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

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1 Duties of investigation under the international law of human rights

1.1 Bringing the human rights research together

Part II of this study, in Chapters 4-7, examined *whether* and *how* States are bound to investigate violations of IHRL during armed conflict. Going back to the overarching research question, it addressed

> *What are the scope of applicability and contents of States' duty to investigate (potential) violations during armed conflicts, under (…), international human rights law (…)?*

This question was answered by looking in the various Chapters at duties of investigation under the ICCPR, the ACHR, and the ECHR – as well as briefly at the Genocide, Torture, and Disappearance Conventions. This Chapter brings these findings together, and draws conclusions on duties of investigation under the international law of human rights. In other words, this Chapter synthesises the findings of Part II.

To facilitate the synthesis, this Chapter takes a comparative approach. This way, relevant commonalities and divergences are drawn out, which inform how the various systems incorporate a duty to investigate. The points of comparison relate to the rationale, scope of application, and standards for investigative obligations.[1] In other words, the *why*, *when*, and *how* of investigations. As will be seen, the investigative obligations under the various human rights regimes *converge* in most respects. Although all systems place their own accents and emphases, they conceptualise the duty to investigate in a very similar way, clearly drawing inspiration from the other systems – at times explicitly. Insofar as there are relevant divergences in how the three systems approach investigative duties, these are drawn out in this Chapter.

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1 These are the elements of comparison required for a comparative approach. Cf. Esin Örücü, 'Methodology of Comparative Law' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012) 561; Sue Farran, 'Comparative Approaches to Human Rights' in Lee McConnell and Rhona Smith (eds), *Research Methods in Human Rights* (1st edn, Routledge 2018) 134–5.

It ought to be restated at this point that it is in the nature of human rights law that it develops on a case-by-case basis, dependent on the cases which are brought before the HRC and the Inter-American and European Courts. The conclusions set out here are grounded in an extensive case-law analysis, such as the case-law stands. Under the ACHR and ECHR, both Courts have developed a highly detailed jurisprudence, which develops incrementally through binding pronouncements. Under the ICCPR, the HRC has similarly produced a significant amount of case-law, but much of its guidance also flows from general comments. It must be awaited whether views in individual cases will further strengthen and anatomise its findings in this respect.

1.2 The sword-function of IHRL and explicit investigative obligations

The duty to investigate forms an important part of many different human rights regimes. A number of global human rights conventions explicitly require States to criminalise and investigate human rights abuses in their treaty provisions. This is so in particular in the Genocide, Torture, and Disappearance Conventions. The simultaneous protection of human rights and emphasis on criminal repression, renders these treaties a sort of hybrid between human rights treaties, and transnational criminal law conventions. This combination of functions can be best understood through the 'sword and shield' metaphor. In their most basic form, human rights were conceptualised to protect individuals against State repression, and they therefore form a *shield*. This shield protects a sphere around individuals in which the State may not tread. But then we have the provisions which require States to repress human rights abuses, which corresponds to the *sword*. Quite contrary to the aim of protecting individuals against State repression, human rights here function to *invite and require* the State to take repressive action. This has also been termed the 'coercive side' of human rights law, because it requires States to use the most repressive tools at their disposal – their criminal justice systems – to investigate, prosecute, and punish human rights abuses.

If we then shift our attention to the human rights regimes which are the main focus of this study, the ICCPR, the ACHR and the ECHR, their provisions *prima facie* correspond to the shield. They grant certain rights, prohibit States from interfering with them, and are largely phrased as *negative obligations*, setting out what States may *not* do. Yet, through the interpretation and application of the HRC and the Inter-American and European Courts, the sword-function which we can see so explicitly in the Genocide, Torture, and Disappearance Conventions, has been incorporated into these more general human rights catalogues. According to these bodies, investigative obligations take up an important place within these human rights regimes. Their case-law recognises the duty to investigate to be essential to effectively protect and ensure human rights, by adding a procedural layer of protection to substantive

rights. This layer then importantly includes the investigation of potential violations. In other words, despite the lack of explicit investigative obligations under the ICCPR, ACHR, and ECHR, they have been interpreted to include precisely the type of sword-related obligations which the Genocide, Torture, and Disappearance Conventions provide for explicitly. Despite the variety in sources, this study shows that investigative obligations under IHRL largely converge: apart from certain particularities of the various systems, the duty to investigate is conceptualised and applied in broadly similar ways, as a tool to effectuate protection of human rights and ensure accountability for violations.

1.3 The *why* of investigations: rationale, legal basis, and place within the system

In reading investigative obligations into the ICCPR, ACHR, and ECHR, their supervisory bodies have taken very similar approaches. Firstly, they have all relied on a systematic interpretation of their treaties. This means that they interpret specific treaty provisions in light of the larger treaty as a whole. Importantly, they have in that respect all relied on the duty to *ensure* (or secure) human rights, which together with substantive rights such as the right to life, give rise to the obligation to institute a procedural layer of protection. This procedural layer includes the criminalisation in domestic law of certain human rights abuses, the institutionalisation of an investigation mechanism, and the effectuation of such laws and mechanisms when human rights are indeed infringed, by conducting investigations, where appropriate followed-up by a criminal prosecution and punishment. Secondly, all three systems have found that the individual right to a remedy gives rise to investigative obligations on the part of the State, and thirdly, that the obligation to provide reparation can require an investigation. For these last two sources, the approach between the various bodies shows some small degree of variation.

As the previous Chapters have shown, the procedural right to a remedy is given the most weight under the ICCPR. The HRC consistently finds that a failure to investigate constitutes a violation of the right to a remedy, which requires such investigation. The Inter-American Court's case-law shows a trend which also moves in this direction. Historically it placed more emphasis on the duty to ensure substantive rights, but it has for some time now shifted its focus to the procedural right to a (judicial) remedy. The European Court, finally, continues to find violations primarily under the procedural limb of substantive rights, and only less frequently also finds violations of the right to a remedy. The European Court does not appear to have come to a fully consistent approach thus far, but continues with some regularity to find that when it has already found a violation of the duty to investigate under a

substantive right, that it is not necessary for it to examine separately the right to a remedy.

Investigations as a form of reparation, similarly, have been subject to slightly diverging approaches. The Inter-American Court leads the way here, regularly finding that States must investigate, prosecute, and punish as a form of reparation for material violations. It moreover goes on to closely oversee investigations and criminal trials, even whilst they are still ongoing, in the context of its supervisory role in the execution of its judgments. The HRC similarly regularly recommends States conduct investigations if it finds substantive violations. The European Court is historically reticent in ordering specific forms of reparation, normally leaving this up to the State, under the supervision of the Committee of Ministers of the Council of Europe. Nonetheless, there is a recent trend where the Court exceptionally *does* provide what specific forms of reparation are required, which have, at times, included that States must conduct an effective investigation. This remains an exception, however, and it is primarily for the Council of Europe's political organs, together with the respondent State, to decide what forms of reparation are required to properly execute the Court's judgments. Like the Inter-American Court, the Committee of Ministers too, has emphasised on many occasions that in order to execute the ECtHR's judgments, investigations must be conducted.[2]

In sum, whereas the HRC, Inter-American Court, and European Court all recognise three separate sources for investigate duties, they have put different *emphases* in doing so. These do not appear to be differences of principle; when and how all bodies apply the duty to investigate is largely similar.

The ICCPR, ACHR, and ECHR strive to achieve very similar aims through their investigative requirements. Through the authoritative interpretations of the HRC and the Inter-American and European Courts, obligations to criminalise certain human rights abuses have been read into the various treaty provisions, coupled with the duty to set up procedural mechanisms which execute such legislation. If a potential abuse comes to light, States must then effectuate these mechanisms through investigation, and where appropriate prosecution. The specific aims the duty to investigate strives to achieve, have been formulated differently depending on the specific context of the case. Aims mentioned range from bringing perpetrators to justice, advancing accountability, and combating impunity, to ensuring the right to a remedy and granting reparation, drawing lessons to prevent future violations, effectuating the legislation protecting the rights in question, safeguarding the public's faith in the State's monopoly on

2 See e.g. 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)).

the use of force, and guaranteeing the right to truth. Proper State investigations into potential abuses can achieve, or contribute to achieve, all these aims. The main overarching aims of the duty to investigate are to render the protection of rights effective through the effectuation of domestic legislation safeguarding those rights, and in a sense to create the necessary conditions for proper respect for human rights. By this, it is meant that the duty to investigate aims to have States take up their roles as primary guardians of human rights, and to create a domestic context in which this can be achieved. The duty to investigate in this respect also plays a major role in maintaining or restoring public confidence in the State's monopoly on the use of force, and ensuring its respect for the rule of law. To do so, as is illustrated so strongly by the Inter-American Court's work, there can be absolutely no room for a culture of impunity. In this sense, ensuring accountability of perpetrators ensures individual justice for direct victims, but also contributes to a culture where human rights are respected, and where abuses are not tolerated.

The above also touched already on the place which the duty to investigate takes up within the IHRL system. The duty to investigate, similar to its place within the IHL system, emphasises States' role as guardian of the law. It is for States to respect, protect, and fulfil human rights, and to provide effective remedies on the domestic level for any infringements. Supervisory human rights mechanisms take up a secondary role in this respect. If a violation potentially occurred, States must take up their roles as primary guardians of human rights by investigating, of their own motion, what happened, whether a violation has taken place, and to decide on the proper course of action. This very clearly places States under the obligation to remedy any human rights violations on the domestic level, and thereby reinforces States' primary responsibility in this regard. That States must investigate of their own motion as soon as they become aware of the potential breach is significant, because in many cases it will be impossible for victims themselves to gather the evidence required. This also explains why the right to a remedy includes an obligation for the State to investigate – victims' right to obtain a remedy is fully contingent on States bringing to light the facts of a case. Only once the facts are brought to light, can victims hope to be successful in bringing action against the State, and thereby obtaining a remedy.

Finally, the duty to investigate additionally informs the relationship between States and supervisory mechanisms in another way. Beyond placing the primary responsibility on States, which reinforces the subsidiary role of international mechanisms, it also provides international human rights bodies with a tool to handle recalcitrant States. In cases where State agents have (allegedly) committed violations, and where the State simply denies any involvement without investigating or furnishing any evidence, it can be very difficult for international bodies to find a violation. There is not enough evidence to find a violation because the State holds all information and evid-

ence, but the State refuses to cooperate. Whether international bodies are nevertheless able to find a violation will depend on the evidentiary standards they employ, how they divide the burden of proof, and to what extent they are willing to make inferences from a State's refusal to furnish further evidence. The Inter-American Court, for instance, has proved more willing to find substantive violations in such instances, because it more readily draws inferences from States' lack of cooperation. The European Court has been more troubled by such practices, and this has in fact been one of the reasons for the introduction of the duty to investigate in the European system: if States do not take up their role as guardians of human rights through investigations into allegations, then this will constitute a separate human rights violation in itself. Thus, international bodies need not simply send victims away because the State has frustrated proceedings, nor do they need to lower their evidentiary standards. The duty to investigate then serves as a big stick, sanctioning recalcitrant States where they fail to produce evidence. Further, it provides international proceedings with the necessary facts, because international bodies themselves do not have the resources to regularly conduct fact-finding missions of their own.

1.4 The *when* of investigations: scope of application and knowledge triggering the duty to investigate

Having presented these main findings as to the aims of the duty to investigate, and its place within the international system of human rights protection, we may now move on to some conclusions on more specific investigative obligations. As was already touched upon earlier, investigative obligations under IHRL flow from States' general obligation to actively ensure human rights, coupled with specific provisions safeguarding human rights. All three systems under discussion have recognised that the active protection of rights, and victims' right to a remedy for violations, requires States to investigate potential abuses. When looking more closely at violation of *which* rights must be investigated, in other words the material scope of application of the duty to investigate, it is however difficult to provide a clear-cut answer. It has been suggested by the HRC that the ICCPR attaches investigative duties to violations of those rights which are recognised as criminal under either domestic or international law[3] – though it has at the same time been suggested that all violations must be investigated.[4] In Inter-American case-law there are similar

3 *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, HRC 29 March 2004, CCPR/C/21/Rev.1/Add. 13 [18].

4 *General Comment No. 31* (ibid) [15].

suggestions both that the duty to investigate encompasses *all* violations,[5] or that it attaches to *grave* violations, only.[6] Because IHRL develops case by case, it is difficult to circumscribe the exact scope of the duty to investigate. Whereas it is, of course, possible to list what violations have been made subject to investigative obligations thus far, no definitive answer is possible at this time.

What is clear, crucially, is that violations of the right to life, the prohibition of torture, cruel, inhuman, and degrading treatment, the prohibition of slavery, and cases of unacknowledged detention and enforced disappearance, are subject to investigative obligations. These rights are crucial also during armed conflict, which makes them the most relevant for this study. The emphasis in the vast majority of cases is on criminal investigations, which might also explain that thus far, investigative obligations have almost exclusively been held to arise in case of the most serious human rights violations. It may cautiously be concluded that, thus far, IHRL attaches duties of criminal investigation in case of serious, or grave, human rights violations – very similar therefore to IHL.

This study has opted to focus on those rights with the strongest nexus to, and relevance for, armed conflict. The duty to investigate violations of the right to life, the prohibition of torture, cruel, inhuman, and degrading treatment, the prohibition of slavery, and cases of unacknowledged detention and enforced disappearance, and the prohibition of genocide, therefore form the core focus of this study. This is not to say that the duty to investigate IHRL violations is limited to these rights. Especially under the ECHR, the material scope of the duty to investigate appears to include also violations of other rights when there is an element of violence to it, and the case by case development of the law may see further developments in the future.

When it comes to the personal scope of application of the duty to investigate, this is clearly addressed to States. It is States, as primary guardians of IHRL, who must conduct investigations into potential violations. Moreover, it is States who are the primary addressees of obligations under IHRL. This study has not engaged with debates surrounding human rights obligations of non-State actors, such as non-State armed groups.

This being said, this study does more indirectly address conduct by non-State actors. Such conduct, however, is approached through the lens of State obligations. Thus, the State obligation to investigate human rights violations and abuses includes all such instances which fall within the *jurisdiction* of the State. The duty to investigate is therefore not limited to violations by State agents, but includes abuses by all, including non-State armed groups during

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

6 *Goiburú et al. v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 153 (22 September 2006) [88].

armed conflict, so long as it was within the State's jurisdiction. This is especially clear in the Inter-American and European Courts' case-law. Under the ICCPR, the HRC has been somewhat ambiguous in this respect.[7] Nevertheless, this is an example where IHRL's investigative obligations go beyond those of IHL, because under IHL, it is only in case of war crimes that States must investigate conduct of third parties. Under IHRL, on the other hand, this is part and parcel of the human rights regime. IHRL's aim of a society governed by the rule of law and human rights includes an obligation for States to actively protect and fulfil individuals' rights, also against interferences by third actors. In situations of normalcy, this means that if human remains are found with a suspicion of a violent death, the State must investigate, regardless of any indications of State involvement. In situations of armed conflict, this similarly means that whenever there is a potential violation listed above, within the jurisdiction of the State, that it must investigate, regardless of the suspected author of the violation.

Beyond the *obligation* for the State to investigate, individuals also have a *right* to an investigation. This is especially clear under the ICCPR and ACHR, because under those systems, the individual right to a remedy, and thus the right to justice, is such a strong driving force behind the case-law. Under the ECHR, this drive is not quite as strong, but the ECHR nonetheless confers a right to an investigation on individuals. Where the various systems diverge, however, is the question whether individuals also have a *right to have someone prosecuted*, or a right to criminal justice. The HRC and European Court have both held explicitly that no such right can be derived from their respective treaties, while the Inter-American Court has recognised such a right.

A unique feature, where the duty to investigate pushes the boundaries of the regular interpretation of IHRL, concerns its temporal scope of application. The duty to investigate, as a positive obligation which requires States to take action, can apply to incidents which took place before a human rights convention entered into force for a State – at least according to the European Court of Human Rights. The European Court has found the duty to investigate to be 'detachable' from the material violation, which means that even if a material violation, for instance a killing, took place before the ECHR entered into force for the State in question, the duty to investigate can nevertheless apply, and be violated. After all, even if the killing itself may not be subject to the ECHR, the investigative obligations – which extend through time – are. This applies even more strongly to enforced disappearances, in regard to which the duty to investigate constitutes a continuing obligation. The continued importance of saving the life of the disappeared, and of relieving the suffering of their next of kin which is exacerbated by their being left in the dark as to the fate

7 See the discussion in Chapter 5, §6.4.2.

of their loved one, also render a lack of investigation a continuing violation which extends through time, and therefore normally falls within the temporal scope of application of IHRL. The Inter-American Court has found similarly. The HRC has not been fully consistent on this issue, but it has left the door open for investigative obligations with respect to continuing violations. Although it remains relevant to distinguish between the various systems, here too the duty to investigate expands the normally applicable boundaries of human rights law.

The geographic reach of the duty to investigate extends first and foremost to those violations which occurred in States' jurisdiction. Thus, they must investigate violations within their territories, as well as those which were committed outside their territories, but nevertheless fell within their jurisdiction. This is the case, under all three systems, when States exercise control over the territory in question, or over the victim. Beyond these spatial and personal conceptions of jurisdiction, this study has shown that a third model is developing, a 'reasonably foreseeable impact' model. According to the HRC, investigations must also be conducted when States' extraterritorial conduct has a reasonably foreseeable impact on the right to life of victims. The Inter-American Court may also support this view, though further case-law on this issue will need to be awaited.

The European Court has not ventured into this direction, rather reaffirming that extraterritorial jurisdiction follows from control over either an area, or over an individual. With respect to the extraterritorial applicability of the duty to investigate, however, the Court has formulated a separate basis for jurisdiction, when there are 'special features' establishing a jurisdictional link. Such features may relate to the presence of suspects on the State's territory, its international or domestic obligations with respect to investigation, or whether the territorial State is prevented from investigating effectively – for instance when a State's armed forces are involved.[8] As was set out in Chapter 7, this approach based on the special features of a case applies also where no control over an area or persons was present, even if – pursuant to the controversial finding by the Court – no such control *could* be exercised, during the 'active phase of hostilities' and in a 'context of chaos' of an international armed conflict.

Finally, States can be subject to a duty to cooperate in the investigation by another State, if the suspect, or evidence, is within their jurisdiction. The precise contours of this obligation have yet to materialise, but it would appear that IHRL obliges States to make use of international mechanisms for cooperation, if they are party to such. Although we must await further developments, this obligation may prove a significant strand in the effectuation of IHRL which

8 For a full discussion, see Chapter 7, §4.5.

pushes the boundaries of IHRL obligations beyond the orthodoxy that for IHRL obligations to arise, a State must have jurisdiction over a violation.

Information triggering the duty to investigate

If, therefore, the right to life, or the prohibitions of TCIDT, slavery, and enforced disappearance or unacknowledged detention have potentially been violated, States must conduct an investigation. There must, in other words, be knowledge, or an indication, of a violation. But the duty to investigate precisely aims to uncover what exactly happened, and to establish whether a violation has taken place. This raises the question, what threshold of information the State must have, before the duty to investigate is triggered?

This study finds that IHRL requires investigations whenever States have knowledge of a potential violation, whether they have come to this information through a complaint by a victim or their next of kin, or otherwise. A relevant point to note is that there is *some* qualification of the trigger: there needs to be an *arguable* claim, a *credible* assertion, a *well-founded* or *sufficient* reason to suspect a violation may have occurred. Complaints with no level of credibility whatsoever thus do not as such trigger the duty to investigate, though it must be kept in mind that one of the main aims of the duty to investigate is to require *States* to clarify the facts, precisely because victims are not in a position to do so. The credibility of a complaint, therefore, must not be interpreted in a way which would render it an inordinate hurdle to investigations – after all, the point is precisely that victims do *not* need to prove their case, it is for the State to gather the facts. It must moreover be kept in mind that States are under the obligation to investigate *ex officio*: they may not simply wait and see whether victims or others file a complaint, they must investigate of their own motion. Further, according to the HRC, States must investigate when they know, or *should have known* of a potential violation. In other words, States cannot hide behind a lack of evidence that they knew, if circumstances are such that they should have known. Objective reasons for suspecting a violation, such as for instance uncovering a body of someone who appears to have died a violent death, would therefore also trigger the duty, also irrespective of any allegation.

1.5 The *how* of investigations: investigative standards

This finally brings us to the question *how* States must conduct an investigation according to human rights law. IHRL sets very specific standards for how investigations must be conducted. An extensive case-law analysis shows that States must observe eight standards in order for their investigations to be human rights compliant. The case-law analysis also reveals that the ICCPR, ACHR, and ECHR, in large measure require very similar things, with a few small variations. As was mentioned previously, these bodies largely develop the

law on a case by case basis. This also means that the supervisory bodies and courts are dependent on exactly which cases reach them. The Inter-American context of massive State-led human rights atrocities, for instance, has led the Court in San José to develop a very strong anti-impunity strand in its case-law, which has arguably shaped its jurisprudence as a whole. The European Court, on the other hand, has developed its case-law regarding the duty to investigate in what by comparison can be viewed as tranquil circumstances. This difference in context has meant that many cases reaching the European Court have considered incidents where things had gone wrong, rather than situations where there was a larger State policy of disappearing its own citizens. Whereas the European Court has over time had its share of cases related to systemic and conflict-related human rights abuses, these cases have always remained a small minority in the Court's overall caseload. This explains why the fight against impunity has been perhaps the major driving force in the Inter-American Court's case-law, while it has a much smaller role in the case-law of its European counterpart. This has also led the European Court to develop a jurisprudence on deaths resulting from negligence, for which an investigation resulting in private law responsibility can be sufficient[9] – cases which thus far have not frequently reached the Court in San José.[10]

So let us now examine what a human rights compliant investigation looks like. First of all, all courts and treaty bodies agree that the duty to investigate is an *obligation of means, a due diligence obligation*, and that therefore the simple fact that ultimately those responsible for a violation could not be identified or that a conviction was not obtained, does not mean an investigation was ineffective. Nonetheless, the State's efforts must be such that the investigation is *capable* of identifying culprits, and must be *genuine*: an investigation which is 'preordained to be ineffective' will clearly not suffice. The criterion of a 'genuine' or 'credible' investigation moreover entails that it is not carried out in bad faith, used merely to shield the accused from *actual* investigation and prosecution. Bringing all case-law together, this study shows that there is a very large measure of convergence as to the investigative standards formulated under the three human rights conventions.

Summing up, States must (i) launch the investigation of their own accord (*ex officio*), and do so (ii) promptly. Thus, States cannot leave it up to the initiative of victims, and must as soon as practicable when information has reached it, start an investigation, and carry it out with reasonable expediency. Further, the investigation must be (iii) serious and effective, thorough, and adequate. This third criterion imposes the most concrete requirements. It entails that States must take those investigative steps which are called for by the circumstances of the case, which can range from taking witness statements,

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

10 Moreover, the Inter-American Commission functions as a filter for the cases which reach the Court. ACHR, art 61(1).

to establishing bullet trajectories, carrying out autopsies, collecting further forensic evidence, and so on. What is required is obviously highly contextual, but States will need to take all reasonable steps to establish the facts, and to identify potential perpetrators. Next, the investigation will need to be conducted (iv) independently and (v) impartially. This means that investigators may not be guided by bias or prejudice, and that they must be both objectively and subjectively independent from those who are subject of the investigation. Investigations into conduct by the armed forces, for instance, must be carried out by investigators outside the chain of command. Then, the investigation must also (vi) sufficiently involve the victims or their next of kin, so they can exercise their rights. According to the HRC, this even means that next of kin must be afforded legal standing in the investigation, and must be allowed to bring evidence.[11]

Then, for the final two standards, there is some degree of divergence between the various human rights systems. All human rights regimes require investigations to be (vii) transparent, but what they require precisely in this context, varies somewhat. The European Court has interpreted this as requiring a sufficient element of public scrutiny, the precise contents of which are contextual. An important goal in this respect, is to ensure public confidence in the State's monopoly on the use of force, and to show that it in no way colludes with human rights violations. Under the ICCPR, the HRC requires more, insofar as it finds that States should

> 'in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered.'[12]

Whereas the various human rights regimes therefore all require investigations to be transparent, what this entails precisely varies: from relatively flexible, to very demanding. It will be very interesting to see how the law develops on this issue, which is moreover highly relevant for the law of interplay – the requirement of transparency is likely to cause tension with IHL.[13]

Finally, investigations must be (viii) followed-up by criminal accountability processes, when appropriate, and *de jure* and *de facto* obstacles to such accountability must be removed. All three systems require investigation, and in many cases also criminal investigation. Under the ACHR, there is even a right to criminal justice and thus a prosecution, though the ICCPR and ECHR do not

11 *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, HRC 30 October 2018, CCPR/C/GC/36 [28].
12 Ibid [64], references omitted.
13 See Chapter 10, §4.3.3.

confer an individual right to prosecution. The European Court and the HRC have equally found that serious human rights violations require a criminal response, but that in other cases, a civil or administrative remedy may suffice. The Inter-American Court, on the other hand, has thus far insisted on criminal prosecution and punishment. In the Inter-American system, there is hardly room to break apart the duty to 'investigate, prosecute, and punish', whereas in the other two systems, there are (some) cases which can be remedied through other types of investigation.

If a criminal investigation *is* required, all three systems very similarly limit the extent to which prescriptions, amnesties, and rights of the defence such as *ne bis in idem* and *nullum crimen sine lege* can impede criminal accountability processes in the context of serious human rights violations. But the Inter-American Court has moreover insisted that such cases are prosecuted and tried before the regular criminal justice system – outright prohibiting military justice systems from hearing such cases. The HRC has similarly found that enforced disappearances, as a rule, must be investigated and tried within the ordinary criminal justice system. The European Court takes a more graduated approach in this context, insisting that the overall independence of the trial must be sufficiently safeguarded, which *can* also be the case in the military justice system.

1.6 The duty to investigate and armed conflict

Turning now to investigative obligations during armed conflict, this study has first confirmed that IHRL continues to apply during armed conflict, and co-applies with IHL. The HRC, the Inter-American Court, and the European Court have all been resolute in declaring the continued application of their convention in situations of armed conflict and occupation – in line with the International Court of Justice's pronouncement to the same effect. The ICJ worded it as such, that 'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation (…)'.[14] The same goes for the duty to investigate. It was further shown that the various human rights courts and treaty bodies have taken varying approaches to the role of IHL when faced with armed conflict situations. While the Human Rights Committee and Inter-American Court have proved very open to taking IHL into account in their pronouncements, the

14 I cite here the *Wall* opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ (Advisory Opinion) 9 July 2004, *I.C.J. Reports* 2004, p. 136 [106]; the Court later cites this verbatim in *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]. In very similar wording see the earlier *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), *I.C.J. Reports* 1996, p. 226 [25].

European Court has historically been much more reticent in its reliance on IHL. More recently, however, the European Court appears to have started revising its approach, with an increased role for IHL. The most prominent way the various courts and bodies take account of IHL, is by interpreting open human rights norms in light of IHL, for instance by finding that what constitutes an 'arbitrary' deprivation of life must be determined in light of applicable rules of IHL. The European Court in addition ascertains whether the ECHR comes into conflict with rules of IHL, although the precise consequences it attaches to a finding of conflict remain uncertain.

Looking at investigative obligations, this study finds that insofar as human rights courts and treaty bodies have been faced with cases relating to investigations during armed conflict, they have not developed an approach which differs in any significant way from their regular approach outside of conflict. The duty to investigate under IHRL, as a due diligence obligation, includes a measure of flexibility which is maximised when applied in a context of armed conflict, but the applicability of the obligation, and the standards applied, are principally the same – whether a violation took place in or outside of armed conflict.

Derogations do not and cannot exclude States' obligation to investigate, as such. Derogations can shrink a State's human rights obligations in emergencies or armed conflict, if such a situation requires that the State is free to combat this crisis without overly demanding human rights restrictions. Nonetheless, it was shown that States cannot derogate from the duty to investigate. All treaties contain a list of non-derogable rights, which has moreover been interpreted extensively by certain supervisory bodies. Thus, the HRC and the Inter-American Court have held that such procedural and judicial safeguards which are necessary to guarantee non-derogable rights, are also non-derogable themselves. This includes, notably, the right to a remedy. Thus, the non-derogable character of the right to life, the prohibition of TCIDT, and the prohibition of slavery, is extended to the duty to investigate. Insofar as the right to liberty can be derogated from, this clearly does not pertain to unacknowledged detention and enforced disappearance: no matter the crisis to which States must respond, they may never resort to such measures, and the right to *habeas corpus* has been viewed as non-derogable as well. It is only under the ECHR that the right to life *is* derogable, 'in respect of deaths resulting from lawful acts of war'.[15] Even if such a derogation was entered, which no State has done to date, what such a derogation arguably achieves is to shrink the substance of the right to life, to the point it coincides with the protections afforded by IHL. This therefore alters whether and when a deprivation of life is to be considered as *unlawful*. Because the duty to investigate has an accessory

15 ECHR, art 15(2).

nature, the material scope of application of the duty to investigate then equally shrinks: to those deaths which potentially did *not* result from lawful acts of war. In other words, the duty to investigate continues to apply and cannot be derogated as such. But in case of derogation it becomes of relevance where a deprivation of life may have violated IHL. Thus, the scope of application of the duty to investigate can be altered depending on the interplay of *substantive* law, and on derogations, because these determine whether a potential violation has occurred. But armed conflict does not affect the applicability of the duty to investigate as such.

When it comes to *investigative standards*, the duty to investigate is approached with a measure of flexibility during armed conflict, under all three regimes. As was set out above, the duty to investigate is an obligation of means, not of result. States are therefore under an obligation to take all reasonable steps to investigate, but what is reasonably possible is affected by the circumstances pertaining during an armed conflict. The difference within and outside armed conflict, is therefore one of degree, rather than principle. To give an example of a flexible interpretation of investigative standards, the European Court has found that whether an investigation was conducted sufficiently 'promptly' must be determined in light of the circumstances of the case. This means that during active hostilities, it may need to be accepted that immediately securing the scene and hearing witnesses may not be possible, or that in a post-conflict context, the legal and investigative system may be overwhelmed leading to delays. Whether all investigative steps have been taken to render an investigation 'serious and effective' is similarly dependent on the context of the armed conflict. It will however depend on a case-by-case assessment whether the steps taken are sufficient. The European Court appears to have been more lenient in this respect in cases relating to active hostilities during an IAC, than those relating to situations of occupation or NIAC – likely because States have more control in such situations. Unfolding practice at the various human rights courts and bodies shows how even during armed conflict, the applicable standards can be quite strict.

Finally, regardless of how receptive the HRC and Inter-American Court have been to IHL, they have not relied on IHL when it comes to the duty to investigate. Even in cases where the Inter-American Court, for instance, determines the lawfulness of the lethal use of force in light of IHL, its subsequent assessment of investigations is based solely on IHRL. This, it is submitted, may very well have to do with the lack of detail in IHL's investigative rules. Yet, the European Court in more recent cases in 2021 *has* taken account of IHL in its findings with respect to the duty to investigate. Whereas it is too early to tell where such developments are headed, it goes to show that there is scope for recourse to IHL in interpreting human rights investigative requirements. When all is said and done, regardless of how open IHRL bodies may be towards IHL, the duty to investigate has thus far been interpreted in a largely independent manner. Further, it has been given a measure of flexibility which is

able to account for the context of armed conflict, without however departing from regular case-law in any fundamental way.

1.7 Conclusion

As was shown above, duties of investigation under IHRL converge in almost all respects. The various regimes' supervisory bodies have clearly drawn inspiration from each other's work. The Inter-American Court was first to anatomise the obligation, and the duty to investigate remains a main trend, if not *the* main trend, in its case-law. The Inter-American Court continues to spearhead the fight against impunity, which has made a major contribution to human rights protection in the Americas. Meanwhile, the HRC and the European Court have caught up, and in certain aspects are now at the forefront of developments. The Human Rights Committee now operates at the cutting edge of the development of requirements of transparency in investigations. It has moreover, together with the European Court of Human Rights, introduced the newest addition to the *corpus juris* regarding investigations: the duty to cooperate. Requiring States to cooperate with investigations into human rights violations over which they had no jurisdiction is a truly novel development, which is still evolving. The European Court, finally, arguably has the most refined case-law, with the greatest level of detail. Further, it is at the forefront of developing the temporal scope of the duty to investigate. All three systems, despite some difference in accents, clearly drive in the same direction. In this respect, there can certainly be said to be an 'international law of human rights', with very little, if any, fragmentation.