

IN THE EUROPEAN COURT OF HUMAN RIGHTS
Application no. 4871/16 - *Hanan v. Germany*

**WRITTEN COMMENTS OF THE
OPEN SOCIETY JUSTICE INITIATIVE**

1. In these written comments the Open Society Justice Initiative provides an analysis of the following issues, relevant to the Grand Chamber’s consideration of the case of *Hanan v. Germany*: (I) the importance of conducting effective investigations into civilian deaths during armed conflicts, (II) the existence of the obligation to conduct such investigations under International Human Rights Law (IHRL) and International Humanitarian Law (IHL), (III) the scope of the required investigation and (IV) the circumstances in which the obligation is triggered where the incident occurs outside the national territory of the State.¹
2. While the comments refer principally to IHRL standards, they also make reference to IHL in order to assist the court if and to the extent that an examination of IHL is required (either because the State has specifically invoked IHL in its pleadings before the Court and made any necessary derogation,² or to support the Court’s analysis under the European Convention on Human Rights (ECHR)). The comments note, in particular, the similarity between the obligations that arise in IHRL and IHL in relation to the obligation to investigate.³
3. The analysis draws upon the jurisprudence of this Court and comparative regional and international standards, noting that the Court takes into account “evolving norms of national and international law in its interpretation of Convention provisions”.⁴

I. IMPORTANCE OF AN EFFECTIVE INVESTIGATION

4. Effective investigations into civilian deaths during armed conflict are vital. Establishing and interrogating the facts relating to civilian deaths is essential for, *inter alia*:
 - i) Maintaining and enforcing IHRL and IHL. Investigations are crucial for the proper enforcement of laws (in both IHRL and IHL) designed to safeguard lives. Without investigations, the IHRL prohibition on arbitrary killing by agents of the state, and the IHL rules around targeting, based on principles of distinction, proportionality and precaution, have limited practical effect.⁵

¹ Written comments provided pursuant to the President of the Grand Chamber’s grant of permission under Rule 44§3 of the European Court of Human Rights *Rules of Court*, dated 21 November 2019.

² *Hassan v. United Kingdom*, 16 September 2014, para. 107.

³ The comments do not address the question of the extent to which the Court should take into account IHL, which is the subject of other submissions before the Court. The Intervener’s position, in broad terms, is that the specific standards developed in IHRL on Article 2 should not be lowered by reference to IHL, but that IHL standards on investigations in armed conflicts are in any event, similar to those in IHRL.

⁴ *Demir and Baykara v. Turkey*, 12 November 2008, para. 68. The comments draw significantly on the International Committee of the Red Cross and Geneva Academy’s new *Guidelines on Investigating Violations of International Humanitarian Law*, (September 2019), which were drafted following a five year project on investigations in armed conflict, and are the result of expert consultations (including with senior government lawyers and military experts) and extensive research. The Guidelines seek to identify and present practical and legal issues that may arise in investigating IHL violations and provide assistance to those conducting such investigations by setting out a framework for investigations in armed conflict (“*Guidelines on Investigating Violations of IHL*”).

⁵ *Al Skeini and ors v. United Kingdom*, 7 July 2011, para. 163; *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*, A/RES/60/147, 21 March 2006.

- ii) Supporting accountability. Investigations ensure that those who violate the law do not go unpunished. Accountability for individual and state responsibility is critical as an end in itself as well as for deterring future violations.⁶
- iii) Providing redress to victims. Effective investigations helps victims seek redress,⁷ including both financial compensation and the right to truth.⁸
- iv) Maintaining public confidence in adherence to the rule of law. Rigorous and transparent investigations maintain public confidence in the rule of law and prevent the appearance of collusion in or tolerance of unlawful acts.⁹
- v) Supporting post-conflict transitional justice. Investigations into wrongdoing assist in establishing the record necessary for transitional justice.¹⁰
- vi) Improving military effectiveness and efficiency. Investigations enable armed forces to develop best practice and to learn from errors. They also allow appropriate measures to be taken which maintain high standards and discipline.¹¹

II. OBLIGATION TO CONDUCT INVESTIGATION OF INCIDENTS OCCURRING DURING ARMED CONFLICT UNDER IHRL AND IHL

IHRL

5. IHRL continues to apply in situations of armed conflict.¹² The obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires "that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State".¹³ This obligation "continues to apply in difficult security conditions, including in a context of armed conflict".¹⁴ The circumstances in which the investigation takes place may affect the form and measures that the state can deploy to carry out the investigation – the obligation being one of means and not results¹⁵ – but the state must ensure that "even in difficult security conditions, all reasonable steps [are] taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life".¹⁶

IHL

⁶ See, for example, Human Rights Committee, *General Comment no. 31*, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 18; *UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, (E/CN.4/2005/102/Add.1), 8 February 2005.

⁷ See General Assembly Resolution, *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*, A/RES/60/147, 21 March 2006.

⁸ The right to truth was addressed by this Court in *El Masri v. The Former Yugoslav Republic of Macedonia*, 13 December 2012, para. 191. See also Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, para. 6, "establishing the true facts and securing an acknowledgment of serious breaches of human rights and humanitarian law constitute forms of redress that are just as important as compensation, and sometimes even more so.". See also international standards including: General Assembly Resolution, *Right to Truth*, A/RES/68/165, 21 January 2014; Human Rights Council Resolution, *Right to the Truth*, A/HRC/RES/21/7, 10 October 2012; Commissioner for Human Rights, *Study on the Right to the Truth*, 8 February 2006.

⁹ *El Masri v. The Former Yugoslav Republic of Macedonia*, para. 191.

¹⁰ See for example, *Report of the United Nations High Commissioner for Human Rights on human rights and transitional justice*, A/HRC/18/23, 4 July 2011.

¹¹ *Guidelines on Investigating Violations of IHL*, para. 26.

¹² *Hassan*, para. 104.

¹³ *Al Skeini*, para. 163, citing *McCann and Others v. United Kingdom*, 27 September 1995, para. 161.

¹⁴ *Al Skeini*, para. 164.

¹⁵ *Güzelyurtlu and Others v. Cyprus and Turkey*, para. 235; *Armani Da Silva v. the United Kingdom* [GC], 30 March 2016, paras. 233, 257.

¹⁶ *Al Skeini*, para. 164.

6. While the content of the obligation to investigate has been given additional specificity by human rights bodies, the underlying requirement to investigate also exists in IHL.
7. There is no *express* requirement in IHL to conduct an investigation of a violation of the laws of armed conflict (LOAC). However, the obligation is considered to be implicit in the undertaking made by all States Parties to the Geneva Conventions both to respect and to “*ensure respect*” for the Conventions (emphasis added).¹⁷
8. In order to give meaning to that undertaking, States Parties are obliged to “repress” grave breaches of the Conventions by establishing effective penal sanctions for those committing such breaches¹⁸ and in addition must “take measures necessary for the suppression of *all acts* contrary to the provisions of the present Convention other than the grave breaches”.¹⁹ The International Committee of the Red Cross (ICRC) Commentary explains that this obligation to suppress “covers everything which can be done by a State to avoid acts contrary to the Convention being committed or repeated”, and that States Parties should institute judicial or disciplinary punishment for *all breaches* of the Convention.²⁰ The obligation to ensure respect for LOAC as a whole and to suppress all LOAC violations forms part of customary international law.²¹
9. The obligation to suppress applies whether the IHL violation is criminal or non-criminal. Not all violations of IHL are criminalised under international law. A breach of the principle of distinction or proportionality, for example, amounts to a serious breach of LOAC – included in Additional Protocol I to the Geneva Conventions as a grave breach, and as a war crime in the Rome Statute²² – but other breaches of the Geneva Conventions (including violations of the principle of precaution) that do not reach the gravity threshold of a grave breach, still amount to a breach of IHL and may amount to a crime under a state’s domestic law, or a disciplinary offence.
10. In order to effectively “suppress” violations and to fulfil their obligation to pursue penal or other punishment for all breaches of IHL, states must have a system for monitoring the conduct of their armed forces and need to investigate all alleged violations of IHL.²³
11. The obligation to investigate under IHL is also apparent from IHL obligations to account for the dead. The ICRC study on customary international law identifies a number of relevant rules applicable in non-international armed conflicts (NIACs) including the obligation to search for and collect the dead (rule 112), the obligation to account for the dead (rule 116), the obligation to take all feasible measures to account for persons reported missing as a result of armed conflict and provide their family members with any information it has on their fate (rule 117)

¹⁷ Common Article 1 of the *Geneva Conventions of 1949*.

¹⁸ *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (‘Geneva I’), Chp. IX, Art. 49; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (‘Geneva II’), Chp. VIII, Art. 50; *Convention (III) relative to the Treatment of Prisoners of War* (‘Geneva III’), Art. 129; *Convention (IV) relative to the Protection of Civilian Persons in Time of War* (‘Geneva IV’), Art. 146.

¹⁹ *Ibid.* The reference to “all” acts makes it clear that the duty of suppression extends to violation of Common Article 3, applicable in non-international armed conflicts.

²⁰ Jean Pictet, ed., *Commentary on the Geneva Conventions of 12 August 1949: Convention (IV) relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, (1958), Commentary to Article 146, p. 594.

²¹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol I (‘*ICRC Customary International Law*’), p. 495 and p.558, Rule 139 and Rule 153.

²² *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (‘Additional Protocol I’), 8 June 1977, Art. 85(3); *Rome Statute of the International Criminal Court*, Article 8.

²³ See, for example, Mark Lattimer, ‘The Duty in International Law to Investigate Civilian Deaths’ in *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War*, Mark Lattimer and Philippe Sands, ed.s, Hart Publishing, London, (2018), p.56.

and the obligation to respect family life (105), which all require investigatory action from the State.

12. The Turkel Commission confirmed the obligation to investigate where there is a “reasonable suspicion” or a “credible accusation” that war crimes have been committed and to “examine” and sanction allegations of *all* IHL violations.²⁴
13. The obligation to investigate all breaches of LOAC causing civilian death is also supported by state and international practice.²⁵ For example:²⁶ the UK examines civilian casualties without limiting the review to criminal LOAC violations; in Canada, any alleged breaches of LOAC must be “investigated rapidly”; Canadian operational practice in Afghanistan indicates that every instance of death or injury caused by Canadian Forces is to be reported to the military police and subsequently investigated, usually by the Canadian Forces National Investigation Service; a 2008 Tactical Directive issued by NATO to Member States in Afghanistan instructed commanders “to acknowledge civilian casualties immediately and transparently investigate allegations rapidly”.
14. International law and standards are thus coalescing around a recognition that the obligation to investigate is not just an obligation to investigate allegations of war crimes (which is well-established in international law), but an obligation to investigate all allegations of IHL violations leading to civilian deaths.²⁷ Where there is information to suggest that a war crime may have been committed, the state must open a criminal investigation. Where there is evidence to suggest that another breach of IHL may have been committed, the State must also investigate the incident, whether through a criminal or administrative investigation.

State responsibility for violations of IHL

15. It is worth noting, separately, that as the acts of armed forces (as organs of the state) are generally attributable to the State, breaches of IHL by members of a State’s armed forces may give rise to State responsibility as well as or instead of individual criminal responsibility.²⁸ State responsibility for IHL breaches may arise where a war crime is committed, but may also arise where there is no individual responsibility – for example as a result of systemic failure or lack of appropriate structures to ensure compliance with the law.²⁹

²⁴ *Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law: The Public Commission to Examine the Maritime Incident of 31 May 2010, Second Report – The Turkel Commission* (February 2013), Summary at para. 113.

²⁵ For detailed analysis of state practice in investigating allegations of violations of IHL and IHRL, focusing on US, UK, Canada and Australia, see the Open Society Justice Initiative’s submission to the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, (following the Goldstone Report): ‘Comparative analysis of preliminary investigation systems in respect of alleged violations of international human rights and/or humanitarian law’. Available here: <https://www.justiceinitiative.org/uploads/3d0b1b46-bb82-410c-b55e-c060d881ba1b/comparative-analysis-20100810.pdf>

²⁶ All examples from Alon Margalit, ‘The Duty to Investigate Civilian Casualties During Armed Conflict and Its Implementation in Practice’, *Yearbook of International Humanitarian Law 2012*, Vol. 15, December 2012, pp. 155 – 186, p. 165.

²⁷ See for example, Mark Lattimer, ‘The Duty in International Law to Investigate Civilian Deaths’, p.56 (op. cit. fn. 23); Françoise J Hampson, ‘An investigation of alleged violations of the law of armed conflict’, 46 *Israel Yearbook on Human Rights* (2016); Alon Margalit, ‘The Duty to Investigate Civilian Casualties During Armed Conflict and Its Implementation in Practice’, pp. 155 – 186 (op. cit. fn. 26).

²⁸ See *Guidelines on Investigating Violations of IHL*, citing UN International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10(A/56/10), chap. I.V.E; Geneva I, Art. 51; Geneva II, Art. 52; Geneva III, Art. 131; Geneva IV, Art. 148; Additional Protocol I, Art. 91 and *ICRC Customary International Law*, Rule 149.

²⁹ *Guidelines on Investigating Violations of IHL*, para. 21.

16. A State is obliged to cease the act if it is continuing, to offer assurances and guarantees of non-repetition in appropriate circumstances, and to make reparation.³⁰ According to the *Guidelines on Investigating Violations of IHL* “An investigation will in many cases be a preliminary step to any such action and is thus essential.”³¹
17. The domestic law of the State will govern the procedure under which a claim against the state can be made, but it may take the form of civil liability. The implications of this on the necessary scope of an investigation are discussed below.

III. SCOPE OF OBLIGATION TO INVESTIGATE AND GUIDING PRINCIPLES

18. In assessing whether an investigation complies with Article 2, IHRL has identified a number of principles:³² (1) independence,³³ (2) impartiality³⁴ (3) thoroughness and effectiveness³⁵ (4) promptness³⁶ (5) accessibility of the investigation to the family of the victim to the extent necessary to protect their legitimate interests³⁷ and (6) public scrutiny.³⁸ Ultimately, the investigation must be capable of leading to a determination of whether the use of force was justified and to the identification and punishment of those responsible.³⁹ The procedural duty under Article 2 must be applied realistically, taking into account specific problems faced by investigators during armed conflicts.⁴⁰ The particular circumstances may increase, as well as decrease the ability and importance of adhering to the guiding principles.⁴¹
19. The law on the scope of IHL investigations is considerably less developed. However, there is growing recognition that the more developed principles recognised in IHRL also apply to IHL investigations – according to the Human Right Council’s Committee of independent experts appointed to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side (following the Goldstone Report):

“the gap between the expansive standards under IHRL and the less defined standards for investigations under IHL is not so significant [...] Above all, investigators must be impartial, thorough, effective and prompt; otherwise, an investigation would be no more than a manoeuvre of artful deceit. Any investigations that meet these criteria may be called credible and genuine. Credibility presupposes also that the investigating bodies enjoy some measure of

³⁰ *Articles on State Responsibility*, Articles 30 and 31.

³¹ *Guidelines on Investigating Violations of IHL*, para. 23.

³² See *Al Skeini*, paras. 162 – 167.

³³ *Öğur v. Turkey*, [GC], 30 November 2004, para. 91-92; *Ramsahai and Ors v. the Netherlands*, 15 May 2007, para. 325: “[...] for the investigation to be “effective” in this sense it may generally be regarded as necessary for the persons responsible for it and carrying it out to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence (see Tahsin Acar, cited above, § 222). What is at stake here is nothing less than public confidence in the State’s monopoly on the use of force.”

³⁴ *Nachova v. Bulgaria*, 6 July 2005, para. 117.

³⁵ *Assenov and Ors v. Bulgaria*, 28 October 1998, para. 103. See also *Nachova v. Bulgaria* on the importance of examining all relevant matters and not disregarding relevant facts (paras. 114 – 117).

³⁶ *Collette and Michael Hemsworth v. United Kingdom*, 16 July 2013, paras. 69 – 74. Promptness is required “quite apart from any question of whether the delay actually impacted on the effectiveness of the investigation.”

³⁷ *Isayeva v. Russia*, 24 February 2005, para. 213.

³⁸ *Al Skeini*, para. 167.

³⁹ *Hugh Jordan v. United Kingdom*, 4 May 2001, para. 107; *Sultan Karabulut v. Turkey*, 19 September 2006, paras. 73-74.

⁴⁰ *Al Skeini*, para. 168.

⁴¹ For example in *Al Skeini* the Court concluded that “the fact that the United Kingdom was in occupation also entailed that, if any investigation into acts allegedly committed by British soldiers was to be effective, it was particularly important that the investigating authority was, and was seen to be, operationally independent of the military chain of command.”, para. 169.

*independence. The standard of promptness is alluded to in the ICRC Commentary, which refers to the duty to search for and prosecute the perpetrator with speed.*⁴²

20. The *Guidelines on Investigating Violations of IHL* suggest that “There should be no fundamental difference between the general principles of an effective investigation in armed conflict and outside it, as their application will depend on what is feasible in each situation.”⁴³
21. The following sections set out in more detail the scope of the investigation required by IHRL and IHL.

Requirement for criminal investigation

22. Under IHRL, where the allegation is that death has resulted from intentional acts, a criminal investigation will be required.⁴⁴ In other cases, a criminal investigation will be necessary if “civil action is incapable, without the benefit of the conclusions of a criminal investigation, of making any meaningful findings as to the perpetrators of fatal assaults, and still less to establish their responsibility”.⁴⁵
23. Further, the Court has held that in the particular context of “dangerous activities”, an official criminal investigation is “indispensable” because “public authorities are often the only entities to have sufficient relevant knowledge to identify and establish the complex phenomena that might have caused an incident”.⁴⁶
24. The Court has also held that where the negligence attributable to State officials or bodies goes beyond an error of judgement or carelessness, “in that the authorities in question, fully realising the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity”, there may be a violation of Article 2 if those responsible for endangering life are not charged with a criminal offence or prosecuted.⁴⁷ This has been held to be the case in the context of military activities which posed a particular threat to civilians, in relation to which the state failed to take adequate measures to protect lives.⁴⁸
25. A criminal investigation will not automatically satisfy Article 2. The scope of the investigation – i.e. whether it actually considered all relevant breaches – and the quality – e.g. whether the authorities approached it adequately and with an open mind, must be examined.⁴⁹
26. As set out above, IHL requires criminal investigations into war crimes and some form of official fact-finding investigation (criminal or non-criminal) into other IHL violations.

Requirement for official investigation beyond criminal liability

27. Depending on the scope and findings of the criminal investigation, some other form of official investigation may also be required to satisfy the state’s Article 2 obligations. Where, for example, there is an allegation that a death was caused by negligence that does not amount to a crime under domestic law, that must still be investigated in order to satisfy the obligation to

⁴² ‘Report of the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards’, A/HRC/15/50, 23 September 2010, para. 30.

⁴³ *Guidelines on Investigating Violations of IHL*, para. 34.

⁴⁴ *Abdurashidova v. Russia*, 8 April 2010, para. 56; *Hashiyev and Akayeva v. Russia*, 24 February 2005, paras. 119-121.

⁴⁵ *Hashiyev and Akayeva v. Russia*, 24 February 2005, para. 121; *Vo v. France*, 8 July 2004, para. 90.

⁴⁶ *Kolyadenko and Ors v. Russia*, 28 February 2012, para. 188.

⁴⁷ *Kolyadenko*, para. 188. See also *Öneryıldız v. Turkey*, 30 November 2004, para. 93 and *Budayeva and Others v. Russia*, 20 March 2008, para. 140.

⁴⁸ *Oruk v. Turkey*, 4 February 2014, paras. 50 – 68.

⁴⁹ See, for example, *Kolyadenko*, para. 196 - 202. For breach of Article 2 stemming from *inter alia* the failure to go behind the official version of events in a criminal investigation, see *Şimşek v Turkey*, 26 July 2005, para. 123.

determine whether the use of force was justified and to identify and punish those responsible.⁵⁰ Depending on the facts of the case, the investigation of negligence could take place in the context of the criminal investigation, or in administrative or disciplinary proceedings (if appropriate).

28. An investigation limited to consideration of criminal liability will not consider other non-criminal breaches of IHL. For example, if a decision is taken to attack a target based on a material error of fact, the decision-maker may not be criminally liable, but the individual and the state may still be legally liable for failing to take the necessary steps to verify the information they were acting on.⁵¹ For the reasons set out above, IHL would require an investigation in those circumstances.

Assessment of steps leading up to incident, including precautionary measures

29. In view of the importance of the protections afforded by Article 2, the Court has held that it “must subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used” and that this scrutiny must take into consideration “not only the actions of State agents who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination”.⁵²
30. In the context of a targeted attack, the investigation must necessarily consider all steps leading up to the decision to order the attack, including what information was considered, whether legal advice was received and followed, whether alternatives were considered and if so why they were rejected, and what steps were taken to minimise the risk to life.⁵³

31. These principles are reflected in the Human Rights Committee’s General Comment no. 36:

*“States parties should, in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered.”*⁵⁴

32. Again, if there is a credible allegation of breach of LOAC – for example a breach of the principle of precautions – an investigation should be conducted as a matter of IHL and would need to examine the steps leading up to the attack.

State responsibility and systemic issues

33. Where there is evidence indicating the possibility of systemic issues or concerns about whether the appropriate policies or practices were in place or adhered to, the investigation will also need to consider those broader issues of state responsibility, including the instructions, training and supervision given to those involved in the incident.⁵⁵

34. In *Al Skeini*, this Court considered the “narrow focus” of the criminal proceedings against the accused soldiers to be inadequate: “Article 2 required an independent examination, accessible

⁵⁰ Article 2 requires investigations of deaths caused by negligence. See, for example, the many cases of this Court dealing with medical negligence. In many negligence cases falling outside the types of cases identified at para. 22 - 24 above, a criminal investigation will not be required, but the Court must “examine whether the available legal remedies, taken together, as provided in law and applied in practice, could be said to have constituted legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim.”: *Valeriy Fuklev v. Ukraine*, 16 January 2014, para. 67.

⁵¹ See Françoise J Hampson, ‘An investigation of alleged violations of the law of armed conflict’, (op. cit. fn. 27) pp. 8-9.

⁵² *Esmukhambetov and Others v. Russia*, 29 March 2011, para. 138; *Al Skeini*, para. 163.

⁵³ *Isayeva v. Russia*, 24 February 2005, para. 170.

⁵⁴ Human Rights Committee, *General comment no. 36* (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, para. 64 (footnotes omitted).

⁵⁵ *Al Skeini*, para. 174.

to the victim’s family and to the public, of the broader issues of State responsibility for the death [...]”. See also the High Court of England and Wales’s discussion in a case considering the adequacy of the Iraqi Historic Allegations Tribunal investigations into deaths in custody in *R (Ali Zaki Mousa and Ors) v. Secretary of State for Defence*.⁵⁶

35. The point has been reiterated by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (emphasis added):

*“The obligation to investigate is part and parcel of the obligation to ensure the right to life and, thus, entails more than the determination of criminal responsibility. States are also responsible for undertaking the systematic supervision and periodic investigation necessary to ensure that their institutions, policies, and practices ensure the right to life as effectively as possible.”*⁵⁷

36. As such, if there is prima facie evidence suggesting possible state responsibility – including questions around the instructions, training and supervision given to individuals involved, or other systemic issues, the investigation must examine the broader issues of State responsibility for the death in a manner compliant with Article 2.

IV. CIRCUMSTANCES IN WHICH INVESTIGATION OF EXTRATERRITORIAL INCIDENT IS REQUIRED

37. Under IHRL, the procedural obligation to conduct an investigation is triggered “where lives have been lost in circumstances potentially engaging the responsibility of the State”.⁵⁸
38. If the State has jurisdiction over the substantive Article 2 right of a victim, its procedural obligation to conduct an investigation will also be triggered.⁵⁹
39. Even if the state does not have jurisdiction over the substantive Article 2 right of the victim, it may still have an obligation to guarantee that person’s procedural right,⁶⁰ as the procedural obligation is “detachable” from the substantive obligation under Article 2.⁶¹
40. This may arise where there are “special features” in the case connecting the state to the victim.⁶² The Court has not defined what factual circumstances might amount to “special features”. We know from *Rantsev v. Cyprus*, that the victim being a national of the Contracting State may not be sufficient, and from *Güzelyurtlu and Others v. Cyprus and Turkey*, that the presence of suspects in the territory of the Contracting State may be.
41. Even in the absence of special features, a state which does not have jurisdiction over the substantive Article 2 right of a victim will have an obligation to carry out an investigation in accordance with Article 2 if it has started an investigation under its domestic law.⁶³

⁵⁶ *R (Ali Zaki Mousa and Ors) v. Secretary of State for Defence*, [2013] EWHC 1412 (Admin), para. 148. While these considerations were set out by reference to deaths in custody, “similar principles will apply to other deaths within the territorial scope of the Convention, though the detailed approach may vary” (para. 149).

⁵⁷ ‘Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston: Civil and Political Rights, Including the Questions of Disappearances and Summary Executions’, 8 March 2006, E/CN.4/2006/53, para. 41.

⁵⁸ *Trubnikov v. Russia*, 5 July 2005, para. 85 citing *Öneryıldız v. Turkey* [GC], para. 91 and *Paul and Audrey Edwards v. the United Kingdom*, para. 54.

⁵⁹ See for example, *Al Skeini*, para. 149 – 151; *Jaloud v. the Netherlands*, 20 November 2014, para. 152.

⁶⁰ *Güzelyurtlu*, para. 190.

⁶¹ *Güzelyurtlu*, para. 189.

⁶² *Güzelyurtlu*, para. 190.

⁶³ *Güzelyurtlu*, para. 188. While such a link is an important way of ensuring that any investigations that are started meet Article 2 standards, it should not be used to suggest that the State does not have an obligation under IHRL (and under domestic law, if relevant) to investigate in the first place. Such a suggestion may have a chilling effect, encouraging states not to begin an investigation at all in order to avoid having to comply with obligations imposed by Article 2.

42. A Contracting State that does not have jurisdiction over the substantive Article 2 right of a victim but which has relevant evidence will also have a duty to render any assistance within its competence and means sought under a legal assistance request.⁶⁴
43. These principles, taken together, suggest that the Court's approach to determining whether a Contracting State has procedural obligations under Article 2, is consistent with the trend in this court's jurisprudence as well as in international law, towards recognising that IHRL imposes obligations on states where those states have direct control or authority over a victim's rights, irrespective of where the incident took place.⁶⁵
44. Applying that framework, where a Contracting State has direct control over a victim's procedural right under Article 2 (e.g. because the perpetrator is present in the Contracting State's territory,⁶⁶ or domestic laws require an investigation,⁶⁷ or a specific request for evidence in its possession has been made to it by another Contracting State),⁶⁸ the obligation is triggered, regardless of whether the State also had jurisdiction over the victim's substantive right under Article 2. The scope of that obligation will then be influenced by what is actually feasible for the State in the circumstances of the case, the procedural obligation being one of means and not results, as set out above (see para. 5).
45. If the Court *is* required to consider a State's jurisdiction over a victim's substantive right under Article 2 in order to establish whether a procedural obligation arises (which for the reasons set out above will often not be required), the Intervener submits that careful consideration should be given to the growing recognition that IHRL obligations arise where a state exercises direct control and authority over a person's rights. The Intervener notes in particular the following comparative standards:⁶⁹
 - i) Human Rights Committee: The Committee's General Comment no. 36 sets out new guidance on the extraterritorial application of the ICCPR, which is directly relevant to military targeting. It concluded that a state has jurisdiction over "[...] *all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.*"⁷⁰ The approach is consistent with previous decisions and commentary of the Committee:
 - (a) In *Lopez Burgos v. Uruguay* (involving the kidnap and detention of a Uruguayan citizen by Uruguayan security forces in Argentina), the Committee explained that it would be "unconscionable" to interpret the responsibility under Article 2 of the ICCPR to permit a State to perpetrate violations on the territory of another State which it could not perpetrate on its own territory.⁷¹

⁶⁴ *Rantsev*, para. 245; *Güzelyurtlu*, paras. 233-235.

⁶⁵ See further at paragraph 45 below.

⁶⁶ *Güzelyurtlu*, para. 196.

⁶⁷ *J and Others v. Austria*, 17 January 2017, para. 114.

⁶⁸ *Güzelyurtlu*, para. 233.

⁶⁹ See also developing jurisprudence in this court: *Ilaşcu and Ors v. Moldova and Russia* [GC], 8 July 2004, para. 317; *Issa & others v. Turkey*, Admissibility Decision, 16 November 2004, para. 71; *Pad v. Turkey*, A Admissibility Decision, 28 June 2007, paras. 54 - 55: "[...] the Court considers that it is not required to determine the exact location of the impugned events, given that the Government had already admitted that the fire discharged from the helicopters had caused the killing of the applicants' relatives, [...] Accordingly, the Court finds that the victims of the impugned events were within the jurisdiction of Turkey at the material time."; *Andreou v. Turkey*, Admissibility Decision, 3 June 2008: "[...] even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as "within [the] jurisdiction" of Turkey within the meaning of Article 1 and that the responsibility of the respondent State under the Convention is in consequence engaged."; *Jaloud*, para. 152.

⁷⁰ *General comment no. 36*, para. 63. Footnotes omitted. See also para. 22.

⁷¹ *Lopez Burgos v. Uruguay*, Communication No. 052/1979, Views adopted on 29 July 1981, para. 12.3.

- (b) In its Concluding Observations on the fourth periodic report of the USA, it advised that the USA's use of armed drones in extraterritorial operations must comply with its obligations under Article 6, ICCPR.⁷²
- ii) Inter-American Commission on Human Rights: In *Coard v. United States* the Commission observed that the inquiry as to whether a person is subject to the jurisdiction of a state turns on whether a person is under their authority and control.⁷³ In *Allejandre v. Cuba*,⁷⁴ the Commission made clear that a person may be under the "authority and control" of a state even if they are not under the physical control of that state: a civilian plane was shot down by the Cuban Air-force while in international airspace, killing the four passengers (two Cuban nationals and two US nationals). The Commission concluded: "when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues [...]".
- iii) International Court of Justice: In *Democratic Republic of the Congo (DRC) v Uganda*,⁷⁵ which concerned violations of IHRL and IHL by Ugandan troops in the DRC, the court found that Uganda had violated IHRL in areas where Uganda did not exercise effective control (as well as in areas where it was considered to be an occupying force). The Court cited its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, noting that "international human rights instruments are applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory", particularly in occupied territories" (suggesting that such jurisdiction was not limited to occupied territories).⁷⁶
46. The Intervener suggests that the common thread running through these authorities is the recognition that where a state has direct authority or control over a person's rights (whether all or some of them⁷⁷) it has obligations to that person in respect of that or those rights, wherever that person is physically located.
- IHL trigger to conduct investigation of extraterritorial incidents*
47. If IHL applies to the conflict and to the incident in question then the parties are bound by their IHL obligations and no further question of jurisdiction arises.

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⁷² *Concluding observations on the fourth periodic report of the United States of America*, CCPR/C/USA/CO/4, 23 April 2014.

⁷³ *Coard et al v. United States*, Inter-American Commission on Human Rights, Report No. 109/99, Case 10.951, 29 September 1999, para. 37.

⁷⁴ *Armando Alejandro Jr., Carlos Costa, Mario de la Pena y Pablo Morales v República de Cuba*, Inter-American Commission on Human Rights, Report No. 86/99, 29 September 1999, para. 25.

⁷⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo (DRC) v. Uganda*, 19 December 2005, ICJ Rep 168.

⁷⁶ *Armed Activities on the Territory of the Congo*, para. 216. Emphasis added.

⁷⁷ Convention rights can be "divided and tailored": *Al Skeini*, para. 137.