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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11 Drawing conclusions

1 Answering the research question

This study has explored investigative obligations arising in respect of incidents during armed conflict, under IHL, IHRL, and their interplay. The inspiration for doing so, as identified in the introductory Chapter 1, was twofold. Firstly, what is required of States by way of investigating potential violations of the law during armed conflict lacks clarity – in part because the rules of IHL and IHRL diverge in this respect. Secondly, how IHL and IHRL interrelate is not clear, further obscuring when and how States must conduct investigations into incidents during armed conflict.[1] In order to clarify these issues, the following question has guided this study:

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

Based on this research question, it was mapped out in Parts I and II *when* and *how* States must conduct an investigation into an incident during armed conflict, under IHL and IHRL, respectively. Part III developed the normative framework for determining how norms of IHL and IHRL interact, how normative overlaps are to be resolved, and how this plays out for investigative obligations.

This Chapter first summarises this study's findings with respect to duties of investigation under IHL (Part I, §2), under IHRL (Part II, §3), and with respect to the secondary rules of international guiding the interplay between IHL and IHRL (Part III, §4). In presenting these findings, each section will start out by presenting a number of major takeaways from the research in that area, before presenting the findings as they relate to the scope of application and contents of the duty to investigate. Section 5 then provides an answer to the research question. The study concludes with a final reflection (§6).

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1 Chapter 1, §§1.2.2-1.2.3.

2 Overarching conclusions on the duty to investigate under IHL

Part I's examination of investigative obligations under IHL has brought clarity in a number of respects. First, the vague and indeterminate IHL treaty norms were fleshed out, based on an analysis of treaty law and the system of IHL, State practice, and soft law. In doing so, a clear legal obligation was identified, requiring States to investigate all serious *and* non-serious violations of IHL.[2] Second, it was shown that that States must conduct criminal investigations into serious breaches of IHL, whilst they may choose to stick to an administrative investigation when non-serious breaches are concerned.[3] Whether IHL requires a criminal or a non-criminal investigation to a large degree determines *how* an investigation must be conducted – and ultimately therefore how the standards an investigation must meet, relate to those under IHRL. Third, IHL requires investigations into violations during both IACs and NIACs.[4] Whereas the grave breaches regime applies during IACs only, investigative obligations which relate to other serious breaches (war crimes) and non-serious breaches do apply during NIACs. Fourth, the IHL system was shown to *rely* to a large extent on an obligation for States to investigate.[5] It is set up in a way which leaves the primary responsibility for implementation and enforcement of the law up to States themselves, with its effectiveness wholly dependent on States investigating their own conduct. This is all the more so because other forms of oversight are largely absent.

Based on these takeaways, the study provides clarity in respect of a number of controversial issues under IHL. It shows that the ongoing discussion as to *whether* IHL requires investigations, must now be considered to be settled. It further shows that whereas a distinction must be made between serious and non-serious breaches of IHL for the purposes of corresponding investigative duties, this is relevant only for the question *how* a State must investigate – not *whether* it must do so. Finally and crucially, the study provides clarity as to *when* and *how* States must investigate under IHL, by mapping out the scope, trigger, and contents of the duty to investigate under IHL.[6]

The following provides a brief overview of the conclusions of Part I of this study, thereby answering the first sub-question of this study's research question:

> *Are States under an obligation to investigate (potential) violations of IHL? If so, what are the scope of application and contents of such an obligation?*

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2 Chapter 3, §3. For the definition of 'serious' and 'non-serious' breaches, see Chapter 3, §3.2 and §3.3.
3 Chapter 3, §4.2.
4 Chapter 3, §3.4.
5 Chapter 3, §2.
6 Chapter 3, §3 and §4.

IHL's system of self-enforcement

Using a purposive and systematic interpretation method, based on three characteristics of the IHL treaty regime, the study concludes that the system set up is ultimately one of *self-enforcement*: it is the subjects of the law themselves – States – who must not only implement the rules in their domestic systems, but who must moreover supervise their own compliance, and enforce the rules in respect of their own conduct.[7] This is so because, *firstly*, under IHL there are no institutionalised oversight, implementation, or enforcement mechanisms. Insofar as any mechanisms do exist, they are not institutionalised in the sense that they are either dependent on prior *ad hoc* consent (for instance the International (Humanitarian) Fact-Finding Commission), on discretionary powers (such as the Security Council's powers of enforcement), or are principally limited in their jurisdiction to apply IHL, as applies to for instance human rights courts, as well as international criminal tribunals. This leads, *secondly*, to the conclusion that it is *States* who are the primary enforcers of IHL. In lieu of specific enforcement mechanisms, general international law normally leaves it up to States to enforce the law through unilateral (or coordinated) sanctions. There is, however, a *third* factor in play, which limits the regular operation of unilateral enforcement measures. States' countermeasures may not deviate from their humanitarian obligations, and they are equally prevented from suspending or terminating IHL treaties in response to breaches by others. This restricts the functioning of reciprocity, further underlining States' primary responsibility with respect to ensuring respect for IHL by their own armed forces.[8]

This strongly implies a duty to investigate.[9] The system of self-enforcement entails that States must implement IHL in their domestic systems, both in the law and in the practice of their armed forces, and must themselves oversee and review the actions of their armed forces in light of the applicable rules of IHL. This moreover ties in with the obligation to 'ensure respect' for IHL, pursuant to Common Article 1 to the Geneva Conventions. Thus, the system of IHL in itself requires States to supervise the conduct of their own armed forces, and it puts the primary responsibility for such oversight firmly on States themselves. This requirement is all the more clear if we consider that IHL does not only impose certain obligations on States, but also binds individuals directly. Ensuring individuals comply with IHL and enforcing the law where it is breached, in lieu of other mechanisms, requires States to institutionalise review and monitoring of their own military operations, and if these procedures bring to light potential violations, to effectuate mechanisms for the

7 Chapter 2, §5; Chapter 3, §2.
8 Chapter 2, §5.
9 Chapter 3, §2.

enforcement of the law.[10] The duty to investigate, in other words, is engrained in IHL's DNA.

In conclusion, *enforcement by States* is crucial for the proper working of IHL's implementation and enforcement system.[11] It is good practice to do so by institutionalising supervision which provides for the recording, reporting, and assessment of all incidents potentially violating IHL.[12] The lack of oversight and enforcement mechanisms, and the individual obligations imposed by IHL coupled with States' obligation to in good faith ensure respect for IHL, render the duty to investigate key in such State enforcement. Beyond implementation of the rules of IHL, and the institutionalisation of proper review and monitoring mechanisms for their military operations, States must therefore also *enforce* these rules and *effectuate* these mechanisms wherever they uncover facts which indicate a violation. The entire framework of IHL therefore strongly relies on State investigations into their own conduct.

The scope of the duty to investigate under IHL

Against the backdrop of this pivotal role of States in self-enforcing IHL, the study has shown that three categories of violations must be distinguished: grave breaches, other serious violations, and non-serious violations.

The duty to investigate is most explicit, and most extensive, for those violations of IHL known as grave breaches.[13] Grave breaches are, in essence, the most egregious violations of the law of IAC, as listed in the Geneva Conventions and AP I.[14] When a State gains information that such a breach may have occurred, whether it is through its own review and monitoring system, or through an outside allegation or media reports, it must conduct an investigation. Because of the seriousness of such breaches, this must moreover be a *criminal investigation*. The Geneva Conventions and AP I require that States criminalise grave breaches, search for alleged perpetrators, and either prosecute or extradite them. Moreover, States are even under a duty to vest universal jurisdiction over these crimes.

When reading these various obligations together, this clearly requires States to investigate both (i) *perpetrators* of grave breaches, who must be brought to justice, as well as (ii) the *grave breach itself*, as an occurrence. The study has shown how, despite the duty to vest universal jurisdiction, there is a practical

10 Cf. also AP I, art 41(1), which provides that 'armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict'.

11 Chapter 2, §5; Chapter 3, §2.

12 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).

13 Chapter 3, §3.2.2.

14 GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146; AP I, art 11 and 85.

distinction to be made between States who are firstly responsible for such investigations, and those which operate under a 'secondary' obligation.[15] First responsible for an investigation are (i) the State on whose territory the breach has occurred, (ii) the State whose nationality the perpetrator has, and (iii) the State on whose territory or within whose jurisdiction the perpetrator is present. States without such nexus must vest universal jurisdiction, but may in practice not be in a position to take investigative steps because both the perpetrator and the evidence are outside of their control. Their obligations therefore appear to concern primarily the cooperation in the investigation by other States. State practice also shows that numerous States have opted for vesting a limited form of universal jurisdiction which requires the perpetrator's presence on their territory for any prosecution to take place.

When it comes to other serious violations of IHL – war crimes not constituting grave breaches – States' investigative obligations are similar.[16] States must conduct criminal investigations into such breaches. Three points can be made where the duty to investigate war crimes differs from the specific duty to investigate grave breaches. Firstly, the legal basis for the duty to investigate war crimes lies in customary international law and ICL, rather than IHL treaty law. This also means, secondly, that the duty to investigate equally extends to war crimes committed in NIACs – both under the customary norm as identified by the ICRC and the *ad hoc* tribunals, as well as under the Rome Statute.[17] Thirdly, States do not have the *obligation* to vest universal jurisdiction over all war crimes – they only have the *right* to do so.[18] Nonetheless, the obligation to actually investigate is again limited to cases where they have territorial jurisdiction over the crime or over the suspect, or where they have personal jurisdiction over the suspect.

The study finally shows that non-serious violations, that is, all breaches of IHL which do not amount to war crimes, also require investigations – albeit subject to different rules.[19] Examples of non-serious violations can pertain to ostensibly rather trivial situations, such as selling soap and tobacco to POWs above local market price, or failing to post a copy of the Geneva Conventions in a POW camp. They can, however, also be more directly linked to the use of lethal force, such as where States fail to take all feasible precautions in attack, which even when leading to the loss of civilian life does not rise to the level of a war crime unless the attack is indiscriminate or directed against civilians. IHL nor ICL requires States to conduct a *criminal* investigation into such violations. Nonetheless, it was shown that States *are* under the obligation

15 Chapter 3, §3.2.2.4.
16 Chapter 3, §3.2.3.
17 As is explained in Chapter 3, the Rome Statute arguably includes an implicit obligation for States to investigate war crimes. See Chapter 3, §3.2.3.2.
18 Chapter 3, §3.2.3.4.
19 Chapter 3, §3.3.

to investigate such breaches. This obligation flows from IHL's system of self-enforcement, coupled with a combined reading of the *duty to ensure respect* for IHL, *the duty to suppress* all violations, *commanders' specific obligations to repress and suppress* violations, and the *precautionary principle's* obligation to take 'constant care' in military operations, and to take 'all feasible precautions' in attack, to spare the civilian population.[20] Because international law does not consider such non-serious violations as crimes, States have discretion in deciding whether they wish to couple an investigation with criminal prosecution and punishment, or rather with, for instance, a disciplinary measure.[21] An important aim of such investigations must be that they establish whether the conduct in question was lawful, so that State responsibility can be established, and potential systemic shortcomings can be remedied.

Knowledge triggering the duty to investigate

States must thus investigate violations of IHL. But they must equally investigate 'alleged' violations of IHL, and incidents which *potentially* violated IHL. In order to satisfactorily answer *when* States must investigate, it was therefore also determined *what level of knowledge* is required to trigger the duty to investigate.

This study has shown that this question is best answered by looking at State practice. Such practice, it was determined, relies on a criterion of knowledge which would lead a 'reasonable commander' or 'prudent individual' to consider there was potentially a violation.[22] Moreover, IHL relies on a system of self-enforcement, for which it is good practice to set up a system of recording, reporting, and assessment of military operations.[23] This ensures an active system of keeping tabs on the effects of military operations, which in turn safeguards that incidents which potentially violated IHL are in practice submitted to a commander. If this commander determines IHL was potentially violated, and that therefore an incident was 'notifiable', they must then either report the incident to an investigative authority, or conduct an investigation. It must be stressed that the criterion of the reasonable commander does not mean that whether or not the duty to investigate is triggered, is fully contingent on a subjective decision by a commander. Ultimately, whether information originates from the State's own monitoring activities, from outside allegations, media reporting, or yet other sources makes no difference for triggering the duty to investigate. In case of outside allegations, the State should be able to check its own records and reports easily enough to establish whether there is any merit to the complaint, and can then make use of the regular system of military review. In case potentially serious violations are uncovered, this will need to be upscaled to a criminal investigation. As soon as a *reasonable*

20 Chapter 3, §3.3.3.
21 Chapter 3, §4.2.
22 Chapter 3, §3.2.2.3, §3.2.3.3, 3.3.4.
23 Chapter 3, §2.

commander, or a *prudent* individual would consider such information to indicate a breach, this triggers the duty to investigate.

Investigative standards and the question how States must conduct an investigation
With respect to the crucial question *how* States must carry out an investigation, the study has shown that IHL is largely silent. Beyond requiring an investigation, treaty law does not go into the details of what is required of States. To flesh out further what it means when States must investigate, other sources were therefore explored. State practice and soft law – in particular the ICRC and Geneva Academy 2019 *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* – are instrumental in this respect.[24] Finally, IHL's guiding principles provide a framework for interpreting the duty to investigate, though the principles are largely indeterminate when it comes to fleshing out *how* States must investigate.

The study was able to determine a number of standards which must guide investigations. War crimes investigations require strict criminal accountability. The aim of preventing impunity, ensuring criminal accountability, and thereby exacting retribution, to a large extent determine the shape of the investigation. A thorough analysis of IHL, of the judicial practice of ICL bodies, as well as of State practice and soft law instruments, shows that investigations into war crimes must meet standards of effectiveness, thoroughness, genuineness, promptness, impartiality, and fundamental due process guarantees.[25] It must be borne in mind that the obligation imposed here is one of *conduct*, not of result, and that there is therefore no requirement that the investigation result in a criminal conviction. Thus, whereas States must do what they can to ensure the investigation results in establishing the facts and the identification of those responsible, if they ultimately cannot, this need not violate the duty to investigate.

Whereas IHL does not explicitly formulate standards of thoroughness, promptness, and the importance of fair trial guarantees, the requirement that the investigation is capable of leading to prosecution and punishment nonetheless implies these standards. If an investigation is not initiated promptly, this clearly harms its capability of gathering the required evidence, as evidence is lost quickly, especially in a situation of armed conflict. Equally, if an investigation is not thorough in the sense that relevant lines of enquiry are pursued in a way which is suitable to uncover what happened, and moreover in a way which respects fair trial guarantees and due process rights, it is difficult to see how the effectiveness criterion could be satisfied.

Other oft-mentioned standards, those of independence and transparency, were not corroborated by this study.[26] With respect to transparency, it was

24 Lubell, Pejic and Simmons (n 12).
25 Chapter 3, §4.3.
26 Chapter 3, §4.3.

shown that elements of public scrutiny and the involvement of next of kin can certainly contribute to the effectiveness of the investigation, because this safeguards the investigation is carried out genuinely, and ensures public confidence in the State's review of its own use of force. Nevertheless, they appear to be further removed from what IHL itself requires, and cannot at this stage be read as inherent requirements of IHL itself. Also when it comes to independence, which is so often mentioned as a cornerstone for effective investigations, this study does not support the unequivocal inclusion of independence as an investigative standard under IHL. State practice concerning war crimes investigations has shown a varied level of independence of investigators, such as military police. Their precise status, however, differs from State to State, and so does their independence. IHL treaty law, moreover, appears to contradict a strict legal requirement of independence. It emphasises the role of the commander in the investigation, which indicates an important role for investigators who are part of the chain of command. Thus, independence, although important, does not appear to be strictly required by IHL as it stands. Of course, these conclusions are notwithstanding potential developments of the law with respect to transparency and independence, and the ICRC and Geneva Academy *Guidelines* may certainly influence evolving practice in this regard. Yet, as a matter of *lex lata* this study finds that transparency and independence are good practice rather than required by IHL. These findings will be returned to when discussing interplay, because IHRL *does* clearly require investigations to be transparent and independent.

Non-serious violations of IHL, in contrast, are more loosely governed by international standards, which leaves States a measure of discretion in how they conduct them.[27] As these investigations need not be criminal, States have a measure of discretion in how they conduct such investigations. Nonetheless, because of the importance awarded under IHL to States enforcing the law in respect of their own armed forces, and because the investigation must at least be capable of determining whether a State bears State responsibility for a breach, States will need to establish the facts, and determine lawfulness. Standards which can be derived from IHL, State practice, and soft law instruments would appear to pertain to an effective investigation, which is prompt and impartial.[28] Such investigations may take place within the military procedures of the armed forces themselves, and can be largely informal. State practice shows a varied approach. On one extreme, there are those who in their domestic legislation consider all breaches of IHL to constitute war crimes which require a criminal response.[29] Amongst those States which take a more

27 Chapter 3. §4.4.
28 Chapter 3, §4.4.
29 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *ICRC Customary International Humanitarian Law – Volume II: Practice* (Cambridge University Press 2005) Chapter 44.

graduated approach towards such violations, practice varies. Many, however, take a 'lessons learned'-approach which is usually implemented through 'after action reviews', 'after action reports', or 'post-attack reviews'. In case of individual transgressions, disciplinary measures can sufficiently ensure a deterrent effect, and whereas States are free to criminalise simple breaches of IHL, they are not obligated to do so. Beyond individual measures, administrative investigations should also, where appropriate, take into account any potential systemic shortcomings which may be the root cause for a breach.

In sum, IHL clearly imposes investigative obligations on States, and moreover does so for all violations of IHL. When it comes to investigative standards, a number can be derived from IHL – but such standards are not explicit in treaty law, and are relatively rudimentary.

3 Overarching conclusions on the duty to investigate during armed conflict under IHRL

Part II of the study brought clarity with respect to States' obligation to investigate human rights violations during armed conflict. It was shown that across human rights regimes, States are required to investigate potential human rights violations – among them violations of some of the core rights most relevant to situations of armed conflict, such as the rights to life and liberty and security, the prohibitions of torture and slavery.[30] Further, it was shown that States are bound to comply with eight investigative standards.[31] Although the various courts and bodies sometimes use slight variations in phrasing and accentuate different aspects of the duty to investigate, it was shown through an extensive case-law analysis that these standards apply in all systems. Finally, the case-law of the various courts and bodies shows that the duty to investigate continues to apply during armed conflict.[32] Beyond these conclusions, a number of findings stands out which are highlighted here, before further exploring the study's findings with respect to investigative duties during armed conflicts, under IHRL.

First, an analysis and systematisation of the vast amount of case-law under the ICCPR, the ACHR, and the ECHR, showcases a large measure of convergence between the various systems when it comes to investigative obligations.[33] They all require investigations into potential violations of rights, such obligations are coupled under all systems with a duty to prosecute and punish in case of serious violations, and all systems arguably also require investigations

30 See §4 of Chapters 5, 6, and 7; Chapter 8, §1.4.
31 See §5 of Chapters 5, 6, and 7; Chapter 8, §1.5.
32 See Chapter 4, §4.6; §6 of Chapters 5, 6, and 7; Chapter 8, §1.6.
33 Further, see Chapter 8.

into less serious violations, although jurisprudence on that issue is sparse. It was further demonstrated that the investigative standards which must guide States' investigations are almost identical under the three systems, with only relatively slight differences in accent. Second, the study has shown that IHRL continues to apply during armed conflict, and that the duty to investigate is no exception in this respect.[34] Based on a close reading of the case-law, it was shown that the duty to investigate is a flexible obligation, which can be interpreted contextually to take account of the circumstances of conflict to somewhat loosen otherwise strict investigative requirements – for instance with respect to the precise investigative steps which States must take in order to establish the facts.[35] Third, the study has clarified the controversial issue of the extraterritorial applicability of the duty to investigate.[36] It is well-accepted under all systems that human rights apply when States exercise control over territory or over individuals through their State agents. Beyond such instances, it was shown that under the ICCPR and ACHR, a model for the extraterritorial exercise of jurisdiction appears to be developing, which hinges on the 'reasonably foreseeable impact' of States' conduct on the rights of individuals – even if they are outside the territory of a State.[37] This is likely to bring States' conduct abroad during an armed conflict, such as the use of force, within the scope of investigative obligations. Under the ECHR, it was shown that the duty to investigate may also apply irrespective of whether States exercise control under the spatial or personal concepts of jurisdiction, so long as 'special features' of the case establish a 'jurisdictional link' between the State and the victim.[38] This is likely to include most armed conflict related violations. A fourth and final takeaway worthy of mention here, is that human rights courts and treaty bodies have been reticent in relying on IHL in the context of investigative obligations.[39] This is noteworthy especially for the Inter-American Court, which has been very open to interpreting the ACHR in light of IHL. The European Court has been the first – and has only done so for the first time in 2021 – to take account of IHL's rules with respect to the duty to investigate. This means that the primary method for courts and treaty bodies to take account of the exigencies of armed conflict, has been to apply the duty to investigate *contextually*, in light of the circumstances, rather than taking express account of IHL in the interpretation of the legal obligations.

The following briefly recapitulates Part II's findings with a view to answering the second sub-question which guided this study:

34 See Chapter 4, §4.6; §6 of Chapters 5, 6, and 7; Chapter 8, §1.6.
35 See §6.4 of Chapters 5, 6, and 7; Chapter 8, §1.6.
36 See §4.5 of Chapters 4, 5, 6, and 7; Chapter 8, §1.4.
37 Chapter 4, §4.5.
38 Chapter 7, §4.5 and §6.3.2.
39 See §6.4 of Chapters 5, 6, and 7; Chapter 8, §1.6.

Are States under an obligation to investigate (potential) violations of IHRL? If so, what are the scope of application and contents of such an obligation, in particular during armed conflict and occupation?

The focus in this respect is on investigative obligations during armed conflict. For a more comprehensive overview, readers are directed to Chapter 8, and to the Chapters 5, 6, and 7, which discuss investigative obligations under the ICCPR, ACHR, and ECHR.

Legal basis of investigative obligations

The research question can be answered affirmatively – States are under the obligation to investigate human rights violations, also during armed conflict. Certain human rights treaties, in particular the Genocide, Torture, and Disappearance Conventions, explicitly include investigative obligations in their provisions.[40] Others, which are the main focus of this study – namely the ICCPR, the ACHR, and the ECHR – do not include explicit investigative duties. Yet, according to their supervisory bodies and courts, such obligations nevertheless take up an important place within these human rights regimes.[41] Human rights case-law recognises the duty to investigate to be essential to effectively protect and ensure human rights, by adding a procedural layer of protection to substantive rights. This procedural layer includes the criminalisation in domestic law of certain human rights abuses, and the effectuation of such laws when human rights are indeed infringed by conducting investigations, where appropriate followed-up by a criminal prosecution and punishment. The legal basis for the duty to investigate can therefore vary from an explicit treaty obligation in certain treaties, to a more purposive and systematic interpretation of various treaty provisions in conjunction with each other, which finds investigative obligations to be implicit in the duty to actively ensure human rights. The right to a remedy and the obligation to provide reparation can also include investigative obligations. Despite the variety in sources, this study has shown that investigative obligations under IHRL largely converge: apart from certain particularities of the various systems, the duty to investigate is conceptualised and applied in broadly similar ways, as a tool to effectuate protection of human rights and ensure accountability for violations.

Rationale and place of investigations within the IHRL framework

The duty to investigate under IHRL, this study has found, corresponds to the 'sword' function of human rights.[42] Beyond simply *protecting* individuals against repression by the State (the shield), human rights in this context invite

40 See Chapter 5, §2.
41 See §3.2 of Chapters 5, 6, and 7; Chapter 8, §1.3.
42 See Chapter 5, §2; Chapter 8, §1.2.

and require the State to actively interfere with individual rights (the sword). Human rights jurisprudence recognises the duty to investigate to be essential to effectively protect and ensure human rights, by adding a procedural layer of protection to substantive rights.[43] This layer then importantly includes the investigation of potential violations. Further, investigations are often considered indispensable for victims to be able to exercise their right to a remedy – because the State is the only one capable of establishing what has befallen them.

A main purpose for the duty to investigate is to ensure that States assume their roles as principal guardians of human rights, and to create a domestic context in which this can be accomplished. This also means that a culture of impunity, as the Inter-American Court's case-law makes so abundantly clear, is absolutely unacceptable. In this sense, ensuring accountability of perpetrators ensures individual justice for direct victims, but also contributes to a culture where human rights are respected, and where abuses are not tolerated. Establishing and making known the facts of what happened moreover forms part of accountability in and of itself, and is closely intertwined with the right to truth. The duty to investigate therefore, like under IHL, forms an important part of the implementation and enforcement system of human rights, requiring States to bring to light and remedy violations at the domestic level. In stark contrast to IHL, however, such obligations are subject to international supervision by courts and treaty bodies, who take up a secondary role in this respect.

The scope and contents of investigative obligations under IHRL

Outside of armed conflict, the study has shown that under the case-law as it stands, States must investigate potential violations of core rights such as the rights to life, liberty and security, and the prohibitions of torture and slavery.[44] It would appear that although the duty to investigate is not necessarily limited to these rights, the focus in the case-law thus far has clearly been on these rights. Furthermore, violations of these core rights must normally be subject to criminal investigations – similar to IHL, where grave breaches also require a criminal response.

Further, States must conduct investigations not only when it is State agents who have violated such rights.[45] The State obligation to investigate encompasses all of the above human rights violations and abuses which fall within the jurisdiction of the State. The duty to investigate is therefore not limited to violations by State agents, but includes abuses by all, including non-State actors. Importantly, individuals have a *right* to an investigation under IHRL – although a right to have someone prosecuted exists only under the ACHR.

43 See §3.3 of Chapters 5, 6, and 7; Chapter 8, §1.3.
44 See §4.2 of Chapters 5, 6, and 7; Chapter 8, §1.4.
45 See §4.3 of Chapters 5, 6, and 7; Chapter 8, §1.4.

Especially noteworthy with respect to the applicability of the duty to investigate, are its temporal and geographic scope of application.[46] The study has shown that States may be required to investigate even if an incident took place outside a State's territory, or when the incident predated the entry into force of the treaty for the State in question, depending on the applicable treaty regime. Beyond such cases where States exercised effective control over territory or individual victims, it would appear that under the ICCPR and ACHR, States may also be required to investigate incidents where the State's conduct had a reasonably foreseeable impact on rights. Under the ECHR, case-law has affirmed the applicability of investigative obligations whenever 'special features' of a case give rise to a 'jurisdictional link' – also going well beyond the spatial and personal models for extraterritorial jurisdiction. Temporally, it appears that States may be required to investigate incidents predating their accession to a treaty – at least under the ACHR and ECHR – where violations are of a continuing nature, as is the case with respect to enforced disappearances.

Finally, States are held to investigate in case there is an *arguable* claim, a *credible* assertion, a *well-founded* or *sufficient* reason to suspect a violation may have occurred.[47] States therefore need not investigate any allegation no matter how far-fetched, although it must be stressed that they may not create overly burdensome hurdles in this respect. Whenever information reaches State authorities, no matter the source, which indicates a violation has occurred, they will be held to investigate of their own accord.

If States are required to investigate, IHRL also regulates *how* they must do so. First and foremost, the duty to investigate is a *duty of means*, not of result.[48] States must therefore diligently establish the facts and identify perpetrators, and if they have attempted such properly, this can discharge their obligation even if their efforts ultimately prove futile. In order to gauge whether States have met their obligation, eight standards have been formulated.[49] These standards stipulate 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. In effect, States must therefore initiate investigations promptly when information reaches them, not leaving it up to the initiative of victims, and must furthermore ensure that that investigators may not be guided by bias or prejudice, and that they must be both objectively and subjectively independent from those who are the subject of the investigation. In addition, the investigation must be (v) serious and effective, thorough, and adequate. This

46 See §4.4-§4..5 of Chapters 5, 6, and 7; Chapter 8, §1.4.
47 See §4.2 of Chapters 5, 6, and 7; Chapter 8, §1.4.
48 See §5.2 of Chapters 5, 6, and 7; Chapter 8, §1.5.
49 See §5.3 of Chapters 5, 6, and 7; Chapter 8, §1.5.

is the most substantive criterion formulated for investigations, and stipulates that States must take the necessary investigative steps which a situation calls for, in order to establish the facts and identify perpetrators. In case of a death through the use of force, for instance, States will – depending on the facts of the case – need to gather witness testimonies and forensic evidence, conduct an autopsy, establish bullet trajectories, dust for fingerprints, check for gun powder residue, and so forth. In case of torture or ill-treatment, testimony by the victim will of course be instrumental, as well as a medical examination of the victim. If States fail to utilise one such investigative step or line of inquiry, leading the investigation to fail to establish the facts or to identify perpetrators, this may render the investigation as a whole ineffective and therefore as falling short of human rights standards. Investigations must further (vi) sufficiently involve the victims or their next of kin. They must be kept abreast of developments in the investigation, and must at the very least be informed to the extent necessary for them to effectuate their rights in the procedure. In addition, the various human rights regimes require somewhat varying levels of (vii) transparency to the investigation. All systems require a sufficient element of public scrutiny, which allows the public to gauge the genuineness of the investigation, and is meant to ensure the public's confidence in the State's monopoly on the use of force. The Human Rights Committee further adds that States should be transparent with respect to the process leading up to the use of force, including by disclosing criteria for targeting, and whether less harmful alternatives were considered. Finally, (viii) the follow-up process to investigations often requires measures ensuring criminal accountability. This is often phrased in a way that a potential violation must be investigated and that those responsible must where appropriate be prosecuted and punished. This includes a duty to remove *de jure* and *de facto* obstacles to accountability such as amnesties and prescriptions. Further, it can require States to restrict or limit certain rights of the defence, such as *ne bis in idem* and *nullum crimen*.[50]

The scope and contents of the duty of investigative obligations under IHRL during armed conflict

Turning now to IHRL investigations during armed conflict, an important preliminary finding is that IHRL continues to apply during armed conflicts which give rise to the applicability of IHL. This was set out in Chapter 4, and finds support in case-law by the ICJ and human rights courts and treaty

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

bodies.[51] Looking in particular at the duty to investigate, a finding which stands out is that the scope and contents of investigative obligations do not principally differ inside and outside of armed conflict.[52] Human rights courts and bodies have not developed a separate approach, nor have they declared certain standards to be inapplicable during armed conflict. They have rather applied their regular approach, taking account of the armed conflict and the exigencies of the situation by relying on the measure of flexibility included in investigative obligations. They thus apply the duty to investigate contextually, maximising its flexibility where circumstances call for such.

The Inter-American Court of Human Rights and the Human Rights Committee, despite their overall openness towards applying rules of international law and IHL, have not had recourse to IHL in interpreting the duty to investigate during armed conflict.[53] They have not given any principled reasons for refraining from doing so, which may lead one to conclude that it has to do with the relative lack of specificity in IHL investigative obligations. The European Court of Human Rights until 2021 equally did not refer to IHL in the context of the duty to investigate. In 2021, however, it has had recourse to IHL in the two Grand Chamber judgments of *Georgia v Russia (II)* and *Hanan v Germany*,[54] assessing whether any conflict exists between the IHL and ECHR duties of investigation. In both cases, it found that no such conflicts existed, and that it could therefore apply its normal case-law – although it did attempt to incorporate the role of commanders under IHL through a form of harmonious interpretation.[55]

Further, importantly, this study finds that derogations do not and cannot exclude State's obligation to investigate, as such.[56] While derogations can shrink a State's human rights obligations in emergencies or armed conflict, the duty to investigate pertains in particular to rights which are non-derogable. The HRC and the Inter-American Court have furthermore held that procedural and judicial safeguards which are necessary to guarantee non-derogable rights, are also non-derogable themselves.[57] This includes, notably, the right to a remedy. Thus, the non-derogable character of the right to life, the prohibition of torture and ill-treatment, and the prohibition of slavery, is extended to the duty to investigate. The ECHR is the only treaty in which the right to life *is* derogable, 'in respect of deaths resulting from lawful acts of war'.[58] Nevertheless, even if such a derogation was entered, which no State has done to date,

51 Chapter 4, §4.6.
52 See §6.4 of Chapters 5, 6, and 7; Chapter 8, §1.6.
53 See §6.3-§6.4 of Chapters 5 and 6.
54 *Georgia v Russia (II)*, ECtHR [GC] 21 January 2021, Appl No 38263/08; *Hanan v Germany*, ECtHR [GC] 16 February 2021, Appl No 4871/16.
55 See Chapter 7, §6.4.
56 See §6.2 of Chapters 5, 6, and 7; Chapter 8, §1.6.
57 See Chapter 4, §4.6.
58 ECHR, art 15(2).

it will not as such derogate the duty to investigate. Rather, it will shrink the substance of the right to life, to coincide with the protections afforded by IHL.[59] This therefore determines the lawfulness of deprivations of life, which means that deprivations of life which are lawful under IHL will be lawful under the ECHR – in turn limiting the scope of application of the duty to investigate, which is principally concerned with unlawful deprivations of life. Investigations will then, therefore, only be required into deaths potentially in contravention with IHL. Derogations may in this light, at least under the ECHR, influence the scope of application of the duty to investigate, though that duty cannot be derogated as such and will remain applicable to any potentially unlawful deprivation of life.

The *scope of application* of the duty to investigate is therefore principally the same during armed conflict as during situations of normalcy, and its applicability has been confirmed by all human rights courts and treaty bodies. It is worth underscoring that this also applies to the European Court of Human Rights, which despite adopting a limited interpretation of the extraterritorial exercise of jurisdiction during active hostilities, has accepted that the duty to investigate does apply in such situations if certain 'special features' are present.[60] Another notable feature of the duty to investigate during armed conflict, is that it continues to apply also to incidents attributable to *third parties*, such as killings perpetrated by armed groups.[61] Insofar as such incidents took place within the jurisdiction of the State, it will need to investigate – also during armed conflict. The HRC may leave some leeway for a different interpretation, but the Inter-American and European Courts have been clear in this respect. Whereas the exigencies of the situation may influence what steps States can realistically take with respect to such situations, of which both regional courts are aware, the applicability of the duty itself is not affected.

When it comes to *investigative standards*, the duty to investigate is applied flexibly during armed conflict under the ICCPR, ACHR, and ECHR.[62] Because the duty to investigate is an obligation of means, what means are available to the State can be interpreted in light of the circumstances prevailing during an armed conflict. A contextual interpretation of the duty to investigate therefore determines what is precisely required, but the standards applied are the same eight as those set out above. The unfolding judicial practice of human rights courts and treaty bodies shows that a flexible interpretation can lead to a measure of leniency with respect to the promptness of the investigation, the precise investigative steps which were pursued, and the independence and transparency of the investigation. Some variations exist in the case-law on this point, which is also heavily influenced by the case-by-case and con-

59 See Chapter 7, §6.2 and §6.4.
60 See Chapter 7, §6.4.2.
61 See §6.4.2 of Chapters 5, 6, and 7; Chapter 8, §1.6.
62 See §6.4.3 of Chapters 5, 6, and 7; Chapter 8, §1.6.

textual nature of human rights jurisprudence. For instance, the HRC appears to be more demanding with respect to the transparency of the investigation, and the Inter-American Court is more strict with respect to the independence of the investigation and the criminal prosecution and trial of perpetrators.

When all is said and done, regardless of how open IHRL bodies may be towards IHL, the duty to investigate has thus far been interpreted in a largely independent manner. Further, it has been given a measure of flexibility which is able to account for the context of armed conflict, without however departing from regular case-law in any fundamental way.

4 OVERARCHING CONCLUSIONS ON THE INTERPLAY BETWEEN IHL AND IHRL

In terms of this study's research question, Parts I and II answered the first two prongs: *What are the scope of application and contents of States' duty to investigate (potential) violations during armed conflicts, under international humanitarian law, international human rights law, and their interplay?* In order to answer the last part, relating to interplay, Part III of this study has clarified how IHL and IHRL interrelate. Having shown that IHRL and IHL apply simultaneously, it has delved into general international law to set up a methodology for dealing with cases of interplay. It was shown how despite the many controversies and discussions in relation to interplay, a step-by-step methodology can be derived from international law's secondary rules – regulating the interaction of norms.[63]

First, it must be determined whether both legal regimes indeed apply to the situation at hand.[64] This step requires first a determination of the applicability of both legal regimes (based on the criteria for applicability as set out in Chapters 2 and 4), and second a determination of whether those regimes do not only apply to the broader *situation*, but also govern the specific *incident* in question (i.e. a specific use of force). If IHL and IHRL are indeed applicable to the situation and the incident, second, the existence and operation of a conflict clause must be explored.[65] If a conflict clause does regulate the relationship between IHL and IHRL, the solutions provided by such clauses must be followed. Chapter 9 showed, however, that IHL nor IHRL regularly contains such conflict clauses – and that derogation clauses in human rights treaties are *not* conflict clauses.[66] If a conflict clause cannot resolve the conflict, or – more likely – if no conflict clause is in operation, the third step is to assess whether the various applicable norms of IHL and IHRL conflict.[67] Step four

63 See Chapter 9, §4, §5, and §6 for the reasoning underlying these conclusions.
64 Chapter 9, §4.
65 Chapter 9, §4.
66 Chapter 9, §6.2.
67 Chapter 9, §5.

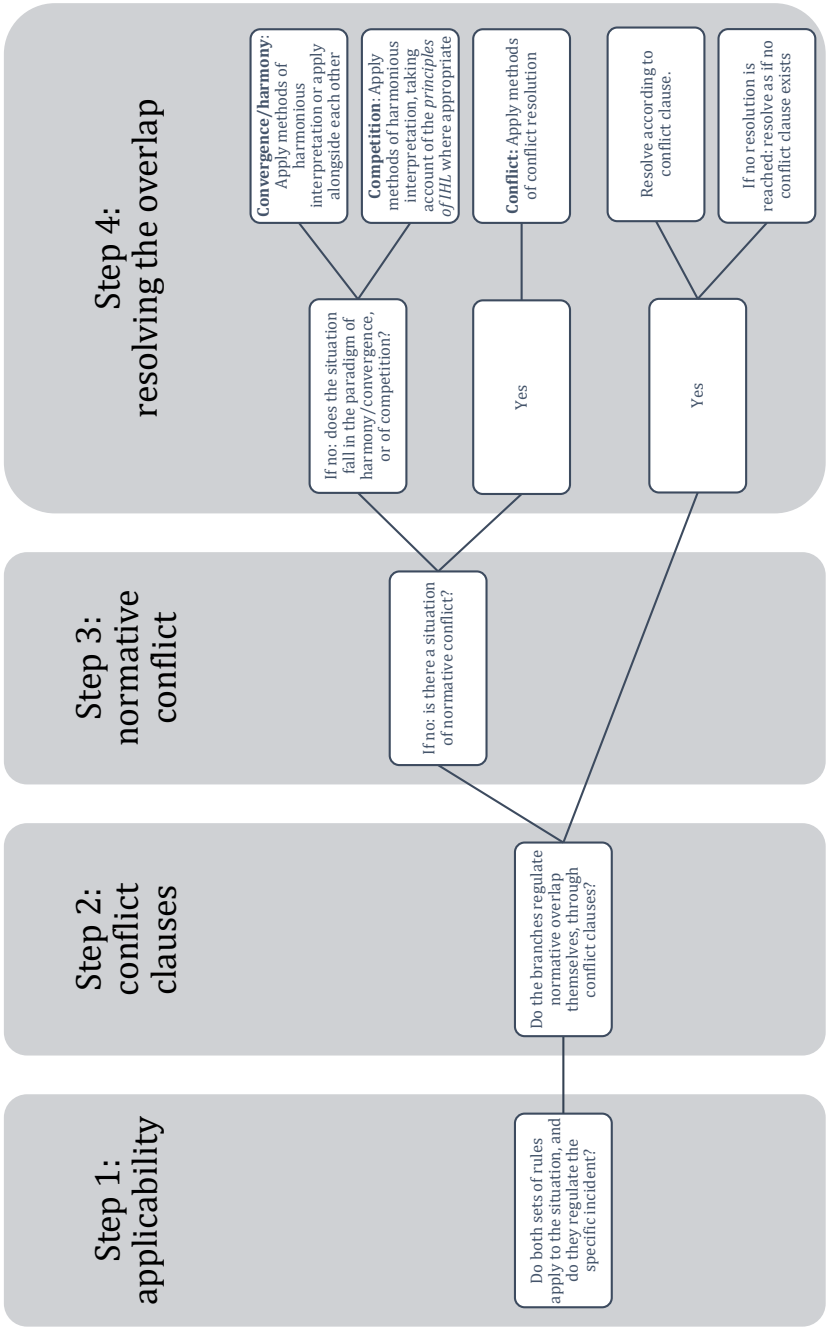
then resolves the normative overlap.[68] In case of normative conflict, resort must be had to methods of conflict resolution, in particular *lex specialis*.[69] If they do not, the overlap may be solved through harmonious interpretation and systemic integration, pursuant to Article 31(3)(c) VCLT.[70] How to do so precisely, however, depends on whether the relevant norms of IHL and IHRL are 'genuinely' in harmony, or whether they are rather in a relationship of competition.

This results in the following figure 8. The below step-by-step methodology showcases a number of this study's main takeaways with respect to the interplay of IHL and IHRL. The study finds first that we must look beyond the 'magic solution' that is supposedly presented by the ICJ's finding that *lex specialis* governs the relationship.[71] *Lex specialis* is not, as some have aptly pointed out, a Harry Potter spell which solves issues of normative overlap.[72] *Second*, we must look beyond the 'macro' relationship between IHL and IHRL as such. Discussions on how the two regimes interact as a whole, are generally unhelpful.[73] *Third*, on the level of interaction of norms, international law attaches decisive importance to the question whether norms *conflict*. This determines what legal tools for resolving normative overlap are available.[74] *Fourth*, we must look beyond a purely black-and-white assessment of either 'conflict' or 'convergence', when we classify the interplay of specific norms of IHL and IHRL. Not all situations falling outside the paradigm of normative conflict point towards a fully harmonious relationship between the norms. We must therefore acknowledge that norms can also be in a *relationship of competition*.[75] These four findings give rise to the following conclusions.

Firstly, *lex specialis* must be defined clearly. To this effect, it is necessary to strictly distinguish between the principle's role as an *interpretive tool* in the context of systemic integration, and as a *tool for conflict resolution*.[76] As a tool for conflict resolution, *lex specialis*: (i) applies on a norm-by-norm basis, meaning it does not displace a legal regime as such; (ii) must be applied contextual-

68 Chapter 9, §6.
69 Chapter 9, §6.3.
70 Chapter 9, §6.4 and §6.5.
71 Chapter 9, §3.
72 Helen Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' in Helen Duffy, Janina Dill and Ziv Bohrer (eds), *Law Applicable to Armed Conflict* (Cambridge University Press 2020) 74–7.
73 Chapter 9, §3.3.3, §6.3.2.
74 Chapter 9, §5.
75 Chapter 9, §5.2.
76 Chapter 9, §6.3.2.

Figure 8: A step-by-step methodology for interplay



ly, which means practically that even during armed conflict, the precise factual and legal context determine whether IHL or IHRL is *lex specialis*;[77] (iii) must be applied in a *nuanced* manner, meaning that one regime does not displace the other, nor does even a norm fully displace another if it is found to be *specialis*. It merely provides *precedence* of one norm over the other in that specific situation and for that specific incident. In order to decide which norm functions as *lex specialis*, regard must be had to a contextual element – the relevance or appropriateness of a rule to regulate the specific situation – and a purely legal element, looking at the wording of the norm itself, particularly how explicit, direct and precise the provision is. Thus, the rule with the 'largest common contact surface area' with the specific situation and incident, operates as *specialis*.[78] The contextual element of the *specialis* determination asks whether rules are designed to govern a situation. This depends on (1) whether the situation concerns one of IAC, NIAC, or occupation, (2) whether there is active fighting going on, (3) the status of individuals concerned and their activities, and (4) the level of control the State has over the situation.[79] Once it is decided, based on these factors, whether IHL or IHRL provides the more specific norm, the *specialis* then takes precedence over the conflicting *generalis*.

As an interpretive tool, *lex specialis* helps to interpret a norm in light of another norm, under a paradigm of relationships of interpretation.[80] This is therefore ultimately a form of systemic integration, in the sense of Article 31(3)(c) VCLT. Thus, the ICJ's application of *lex specialis* in the *Nuclear Weapons* Advisory Opinion is a classic example of its use as an interpretive tool: what constitutes an *arbitrary* deprivation of life in the context of the ICCPR, must during armed conflict be interpreted in light of the rules of IHL which regulate the conduct of hostilities. The more general rule is therefore interpreted in light of the more specific, but neither is given precedence over the other.

Secondly, interplay must be examined on a norm-by-norm basis. 'International humanitarian law' and 'international human rights law' do not as such conflict, converge, or compete. Only once looking at more specific norms, such as those concerning the duty to investigate, can the normative relationship between the two be usefully articulated. And even within this more detailed examination, one must do so (i) contextually and (ii) for each *facet* of a norm.[81] In other words, the relationship between two norms is not necessarily the same in each and every context, but must be determined in light of the circumstances

77 This pertains to the specificity of the norms, and the extent to which they are meant to govern the specific situation, i.e. are we dealing with active hostilities, or with security operations?

78 Marco Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 439. Chapter 9, §6.3.2.

79 Daragh Murray and others, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford University Press 2016) 89. Chapter 9, §6.3.2.

80 Chapter 9, §6.4.

81 Chapter 9, §6.3; Chapter 10, §4.3.

of the case. Further, even within the norm-by-norm determination, we must sometimes look in even more detail, on a facet-by-facet level. For example, it must be determined for each investigative standard whether a potential conflict exists, rather than to look at 'the duty to investigate' under IHL and IHRL as such.

Thirdly, a clear definition of normative conflict is required. This ultimately decides, under international law, whether tools for conflict resolution can be relied upon to give precedence to one norm over the other.[82] In the context of IHL and IHRL, the applicable tool will be that of *lex specialis derogat legi generali*.[83] In order for tools of conflict resolution to play a meaningful role in the resolution of normative overlap between various legal regimes, the existence of normative conflict must be acknowledged also beyond situations of mutually exclusive obligations. Notably, conflicts must be included between permissive norms on the one hand, and obligatory or prohibitive rules on the other – or, in terms of legal theory, contradictory conflicts must be included within the definition of conflict.[84] To illustrate, under a strict definition of conflict as two obligations which are mutually exclusive even the rules of IHL which permit the use of lethal force and the detention of combatants and civilians do not conflict with rules of IHRL which forbid such conduct unless certain restrictive conditions are met. After all, one can comply with both sets of rules by simply applying the IHRL standard, which in no way violates IHL. This, however, in no way does justice to the purposes served by IHL, and potentially renders permissive rules obsolete as such. The study therefore argues for including such normative clashes within the definition of normative conflict.

Fourthly and finally, beyond convergence and conflict, a relationship of normative *competition* must be acknowledged.[85] Perceiving the relationship between IHL and IHRL as binary – either in conflict or in harmony – is an oversimplification of the interplay between rules under both regimes. The absence of normative conflict need not mean there is actual harmony, because real harmony only exists when IHL and IHRL drive in the same direction. Yet, very real normative tensions can exist even in the absence of conflict. For instance, as this study shows, IHL is only rudimentary in regulating *how* investigations must be conducted, whereas IHRL is much more detailed. Yet, the simple filling of gaps in IHL by relying on IHRL can cause tensions with IHL's aim of balancing humanitarian considerations against military necessities. The IHRL requirement that investigations are transparent, by way of example, does not conflict with any rules of IHL, as IHL simply does not provide any

82 Chapter 9, §4.
83 Chapter 9, §6.3.
84 Chapter 9, §5.1.
85 Chapter 9, §5.2.2.

rules in this respect.[86] Nevertheless, requirements that States disclose all targeting procedures and the circumstances of an attack, may well cause very real tensions with operational requirements and military necessities. In such situations, a paradigm of normative harmony in which rules of one regime can simply fill the gaps in the other because there is no conflict, does not do justice to the existing tensions. If, however, we acknowledge that there can also be normative *competition*, meaning that despite the absence of conflict, IHL and IHRL nevertheless pull in different directions, this deepens the analysis of interplay, and allows for a better resolution of such situations.

When it comes to the resolution of normative tensions, no recourse can be had to *lex specialis*, because the applicability of that rule is contingent on the existence of normative conflict. The available tools are therefore those of systemic integration and harmonious interpretation. In situations of normative competition, these tools can serve to interpret the flexible norms of IHRL, insofar as they are flexible, in light of the applicable *principles of IHL*.[87] These principles at all times guide State conduct during armed conflict, and if norms of IHL are indeterminate or are lacking altogether, the principles still apply. Thus, they provide a legal source with which norms of IHRL can be balanced, although principles cannot set aside rules. If applicable rules of IHRL do not allow for flexibility, the rules must therefore be applied as they are. This can only be different when IHL and IHRL *conflict*, because then, depending on the context, IHL may prevail over conflicting norms of IHRL.

5 Duties of investigation under the interplay of IHL and IHRL

Based on the foregoing, Chapter 10 has answered the last prong of the research question – relating to the scope of application and contents of the duty to investigate under the interplay of IHL and IHRL. The study has applied the methodology for interplay to investigative duties under IHL and IHRL, engaging in a comparative analysis which showed whether aspects of the duty to investigate under both regimes converge, conflict, or compete.

Rationale

An important finding, firstly, is that the rationale of investigative obligations under both IHL and IHRL converges.[88] The role of investigations is highly similar under both regimes, as it is meant as a procedural mechanism which is used for the effectuation of the law. It obliges States to set up institutional oversight over their own conduct, to investigate when an incident potentially violated the law, and to ensure accountability of perpetrators where appro-

86 See Chapter 9, §5.2.4; Chapter 10, §4.3.3.3.
87 See Chapter 9, §6.5.
88 See Chapter 10, §2.

priate. Further, they must establish State responsibility for violations of international law. By finding that investigations under both regimes serve similar aims, the study debunks the idea that investigative obligations under IHRL are as such incompatible with the object and purpose of IHL. IHL has similar obligations, which serve similar purposes – and investigations are a crucial aspect in the effectuation of both IHRL and IHL.

Scope of application

Under the interplay of IHL and IHRL, the study concludes that the *scope of application* of the duty to investigate depends primarily on the lawfulness of an incident under substantive law.[89] If an incident violates IHL, States will be required to investigate it under that regime. War crimes require criminal investigations, administrative investigations suffice in case of non-serious violations. Under IHRL, investigations have to be conducted at the very least into suspected violations of the right to life, the prohibition of torture and cruel, inhuman, or degrading treatment or punishment, the prohibition of slavery and forced labour, the right to liberty, the prohibition of genocide, and the prohibition of enforced disappearance – which require criminal investigations. Investigations beyond such 'serious' human rights violations are subject to further legal developments. Because IHRL develops on a case-by-case basis it is dependent on the facts brought before a court, and such cases have to date been scarce. Further guidance must therefore be awaited on this issue.

In line with the coinciding aims of investigations, the study's comparative analysis showed that there is a large degree of convergence in the *scope of application* of the duty to investigate.[90] During an armed conflict, many incidents will trigger investigative obligations under both IHL and IHRL. An obvious example is an extrajudicial execution of a captive, which is prohibited under both legal regimes, and must be criminally investigated under both. In such situations, the law is in harmony. Both obligations then drive in the same direction, that of effectuating the law and ensuring accountability, which does not as such give rise to any issues. The same goes for certain situations where only IHL, or only IHRL, requires an investigation. So long as the other regime does not militate against an investigation, there is no normative tension. For example, if IHL is violated because the State's armed forces make perfidious use of the ICRC's distinctive emblem, this is subject to an investigative obligation under IHL only, not under IHRL. Yet, IHRL in no way opposes such investigation, and the law is therefore in harmony. The same goes the other way around. IHL and IHRL can, in such instances, be applied alongside one another without any need to have recourse to tools for the resolution of normative conflict, or harmonious interpretation.[91]

89 See Chapter 10, §3.
90 See Chapter 10, §3.3.
91 See Chapter 10, §3.3.

Yet, divergences between IHL and IHRL can arise where both hold different views on the lawfulness of the same incident. This is most prominently so with respect to the use of lethal force, where IHL is more permissive than IHRL. Chapter 10 has set out four situations in which the rules on the use of lethal force under IHL and IHRL potentially clash, which in turn lead to a situation in which IHRL does require an investigation because it regards the use of force as unlawful, while IHL considers it to be lawful and therefore does not require an investigation.[92] In such situations, whether or not a duty to investigate applies is contingent on how the normative conflict between the substantive norms of IHL and IHRL is resolved. This essentially means that where IHL functions as *lex specialis*, it will prevail over more restrictive rules of IHRL for judging the lawfulness of that particular use of force. IHL will then determine the lawfulness of the use of force, and whether an investigation is required. Where IHRL functions as *lex specialis*, IHRL's determination of lawfulness will prevail over IHL's more permissive rules, and IHRL therefore determines whether an investigation is called for.

A further tension giving rise to normative competition was uncovered with respect to the investigation of incidents perpetrated by non-State actors.[93] IHRL requires such investigations where the State exercised jurisdiction over the incident – most prominently so when the incident took place in an area falling within the State's territory, or over which it exercised effective control. While not providing any expressly conflicting rules, IHL does not require such except where war crimes are concerned, giving rise to normative tensions. This competition, the study has 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 currently 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. Because IHL does not contain explicit rules on this issue – it simply does not provide anything – there is no normative conflict, and recourse to *lex specialis* is therefore excluded. Insofar as IHRL does not leave room for flexibility to account for the military necessities which oppose such extensive investigative obligations, these obligations must nonetheless be met. International law does not provide further options to alleviate this tension, although this tension ought perhaps not be overstated. If States operate abroad without controlling territory, or if another State or a NSAG takes control over a territory, this may have consequences for the State's jurisdiction under IHRL, which may mean its obligations under IHRL are not applicable, or loosened. Moreover, as is discussed below, even if the IHRL duty to investigate third

92 See Chapter 10, §3.4.2.1.
93 See Chapter 10, §3.4.3.

party conduct *is* applicable, the applicable standards of investigation may yet be loosened insofar as the situation calls for such. This may significantly lower demands placed on States, and therefore mitigate tensions in this respect.

Knowledge triggering the duty to investigate

The information which triggers the duty to investigate does not seem to diverge too much when compared between IHL and IHRL.[94] IHL relies on a criterion of when a reasonable commander or prudent individual would consider there was potentially a violation. Moreover, as was shown, IHL relies on a system of self-enforcement through review and monitoring of military operations. Thus, there is an active system of keeping tabs on the effects of military operations, of review, and of reporting. This ought to also ensure that there will, in practice, be a reasonable commander who at some point reviews the information.

IHRL is not completely uniform in the information required to trigger the duty to investigate. What seems determinative is a requirement of 'arguable' or 'credible' complaints, or 'sufficient reasons' to suspect a violation has occurred. This largely overlaps with IHL's standard of information, and does not lead to major difficulties in co-application of IHL and IHRL. Issues which arise pertain rather to what type of conduct potentially amounts to a violation under interplay, the issue which was addressed above.

It should be noted that whereas the concept of an 'arguable claim' or 'credible complaint' may carry a connotation of the State being the passive recipient of information which then triggers the duty to investigate, it must be stressed that States are under an obligation to investigate of their own motion whenever certain information reaches them. The source of this information is immaterial, and whether there is thus an actual 'claim' or 'complaint' by victims, or rather information stemming from a State's own monitoring activities or media reports, thus does not matter: all can trigger the duty to investigate.

The applicable investigative standards under interplay

Based on a comparison of the results in Parts I and II, this study showed that the investigative standards formulated by both regimes vary quite strongly.[95] 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 treaty bodies in some level of detail. Under both regimes, however, what is clear is that the duty to investigate is an obligation of conduct, not of result. Thus, the simple fact that ultimately those responsible for a violation could not be identified or that a conviction was not obtained, does not mean an investigation was ineffective. The various standards are

94 See Chapter 10, §3.5.
95 See Chapter 10, §4.

procedural yardsticks meant to ensure that investigations are, at the very least, *capable* of achieving the aims of establishing the facts and determining the lawfulness of an incident. If appropriate, and depending on the violation in question, this may include identifying perpetrators, and to prosecute and punish them.

Turning then towards the applicable standards when IHL and IHRL interplay, three situations must be distinguished. The *first* concerns situations where, although both IHL and IHRL apply to the broader situation, only IHL requires an investigation because the conduct in question violated IHL only, not IHRL. This may be the case both for a war crime or for a non-serious violation. To give an example of both, the war crimes of unjustifiable delay in repatriation of POWs or civilians, or of occupying States transferring parts of their own civilian population into occupied territory,[96] do not require an investigation under IHRL – or there is no case-law to that effect. The same goes for many non-serious violations of IHL, which simply do not have any equivalent under IHRL – such as failing to post a copy of the Geneva Conventions in a POW camp.[97] When such violations occur, despite the general applicability of IHRL to a situation, the investigation is governed by IHL alone. Thus, such investigations are subject to IHL standards only – similar to situations where IHRL is inapplicable full stop. The *second* situation is the mirror image of the first, with this time IHRL requiring an investigation and IHL not governing an incident in particular. An example would be a violation of the prohibition of slavery, which as such is not regulated by IHL, but which requires a criminal investigation under IHRL. Because IHL is neutral in this respect, this means that IHRL's extensive investigative standards apply. Such standards will, under contemporary case-law, be interpreted in light of the exigencies of the armed conflict situation. They may therefore be somewhat more flexible than when applied in situations of normalcy, but it is simply the IHRL standards which apply. The *third* situation, and the one this study has afforded most attention to, is where both IHL and IHRL govern an incident. This can pertain to situations where both IHL and IHRL require an investigation, or where IHL governs an incident but does *not* require an investigation. In such situations, the interplay of IHL and IHRL is relevant for determining the applicable investigative standards, and therefore also calls for an analysis of how the various investigative standards relate to one another.

The study showed that the standards that an investigation be carried out *ex officio* and impartially fall under a paradigm of normative harmony;[98] the standards that an investigation be carried out promptly and with reasonable expedition, seriously, effectively, adequately and thoroughly, transparently,

96 AP I, art 85(4)(a) and (b).
97 GC III, art 41.
98 See Chapter 10, §4.2.

and with sufficient involvement of next of kin, fall under a paradigm of normative competition;[99] and the standards that an investigation be carried out independently, and followed-up by a criminal prosecution, fall (potentially) under a paradigm of normative conflict.[100]

This means, *firstly*, that no matter the circumstances, investigations will need to be initiated *ex officio*, and be conducted impartially. IHL and IHRL are in complete harmony on these points.[101] *Secondly*, the standards of promptness, seriousness, effectiveness, adequacy, thoroughness, sufficient involvement of next of kin, and transparency, must be applied contextually under a paradigm of normative competition.[102] Because there is no normative conflict, *lex specialis* cannot be relied upon in order to give IHL precedence. Nevertheless, these standards can – to a certain extent – be interpreted flexibly, taking the principles of IHL into account. By way of example, although promptness is essential to secure evidence which may otherwise be lost, if there is a certain delay in the investigation because military necessities do not allow for the immediate deployment of investigators in light of ongoing hostilities, a flexible and contextual interpretation of what is sufficiently prompt may alleviate any tensions between IHL and IHRL. Such solutions are of course reliant on the extent to which IHRL's standards include a measure of flexibility. The same applies to the investigative steps which States must take. If under normal circumstances the immediate separation of a suspect from potential witnesses is required, taking account of military necessities may lead to a loosened requirement if a suspect is the highest in command who during a military operation cannot be separated from his forces.

Thirdly, the applicability of the standards of independence and criminal follow-up may be subject to a *lex specialis* determination.[103] The requirements that an investigation be carried out fully independently, outside the chain of command, and that they are followed-up by criminal prosecutions before civil courts, *can* conflict with IHL.[104] If they do, whether the IHRL standard prevails and must therefore be applied, hinges on the question whether IHRL is the *lex specialis* in the specific circumstances of the case. This, once more, calls for a contextual analysis, which hinges on whether a situation falls under the active hostilities or security operations paradigms. Depending on the applicable paradigm, the norm which applies as *specialis* therefore takes precedence over the other. If IHL must be considered the *specialis*, then an investigation by the commander may suffice, at least insofar as non-serious IHL violations are concerned. In case of war crimes, it is likely that IHL also requires that the

99 Chapter 10, §4.3.3.
100 Chapter 10, §4.3.2.
101 Chapter 10, §4.2.1 and §4.2.2.
102 Chapter 10, §4.3.3.1, §4.3.3.2, and §4.3.3.3.
103 Chapter 10, §4.3.2.
104 Chapter 10, §4.3.2.1 and §4.3.2.2.

commander, though potentially taking the first investigative measures, remits the case to an independent investigative body. This approach was adopted by the European Court of Human Rights, when it was faced with an airstrike during active hostilities in an extraterritorial military operation in Afghanistan.[105] Further, if IHL is *specialis*, IHL's insistence that States 'endeavour' to grant the broadest possible amnesty at the end of a NIAC may take precedence over IHRL's requirement that the investigation be followed by a criminal prosecution and trial. This study has suggested that States, in such circumstances, ought formulate amnesties such that they explicitly exclude application to 1) war crimes, 2) serious violations of human rights (however defined), and 3) human rights violations committed outside active hostilities.[106] Finally, if a criminal trial is conducted, application of IHRL as *lex specialis* will mean that demands of independence and criminal prosecution and trial following the investigation must be complied with fully. If, however, IHL constitutes *lex specialis*, there may be scope for relying on military prosecutors and courts insofar as the genuineness and overall independence of the proceedings are sufficiently safeguarded.

6 Investigations and armed conflict: a final reflection

This final section of the study brings out a number of broader implications which follow from the above conclusions.

Legal scholarship has suggested that the duty to investigate – especially as conceptualised under IHRL – imposes an unrealistic burden on States who are engaged in armed conflict. This problem is moreover brought to the fore due to the expanding reach of IHRL. This study has shown that this narrative needs to be changed. It is true that the scope of application of IHRL, and of the duty to investigate in particular, has been subject to expansion. As the study has shown, whereas the scope of application of the duty to investigate is drawn by courts and treaty bodies on case-by-case basis, the material, temporal, and geographic scope of application are extensive. Under the ECHR, the duty to investigate may arguably be in the process of taking up a more prominent role during armed conflict if the Court continues on the pathway of restricting the material applicability of the Convention to active extraterritorial hostilities, but at the same time confirming the duty to investigate for such situations. This expansion, however, need not raise any problems.

The duty to investigate under IHRL is not contrary to IHL. IHL itself requires investigations in many cases, and serves highly similar purposes. Investigations safeguard the proper application of the law, and accountability where appro-

105 *Hanan v Germany* (n 54); Chapter 7, §6.4.3; Chapter 10, §4.3.2.1.
106 Chapter 10, §4.3.2.2.

priate. So long as a nuanced and contextual assessment is made of whether any conflict or tension exists between norms of IHL and IHRL, and if a careful determination is made of which rule constitutes *lex specialis* in case of conflict, investigative obligations need not lead to excessive burdens for the State. Rather, this study considers the duty to investigate to be a realistic tool for the effectuation of the international law governing armed conflict. It has the necessary level of flexibility to account for the difficult circumstances which are inherent in investigations into violations taking place in war zones. Although the starting points for IHL and IHRL could be said to be very different – with IHL's constant balancing act between military necessities and humanitarian considerations and aim of realistically regulating armed conflicts and with State obligations in that respect, and with IHRL's basis in protecting human dignity and bestowing individually justiciable rights on all human beings – they find each other when it comes to the duty to investigate, the aim of effectuating the law, and the aim of ensuring accountability.

Both IHL and IHRL have institutionalised investigations as a crucial aspect for the effectuation of the law. It forces States to take up their primary role as guardian and enforcer of the law. A proper effectuation of the duty to investigate is to the benefit of all actors involved. Victims of armed conflict can obtain justice and remedies, and the truth of what has befallen them. Members of armed forces obtain certainty as to their legal position and potential criminal liability, and they are safeguarded from the harmful effects of a continuous looming threat of investigation or reinvestigation. States equally gain certainty as to their obligations and potential legal liability, and if investigations bring to light any systemic deficiencies, they are able to remedy them. Further, the more general aim of accountability – both of the State and of individuals – can be achieved through proper investigations. Finally, the State and the armed forces as a whole gain credibility when they genuinely investigate potential violations committed by the armed forces, which contributes to the protection of the rule of law, and the broader societal right to the truth about armed force used in their name.

The duty to investigate acknowledges the central importance of States in enforcing international law, by obliging them to set up a procedural framework which effectuates the international law governing armed conflict, and to apply that framework if any potential violations take place. Because they must moreover, under certain circumstances, do so for violations which took place outside of their control, this effectively creates a domestic enforcement mechanism of international law which spans the globe. This could, therefore, theoretically achieve the aims of the fight against impunity by ensuring accountability for violations, and by providing victims with the truth and a remedy.

Yet, the obligation remains realistic because it is one of *means, not of result*. Furthermore, because it is a flexible obligation which can be applied contextually, and because international law provides for a framework for the relationship between both norms, a careful application of the obligation need not impose

obligations going beyond what is realistic. As this study has shown, *lex specialis* can resolve normative conflicts – which can alleviate tensions with respect to investigations into the use of force which is considered to be lawful under IHL, or with respect to command investigations which are not fully independent. Beyond normative conflict, however, the study has also shown that other normative tensions can be alleviated by acknowledging them under a paradigm of normative competition, and by incorporating the principles of IHL in the interpretation of flexible norms of IHRL. This ensures that the duty to investigate incidents during armed conflict is interpreted in ways which take account both of the exigencies of the situation, and of the norms of both IHL and IHRL which regulate the situation.

The *realism* rooted in the duty to investigate ensures it can remain applicable in all circumstances of conflict, even in high intensity active hostilities, whilst at the same time tempering the precise investigative requirements which apply in extreme circumstances. Thus, the legal obligations flowing from the duty to investigate oscillate between *effectiveness* and *realism*. States must fulfil their obligations to effectuate the international law governing armed conflict and take up their roles as guardians of the international legal system. But the factual context of a case and the State's capacity to actually investigate will equally determine how the investigation is ultimately carried out. A balance must thus be struck, with the effectuation of the law ultimately dependent on what is realistically possible in the circumstances of the case. This also means that the precise application of investigative standards to a particular incident is dependent on a case-specific analysis.

Secondly, this study has sought to clarify the interplay of IHL and IHRL. Ultimately, it was shown 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 norm-by-norm and case-by-case basis. Nonetheless, general international law does provide the necessary guidance for their co-application. The rules of both regimes interact in a variety of ways, with the precise outcome dependent on context. This analysis is precisely what has driven a project such as the *Practitioners' Guide to Human Rights Law in Armed Conflict* to select a number of the most important issues from an operational perspective, and to set out how interplay works out for those situations. This study has done so for the duty to investigate violations committed during armed conflict.

These findings on the interaction of IHL and IHRL aim to contribute to our understanding of the law of interplay, which is of potentially much broader interest than for the duty to investigate alone. The approach developed in this study can be applied to all other norms of IHL and IHRL, which can assist in determining the contents of the international law governing armed conflict. In fact, from the perspective of the broader debate on interplay, this study's enquiry into the duty to investigate is merely an important *example* of how

issues of interplay ought to be resolved. It is suggested that the law of interplay could be mapped out by rigorously applying the same method to other relevant instances of normative overlap. Herein lies an important task for States, who must properly instruct their armed forces as to the legal framework they must operate under. If this is done diligently, it is hypothesised, this will also remove certain misgivings States have with regard to human rights courts and bodies' engagement with IHL and situations of armed conflict. If States come up with a coherent framework of interplay, this will provide human rights courts and bodies who are faced with cases arising out of armed conflict with a solid starting point. It might also contribute to States' perception of having a sufficiently prominent role in shaping the international law governing armed conflict. If they develop the law of interplay through their domestic practices, they will not only influence international law through their own State practice, but will also inform domestic proceedings,[107] which in turn provides the basis for international proceedings after the exhaustion of domestic remedies. Such a practice could benefit the dialogue between States human rights courts and treaty bodies. This, it is submitted, does justice to the role States have in shaping international law, whilst also contributing to the quality of IHRL bodies' judicial role in this field. If States continue to argue that IHRL does not apply to armed conflict, or does not apply extraterritorially, this is not helpful, and it fully leaves it up to IHRL bodies to shape the law of interplay without any useful input from the experts on the ground – States. If, on the other hand, States argue on the substance how the law of interplay has shaped their operations, this will greatly assist IHRL bodies in their findings. This, it is submitted, will lead to the most balanced interpretation of interplay – to the benefit of victims, armed forces, States, and international law as a whole.

107 Domestic court judgments constitute both State practice, and a subsidiary means of determining international law, and thus play a dual role in the development of international law. See Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 International and Comparative Law Quarterly 57.