

A contextual-functional approach to investigations into right to life violations in armed conflict

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1. Introduction

The right to life is often referred to as the foundational right insofar as ‘when [it] is not respected, all the other rights lack meaning’.¹ An essential protection of the right to life consists of the duty to investigate its violations.²

Under both international human rights law and international humanitarian law States have an obligation to investigate, prosecute and punish those responsible of particularly severe conduct.³

These parallel obligations, however, are triggered in different ways and shall satisfy different parameters, depending on which of the two *corpora juris* is taken into account.⁴ Due to these differences, the question remains as to which standards should govern investigations in times of armed conflict, when both legal regimes find simultaneous application.

International human rights courts and quasi-judicial mechanisms have played a fundamental role in establishing criteria that apply to the conduct of investigations in cases concerning the loss of life. The pur-

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¹ Inter-American Court of Human Rights (hereinafter IACtHR) *Myrna Mack-Chang v Guatemala* (25 November 2003) para 152.

² IACtHR *Case of Mapiripán Massacre v Colombia* (15 September 2005) para 232.

³ UN Office of the High Commissioner for Human Rights (hereinafter UNOHCHR), *International Legal Protection of Human Rights in Armed Conflict*, New York (2011) 23; United Nations Fact-Finding Mission on the Gaza Conflict ‘Report on Human Rights in Palestine and Other Occupied Territories’ (hereinafter Goldstone Report) (25 September 2009) UN Doc A/HRC/12/48 para 1804.

⁴ M D’Avolio, ‘Regional Human Rights Courts and Internal Armed Conflicts’, (2007) 2 *Intercultural Human Rights L Rev* 272, 273.



pose of this contribution is to explore the source of those parameters, what they entail in terms of practical activities that States are bound to carry out in order to satisfy their duty to investigate, and verify how they apply to situations of armed conflict.

The following analysis will unveil the existence of some issues that hinder an unmodified transposition of investigative standards elaborated for peace situations to contexts of armed conflict; it will analyze decisions of human rights bodies that have tackled and partly overcome some of those critical issues; it will try to detect challenges that still remain and to envisage a coherent theoretical framework applicable to varying scenarios and capable of leading to satisfactory results in any such case. In so doing, this contribution will try to identify a common denominator characterizing the recalled judgments, detecting it in a functional-contextual approach to the duty to investigate and concluding that the ensuing obligation is not unrealistic, even in times of armed conflict, since it is inherently flexible and context-specific.

2. *Duty to investigate right to life violations under human rights law*

Under human rights law States bear a general duty of diligence which requires them to ensure respect for fundamental rights. As far as the right to life is concerned, this duty generates an obligation to protect, which in turns translates into a twofold obligation to prevent violations and, once violations have occurred, to investigate the circumstances that led to the relevant breach. Thus, the European Court of Human Rights (hereinafter ECtHR) has had occasion to aver that a failure to undertake investigative steps may in and by itself amount to a violation of Article 2 of the European Convention.⁵

What is striking in this regard is that a duty to investigate alleged violations of the right to life is not explicitly set forth in any of the main human rights treaties. However, as correctly pointed out by the ECtHR, ‘the general legal prohibition of arbitrary killing by agents of the State would be ineffective in practice if there existed no procedure for re-

⁵ *Velikova v Bulgaria* App no 41488/98 (ECtHR, 18 May 2000) para 20.



viewing the lawfulness of the use of lethal force'.⁶

2.1. *Source of the obligation*

The obligation to investigate has been deduced by international human rights bodies by reference to other explicit conventional provisions.⁷ All international human rights mechanisms and courts have indeed come to detect the existence of such an obligation through a joint reading of provisions granting substantive rights and the general obligation to 'respect and ensure respect' of the fundamental rights enshrined in treaty texts.⁸

Pursuant to this joint reading, States cannot simply refrain from arbitrarily depriving individuals of their lives but shall in addition prevent any violation of the right to life⁹ and take all possible steps, once a loss of life has occurred, to clarify the events, investigate a person's death, prosecute those believed to be responsible for it, try them and, if found guilty, sanction them,¹⁰ affording victims integral reparations for the

⁶ *Al-Skeini and Others v The United Kingdom* App no 55721/07 (ECtHR, 7 July 2011) para 163.

⁷ Affirmative, S Sivakumaran, 'International Humanitarian Law' in D Moekli, S Shah, S Sivakumaran (eds), *International Human Rights Law* (OUP 2010) 528 and F Andreu-Guzman, *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations* (International Commission of Jurists 2004) 41. Notably, well before the advent of human rights law, Max Huber deduced the existence of such an obligation from a general principle of due diligence. See, to this end, *Biens britanniques au Maroc espagnol (Espagne contre Royaume-Uni)* (1925) 2 RIAA 645, 646.

⁸ To this end see, *inter alia*, *McCann and Others v The United Kingdom* App no 18984/91 (ECtHR, 27 September 1995) para 171; *McKerr v United Kingdom* App no 28883/95 (ECtHR, 4 May 2001) para 111; and *Şemsi Önen v Turkey* App no 22876/93 (ECtHR, 14 May 2002) para 87. By the same token see also *Mynra Mack Chang* (n 1) and African Commission on Human and Peoples' Rights (hereinafter ACmHPRs) *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (11 October 1995). Concluding accordingly, Goldstone Report (n 3) para 1806.

⁹ *Case of Masacre de Mapiripan* (n 2) para 114.

¹⁰ *Basayeva and others v Russia* App nos 1544/05 and 20731/04 (ECtHR, 28 May 2009) paras 133-140; *Varnava and others v Turkey* App nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009) paras 128-133; *Finucane v The United Kingdom* App no 29178/95 (ECtHR, 1 July 2003) para 71; IACtHR, *Anzualdo Castro v Peru* (22 September 2009) paras 65, 116-119, 125, 135; *La Cantuta v Peru* (29 November 2006) para 110; *Goiburú and Others v Paraguay* (22 September 2006) para 84; *Velásquez Rodríguez v Honduras* (29 July 1988) paras 174, 176.



damages suffered.¹¹

The duty to investigate and prosecute is not only geared around a joint reading of the substantive provision protecting individuals against arbitrary deprivations of life and the general duty to ensure respect; it also stems from the right to an effective remedy. As the UN Human Rights Committee (hereinafter HRC) has clarified ‘Article 2, paragraph 3 [ICCPR] requires that in addition to effective protection of Covenant rights States parties must ensure that individuals also have accessible and effective remedies to vindicate those rights’.¹² This assessment has found consistent confirmation in the case law and Concluding Observations of the Committee¹³ as well as in the jurisprudence of other human rights courts.¹⁴

The judicial affirmation of a positive duty to investigate finds further confirmation in a number of declarations and other non-binding instruments relevant for the protection of the right to life. Thus, in particular, the *UN Basic Principles on the Use of Force and Firearms*,¹⁵ the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*¹⁶ and the *Declaration on the Protection of All Persons from Enforced Disappearance*¹⁷ all concur in stating that States have a duty to perform an impartial and independent investigation into alleged violations of the right to life.¹⁸ Various UN organs and procedures have endorsed this stance and reiterated the existence

¹¹ *Goiburú and others* (n 10) para 122.

¹² UNHRC ‘General Comment no 31’ (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13 paras 3, 15, 18.

¹³ To this end see, *inter alia*, UNHRC, *Pestano v The Philippines* (23 March 2010) para 7.2; *Gonzalez v Argentina* (17 March 2001) para 9.4; *Concluding Observations: Jamaica*, (2011) para 16.

¹⁴ See to this end, *inter alia*, *Myrna Mack Chang* (n 1) para 175; *Velásquez-Rodríguez* (n 10) paras 161-172; *Kaya v Turkey* App no 22535/1993 (ECtHR, 10 October 2000) para 105; *Isayeva, Yusupova and Bazayeva v Russia* Apps nos 57947/00, 57948/00, 57949/00 (ECtHR, 24 February 2005) paras 208-213.

¹⁵ UN Congress on the Prevention of Crime and the Treatment of Offenders ‘Basic Principles on the Use of Force and Firearms by Law Enforcement Officials’ (7 September 1990).

¹⁶ UN ECOSOC ‘Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary or Summary Executions’ Resolution 1989/65 (24 May 1989).

¹⁷ UNGA ‘Declaration on the Protection of All Persons from Enforced Disappearance’ UN Doc A/RES/47/133 (18 December 1992).

¹⁸ See accordingly Andreu-Guzman (n 7) 37.



of such an obligation.¹⁹

In light of the aforementioned international jurisprudence and practice it could comfortably be argued that the obligation to investigate violations of the right to life, including the obligation to prosecute those responsible for such violations, has now attained customary status.²⁰ Therefore, the duty to investigate human right violations stems from provisions of both conventional and customary nature, being a fundamental component of States' obligation to ensure respect to human rights.²¹ Finally, the absence of an investigation into a suspicious loss of life may give rise in and by itself to a violation of the right to life, at least insofar as its procedural limb is concerned.²²

2.2. Content of the Obligation

From the silence of relevant human rights conventions as to the existence of a specific duty to investigate derives a natural lack of black letter indications as to the main tenets of such an obligation.

A set of non-binding principles as well as a consistent body of jurisprudence of international human rights mechanisms have come to elucidate detailed parameters that an investigation must satisfy in order for States to fully discharge their duties in this regard.

In particular, a comparative assessment of non-binding principles clarifies that States must 'ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances'.²³ Additionally, States shall ensure that a report be filed 'promptly to

¹⁹ UN Commission on Human Rights, Resolution 2002/36 (23 April 2002) para 6 and UNGA, UN Doc A/RES/55/111 (4 December 2000) para 6; Bacre Waly Ndiaye, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' UN Doc E/CN.4/1997/60 (24 December 2006) para 46.

²⁰ Public Commission to Examine the Maritime Incident of 31 May 2010 (hereinafter Turkel Commission) 'Second Report' (6 February 2013) 84.

²¹ *ibid.* See accordingly, Andreu-Guzman (n 7) 33.

²² UNHRC, *Bautista de Arellana v Colombia* (27 October 1995) para 8.6; *Rajapakse v Sri Lanka* (14 July 2006) para 9.3; *Bousroual v Algeria* (30 March 2006) para 9.11; *Coronel and others v Colombia* (24 October 2002) para 9.3; *Vicente and others v Colombia* (29 July 1997) para. 8.3.

²³ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 15) para 22.



the competent authorities responsible for the administrative review and judicial control, whenever a death or serious injury results'.²⁴ In conclusion, investigations into alleged violations of the right to life must be prompt, thorough, independent and impartial and States must consequently take all necessary measures to ensure that perpetrators are prosecuted and punished to the full extent of the law.²⁵

These parameters find full confirmation in international practice and jurisprudence. Accordingly, international human rights bodies have established that an investigation 'must be discharged seriously and not as a mere formality'.²⁶ As a consequence, any investigation needs to meet a threshold of effectiveness which is informed by principles of promptness,²⁷ thoroughness,²⁸ independence²⁹ and impartiality.³⁰ More-

²⁴ *ibid.*

²⁵ UN Economic and Social Council 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity' (8 February 2005) UN Doc E/CN.4/2005/102/Add.1 principle 19. Similarly, the UN Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions (n 16) at para 9 provide for a 'thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death'.

²⁶ IACtHR, *El Amparo v Venezuela* (14 September 1996). By the same token see also IACtHR, *Blake v. Guatemala* (24 January 1998) para 65.

²⁷ UNHRC, 'General Comment no 31' (n 12) para 15; *Concluding Observations, Venezuela* (26 April 2001) para 8; *Concluding Observations, Kyrgyz Republic* (24 July 2000) para 7; *Concluding Observations, Chile* (30 March 1999) para 10; IACtHR, *Heliodoro Portugal v Panama* (12 August 2008) para 143; *Finucane* (n 10) para 70; *Çakici v. Turkey* App no 23657/94 (ECtHR, 8 July 1999) paras 80, 87, 106; and *Mahmut Kaya* (n 14) paras 106-07.

²⁸ UNHRC 'General Comment no 31' (n 12) para 15; *Concluding Observations, Venezuela* (26 April 2001) para 8; *Concluding Observations, Kyrgyz Republic* (24 July 2000) para 7; *Concluding Observations, Chile* (30 March 1999) para 10; *José Vicente and Others* (n 22) para 8.8; *Heliodoro Portugal* (n 27) paras. 115, 144; *Finucane* (n 10) para 67.

²⁹ UNHRC 'General Comment no 31' (n 12) para 15; *Concluding Observations, Venezuela* (n 28) para 8; *Concluding Observations, Kyrgyz Republic* (n 28) para 7; *Concluding Observations, Chile* (n 28) para 10; *Heliodoro Portugal* (n 27) para 144; ACmHPR, *Amnesty International et al v Sudan* Communication nos 48/90, 50/91, 52/91, 89/93 (1999) para 51; *Finucane* (n 10) para 68; *Gülec v Turkey* App no 21593/93 (ECtHR, 27 July 1998) para 80; and *Ogur v Turkey* App no 21594/93 (ECtHR, 20 May 1999) para 91.

³⁰ UNHRC 'General Comment no 31' (n 12) para 15; *Concluding Observations, Venezuela* (26 April 2001) para 8; *Concluding Observations, Kyrgyz Republic* (n 28) para 7; *Concluding Observations, Chile* (n 28) para 10; UNHRC 'General Comment no 20' (10 March 1992) para 14; 'Principles on the Effective Prevention and Investigation of



over, any investigation must be carried out *ex officio*, without victims' relatives having to launch a complaint.³¹

While avoiding an exercise of identifying a definitive list of that conduct which satisfies the parameters thus established, international human rights bodies have nonetheless inferred from the recalled principles a number of investigative proceedings that may come into consideration when assessing the overall effectiveness of an investigation. Thus, for instance, the ECtHR has affirmed that States shall take

‘whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death’.³²

The IACtHR has reached very similar conclusions.³³

3. *Human rights obligations to investigate in armed conflict*

A survey of human rights bodies' case law reveals that the duty to investigate violations of the right to life continues to apply to States in times of armed conflict or other military operations³⁴ as ‘neither the

Extra-Legal, Summary or Arbitrary Executions (n 16) Principle 9; *Heliodoro Portugal* (n 27) para 144; and *Finucane* (n 10) para. 71.

³¹ IACtHR, *Case of Radilla Pacheco v Mexico* (23 November 2009) para 143; *Heliodoro Portugal* (n 27) paras 115, 143-145; *Case of Velásquez Rodríguez v Honduras* (29 July 1988) para 176; *Hugh Jordan v United Kingdom* App no 24746/94 (ECtHR, 4 May 2001) para 141.

³² *Salman v Turkey* App no 21986/93 (ECtHR, 27 June 2000) para 106; *Tanrikulu v Turkey* App no 23763/94 (ECtHR, 8 July 1999) para 109; *McKerr* (n 8) para 113.

³³ *Masacre de Mapiripan* (n 2) para 224. Affirmative, ‘Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary or Summary Executions’ (n 16) Principle 9. As to more specific parameters related to the powers of investigative authorities, their degree of independence and expertise, the handling of the victims' remains and the relationships with their family see *ibid* Principles 10 -17.

³⁴ *Al-Skeini* (n 6) para 164: ‘The Court has held that the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict’, recalling *inter alia* *Güleç v Turkey* App no 21593/93 (ECtHR, 27 July 1998) para 8; *Ergi v Turkey* App no 23818/94 (ECtHR, 28 July 1998) paras 79, 82; and *Isayeva v Russia* App no 57950/00 (ECtHR, 24 February 2005) paras 180, 210.



prevalence of violent armed clashes nor the high incidence of fatalities' can displace it.³⁵ Significantly, the principle that investigations must also take place in times of conflict is equally set forth by international instruments of a non-binding nature.³⁶

As to the exact scope of the investigation, in a series of cases the ECtHR seems to have transposed to the context of armed operations the parameters that it has carved out for investigations in times of peace. The Court has indeed maintained that Article 2 of the European Convention of Human Rights creates a duty for States to 'ensure that an effective, independent investigation was conducted into the deaths arising out of clashes with security forces' during military operations.³⁷ In the *Isayeva* case, the ECtHR has reasoned that the same rationale (ie joint reading of substantive provisions and general duty to ensure respect for fundamental rights) leads to the retention of a general duty to investigate even when the loss of life occurs amidst armed confrontations; that this duty is solely complied with if the investigation carried out is effective; and that a lack of an effective investigation gives rise to an additional, autonomous violation of the right to life, in its procedural dimension.³⁸ The ECtHR has further clarified that, albeit the precise modalities of the investigation may actually vary depending on the circumstances of the case, the following criteria should in any case be respected: a) authorities must act of their own initiative; b) investigations must be performed by persons formally as well as practically independent from those allegedly responsible; c) investigations must be capable of determining whether the recourse to lethal force was justified under the prevailing circumstances; d) investigations must be promptly undertaken; e) investigations must be characterized by a sufficient degree of public scrutiny and the victims' next-of-kin must be safeguarded in his interests throughout the entire procedure.³⁹

³⁵ *Kaya* (n 14) paras 87-91; *Mapiripan* (n 2) para 137; ACmHPR, *Amnesty International and Others v. Sudan* (15 November 1999) para 51.

³⁶ UN General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Law' (16 December 2005) para 4.

³⁷ *Ergi* (n 34) para 85.

³⁸ *Isayeva* (n 34) paras 208-225.

³⁹ *Isayeva, Yusupova and Bazayeva* (n 14) paras. 209-213. See also, accordingly, *Khashiyev and Akayeva v Russia* Apps nos 57942/00 and 57945/00 (ECtHR, 24 February 2005) paras 153, 185.



As is apparent, then, all the parameters that the Court considers indispensable for an investigation to be deemed effective in times of peace retain their full force in times of armed conflict.⁴⁰

Other human rights courts and bodies have come to analogous conclusions. Thus, in the Inter-American system both the Commission and the Court have repeatedly found that States remain under an obligation to investigate alleged human rights violations in times of armed conflict, making reference to the same standard threshold of effectiveness.⁴¹ Analogously, the HRC in a Chechen case has come to conclusions equivalent to those reached by the ECtHR, finding a violation of the procedural limb of the right to life as a result of shortcomings affecting the investigation into the victim's death⁴² and recommending that the author of the communication be provided with an effective remedy, including an impartial investigation, prosecution of those responsible, and adequate compensation.⁴³

Significant instruments of a non-binding nature provide for similar standards to also be applied in times of armed conflict without introducing any specific context-dependent distinction or limitation.⁴⁴

4. *Issues*

This conspicuous set of principles and judicial precedents has led commentators to point out that human rights bodies 'have expanded the protections available during armed conflict well beyond the protections that are currently provided for under [international humanitarian law], and certainly beyond anything that has been established with re-

⁴⁰ Affirmative, Goldstone Report (n 3) para 1808.

⁴¹ IACmHR, *Abella v Argentina* (18 November 1997) paras 236, 243, 247. See accordingly, IACtHR, *Ituango Massacre v Colombia* (1 July 2006) paras 297-299 and 322; *Mapiripan* (n 2) paras 216-219; *Bamaca Velasquez v. Guatemala* (25 November 2000) paras 211, 212; and *Las Palmeras v. Colombia* (6 December 2001) paras 58, 60.

⁴² UNHRC *Amirov v Russia* (22 April 2009) para 11.4.

⁴³ *ibid* para 13. See accordingly K Koroteev, 'Legal Remedies for Human Rights Violations in the Armed Conflict in Chechnya: The Approach of the European Court of Human Rights in Context' (2010) 1 *J Intl Humanitarian Legal Studies* 296.

⁴⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation (n 36) para 3.



gard to internal armed conflicts'.⁴⁵ In particular, the application of the principles of autonomous initiative, promptness, thoroughness, independence and impartiality to situations of armed conflict has led some authors to wonder whether these parameters are well suited for such a different context and whether, as a consequence, maintaining such a high-standard threshold of effectiveness is at all realistic.⁴⁶ This issue is indeed one of prominent importance, considering the mutated circumstances under which the recalled principles should apply.

Thus, whereas human rights bodies have maintained that 'punishing those responsible is an obligation incumbent upon the State *whenever* there has been a violation of human rights',⁴⁷ commissions of inquiry into violations of international humanitarian law have found that 'there is a difference between the use of force in the context of the conduct of hostilities and the use of force in the context of law enforcement activities', specifying that 'unlike the law enforcement context, the death or injury of a civilian during the conduct of hostilities does not automatically give rise to a duty to investigate'.⁴⁸ Also the International Committee of the Red Cross (hereinafter ICRC) has identified a divergence between the obligations imposed by IHL, where 'not every death triggers the obligation to investigate', and human rights law, which 'provides for a much more stringent obligation to investigate [...] each time a person has been killed and at least each time there is an allegation of a violation of the right to life'.⁴⁹ This is a first notable discrepancy since it reflects a dramatically different conception of what should be sufficient to trigger an investigation.

It should further be noted that under normal circumstances the obligation to investigate extends to losses of life deriving from the conduct of non-state actors.⁵⁰ Thus, States' failure to investigate human rights

⁴⁵ D'Avolio (n 4) 283, 284, 287, 304.

⁴⁶ MN Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 *Harvard National Security J* 53-55 and E Biotti, J de Cillia, 'L'obligation conventionnelle d'enquête sur les atteintes à la vie dans le contexte des conflits armés' (2014) *La Revue des droits de l'homme* 6.

⁴⁷ See *inter alia*, *El Amparo v Venezuela* (14 September 1996) para 61.

⁴⁸ Turkel Commission, *Second Report* (n 20) 106.

⁴⁹ ICRC *The Use of Force in Armed Conflicts, Interplay between the Conduct of Hostilities and Law Enforcement Paradigms* (ICRC 2013) 49, 50.

⁵⁰ UNHRC 'General comment no 31' (n 12) para 8; *Concluding Observations: Yemen* (2012) para 24. See accordingly K Thompson, C Giffard, *Reporting Killings as*



violations perpetrated by private individuals have sometimes been characterized as aid, connivance and complicity.⁵¹ However, in cases of internal armed conflicts maintaining such an approach would seem to be practically impossible.⁵²

Partly related to the previous question is whether the obligation to investigate also binds States when alleged violations of the right to life take place in areas that are not under their control and, potentially, under the sovereign territory of third Countries. In particular, in this case any consideration on the scope and range of the duty to investigate is seemingly interconnected with the (extra)territorial applicability of human rights law.⁵³

Finally, since according to the parameters recalled above, investigations require a certain degree of public scrutiny, including the meaningful involvement of the victims' next-of-kin, a question arises as to whether these same standards may apply also in the context of hostilities. This, in turns, begs the question of the compatibility of human rights law standards with avoidance doctrines typically invoked by Courts called upon to deliver judgements concerning the conduct of armed activities by their States' militaries. Several domestic lawsuits concerning alleged violations of the right to life in the context of counter-terrorism operations in the last years have indeed been rejected on procedural grounds before ever reaching the merits stage, due to domestic courts' reliance on avoidance doctrines such as the 'political question doctrine' and other expedients geared around the principle of separation of powers.⁵⁴

Human Rights Violations Handbook (University of Essex Human Rights Centre 2002) ss 3.2.3 and 3.3.

⁵¹ I Ziemele, *Human Rights Violations by Private Persons and Entities* (European University Institute 2009) 10.

⁵² J-M Kamatali, 'The Application of International Human Rights Law in Non-International Armed Conflicts, From Rhetoric to Action' (2014) 4 *J Intl Humanitarian L Studies* 237. See, accordingly, N Szablewska, 'Non-State Actors and Human Rights in Non-International Armed Conflicts' (2007) 32 *South African YB Intl L* 352.

⁵³ In general on extraterritorial application of human rights treaties see, *inter alia*, F Coomans, MT Kamminga, *Extraterritorial Application of Human Rights Treaties* (Kluwer Law International 2004); K Da Costa, *The Extraterritorial Application of Human Rights Treaties* (Martinus Nijhoff 2013); and M Milanovic, *Extraterritorial Application of Human Rights Treaties, Law, Principles and Policies* (OUP 2011).

⁵⁴ To this end see, for instance, United States District Court for the District of Columbia, *Al-Aulaqi v Obama* (Judgment 7 December 2010) 65-66; United States



5. *A contextual-functional approach*

It is submitted here that these questions have been addressed only in part by international instruments recently adopted or still in the making. Nonetheless, a rationale satisfactorily applicable to all of the circumstances underlying those queries may be deduced from a minimum common denominator characterizing the most recent jurisprudence of international human rights bodies.

5.1. *Recent evolutions*

The salient importance of the obligation to investigate violations of the right to life and the continuous interest in exploring its exact scope is reflected in a number of international instruments that human rights bodies have recently framed or are currently engaged with. While these documents shed some light on some of the issues reported above, actually providing confirmation for part of what has been discussed so far, they leave other issues untouched.

Thus, the African Commission on Human and People's Rights (hereinafter ACmHPRs) *General Comment on the Right to Life* confirms that States 'must undertake all feasible measures of accountability to ensure respect for the right to life' during armed conflict and special emergencies.⁵⁵ Moreover, according to the Commission,

'the failure of the State transparently to take all necessary measures to investigate suspicious deaths and all killings by State agents and to identify and hold accountable individuals or groups responsible for violations of the right to life constitutes in itself a violation by the State of that right. [...] All investigations must be prompt, impartial, thorough and transparent'.⁵⁶

Albeit avoiding any specific reference to the context of armed con-

District Court for the District of Columbia, *Al-Aulaqi v Panetta* (Judgment 4 April 2014) 32-36. On avoidance doctrines in general see, *inter alia*, S Weill, 'Reducing the Security Gap through National Courts: Targeted Killings as a Case Study' (2015) 21 *J Conflict and Security* L 49.

⁵⁵ ACmHPRs 'General Comment no 3. The Right to Life' (November 2015) para 20.

⁵⁶ *ibid* para 15.



flict, the HRC's *Draft General Comment on the Right to Life* similarly maintains that

'[i]nvestigations into allegations of violation of article 6 must *always* be independent, impartial, prompt, thorough, effective, credible and transparent The State party should take, among other things, appropriate measures to establish the truth relating to the events leading to the deprivation of life, including revealing the reasons for targeting certain individuals and the procedures employed by State forces before, during and after the time in which the deprivation occurred'.⁵⁷

Both instruments are then very clear in excluding any compliance of avoidance doctrines with human rights parameters. In this regard, the ACmHPRs' General Comment on the Right to Life makes it explicit that

'[a]ppeals to national security or State secrecy can never be a valid basis for failing to meet the obligation to hold those responsible for arbitrary deprivations of life to account, including during armed conflict or counterterrorism operations'.⁵⁸

Neither of these general comments, however, goes into details as to possible alteration of the standard- that the obligation to investigate may suffer in times of armed conflict. What more closely tackles some of the issues referred to above is the *Draft revised version of the 'Minnesota Protocol'*⁵⁹ which, after stating that 'the duty to investigate a potentially unlawful death applies generally during peacetime, situations of internal disturbances and tensions, and armed conflict',⁶⁰ concedes that 'where context-specific constraints prevent compliance with all of the guidance in this protocol, the constraints and reasons for non-compliance should be recorded and publicly explained',⁶¹ thus intro-

⁵⁷ UNHRC 'Draft General Comment on the Right to Life' (2 September 2015) UN Doc CCPR/C/GC/R.36/Rev.2, para 30.

⁵⁸ ACmHPRs 'General Comment no 3' (n 55) para 20. See, in a similar vein, UNHRC 'Draft General Comment on the Right to Life' (n 57) para 29.

⁵⁹ Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, 'Revision of the UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (16 June 2016) UN Doc A/HRC/32/39/Add. 4.

⁶⁰ *ibid* para 25.

⁶¹ *ibid*.



ducing a contextually-motivated element which may provide some degree of flexibility in discharging the relevant obligation. As for investigations into possible violations of the right to life occurring during hostilities, the document goes on to affirm that

‘where there are reasonable grounds to suspect that a war crime was committed, the state must conduct a full investigation and prosecute those who are responsible. Where any death is suspected or alleged to have resulted from a violation of international humanitarian law ... that would not amount to a war crime, and where an investigation (“official inquiry”) into the death is not specifically required under IHL, at a minimum, a preliminary inquiry is necessary. In any event, where evidence of unlawful conduct is identified, a full investigation should be conducted’.⁶²

5.2. *On the nature of the obligation*

In order to better assess whether the obligation to investigate violations of the right to life in times of armed conflict burdens States with unrealistic duties, making reference to the nature of such an obligation may prove revealing.

The obligation characterizing the procedural limb of the right to life is indeed not one that may be breached merely because the investigation fails to reach satisfactory results.⁶³ In other words, an investigation might be effective, and the obligation incumbent upon the concerned State might thus be fully discharged, even if it does not lead to the identification of those responsible insofar as all the parameters of *ex officio* initiative, expediency, thoroughness, independence and impartiality are satisfied.

As pointed out in relevant case law, the obligation at stake is one of means:⁶⁴ what States are bound to do after a violation of the right to life occurs is to undertake an investigation ‘capable of leading to’ (rather than actually ‘leading to’) a satisfactory outcome. This imposes an in-

⁶² *ibid* para 26.

⁶³ *Velásquez Rodríguez* (n 31) para 177, and *Godínez Cruz v Honduras* (20 January 1989) para 188.

⁶⁴ *Tunc and Tunc v Turkey* (ECtHR, 14 April 2015) paras 173, 174; *Ialoud v the Netherlands* App no 47708/08 (ECtHR, 20 November 2014) para 186; *Cindrić and Bešlić v Croatia* App no 72152/13 (ECtHR, 6 settembre 2016) para 68.



herently hypothetical dimension as to the final conclusion of the investigation itself. From this perspective, the results of an investigation should be duly considered as one of the possible critical indicators of its effectiveness but cannot be deemed as a conclusive factor in this regard.⁶⁵

If the obligation is one of means rather than one of results, then States are expected to do everything that is in their power to integrate in their investigations all the five parameters recalled above. Requiring States to do all that is in their power apparently implies holding them accountable to a very high standard. However, at the same time, this standard also involves an inherent limitation dimension, since it implies that States cannot be required to do anything more than what is realistically feasible.

5.3. On the jurisprudence of human rights bodies concerning investigations in armed conflicts

This twofold dimension is mirrored in the relevant jurisprudence of human rights bodies. Thus, the IACtHR has consistently maintained that States at the same time have the ‘right and obligation to guarantee [their] security’ and the duty to ‘execute [their] actions within limits and according to procedures that preserve both public safety and fundamental rights’, also in times of armed conflict.⁶⁶ Even more to the point, the Court has further clarified that under every circumstance the obligation to investigate remains intact up until the moment that it is not possible to pursue it further.⁶⁷

Accordingly, the ECtHR has had several occasions to underline that the characteristics of an investigation should be evaluated against the background of the relevant factual, political and legal context.⁶⁸ On the one hand the ECtHR has found that: a) even in difficult security conditions, including armed conflicts, all reasonable steps must be taken to ensure that an effective investigation is conducted; b) the form of an investigation complying with Article 2 parameters may vary depending on the relevant circumstances; c) in any event authorities must act of their

⁶⁵ *Masacre de Mapiripan* (n 2) para 137.

⁶⁶ *Bamaca Velasquez* (n 41) paras 121, 174.

⁶⁷ *Velasquez Rodríguez* (n 31) para 174; *Godínez Cruz* (n 63) para 184.

⁶⁸ *Akdivar and Others v Turkey* (ECtHR 16 September 1996) para 69.



own motion, the investigation must be capable of leading to a determination of whether the use of force was or was not justified and to the identification and sanctioning of those responsible, the authorities mandated with the investigation must be independent from those allegedly implicated, the investigation must be promptly launched and even though the exact degree of public scrutiny may vary from case to case the victim's next-of-kin must be involved in the procedure.⁶⁹

On the other hand, however, the ECtHR has also maintained in its most recent jurisprudence that these parameters are to be evaluated in a context-specific fashion. In *Cindrić and Bešlić v. Croatia*, the ECtHR has recalled several of its previous decisions, confirming that an effective investigation and prosecution is also required in relation to alleged human rights violations occurring in times of armed conflict, and also when those responsible are not State authorities.⁷⁰ Nonetheless, recalling that '[the duty to investigate] is not an obligation of result, but of means', the ECtHR has stressed that 'the authorities must take whatever reasonable steps they can' but 'the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case'.⁷¹ More specifically, the Court found that

'the nature and degree of scrutiny must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation'.⁷²

This context-specific approach bears a number of practical consequences as to the activities that might be required from the authorities in charge of investigative proceedings. Thus, concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed.⁷³ Analogously, 'the authorities must take *the reasonable steps available to them* to secure the evidence concerning

⁶⁹ *Al-Skeini* (n 6) paras 164-167. In the same vein see *Isayeva* (n 34) paras 211-214; *Jaloud* (n 64) para 186 and *Tunc and Tunc* (n 64) para 178.

⁷⁰ *Cindrić and Bešlić* (n 64) paras 68-80.

⁷¹ *ibid* paras 68-80.

⁷² *ibid*.

⁷³ *Bazorkina v Russia* App no 69481/01 (ECtHR, 27 July 2006) para 121.



the incident'.⁷⁴ Similarly, in *Mustafic-Muijc v. The Netherlands* the ECtHR, recalling its consolidated jurisprudence in *Tunc and Tunc v. Turkey* and *Jaloud v. The Netherlands*, has clarified that

'the authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy [...] Nevertheless, the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case. It is not possible to reduce the variety of situations which might occur to a bare check-list of acts of investigation or other simplified criteria'.⁷⁵

Therefore, the Court has once again concluded that the efficiency of an investigation should be assessed against the backdrop of all relevant facts and practical realities.⁷⁶

5.4. *Envisaging a contextual-functional approach*

Retaining the same investigative standards while tailoring them to context-specific realities requires an inherent flexibility to the underlying obligation.

In this regard, a separate opinion authored by Judge Bonello in the *Al-Skeini* case might be particularly enlightening in that, albeit being primarily concerned with the issue of jurisdiction, it introduces considerations that have crucial repercussions in investigative matters. According to Judge Bonello,

'A "functional" test would see a State effectively exercising "jurisdiction" whenever it falls within its power to perform, or not to perform, any of these five functions [*i.e.* refraining from violating human rights; preventing violations; conducting investigations; scourging State agents responsible for those violations; granting reparation to victims]. Very simply put, a State has jurisdiction [...] whenever the observance or the

⁷⁴ *Al-Skeini* (n 6) para 166.

⁷⁵ *Mustafic-Muijc v The Netherlands* App no 49037/15(ECtHR, 22 September 2016) para 100.

⁷⁶ *ibid.*



breach of any of these functions is within its authority and control'.⁷⁷

According to this theory, jurisdiction is therefore intrinsically functional in nature and it depends on what States have the power to do. Conducting investigations is one of the five functions upon which the existence of jurisdiction depends. This means that whenever States have the material capacity to investigate, they have a parallel legal obligation to do so to the full extent of their capability. *A contrario*, this understanding means that whenever States encounter insurmountable difficulties, then they cannot be required to undertake measures that are actually unrealistic.

The obligation to investigate is thus naturally tied to the scope of jurisdiction as the former expands and diminishes alongside the latter. As to the latter, it is therefore inherently contextual insofar as it is context-specific, depending on what States have (or do not have) the power to do. This understanding is thus in perfect keeping not only with the jurisprudence recalled above, but also with the general principle of law establishing that *ad impossibilia nemo tenetur*.

6. *Assessing issues in light of the suggested theoretical framework*

Arguably, an application of the contextual–functional approach just described would permit the main issues identified above to be addressed.

First of all, as to the elements that trigger an obligation to investigate, the guiding principle remains that all credible allegations of violations of the right to life should be sufficient to give rise to an investigation. Of course, the credibility of the allegation should be assessed against the background of the relevant factual context. Thus, for instance, the allegation of a soldier's death on the battlefield would not *per se* be sufficient to trigger an obligation to investigate his death. To the contrary, a similar allegation involving a civilian's death should be investigated and it would fall upon those allegedly responsible to show that the killing is justified. In this case what changes, in comparison with peacetime duties, is not the obligation to investigate in and by it-

⁷⁷ *Al-Skeini* (n 6) concurring opinion of Judge G Bonello paras 10-12.



self, as it is the nature of the underlying allegation *vis-à-vis* the lamented conduct: whereas the killing of a soldier on the battlefield would not give rise, on the face of it, to a violation of his right to life, the killing of a civilian *would*, and it would therefore require an investigation.

Secondly, considering the context-specific adaptability of the obligation to investigate under human rights law, a State also holds a general duty to investigate deaths caused by non-state actors during armed conflicts. However, it is apparent that in practice State authorities are prevented from abiding by the stringent standards outlined above when killings are perpetrated by insurgents in territories outside State control. Under the functional-contextual approach suggested here, this *de facto* impossibility would be matched with a lack of *de jure* responsibility due to both the recalled principle *ad impossibilia nemo tenetur* and a temporary absence of jurisdiction for investigative purposes, regardless of the fact that an area occupied by the insurgents remains formally within the State's boundaries.⁷⁸ Notably, the logical underpin of this understanding is that States remain bound to undertake all the investigative measures that it is in their power and authority to perform. As a consequence, whereas their powers in this regard might be extensively compromised during hostilities, after the re-expansion of States' control over territory following the end of the conflict their jurisdiction and their obligation to investigate will simultaneously re-develop to full strength.

Thus, in the midst of armed confrontations some degree of flexibility should be allowed in relation to parameters of promptness and expediency, since a proper investigation could sometimes not take place at all before the end of hostilities. Similarly, it would not be reasonable to require States to either secure the area, collect evidence from the field and conduct autopsies in areas where hostilities are taking place. Nonetheless, as soon as the hostilities come to an end, the scope of the obligation will re-

⁷⁸ Notably, the ECtHR has seemingly come to an opposite conclusion as to the existence of jurisdiction in areas where the territorial State is not able to exercise its power in *Assanidze v Georgia* App no 71503/01 (ECtHR, 8 April 2004) paras 137, 138 and 146. However, the ECtHR itself has found that the presumption of territorial jurisdiction may be limited in exceptional circumstances where a state is prevented from exercising authority over part of its territory, in cases of military occupation or other similar circumstances. To this end see *Ilascu and Others v Moldova and Russia* App no 48787/99 (ECtHR, 7 July 2004) paras 312-314.



expand and all these measures will return to be crucial elements of an effective investigation in compliance with international standards.

It appears that tailoring investigative parameters to relevant factual contexts provides a standard model of self-adapting obligations capable of suiting the most varied practical realities. Thus, the same rationale just referred to may be applied *a contrario* to situations of armed conflicts taking place on third States' territories. Indeed, for armed conflicts of both an internal and international character the guiding principle is that the obligation to investigate requires States to undertake all the investigative measures that is in their power to carry out: the obligation will be satisfied by more or less stringent adherence to the usual requirements depending on the precise facts that need to be investigated. Therefore, for instance, it would be impossible to require a State to conduct thorough investigations, including collection of evidence from the ground, following an aerial bombing performed on a third State's territory. Nonetheless, the responsible State is in the position to promptly undertake a series of investigative measures such as acquiring documents, gathering of information and sworn testimonies, interviewing those allegedly responsible for the unlawful killing. Henceforth, the State will bear an obligation to undertake all such activities, in compliance with parameters of promptness, impartiality, independency, thoroughness and autonomous initiative, also during hostilities.

Notably, compliance with these parameters is to be evaluated not in relation to the simultaneous applicability of other legal regimes but against the factual background characterizing the place and time of the violation and those of the investigation. Thus, under special circumstances, it might be the case that the obligation to investigate into violations of the right to life perpetrated in times of armed conflict be even more strict than it normally is. In this vein, for instance, the IACtHR has also found in cases of internal armed conflicts that all the parameters just recalled apply and, in some cases, they do so *a fortiori* due to the general attitude assumed by armed forces *vis-à-vis* victims of gross human rights violations.⁷⁹

In this case the Court did not consider the obligation to investigate to be somewhat mitigated by virtue of the simultaneous applicability of international humanitarian law; it rather maintained that what was cru-

⁷⁹ *Masacre the Mapiripan* (n 2) paras 216, 219, 238.



cial in assessing the State's compliance with its duty to investigate was the factual context, a context in which nothing prevented State authorities from implementing their duty to act *ex-officio*, promptly, impartially and effectively, offering the victims' next of kin an opportunity to participate in the investigative process. Against this background, the Court deemed the obligation to investigate to be enhanced rather than lessened since the 'non-fulfillment shows a form of continuity of the *modus operandi* of the paramilitary in covering up the facts and it has led to subsequent ineffectiveness of the ongoing criminal proceeding'.⁸⁰

7. Conclusions

Whereas the consistent jurisprudence of human rights bodies traditionally left little doubt as to the existence of an obligation to investigate right to life violations in armed conflict, its triggers, its exact scope and its ultimate implications have remained rather uncertain. So much so that some doubts have been cast upon the feasibility of applying human rights standards in such a different scenario.

The most recent human rights instruments reaffirm the applicability of the full scope of the obligation to investigate right to life violations in times of armed conflict. As shown throughout this article, they do so by further clarifying that in this context also, the obligation is triggered by all suspicious deaths and adding that no national security concern may relieve a State from its investigative duties. Notably, the *Revised version of the Minnesota Protocol* makes specific allowance for the shaping of the obligation in a context-specific fashion. It is submitted here that this is the key to maintaining the existence of a full obligation to investigate right to life violations in times of armed conflict, while at the same time making this duty adaptable to the practical realities of investigative work. Indeed, the nature of the obligation to investigate, which is an obligation of means rather than one of results, as well as the most recent jurisprudence of human rights bodies on this issue confirm that the efficiency of an investigation should be assessed against the backdrop of practical realities. Combining these considerations with a functional approach to jurisdiction which makes the latter dependent upon States'

⁸⁰ *ibid* para 235.



power and authority to actually perform an investigation offers an unparalleled chance to envisage a standard-model of self adaptation for the duty to investigate.

A contextual-functional approach to jurisdiction and its implications on the obligation to investigate right to life violations grant to human rights law an inherently flexible character that impedes the argument that the threshold of effectiveness is unrealistic. The obligation in fact varies according to a variation in context as it depends from what investigative steps a State has the authority and power to take. Thus, the obligation to investigate does not fade away in times of armed conflicts, nor are the parameters useful to assessing an investigation's effectiveness in any way weakened. What changes is the way in which those parameters should be evaluated, as they are to be tailored to factual circumstances.

It follows that after the end of a conflict the relevant requirements can become more stringent than during hostilities, since authorities may have the possibility to undertake new investigative measures that were before practically impossible. In other words, the flexibility of the obligation derived from the elastic character of jurisdiction makes it possible for the duty to investigate to expand and be restricted in a context-dependent fashion.

Thanks to its essential elasticity and its natural predisposition for self-adaptation to mutating frameworks, the obligation to investigate deriving from human rights law applies to law enforcement dimensions of armed conflicts, as well as to hostilities making legal obligations dependent upon specific factual assessments.

Notably, tailoring investigative requirements in a context specific way is very different from interpreting human rights law in light of other legal regimes: in fact, the quality of the investigation required is made dependent upon a factual assessment rather than on *de jure* considerations concerning the simultaneous interoperability of different *corpora juris*. As a consequence, the obligation to investigate right to life violations in armed conflict may be as stringent as it is in peacetime or much less rigorous depending on the exact circumstances of the case.

All in all, a contextual-functional approach to investigations of right to life violations in armed conflicts justifies the full efficiency of human rights investigative standards, taking into account the practical realities of armed conflict without compromising victims' rights.

