how the Court can delineate the 'active phase of hostilities', because as the Court reiterated in *Georgia v Russia (II)*, the Convention did apply extraterritorially during the 'occupation phase' of a conflict. Defining the threshold for such hostilities gives rise to complex problems. In the *Georgia v Russia (II)* case, the Court could relatively easily distinguish both phases in the conflict, because the initial hostilities in which

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the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/> (last accessed 15 July 2021).

263 Helen Duffy, 'Georgia v. Russia: Jurisdiction, Chaos and Conflict at the European Court of Human Rights' (*Just Security*, 2021) <https://www.justsecurity.org/74465/georgia-v-russia-jurisdiction-chaos-and-conflict-at-the-european-court-of-human-rights/> (last accessed 15 July 2021).

264 Further (in Dutch), see Marten Zwanenburg and Floris Tan, 'Georgië t. Rusland (II) (EHRM, Nr. 38263/08) – Toepasselijkheid van Het EVRM Tijdens Extraterritoriale Interstatelijke Conflicten' (*EHRC Updates*, 2021) <https://www.ehrc-updates.nl/commentaar/211205> (last accessed 15 July 2021).

Russian forces invaded Georgian territory lasted for five days, and ended with a ceasefire agreement.[265] In many conflicts, however, no clear distinction can be made between both phases. Further, in a conflict such as the one in the east of Ukraine where the armed conflict has lasted for years rather than days, with many shifts taking place overtime between periods of relative calm and renewed flaring up of hostilities,[266] drawing a line between two 'phases' of a conflict risks becoming arbitrary, and can leave victims of warfare outside the protection of the ECHR for years on end. This is an outstanding issue which the Court will need to tackle in the cases brought by Ukraine against Russia.

As a final point, it must be asked whether the Court's sweeping statements will be subject to mitigation in future case-law. In the Court's established case-law, the question whether a State has exercised 'jurisdiction' extraterritorially, is a question of fact.[267] Yet, in *Georgia v Russia (II)*, the Court considered that during the active phase of hostilities of an IAC, there 'is no control over an area', and that this situation 'excludes any form of "State agent authority and control" over individuals'.[268] Thus, the Court in such situations does not apply a factual test whether the respondent State exercised control, but rather finds that control is not possible in such a 'context of chaos'. Moreover, the Court has not formulated this as a legal presumption. It rather phrases it as a logical impossibility of control. It remains to be seen whether, if applicants are able to make a strong case that control was in fact present, the Court will take the – more appropriate – approach that even if there is a presumption of a lack of control, this presumption can be rebutted through factual evidence. This would, at the very least, mitigate the Court's findings somewhat, and bring the question of jurisdiction back to a question of fact, as the Court itself finds it must be.

Certain signs of mitigation are present in the Court's findings in *Georgia v Russia* itself. The Court considered that Russia *did* exercise jurisdiction, also during the active phase of hostilities, with respect to the detention and treatment of civilians and prisoners of war, freedom of movement of displaced persons, the right to education and the obligation to investigate. There does therefore appear to be some scope for mitigating the sweeping statement that jurisdiction is excluded, though the reasoning for this remains vague. The Court simply considered, with respect to prisoners of war and civilian internees that because they were 'mostly' or 'inter alia' detained after the cessation of

265 *Georgia v Russia (II)* (n 19).

266 Anastasiia Moiseieva, 'The ECtHR in Georgia v. Russia – a Farewell to Arms? The Effects of the Court's Judgment on the Conflict in Eastern Ukraine' (*EJIL:talk!*, 2021) <https://www.ejiltalk.org/the-ecthr-in-georgia-v-russia-a-farewell-to-arms-the-effects-of-the-courts-judgment-on-the-conflict-in-eastern-ukraine/> (last accessed 15 July 2021).

267 *Georgia v Russia (II)* (n 19) [164]; *Al-Skeini v UK* (n 14) [139]; *Ilaşcu and Others v Moldova and Russia*, ECtHR [GC] 8 July 2004, Appl No 48787/99 [387].

268 *Georgia v Russia (II)* (n 19) [126] and [137].

active hostilities, all detainees fell within the jurisdiction of Russia.[269] With respect to the duty to investigate, as is set out further below,[270] the Court considered that if 'special features' are present, it will apply even to incidents over which there was no jurisdiction under Article 1.

Precisely delineating extraterritorial applicability of the ECHR during armed conflict is rendered difficult by the many questions the Court's most recent judgment on this issue has raised. An important limitation has been made for the 'active phase of hostilities' during *international* armed conflict, but what that means precisely, and whether extraterritorial NIACs will be subject to the same rules, remains to be seen. It should be stressed, however, that it is not the applicability of IHL as such which displaces the applicability of the ECHR, but rather that in certain situations, States cannot be held to exercise the level of control required for them to be seen as exercising jurisdiction for the purposes of Article 1 ECHR. It should further be stressed that the applicability of the Convention during situations of occupation was reaffirmed, and that the Convention was applied with respect to a number of rights – though not all. Thus, even if the Court's findings may limit the number of situations in which this so, the question remains how the Convention must be applied during armed conflict and in co-application with IHL.

6.3.3 The European Court's engagement with international humanitarian law

The Strasbourg Court has for a long time been more reticent towards IHL than its counterparts in San José and Geneva.[271] The European Court has long insisted on an exclusive human rights approach towards cases arising out of armed conflict, although there are indications that it is in the process of overhauling its case-law.[272] Initially, in cases concerning NIACs, the Court held that if no derogation was entered, it would assess cases against a 'normal legal background'.[273] It did develop some flexibility in its case-law, taking account of the exigencies of a specific situation, and at times also incorporated 'IHL vocabulary' into its judgments,[274] but never through explicit reliance on rules

269 *Georgia v Russia (II)* (n 19) [239] and [269].
270 See §6.4.2.
271 For their respective approaches, see Chapters 5 and 6.
272 Larissa van den Herik and Helen Duffy, 'Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches' in Carla Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill Nijhoff 2017) 389.
273 *Isayeva v Russia* (n 15) [191]; Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' (n 231) 502.
274 Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 European Journal of International Law 161, 173–4; Moir (n 244) 484–5; Françoise J Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' in Scott

of IHL to ground its judgments. For instance, in relation to the NIAC in Chechnya, the Court has referred to IHL concepts such as the 'incidental loss of civilian life',[275] 'legitimate targets',[276] 'use of indiscriminate weapons',[277] and 'disproportionality in the weapons used'.[278] And in the case of *Isayeva, Yusupova and Bazayeva v Russia*, the Court ruled that a military operation 'was [not] planned and executed with the requisite care for the lives of the civilian population'.[279] Despite these apparent nods towards the law of armed conflict,[280] as William Abresch rightly explains, this vocabulary is not exclusive to IHL.[281] What is more, the Court appears to use it in a human rights context, rather than interpreting these terms the way they would be under IHL[282] – as we have seen the Inter-American Court do.[283] Thus, even if the Strasbourg Court incidentally used what seems to be IHL terminology, it in actuality relied upon a human rights assessment, not an IHL assessment.[284]

Rather than engaging explicitly with the law of armed conflict, the European Court has opted for a 'contextual' application of the ECHR.[285] This means it takes the factual circumstances, and exigencies of a situation, into account when interpreting the State's obligations, mindful that it ought not impose unrealistic demands.[286] One potential explanation for the Court's reticence in relying on IHL, is the definition of the Court's task in ensuring that States observe their engagements *under the Convention*, not under any other regime of international law.[287] Nevertheless, even if the *application* in the sense of

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Sheeran and Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 208–9.

275 *Isayeva v Russia* (n 15) [176]; *Ergi v Turkey* (n 104) [79].

276 *Isayeva, Yusupova and Bazayeva v Russia*, ECtHR 24 February 2005, Appl No 57947/00 57948/00 57949/00 [175].

277 *Isayeva v Russia* (n 15) [191].

278 *Isayeva, Yusupova and Bazayeva v Russia* (n 276) [197].

279 Ibid [199].

280 Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' (n 251) 67.

281 Abresch (n 17) 746; see also Moir (n 244) 485–6.

282 Ibid.

283 See Chapter 6, §6.3.3, outlining the Inter-American Court's application of the IHL principles of distinction, proportionality, and precautions in attack.

284 van den Herik and Duffy (n 272).

285 Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' (n 231) 514–5; Noëlle Quénivet, 'The Obligation to Investigate After a Potential Breach of Article 2 ECHR in an Extra-Territorial Context: Mission Impossible for the Armed Forces?' (2019) 37 Netherlands Quarterly of Human Rights 119, 135.

286 *McCann and Others v UK* (n 27) [200]; *Al-Skeini v UK* (n 14) [168]; Juliet Chevalier-Watts, 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?' (2010) 21 European Journal of International Law 701, 709.

287 ECHR, art 19; *Brannigan and McBride v the United Kingdom*, ECtHR 25 May 1993, Appl No 14554/89 [72]; *Jersild v Denmark*, ECtHR 23 September 1994, Appl No 15890/89 [30].

establishing States' responsibility for breaches of other rules of international law falls outside the purview of the Court, it is submitted that it can – and indeed must, under the rules of treaty interpretation – take other applicable rules of international law into account in its *interpretation* of the Convention.[288] Another explanation is that the text of the ECHR restricts the European Court's possibilities of taking IHL onboard, especially with regard to the two rights which give rise to the majority of issues: the rights to life and liberty. In contrast to the ICCPR and the ACHR, which prohibit States from depriving individuals of their lives and liberty *arbitrarily*,[289] the ECHR forbids States from doing so *unless when pursuant to an exhaustive list of legitimate aims*.[290] Because the permissive rules of IHL are not included in such lists, this has, perhaps, restricted the European Court in taking a more open stance towards IHL – at least so long as States do not derogate from the Convention.[291]

There are, however, indications of a shift in the Court's approach. In an apparent move towards more overt reliance on IHL, the Grand Chamber of the Court held in 2009, in *Varnava and Others v Turkey*, that the right to life 'must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict'.[292] Whereas this has yet to lead to the clear application of IHL rules pertaining to targeting under the right to life, a new step does appear to have been taken in 2014, when the Grand Chamber handed down its judgment in *Hassan v the United Kingdom*.[293] In this case, the Court had to rule on the lawfulness of internment measures applied by the United Kingdom during its occupation of Iraq. It was clear the internment for reasons of the conflict could not be brought under Article 5's exhaustive list of grounds for detention, and the UK invoked IHL as nevertheless permitting the internment. Thus, the stage was set for a real conflict of norms between the IHL rule permitting internment, and the ECHR rule prohibiting it. The Court then, going well beyond its previous reliance on IHL, decided to open up the permissible grounds for detention in case of international armed conflict, to

288 VCLT, art 31(3)(c). See further Chapter 6, §6.3.3, detailing how the Inter-American Court has overruled the Inter-American Commission's direct application of IHL, and has rather found that the ACHR must be interpreted in light of applicable rules of IHL.

289 See Chapters 5 and 6.

290 This leaves less interpretive room for taking IHL into account, and does not allow for a *renvoi* to IHL; Giulia Pinzauti, 'The European Court of Human Rights' Incidental Application of International Criminal Law and Humanitarian Law. A Critical Discussion of Kononov v. Latvia' (2008) 6 Journal of International Criminal Justice 1043.

291 Further, see e.g. Marko Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2010) 14 Journal of Conflict and Security Law 459, 477–80.

292 *Varnava and Others v Turkey* (n 118) [185].

293 *Hassan v UK* (n 91).

include internment permitted under Geneva Conventions III and IV. Interestingly, in doing so it relied on an 'implicit derogation', which the Court derived from States' consistent practice of not derogating in case of IACs.[294] Moreover, it insisted that this was possible only in light of IHL's explicit rules on detention, and of the UK's invocation of IHL.[295]

Then, in *Georgia v Russia (II)*, the Grand Chamber took yet further steps of engaging with IHL. Whereas the Court found, as was set out above, that Russia did not exercise jurisdiction during the 'active phase of hostilities', it ruled differently for the occupation phase of the conflict. During that phase the Convention applied, therefore, alongside rules of IHL. The Court expressly acknowledged this fact, and citing *Hassan*, considered it had to 'examine the interrelation between the two legal regimes with regard to each aspect of the case and each Convention Article alleged to have been breached'.[296] This required an examination under each applicable provision, considering whether the ECHR and IHL conflicted, or not. Ultimately, in considering complaints of an administrative practice of 'the killing of civilians and the torching and looting of houses', the Court found that there was no conflict between Articles 2, 3, and 8 ECHR and Article 1 of Protocol 1, and the applicable rules of IHL under the law of occupation.[297] It found similarly for the detention and treatment in detention of both civilians and prisoners of war, freedom of movement, the right to education, and the duty to investigate.[298] Thus, the Court expressly cited provisions of IHL and considered whether potential conflicts between the Convention and IHL existed. Based on a rather rudimentary assessment, however, it did not find any instance of conflict, on the facts of the case. As a consequence, the Court also did not address how it might resolve normative conflict should such arise.

It may be observed that in ruling that the ECHR was not applicable to the active phase of hostilities (at least insofar as Russia's conduct was concerned), the Court sidestepped the most prominent normative conflict between the Convention and IHL: where it concerns deprivations of life.[299] It therefore remains to be seen whether, like in *Hassan*, the right to life can also be subject to 'implicit derogations' with a view to justifying deprivations of life 'resulting from lawful acts of war'. The Court will likely need to answer this question in future case-law, and such cases as the inter-State applications brought in the conflict between Armenia and Azerbaijan will likely require the Court to settle this issue.

294 Ibid [101]-[104].
295 Ibid [101]-[104] and [107].
296 *Georgia v Russia (No. 2)* (n 19) [95].
297 Ibid [220]-[222].
298 Ibid [235]-[237], [267], [291], [311], [323]-[325].
299 Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' (n 251) 90–2.

In *Hanan v Germany*, finally, the Court engaged in a somewhat more detailed examination of IHL. Faced with the question whether and how Germany had to investigate an airstrike which had caused civilian casualties in the context of the NIAC in Afghanistan, the Court took express account of IHL. Three full pages of the judgment are devoted to summing up the relevant rules of IHL,[300] and in examining the complaint, the Court considered IHL relevant at four different junctions. Firstly, for establishing that Germany exercised jurisdiction for the purposes of the investigation, the Court considered it a relevant 'special feature' that Germany had been required to conduct an investigation under applicable rules of IHL – referencing in particular the ICRC's Customary IHL Study and the UN Basic Principles and Guidelines.[301] Secondly, like in *Georgia v Russia (II)*, it considered that there was 'no substantive normative conflict in respect of the requirements of an effective investigation between the rules of international humanitarian law applicable to the present case (…) and those under the Convention'.[302] It did not, therefore, engage with the respondent and intervening Governments' arguments that IHL 'provided the appropriate yardstick' or even the '*lex specialis*' for deciding the case, nor did it answer whether an implicit derogation could be used to resort to IHL as it had done in *Hassan*.[303]

Thirdly, in determining the adequacy of the investigation, the Court examined whether the investigative steps were sufficient to establish the legality of the use of force, and consequently the criminal liability of those involved in ordering the airstrike. The German prosecutor had determined the lawfulness of the attack in light of the applicable rules of IHL, for which the *mens rea* of the commander ordering the strike is ultimately decisive. A breach of IHL will only occur where civilians are made the direct target of attack, where the expected civilian casualties are excessive in light of the anticipated military advantage, where the necessary precautions of attack were not taken, or where an attack was indiscriminate.[304] The *ex ante* expectations and intentions of the commander are therefore of decisive importance in determining lawfulness, and the German prosecutor had determined that all necessary precautions had been taken, and that the commander had been convinced that there had been no civilians present at the target. The Court, crucially, went along with this assessment. It accepted not only that it had been difficult under the circumstances to determine the exact number of civilian casualties, but moreover that the number of victims 'did not have any bearing on the legal assessment in respect of the criminal liability of Colonel K., which focused on his

300 *Hanan v Germany* (n 13) [80]-[85].
301 Ibid [137].
302 Ibid [199].
303 Ibid [193]-[195], [198]-[199].
304 See AP I, art 48, 51(1), (2) and (4), 57(2).

subjective assessment at the time of ordering the airstrike'.[305] This means that in order to determine the *legality* of the use of force, which according to the Court must be established in the investigation, it defers to legality *under IHL*. This may well have to do with the fact that the applicants complained under the duty to investigate only, and that Germany had likely not exercised jurisdiction under Article 1 for the purposes of a substantive assessment of the lawfulness of the use of force under the Convention.[306] If the substantive limb of Article 2 therefore did not apply, there was no real issue of interplay here, as IHL was the only legal framework regulating the lawfulness of the use of force. Still, this is the first time that the Court has deferred to an assessment of lawfulness under IHL.

Fourthly and finally, when examining the independence of the investigation, the Court considered that it cannot be the case that 'commanders must be excluded from investigations against their subordinates entirely, having regard also to the duty assigned to commanders in this respect under international humanitarian law'.[307] Thus, once again the Court takes express account of IHL in interpreting the Convention – where it was previously reticent in doing so.

To sum up, the European Court appears to be moving towards a more open approach to IHL. The cases of *Hassan v UK*, *Georgia v Russia (II)* and *Hanan v Germany* illustrate that it is willing to take express account of IHL in interpreting the Convention, when respondent Governments invoke IHL during the proceedings. In the latter two cases, this led the Court to assess on a right by right basis whether a conflict between the Convention and IHL existed. On the facts of those cases, however, it considered no conflict to exist, meaning it could follow its more general approach in which diverging international obligations must 'be harmonised as far as possible so that they produce effects that are fully in accordance with existing law'.[308] Likely, the Court will sooner rather than later be faced with cases in which a conflict between IHL and the Convention is unavoidable. The *Hassan* case illustrates that the Court has been willing to open up the exhaustive list of justifications for deprivations of liberty, but whether it will do so also for deprivations of life – as was argued by respondent and intervening Governments in *Hanan* – remains a pressing question.

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305 *Hanan v Germany* (n 13) [218].

306 The Court itself notes in this respect that the fact that it found a jurisdictional link to exist between Germany and the applicants with respect to the duty to investigate, this does not mean that the airstrike itself also fell within the jurisdiction of the State in the context of a substantive assessment, ibid [143]. The dissenters note that in their view, there indeed was no jurisdiction under the personal or spatial models for jurisdiction, ibid, *Jointly partly dissenting opinion of Judges Grozev, Ranzoni and Eicke* [25]-[31].

307 Ibid [224].

308 *Nada v Switzerland*, ECtHR [GC] 12 September 2012, Appl No 10593/08 [170].

6.4 Investigations into violations committed during armed conflict

6.4.1 Introduction

In the above, it was determined how the duty to investigate applies during situations of normalcy, that the ECHR continues to apply during armed conflicts, and how the European Court takes account of IHL. Based on these findings, this section aims at answering what, under the ECHR, States' investigative duties during armed conflicts amount to. One may question, for instance, whether it is feasible to require States to investigate all deprivations of life during armed conflict, as well as whether it is realistic to require States to conduct investigations the same way they must outside of conflict. In addressing these issues, this section first discusses the scope of application of the duty to investigate during armed conflict, to secondly examine any flexibility in the standards applied during conflicts.

6.4.2 Scope of application

The scope of the duty investigate in armed conflicts and occupation is principally the same as during situations of 'normalcy' – with a number of nuances. The Court has held that 'the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict',[309] as well as during 'violent armed clashes' in the context of NIACs.[310] A selection of cases from the numerous conflicts that have taken place in Europe shows this to be the case where States operate in international armed conflicts both extraterritorially[311] and within their territory,[312] as well as in high intensity non-international armed conflicts on their own territory,[313] and recently also abroad.[314] It is therefore clear that the duty to investigate continues to apply in situations of armed conflict.

This is no different when States engage in extraterritorial IACs or NIACs, even during the 'active phase of hostilities', and even insofar as such hostilities give rise to a 'context of chaos' which otherwise prevents it from exercising

309 Ibid [164].

310 *Kaya v Turkey* (n 16) [91]. See also the many Chechen cases, concerning Articles 2, 3 and 5, discussed by Philip Leach, 'The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights' [2008] European Human Rights Law Review 732; Philip Leach, 'Egregious Human Rights Violations in Chechnya: Appraising the Pursuit of Justice' in Lauri Mälksoo and Wolfgang Benedek (eds), *Russia and the European Court of Human Rights*, vol 1 (Cambridge University Press 2017).

311 *Al-Skeini v UK* (n 14) [164]; *Georgia v Russia (II)* (n 19) [328]-[332].

312 *Çakir and Others v Cyprus* (n 226).

313 E.g. *Isayeva v Russia* (n 15).

314 *Hanan v Germany* (n 13).

control, according to the Court. As was explained above, the Court has held in *Georgia v Russia (II)* that in such situations States cannot principally exercise the control necessary for them to exercise jurisdiction extraterritorially.[315] Nevertheless, the case-law shows that an exception in this respect must be made for the duty to investigate. As was set out in section 4.5, if the 'special features' of a case are such that a 'jurisdictional link' exists between the State and an incident, the duty to investigate will apply extraterritorially. This, the Court held in *Georgia v Russia (II)*, is also the case during the 'active phase of hostilities' of an IAC.[316] In *Hanan v Germany*, it held to the same effect with respect to the 'active hostilities phase' of an extraterritorial NIAC, which meant Germany had to investigate an airstrike carried out in the context of the NIAC taking place in Afghanistan.[317] Because, as was set out above, the 'special features' relevant to these cases related *inter alia* to the duty to investigate under IHL, the presence of suspects within the State's jurisdiction, and the territorial State being prevented from conducting an effective investigation, this likely brings many incidents involving a State's armed forces within the investigative jurisdiction of the State – at least insofar as such incidents violated IHL. As the Court found in *Hanan*,

> 'The Court does not overlook the restrictions on Germany's legal powers to investigate in Afghanistan, nor the fact that the deaths to be investigated occurred in the context of active hostilities. However, such circumstances do not *per se* exclude the determination that further investigatory measures, including in Afghanistan, may have been necessary, including through the use of international legal assistance and modern technology. The specific challenges to the investigation relate to the scope and content of the procedural obligation under Article 2 incumbent on the German authorities and thus to the merits of the case.'[318]

In sum, the geographic scope of the duty to investigate is not limited with respect to armed conflict.

Two further issues remain which may influence the *scope* of the duty to investigate during conflicts. The first is whether the scope of the duty to investigate under the right to life can be altered, through derogation. If 'deaths resulting from lawful acts of war' are permitted under the ECHR by virtue of a derogation, then the scope of the duty to investigate is arguably similarly reduced to credible assertions of deaths which are unlawful under the law of armed conflict. The second issue is whether during armed conflicts, States are held to investigate deaths caused by third parties – including non-State armed groups.

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315 *Georgia v Russia (II)* (n 19) [126] and [137].
316 *Georgia v Russia (II)* (n 19) [328]-[332].
317 *Hanan v Germany* (n 13) [136]-[142].
318 Ibid [145].

First, the question whether the scope of investigative obligations under the right to life narrows to only those deaths that appear to be unlawful under the law of armed conflict. Much has been written on the right to life during armed conflict, and the interplay between human rights law and IHL in this context. This discussion is not repeated here, although Chapter 10 of this study does engage with it to a certain extent.[319] At this point, it is merely submitted that, despite its finding that Article 2 ought to be interpreted in line with IHL,[320] the Court has thus far not applied rules of IHL to assess the lawfulness of deaths. Rather, it has developed its own test of absolute necessity and applied this contextually – which remains far-removed from the status-based targeting rules of IHL.[321] It is submitted that likely, the lack of derogations by States have restricted the Court's possibilities of resorting to IHL in this context[322] – which has instead applied the Convention 'against a normal legal background'.[323] This may change if the Court applies its approach in *Hassan* to right to life cases – thereby allowing 'implicit derogations' of the right to life – at least when States argue before the Court that it should take account of the rules of international armed conflict.[324] It was asked to do so in the case of *Hanan v Germany*, but ultimately, the Court did not find it necessary to rule on this issue.[325] Whether it will take a similar approach under the right to life therefore remains to be determined.

Should the Court indeed allow for implied derogations, or should States choose to derogate from their obligations under Article 2, then presumably investigative obligations will be limited to credible assertions of the unlawfulness of deaths under IHL, or the absolute necessity test under the ECHR would at least be modified to take account of IHL.[326] Insofar as the deaths of combatants are concerned, this appears no more than reasonable, as the criterion of investigating every death caused by State agents would appear unfeasible and untenable during active hostilities in armed conflicts,[327] where a State's

319 Chapter 10, §3.4.2.1.
320 *Varnava and Others v Turkey* (n 118) [185].
321 At least insofar as non-international armed conflicts are concerned, see Abresch (n 17).
322 E.g. Milanović, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' (n 236). On the competence to apply international humanitarian and criminal law by the ECtHR, be it incidentally, see Pinzauti (n 290) 1045–8.
323 *Isayeva v Russia* (n 15) [191]; Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' (n 231) 502.
324 *Hassan v UK* (n 91) [101]-[103], [107].
325 *Hanan v Germany* (n 13) [173], [195], [199].
326 On necessity, see further Lawrence Hill-Cawthorne, 'The Role of Necessity in International Humanitarian and Human Rights Law' (2014) 47 Israel Law Review 225; Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 Virginia Journal of International Law 796.
327 See also Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98 American Journal of International Law 1, 33.

aim is precisely to weaken the military forces of the enemy by incapacitating or killing as many of the enemy's armed forces as possible.[328]

Interestingly, in the cases of *Georgia v Russia (II)* and *Hanan v Germany*, the Court considered that with respect to the duty to investigate, there is no conflict between the requirements under the Convention, and those under IHL. In *Georgia v Russia (II)*, in the context of an IAC, the Court found that 'In general, it may be observed that the obligation to carry out an effective investigation under Article 2 of the Convention is broader than the corresponding obligation in international humanitarian law', but that '[o]therwise, there is no conflict' between them.[329] In *Hanan*, it considered that 'there is no substantive normative conflict in respect of the requirements of an effective investigation between the rules of international humanitarian law applicable to the present case (…) and those under the Convention'.[330] This may be taken to indicate that the Court does not view the broader scope of investigative obligations under the Convention as conflicting with IHL. Yet, both cases were concerned with potential violations of IHL or war crimes, which indeed require an investigation under that body of law as well.[331] This leaves open the question how the Court will deal with complaints with respect to intentionally caused deaths which are uncontrovertibly lawful under IHL – for instance the targeted use of force against combatants in an IAC, or where a civilian casualty is caused which was foreseen, but which was clearly proportionate to the anticipated military advantage. In such cases, the Convention would normally require an investigation as a death is caused through the use of force by State agents, whereas IHL would not as the use of force was clearly lawful.

If the Court is indeed to interpret the right to life in light of IHL, based on either implicit or explicit derogations, then a reading down of the scope of application of the duty to investigate appears inevitable. This will reduce the material scope of application, to such deaths which are unlawful under IHL, only.

Secondly, another potentially onerous obligation is that of investigating deaths which are not attributable to the State itself. After all, during armed conflicts, loss of life occurs on a large scale. The starting point here must be the Court's finding that investigations 'should take place in every case of a killing resulting from the use of force, regardless of whether the alleged perpetrators are State agents or third persons'.[332] The Court has never watered down this require-

328 *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, opened for signature 29 November 1869, 18 Martens Nouveau Recueil (ser. 1) 474, 138 Consol. T.S (hereinafter 1868 St. Petersburg Declaration).

329 *Georgia v Russia (II)* (n 19) [325].

330 *Hanan v Germany* (n 13) [199].

331 Further, see Chapter 3.

332 *Tahsin Acar v Turkey*, ECtHR [GC] 8 April 2004, Appl No 26307/95 [220].

ment of investigations into third-party conduct even in conflict situations. In fact, it has held to this effect in NIACs,[333] and has confirmed it in the context of the occupation of Iraq.[334] It has, however, explicitly noted the difficult conditions for investigations in such circumstances, finding that '[t]he nature and degree of scrutiny which satisfies the minimum threshold of an investigation's effectiveness depends on the circumstances of the particular case'.[335] Thus, any leeway provided by the Court would seem to relate to investigative *standards* – discussed below – rather than applicability of the duty to investigate as such.

There are a number of examples in the European Court's case-law which illustrate how it requires States to investigate also instances of third-party and NSAG killings during armed conflicts. The leading cases of *Al-Skeini* and *Jaloud* provide some indication for such. Both cases concerned the occupation of Iraq, and the respective roles of the UK and the Netherlands therein. In *Al-Skeini*, relatives of the applicants had been killed during UK security patrols. Five out of the six victims represented in that case were killed directly by UK security soldiers, which was not contested.[336] Interestingly, however, the one remaining victim had died during an exchange of fire between UK forces and unidentified gunmen, and it was unclear from what side the fatal shot had originated.[337] The Court considered that 'since the death occurred in the course of a [UK] security operation, when British soldiers carried out a patrol in the vicinity of the applicant's home and joined in the fatal exchange of fire, there was a jurisdictional link between the United Kingdom and this deceased'.[338] Thus, the Court here at least potentially finds the UK responsible for an investigation into a death caused by third-party gunmen, though admittedly the link with the UK's own operations was very close. This was similar in *Jaloud*, where the applicant's son had been shot and killed when passing through a vehicle check-point in Iraq, which was at the time manned by both Iraqi and Dutch personnel. The investigation never established whether the fatal bullet had been fired by the Dutch lieutenant who had been subject to investigation, and who was known to have fired an entire magazine worth of rounds at the car, or by Iraqi personnel, who denied having fired.[339] Bullet holes, however, seemed to indicate at least two different types of rounds had been used. Here too, the Court required an investigation into a death which was potentially caused by a third-party, though even if this was the case, the link with the Netherlands own operations was very close indeed. A final case concerning Iraq is the case of *Miller v UK*, which incontrovertibly concerned

333 Ibid, concerning the NIAC between Turkey and the PKK in South-East Turkey.
334 *Miller v the United Kingdom*, ECtHR 2 July 2019 (dec.), Appl No 32001/18 [80].
335 Ibid [90].
336 *Al-Skeini v UK* (n 14) [150].
337 Ibid [151].
338 Ibid.
339 *Jaloud v Netherlands* (n 134) [184].

a death caused by private actors.[340] Unique to this case, however, was that the victim was a member of the UK Royal Military Police, which perhaps in and of itself engaged the UK's responsibility to investigate his death.[341] Nonetheless, this is a clear instance where the Court considered a death caused by private individuals to require investigation in a context of conflict.

Finally, and perhaps most explicitly, the European Court has found similarly in cases concerning deaths resulting from armed conflicts in the former Yugoslavia and North Ireland. In the *Palić* case, the Court found that Bosnia and Herzegovina was under the obligation to investigate the disappearance of the applicant's husband, who during the Yugoslav conflict had last been seen when negotiating with a non-State armed group, the VRS (the army of the Republika Srpska).[342] Thus, the State was tasked with investigating potential abuses committed by an armed group operating during an armed conflict, and the Court found that ultimately and in light of the extremely difficult circumstances of the post-conflict situation, Bosnia and Herzegovina had made sufficient efforts to investigate the applicant's husband's death. In *Cummins v UK*, the case concerned an attack in Ireland, carried out by IRA operatives who subsequently fled to the UK. The Court in this case observed that the right to life might require States on whose territory suspects or evidence were located to investigate, and to do so of their own motion.[343] Ultimately, however, the Court declared the application manifestly ill-founded because the UK had sufficiently cooperated with Ireland in its investigation. Here too, then, the European Court confirmed the applicability of the duty to investigate conduct by NSAGs.

In conclusion, the ECHR duty to investigate continues to apply during armed conflict, also in respect of third-party infringements, and also where concerning violations committed by NSAGs. If the State can no longer be held to exercise jurisdiction because it has lost control this might be different, though once it resumes control over its territory or if other 'special features' indicate a jurisdictional link, it will likely need to investigate at that point.

It can be concluded that the scope of investigative duties during armed conflicts is largely similar to the scope of such duties in times of peace. In right to life cases, the material scope of application of the duty requires further clarification. The starting point, as the case-law stands, must be that any credible assertion of unlawful deprivations of life requires an investigative response. However, whether the Court may open up the definition of what

340 *Miller v the United Kingdom* (n 334) [6].

341 Although the Court is ambiguous about this, finding that the question whether the UK exercised art 1 jurisdiction was 'potentially complex', but did not require an answer because the application was in any case manifestly ill-founded; ibid [78].

342 *Palić v Bosnia and Herzegovina*, ECtHR 15 February 2011, Appl No 4704/04 [11].

343 *Cummins and Others v the United Kingdom* (n 17). Summarised in *Güzelyurtlu and Others v Cyprus and Turkey* (n 138) [182].

constitutes an 'unlawful' deprivation of life to interpretation in light of IHL – whether or not following a derogation – remains to be seen. Thus far, it appears that when States are engaged in non-international conflicts on their own territory, the scope of their investigative duties is unaltered, at least in current practice where States do not derogate in these types of conflict. In international armed conflicts, the scope of investigative obligations may be altered depending on whether the Court extends its approach of 'implied derogations' to right to life cases as well.

6.4.3 Investigative standards

Finally, let us now turn to the standards investigations must meet, during armed conflict. As was alluded to above, the Court has repeatedly stressed the importance of applying the investigative obligations under the ECHR in a practical and realistic manner. It is an obligation of means, not of result. In this light, it may therefore be expected that there is some room for leniency in the application of investigative standards to violations stemming from armed conflict. Indeed, in the context of the UK's involvement in Iraq, it found:

> 'It is clear that where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and (…) concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed. Nonetheless, the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.'[344]

The Court therefore takes account of the practical constraints of investigations in these types of situations – both IACs and NIACs[345] – though it in principle applies the same standards. Especially in cases which concern post-conflict societies, the Court indeed appears to apply a somewhat relaxed standard of review. By way of example, the Court found in *Palić v Bosnia and Herzegovina* that although the applicant's husband's remains had only been uncovered after fourteen years, and although a perpetrator had not been identified, in the context of the post-conflict society grappling with the deaths of over 100,000 people, and 30,000 missing, simply the recovery and identification of the body had been a significant effort. The Court found the State had done all it could, having provided compensation for the applicant and having carried out a

344 *Al-Skeini v UK* (n 14) [164]. References omitted.

345 In the case of *Tagayeva*, the Court 'acknowledged the difficulties faced by the Russian Federation in maintaining law and order in the North Caucasus and the restrictions that may be placed on certain aspects of the investigation' *Tagayeva and Others v Russia* (n 7) [504].

criminal investigation, even if ultimately unable to identify the perpetrator.[346] It has found similarly in cases concerning Croatia.[347] This goes to underline that States must do what they can to investigate, but are not held to do the impossible.

Looking more in particular at the various standards the Court has formulated, the standards of promptness, adequacy, independence, and involvement of next of kin in particular warrant further discussion, because the Court has addressed them in an armed conflict context.

Let us first consider the requirement of promptness. This criterion appears to be applied with some leniency, for instance – again – where the circumstances in a post-conflict society simply do not allow for many complex investigations to be conducted.[348] There may therefore be some room for an investigation to be less prompt than otherwise, in a situation of conflict. Yet, promptness is crucial in ensuring the effectiveness of an investigation. To illustrate, in a number of cases where applicants sought remedies in the form of the Court ordering States to carry out investigations, it found that such investigations would be futile given the passage of time since the incidents, inhibiting any fruitful fact-finding.[349] This apparent contradiction reveals a major dilemma the Court must deal with on a case-by-case basis when judging investigations in conflict situations: on the one hand a realistic approach to situations of active hostilities where States are not in full control clearly militates against requiring immediate investigation, as in those situations States can in no way safeguard the safety of their investigators. On the other hand, promptness is of crucial importance for establishing what happened, especially in armed conflict situations where forensic evidence may be lost quickly due to ongoing shelling, and where witnesses might not even survive the conflict to give their account.[350] The Court appears to have approached this issue thus far by looking also at the other criteria for investigations, especially whether the authorities have genuinely attempted to establish the truth. If so the Court has accepted delays, whereas the shielding of State agents by conducting tardy and half-hearted investigations has been penalised consistently.[351] By way of illustration of the former, in *Hanan*, the Court considered that due to an armed conflict investigations may be 'delayed', stressing that its standards must be applied realistically. On the facts of the case, this meant that the Court accepted that on-site reconnaissance by German forces, under protection of Afghan security forces, could not have taken place any sooner than approxima-

346 *Palić v Bosnia and Herzegovina* (n 342) [70]-[71]. See further Chernishova (n 71) 153–4.
347 *Zdjelar and Others v Croatia*, ECtHR 6 July 2017, Appl No 80960/12 [91]-[94].
348 *Palić v Bosnia and Herzegovina* (n 342) [70]-[71]; *Zdjelar and Others v Croatia*, ibid.
349 *Musayeva v Russia*, ECtHR 3 July 2008, Appl No 12703/02 [166].
350 Addressing this in the context of interim measures, see Leach, 'The Right to Life – Interim Measures and the Preservation of Evidence in Conflict Situations' (n 167).
351 E.g. *Damayev v Russia* (n 169) [81].

tely 12 hours after the airstrike. This had to do with the active hostilities taking place, and with the investigators coming under fire despite their 100 man strong protection force.[352] With respect to the criminal investigation, the chief legal officer had informed the public prosecutor on the day of the airstrike, and the prosecutor and the Federal Prosecutor General had initiated preliminary investigations three and four days after the strike – which the Court considered sufficiently prompt.[353]

Secondly, the standard that investigations must be 'adequate'. This criterion, it will be recalled, relates to the investigative steps States must take in order to bring all relevant facts to light, and with a view to identifying those responsible. The Court has handed down a number of cases relating to the question how investigations must be shaped during conflict, relating to armed conflicts both on the State's own territory, as well as conflicts fought extraterritorially. Both are considered in turn.

In the context of *territorial* NIACs, the sheer number of violations found by the Court may call into question whether it indeed makes allowances for the difficulties arising out of an armed conflict situation. A significant number of cases, however, stems from the conflicts concerning Chechnya and South East Turkey, where often no investigations into suspicious deaths, disappearances or allegations of torture and ill-treatment were conducted at all – or with such significant delays that actually establishing the truth and ensuring accountability was illusory.[354] Violations found in these cases of glaring shortcomings or a complete absence of investigations do not necessarily give much insight in what the Court would find satisfactory, as often there simply was no investigation to review. The criterion of a 'thorough' and 'genuine' investigation is clearly not met in such cases where the State authorities are shielded from accountability.[355]

Nevertheless, a number of Chechen and Turkish cases provide some insight in the investigative measures the Court would have liked to see, in the context of these non-international armed conflicts on the respondent States' own territories. The Court on occasion indicated why investigations did not meet the adequacy criterion, for instance in *Kaya v Turkey*, concerning the shooting by security forces of an alleged PKK (Kurdistan Workers' Party) member. The Court reproached the Turkish authorities for not having carried out examinations of gunpowder residue on the deceased's hands, not having dusted the weapon perceived to be his for fingerprints, not having analysed the bullets

352 *Hanan v Germany* (n 13) [27], [223].

353 *Hanan v Germany* (n 13) [228].

354 See further the in-depth analyses of the Chechen conflict Leach, 'The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights' (n 310); and for Turkey Borelli (n 104) 382–5.

355 See e.g. *Mihdi Perinçek v Turkey*, ECtHR 29 May 2018, Appl No 54915/09 [80], where the investigation was 'so manifestly inadequate' that it clearly violated the Convention.

lodged from his body, having come up with an incomplete autopsy report and having handed over the body to villagers, in this context also expressing its surprise the body was not moved to a more secure location where further examinations could have taken place.[356] In addition, the Court condemned the absence of the taking of witness testimonies, or seeking confirmation of the deceased's membership of the PKK.[357] Philip Leach carried out an extensive analysis of cases concerning the Chechen conflict, concluding that investigations were deficient due to

> 'the failure to question the applicants or delays in doing so; the failure to identify and question witnesses, or delays in doing so, or the failure to raise particular pertinent questions; the failure to identify other victims and witnesses of an attack, including those identified and named by the applicants; the failure to initiate criminal proceedings or to specify what investigative steps were taken following the discovery of a body; the failure to carry out an appropriate autopsy or forensic report, or delays in doing so; the failure to carry out a ballistics report or delays in doing so; the failure to draw up a map or plan; and the delay in drawing up an inventory of real evidence.'[358]

Taken together, the investigative steps which the Court requires – and found to be lacking – do not appear to be quite so different from those applied during situations of normalcy. As the Court made clear in *Tagayeva*, States must gather forensic evidence from victims' bodies in order to establish the cause of death, and secure and collect evidence.[359] All 'reasonable steps' must be taken in this regard, and although what is reasonable is subject to a contextual determination,[360] the Court does not appear to loosen its test by virtue of the existence of a NIAC.

In relation to *extraterritorial IACs*, the Court has dealt with a number of cases arising out of the occupation of Iraq. In *Jaloud v the Netherlands*, the Court applied similar criteria, finding fault in handing over the remains of an Iraqi civilian to an Iraqi doctor for autopsy, after he had been shot at a military checkpoint presumably by a member of the Netherlands armed forces.[361] Further, the Court stressed the importance of separating the subject of investigations from witnesses to prevent collusion and interviewing him promptly to prevent any risk or appearance of collusion, even though he was in this case the highest ranking officer present.[362] Finally, it was equally detailed

356 *Kaya v Turkey* (n 16) [90].
357 Ibid [91].
358 Leach, 'The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights' (n 310) 751–2, footnote references omitted.
359 *Tagayeva and Others v Russia* (n 7) [500]-[516].
360 Ibid [511].
361 *Jaloud v Netherlands* (n 134) [212]-[216].
362 Ibid [206]-[208].

in requiring the prompt gathering of witness testimonies and disclosing those to the prosecutorial and judicial authorities, as well as concerning the storing of the bullet fragments collected.[363] One might surmise, therefore, that the requirements are not necessarily much less strict than in a situation of normalcy – despite the Court's insistence that it must apply the Convention realistically, in light of the obstacles arising out of the context of armed conflict.

Finally, however, in the context of the *extraterritorial* NIAC considered in *Hanan*, the Court appears to have made more allowances with respect to the investigative steps taken. Emphasising that the duty to investigate 'must be applied realistically', it considered:

> 'that the challenges and constraints for the investigation authorities stemming from the fact that the deaths occurred in active hostilities in an (extraterritorial) armed conflict pertained to the investigation as a whole and continued to influence the feasibility of the investigative measures that could be undertaken throughout the investigation, including by the civilian prosecution authorities in Germany.'[364]

The Court therefore assessed the German investigative efforts contextually, pointing out that active hostilities were going on which rendered the collection of evidence on the ground difficult. The Court accepted that because the airstrike had taken place during hostilities and at night, and because locals had removed the bodies before investigators were on site, a number of investigative steps had not been available.[365] 'Under normal circumstances', the fact that the investigation had been unable to establish the precise number and status of the victims would have been crucial.[366] Yet, the Court took two factors into consideration for finding differently in this case. Firstly, important investigative aims had already been achieved at the start of the investigation, as the cause of death of the applicant's relatives had been established, and those responsible had been identified.[367] Secondly, the Court crucially deferred to the standards for the legality of the use of force *under* IHL. It considered that the fact that the investigation could not establish the precise number of civilian casualties 'did not have any bearing on the legal assessment in respect of the criminal liability of Colonel K.', because IHL legality hinges on an *ex ante* assessment and on the knowledge of those involved.[368] This justified the investigation's focus on establishing the commander's *mens rea*, beyond the on-site reports by the German military police,

363 Ibid [202]-[203]; [209]-[211]; [217]-[220].
364 *Hanan v Germany* (n 13) [200], references omitted.
365 Ibid [218].
366 Ibid.
367 Ibid [211].
368 Ibid [218].

Afghan authorities, and the NATO and UN.[369] The Court was therefore mindful of the obstacles to an investigation in this situation of extraterritorial conflict and active hostilities, and accepted that it could not meet the same standards it would normally impose – in which IHL played an implicit role as the yardstick for the legality of the use of force.

Thirdly, the Court has also considered the standard of independence, also in cases arising out of armed conflict. In the context of the Chechnyan NIAC, the Court has held that

> 'where decisions to terminate proceedings in situations involving civilian casualties are taken by the military prosecutor's office on the basis of expert reports prepared by army officers, this may raise serious doubts about the independence of the investigation from those implicated in the events at issue.'[370]

Further, the case law pertaining to the occupation in Iraq also provides some guidance on the standard of independence. In *Al-Skeini*, the Court found that the command investigations carried out by the UK were lacking.[371] The investigating authority ought to have been operationally independent from the chain of command, which was not the case, as the British government had conceded. In *Jaloud*, an investigation mounted by the military police did meet this requirement as they were institutionally outside the chain of command, and were also found to be sufficiently independent in practice, despite sharing living quarters with the military in Iraq.[372] These findings as to the required independence of investigators are especially relevant when compared to the relevant norms under the law of armed conflict, as there it is normally precisely the direct commander who is tasked with the immediate investigation of alleged breaches, and who is in fact criminally liable should they fail to mount such investigations.[373] In the case of *Hanan*, the Court took account of this fact. There, it had to assess the independence of an investigation into an airstrike, with the initial on-site investigation taking place by forces under the command of Colonel K, who had ordered the strike. The Court found that while it would have been 'preferable' for others to have conducted the investigation, it was justified due to the ongoing hostilities. Further, it found that commanders need not be excluded from investigations involving their subordinates, 'having regard also to the duty assigned to commanders in this

369 More specifically, the international investigations were carried out by ISAF, the International Security Assistance Force which was at that stage under control of NATO, and by the United Nations Assistance Mission in Afghanistan, UNAMA.

370 *Tagayeva and Others v Russia* (n 7) [536].

371 *Al-Skeini v UK* (n 14) [169]-[177].

372 *Jaloud v Netherlands* (n 134) [189]-[190].

373 AP I, art 86 and 87. See Chapter 3, §4.

respect under international humanitarian law'.[374] Commanders who are themselves implicated in an incident, however, must not be involved in its investigation. Although this had been the case in *Hanan*, the Court considered that because those responsible had been identified and because to determine their criminal liability an assessment of their *mens rea* was decisive, this defect had not rendered the investigation ineffective.[375] Thus, it interpreted the requirement of independence both contextually – in light of the extraterritorial NIAC, and the active ongoing hostilities – and in light of IHL. The Court's approach therefore mitigates the potential conflict between IHL and the ECHR with respect to the independence of investigations.

Fourthly and finally, the Court has briefly alluded to the involvement of next of kin in the investigation in respect of investigations into incidents in a context of armed conflict. In *Hanan*, the Court considered that the 'investigative material contained sensitive information concerning a military operation in an ongoing armed conflict', in respect of which 'it cannot be regarded as an automatic requirement (…) that a deceased's victim's surviving next-of-kin be granted access to the ongoing investigation'.[376] Certain restrictions on transparency are therefore permissible, in the Court's view, with respect to investigations into the operations of armed forces during armed conflicts.

Both in case of territorial NIACs and of extraterritorial IACs, it would appear therefore that whereas the Court stresses it must take account of the circumstances of conflict to ensure investigative requirements are realistic, its test remains strict. The close scrutiny exercised in *Jaloud* has been widely criticised both by academics[377] and from within the Court itself, because of its perceived lack of realism in for instance separating the potential wrongdoer, who as a Lieutenant was the highest in command, and whose separation would therefore clearly harm operational capabilities in a tense security situation. Seven Judges opined they 'respectfully regret that the Grand Chamber also found it appropriate to scrutinise the investigations in Iraq in such a painstaking way that eyebrows may be raised about the role and competence of our Court.'[378] This may have driven the Court's approach in *Hanan*, where it applied the standards for investigations in a significantly loosened fashion. It even took express account of IHL in this respect – which is something the

374 *Hanan v Germany* (n 13) [223]-[224].
375 Ibid [226].
376 Ibid [233].
377 E.g. Friederycke Haijer and Cedric Ryngaert, 'Reflections on Jaloud v. the Netherlands. Jurisdictional Consequences and Resonance in Dutch Society' (2015) 19 Journal of International Peacekeeping 174, 182–4.
378 Joint concurring opinion to *Jaloud* of Judges Casadevall, Berro-Lefevre, Šikuta, Hirvelä, López Guerra, Sajó and Silvis [5]-[7].

Human Rights Committee and the Inter-American Court have not done in this context.

7 Conclusion

This Chapter has explored the contours of the duty to investigate under the ECHR. In the terms of the research question, it examined *whether* the ECHR requires States to investigate violations, as well as the *scope of application* and *contents* of that obligation, with particular attention for its application during armed conflict. Like we have seen under the ICCPR and ACHR, the European Court has found investigative obligations to be implied in the Convention, and the question whether States must investigate potential violations, can therefore be answered firmly in the affirmative.

In order to render rights practical and effective, States must institutionalise a procedural layer of protection, including an investigative mechanism which they must operationalise whenever an arguable claim of an infringement is brought. The Court has never pronounced generally on violation of *which rights* requires an investigation, though it most certainly includes the rights central to this study – the rights to life and liberty, and the freedom from torture and slavery. These rights, in conjunction with the Article 1 obligation to secure rights, requires them to investigate potential violations. Further, the rights to a remedy and reparation, may also call for an investigation.

The duty to investigate applies broadly. It applies both to violations committed by State agents and abuses committed by private individuals and armed groups, it can apply to incidents which occurred before the ECHR even entered into force for the State in question, and it can apply outside States' territories. This is the case if States exercise control over territory or victims, or if 'special features' of a case lead to the existence of a jurisdictional link between the State and the victim. In a number of respects, the duty to investigate is therefore at the forefront of developments of human rights law. This is particularly so in respect of a duty to cooperate, which the Court has found to apply even in situations where an incident fell outside of a State's jurisdiction. Even in such cases, States can be held to cooperate in the investigation of other States, for instance if the suspect is present in their territory, or if they have access to material evidence.

The duty to investigate is an obligation of means, not of result. States must therefore take all reasonable steps to clarify the facts, and to identify those responsible. The Court has formulated eight standards for investigations, which are highly similar to those formulated under the ICCPR and ACHR. Investigations must be (i) launched of the State's own accord (*ex officio*), (ii) initiated promptly and carried out with reasonable expediency, and must furthermore be (iii) adequate, (iv) independent and (v) impartial, and (vi) must contain a sufficient element of public scrutiny, including (vii) sufficient involvement of the victims

or their next of kin. Finally, (viii) follow-up to the investigation may be required, which depending on the case may require either criminal accountability processes, or the availability of civil remedies. Intentional infringements or use of force by State agents will normally require criminal law measures.

In the context of armed conflict, the Court has made it very clear that the duty to investigate continues to apply, regardless of the circumstances. Nevertheless, it has found that the difficult circumstances which pertain during armed conflicts, must be taken into account when judging whether the State has taken all reasonable steps to ensure the effectiveness of the investigation. It thus applies a contextual approach, and has recently also had recourse to IHL in such contexts. Whereas the Court has historically been more reticent towards IHL than the HRC and the IACtHR, a shift appears to be taking place in which the Court relies on IHL as an interpretive tool.

The Court's practice relating to investigations in armed conflict appears to be going in different directions. In territorial NIACs and cases of extraterritorial occupation, it has reviewed in detail the investigative steps taken by States, and found them wanting. Whereas it applied a standard which is able to accommodate the exigencies of armed conflict, practice has thus far proved demanding. In the extraterritorial NIAC in *Hanan*, where active hostilities were ongoing, the Court applied a much more lenient approach taking account of the context and of IHL. The flexible standard of requiring all reasonable investigative steps, and allowing for less effective measures where dictated by the circumstances, may therefore lead to a more accommodating approach – although States will have to show that circumstances were such that more effective measures were not feasible.