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

Tan, F.

Summary

THE DUTY TO INVESTIGATE IN SITUATIONS OF ARMED CONFLICT
An Examination under International Humanitarian Law, International Human Rights Law, and their Interplay

Investigations have a crucial role to play during armed conflicts and in their aftermath. The so-called 'fog of war' obfuscates what happens on the ground. This can render it almost impossible for victims of war violence to find out what has happened to them, why it happened, who is responsible, and whether they may have a right to reparation and some form of legal recourse. Victims are, in this respect, highly dependent on State investigations. Accountability efforts similarly rely on knowledge of the facts, because without such knowledge, there is no way to establish whether the law may have been violated, let alone who was responsible for such a violation. Larger aims such as justice for victims and accountability of perpetrators then remain out of reach. In addition, because thorough investigations will be able to substantiate or disprove allegations of violations of international law, they equally serve to safeguard the integrity of States' armed forces, and can protect the armed forces from lingering aspersions or the looming risk of investigation and re-investigation in the future. This underscores the vital nature of investigations for all involved.

International humanitarian law (IHL) and international human rights law (IHRL) both regulate to what extent States must investigate incidents during and after armed conflict, and how they must do so. Both regimes, however, regulate *what* States must investigate, and *when* and *how* they must do so, in very different levels of detail, and moreover appear (at least *prima facie*) to do so in diverging ways. This leads to uncertainty in the law, which puts the effectuation of individual rights, the fight against impunity, and of States' rights and interests, in jeopardy. A common narrative moreover holds that to require States to conduct human rights investigations during armed conflict would impose inordinate burdens on them, and would be wholly unrealistic in light of the realities of hostilities.

In light of the importance of investigations for achieving justice, accountability, and legal certainty, this study seeks to answer the following question:

> *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 doing so, it aims to clarify the law with respect to States' investigative obligations during armed conflicts. This search for clarity is conducted through the means of a doctrinal research method.

Under IHL (Part I, Chapters 2 and 3), the search for clarity takes the shape of an analysis of treaty law, custom, State practice, and soft law, in order to identify investigative obligations and to flesh out what they entail. This study finds that the IHL system of supervision, implementation, and enforcement, fully relies on State investigations for its effectiveness. The lack of institutionalised international means of supervision and enforcement, place the task of effectuating IHL fully on States. In order to take up this task, and in light of the duty to respect and ensure respect for IHL, investigations are crucial. An analysis of IHL treaty law shows that this applies to *all* breaches of IHL – both serious and non-serious violations.

IHL does, however, make a sharp distinction between the obligations pertaining to criminal, and non-criminal breaches. War crimes (grave breaches and other serious violations) entail broad-ranging investigative obligations, including the investigation of such crimes when they are committed by others than States' own armed forces. Preventing impunity for these crimes is an important driving force behind such obligations. Simple violations of IHL, which are all breaches which are not 'serious', are subject to a less extensive investigative regime. The focus of investigative obligations with respect to such breaches is internal, on breaches committed by a State's own forces, because the interests of the international community are less directly at stake here. Non-serious breaches, after all, are not outrages against humanity, nor are they crimes under international law.

The IHL norms with respect to investigative obligations are often terse and require further interpretation to map out *what* States must investigate, as well as *when* and *how* they must do so. Soft law instruments and State practice play an important role in this respect. This study shows that war crimes require criminal investigations, meeting standards of effectiveness, thoroughness, genuineness, promptness, impartiality, and fundamental due process guarantees. Simple violations of IHL require administrative investigations, which leave more discretion to States in how they shape the investigative process. Nonetheless, such investigations will need to be effective, prompt, and impartial. Because criminal punishment and retribution are not the aim of such investigations, they regularly take place within the chain of command, and

can result in disciplinary measures. These investigations should moreover identify potential systemic issues which caused a breach, and facilitate the establishment of, or acknowledgment of, State responsibility for the breach. Finally, the trigger for the duty to investigate appears to be very similar for all breaches. Whenever the State has information which reasonably leads to a suspicion of a violation, it must start an investigation. The source of the information is immaterial.

In Part II (Chapters 4-8), the study outlines the contours of the duty to investigate human rights violations under the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (ACHR), and the European Convention on Human Rights (ECHR). It does so by establishing the material, personal, temporal, and geographic scope of application of the obligation, as well as the standards investigations must meet. It thereby establishes *when* States must investigate (potential) violations of human rights, and *how* they must do so. It first maps these elements in general, and then examines to what extent the obligation is altered during armed conflict.

It is shown that investigative obligations pertain primarily to potential violations of the right to life, the prohibition of torture and other cruel, inhuman, and degrading treatment and punishment, the prohibition of slavery, and enforced disappearances. Investigative obligations can and do attach to other violations, but case-law is still developing on this issue. It is further shown that States must also investigate abuses by non-State actors within their jurisdiction, and that individuals have a right to an investigation. Temporally and geographically, the applicability of the duty to investigate is shown to be broad, potentially encompassing incidents which predated the entry into force of the human rights treaty in question, and extending extraterritorially in a broad range of circumstances.

The study further clarified what information triggers States' duty to investigate. As soon as information – no matter the source – reaches the State which indicates a potential violation of the rights listed above, and raises an arguable claim that a violation has occurred, an investigation must be conducted.

With respect to how States must conduct their investigations, an important starting point is that the duty to investigate is not an obligation of result, but rather an obligation of means, a due diligence obligation. Procedural standards have been developed in case-law which provide the yardstick for the overall effectiveness of the investigation, numbering eight in total, which when they are observed discharge the State's obligation – even if the investigation ultimately failed to clarify the facts or the identity of perpetrators. The eight standards formulated by the Human Rights Committee (HRC), Inter-American Court of Human Rights (IACtHR), and European Court of Human Rights (ECtHR) alike, stipulate that the investigations must be (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) im-

partial. The last two criteria entail that investigators may not to 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 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 sine lege*.

Crucially for this study, it is found that human rights continue to apply during armed conflict. Beyond the International Court of Justice, judgments and decisions were also rendered to this effect by the HRC, and the Inter-American and European Courts. Investigative obligations equally continue to apply during armed conflict. When applying the duty to investigate during armed conflict, regional courts and treaty bodies have followed their regular approach, without as such altering the scope of application or standards of investigative obligations. Rather, they have applied the obligation contextually, meaning they take the exigencies of the situation into account when interpreting what could reasonably be required of the State by ways of, for instance,

a prompt or effective investigation. The HRC and IACtHR have, in contrast with their usual openness to IHL, not relied on IHL in interpreting the duty to investigate in such situations. The European Court until recently equally relied on contextual interpretation alone to shape the contours of the duty to investigate during armed conflict, but has in 2021 for the first time incorporated IHL in its application of the duty to investigate. This divergence in approaches indicates that the interplay of IHL and IHRL, also in the context of the duty to investigate, is in flux and requires continued attention.

In respect of the interplay between IHL and IHRL (Part III, Chapters 9 and 10), the study first sets out the relationship between both regimes *in abstracto*. Based on the secondary rules of general international law, a step-by-step approach is developed for the analysis of issues of interplay. This involves four steps. First, step 1, it must be determined whether both legal regimes indeed apply to the situation at hand. This step requires a determination of the applicability of both legal regimes, and, subsequently, 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 this is the case, step 2 is to explore the existence and operation of a conflict clause. This is a clause which expressly provides how potential conflicts with other legal regimes must be resolved. If a conflict clause does regulate the relationship between IHL and IHRL, the solutions provided by such clauses must be followed. Chapter 9 shows, however, that IHL nor IHRL regularly contains such conflict clauses – and that derogation clauses in human rights treaties are *not* conflict clauses. If a conflict clause cannot resolve the conflict, or – more likely – if no conflict clause is in operation, step 3 is to assess whether the various applicable norms of IHL and IHRL conflict. Step 4 then resolves the normative overlap. In case of normative conflict, resort must be had to methods of conflict resolution, in particular *lex specialis*. If they do not, the overlap may be solved through harmonious interpretation and systemic integration, pursuant to Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties (VCLT).

Looking further at steps 3 and 4, under the rules of general international law, it was found that the existence or not of normative *conflict* is decisive for how normative overlap can be resolved because it determines whether recourse can be had to tools for conflict resolution. This brings to the fore two issues. The first pertains to the definition of normative conflict, which is – in common international practice – so strict that it is underinclusive. Under this definition, normative conflict exists only where two norms are mutually exclusive, meaning that in order to meet the one, the other is necessarily violated. With respect to the interplay of IHL and IHRL, this is especially evident when it comes to rules under IHL that *permit* certain conduct which is simultaneously *prohibited* by IHRL, for instance the use of lethal force or deprivation of liberty. Under a strict definition, IHL and IHRL do not conflict in this context because both rules can be complied with by simply refraining from killing or detaining.

Such an approach, however, completely disregards the opposite directions in which both rules pull, and would render rules of IHL obsolete. This study therefore proposes to widen the definition to include conflicts between obligatory norms on the one hand, and permissive norms on the other hand. This allows for the resolution of these types of normative conflict through the use of *lex specialis*, which grants precedence to the rule which is more specific, and is more specifically geared towards the context of a situation and incident. The second issue that arises when establishing whether there is a normative conflict, is that even when a broader definition of normative conflict is used, there remain many instances of normative overlap which cannot genuinely be categorised as convergence because both regimes still pull in different directions. Very real tensions between IHL and IHRL are overlooked, especially where IHL is silent – arguably because it intentionally leaves discretion to States. Simply applying rules of IHRL because IHL is silent would then disregard the existing tensions. This study therefore submits that beyond paradigms of conflict and convergence, normative *competition* must be recognised as a third category of normative overlap. Under a paradigm of normative competition, tools for the resolution of normative conflict cannot be relied upon, but it is submitted that in such situations, rules of IHRL must be interpreted flexibly insofar as such rules allow, in light of the principles of IHL. This should ensure a more balanced outcome, whilst acknowledging that there are limits to harmonious interpretation and that principles cannot set aside rules.

The study further concludes that the resolution of normative overlap must take place on a highly contextual basis. Beyond a strictly legal analysis of the specificity of norms and the extent to which they conflict, converge, or compete, the resolution to such interactions must equally be based on a contextual analysis which takes the circumstances of the case into account.

The study in Chapter 10 finally applies the step-by-step approach to investigative obligations under IHL and IHRL, to determine their relationship and interaction. Because it was concluded that it is decisive whether norms conflict, compete, or converge, a comparative analysis is carried out. The points for comparison are the scope of application of the duty to investigate, and the standards guiding investigations as they were identified in Parts I and II.

What stands out is that there is a large measure of convergence between investigative obligations under IHL and IHRL, and that common claims that IHRL imposes inordinate investigative burdens on States therefore appear to be unfounded. With respect to the scope of application of investigative obligations, many incidents during armed conflicts 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 International Committee of the Red Cross' (ICRC) 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.

This is not to say that there are no instances of competition and conflict regarding the scope of application of investigative obligations under IHL and IHRL. *Conflicts* may arise in particular in respect of the use of lethal force. This study has identified a number of 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. Whether or not the duty to investigate applies then becomes dependent on how this conflict of substantive norms is resolved – meaning that if IHL constitutes *lex specialis* no investigation will be required, whereas if IHRL functions as *lex specialis*, an investigation must follow. Which norm constitutes the *specialis* will depend on the context of the use of force. Normative *competition*, next, exists in respect of incidents perpetrated by non-State actors for which IHRL requires investigations when the incident took place within the State's jurisdiction, while IHL does not (except where war crimes are at issue). The study shows that this competition can be resolved through flexible interpretation of the norms of the ICCPR, but that the case-law of the Inter-American and European Courts does not leave scope for such flexibility. This means that under those regimes, investigations will be required of States in spite of potential tensions with military necessities.

How investigations must be conducted, this study shows, varies quite strongly under IHL and IHRL. Under both regimes, however, it is clear that the duty to investigate is an obligation of conduct, not of result. Thus, the simple fact that those responsible for a violation could not ultimately be identified or that a conviction was not obtained, need not mean an investigation fell short. The various standards are 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 prisoners of war (POWs) or civilians, or of occupying States

transferring parts of their own civilian population into occupied territory, do not require an investigation under IHRL – or there is at least 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. When such violations occur, despite the general applicability of IHRL to a situation, the investigation is governed by IHL alone, and thus 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 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 (i) *ex officio* and (iv) impartially fall under a paradigm of normative harmony. This means 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. The standards that an investigation be carried out (ii) promptly and with reasonable expedition, (v) seriously, effectively, adequately and thoroughly, (vii) transparently, and (vi) with sufficient involvement of next of kin, fall under a paradigm of normative competition. These standards must be applied contextually under a paradigm of normative competition. Because there is no normative conflict, *lex specialis* cannot be relied upon in order to give IHL precedence. Nevertheless, the IHRL standards can – to a certain extent – be interpreted flexibly, taking the principles of IHL into account. Finally, the standards that an investigation be carried out (iii) independently, and (viii) followed-up by a criminal prosecution, fall (potentially) under a paradigm of normative conflict. These standards may be subject to a *lex specialis* determination. 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. 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 requires a

determination of whether an incident falls under the active hostilities or security operations paradigms. Contingent on the applicable paradigm, the norm which applies as *specialis* therefore takes precedence over the *generalis*. 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. Further, if IHL is *specialis*, IHL's insistence that States 'endeavour' to grant the broadest possible amnesty at the end of a non-international armed conflict (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 to formulate amnesties in such a way 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. Finally, if a criminal trial is conducted, in the event that IHRL is *lex specialis*, 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.

In sum, this study finds that the duty to investigate forms an integral part of both IHL and IHRL. Both regimes have institutionalised investigations as a crucial aspect of the effectuation of their rules, and of ensuring accountability for violations. The *rationale* for investigative obligations under both legal regimes is therefore similar, and they are highly compatible. The narrative that the duty to investigate human rights violations during armed conflicts imposes an inordinate burden on States and is unrealistic, is in need of change. This obligation is in large part mirrored in IHL. Moreover, the duty to investigate is flexible and can be applied contextually, which safeguards that its application remains realistic. 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.