Israel Law Review **51**(2) 2018, pp 169–191. © Cambridge University Press and The Faculty of Law, The Hebrew University of Jerusalem, 2018.
doi:10.1017/S0021223718000055

The Duty to Investigate Violations of the Right to Life in Armed Conflicts in the Jurisprudence of the Inter-American Court of Human Rights

Giovanna Maria Frisso[*]

This article explores how the Inter-American Court of Human Rights (the Court) has dealt with allegations of violations of the right to life during an armed conflict and, in particular, how it has dealt with allegations of violation of the obligation to investigate such allegations. The article notes that international humanitarian law (IHL) was initially used by the Court to strengthen the general obligations of states to protect the rights guaranteed by the American Convention on Human Rights (ACHR). Later IHL began informing the interpretation of specific rights. This change has been more significant in relation to the interpretation of the right to life under the ACHR than in the examination of state compliance with the right of access to justice, which encompasses the duty to investigate allegations of violations of the right to life during an armed conflict. The analysis of the Court's jurisprudence demonstrates that the different ways in which the Court has addressed the relationship between IHL and international human rights law (IHRL) have been informed by its primary effort to ensure that the interpretation of the ACHR provides the widest protection possible to individual rights.

Keywords: international humanitarian law, international human rights law, Inter-American Court of Human Rights, right to life, duty to investigate

1. Introduction

The right to life has been described as a supreme, basic right. 'When life is deprived, it is impossible to enjoy any fundamental freedom'.[1] Efforts to ensure the protection of other rights are of little relevance if the right to life is not protected. It is therefore reasonable to expect that the deprivation of life should be regulated not only during times of peace, but also during an armed conflict.

Such regulation within international law has been promoted by international human rights law (IHRL) and international humanitarian law (IHL), both of which have been considered to be complementary bodies of international law.[2] Nonetheless, the meaning of such complementarity remains a matter of dispute as a result of existing differences between the objectives and the scope of applicability of both bodies of international law.[3] In this context, much has been written

[*] Professor of International Law at Universidade Federal Fluminense and coordinator of the School of the Public Defender's Office in Brazil. The author is grateful to Carlos Gaio, the anonymous reviewers and to participants in the Minerva/ICRC Jerusalem 11th Annual Conference on Contemporary Challenges in International Humanitarian Law for their helpful comments. giovanna_frisso@hotmail.com.

[1] Yoram Dinstein, 'Terrorism as an International Crime' (1989) 19 *Israel Yearbook on Human Rights* 55, 63.

[2] Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 *Israel Law Review* 310, 337.

[3] The application of IHL during an armed conflict and of IHRL at all times is at the centre of the debates that consider their co-applicability in accordance with the *lex specialis* argument. As a result of the difference in

about the relationship between IHRL and IHL, their separate origins, their convergence and their mutual influence. Their fields of application, the rights protected, and their respective implementation mechanisms have also been compared.[4]

This article assumes that IHRL applies during an armed conflict[5] and, consequently, that a violation of the right to life during an armed conflict can be brought to the attention of international and regional human rights systems. Among regional human rights systems the inter-American system has been considered 'the pioneer among regional and international counterparts to take IHL effectively into account' when dealing with human rights violations occurring during an armed conflict.[6]

The normative framework of the inter-American system of human rights can be traced back to 1948, when the American Declaration of the Rights and Duties of Man and a resolution acknowledging the need for a judicial organ in charge of the protection of human rights in the region were adopted by the member states of the Organization of American States (OAS).[7] Almost a decade later, in 1959, the Inter-American Commission on Human Rights (the Commission) was created by the member states of the OAS to further the observance of human rights

focus of IHL and IHRL, IHL has been said to bind the parties to the conflicts, both state authorities and non-state actors, while IHRL has been understood to bind only states. Traditionally, the extraterritorial application of IHL and IHRL has also been conceived in different terms. An important distinction in this article concerns the fact that IHRL applies equally to all persons within the jurisdiction of a state, disregarding the IHL distinction between combatants and civilians or those *hors de combat*. Various articles cited in this work articulate some of the differences between IHL and IHRL. To further explore this aspect see ICRC Advisory Service on International Humanitarian Law, 'International Humanitarian Law and International Human Rights Law: Similarities and Differences', January 2003, https://www.icrc.org/eng/assets/files/other/ihl_and_ihrl.pdf.

[4] See, eg, Christina M Cerna, 'The History of the Inter-American System's Jurisprudence as regards Situations of Armed Conflict' (2011) 2 *International Humanitarian Legal Studies* 3, 7–10; Iain Scobbie, 'Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict' (2010) 14 *Journal of Conflict and Security Law* 449; Laura M Olson, 'Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law – Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict' (2009) 40 *Case Western Reserve Journal of International Law* 437; Marko Milanović, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 *Duke Journal of Comparative and International Law* 69; Marko Milanović, 'Norm Conflicts, International Humanitarian Law and Human Rights Law', *SSRN*, 5 January 2010, https://ssrn.com/abstract=1531596; Silvia Borelli, 'The (Mis)-Use of General Principles of Law: *Lex Specialis* and the Relationship between International Human Rights Law and the Laws of Armed Conflict' in Laura Pineschi (ed), *General Principles of Law: The Role of the Judiciary* (Springer 2015) 265.

[5] It is acknowledged that some states dispute the concurrent application of IHL and IHRL in an armed conflict. Sassòli and Olson point out that these states 'have never specifically done so with regard to non-international armed conflicts on their own territory': Marco Sassòli and Laura M Olson, 'The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 *International Review of the Red Cross* 599, 603.

[6] Larissa van den Herik and Helen Duff, 'Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches' in Carla M Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill Nijhoff 2016) 366, 384.

[7] American Declaration on the Rights and Duties of Man (entered into force April 1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OAS/Ser.L/V/I.4 Rev. 9 (2003), available at: http://www.cidh.oas.org/basicos/english/basic2.american%20declaration.htm.

among them. The American Convention on Human Rights (ACHR)[8] was adopted in 1969, providing for the creation of the Inter-American Court of Human Rights (the Court). The Convention entered in force in 1978. Since then two bodies have been in charge of overseeing compliance with the Convention: the Commission and the Court.

Currently 23 OAS member states are parties to the ACHR[9] and 20 have opted to accept the Court's contentious jurisdiction in accordance with Article 62 of the Convention.[10] The Court began operating in 1979, but it did not begin to exercise its contentious jurisdiction until 1986, when the Commission submitted the first contentious case: *Velásquez Rodriguez v Honduras*.[11] The Court and the Commission have dealt with the relationship between IHL and IHRL through the analysis of individual petitions.[12] In the work of the Commission, this relationship has also been developed in various country reports.[13] The way in which each body has dealt with this topic has changed over the years.[14]

This article explores the scope of these changes in the jurisprudence of the Court on allegations of violations of the right to life committed during an armed conflict and, in particular, violations of the obligation to investigate such allegations. The choice to focus on the Court takes into account the binding effect of its decisions. Given the procedural framework provided for in the ACHR,[15] this choice allows the views of the Commission to be addressed indirectly.

The ACHR recognises the right to life in Article 4(1), which states that '[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life'. The ACHR further identifies, in Article 27(2), the right to life as one of the rights that cannot be suspended in the event of war, public danger or other threats to the independence or security of states.

[8] American Convention on Human Rights, Pact of San José, Costa Rica (entered into force 18 July 1978) 1144 UNTS 123; OAS Treaty Series No 36 (ACHR).

[9] The Commission continues to be responsible for assessing the observance of human rights by OAS member states that did not ratify the ACHR or did not accept the jurisdiction of the Court, in accordance with arts 18 and 19 of the Statute of the Inter-American Commission of Human Rights, adopted by the General Assembly of the OAS, La Paz (Bolivia), October 1979, Resolution 448, https://www.oas.org/en/iachr/mandate/basics/statute-inter-american-court-human-rights.pdf.

[10] The 20 states over which the Court may exercise its contentious jurisdiction are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay.

[11] *Case of Velásquez Rodríguez v Honduras* (1988) Inter-Am Ct HR, Judgment of 29 July 1988, (Ser C) No 4.

[12] The Commission may, when the conditions are met, refer cases to the Court only with respect to those states that have ratified the ACHR and have previously recognised the contentious jurisdiction of the Court, unless a state accepts jurisdiction expressly for a specific case. The focus of the article indicates, therefore, that situations that might involve, for instance, Canada and the United States will not be discussed.

[13] On the work of the Commission, see Cerna (n 4) 52; Lindsay Moir, 'Law and the Inter-American Rights System' (2003) 25 *Human Rights Quarterly* 182.

[14] In relation to the changes in the approach of the Commission regarding the co-applicability of IHL and IHRL, see Cerna (n 4). The changes in the approach of the Court are discussed by Alonso Gurmendi Dunkelberg, 'There and Back Again: The Inter-American Human Rights System's Approach to International Humanitarian Law', *SSRN*, 8 March 2017, https://ssrn.com/abstract=2929570.

[15] In accordance with the ACHR, the Commission is responsible for the initial processing and admissibility of cases, and transmits those deemed admissible to the Court for a decision on the merits.

The duty to investigate violations of the rights guaranteed by the ACHR is not explicitly provided for in the Convention. The Court's jurisprudence has related this duty to different provisions of the ACHR, and its various normative bases are outlined in Section 2 of this article.[16] Section 3 provides an overview of the jurisprudence of the Court regarding the applicability of the ACHR during an armed conflict and the overall interplay between IHL and IHRL. Section 4 examines how the Court has taken into account both IHL and the particularities of the context of an armed conflict in its analysis to assess state compliance with the duty to investigate alleged violations of the right to life.

2. THE JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS REGARDING THE DUTY TO INVESTIGATE VIOLATIONS

The development of the duty of states to investigate violations of the rights guaranteed by the ACHR in the jurisprudence of the Court has to be understood in the context of the impunity that characterised the transition to democracy in various Latin American countries and informed the initial cases heard by the Court.[17] Antkowiak explains that in Latin America impunity for serious human rights violations resulted not only from amnesty laws and presidential pardons, but also from factual measures aimed at aborting or rendering ineffective all meaningful investigations into past violations and the unjustifiable extension of military court jurisdiction, which allowed 'the army to absolve its own in contexts that should be clearly controlled by civil authorities'.[18]

This context of impunity, in the eyes of the Court, fostered chronic recidivism of human rights violations, and left victims and their relatives defenceless.[19] To combat impunity, the

[16] It is important to note that the duty to investigate has been related to the right to truth in the jurisprudence of the Court. Nonetheless, this relationship will not be explored in this article, as the right to truth is not provided for in the ACHR. As stated by the Court, it corresponds with 'a concept that is being developed in doctrine and case law': *Case of Castillo-Páez v Peru* (1997) Inter-Am Ct HR, Judgment of 3 November 1997, (Ser C) No 34, [86].

[17] The impunity context that characterised the first cases brought before the Court is discussed in Victor Abramovich, 'From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System' (2009) 11 *SUR – International Journal on Human Rights* 7; Felipe González, 'The Experience of the Inter-American Human Rights System' (2009) 40 *Victoria University of Wellington Law Review* 103; Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 *California Law Review* 451, 453–58; Gerald L Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 *European Journal of International Law* 101, 108.

[18] Thomas M Antkowiak, 'Truth as Right and Remedy in International Human Rights Experiences' (2002) 23 *Michigan Journal of International Law* 977, 980. The consequence of the expansion of the military justice mentioned by Antkowiak relates to the characteristics of military justice in Latin America, as explained by Juan E Méndez and Javier Mariezcurrena, 'Accountability for Past Human Rights Violations: Contributions of the Inter-American Organs of Protection' (1999) 26 *Social Justice* 84, 86.

[19] *Case of Bámaca-Velásquez v Guatemala* (2000) Inter-Am Ct HR, Judgment of 25 November 2000, (Ser C) No 70, [211]; *Case of the Ituango Massacres v Colombia* (2006) Inter-Am Ct HR, Judgment of 1 July 2006, (Ser C) No 148, [299].

investigation of human rights violations was closely related to the duty under the Court's jurisprudence to prosecute and to punish.[20]

Within the legal framework of the ACHR, the duty to investigate has been developed as an element of the obligation of states to guarantee rights, as established in Article 1(1) of the Convention, together with the substantive right that must be protected or ensured, and as an element of the right of access to justice, in accordance with Articles 8 and 25 of the ACHR. In some cases, the continuing lack of an effective investigation has led to the characterisation of aggravated international responsibility of the state. Whenever the duty to investigate has been violated, the Court has ordered investigations as a reparative measure within the framework of Article 63(1) of the ACHR.

With regard to Article 1(1), the Court explained in *Velásquez Rodrigues v Honduras* that states must respect the rights and freedoms recognised by the ACHR and ensure the free and full exercise of those rights for every person subject to its jurisdiction.[21] The meaning of the second obligation has been clarified as follows:[22]

> This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. *As a consequence of this obligation, the States must* prevent, *investigate* and punish *any violation of the rights recognized by the Convention*.

Thus, the Court has asserted that the duty to investigate is one of the positive measures that states must adopt in order to guarantee the rights recognised in the ACHR.[23] Although the duty to investigate has been framed in broad terms, it has been understood as arising especially from the infringement of IHRL through acts that are or should have been criminalised by domestic criminal law.[24] A violation of the right to life, therefore, imposes on states the duty to investigate, try and punish those individually responsible for the violation.[25]

---

[20] Impunity has been defined by the Court as 'the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention, in view of the fact that the State has the obligation to use all the legal means at its disposal to combat that situation': *Case of Paniagua Morales and Others v Guatemala* (1998) Inter-Am Ct HR, Judgment of 8 March 1998, (Ser C) No 37, [173]. The permanence of this context was reiterated in subsequent judgments of the Court, such as *Bámaca-Velásquez v Guatemala*, ibid [211]. The Court has indicated that the investigations have to aim at the identification of suspects: *Case of Juan Humberto Sánchez v Honduras* (2003) Inter-Am Ct HR, Judgment of 7 June 2003 (Ser C) No 99 [83]. See also *Case of Yarce and Others v Colombia* (2016) Inter-Am Ct HR, Judgment of 22 November 2016, (Ser C) No 325, [280]; *Case of the Las Dos Erres Massacre v Guatemala* (2009) Inter-Am Ct HR, Judgment of 24 November 2009, (Ser C) No 211, [234].

[21] *Velásquez Rodríguez v Honduras* (n 11) [165]–[166].

[22] ibid [166] (emphasis added). A similar statement is found in *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (2012) Inter-Am Ct HR, Judgment of 25 October 2012, (Ser C) No 252 (*El Mozote v El Salvador*), [144].

[23] *Velásquez Rodríguez v Honduras* (n 11) [176].

[24] Tomuschat believes that only where the life and personal integrity or the freedom of a victim has been injured can it be deemed to be compulsory to institute criminal proceedings: Christian Tomuschat, 'Reparation for Victims of Grave Human Rights Violations' (2002) 10 *Tulane Journal of International and Comparative Law* 157, 167. See Diane F Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537, 2578; Noelle Higgins and Michael O'Flaherty, 'International Human Rights Law and "Criminalization"' (2015) 58 *Japanese Yearbook of International Law* 45.

[25] *El Mozote v El Salvador* (n 22) [244].

https://doi.org/10.1017/S0021223718000055 Published online by Cambridge University Press

The other normative basis of the duty to investigate is found in Articles 8 and 25 of the ACHR, which provide the legal framework of the right of access to justice. In accordance with Article 25, states are required to provide effective judicial remedies to victims of human rights violations. These remedies must follow due process of law, guaranteeing fair proceedings. The right to a fair trial, acknowledged in Article 8, includes the right of victims' relatives to a criminal investigation aimed at the attribution of criminal responsibility in cases of violation of the right to life.[26]

In certain cases, the suffering and anguish caused by the uncertainty about what happened and the impunity of the perpetrators resulting from the lack of an investigation or an ineffective investigation have led the Court to determine that a violation has occurred of the right to personal integrity of the next of kin of victims of violations of the right to life.[27] However, lack of investigation has not been considered sufficient to create a presumption that such a violation has taken place.

Whenever a state has not complied with its obligation to investigate under Article 1(1) or Articles 8 and 25 of the ACHR, the Court has ordered the carrying out of investigations as a reparative measure. The Court understands that the investigation of human rights violations can contribute to the satisfaction and even the rehabilitation of both family members of the deceased victims and their communities, once such investigation provides information about the human right violation and assists in the attribution of criminal responsibility.[28]

As a reparative measure, investigations will most probably take place years after the events. In *El Mozote v El Salvador*, for instance, the decision of the Court, which ordered investigations, was reached in 2012, almost 20 years after the end of the conflict.[29] In *Cruz Sánchez v Peru* approximately 15 years lapsed between the end of the conflict[30] and the decision[31] reached in 2015.

The duty to investigate encompasses a common set of features in the jurisprudence of the Court.[32] It has been continually defined as an obligation of means, which should not be a simple formality preordained to be ineffective.[33] Any de jure and de facto obstacles that could impede

[26] ibid [242].
[27] ibid [197]; *Velásquez Rodríguez v Honduras* (n 11) [181].
[28] Thomas M Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2007–08) 46 *Columbia Journal of Transnational Law* 352, 388–89. Exploring the relationship between the duty to investigate and the duty to punish as a reparative measure, see Fernando Felipe Basch, 'The Doctrine of the Inter-American Court of Human Rights regarding States' Duty to Punish Human Rights Violations and Its Dangers' (2007) 23 *American University of International Law Review* 195.
[29] The signature of the 1992 Accords of Chapultepec is considered the end point of the armed conflict.
[30] In relation to the Peruvian armed conflict, the time frame indicated by the Peruvian Truth and Reconciliation Commission is considered – i.e. the period between 1980 and 2000: Truth and Reconciliation Commission, 'Final Report', Peru, 2003, Vol 1, Ch 1, 1, 53. This period has been questioned: see, eg, Alonso Gurmendi Dunkelberg, 'The Era of Terrorism: the Peruvian Armed Conflict and the Temporal Scope of Application of International Humanitarian Law', *SSRN*, 3 March 2017, https://ssrn.com/abstract=2927155.
[31] *Case of Cruz Sánchez and Others v Peru* (2015) Inter-Am Ct HR, Judgment of 17 April 2015, (Ser C) No 292.
[32] The Court strategically refers to its previous judgments when reasserting its jurisprudence. In this article, references will mainly indicate one case and, when possible, one of the cases that will be examined in more detail.
[33] *El Mozote v El Salvador* (n 22) [248].

https://doi.org/10.1017/S0021223718000055 Published online by Cambridge University Press

investigations therefore should be removed.[34] As a state's inherent duty, investigations should not depend on the procedural initiative of the victims or their next of kin, or on the provision of probative elements by private individuals.[35] In fact, as soon as state authorities become aware of the facts, they must initiate, *ex officio* and without delay, a serious, impartial, thorough and effective investigation by all lawful means available.[36]

The state should ensure that the organ investigating an alleged human rights violation uses all lawful 'available means to carry out, within a reasonable time' all necessary actions and inquiries.[37] In an intimidating context, protective measures have been considered particularly relevant, as their absence could impair the effectiveness of the investigation.[38] The Court has also drawn attention to the importance of a system that is capable of protecting the independence and impartiality of members of the judiciary.

Since it is aware of the fact that recourse to military jurisdiction in Latin American countries has been associated with impunity,[39] the Court has been particularly attentive to the delimitation of the competence of the military justice system. As far as the Court is concerned, the military justice system may investigate, try and punish only members of the armed forces on active duty for the perpetration of crimes that by their nature infringe rights inherent in the military system.[40] To the Court, when military justice assumes competence in a matter that should be examined by ordinary (civilian) justice, the right of access to justice, provided for in Articles 8 and 25, is violated.[41]

To the Court, the duty to investigate aims at determining the facts and 'ensuring the identification, pursuit, capture, trial, and eventual punishment, if applicable' of all perpetrators of the acts, especially when state agents are or may be involved.[42] The investigation also needs to be able to clarify 'whether a specific violation … has occurred with the support or the tolerance of the public authorities or whether the latter have acted so that the violation has been committed

[34] *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (2013) Inter-Am Ct HR, Judgment of 20 November 2013, (Ser C) No 270 (*Cacarica v Colombia*), [440].
[35] *Velásquez Rodríguez v Honduras* (n 11) [177]; *El Mozote v El Salvador* (n 22) [248]; *Cruz Sánchez v Peru* (n 31) [351].
[36] *Ituango Massacres v Colombia* (n 19) [296].
[37] *Cacarica v Colombia* (n 34) [372].
[38] ibid [376]; *Ituango Massacres v Colombia* (n 19) [323].
[39] See Abramovich (n 17) 9, 23.
[40] Since the judgment in *Castillo Petruzzi v Peru* in 1999, the Court's rejection of military jurisdiction has been continuously articulated in the jurisprudence of the Court: *Case of Castillo Petruzzi and Others v Peru* (1999) Inter-Am Ct HR, Judgment of 30 May 1999, (Ser C) No 52. See Luiz Octavio Rabelo Neto, 'Competência da Justiça Militar da União para julgamento de civis: compatibilidade constitucional e com o Sistema interamericano de proteção de direitos humanos' ['The Competence of Military Courts to Judge Civilians: Compatibility with the Constitution and the Inter-American System of Human Rights'] (2016) 25(2) *Revista de Doutrina e Jurisprudência do Superior Tribunal Militar* 53, 120 (in Portuguese).
[41] *Case of Santo Domingo Massacre v Colombia* (2012) Inter-Am Ct HR, Judgment of 20 November 2012, (Ser C) No 259, [158].
[42] *Case of Valle Jaramillo and Others v Colombia* (2008) Inter-Am Ct HR, Judgment of 27 November 2008, (Ser C) No 192, [101].

https://doi.org/10.1017/S0021223718000055 Published online by Cambridge University Press

despite any prevention or with impunity'.[43] For this purpose, conducting investigations independently and impartially is essential.

3. ARMED CONFLICT, IHL AND IHRL IN THE JURISPRUDENCE OF THE COURT

The first challenge that the applicability of IHL by a human rights body presents concerns the categorisation as an armed conflict of the situation under analysis. An online search of the Court[44] indicates that the armed conflicts considered by the Court are those of Peru, Colombia, El Salvador, Guatemala and Paraguay.

In these cases, the categorisation of the armed conflict by the Court has followed the Commission's determination.[45] In addition, the Court has usually referred to reports of the relevant truth commissions,[46] decisions of national courts[47] and its own previous jurisprudence. Salmon pointed out that the listing by the Court of the sources on which it has relied is an important contribution to the clarification of the criteria that motivated the Court's recourse to IHL as well as the definition of the relevant humanitarian norms.[48]

[43] *Velásquez Rodríguez v Honduras* (n 11) [173]; *Santo Domingo v Colombia* (n 41) [156]; *Cacarica v Colombia* (n 34) [370].

[44] The term *conflicto armado* [armed conflict] was found in five cases and the term *derecho internacional humanitario* [international humanitarian law] was found in eleven other cases. The search had to be carried out in Spanish as no cases were found when the search was in English. The term *conflicto armado* was found in *Case of Rochac Hernández and Others v El Salvador* (2014) Inter-Am Ct HR, Judgment of 14 October 2014, (Ser C) No 285; *Case of Peasant Community of Santa Barbara v Peru* (2015) Inter-Am Ct HR, Judgment of 1 September 2015, (Ser C) No 299; *Case of Tenorio Roca and Others v Peru* (2016) Inter-Am Ct HR, Judgment of 22 June 2016, (Ser C) No 314; *Yarce v Colombia* (n 20); and *Case of the Members of the Village of Chichupac and Neighbouring Communities of the Municipality of Rabinal v Guatemala* (2016) Inter-Am Ct HR, Judgment of 30 November 2016, (Ser C) No 328. The term *derecho internacional humanitario* was found in *Cacarica v Colombia* (n 34); *Santo Domingo v Colombia* (n 41); *Case of Contreras and Others v El Salvador* (2011) Inter-Am Ct HR, Judgment of 31 August 2011, (Ser C) No 232; *Las Dos Erres v Guatemala* (n 20); *Case of Zambrano Vélez and Others v Ecuador* (2007) Inter-Am Ct HR, Judgment of 4 July 2007, (Ser C) No 166; *Case of the Miguel Castro Castro Prison v Peru* (2008) Inter-Am Ct HR, Judgment of 2 August 2008, (Ser C) No 181; *Case of Vargas Areco v Paraguay* (2006) Inter-Am Ct HR, Judgment of 26 September 2006, (Ser C) No 155; *Ituango Massacres v Colombia* (n 19); *Case of the Mapiripán Massacre v Colombia* (2005) Inter-Am Ct HR, Judgment of 15 September 2005, (Ser C) No 134; *Case of Las Palmeras v Colombia* (2001) Inter-Am Ct HR, Judgment of 6 December 2001, (Ser C) No 90; *Bámaca-Velásquez v Guatemala* (n 19). The *Case of Zambrano Vélez v Ecuador* does not refer to an armed conflict context and therefore will not be considered in this article.

[45] The determination of the Commission has adhered to the orientation of the International Committee of the Red Cross (ICRC), in accordance with which the qualification of a situation made by the parties to a conflict does not by itself lead to the categorisation of that situation as an armed conflict. Such qualification is, at most, one of the various factual aspects to be taken into account: Laurence Burgorgue-Larsen and Amaya Ubeda de Torres, 'War in the Jurisprudence of the Inter-American Court of Human Rights' (2011) 33 *Human Rights Quarterly* 148, 153.

[46] Reference to the Truth Commissions' reports does not focus on the characterisation of the situation: see, eg, *Las Dos Erres v Guatemala* (n 20) [70]; *El Mozote v El Salvador* (n 22) [3].

[47] In the cases against Colombia, the Court has usually made reference to the decision of the Colombian Constitutional Court as well as Colombia's own acknowledgement of the existence of an armed conflict: *Ituango Massacres v Colombia* (n 19) [90]; *Mapiripán Massacre v Colombia* (n 44) [114].

[48] Elizabeth Salmon, 'Institutional Approach between IHL and IHRL: Current Trends in the Jurisprudence of the Inter-American Court of Human Rights' (2014) 5 *Journal of International Humanitarian Legal Studies* 152.

https://doi.org/10.1017/S0021223718000055 Published online by Cambridge University Press

A problem arises, however, when the sources used by the Court do not provide a strong analysis of the situation of the alleged conflict. In this context, Dunkelberg offers a critical analysis of the time delimitation of the armed conflict in Peru by the Peruvian Truth and Reconciliation Commission (TRC).[49] He points out that the Court's reliance on this report also brought to the fore a risk of inconsistency in the jurisprudence of the Court. In his words, 'it was not until after 2003, with the publication of the TRC's Final Report, that Inter-American case law began to expressly refer to the Peruvian situation as a NIAC [non-international armed conflict]'.[50] As a result, members of the Tupac Amaru Revolutionary Movement (MRTA) have been characterised variously as civilians or as combatants depending on the year of the judgment. Similarly the alleged violation of their rights has been classified differently at different times.[51]

As Article 27 of the ACHR lists its provisions that cannot be suspended in emergency situations, including war, the applicability of these provisions during an armed conflict has not been disputed. The Court has therefore constantly reiterated that 'under the ACHR, states undertake to respect the rights and freedoms recognized therein and to ensure the exercise of such rights and freedoms to all persons subject to their jurisdiction in times of peace or armed conflict'.[52] The applicability of the ACHR during an armed conflict has resulted in the affirmation of the Court's competence to hear cases relating to situations of armed conflict. As stated by the Court,[53]

> [w]hen a State is a Party to the American Convention and has accepted the contentious jurisdiction of the Court, the Court may examine the conduct of the State to determine whether it conforms to the provisions of the Convention, even when the issue may have been definitively resolved by the domestic legal system. The Court is also competent to determine whether any norm of domestic or international law applied by a State, in times of peace or armed conflict, is compatible or not with the American Convention. In this activity, the Court has no normative limitation: any legal norm may be submitted to this examination of compatibility.

It is important to note that Article 27 of the ACHR does not allow states to suspend the right to life during an armed conflict. On this particular issue the following was made clear:[54]

[49] Dunkelberg (n 30).
[50] ibid [12].
[51] Compare *Cruz Sánchez v Peru* (n 31) with *Castillo Petruzzi v Peru* (n 40).
[52] *Santo Domingo v Colombia* (n 41) [21].
[53] *Las Palmeras v Colombia* (n 44) [32].
[54] *Cruz Sánchez v Peru* (n 31) [217]. The original text reads: '[R]esulta incuestionable que las disposiciones de la Convención Americana relativas al derecho a la vida mantienen su vigencia y aplicabilidad en situaciones de conflicto armado. … [E]ste derecho pertenece al núcleo de derechos convencionales no susceptibles de suspensión en ninguna circunstancia, ni aún en aquellas consideradas como las más apremiantes para la independencia o seguridad de un Estado parte. … La Corte ya ha afirmado que este hecho – la existencia de un conflicto armado interno al momento que sucedieron los hechos del presente caso – en vez de exonerar al Estado de sus obligaciones de respetar y garantizar los derechos de las personas, lo obligaba a actuar en manera concordante con dichas obligaciones.'

https://doi.org/10.1017/S0021223718000055 Published online by Cambridge University Press

> It is unquestionable that the provisions of the American Convention relating to the right to life maintain their validity and applicability in situations of armed conflict. … [T]his right belongs to the core of conventional rights that cannot be suspended under any circumstances, not even in those circumstances that are considered as the most pressing for the independence or security of a State party. … The Court has already stated that the existence of an internal armed conflict at the time of the events, instead of exempting the State from its obligations to respect and guarantee the rights of individuals, forced it to act in accordance with those obligations.

In accordance with Article 27, Articles 8 and 25 of the ACHR may be suspended in time of war. Their suspension must be temporarily limited and should not be inconsistent with other obligations under international law, nor involve discrimination on the ground of race, colour, sex, language, religion or social origin. The duty to investigate alleged violations of human rights during an armed conflict based on Articles 8 and 25 can therefore be temporarily suspended. None of the states whose international responsibility is discussed in Section 4 below have made use of the power to suspend these articles.

It is important to note that even if Articles 8 and 25 are suspended, the state remains obliged to investigate violations of the right to life committed during an armed conflict, based on Article 1(1). Article 27 stipulates that states continue to be obliged to provide the judicial guarantees essential for the protection of the rights that cannot be suspended during an armed conflict. As the right to life cannot be suspended, Article 1(1) continues to define states' obligations associated with the right.

The application of IHL by the Commission and the Court has generated more debate within the inter-American system of human rights than the application of the ACHR in the context of an armed conflict. At the centre of this debate is the case of *Juan Carlos Abella v Argentina*, which involved attacks on several Argentinian military barracks by a group of individuals belonging to the movement Todos por la Patria.[55] The armed confrontation, which lasted almost 30 hours, resulted in the deaths of 29 people, among them assailants and members of the armed forces.[56] Survivors of the attacks alleged that the military refused their offer of surrender and, at the end of

[55] *Case of Juan Carlos Abella v Argentina* (1997) Inter-Am Comm HR, Merits, 18 November 1997, OEA/SER.L/V/II.98, Doc 6 rev, [147]–[148] (*La Tablada v Argentina*). For a more detailed analysis of this case see Liesbeth Zegveld, 'The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the *Tablada* Case' (1998) 38(324) *International Review of the Red Cross* 505. The Commission has also mentioned IHL in its country reports: Cerna (n 4) 11–25.

[56] Despite the brief duration of the attacks, the Commission understood that the violent acts at the La Tablada military base on 23–24 January 1989 could not be properly characterised as a situation of internal disturbances. It explained: 'What happened there was not equivalent to large scale violent demonstrations, students throwing stones at the police, bandits holding persons hostage for ransom, or the assassination of government officials for political reasons – all forms of domestic violence not qualifying as armed conflicts. What differentiates the events at the La Tablada base from these situations are the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence attending the events in question. More particularly, the attackers involved carefully planned, coordinated and executed an armed attack, i.e., a military operation, against a quintessential military objective – a military base. The officer in charge of the La Tablada base sought, as was his duty, to repulse the attackers, and President Alfonsín, exercising his constitutional authority as Commander-in-Chief of the armed forces, ordered that military action be taken to recapture the base and subdue the attackers'. Therefore, the attack, in its view, triggered the application of the

the combat, four individuals were summarily executed and six others were the victims of forced disappearances. Pointing out that IHRL contains no rules governing the means and methods of warfare, the Commission observed that 'provisions of conventional and customary humanitarian law generally afford victims of armed conflicts greater or more specific protections than do the more generally phrased guarantees in the American Convention and other human rights instruments'.[57]

The Commission decided not only that IHL applied and took priority over IHRL in the case, but also that the Commission itself had the competence to directly apply IHL.[58] The Commission decision was based on the *pro persona* principle of interpretation, which implies 'making the most favorable interpretation for the effective enjoyment and exercise of the fundamental rights and freedoms, which, also, prevents using other international instruments [for example, the Geneva Conventions of 1949 or their Additional Protocols] to restrict the rights of the American Convention'.[59]

In *Las Palmeras v Colombia* – a case in which the national police acted in concert with Colombian armed forces to carry out an armed operation causing the death of six individuals – the Commission called upon the Court to 'conclude and declare that the State of Colombia violated the right to life, embodied in Article 4 of the Convention and Article 3, common to all the 1949 Geneva Conventions'.[60] To the Commission, the latter provision was instrumental for the interpretation of the former, as it was necessary to determine whether the six individuals who were killed during the armed conflict were protected by Common Article 3(1) of the Geneva Conventions.[61] Once the Commission understood that they were protected, and therefore unlawfully killed, the Commission determined there had been a violation of Common Article 3. It then determined that Article 4 of the ACHR had been violated.[62] According to the Commission, the Court should follow a similar reasoning, adopting a proactive method of interpretation that would enable an examination of Article 4 of the ACHR regarding the right to life in conjunction with Common Article 3 of the Geneva Conventions.

The Court has acknowledged that certain acts or omissions that violate human rights under the ACHR also violate other international instruments. However, it has decided that the ACHR 'has

provisions of Common Article 3, as well as other rules relevant to the conduct of internal hostilities: *La Tablada v Argentina* (n 55) [154]–[155].

[57] ibid [159]. The Commission also defended the application of international humanitarian law in the *Case of Las Palmeras v Colombia* (2000) Inter-Am Ct HR, Judgment of 4 February 2000 (Preliminary Objections), (Ser C) No 67, [28]–[29].

[58] This case was not submitted to the Court by the Commission.

[59] *Case of Suárez Peralta v Ecuador* (2013) Inter-Am Ct HR, Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot of 21 May 2013, (Ser C) No 261, [68].

[60] *Las Palmeras v Colombia* (n 57) [12].

[61] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85; Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (Common Article 3).

[62] The reasoning of the Commission is summarised in *Las Palmeras v Colombia* (n 57) [29].

https://doi.org/10.1017/S0021223718000055 Published online by Cambridge University Press

only given the Court competence to determine whether the acts or the norms of States are compatible with the Convention itself, and not with the 1949 Geneva Conventions'.[63] Therefore, the conduct of Colombia in *Las Palmeras v Colombia* should be assessed in accordance with the obligations under the ACHR, whether or not the conduct analysed is permitted under any other body of law.[64] The Court has asserted that it could interpret the obligation and the rights contained in the ACHR in light of other treaties. Relevant provisions of IHL could, therefore, inform the interpretation of the ACHR, allowing a more specific application of its provisions to define the scope of the state's obligations during an armed conflict.[65] The Court has since stated that it would take into account, for instance, Common Article 3,[66] Additional Protocol II[67] and customary international law in the interpretation of the ACHR whenever an alleged violation of the rights recognised in the Convention has taken place during an armed conflict. As will be seen in the following section, the extent to which the Court has indeed considered IHL in the interpretation of the right to life and the duty to investigate has varied.

4. The Duty to Investigate Allegations of Violations of the Right to Life During an Armed Conflict

Considering the results of the searches referred to above, a total of 16 cases in the jurisprudence of the Court could, at first sight, be relevant to this article.[68] Nonetheless, only in a few of them has IHL been used to determine state responsibility for alleged violations of the right to life or violations of the duty to investigate such allegations.[69] Despite not being found through the search engine, *Cruz Sánchez v Peru* also examined alleged violations of the right to life during an armed conflict and the duty to investigate. Reference will be made mainly to these cases in examining the jurisprudence of the Court. Their analysis illustrates the various ways in which IHL has been used by the Court in the examination of an allegation of a violation of the right to life during an armed conflict and the obligation to investigate it.

[63] *Las Palmeras v Colombia* (n 57) [33].
[64] ibid [33].
[65] ibid [32]–[34]; *Bámaca-Velásquez v Guatemala* (n 19) [209].
[66] (n 61).
[67] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II).
[68] Only two of the cases identified by searching against the term *conflicto armado* refer to IHL: *Rochac Hernández v El Salvador* (n 44) and *Yarce v Colombia* (n 20). In none of the cases is IHL considered in the determination of a violation of the right to life. In the list of cases that resulted from searching against the term *derecho internacional humanitário* two cases do not refer to IHL in examining a violation of the right to life: *Contreras v El Salvador* (n 44); *Vargas Areco v Paraguay* (n 44); *Ituango Massacres v Colombia* (n 19).
[69] They are *Cacarica v Colombia* (n 34); *Santo Domingo v Colombia* (n 41); *Las Dos Erres v Guatemala* (n 20); *Miguel Castro Castro Prison v Peru* (n 44); *Mapiripán Massacre v Colombia* (n 44); *Las Palmeras v Colombia* (n 44), *Bámaca-Velásquez v Guatemala* (n 19).

https://doi.org/10.1017/S0021223718000055 Published online by Cambridge University Press

4.1. THE COURT'S INTERPRETATION OF THE RIGHT TO LIFE UNDER THE ACHR IN LIGHT OF IHL

The analysis of the overall jurisprudence of the Court does not indicate a clear framework for the consideration of IHL. In its earlier cases, the Court referred to IHL and asserted its relevance in interpreting the ACHR.[70] In *Mapiripán Massacre v Colombia*, even though the Court acknowledged that it could not determine the international responsibility of Colombia for a violation of IHL,[71] it referred to IHL to reinforce its interpretation of the general obligations of states. It used IHL to reinforce the understanding that the obligations derived from Article 1(1) of the ACHR are applicable not only during times of peace, but also during an armed conflict.[72]

> With regard to [the] establishment of the international responsibility of the State in the instant case, the Court cannot set aside the existence of general and special duties of the State to protect the civilian population, derived from International Humanitarian Law, specifically Article 3 common of the August 12, 1949 Geneva Agreements and the provisions of the additional Protocol to the Geneva Agreements regarding protection of the victims of non-international armed conflicts (Protocol II). Due respect for the individuals protected entails passive obligations (not to kill, not to violate physical safety, etc.), while the due protection entails positive obligations to impede violations against said persons by third parties. Carrying out said obligations is significant in the instant case, insofar as the massacre was committed in a situation in which civilians were unprotected in a non-international domestic armed conflict.

Three years later, in *Miguel Castro Castro Prison v Peru*, the judgment did not refer to specific provisions of IHL, even though the existence of an armed conflict during that period in Peru was acknowledged. IHL was discussed only in the concurring opinion of Judge Cançado Trindade, in which he indicated that the analysis of the case should not be framed as a discussion about the proportionality of the means used by the state within the IHL framework, but as a violation of the dignity of those who were not a belligerent party in an armed conflict but instead were people who were already deprived of their freedom.[73] In his view,[74]

> [t]he flagrant illegality of the acts of brutality imputable to the State, that make up *ab initio* its international responsibility under the American Convention, assumes a truly central position in the judicial reasoning of an international human rights tribunal such as this Court; the principle of proportionality appears as an additional element, in a tangential position, before a previously established international responsibility of the case.

[70] Salmon mentions the existence of an earlier phase, a phase of indifference, in which the existence of an armed conflict was not taken into account by the Court: Salmon (n 48) 161.
[71] *Mapiripán Massacre v Colombia* (n 44) [115].
[72] ibid [114].
[73] *Case of the Miguel Castro Castro Prison v Peru* (2008) Inter-Am Ct HR, Concurring Opinion of Judge AA Cançado Trindade, 25 November 2006, (Ser C) No 160, [37].
[74] ibid [36].

https://doi.org/10.1017/S0021223718000055 Published online by Cambridge University Press

The recourse to IHL as a means of strengthening the interpretation of the provisions of the ACHR in order to better protect individuals has been related to the influence of Judge Cançado Trindade's views regarding the centrality of Article 1(1) of the ACHR. According to his understanding, Article 1(1) establishes an *erga omnes* obligation to respect and ensure the rights recognised in the ACHR. IHLR, IHL and refugee law converge into this single obligation.[75] As explained by Dunkelberg, in the view of Judge Cançado Trindade:[76]

> [The] interpretation of human rights in light of humanitarian law is unnecessary as both sets of laws can be applied simultaneously or even accumulatively in *all* instances. … One does not need to choose between interpreting the situation in light of either human rights law or humanitarian law. Given that they are part of the same *erga omnes* obligation, one only needs to use the former to strengthen whatever weaknesses one finds in the latter's protective scheme.

This understanding rejects the notion of *lex specialis* as a method of interpretation that aims at 'preventing or … reducing the fragmentary impact that could result from the development of an increasing number of specialised regimes in international law'.[77] Unless IHL better ensures the protection of victims, it might not be applied by the Court even if the alleged violation of the right to life has taken place during an armed conflict. As identified by Lenzerini, the initial cases of the Court clearly illustrate this approach.[78]

More recently, IHL has been expressly used by the Court as a supplementary norm of interpretation of the Convention rights, and not as part of a legal framework capable of strengthening the general obligation of states to protect rights.[79] Acknowledging IHL as the specific law applicable during an armed conflict, the Court considered it necessary to observe IHL in order to make a more specific application of the provisions of the ACHR when defining the scope of the state's obligations during an armed conflict.[80] In relation to the right to life, in *Cruz Sánchez v Peru* the Court resorted to IHL in order to determine state obligations with regard to the right to life during an armed conflict, understanding that the ACHR does not expressly define what would be considered 'arbitrary' to qualify a deprivation of life in situations of armed conflict as unlawful.[81]

---

[75] Antônio Augusto Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el siglo XXI* (Editorial Jurídica de Chile 2006) 185–89.
[76] Dunkelberg (n 14) 17.
[77] Erika de Wet and Jure Vidmar, 'Conflicts between International Paradigms: Hierarchy versus Systemic Integration' (2013) 2 *Global Constitutionalism* 196, 215.
[78] Federico Lenzerini, 'The Interface of Human Rights Law and International Humanitarian Law in the Regulation of Private Military and Security Companies', *EUI Working Papers*, PRIV-WAR project, 2010, 14. See, eg, *Case of Plan de Sánchez Massacre v Guatemala* (2004) Inter-Am Ct HR, Separate Opinion of Judge Cançado Trindade, 29 April 2004, (Ser C) No 105, [18].
[79] *Santo Domingo v Colombia* (n 41) [24]. According to Dunkelberg, this change can be perceived from 2012 onwards. In his words, 'before 2012, the Court traditionally refrained from applying international humanitarian law as per its precedent in Las Palmeras': Dunkelberg (n 30) 11. With regard to the interpretation of the right to life, the year 2012 can indeed be identified as a turning point in the jurisprudence of the Court.
[80] *Santo Domingo v Colombia* (n 41) [24].
[81] *Cruz Sánchez v Peru* (n 31) [272, 273].

https://doi.org/10.1017/S0021223718000055 Published online by Cambridge University Press

The recognition that 'the rule of arbitrary deprivation of life varies depending on whether it is a situation of armed conflict or not'[82] is illustrated in the Court's reasoning in *Cruz Sánchez v Peru*. In this case, the main reference to IHL in the judgment of the Court relates to the statement that the MRTA kidnappers *were not* civilians, and therefore did not benefit from the protection of Common Article 3 unless they found themselves *hors de combat*.[83] A finding on the alleged violation of the right to life by the Peruvian armed forces required, therefore, clarification of the facts in order to determine 'if [the MRTA members] died as a result of the actions of state agents once they were out of combat … or whether, on the contrary, they died while they were actively participating in hostilities'.[84] To determine whether they could be considered *hors de combat*, the Court relied on IHL. It examined whether (i) they were held by the armed forces; (ii) they could not defend themselves because they were unconscious, had been shipwrecked, injured or ill; or (iii) they clearly expressed their intention to surrender, had refrained from any hostile act and did not try to escape.[85]

To the Court, the evidence demonstrated that Cruz Sánchez was in a situation of *hors de combat* and, once he had been captured alive, Peru had the obligation to grant him humane treatment and to respect and to guarantee his rights in accordance with Article 4 of the ACHR, interpreted in the light of Common Article 3 of the four Geneva Conventions.[86] In relation to the deaths of the MRTA members, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza, the Court considered that it did not have enough evidence to conclude that they had ceased to participate in hostilities at the time of their deaths, and therefore they could not be classified as *hors de combat*. As a result, the Court did not find a violation of the right to life in respect of Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza.

In *Santo Domingo v Colombia*, which dealt with the use of cluster munitions by the Colombian air force against the village of Santo Domingo in 1998, clear references to principles of IHL can be found in the judgment, given in 2012. For instance, the Court referred to the principles of distinction[87] and of precaution in attack in determining the legality of the launch of a cluster bomb by Colombia.[88] According to the Court, the determination of 'whether the deceased and injured among the civilian population could be considered an "excessive" result in relation to the specific and direct military advantage expected if it had hit a military objective' required the target to hit a military objective, which did not occur in the circumstances of the case.[89] Therefore, the Court considered it inappropriate to analyse the launch of the cluster bomb in light of the principle of proportionality.[90]

[82] Salmon (n 48) 175.
[83] *Cruz Sánchez v Peru* (n 31) [277].
[84] ibid [247]–[248].
[85] ibid [277]. These criteria were, in the Court's opinion, in accordance with international customary humanitarian law.
[86] ibid [316]; Common Article 3 (n 61)
[87] *Santo Domingo v Colombia* (n 41) [213].
[88] ibid [216], [229].
[89] ibid [215].
[90] ibid.

https://doi.org/10.1017/S0021223718000055 Published online by Cambridge University Press

As is pointed out by Salmon, the silence of the Court in relation to the principle of proportionality can be understood as 'a desire to distance itself from the possible side effect that comes with asserting the excessive or collateral damages that come with the application of the principle of proportionality in regards to the right to life'.[91] For Salmon, this silence reflects a 'new – and controversial – partial recourse to the rules of IHL',[92] one that is based on the ability of IHL 'to define the content and even to expand the scope of the rights established in the [ACHR] and to stipulate the obligations of states, but not to limit its scope'.[93] When understood in light of the broader position of the Court in relation to the interpretation of the ACHR in light of IHL in order to strengthen the protection of the rights recognised in the Convention, the partial recourse to the rules of IHL does not seem to be a new strategy, but a direct consequence of the previous jurisprudence of the Court.

It is important to note that, even among the most recent judgments of the Court that have examined allegations of violations of the right to life committed during an armed conflict, one does not always find express reference to IHL provisions. In *El Mozote v El Salvador*, for instance, express references to principles of IHL are not found in the judgment of 2013,[94] although IHL terminology is used. The Court asserts, for example, that the counter-insurgency operations conducted by the military did not have a military objective; the attacks were 'directed deliberately against the civilian or non-combatant population',[95] including children, women – some of whom were pregnant – and the elderly.[96]

Despite these differences, whenever a violation of the right to life has been determined, the Court has examined it in light of Article 1(1) of the ACHR. The duty to investigate an alleged

[91] Salmon (n 48) 164.
[92] ibid 170.
[93] ibid. It is interesting to note that the first use of IHL mentioned by Salmon was acknowledged by the Court in *Case of Suárez Peralta v Ecuador* (n 59) [68]. See also Lenzerini (n 78) 16. The principle of proportionality was considered in relation to the machine gun attack that took place soon after the launching of the cluster bomb. Examining the pilots' exchanges, the Court concluded that 'the aircraft pilots expressed doubts as to whether or not the people they were observing moving on the highway were civilians'. Nonetheless, 'they still used their weapons (in this case machine guns), in manifest lack of concern for the life and integrity of these people, and in non-compliance with the principle of distinction. In addition, even in the hypothetical case that there could be members of the guerrilla forces among the civilian population, the military advantage sought would not have been so great that it could justify eventual civilian deaths and injuries, so that, in that hypothesis, these actions would also have affected the principle of proportionality'. This 'entailed a failure to comply with the obligation to guarantee the rights to life under the ACHR. … However, the representatives and the Commission did not individualize those who were the victims of these grave events', so the Court decided that it should not make a separate ruling in this regard: *Santo Domingo v Colombia* (n 41) [235]–[237].
[94] *El Mozote v El Salvador* (n 22) [141].
[95] ibid [153]–[154]. At the time of the facts, no members of the guerrilla forces or armed persons were present in the villages. Additionally, the examination of the forensic reports did not support the allegation that the deaths occurred in the context of a combat, confrontation or an exchange of gunfire. It is important to note that the terminology 'non-combatant' was used by the Court even though IHL does not formally recognise the status of combatant in non-international conflicts: Louise Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?' (2006) 88 *International Review of the Red Cross* 881, 889–91.
[96] *El Mozote v El Salvador* (n 22) [153]. The exhumations uncovered the bodies of 131 children under the age of 12, with regard to whom the violation of the right to life was related to art 19 of the ACHR.

https://doi.org/10.1017/S0021223718000055 Published online by Cambridge University Press

violation of the right to life within the framework of Article (1) during an armed conflict was expressly asserted by the Court in *Cruz Sánchez v Peru*:[97]

> The fact that the deaths occurred in the context of a non-international armed conflict did not exempt the State from its obligation to initiate an investigation, initially on the use of force, that has had lethal consequences, even if the Court may take into account specific circumstances or limitations determined by the conflict situation itself in assessing the State's compliance with its State obligations.

Nonetheless, the components of the duty to investigate have been developed mainly within the framework of Articles 8 and 25 of the ACHR in the jurisprudence of the Court. The evaluation of a violation of the duty to investigate a violation of the right to life based on Article 1(1) of the ACHR has, therefore, been informed by the components of the duty to investigate established by the Court within the framework of Articles 8 and 25 of the ACHR. Section 4.2 below examines the extent to which IHL and the specific circumstances or limitations imposed by the relevant armed conflict have been taken into account in the Court's analysis of state compliance with the duty to investigate in the interpretation of Articles 8 and 25 of the ACHR. As references to IHL before 2012 can be found mainly in relation to the interpretation of Article 1(1) and not in the interpretation of specific rights, the analysis of the interpretation of Articles 8 and 25 will focus on judgments handed down since 2012 to examine whether the Court has started to refer to IHL when discussing its interpretation.

4.2. THE COURT'S INTERPRETATION OF THE DUTY TO INVESTIGATE ALLEGATIONS OF VIOLATIONS OF THE RIGHT TO LIFE IN LIGHT OF IHL

Contrary to the interpretation of the right to life, the analysis of the recent jurisprudence of the Court indicates that the duty to investigate allegations of violations of that right does not particularly take into account provisions of IHL. This silence towards IHL can be related not only to the fact that IHL provisions do not set standards for the nature of the investigation of war crimes, but also to the debates concerning the scope of the duty to investigate during non-international armed conflicts. Even though Common Article 3 to the Geneva Conventions and Additional Protocol II contain no reference to investigations or prosecutions of violations of IHL, it has been asserted that these obligations also exist in non-international armed conflicts.[98]

[97] *Cruz Sánchez v Peru* (n 31) [350]. The original text reads: 'En el presente caso, el hecho de que las muertes se hayan producido en el marco de un conflicto armado no internacional, no eximía al Estado de su obligación de iniciar una investigación, inicialmente sobre el uso de la fuerza que haya tenido consecuencias letales, aunque la Corte podrá tener en cuenta circunstancias o limitaciones específicas determinadas por la propia situación de conflicto al evaluar el cumplimiento por parte del Estado de sus obligaciones estatales'.

[98] The duty of states to undertake the necessary measures for the suppression of all acts contrary to the provisions of the Geneva Conventions other than grave breaches have been understood to encompass Common Article 3: Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 *Harvard National Security Journal* 31, 47.

https://doi.org/10.1017/S0021223718000055 Published online by Cambridge University Press

The developments in the field of international criminal law have been particularly important for the assertion of a duty to investigate war crimes during non-international armed conflicts.[99] A defence of the duty to investigate IHL breaches during non-international armed conflicts is found in the jurisprudence of the Court in the concurring opinion of Judge Ramón Cadena Rámila in *Las Dos Erres v Guatemala*. In his view, Guatemala is obligated to investigate the massacres that took place in 1982 and identify those responsible 'to determine if there were any violations of international humanitarian law, with the purpose of identifying those responsible'.[100]

An important exception to the Court's silence about IHL in relation to the duty to investigate relates to Article 6(5) of Additional Protocol II, which states:

> At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

Article 6(5) was discussed in *El Mozote v El Salvador*, in which the violation of the duty to investigate by El Salvador was related to the existence of an amnesty law that impeded both the development of ongoing proceedings and the conducting of new investigations.[101] The Court acknowledged the specificity of the amnesty law, which was aimed at acts committed in the context of an internal armed conflict. It recognised that, according to Article 6(5) of Additional Protocol II, the enactment of amnesty laws on the conclusion of hostilities in non-international armed conflicts can be justified to pave the way to peace. Nonetheless, the Court drew attention to the fact that under IHL states also have an obligation to investigate and prosecute war crimes.[102] Considering this obligation, the Court has

[99] The Statute of the International Criminal Tribunal for Rwanda (annexed to UNSC Res 955 (8 November 1994), UN Doc S/RES/955) establishes, in art 4, the jurisdiction of the tribunal over violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II. The preamble to the Rome Statute of the International Criminal Court ((entered into force 1 July 2002) 2187 UNTS 90) (ICC Statute) recognises a customary duty of states to investigate all crimes under international law, including war crimes committed in non-international armed conflicts. The ICC Statute asserts the jurisdiction of the ICC over war crimes committed in international and non-international armed conflicts. Violations of Common Article 3 are covered by art 8(2)(b) of the ICC Statute.

[100] *Las Dos Erres v Guatemala* (n 20) Concurring Opinion of Judge ad hoc Ramón Cadena Rámila [1].

[101] General Amnesty Law for the Consolidation of Peace, Legislative Decree 486, 20 March 1993 (Republic of El Salvador). The law was adopted five days after the presentation of the Truth and Reconciliation Commission Report, granting amnesty to 'those persons who, according to the Truth Commission, participated in grave human rights violations that have occurred since January 1, 1980'. Beneficiaries of the amnesty included not only individuals whose cases were pending, but also those who had not yet been prosecuted and those who had been found guilty. The amnesty law also extinguished civil responsibility.

[102] The Court relied on rule 159 of the International Committee of the Red Cross study on international customary rules. In accordance with this rule: 'At the end of hostilities, the authorities in power must endeavor to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes': Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol I: Rules* (International Committee of the Red Cross and Cambridge University Press 2005, revised 2009) 611.

provided a restricted interpretation of Article 6(5) of Additional Protocol II,[103] according to which:[104]

> [this provision] refers to extensive amnesties in relation to those who have taken part in the non-international armed conflict or who are deprived of liberty for reasons related to the armed conflict, provided that *this does not involve facts, such as those of the instant case, that can be categorized as war crimes, and even crimes against humanity*.

The investigation and punishment of grave human rights violations, according to the Court, were provided for in the text of the Peace Agreement.[105] Therefore, the unrestricted amnesty law explicitly contradicted what the parties to the armed conflict had established in the Peace Agreement, demonstrating the lack of interest on the part of the state in identifying and attributing criminal responsibility to the perpetrators. From this perspective, the Court has declared that the amnesty law lacks effectiveness and it is not compatible with the ACHR, as it denies the right of access to justice, as provided for in Articles 8 and 25. The Court further concluded that the lack of investigation entailed 'cruel, inhuman and degrading treatment, contrary to Article 5(1) and 5(2) of the ACHR, in relation to Article 1(1) of this same instrument, to the detriment of the next of kin of the victims who were executed'.[106]

Even though express reference to IHL provisions have not been found in other recent cases to assist in the interpretation of Articles 8 and 25, the Court has attempted to take into account the challenges that the existence of an armed conflict presents to an investigation. In *Cacarica v Colombia*, for instance, the Court considered Colombia's acknowledgement of responsibility for the negative impact that the delay in the investigations had on its ability to identify and punish those responsible for the violation of the right to life.[107] According to Colombia, the delay was as a result of:[108]

> [T]he complexity of the events under investigation, owing to the *modus operandi* of the illegal organizations that instigated the events, the vulnerable conditions of the population that was the victim of those events, and the difficulty for the judicial officials to access the area where the events occurred.

The Court also dismissed, for lack of evidence, all allegations that the investigations that resulted in the criminal proceedings were not conducted with due diligence.[109] A violation of the duty to investigate was not found in relation to the procedures that had already been taken by the state. The Court nonetheless identified a violation of the duty to investigate the contribution of

[103] This view is also shared in the literature by Naomi Roht-Arriaza and Lauren Gibson, 'The Developing Jurisprudence on Amnesty' (1998) 20 *Human Rights Quarterly* 843, 865.
[104] *El Mozote v El Salvador* (n 22) [286] (emphasis added).
[105] ibid [288].
[106] ibid [201].
[107] *Cacarica v Colombia* (n 34) [17].
[108] ibid [366].
[109] ibid [375], [378]–[379], [382].

https://doi.org/10.1017/S0021223718000055 Published online by Cambridge University Press

members of the armed forces to the violation of the right to life.[110] Within the context of an armed conflict, the need for investigations to embrace the actions of all state agents was deemed relevant not only to combat impunity, but also to bring to the fore such factors as training, orders, and rules of engagement. As a result, according to the Court, the duty to investigate was violated by Colombia, because it had failed to comply with its obligation to investigate, as appropriate, within a reasonable time, *all* those responsible for the facts of this case.

The impact of an armed conflict context on the conduct of investigations can also be perceived in the Court's judgment in *Cruz Sánchez v Peru*. In this case, the Court stated that 'the fact that the deaths occurred in the context of a non-international armed conflict did not exempt the State from its obligation to initiate an investigation … on the use of force that had lethal consequences'.[111] It explained that, as the allegations of extrajudicial executions came to light several years after the events occurred, the Court could not assess the initial investigations conducted by the state against the international standards developed in cases of extrajudicial executions.[112] These investigations should, nonetheless, have been conducted with due diligence and, according to the Court, the initial investigations conducted by Peru did not follow minimum standards of diligence.[113] The lack of due diligence characterised a violation of Articles 8 and 25 of the ACHR; they were also considered to have been violated because, in the Court's view, military courts should not have been considered competent to examine allegations of extrajudicial executions.

Similarly, no direct references to provisions of IHL or to the circumstances of the armed conflict are found in the Court's analysis of the duty to investigate in *Santo Domingo v Colombia*. The focus here was on the proceedings required to determine the responsibility of those members of the Colombian air force who had taken part in the military operation. Analysing the development of the case before the national justice system, the Court concluded that although investigations into the facts were delayed while they were under the jurisdiction of the military criminal justice system, they were later continued within the ordinary criminal jurisdiction within a reasonable time frame.[114] In fact, the Court considered that the domestic mechanisms and procedures had not only led to the assignment of criminal responsibility, but had also contributed to the clarification of the truth and the determination of the scope of state responsibility. The Court dismissed the allegation that a violation of the right of access to justice had been constituted by a failure to investigate the possible criminal responsibility of other military participants in

[110] ibid [386]–[387].
[111] *Cruz Sánchez v Peru* (n 31) [350].
[112] ibid.
[113] Among the irregularities identified, the Court emphasised that the bodies were removed a day after the events and that there was no information to indicate that the crime scene had been secured; no ballistic comparison of the weapons used in the operation was carried out; no photos of the weapons or grenades allegedly involved in the events were taken; similarly no fingerprints were taken on the weapons or grenades; the autopsies took place in a facility that was not suitable for such a procedure by staff who were not accustomed to performing such procedures; no dental tests were performed; only three of the fourteen corpses were identified, and the remains of the fourteen MRTA members were buried clandestinely: ibid [370]–[374].
[114] *Santo Domingo v Colombia* (n 41) [159], [164].

https://doi.org/10.1017/S0021223718000055 Published online by Cambridge University Press

the operation, as no evidence was submitted by the Commission or the victims regarding this issue. No violation of the duty to investigate under Articles 8 and 25 was found.

In the cases examined, whenever a violation of the duty to investigate was found, the Court has ordered investigations to be conducted as a reparative measure.[115] As a reparative measure, in *El Mozote v El Salvador* and *Cruz Sánchez v Peru* the obligation to investigate would be fulfilled after the end of the armed conflict. The standards to be followed during the investigations were informed mainly by the previous jurisprudence of the Court. Peru and El Salvador were ordered to conduct investigations with the greatest possible diligence and to remove any obstacles de facto and de jure that could maintain impunity. In both cases the Court reiterated that the investigation of violations of the right to life, even when committed during an armed conflict, should not be kept under military jurisdiction. The rejection of military jurisdiction relates to its possible impact on the independence and impartiality of the proceedings. Bearing in mind that information related to armed operations during an armed conflict might be considered sensitive information by the state, in *El Mozote v El Salvador* the Court stated:[116]

> In order to guarantee its effectiveness, the investigation must be conducted taking into account the complexity of this type of event, which occurred within the framework of counterinsurgency operations by the Armed Forces, and the structure in which the persons who are probably involved were inserted, thus avoiding omissions in the collection of evidence and in following logical lines of investigation … State authorities are obliged to collaborate in the collection of evidence in order to achieve the objectives of the investigation and must abstain from actions that entail obstructions to the progress of the investigative process. It is also essential that the organs responsible for the investigations be provided, formally and substantially, with the adequate and necessary authority and guarantees to obtain access to the pertinent documentation and information to investigate the facts denounced and obtain indications or evidence of the location of the victims. The State cannot shield itself behind lack of evidence of the existence of the documents requested; but rather, it must justify the refusal to provide them, demonstrating that it has taken all available measures to verify that the information requested does not exist … State authorities cannot shield themselves behind mechanisms such as State secrets or the confidentiality of information, or by reasons of public interest or national security, in order not to provide the information required by the judicial or administrative authorities responsible for the pending investigation or proceedings.

In *Cacarica v Colombia*, in which the Court found a violation of the duty to investigate, the Court ordered Colombia to use all necessary means to continue to investigate the facts of this case in order to individualise, prosecute and eventually punish all those responsible.[117] As in *El Mozote v El Salvador* and *Cruz Sánchez v Peru*, the Court stated that investigations must be conducted with the greatest possible diligence and any obstacles de facto and de jure that

[115] In addition to *El Mozote v El Salvador* (n 22) see, eg, *Ituango Massacres v Colombia* (n 19) [399]; *Las Dos Erres v Guatemala* (n 20) [233].
[116] *El Mozote v El Salvador* (n 22) [257].
[117] *Cacarica v Colombia* (n 34) [440].

https://doi.org/10.1017/S0021223718000055 Published online by Cambridge University Press

could maintain impunity should be removed.[118] It is interesting to note that, in accordance with the Court's overall reasoning, it seems that these investigations do not need to be conducted within the ordinary criminal justice system. In other words, the Court seems to have acknowledged the legitimacy of the measure adopted by Colombia to end the conflict and to ensure access to justice to all those whose rights were violated during the armed conflict.

5. CONCLUSION

Violations of human rights committed during an armed conflict have long been brought to the attention of the organs of the inter-American system of human rights. The cases analysed illustrate that recently the Court has been addressing the relationship between IHL and IHLR when violations of the right to life have taken place during an armed conflict. Even though it has avoided framing IHL as *lex specialis*, references to it can be found in its most recent jurisprudence.

The cases examined indicate that the Court has taken into account principles and provisions of IHL in determining whether the right to life has been violated. Nonetheless, resort to these principles and provisions, even when they were considered *lex specialis*, has varied. This selective reliance can be understood as an attempt to ensure that a stronger system of individual protection is provided during an armed conflict. For this purpose, IHL has been taken into account not only in the overall definition of a state's obligations, but also in the interpretation of Article 4 of the ACHR on the grounds that the alleged arbitrary deprivation of life in the ACHR occurred within an armed conflict.

It is interesting to note that the determination by the Court in *Cruz Sánchez v Peru* that the death of Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza did not violate the ACHR was based exclusively on rejecting their characterisation as *hors de combat.* Through this strategy the Court has been able to avoid consideration of the principle of proportionality and the notion of collateral damage and, consequently, their possible impact on the characterisation of the violation of the right to life of Cruz Sánchez. This strategy has not passed unnoticed, leading Dunkelberg to question its adequacy.[119]

With regard to the interpretation of the duty to investigate, the Court's reliance on IHL has been limited. As has been shown, the duty to investigate can be considered as a positive obligation related to the right to life. A violation of the right to life in the jurisprudence of the Court is usually framed as a violation of Article 4 of the ACHR, in relation to Article 1(1) of the ACHR. In this context, the duty to investigate has usually been related to the duty to prosecute and to punish those responsible for the violation of the right to life, as a means of combating impunity. Recourse to IHL in the interpretation of the obligations derived from Article 1(1) is more common in the earlier cases of the Court, in which the Court attempted to strengthen the jurisprudential development of *jus cogens* and *erga omnes* obligations.

[118] ibid.
[119] Dunkelberg (n 30) 1, 31, 32.

https://doi.org/10.1017/S0021223718000055 Published online by Cambridge University Press

The components of the duty to investigate have been treated mainly within the legal framework of Articles 8 and 25 of the ACHR. The discussion of the duty to investigate within this framework can be understood as a result of the claims of the victims and the Commission, which have articulated the lack of an investigation into their right of access to justice. It is important to note that the duty to investigate alleged violations of the right to life during an armed conflict, based on Articles 8 and 25, remains even if the state has acknowledged its international responsibility for the violation of the right to life.

Resort to IHL to support the interpretation of the right of access to justice has proved to be far less common. The main reference to IHL in relation to the duty to investigate was found in the discussion of the amnesty law adopted by El Salvador, in which the Court considered it relevant to take into account Article 6(5) of Additional Protocol II to decide whether, in that specific case, it could exempt the state from its duty to investigate. In general, the parameters that have informed the decisions of the Court regarding the adequacy of the investigations conducted were those already established in the jurisprudence of the Court. In other words, the criteria that inform the notion of an effective investigation during an armed conflict and during a peaceful period are basically the same in the Court's jurisprudence.

It is also important to note that the duty to investigate has been considered as an element of the right to a remedy. Even if a state has already conducted an investigation of an alleged violation of the right to life committed during an armed conflict, it might still be required to conduct further investigations in order to comply fully with the criteria established by the Court. The understanding of the duty to investigate as a reparative measure exemplifies the predominance of IHLR in the discussion of the duty to investigate violations of the right to life committed during an armed conflict.

The Court has not explored the different normative bases of the duty to investigate in order to adopt different standards of investigation. On the contrary, it has opted to promote a common understanding of the duty. As result, even though the earlier reasoning of the Court – which conceived the interplay between IHL and IHRL as a means of strengthening the obligations of states in relation to the rights protected in the ACHR – cannot be identified in the most recent cases, it still has an impact, which is best appreciated in the relatively rare recourse to IHL in the interpretation of Articles 8 and 25 of the ACHR.

The analysis of the relationship between IHL and IHRL in the jurisprudence of the Court indicates an attempt to introduce a more detailed analysis of IHL in determining a violation of the right to life during an armed conflict in the more recent cases. Nonetheless, this effort continues to be guided by the overall understanding of the Court that the interpretation of the ACHR should provide the widest protection possible to individuals. From this perspective, even if a provision of IHL is considered *lex specialis* by the Court, it will be applied only if it strengthens the interpretation of the relevant right, affording a higher degree of protection to the individual. This understanding is also reflected in the little impact that the existence of an armed conflict has had on the Court's assessment of state compliance with the duty to investigate alleged violations of the right to life committed during an armed conflict.