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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10 The duty to investigate under the interplay of IHL and IHRL

1 Putting together the pieces of the puzzle: a roadmap

This Chapter puts the pieces of the puzzle together. It synthesises the research results in the previous Chapters by conducting a comparative analysis of the duty to investigate under IHL and IHRL, and by analysing those through the methodology for interplay developed in Chapter 9. Chapter 9 showed that a proper understanding of interplay ultimately hinges on the existence, or not, of normative conflict between the various applicable norms of IHL and IHRL. A comparative analysis of the scope and contents of the duty to investigate under IHL and IHRL is therefore carried out, to assess to what extent they diverge, and to what extent they conflict.

As was explained in the previous Chapter, the relationship between IHL and IHRL ought not to be evaluated on the level of these legal regimes as such, but rather on the level of specific norms. This is put into practice by taking a closer look at those norms prescribing a duty to investigate. The key to determining how a situation of interplay unfolds in practice, is to ascertain whether the norms are in harmony, or whether they are rather in conflict or competition. To ascertain such, an examination of the applicable *legal norms* is required. Only once this has been done, does the specific context of a case, in other words the broader situation and the specific incident in question, play a role. As was shown in the previous Chapter, such contextual factors come into play in instances of normative conflict, to decide which norm is the *specialis* which must take precedence.

This Chapter must therefore show whether the duties of investigation as they flow from IHL and IHRL conflict, converge or compete. Even when already looking at the level of individual norms, however, care must be taken to take a sufficiently nuanced approach to any potential conflict between them. As was shown in the previous parts of this research, a meaningful examination of the duty to investigate requires one to distinguish between the duty's scope and the investigative trigger (§3), and the applicable investigative standards (§4). This separating out of the various aspects of investigations is equally

important when assessing whether any potential conflict between the IHL and IHRL duties of investigation exists.[1]

To illustrate, if a conflict potentially exists regarding the independence of investigations, this would not merit the conclusion that 'the IHL and IHRL duty to investigate conflict' in their entirety – and thus that if IHL were *lex specialis* the IHL duty to investigate in all its aspects takes precedence over that under IHRL. If the conflict is limited to one aspect of investigations, or to one investigative standard, then only on this particular point does *lex specialis* regulate the resolution of the normative conflict. In our example, the precedence of IHL over IHRL would likely only concern the requirement of independence.

All this means that even when the *lex specialis* approach is applied only on the level of norms (rather than regimes), even then further specification may be required to decide what element of norms conflict, and how this must be resolved. As was explained in Chapter 9, even once *lex specialis* operates to resolve a conflict of norms, the *lex generalis* remains operative and regulates a situation from the background. No full displacement therefore occurs, and a detailed examination is always required. This also means that in examining whether the duties of investigation under IHL and IHRL conflict, converge, or compete, a distinction must be made between the various aspects of the duty to investigate: the scope, the trigger, and the standards.[2]

2 The aims of investigations under IHL and IHRL

As a precursor to the detailed comparison between investigative obligations under IHL and IHRL in the subsequent section, the aims of investigations are first briefly compared here. Parts I and II of this study have shown an important convergence with respect to such aims.

Under IHL, investigations are firstly an important mechanism for the effectiveness of the legal regime. There is no institutionalised international oversight, nor is there another external enforcement mechanism for States. This largely renders IHL dependent on States' own efforts to comply with the law, and to monitor to what extent their military operations and structures conform to it. In this respect, investigative mechanisms are meant to ensure a lessons-learned process, to put a stop to violations, and to uncover systemic shortcomings – in other words, to 'ensure respect' for IHL for the purposes of

1 They are the elements of comparison required for a comparative approach, see Chapter 1, §3.2.2.

2 Making a similar distinction, see Alon Margalit, *Investigating Civilian Casualties in Time of Armed Conflict and Belligerent Occupation. Manoeuvring between Legal Regimes and Paradigms for the Use of Force* (Brill Nijhoff 2018) 80.

Common Article 1 of the Geneva Conventions. Also after they have implemented most international obligations into their domestic legislative and operational systems, have ingrained IHL in their militaries through training, and have adapted their military manuals, rules of engagement and the like, there remains a necessity to follow-up on such means of implementation. States must know the *consequences* of their military operations. After all, gauging compliance and keeping track of whether the law may have been violated is impossible without knowledge of what has been going on the ground. They therefore need to set up and institutionalise ways of monitoring the actions of their armed forces and reviewing them. A solid mechanism for monitoring and supervision requires it to be institutionally imbedded into the system, and requires the setting up of a procedural oversight mechanism. Such review and oversight are already embedded into many military systems because armed forces have a great interest in gauging the effectiveness of their operations. In the context of the duty to investigate, these further need to be coupled with a legal assessment of compliance with IHL. Finally, keeping tabs on the consequences of military operations on the ground will bring to light any potential systemic issues which hinder compliance, and which can be remedied on the basis of the outcomes of monitoring and investigation exercises.[3]

A second purpose served by investigations under IHL is to ensure accountability for violations. It is about making sure that those responsible are held to account – be it through measures geared towards individuals (such as disciplinary measures, reprimands, dishonourable discharge, or criminal proceedings), or towards the State (State responsibility and broader accountability structures, for instance aimed at making known the truth). In case of grave breaches and other war crimes, this will necessarily imply criminal prosecution of perpetrators. In case of 'simple', non-serious breaches, other forms of accountability such as disciplinary measures may suffice, in addition to the acknowledgement of State responsibility. When implementing its obligations, States set up the legislative framework and procedural mechanisms which allow for monitoring and investigations to take place. Once there is information that a violation has potentially occurred, this broader legislative framework and procedural mechanism must be applied in the case at hand, which will provide the basis for further accountability processes where appropriate. Criminal accountability processes, or reparations procedures, can then have their proper course.

Under IHRL, the duty to investigate similarly aims to render rights practical and effective. Like under IHL, this requires States to enact legislation which criminalises offences against these rights, and to set up an investigative mechanism and machinery in order to investigate, and where appropriate prosecute

3 Françoise J Hampson, 'An Investigation of Alleged Violations of the Law of Armed Conflict' (2016) 46 Israel Yearbook on Human Rights 1.

and punish such offences. The effectiveness of rights hinges on such procedures, as they ensure that potential violations are investigated and addressed domestically. Proper implementation of human rights obligations requires here too that States train their police forces so they are aware of, and comply with, the rules regarding *inter alia* the use of force. A complicating factor under human rights law, however, is that States must also investigate violations committed by third parties.[4] If there is a suspicion that a death did not have natural causes, the State will need to investigate regardless of the question whether a State agent is implicated. This also means that training and monitoring its own agents is just one strand of the State's obligations; it will necessarily also need a proper investigative mechanism, and effectively investigate, when there arises any credible information or any arguable claim of an infringement, also when caused by private parties.[5]

The second purpose served by investigations is bringing perpetrators to justice, advancing accountability, and combating impunity. For many human rights violations or abuses, this will require criminal investigation and prosecution. Such accountability is important both for individual victims, and for fighting a broader culture of impunity. Beyond criminal accountability, investigations may also serve to ensure accountability in other fora. Especially where information with respect to a violation is in the hands of the State, an investigation will be a condition for victims to be able to effectuate any other remedies.

Third and closely related, is the purpose of ensuring victims have an effective recourse to domestic remedies, and can obtain reparation. Investigations are an essential element thereof, because victims will often not be in a position to establish the facts themselves with respect to the use of force by State agents – especially so during armed conflict. Especially when considering the establishment of the facts and the truth of what happened as both a perquisite for, *and* an element of accountability, investigations serve an essential purpose in this respect.

The purposes and rationale of the duty to investigate are therefore very similar under IHL and IHRL. Investigations fulfil a highly similar function in ensuring

4 *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 [21]; *Alemán Lacayo case* (Provisional Measures) Inter-American Court of Human Rights Series E No 1 (2 February 1996); *Tahsin Acar v Turkey*, ECtHR [GC] 8 April 2004, Appl No 26307/95 [220]. See Chapter 8, §1.4.

5 For the sake of completeness: the investigation here might not as such target a 'violation' of IHRL. If we stick with our example of the right to life, if the death in question, caused by a third party, was completely unforeseeable, then the State was not under an obligation specifically to prevent it. No violation of the *right to life* thus took place, though a violation of *life* certainly did. The duty to investigate in such case thus attaches to the interference with the interest or value protected by a right, rather than the right itself.

the effectiveness of the system, and in achieving accountability for violations. This is a strong indication that there is no incompatibility as such between the duty to investigate under IHL and IHRL, and it may rather be thought that because they serve the same aims, the obligations under IHL and IHRL mutually reinforce one another in this respect.

Insofar as tensions do arise between the investigative obligations under both regimes, this then has to do with a divergence in the *substance* of the law: where the scope of the obligation diverges because IHRL prohibits and requires investigations into certain behaviour, whilst IHL permits such behaviour and therefore does not require an investigation, and where both impose diverging standards with respect to *how* an investigation must be conducted.

3 SCOPE AND TRIGGERS OF THE DUTY TO INVESTIGATE UNDER INTERPLAY

3.1 Introduction

The scope of the duty to investigate is a hot topic where IHL and IHRL potentially diverge, and where issues of interplay arise. The scope of the duty to investigate under the interplay of IHL and IHRL is determined through a comparative analysis. Determining the material scope of applicability of the duty to investigate ultimately comes down to establishing violation of which norms brings with it a corresponding duty to investigate that violation. Thus, the scope of application of the duty to investigate is heavily interlinked with substantive law, in other words, with the question whether an incident violated the law. Issues of interplay under substantive law, and the lack of clarity regarding rules of conduct where both IHL and IHRL apply, thus seep into the debate on the duty to investigate under interplay. This issue is addressed in section 3.2, where it is explained how substantive law relates to the procedural obligation to investigate. The subsequent sections (§§3.3-3.4) then take a closer look at where the duties of investigation under IHL and IHRL converge, compete, or conflict. This includes an examination of situations where IHL and IHRL appear to converge because both require investigation, but where they in fact may conflict or compete, because IHRL requires a criminal investigation geared towards establishing accountability, while IHL requires a compliance-geared investigation, but no criminal accountability. This in a sense anticipates already the discussion in section 4, which considers investigative standards applicable under both regimes. Before moving on to that issue, however, section 3.5 addresses what knowledge on the part of State authorities triggers the duty to investigate.

3.2 The relationship between the duty to investigate and substantive issues of interplay

3.2.1 Interplay and substantive law

In Chapter 9 of this study, the various modalities of interplay were examined. It was concluded that rules of IHL and IHRL can converge, conflict, or compete. In these latter two scenarios, they vie for precedence due to normative tensions or outright conflict between them; in the former scenario the rules can be interpreted in harmony.[6] The primary examples of each of these paradigms of normative overlap concern issues of *substantive law*. Recall for instance the conflict and competition between the IHL system of status-based targeting for the use of lethal force, and IHRL's insistence on respect for anyone's right to life, limiting the use of lethal force to stringently interpreted exceptions which can render a deprivation of life not arbitrary. This major example of divergence of IHL and IHRL concerns *regulation of the same conduct, differently*, and is in other words an issue of substantive law. Substantive law, given this study's focus on the procedural duty to investigate, is not at the heart of our attention. How precisely to resolve conflict and competition between the rules governing lethal force, for instance, falls beyond the scope of this research.

Nonetheless, the procedural obligation to investigate is not self-standing, it is *accessory* in the sense that only (potential) violations of some other primary obligation require an investigative response. Substantive law therefore feeds into the duty to investigate as the *trigger* for investigations: a potentially *unlawful* use of lethal force requires an investigation, which means that how one interprets the interplay of the substantive rules governing the use of force determines whether an investigation into a death is required. Substantive law is therefore most certainly of relevance for determining *the scope* of the duty to investigate. Moreover, which rule of substantive law was violated may be reflected in the *standards* investigations must meet. IHL attaches quite different consequences to war crimes, which require a criminal investigation, as compared to simple violations, where States are largely free to decide how they shape their investigations. On the whole, therefore, whereas issues of substantive law do not lie at the heart of this research project, they must have their proper place.

The following aims to clarify the relationship between substantive law, and the interplay of IHL and IHRL in that context, with the procedural duty to investigate. In order to map the scope of the duty to investigate, and thus whether IHL and IHRL converge or diverge, it may be useful to visualise these situations of interplay as presented in the figures below.

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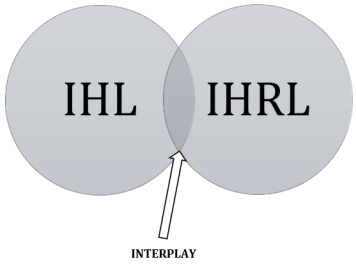
6 See Chapter 9, §4 and §5.

Figure 6: Substantive law during armed conflict



As figure 1 shows, IHL and IHRL can be viewed as partly overlapping bodies of law. Both legal regimes apply at the same time, and partly also regulate the same conduct. The darker part in the figure, where both circles overlap, is then where 'interplay' occurs. As the figure also shows, the area of overlap is relatively slim: most subjects are regulated exclusively by the one or the other. After all, any IHL rules which do not pertain to individual protection normally do not have an equivalent under IHRL. IHRL similarly regulates many issues which simply do not have a counterpart under IHL, such as the right to marry, the right to respect for private life, and the right to free elections.[7] This moreover does not even take into consideration that IHRL applies also in the absence of armed conflict, instances in which IHL does not apply, and where there is therefore no co-application or interplay at all. Thus, when IHL and IHRL are visualised as conjoining circles, there is certainly overlap between them, but there remains a larger area where they govern autonomously.

It was concluded in Chapter 9 that 'interplay' does not concern one coherent and unambiguous whole; it is indeterminate and any proper understanding of interplay hinges on an assessment of how overlapping norms interrelate on a case-by-case basis. The rules of both regimes interact in a variety of ways, with the precise outcome dependent on context.

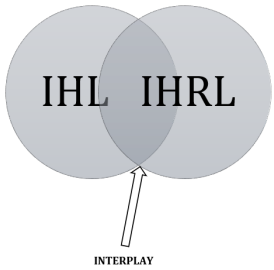
3.2.2 Interplay and the procedural duty to investigate

When it comes to procedural obligations, the overlap between IHL and IHRL is more pronounced. Both regimes insist on effective investigations into violations, and where both fields regulate certain conduct, both often point in the

7 Lawrence Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' in Eirik Bjorge and Mads Andenas (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015).

direction of investigation. There is thus clear convergence between IHL and IHRL on the point of the duty to investigate.

Figure 7: The procedural duty to investigate



Looking in more detail, human rights law contains clear investigative duties when it comes to violations of i) the right to life, and the right not to be subjected to ii) torture, cruel, inhuman and degrading treatment, iii) slavery and forced labour, iv) enforced disappearance and unacknowledged detention, and v) genocide.[8] If such a violation had a discriminatory motive, this aspect must also be part of the investigation.[9] Potential violations of these rights must be effectively investigated by the State, of their own accord. Because violations of core rights are the focal point of the duty to investigate under IHRL, most conduct violating these rights will equally violate IHL when committed during armed conflict. There is no question that torture, enforced disappearance, and genocide are equally prohibited under IHL, constitute war crimes, and are subject to investigative obligations under IHL.[10]

Yet, there remain large areas where investigative duties arise exclusively under IHL, or exclusively under IHRL. IHL, for its part, requires investigation into *any* violation of that body of law, no matter how serious, or how trivial. Because it is also a very technical field of law, this means that in quite a few cases it sets rules and requirements which have no direct bearing on human rights. Examples include the rules on the use of the distinctive emblem of the ICRC, the prohibition of perfidy, and the requirement that all soap and tobacco must be sold to POWs at local market price. If violated, IHL requires an investigation, with no counterpart under IHRL, clear and simple. IHRL similarly requires investigations into violations which do not under IHL. Examples include investigations into deaths which are the result of lawful acts of war,

8 See Chapter 8, §1.4. There is no reason of principle investigative duties are limited to these rights, though human rights jurisprudence thus far sticks primarily to these core rights having to do with physical integrity and freedom.

9 See Chapter 8, §1.4.

10 See the grave breaches provisions, artt 50 GC I; 51 GC II; 130 GC III; 147 GC IV; and 85 AP I; and ICC Statute, art 8.

and certain instances of slavery, human trafficking or forced labour which are not covered by the IHL rules on putting POWs and civilians to work.[11] Further, 'regular' human rights violations with no nexus to the armed conflict may not be governed by IHL, but still require an investigation under IHRL. For example, a death resulting from a poorly planned but otherwise regular police operation, may certainly amount to a violation of the right to life and thus require an investigation, while IHL does not govern the use of force in this situation despite the existence of an armed conflict at the time.[12] Finally, the Inter-American Court and Human Rights Committee have hinted at broader duties of investigation concerning all rights, and the European Court's case-by-case approach equally does not exclude broader investigative obligations without a counterpart under IHL.[13]

As is explored in-depth in the subsequent sections, when it comes to the scope of the duty to investigate, there are roughly three situations of interplay. One where IHL requires an investigation but IHRL does not, one where IHRL requires an investigation but IHL does not, and one where both IHL and IHRL require an investigation.[14] These three situations cut across the paradigms of normative convergence, conflict or competition – and care must be taken not to assume that where both regimes require investigation there is convergence, and that where only one of the two does, there is conflict or competition. A more nuanced approach is necessary. To illustrate, when looking more in-depth at the situation of overlapping investigative duties, variations occur. In a number of cases, the obligations will likely be very similar, because when a violation of the right to life also constitutes a war crime, both IHL and IHRL call for criminal investigation. In other situations, IHRL may require a criminal investigation, whereas IHL requires a more compliance-geared investigation. An example could be deaths caused by an air strike which was based on incomplete information. Under IHRL, when State agents cause loss of life, an investigation is warranted, and this must moreover principally be a criminal investigation.[15] Under IHL, the situation described likely constitutes a violation of the duty to take precautionary measures, but if there were no other de-

11 For POWs, see GC III, arts 49-57; see further Silvia Sanna, 'Treatment of Prisoners of War' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (Oxford University Press 2015) 1002–6; Nils Melzer, *International Humanitarian Law. A Comprehensive Introduction* (1st edn, International Committee of the Red Cross 2016) 185. For civilians, see GC IV, arts 40 and 51; see further Marco Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019).

12 Cordula Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Israel Law Review 310, 346; Daragh Murray and others, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford University Press 2016) 113.

13 See Chapter 8, §1.4.

14 The fourth situation where neither requires investigation is not discussed.

15 See Chapter 8, §1.5.

ficiencies or indications of the attack having been intentionally directed against civilians, there will be no need for a criminal investigation because violations of the principle of precautions in attack do not amount to war crimes.[16] All three situations are explored further in the subsequent sections, subdivided by their raising issues of convergence, conflict, or competition.

An important point to make here is that not all situations which raise controversy under the substantive rules of interplay, also lead to difficulties when it comes to the procedural duty to investigate. Whereas one of the major fields of controversy and potential conflict between the substantive rules of IHL and IHRL relates to detention and the right to liberty,[17] this appears to have limited effects under the procedural duty to investigate. Reason for this is that thus far IHRL has primarily required investigation into *enforced disappearances and unacknowledged detention*, not 'simple' violations of the right to liberty.[18] The divergence regarding whether detention is allowed for reasons of the conflict only or not, thus likely does not lead to difficulties when it comes to the duty to investigate, because even if detention solely for reasons of the conflict were to violate IHRL (but not IHL), such a violation of the right to liberty does not require investigation.

In sum, the scope of the duty to investigate is closely interlinked with substantive law. Clearly outlining the scope of the duty to investigate under interplay therefore requires a look also at substantive norms, and the way interplay works out for those norms. The following sections engage with these issues.

3.3 Convergence in the scope of investigative duties

Let us now return to the scope of the duty to investigate under the interplay of IHL and IHRL. The main narrative regarding investigations during armed conflict focuses on divergence and normative conflict, and the perceived lack of realism of requiring human rights investigations during armed conflicts. Nonetheless, as this section will show, the majority of cases which require an investigation under IHRL, also do so under IHL. And often, even in the absence of an investigative counterpart under IHL, a duty to investigate a human rights violation does not conflict or compete with IHL. In other words, despite aca-

16 Wilful killing and indiscriminate attacks do constitute war crimes, but a lack of precautions does not. See AP I, art 57 and 85.

17 Together with the right to life and regulation of situations of occupation, see e.g. Marko Milanović, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford University Press 2011).

18 See Chapter 5, §4.2; Chapter 6, §4.2; Chapter 7, §4.2; Chapter 8, §1.4. Further, see Krešimir Kamber, *Prosecuting Human Rights Offences. Rethinking the Sword Function of Human Rights Law* (Brill 2017) 330–1.

demia's strong focus on divergences between IHL and IHRL, when it comes to the scope of the duty to investigate, there is in large part convergence. It must be pointed out, however, that human rights law develops on a case-by-case basis, and that the scope of the duty to investigate may therefore be expanded in future. This could give rise to new tensions and competition not yet covered in this study.

Convergence and harmony between IHL and IHRL regarding the scope of investigative duties, can concern all three situations of overlap distinguished above – those where 1) both IHL and IHRL require an investigation because the same conduct violated substantive norms of both regimes, or where 2) only IHL, or 3) only IHRL requires an investigation. Below follow examples for all three situations.

First, if the same conduct gives rise to a violation of both IHL and IHRL, and both require an investigation, the two are in harmony – at least insofar as the *scope* of the duty to investigate is concerned. This is for instance the case for wilful killings of civilians, which clearly violate both IHL and IHRL, and which must be investigated under both. Another example would be standards of treatment for detainees, with both IHL and IHRL setting standards, and requiring investigations into violations thereof. In such cases, where IHL and IHRL require the same from States, and where they both attach investigative obligations to violations of the law, they are in harmony as it was defined in the previous Chapter: 'Convergence between IHL and IHRL can be observed where norms of these bodies ultimately drive in the same direction. In such situations, both norms strive to achieve largely the same aim – though sometimes in different ways – with no conflict between them.'

Second, if IHL does require an investigation but IHRL does not, this will not normally give rise to any conflict or competition between them. As an example the perfidious use of the ICRC's distinctive emblem again comes to mind, which constitutes a violation of IHL, but not of IHRL. When an investigation into such conduct is instigated, this raises no tensions with human rights law. After all, so long as IHRL does not implicitly or explicitly *permit* certain conduct (the perfidious use of the emblem), it does not conflict with IHL's prohibitions and corresponding investigative obligations. Human rights law does not principally affect States' discretion to criminalise or otherwise regulate conduct which does not impinge upon human rights, so if States choose to criminalise violations of IHL, they are well within their rights from a human rights perspective. Of course, such investigation will need to respect human rights.[19] Moreover, when IHL requires non-criminal investigations, this will normally have a limited impact om human rights, so human rights standards

19 On this, see Stefan Trechsel, *Human Rights in Criminal Proceedings* (Sarah J Summers ed, Oxford University Press 2005).

may be less demanding or even not at all applicable.[20] Considering once again the example of the sale of tobacco and soap to POWs above local market price, the non-criminal investigation required under IHL will in no way give pause under human rights law,[21] meaning that the duty to investigate under IHL is in harmony with IHRL's silence on this point. The substantive divergence between IHL and IHRL does not lead to tensions, because IHRL remains neutral towards such regulations and investigations. This is an important finding, because as was concluded previously, IHL requires investigations into each and every violation no matter the severity, and the many technical regulations of IHL often have no direct counterpart under human rights law.

Third and finally, conduct may violate and require investigation under IHRL, but not under IHL. This *can* give rise to conflict or competition between the two where IHL (implicitly) permits that conduct, but this is not necessarily so. For instance, IHRL has more extensive rules on the prohibition of slavery and forced labour, which when violated require investigation.[22] Even though IHL does not contain an explicit prohibition of slavery, at least not in *lex scripta*,[23] rule nor *ratio* of IHL militates against investigating instances of slavery. Clearly, also, IHL most certainly does not permit slavery, meaning there is no conflict or competition here, and IHRL's duty to investigate slavery is in harmony with IHL.

Most other conduct which violates IHRL but not IHL, has not yet been held to entail a duty to investigate. So far, therefore, these do not raise issues with respect to investigations – although this may change subject to developments in the case-law. Examples of this category of conduct concern, for instance, issues where IHL and IHRL are in a relation of harmony in any case, for instance concerning the right to freedom of expression, and the right to marry. IHL does not regulate these issues, and their application is not at odds with either rules or object and purpose of IHL, which means they can be applied without trouble. If they are nonetheless violated during armed conflicts, this does not normally require States to investigate, because the duty to investigate under IHRL is not

20 The applicability of the right to a fair trial is limited under the ECHR to civil and criminal proceedings, and thus not applicable to administrative proceedings; see ECHR, art 6. This is not the case under the ACHR; see ACHR, art 8.

21 Any coercive measures which interfere with human rights, such as the right to privacy, will of course need to meet human rights standards.

22 See Chapter 5, §4.2; Chapter 6, §4.2; Chapter 7, §4.2; Chapter 8, §1.4.

23 The ICRC has discerned a customary prohibition of slavery applicable in both IAC and NIAC, see Rule 94 in Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *ICRC Customary International Humanitarian Law – Volume I: Rules*, vol I (Cambridge University Press 2005). The Rome Statute of the ICC does not recognise slavery as a war crime (sexual slavery only), though it does criminalise 'enslavement' as a crime against humanity; art 7(1)(c), 8(2)(b)(xxii) and 8(2)(e)(vi).

normally applied when these rights are violated.[24] In fact, there may even be a situation of harmony with respect to issues which *do* lead to conflict under the substantive rules of IHL and IHRL. It was already explained above that despite the conflicting rules under IHL and IHRL regarding detention, when it comes to the duty to investigate, both legal regimes appear to be in a relationship of harmony. Even if lawful security detention under IHL violates the human right to liberty, this has not yet been found to require States to investigate and punish, because the duty to investigate in this context has thus far been applied to cases of *enforced disappearance* and *unacknowledged* detention. Even in this situation of clear-cut conflict between IHL and IHRL on substance, then, there is no conflict with respect to investigative obligations – at least so long as human rights courts and treaty bodies do not expand their case-law in this respect.

Hence, in all three situations of 1) overlapping duties of investigation, and exclusive investigative obligations under 2) IHL and 3) IHRL, there can be convergence. When the law is thus in harmony, which as was mentioned is the case for the majority of investigative obligations during armed conflict, there is no reason, and no *lex specialis* argument, to diverge from the obligation to carry out an investigation. No tension between IHL and IHRL exists *regarding the scope of the duty to investigate*, in other words the simple fact *that an investigation must be carried out*. This is not to say that conflicts cannot arise when it comes to *how* the investigation must be carried out, which is addressed in section 4.

3.4 Divergence in the scope of investigative duties

3.4.1 Introduction

This section addresses situations in which the scope of investigative duties does give rise to tensions, leading to conflict and competition. It must be recalled at this junction that normative conflict was defined previously as two norms which 'point in different directions, because [i] the requirements under both norms are mutually exclusive, because [ii] one norm (implicitly) permits what the other prohibits, or because [iii] one norm (implicitly) permits not

24 See Chapter 5, §4.2; Chapter 6, §4.2; Chapter 7, §4.2; Chapter 8, §1.4. Under the ECHR, there can be an exception to this where violence has been used to hinder the freedom of expression, such as was the case where a violent campaign had been levelled against a newspaper in *Özgür Gündem v Turkey*, ECtHR 16 March 2000, Appl No 23144/93 [45]-[46]. 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) 144.

to do what the other requires'.[25] The prime example thereof in the context of the scope of the duty to investigate, addressed further in section 3.4.2, is a killing which is lawful under IHL, but requires an investigation under IHRL. Normative competition is addressed in section 3.4.3, and connotes the situation where although two norms do not strictly speaking conflict, they nonetheless pull in different directions.[26] This may occur most regularly when one regime regulates a situation and the other remains silent on the issue, but nonetheless militates against full and unabridged application of the other regime's rules. The prime example here is IHRL's insistence on investigations into interferences by third parties, including private individuals, which IHL does to a limited extent only. The subsequent sections address these issues.

3.4.2 Normative conflict

There are three primary issues where IHL and IHRL prescribe divergent rules. Such divergence in substantive norms reverberates into the investigative counterparts of such norms, because duties of investigation are accessory to *violations* of substantive law. This section therefore turns to the primary junctions where the substantive rules of IHL and IHRL conflict, to then explore how such conflicts translate to the existence or not of a duty to investigate. In doing so, the section turns first to the major conflict between IHL and IHRL, namely where the rules concerning the use of lethal force are concerned (§3.4.2.1). It then explores another such conflict, regarding transformative occupation (§3.4.2.2). The other main area of conflict between IHL and IHRL, relating to deprivation of liberty, does not appear to give rise to conflicts when it comes to the duty to investigate, as was explained above, and is therefore not addressed further. It ought to be noted that this section does not seek to set out exhaustively the conflicts between substantive norms of IHL and IHRL; rather, it has selected the conflicts most pertinent for practice, and giving rise to the most acute issues also under investigative obligations.[27]

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25 Chapter 9, §5.2.2.

26 Chapter 9, §5.2.2.

27 That deprivation of life, liberty and the issue transformative occupation are the main avenues for conflict is based on previous research; 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; Marco Sassòli and Laura M Olson, 'The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 International Review of the Red Cross 599; Sean Aughey and Aurel Sari, 'Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence' (2015) 91 International Law Studies 60; Andrea Carcano, 'On the Relationship between International Humanitarian Law and Human Rights Law in Times of Belligerent Occupation: Not yet a Coherent Framework' in Erika De Wet and Jann K Kleffner (eds), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations* (Pretoria University Law Press (PULP) 2014); Noam

In this section, a choice has been made to present the selected issues as 'hard' conflicts; conflicts which are unavoidable, or where the norms are irreconcilable.[28] The discussion below is therefore not to say that there is no way, depending on the applicable human rights regime, to potentially *avoid* the normative conflict with IHL. The aim of this section is to show where conflicts in the scope of application of the duty to investigate *can* arise, and because much has been written on the interplay of substantive norms of IHL and IHRL, that aim is better achieved by mapping out potential conflicts than by restating the nuanced debate on interplay with respect to the right to life. Whether conflicts arise in practice must be determined on a case-by-case basis. By way of example, under the ICCPR, there is a potential conflict between the right to life and IHL's status-based targeting rules. Whether this conflict can be avoided must be determined contextually. On the one hand, what constitutes an 'arbitrary' deprivation of life can be interpreted in light of IHL. On the other hand, the HRC has found that if deprivations of life result from 'acts of aggression', this *ipso facto* violates the right to life.[29] For a State engaging in acts of aggression, all potential conflicts between the right to life and IHL are therefore unavoidable conflicts, because in the HRC's view, there is no scope for harmonious interpretation with IHL. Whereas some of the conflicts presented below may therefore be avoided, they can depending on the circumstances and the applicable human rights regime, also lead to unavoidable conflicts which have implications for the duty to investigate.

3.4.2.1 Normative conflict with regard to deprivations of life

Normative conflict regarding the scope of the duty to investigate, as explained, is most likely to arise where there is a conflict in substantive norms of conduct. Regarding the duty to investigate, this is most pertinently so with respect to the regulation of lethal force and deprivations of life. If we deconstruct the lines of conflict between the IHRL right to life and the IHL rules on targeting and the conduct of hostilities, four principal conflicts with a bearing on the duty to investigate materialise. They pertain to IHL's more permissive rules with respect to (1) the use of lethal force against combatants in IACs, (2) the use of lethal force against fighters and those directly participating in hostilities in NIACs, and (3) the use of force directed against lawful military objectives, causing 'collateral damage' – all bound to more restrictive rules under the right to life under IHRL. A final conflict relates to (4) the planning of operations which include the use of lethal force, where IHL requires precautions which are less demanding than those under IHRL. All of these conflicts with respect

Lubell, 'Human Rights Obligations in Military Occupation' (2012) 94 International Review of the Red Cross 317, 328–9.

28 Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 27).

29 *General Comment No. 36* (n 4) [70]; further, see Chapter 5, §6.3.

to the substantive rules relating to the use of force can give rise to conflicting investigative obligations.

The *first* instance of conflict, regarding the targeting of combatants, constitutes a conflict between a permissive norm of IHL on the one hand, and a prohibitive norm of IHRL on the other. IHRL principally requires an investigation into any lethal use of force by State agents. Investigations into deaths caused intentionally by State agents must moreover principally be *criminal* investigations.[30] Human rights courts and treaty bodies have not yet ruled on the applicability of this obligation to lethal force used against combatants, and they may decide to interpret IHRL in light of IHL on this issue. Nonetheless, based on existing case-law, IHRL thus a positive obligation on the State to investigate any lethal force used by State agents. IHL, meanwhile, regards the killing of combatants as lawful, and therefore does not require an investigation.[31] Moreover, IHL bestows 'combatant privilege' on combatants, which protects them against prosecution for military conduct which is lawful under IHL by any State other than their own – a prohibition, in other words, of prosecution for lawful acts of war.[32] Thus, a direct conflict can arise between the IHRL obligation to conduct a criminal investigation on the one hand, and the IHL prohibition to prosecute on the other, resulting in a conflict between two mutually exclusive obligations. There may be some scope for human rights courts and bodies to avoid this conflict by interpreting the right to life in light of IHL, but case-law thus far has not addressed this issue directly.

The *second* form of conflict, that of targeting NSAG fighters[33] and civilians directly participating in hostilities, leads to similar though slightly distinct problems. Neither civilians taking a direct part in hostilities, whether in a NIAC or an IAC,[34] nor NSAG fighters, can invoke combatant privilege.[35] Combatant privilege in IACs is reserved for combatants meeting the standards identified

30 See Chapter 8, §1.5.

31 See also Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 92–3. Importantly, however, IHL does require States to make an effort to record casualties, GC IV, art 16; AP I, art 33, and to make a record of burial and identities, GC I, art 17; and Rules 112-116 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 23). See further Susan Breau and Rachel Joyce, 'The Responsibility to Record Civilian Casualties' (2013) 5 Global Responsibility to Protect 28, 34–6; Liesbeth Zegveld, 'Body Counts and Masking Wartime Violence' (2015) 6 Journal of International Humanitarian Legal Studies 443, 458–9.

32 Sandra Krähenmann, 'Protection of Prisoners in Armed Conflict' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) 367; Sassòli (n 11) 20–3.

33 Following the example of Sassòli and Olson, the term 'fighter' is used here for want of a better term. The law of NIAC does not recognise 'combatants', and classifying members of an armed group who fulfil a continuous combat function as 'civilians directly participating in hostilities', can be problematic; Sassòli and Olson (n 27).

34 With the exception of those taking part in a lawful *levée en masse* under GC III, art 4(A)(6).

35 Sassòli (n 11) 29–30, 503, 585.

in GC III,[36] and when it concerns NIACs, combatant privilege does not apply at all.[37] IHL, under the majority position,[38] still permits the use of lethal force against fighters and civilians directly participating in hostilities, which means that no violation of IHL occurs and that no investigation is necessary under IHL. Nor does IHL, however, explicitly oppose investigation and prosecution, as it does in case of IAC. This seemingly removes the sharp edges of the conflict – but looks may be deceiving. The reason IHL does not grant combatant privilege in NIACs, and the reason why it does not recognise combatant status in NIACs at all, is that States do not wish to confer upon non-State armed groups the *right* to lawfully take part in hostilities against the State.[39] Under domestic law, States classify members of NSAGs as terrorists or rebels, who their armed forces may kill without facing criminal charges, but who may also be called to account for their participation in hostilities in a criminal trial. As compensation for this lack of combatant privilege, AP II requires States to 'endeavour' to grant amnesty to those who took part in the conflict.[40] This obligation is typically interpreted as excluding amnesties for war crimes, meaning that deprivations of life in line with IHL but in violation of the right to life still require an amnesty.[41] Thus, IHRL's insistence on criminal investigation and its prohibition of amnesties for serious human rights violations potentially conflicts with IHL's permission of targeting and killing NSAG fighters and civilians directly participating in hostilities, and its call for amnesties. Here too, then, IHL permits not doing, or perhaps even prohibits, what IHRL requires – conducting an investigation.

The *third* type of conflict relates to how both regimes regard collateral civilian damage. Here too, IHL will more readily consider such civilian harm lawful and therefore as not requiring an investigation, while IHRL takes a stricter view. The divergence between both regimes hinges on two principal issues. Firstly, IHL is concerned with a purely *ex ante* assessment of the expected results of an attack and even if civilian costs may *ex post* turn out to be excessive in light of the anticipated or actual military advantage, this in principle

36 GC III, art 4. Further, see Yoram Dinstein, *The Conduct of Hostilitites under the Law of International Armed Conflict* (3rd edn, Cambridge University Press 2016) 41–5; Sassòli (n 11) 20–3.

37 Sassòli and Olson (n 27) 606.

38 E.g. Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) 59; Sassòli (n 11) 20–3. The applicable IHL here is less clear, mostly because treaty law is terse at best, and scholars and practitioners continue to debate the exact definition of direct participation, and whether members of NSAGs may be targeted at all times merely by virtue of their membership; Sassòli and Olson (n 27) 606–8; Aughey and Sari (n 27) 98–103. The ICRC has attempted to clarify what constitutes direct participation in hostilities, Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009).

39 Aughey and Sari (n 27) 94.

40 AP II, art 6(5). See also Sivakumaran (n 31) 507. Cf. Dinstein, *Non-International Armed Conflicts in International Law* (n 38) 200.

41 More extensively, see Sivakumaran (n 31) 505–9.

does not violate the principle of proportionality.[42] Under IHRL, determining the lawfulness of an attack will also have regard to the planning of the operation, but may also include an element of *ex post* determination of proportionality. Secondly, what is weighed in the proportionality test under IHL and IHRL, is fundamentally different.[43] Under IHRL, the lives of both combatants and civilians are weighed against the absolute necessity of protecting the lives of others. In other words, is there really no other option but to use lethal force? Under IHL, expected civilian costs are weighed against anticipated military advantage – and the advantage *is precisely* the damage dealt to enemy forces and military properties.[44] In other words, IHL counts the lives of combatants and the destruction of military property *in favour* of attack,[45] while IHRL requires absolute necessity for both the deaths of combatants and the resultant deaths of civilians. If we envision a proportionality test as a scale, weighing one interest against the other, IHL and IHRL place the lives of combatants on opposite side of the scale.[46] The lawfulness of the use of force causing collateral damage may therefore be considered lawful under IHL but potentially unlawful under IHRL, due to a different appreciation of proportionality under both regimes, or because the *ex ante* assessment differed led to very different results than the *ex post* determination. In such instances, IHRL will require an investigation – as human rights courts have held for instance in relation to the excessive use of force where (numerous) hostages died during rescue operations, and have called for stringent investigations into such cases[47] – while IHL does not, and potentially even grants combatant privilege for.

The *fourth* and final case of conflict, regarding the planning of operations and the precautions in attack, potentially leads to a more subtle conflict in investigative obligations. The planning of operations involving potential use of force under IHRL, and precautions in attack under IHL, are of a similar

42 AP I, art 57(2)(a)(iii). For an in-depth analysis, see Jeroen van den Boogaard, *Proportionality in International Humanitarian Law. Principle, Rule and Practice* (Dissertation University of Amsterdam 2019). It ought to be noted that if, at whatever stage, it becomes apparent that the civilian costs *are* excessive in light of military advantage, the attack must be cancelled or suspended, see AP I, art 57(2)(b).

43 Nehal Bhuta, 'States of Exception: Regulated Targeted Killing in a "Global Civil War"' in Philip Alston and Euan McDonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford University Press 2008) 271.

44 AP I, artt 51(5)(b) and 57(2)(a)(iii); see further Sassòli and Olson (n 27) 606.

45 Dinstein explains further how there is no requirement of proportionality between combatant losses between warring parties – which further underscores that the lives of combatants do not count for proportionality purposes (except insofar as killing them leads to a military advantage); Yoram Dinstein, 'The Principle of Proportionality' in Camilla Guldahl Cooper, Gro Nystuen and Kjetil Mujezinović Larsen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge University Press 2012) 80.

46 Further, see Bhuta (n 43).

47 E.g. *Tagayeva and Others v Russia*, ECtHR 13 April 2017, Appl No 26562/07 et al.

nature. IHRL principally requires high-level planning of operations, geared towards maximum protection of human life, and with the use of lethal force as a means of last resort only.[48] This thus indicates a graduated use of force,[49] escalating to lethal force only when no other options remain.[50] IHL precautions, in contrast, again hinge on minimising *civilian* costs, but do not account for the lives of combatants and fighters.[51] Moreover, everything *feasible* must be done, all *feasible* precautions must be taken,[52] but if ultimately action is taken based on incomplete information, this need not lead to a violation where the State was justified in relying on such information, was not in a position to obtain better intelligence, and did not become aware that there was reason to halt the attack whilst carrying it out.[53] The requirement of taking all necessary precautions to minimise civilian injury relates not only to the selection of targets, but also the type of weaponry used, and if possible, a warning to civilians in advance of the attack.[54] When looking at the investigative corollaries of these *ex ante* obligations, IHL considers a lack of precautions (which does not amount to an indiscriminate attack) a 'non-serious' violation, which therefore does not constitute a war crime. This is an important qualification, because it means that attacks leading to excessive civilian losses *by accident*, even if due to a lack of precautions, require a *non-criminal* investigation under IHL.[55] Under IHRL, meanwhile, criminal investigations into the planning of an operation may be required depending on the context of the case.

By way of example, comparing the European Court cases of *McCann and Others* and *Tagayeva and Others* may be of use. In *McCann*, the European Court of Human Rights found that UK forces' use of lethal force against IRA operatives was absolutely necessary in the circumstances, but found fault with the planning of the operation which had led to the situation where no other

48 See *Cruz Sánchez et al. v Peru* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 292 (17 April 2015) [283]; *General Comment No. 36* (n 4) [12]. In particular, see the European Court in *Tagayeva and Others v Russia*, ibid [562]: 'In particular, it is necessary to examine whether the operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force. The authorities must take appropriate care to ensure that any risk to life is minimised. The Court must also examine whether the authorities were not negligent in their choice of action. The same applies to an attack where the victim survives but which, because of the lethal force used, amounted to an attempt on life'.

49 Murray and others (n 12) 125.

50 *Cruz Sánchez et al. v Peru* (n 48) [265].

51 AP I, art 57(2)(a).

52 AP I, art 57(2)(a)(i) and (ii).

53 AP I, art 57(2)(b).

54 See Rule 20 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 23); see further Stefan Oeter, 'Methods and Means of Combat' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press 2013) 179.

55 Unless of course there are indications of wilful targeting of civilians, or of indiscriminate attacks.

option was left than to shoot to kill.[56] No criminal investigation and procedure against UK troops was therefore necessary, though an investigation aimed to ensure civil accountability and State responsibility, was called for. In *Tagayeva and Others v Russia*, concerning a hostage rescue operation ultimately killing 330 including 186 children, the European Court contrarily considered that the investigation by Russia had to include lines of inquiry regarding accountability of State agents in their failure to take the necessary precautions and adequately plan and control the operation – for which investigations establishing 'strict accountability' are 'imperative'.[57] How the operation was planned, to what extent every effort was made to minimise loss of life, and whether for instance orders were given that none must be left alive (that 'no quarter shall be given'),[58] obviously weigh into the assessment of the criminal accountability of those involved in controlling the operation. Thus, IHRL can require a criminal investigation into the lack of planning which went into an operation, where under IHL there would arguably be a violation of the precautionary rule, but where a criminal investigation might not be required. Under such circumstances, a conflict may arise between IHL and IHRL, because IHRL's insistence on criminal investigations may clash with IHL's obligation to conduct an investigation, and its permission to do so in a non-criminal way.

3.4.2.2 Normative conflict with regard to transformative occupation

Another field where substantive norms of IHL and IHRL may clash, concerns transformative occupation.[59] This issue is – very briefly – examined here, to see whether it gives rise also to conflicts regarding investigative obligations. As was explained in Chapter 9, the substantive conflict of norms regarding occupation lies in IHL's prohibition for occupying States to respect, 'unless absolutely prevented' applicable law,[60] and to leave in place 'penal laws (…) with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of [GC IV]'.[61] This obligation to leave legislation in place in order to preserve the existing *status quo* in the occupied territory,[62] can clash with the positive obligation to ensure human rights which conflict with existing legislation in the occupied territory. An example could be legislation in certain

56 Further, see Chapter 7, §3.2.
57 *Tagayeva and Others v Russia* (n 47) [525].
58 See *Cruz Sánchez et al. v Peru* (n 48) [284]-[286].
59 Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 27) 480–1.
60 1907 Hague Regulations, art 43.
61 GC IV, art 64.
62 Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 228.

States which prescribe stoning as punishment for adultery.[63] Other examples would include discriminatory legislation, for instance restricting access to education based on sex, or restricting access to public places when wearing religious garb. For present purposes, it is sufficient to consider conflicts with human rights which require investigation when infringed. Should domestic legislation permit torture, slavery, or arbitrary deprivation of life, for instance, this would give rise to a normative conflict.

Marko Milanović considers the stoning example to give rise to an unavoidable conflict between IHL and IHRL, because one would have to 'forcibly read down' either IHL or IHRL to sufficiently accommodate the other.[64] Others have contended differently. The ICJ in the *Armed Activities* case explained that the Occupying Power must 'secure respect' for both IHL and IHRL in the occupied territory, entailing both negative and positive obligations.[65] In line with this finding, several authors have construed arguments to show that there is no normative conflict in this context. Gerd Oberleitner argues that what 'domestic law' requires ought to already be read in light of the occupied State's own human rights obligations (also under customary international law), rendering stoning illegal in any case.[66] Andrea Carcano considers compliance with human rights law to be 'essential to secure security', meaning any modifications to legislation which violates human rights is permissible under IHL.[67] Hans-Peter Gasser and Knut Dörmann argue that GC IV allows for the disapplication of domestic law when it conflicts with humanitarian law,[68] which in their view includes other rules of international law, including human rights.[69] Views as to whether transformative occupation gives rise to irreconcilable conflicts between IHL and IHRL thus differ. The discussion now turns to what this means for the duty to investigate in situations of occupation.

If one supports the view that the IHL governing belligerent occupation does not conflict with human rights law because it allows for the alteration of legislation which is incompatible with human rights, no problems arise when it comes to the duty to investigate. Occupying States will then simply, by virtue

63 Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 27) 480–1.

64 Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 27) 480–1.

65 *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 [178]-[179]; Lubell (n 27) 327.

66 Oberleitner (n 62) 228–31.

67 Carcano (n 27) 148.

68 Based on GC IV, art 64, insofar as its second paragraph states that 'The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention [GC IV] (…)'.

69 Hans-Peter Gasser and Knut Dörmann, 'Protection of the Civilian Population' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd (pb), Oxford University Press 2013) 284.

of the jurisdiction they exercise through control over the occupied territory, enact criminal legislation with regard to deprivations of life, torture, cruel, inhuman and degrading treatment, slavery, forced labour, genocide, and enforced disappearance. When violated, they must then effectuate such legislation through criminal investigations, similar to cases arising within their own territories. If one does perceive IHL and IHRL to conflict on this point, because IHL prohibits altering legislation, then this conflict under substantive law also extends to the duty to investigate. If IHL prohibits altering existing legislation and enacting criminal legislation, then effectuating the IHRL duty to investigate will not be possible without violating IHL – thus leading to a normative conflict between a prohibition on the one hand, and a positive obligation on the other. How such a conflict may be resolved is explored further, below.

3.4.2.3 Resolving normative conflicts

The normative conflicts with respect to investigations into the use of lethal force and issues of transformative occupation uncovered above, raise the question how they can be resolved. Following the roadmap for interplay as developed in Chapter 9, steps 1 through 3 have been completed: both IHL and IHRL apply, there are no relevant conflict clauses regulating the relationship between both regimes,[70] and there is a normative conflict. The remaining step, then, is to assess how to resolve the normative conflict, through available tools for conflict resolution.

Transformative occupation and lex superior

Firstly, the normative conflict arising in situations of transformative occupation. This may prove a relatively rare normative conflict, in the sense that it may (at least in part) be resolved by recourse to the *lex superior derogat legi inferiori* rule. Recall that this tool for conflict resolution solves conflicts by way of reference to the status of norms within the hierarchy of norms, and that the only rules of a 'higher' status than others, are peremptory norms of international law, or *ius cogens*. Whereas it was submitted in Chapter 9 that *lex superior* is unlikely to be very useful in resolving conflicts because norms of peremptory status are rare and moreover likely overlap between both regimes, in the context of transformative occupation, it may nevertheless be key in the situation at hand.

The conflict outlined above essentially concerns the IHL rule prohibiting Occupying Powers to deviate from domestic law, and IHRL's insistence on precisely the abolishment of laws which breach human rights, and the enact-

70 Should a derogation have been made, insofar as allowed under the various human rights treaties, this will alter the human rights obligations owed by the State. Thus, because the *contents* of the right under IHRL are changed, this may align the right in question with IHL, thus alleviating the normative conflict. In such cases, the normative overlap must be assessed under the 'convergence' paradigm.

ment of laws protecting those rights – coupled with investigative action where required to effectuate such legislation. The existence of a conflict thus hinges on the non-compliance of the existing domestic law in the occupied State, with IHRL norms. If, however, those norms of IHRL concern norms of *ius cogens*, then their application must prevail over rules of IHL which insist on leaving domestic law intact. Considering once more the example of domestic legislation stipulating stoning as punishment, this clearly constitutes a punishment in violation of the right not to be subjected to torture, cruel, inhuman and degrading treatment and punishment.[71] This right has been broadly accepted to constitute a norm of *ius cogens* – at the very least insofar as torture is concerned[72] – and stoning likely constitutes torture. Thus, an occupying State's duty to ensure the right not to be tortured is of a higher rank than the IHL obligation to leave the punishment of stoning intact. According to the principle of *lex superior derogat legi inferiori*, IHRL must in this instance prevail over IHL, thus resolving the conflict in favour of the peremptory prohibition of torture. In turn, once the substantive conflict has been resolved because the IHRL obligations prevail over those under IHL, the duty to investigate naturally follows, and the IHRL duty to investigate applies. As will be explored below, investigative standards may be somewhat loosened depending on the exact circumstances and the level of control exercised by the State (is it a case of quiet occupation, or are there constant smaller or larger armed clashes, and so forth), but the *applicability* of the duty to investigate has then been established.

Many of the other human rights which go in hand in hand with investigative obligations, also arguably form part of *ius cogens*. The prohibitions of genocide, slavery and enforced disappearance have all been referred to as such,[73] and it is in any case difficult to imagine domestic legislation which requires or considers lawful such practices, which amount to international crimes. Thus, *lex superior* can be used to resolve conflicts regarding the scope of application of the duty to investigate during transformative occupation.

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71 Cf. *General Comment No. 36* (n 4) [40] and [52].

72 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment (20 July 2012), *I.C.J. Reports* 2012, p. 422 [99]; *Al-Adsani v the United Kingdom*, ECtHR [GC] 21 November 2001, Appl No 35763/97 [61]; *Almonacid Arellano v Chile* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 154 (26 September 2006) [99]. Also including cruel, inhuman and degrading treatment or punishment, see *General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, HRC 4 November 1994, CCOR/C/21/Rev.1/Add.6 [8].

73 *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment (26 February 2007), *I.C.J. Reports* 2007, p. 43 [161] (genocide); *General Comment No. 24*, ibid [8] (slavery, TCIDT, arbitrary deprivations of life and liberty, as well as others).

The right to life and lex specialis

Let us now move on to the conflict arising from deprivations of life, regarding investigations into the deaths of combatants, of NSAG fighters and civilians directly participating in hostilities, into deaths of civilians as 'collateral damage', and into the planning of operations leading to loss of life. In this context, the answer must be found by application of the *lex specialis derogat legi generali* rule. Deciding which rule prevails then hinges on which norm is the more specific in the given situation and regarding a specific incident. Determining which norm functions as *lex specialis* depends on both a legal and a contextual assessment.

The legal side of the test is concerned with the wording of the various norms, looking at how explicit, direct, and precise the relevant provision is.[74] When it comes to the duty to investigate deaths, this assessment does not lead to an apparent result as to the more specific nature of either regime's norms. Both provide relatively little by way of treaty law. Combatant privilege and immunity, for instance, are not explicitly provided for in the Geneva Conventions. Nor does IHRL's duty to investigate and prosecute flow explicitly from general IHRL treaties – it is only included in the texts of the Torture, Genocide, and Disappearance conventions, and under the other systems was developed in human rights jurisprudence. What may be a relevant element to note is that IHL's non-requirement of investigation into conduct which it considers lawful, is – obviously – not explicit. No norm of IHL stipulates that what is lawful does not require investigation. In that sense, IHRL's requirement of investigation, as included in the treaties referred to above and in the various treaty bodies' and regional courts' case-law, is certainly more direct and explicit than IHL's non-requirement of investigation. Thus, this assessment may tentatively point in the direction of IHRL being the more specific,[75] with the exception of the law of NIAC's explicit reliance on amnesties for taking part in hostilities.

The contextual aspect of the *specialis* determination, as is implied in the term, cannot be assessed in the abstract. Generally, the more control the State has, the more likely it is that IHRL constitutes the *lex specialis*.[76] When a State operates extraterritorially, for instance, and when engaged in active hostilities, this element works in favour of the *specialis* function of IHL – such as in cases

74 See Chapter 9, §6.3.2.

75 Note, however, that Hathaway et al. consider the nature of the norm to also have a bearing on what norm constitutes the *specialis*. Thus, they argue that obligations are more likely to be *specialis* than permissions, although they qualify this argument by stating that IHL obligations are likely to be *specialis*, whereas the question whether IHRL obligations prevail over IHL permissions must be answered based on the other factors; Oona A Hathaway and others, 'Which Law Governs during Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law' (2012) 96 Minnesota Law Review 1883, 1918.

76 Hathaway and others (n 75) 1918–21.

like *Hanan v Germany* therefore.[77] Nonetheless, other considerations also play a role, such as the status of the individuals involved in an incident. For instance, when a State takes individuals into detention, this provides the State with a large measure of control which ostensibly leads to a determination of IHRL as *lex specialis*. When, however, a combatant is taken prisoner, the IHL rules pertaining to POWs must be considered to be *specialis*, due to the status of these individuals, and the specificity with which IHL governs POWs.[78] This illustrates how the various factors identified in Chapter 9 may influence which norm must prevail over the other as *specialis*. To say in the abstract whether IHRL is to prevail over IHL, or rather the other way around, also in the context of investigative obligations, is therefore impossible. Generally, however, it may be observed in line with the *Practitioners' Guide to Human Rights Law in Armed Conflict*'s approach that during active hostilities IHL is likely to prevail, meaning that conduct which complies with IHL will not give rise to a duty to investigate. Where States operate under the security operations paradigm, the IHRL duty to investigate applies and prevails over potentially conflicting IHL obligations.[79]

The *Practitioners' Guide* contends that once it is determined whether an incident falls into the 'active hostilities' or the 'security operations' paradigm, this not only determines the rules governing the incident itself, but also the investigative response thereto.[80] Thus, if a combatant is killed in a situation falling under the active hostilities paradigm, the leading frame of reference is IHL, which determines that i) the killing is lawful, and ii) no investigation is required into conduct without any indication of a violation. Thus, no investigation is required when IHL is the leading frame of reference, and IHL itself does not require an investigation. If, in contrast, an incident falls within a security operations paradigm, IHRL takes the lead, determines the lawfulness of any operations involving lethal force, and any potential violation will need to be investigated pursuant to IHRL, even if IHL would not require investigation. This approach must be agreed with, although as was set out in the roadmap for interplay in Chapter 9, the dichotomy between active hostilities and security operations only becomes relevant once a normative conflict has been found, because then it determines which of both legal regimes constitutes the *lex specialis*. In sum, where a situation concerns active hostilities and IHL therefore governs the use of lethal force as *lex specialis*, then the applicability of the accessory duty to investigate equally depends on IHL as *specialis*: if no (potential) violation of IHL has occurred, no investigation is required. IHL's non-requirement of an investigation therefore prevails over IHRL's duty to invest-

77 Further, see Chapter 7, §6.3.3.
78 Murray and others (n 12) 89–90.
79 Such as IHL either not requiring investigation, or requiring amnesties instead of investigation.
80 Murray and others (n 12) 330–4.

igate, because the normative conflict is resolved in favour of IHL. If, on the other hand, an incident takes place within a security operations paradigm, IHRL will be the *specialis*, and its requirement of investigation will prevail over IHL's non-requirement or prohibition of an investigation.

A final remark may be made here to illustrate that the normative conflicts between IHL and IHRL in the context of the applicability of the duty to investigate, need not be as stark as sometimes portrayed. Think for instance of situations where indeed IHL prevails over IHRL as *lex specialis*, such as where during active hostilities, State armed forces shoot and kill enemy combatants. This is clearly lawful under IHL, and therefore does not require an investigation. The IHRL obligation to conduct an investigation into any lethal force employed by State agents is then trumped by IHL. However, the reason IHRL requires investigation is not just assessing the lawfulness of conduct, and if unlawful, to ensure the accountability of those responsible. It also has to do with the next of kin's interests in knowing what happened to their loved one, and whether they are alive or dead. Despite the duty to investigate being inapplicable, these interests remain – in seeming contrast with IHL's prevailing norm of non-investigation. But in fact, this conflict may be less pressing than it seems at first sight. IHL also acknowledges these interests, stipulating obligations to search for the dead, to register them, or to allow the ICRC to do so.[81] Through such obligations, IHL means to ensure the dead are not left unaccounted for. An investigation completely geared to establishing what happened in order to ensure the rights of next of kin, thus does not conflict with IHL and in fact converges with obligations already established under that body of law itself. IHRL in this sense reinforces IHL's obligations in this field, and the perceived divide between the two is thus not as deep as it might seem.

3.4.3 Normative competition

3.4.3.1 The paradigm of normative competition and investigations into non-State conduct

The scope of applicability of the duty to investigate can also give rise to normative competition, with regard to one issue in particular. As was explained in Part I,[82] IHL essentially sets up a system of *self-enforcement*, where the State enforces the law by applying it to its own armed forces, and taking action where the law is violated. The duty to investigate falls squarely within this system, as it requires States to investigate their own violations, committed by their own troops. The IHL investigative regime only moves beyond this

81 On this subject, see Breau and Joyce (n 31); Zegveld (n 31); Mark Lattimer, 'The Duty in International Law to Investigate Civilian Deaths in Armed Conflict' in Mark Lattimer and Philippe Sands (eds), *The Grey Zone: Civilian Protection between Human Rights and the Laws of War* (Hart Publishing 2018).

82 See Chapter 2, §5 and Chapter 3, §2.

system of self-enforcement in two situations. This is the case firstly where it concerns grave breaches over which States must vest universal jurisdiction, and are under the *aut dedere aut judicare* obligation – to either extradite, or prosecute.[83] Secondly, other war crimes (serious violations which are not grave breaches) must be investigated primarily by the territorial State or the State of nationality, which again emphasises the responsibility of the State for its own armed forces, and only secondarily must other States *who have jurisdiction* investigate and prosecute.[84] For such other serious violations, there is, however, no obligation to vest universal jurisdiction. Thus, IHL relies heavily on States investigating the conduct of their own armed forces: for non-serious violations it is solely their obligation, for serious violations it is primarily their obligation, with only secondary obligations for third States.[85]

Human rights law, meanwhile, envisages a much broader duty to investigate, which encompasses also deaths, instances of torture, and so forth, *perpetrated by third parties*, when committed within the jurisdiction of the State. In situations of normalcy, this duty is the logical procedural corollary of the duty to protect the human rights of those within their jurisdiction: if there is a positive obligation to, for instance, protect individuals from (lethal) domestic violence, then if such violence nonetheless occurs, States must investigate it and hold to account those responsible, as well as potentially failures on the part of the State in ensuring protection. All this is now a well-entrenched part of the effective protection of human rights, also through criminal law.[86]

In situations of armed conflict, however, the duty to investigate potential IHRL violations committed by third parties goes well beyond what is required under IHL. Moreover, especially in situations where States operate extraterritorially, such as when they operate as Occupying Power, such obligations can become extremely demanding. After all, to require States to investigate any transgressions committed by their troops in the course of the occupation is one thing, but to require them to investigate each and every death, instance of torture or degrading treatment, and so forth, throughout the entirety of an occupied territory even without any nexus with the State's agents, is quite another.[87] Such obligations likely go beyond IHL's obligation for Occupying Powers to 'ensure public order and civil life', which must normally be ef-

83 Chapter 3, §3.2.2. GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146.

84 Chapter 3, §3.2.3. Rule 158 ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 23) 607.

85 See Chapter 3, §§2 and 3.

86 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.

87 Cf. Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002) 166ff.

fectuated through support for local authorities which administer the territory.[88] Similarly, in situations of NIAC, where a NSAG controls a part of the territory and/or population of the State, requiring States to investigate all violations perpetrated by such armed group is a tough ask, which moreover has no equivalent in IHL.[89]

The normative competition between IHL and IHRL is, in light of the above, encapsulated in IHRL's duty to investigate third-party infringements,[90] and IHL's silence on this issue. As was set out in Chapter 9,[91] normative competition entails a situation where although two norms do not conflict, they do pull in different directions. IHL's normative silence when it comes to investigations into third-party infringements is a case in point: in no way does it explicitly militate against such investigations. But, at the same time, IHL's equilibrium between military necessity and humanitarian considerations may be distorted by such a requirement, because it is highly resource-intensive, therefore potentially or likely interfering with other military operations. The duty to investigate third-party violations may prove overly burdensome and unrealistic in situations of extraterritoriality, because normally military police will make up only a small portion of forces present. To then investigate all third-party infringements of human rights becomes an overly burdensome task, which is at variance with military necessity, because allocating a huge portion of resources to policing goes at the cost of other military operations. Thus, a balancing of the IHRL duty to investigate with the principles of IHL, in particular the principle of military necessity, may be called for. Moreover, investigations into violations committed by NSAGs may be impossible for States to carry out, as they are fighting tooth and nail to defeat such groups, rendering it unlikely that they have sufficient control at least until territory is retaken, to send in on-site investigators. A normative competition between IHL and IHRL therefore exists with respect to the duty to investigate third-party interferences.

3.4.3.2 Resolving normative competition

Resolving this situation of competition, it was suggested in Chapter 9, requires an innovative approach. The *lex specialis* rule cannot be relied upon, because

88 1907 Hague Regulations, art 43; Sassòli (n 11) 334.

89 See, however, the discussion whether under Common Article 1 GC, the 'duty to ensure respect' includes an obligation to coerce others into compliance, Carlo Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?' (2010) 21 European Journal of International Law 125; Marten Zwanenburg, 'The "External Element" of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation' (2021) 97 International Law Studies 622.

90 I use here the term 'infringement', because technically speaking, the third-party conducting interfering with, for instance, life or physical integrity, does not constitute a 'violation' of IHRL.

91 Chapter 9, §5.2.2.

it only applies (in its capacity as a tool for conflict resolution) once a normative conflict has been established, and that is not the case here. Further, the solution for situations of convergence is equally unsatisfactory, because 'applying alongside one another' results in simple application of IHRL, due to IHL's silence on this matter. Moreover, harmonious interpretation is difficult because again, IHL is silent. What remains, IHL's normative silence or indeterminacy notwithstanding, are the principles of IHL, which guide interpretation, and which provide the general framework of the 'system' of IHL. IHL's lack of explicit rules ought therefore not be viewed as a vacuum *per se*, because the principles of IHL remain to guide conduct. The solution proposed is therefore to interpret the applicable human rights norms in light of the principles of IHL, to thus come to a balanced and well-rounded solution.[92]

This leaves the question how we may 'balance' the duty to investigate third-party interferences with the principles of IHL, especially the principle of military necessity. It was proposed in Chapter 9 to rely on IHRL's inherent flexibility to take IHL principles into account in specific application and interpretation of IHRL rules. This, moreover, is as far as such interpretation *can* go, because principles by themselves cannot set aside rules. When applied to our specific instance of normative competition, military necessity may certainly oppose the investigation of, for instance, unlawful killings carried out by third parties, the more so where the level of control exercised by the State is minimal. But the question is to what extent IHRL's rule that third-party killings must be investigated actually *allows* for flexibility.

Exploring flexibility in the case-law of the various IHRL systems

Whereas human rights courts and bodies have proved susceptible to arguments that certain investigative measures cannot be expected of them in the extenuating circumstances pertaining during armed conflicts, they have as yet not been forthcoming in dispensing with the applicability of the duty to investigate itself. Whereas some leniency is apparent when it comes to *how* States conduct their investigations where the conflict situation simply does not allow for full-fledged application of all investigative standards, the applicability of the duty to investigate itself has consistently been reaffirmed in case-law. Nonetheless, human rights case-law might not be settled yet on this issue. Cases thus far have pertained almost exclusively to situations where State armed forces were implicated in killings, thus leaving the issue of investigations into third-party infringements during armed conflicts, not yet settled. Moreover, the issue has proved controversial in extraterritorial contexts, where States have argued vehemently against unfettered application of IHRL norms, especially against the demanding positive obligations to act, such as the duty to investigate. Scholars such as Marko Milanović have therefore argued that

92 See Chapter 9, §6.5.

when it comes to extraterritorial application IHRL, a distinction ought to be made between negative obligations, which States must comply with also in such instances, and positive obligations, which are meant for territorial application.[93] Such an approach has not been adopted by the relevant human rights courts and treaty bodies. As was shown in Part II,[94] however, case-law under the ACHR and ECHR appears to diverge somewhat from that under the ICCPR.[95]

Under the ACHR and ECHR, the Inter-American and European Courts have affirmed the unabridged applicability of the duty to investigate during armed conflicts. This, as was set out in Chapters 6 and 7,[96] pertains also to investigations into conduct by third-parties, including NSAGs. The Inter-American Court did so most prominently in cases relating to peace process related amnesties, where it found that amnesties for NSAGs went counter to the ACHR's requirement of fighting impunity – even if they were instrumental to a peace process, and confirmed in referenda.[97] The European Court has also dealt with cases relating to abuses committed by NSAGs during armed conflict, confirming that the duty to investigate continues to apply. In cases related to the Yugoslav and North Ireland conflicts, it found Bosnia Herzegovina and the UK to be under duties of investigation, even in respect of abuses committed by armed groups. In sum, the Inter-American and European Courts have not as yet left a lot of flexibility when it comes to the duty to investigate third-party infringements. To what extent an interpretation in light of the principles of IHL could change this outlook, is therefore questionable.

Under the ICCPR, the Human Rights Committee may have left more leeway – as was shown in Chapter 5.[98] It ostensibly makes a distinction between peacetime situations in which States must investigate all '*potentially unlawful deprivations of life* (…) including allegations of excessive use of force with lethal consequences',[99] and situations of armed conflict when States 'must also investigate alleged or suspected *violations of article 6* [the right to life – FT]'.[100] As was set out in Chapter 5, this may indicate a deliberate decision by the Committee to restrict the duty to investigate during armed conflict to *State conduct* (which after all can *violate* the Covenant), and thereby to exclude third-party conduct. Whether this difference in application of the duty to investigate

93 Marko Milanović, *Extraterritorial Application of Human Rights Treaties – Law, Principles, and Policy* (Oxford University Press 2011) 209–22.
94 Chapter 5, §6.4.2; Chapter 6, §6.4.2; Chapter 7, §6.4.2.
95 Chapter 8, §1.4.
96 Chapter 6, §6.4.2; Chapter 7, §6.4.2.
97 The Inter-American Court has dealt with cases related to NSAG abuses very frequently, but such groups often acted with acquiescence or connivance of the State.
98 Chapter 5, §6.4.2.
99 *General Comment No. 36* (n 4) [27]. Emphasis FT. To the same effect, see *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 [8].
100 *General Comment No. 36* (n 4) [64]. Emphasis FT.

is truly what the Committee intends will need to be clarified in future case-law.[101] Based on the Committee's wording, however, it can at least be concluded that there is scope for flexibility, which ought to allow for taking account of the principles of IHL.

Alleviating the normative competition

Based on the above, it is now time to answer whether and how the principles of IHL can play a role in the interpretation of the IHRL duty to investigate third-party conduct, in a way which alleviates tensions without going against the core of the IHRL rule. The Human Rights Committee seemingly leaves leeway for a more narrow understanding of the duty to investigate third-party infringements during armed conflicts, because in such contexts, it first of all interprets what constitutes an 'arbitrary' deprivation of life in light of IHL,[102] and secondly limits the duty to investigate to 'suspected violations of article 6' (the right to life).[103] Thus, IHL plays a role in the substantive question whether the right to life was potentially violated, and because suspected *violations* can only be committed by States, tensions with IHL are already alleviated when it comes to third-party infringements. Of course, a violation of the right to life can also consist in a State's failure to actively protect life, also against force used by armed groups,[104] so third-party conduct can still be brought within the sphere of investigative obligations, though the scope of such obligations is more narrow. For instance, not every suspicious death will then be subject to investigative obligations, but rather only those where the State was under an obligation to protect life, because it knew or ought to have known of a specific threat.[105] Insofar as military necessity presents an obstacle for States to investigate third-party infringements, because they cannot allocate sufficient resources to sending in large numbers of military police, or because the risks for the well-being of the investigators is simply too large in a tense security situation which potentially involves territories outside the State's effective control, the ICCPR thus appears to leave sufficient leeway to take such interests into account. The principle of military necessity can thus tip the scale in favour of non-investigation into third-party infringements during armed conflicts, on a case-by-case basis, in line with the Human Rights Committee's own finding that the positive obligations stemming from the right to life ought not impose a disproportionate burden on the State.[106]

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

102 *General Comment No. 36* (n 4) [64].

103 Ibid.

104 Ibid [21].

105 Ibid.

106 Ibid.

For the American and European Conventions, there appears to be less scope to make use of the principles of IHL to mitigate tensions. Both the Inter-American and the European Court have reaffirmed the applicability of the duty to investigate in cases involving third-party infringements during armed conflict, and they have in fact dealt specifically with cases where States needed to investigate deaths caused by armed groups. This approach is in line with the more general continued applicability of human rights law during armed conflict.[107] It is in *how* the duty to investigate is applied, in the standards investigations must meet, that the Courts take account of the difficulties arising out of conflict situations, but not in the applicability of the duty itself. Thus, there appears little flexibility to rely on principles of IHL to mitigate tensions between military necessities and the duty to investigate third-party infringements.

This finding notwithstanding, there are of course restrictions on what is required of States. First of all, especially in situations where States operate outside their own territories, their human rights obligations extend only insofar as they have jurisdiction. Even where they operate within their own territories, if another State assumes control over part of their territory as Occupying Power, or if an armed group manages to take such control, this can limit States' obligations to ensure effective protection of human rights in those territories.[108] Secondly, even if the duty to investigate third-party infringements applies, the leeway offered to States when it comes to investigative standards can significantly reduce the demands on States, which in turn can relieve tensions with military necessities. Even if the applicability of the duty to investigate third-party infringements causes tensions with IHL and the principle of military necessity, such tensions may therefore in practice be relatively mild when the investigative standards are sufficiently loosened to account for operational and practical needs and constraints on States' armed forces.

3.5 Information triggering the duty to investigate

One remaining issue is what *information* precisely triggers a State's duty to investigate. The above, and the previous Chapters, have addressed what conduct, what type of (potential) violations, require an investigative response by the State, to unearth what has happened and to ensure accountability. The final piece of the puzzle in determining when States need to investigate, is then what information concretely triggers the duty: when is there a 'potential' violation? When are States considered to have had sufficient knowledge to

107 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996) *I.C.J. Reports* 1996, p. 226 [25].

108 *Ilaşcu and Others v Moldova and Russia*, ECtHR [GC] 8 July 2004, Appl No 48787/99 [333]-[334].

require them to find out more, and properly investigate? As transpires from the outcomes of Parts I and II of this study, the answer to this question varies among the systems of IHL and IHRL, and even within these respective regimes themselves.

As was shown in Chapter 3, the information triggering the duty to investigate under IHL varies slightly depending on whether a grave breach or war crime is at stake on the one hand, or whether a case concerns simple violations on the other.[109] For war crimes, the criterion appears to be that a serious violation was 'allegedly committed', which means States must investigate whenever they 'realize' an alleged perpetrator is present on their territory or within their jurisdiction.[110] In their practice, States interpret the triggering moment to be when the commander on the ground obtains knowledge of an incident or allegation which indicates a serious violation.[111] It is moreover the criterion of the 'reasonable commander' which is determinative of what they must have known or understood in light of the information in their possession. There is, therefore, some guidance, though what level of information precisely triggers the duty to investigate is not entirely clear. For simple, non-serious violations, the investigative trigger is less clear yet. Chapter 3 showed that the duty to investigate is triggered when a commander 'is aware' that someone under their control has committed or intends to commit a breach, with any information which would lead a prudent person to the conclusion a breach was committed, being sufficient to trigger the duty.[112]

Under IHRL, Part II has shown that States must investigate when they have knowledge of a potential violation, no matter the source. Once they have such knowledge, they must investigate *ex officio*, and may not sit on their hands and wait for victims to furnish evidence. Yet, there are some qualifications with respect to the information triggering the duty to investigate: there needs to be an *arguable* claim, a *credible* assertion, a *well-founded* or *sufficient* reason to suspect a violation may have occurred. Because the aim of the duty to investigate is to ensure that violations are brought to light by the State's authorities, this ought not be interpreted in a way which would impose an unrealistic burden on victims. Under the ICCPR, the Human Rights Committee has found that States must also investigate when they '*should have known* of potentially unlawful deprivations of life'.[113]

109 Chapter 3, §3.2.2.3, §3.2.3.3, §3.3.4.

110 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) [2890].

111 Chapter 3, §3.2.3.3.

112 Chapter 3, §3.3.4.

113 *General Comment No. 36* (n 4) [27].

Comparing both standards, the trigger for the duty to investigate does not seem to diverge too much when compared between IHL and IHRL. The criterion of when a reasonable commander or prudent individual would consider there was potentially a violation, and IHRL's requirement of 'arguable' or 'credible' complaints, or 'sufficient reasons', largely overlap and do not lead to major difficulties in their application alongside one another. Issues which arise pertain rather to what type of conduct potentially amounts to a violation under interplay, the issue which was addressed in the previous sub-sections. The trigger for investigations, however, converges.

One interesting remaining issue, which to date has never been addressed in case-law, is how precisely to assess the attribution of knowledge to the State. After all, in situations where State armed forces and other State agents commit violations of the law, they operate as organs of the State whose conduct is directly attributable to the State.[114] Because 'the State' is an abstract entity which in effect is a legal fiction, the same must go for knowledge: what 'the State knows', must be assessed through attribution of knowledge by its organs. Where, however, it is State agents committing violations and concealing such conduct to avoid being held to account, there would seem to be a snag. Whereas it is beyond doubt that these agents' conduct can be attributed to the State, engaging its responsibility for the substantive violation of the law,[115] whether these agents' knowledge of their own wrongdoing ought also be considered to trigger the duty to investigate, is a different matter. Whereas this might make sense from a general international law perspective, from a practical point of view, it does not. Finding that a State has violated its obligation to promptly investigate whenever it does not take action because the perpetrators themselves conceal evidence, does not contribute to the aims of the obligation. Rather, in the circumstances at issue it is for any other who becomes aware of the facts to bring it to the attention of the competent authorities. Anyone up the chain of command, or responsible for further investigating or referring the case who then decides not to pursue the issue will be criminally liable themselves under the doctrine of command responsibility, for failure to investigate and repress violations. Also in such cases, therefore, the duty is triggered when information reaches the relevant authorities. Of course depending on the exact circumstances, this may always be the case, for instance where military operations are constantly monitored for their effectiveness and compliance with the law, any potential violation will immediately become known up the chain of command (or at least upon debriefing).

114 ARSIWA, art 4.

115 Either under ARSIWA, art 4, or if they operate outside their competence, under art 7 (*ultra vires* acts).

3.6 Résumé

Above, it was shown how in most cases, the duty to investigate is an example of where IHL and IHRL converge, and thus operate in harmony and mutually reinforce each other. This is also the case for the information triggering the duty to investigate. In some areas, however, there is normative conflict – primarily in the contexts of the use of force and transformative occupation. Resolving these conflicts, it was shown, requires a case-by-case analysis taking account of context to determine whether an incident took place in a situation of 'active hostilities', or of 'security operations'. This, in turn, determines whether IHL or IHRL functions as *lex specialis*, and thus whether the investigative norms of IHL or IHRL prevail. Normative competition exists with respect to investigations into third-party infringements, which can partly be mitigated by using the flexibility provided by the IHRL duty to investigate such conduct, although not all human rights regimes allow for such interpretive flexibility.

The conclusion that the scope of the duty to investigate in many and perhaps even the majority of cases does not give rise to conflict under interplay, but rather harmony, may partially debunk complaints that the duty to investigate human rights violations during armed conflicts is 'mission impossible',[116] and that it leads to 'vexatious claims' against armed forces.[117] After all, the law of armed conflict similarly contains a duty to investigate, the scope of which can moreover be broader than under IHRL. Nevertheless, this conclusion should not be overstated. The scope of the duty to investigate *can* give rise to normative conflict and competition, and such normative tensions can – as was shown – have important practical implications.

4 PROCEDURAL STANDARDS OF THE DUTY TO INVESTIGATE UNDER INTERPLAY

4.1 Introduction

Turning now towards the question *how* States must conduct investigations under the interplay of IHL and IHRL, this section again engages in a comparative analysis of both regimes. It classifies investigative standards under both regimes as converging, conflicting, or competing. Once the nature of the normative overlap has thus been mapped out, the roadmap for interplay as

116 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.

117 See Ministry of Defence & The Rt Hon Sir Michael Fallon, 'Government to Protect Armed Forces from Persistent Legal Claims in Future Overseas Operations', www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations (last accessed 15 July 2021).

articulated in Chapter 9 can be applied to decide how to co-apply the two legal regimes, and how to resolve any potential conflicts between them.

In general terms, the standards governing investigations are relatively vague and underdeveloped under IHL, whereas under IHRL a coherent set of standards has been identified by courts and supervisory bodies across all systems in some level of detail. Under IHL, good practice is to monitor military operations, to report incidents up the chain of command, and for an appropriate authority to assess whether further investigation is necessary.[118] If there are indications of a serious violation, this gives rise to an obligation to conduct a criminal investigation, whereas indications of non-serious violations require an administrative investigation in response. Despite a lack of clarity in IHL treaty law, Chapter 3 showed through a thorough analysis of IHL, of the judicial practice of ICL bodies, as well as of State practice and soft law instruments, that investigations into war crimes must meet standards of effectiveness, thoroughness, genuineness, promptness, impartiality, and fundamental due process guarantees.[119] With respect to investigations into non-serious violations, States have significant discretion although it would appear they must ensure the investigation is effective prompt, and impartial. Such investigations may take place within the military procedures of the armed forces themselves, and can be largely informal. In case of individual transgressions, disciplinary measures can sufficiently ensure a deterrent effect.[120]

Under IHRL, the investigative standards developed under the various systems are highly similar – with only few small nuances across the systems. First of all, all courts and treaty bodies agree that the duty to investigate is an obligation of means, a due diligence obligation, and therefore that the simple fact that an investigation was unable to identify those responsible for a violation or to obtain a conviction, does not mean that it was ineffective. Nonetheless, the State's efforts must be such that the investigation is *capable* of identifying culprits, and must be *genuine*: if it is 'preordained to be ineffective', it will fall foul of human rights standards. 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. As was set out in Part II, according to human rights courts and treaty bodies, relevant standards concern that the investigation is: (i) launched of the State's own accord (*ex officio*); (ii) initiated promptly and carried out with reasonable expediency; and that it must furthermore be (iii) independent and (iv) impartial; (v) serious and effective, thorough, and adequate; and (vi)

118 Noam Lubell, Jelena Pejic and Claire Simmons, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* (The Geneva Academy of International Humanitarian Law and Human Rights & International Committee of the Red Cross 2019). Further, see Chapter 3, §2.1.

119 See Chapter 3, §4.3.

120 See Chapter 3, §4.4.

sufficiently involve the victims or their next of kin. Further, the various systems require somewhat differing levels of (vii) transparency to the investigation, in the sense that it must contain a sufficient element of public scrutiny. Finally, (viii) the follow-up process to investigations often requires measures ensuring criminal accountability.[121]

As is apparent from these brief summaries of investigative requirements and standards, IHL and IHRL regulate investigations differently, or at least in varying levels of detail. The following categorises the various investigative requirements along the lines of their normative convergence and divergence, and explores how States must carry out investigations under this normative overlap. For certain standards, as will become clear, the harmony or competition between rules depends on the exact interpretation of flexible norms. For instance, human rights courts and treaty bodies have formulated flexible tests for the effectiveness of investigative measures taking account of the exigencies of armed conflict. This allows for a harmonious interpretation of this requirement, and thus is an example of normative convergence. Whether this conclusion holds true in practice, however, depends on the precise application of a rule, and as we have seen earlier, despite human rights courts' and bodies' emphasis on flexibility, their application of investigative standards in practice has at times been quite stringent. Such stringency is liable to transform the categorisation of normative overlap from harmony, to competition, because there is now real tension between IHRL's requirements and IHL's call for leniency. Where such issues arise, where an investigative standard could be interpreted harmoniously but could equally be interpreted in a way such as to cause normative competition, this Chapter categorises them as falling under the 'competition' paradigm. Whereas the norms in question, after all, leave room for harmonious interpretation, such harmony is contingent on an interpretation taking account of IHL and its guiding principles. This, then, falls within the paradigm of normative competition as was articulated in the previous Chapter. Pursuant to this methodology, section 4.2 examines investigative standards where IHL and IHRL converge, and section 4.3 shows where normative conflict and competition arise.

4.2 Convergence in the investigative standards

As was set out above, the simple fact that States must conduct investigations is a point where the requirements of IHL and IHRL largely converge. Although there are some notable situations where conflict and competition may arise, the duty to investigate itself is very much entrenched in *both* legal regimes, and is in that sense a point of convergence between them. When it comes to

121 See Chapter 5, §5, Chapter 6, §5, Chapter 7, §5, and for a synthesis, see Chapter 8, §1.5.

investigative standards, there are also points of convergence and harmony between IHL and IHRL, which are set out in this section.

4.2.1 *Ex officio investigations*

First, the requirement that an investigation must be launched of the State's own accord (*ex officio*) as soon as there is sufficient information to trigger the duty, would appear to be a clear case of convergence and harmony between IHL and IHRL. Human rights courts and treaty bodies have been very explicit in this requirement,[122] the more so where State agents and armed forces are involved in potential violations, because in such situations, what is at stake is nothing less than public confidence in the State's monopoly on the use of force.[123] Effectuating human rights in good faith then quite clearly requires States do not take a 'wait and see'-approach and hope no allegations of violations will be brought; as soon as there is sufficient information of a potential violation, they must actively uncover the truth and investigate.

This is no different under IHL. As was set out previously, IHL requires States to monitor their military operations and evaluate them in light of compliance with IHL. These are clearly obligations imposed on the State independently from any outside allegation of misconduct; rather, they are self-standing obligations which attach to the conduct of any military operation. If any potential breach is brought to light through such monitoring, then clearly, it is for the State of its own motion to investigate and potentially ensure accountability – whether through acknowledgement of State responsibility, through administrative investigations, disciplinary measures, or criminal investigation and prosecution. The duty to repress grave breaches, and to suppress all other breaches of IHL implies an active obligation, not contingent on any outside allegation. This is encapsulated particularly well in Articles 86 and 87 of AP I, which hold commanders and superiors liable for a failure to take all feasible measures to prevent or repress a breach which they knew, or should have known, was going to occur. They moreover clarify the spectrum of commanders' obligations, ranging from prevention of breaches to their suppression and repression – which indicates their continuous and active role. Finally, these obligations are even coupled with criminal liability for commanders if they fail to fulfil their active role.

In other words, that investigations must be carried out of the State's own accord is clearly enshrined equally in IHRL and IHL, and in fact, IHL might be more adamant in this respect through commanders' individual responsibility for investigations. This raises no particular issues with respect to resolving

122 See Chapter 5, §5.3.2, Chapter 6, §5.3.2, Chapter 7, §5.3.2, for a synthesis see Chapter 8, §1.5.

123 *Ramsahai and Others v the Netherlands*, ECtHR [GC] 15 May 2007, Appl No 52391/99 [325]; *Al-Skeini v the United Kingdom*, ECtHR [GC] 7 July 2011, Appl No 55721/07 [167].

normative overlap, because both norms converge and can therefore be applied in parallel.

4.2.2 Impartiality

A second point where IHL and IHRL converge, is the impartiality of investigations. Impartiality connotes the absence of 'prejudice or bias'.[124] This investigative requirement has not been given much attention in case-law. Impartiality has to do with the existence, or appearance, of bias.[125] In other words, investigators may not have strong preconceived ideas of what happened, whether this constituted a violation, and who must (or must not) be held accountable. This IHRL requirement, which is also a commonly cited standard for IHL investigations,[126] does not appear to differ under both legal regimes. Any investigation where right from the start, the investigators are already fully convinced nothing untoward has taken place, is predetermined to be ineffective. This also means, and this already comes close to the separate criterion of independence, that investigators may not have an own stake in the outcome of the investigation. Because both IHL and IHRL equally insist on impartiality, this again is an instance of convergence between them, which does not require any reconciliation through interpretation or conflict resolution.

Beyond the *ex officio* instigation and the impartiality of investigations, investigative standards would appear to diverge as between IHL and IHRL. As is explored below, a number of these divergences is not necessarily problematic, but nonetheless, many aspects of how States must carry out investigations lead to a competition between IHL and IHRL.

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124 David J Harris and others, *Law of the European Convention on Human Rights* (3rd edn, Oxford University Press 2014) 450; Lubell, Pejic and Simmons (n 118) 24.

125 This criterion has been outlined in jurisprudence primarily in the context of the right to a fair trial. See *Micallef v Malta*, ECtHR [GC] 15 October 2009, Appl No 17056/06 [93]: 'Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the Court's constant case-law, the existence of impartiality for the purposes of Article 6 §1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.' Further, see William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 294–6; Lubell, Pejic and Simmons (n 118) 24.

126 The Turkel Commission, 'Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law' (2013) 125–7, 140 <https://www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_b1-474.pdf (last acccessed 15 July 2021)>; Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 Harvard National Security Journal 31, 55; Lubell, Pejic and Simmons (n 118) 24.

4.3 Divergence in the investigative standards

4.3.1 Introduction

This section looks at those investigative standards under IHRL which diverge from what IHL requires or permits. In terms of the roadmap for interplay, as developed in Chapter 9, this concerns situations of conflict and competition. As will be shown, a number of investigative standards under IHL and IHRL constitute each other's contrary opposite, setting standards which are at least *prima facie* incompatible. Those standards, which give rise to normative conflict, are addressed first (§4.3.2). Those standards which do not strictly speaking conflict, but can nevertheless give rise to tensions and therefore compete, are the subject of section 4.3.3.

4.3.2 Conflict between investigative standards

Of the eight investigative standards formulated by human rights courts and treaty bodies, two give rise to potential conflicts with IHL's regulation of investigations. As we shall see, certain of these conflicts can potentially be avoided through interpretation. But because of the potential for conflict, it is addressed here how such conflicts can be resolved.

4.3.2.1 Independence

The first potential conflict between investigative requirements under IHL and IHRL, concerns the standard of independence. IHRL requires an investigation to be carried out independently, which means that investigators must be statutorily and institutionally independent from those whose responsibility is likely to be engaged.[127] In an armed conflict context, this has been interpreted to mean that investigators must be operationally independent from the chain of command.[128] In other words, military police are sufficiently independent, but direct commanders are not. Moreover, investigations by military prosecutors have been found lacking due to their lack of independence. The Inter-American Court has found military jurisdiction over human rights violations to be acceptable only highly exceptionally, and in case of serious human rights violations has rejected this approach outright.[129] The European Court has similarly found that the investigation into civilian

127 See Chapter 5, §5.3.5, Chapter 6, §5.3.5, Chapter 7, §5.3.5, for a synthesis see Chapter 8, §1.5.

128 See Chapter 5, §6.4.3, Chapter 6, §6.4.3, Chapter 7, §6.4.3. Further, see *Al-Skeini v the United Kingdom* (n 123) [169]-[177]; *Jaloud v the Netherlands*, ECtHR [GC] 20 November 2014, Appl No 47708/08 [189]-[190].

129 Chapter 6, §5.3.5; *Cruz Sánchez et al. v Peru* (n 48) [398]; [401]-[404].

deaths by a military prosecutor on the basis of witness testimonies by military servicemen is problematic in light of the requirement of independence.[130]

IHL, meanwhile, places heavy emphasis on the role of military commanders in the prevention, suppression, repression, and thus investigation, of breaches. Additional Protocol I clearly envisions the commanders as an 'investigative magistrate', who is first on the scene, and first responsible for investigation.[131] Thus, military commanders are under the *obligation* to investigate, pursuant to IHL. And that is not all, they are even *criminally liable* if they fail to do so – both under IHL and ICL.[132]

IHL and IHRL therefore require wholly different things: IHL requires commanders to investigate, and holds them criminally liable if they do not, whereas IHRL effectively prohibits commanders from investigating, because this breaches the independence of the investigation – a case of contrary conflict. Such conflict must, in principle, be resolved by reliance on the *lex specialis derogat legi generali* rule, meaning that the rule which is explicit and meant to govern a situation, takes precedence. Because the contents of both rules are specific, and both are moreover attuned to situations of armed conflict – either because the rule itself is part of the law of armed conflict, or because the rule was modified by supervisory bodies for armed conflict situations – this method does not lead to an immediately apparent answer.

But perhaps, resolving the issue through application of *lex specialis* is not necessary in this specific situation. Despite the apparent contrary conflict between both rules, there appears to be some room to interpret the two harmoniously. IHL's requirement for commanders to investigate is sensible precisely because it is the commander who is the first on the scene, and the first who is in a position to react effectively to a potential violation. Moreover, as Michael Schmitt explains, the requirement to investigate *effectively* also means the investigator will need to have the expertise to do so:

> 'While impartiality and independence are investigatory requirements, so too is effectiveness. An investigator who does not understand, for example, weapons options, fuzing, guidance systems, angle of attack, optimal release altitudes, command and control relationships, communications capabilities, tactical options, available intelligence options, enemy practices, pattern of life analysis, collateral damage estimate methodology, human factors in a combat environment, and so forth, will struggle to effectively scrutinize an air strike.'[133]

130 *Abuyeva and Others v Russia*, ECtHR 2 December 2010, Appl No 27065/05 [212]; *Tagayeva and Others v Russia* (n 47) [536].

131 See Chapter 3, §4.3. Further, see Jean Pictet and others, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Yves Sandoz, Christophe Swinarski and Bruno Zimmermann eds, Martinus Nijhoff 1987) 1023, [3562]; Schmitt (n 126) 44.

132 AP I, art 86(2); see further Chapter 3, §4.3.

133 Schmitt (n 126) 84.

In other words, where the military expertise of a commander is absolutely necessary to effectively investigate, human rights courts and treaty bodies likely should take this into account. After all, the various investigative standards as formulated by human rights courts and bodies ultimately serve to ensure the effectiveness of the investigation, which effectiveness must be assessed holistically: did all investigative measures taken together amount to a proper investigation. Moreover, IHL would seem to leave some leeway for situations where commanders who become aware of a potential violation immediately take action to prevent further violations, who then report the incident up the chain of command, or to competent investigative authorities, such as military police or prosecutorial services. In fact, the ICRC and Geneva Academy have identified this as good practice in their *Guidelines on Investigating Violations of International Humanitarian Law* (hereinafter: *Guidelines*).[134] If indeed commanders take the very first required steps, such as securing the scene of an incident for further investigation, which they alone are arguably in a position to do,[135] before remitting the case for further investigation to other, independent investigators, this would seem to satisfy both IHL and IHRL criteria. IHL also allows for such, if we read 'all feasible measures (…) to prevent or repress the breach' to be taken by commanders,[136] as being satisfied when they report incidents. This reading is in line with Article 87(1) AP I, which further specifies commanders' duties 'to suppress *and report to competent authorities* breaches of the Conventions and of this Protocol'.[137] Thus, despite the ostensible conflict between IHL and IHRL on the criterion of independence, it would seem that both rules can be satisfied by having commanders take certain preliminary investigative steps only, necessary to ensure the further effectiveness of the investigation, and having them report incidents as soon as reasonably possible to competent authorities outside the chain of command.[138]

This approach which reconciles the requirements of IHL and IHRL, was supported by the European Court of Human Rights in the case of *Hanan v Germany*. As was set out in Chapter 7, the Court there found that whereas it is 'preferable' for investigations to take place outside the chain of command, this may not be feasible during active hostilities. Taking this context and the applicable IHL into account, this led the Court to the conclusion that commanders should not be excluded from having a role in on-site investigations.[139] On the facts of the case, the investigation had moreover been reported promptly to independent authorities which conducted a further investiga-

134 Lubell, Pejic and Simmons (n 118) 16–23.
135 Ibid.
136 AP I, art 86(2).
137 AP I, art 87(1). Emphasis FT.
138 Lubell, Pejic and Simmons (n 118) 16–23.
139 *Hanan v Germany*, ECtHR [GC] 16 February 2021, Appl No 4871/16 [223]-[224]. Further, see Chapter 7, §6.4.3.

tion. Thus, the approach outlined above with commanders operating to secure the further effective investigation before remitting the case as soon as possible to competent and independent authorities, can be accepted by IHRL courts and treaty bodies, and is feasible under IHL, *when concerning war crimes*. As was set out previously, war crimes require a criminal investigation, for which IHL too advises independent investigators, outside the chain of command.[140] State practice also confirms that many States require their commanders to report potential war crimes to investigatory authorities outside the chain of command.[141] It may therefore be concluded that the requirement that investigations be independent, can be interpreted harmoniously such that no conflict arises and no application of *lex specialis* is necessary.

Whether the above approach is also feasible for simple violations, however, which require an 'administrative investigation' only, can be questioned. There, IHL does not require a criminal response, and the aim of guaranteeing non-repetition through a lessons-learned approach, coupled potentially with acknowledgement of State responsibility and disciplinary measures, can be equally satisfied through command investigations. As the *Guidelines* also clarify, such administrative investigations are sufficient under IHL.[142] But if the incident giving rise to a non-serious violation also requires an investigation under IHRL, such as is likely the case when a lack of precautionary measures results in civilian casualties, such internal military investigations do not satisfy IHRL's standard of independence. Requiring States to submit also such incidents to independent investigative authorities likely clashes with what IHL aims to do: set strict requirements for war crime investigations, and leave a wide margin of discretion to States in how they address non-serious violations. If this margin of discretion left to States is read as implying an IHL *permission* to do no more than institute an investigation which is able to determine State responsibility and a potentially administrative sanction, then we are faced here with a normative conflict which must be resolved through application of *lex specialis*.

Let us therefore look at the two determinatives of *lex specialis*, specificity of the rules, and the extent to which they were meant to govern a situation. Arguably, IHRL is more specific in its requirement of independent investigations, as human rights courts and treaty bodies have been explicit and clear in their requirements, while IHL provides rudimentary guidance only when it comes to how States should conduct investigations into non-serious violations.[143] Nevertheless, if IHL's norms are interpreted as being *permissive*, as

140 Lubell, Pejic and Simmons (n 118) 16–23.
141 Chapter 3, §4.3; see further Margalit (n 2) Chapter 6; Lubell, Pejic and Simmons (n 118) fn 51.
142 Lubell, Pejic and Simmons (n 118) 32–6.
143 Murray and others (n 12) 334–9.

intentionally leaving discretion to States,[144] then it does not lack specificity. Which rule is designed to govern a situation depends on the precise context of the incident, which as was set out above also in the context of precautions in attack,[145] must depend on the exact circumstances pertaining during the use of force, and whether the incident thus falls within an 'active hostilities', or rather a 'security operations' paradigm. During active hostilities, IHL must then take the lead, meaning that a lack of precautions resulting in civilian deaths, constitutes a 'regular' IHL violation, which requires an administrative investigation only. Under a security operations paradigm, conversely, IHRL provides the main frame of reference, and where precautionary measures were lacking leading to incidental loss of civilian life, this will need to be investigated independently, conforming to human rights standards.[146]

4.3.2.2 Follow-up to investigations

A further potential conflict between IHL and IHRL when it comes to investigative standards, is the IHRL requirement that investigations must be followed, if appropriate, by prosecution and punishment. This emphasis, which has been particularly strong under the ACHR,[147] but which also features quite prominently under the ICCPR and ECHR,[148] can under certain circumstances clash with IHL. For instance, the IHL governing NIACs requires States to endeavour to enact the broadest possible amnesty at the end of the conflict, which would absolve those responsible from investigation and prosecution.[149] Also, closely intertwined with the requirement of independence discussed above, many States if they do prosecute their own armed forces, rely on military prosecutors and courts. IHRL, however, on many occasions stresses the importance of independent civil courts to oversee and adjudge perpetrators of human rights violations, especially where civilians fell victim to such conduct. These two issues are addressed here.

Firstly, the IHRL duty to investigate entails an obligation for States to remove all *de facto* and *de jure* obstacles for investigation, prosecution and

144 Also explained as constituting a *qualified* silence; Marco Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford University Press 2011) 77. Similarly, see Sivakumaran (n 31) 92.

145 *Supra*, §3.4.2.1.

146 For a contrary reading, assuming IHL's rudimentary rules on how investigations must be carried out ought to always be given substance by way of reference to IHRL, see Murray and others (n 12) 334–9.

147 See Chapter 6, §3.4 and §5.3.7.

148 See Chapter 5, §5.3.7; Chapter 7, §5.3.7.

149 AP II, art 6(5).

punishment, including a prohibition of amnesties.[150] Meanwhile Additional Protocol II, applicable to non-international armed conflicts, requires States to 'endeavour' to grant 'the broadest possible amnesty' for those who have taken part in hostilities,[151] thus giving rise to contrary obligations. Moreover, the ICRC has identified this rule to be part of customary law,[152] which means that the rule applies to all NIACs, and all States.[153] Amnesties absolve those involved in a conflict from their criminal responsibility, which conflicts directly with IHRL's insistence on criminal measures for certain human rights violations committed during the conflict. A potential way of reconciling these two norms is to be found in the ICRC's formulation of an exception to the customary rule requiring amnesties, which is not part of AP II: war crimes should not be made subject of amnesties.[154] This exception goes a long way of bringing IHL and IHRL closer together, and human rights courts have gratefully relied on this exception,[155] but it does not solve all issues. There remain human rights violations which do not amount to war crimes, but which nevertheless require criminal prosecution. Thus, on the issue of the use of lethal force against fighters and civilians directly participating in hostilities during NIACs, which was already touched upon above,[156] IHRL would require an investigation and a criminal follow-up thereto, while IHL prescribes the granting of amnesty. Similarly, a lack of precautions in attack resulting in civilian deaths would require criminal investigations under IHRL, whereas as a non-war crime, the IHL of NIACs prescribes 'endeavouring' the granting of amnesty. Interestingly, the Inter-American and European Courts have qualified the prohibition of amnesties as relating to 'serious violations'[157] and 'grave breaches'[158] of (fundamental) human rights – without however defining what this means precisely, and with both formulations not being legal terms of art. Arguably however, the regional courts thus leave some flexibility for less grave violations, such as might be the case where conduct during armed conflict is not viewed as a war crime, and perhaps even as not unlawful at all. The key to

150 *General Comment No. 36* (n 4) [27]; *Gelman v Uruguay* (Merits and Reparations) Inter-American Court of Human Rights Series C No 221 (24 February 2011) [226]; *Marguš v Croatia*, ECtHR [GC] 27 May 2014, Appl No 4455/10 [127]. Further, see Chapter 5, §5.3.7; Chapter 6, §5.3.7; Chapter 7, §5.3.7; and for a synthesis see Chapter 8, §1.5.

151 AP II, art 6(5).

152 Henckaerts and Doswald-Beck (n 23) 611, Rule 159.

153 After all, AP II is limited in applicability both *ratione personae* (to signatories), and *ratione materiae* (to NIACs meeting the threshold defined in AP II, art 1(1)). Customary law does not have such limitations.

154 Henckaerts and Doswald-Beck (n 23) 611, Rule 159.

155 *Gelman v Uruguay* (n 150) [210]; *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 252 (25 October 2012) [286]; *Marguš v Croatia* (n 150) [129]-[139].

156 *Supra*, §3.4.2.1.

157 *Gelman v Uruguay* (n 150) [226].

158 *Marguš v Croatia* (n 150) [139].

solving the issue must ultimately be found in a nuanced application of *lex specialis*, with the lawfulness of conduct depending on whether it was committed during active hostilities, or during security operations. One way for States to tackle this issue might be to enact amnesty laws which explicitly exclude application to 1) war crimes, 2) serious violations of human rights (however defined), and 3) human rights violations committed outside active hostilities. This way, it can be ensured that for active hostilities, IHL's amnesty rule prevails, whilst for all situations falling short of active hostilities, IHRL's duty to investigate, prosecute, and punish is applied.[159]

Secondly, once criminal prosecution and trial is initiated, IHRL sets further norms. On the one hand, these concern fair trial rights of the accused, which guide how prosecution and trial may be conducted fairly. These rights are not addressed further here. On the other hand, the duty to investigate, prosecute, and punish also governs such proceedings to a certain extent.[160] The duty to investigate is an obligation of means, a due diligence obligation, and there is therefore no obligation for a trial to end in a conviction[161] – a requirement which would quite obviously violate the presumption of innocence. Rather, IHRL requires the investigation and subsequent trial to be 'genuine', not just a show trial 'preordained to be ineffective',[162] and conducted before an independent and impartial tribunal. This also means that prosecution and trial before military courts is potentially problematic – although the various human rights regimes appear to take somewhat varying approaches to this issue. The *Inter-American Court* has been consistent and adamant in excluding investigations under military jurisdictions, for violations of the ACHR.[163] That

159 I leave aside here the issue whether the duty to investigate, prosecute, and punish can be balanced against the interests of peace, if the conclusion of a peace agreement (seemingly) requires the granting of amnesties to members of NSAGs. There is extensive literature on this 'peace versus justice'-debate, to which I do not aim to add. See, for instance, Courtney Hillebrecht, Alexandra Huneeus and Sandra Borda, 'The Judicialization of Peace' (2018) 59 Harvard International Law Journal 279; Karen L Engle, Zinaida Miller and Dennis Davis (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press 2016); Jacopo Roberti di Sarsina, *Transitional Justice and a State's Response to Mass Atrocity. Reassessing the Obligations to Investigate and Prosecute* (TMC Asser Press 2019).

160 In the words of the European Court, 'Where the official investigation leads to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect the right to life through the law. In this regard, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished', *Armani Da Silva v the United Kingdom*, ECtHR [GC] 30 March 2016, Appl No 5878/08 [239].

161 Ibid [238] and [259]; *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (n 155) [242] and [248]; see also Giovanna Maria Frisso, 'The Duty to Investigate Violations of the Right to Life in Armed Conflicts in the Jurisprudence of the Inter-American Court of Human Rights' (2018) 51 Israel Law Review 169, 174.

162 *Velásquez Rodríguez v Honduras* (Merits) Inter-American Court of Human Rights Series C No 4 (29 July 1988) [177].

163 See Chapter 6, §6.4.3.

system ought to be reserved only for those individuals who are still in active military service, and limited to cases involving crimes or infractions that by their very nature violate legal interests specific to the military order.[164] The *European Court* is less stringent, and applies a more holistic test to ascertain investigators' and courts' independence from the perspective of the duty to investigate. The leading consideration when it assesses independence in this context is whether in the concrete case under examination, there were indications calling independence into question. This means that 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 other contextual factors can lead to that conclusion.[165] Moreover, it must be noted that the Court itself attaches weight to whether State agents are implied in ill-treatment or unlawful killings, in which case a military justice system may be less suitable.[166] The European Court thus takes a relatively nuanced approach, and leaves more leeway for States to conduct prosecution and trial through a military justice system than the Inter-American Court. The *Human Rights Committee* has not yet developed an extensive jurisprudence on this matter, but has in the context of disappearances found that the system of investigation, prosecution, and adjudication, must 'operate, as a rule, within the ordinary criminal justice system'.[167] Whereas the various IHRL systems thus all stress the independence of the investigation and the follow-up proceedings thereto, they have interpreted this criterion in varying ways. The ordinary criminal justice system is the preferred method for all systems, because it guarantees the best safeguards for independence, but at least under the European system there is some leeway for military proceedings so long as in the concrete circumstances of the case, there are no signals that the independence of the proceedings was compromised.

Compared with the human rights concerns for the independence of the proceedings following investigation, IHL is markedly less pronounced. For prisoners of war, GC III stipulates that POWs shall be tried by military courts, unless insofar as the State's own forces would also be tried by civil courts – and the independence and impartiality of such a court must in any case be ensured.[168] For prosecution and trial of a State's own armed forces, however,

164 E.g. *Cruz Sánchez et al. v Peru* (n 48) [397]; *Santo Domingo Massacre v Colombia* (Preliminary Objections, Merits and Reparations) Inter-American Court of Human Rights Series C No 259 (30 November 2012) [158]; see further Frisso (n 161) 188.

165 *Mustafa Tunç and Fecire Tunç v Turkey*, ECtHR [GC] 14 April 2015, Appl No 24014/05 [217]-[254]. See Chapter 7, §5.3.5.

166 Ibid [228].

167 *General Comment No. 36* (n 4) [58].

168 GC III, art 84. Questioning whether this provision really safeguards POW rights, see Derek Jinks, 'The Declining Significance of POW Status' (2004) 45 Harvard International Law Journal 367, 434–6; generally, see Peter Rowe, 'Penal or Disciplinary Proceedings Brought

IHL sets no standards whatsoever. Even though IHL therefore requires States to monitor their military operations, ensure they have effective systems of supervision, implementation and enforcement of the rules, and requires States to investigate any potential breaches in this context, it does not regulate how subsequent proceedings must be conducted. This, arguably, leaves room for application of human rights norms, which as was explained, *do* govern this situation. However, IHRL's emphasis on civil rather than military jurisdiction over serious human rights violations can clash with State practice which relies quite heavily on military prosecutors and courts.[169]

There appears to be some middle ground between military proceedings and IHRL's requirement of independence. As the European system illustrates, it is practical independence in a concrete case which is ultimately decisive of whether an investigation and subsequent trial meets the requirements set to ensure the effective protection of victims' rights. Meanwhile, the Inter-American Court's stricter stance on this issue is understandable and justified. As was explained in Chapter 6,[170] the context on the American continent has shaped the San José Court's case-law. In this context of rampant impunity and State-sponsored and State-led atrocities, which were subsequently covered up by the State, a certain mistrust of prosecutors and judges who form part of the military and who are therefore not fully independent from the executive, is justified. The European Court would no doubt find similarly in cases where the military is completely and absolutely involved in widespread and systematic atrocities. This makes it difficult to abstract a more general code of conduct when it comes to military proceedings, however. Whereas State reliance thereon does not appear to be out of the question altogether, where a State's military is implicated in atrocities to an extent where there appears to be a systematic failure, or rather even a policy which prescribes such atrocities, then clearly a military justice system which is not completely separate from the chain of command and the executive, can no longer be perceived as sufficiently independent. In less extreme circumstances, however, there does appear to be leeway for military justice systems operating to adjudicate IHL and IHRL violations committed by State armed forces during armed conflicts.

4.3.3 Competition between investigative standards

Of the eight investigative standards as applied by human rights courts and bodies, it was shown above that the requirements of an *impartial* and *ex officio* investigation converge under IHL and IHRL, while the requirements of *independence*, and a sufficiently independent *criminal law follow-up* lead to potential

against a Prisoner of War' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (Oxford University Press 2015) 1028–9.

169 Margalit (n 2) 153.

170 Chapter 6, §2.

conflicts. This leaves four investigative standards which fall under the paradigm of normative competition. The requirements that investigations are (i) prompt and carried out with reasonable expedition, (ii) serious, effective, adequate, and thorough, (iii) sufficiently involve victims or their next of kin, and are (iv) transparent and subject to public scrutiny, do not lead to conflicts with norms of IHL. Nonetheless, simple application of these standards may raise tensions with IHL's object and purpose, and can therefore give rise to normative competition. The following discusses these criteria for the effectiveness of investigations in turn, explains why these standards raise tensions with IHL, and how such tensions can be resolved.

4.3.3.1 Prompt and carried out with reasonable expedition

If an investigation is to have any hopes of being effective, it must be initiated promptly after an incident.[171] This is crucial because certain evidence will simply be lost if it is not secured immediately, if the scene of events is not cordoned off, and witnesses will be more difficult to find, and their testimonies will be less reliable, if too much time is allowed to pass. Thus, the effectiveness of many of the concrete investigative steps required which make an investigation serious, effective, adequate and thorough, hinge on the promptness of the investigation. These considerations apply to all investigations, whether they are carried out under IHRL or IHL. Human rights courts and treaty bodies have found to this effect expressly, with the European Court of Human Rights recognising promptness as one of the 'essential parameters' for an effective investigation,[172] and stressing its importance for safeguarding 'public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts'.[173] Under IHL, the standard of promptness is implicit in the requirement that an investigation is capable of leading to prosecution and punishment. Despite the role of promptness as an investigative standard under both regimes, tensions can nevertheless arise in its application.

What 'prompt' entails precisely is difficult to say in the abstract, and will depend on the exact moment State authorities become aware of a potential violation, and whether an immediate response is called for. As the Inter-American Court formulates it, States must initiate the investigation 'as soon

171 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.

172 *Mustafa Tunç and Fecire Tunç v Turkey* (n 165) [225].

173 *Armani Da Silva v the United Kingdom* (n 160) [237]; 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) 40.

as is practicable after [taking] knowledge of the facts'.[174] In case of enforced disappearance, for instance, any hope of saving the life of the disappeared person hinges on an immediate and effective response.[175] In other situations, it will depend more on context. In situations of armed conflict, what is 'as soon as practicable' is influenced by the exigencies of the situation. As the Human Rights Committee has found, an 'unexplained delay' can undercut the effectiveness of the investigation.[176]

Under IHL, there are no explicit norms governing what the 'promptness' of an investigation entails.[177] Some inferences can be drawn from the duties to 'repress' grave breaches and 'suppress' all other breaches, which according to Additional Protocol I requires superiors to 'take all feasible measures within their power to prevent or repress' a violation.[178] Although there are no further clarifications on the promptness of such action, at least for the duty to prevent, there can be no question that effective prevention requires prompt action on the part of superiors as soon as they find out their subordinates intend to commit a breach. Soft law moreover reinforces this point.[179] Yet, in the absence of explicit rules guiding when States must initiate investigations, there is a measure of leeway here for States. This is all the more so in case of administrative investigations into non-serious breaches, which likely do not warrant an equally prompt response. Ultimately, IHL treaty law is therefore silent, and how the standard of promptness must be construed has not yet crystallised.

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174 *Vargas-Areco v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 155 (26 September 2006) [77].

175 See Chapter 6, §5.3.3.

176 It found a violation of the right to life because of unexplained 'delay in initiating and completing the criminal investigation and proceedings on Mr. Novaković's death' (*Novaković v Serbia*, HRC 21 October 2010, CCPR/C/100/D/1556/2007 [7.3]) and found in the context of the Chechnyan conflict, that Russia must 'Ensure prompt and impartial investigation by an independent body of all human rights violations allegedly committed or instigated by State agents and suspend or reassign the agents concerned during the process of investigation' (*Concluding Observations on Russia*, HRC 24 November 2009, CCPR/C/RUS/CO/6 [14]).

177 Chapter 3, §§4.3 and 4.4; further, see Murray and others (n 12) 334–7.

178 AP I, art 86(2).

179 E.g. Human Rights Council 23 September 2010, *Report of the Committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards*, A/HRC/15/50 [21] and [33]; Goldstone Report (2009) UN fact-finding mission on the Gaza conflict (25 Sept 2009), UN Doc. A/HRC/12/48 [1814]; UNGA Resolution 60/147 (2005), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, principle 3(b); Lubell, Pejic and Simmons (n 118).

IHL's somewhat unspecified criterion of promptness potentially leads to tensions with IHRL's harder requirement that States initiate investigations 'as soon as practicable', without delays. It may be thought that one can simply apply the IHRL requirement of promptness, and thus rely on IHRL to fill gaps left by IHL. Nonetheless, there is at least a potential for normative tension here, insofar as IHRL places demands on States which go at the cost of their operational capabilities. The European Court's jurisprudence illustrates best how such tensions can arise, as it tries to walk a balanced path. In *Al-Skeini*, it held that whereas it is cognisant that the exigencies of armed conflict may hamper a State's possibilities of investigating, a prompt response is nonetheless essential.[180] In the same vein, in *Damayev*, it held that the Russian authorities' instigation of an investigation into an airstrike which had killed the applicant's wife and two children, eight days after the event and at the very least four days after the prosecutor had become aware of the incident, was 'unjustifiably long and inevitably contributed to the ineffectiveness of the investigation'.[181] In *Hanan*, it considered that a situation of armed conflict may lead to an investigation being 'delayed', and accepted that in the context of active hostilities in an extraterritorial conflict, on-site investigators arrived 12 hours after an airstrike, and that preliminary investigations were started by respective prosecutors three and four days after the incident.[182] At the same time, in a number of cases relating to the Yugoslav conflict, the Court has shown leniency in assessing the promptness of investigations, taking account of exigencies of armed conflict, and the difficulties for newly independent States who simply needed time to set up a proper investigative system.[183] Thus, there is some flexibility under the ECHR as to the promptness of investigations where circumstances, such as those arising out of armed conflict, render an immediate investigative response difficult. This showcases how in the European case-law, promptness is essential for the effectiveness of the investigation, and yet is a flexible context-sensitive criterion which can take account of the exigencies of armed conflict situations, and which feeds into the more general criterion of investigating 'as soon as is practicable after [taking] knowledge of the facts'.

The potential tension between IHL and IHRL may therefore be alleviated, as was suggested before, by relying on IHL's principle of military necessity. Even though IHL may be silent on the specific issue of promptness, that does not mean that there is a complete normative vacuum; its principles guide the interpretation of any vague norm and apply also to issues not explicitly covered by its provisions. Thus, if IHRL's requirement that States investigate

180 *Al-Skeini v the United Kingdom* (n 123) [167].
181 *Damayev v Russia*, ECtHR 29 May 2012, Appl No 36150/04 [81].
182 *Hanan v Germany* (n 139) [223], [227].
183 *Palić v Bosnia and Herzegovina*, ECtHR 15 February 2011, Appl No 4704/04 [70]-[71]; *Zdjelar and Others v Croatia*, ECtHR 6 July 2017, Appl No 80960/12 [91]-[94].

as soon as practicable is interpreted in light of military necessity, this can relieve tensions, and ensure that the investigative requirements placed on States remain practicable and feasible. This may also allow for perhaps a more graduated approach, with certain investigative steps which can be taken immediately being required, and further follow-up as soon as this is feasible. For instance, if military operations are monitored through video surveillance, any footage can be reviewed as soon as possible, together with any intelligence and data gathered by the State, and witness statements can be taken from military personnel involved. If active hostilities are ongoing, or if the State lacks territorial control, sending investigators to secure the scene of an incident and to gather evidence may not yet be feasible, but first steps such as those outlined above can be taken regardless of further circumstances. Further follow-up can then be carried out as soon as this is feasible, taking account of military necessities.

4.3.3.2 A serious and effective, adequate and thorough investigation

Whereas the duty to investigate is an obligation of means, the State's investigative efforts must nevertheless be *capable* of achieving the aims of establishing what happened, identifying those responsible, determining whether use of force was justified and thus whether the law was breached, and that ultimately redress is offered.[184] Practically, this means States must take a number of investigative steps, primarily with respect to fact-finding. Human rights courts and treaty bodies have been very explicit in what this entails, although they have done so under various phrasings – with the Inter-American Court referring to the criterion that an investigation is 'serious and effective', the European Court insisting on the 'adequacy' of the investigation, and the Human Right Committee holding that it must be 'thorough, effective, and credible'. They have moreover fleshed out this standard in their case-law, at times establishing in great detail what is required of States, for instance with respect to establishing bullet trajectories, separating suspects from potential witnesses, gathering witness testimonies, conducting autopsies, and so forth. Any deficiency in such steps, or an obvious line of inquiry which was not pursued, will lead to a violation of IHRL if it is such as to undermine the aim of establishing the facts and those responsible.[185] IHL, meanwhile, equally requires investigations to be effective and capable of leading to prosecution and punishment, or to establishing responsibility, but does not outline expressly what this amounts to in practice. This arguably leaves leeway for States

184 *Mustafa Tunç and Fecire Tunç v Turkey* (n 165) [172]; *Jaloud v the Netherlands* (n 128) [200]; *Velásquez Rodríguez v Honduras* (n 162) [177]; *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)* (Advisory Opinion) Inter-American Court of Human Rights Series A No 9 (6 October 1987). Further, see Chapter 5, §5, Chapter 6, §5, Chapter 7, §5, Chapter 8, §1.5.

185 E.g. *Hanan v Germany* (n 139) [202].

to decide how they conduct investigations, which potentially causes tensions with IHRL's specific and detailed requirements. Thus, much like the situation regarding the standard of promptness, we are faced with an IHRL demand which – although allowing for some flexibility – may cause friction with IHL's rather indeterminate norms.

IHL merely provides, in case of serious violations, that the investigation must be *capable* of leading to prosecution and punishment of the accused.[186] *How* the investigation is carried out, then, and what avenues must be pursued, is left up to States themselves. This leaves a lot of discretion to State authorities when they conduct investigations, and arguably leaves more leeway for practical constraints borne out by the exigencies of the situation, and countervailing military necessities. Because IHL, however, does not explicitly formulate the standards investigations must meet, and to what extent the feasibility of such measures plays a role, there is no *conflict* here between IHL and IHRL. Tensions may nonetheless arise if IHRL's requirements go against military necessities by placing undue burdens on the State. A case in point is *Jaloud*, where a Dutch lieutenant shot and killed a civilian at a vehicle checkpoint in Iraq during an extraterritorial military operation. The European Court in this case 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.[187] Crucially though, the lieutenant was the highest ranking officer present at the checkpoint, meaning that separating him from 'witnesses', namely the other troops, would have significantly impacted the military's operational capabilities on the ground in a tense security situation where the checkpoint had in fact been attacked earlier that very evening. Moreover, the Court took issue with deficiencies in the autopsy which was carried out later by an Iraqi doctor. It found that the Dutch troops ought to have taken responsibility for the autopsy themselves, or at the very least should have monitored it. The Dutch State, meanwhile, had argued that it did not have the proper facilities in Iraq, and that the troops which had brought Mr. Jaloud's remains to hospital had been forced to leave; the situation had been sufficiently hostile for these forces to fear for their lives. This goes to illustrate that the requirement that investigations be 'effective' can give rise to normative competition.

In order to resolve this normative competition, the flexibility in the applicable IHRL norms must be considered. Human rights jurisprudence on this point shows that what constitutes an 'effective' investigation is a relatively open norm. What lines of inquiry must be pursued can only be determined on a contextual, case-by-case basis. Nonetheless, the extensive case-law on what constitutes an 'effective' investigation does give some guidance. Both the Inter-

186 See Chapter 3, §4.3.
187 *Jaloud v the Netherlands* (n 128) [206]-[208].

American Court and the Human Rights Committee have relied heavily on the United Nations *Manual on the Effective Prevention and Investigation of Extra-judicial, Arbitrary and Summary Executions*,[188] meaning

> 'an investigation must seek, at the least, *inter alia*: a) to identify the victim; b) to obtain and preserve evidence regarding the death, so as to aid any potential criminal investigation regarding those responsible; c) identify possible witnesses and receive their statements regarding the death under investigation; d) establish the cause, manner, place and time of death, as well as any pattern or practice that may have caused the death; and e) differentiate between natural death, accidental death, suicide, and homicide. It is also necessary to exhaustively investigate the crime scene, autopsies and analyses of human remains must be conducted rigorously, by competent professionals, applying the most appropriate procedures.'[189]

The European Court's case-law closely mirrors such requirements.[190] States must therefore take a variety of concrete investigative steps, which are capable of bringing the truth to light, and which demonstrate the State's genuine effort to do so. In situations of armed conflict, and especially during active hostilities, States may not have all investigative means at their disposal which they normally do when they exercise full control. In principle, the duty to investigate effectively is able to accommodate such difficulties, because it is an obligation *of means*, a due diligence obligation, and there is no obligation to ultimately solve all cases, and to prosecute and punish all perpetrators. Thus, as a starting point, so long as the State does everything *feasible* by way of investigative steps, this is likely to satisfy the duty to investigate effectively.[191] As the European Court has made clear, during armed conflict 'obstacles may be placed in the way of investigators and (…) concrete constraints may compel the use of less effective measures of investigation'.[192] Nevertheless, 'all reasonable steps' must be taken. The Inter-American Court has found similarly, simultaneously acknowledging investigative difficulties, and stressing the continued application of the duty to investigate to break the cycle of impun-

188 United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, Doc. E/ST/CSDHA/.12 (1991).

189 *Mapiripán Massacre v Colombia* (Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No 134 (15 September 2005) [224]; *Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 124 (15 June 2005) [149]. Further, see Chapter 5, §5.3.4; Chapter 6, §5.3.4.

190 *Damayev v Russia* (n 181) [84]; *Armani Da Silva v the United Kingdom* (n 160) [233]. Further, see Chapter 7, §5.3.4.

191 See Chapter 5, §6.4.3; Chapter 6, §6.4.3; Chapter 7, §6.4.3.

192 *Jaloud v the Netherlands* (n 128) [186]; *Al-Skeini v the United Kingdom* (n 123) [164]. References omitted. For a case of NIAC, see *Tagayeva and Others v Russia* (n 47) [504], 'The Court has 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'.

ity.[193] It would appear, therefore, that there is some measure of flexibility in this respect.

As human rights jurisprudence from the various systems shows, however, this 'relaxation' of investigative standards in name, does not always translate to practice. The Inter-American Court appears to apply its case-law on the duty to investigate equally during armed conflict, as it does in cases pertaining to normalcy,[194] and has in fact stated that States must employ 'all necessary means' to ensure effective investigation.[195] The European Court, similarly and despite its awareness of practical constraints, has proved demanding. This was already illustrated above in relation to the case of *Jaloud*. More recently, it proved more sensitive to constraints on investigators in the case of *Hanan*, concerning the investigation into an airstrike taking place during the active hostilities of an extraterritorial NIAC. There it accepted, in light of the situation, that on-site investigators had arrived approximately 12 hours after the airstrike, after locals had already removed the physical remains of victims. It therefore also accepted that the investigation was ultimately unable to establish the precise amount of casualties as well as the status of those killed, although 'under normal circumstances' that would have proved critical.[196] It further deferred to the German prosecutors' focus on *mens rea* as determinative for the lawfulness of the strike, which was the first time the Court deferred to an IHL standard for determining lawfulness.[197] 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 plays an implicit role as the yardstick for the legality of the use of force.

It would therefore appear that the IHRL criterion that all reasonable investigative steps must be taken, is in principle sufficiently flexible to take the realities of armed conflict into account, and to take the principles of IHL onboard. The Inter-American and European Courts have both formulated relatively flexible tests which allow for taking practical constraints into account. The way to resolve tension, then, may be to interpret IHRL's requirement of 'effectiveness' in light of IHL's principles, most pertinently that of military necessity. Whereas the overarching standard then remains that all reasonable steps must be taken to carry out an effective investigation, the idea of employing 'all necessary

193 See *Cruz Sánchez et al. v Peru* (n 48) [350]; *Mapiripán Massacre v Colombia* (n 189) [238].
194 See Chapter 6, §6.4.
195 *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 270 (20 November 2013) [440]; cf. Frisso (n 161) 189.
196 *Hanan v Germany* (n 139) [218].
197 Ibid.

means',[198] would be more seriously counterbalanced by necessities arising out of the conflict situation. This therefore does not necessarily mean IHRL courts and treaty bodies need to alter their tests, as these already allow for taking into account the practical constraints placed on investigative measures. This is illustrated by the European Court's approach in *Hanan*. Furthermore, taking military necessity into account more explicitly, not merely as an issue of practicality and feasibility, but also as a legitimate interest, may allow it to serve as a counterweight for the interest of effective investigation. This would therefore mean that it is not only practical impossibility which inhibits certain investigative steps, but also an unreasonable burden placed on a State's military and operational capacities.[199] In the case of *Jaloud*, this might arguably have led the European Court to depart from its insistence on separating suspects from witnesses, and have therefore mitigated tensions between IHRL and IHL.

4.3.3.3 Involvement of victims and transparency

Finally, investigations must, according to human rights jurisprudence, guarantee a certain level of transparency, and sufficiently involve victims or their next of kin. This means there must be a certain level of public scrutiny of the case, which has to do with ensuring public confidence in a State's adherence to the rule of law, as well as ensuring the broader right to truth. In addition, more closely related to victims' individual rights, victims and their next of kin must be put in a position to effectuate their procedural rights in the investigation, which means they must be kept abreast of how the investigation progresses, especially at crucial junctions such as before a potential decision to discontinue the investigation.[200] This can lead to tensions with IHL, insofar as that regime does not require transparency, and where interests of State security may point in a different direction. Because IHL is not explicit in this respect, a situation of normative competition arises – with both regimes pulling in different directions whilst falling short of conflict.

What is required precisely under IHRL, varies from system to system. The Human Rights Committee appears to go furthest, also finding that States should allow victims to present evidence, and 'make public information about the investigative steps taken and the investigation's findings, conclusions and recommendations, subject to absolutely necessary redactions (…)'.[201] And in fact its emphasis on transparency goes further, where it finds that during armed conflicts,

198 *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (n 195) [440]; cf. Frisso (n 161) 189.

199 *Al-Skeini v the United Kingdom* (n 123) [152]; Quénivet (n 116) 138.

200 *Mapiripán Massacre v Colombia* (n 189) [219]; *Anguelova v Bulgaria*, ECtHR 13 June 2002, Appl No 38361/97 [140].

201 *General Comment No. 36* (n 4) [28], references omitted.

> 'States parties should, in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered.'[202]

Although the Committee qualifies this statement in its General Comment by saying States *should* guarantee transparency this way, which indicates this is a point of progressive development rather than a fully crystallised legal standard,[203] the Committee's case-law will likely develop in this direction.

The Inter-American and European Courts, meanwhile, set similar standards when it comes to the involvement of victims or their next of kin, emphasising that their interests and legal position must be secured. As far as broader transparency goes, the European Court takes a more nuanced position. It finds that there is no 'automatic requirement' of disclosing police reports, because of sensitive materials which may be included therein.[204] It therefore requires a '*sufficient* element of public scrutiny', the degree of which can vary on a case-by-case basis.[205] 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.[206]

IHL is not equally concerned directly with the rights and position of victims. State obligations form the core of IHL, with a more modest position for individualised rights for victims.[207] Nonetheless, IHL does not explicitly militate against notifying victims and their next of kin of the progress of an investigation, insofar as feasible. In fact, when it comes to the dead and missing, the Geneva Conventions impose specific obligations on States to record casualties, insofar as possible including an identity and place of burial.[208] This information must moreover be transmitted, through appropriate channels, to the adverse party to the conflict. Whereas the Geneva

202 Ibid [64], references omitted.

203 For an explanation of the HRC's use of the wording 'should', cf. Sarah Joseph, 'Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36' (2019) 19 Human Rights Law Review 347, 349.

204 *Armani Da Silva v the United Kingdom* (n 160) [236].

205 *Al-Skeini v the United Kingdom* (n 123) [167].

206 Ibid.

207 Silja Vöneky, 'Implementation and Enforcement of International Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) 684; contrary, however, see Lawrence Hill-Cawthorne, 'Rights under International Humanitarian Law' (2017) 28 European Journal of International Law 1187.

208 GC IV, art 16; AP I, art 33; GC I, art 17; and Rules 112-116 of the ICRC Customary IHL Study, Henckaerts and Doswald-Beck (n 23). See further Breau and Joyce (n 31) 34–6; Zegveld (n 31) 458–9.

Conventions do not explicitly require the adverse party to in turn forward this information to victims' next of kin, the clear objective of these provisions cannot be otherwise.[209] Thus, IHL is certainly not indifferent towards this issue of informing next of kin. IHRL, however, goes one step further: next of kin must be involved 'to the extent necessary to safeguard [their] legal interests'.[210] This may well go beyond simply reverting the death of their loved one and the place they lie buried, because at relevant junctions during the investigation, next of kin must be informed so they can effectuate any procedural rights they have, for instance to give input or appeal any formal decisions taken – for instance a decision to discontinue the investigation, or not to prosecute.[211] Such obligations are not enshrined in IHL, and are moreover complicated by the specific avenues IHL opens for transmitting information. It requires States to forward information to an 'Information Bureau', which in turn transmits the information to the Protecting Power or Central Prisoners of War/Tracking Agency. These intermediaries then convey the information to the adverse party to the conflict, who finally brings the news to the next of kin.[212] Likely, this system falls short of IHRL requirements because at crucial junctions during a potential investigation, next of kin may not be aware of what is going on, and thus cannot exercise their procedural rights.

Arguably, then, IHL does not oppose involvement of victims or their next of kin in investigations. Nonetheless, there are practical constraints on what States can do during armed conflicts. IHL has set up a system to tackle a number of such issues, but this system seems equally concerned with setting up a line of communication at least on this issue of casualties, because warring States are likely to have cut diplomatic relations. Thus, this system is more complex and more time-consuming than would be envisioned under IHRL where the norm is that States keep next of kin up-to-date at least sufficiently to safeguard their legal position. The extent of this normative tension will to a large extent depend on the precise circumstances of the case. For instance, in cases of peaceful occupation, States are likely quite capable of being in direct contact with next of kin regarding investigative results. If a State is involved in active hostilities, such as extraterritorial aerial bombardments, identifying and contacting victims and their next of kin might be next to impossible. IHL equally does not address this issue, as its rules seem geared primarily to a

209 ICRC (n 110) [1599]-[1600].
210 *Anguelova v Bulgaria* (n 200) [140].
211 See *General Comment No. 36* (n 4) [28], which moreover adds that States must allow next of kin 'to present new evidence, [and] afford them with legal standing in the investigation'.
212 Extensively, see ICRC (n 110) [1585]-[1600].

'right to know' the fate of loved ones,[213] which would classically involve soldiers who perish whilst sent abroad, and where news of their fate is therefore reliant on the opposing State. Whereas cases where States have full territorial control would then arguably allow for more strict application of IHRL's criterion of involvement of next of kin, IHL considerations, practical constraints, and military necessity may alter the balance when it comes to situations where States lack such control, such as where they operate outside their territorial control, or in situations of active hostilities.

Finally, when it comes to the element of transparency and public scrutiny, IHL does not contain rules requiring transparency as such. Nor does it explicitly prohibit such. Nonetheless, military necessity, arguments of State and national security, and military strategy would argue against divulging the information required. IHRL's insistence on transparency, especially as formulated by the Human Rights Committee, thus causes tensions with IHL. The normative competition which ensues is again best solved by interpreting IHRL in light of the principle of military necessity. The European Court already accounts for limitations on transparency due to the sensitivity of information, finding that 'it cannot be regarded as an automatic requirement' to divulge sensitive materials with respect to military operations.[214] This flexible norm thus allows for giving sufficient weight to countervailing military considerations. For the ICCPR, the Human Rights Committee's far-reaching requirements appear less open to balancing, although the finding that States 'should' make public information *inter alia* regarding targeting, does leave some leeway for interpretation.

The requirements of involvement of next of kin and transparency, in sum, while giving rise to normative competition can potentially be brought into harmony by taking the guiding principles of IHL into account in their interpretation. The IHRL norms are relatively flexible and allow for such, which can alleviate tensions between both regimes.

4.4 Résumé

This section has subjected the investigative standards prescribed by IHL and IHRL to a comparative analysis. Whereas it is sometimes assumed that IHL's lack of detailed investigative standards allows for 'gap-filling' by IHRL, a more

213 Further, see Anna Petrig, 'Search for Missing Persons' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (Oxford University Press 2015); Daniela Gavshon, 'The Dead' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (Oxford University Press 2015).

214 *Hanan v Germany* (n 139) [233].

nuanced examination reveals a wide variety of normative convergence, conflict, and competition regarding investigative standards. Making use of the roadmap for interplay developed in Chapter 9, this section resolved these issues of normative overlap. Thus, it showed how the requirements of *ex officio* and *impartial* investigations, are equally important under IHL and IHRL, meaning both regimes can be applied alongside one another without giving rise to serious issues of interpretation. Meanwhile, requirements of strict *independence*, as well as *independent criminal proceedings following up to investigations*, can lead to normative conflict with IHL's reliance on command investigations, and its requirement of amnesties for those having taken part in NIACs. Section 4.3.2 has shown how such conflicts can be resolved, making use of the *lex specialis* rule. Finally, the requirements that an investigation be carried out *promptly and with reasonable expedition*, *effectively*, and *transparently and involving victims' next of kin*, do not conflict with rules of IHL, but nevertheless give rise to tensions with that regime. Such situations of normative competition can be remedied by reading IHRL norms in light of the principles of IHL, especially the principle of military necessity. This leads to an interpretation of IHRL which balances its requirements with IHL's basic tenets, thus resulting in a well-rounded and feasible investigative obligation for the State. This obligation moreover simultaneously works towards establishing what happened and who is responsible, as well as safeguarding operational and military necessities, thereby avoiding placing an unreasonable burden on the State.

5 Conclusion

This Chapter has shown to what extent investigative duties under IHL and IHRL overlap, and where and how they diverge or lead to normative tensions. This was done through a comparative analysis of the aims of investigations, their scope of application, and the standards they must adhere to. Investigative obligations under both regimes, it turns out, in many respects closely mirror one another. Their purposes are highly alike, in that they serve to ensure the effectiveness of their legal regime as such, requiring States to set up implementing mechanisms. Further, both regimes insist on ensuring the accountability of perpetrators and the establishment of State responsibility in respect of violations, which shows that IHL and IHRL drive in the same direction. In consequence, tensions do not normally arise with respect to the question which incidents require an investigation, even if only one regime requires an investigation, and the other does not. Finally, IHL and IHRL are very similar in requiring States to investigate impartially and of their own accord.

Yet, there are also conflicts between the rules of both legal fields. Where substantive norms of IHL and IHRL conflict, this also gives rise to conflicts with respect to the applicability of the duty to investigate. If incidents must be investigated if they were (potentially) unlawful, then of course, if an incident

is considered lawful under IHL but unlawful under IHRL, this leads to divergences in investigative obligations. This, the comparative analysis shows, is most prominently the case for the use of lethal force. If a use of lethal force is lawful under IHL but potentially unlawful under IHRL, whether States must conduct an investigation or not must be decided through application of *lex specialis*, which is a context-dependent test. Under an 'active hostilities paradigm', IHL will then be determinative of lawfulness and an investigation will be required only if the use of force was potentially unlawful *under IHL*. If an incident rather fell under a 'security operations paradigm', IHRL will take the lead, and determine whether an investigation is required.

Also controversial, but not giving rise to conflict, is the question whether States must investigate abuses by non-State actors during armed conflict. IHRL's requirement of such investigations would rather appear to give rise to *tension* with IHL's more restrictive stipulation of investigative obligations, leading to normative competition. This competition, it was shown, can be mitigated by interpreting the flexible norms under the ICCPR to accommodate the IHL principle of military necessity. Yet, under the ACHR and ECHR such flexibility does not as yet appear to exist – which means that unless the Inter-American and European Courts revise their positions, this tension cannot be alleviated and States will need to investigate human rights infringements caused by third parties under their jurisdiction – even if they concern abuses by non-State armed groups during an armed conflict.

With respect to the question *how* States must conduct an investigation, IHL and IHRL appear to diverge on a number of issues. Conflicts may arise with respect to the independence of investigations, as well as their criminal law follow-up. Yet, it would also appear that such conflicts are not as hard as they may seem. Whereas command investigations are insufficiently independent under IHRL, it would seem that a system where direct commanders take the initial investigative steps like securing the site of an incident, but immediately report the case to an investigative authority outside the chain of command who takes over the investigation, can satisfy IHRL's standards whilst also complying with IHL's rules on command investigations. With respect to IHL's insistence on amnesties for those having participated in NIACs, it would appear that so long as a caveat is made for war crimes, serious human rights violations, and human rights violations committed outside an active hostilities paradigm, both IHL and IHRL can be satisfied.

The requirements that an investigation is conducted promptly, adequately, transparently, and involves the victims' next of kin, may also give rise to tensions between both regimes. Under a paradigm of normative competition, the comparative analysis showed that most such tensions can be alleviated by interpreting the flexible human rights standards in light of the principles of IHL, thereby taking account of the exigencies of armed conflict situations. Thus, human rights standards are sufficiently flexible to take account of

obstacles which render an immediate on-site investigation impossible, which do not allow for pursuing all regular lines of inquiry, or interests of State security which preclude full transparency with respect to all military operations. The precise measure of flexibility may diverge somewhat under the various human rights regimes, which potentially also has to do with the case-by-case development of human rights law. It will be interesting to see how human rights case-law develops on this point.

In light of this comparative analysis, and the resolution of normative convergence, conflict, and competition pursuant to the roadmap for interplay, Chapter 11 can now provide an answer to the research question formulated in the Introduction.