

The dead and missing in armed conflict: Protections set out in the judgments of the European and Inter-American Courts of Human Rights

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Abstract

In their analyses of specific cases involving armed conflict, the European Court of Human Rights and the Inter-American Court of Human Rights have acted as monitor-

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ing bodies for international humanitarian law (IHL) by factoring that body of law into their interpretation of human rights and State obligations set out in the European and American Conventions on Human Rights. In this article, the author argues that, in such cases, the two courts also acted as monitoring bodies for the rules of IHL designed to protect the dead and missing in both international and non-international armed conflicts. This monitoring function is apparent in the two courts' judgments, which uphold the obligations of States to search for and identify the dead and missing in armed conflicts, to bury the remains of the dead and to investigate unlawful deaths and cases of forcible disappearance. The author concludes that not only has IHL bolstered the interpretation of the European and American Conventions on Human Rights, but that those two instruments and their interpretation have expanded the content and scope of the rules of IHL that protect the dead and missing in armed conflict.

Keywords: international humanitarian law, Inter-American Court of Human Rights, European Court of Human Rights, armed conflicts, the dead, the missing, right to the truth, obligation to investigate, reparations.

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Introduction

International human rights law (IHRL) and international humanitarian law (IHL) both seek to safeguard human dignity.¹ Yet they diverge in numerous ways, including the fact that IHL, unlike IHRL, has limited monitoring mechanisms whose level of implementation is practically nil.² As a result, in specific cases involving international or non-international armed conflicts,³ the European Court of Human Rights

1 As pointed out by Professor Theodor Meron, "[t]he fact that the law of war and human rights law stem from different historical and doctrinal roots has not prevented the principle of humanity from becoming the common denominator of both systems. Current trends point to ever greater reliance on that principle." Theodor Meron, "The Humanization of Humanitarian Law", *American Journal of International Law*, Vol. 94, No. 2, 2000, p. 245.

2 Sebastien Marmin, "Les organes de contrôle du droit international des droits de l'homme et le droit international humanitaire", *Revue Trimestrielle des Droits de l'Homme*, No. 92, 2012, pp. 818–819. These monitoring mechanisms are the International Humanitarian Fact-Finding Commission and the Protecting Powers. As highlighted by Toni Pfanner, these mechanisms "are often considered to be less stringent, only exceptionally applied and only rudimentarily developed, especially in non-international armed conflicts". This can be attributed to the fact that "states are averse to any form of judicial supervision of their behaviour during hostilities that could hamper their ability to wage (and win) a ferocious and bloody war". In addition, the precariousness of IHL monitoring mechanisms can be understood, in part, because States "argue that the reality of conflict and the disruption of justice systems in wartime are not conducive to a judicial approach". Toni Pfanner, "Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims", *International Review of the Red Cross*, Vol. 91, No. 874, 2009, pp. 310, 313.

3 Juana María Ibáñez Rivas, *Le droit international humanitaire dans la jurisprudence des Cours européenne et interaméricaine des droits de l'homme*, Editions Pédone, Paris, 2025; Juana María Ibáñez Rivas, "El derecho internacional humanitario en la jurisprudencia de la Corte Interamericana de Derechos Humanos", *Revista Derecho del Estado*, No. 36, 2016. See also Gloria Gaggioli, *L'influence mutuelle entre les droits de l'homme et le droit international humanitaire à la lumière du droit à la vie*, Editions Pédone, Paris, 2013.

(ECtHR) and Inter-American Court of Human Rights (IACtHR) have served as monitoring bodies for IHL.

Reference to IHL in ECtHR and IACtHR case law has not been constant, linear or consistent. With their respective differences, notably in how they exercise their contentious jurisdiction, the two courts' relationship to IHL has changed over time through two approaches: implicit and explicit. Under the implicit approach, the courts have used the language of IHL,⁴ overtly or not, in the way they present information (such as the parties to an armed conflict, the weapons they use and the facts of the situation).⁵ In such cases, however, these two courts have limited themselves to assessing the facts through the prism of the European and American Conventions on Human Rights respectively. Under the explicit approach, which first appeared in the 2000s,⁶ the two courts specifically cite various sources of IHL (treaty law, custom, general principles, doctrine, case law and soft law) in their analyses of certain cases involving an armed conflict. In some cases, explicit references to IHL are made to provide background,⁷ while in others, the references have been incorporated into the courts' considerations and arguments.⁸ These implicit and explicit references to IHL do not necessarily correspond to linear phases in the two courts' respective bodies of

- 4 As noted by Helen Duffy with regard to the language used by the ECtHR in the *Finogenov and Others v. Russian Federation* case, "[w]hile the language is resonant of IHL, the standards are not, and as was typical, the Court does not explain". Helen Duffy, *Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication*, Grotius Centre Working Paper No. 2020/086-HRL, 29 January 2020, p. 43. In the *McCann, Ergi, Loizidou, Issaïeva and Abuyeva* cases, the ECtHR employed IHL terminology, such as the principles of legitimacy, proportionality and necessity, without directly invoking this body of law: see ECtHR, *McCann and Others v. United Kingdom*, Appl. No. 18984/91, Judgment (Grand Chamber), 27 September 1995; ECtHR, *Ergi v. Turkey*, Appl. No. 66/1997/850/1057, Judgment, 28 July 1998; ECtHR, *Loizidou v. Turkey*, Appl. No. 15318/89, Judgment (Grand Chamber), 18 December 1996; ECtHR, *Issaïeva v. Russia*, Appl. No. 57950/00, Judgment, 24 February 2005; ECtHR, *Abuyeva and Others v. Russia*, Appl. No. 27065/05, Judgment, 2 December 2010.
- 5 As Hélène Tigroudja rightly points out, in cases before the ECtHR involving the conflict in Chechnya, "it is not necessary to look very hard at the Court's rulings to see that the reasoning and logic are based on international humanitarian law and rooted in the main principles – proportionality, protection for civilians and civilian objects – that underpin this branch of law". Hélène Tigroudja, "La Cour européenne des droits de l'homme face au conflit en Tchétchénie: Propos sur l'inadaptation du mécanisme européen de protection des droits de l'homme à la situation tchétchène", *Revue Trimestrielle des Droits de l'Homme*, No. 65, 2006, p. 136.
- 6 It was towards the end of the 2000s that the ECtHR started making explicit references to IHL. Although both international and non-international armed conflicts had been a recurrent topic in cases brought before the ECtHR, "[f]or nearly 50 years, the Strasbourg Court, while not ignoring IHL, did not feel the need or find the opportunity to make use of it". Jean-Paul Costa, "Le système européen", in *Respecting International Humanitarian Law: Challenges and Responses*, 36th Round Table on Current Issues of International Humanitarian Law (Sanremo, 5–7 September, 2013), 2014, p. 153. At the IACtHR, explicit reference to IHL first appeared in 2000, when the Inter-American Commission on Human Rights argued that the IACtHR should apply this body of law to its analysis of a case involving the non-international armed conflict (NIAC) in Colombia. J. M. Ibáñez Rivas, *Le droit international humanitaire*, above note 3, p. 33.
- 7 Marina Eudes, "La Cour européenne des droits de l'homme et le droit international humanitaire: De la réticence à l'utilisation assumée", in Jean-François Akandji-Kombé (coord.), *L'homme dans la société internationale: Mélanges en hommage au Professeur Paul Tavernier*, Bruylant, Brussels, 2013, p. 864.
- 8 J. M. Ibáñez Rivas, *Le droit international humanitaire*, above note 3, p. 30.

case law.⁹ In addition, while there are no established methodologies for determining when these regional courts must apply IHL, its application is a real and unavoidable fact which has shown, over time, that there is no going back.¹⁰

Building on these observations, this article contends that the ECtHR and IACtHR have also acted as monitoring bodies with respect to the rules of IHL that protect the dead in armed conflict, as well as those who go missing and, in many cases, are presumed or found dead. The two courts have done this by interpreting the human rights and State obligations set out in the European and American Conventions on Human Rights through the prism of IHL, in particular with respect to the right to the truth and to State obligations of prevention, investigation and reparations. The first part of this article will focus on the standards that the ECtHR and IACtHR have developed regarding the obligation to search for and identify the dead and missing in armed conflict. The second part looks at the standards that apply to the obligations to bury the remains of the dead (including missing people who are found dead) and to investigate unlawful deaths and cases of forcible disappearance. The two courts have interpreted these obligations while carefully analyzing the merits of the cases and determining reparations.

Obligations to search for and identify the dead and missing

In IHL, the obligations of States to search for and identify the dead and missing in armed conflict are rooted in respect for family life¹¹ and in families' right to know the fate of their loved ones.¹²

In cases involving an armed conflict where the two courts refer explicitly to IHL, they have developed the content and scope of the obligation to search for and identify the dead and missing in the context of both the right to truth – in its

9 Between the 2000s, when the ECtHR and IACtHR began to refer explicitly to IHL, and today, a number of judgments on cases involving armed conflicts contain no express mention of that body of law. J. M. Ibáñez Rivas, *Le droit international humanitaire*, above note 3, pp. 34–35.

10 *Ibid.*, p. 35.

11 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 105, available at: <https://ihl-databases.icrc.org/en/customary-ihl/rules> (all internet references were accessed in June 2025); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts 27(1), 82(3); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Arts 4(3)(b), 5(2)(a).

12 ICRC Customary Law Study, above note 11, Rule 117; Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Arts 16–17; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 19; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 122; GC IV, Art. 136.

individual and collective dimensions¹³ – and the obligation to investigate, prosecute and punish those responsible for human rights violations. However, the content and scope of the obligation to search for and identify the dead and missing are autonomous: that obligation will remain a duty of States even if the perpetrators are punished as a result of an investigation or if no investigation takes place. The next two sections will show how, in armed conflict, the obligation to search for and identify the dead differs in several respects from the obligation to search for and identify the missing who may be presumed or found dead.

Searching for and identifying the dead

Under IHL, “[e]ach party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction”.¹⁴ The reference to the principle of non-discrimination¹⁵ means that the obligation to search for, collect and identify the dead applies to all dead people, “regardless to which party they belong, but also regardless of whether or not they have taken a direct part in hostilities”.¹⁶ States that are party to an armed conflict must all “take all possible measures to prevent the dead from being despoiled,” as the “[m]utilation of dead bodies is prohibited”.¹⁷

With regard to non-international armed conflicts (NIACs), the IACtHR, drawing on Article 3 common to the four Geneva Conventions, Additional Protocol II (AP II) and customary IHL,¹⁸ has maintained that, even in these exceptional circumstances, IHL “includes obligations of due diligence concerning the correct and adequate removal of corpses and the efforts that should be made to identify and to bury them in order to facilitate their subsequent identification”.¹⁹ In this regard, the San José court warned that “the management of the crime scene and the handling of

13 The right to the truth is defined in relation to the right to justice for victims of human rights violations. The aim is both judicial truth, which is the result of criminal or other proceedings in which those responsible for human rights violations are investigated, prosecuted and, if appropriate, punished, and historical truth, which is established by reports of truth commissions in post-armed conflict or post-dictatorship situations. See Laurence Burgogues-Larsen, “La erradicación de la impunidad: Claves para descifrar la política jurisprudencial de la Corte Interamericana de Derechos Humanos”, in Eduardo Ferrer Mac-Gregor (coord.), *El control difuso de convencionalidad: Diálogo entre la Corte Interamericana de Derechos Humanos y los jueces nacionales*, Fundap, Mexico, 2012; Juana María Ibáñez Rivas, “Artículo 25”, in Marie-Christine Fuchs and Christian Steiner (eds), *Convención Americana sobre Derechos Humanos: Comentario*, 2nd ed., Konrad Adenauer Stiftung, Bogotá, 2019; Luis López Guerra, “El derecho a la verdad: ¿La emergencia de un nuevo derecho en la jurisprudencia del Tribunal Europeo de Derechos Humanos?”, *Anuario Iberoamericano de Justicia Constitucional*, No. 22, 2018.

14 ICRC Customary Law Study, above note 11, Rule 112; GC I, Art. 15(1); GC II, Art. 18(1); GC IV, Art. 16(2); AP II, Art. 8.

15 ICRC Customary Law Study, above note 11, Rule 88.

16 *Ibid.*, p. 408.

17 *Ibid.*, Rule 113; GC I, Art. 15(1); GC II, Art. 18(1); GC IV, Art. 16(2); Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 34(1); AP II, Art. 8.

18 ICRC Customary Law Study, above note 11, Rules 112–113, 115–116; AP II, Art. 8.

19 IACtHR, *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Judgment (Preliminary Objections, Merits and Reparations), Series C, No. 287, 14 November 2014, para. 496.

bodies must include, as a minimum, the procedures essential for preserving evidence that may contribute to the success of the investigation”.²⁰ This means that the crime scene and corpse removal must be managed, and initial autopsies carried out,²¹ so that the remains can be identified, returned and buried, and, if applicable, so that investigation-related duties can be fulfilled.

In the European system, with respect to the procedural obligation to investigate that derives from the right to life,²² the ECtHR has pointed out the obligation of States to “account for” people who, in an international armed conflict (IAC), die in combat or succumb to their wounds. One of the implications of this obligation is that “the authorities [must] collect and provide information about the identity and fate of those concerned”.²³ This obligation also gives the authorities grounds to permit organizations like the International Committee of the Red Cross (ICRC) to collect and share information on the identity and fate of those concerned.²⁴

Regarding the search for people who have died in a NIAC, the Strasbourg court has noted that “under normal circumstances the establishment of the precise number and status of the victims of the use of lethal force is an essential element of any proper investigation of incidents involving a high number of casualties”.²⁵ Yet the Court has also acknowledged that it is not always possible to obtain a “more accurate assessment”²⁶ in view of the circumstances that can arise in armed conflict situations. These circumstances can include, for example, the use of lethal force in an active combat zone at night-time or the removal of the victims’ bodies by civilians after the strike, as happened in the *Hanan* case, which involved the armed conflict in Afghanistan.²⁷ In this respect, it is worth noting that the ECtHR cited cultural and religious factors in connection with the obligation to recover bodies, emphasizing that “the use of modern forensic techniques was difficult in view of the social and religious mores of the local population”.²⁸ According to the Court, such circumstance can delay the investigation process.²⁹

20 IACtHR, *Cruz Sánchez et al. v. Peru*, Judgment (Preliminary Objections, Merits and Reparations), Series C, No. 292, 17 April 2015, para. 367.

21 *Ibid.*, para. 431.

22 ECtHR, *Varnava and Others v. Turkey*, Appl. Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, 16073/90, Judgment (Grand Chamber), 18 September 2009, paras 187–194.

23 *Ibid.*, para. 185.

24 *Ibid.*

25 ECtHR, *Hanan v. Germany*, Appl. No. 4871/16, Judgment (Grand Chamber), 16 February 2021, para. 218.

26 *Ibid.*

27 *Ibid.* In the *Hanan* case, the ECtHR noted that the air strike ordered by the German armed forces took place “in an active combat zone at night-time” and that “the bodies were removed from the scene by the local population within hours of the air strike”.

28 *Ibid.* See Ahmed Aldawood (ed.), *IHL and Islamic Law in Contemporary Armed Conflicts: Experts’ Workshop (Geneva, 29–30 October 2018)*, ICRC, Geneva, 2020. See also Paul Tavernier, “La protection de l’exercice des religions par le droit international humanitaire”, in Anne-Sophie Millet-Devalle (ed.), *Religions et droit international humanitaire: Colloque, Nice, 18–19 juin 2007*, Editions Pédone, Paris, 2008.

29 ECtHR, *Al-Skeini and Others v. The United Kingdom*, Appl. No. 55721/07, Judgment (Grand Chamber), 7 July 2011, para. 164; ECtHR, *Hanan*, above note 25, para. 204.

In addition, although the rules of IHL applicable to IACs authorize the parties to call on civilians and aid societies to participate in the tasks of searching for and evacuating the dead,³⁰ the ECtHR has identified a clear limit when it comes to people deprived of their liberty. In the case *Georgia v. Russia (II)*, as part of its analysis of the prohibition on torture (Article 3 of the European Convention), the Court stated that the practice of guards³¹ ordering detainees (close to 160 of them, around one third women, many of them older)³² to carry out “vexatious and humiliating measures”,³³ such as cleaning the streets and collecting corpses, was not consistent with State obligations.³⁴ According to the Court, these measures contravene the European Convention as well as IHL, in particular Geneva Convention IV (GC IV) and Additional Protocol I (AP I),³⁵ which “provide in a general way that detainees are to be treated humanely and detained in decent conditions”.³⁶

In view of these standards, let us now turn to State obligations to search for and identify people who have gone missing during an armed conflict and who, in many cases, can be presumed or will be found dead.

Searching for and identifying the missing

Under IHL, “[e]ach party to the conflict must take all feasible measures to account for persons reported missing ... and must provide their family members with any information it has on their fate”.³⁷ The prohibition on forcible disappearances (i.e., involving agents of the State)³⁸ is also part of customary IHL.³⁹ The ECtHR and IACtHR have already studied the question of forcible disappearances during armed conflicts, which are also serious violations of IHRL, in order to determine the State’s potential responsibility. The two courts concur in their judgments that denying the truth about the fate of victims of forced disappearance results in a form of cruel and inhuman treatment for the closest family members.⁴⁰

30 AP I, Art. 17(2).

31 ECtHR, *Georgia v. Russia (II)*, Appl. No. 38263/08, Judgment (Merits) (Grand Chamber), 21 January 2021, para. 244.

32 *Ibid.*, paras 238–239.

33 *Ibid.*, para. 244.

34 *Ibid.*

35 *Ibid.*, para. 234. According to the ECtHR, the relevant provisions here are GC IV, Arts 27, 32, 33(1), 34, 42(1), 43, 78(1), 78(2), 85, 89, 95, 146 and 147; and AP I, Art. 75.

36 ECtHR, *Georgia v. Russia (II)*, above note 31, para. 235.

37 ICRC Customary Law Study, above note 11, Rule 117; GC I, Arts 16–17; GC II, Art. 19; GC III, Art. 122; GC IV, Arts 26, 136; AP I, Art. 33; IACtHR, *Rodríguez Vera*, above note 19, para. 478.

38 For more on how the obligation to search for and return the remains of forcibly disappeared and missing persons has evolved under international law, see Grażyna Baranowska, “Advances and Progress in the Obligation to Return the Remains of Missing and Forcibly Disappeared Persons”, *International Review of the Red Cross*, Vol. 99, No. 2, 2017.

39 ICRC Customary Law Study, above note 11, Rule 98.

40 IACtHR, *Gudiel Álvarez et al. (Diario Militar) v. Guatemala*, Judgment (Merits and Reparations), Series C, No. 253, 20 November 2012, para. 301. See L. Burgorgue-Larsen, above note 13; L. López Guerra, above note 13.

The IACtHR, citing the *Guiding Principles for the Search for Disappeared Persons* adopted by the United Nations (UN) Committee on Enforced Disappearances,⁴¹ has pointed out that the obligation to search for and locate the disappeared is a key component of the right to the truth⁴² and must be complied with in an effective, comprehensive, appropriate and diligent manner.⁴³ In situations of forced disappearance and in keeping with the right to freedom of expression,⁴⁴ the Court has noted that both the right to access to information on the fate of the disappeared person and the State's positive obligation resulting therefrom to provide it require "the active participation of all authorities involved".⁴⁵ According to the San José court,

it is not enough for the information to be provided or for the non-existence of the information to be alleged, rather, it is necessary to carry out exhaustive efforts to determine where the victim is located and inform the victim's family and society as a whole.⁴⁶

According to the Court, this obligation is independent of whether the disappearance was forcible (i.e., a strictly wrongful act) or was the result of other circumstances such as death occurring during an operation, a mistake in the process of returning the remains,⁴⁷ or "other reasons whether or not related to the armed conflict".⁴⁸

Even if the person responsible for the forcible disappearance is found guilty as a result of criminal proceedings, the State's duty to investigate thus remains intact as long as there is uncertainty about the fate of the missing person.⁴⁹ In addition, "on the assumption that internal difficulties might prevent the identification

41 UN Committee on Enforced Disappearances, *Guiding Principles for the Search for Disappeared Persons*, UN Doc. CED/C/7, Geneva, 8 May 2009.

42 IACtHR, *Tabares Toro et al. v. Colombia*, Judgment (Merits and Reparations), Series C, No. 491, 23 May 2023, para. 89.

43 *Ibid.*

44 See Françoise Hampson, "Freedom of Expression in Situations of Emergency and Armed Conflict", in Josep Casadevall, Egbert Myjer, Michael O'Boyle and Anna Austin (eds), *Freedom of Expression: Essays in Honour of Nicolas Bratza, President of the European Court of Human Rights*, Wolf Legal Publishers, Oisterwijk, 2012.

45 IACtHR, *Tabares Toro*, above note 42, para. 90. However, according to the IACtHR, the State may restrict access to information in a specific case for any reason permitted by the American Convention. In that case, the person has the right to receive a reasoned refusal.

46 IACtHR, *Members and Militants of Unión Patriótica v. Colombia*, Judgment (Preliminary Objections, Merits and Reparations), Series C, No. 455, 27 July 2022, para. 479; IACtHR, *Tabares Toro*, above note 42, para. 90. For more on this, see María Clara Galvis Patiño, "De Velásquez Rodríguez a los Principios Rectores para la Búsqueda de Personas Desaparecidas", in Juana María Ibáñez Rivas, Rogelio Flores Pantoja and Jorge Padilla Cordero (coord.), *Desaparición forzada en el Sistema Interamericano de Derechos Humanos: Balance y desafíos*, IIDH, San José, and IECEQ, Querétaro, 2020.

47 IACtHR, *Rodríguez Vera*, above note 19, para. 478.

48 IACtHR, *Vásquez Durand et al. v. Ecuador*, Judgment (Preliminary Objections, Merits and Reparations), Series C, No. 332, 15 February 2017, para. 157.

49 IACtHR, *Tenorio Roca and Others v. Peru*, Judgment (Preliminary Objections, Merits and Reparations), Series C, No. 314, 22 June 2016, para. 178.

of the individuals responsible”⁵⁰ for a forcible disappearance, “the victim’s family still have the right to know what happened to him and ... where his remains are located”.⁵¹ Therefore, in cases of forcible disappearance for which a judicial investigation has begun, the obligation to determine the victim’s whereabouts and fate persists, whether or not those responsible for the crime have been identified and punished.

In addition, the IACtHR mentions the possibility that a State can carry out “humanitarian” searches – that is, searches to determine the whereabouts or fate of a missing person that are conducted without a process already ongoing related to either the investigation, the prosecution of those responsible for the disappearance, or their eventual punishment. Thus, the Court has emphasized that States must use all appropriate and effective means at their disposal – judicial, administrative and others – to search for disappeared people.⁵² In an effort to show that the humanitarian imperative is not an obstacle to the implementation and progress of judicial proceedings on disappearances, the San José court determined that a humanitarian search for missing people is not incompatible with a subsequent judicial investigation into the crime, asserting that “[t]he remains are evidence of that which occurred [and, together with] the place where the remains are found[,] may also provide valuable information as to the perpetrators or to which institution they belonged”.⁵³ In other words, a humanitarian search for disappeared people can certainly be the starting point for a judicial investigation.

Moreover, based on the General Comment on Women Affected by Enforced Disappearances adopted by the UN Working Group on Enforced or Involuntary Disappearances,⁵⁴ the IACtHR determined, in the *Movilla Galarcio* case, that States have an obligation to adopt measures to recognize and guarantee the efforts by women to search for their loved ones (*mujeres buscadoras*)⁵⁵ during an armed conflict, as part of the State duty to prevent and investigate forcible disappearances. Similarly, the Court determined that States must guarantee that the women’s efforts are “carried out without obstacles, intimidation or threats, ensuring [their] personal integrity and ... their rights to political participation acknowledged in the [American Convention on Human Rights]”.⁵⁶ Along these same lines, and adopting a differentiated approach in its analysis, the Court noted that women are affected in unique

50 IACtHR, *Castillo Páez v. Peru*, Order (Monitoring Compliance with Judgment), 3 April 2009, para. 19.

51 *Ibid.*

52 *Ibid.*, paras 19, 22.

53 IACtHR, “*Las Dos Erres*” *Massacre v. Guatemala*, Judgment (Preliminary Objection, Merits and Reparations), Series C, No. 211, 24 November 2009, para. 245; IACtHR, *Rodríguez Vera*, above note 19, para. 480.

54 UN Working Group on Enforced or Involuntary Disappearances, “General Comment on Women Affected by Enforced Disappearances”, UN Doc. A/HRC/WGEID/98/2, 14 February 2013.

55 IACtHR, *Movilla Galarcio et al. v. Colombia*, Judgment (Merits and Reparations), Series C, No. 452, 22 June 2022, para. 180; IACtHR, *Tabares Toro*, above note 42, para. 108. For more on this topic, see Julissa Mantilla, “Violencia sexual y desaparición forzada: El rol de las mujeres en la construcción de la verdad”, IDEHPUCP, 29 August 2023, available at: <https://idehpucp.pucp.edu.pe/boletin-eventos/violencia-sexual-y-desaparicion-forzada-el-rol-de-las-mujeres-en-la-construccion-de-la-verdad-28568/>.

56 IACtHR, *Movilla Galarcio*, above note 55, para. 181; IACtHR, *Tabares Toro*, above note 42, para. 110.

ways (economically, socially and psychologically)⁵⁷ in situations where their loved ones have been forcibly disappeared in an armed conflict.

For the specific case of a disappearance occurring during an IAC, in terms of prevention, the San José court noted that “any detention, regardless of its cause or duration, must be duly registered”;⁵⁸ that States have an obligation to set up an “official information bureau responsible for receiving and providing information on protected people who are within its power”⁵⁹ in order to avoid forcible disappearances;⁶⁰ and that States must facilitate the ICRC’s access to anyone deprived of their liberty.⁶¹ For the IACtHR, “the failure to register a detention, despite clear obligations in this regard, show the intention to hide it.”⁶²

The ECtHR, in cases with explicit reference to IHL, has considered that, based on the right to life and the procedural obligation to investigate, States have a “continuing obligation ... to account for the whereabouts and fate of the missing”.⁶³ If necessary, “measures for redress could then be effectively adopted”.⁶⁴ Yet the Court added that the “discovery of the body or the presumption of death ... merely casts light on one aspect of the fate of the missing person”,⁶⁵ and that “[a]n obligation to account for the disappearance and death, and to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain”.⁶⁶ Even if “a lapse of [time] without any news of the missing persons may provide strong circumstantial evidence that they have died meanwhile, this does not remove the procedural obligation to investigate”.⁶⁷

Compliance with the obligation to search for and identify the dead or missing “is a *conditio sine qua non* of respect for the [other] rules”⁶⁸ of IHL. The second part of this article will look at whether the judgments of the ECtHR and IACtHR protect the dead and missing with respect to these other rules – including the obligations to bury remains and investigate war crimes – that are incumbent upon States involved in an armed conflict.

57 IACtHR, *Movilla Galarcio*, above note 55, para. 180; IACtHR, *Tabares Toro*, above note 42, para. 108.

58 IACtHR, *Vásquez Durand*, above note 48, para. 127.

59 *Ibid.* Under GC IV, Art. 138, the information required for each person must include at least “his surname, first names, place and date of birth, nationality, last residence and distinguishing characteristics, the first name of the father and the maiden name of the mother, the date, place and nature of the action taken with regard to the individual, the address at which correspondence may be sent to him and the name and address of the person to be informed”.

60 IACtHR, *Vásquez Durand*, above note 48, para. 108.

61 *Ibid.*, para. 128. See GC IV, Arts 76(6), 142–143; GC III, Arts 125–126.

62 IACtHR, *Vásquez Durand*, above note 48, para. 129.

63 ECtHR, *Varnava*, above note 22, para. 186.

64 *Ibid.*

65 *Ibid.*, para. 145.

66 *Ibid.*

67 *Ibid.*, paras 146, 148.

68 ICRC Customary Law Study, above note 11, p. 537.

Obligations to bury the dead and investigate war crimes

When States comply with the obligation to search for and identify the dead and missing in armed conflict, they are more likely to comply with other obligations under IHL, including those of disposing of the dead in a respectful manner and investigating war crimes. These State obligations are also linked to respect for family life⁶⁹ and the right of families to know the fate of their missing relatives.⁷⁰

In cases involving an armed conflict in which the ECtHR and IACtHR refer explicitly to IHL, the two courts have determined the content and scope of the obligation to bury the remains of the dead and of missing people found dead as well as the obligation to investigate, prosecute and punish those responsible for serious violations of IHL, including extrajudicial executions, massacres and forcible disappearances. Those two obligations are the focus of the next two sections.

Burying the dead

Under IHL, “[t]he dead must be disposed of in a respectful manner”⁷¹ and “their graves respected and properly maintained”.⁷² Furthermore, if the dead have not been identified, “each party to the conflict must record all available information prior to disposal and mark the location of the graves”.⁷³ Compliance with this obligation is necessary so that people who go missing in armed conflict can be identified.

In this regard, although the American Convention on Human Rights “does not explicitly establish the right to ‘bury the dead’”,⁷⁴ the IACtHR “has addressed this issue not as a substantive right, but in the context of the reparations in cases of forced disappearances; mainly, as a result of the violation of another right that is established in the Convention”.⁷⁵ The Court has emphasized that “the impossibility of burying the dead [is] a fact that increases the suffering and anguish of the next of kin, which can be considered in the reparations when determining an amount for the non-pecuniary compensation in their favor”.⁷⁶

69 ICRC Customary Law Study, above note 11, Rule 105; GC IV, Arts 27(1), 82(3); AP II, Art. 4(3)(b), 5(2)(a).

70 ICRC Customary Law Study, above note 11, Rule 117; GC I, Arts 16–17; GC II, Art. 19; GC III, Art. 122; GC IV, Art. 136.

71 ICRC Customary Law Study, above note 11, Rule 115; GC I, Art. 17; GC II, Art. 20; GC III, Art. 120; GC IV, Art. 130; AP I, Art. 34(2); AP II, Art. 8. According to Rule 114 of customary IHL, “[p]arties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin” and must also “return their personal effects to them”: ICRC Customary Law Study, above note 11, Rule 114. See also GC I, Arts 16(4), 17(3); GC II, Art. 19(3); GC III, Arts 120(6), 122(9); GC IV, Arts 130(2), 139; AP I, Arts 34(2), 34(3).

72 ICRC Customary Law Study, above note 11, Rule 115.

73 *Ibid.*, Rule 116; GC I, Arts 16–17; GC II, Arts 19–20; GC III, Arts 120–122; GC IV, Arts 129–131, 136–139.

74 IACtHR, *Río Negro Massacres v. Guatemala*, Judgment (Preliminary Objection, Merits and Reparations), Series C, No. 250, 4 September 2012, para. 155.

75 *Ibid.*

76 *Ibid.*

Thus, the San José court has noted that “care for the mortal remains of a person is a form of observance of the right to human dignity”⁷⁷ and that “the mortal remains of a person deserve respectful treatment before that person’s next of kin, due to the significance they have for them.”⁷⁸ In keeping with the ECtHR’s attention to religious and cultural factors, the IACtHR has pointed out the need for an “ethnic” approach when the State’s obligation comes into play in cases involving indigenous and tribal peoples.⁷⁹ Indeed, in the *Bámaca Velásquez* case, the IACtHR noted the obligation to respect the remains of a member of a non-State armed group who was part of the Maya people (Mam ethnic group) and who was a victim of forcible disappearance in the armed conflict in Guatemala. The Court pointed out that “funeral ceremonies ensure the possibility of the generations of the living, the deceased person, and the deceased ancestors meeting anew.”⁸⁰ Thanks to this ethnic approach, according to the Court, “the cycle between life and death closes with these funeral ceremonies”,⁸¹ as the group is given a chance to pay homage to the victim, keep him near and return or take him to live with his ancestors, and “new generations [can] share and learn about his life, something that is traditional in his indigenous culture”.⁸²

In addition, in a case related to the IAC between Ecuador and Peru, the San José court underscored the obligation of States to respect the remains of the dead and to “facilitate access to graves for family members ... and representatives of official grave registration offices, and to set out practical arrangements regarding this access.”⁸³ As former judge A. A. Cançado Trindade noted in one of his initial separate opinions, this obligation complies fully with IHL, which “imposes expressly the respect for the mortal remains of the dead persons, as well as a burial place with dignity for them.”⁸⁴ Moreover, with regard to full reparations, the IACtHR has determined that, in armed conflict, the State is responsible for taking all necessary steps to return to the next of kin the remains of victims of wrongful death⁸⁵ or of forcible

77 IACtHR, *Bámaca Velásquez v. Guatemala*, Judgment (Reparations), Series C, No. 91, 22 February 2002, para. 81.

78 *Ibid.*

79 See Laurence Burgogues-Larsen, “Le système interaméricain des droits de l’homme face aux religions”, in Robert Uerpman-Witzack, Evelyne Lagrange and Stefan Oeter (eds), *Religion and International Law: Living Together*, Brill Nijhoff, Leiden and Boston, MA, 2018; Juana María Ibáñez Rivas, “Los derechos de pueblos indígenas y tribales en la jurisprudencia de la Corte interamericana de derechos humanos”, in IACtHR, *Jurisprudencia de la Corte IDH y buenas prácticas sobre derechos de los pueblos indígenas y tribales, derecho a un medio ambiente sano y personas defensoras de derechos humanos*, San José, 2024.

80 IACtHR, *Bámaca Velásquez*, above note 77, para. 81.

81 *Ibid.*

82 *Ibid.*

83 IACtHR, *Vásquez Durand*, above note 48, para. 109. See AP I, Art. 34(2)(a).

84 IACtHR, *Bámaca Velásquez*, above note 77, Separate Opinion of Judge A. A. Cançado Trindade, para. 2. See GC IV, Art. 130; AP I, Art. 34.

85 IACtHR, *Las Palmeras v. Colombia*, Judgment (Reparations), Series C, No. 96, 26 November 2002, paras 76–77.

disappearance (if the remains are found).⁸⁶ In both situations, the Court has ordered the State to cover the burial costs.⁸⁷

Furthermore, in some cases of extrajudicial executions and massacres where victims were buried in mass graves, the IACtHR has ordered the State to immediately undertake the necessary steps to exhume⁸⁸ and individually identify the executed victims within a reasonable time frame⁸⁹ and to return their remains to their next of kin.⁹⁰ In one of these cases, the Court pointed out that burial in mass graves “without respecting the basic standards that would facilitate the subsequent identification of the bodies”⁹¹ and “the failure to return the bodies to the next of kin may constitute demeaning treatment, to the detriment of the person who died, as well as to the members of his or her family”.⁹²

In the European system, the ECtHR has deemed that the obligation of States to “account for” people who, in an IAC, died in fighting or succumbed to their wounds implies the need to “proper[ly] dispos[e] of remains and ... collect and provide information about the identity and fate of those concerned”.⁹³

Let us now consider the question of whether the State obligation to investigate war crimes, prosecute suspects and punish those found guilty of wrongful death and forcible disappearance protects the dead and missing in armed conflict.

Investigating wrongful deaths and forcible disappearances

Under IHL, States are required to investigate potential war crimes that fall within their jurisdiction and to prosecute any suspects.⁹⁴ Wrongful deaths and forcible disappearances are both examples of war crimes.

As both the ECtHR and the IACtHR have made clear in cases related to armed conflicts, States have an obligation to investigate potential war crimes where

86 IACtHR, *Río Negro Massacres*, above note 74, para. 155.

87 IACtHR, *Las Palmeras*, above note 85, paras 76–77; IACtHR, *Río Negro Massacres*, above note 74, para. 155.

88 IACtHR, “*Las Dos Erres*”, above note 53, paras 244–249.

89 IACtHR, “*Mapiripán Massacre*” v. *Colombia*, Judgment (Merits and Reparations), Series C, No. 134, 15 September 2005, paras 305–311, 326.

90 IACtHR, “*Las Dos Erres*”, above note 53, paras 244–249.

91 IACtHR, *Rodríguez Vera*, above note 19, para. 327.

92 *Ibid.*, para. 327.

93 ECtHR, *Varnava*, above note 22, para. 185. It is important to note that the ECtHR has extensive case law when it comes to the question of burial in connection with the right to respect for private and family life (Article 8 of the European Convention on Human Rights), even where this question is not linked to cases involving an armed conflict or cases with an explicit reference to IHL. See, for example, ECtHR, *M. L. v. Slovakia*, Appl. No. 34159/17, Judgment, 14 October 2021, para. 23; ECtHR, *Solska and Rybicka v. Poland*, Appl. Nos 30491/17, 31083/17, Judgment, 20 September 2018, paras 104–110; ECtHR, *Gurbanov v. Armenia*, Appl. No. 7432/17, Judgment, 5 October 2023, paras 63–69; ECtHR, *Sabanchiyeva and Others v. Russia*, Appl. No. 38450/05, Judgment, 6 June 2013, para. 146.

94 ICRC Customary Law Study, above note 11, Rule 158; GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146.

wrongful deaths and forcible disappearances have occurred.⁹⁵ The two courts⁹⁶ have also deemed, with their respective nuances, that war crimes, as defined by the Rome Statute of the International Criminal Court,⁹⁷ are an exception to the rule set out in AP II that calls on the authorities, at the end of hostilities, “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”.⁹⁸ Under both IHRL and IHL, States must combat impunity for war crimes and protect the right of victims’ families to know the truth.⁹⁹

The IACtHR has applied the status of *jus cogens*¹⁰⁰ to the obligation to investigate potential grave human rights violations (extrajudicial executions or massacres, forcible disappearances, torture, and slavery and servitude and their modern-day forms) that also constitute serious breaches of IHL. With respect to forcible disappearances, the Court has noted that the terms of the Inter-American Convention on Forced Disappearance of Persons strengthen the duty to investigate.¹⁰¹ Furthermore, the Court has pointed out that the investigation requires a “differentiated analysis of the impact that those violations had on the different groups in a situation of vulnerability ... , such as the children and women”,¹⁰² so that specific violations against these groups are not made invisible.¹⁰³

For cases associated with an IAC, the San José court has asserted that States’ obligation to investigate breaches of rules of IHL designed to protect civilians is strengthened by GC IV, which assigns to States the “obligation to search for persons alleged to have committed, or to have ordered to be committed, ... grave breaches [of

95 IACtHR, *Cruz Sánchez*, above note 20, para. 350; ECtHR, *Al-Skeini*, above note 29, paras 168–169, 174; ECtHR, *Hanan*, above note 25, para. 204.

96 IACtHR, *Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment (Merits and Reparations), Series C, No. 252, 25 October 2012, paras 266–280, 284–286; ECtHR, *Marguš v. Croatia*, Appl. No. 4455/10, Judgment (Grand Chamber), 27 May 2014, paras 126–132, 138.

97 Rome Statute of the International Criminal Court, 2187 UNTS 3, 17 July 1998 (entered into force 1 July 2002). The Rome Statute defines “war crimes” as, among other things, violence to life and person, including murder, as well as cruel treatment, torture and executions without previous judgment (Art. 8(2)(c)(i), (ii) and (iv)), and intentional attacks against the civilian population and rape (Art. 8(2)(e)(i) and (vi)). For more on the definition of “war crimes”, see Georges Abi-Saab and Rose-Marie Abi-Saab, “Les crimes de guerre”, in Hervé Ascensio, Emmanuel Decaux and Alain Pellet (dir.), *Droit international pénal*, 2nd ed., Editions Pédone, Paris, 2012, Chap. 10.

98 See ICRC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, Geneva, 2008, pp. 28–29.

99 IACtHR, *Gudiel Álvarez*, above note 40, paras 295–302; ECtHR, *Abakarova v. Russia*, Appl. No. 16664/07, Judgment, 15 October 2015, para. 111.

100 IACtHR, *Goiburú et al v. Paraguay*, Judgment (Merits and Reparations), Series C, No. 153, 22 September 2006, para. 84; IACtHR, *Rochac Hernández et al v. El Salvador*, Judgment (Merits and Reparations), Series C, No. 285, 14 October 2014, para. 92.

101 Adopted in Belém do Pará, Brazil, 9 June 1994, at the 24th regular session of the General Assembly of the Organization of American States.

102 IACtHR, *Village of Los Josefinos Massacre v. Guatemala*, Judgment (Preliminary Objection, Merits and Reparations), Series C, No. 442, 3 November 2021, para. 115.

103 *Ibid.*

the Convention]”,¹⁰⁴ including forcible disappearances and other violations of IHL, both treaty and customary.¹⁰⁵

In its analysis of the obligation to investigate, the ECtHR referred not just to the Geneva Conventions but also to the *Guidelines on Investigating Violations of International Humanitarian Law*, a document prepared by the ICRC and the Geneva Academy of International Humanitarian Law and Human Rights.¹⁰⁶ Under Geneva Conventions III and IV, the Strasbourg court reiterated that in occupation situations¹⁰⁷ “an official enquiry must be held by the Detaining Power following the suspected homicide of a prisoner of war”,¹⁰⁸ and that “[e]very death or serious injury of an internee, caused or suspected to have been caused by a sentry, another internee or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power”.¹⁰⁹ Regarding forcible disappearances, the Court noted that “the ongoing failure to provide the requisite investigation will be regarded as a continuing violation”.¹¹⁰

Moreover, in some cases in which States took part in a multinational force under the auspices of an international organization, the ECtHR has pointed out that

the investigation should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the State complied with its obligation under Article 2 [of the European Convention on Human Rights] to protect life.¹¹¹

Furthermore, the ECtHR has deemed that people suspected of having committed war crimes should be arrested, tried and punished “by military or civilian tribunals”¹¹² – or even by a “Partisan trial”¹¹³ – in a fair trial.¹¹⁴ Prosecuting those suspected of war crimes in a military tribunal runs counter to the IACtHR’s case

104 GC IV, Art. 146.

105 IACtHR, *Vásquez Durand*, above note 48, para. 143.

106 ECtHR, *Hanan*, above note 25, para. 85; ICRC and Geneva Academy of International Humanitarian Law and Human Rights, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice*, Geneva, 2019.

107 ECtHR, *Al-Skeini*, above note 29, para. 92.

108 *Ibid.* See also GC III, Art. 121.

109 ECtHR, *Al-Skeini*, above note 29. See GC IV, Art. 131. See also GC I, Arts 49–50; GC II, Arts 50–51; GC III, Arts 129–130; GC IV, Arts 146–147.

110 ECtHR, *Varnava*, above note 22, para. 148.

111 ECtHR, *Al-Skeini*, above note 29, para. 163; ECtHR, *Hanan*, above note 25, para. 205.

112 ECtHR, *Kononov v. Latvia*, Appl. No. 36376/04, Judgment (Grand Chamber), 17 May 2010, paras 202–204.

113 *Ibid.*, para. 221. The ECtHR appears to be positing that, if these tribunals observe the guarantees of a fair trial in their administration of justice, they are acting in compliance with the European Convention on Human Rights. See Carlos Arévalo and Luisa María Lozano, “Decisiones Judiciales de Actores no Estatales en el marco de los conflictos armados: Las FARC frente a la Jurisdicción Especial para La Paz”, *Anuario Iberoamericano sobre Derecho Internacional Humanitario*, Vol. 1, 2020.

114 ECtHR, *Kononov*, above note 112, paras 202–204, 221.

law, under which ordinary courts alone are competent to investigate and prosecute suspects and punish those found guilty of human rights violations, including serious violations such as wrongful death and forcible disappearances in armed conflict.¹¹⁵

With regard to NIACs, in the *Hanan* case, the ECtHR pointed out that the fact that the deaths which the authorities must investigate took place during active hostilities in an “extraterritorial armed conflict”¹¹⁶ is a decisive factor when it comes to the requirements and scope of the investigation into the crime.¹¹⁷ Indeed, taking into account the complexity of an investigation involving this phase of a conflict, the Court has stated that “the procedural duty under Article 2 [of the European Convention on Human Rights] must be applied realistically”.¹¹⁸ This position differs from the judgments of the IACtHR, which has only stated in general terms that it could take into account “specific circumstances or constraints created by the situation of [armed] conflict per se when analysing whether the State has complied with its obligations”,¹¹⁹ including the duty to investigate.

Conclusion

In a number of cases, the ECtHR and IACtHR have acted as monitoring bodies regarding compliance with the rules of IHL designed to protect the dead and missing in international or non-international armed conflicts. The two courts have addressed the right to the truth and the State obligations of prevention, investigation and reparations by developing standards that govern the duties to search for and identify the dead and missing, to bury the dead (including missing people who are found dead) and to investigate wrongful deaths and forcible disappearances in armed conflict.

The two courts have taken into account relevant rules of IHL in interpreting the European and American Conventions on Human Rights, and as a result of this hermeneutic process, the relationship between IHL and IHRL has evolved. It has become a symbiotic relationship: not only has IHL bolstered the interpretation of the European and American Conventions, but the Conventions and their interpretation have also expanded the meaning and scope of the rules of IHL that are meant to protect the dead and missing in armed conflicts.

115 IACtHR, *Tenorio Roca*, above note 49, para. 194.

116 ECtHR, *Hanan*, above note 25, para. 223.

117 With the reversal of the *Banković and Others* judgment, and in light of IHL, the ECtHR confirmed that there were exceptions to the principle of territoriality, thereby confirming the potential extraterritorial scope of the general obligations of the States party to the European Convention on Human Rights in armed conflict situations. Yet it remains to be seen how the ECtHR rules when it comes to State jurisdiction when the facts of a case occur in the chaos of active hostilities. The IACtHR has adopted the ECtHR's standards in the area of extraterritorial jurisdiction in its advisory opinions, but it remains to be seen how they are applied in a future court case. J. M. Ibáñez Rivas, *Le droit international humanitaire*, above note 3, pp. 191–202. See ECtHR, *Al-Skeini*, above note 29, paras 143–149; ECtHR, *Georgia v. Russia (II)*, above note 31, para. 137; ECtHR, *Ukraine and the Netherlands v. Russia*, Appl. Nos 8019/16, 43800/14, 28525/20, Decision (Grand Chamber), 25 January 2023, para. 704.

118 ECtHR, *Al-Skeini*, above note 29, para. 168; ECtHR, *Hanan*, above note 25, para. 224.

119 IACtHR, *Cruz Sánchez*, above note 20, para. 350.

This symbiotic relationship between IHRL and IHL promotes diligent and preventive behaviour by States in times of peace, compliance with the norms and principles of IHL during hostilities, and a post-armed conflict scenario in which the ideals of transitional justice aimed ultimately at protecting human dignity – an objective shared by both of these branches of international law – can be achieved.