

Case No. 12.251

Vereda La Esperanza v. Colombia

Amicus Curiae Brief of

The Open Society Justice Initiative

1. This submission by the Open Society Justice Initiative (“the Justice Initiative”) is provided to assist the Court with its interpretation of the obligation to effectively investigate enforced disappearances and unlawful killings committed during situations of armed conflict. Our submission presents comparative legal perspectives from outside the Inter-American system which confirm that the human rights standards for an effective investigation apply in full to violations committed during situations of armed conflict.
2. This submission assists the Court on two points:
 - *A. The Nature and Scope of the Obligation to Conduct an Effective Investigation.* International human rights law (IHRL) requires States to conduct effective investigations into enforced disappearances and unlawful killings. The obligation to effectively investigate applies to acts committed by State and non-State actors. For an investigation to be effective, it must be thorough, independent and impartial, prompt and expeditious, allow for family participation and public scrutiny, and be capable of identifying and punishing those responsible.
 - *B. This Obligation Applies in Full to Violations Committed During an Armed Conflict.* In situations of armed conflict, when IHL is applicable, States retain their obligation to conduct effective investigations of enforced disappearances and unlawful killings. This obligation applies even when there are high numbers of disappearances and executions, and when an investigation encounters practical or other difficulties, such as political blockages.

I. BACKGROUND

3. The case involves allegations that the Colombian military and paramilitary forces worked together to bring about the enforced disappearance of 16 individuals – including three children – and the execution of another, in the village of Vereda La Esperanza from June 21 to December 27, 1996.¹ The petitioners claimed before the Inter-American Commission on Human Rights that Colombia’s investigation of those events, which took place during an armed conflict, was inadequate and failed to meet the standards set out by the American Convention (at para. 2). Colombia submitted that the investigations were adequate, and justified the investigations’ failures to “shed light on the crimes” by noting, *inter alia*, “the high degree of complexity involved in the case” (at para. 3). Nonetheless, the Commission determined that Colombia violated the right to a fair trial and judicial protection (at para. 296). The Commission came to this conclusion after explaining that an investigation “should be oriented at a specific purpose: the determination of the truth and the investigation, finding, arrest, prosecution and, if applicable, punishment of those responsible for the events” (at para. 242). To ensure this, “the investigation must be conducted with due diligence, effectively, seriously and impartially, and within a reasonable period of time” (at para. 243).

II. NATURE AND SCOPE OF THE OBLIGATION TO CONDUCT AN EFFECTIVE INVESTIGATION

4. The obligation that IHRL places on States to effectively investigate violations such as enforced disappearances and unlawful executions is well established and broadly accepted. An effective investigation must be thorough, independent and impartial, prompt and expeditious, allow for

¹ IACHR, *Vereda La Esperanza v. Colombia*, Case 12.251, Admissibility and Merits, 4 November 2013, para. 1.

family participation and public scrutiny, and be capable of identifying and punishing those responsible. The State's obligation to carry out an effective investigation is triggered once an arguable claim is made that an enforced disappearance or unlawful killing has occurred, or the authorities have reasonable grounds to suspect as much. As set out in Section III, international and comparative law makes clear that these requirements of an effective investigation continue to apply in situations of armed conflict.

5. The obligation to effectively investigate enforced disappearances and unlawful killings applies to acts committed by State agents and non-State actors.² In its General Comment 31, the U.N. Human Rights Committee stated that a violation of the International Covenant on Civil and Political Rights (ICCPR) may arise when a State fails to “take appropriate measures or to exercise due diligence to...investigate...harm caused by...private persons or entities.”³ The African Commission on Human and Peoples' Rights (ACHPR) has similarly held that a violation can arise “even if the State or its agents are not the immediate cause of the violation.”⁴ It explained, “[e]ven where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders.”⁵
6. *Thorough investigation.* For an investigation to be effective it must be thorough, meaning that the State must make a serious attempt to find out what happened, and any deficiency that undermines an investigation's ability to establish the facts or the identity of the perpetrators may mean that it was not effective.⁶ The European Court of Human Rights (ECtHR) has explained that authorities must take “all reasonable steps available to them to secure the evidence concerning the incident” including, *inter alia*, eyewitness testimony and forensic evidence.⁷ In cases of enforced disappearances, particular emphasis is placed on the State's obligation to seek information about the fate of the victims due to the grave nature of the violation.⁸ In this context, the United Nations General Assembly has called on States to, *inter alia*, verify facts and search for the whereabouts of the disappeared and for the identities of abducted children.⁹ The U.N. International Convention for the Protection of All Persons from Enforced Disappearance, which Colombia ratified in 2012, sets out the same requirement, and the ECtHR has applied the requirement in a series of cases.¹⁰ With respect to unlawful killings, the U.N. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions states that the “purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible,

² U.N. Human Rights Committee, *General Comment 6: Article 6 (Right to Life)* (1982), para. 3; U.N. Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 8; U.N. International Convention for the Protection of All Persons from Enforced Disappearance, Art. 3; Council of Europe, Committee of Ministers, “Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations” (30 March 2011), Section V(1); ECtHR, *Ergi v. Turkey*, Judgment of 28 July 1998, para. 82; ACHPR, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Decision of 11 October 1995, para. 20.

³ U.N. Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 8.

⁴ ACHPR, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Decision of 11 October 1995, para. 20.

⁵ *Ibid.*, 22.

⁶ ECtHR, *Jasar v The Former Yugoslav Republic of Macedonia*, Judgment of 15 February 2007, para. 55.

⁷ ECtHR, *Finogenov and others v. Russia*, Judgment of 20 December 2011, para. 271. See, also, ECtHR, *Fanzিয়েva v. Russia*, Judgment of 18 June 2015, para. 53.

⁸ ECtHR, *Cyprus v. Turkey*, Judgment of 10 May 2001, para. 147.

⁹ U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 22(b) & (c).

¹⁰ ECtHR, *Cyprus v. Turkey*, Judgment of 10 May 2001, para. 147. See, also, ECtHR, *Timurtaş v. Turkey*, Judgment of 13 June 2000, paras. 104 & 106; ECtHR, *Kurt v. Turkey*, Judgment of 28 May 1998, paras. 123-124.

and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide.”¹¹

7. Moreover, a thorough investigation requires States to carry out investigative measures even when a State believes that an investigation might prove inconclusive, or where the State believes sufficient evidence may not appear to be available. If such outcomes are not inevitable, the State must make the requisite investigatory efforts.¹² The ECtHR has ruled that authorities must follow up on new leads or evidence: they “must be sensitive to any information or material which has the potential ... to allow an earlier inconclusive investigation to be pursued further”,¹³ and “where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures.”¹⁴ The requirement to pursue an investigation even if evidence appears sparse, and to follow up on new information when it is uncovered, is particularly important with respect to enforced disappearances. The ECtHR has explained that when investigating disappearances, “authorities often have to start with very little evidence and have to search for the evidence in order to trace the disappeared person or discover his or her fate. Crucial evidence may not come to light until later.”¹⁵
8. *Independent and impartial.* An independent and impartial investigation requires that the individuals responsible for, and who carry out, the investigation are independent from those implicated in the events. As the ECtHR explained, “this means not only a lack of hierarchical or institutional connection but also a practical independence.”¹⁶ The U.N. Committee on Enforced Disappearances,¹⁷ the U.N. Human Rights Committee,¹⁸ and the U.N. Working Group on Enforced or Involuntary Disappearances (WGEID)¹⁹ have all concluded that investigations of serious violations of human rights such as enforced disappearances and unlawful killings must be independent and impartial. The U.N. Human Rights Committee has instructed States to investigate disappearances and unlawful killings by members of the armed forces or police through the use of an “impartial body that does not belong to the organization of the security forces themselves.”²⁰ In this regard, the U.N. Committee on Enforced Disappearances has recommended States establish “a mechanism that ensures that law enforcement or security forces, whether civilian or military, whose members are suspected of having committed an offence of

¹¹ U.N. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, U.N. Doc. E/1989/89 (1989), para. 9. See, also, U.N. Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. Doc. E/ST/CSDHA/12 (1991), Section III.

¹² ECtHR, *Varnava and others v. Turkey*, Grand Chamber Judgment of 18 September 2009, para. 192.

¹³ ECtHR, *Brecknell v. U.K.*, Judgment of 27 November 2007, para. 70.

¹⁴ *Ibid.*, para. 71.

¹⁵ ECtHR, *Aslakhanova v. Russia*, Judgment of 18 December 2012, para. 214.

¹⁶ ECtHR, *Al-Skeini and others v. U.K.*, Grand Chamber Judgment of 7 July 2011, para. 167; ECtHR, *Giuliani and Gaggio v. Italy*, Grand Chamber Judgement of 24 March 2011, paras. 300 & 302.

¹⁷ Concluding Observations of the Committee on Enforced Disappearances on the Report submitted by France under article 29, para. 1, of the Convention, approved by the Committee in its fourth period of sessions (8 to 19 April 2013), U.N. Doc. CED/C/FRA/CO/1 (8 May 2013), paras. 24 & 25.

¹⁸ See the Concluding Observations of the U.N. Human Rights Committee on: Peru, U.N. Doc. CCPR/C/79/Add.67 (25 July 1996), para. 22; Venezuela, U.N. Doc. CCPR/CO/71/VEN (26 April 2001), para. 8; Former Yugoslav Republic of Macedonia, U.N. Doc. CCPR/C/79/Add.96 (18 August 1998), para. 10; Sudan, U.N. Doc. CCPR/C/79/Add.85 (19 November 1997), para. 12; Sri Lanka, U.N. Doc. CCPR/C/79/Add.56 (27 July 1995), para. 30; Algeria, U.N. Doc. CCPR/C/79/Add.95 (18 August 1998), paras. 6 & 7.

¹⁹ See, for example, WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, U.N. Doc E/CN.4/1990/13 (24 January 1990), para. 22.

²⁰ Concluding Observations of the U.N. Human Rights Committee on Peru, U.N. Doc. CCPR/C/79/Add.67 (25 July 1996), para. 22.

enforced disappearance do not take part in the investigation.”²¹ The ACHPR has taken a similar approach to independence.²²

9. *Prompt and expeditious.* For an investigation to be effective it must be commenced promptly and conducted expeditiously.²³ The ECtHR has explained that in the case of disappearances authorities must “conduct a prompt and effective investigation” due to the grave nature of the violation²⁴ and because “prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment.”²⁵ With respect to unlawful killings, the ECtHR has said an investigation must be started promptly and carried out with reasonable expedition as doing so is “essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”²⁶ The ACHPR similarly requires that effective investigations be prompt.²⁷
10. The requirement of promptness also requires States to undertake an effective investigation on their own motion “[w]here an arguable claim is made, or the authorities have reasonable grounds to suspect that a serious human rights violation has occurred.”²⁸ There is no requirement for a formal complaint or for the victim to pursue the investigation themselves. The ECtHR has stated in the specific context of a disappearance that “whatever mode [of investigation] is employed, the authorities must act of their own motion once the matter has come to their attention”²⁹ The U.N. International Convention for the Protection of All Persons from Enforced Disappearance also places an obligation on States to undertake an investigation “[w]here there are reasonable grounds for believing that a person has been subjected to enforced disappearance,” and to do so “even if there has been no formal complaint.”³⁰ The ACHPR has also held that a State has an obligation to

²¹ Concluding Observations of the U.N. Human Rights Committee on the Report submitted by Paraguay under article 29, para. 1, of the Convention, U.N. Doc. CED/C/PRY/CO/1 (20 October 2014), para. 16. See, also, Concluding Observations of the U.N. Human Rights Committee on the Report submitted by France under article 29, para. 1, of the Convention, approved by the Committee in its fourth period of sessions (8 to 19 April 2013), U.N. Doc. CED/C/FRA/CO/1 (8 May 2013), para. 25.

²² ACHPR, *General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)* (2015), paras. 7, 15, 37; ACHPR, *Amnesty International, Comité Loosli Bachelard, Lawyers’ Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*, Decision of 15 November 1999, para. 51; ACHPR, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Decision of 27 May 2009, para. 150; ACHPR, *Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l’Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l’Homme v. Mauritania*, Decision of 11 May 2000, Recommendations to the government, at 1.

²³ See e.g. ECtHR, *Sulejmanov v The Former Yugoslav Republic of Macedonia*, Judgment of 24 April 2008, para. 48; U.N. Human Rights Committee, *Ernazarov v. Kyrgyzstan*, Views of 7 May 2015, U.N. Doc. CCPR/C/113/D/2054/2011, para. 9.6.

²⁴ ECtHR, *Cyprus v. Turkey*, Judgment of 10 May 2001, para. 147. See, also, ECtHR, *Timurtaş v. Turkey*, Judgment of 13 June 2000, para. 104; ECtHR, *Kurt v. Turkey*, Judgment of 28 May 1998, para. 124.

²⁵ ECtHR, *Kurt v. Turkey*, Judgment of 28 May 1998, para. 123.

²⁶ ECtHR, *Al-Skeini and others v. U.K.*, Grand Chamber Judgment of 7 July 2011, para. 167; See, also, ECtHR, *Varnava and others v. Turkey*, Grand Chamber Judgment of 18 September 2009, para. 191; ECtHR, *Giuliani and Gaggio v. Italy*, Grand Chamber Judgment of 24 March 2011, para. 305; ECtHR, *Hugh Jordan v. U.K.*, Judgment of 4 May 2001, para. 108; ECtHR, *Brecknell v. U.K.*, Judgment of 27 November 2007, para. 65.

²⁷ ACHPR, *General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)* (2015), paras. 7, 15, 37; ACHPR, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Decision of 27 May 2009, para. 150.

²⁸ Council of Europe, Committee of Ministers, “Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations” (30 March 2011), Section V(2); ECtHR, *Ergi v. Turkey*, Judgment of 28 July 1998, para. 82; U.N. Committee Against Torture, *Henri Unai Parot v. Spain*, Decision of 2 May 1995, U.N. Doc. CAT/C/14/D/6/1990, para. 10.4.

²⁹ ECtHR, *Khamila Isayeva v. Russia*, Judgment of 15 November 2007, para. 127. See, also, Council of Europe, Committee of Ministers, “Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations” (30 March 2011), Section V(1).

³⁰ U.N. International Convention for the Protection of All Persons from Enforced Disappearance, Art. 12.

investigate when it is “properly informed” of a breach of the African Charter,³¹ emphasizing that “whenever there is a crime that can be investigated and prosecuted by the State on its own initiative, the State has the obligation to move the criminal process forward to its ultimate conclusion....[I]t is up to the State to investigate the facts and bring the accused to court.”³²

11. *Family participation and public scrutiny.* An effective investigation requires family participation and public scrutiny, both of which enable victims’ families to access the investigation and secure “accountability in practice as well as in theory”³³ The ECtHR has explained that in all cases “the victim’s next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.”³⁴ The U.N. International Convention for the Protection of All Persons from Enforced Disappearance states that a disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance “has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.”³⁵ The U.N. Declaration on the Protection of All Persons from Enforced Disappearances, also promotes transparency, stating that the findings of an investigation shall be made available on the request of all people concerned, unless doing so would jeopardize an on-going investigation.³⁶ The WGEID has stated that this restriction “should be interpreted narrowly.” It notes that “the relatives of the victims should be closely associated with an investigation into a case of enforced disappearance” and a “refusal to provide information is a limitation on the right to truth...[and]...must be strictly proportionate to the only legitimate aim: to avoid jeopardizing an on-going criminal investigation.”³⁷ The ACHPR has also determined that the obligation to conduct effective investigations requires that the findings of the investigation are made public.³⁸
12. *Investigation capable of identifying and punishing those responsible.* The ECtHR has repeatedly determined that investigations into killings should be capable of leading to “the identification and punishment of those responsible.”³⁹ The U.N. Human Rights Committee has also determined that a failure to bring perpetrators to justice could give rise to a breach of the ICCPR.⁴⁰ The ACHPR, in its General Comment on the right to life, has held that the failure of the State to “identify and

³¹ ACHPR, *Article 19 v. Eritrea*, Decision of 30 May 2007, para. 77.

³² ACHPR, *Mohammed Abderrahim El Sharkawi (represented by EIPR and OSJI) v. Egypt*, Admissibility Decision of 14 March 2014, para. 56.

³³ ECtHR, *Hugh Jordan v. U.K.*, Judgment of 4 May 2001, para. 109; ECtHR, *Brecknell v. U.K.*, Judgment of 27 November 2007, para. 72; ECtHR, *Al-Skeini and others v. U.K.*, Grand Chamber Judgment of 7 July 2011, para. 167.

³⁴ ECtHR, *Al-Skeini and others v. U.K.*, Grand Chamber Judgment of 7 July 2011, para. 167; ECtHR, *Aslakhanova v. Russia*, Judgment of 18 December 2012, para. 121; ECtHR, *Varnava and others v. Turkey*, Grand Chamber Judgment of 18 September 2009, para. 191; ECtHR, *Giuliani and Gaggio v. Italy*, Grand Chamber Judgment of 24 March 2011, paras. 303-304; ECtHR, *Hugh Jordan v. U.K.*, Judgment of 4 May 2001, para. 109.

³⁵ U.N. International Convention for the Protection of All Persons from Enforced Disappearance, Art. 24.

³⁶ U.N. Declaration on the Protection of All Persons from Enforced Disappearances, Art. 13(4).

³⁷ U.N. Working Group on Enforced or Involuntary Disappearances, *General Comment on the Right to the Truth in Relation to Enforced Disappearances*, para. 3.

³⁸ ACHPR, *General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)*, paras. 7, 15, 37; ACHPR, *Amnesty International, Comité Loosli Bachelard, Lawyers’ Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*, Decision of 15 November 1999, para. 51; ACHPR, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Decision of 27 May 2009, para. 150.

³⁹ ECtHR, *Al-Skeini and others v. U.K.*, Grand Chamber Judgment of 7 July 2011, para. 166. See, also, ECtHR, *Abdulkhayrov and others v. Russia*, Judgment of 3 October 2013, para. 59.

⁴⁰ U.N. Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 18.

hold accountable individuals or groups responsible for” right to life violations constitutes in itself a violation by the State.⁴¹

III. OBLIGATION TO CONDUCT EFFECTIVE INVESTIGATIONS CONTINUES DURING ARMED CONFLICT

13. The obligation to conduct effective investigations into enforced disappearances and unlawful killings continues to apply during armed conflict. This is firmly established by treaties, the U.N. General Assembly, the ECtHR, U.N. treaty bodies, and other expert views. The obligation to conduct effective investigations applies in full to all such violations, including to situations where there are high numbers of alleged enforced disappearances or executions and in situations where an investigation encounters practical or other difficulties.
14. *Effective investigations in armed conflict.* The U.N. Security Council, U.N. General Assembly, U.N. Human Rights Commission and the latter’s successor, the U.N. Human Rights Council have all stated that IHRL applies during armed conflict.⁴² This position is affirmed by numerous pronouncements of the International Court of Justice (ICJ),⁴³ the U.N. Human Rights Committee,⁴⁴ and the ECtHR.⁴⁵
15. It is also well established that the application of IHRL during armed conflict includes its obligation to conduct effective investigations into enforced disappearances and unlawful killings. Far from conflicting with international humanitarian law (IHL), the application of IHRL during armed conflict reinforces and supports IHL’s own obligation to “investigate war crimes allegedly committed by [a State’s own] nationals or armed forces, or on [its] territory, and, if appropriate, prosecute the suspects.”⁴⁶
16. IHRL’s obligation to conduct effective investigations into enforced disappearances and unlawful killings committed during armed conflict is reflected in, amongst other authorities, the U.N. International Convention for the Protection of All Persons from Enforced Disappearance, the U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, and the U.N. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.⁴⁷ Israel’s Public Commission to Examine the

⁴¹ ACHPR, *General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)* (2015), para. 15.

⁴² A recent study identifies 330 resolutions from these bodies between 2000 and 2010 affirming the applicability of IHRL in situations of armed conflict. See Iliia Siatistisa and Maia Titberidze, “Human rights in armed conflict from the perspective of the contemporary State practice in the United Nations: Factual answers to certain hypothetical challenges,” at http://www.geneva-academy.ch/docs/ResearchActivities/HRL%20in%20AC%20Iliia%20Maia_Final_%20Version_24JAN2011.pdf, p. 3 & 35. As early as 1970, the UN General Assembly affirmed that “Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.” General Assembly Resolution 2675(XXV) (1970), para.1.

⁴³ See, for example: *Legality of the Threat or Use of Nuclear Weapons in Armed Conflict*, Advisory Opinion (1996) ICJ Reports, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (2004) ICJ Reports, especially para. 106.

⁴⁴ See U.N. Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para.11.

⁴⁵ ECtHR, *Al-Skeini and others v. U.K.*, Grand Chamber Judgment of 7 July 2011, para. 164.

⁴⁶ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press, 2005, Rule 158.

⁴⁷ U.N. International Convention for the Protection of All Persons from Enforced Disappearance, Arts. 1(2), 12, 18 & 24; U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, paras. 3 & 22(b); U.N. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, U.N. Doc. E/1989/89 (1989), paras. 1 & 9-17. See, also, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions Philip Alston, U.N. Doc. E/CN.4/2006/53 (8 March 2006), para.

Maritime Incident of May 31, 2010 (“the Turkel Commission”), which set out the obligation to investigate under international law, emphasized that from the moment a duty to carry out an investigation arises, there is no fundamental difference between the principles for conducting an investigation in a situation of an armed conflict and the principles for conducting an investigation under normal circumstances.⁴⁸ It also concluded that “the mere existence of an armed conflict does not negate the duty to conduct an ‘effective investigation’ in accordance with the accepted general principles.”⁴⁹ The 2009 Report of the U.N. Fact-Finding Mission on the Gaza Conflict similarly noted that States are under an obligation to apply the “universal principles” of independence, effectiveness, promptness, and impartiality when investigating allegations of serious violations that occur during armed conflict. These principles, the report states, “have been developed in the jurisprudence of international courts of human rights and are agreed upon by the States represented within the relevant United Nations bodies.”⁵⁰ In applying these principles, the report determined that investigations by Israel failed to meet international standards because they lacked thoroughness, suffered from procedural delays, and were not effectively punishing perpetrators.⁵¹

17. The ECtHR and U.N. Human Rights Committee have both applied the obligation to effectively investigate under IHRL to conflict-related disappearances and unlawful killings, and found States in violation when the investigations were not effective. The ECtHR considered this in the context of alleged unlawful killings in *Al-Skeini v. U.K.* and *Jaloud v. Netherlands*, cases that focused on killings resulting from military operations in Iraq in 2003 and 2004, and explained that even “in a context of armed conflict” the obligation to investigate remains applicable⁵² and that “all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.”⁵³ In *Jaloud*, the ECtHR applied the requirement under IHRL that any investigation be effective and found that the Netherlands failed in its obligation to effectively investigate a shooting death during the conflict because important evidentiary documents were not made available to the judicial authorities and the applicant, that no precautions were taken to prevent a suspect from colluding with other witnesses about the events before he was questioned, that no sufficient attempt was made to carry out an autopsy, resulting in an inadequate report, and that important material evidence was mislaid in unknown circumstances.⁵⁴
18. Similarly, in *Al-Skeini* the ECtHR Grand Chamber relied on the requirements of an effective investigation under IHRL to assess how the U.K. responded to killings during armed conflict. With respect to three individuals shot dead in that case, the ECtHR found a violation of the obligation to conduct an effective investigation because the U.K.’s investigation process lacked the necessary independence, given that it was “entirely within the military chain of command,” and was “limited to taking statements from the soldiers involved.”⁵⁵ With respect to two other victims in the case, the U.K. failed to meet its obligations because the investigations were not “operationally independent from the military chain of command.”⁵⁶ Additionally, a long period of time was allowed to elapse before a key suspect was questioned. This, combined with delays in

60; U.N. Human Rights Council, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict* (2009), U.N. Doc. A/HRC/12/48, paras. 1808-1814.

⁴⁸ Public Commission to Examine the Maritime Incident of May 31, 2010, *Second Report – The Turkel Commission*, February 2013, p. 115.

⁴⁹ *Ibid.*, p. 146.

⁵⁰ U.N. Human Rights Council, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict* (2009), U.N. Doc. A/HRC/12/48, paras. 1814.

⁵¹ *Ibid.*, paras. 1814-1832.

⁵² ECtHR, *Al-Skeini and others v. U.K.*, Grand Chamber Judgment of 7 July 2011, para. 164; ECtHR, *Jaloud v. Netherlands*, Grand Chamber Judgment of 20 November 2014, para. 186.

⁵³ *Ibid.*

⁵⁴ ECtHR, *Jaloud v. Netherlands*, Grand Chamber Judgment of 20 November 2014, para. 227.

⁵⁵ ECtHR, *Al-Skeini and others v. U.K.*, Grand Chamber Judgment of 7 July 2011, para. 171.

⁵⁶ *Ibid.*, para. 172.

having a fully independent investigator interview the other military witnesses, “entailed a high risk that the evidence was contaminated and unreliable.”⁵⁷ The ECtHR also found a violation of the obligation to investigate because it appeared that a delay between a victim’s death and a court-martial “seriously undermined the effectiveness of the investigation, not least because some of the soldiers accused of involvement in the incident were by then untraceable.”⁵⁸ The ECtHR further held that one of the investigations was too narrowly focused and required an “independent examination, accessible to the victim’s family and to the public, of the broader issues of State responsibility for the death, including the instructions, training and supervision given to soldiers.”⁵⁹

19. With respect to disappearances, in *Varnava and others v. Turkey*, the ECtHR Grand Chamber likewise emphasized the need for an effective investigation in the context of an armed conflict.⁶⁰ In that case, the Grand Chamber pointed out that its case-law on “the ambit of the procedural obligation [to investigate] is *unambiguous*,”⁶¹ explaining,

“the essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. Even where there may be obstacles which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. Besides being *independent, accessible to the victim’s family*, carried out with reasonable *promptness and expedition* and affording a sufficient element of *public scrutiny* of the investigation or its results, the investigation must also be effective in the sense that it is capable of leading to a determination of whether the death was caused unlawfully and if so, to the *identification and punishment of those* responsible.”⁶²

20. The U.N. Human Rights Committee has also affirmed that IHRL’s effective investigation obligation continues to apply to violations committed during armed conflict. It has applied these standards in finding violations of the obligation to investigate the enforced disappearances of persons during the armed conflict surrounding the independence of Bosnia and Herzegovina. Despite the scale and context of the disappearances, the U.N. Human Rights Committee considered that efforts to search for the remains were not sufficient, and found that Bosnia and Herzegovina had violated their obligation to conduct an effective investigation as it did not “identify any steps taken to pursue the investigation by other means, such as interviewing possible witnesses.” The Committee also criticized the fact that the State had provided limited information to the family and said that the authorities investigating enforced disappearances need to provide the families a “timely opportunity to contribute their knowledge to the investigation and that information regarding the progress of the investigation must be made promptly accessible to the families.”⁶³ The Committee has also reprimanded Nepal for failing to independently and thoroughly investigate allegations of armed conflict-related extrajudicial killings and enforced

⁵⁷ *Ibid.*, para. 173.

⁵⁸ *Ibid.*, para. 174.

⁵⁹ *Ibid.*, para. 174.

⁶⁰ ECtHR, *Varnava and others v. Turkey*, Grand Chamber Judgment of 18 September 2009, para. 208.

⁶¹ *Ibid.*, para. 191. (Emphasis added.)

⁶² ECtHR, *Varnava and others v. Turkey*, Grand Chamber Judgment of 18 September 2009, para. 191 (citations removed and emphasis added.) See, also, ECtHR, *Cyprus v. Turkey*, Judgment of 10 May 2001, paras. 136 & 147.

⁶³ U.N. Human Rights Committee, *Emina Kožljak and Sinan Kožljak v. Bosnia and Herzegovina*, Views of 28 October 2014, U.N. Doc. CCPR/C/112/D/1970/2010, para. 9.6; see, also, U.N. Human Rights Committee, *Nevzeta Durić and Nedžad Durić v. Bosnia and Herzegovina*, Views of 16 July 2014, U.N. Doc. CCPR/C/111/D/1956/2010, para. 9.6.

disappearances, and to hold the perpetrators accountable.⁶⁴ The Committee has done the same with Sri Lanka, noting concern about the “large number of enforced or involuntary disappearances of persons during the time of the armed conflict” and Sri Lanka’s “inability to identify, or inaction in identifying those responsible and to bring them to justice.”⁶⁵

21. *High numbers of allegations and practical difficulties do not obviate the obligation to investigate.* Violations committed during an armed conflict or other situations of extensive violence may be numerous and various difficulties may arise when conducting the investigation. Human rights bodies have dealt with this repeatedly and have agreed that these challenges do not diminish the obligation to conduct an effective investigation. The ECtHR has held that where loss of life is a “frequent occurrence,” high incidence of fatalities cannot displace the obligation to ensure that an effective, independent investigation is conducted.⁶⁶ In *Aslakhanova v. Russia*, the ECtHR cited reports of “thousands of missing persons in the region” and noted that more than 100 similar cases of disappearances had been communicated to the Court and 120 judgments had been handed down.⁶⁷ The fact that there had been such a high number of enforced disappearances led the ECtHR to find not that the problem was too great for an effective investigatory response, but that there were “systemic problems at the national level” that must be investigated.⁶⁸ The ECtHR made similar findings that the Russian authorities failed to carry out a thorough and effective investigation into killings in the same conflict, for example five deaths that resulted from two military planes raiding a village, firing machine guns and dropping a number of bombs.⁶⁹
22. In *Cyprus v. Turkey*, the ECtHR applied its routine standards on the obligation to conduct a prompt and effective investigation to the Cypriot government’s claim that 1,485 persons were missing as a result of the armed conflict.⁷⁰ The ECtHR and U.N. Human Rights Committee similarly applied the obligation to conduct an effective investigation to cases of missing persons in Bosnia and Herzegovina—which amounted to thousands.⁷¹ The U.N. Human Rights Committee has also called for independent investigations into what it described as “widespread massacre of men, women and children” and “innumerable reports of arbitrary or extrajudicial executions of individuals” in Algeria.⁷² All of these cases demonstrate that a State retains its full obligation to effectively investigate even, or in some cases especially, when there are high numbers of allegations of grave human rights abuses.
23. This does not mean that human rights law, and the obligation to conduct an effective investigation, are blind to the challenges posed by investigating violations allegedly committed during armed conflict or similar systemic violence. But those challenges do not relieve the State of its obligations or mean that it is held to a lower standard. The ECtHR also makes it clear that a State is bound to its obligation to conduct effective investigations when the investigation encounters difficulties. In *Jaloud*, where the ECtHR was willing to “make reasonable allowances

⁶⁴ U.N. Human Rights Committee, Concluding observations on the second periodic report of Nepal, U.N. Doc. CCPR/C/NPL/CO/2, 15 April 2014, para. 5.

⁶⁵ U.N. Human Rights Committee, Concluding observations on the fifth periodic report of Sri Lanka, U.N. Doc.

U.N. Doc. CCPR/CO/79/LKA (2003), para. 10.

⁶⁶ ECtHR, *Ergi v. Turkey*, Judgment of 28 July 1998, para. 85.

⁶⁷ ECtHR, *Aslakhanova v. Russia*, Judgment of 18 December 2012, paras. 72 & 216.

⁶⁸ *Ibid.*, para. 217.

⁶⁹ ECtHR, *Esmukhambetov and others v. Russia*, Judgment of 29 March 2011, para. 129.

⁷⁰ ECtHR, *Cyprus v. Turkey*, Judgment of 10 May 2001, paras. 119 & 147.

⁷¹ ECtHR, *Palić v. Bosnia and Herzegovina*, Judgment of 15 September 2011, para. 6. (“It would appear that more than 100,000 people were killed and more than two million people were displaced. It is estimated that almost 30,000 people went missing and that one third of them is still missing.”). See, also, U.N. Human Rights Committee, *Emina Kožljak and Sinan Kožljak v. Bosnia and Herzegovina*, Views of 28 October 2014, U.N. Doc. CCPR/C/112/D/1970/2010, paras. 9.4-9.6; U.N. Human Rights Committee, *Nevzeta Durić and Nedžad Durić v. Bosnia and Herzegovina*, Views of 16 July 2014, U.N. Doc. CCPR/C/111/D/1956/2010, paras. 9.4-9.6.

⁷² U.N. Human Rights Committee, Concluding Observations of the Algeria, U.N. Doc. CCPR/C/79/Add.95 (18 August 1998), paras. 6 & 7.

for the relatively difficult conditions under which the Netherlands military and investigators had to work,” it found a violation after determining that the shortcomings of the investigation were not “inevitable, even in the particularly difficult conditions prevailing in Iraq at the relevant time.”⁷³ (See para. 17 above). In *Al-Skeini*, the ECtHR recognized that in circumstances of “generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators.” Nonetheless, the ECtHR ruled that “all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.”⁷⁴ (See para. 18 above). Within this framework, where the ECtHR applied the obligation to investigate while being sensitive to the practical difficulties that investigations can face, especially in situations of armed conflict, the ECtHR nevertheless found violations based on shortcomings such as misplacing of evidence, failing to seek to interview relevant witnesses, lack of independence, and the narrow scope of an investigation.

24. An effective investigation is required, not only when an investigation encounters practical difficulties, but also despite political sensitivities. The ECtHR held in *Varnava* that even if both sides of a conflict prefer to broker a “politically sensitive” arrangement that does not “attempt to bring out to the light of day the reprisals, extra-judicial killings and massacres that took place or to identify those amongst their own forces and citizens who were implicated,” such limiting arrangements and their underlying political sensitivities “can have no bearing on the application of the provisions of the Convention.”⁷⁵ The U.N. Human Rights Committee told Nepal that at the end of its ten-year armed conflict it too continued to have obligations to conduct effective investigations into conflict-related serious human rights violations and that “transitional justice mechanisms cannot serve to dispense with the criminal prosecution” of those abuses.⁷⁶

IV. CONCLUSION

25. Numerous international and regional human rights bodies have made clear that the obligation to effectively investigate enforced disappearances and unlawful killings applies in times of armed conflict. ECtHR case law and U.N. Human Rights Committee pronouncements also demonstrate that the obligation to conduct an effective investigation applies even, or in some cases especially, when there are high numbers of allegations of grave human rights abuses. While the ECtHR has been sensitive to the various difficulties that investigations may face, especially due to situations of armed conflict, human rights bodies have also agreed that these challenges do not diminish the obligation to conduct an effective investigation.

1 July 2016



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⁷³ ECtHR, *Jaloud v. Netherlands*, Grand Chamber Judgment of 20 November 2014, paras. 226 & 227.

⁷⁴ ECtHR, *Al-Skeini and others v. U.K.*, Grand Chamber Judgment of 7 July 2011, para. 164.

⁷⁵ ECtHR, *Varnava and others v. Turkey*, Grand Chamber Judgment of 18 September 2009, para. 193.

⁷⁶ U.N. Human Rights Committee, Concluding observations on the second periodic report of Nepal, U.N. Doc. CCPR/C/NPL/CO/2, 15 April 2014, para. 5.