

**A legal approach to investigations of arbitrary deprivations of life
in armed conflicts: The need for a dynamic understanding of
the interplay between IHL and HRL**

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1. *Introduction*

This paper is a response to the analysis provided by Dr Luca Gervasoni on a ‘Contextual-Functional Approach to Investigations of Right to Life Violations in Armed Conflicts’. In his contribution, Dr Gervasoni provided a very thorough and precise analysis of developments in the human rights sphere pertaining to the obligation to investigate in armed conflicts. His main findings are that human rights law (HRL) requires an effective investigation at all times, even in armed conflicts; and that this requirement is not unrealistic to the extent that human rights bodies can flexibly apply and adapt the requirements for an investigation to be considered as effective depending on the context. This is what he elegantly calls a ‘context-specific approach’. Although I fully share most of these views,¹ I am more uncomfortable with his conclusion to the effect that a legal analysis of the interplay between international humanitarian law (IHL) and HRL is thus not needed to grasp the quality of the investigation required.² In my view, a contextual-functional approach is certainly needed, but there are prominent legal reasons, which always

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¹ See G Gaggioli, *L’influence mutuelle entre les droits de l’homme et le droit international humanitaire à la lumière du droit à la vie* (Pedone 2013) 474-515.

² See the concluding sentence of Luca Gervasoni’s paper: ‘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*.’



command an accurate analysis of the interplay between IHL and HRL in armed conflict situations; including in the context of investigations. This is what I will try to demonstrate in the following response.

Moreover, I strongly believe that we should not encourage human rights bodies to simply ignore IHL and to apply HRL in a legal vacuum while focusing on facts to adapt on a case-by-case basis – and in an unpredictable manner – the requirements for an effective investigation. In some cases, this has indeed been the strategy adopted by certain human rights bodies, in particular the European Court of Human Rights in the Turkish and Russian cases pertaining to right to life violations in armed conflict situations.³ The context should nevertheless be borne in mind. In those cases, the respondent States negated the existence of an armed conflict on their territory.⁴ For understandable policy reasons, the Court adopted a ‘legal fiction’ and continued to apply the somehow more protective peacetime human rights framework without, at least explicitly, taking into account IHL. From a purely legal perspective, this approach is frustrating as it does not rely on a real assessment of the facts on the ground and on a needed classification of situations of violence.⁵ It should be noted however that in cases of acknowledged armed conflicts, especially international armed conflict, even the European Court has been open to IHL and has outlined the necessity to interpret the European Convention *in harmony* with IHL.⁶ Even if human rights treaty bodies cannot as such ‘apply’ IHL, they certainly can – and must – by virtue of Article 31(3)(c) of the Vienna Convention on the Law of

³ See, eg (among many others), *Güleç v Turkey* App no 21593/93 (ECtHR, 27 July 1998); *Isayeva v Russia* App no 57950/00 (ECtHR, 24 February 2005). More references can be found in Gaggioli, *L'influence mutuelle* (n 1).

⁴ W Abresch, ‘A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya’ (2005) 16 *Eur J Intl L* 754-55; F Hampson, ‘Written Statement: The Case-law of the European Court of Human Rights and the Use of Force’ Appendix III in G Gaggioli, *Report of the Expert Meeting on the Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms* (ICRC 2013) 71.

⁵ G Gaggioli, R Kolb, ‘A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights’ (2007) 37 *Israel YB Human Rights* 126-127. See also F Martin, ‘Application du Droit International Humanitaire par la Cour Interaméricaine des Droits de l’Homme’ (2001) 83 *Intl Rev of the Red Cross* 1051.

⁶ *Varnava v Turkey* App no 16064/90 (ECtHR, 18 September 2009) para 185; *Georgia v Russia II* App no 38263/08 (ECtHR, 13 December 2011) para 72; *Hassan v United Kingdom* App no 29750/09 (ECtHR, 16 September 2014) para 102.



Treaties take into account IHL when it is applicable.⁷ This does not necessarily mean that in case of contradiction, IHL must always prevail, but that at the very least the interplay between IHL and HRL must be duly taken into account.

It is submitted that such an open approach towards IHL would not undermine the human rights analysis and would not necessarily diminish the importance of the obligation to investigate in armed conflict situations. On the contrary, it would give more credibility to the findings of human rights bodies. Frustration among States, humanitarian practitioners and IHL experts because of the under-reliance on IHL by human rights bodies in some armed conflict cases is noticeable. Human rights experts are sometimes harshly depicted as living in their ‘ivory towers’, as being ignorant of the particular challenges faced by States in armed conflicts and as having a poor expertise in IHL. Human rights case law is then unduly dismissed.

With a view to highlighting the relevance of IHL and of its interplay in the field of investigations, I will attempt to shed further light on whether and to what extent IHL provides for an obligation to investigate (section 2), highlight the greatest discrepancies between IHL and HRL in this field (section 3), propose ways to work out the interplay between IHL and HRL (section 4), and discuss potential challenges in ensuring that the obligation to investigate remains realistic in armed conflicts (section 5).

2. *What does IHL say regarding investigations?*

Under IHL, the obligation to investigate certain violations exists but it is somehow concealed in several provisions.

i) First, regarding international armed conflicts, there are explicit and specific provisions regarding the obligation to investigate when *prisoners of war and civilian internees are killed or injured in special cir-*

⁷ This rule is considered as customary. See Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep para 53; *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* (Merits) [2003] ICJ Rep para. 41.



cumstances.⁸ Although there are no similar provisions for non-international armed conflicts, analogies could be drawn to conclude that the IHL obligation to investigate violent deaths of prisoners of war and civilian internees, or deaths the cause of which is unknown, should be extended to every person deprived of liberty in an armed conflict, and more broadly to any person in the power of the enemy even if not detained *stricto sensu*.⁹

ii) Second, IHL implicitly provides for an obligation to investigate grave breaches in international armed conflicts¹⁰ and more generally *war crimes*.¹¹ It would indeed be impossible to prosecute alleged war criminals without having previously conducted an effective criminal investigation. This means notably that IHL requires an investigation in cases where there are certain allegations where force is used, for example, if it is claimed that the civilian population or individual civilians have been wilfully made the object of attack; an indiscriminate attack has been wilfully launched affecting the civilian population or civilian objects, with the knowledge that such attack would cause excessive incidental loss of life, injury to civilians or damage to civilian objects; or a person has been wilfully made the object of attack with the knowledge that he/she is *hors de combat* or a protected person has been wilfully killed.¹² This obligation to investigate war crimes must be enacted by belligerent States *proprio motu*. It does not depend on an action by a third State or by the victims or their next-of-kin.¹³

⁸ See art 121 of the Third Geneva Convention (GCIII) and art 131 of the Fourth Geneva Convention (GCIV).

⁹ Gaggioli, ICRC Use of Force Report (n 4) fn 134. On the obligation to investigate deaths in custody, see: M Bollmann, A Coyle, G Gaggioli, I Hight, S Khamis, P Mutzenberg, M Tidball-Binz, *Guidelines on Deaths in Custody* (ICRC 2013).

¹⁰ Arts 49-50 of the First Geneva Convention (GCI); arts 50-51 of the Second Geneva Convention (GCII); arts 129-130 GCIII; arts 146-147 GCIV. See also arts 11 and 85-86 of Additional Protocol I to the Geneva Conventions (API).

¹¹ The customary law obligation to investigate war crimes exists for all war crimes, not only grave breaches. See J-M Henckaerts, L Doswald-Beck, *Customary International Humanitarian Law* (vol 1: Rules) (ICRC 2005), Rule 158.

¹² See API, art 85 (3)(4). See also GCI, art 50; GCII, art 51; GCIII, art 130; GCIV, art 147. See also the 1998 Statute of the International Criminal Court, art 8(2)(b) and (e).

¹³ J Pictet (ed) *ICRC Commentary to Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field* (ICRC 1952) 'Article 49' at 366. See also, *ICRC Commentary to Geneva Convention I for the Amelio-*



iii) Third, the duty to *suppress IHL violations*¹⁴ may be held to entail some sort of obligation to investigate, although, depending on the circumstances, this investigation may take place in the context of administrative or disciplinary proceedings rather than judicial proceedings.¹⁵

iv) Fourth, an IHL obligation to investigate may also be derived from the *duty of commanders*¹⁶ to prevent and, where necessary, to suppress and to report to competent authorities breaches of IHL, with a view to initiating disciplinary or penal action against violators.¹⁷

v) Fifth, IHL provisions pertaining to the *dead and missing persons* may also entail some sort of obligation to investigate or, at least, a fact-finding assessment.¹⁸ The 1949 Geneva Conventions already recognized a duty to account for the dead, which implies a duty to identify the dead who have fallen into the hands of a belligerent party and, regarding persons who die in detention, a duty to elucidate the cause of death.¹⁹ Additional Protocol I further recognizes the ‘right of families to know the fate of relatives’,²⁰ which notably requires from belligerent parties to account for missing persons.²¹

ration of the Condition of the Wounded and Sick in the Armed Forces in the Field (2nd edn, ICRC 2016), ‘Article 49’ para 2890.

¹⁴ GCI, art 49(3); GCII, art 50(3); GCIII, art 129(3); and GCIV, art 146(3). See also art 86 API.

¹⁵ ICRC Commentary 2016 (n 13) para 2896: ‘It is clear from the genesis of this provision that States Parties are therefore under an obligation to address all other violations of the Conventions, in addition to grave breaches. (...) States Parties will determine the best way to fulfil these obligations, for example by instituting judicial or disciplinary proceedings for violations of the Conventions other than grave breaches, or by taking a range of administrative or other regulatory measures or issuing instructions to subordinates. The measures chosen will depend on the gravity and the circumstances of the violation in question, in accordance with the general principle that every punishment should be proportional to the severity of the breach.’ See also: Gaggioli, ICRC Use of Force Report (n 4) 52.

¹⁶ See API, art 87. See also: See also Henckaerts, Doswald-Beck, *ICRC Customary IHL Study* (n 11) rule 153.

¹⁷ Gaggioli, ICRC Use of Force Report (n 4) 52.

¹⁸ On IHL obligations pertaining to dead and missing persons, see: G Gaggioli, ‘International Humanitarian Law: The Legal Framework for Humanitarian Forensic Action’ (forthcoming) *Forensic Science International*, special issue on Humanitarian Forensic Action.

¹⁹ Arts 16-17 GCI; 19-20 GCII; 120-122 GCIII; 129-131 GCIV, 136-139 GCIV. See also: Henckaerts, Doswald-Beck, *ICRC Customary IHL Study* (n 11) rule 116.

²⁰ Art 32 of API.

²¹ Art 33 of API.



vi) Sixth, an obligation for belligerent States to investigate arbitrary deprivations of life in armed conflicts can be derived from the famous obligation to *respect and ensure respect for IHL*.²² Arguably, this obligation may even entail duties for third States or the international community, which may take the shape of investigations and prosecutions of alleged serious violations when the belligerent parties are unwilling or unable to do so.²³

Finally, it shall be recalled that IHL even provides for mechanisms to investigate IHL violations, through enquiries and the establishment of the International Humanitarian Fact-Finding Commission.²⁴ Although these provisions remained unfortunately dead letters, they can be seen as evidence that alleged IHL violations should not remain unanswered.

3. *What are the greatest differences and possible incompatibilities between IHL and HRL in terms of investigations?*

A first important difference between IHL and HRL is that the *trigger* for conducting effective investigations is not the same. Under human rights law, every alleged violation of the right to life must be investigated, even in armed conflicts.²⁵ The European Court of Human Rights goes even further and considers that every death as a result of the use of force²⁶ must be investigated as well as every death in custody²⁷.

²² See in this sense: ‘Report of the Special Rapporteur on the Extrajudicial, Summary and Arbitrary Executions, Philip Alston (8 March 2006) UN Doc E/CN.4/2006/53, para 34. The obligation to respect and ensure respect for IHL is to be found in: art 1 common to the Geneva Conventions; art 1(1) of API and art 1(1) of Additional Protocol III of 2005.

²³ ICRC Commentary 2016 (n 13) paras 130-137; para 181.

²⁴ Arts 52 GCI; 53 GCII, 132 GCIII; 149 GCIV.

²⁵ Alston Report 2006 (n 22) paras 35-36; *Al Skeini and others v. United Kingdom App no 55721/07* (ECtHR, 7 July 2011) paras 163-164; *Mapiripán Massacre v. Colombia* (Inter-American Court of Human Rights (IACtHR), 15 September 2005) paras 216-241; Commission Nationale des Droits de l’Homme et des Libertés v. Chad (African Commission on Human and People’s Rights (AfCommHPR), 11 October 1995) para 22.

²⁶ *Al Skeini* (n 25) para 163. See *ibid* references to previous case law.



Under IHL, it is clear that not every violent death triggers the obligation to investigate.²⁸ Typically, killing a legitimate target (i.e. combatants, fighters and civilians directly participating in hostilities) in combat and causing incidental civilian loss of lives that are not excessive compared to the concrete and direct military advantage anticipated are lawful acts of war and therefore do not demand an investigation. This is so because ‘IHL takes into account the fact that some deaths are inherent to the conduct of hostilities in armed conflicts’.²⁹ Regarding deaths in custody, IHL does not require investigating every death, but only those happening in special circumstances.³⁰

It is furthermore unclear under IHL whether mere violations (not alleged war crimes) entail a duty to investigate.³¹ A situation, for instance, where precautionary measures were insufficient or where collateral damage seemed excessive but the conditions for an alleged war crime are not present would fall under this category.³² An obligation to investigate such cases might be derived from the duty to suppress IHL violations and from the duty of commanders to prevent and suppress IHL breaches.³³ But even then, it is unclear whether the duty flowing from these provisions for mere violations (not serious ones) is more akin to a fact-finding assessment accompanied by appropriate preventive, administrative, disciplinary measures than to a full-fledged investigation. The *nature* of the investigation might thus differ. In other words, what might not be considered as a sufficiently thorough investigation from a human rights perspective might be seen as ‘good enough’ in the context of IHL provisions.

²⁷ See among many others, *Salman v Turkey* App no 21986/93 (ECtHR, 27 June 2000) para 105; *Tanribilir v Turkey* App no 21422/93 (ECtHR, 16 November 2000) para 83.

²⁸ Gaggioli, ICRC Use of Force Report (n 4) 49.

²⁹ *ibid.*

³⁰ See above (n 8).

³¹ Professor Schmitt considers, for instance, that there is no such duty under IHL. See M Schmitt, ‘Investigating Violations of International Law in Armed Conflicts’ (2011) 2 *Harvard National Security J* 39.

³² See the restrictive definition of war crimes in conduct of hostilities context. See API, art 85(3). See also the 1998 Statute of the International Criminal Court, art 8(2) (b) and (e).

³³ See above (n 14 and n 16).



In relation to this potential difference in terms of trigger, some have held that the IHL obligation to investigate does not fulfil the same *purpose* as its human rights law counterpart.³⁴ The latter has been described as aiming at establishing State responsibility while the former was seen as associated with war crimes and thus focusing on individual criminal responsibility.³⁵ This argument is in my view not very convincing. On the contrary, the fact that IHL violations obviously entail State responsibility should be a compelling argument to consider that mere IHL violations (not only serious violations) should give rise to an obligation to investigate. A counter-argument could be that even if this is desirable, it is not feasible for belligerent States to conduct investigations into each and every IHL violation as these are potentially too numerous in armed conflicts. I believe such argument should nevertheless be dismissed when dealing with potential violations of the supreme right to life.

Finally, IHL does not provide any *criteria* to assess the effectiveness of investigations in contradistinction with human rights law, which clearly establishes that to be effective an investigation must be led expeditiously and with due diligence by an independent and impartial body; the next-of-kin must be given an opportunity to participate in the investigation process and all possible steps must be taken in order to gather evidence, including hearing witness testimony, conducting ballistic examinations, medico-legal examinations etc.³⁶ It has been questioned whether these criteria are too demanding in armed conflict

³⁴ Gaggioli, ICRC Use of Force Report (n 4) 51-52.

³⁵ *ibid.*

³⁶ See, eg, Alston Report 2006 (n 22) para 36; The Public Commission to Examine the Maritime Incident of 31 May 2010 (Turkel Commission), Second Report, 'Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law' (February 2013) 118-135; 'Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict' (Goldstone Report) (15 September 2009) UN Doc A/HRC/12/48 para 1611; *Al-Skeini* (n 25) paras 161-177; *Mapiripán Massacre* (n 25) para 223. For additional case law and practice for each criterion, see Gaggioli, *L'influence mutuelle* (n 1) 494-496. See also references in Luca Gervasoni's paper. For steps to be taken in order to gather evidence, see: *UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* ST/CSDHA/12 (1991) ch III at 15, Model Protocol for a Legal Investigation of Extra-Legal, Arbitrary and Summary Executions (Minnesota Protocol) available at <www.ohchr.org/Documents/Issues/Executions/UNManual2015/Annex1_The_UN_Manual.pdf>. See also the draft revised version of 2015.



situations where the instability and insecurity can pose serious obstacles to investigations, such as difficulties in gathering evidence on site or hearing witnesses.³⁷

4. *Which theoretical approach to the interplay between IHL and HRL should be adopted based on these differences?*

Given these differences between HRL and IHL, different theoretical approaches could be adopted to the interplay between these two branches as regards investigations.

i) A ‘separatist approach’ would be to consider that there are insuppressible contradictions between IHL and HRL regarding the obligation to investigate.³⁸ Such differences and the relative silence of IHL regarding the obligation to investigate are qualified, or in other words were intended by States, which contemplated investigations in exceptional circumstances only. Since IHL is the *lex specialis* in armed conflicts, human rights developments, as presented in Gervasoni’s piece, simply need to be ignored in such situations. In brief even if (and when) HRL applies in armed conflicts, it would be derogated from by IHL, at the very least when there are contradictions between the two bodies of law.³⁹

This conservative approach should be rejected. First, it ignores a fundamental point. Even in armed conflict situations, and even in the context of the use of lethal force, there are situations that are mainly governed by human rights law. In many contemporary armed conflicts,

³⁷ Gaggioli, ICRC Use of Force Report (n 4) 56.

³⁸ On the notion of a ‘separatist approach’, see: Gaggioli, *L’influence mutuelle* (n 1) 33. See also H-J Heintze, ‘On the Relationship between Human Rights Law Protection and International Humanitarian Law’ (2004) 86 *Intl Rev of the Red Cross* 789-814.

³⁹ This seemed to be the majority view during the ICRC Expert Meeting on the Use of Force. Gaggioli, ICRC Use of Force Report (n 4) 53: ‘The majority of experts were of the view that IHL has to prevail regarding the obligation to investigate in armed conflicts. The human rights obligation to investigate every killing was seen as unrealistic and not practicable in armed conflict situations. It was also argued that it would not make sense to oblige belligerents to investigate deaths that are perfectly lawful under IHL. Thus, when it comes to investigations in armed conflict situations (at least in the context of the use of lethal force), IHL is the *lex specialis* and the human rights obligation to investigate has to be read in light of IHL; otherwise one might come to the conclusion that what is lawful under IHL is a violation of human rights law.’

particularly in occupied territories and in non-international armed conflicts (NIAC), armed forces are increasingly expected to conduct both combat operations against the adversary and law enforcement operations to maintain or restore public security, law and order.⁴⁰ It is generally accepted that this latter type of operations is governed by applicable HRL rules and standards for the use of force, i.e. the human rights law enforcement paradigm. The difficulty then lies in finding the dividing line between the conduct of hostilities and law enforcement paradigms. This is a matter of ongoing legal debate and has been addressed elsewhere.⁴¹ What is clear is that even in armed conflicts, there are situations – such as civilian unrest and other forms of civilian violence, criminal acts not amounting to direct participation in hostilities, checkpoint scenarios – that must be addressed under a human rights law enforcement paradigm.⁴² This is true not only for the principles and rules governing the actual use of force (see the human rights principles of necessity, proportionality and precautions) but also for the HRL obligations that come into play before and after the actual use of force in law enforcement operations (i.e. principles of legality and accountability).⁴³ In other words, reporting and investigating violent deaths is an integral part of the human rights obligations pertaining to the use of force in law enforcement operations, be they conducted in peacetime or wartime.⁴⁴

⁴⁰ Gaggioli, ICRC Use of Force Report (n 1) 1.

⁴¹ *ibid.* See also: T Ferraro, *Expert Meeting Report on Occupation and Other Forms of Administration of Foreign Territory, Third Meeting of Experts: The Use of Force in Occupied Territory* (ICRC 2012); D Fleck, 'Law Enforcement and the Conduct of Hostilities: Two Supplementing or Mutually Excluding Legal Paradigms?' in A Fischer-Lescano et al (eds), *Frieden in Freiheit Festschrift für Michael Bothe* (Nomos DIKE 2008) 391-407; D Kretzmer, A Ben-Yehuda, M Furth, 'Thou Shall Not Kill: The Use of Lethal Force in Non-International Armed Conflicts' (2014) 47 *Israel L Rev* 191-224; K Watkin, 'Use of Force during Occupation: Law Enforcement and Conduct of Hostilities' (2012) 94 *Intl Rev of the Red Cross* 295-296.

⁴² Gaggioli, ICRC Use of Force Report (n 4). See discussions of case studies 2, 3 and 5.

⁴³ As an example, see: *Jaloud v The Netherlands*, App no 47708/08 (ECtHR, 20 November 2014): killing at a checkpoint by a Dutch soldier in Iraq. The European Court found a violation of the right to life under its procedural limb.

⁴⁴ Alston Report 2006 (n 22) para 35; Turkel Commission Report (n 36) 106. See also: Gaggioli, *L'influence mutuelle* (n 1) 487; Gaggioli, ICRC Use of Force Report (n 4) 55.



These obligations cannot be derogated from by IHL because the human rights law enforcement paradigm can be viewed as the actual *lex specialis* for regulating the use of force against violent civilians whose acts do not amount to direct participation in hostilities.⁴⁵ Another interpretation could be that such acts of violence have no *nexus* with the hostilities, and are therefore not governed by IHL as a *lex specialis*, but continue to be governed by the human rights law enforcement paradigm as *lex generalis*.⁴⁶ Second, as we shall see below, even in conduct of hostilities operations, IHL may be seen today as being complemented, or even superseded by HRL regarding the obligation to investigate.

ii) A ‘traditional-complementarist approach’⁴⁷ may theoretically recognize the *lex specialis* character of IHL but nevertheless consider that HRL, as *lex generalis*, fills gaps and provide useful interpretative direction regarding the obligation to investigate, at least when there is no contradiction between the two bodies of law.⁴⁸ This approach may also allow taking stock of human rights guidance as to the criteria to be analyzed to ensure the effectiveness of investigations.⁴⁹ This approach could be criticized as not acknowledging that IHL rules might at some point become superseded by human rights developments.⁵⁰ For instance, for a

⁴⁵ As discussed elsewhere, in the interplay between IHL and HRL rules, IHL rules are not necessarily always the *lex specialis*. This maxim does not operate in a rigid but rather in a flexible manner. See: M Sassòli, ‘Le droit international humanitaire, une *lex specialis* par rapport aux droits humains ?’, in A Auer, A Flückiger, M Hottelier (eds) *Les droits de l’homme et la constitution* (Schulthess 2007) 375-395; Gaggioli, Kolb (n 5) 118-124; Gaggioli, *L’influence mutuelle* (n 1) 42-60.

⁴⁶ Gaggioli, ICRC Use of Force Report (n 4) 25. See also: Turkel Commission Report (n 36) para 14.

⁴⁷ On the notion of a ‘complementarist approach’, see: Gaggioli *L’influence mutuelle* (n 1) 34. See also H-J Heintze (n 38) 789-814.

⁴⁸ As highlighted in the ILC Study on the fragmentation of IHL, ‘the more general rule remains in the background providing interpretative direction to the special one’. See: ILC, *Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (13 April 2006) UN Doc A/CN.4/L.682 paras 102 and 103. See, in the sense of accepting HRL as a complementary framework for investigations: A Cohen, Y Shani, ‘Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts’ (2011) 14 YB Intl Humanitarian Law 48.

⁴⁹ See in the sense of complementing IHL with human rights law as a *lex generalis* for the criteria to ensure the effectiveness of an investigation: Turkel Commission Report (n 36) para 108.

⁵⁰ See above (n 45).



European State, such an approach might well lead it to violate its obligations under the European Convention of Human Rights. Not investigating the killing of alleged insurgents or incidental killings of civilians (even if they do not appear as excessive under an IHL analysis) in the context of a civil war is frankly hard to conceive from a European human rights law perspective.⁵¹

iii) A ‘harmonization approach’⁵² would simply avoid discussing *lex specialis* issues and tend to focus on the similarities between IHL and HRL and attempt to eliminate or tone down the differences between them. There is room for such an approach in the context of the obligation to investigate. For instance, relying on the legal basis mentioned above (under 2.iii, 2.iv and 2.vi) and adopting an expansive interpretation, it could be concluded that even IHL requires an investigation into alleged violations of IHL (and not only into war crimes). What would amount to a violation, then obviously needs to be analyzed under an IHL prism. Thus, killings of enemy soldiers or insurgents in combat may not give rise to an investigation, while excessive collateral damage definitely would, even if it is clear that they were not intentional and did not give rise to individual criminal responsibility. This approach could be criticized as artificially negating potential contradictions between IHL and HRL and unduly attempting to modify the meaning and equilibrium of IHL rules. On the other hand, it somehow limits the possibility of progressive developments under HRL that are impossible or too difficult to fit into IHL rules.

iv) The ‘progressive approach’ would be to consider that regarding the obligation to investigate, there are indeed contradictions between

⁵¹ *Kaya v Turkey* App no 22729/93 (ECtHR, 19 February 1998); *Ergi v Turkey* App no 23818/94 (ECtHR, 28 July 1998); *Isayeva v Russia* App no 57950/00 (ECtHR, 24 February 2005). A counter-argument could be to say that in those cases the Court did not look at the interplay between IHL and HRL because the State negated the existence of an armed conflict on its soil. The Court may adopt a different approach in future to acknowledged non-international armed conflicts. Personally, I seriously doubt the Court would adopt a diametrically different approach. Given that IHL for non-international armed conflicts is simply silent on the matter, this gives the Court plenty of room for interpretations of the interplay between IHL and HRL which would integrate its constant jurisprudence in favor of investigating violent deaths.

⁵² There is a trend in human rights case law, notably, to ‘harmonize’ the interpretation of IHL and HRL rules with a view to avoid conflicts between the two legal regimes. See above (n 6).



IHL and HRL, but that HRL has become at least a limited *lex specialis*, even when force is used in the context of the conduct of hostilities.⁵³ Indeed, as highlighted earlier, a number of human rights bodies have considered that the obligation to investigate alleged violations of the right to life continues to apply in armed conflict situations.⁵⁴ Moreover, the obligation to investigate is seen as inherent to the right to life,⁵⁵ which is generally considered as non-derogable,⁵⁶ and safeguarded by IHL also (albeit in a different manner)⁵⁷. The obligation to investigate has been extremely systematically and consistently analyzed by human rights bodies in the context of where persons have been found dead in custody, have been killed or disappeared, including in armed conflict contexts (whether they were acknowledged or not by the respondent State). Sophisticated and flexible criteria have been developed to assess the effectiveness of investigations. In brief, the human rights obligation to investigate right to life violations is so much more detailed and up-to-date when compared to IHL which addresses the issue mostly implicitly, that it becomes barely sustainable to say that IHL is more specific or precise than HRL in this context. Actually, the reverse is true. This is even more so when considering non-international armed conflicts for which IHL says – at least explicitly – nothing about investigations. By ratifying human rights treaties, such as the European Convention on Human Rights, that are applicable in armed conflicts, and offering substantial procedural guarantees, States have accepted to be bound by obligations that were unforeseen or less detailed under IHL.

Personally, I have a preference for this last approach, which sets aside the dogma that IHL is always the *lex specialis* and recognizes that

⁵³ Gaggioli, *L'influence mutuelle* (n 1) 474-515.

⁵⁴ See above (n 25).

⁵⁵ *McCann and Others c The United Kingdom* App no 18984/91 (ECtHR, 27 September 1995) para 161; IACtHR, *Myrna Mack Chang c Guatemala* (25 November 2003) paras 156-157; Alston Report 2006 (n 22) para 36.

⁵⁶ International Covenant on Civil and Political Rights, art 4(2); American Convention on Human Rights, art 27(2). The only exception being the European Convention on Human Rights in which the right to life is considered as non-derogable 'except in respect of deaths resulting from lawful acts of war' (art 15(2)). So far, this provision has had no real impact in practice since no European State has ever derogated from the right to life and the European Court of Human Rights has never resorted to this exception *proprio motu*.

⁵⁷ Gaggioli, *L'influence mutuelle* (n 1) 251-266.



the interplay between IHL and HRL is dynamic rather than static.⁵⁸ The obligation to investigate is one of the more typical cases where the law has evolved so much through HRL that it appears *dépassé* to consider IHL as more ‘specific’ and as constituting the starting point of the legal analysis. This is not to say that human rights bodies should avoid taking into account IHL. This would actually be another ‘separatist approach’. The point is that it is not because IHL does not provide for some obligations that these cannot emerge and prevail through HRL. It is not impossible, moreover, that human rights practice concerning the obligation to investigate is indicative of the emergence of a customary norm to the effect that alleged arbitrary deprivations of life must be effectively investigated at all times.⁵⁹ If one accepts that there is no boundary between HRL and IHL with regard to customary law,⁶⁰ then it is foreseeable that human rights developments that impose a wider obligation to investigate will gradually influence States’ practice and thus customary law. In any case, all but the first approach recognize that HRL has an important role to play to understand the obligation to investigate in armed conflicts. In practice, these last three ‘modern’ approaches may lead in most (but certainly not all) cases to very similar and reasonable results if both IHL and HRL are duly taken into account.

5. *How to ensure that the obligation to investigate remains realistic in armed conflicts: what needs to be further elaborated?*

Accepting the complementary or superseding role of human rights law in the context of the obligation to investigate, three broad questions need to be further elaborated in order to ensure that the obligation to investigate remains realistic in armed conflicts.

⁵⁸ See above (n 44).

⁵⁹ Gaggioli (n 1) 490. See also Gervasoni’s paper which supports it.

⁶⁰ Sassòli (n 45) 384-385. Professor Sassòli explains that under customary law there can be no conflict between IHL and HRL norms because, by definition, customary law is made of State practice and *opinio juris*.



5.1. *What should the trigger for conducting investigations in armed conflicts be to be considered as realistic?*

Concluding that every violent death in an armed conflict must be investigated will probably be considered by most as a non-starter.⁶¹ At least in international armed conflict situations, when an enemy combatant is killed in combat and where there are no credible allegations that the combatant was *hors de combat* or killed by unlawful means and methods of warfare, it would be a waste of resources to conduct a fully-fledged investigation.

In non-international armed conflicts, or when the target is a civilian allegedly participating in hostilities, the answer might be more nuanced. Insurgents or civilians directly participating in hostilities might not distinguish themselves from the civilian population and it might in practice be difficult to ascertain (at least for outside observers) that a person who has been killed was effectively a 'legitimate target'. Practice has unfortunately shown that murders of civilians have sometimes been disguised as deaths in combat.⁶² In the same vein, when civilians are killed incidental to an attack, it is far from obvious (at least for outside observers again) that these did not amount to IHL violations. What was the military objective? Were all precautions taken? Was the proportionality calculus appropriate? This is even more the case when new technologies are used, such as remote weapons systems (drones, semi-autonomous and potentially autonomous weapons systems in the future), which allow targeting in remote areas that are difficult or impossible to access for civil society.⁶³ In such cases, is not an independent and impartial investigation, or at least an independent and impartial fact-finding assessment, depending on the case, the best means for a belligerent State to demonstrate the legality of its military operations

⁶¹ Only the European Court theoretically held that every death resulting from the use of force must be investigated. See above (n 26).

⁶² See for instance the practice in Colombia of 'falsos positivos'. See: UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston. Mission to Colombia' (31 March 2010) UN Doc A/HRC/14/24/Add.2, paras 10-42. See also: *Las Palmeras v Colombia* (IACtHR, 4 February 2000) para 57, fn 9.

⁶³ UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston Study on Targeted Killings' (28 May 2010) UN Doc A/HRC/14/24/Add.6, para 91.



and thus legitimize its actions? Even when collateral damages are minimal, and that the principles of distinction, proportionality and precautions seem *prima facie* to have been respected, military operations can continuously be improved. Appropriate processes to allow lessons learned should be put in place. There are strong policy and legal reasons (if the influence of human rights law over IHL is duly taken into account) to consider that nowadays when civilians are killed pursuant to an attack, the principle of accountability requires appropriate steps to be taken to elucidate the factual circumstances and legally justify such killings in an independent and impartial manner.

Finally, it is crystal clear (even without taking into account human rights law) that alleged war crimes must be investigated.⁶⁴ In case of doubt as to the presence of war crimes, belligerent States must initiate *proprio motu* an investigation. They must also initiate an investigation when ‘credible allegations’ of war crimes are made by third parties. At a closer look, the concrete meaning of this truism is not so obvious. At what point does an allegation become credible? Is it sufficient that the next-of-kin make accusations? What about allegations made by international organizations, non-governmental organizations, the media, enemy States, third States? Although human rights case law remains silent on these issues, it is submitted that several factors may be taken into account. If there is already some evidence (in some cases, maybe even minor evidence) that raise unanswered questions, if allegations emanate from various sources⁶⁵ or from entities whose neutrality, impartiality, independence and professionalism is internationally recognized, if there is a total lack of transparency around a military operation, these constitute good indications in favour of the existence of a credible allegation.

5.2. *What type of investigation must be conducted in what cases?*

Considering that a criminal investigation must be conducted each time persons are killed in an armed conflict is legally untenable. Criminal investigations are limited to alleged crimes. The purpose of such investigations is primarily repressive. Other equally important purposes –

⁶⁴ See above section 2.ii).

⁶⁵ See in this sense: *Prosecutor v Jean-Pierre Bemba Gombo* (ICC Trial Chamber III, 21 March 2016) 578.



such as prevention or suppression of mere violations involving State responsibility but not necessarily (war) crimes – can be fulfilled through different investigative measures in the large sense of the word. Adopting an overly restrictive understanding of effective investigation would unduly limit the concept of accountability. Effective investigations may be conducted in the context of civil proceedings. In some cases, administrative or even disciplinary proceedings may involve investigations, which will help prevent or suppress violations. Mere fact-finding assessments may also be conducted in order to determine whether further investigation is required.⁶⁶ Post-incident reviews and lessons learned processes may be put in place with a view to preventing violations or, more generally, improving military operations. Preliminary aspects, such as keeping records of military operations should also be given particular importance, as this information would play a key role if criminal or civil proceedings were initiated in the future.⁶⁷ Human rights case law deals most of the time with serious violations of the right to life, and therefore focuses mainly on the existence and effectiveness of criminal investigations. There is more to the concept of accountability. As highlighted by the Special Rapporteur on extrajudicial, summary or arbitrary executions:

‘The obligation to investigate is part and parcel of the obligation to ensure the right to life and, thus, entails more than the determination of criminal responsibility. States are also responsible for undertaking the systematic supervision and periodic investigation necessary to ensure that their institutions, policies, and practices ensure the right to life as effectively as possible. Canada’s experience in Somalia illustrates the complementary roles of criminal and non-criminal investigation. Canada prosecuted and punished several soldiers for their actions in Somalia, but it also established a Commission of Inquiry to determine the institutional defects that allowed those abuses to occur. By identifying

⁶⁶ See in this sense: UNHRC, ‘Report of the Special Rapporteur, Ben Emmerson, on the promotion and protection of human rights and fundamental freedoms while countering terrorism’ (11 March 2014) UN Doc A/HRC/25/59, para 42; Turkel Commission Report (n 36) 102.

⁶⁷ M Sassòli, L Cameron, ‘The Protection of Civilian Objects – Current State of the Law and Issues *de lege ferenda*’, in N Ronzitti, G Venturini (eds), *The Law of Air Warfare: Contemporary Issues* (Eleven International 2006) 63-64; Alston Report 2006 (n 22) paras 35-36, 43.



pervasive problems in how rules of engagement were drafted, were disseminated through the chain of command, and were taught to soldiers on the ground, Canada improved its institutional capacity to better ensure the right to life in the future. States must constantly monitor and investigate whether they are effectively ensuring human rights law and adopt all necessary measures to prevent the recurrence of a violation.⁶⁸

On the other hand, although national truth commissions are a worthwhile endeavour and can help in collecting evidence and facilitating the prosecution of those responsible, they cannot replace criminal processes when serious violations of IHL and human rights have been committed.⁶⁹

Further work needs to be done to give a more complete picture of the various types of investigations and their appropriate character depending on the situation. The practice of States in this respect is not homogenous.⁷⁰ A 'best practices' or 'good practices' exercise in this context would certainly be a useful endeavour.

5.3. *How to adapt the criteria for ensuring the effectiveness of investigations in armed conflicts?*

Although the criteria for ensuring the effectiveness of investigations (independence, impartiality, transparency, celerity, thoroughness in the collection of evidence) should remain the same, their implementation to armed conflict situations may raise thorny issues that need to be carefully thought through. Some examples will be discussed hereafter.

It is generally accepted that any investigations into alleged war crimes and arbitrary deprivations of life must be conducted by *independent and impartial* institutions and military jurisdictions are no ex-

⁶⁸ Alston Report 2006 (n 22) para 41.

⁶⁹ *ibid* paras 25-27. In the same sense, see: *La Cantuta v Peru* (IACtHR 29 November 2006) para 224; *Almonacid Arellano et al v Chile* (IACtHR, 26 September 2006) para 150.

⁷⁰ Further work is needed to differentiate possible types of investigations, their triggers and criteria notably. A process has been launched in January 2014 by the Geneva Academy under the lead of Professor Noam Lubell on 'the duty to investigate under international law' and is ongoing. See <www.geneva-academy.ch/our-projects/our-projects/armed-conflict/detail/3>.



ception to this rule.⁷¹ Some human rights experts are additionally of the view that allegations of human rights violations must be investigated and prosecuted by bodies independent of the military because practice has shown that the risk of impunity is otherwise too high.⁷² The Inter-American Commission on Human Rights, for instance, has often considered that military tribunals lack the requisite independence and impartiality when investigating military personnel suspected of serious human rights violations, such as the killing of civilians in military operations and required that civilian courts investigate such killings, even in armed conflict situations.⁷³ This case law must be understood in light of the particular historical context of the use of military courts by military dictatorships in Latin America and the ensuing prevalence of impunity.⁷⁴ The European Court of Human rights has not been as restrictive. For instance, in the *Al-Skeini* case, the European Court found a violation of the obligation to investigate because the investigating authority was not operationally independent of the military chain of command.⁷⁵ The fact that the investigating authority was a military entity was not seen as problematic as such. It is submitted that holding that investigations into allegedly unlawful killings in armed conflicts must always be investigated by civilian jurisdictions may be unrealistic and potentially counterproductive.⁷⁶ It would be wrong to consider that military investigations are intrinsically not independent and impartial. Civilian jurisdictions might be less well equipped to analyze alleged IHL violations.

⁷¹ Alston Report 2006 (n 22) paras 35-37.

⁷² *ibid* para 37; UNCHR, 'Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux. Issue of the administration of justice through military tribunals' (13 January 2006) UN Doc E/CN.4/2006/58, Principle 9: 'In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.'

⁷³ *Las Palmeras v Colombia* (n 62) para 53.

⁷⁴ Gaggioli, ICRC Use of Force Report (n 4) 56.

⁷⁵ See *Al-Skeini* (n 25) para 169: 'Nonetheless, the fact that the United Kingdom was in occupation also entailed that, if any investigation into acts allegedly committed by British soldiers was to be effective, it was particularly important that the investigating authority was, and was seen to be, operationally independent of the military chain of command.'

⁷⁶ Professor Schmitt questions for instance the effectiveness of civilian jurisdictions in investigating attacks since they may have no knowledge of military practice and equipment notably. Schmitt (n 31) 84.



Rulings by military jurisdictions might also be more easily accepted and integrated by the military than civilian rulings. Discouraging the military from conducting investigations into right to life violations would also disinvest the military of their actual duty to prevent and suppress IHL violations. Prevention can also take the form of disciplinary proceedings in the military chain of command, which may not fulfil the strict criterion of independence under human rights. Such proceedings would not be appropriate in cases of arbitrary deprivations of life, but could certainly be useful, for instance, to ensure compliance with certain procedures that are put in place to prevent civilian casualties or to positively identify legitimate targets. The military should then rather be encouraged to put in place mechanisms to ensure that their investigations will indeed be independent and impartial. If killings related to armed conflict situations were prosecuted by civilian jurisdictions in some cases, belligerent States must ensure that civilian judges are properly trained in IHL.

The *collection of evidence* must be as thorough as possible. In a number of situations of non-international armed conflicts, human rights courts found that the investigation was ineffective because the investigative authorities did not interrogate the soldiers having conducted the military operation which resulted in killings or possible witnesses, because they did not investigate the crime scene and collect evidence (eg empty cartridges) on sight or because they did it too late, because there was no attempt at reconstructing the facts, because no measures were undertaken to verify that the persons killed were actual insurgents, because human remains were not analyzed or autopsies not conducted.⁷⁷ In the relevant cases, these requirements did not seem unrealistic and the cumulative effect of several deficiencies in the investigation justified the human rights court's findings. Depending on the armed conflict situation, several practical and legal challenges must be kept in mind. Here are a few examples: 1) Interviewing possible witnesses might endanger them and/or the interviewers. Given the political and security context, convincing possible witnesses to speak as well as ensuring the veracity of the statements might also be difficult. These issues also exist

⁷⁷ See among many others: *Kaya v Turkey* App no 22729/93 (ECtHR, 19 February 1998) paras 86-92; *Isayeva v Russia* App no 57950/00 (ECtHR, 24 February 2005) paras 215-224; *Mapiripán Massacre* (n 25) paras 227-228.



in peacetime but they are much more severe in an armed conflict context. 2) Celerity is crucial notably to safeguard the evidence. The more time elapses, the greater the risk is that evidence will be destroyed and the possibility to elucidate the truth will be compromised. In situations of armed conflict, it may not be possible for security reasons or because of lack of control over an area notably to collect the evidence promptly. Moreover, given the multiplication of deaths, it may be difficult (or impossible) to conduct investigations at the same pace as in peacetime.⁷⁸ The point in the notion of celerity is that investigations should be initiated and conducted as fast as possible in the light of circumstances. 3) Autopsies may not always be conducted. Depending on where they are, bodies may be difficult to recover.⁷⁹ In case of bombings, for instance, conducting autopsies on each dead body seems unrealistic (and maybe unnecessary).⁸⁰ In some war-torn countries, financial resources and expertise is lacking. In other cases, autopsies are considered as going against religion (Islam, Judaism), which might also at times lead to difficult dilemmas in contexts where a belligerent party wishes to perform an autopsy as per its obligation to elucidate the cause of death, while the family or community equates autopsies with bodily intrusion, which violates beliefs about the sanctity of keeping the human body complete.⁸¹ Religion, culture and other beliefs should as far as possible be taken into account in deciding upon the forensic methods to be used for the identification of dead bodies and for further investigation.⁸² The

⁷⁸ Gaggioli, Kolb (n 5) 156. *Contra*: A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, 2004) 38: 'If States become aware of a significant rise in killings, especially if this occurs in one part of their territory, they should be expected to increase or re-direct, investigative resources to ensure that prompt and thorough inquiries can be undertaken into those deaths.'

⁷⁹ Alston Report 2006 (n 22) para 36. See, however: *Kaya* (n 77) para 89: 'The Court acknowledges that the on-the-spot post-mortem and forensic examination were conducted in an area prone to terrorist violence, which may have made it extremely difficult to comply with standard practices. (...) It is therefore surprising that neither the doctor nor the public prosecutor requested that the body be flown to a safer location to allow more detailed analyses to be made of the body, the clothing and the bullet wounds.'

⁸⁰ Interestingly enough, the European Court did not comment on the lack of autopsies in the *Isayeva* case when it applied the law to the facts. *Isayeva* (n 77) paras 215-224.

⁸¹ EC Burton, 'Religions and the Autopsy' Medscape (2012) available at <<http://emedicine.medscape.com/article/1705993-overview#showall>>.

⁸² Gaggioli (n 18).



legal requirement to identify and, where necessary, investigate the cause of the death must however be maintained and remain the ultimate objective to be achieved. Although challenges are real, solutions exist. New technologies, in terms of forensic action, the possibility to conduct interviews through the internet, using social media to reconstruct the facts, mapping areas through remote systems (eg drones, geospatial technologies) can also provide original solutions that are being increasingly used by non-governmental organizations.⁸³ These do not necessarily require significant financial resources.

Finally, human rights bodies consider that investigations must be conducted with due regard for the principle of *transparency*. This implies involving the next-of-kin in the investigation process⁸⁴ and some form of publicity regarding the outcome of the investigation.⁸⁵ In practice, these might raise challenges. For instance, if the next-of-kin are suspected of belonging to armed groups, their direct involvement in the investigation process may constitute a risk.⁸⁶ Publicly disclosing all elements of the investigation, including military strategies, anticipated targets, military operations' planning and so forth may be dangerous and forfeit the belligerent State's ability to effectively wage wars. Again, similar risks may exist in peacetime, but are certainly less serious and far-reaching. Nevertheless, solutions and adaptations are possible to ensure an appropriate degree of transparency.⁸⁷ For instance, the mere conclu-

⁸³ UNGA, 'Interim report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston (23 September 2010) UN Doc A/65/32, 13-7. See also: E Lieblich, 'Show Us the Films: Transparency, National Security and Disclosure of Information Collected by Advanced Weapon Systems under International Law' (2012) 45 *Israel L Rev* 459-491.

⁸⁴ See, eg, *Güleç v Turkey* App no 21593/93 (ECtHR, 27 July 1998) para 82; *Ximenes-Lopes v Brasil* (IACtHR, 4 July 2006) para 193; *Prison de Miguel Castro-Castro v Peru* (IACtHR, 25 November 2006) paras 255-256.

⁸⁵ See, eg, *Güleç* (n 84) paras 78 and 80; *Bámaca Velásquez v Guatemala* (IACtHR, 22 February 2002) para 77. The degree of publicity required may vary depending on the case. See: *Isayeva* (n 77) para 214.

⁸⁶ See in this sense, UNHRC, 'Report of the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254 including the independence, effectiveness, genuineness of these investigations and their conformity with international standards' (18 June 2010) UN Doc A/HRC/15/50, para 33.

⁸⁷ See, in this sense: UNGA 'Report of the Special Rapporteur, Ben Emmerson, on the promotion and protection of human rights and fundamental freedoms while

sions of the investigation might be disclosed during the armed conflict while the full investigation could be disclosed only after a certain period of time has elapsed following an armed conflict. The next-of-kin could be generally informed about progress of an investigation without further details. Alternatively, information could be given to a neutral third party representing the next-of-kin's interest, who is bound by professional secrecy. In any case, it is clear that total secrecy around investigations is not acceptable as it would constitute an easy way out for dispensing States of conducting effective investigations.

6. *Conclusion: Why the interplay between IHL and HRL matters?*

In conclusion, taking into account IHL and carefully analyzing the interplay between IHL and human rights law is necessary and useful when considering the obligation to investigate in armed conflicts for the following reasons:

i) IHL does entail an obligation to investigate, even if it is more limited than under HRL. In some cases, such as regarding the obligation to investigate alleged war crimes, there are no contradictions between IHL and HRL and these two bodies of international law simply *reinforce each other*. The same can be said regarding the obligation to investigate deaths in custody.

ii) Whenever States carry out law enforcement operations, HRL generally prevails over IHL, or at least is not displaced by IHL. Thus, when force is not directed at persons believed to be legitimate targets under IHL, the force used cannot exceed what is allowed under a human rights law enforcement paradigm and every violent death in this context must be investigated. Holding that IHL derogates from human rights law as *lex specialis* in such cases is mostly erroneous and untenable.⁸⁸ A correct understanding of the interplay between IHL and HRL

countering terrorism' (18 September 2013) UN Doc A/68/389, para 42; Turkel Commission Report (n 36) para 106.

⁸⁸ Exceptions are when IHL itself integrates the law enforcement paradigm. For example, art 43 of the 1907 Hague Regulation provides that 'the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the



is needed to refute false arguments about an alleged supremacy of IHL in all armed conflict situations.

iii) Even when IHL is the *lex specialis*, such as in conduct of hostilities operations, it does not necessarily mean that human rights requirements regarding investigations are irrelevant. For instance, criteria to consider an investigation effective have been developed under human rights law and can usefully complement IHL, which remains silent on the matter. The legal relevance of human rights law can be theoretically construed around the complementary theory, the harmonization theory or the *lex specialis* character of human rights law in the context of the duty to investigate. A modern interpretation of the interplay between IHL and HRL demonstrates that human rights evolutions can and must be taken into account in the context of investigations, even when IHL is considered as *lex specialis* as regards the actual use of force.

iv) IHL rules provide a baseline, or at least a good indication, as to what can be considered as feasible or realistic in armed conflict situations. For instance, investigating all violent deaths seems unrealistic in armed conflicts because some deaths are ‘inherent to the conduct of hostilities in armed conflicts’.⁸⁹ Instead, arguing that there is a duty to investigate alleged violations of the right to life in armed conflicts seems much more reasonable, provided that IHL is duly taken into account to identify what would constitute an arbitrary deprivation of life. Other examples, including a requirement that investigations to prevent or repress right to life violations must always be conducted by bodies independent of the military is neither feasible, nor advisable. As evidenced in several IHL rules, military institutions have an important role to play in the prevention and suppression of IHL violations. A better approach is rather to insist on the necessity of strict independence and impartiality in cases of investigations into right to life violations and to provide advice to ensure that military institutions fulfil these criteria.

country.’ Thus, under occupation law, the occupying power has an obligation to maintain law and order and has the power to use force to do so. In this regard, see See: Ferraro (n 41) 119. Similar arguments can be made regarding the escape of prisoners of war. See art. 42 GCIII: ‘The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances.’

⁸⁹ Gaggioli, ICRC Use of Force Report (n 4) 49.



In brief, in order to frame the obligation to investigate arbitrary deprivations of life in armed conflicts in a way that is protective but still convincing and realistic, due consideration must be given to both IHL and HRL, and a dynamic understanding of their interplay is required. A flexible ‘contextual-functional’ human rights approach is certainly useful but it must be complemented by an analysis of IHL rules when applicable.

