VIVIANA PALACIO REVELLO

Amnesties in transitions from armed conflict to negotiated peace: the State obligation to investigate, prosecute and punish serious human rights violations before the Inter-American Court of Human Rights

Dissertação de Mestrado

Orientador: Professor Associado Dr. Alberto do Amaral Júnior

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Dissertação apresentada à Banca Examinadora do Programa de Pós-Graduação em Direito, da Faculdade de Direito da Universidade de São Paulo, como exigência parcial para obtenção do título de Mestre em Direito, na área de concentração Direito Internacional, sob a orientação do Professor Associado Dr. Alberto do Amaral Júnior.

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To the victims of the armed conflict in Colombia and their dream of truth, justice, reparation and non-recurrence

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"Del mismo modo que la paz no puede ser solamente la ausencia de combate, la reconciliación no es susceptible de ser impuesta por decreto" (Méndez, 2001, p.307)

ABSTRACT

Palacio Revello, V. (2017). *Amnesties in transitions from armed conflict to negotiated peace: the State obligation to investigate, prosecute and punish serious human rights violations before the Inter-American Court of Human Rights* (Master's Dissertation). Faculty of Law, University of Sao Paulo, Sao Paulo.

This work discusses exonerations and limitations from criminal liability represented in amnesties enacted at the end of the hostilities of a non-international armed conflict in the light of standards of human rights protection and State international responsibility. In 2012, Judge García Sayán appended a Concurring Opinion in the *Case of the Massacres of El Mozote and nearby places v. El Salvador* from which some legal scholars have claimed the emergence of some awareness on the part of the Inter-American Court of Human Rights on tensions in transitions from armed conflict to negotiated peace justifying a reassessment of the State obligation to investigate, prosecute and punish serious human rights violations in these specific transitional contexts. Defining the existence of this alleged reassessment gains in importance for the upcoming transition in Colombia. Amnesties are discussed from three approaches: amnesties derived from Article 6(5) of 1977 Additional Protocol II to the Geneva Conventions of 1949; amnesties for serious human rights violations; and amnesties exonerating partially and conditionally from criminal liability, based on the analysis of 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace between the State of Colombia and FARC guerrilla group. It is concluded that there is a well-established condemnation for total amnesties for serious human rights violations and international crimes, but amnesties exonerating partially and conditionally from liability require a cautious approach. Selection and prioritization attending the seriousness of the crime and level of responsibility of the offender do not find support in the Inter-American Human Rights System, but alternative penalties and reduced sentences, provided that rights of the victims to truth, reparation and non-recurrence are fulfilled and certain reasonable degree of proportionality is maintained, may be accepted.

Keywords: Human rights. Armed conflict. Amnesties. State international responsibility. Inter-American Court of Human Rights.

RESUMO

Palacio Revello, V. (2017). *Amnesties in transitions from armed conflict to negotiated peace: the State obligation to investigate, prosecute and punish serious human rights violations before the Inter-American Court of Human Rights* (Dissertação de Mestrado). Faculdade de Direito, Universidade de São Paulo, São Paulo.

Este trabalho discute exonerações e limitações à responsabilidade criminal representadas nas anistias promulgadas no fim das hostilidades de um conflito armado não internacional à luz dos padrões de proteção dos direitos humanos e responsabilidade internacional do Estado. Em 2012, o Juiz García Sayán anexou um voto concorrente no *Caso dos Massacres de El Mozote e lugares vizinhos vs. El Salvador* a partir do qual alguns doutrinantes tem afirmado o surgimento de certo reconhecimento de parte da Corte Interamericana de Direitos Humanos sobre tensões em transições do conflito armado para paz negociada que justificaria uma reavaliação dos deveres do Estado de investigar, julgar e punir graves violações dos direitos humanos nestes contextos transicionais específicos. Definir a existência dessa alegada reavaliação ganha importância por conta da próxima transição na Colômbia. As anistias são discutidas a partir de três enfoques: anistias derivadas do artigo 6(5) do Protocolo Adicional II de 1977 às Convenções de Genebra de 1949; anistias por graves violações dos direitos humanos; e anistias que exoneram parcialmente e condicionalmente de responsabilidade, baseado na análise do Acordo Final para a Terminação do Conflito e a Construção de uma Paz Estável e Duradoura de 2016 entre o Governo da Colômbia e o grupo guerrilheiro das FARC. Concluímos que existe uma condenação bem consolidada das anistias totais para graves violações dos direitos humanos e crimes internacionais, porém, as anistias que parcialmente e condicionalmente limitam responsabilidade precisam de uma abordagem cautelosa. A seleção e priorização baseada na gravidade do crime e nível de responsabilidade do perpetrador não encontram suporte no Sistema Interamericano de Direitos Humanos, mas as sanções alternativas e sentenças reduzidas, sempre que os direitos das vítimas à verdade, à reparação e a não repetição sejam atendidos e certo grau razoável de proporcionalidade seja mantido, podem ser aceitas.

Palavras-chave: Direitos humanos. Conflito armado. Anistias. Responsabilidade internacional do Estado. Corte Interamericana de Direitos Humanos.

ABBREVIATIONS, ACRONYMS AND SYMBOLS

§	Paragraph or paragraphs
ACHR	American Convention on Human Rights
ECtHR	European Court of Human Rights
DPLF	Due Process of Law Foundation
HRL	Human Rights Law
I/A Court H.R.	Inter-American Court of Human Rights
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
JEP	Jurisdicción Especial para la Paz or Special Jurisdiction for Peace
MCJ	Military Criminal Justice
MP	Magistrado Ponente or Reporting Judge
OAS	Organization of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
TC	Truth commission
TCs	Truth commissions
UN	Organization of the United Nations

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INTRODUCTION

In 2012, Judge García Sayán appended a Concurring Opinion in the *Case of the Massacres of El Mozote and nearby places v. El Salvador* from which some legal scholars have claimed the emergence of some awareness on the part of the I/A Court H.R. regarding tensions in transitions from armed conflict to negotiated peace justifying a reassessment of the State obligation to investigate, prosecute and punish serious human rights violations in these specific transitional contexts. This alleged reassessment gains in importance for the upcoming transition in one of the States Party to the Inter-American Human Rights System: Colombia. This work is aimed at discussing exonerations and limitations from criminal liability, represented in amnesties enacted at the end of the hostilities, in the light of standards of human rights protection and State international responsibility.

On October 25, 2012 the I/A Court H.R. issued a judgment on merits, reparations and costs in the *Case of the Massacres of El Mozote and nearby places v. El Salvador*[1] related to successive massacres committed between December 11 and 13, 1981 in the context of a military operation conducted in seven places located in the Department of Morazán, during which around 1.000 people were extrajudicially executed, including an alarming number of children. Other serious human rights violations such as torture, rape, enforced disappearance and forced displacement were also perpetrated in this context.

From 1980 to 1991, El Salvador experienced a non-international armed conflict. The Government of El Salvador was confronted with Frente Farabundo Martí para la Liberación Nacional (FMLN), which emerged in 1980 seeking to launch an offensive and promote a popular uprising. Although it failed to attain its objective, FMLN ended up controlling some villages, settled areas of political influence and achieved international recognition as a fighting force. Against this background, the armed conflict intensified in the framework of counterinsurgency operations and involved indiscriminate attacks against the civilian population, particularly peasant population where the guerrilla was active.

In this context are framed the massacres of El Mozote and nearby places, the largest massacres against civilian population perpetrated in the contemporary history of Latin America, as acknowledged by the State itself. Between December 11 and 13, 1981, the

[1] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of the Massacres of El Mozote and nearby places v. El Salvador*, Judgment Series C No.252, 2012 (Merits, Reparations and Costs); Judgment Series C No.264, 2013 (Interpretation of the Judgment on Merits, Reparations and Costs).

Salvadoran Armed Forces conducted a series of massive and indiscriminate extrajudicial executions of defenseless individuals in the village of El Mozote and nearby places, which "were committed with extreme cruelty, mainly using firearms, but also by beatings with sticks, slitting throats and even setting fire to places in which there were people who were still alive" (I/A Court H.R., Judgment Series C No.252, 2012, §128). The Armed Forces executed every individual they encountered, killed animals, set fire to crops and homes, and destroyed anything of community value.

The peace negotiation process began in 1989 when the five Presidents requested the intervention of the UN Secretary General with a view to achieve peace in the Central American region. Some agreements were reached, in all of which the respect for human rights and the need to overcome impunity were reaffirmed, including 1992 Chapultepec Accords or final peace agreement. The TC was set up in 1992 seeking to create confidence in positive changes promoted by the peace process and to facilitate national reconciliation. The TC final report regarding the patterns of violence of State agents and members of the FMLN during the armed conflict was published in 1993.

The Law for National Reconciliation or Legislative Decree 147/1992 following 1992 Chapultepec Accords eliminated the possibility of granting amnesties to perpetrators of serious human rights violations. Nevertheless, the Law of General Amnesty for the Consolidation of Peace or Legislative Decree 486/1993, published five days after the presentation of the report of the TC, extended the possibility of granting amnesties to perpetrators of heinous crimes. Consequently, investigation, prosecution and punishment of serious human rights violations occurred in the context of the massacres of El Mozote and nearby places were dismissed.

Considering the context in which these serious human rights violations occurred, the I/A Court H.R. attended Article 3 common to the four 1949 Geneva Conventions, 1977 Additional Protocol II and customary IHL as complementary instruments of interpretation. In particular, as the *Case of the Massacres of El Mozote and nearby places v. El Salvador* deals with an amnesty law concerning acts committed in a situation of non-international armed conflict, the I/A Court H.R., and notably the Concurring Opinion of Judge García Sayán, included Article 6(5) of 1977 Additional Protocol II concerning penal prosecutions at the end of the hostilities of a non-international armed conflict, in the legal analysis.

First of all, Article 65(2) of the Rules of Procedure of the I/A Court H.R. provides that *"[a]ny Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting . . . said opinions*

shall only refer to the issues covered in the judgment." In this respect, it should be pointed out that the Concurring Opinion of Judge García Sayán was broadly embraced by Judges Franco, Macaulay, Abreu Blondet and Pérez Pérez.

The Concurring Opinion of Judge García Sayán (I/A Court H.R., Judgment Series C No.252, 2012) exposed as a central argument the need to harmonize criminal justice and negotiated peace, which

> [M]ust be carried out by weighing these rights in the context of transitional justice itself. Thus, particularities and specificities may admittedly arise when processing these obligations in the context of a negotiated peace. Therefore, in these circumstances, States must weigh the effect of criminal justice both on the rights of the victims and on the need to end the conflict. (§27)

Judge García Sayán (I/A Court H.R., Judgment Series C No.252, 2012) begins by affirming that in the *Case of Barrios Altos v. Peru*, the I/A Court H.R. considered that legal provisions intending to exclude responsibility in cases of gross human rights violations are inadmissible and lack juridical effect since these offenses attempt against non-derogable rights, and that this idea was reinforced in cases such as *Almonacid-Arellano v. Chile*, *La Cantuta v. Peru*, *Gomes-Lund et al. v. Brazil* and *Gelman v. Uruguay.* According to Judge García Sayán (I/A Court H.R., Judgment Series C No.252, 2012)

> Each of the cases on amnesty laws examined by the Court up until the massacres of El Mozote and nearby places had its own characteristics, nuances and emphasis, either with regard to the context in which the law originated or its scope. However, they all had in common that none of these amnesty laws was created in the context of a process aimed at ending, *through negotiations*, a non-international armed conflict. [emphasis added] (§9)

Referring to Article 6(5) of 1977 Additional Protocol II, the I/A Court H.R. opened up the possibility for amnesties granted at the end of the hostilities of a non-international armed conflict, leaving behind the insight in accordance to which any crime committed in these situations could not be amnestied or pardoned. In this respect, Judge García Sayán (I/A Court H.R., Judgment Series C No.252, 2012) emphasized that the I/A Court H.R. concluded that "even though amnesties may be permitted as a component of the ending of a non-international armed conflict, they have a limit which is in relation to war crimes and crimes against humanity" (§18). Furthermore, "peace agreements approved by the United Nations can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights" (I/A Court H.R., Judgment Series C No.252, 2012, Concurring Opinion of Judge García Sayán, §19).

Nevertheless, the Concurring Opinion of Judge García Sayán introduced a point of discussion in this matter, to the extent that State duties related to performing actions aimed

at investigating and establishing the facts–duty to investigate–and identifying individual responsibilities–duty to prosecute–remain untouched, but if applying criminal sanctions is difficult, the duty to impose punishments proportionate to the gravity of the violations–duty to punish–should yield. "Even though the aim of criminal justice should be to accomplish all three tasks satisfactorily, if applying criminal sanctions is complicated, the other components should not be affected or delayed" (I/A Court H.R., Judgment Series C No.252, 2012, Concurring Opinion of Judge García Sayán, §28).

This nuance of the State duty to punish is explained by the emergence of the *peace* as a right of the society and as an aim that shall be pursued by the State. The Concurring Opinion of Judge García Sayán (I/A Court H.R., Judgment Series C No.252, 2012) argued that

> States have a legal obligation to address the rights of the victims and, with the same intensity, the obligation to prevent further acts of violence and to achieve peace in an armed conflict by the means at its [*sic*] disposal. Peace as a product of a negotiation is offered as a morally and politically superior alternative to peace as a result of the annihilation of the opponent. Therefore, international human rights law should consider that peace is a right and that the States must achieve it. (§37)

Some distinct and complementary ideas can be drawn from the Concurring Opinion of Judge García Sayán (I/A Court H.R., Judgment Series C No.252, 2012): ". . . a negotiated peace process attempts to ensure that the combatants choose peace and submit to justice" (§30), and if criminal punishes become difficult, "routes towards alternative or suspended sentences" (§30) such as "[r]eduction of sentences, alternative punishments, direct reparation from the perpetrator to the victim, and public acknowledgment of responsibility" (§31) could be designed and implemented, giving priority to the cases of those involved in the most serious human rights violations (§29) like "facts that can be categorized as war crimes or crimes against humanity in the definitions of the Statue of the International Criminal Court" (§24) and distinguishing "between the 'perpetrators' and those who performed functions of high command and gave the orders" (§30).

Judge García Sayán affirms that considering that none of the rights and duties is of an absolute nature, in times of transition from armed conflict to peace, the State can validly be in a situation of inability to implement fully and simultaneously some prerogatives and burdens it has assumed, being entitled to partially override some of them. This being the case,

> [I]n certain transitional situations between armed conflicts and peace, it can happen that a State is not in a position to implement fully and simultaneously, the various international rights and obligations it has assumed. In these circumstances, taking into consideration that none of those rights and obligations is of an absolute nature, it is legitimate that they be

> weighed in such a way that the satisfaction of some does not affect the exercise of the others disproportionately. (I/A Court H.R., Judgment Series C No.252, 2012, Concurring Opinion of Judge García Sayán, §38)

Certain experts affirm that no distinction should be drawn in transitional contexts regarding the State duty to investigate, prosecute and punish gross human rights violations (Méndez, 2015), whereas other legal scholars argue that from the Concurring Opinion of Judge García Sayán in the *Case of the Massacres of El Mozote and nearby places v. El Salvador* it can be perceived certain awareness from the I/A Court H.R. about tensions in transitions from armed conflict to negotiated peace (Gutiérrez Ramírez, 2014), represented in a confrontation between justice–as a right of the victims to an effective judicial remedy and judicial protection–and national reconciliation–as a transit from a situation of armed conflict to a situation of definitive ceasefire–. For some legal scholars, this alleged awareness could modify the State duty to investigate, prosecute and punish serious human rights violations for these specific transitional contexts. This is particularly important for the upcoming transition in one of the States Party to the Inter-American Human Rights System: Colombia.

The Concurring Opinion of Judge García Sayán in the *Case of the Massacres of El Mozote and nearby places v. El Salvador* has even substantiated some points in 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace concluded between the Government of Colombia and FARC guerrilla group, *e.g.*, the creation of the Special Jurisdiction for Peace.[2] Nevertheless, there is a debate regarding the adequacy of some points contained in this Concurring Opinion of Judge García Sayán to the standards of human rights protection and the State international responsibility, in particular, ideas related to exoneration from criminal liability and the State obligation to investigate, prosecute and punish perpetrators of serious human rights violations.

Although this Concurring Opinion is not the current positioning of the I/A Court H.R., it can be taken into account for further judgments and for the continuity of the debate in the field of international legal doctrine (Serrano Suárez, 2015). According to Olásolo Alonso (2014), this is a topic of current interest that transcends the particularities of the Colombian case, since measures proscribed by international law that cannot be negotiated by actors involved in serious human rights violations committed in situations of armed conflict will be accurately defined through the analysis of Colombia. The positioning of the

[2] *See* 2016 Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, p.143

I/A Court H.R. on this topic, as ultimate interpreter of the American Convention on Human Rights, will undoubtedly set a parameter for the rest of the world in terms of protection of the rights to an effective judicial remedy and judicial protection, and the correlative State international responsibility.

Defining the State obligation to investigate, prosecute and punish serious human rights violations in a continent marked by widespread atrocities resulting from situations of armed conflict is an issue of the utmost importance for the Inter-American Human Rights System. El Salvador, Guatemala, and Peru, *e.g.*, represent cases where the concern about what to do with human rights violations committed during the armed conflict could return to their national agendas. Colombia represents a case where the concern regarding the *due diligence* reflected in the State obligation to investigate, prosecute and punish gross human rights violations related to the armed conflict is currently addressed in its national agenda.

On the basis of the considerations outlined above, this work is aimed at discussing exonerations and limitations from criminal liability, represented in amnesties enacted at the end of the hostilities of a non-international armed conflict in the light of the standards of human rights protection and State international responsibility. For this purpose, amnesties are discussed from three approaches related to the State international responsibility in cases concerning armed conflict: amnesties derived from Article 6(5) of 1977 Additional Protocol II; amnesties for serious human rights violations; and amnesties exonerating partially and conditionally from liability, based on the analysis of 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace signed between the Government of Colombia and FARC guerrilla group.

We depart from the search and selection of contentious cases related to situations of armed conflict in Colombia, El Salvador, Guatemala and Peru judged by the I/A Court H.R. Other emblematic cases were selected in order to address specific issues discussed herein. The subjects of the cases are briefly exposed seeking to contextualize human rights violations committed in situations of armed conflict in the region. Pursuant to Uprimny Yepes, Sánchez Duque and Sánchez León (2014), rulings of the I/A Court H.R. as a whole constitute guidelines for determining content and scope of HRL. Regarding the IACHR, relevant reports in the framework of the system of petitions and cases, thematic reports and statements are included. Positioning of legal scholars and international bodies, provisions of international treaties, domestic legislation and case-law, and soft law contribute to the discussion.

The first chapter addresses amnesties derived from Article 6(5) of 1977 Additional Protocol II, inasmuch as the I/A Court H.R. (Judgment Series C No.252, 2012), has stated that “[a]ccording to the international humanitarian law applicable to these situations, the enactment of amnesty laws on the conclusion of hostilities in non-international armed conflicts are sometimes justified to pave the way to a return to peace” (§285). If some amnesties are allowed at the end of the hostilities in a non-international armed conflict, it is necessary to define how Article 6(5) can be interpreted in order to determine the scope of this permission. The first chapter begins by exposing the use of IHL as an interpretative resource of the American Convention on Human Rights and the legal base justifying this use; continues by discussing Article 6(5); and concludes by addressing the State duty to prosecute international crimes committed in non-international armed conflicts.

The second chapter discusses amnesties for serious human rights violations before the I/A Court H.R., since the State of Colombia has affirmed that “from the Inter-American Court’s analysis in the case of the *Massacres of El Mozote and Nearby Places,* the Commission must conclude that international law prohibits amnesties in contexts in which peace is being sought, solely with respect to 'international crimes'” (IACHR, 2013, §263). The second chapter begins by presenting a comprehensive vision in relation to the State obligation to investigate, prosecute and punish serious human rights violations in the Inter-American Human Rights System; and concludes by addressing the scope of gross human rights violations.

According to Uprimny et al. (2014), the determination of the scope of the State duty to investigate, prosecute and punish involves defining the object of such an obligation or the conducts covered by it, as well as the specific obligations constituting this duty. In the first chapter, we discuss the scope of war crimes, crimes against humanity and genocide, or international crimes. In the second chapter, we address torture, extrajudicial execution and enforced disappearance, offenses repeatedly defined as serious human rights violations in the contentious case-law of the I/A Court H.R. regardless the existence of elements to be classified as international crimes. The State obligation to investigate, prosecute and punish serious human rights as such is discussed throughout this work.

The third chapter addresses amnesties exonerating partially and conditionally from criminal liability, intending to define international standards on the protection of human rights and State responsibility from mechanisms enshrined in the 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace. Some legal scholars argue that “any peace accord between the Colombian government and the

FARC . . . will not be able to adapt to a strict interpretation of the duty to investigate, judge, and penalize" (Sánchez León, 2016, p.172), thus supporting amnesties exonerating partially and conditionally from criminal liability. The third chapter begins by presenting a discussion regarding the weighing of State obligations for serious human rights violations in times of transition from armed conflict to peace; continues by addressing the nationally-based selection and prioritization system over human rights violations; and concludes by discussing the proportionality of punishment and alternative penalties before HRL.

1 AMNESTIES DERIVED FROM ARTICLE 6(5) OF 1977 ADDITIONAL PROTOCOL II

Transitional contexts can be distinguished by an eventual perpetration of serious human rights violations or its unlikelihood. In the context of a negotiated peace, as perpetrators are still powerful enough, ceasing violence may often be conditioned to the absence of criminal sanctions. Under these circumstances, from the *Case of the Massacres of El Mozote and nearby places v. El Salvador,* and particularly, from the Concurring Opinion of Judge García Sayán, International Humanitarian Law has been included in the discussion of amnesties enacted in transitions from armed conflict to negotiated peace, in an effort to give consideration to certain obstacles and tensions inherent in these processes such as demands of people who used to take part in the hostilities related to not to be tried and different requirements to prosecute all sorts of crimes committed in situations of armed conflict.

In the *Case of the Massacres of El Mozote and nearby places v. El Salvador,* the I/A Court H.R. (Judgment Series C No.252, 2012) invoked Article 6(5) of 1977 Additional Protocol II and stated that "[a]ccording to the international humanitarian law applicable to these situations, the enactment of amnesty laws on the conclusion of hostilities in non-international armed conflicts are sometimes justified to pave the way to a return to peace" (§285). Judge García Sayán, in his Concurring Opinion (I/A Court H.R., Judgment Series C No.252, 2012) affirmed that "[t]here is no norm in positive international law that has explicitly prescribed [*sic*] any kind of amnesty" (§17) and that "[t]he only explicit mention of amnesty in a multilateral treaty is contained in article 6(5) of Protocol II Additional to the Geneva Conventions of August 12, 1949" (§17).

If some amnesties are allowed at the end of the hostilities in a non-international armed conflict, it is thus necessary to define how Article 6(5) of 1977 Additional Protocol II can be interpreted in order to determine the scope of the permission contained therein. Méndez (1997) summarizes the argument to be developed throughout this chapter, saying that with a view to achieve national reconciliation, amnesty becomes necessary to facilitate the reintegration of combatants into peaceful political life. Nevertheless, Méndez (1997) emphasizes that amnesties encouraged from international law encompass crimes related to the armed conflict itself, such as rebellion and sedition–committed by the armed opposition groups–as well as offenses like arbitrary arrest and minor ill-treatment–committed by State

agents–and not serious violations of the laws of war materialized in war crimes, crimes against humanity and genocide.

Addressing the specificity introduced from Article 6(5) of 1977 Additional Protocol II to transitions from a non-international armed conflict starts by understanding the purpose of the I/A Court H.R. in using IHL as an interpretative resource of 1969 American Convention on Human Rights, as well as the legal base justifying this use. The first section exposes the jurisprudential positioning before the preliminary objection filed by the States referred to as lack of competence *ratione materiae*, and introduces Article 29(b) of the American Convention on Human Rights and the evolutive interpretation derived thereof. We conclude that IHL rules assist in establishing the State international responsibility and other aspects of the violations alleged, and their use is justified because when interpreting the American Convention on Human Rights it is always necessary to choose the alternative that is most favorable to protection of the human being.

The second section discusses Article 6(5) of 1977 Additional Protocol II in order to define what crimes could be validly covered by amnesties encouraged therein. We start by considering that the recourse to IHL, specifically, to 1977 Additional Protocol II, acquires importance since this is the only multilateral instrument in international law explicitly referring to amnesties. We conclude that it follows from Article 6(5) that war crimes, crimes against humanity, genocide and gross human rights violations cannot be amnestied, but offenses strictly related to the armed uprising against the State could be legitimately decriminalized, and that the I/A Court H.R. opened up the possibility to issue these kinds of amnesties at the end of a non-international armed conflict.

The third section addresses the State duty to prosecute war crimes, crimes against humanity and genocide–international crimes–committed in situations of non-international armed conflict. This section starts by exposing this obligation in accordance with IHL rules arising from positive and customary law and positioning of international human rights bodies, and continues by presenting contentious case-law of the I/A Court H.R. represented in some emblematic cases regarding war crimes as serious violations of Common Article 3, crimes against humanity and genocide. We conclude that it follows from all sources of international law on this subject that the States are obliged to investigate, prosecute and, if appropriate, punish the perpetrators of war crimes, crimes against humanity and genocide, and that this duty cannot be overridden.

1.1 THE INTERNATIONAL HUMANITARIAN LAW AS AN INTERPRETATIVE RESOURCE OF 1969 AMERICAN CONVENTION ON HUMAN RIGHTS

Transitional contexts can be distinguished by an eventual perpetration of serious human rights violations or its unlikelihood. In a violent transition, one of the conflicting parties is defeated; whereas in a negotiated transition, some perpetrators are still powerful enough to commit gross human rights violations once again (Gutiérrez Ramírez, 2014). Being aware of situations of armed conflict experienced by some countries in the region and the subsequent need to achieve national reconciliation, the I/A Court H.R. has included IHL in the discussion of amnesties framed in transitions from armed conflict to peace.

Addressing this specificity starts by understanding the purpose of the I/A Court H.R. in using IHL as an interpretative resource of the American Convention on Human Rights, as well as the legal base justifying this use. The first part of this section exposes the jurisprudential positioning before the preliminary objection referred to as "lack of competence *ratione materiae";* the second part introduces Article 29(b) of the American Convention on Human Rights and the evolutive interpretation derived thereof.

1.1.1 The jurisprudential positioning before the preliminary objection referred to as lack of competence *ratione materiae*

International humanitarian law (IHL), also known as *ius in bello*, "is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict" (ICRC, 2004, p.1), regardless the compliance or not with the legal use of force as enshrined in 1945 Charter of the United Nations.[3] IHL applies in cases of international armed conflict, non-international armed conflict and wars of national liberation, "protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare" (ICRC, 2004, p.1). E. Tardif (lecture notes, 26 May 2017) claims that IHL also aims to restrict hostilities to the amount necessary to achieve the objective of the conflict which, regardless of the causes for which the parties are fighting for, can only be to weaken the military potential of the enemy.

First of all, Protocol I Additional to the Geneva Conventions of 1949 (1977), regarding international armed conflicts, in Article 1(3) refers to Article 2 common to those

[3] Intending to maintain international peace and security, 1945 Charter of the United Nations rules the legal use of force through Chapter VII concerning "action with respect to threats to peace, breaches of the peace, and acts of aggression."

Conventions[4] in order to set its scope of application, encompassing *"all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."* Additionally, Article 1(4) thereof covers *"armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination"* which does not require meeting with armed resistance, by virtue of Common Article 2.

Non-international armed conflicts are ruled by Article 3 common to the four 1949 Geneva Conventions and 1977 Protocol II Additional to these Conventions. Common Article 3 defines certain prohibitions to be applied in case of *"armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."*[5] Besides that, Article 1(1) of Additional Protocol II (1977) encompasses armed conflicts taking place in the territory of a High Contracting Party *"between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."*[6]

The law applicable to non-international armed conflicts thus distinguishes between two situations. If the armed group does not have territorial control, Common Article 3 will be applicable; but if the armed group can exercise control over a part of the territory of the State, 1977 Additional Protocol II will join Common Article 3 in ruling the non-international armed conflict. In both cases, the customary IHL applicable to non-international armed conflicts will also govern the conduct of hostilities. According to E. Tardif (lecture notes, 26 May 2017), the threshold that a situation must satisfy in order to be defined as an armed conflict under Common Article 3 is, therefore lower, because the only requirement set by the Article is that the conflict takes place in the territory of one of the High Contracting Parties.

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[4] *See* Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War.

[5] Pursuant to the ICRC (2008) in the Opinion Paper *How is the Term 'Armed Conflict' Defined in International Humanitarian Law?* As 1949 Geneva Conventions have been universally ratified, the requirement contained in Common Article 3 in relation to the execution of the non-international armed conflict *"in the territory of one of the High Contracting Parties"* has lost importance in practice.

[6] Differently to Common Article 3, 1977 Additional Protocol II has not been universally ratified and its scope of application appears to be more limited. However, 1977 Additional Protocol II does not modify the existing conditions of application of Common Article 3, which remains as the sole provision binding worldwide and governing all non-international armed conflicts (ICRC, 2016).

Since the end of the Cold War, non-international armed conflicts have prevailed over classic wars between States (Burgorgue-Larsen & Úbeda de Torres, 2010). In this context, Common Article 3 represents an advance in IHL inasmuch as the States agreed on regulating, through a treaty-based framework, an issue historically considered "as being exclusively their domestic affair" (ICRC, 2016, §351). That said, as previously stated, IHL applies in cases of international armed conflict, non-international armed conflict, and wars of national liberation, excluding its application to situations of internal disturbances and tensions *"such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts",* in accordance with 1977 Additional Protocol II, Article 1(2).

The IACHR (1997) has reinforced the exclusion of internal disturbances and tensions from the scope of IHL since "they are governed by domestic law and relevant rules of international human rights law" (§151), *v.gr.*, in the Merits Report No.55/97, *Juan Carlos Abella (Argentina),* regarding an attack to a military barrack located in La Tablada, Province of Buenos Aires, in 1989, in which most of the armed individuals and some State agents died during a combat of about 30 hours. The IACHR (1997) concluded in this case that "despite its brief duration, the violent clash between the attackers and members of the Argentine armed forces triggered application of the provisions of Common Article 3, as well as other rules relevant to the conduct of internal hostilities" (§156).

Even if the law applicable to armed conflicts had gained wide recognition, a definition of *armed conflict* in international law remained pending for a number of years. Under these conditions, following the declaration of the United States of America of a global war on terrorism after the attacks of September 11, as international law scholars had not embraced a broadly accepted definition of armed conflict, the International Law Association (ILA) Use of Force Committee prepared a report on this topic (O'Connell, 2009), intending to distinguish between situations of armed conflict and cases in which peacetime law prevails, and support a correct application of HRL (ILA, 2010). Due to the lack of a multilateral treaty providing a generally applicable definition of armed conflict, this notion needed to be found "in customary international law as evidenced by state practice and *opinio juris,* as well as subsidiary sources, judicial decisions and scholarly commentary" (ILA, 2010, p.5).

Lower level, chaotic violence or internal disturbances must be differentiated in relation to armed conflict. In *Prosecutor v. Tadić* regarding crimes against humanity and war crimes committed against non-Serb civilians in 1992 in Prijedor and surrounding

areas, Bosnia and Herzegovina, which were under the control of the Serb Democratic Party,[7] the "International Criminal Tribunal for the former Yugoslavia (ICTY) found that both a certain amount of organization among all fighting groups and a certain level of intense fighting distinguished armed conflict from other violence, such as riots and border incidents" (ILA, 2010, p.3). Organization and intensity are the two criteria differentiating these kinds of situations.

On the one hand, the *criterion of organization* entails that "armed conflicts involve two or more organized groups"[8] (ILA, 2010, p.28). Differently to international armed conflicts where most of them involve the regular armed forces of the States, the satisfaction of the criterion of organization can become more complex in the case of non-international armed conflicts (ILA, 2010). In *Prosecutor v. Milošević* regarding crimes against humanity and war crimes committed during the Yugoslav wars occurred from 1991 to 1999,[9] the ICTY stated that the organization can be assessed by "command structure; exercise of leadership control; governing by rules; providing military training; organized acquisition and provision of weapons and supplies; recruitment of new members; existence of communications infrastructure; and space to rest" (ILA, 2010, p.29).

On the other hand, "hostilities must reach a certain level of intensity to qualify as an armed conflict" (ILA, 2010, p.29). The *criterion of intensity* was clarified from the judgment of the ICTY in *Prosecutor v. Boškoski & Tarčulovski* about breaches of the laws or customs of war[10] committed during and subsequent a police operation conducted in 2001 in Ljuboten, former Yugoslav Republic of Macedonia, being Ljube Boškoski the Minister of the Interior and Johan Tarčulovski a police officer. There are some factors to assess the intensity of the conflict, none of which is decisive in itself since a lower level with respect to any one may satisfy this criterion if the level of another factor is high (ILA, 2010); these factors were detailed by the ICTY (Case No.IT-04-82-T, 2008) in *Prosecutor v. Boškoski & Tarčulovski,* including

[7] Duško Tadić was the President of the Local Board of the Serb Democratic Party in Kozarac, nearby town.
[8] The ICTY (Case No.IT-04-84-T, 2008) in *Prosecutor v. Haradinaj et al.,* considered that ". . . an armed conflict can exist only between parties that are sufficiently organized to confront each other with military means [and] State governmental authorities have been presumed to dispose of armed forces that satisfy this criterion" (§60). According to E. Tardif (lecture notes, 26 May 2017), the assessment of the level of organization thus concerns only non-State armed groups–including dissident armed forces–involved in acts of violence.
[9] Slobodan Milošević was the Yugoslav president by that time.
[10] *See* Article 3 of the Statute of the International Criminal Tribunal for the former Yugoslavia (1993) containing violations of the laws or customs of war, which turn out to be indicative as opposed to exhaustive, when providing that "[t]he International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to. . ."

> [T]he seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed . . . the number of civilians forced to flee from the combat zones; the type of weapons used, in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by shelling or fighting; the quantity of troops and units deployed; existence and change of front lines between the parties; the occupation of territory, and towns and villages; the deployment of government forces to the crisis area; the closure of roads; cease fire orders and agreements, and the attempt of representatives from international organisations to broker and enforce cease fire agreements. (§177)

For non-State actors to switch from participants of internal disturbances or tensions, to parties to an armed conflict, it is thus required "organization, meaning a command structure, training, recruiting ability, communications, and logistical capacity . . . [and] [s]uch organized forces are only recognized as engaged in armed conflict when fighting between them is more than a minimal engagement or incident" (ILA, 2010, p.2). In this sense, in the Merits Report No.55/97, *Juan Carlos Abella (Argentina),* the IACHR (1997) set out a guideline, arguing that unlike internal disturbances or tensions, an armed conflict "requires the existence of organized armed groups that are capable of and actually do engage in combat and other military actions against each other" (§152). "Internal disturbances characterized by sporadic acts of violence and internal tensions characterized by widespread arrests are not considered armed conflicts" (Junod, 1983, p.30).

Non-international armed conflicts will call for the application of HRL and IHL, whereas internal disturbances or tensions will be solely ruled by HRL. Claiming the existence of a non-international armed conflict or an internal disturbance or tension in order to define the applicable law requires an assessment of the facts, and will not be bound to the denomination asserted by the contenders (Burgorgue-Larsen & Úbeda de Torres, 2010). On this point, the ILA Use of Force Committee (2010) argues that declarations of war or armed conflict, national legislation, and expressions of subjective intent by parties to a conflict, for example, may have evidentiary value, but the *de jure* state or situation of armed conflict depends on the presence of objective criteria.

With that in mind, as the I/A Court H.R. has judged some cases concerning serious human rights violations framed in non-international armed conflicts, IHL has been used as an interpretative resource in order to specify rights and duties contained in the American Convention on Human Rights. In this respect, when the I/A Court H.R. has referred to

IHL, the existence of an armed conflict–which is essential for the referral to this *corpus juris*–, has not been established by itself (Ibáñez Rivas, 2016). The I/A Court H.R. has relied on the recognition of international responsibility, the interpretation of the silence of the State and reports of TCs when defining the existence of an armed conflict as a proven fact (Ibáñez Rivas, 2016).

The I/A Court H.R. incorporated IHL to its legal analysis, for the first time, in the *Case of Las Palmeras v. Colombia*[11] related to extrajudicial executions of civilians committed in the context of the Colombian armed conflict. On January 23, 1991, the National Police with assistance of members of the Armed Forces conducted an operation in Las Palmeras, Mocoa, Department of Putumayo. During this alleged counterinsurgency operation, at least six civilians were extrajudicially executed while doing their routine activities. That morning, while children were at the rural schoolhouse of Las Palmeras waiting for classes to start, members of the security forces murdered two laborers who were working on the repair of a septic tank and one teacher, as well as two brothers who were milking some cattle near the schoolhouse and one unidentified person.

Some measures were taken by members of the security forces in order to justify this action. They "put military uniforms on the bodies of some of those killed, burned their real clothes and threatened a number of witnesses in the case . . . claiming that they were the bodies of subversives killed in the supposed clash" (I/A Court H.R., Judgment Series C No.90, 2001, §2; Judgment Series C No.96, 2002, §35(d)). The criminal proceedings were assumed by the Military Criminal Justice before which any investigation, prosecution and punishment did not progressed. Administrative-law proceedings acknowledged that the victims of the military operation did not belong to any armed opposition group, and that when the events occurred, they were carrying out their usual tasks. The phenomenon of the *False Positives*[12] that would strongly afflict the Colombian rural population some years later, started to show up in cases such as this one.

The IACHR requested the I/A Court H.R. to declare that the State had violated the right to life contained in Article 4 of the American Convention on Human Rights, as well

[11] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of Las Palmeras v. Colombia,* Judgment Series C No.67, 2000 (Preliminary Objections); Judgment Series C No.90, 2001 (Merits), and Judgment Series C No.96, 2002 (Reparations and Costs).

[12] The phenomenon of the *False Positives* refers to extrajudicial executions of civilians subsequently presented as guerrillas killed in combat with a view to inflate the casualty rates caused to the enemy. Killings committed under these circumstances have been assessed as crimes against humanity by the ICC and as war crimes by some sectors of society–considering that these offenses were committed on occasion of the armed conflict–. The first cases date back to the 80s, but the phenomenon started to show up to a larger extent from 2008, approximately.

as Common Article 3 (I/A Court H.R., Judgment Series C No.67, 2000). The IACHR stated that it was first concluded whether Common Article 3 had been violated, and once this was positively answered, it was then considered whether Article 4 was infringed (I/A Court H.R., Judgment Series C No.67, 2000). The above since

> [I]n an armed conflict, there are cases in which the enemy may be killed legitimately, while, in others, this was prohibited . . . [and as] the American Convention did not contain any rule to distinguish one hypothesis from the other . . . the Geneva Conventions should be applied. (I/A Court H.R., Judgment Series C No.67, 2000, §29)

In response to this request, Colombia filed a preliminary objection referred to as lack of competence *ratione materiae.* The State argued that the I/A Court H.R. "does not have the competence to apply international humanitarian law and other international treaties" (I/A Court H.R., Judgment Series C No.67, 2000, §28). The State also emphasized the principle of consent in international law, as a result of which, without the consent of the State, the I/A Court H.R. could not apply the Geneva Conventions (I/A Court H.R., Judgment Series C No.67, 2000). "Colombia [also] established the distinction between 'interpretation' and 'application' [in the sense that] [t]he Court may interpret the Geneva Conventions and other international treaties, but it may only apply the American Convention" (I/A Court H.R., Judgment Series C No.67, 2000, §30).

The I/A Court H.R. (Judgment Series C No.67, 2000) concluded that the American Convention on Human Rights "has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions" (§33). The I/A Court H.R. admitted the preliminary objection filed by the State. However, from this case it can be argued that "the relevant provisions of the Geneva Conventions could be taken into account as elements for the interpretation of the American Convention"[13] (I/A Court H.R., Judgment Series C No.259, 2012, §23).

The jurisdiction *ratione materiae* of the I/A Court H.R. is defined through Article 62(3) of the American Convention on Human Rights (1969), providing that the I/A Court H.R. can assume jurisdiction over *"all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States*

[13] In the *Case of Bámaca-Velásquez v. Guatemala,* the I/A Court H.R. (Judgment Series C No.70, 2000) considered that "there is a similarity between the content of Article 3, common to the 1949 Geneva Conventions, and the provisions of the American Convention and other international instruments regarding non-derogable human rights (such as the right to life and the right not to be submitted to torture or cruel, inhuman or degrading treatment). This Court has already indicated in the *Las Palmeras Case* (2000), that the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention" (§209).

Parties to the case recognize or have recognized such jurisdiction."[14] IHL is not the regulation that human rights judges must apply, but the Inter-American Human Rights System does not derogate this rule (Burgorgue-Larsen & Úbeda de Torres, 2010). Thus,

> [B]y using IHL as a supplementary norm of interpretation to the treaty-based provisions, the Court is not making a ranking between normative systems, because the applicability and relevance of IHL in situations of armed conflict is evident. This only means that the Court can observe the regulations of IHL, as the specific law in this area, in order to make a more specific application of the provisions of the Convention when defining the scope of the State's obligations. (I/A Court H.R., Judgment Series C No.259, 2012, §24)

The *Case of Las Palmeras v. Colombia* marked the beginning of explicit references to IHL in the contentious case-law of the I/A Court H.R., particularly in cases involving four States Party to the American Convention on Human Rights that experienced non-international armed conflicts: Colombia, El Salvador, Guatemala and Peru (Ibáñez Rivas, 2016). The use of IHL as an interpretative resource of the provisions contained in the American Convention on Human Rights found part of its support in the legal argument outlined by the IACHR (I/A Court H.R., Judgment Series C No.67, 2000) that "ignoring the meaning and scope of certain international obligations of the State and renouncing the task of harmonizing them with the competence of the organs of the inter-American system in an integral and teleological context, would imply betraying the ethical and juridical benefit promoted in Article 29" (§31).

In the *Case of the Santo Domingo Massacre v. Colombia,*[15] the I/A Court H.R. stated, once again, the application of IHL rules in order to detail the scope of provisions contained in the American Convention on Human Rights. On December 12, 1998, the Colombian Armed Forces conducted a military operation in the Village of Santo Domingo, Tame, Department of Arauca, seeking to combat the armed opposition groups operating in this area, Fuerzas Armadas Revolucionarias de Colombia (FARC)[16] and Ejército de

[14] On this point, it should be stressed that other regional instruments also confer to the IACHR and the I/A Court H.R. a mandate to monitor compliance with those instruments, and thus establish additional bases for jurisdiction *ratione materiae.* For further information, *see* 1985 Inter-American Convention to Prevent and Punish Torture, Article 8; 1994 Inter-American Convention on Forced Disappearance of Persons, Articles XIII and XIV; 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belem do Para", Article 12 granting jurisdiction in relation to violations of Article 7 thereof; and 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", granting jurisdiction over individual complaints related to Trade Union Rights (Article 8) and Right to Education (Article 13).

[15] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of the Santo Domingo Massacre v. Colombia,* Judgment Series C No.259, 2012 (Preliminary Objections, Merits and Reparations); Judgment Series C No.263, 2013 (Request for interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs).

[16] FARC emerged in 1964 as a predominant peasant guerrilla with a strong presence in rural areas. The most serious human rights violations committed by this armed group include murder of civilians, kidnapping and recruitment of under-age children (Human Rights Watch, 2017).

Liberación Nacional (ELN),[17] whose presence was explained by the revenue derived from oil and the transit for legal and illegal goods to Venezuela characteristic of that region. This military operation, framed in the operations *Relámpago* and *Pantera*, lasted some hours and involved the use of several aircrafts, one of them loaded with a cluster bomb.

The strafing intensified in the night, as a result of which some inhabitants kept their lights on to identify themselves as civilian population. The cluster bomb was launched in the morning of December 13, 1998.[18] This airborne military operation resulted in the death of 17 individuals–six of them children–, as well as personal injuries caused to another group of people–also including children–and force displacement of the survivors seeking for State protection. The events also lead to subsequent sacking, pillaging and destruction of property of the victims.

Due to the context of armed conflict in which the human rights violations occurred, the IACHR attended IHL rules in order to specify the obligations of the State. Before this situation, Colombia filed the preliminary objection referred to as lack of competence *ratione materiae*, arguing that the I/A Court H.R. "does not have competence to make the type of declarations that relate to the application of international humanitarian law, because 'war law' does not fall within its competences" (I/A Court H.R., Judgment Series C No.259, 2012, §16). The State also argued that HRL should be interpreted in the light of the principles of IHL because of the implications of the state of emergency on the constitution and scope of some basic guarantees, but before a situation of armed conflict, IHL becomes *lex specialis* (I/A Court H.R., Judgment Series C No.259, 2012).

The I/A Court H.R. (Judgment Series C No.259, 2012) dismissed this preliminary objection, considering that

> [A]lthough the American Convention has only empowered it to determine the compatibility of the States' acts and omissions or laws with this Convention and not with the provisions of other treaties or customary norms, when making this analysis, it can, as it has in other cases. . . interpret the obligation [*sic*] and the rights contained in the American Convention in light of other treaties. (§24)

The I/A Court H.R. (Judgment Series C No.259, 2012) recalled the *principle of distinction between civilians and combatants*, according to which attacks may only be

[17] ELN emerged in 1965 as a Marxist-Leninist guerrilla. The most serious human rights violations committed by this armed group include kidnapping, forced displacement and personal injuries derived from anti-personnel mines (Human Rights Watch, 2017).

[18] It should be stressed that the context in which the cluster bomb was launched was a disputed fact. On the one hand, it was claimed that the village of Santo Domingo was directly bombed. On the other hand, it was claimed that the bomb was launched 500 meters away from the village in a wooded area, but some inhabitants died because of the activation of an explosive device placed by armed opposition groups close to the village.

directed against combatants or military objectives, and must not be directed against civilians or civilian objects (ICRC, 2009, Rule 1), and concluded that "the State failed to comply with the principle of distinction when conducting the said airborne operation" (§213). The I/A Court H.R. (Judgment Series C No.259, 2012) also considered that the State disregarded the *principle of precaution in attack* (§216-229) by virtue of which the parties to the conflict must take all feasible precautions to protect the civilians and civilian objects against the effects of attacks (ICRC, 2009, Rule 22). Finally, since the military objective was not hit, the I/A Court H.R. (Judgment Series C No.259, 2012) argued that an analysis referred to the *principle of proportionality,* according to which the use of force must not be disproportionate and must be limited to what is essential to obtain the military advantage pursued (ICRC, 2009, Rule 14) would be unfounded (§215).

The interpretation in the light of IHL generated a re-evaluation of the general duties of the States Party to the American Convention on Human Rights in contexts of armed conflict (Ibáñez Rivas, 2016). The I/A Court H.R. uses *ius in bello* as an interpretative resource to define the scope of some duties, such as the State duty to investigate, prosecute and punish serious human rights violations. On this matter, it has been pointed out that despite the I/A Court H.R. "cannot attribute international responsibility under International Humanitarian Law, as such, said provisions are useful to interpret the Convention, in the process of establishing the responsibility of the State and other aspects of the violations alleged"[19] (I/A Court H.R., Judgment Series C No.134, 2005, §115).

1.1.2 The evolutive interpretation derived from Article 29(b) of 1969 American Convention on Human Rights

Article 29(b) of the American Convention on Human Rights (1969) on restrictions regarding interpretation, disposes that no provision contained therein shall be interpreted as *"restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party."* This provision, containing the most favorable to the individual clause, has supported the development of *principio pro personae,* in accordance to which human

[19] There is a positioning according to which the explicit use of IHL by the I/A Court H.R., becoming more technical and specialized, leads to cross the limits between "interpretation" and "application" in some cases. For further information on arguments related to this topic, *see* Ibáñez Rivas, J. M. (2016). El derecho internacional humanitario en la jurisprudencia de la Corte Interamericana de Derechos Humanos. *Revista Derecho del Estado, 36*, 167-198.

rights shall be broadly interpreted. The IACHR (1997), in the Merits Report No.55/97, *Juan Carlos Abella (Argentina),* argued that the purpose of Article 29(b)

> . . . is to prevent States Parties from relying on the American Convention as a ground for limiting more favorable or less restrictive rights to which an individual is otherwise entitled under either national or international law. Thus, where there are differences between legal standards governing the same or comparable rights in the American Convention and a humanitarian law instrument, the Commission is duty bound to give legal effort to the provision(s) of that treaty with the higher standard(s) applicable to the right(s) or freedom(s) in question. If that higher standard is a rule of humanitarian law, the Commission should apply it. (§165)

The evolutive interpretation arising from Article 29(b) of the American Convention on Human Rights was also raised in the *Case of the "Mapiripán Massacre" v. Colombia*.[20] This massacre occurred in Mapiripán, Department of Meta, at a time of territorial disputes between guerrillas, paramilitary groups and drug trafficking organizations with a view to control this area, considered important for the production of coca and poppy, livestock-raising and agriculture. Due to the strategic importance, Autodefensas Unidas de Colombia (AUC)[21] launched an armed campaign in order to increase its control over the territory. In this context, and arguing the presence of guerrillas, in early 1997 the AUC held several meetings with a view to organize their entry into the area of Mapiripán and the inhabitants of said municipality were declared to be military objectives.

On July 12, 1997 about 100 members of the AUC landed in the airport of San José de Guaviare on irregular flights coming from the Department of Antioquia, and were aided by military agents since no record of this arrival was produced and they could freely board trucks that were waiting for them. On July 14, the AUC entered the village of Charras, Department of Guaviare, and threatened to kill every inhabitant who paid taxes to FARC. On July 15, around 100 armed men wearing uniforms and weapons for exclusive use by the Armed Forces surrounded Mapiripán by land and river. The AUC took control of the town, communications and public offices. From July 15 to July 21, some inhabitants were kidnapped, tortured, dismembered, eviscerated, decapitated and murdered for being

[20] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of the "Mapiripán Massacre" v. Colombia,* Judgment Series C No.122, 2005 (Preliminary Objections); Judgment Series C No.134, 2005 (Merits, Reparations and Costs).

[21] AUC emerged in 1997 as an organization seeking to contain the expansion of guerrillas, purpose for which they counted on the frequent collaboration or acquiescence of State agents, including members of the security forces (Human Rights Watch, 2017). Paramilitary groups in Colombia are responsible of serious human rights violations such as massacres, forced displacement and torture. The I/A Court H.R. (Judgment Series C No.134, 2005) argued that "[i]n its reports on the human rights situation in Colombia since 1997, the Office of the United Nations High Commissioner for Human Rights has documented cases representative of violations of the Right to Life, in which the government and the armed forces allegedly collaborated with the paramilitary in murdering, threatening, or displacing the civilian population" (§96.19).

allegedly linked to FARC. About 49 individuals were killed and their remains were thrown into the Guaviare River. The security forces arrived to Mapiripán on July 22, when the massacre had ended and after the arrival of the media, when the paramilitary had already destroyed much of the physical evidence. These events besides intimidation, possibility of further damage, having to testify or already having done so caused the displacement of complete groups of families from Mapiripán to other cities of the country.

Claiming that "human rights treaties are live instruments, whose interpretation must go hand in hand with evolving times and current living conditions" (I/A Court H.R., Judgment Series C No.134, 2005, §106), the use of IHL as an interpretative resource to detail rights and duties contained in the American Convention on Human Rights was justified, because "when interpreting the Convention it is always necessary to choose the alternative that is most favorable to protection of the rights enshrined in said treaty, based on the principle of the rule most favorable to the human being" (I/A Court H.R., Judgment Series C No.134, 2005, §106).

Bearing in mind the *principio pro personae*, the I/A Court H.R. (Judgment Series C No.134, 2005) stated, regarding the recourse to IHL, that

> The obligations derived from said international provisions must be taken into account, according to Article 29.b) of the Convention, because those who are protected by said treaty do not, for that reason, lose the rights they have pursuant to the legislation of the State under whose jurisdiction they are; instead, those rights complement each other or become integrated to specify their scope or their content. (§115)

As a result of the evolutive interpretation derived from Article 29(b), the I/A Court H.R. (Judgment Series C No.134, 2005) argued that regarding the "establishment of the international responsibility of the State in the instant case, the Court cannot set aside the existence of general and special duties of the State to protect the civilian population, derived from International Humanitarian Law. . ." (§114). Under these conditions, as the torture and murder of a group of people in Mapiripán was committed with the tolerance or acquiescence of the State, the I/A Court H.R. (Judgment Series C No.134, 2005) emphasized that the "[d]ue respect for the individuals protected entails passive obligations (not to kill, not to violate physical safety, etc.), while the protection due entails positive obligations to impede violations against said persons by third parties" (§114). The facts in this case were thus assessed based on the *State duty to protect the civilian population,* as enshrined in Common Article 3.

The reference to Article 29(b) of the American Convention on Human Rights has been supplemented attending general rules of interpretation of treaties contained in 1969

Vienna Convention on the Law of the Treaties (Ibáñez Rivas, 2016). In this sense, the I/A Court H.R. (Judgment Series C No.134, 2005) concluded that the "evolutive interpretation is consistent with the general rules of interpretation set forth in Article 29 of the American Convention, as well those set forth in the Vienna Convention on Treaty Law" (§106). The I/A Court H.R. has stressed its competence to interpret the American Convention on Human Rights in the light of other treaties, recalling that for interpreting a treaty, it should be considered any agreement or instrument related to it–Article 31(2) of 1969 Vienna Convention on the Law of the Treaties–, as well as the system of which that treaty is a part–Article 31(3) thereof–(Ibáñez Rivas, 2016).

In the same vein, in a new case against Colombia, the I/A Court H.R. argued that when analyzing certain provisions contained in the American Convention on Human Rights, other international treaties can be invoked, such as 1977 Additional Protocol II. The evolutive interpretation derived from Article 29(b) thus substantiated the use of IHL as an interpretative resource of the American Convention on Human Rights in the *Case of the Ituango Massacres v. Colombia.*[22] In the middle of the 90s, before the increasing presence of guerrillas in Ituango, paramilitary groups and security forces strengthened their presence as well. At the beginning of 1996, inhabitants of Ituango reported to the departmental authorities their fears and concerns about the possibility of a paramilitary incursion. Nevertheless, on June 10, 1996, the Commander of the Battalion based in Ituango ordered the withdrawal of most of the units and their deployment to other villages, far from La Granja and El Aro, districts frightened by a possible armed incursion.

The AUC arrived to La Granja, municipal district of Ituango, Department of Antioquia on June 11, 1996. Following their arrival, they ordered the closure of all public establishments and began a series of selective murders without any opposition from law enforcement bodies and in full sight of the inhabitants of the district. The AUC left La Granja on June 12. Following this paramilitary incursion, members of civil society of Ituango sent several communications to different State authorities requesting the adoption of measures to guarantee the life and safety of the civilian population, threatened by the activities of the illegal armed groups.

However, on October 22, 1997, the AUC reached El Aro, which is a municipal district of Ituango as well. From October 22 to November 12, 1997, the AUC perpetrated a

[22] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of the Ituango Massacres v. Colombia*, Judgment Series C No.148, 2006 (Preliminary Objections, Merits, Reparations and Costs).

series of selective murders, starting at the municipal district of Puerto Valdivia with the acquiescence or tolerance of members of the law enforcement bodies. Because of the state of decomposition of some of the dead, the inhabitants of El Aro buried those people even before any State authority had seen them. Also, before leaving El Aro, the paramilitary group destroyed and set fire to most of the houses in the urban center, leaving only a chapel and eight homes. Some inhabitants were also obliged to transport stolen livestock for about two weeks, without receiving any kind of payment. Part of the local population displaced to other cities of the country because of these events.

As a consequence of the evolutive interpretation derived from Article 29(b), the I/A Court H.R. assessed certain facts based on 1977 Additional Protocol II. Being proved "that the paramilitary incursion in El Aro, and also the theft of the livestock, happened with the acquiescence or tolerance of members of the Colombian Army" (I/A Court H.R., Judgment Series C No.148, 2006, §180), and that "[t]he purpose of setting fire to and destroying the homes of the people of El Aro was to spread terror and cause their displacement, so as to gain territory in the fight against the guerrilla" (I/A Court H.R., Judgment Series C No.148, 2006, §182), protection of civilians and objects indispensable to the survival of civilian population were disregarded (I/A Court H.R., Judgment Series C No.148, 2006).

Therefore, the I/A Court H.R. (Judgment Series C No.148, 2006) considered ". . . useful and appropriate, in keeping with Article 29 [of the American Convention on Human Rights] . . . to interpret its provisions in accordance with the evolution of the inter-American system, taking into account the corresponding developments in international humanitarian law" (§179). In this respect, Article 13(2) of Additional Protocol II (1977) prohibits *"[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population",* and Article 14 thereof provides that it is forbidden *"to attack, destroy, remove or render useless . . . objects indispensable to the survival of the civilian population",* such as livestock and housing.

Furthermore, the possibility of referring to 1977 Additional Protocol II has been strengthened by the fact that the States Party concerned in the Inter-American Human Rights System–Colombia, El Salvador, Guatemala and Peru–have ratified this treaty (Ibáñez Rivas, 2016). With that in mind, the reference to IHL and the use of this *corpus juris* as an interpretative resource of the American Convention on Human Rights by the I/A Court H.R., particularly, the recourse to 1977 Additional Protocol II, acquires importance since this treaty is the only multilateral instrument in international law explicitly referring to amnesties, as we will see below.

1.2 THE SCOPE OF APPLICATION OF ARTICLE 6(5) OF 1977 ADDITIONAL PROTOCOL II

The I/A Court H.R. opens up the possibility to issue certain amnesty laws or decrees at the end of an armed conflict by invoking rules of IHL in its judgments[23] (Gutiérrez Ramírez, 2014). Under these conditions, it is required to define what crimes could be validly covered by these amnesties, which demands attending a joint analysis of IHL rules and HRL. We conclude that it follows from Article 6(5) of 1977 Additional Protocol II that war crimes, crimes against humanity and genocide, as well as gross human rights violations cannot be amnestied, but crimes strictly related to the armed uprising against the State could be legitimately decriminalized.

Regarding amnesties framed in an armed conflict, in the Concurring Opinion of Judge García Sayán (I/A Court H.R., Judgment Series C No.252, 2012) in the *Case of the Massacres of El Mozote and nearby places v. El Salvador*, it was argued that

> There is no norm in positive international law that has explicitly prescribed [*sic*] any kind of amnesty. The only explicit mention of amnesty in a multilateral treaty is contained in article 6(5) of Protocol II Additional to the Geneva Conventions of August 12, 1949. (§17)

According to García Sayán and Giraldo Muñoz (2016), the fact that the I/A Court H.R. has referred to IHL, specifically, to Article 6(5) of 1977 Additional Protocol II in the *Case of the Massacres of El Mozote and nearby places v. El Salvador* shows that serious human rights violations committed in times of armed conflict are addressed differently by this international tribunal. García Sayán and Giraldo Muñoz (2016) also argue that besides amnesties, this different approach brings up other issues such as reduction of sentences, freedom conditioned to confession of the facts and compensation of the victims, as well as other transitional measures like attenuated or alternative punishments that may be different to penalties ordinarily imposed to perpetrators.

First of all, it should be noted that as "[n]ational law is not suspended by Protocol II or by [Common] article 3 . . . a member of an armed group can be brought to justice for having taken up arms" (Junod, 1983, p.35). On this matter, Article 6(5) of Additional Protocol II (1977), concerning penal prosecutions, provides that

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

[23] The armed conflict between the Colombian government–a High Contracting Party–and FARC–a dissident armed group with territorial control–, falls under the criteria for the application of 1977 Additional Protocol II.

The ICRC, in its Commentary of 1987 regarding Article 6(5), states that "[t]his paragraph deals only with amnesty, though this does not mean that free pardon is deliberately excluded" (§4617). Pursuant to Black (1992, p.1113, as quoted by Ntoubandi, 2007)

> The distinction between amnesty and pardon is one rather than philological interest than of legal importance . . . The one overlooks offence; the other remits punishment. The first is usually addressed to crimes against the sovereignty of the State, to political offences, forgiveness being deemed more expedient for the public welfare than prosecution and punishment. The second condones infractions of the peace of the State. Amnesty is usually general, addressed to classes or even communities–a legislative act, or under legislation, constitutional or statutory–the act of the supreme magistrate . . . pardon applies only to the individual, releases him from the punished fixed by law for his specific offence, but does not affect the criminality of the same or similar act when performed by other persons or repeated by the same person. (p.11)

Broadly speaking, even if amnesty is granted through a law or decree producing the legal effect of decriminalizing certain specific conduct, and free pardon is granted athwart an administrative act issued by the Head of State in order to put an end to a particular criminal penalty, both legal institutions aim to end criminal liability. The ICRC in its Commentary of 1987 regarding Article 6(5), also states that the specific draft adopted in Committee provided that "anyone convicted should have the right to seek a free pardon or commutation of sentence" (§4617); however, it was not included in the final text since "national legislation in all countries provides for the possibility of a free pardon" (§4617).

At the end of the hostilities, if broadest possible amnesty proceeds in favor of offenders *"deprived of their liberty for reasons related to the armed conflict"* in such a way should proceed pardon in favor of those offenders interned or detained for reasons related to the armed conflict, this by virtue of the general principle of law *ubi eadem est ratio, eadem est o debet esse juris disposition,* meaning that *where there is the same reason, there shall be applied the same provision of law.* The analogy ensures systematic interpretation, preventing from radical differences between legal responses given to anticipated cases and legal solutions enforced to situations not expressly covered by the law, that turn out to be equal since do not differ in any factor substantiating the *ratio juris* of the law (Colombian Constitutional Court, Judgment C-083, 1995). The analogy is based on the principle of equality, ground of justice, on the basis of which equal beings and situations should be given equal treatment (Colombian Constitutional Court, Judgment C-083, 1995).

As at the end of the hostilities amnesties or fee pardons can benefit those accused for reasons related to the armed conflict by virtue of Article 6(5), it becomes crucial to

clarify how *"reasons related to the armed conflict"* could be consistently interpreted. First of all, as previously stated, all armed conflicts have as defining factors the existence of organized armed groups engaged in fighting of some intensity (ILA, 2010). In this respect, "[a]rmed conflict, particularly internal armed conflict, is a sign that a government has failed to keep order . . . [and] that opponents have reached a level of strength where they may challenge the government militarily" (O'Connell, 2009, p.395). Non-international armed conflicts involve regular armed forces, dissident armed forces and/or other organized armed groups[24] engaged in a military fighting of some intensity against one another; therefore, *"reasons related to the armed conflict",* in *stricto sensu,* would be associated with all those acts that by its nature or purpose are intended to harm the staff or damage the material of the adversary.

Two kinds of persons find themselves in the midst of a non-international armed conflict: civilians and persons participating in hostilities–referred to as "combatants"–. On this point, in his course about International Humanitarian Law, J. Cerone (lecture notes, 9 June 2016) claims that there is a positioning according to which combatants do not exist strictly speaking in non-international armed conflicts, and even non-State actors are considered as civilians. This could be possible because civilians are not defined in 1977 Additional Protocol II, instrument governing specifically non-international armed conflicts. This being the case,

> While State armed forces are not considered civilians, practice is not clear as to whether members of armed opposition groups are civilians subject to Rule 6 on loss of protection from attack in case of direct participation or whether members of such groups are liable to attack as such, independently of the operation of Rule 6. (ICRC, 2009, Rule 5)

J. Cerone (lecture notes, 9 June 2016) affirms that to the ICRC, people are targetable based on status or only when they are taking part in the hostilities, while to the United States of America, they are targetable based on conduct or provided they belong to the armed group. Following Bothe, Partsch, and Solf (1982, p.672, as quoted by ICRC, 2009) when referring to *"dissident armed forces or other organized armed groups . . . under responsible command",* Article 1(1) of 1977 Additional Protocol II "inferentially recognized the essential conditions of armed forces . . . and that it follows that civilians are all persons who are not members of such forces or groups" (p.19). J. Cerone (lecture notes, 9 June 2016) reinforces this point, arguing that practice of States treats those people belonging to armed opposition groups as fighters. Pursuant to the ICRC (2009, Rule 3), in

[24] As exemplified in Article 1(1) of 1977 Additional Protocol II.

non-international armed conflicts, only members of State armed forces are combatants. In relation to members of armed opposition groups,

> [T]his designation is only used in its generic meaning and indicates that these persons do not enjoy the protection against attack accorded to civilians, but this does not imply a right to combatant status or prisoner-of-war status, as applicable in international armed conflicts. (ICRC, 2009, Rule 3)

In spite of disagreements on the status of members of armed opposition groups, it is clear that IHL protects persons not participating in the hostilities through the principle of distinction between civilians and combatants, which provides that "[a]ttacks may only be directed against combatants [and] [a]ttacks must not be directed against civilians" (ICRC, 2009, Rule 1). Persons not participating in the hostilities do not belong to any of the opposite sides engaged in a military fighting, or ceased integrating the military potential of one of the parties to the conflict, so attacks against them are not a means tending to achieve the aims pursued through an armed conflict such as to harm the staff or damage the material of the adversary. War crimes and other international crimes committed against civilian population or persons placed *hors de combat*, constitute crimes committed on the occasion of the armed conflict,[25] or crimes resulting from mass violence in a situation of armed conflict, and not crimes subsumed under *"reasons related to the armed conflict"* in *stricto sensu*, in the sense referred to in Article 6(5).

The Rule 159 of the ICRC study on customary IHL (2009) provides that

> At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes.

At the time of adopting Article 6(5), "the USSR stated, in its explanation of vote, that the provision could not be construed to enable war criminals, or those guilty of crimes against humanity, to evade punishment" (ICRC, 2009, p.612). Article 6(5) is the expression of IHL in favor of amnesties, but this provision cannot be read as allowing those guilty of international crimes to evade a proportional punishment (Serrano Suárez, 2015), since that "would also be incompatible with the rule obliging States to investigate and prosecute persons suspected of having committed war crimes in non-international armed conflicts" (ICRC, 2009, p.612). This being the case, amnesties derived from Article 6(5) end up being restricted to "conduct related to normal or standard participation in hostilities" (Jean-Baptiste, 2017, p.33).

[25] Cassese (2008, as quoted by DPLF, 2009) establishes as elements of the war crimes, the context of the armed conflict and the direct connection of the conduct with the armed conflict.

A non-international armed conflict has parties whose legal status is fundamentally unequal since the insurgents are in conflict with the established government whose actions have the weight of public authority, and this distinction defines the threshold of applicability of 1977 Additional Protocol II (Junod, 1983). Under these conditions, "amnesty should cover offences of rebellion or sedition and comparatively minor infractions of the laws of war, such as arbitrary detentions or mild forms of ill-treatment" (Salmón, 2006, p.337), and even other offenses related to the armed uprising, as long as they do not represent war crimes, crimes against humanity, genocide and serious human rights violations. Amnesties promoted from Article 6(5) encompass the armed uprising against the State or political crimes.

"There is no generally accepted or authoritative definition of political crimes in international law" (Jean-Baptiste, 2017, p.43); however, political crimes and international crimes can be differentiated by the legal assets protected through the criminalization of both kinds of offenses (DPLF, 2009). Political crimes seek to protect the integrity of the State, whereas international crimes aim to protect the existence of groups, life, integrity and security of persons during peacetime or wartime (DPLF, 2009). "The most reliable definition of the concept of political crimes is found in extradition law [since] [a] political offense exception is found in almost all extradition treaties" (Jean-Baptiste, 2017, p.43). Two types of political crimes can be identified from the extradition law: crimes against the State as an institution such as treason, sedition, and espionage–or "pure political crimes"– and ordinary crimes that become political crimes because of their purposes or impacts–or "related political crimes"– (Jean-Baptiste, 2017).

Amnesties derived from Article 6(5) could legitimately grant immunity for committing offenses such as rebellion and sedition. The criminal codes of Colombia and Peru illustrate these offenses. The Colombian Criminal Code, in Title XVIII concerning offenses against the constitutional and legal regime, punishes with imprisonment and fine, those ones who take up arms intending to overthrow the National Government, or to abolish or amend the constitutional or legal orders (Law 599, 2000, Article 467), as well as those ones who take up arms intending to impede the free functioning of the existing constitutional or legal orders (Law 599, 2000, Article 468), conducts defined as rebellion and sedition, respectively.

In the same vein, the Peruvian Criminal Code penalizes these conducts in Title XVI about offenses against the powers of the State and the constitutional order. Rebellion has been defined as taking up arms intending to change the form of government, overthrow the

legally constituted government, or abolish or amend the constitutional regime, and it is punished with imprisonment (Legislative Decree 635, 1991, Article 346). Sedition, also punished with imprisonment, is defined as taking up arms intending to prevent the authorities to carry out their functions freely or to avoid compliance with the laws or resolutions, or to block general, parliamentary, regional or local elections (Legislative Decree 635, 1991, Article 347).

Other offenses can be committed in connection with political crimes, which would be ordinary crimes in isolation, but due to ". . . the connection between the act and the political objective, and whether the act actually furthers the political objective" (Jean-Baptiste, 2017, p.45), they acquire the status of related offenses and receive the favorable treatment granted to political crimes[26] (Colombian Constitutional Court, Judgment C-456, 1997). According to Jean-Baptiste (2017),

> Article 6.5 of Protocol II can therefore be deemed to apply to political crimes and by extension to crimes connected to political crimes. For a political crime to qualify for amnesty under the Protocol, however, it must not constitute a war crime or a serious international crime including genocide and crime against humanity. The same applies to connected crimes. *Even if the original political crime qualifies for amnesty under Protocol II, the connected crime cannot be amnestied if it is a war crime, and vice versa.* For example, if a rebel group engages in an attack against government troops, the attack itself may be considered a political crime and subject to amnesty under Protocol II; however, if in the course of the attack, the group indiscriminately murders civilians, this connected crime is a war crime and cannot be amnestied. *Protocol II is therefore not a blanket endorsement of amnesty for political crimes. It includes an important caveat, which is that the acts must not constitute war crimes or serious international crimes.* [emphasis added] (p.34)

Consequently, not every offense committed in a context of armed conflict could be legitimately interpreted as linked to the acts related to the armed uprising. If some essential purposes of the State are to ensure peaceful coexistence and validity of a just order, a rule making numerous crimes a political weapon would be contrary to these ends (Colombian Constitutional Court, Judgment C-456, 1997). "The distinction between acts of war and war crimes, therefore, is between those acts that are authorized by the laws and customs of war (acts of war), and those that are not (war crimes)" (Jean-Baptiste, 2017, p.51). This being the case, only amnesties excluding war crimes, genocide, crimes against humanity and gross human rights violations, as core or connected crimes, can be deemed to comply with 1977 Additional Protocol II (Jean-Baptiste, 2017).

[26] Using the example of the Colombian legal system, the favorable treatment includes, according to the Colombian Political Constitution (1991), not to be extradited (Article 35), to be amnestied or pardoned (Article 150), and the possibility to be a congressman or congresswoman after being deprived of liberty (Article 179).

Article 6(5) of 1977 Additional Protocol II needs a systematic approach. Following the ICRC (1987), the spirit of Article 6(5) is "to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided" (§4618). Furthermore, the Proceedings of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-1977, as quoted by I/A Court H.R., Judgment Series C No.252, 2012, Concurring Opinion of Judge García Sayán) declared that "the meaning of that norm was to grant immunity to those detained or punished for involvement in the armed conflict" (§17). Article 6(5) thus encourages amnesties as gestures of reconciliation when granting immunity to those ones prosecuted for the armed uprising against the State, with a view to reestablish peace in a country marked by an armed conflict.[27]

According to García Sayán and Giraldo Muñoz (2016), Article 6(5) implies that broadest possible amnesty should be granted to those ones whose only offense consists of being a member of the armed opposition group. In this sense, Zalaquett Daher (2007) says that considering that those ones who take up arms against the established authority do not enjoy the privileges of prisoners of war if they are captured–including the privilege of not to be tried for the sole fact of combating–, Article 6(5) intends to encourage pacification. García Sayán and Giraldo Muñoz (2016) affirm that Article 6(5) is aimed at facilitating a transition process, so that investigations, prosecutions and punishments can be focused on those perpetrators who have allegedly committed war crimes during the armed conflict.

In addition, "[a] systematic interpretation of this provision in light of the object and purpose of Additional Protocol II, leads to the conclusion that amnesty cannot be granted to individuals suspected, accused or convicted of war crimes" (Salmón, 2006, p.338), crimes against humanity or genocide. 1977 Additional Protocol II, in its Preamble "expresses several fundamental viewpoints which will serve as guidelines for the interpretation of the rules of the Protocol, explain the reasons which inspired them and help to provide for cases for which there are no provisions" (ICRC, 1987, §4419).

Two issues can be discerned from this Preamble, both of which makes it unlikely to understand Article 6(5) as allowing amnesties for war crimes, crimes against humanity and genocide, as well as for serious human rights violations. These issues are the relationship

[27] About the legitimacy of amnesties for political crimes, *see* International Committee of the Red Cross. (2009). *Customary International Humanitarian Law, Volume I: Rules.* Cambridge, United Kingdom: Cambridge University Press, p.612; Jean-Baptiste, M. C. (2017). Cracking the Toughest Nut: Colombia's Endeavour with Amnesty for Political Crimes under Additional Protocol II to the Geneva Conventions. *Notre Dame Journal of International & Comparative Law, 7*(1), p.36-37.

between IHL and HRL, as well as some essential humanitarian principles. Containing its object and purpose, the Preamble declares that

> The High Contracting Parties,
> Recalling that the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949 constitute the foundation of respect for the human person in cases of armed conflict not of an international character,
> Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person,
> Emphasizing the need to ensure a better protection for the victims of those armed conflicts,
> Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience . . .

Firstly, recalling that *"international instruments relating to human rights offer a basic protection to the human person",* 1977 Additional Protocol II integrates instruments adopted by the UN and the regional human rights systems (ICRC, 1987), stressing that there are some fundamental guarantees that cannot be suspended in any circumstances. "The Conventions and their additional Protocols have the same purpose as international instruments relating to human rights, i.e., the protection of the human person" (ICRC, 1987, §4429); thus, even if certain human rights can be suspended in times of armed conflict, "the provisions made in this respect do not allow for derogation from so-called fundamental rights protecting the human person, which guarantee respect for the physical and mental integrity of the person" (ICRC, 1987, §4429). In this sense,

> This irreducible core of human rights, also known as "non-derogable rights", corresponds to the lowest level of protection which can be claimed by anyone at any time. Protocol II contains virtually all the irreducible rights of the Covenant on Civil and Political Rights, which constitute the basic protection mentioned in the paragraph under consideration here. These rights are based on rules of universal validity to which States can be held, even in the absence of any treaty obligation or any explicit commitment on their part. It may be accepted that they form part of *jus cogens.* This view may be controversial for some of these rights, but there is no doubt whatsoever as regards, for example, the prohibition of slavery and torture . . . (ICRC, 1987, §4430)

Secondly, some "humanitarian principles enshrined in that article are recognized as the foundation of the protection of the human person in cases of non-international armed conflict" (ICRC, 1987, §4425). These principles consist of

> [F]undamental guarantees of humane treatment (physical and mental integrity) for all those who do not, or who no longer participate in hostilities, and of the right to a fair trial. Respect for such humanitarian principles implies in particular protection of the civilian population, respect for the enemy *hors de combat,* assistance for the wounded and sick, and humane treatment for those deprived of their liberty. (ICRC, 1987, §4426)

1977 Additional Protocol II "adopts the principle of protection of the civilian population as such, setting forth certain rules to that effect" (Junod, 1983, p.34). Also, recalling that *"in cases not covered by the law in force, the human person remains under*

the protection of the principles of humanity and the dictates of the public conscience", it is being defined that principles of humanity will be unconditionally applied. All participants in an armed conflict are bound in their relation to each other in such a way that being a State Party to 1977 Additional Protocol II creates "rights and obligations not only for the authorities in place, but also for the entire population of the territory of that state" (Junod, 1983, p.34), and in cases not covered by the law in force, human beings are protected by the principles of humanity and the dictates of the public conscience.[28]

The respect for the human being, the need to ensure a better protection for the victims, and the enforcement of principles of humanity, constituting the object and purpose of 1977 Additional Protocol II, exclude the possibility of interpreting Article 6(5) as encouraging amnesties or pardons intended to grant immunity to those suspected, accused or convicted of war crimes, crimes against humanity, genocide and serious human rights violations. Attacks against civilians or people placed *hors de combat* are not a means tending to achieve aims pursued through an armed conflict such as to harm the staff or damage the material of the adversary, then international crimes committed against persons taking no active part in the hostilities would not be seen as reasons related to the armed conflict in *stricto sensu,* in the sense referred to in Article 6(5).

In the *Case of the Massacres of El Mozote and nearby places v. El Salvador,* the I/A Court H.R. (Judgment Series C No.252, 2012) said that Article 6(5) fosters "extensive amnesties in relation to those who have taken part in the non-international armed conflict or who are deprived of liberty for reasons related to the armed conflict. . ."(§286). Nevertheless, those extensive amnesties cannot involve facts ". . . that can be categorized as war crimes, and even crimes against humanity" (I/A Court H.R., Judgment Series C No.252, 2012, §286). Amnesties cannot cover war crimes, crimes against humanity and genocide, under penalty of being considered incompatible with the international duties of the States (Serrano Suárez, 2015), as well as serious human rights violations, as we shall discuss in more detail further on. For all these reasons, it can be concluded that Article 6(5) encourages amnesties and free pardons for offenses strictly related to the armed uprising against the State.

[28] The Martens Clause appeared, for the first time, in Convention (II) with Respect to the Laws and Customs of War on Land (1899), providing that "[u]ntil a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience." The Martens Clause was subsequently adopted in the four Geneva Conventions of 1949 and their Additional Protocols of 1977.

1.3 THE STATE DUTY TO PROSECUTE INTERNATIONAL CRIMES COMMITTED IN SITUATIONS OF NON-INTERNATIONAL ARMED CONFLICT

The Rule 158 of the ICRC study on customary IHL (2009) establishes as a norm of customary international law applicable both for international and non-international armed conflicts that

> States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.

"The obligation to investigate and prosecute persons alleged to have committed crimes under international law is found in a number of treaties that apply to acts committed in both international and non-international armed conflicts" (ICRC, 2009, p.608). The Convention on the Prevention and Punishment of the Crime of Genocide (1948), in Article VI, provides that persons charged with conducts forbidden therein *"shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."*

In this sense, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997), in Article 9, disposes that each State *"shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control."* The Rome Statute of the ICC (1998), in its Preamble, also recalls *"the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."*

This duty "has been reaffirmed on several occasions by the UN Security Council in relation to attacks on peacekeeping personnel and in relation to crimes committed in the non-international armed conflicts in Afghanistan, Burundi, Democratic Republic of the Congo, Kosovo and Rwanda" (ICRC, 2009, p.609). The UN Security Council (1995), in Resolution 978 in the case of Rwanda, urged States to arrest "persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda" (§1). The UN Security Council (1998), subsequently, in Resolution 1199 on the situation of Kosovo, concerned "by reports of increasing violations of human rights and of international humanitarian law,

and emphasizing the need to ensure that the rights of all inhabitants of Kosovo are respected" (p.2), requested cooperation "with the Prosecutor of the International Tribunal for the Former Yugoslavia in the investigation of possible violations within the jurisdiction of the Tribunal" (§13).

The State duty to investigate, prosecute and punish international crimes has also been reinforced by the UN General Assembly. The UN General Assembly (1969, 1970, 1971) in Resolutions 2583, 2712 and 2840 about the *question of the punishment of war criminals and of persons who have committed crimes against humanity*, stated that investigation of war crimes and crimes against humanity, and the arrest, extradition and punishment of persons responsible for war crimes and crimes against humanity constitute an important element in the prevention of these crimes. In Resolution 3074 on *principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*, the UN General Assembly (1973) declared that "States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them" (§4). Thus, "[t]he UN General Assembly has, on several occasions, stressed the obligation of States to take measures to ensure the investigation of war crimes and crimes against humanity and the punishment of the perpetrators" (ICRC, 2009, p.609).

In the same vein, the UN Commission on Human Rights "[i]n a resolution on impunity adopted without a vote in 2002 . . . recognized that perpetrators of war crimes should be prosecuted or extradited" (ICRC, 2009, p.609). In Resolution 2002/79, the UN Commission on Human Rights (2002) declared that practice and likelihood of impunity for violations of HRL or IHL encourage these violations and constitute one of the fundamental obstacles for the respect of these legal orders, as well as for implementing international instruments in these fields. The UN Commission on Human Rights (2002) also emphasized the importance of taking all measures to ensure accountability for violations of HRL and IHL, that amnesty shall not be granted in favor of perpetrators and accomplices of serious crimes under HRL and IHL, and that States shall act in accordance with their international obligations.[29]

[29] In the original version of Resolution 2002/79, the UN Commission on Human Rights stated, more comprehensively « qu'il importe de prendre toutes les mesures nécessaires et possibles pour que les auteurs de violations du droit international relatif aux droits de l'homme et du droit international humanitaire, ainsi que leurs complices, aient à rendre compte de leurs actes, *reconnaît qu'il ne devrait pas y avoir d'amnistie en faveur des auteurs de violations du droit international relatif aux droits de l'homme et du droit international humanitaire qui constituent de graves infractions* et invite instamment les États à agir conformément à leurs obligations en vertu du droit international » [emphasis added].

Fulfilling the international obligation to investigate, prosecute and punish war crimes, crimes against humanity and genocide entails that no refugee status or asylum can be granted to persons suspected of or accused of committing these crimes. "It is generally accepted that persons suspected of having committed war crimes are not entitled to refugee status" (ICRC, 2009, p.610). The Convention relating to the Status of Refugees (1951) defines that the provisions thereof shall not apply to any person with respect to whom there are reasons for considering that *"he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes"* (Article 1(f)(a)). "Exclusion from asylum of suspected war criminals has also been supported by the UN General Assembly" (ICRC, 2009, p.610-611), declaring that "States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity" (UN General Assembly, 1973, §7).

The mandatory nature of the State obligation to investigate, prosecute and punish these crimes is reinforced by the Rule 160 of the ICRC study on customary IHL (2009), which provides that "[s]tatutes of limitation may not apply to war crimes." The ICRC (2009) claims that "state practice establishes this rule as a norm of customary international law applicable to war crimes committed in international and non-international armed conflicts" (p.614). On this point, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) provides, in Article 1, that no statutory limitation shall apply to war crimes and crimes against humanity, irrespective of the date of their commission, and *"even if such acts do not constitute a violation of the domestic law of the country in which they were committed."* The Rome Statute of the ICC (1998) also states in Article 29 that *"[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations."* This since "[t]he operation of statutory limitations could prevent the investigation of war crimes and the prosecution of the suspects and would constitute a violation of the obligation to do so" (ICRC, 2009, p.615), as provided in the Rule 158 of the ICRC study on customary IHL.

"States must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects" (ICRC, 2009, Rule 161). "Many bilateral and regional extradition treaties, as well as national legislation, specify that there cannot be extradition for 'political offences' but that this exception cannot apply to crimes under international law" (ICRC, 2009, p.620). Article VII of the Convention on the Prevention and Punishment of the Crime of Genocide

(1948), for instance, provides that Genocide shall not be considered as a political crime for the purpose of extradition, and that *"[t]he Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force."* Article XI of the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) also states that this crime shall not be considered as a political crime for the purpose of extradition.

1.3.1 War crimes as serious violations of Common Article 3 in the contentious case-law of the Inter-American Court of Human Rights

In judgments such as the *Case of the Massacres of El Mozote and nearby places v. El Salvador*, the I/A Court H.R. (Judgment Series C No.252, 2012) has rejected the idea of amnestying war crimes, concluding that it may be understood that Article 6(5) of 1977 Additional Protocol II refers to amnesties benefiting persons who have participated in the non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, "provided that this does not involve facts, such as those of the instant case, that can be categorized as war crimes, and even crimes against humanity" (§286). War crimes, differently to gross human rights violations, crimes against humanity and genocide, require to be framed in an armed conflict, either international or non-international (DPLF, 2009).

Even if the I/A Court H.R. is not a criminal court, in some cases has classified the facts as crimes according to ICL in order to define the scope of the State international responsibility or to specify the extent of the due diligence in the investigation of the events (Parra Vera, 2012). The association of facts representing gross human rights violations with crimes under ICL does not entail an attribution of individual criminal responsibility, but a means to specify the expected due diligence of the State for the particular case. Furthermore, the I/A Court H.R. can validly give form to the content of war crimes in its jurisprudence by making use of Article 38 of the Statute of the ICJ,[30] and subsequently introduce certain precisions provided by other international treaties such as the Rome

[30] *See* Charter of the United Nations and Statute of the International Court of Justice (1945), Article 38: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

Statute of the ICC.[31] In this respect, Article 8(2)(c) and 8(2)(e) of the Rome Statute of the ICC define certain conducts constituting war crimes in a non-international armed conflict.

The Rule 156 of the ICRC study on customary IHL (2009) provides that "[s]erious violations of international humanitarian law constitute war crimes." About the attribution of meaning to the expression "serious violations" it should be stressed that ". . . violations are in practice treated as serious, and therefore as war crimes, if they endanger protected persons or objects or if they breach important values"[32] (ICRC, 2009, p.569). War crimes are offenses committed willfully, either intentionally–*dolus directus*–or recklessly–*dolus eventualis*–, which vary depending on the crime concerned, and can be perpetrated through action or omission of any person, whether members of the armed forces or civilians (ICRC, 2009) against persons protected by IHL (DPLF, 2009). "Unlike crimes against humanity, which consist of a 'widespread or systematic' commission of prohibited acts, any serious violation of international humanitarian law constitutes a war crime" (ICRC, 2009, p.573).

The war crimes as grave breaches of Common Article 3–subject of this section–are embodied in Article 8(2)(c) of the Rome Statute of the ICC (1998), referring to the most serious war crimes in a non-international armed conflict, as follows

> [S]erious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause: (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) Taking of hostages; (iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

Regarding these kinds of offenses, J. Cerone (lecture notes, 10 June 2016) claims that even if war crimes represent breaches of the IHL, they are not always associated to atrocities. Article 8(3) of the Rome Statute of the ICC (1998) provides that *"[n]othing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-*

[31] The ICRC indicates as sources of war crimes in non-international armed conflicts customary IHL; 1977 Additional Protocol II; 1992 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction; 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; and the Statutes of the ICTY, ICTR and the Special Court for Sierra Leone. For further information on the definition and sources of war crimes, *see* International Committee of the Red Cross. (2009), *supra* note 27, Rule 156.

[32] The ICRC mentions as examples of war crimes that breach important values the abuse of dead bodies, subjecting persons to humiliating treatment, making persons undertake work that directly helps the military operations of the enemy, violation of the right to fair trial, and recruiting children under 15 years of age into the armed forces. For further information on this topic, *see* International Committee of the Red Cross. (2009), *supra* note 27, Rule 156.

establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means." In this sense, in cases related to war crimes, the I/A Court H.R. has concluded that the States have the inherent right to use force in order to maintain or restore security and public order within their territory, but this right is not unlimited.

The serious violations of IHL or war crimes have been addressed, for instance, as breaches of rights contained in the American Convention on Human Rights, interpreted in the light of rules aimed at guaranteeing humane treatment for *hors the combat* people. Even if the I/A Court H.R. has not expressly invoked the concept of "war crime," the assessment of the facts in certain cases has been supported in gross violations of Common Article 3 and legal categories belonging to IHL. Serious violations of Common Article 3 committed against people placed *hors de combat* in the case-law of the I/A Court H.R. can be represented in emblematic cases such as the *Case of Bámaca-Velásquez v. Guatemala* and the *Case of Cruz-Sánchez et al. v. Peru.*

First of all, the *Case of Bámaca-Velásquez v. Guatemala*[33] concerns the enforced disappearance of Efraín Bámaca Velásquez, who was the commander of the Luis Ixmatá Front, belonging to Organización Revolucionaria del Pueblo en Armas (ORPA).[34] On March 12, 1992, there was a combat between guerrillas of the Luis Ixmatá Front and Army soldiers in Nuevo San Carlos, Department of Retalhuleu. Bámaca Velásquez was captured alive and wounded, and then secretly confined and submitted to threats and torture. Several judicial proceedings were initiated, but his whereabouts are still unknown, and although some exhumation procedures were ordered with a view to find his corpse, they did not have any positive result as they were obstructed by State agents.

Guatemala was convulsed by an armed conflict at the time of the facts, which lasted from the beginning of 1960 until the end of 1996. Officially founded in 1978, the ORPA was one of the resistance groups acting in this armed conflict. The conflict intensified in the midst of a systematic practice of human rights violations. On this point, for instance, captured guerrillas were kept clandestinely confined and submitted to physical and mental torture in order to obtain information about their armed groups, which constituted enforced disappearance, and often led to extrajudicial execution.

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[33] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of Bámaca-Velásquez v. Guatemala*, Judgment Series C No.70, 2000 (Merits); Judgment Series C No.91, 2002 (Reparations and Costs).

[34] ORPA emerged as a dissident group from Fuerzas Armadas Revolucionarias (FAR) intending to incorporate the fight against racial discrimination in the armed struggle. One of the most serious human rights violations committed by this armed group is massacres perpetrated against peasants (Comisión para el Esclarecimiento Histórico de Guatemala, 1999).

The I/A Court H.R. (Judgment Series C No.70, 2000) presumed that the victim was extrajudicially executed relying on the circumstances in which the detention by State agents occurred, as well as "the victim's condition as a guerrilla commander, the State practice of forced disappearances and extrajudicial executions . . . and the passage of eight years and eight months since he was captured, without any more news of him" (§173). The State was declared internationally responsible for violating–among others–the rights to life, humane treatment, personal liberty, and judicial guarantees and judicial protection, in relation to the duty to respect the rights, to the detriment of Efraín Bámaca Velásquez.

Some years later, the I/A Court H.R. ruled in another case about serious violations of Common Article 3 committed against *hors de combat* people. In the *Case of Cruz-Sánchez et al. v. Peru*,[35] related to alleged extrajudicial executions of three guerrillas of Movimiento Revolucionario Tupac Amarú (MRTA)[36] perpetrated during the operation *Chavín de Huántar*, the State was declared internationally responsible for violating–among others–the right to life, under the terms of Article 4(1) of the American Convention on Human Rights in relation to Article 1(1) thereof, to the detriment of Eduardo Nicolás Cruz Sánchez. The I/A Court H.R. also considered that evidences to trigger responsibility of the State for infringing the right to life to the detriment of Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza were insufficient.

From the beginning of 1980 until the end of 2000, there was an armed conflict in Peru between insurgent groups and security forces. The MRTA was one of these armed groups. Founded in 1982 and inspired by other leftist guerrillas acting in the region, the MRTA took part in violent events that caused the loss of numerous lives and goods. Gross human rights violations were committed by all parties to the armed conflict in this context of violence. The I/A Court H.R. recognized that the conflict intensified in the midst of a systematic practice of human rights violations like extrajudicial executions and enforced disappearances of those people suspected of belonging to the armed groups.

On December 17, 1996, the celebration of the birth of the Japanese Emperor was being conducted at the residence of the then Ambassador of Japan in Peru, located in Lima. About 600 people were attending the meeting, including Ministers of State, judges of the Supreme Court of Justice, high officials of the Armed Forces and the National Police,

[35] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Caso Cruz Sánchez y otros vs. Perú*, Sentencia Serie C No.292, 2015 (Excepciones Preliminares, Fondo, Reparaciones y Costas).

[36] MRTA emerged in 1984 as an armed group essentially urban. The most serious human rights violations committed by this armed group include murder and enforced disappearance (Human Rights Watch, 2009).

congressmen, diplomats, politicians and businessmen. Fourteen heavily-armed members of the MRTA descended from an ambulance parked in front of an adjoining building, and through a hole opened in the wall by explosive charges, entered the residence and took all guests hostage.

Alberto Fujimori tried to pursue a peaceful solution through negotiations. Between December 17, 1996 and January 1997, most of the hostages were released, but 72 of them remained at the residence. Following failed negotiations, an alternative plan was executed. In parallel to the process of negotiations, President Fujimori had ordered the drafting of a plan integrating the Armed Forces and the National Intelligence Service with a view to rescue the hostages. This plan was called *Chavín de Huántar*, and its objective was to dominate the building to capture or eliminate the MRTA fighters and rescue the hostages, maintaining an unrestricted respect for human rights.

The operation was conducted on April 22, 1997. This rescue operation resulted in the release of most of the hostages–three of them died–and the death of all the MRTA fighters. According to the report made by the Commander General of the First Division of Special Forces, all MRTA fighters would have died during the confrontation with the military agents. Nevertheless, later evidences created doubts about the circumstances in which Cruz Sánchez, Meléndez Cueva and Peceros Pedraza died, and whether they were captured alive and extrajudicially executed afterwards.

The domestic jurisdiction stated that Cruz Sánchez died from a single head shot in the back of the neck, at the time of which the body had possibly almost no mobility or the head was slightly down, and as this region is not accessible to a shooter, he was murdered after being in the custody of the National Intelligence Service. The national judges also concluded that as Cruz Sánchez had been arrested and his hands were tied back, it was doubtful that he was holding a grenade since it would not have remained in his hand after the bullet impact. Differently, Meléndez Cueva and Peceros Pedraza had several bullet wounds and evidences were insufficient to demonstrate that they were captured alive and then killed.

Regarding the death of Cruz Sánchez, the I/A Court H.R. concluded that as the last time he was seen alive in *hors de combat* situation, the State had the obligation to grant him humane treatment and to respect and guarantee his rights, pursuant to Article 4(1) of the American Convention on Human Rights, interpreted in the light of Common Article 3. In relation to the death of Meléndez Cueva and Peceros Pedraza, as there was not a variety of evidence sufficient to establish that they could be classified as *hors de combat* at the

time of their death, and considering that the evacuation of hostages was underway, it could not be claimed that the action of the State represented an arbitrary deprivation of life contrary to the applicable principles of IHL.

On the one hand, it was proved that "Bámaca Velásquez was captured and retained in the hands of the Army, constituting a case of forced disappearance" (I/A Court H.R., Judgment Series C No.70, 2000, §170). "Although this is a case of the detention of a guerrilla during an internal conflict . . . the detainee should have been ensured the guarantees that exist under the rule of law" (I/A Court H.R., Judgment Series C No.70, 2000, §143), as well as conditions of detention ensuring his personal dignity and humane treatment (I/A Court H.R., Judgment Series C No.70, 2000). Once Bámaca Velásquez was wounded and detained–placed *hors de combat*–he should have received humane treatment, being prohibited violence to life and person, as provided in Common Article 3.

On the other hand, in the *Case of Cruz-Sánchez et al. v. Peru*, the IACHR graded the death of the three MRTA fighters as extrajudicial executions or arbitrary deprivations of the right to life (I/A Court H.R., Judgment Series C No.292, 2015). According to the IACHR, the fighters were legitimate military targets while they were participating in the confrontation, but once they had surrendered or had ceased hostile acts, or were captured or injured, their lives were protected under the terms of Article 4(1) of the American Convention on Human Rights, interpreted in the light of IHL rules granting humane treatment for *hors de combat* people (I/A Court H.R., Judgment Series C No.292, 2015).

The I/A Court H.R. (Judgment Series C No.292, 2015) considered that pursuant to Article 27(2) of the American Convention on Human Rights, the right to life is recognized as one of those rights that cannot be suspended, even in cases of war, public danger or other threats to the independence or security of the States Party. The right to humane treatment is a non-derogable human right as well, by virtue of Article 27(2). In this sense, "although the State has the right and obligation to guarantee its security and maintain public order, its powers are not unlimited" (I/A Court H.R., Judgment Series C No.70, 2000, §174; Judgment Series C No.292, 2015). The fight against terrorism shall be carried out "according to procedures that preserve both public safety and the fundamental rights of the human person" (I/A Court H.R., Judgment Series C No.70, 2000, §143; Judgment Series C No.292, 2015, Concurring Opinion of Judge Ferrer Mac-Gregor Poisot).

Following the IACHR (I/A Court H.R., Judgment Series C No.70, 2000), "when a State faces a rebel movement or terrorism that truly threatens its 'independence or security', it may restrict or temporarily suspend the exercise of certain human rights, but only in

accordance with the rigorous conditions indicated in Article 27 of the Convention" (§203(b)). Article 27(2) of the American Convention on Human Rights establishes non-derogable human rights, whether in peacetime or in wartime. Under these circumstances, "Article 27(2) of the Convention strictly forbids the suspension of certain rights and, thus, forced disappearances, summary executions and torture are forbidden, even in states of emergency"[37] (I/A Court H.R., Judgment Series C No.70, 2000, §203(b)).

Even if Article 27(2) does not expressly forbid the suspension of the right to personal liberty, Article 7(6) has been integrated to the scope of non-derogable human rights. Article 7(6) of the American Convention on Human Rights (1969), which enshrines *habeas corpus*, provides that

> Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

In the Advisory Opinion OC-8/87 about *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, the I/A Court H.R. considered, first of all, that "Article 27(2) must, therefore, be interpreted 'in good faith' and keeping in mind the 'object and purpose' . . . of the American Convention" (§16). That said,

> In order for *habeas corpus* to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here *habeas corpus* performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment. (I/A Court H.R., OC-8/87, §35)

The writ of *habeas corpus* has protected people from gross human rights violations in times of mass violence, and these realities have been acknowledged, "which may well explain why the Pact of San Jose is the first international human rights instrument to include among the rights that may not be suspended essential judicial guarantees for the protection of the non-derogable rights" (I/A Court H.R., OC-8/87, §36). Thus, "writs of habeas corpus and of 'amparo' are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) and that serve, moreover, to preserve legality in a democratic society" (I/A Court H.R., OC-8/87, §42).

[37] The scope of torture, extrajudicial or arbitrary executions, and enforced disappearance, defined in the contentious case-law of the I/A Court H.R. as serious human rights violations, is specified in the next chapter.

In the *Case of Osorio Rivera and family members v. Peru* regarding the enforced disappearance of Mr. Osorio Rivera committed by military agents in 1991, the I/A Court H.R. (Judgment Series C No.274, 2013) considered that even if the American Convention on Human Rights does not expressly prohibit the suspension of the right to personal liberty, temporarily and to the extent strictly necessary to deal with states of emergency,

> [A]ccording to Article 27(2) of this instrument, the legal procedures established in Articles 25(1) and 7(6) of the American Convention . . . cannot be suspended, because they constitute essential judicial guarantees to protect rights and freedoms that cannot be suspended according to this same provision . . . the International Committee of the Red Cross has [also] established that the prohibition of arbitrary deprivation of liberty is a rule of customary international humanitarian law, applicable to both international and non-international armed conflicts. Consequently . . . the prohibition of arbitrary detention or imprisonment cannot be suspended during an internal armed conflict. (§120)

Regardless the subversive action of Bámaca Velásquez as a leader of the ORPA, or that one of the MRTA members who conducted the taking of hostages, proscribed by Common Article 3 in (1)(b) and Rule 96 of the ICRC study on customary IHL, and defined as a war crime by Article 8(2)(c)(iii) of the Rome Statute of the ICC, once these fighters were placed *hors de combat,* they should be ensured the humane treatment of Articles 4(1), 5(1) and 5(2) of the American Convention on Human Rights, interpreted in the light of relevant IHL rules. "The normative and interpretative convergences between the International Law of Human Rights and International Humanitarian Law . . . contribute to place those non-derogable rights–starting with the fundamental right to life itself–definitively in the domain of *jus cogens*" (I/A Court H.R., Judgment Series C No.70, 2000, Separate Opinion of Judge Cançado Trindade, §27).

Article 4(1) of the American Convention on Human Rights (1969) provides that *"[e]very person has the right to have his life respected . . . [n]o one shall be arbitrarily deprived of his life."* Not any deprivation of life will be considered to be contrary to the American Convention on Human Rights, but only that one occurred arbitrarily, for instance, as a result of the use of force illegitimate, excessive or disproportionate (I/A Court H.R., Judgment Series C No.292, 2015). State agents shall use force only against people who by their actions represent an imminent threat of death or serious injury (I/A Court H.R., Judgment Series C No.292, 2015). Article 5(1) of the American Convention on Human Rights (1969) states that *"[e]very person has the right to have his physical, mental, and moral integrity respected",* and Article 5(2) provides that *"[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment."*

According to the ICRC, as a customary rule in international and non-international armed conflicts, the State shall provide persons who do not directly participate in hostilities or who are *hors de combat*, humane treatment (I/A Court H.R., Judgment Series C No.292, 2015). Common Article 3 to the Geneva Conventions (1949) provides that *"[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction."* For this end, the conflicting parties shall be prevented to conduct *"violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture"* (Common Article 3(1)(a)).

Customary IHL establishes that a person is *hors de combat* when: (a) is held by an adverse party; (b) cannot defend himself because is unconscious, has shipwrecked or is injured or ill; or (c) clearly expresses an intention to surrender, refrains from any hostile act and does not try to escape (I/A Court H.R., Judgment Series C No.292, 2015). Taking into account that Guatemala and Peru were involved in non-international armed conflicts, these criteria for determining if a person was *hors de combat* were applicable at the time of the facts of both cases (I/A Court H.R., Judgment Series C No.70, 2000; Judgment Series C No.292, 2015). Therefore, being involved in an armed conflict, "instead of exonerating the State from its obligations to respect and guarantee human rights, this fact obliged it to act in accordance with such obligations" (I/A Court H.R., Judgment Series C No.70, 2000, §207), which arise from a joint understanding of HRL and IHL.

The I/A Court H.R. (Judgment Series C No.292, 2015) has concluded that IHL does not displace the applicability of Article 4(1) of the American Convention on Human Rights, but rather nourishes the interpretation of this clause prohibiting arbitrary deprivations of life, inasmuch as the events are framed in an armed conflict. The above shall also apply in relation to Article 5(1) and 5(2) of the American Convention on Human Rights. For instance, the IHL *corpus juris* shall be consulted with a view to specify the duties of the State in relation to the respect and guarantee of the right to life in an armed conflict, as the American Convention on Human Rights does not define the scope that shall be granted to the concept of *arbitrariness* assessing a deprivation of life as contrary to the treaty in that situation[38] (I/A Court H.R., Judgment Series C No.292, 2015).

[38] The case-law of international tribunals acknowledges that when a situation reaches the level of an armed conflict, the concept of arbitrariness assessing a deprivation of life shall be defined according to IHL rules, which establish a different proportionality test; *see* ICTY, *Prosecutor v. Haradinaj et al., supra* note 8.

On the one side, in the *Case of Cruz-Sánchez et al. v. Peru*, it was proved that the main objective of the operation was to protect the lives of the hostages (I/A Court H.R., Judgment Series C No.292, 2015). However, even if the alleged victims were not civilians, but members of the MRTA who actively participated in the hostilities, when being *hors de combat,* they should benefit from the safeguards of Common Article 3. On the other side, even if the existence of a prisoner-of-war status could not be invoked in the *Case of Bámaca-Velásquez v. Guatemala*,[39] once he was detained and wounded, he should be ensured humane treatment enshrined in the American Convention on Human Rights and Common Article 3. In both cases, the I/A Court H.R. (Judgment Series C No.91, 2002; Judgment Series C No.292, 2015) decided that the State should refrain from recourse to exemptions from criminal liability in favor of the perpetrators of these violations.

1.3.2 Crimes against humanity and genocide in the contentious case-law of the Inter-American Court of Human Rights

Based on their offense to the conscience of humanity, the I/A Court H.R. has stated that crimes against humanity and genocide cannot be amnestied. In cases such as the *Case of Almonacid-Arellano et al. v. Chile,* the I/A Court H.R. (Judgment Series C No.154, 2006) considered that "[c]rimes against humanity give rise to the violation of a series of undeniable rights that are recognized by the American Convention, which violation cannot remain unpunished" (§111) and that

> [T]he States cannot neglect their duty to investigate, identify, and punish those persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions. Consequently, crimes against humanity are crimes which cannot be susceptible of amnesty. (§114)

Zalaquett Daher (2007) summarizes the decision in the *Case of Almonacid-Arellano et al. v. Chile,* affirming that the I/A Court H.R. concluded that there are certain serious crimes in relation to which international law establishes peremptory duties to investigate, prosecute and punish; that these crimes do not prescribe and cannot be subject to amnesties or other legal measures that prevent such State obligations from being fulfilled; that States cannot invoke domestic provisions in order to be excepted from these duties, and that there is an international obligation for the States related to cooperate with each other with a view to ensure compliance with these obligations.

[39] According to the ICRC (2009, Rule 106), State practice establishes conditions for prisoner-of-war status as a norm of customary IHL applicable in international armed conflicts.

As in the case of the war crimes, even if the I/A Court H.R. is not a criminal court, in some cases has deemed relevant to classify the facts as crimes according to the ICL with a view to define the scope of the particular international responsibility or to specify the extent of the due diligence in the investigation of the events (Parra Vera, 2012). In this respect, Pérez-León Acevedo (2017) argues that even if a State cannot be charged with an international crime by the I/A Court H.R., "a State can be found international responsible, i.e., international state responsibility of a civil-like nature rather than criminal individual liability, for the commission of an international crime" (p.173), and in this sense, former Judge Cançado Trindade "has referred to an aggravated international state responsibility triggered by the commission of international crimes" (p.173).

The association of facts representing gross human rights violations with the most serious crimes under ICL does not imply attributing individual criminal responsibility. In this sense, Uprimny Yepes et al. (2014) affirm that in the case of violations occurring in the framework of a mass or systematic attack, the standard of due diligence before the I/A Court H.R. acquires a special qualification. Indeed, the I/A Court H.R. (Judgment Series C No.213, 2010) has considered that in these kinds of cases, besides prosecuting direct perpetrators, "the obligation to investigate includes the duty to direct the efforts of the apparatus of the State to clarify the structures that allowed these violations, the reasons for them, the causes, the beneficiaries and the consequences" (§118).

The Nuremberg Tribunal featured the first appearance on the international court scene of crimes against humanity, a category designed to cover Nazi atrocities perpetrated by the German government on its own Jewish citizens and other vulnerable groups as well as crimes inflicted on the peoples of occupied countries (Wald, 2007). International law has defined that crimes against humanity must be committed as a part of a systematic or widespread attack against any civilian population–which is the international or contextual element that distinguishes these crimes from other ordinary crimes and even serious human rights violations–and the perpetrator must be aware of the systematic or widespread attack–which constitutes the subjective element of crimes against humanity– (DPLF, 2009).

The I/A Court H.R. has assumed jurisdiction in cases whose facts constituting crimes against humanity occurred before the entry into force of the American Convention on Human Rights, following the positioning of the ECtHR that facts constituting crimes against humanity according to the international law at their time of occurrence shall be investigated, prosecuted and punished regardless of the lack of criminalization by the domestic law (Parra Vera, 2012; I/A Court H.R., Judgment Series C No.154, 2006). In the

contentious jurisprudence of the I/A Court H.R., crimes against humanity are addressed, for instance, by establishing that these offenses

> . . . include the commission of *inhuman acts, such as murder, committed in a context of generalized or systematic attacks against civilians.* A single illegal act as those mentioned above, committed within the described background, would suffice for a crime against humanity to arise. [emphasis added] (I/A Court H.R., Judgment Series C No.154, 2006, §96)

The expression *"such as murder"* results indicative, so the I/A Court H.R. could validly widen the content of crimes against humanity in its case-law by making use of Article 38 of the Statute of the ICJ related to sources of international law, and subsequently introduce certain precisions provided by the Rome Statute of the ICC, for example. Article 7(1) of the Rome Statute of the ICC (1998) defines some conducts constituting crimes against humanity, as follows

> For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Article 7(2) specifies the understanding of some terms mentioned in the preceding paragraph,[40] and Article 7(3) of the Rome Statute of the ICC (1998) clarifies that the expression "gender" employed in 7(1)(h) *"refers to the two sexes, male and female, within the context of society"* and that such term *"does not indicate any meaning different from the above."*[41] Article 7(1) and 7(2) could further shape the scope of crimes against humanity in the case-law of the I/A Court H.R., as this tribunal has repeatedly made use of sources of international law in order to shape its jurisprudence.

Regarding genocide, there are two elements that define the commission of this crime. The first element–known as *dolus specialis* or genocidal intention–is the intention to

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[40] *See* Article 7(2) of the Rome Statute of the ICC for accurate definitions on conducts listed in paragraph 1 of the same Article.

[41] It could be argued that Article 7(3) of the Rome Statute of the ICC would be explained by the wide divergence among States in issues related to the rights of lesbian, gay, bisexual, trans and intersex–LGBTI–people.

destroy totally or partially certain group as such (DPLF, 2009). The second element is the passive subject, including national, ethnic, racial or religious groups. The protected legal asset is the existence of the group itself, so the individual victims must be chosen because of their belonging to the specific group object of the attack (DPLF, 2009). It should be emphasized that although a general definition of each group can be established, the final determination must be made on a case-by-case basis in accordance with cultural and social factors, and taking into account that the purpose of the rule is the protection of stable groups (DPLF, 2009).

Identically, Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) and Article 6 of the Rome Statute of the ICC (1998) state that

> [G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group,[42] as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

Under these conditions, taking into account the definition of both international crimes, even if the crime of genocide could appear as a type of crime against humanity in numerous cases, some textual differences in the criminalization of both kinds of offenses can be drawn. According to Wald (2007),

> Crimes against humanity require that the acts prosecuted be part of a systematic or widespread attack against a civilian population (and the perpetrator knows about the wider campaign). Genocide requires that the acts (which can only be the specific five listed) be committed against a racial, religious, national or ethnic group and be done with the specific intent of destroying the group in whole or in part ‘‘as such.” The genocidal acts themselves might be committed against only a few persons and do not have to be part of a widespread or systematic campaign against civilians. . . (p.623-624)

Crimes against humanity and genocide involve a heavy component of international shame, even greater than war crimes (Wald, 2007). The seriousness of some human rights violations thus justifies the prohibition on amnesties shielding their perpetrators as well as the nullification of these laws or decrees. In this regard, comparatively speaking, if national rules restrict rights but those rights are not in the core of non-derogable human rights, nor the rules amnesty or pardon serious human rights violations, the I/A Court H.R. requests

[42] Scharf (1996, as quoted by Uprimny Yepes et al., 2014) explains that the rejection of the inclusion of political groups in the definition of genocide is due to the fact that 1948 Convention on the Prevention and Punishment of the Crime of Genocide was discussed in the context of the Cold War, so the great powers wanted to guard against the possible international intervention in cases of political persecution.

domestic authorities to amend these provisions without declaring the lack of effect of the respective rule, as happened in the *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile.*[43]

The I/A Court H.R. has addressed crimes against humanity and genocide in cases such as the *Case of the "Las Dos Erres" Massacre*[44] and the *Case of the members of the Chichupac Village and neighboring communities of the Municipality of Rabinal*,[45] both cases versus Guatemala. From 1962 to 1996 there was an armed conflict in Guatemala that involved human, material, institutional and moral costs. The State applied the National Security Doctrine, whereby the external enemy was replaced by the internal enemy represented in supposed local agents of the communism such as guerrillas and any person, group or institution whose ideas were opposed to those ones of the military governments. Several military acts consisted of killings of defenseless civilian population known as massacres and *scorched earth operations*,[46] committed through acts of cruelty aimed at eliminating people and producing terror.

Firstly, the *Case of the "Las Dos Erres" Massacre v. Guatemala* concerns the extrajudicial execution of 251 inhabitants of the community of Las Dos Erres, Department of Petén, committed by the counterinsurgency force of the Guatemalan Armed Forces named Kaibiles[47] between December 6 and 8, 1982, as well as the mistreatments, rape, abduction of a child survivor and pillage perpetrated in that context. It all began when in 1982, the presence of the Fuerzas Armadas Rebeldes (FAR)[48] increased in surrounding areas of Las Dos Erres, so the inhabitants of the community were asked to participate in a Civil Defense Patrol, but before their negative response, they were accused of belonging to the guerrilla.

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[43] This case concerns a judicial censorship imposed on the exhibition of this film, before which the I/A Court H.R. ordered the State to amend a specific provision threatening freedom of thought and expression, enshrined in Article 13 of the American Convention on Human Rights.

[44] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of the "Las Dos Erres" Massacre v. Guatemala*, Judgment Series C No.211, 2009 (Preliminary Objection, Merits, Reparations, and Costs).

[45] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Caso Miembros de la Aldea Chichupac y comunidades vecinas del Municipio de Rabinal v. Guatemala*, Sentencia Serie C No.328, 2016 (Excepciones Preliminares, Fondo, Reparaciones y Costas).

[46] The *scorched earth operations* were a military tactics that consisted in destroying everything that could be useful to the enemy when a force advanced through a territory.

[47] The Kaibiles emerged in 1974 as a specialized counterinsurgency force of the Guatemalan Armed Forces. The most serious human rights violations committed by this group include murder of civilians, rape and torture, in several cases perpetrated against indigenous peoples (Comisión para el Esclarecimiento Histórico de Guatemala, 1999).

[48] FAR emerged in 1962 as the first guerrilla organization in Guatemala. The most serious human rights violations committed by this armed group include murder and kidnapping (Comisión para el Esclarecimiento Histórico de Guatemala, 1999).

The military action was conducted on December 7, 1982. After being driven out from their homes, the men were locked up in the school and the women and children in the evangelical church. Some of them were beaten and died from the blows while confined. Men were blindfolded and hand-tied, and then led to an unfinished well where they were shot. Women and children were taken to the same place, being struck on the head with an iron mallet or shot, and some girls were raped. Umbilical cords and placentas were found on the ground because abortions were caused to pregnant women by beating them or even jumping on their abdomen. Also, one of the children survivors was abducted by one of the perpetrators of the massacre.

The *Case of the members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala* concerns massacres, extrajudicial executions, enforced disappearances, torture, forced labor and sexual violence perpetrated from 1981 to 1986 against members of the Maya indigenous people in Guatemala, who were defined as "internal enemy" claiming that they could be or become the support base of guerrillas. Following the TC of Guatemala, between 1981 and 1983, security agents and paramilitary groups murdered at least 20% of the population in Rabinal, and 99.8% of the victims were indigenous belonging to the Maya Achí people, civilians not taking part in the hostilities. Against this background, the IACHR and the petitioners claimed the existence of genocide against Maya indigenous people in Guatemala.

Pursuant to the criterion *ratione temporis,* the I/A Court H.R. established that it did not have temporal jurisdiction to decide on a part of the facts and human rights violations alleged. Nevertheless, the I/A Court H.R. recalled that Guatemala is a State Party to 1948 Convention on the Prevention and Punishment of the Crime of Genocide from 1950, prior to the perpetration of the gross human rights violations related to this case. In this respect, the I/A Court H.R. considered, as it has done in other cases, that the American Convention on Human Rights can be interpreted in the light of other IHL and ICL treaties taking into account their specificity in the matter as well as Article 29(b) thereof.

Judge Cadena Rámila, in his Concurring Opinion (I/A Court H.R., Judgment Series C No.211, 2009) recalled three principles constituting humanitarian duties, none of which was observed by Guatemala: principle of distinction, principle of proportionality and principle of prohibition on causing superfluous or unnecessary suffering. "The case of Las Dos Erres is not only paradigmatic in terms of impunity, but also in terms of the methods of war used by the State of Guatemala while carrying out hostilities in an internal armed conflict" (I/A Court H.R., Judgment Series C No.211, 2009, Concurring Opinion of Judge

Cadena Rámila, p.3), contravening the content of Article 5(2) of the American Convention on Human Rights (1969), in accordance to which *"[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment."*

It is a proven fact that "[t]he rape of women was a State practice, executed in the context of massacres, directed to destroying the dignity of women at a cultural, social, family, and individual level" (I/A Court H.R., Judgment Series C No.211, 2009, §139). Pregnant women were subjected to induced abortions and other barbaric acts as well (I/A Court H.R., Judgment Series C No.211, 2009). In this respect, the Rome Statute of the ICC and jurisprudence of other international tribunals nourish the content of Article 5(2) of the American Convention on Human Rights, allowing the understanding of sexual violence widespread or systematically practiced in an armed conflict as a form of torture, crime against humanity or genocide, depending on the context.

Article 7(1) of the Rome Statute of the ICC (1998) defines conducts constituting crimes against humanity *"when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack"* among which is *"[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity"* (Article 7(1)(g)). Furthermore, the ICTY has qualified sexual violence as comparable to torture "when it has been committed within a systematic practice against the civil population, or with the intention of obtaining information, punishing, intimidating, humiliating, or discriminating the victim or a third party" (I/A Court H.R., Judgment Series C No.211, 2009, foot note 149).

The I/A Court H.R. (Judgment Series C No.211, 2009) considered that

> [T]he lack of investigation of grave facts against humane treatment such as torture and sexual violence in armed conflicts and/or systematic patterns, constitutes a breach of the State's obligations in relation to grave human rights violations, which infringe non-revocable laws (*jus cogens)* and generate obligations for the States such as investigating and punishing those practices. . . (§140)

Furthermore, the I/A Court H.R. (Judgment Series C No.328, 2016) considered in the *Case of the members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala*, that whenever there is evidence of sexual violence in the context of a non-international armed conflict, it should not be treated as a collateral offense, but its investigation shall integrate the overall strategy of prosecution of torture, crimes against humanity, war crimes or acts of genocide that may have been committed. The I/A Court H.R. (Judgment Series C No.328, 2016) stated that potential links between those directly responsible for sexual violence and their hierarchical superiors, as well as

the existence of components that would demonstrate a discriminatory intent or intention to commit genocide, shall be investigated.

Another humanitarian problem is the separation of children from their families after the massacres, and the abduction and illegal retention of them. The I/A Court H.R. (Judgment Series C No.211, 2009) established the existence of a pattern of abduction and illegal retention of children, usually perpetrated by the same soldiers who murdered their families, as well as the change of their names and denial of their identity. This pattern could even be assessed as a crime against humanity in accordance with Article 7(1)(k) of the Rome Statute of the ICC (1998), encompassing *"[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health"* if they are *"committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack",* as it is the case.

In addition, the I/A Court H.R. (Judgment Series C No.211, 2009) noted that "within the context of an internal armed conflict, the State's obligations toward children are defined in Article 4(3) of the Geneva Conventions' Additional Protocol II" (§191), in the specific case, literal (b) thereof, according to which *"all appropriate steps shall be taken to facilitate the reunion of families temporarily separated."* In the light of Article 19 of the American Convention on Human Rights (1969), according to which *"[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state",* the I/A Court H.R. (Judgment Series C No.211, 2009) reaffirmed "the special gravity of being able to attribute to a State Party to the Convention the charge of having applied or tolerated within its territory a systematic practice of abductions and illegal retention of minors" (§199).

With that in mind, Judge Cadena Rámila, in his Concurring Opinion (I/A Court H.R., Judgment Series C No.211, 2009), considered that

> The fact that the Inter-American Court lacks jurisdiction to determine violations of specific conventions such as the Geneva Conventions of 1944 or the Convention against Genocide (1948), does not mean that the Court cannot consider acts that these conventions typify as grave violations or genocide, as *aggravating circumstances.* . . (p.3)

Besides, at the time of the events of the instant cases, the prohibition regarding violence to life and person against people taking no active part in the hostilities defined in Article 3 common to the four 1949 Geneva Conventions was already part of the customary international law, and even of the *jus cogens* domain, so the State was already forced to comply with this prohibition (I/A Court H.R., Judgment Series C No.211, 2009, Concurring Opinion of Judge Cadena Rámila).

In the *Case of the "Las Dos Erres" Massacre v. Guatemala,* the I/A Court H.R. (Judgment Series C No.211, 2009) decided that the State should refrain from recourse to provisions exonerating from liability contained in the Law of National Reconciliation– Decree N°145/96–, "may not apply amnesty laws nor argue prescription, non-retroactivity of the criminal law, former adjudication, the *non bis in idem* principle . . . or any other similar means of discharging from liability" (§233). In the *Case of the members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala,* the I/A Court H.R. (Judgment Series C No.328, 2016) considered that the State failed to fulfill its duty to investigate serious human rights violations occurred in this case, including sexual violence and rape, forced labor, torture, crimes against humanity, war crimes and acts of genocide.

1.4 CONCLUSIONS OF THE CHAPTER

Transitional contexts can be distinguished by an eventual perpetration of serious human rights violations or its unlikelihood. In the context of a negotiated peace, as perpetrators are still powerful enough, ceasing violence may often be conditioned to the absence of criminal sanctions. Under these circumstances, from the *Case of the Massacres of El Mozote and nearby places v. El Salvador,* and particularly, from the Concurring Opinion of Judge García Sayán, IHL was included in the discussion of amnesties issued in transitions from armed conflict to negotiated peace, in an effort to give consideration to certain obstacles and tensions inherent in these processes.

As the I/A Court H.R. has judged cases concerning serious human rights violations framed in non-international armed conflicts, IHL has constituted an interpretative resource in order to specify provisions contained in the American Convention on Human Rights. Before the preliminary objection filed by the States referred to as lack of competence *ratione materiae,* the I/A Court H.R. considered that IHL rules can be observed in order to make a more specific application of the provisions of the American Convention on Human Rights when defining the scope of the obligations of the States. In this sense, the *Case of Las Palmeras v. Colombia* marked the beginning of explicit references to IHL in the contentious case-law of the I/A Court H.R.

The use of IHL as an interpretative resource of the American Convention on Human Rights has been legally based on Article 29(b) thereof, which concerns restrictions regarding interpretation and enshrines the *most favorable to the individual clause* or

principio pro personae. In accordance with the evolutive interpretation derived from Article 29(b), human rights shall be broadly interpreted; therefore, the use of IHL as an interpretative resource to detail rights and duties contained in the American Convention on Human Rights is justified because when interpreting the Convention, it is always necessary to choose the alternative that is most favorable to protection of the rights enshrined in said treaty.

The recourse to IHL, particularly, to 1977 Additional Protocol II, gains importance since this treaty is the only multilateral instrument explicitly referring to amnesties. On the one side, the I/A Court H.R. opened up the possibility to issue certain amnesties at the end of an armed conflict by invoking IHL in its judgments. On the other side, in the Concurring Opinion of Judge García Sayán in the *Case of the Massacres of El Mozote and nearby places v. El Salvador,* it was argued that there is no norm in positive international law that has explicitly proscribed any kind of amnesty, and that the only explicit mention of amnesty in a multilateral treaty is contained in Article 6(5) of 1977 Additional Protocol II.

Article 6(5) of 1977 Additional Protocol II encourages States 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, at the end of the hostilities. From a joint analysis of IHL rules and HRL, it follows from Article 6(5) that war crimes, crimes against humanity and the crime of genocide cannot be amnestied, but offenses strictly related to the armed uprising against the State could be decriminalized.

Amnesties derived from Article 6(5) encourage to grant immunity to those persons prosecuted for *"reasons related to the armed conflict"* in the strict sense, in the sense referred to as all those acts that by its nature or purpose are intended to harm the staff or damage the material of the adversary. War crimes, crimes against humanity and genocide committed against the civilian population–who do not take part in the hostilities–or persons placed *hors de combat*–who ceased being part of the military potential of the enemy–constitute crimes committed on the occasion of the armed conflict or crimes resulting from mass violence in a situation of armed conflict, and not crimes subsumed under *"reasons related to the armed conflict"* in the sense referred to in Article 6(5).

Under these conditions, as a non-international armed conflict may have parties whose legal status is fundamentally unequal, members of a non-State armed group can be brought to justice for having taken up arms. At the end of the hostilities, by virtue of Article 6(5), amnesties or pardons can benefit prosecuted for committing rebellion or sedition and minor infractions of the laws of war, and even other ordinary crimes related to

the armed uprising, as long as they do not represent gross international crimes or serious human rights violations. Article 6(5) can be deemed to apply to political crimes, and by extension, to crimes connected to political crimes, provided that these offenses do not constitute war crimes, crimes against humanity, genocide or gross human rights violations.

There is a duty for all States to investigate, prosecute and punish war crimes, crimes against humanity and genocide committed in situation of non-international armed conflict. This duty arises from IHL and numerous international treaties, and results consistent with the positioning of international bodies. The jurisprudence of the I/A Court H.R. related to gross violations of Common Article 3, crimes against humanity and genocide surrounded by cruelty and barbarity, reinforce this duty. The I/A Court H.R. has concluded that being involved in an armed conflict, instead of exonerating the State from its duties to respect and guarantee human rights, this fact obliged it to act in accordance with these obligations. The I/A Court H.R. has defined the State duty investigate, prosecute and punish serious international crimes as an obligation that cannot be overridden.

2 AMNESTIES FOR SERIOUS HUMAN RIGHTS VIOLATIONS BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Although amnesties for serious human rights violations have been condemned in the case-law of the I/A Court H.R. on several occasions, Colombia contends that "from the Inter-American Court's analysis in the case of the *Massacres of El Mozote and Nearby Places,* the Commission must conclude that international law prohibits amnesties in contexts in which peace is being sought, solely with respect to 'international crimes'" (IACHR, 2013, §263). This argument emerges from the use of International Humanitarian Law as an interpretative resource of the American Convention on Human Rights, and more specifically, because of the inclusion of Article 6(5) of 1977 Additional Protocol II in the discussion of amnesties enacted in transitions from armed conflict to negotiated peace.

The assessment of the facts as gross human rights violations or international crimes would thus be decisive under this reasoning. For instance, the massacre of a population committed by State actors in violation of an obligation contained in an international human rights treaty would, as a general rule, constitute a serious violation of human rights, and in the absence of genocidal intention, of widespread or systematic attack against civilians, or of the armed conflict and its relation to the conduct–determining elements for genocide, crimes against humanity and war crimes, respectively–the same fact could not be legally classified as an international crime (DPLF, 2009). Following the reasoning exposed above, the consequence would be that in the absence of these contextual elements, an abominable conduct that is not assessed as an international crime, could thus be amnestied.

The international criminal courts have emphasized that the nexus between the crime and the armed conflict serves to distinguish war crimes from purely domestic crimes and to prevent isolated or random criminal events from being assessed as war crimes (DPLF, 2009). According to the Colombian Constitutional Court (Judgment C-291, 2007), not all unlawful acts that occur during an armed conflict are ruled by IHL, since only those acts enough related to conduct of hostilities will be subject to this *corpus juris.* The Colombian Constitutional Court (Judgment C-291, 2007) stated that it shall be concluded that the act was perpetrated against the affected victim or victims on the grounds of the conflict in question. Serious human rights violations are thus at risk of being denatured as war crimes.

The reading of this chapter should be started by defining that HRL applies whether in peacetime or wartime. "The common background is that while humanitarian law applies

only to armed conflicts, as stipulated, for instance, in Common Article 2 of the 1949 Geneva Conventions, human rights law applies in both peace and war" (Orakhelashvili, 2008, p.162). In the same vein, the ICJ (2005) in the case concerning *armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda),* considered that "both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration" (§216). The State duty to investigate, prosecute and punish serious human rights violations arising from HRL, therefore, would have unconditional application anytime and anywhere.

If the I/A Court H.R. introduces IHL in order to analyze the duties of the States, such as to grant "the broadest possible amnesty to persons who have participated in a non-international armed conflict . . . with the exception of persons suspected of, accused of or sentenced for war crimes" at the end of the hostilities–under the terms of Rule 159 of the ICRC study on customary IHL–, what will happen to investigations, prosecutions and punishments of serious human rights violations that are not assessed as international crimes? This chapter aims at providing an answer to such a question.

The first section exposes a comprehensive vision in relation to the State obligation to investigate, prosecute and punish serious human rights violations before the bodies of the Inter-American Human Rights System. This section begins by addressing amnesties for serious human rights violations; continues by exposing the legitimate role of TCs with respect to investigations, prosecutions and punishments of gross human rights violations; and concludes by presenting the natural judge to prosecute serious human rights violations committed by security agents. We conclude that the State duty to investigate, prosecute and punish gross human rights violations not only is non-derogable, but also demands to be fulfilled through criminal proceedings conducted before the ordinary criminal justice.

The second section develops the scope of serious human rights violations in the Inter-American Human Rights System. This section begins by exposing the non-derogable human rights in terms of the American Convention on Human Rights and pronouncements of the I/A Court H.R. in exercise of its advisory role. Afterwards, the scope of three crimes threatening non-derogable human rights, and repeatedly referred to as gross human rights violations–namely torture, extrajudicial executions and enforced disappearance–is set in order to define what kind of facts cannot be shield by an amnesty. We conclude that amnesties for gross human rights violations, even if they are not assessed as international crimes, do not have any support among the human rights bodies.

2.1 THE STATE OBLIGATION TO INVESTIGATE, PROSECUTE AND PUNISH SERIOUS HUMAN RIGHTS VIOLATIONS

The I/A Court H.R. has stressed in its case-law concerning serious human rights violations committed in times of mass violence, the non-derogable character of the duty of the States to investigate, prosecute and punish these offenses. The first part of this section focuses on the positioning of the I/A Court H.R. about amnesties for serious human rights violations. The second part exposes the legitimate role of TCs in the Inter-American Human Rights System in relation to the State duty to investigate, prosecute and punish gross human rights violations. The third part details the traits of the MCJ with a view to elucidate why this special jurisdiction cannot be the natural judge to prosecute serious human rights violations committed by members of the security forces.

The State obligation to investigate, prosecute and punish human rights violations finds its normative support in Articles 1(1), 8(1) and 25(1) of the American Convention on Human Rights, enshrining the obligation to respect the rights, the right to an effective judicial remedy, and the right to judicial protection, respectively. This duty is reinforced in cases related to serious human rights violations, as none of the rights protected through the criminalization of these offenses can be restricted. First of all, Article 8(1) of the American Convention on Human Rights (1969) provides that *"[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal . . . for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature"* and Article 25(1) states that

> Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

From the *Case of Durand and Ugarte v. Peru*,[49] about the enforced disappearance of two inmates detained for terrorism-related reasons, occurred during a riot in El Frontón prison in 1986, the I/A Court H.R. (Judgment Series C No.68, 2000) has emphasized that Article 8(1) of the American Convention on Human Rights in relation to Article 25(1) thereof, grant the relatives of victims of enforced disappearance "the right to investigate their disappearance and death by State authorities, to carry out a process against the liable

[49] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of Durand and Ugarte v. Peru,* Judgment Series C No.68, 2000 (Merits); Judgment Series C No.89, 2001 (Reparations and Costs).

parties of unlawful acts, to impose the corresponding sanctions, and to compensate damages suffered by their relatives" (§130).

The I/A Court H.R. has repeatedly strengthened the State obligation to investigate, prosecute and punish serious human rights violations committed in times of mass violence. In its amnesty case-law related to transitional contexts, "[t]he Court developed some of its most innovative and far-reaching approaches to the effective protection of human rights" (Binder, 2011, p.1204) when insisting on the prohibition to shield perpetrators of serious human rights violations or international crimes from prosecution by omitting imposing them any sanction. The problem is that as the effect of an amnesty is to remove the legal status of a conduct as a crime and by virtue of the principle of retroactive application of a more lenient criminal law, the offense and criminal records of perpetrators of gross human rights violations would disappear.

In spite of the above, self-amnesties and amnesties granting immunity for serious human rights violations proliferated in Latin America as a means to deal with the legacies of mass violence. "It proved difficult for young and only slowly consolidating democracies to struggle against impunity, as many of the previous leaders and human rights violators still remained in influential positions" (Binder, 2011, p.1207-1208). Against this context, the I/A Court H.R., adopting a monist approach to the relationship between international and national law, "gave direct effect to its judgments, determined that national laws lacked legal effects, and also obliged domestic courts to engage in a form of decentralized conventionality control *(control de convencionalidad)*" (Binder, 2011, p.1204) with a view to strengthen the effectiveness of its pronouncements.

Self-amnesties were condemned in the *Case of Barrios Altos v. Peru*[50] for the first time. This case is related to the extrajudicial execution of 15 people and personal injuries caused to four persons during a celebration taking place in Barrios Altos neighborhood, Lima, in 1991, in reprisal against alleged members of Sendero Luminoso,[51] committed by members of the Peruvian Army acting on behalf of a death squadron known as Colina Group,[52] who conducted their own anti-terrorist program, and the subsequent enactment of

[50] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of Barrios Altos v. Peru*, Judgment Series C No.75, 2001 (Merits); Judgment Series C No.83, 2001 (Interpretation of the Judgment of the Merits).

[51] Sendero Luminoso or the Communist Party of Peru emerged as an armed opposition group at the end of the 60s. The most serious human rights violations committed by this group include murder and enforced disappearance (Human Rights Watch, 2017).

[52] Grupo Colina was a specialized squad composed of military personnel and members of the intelligence service who committed serious human rights violations such as murder of civilians and enforced disappearance (Human Rights Watch, 2017).

an amnesty law exonerating members of the security forces and civilians who had been accused, investigated, prosecuted or convicted for human rights violations committed from 1980 to 1995.

Before this scenario, the I/A Court H.R. (Judgment Series C No.75, 2001) stated that "[s]elf-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention" (§43). Invoking Articles 1(1), 2, 8(1) and 25(1) of the American Convention on Human Rights, the I/A Court H.R. (Judgment Series C No.75, 2001) considered that "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations" (§41), and specified that serious human rights violations include "torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law" (§41).

The prohibition of amnesties for serious human rights violations was then extended, in the *Case Gelman v. Uruguay*,[53] to amnesties approved using mechanisms of democratic participation. The above-mentioned case is related to the enforced disappearance of Mrs. Gelman after being detained in Buenos Aires, Argentina, in 1976, during the advanced stages of her pregnancy, after which she was taken to Uruguay where she gave birth to her daughter, whose identity was replaced, all of which was perpetrated by Argentinean and Uruguayan military agents under Operation Condor[54] and was not investigated because of the enactment of an amnesty law exonerating perpetrators of human rights violations committed during the military rule in Uruguay.

In the *Case Gelman v. Uruguay*, the I/A Court H.R. considered that even amnesties popularly approved infringed the right of victims to judicial protection, as well as the State obligation to investigate, prosecute and punish serious human rights violations (Gutiérrez Ramírez, 2014). The I/A Court H.R. (Judgment Series C No.221, 2011) stated that even if the amnesty law was "approved in a democratic regime and yet ratified or supported by the public, on two occasions, namely, through the exercise of direct democracy, does not automatically or by itself grants legitimacy under International Law" (§238).

[53] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case Gelman v. Uruguay*, Judgment Series C No.221, 2011 (Merits and Reparations).

[54] The Operation Condor was a joint and coordinated action taken by the military regimes of Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay against people suspected of having links with leftist movements, subjecting them to torture before their extrajudicial execution or enforced disappearance (I/A Court H.R., Judgment Series C No.221, 2011).

The I/A Court H.R. does not discriminate between self-amnesties benefiting certain regime and amnesties issued in democratic periods since regardless the political orientation or legitimacy of the government, both intend to shield perpetrators of serious human rights violations from prosecution (Binder, 2011). According to the I/A Court H.R., the adoption of amnesties allowing impunity for serious human rights violations is unacceptable since they affect non-derogable rights of the victims and their families, such as access to justice, truth and reparation[55] (Ferrer Mac-Gregor, 2014). The I/A Court H.R. (Judgment Series C No.221, 2011) concluded that

> The incompatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated, "self-amnesties," and the Court, more than the adoption process and the authority which issued the Amnesty Law, heads to its *ratio legis*: to leave unpunished serious violations committed in international law. The incompatibility of amnesty laws with the American Convention in cases of serious violations of human rights does not stem from a formal question, such as its origin, but rather from the material aspect in what regards the rights enshrined in Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention. (§229)

In this sense, Gutiérrez Ramírez (2014) claims that the popular sovereignty is limited by fundamental human rights, among them, the right to criminal retributive justice in cases of serious human rights violations, and therefore, it is not absolute. The case-law of the I/A Court H.R., by providing legal support to flout amnesty laws or decrees, has been decisive in the struggle of domestic actors against impunity. The proactive role of the I/A Court H.R. may be explained as the American Convention on Human Rights, adopted before tides of impunity, does not explicitly deal with the problem of amnesties (Binder, 2011). Before tides of impunity in the region, the case-law about the *conventionality control* became indispensable to retake investigations, prosecutions and punishments of serious human rights violations committed in times of mass violence.

The I/A Court H.R. institutes the conventionality control in Article 27 of Vienna Convention on the Law of Treaties (1969), by virtue of which *"[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."* Under these circumstances, the I/A Court H.R. (Judgment Series C No.154, 2006) has considered that even if domestic judges and courts are bound to apply provisions in force within their respective legal system, they are also required to verify that those provisions are in accordance with the American Convention on Human Rights and the interpretation thereof made by the I/A Court H.R., as its ultimate interpreter.

[55] The I/A Court H.R. has established that the application of amnesty laws violates the right to reparation, considering that the State duty to investigate, prosecute and punish the perpetrators of human rights violations constitutes an important measure to repair the damage (Ferrer Mac-Gregor, 2014).

The conventionality control was addressed, for the first time, in the *Case of Almonacid-Arellano et al. v. Chile*[56] about the extrajudicial execution of Mr. Almonacid Arellano, a teacher and activist of the Communist Party, perpetrated during the military dictatorship that overthrew the government of Salvador Allende in 1973 and suppressed people considered as opponents of the regime, and the subsequent enactment of an amnesty exonerating perpetrators of human rights violations committed from 1973 to 1978. In this case, the I/A Court H.R. (Judgment Series C No.154, 2006) considered that

> [W]hen a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. (§124)

The States are obliged to submit their legal provisions to the conventionality control, as well as to adopt domestic legal remedies in order to ensure rights and freedoms contained in the American Convention on Human Rights. In compliance with Article 2 of the American Convention on Human Rights, committing serious human rights violations must be criminalized within the domestic legal system of the States Party to this treaty. Article 2 of the American Convention on Human Rights (1969) provides that

> Where the exercise of any of the rights or freedoms referred to in Article 1[57] is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

Nevertheless, if a norm removing the punishability of gross human rights violations is enacted, it would not have any juridical effect since these offenses, according to *jus cogens* rules, shall be investigated, prosecuted and punished for being considered as crimes threatening non-derogable human rights or offending the conscience of humanity. On this point, Article 1 of Inter-American Convention to Prevent and Punish Torture (1985) states that *"[t]he State Parties undertake to prevent and punish torture in accordance with the terms of this Convention."* Similarly, Article 1(b) of Inter-American Convention on Forced Disappearance of Persons (1994) establishes that *"[t]he States Parties to this Convention*

[56] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of Almonacid-Arellano et al. v. Chile*, Judgment Series C No.154, 2006 (Preliminary Objections, Merits, Reparations and Costs).

[57] Article 1(1) of the American Convention on Human Rights (1969) enshrines the State obligation to respect the rights, as follows: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

undertake: . . . To punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories." Regarding crimes offending the conscience of humanity, the Preamble of the Rome Statute of the ICC (1998) acknowledges that *"the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."*

In cases such as the *Case of Barrios Altos v. Peru,* the I/A Court H.R. (Judgment Series C No.75, 2001) concluded "that amnesty laws No. 26479 and No. 26492 are incompatible with the American Convention on Human Rights and, consequently, lack legal effect" (§51(4)), extending the effects of this judgment to other cases about serious human rights violations perpetrated during the period of mass violence arising from the dictatorship and the armed conflict experienced in Peru. The I/A Court H.R. (Judgment Series C No.75, 2001) stated that "the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible" (§44), and added that these laws could not "have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated" (§44).

Amnesties shielding perpetrators of gross human rights violations not only lack legal effects, but also shall yield before the content of the American Convention on Human Rights and the interpretation thereof reached by the I/A Court H.R. Pursuant to Cassese (2002, as quoted by Binder, 2011), it was the first time that an international court stated that national laws were devoid of legal effects in the State system where they had been adopted, and consequently, obliged the State to act as if these laws had never been enacted. At first, the positioning of the I/A Court H.R. was not welcomed by the concerned States, resulting in non-compliance as a general rule (Binder, 2011). Nevertheless, the rejection of amnesties for serious human rights violations expanded among States Party to ongoing processes, as well as among expectant States such as Argentina and Colombia (Binder, 2011), as human rights gained in importance.

The State duty to investigate, prosecute and punish serious human rights violations not only excludes amnesties, but also will be regarded as completely fulfilled only through executing criminal proceedings. On this point, even if both bodies of the Inter-American Human Rights System–the IACHR and the I/A Court H.R.–have recognized the great value of TCs from the systematization of all kind of information on serious and massive

human rights violations, TCs cannot legitimately substitute criminal proceedings. In other words, TCs are regarded as valuable resources for further investigations, prosecutions and punishments of serious human rights violations conducted in criminal proceedings.

In the report about *The Right to Truth in the Americas,* the IACHR (2014) stated that TCs constitute resources of "recognizing and dignifying the experiences of the victims; and a fundamental source of information for both instituting and continuing with investigations and judicial proceedings, as well as for making public policy and putting adequate reparation mechanisms into place" (§176). The IACHR (2014) also noted that

> [B]ecause of the nature and scope of the work of truth commissions, which aid in identifying victims and address not only human rights violations but also the causes and consequences thereof, the result of their investigations provides important evidence for identifying institutional deficiencies and liability; adopting measures of reparation and guarantees of non-recurrence; and design of reparation programs, which take into account specific and differential patterns of conduct, hidden acts and infringements committed against the victims and their family members. (§202)

The I/A Court H.R. has also considered that setting up a TC and the publication of its final report mean a great advance and a key effort made by the State in order to help in the quest and discovery of the truth of the events in a particular case and historical period of the country (Gutiérrez Ramírez, 2014). However, even if the establishment of TCs is saluted and promoted by the bodies of the Inter-American Human Rights System, the State duty to investigate, prosecute and punish serious human rights violations is not seen as completely fulfilled through the sole institution of a TC.

The final reports of TCs have been employed as means for setting out the facts matter of dispute. The I/A Court H.R. has repeatedly used the results contained within the final reports of TCs, adding them to the body of evidence in order to set the context and the facts of the case under trial before its jurisdiction (Gutiérrez Ramírez, 2014). Regarding cases about human rights violations committed specifically in a situation of armed conflict, for instance, in *Miguel Castro-Castro Prison v. Peru* and *La Cantuta v. Peru,* the final reports of the TCs helped to set the proven facts.

In the *Case of the Miguel Castro-Castro Prison v. Peru*[58] related to death, physical injury, torture and other cruel, inhuman or degrading treatment or punishment perpetrated against numerous inmates as a consequence of the excessive use of force in the framework of an alleged transfer operation of women inmates conducted in 1992, but whose real

[58] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of the Miguel Castro-Castro Prison v. Peru,* Judgment Series C No.160, 2006 (Merits, Reparations and Costs); Judgment Series C No.181, 2008 (Interpretation of the Judgment on Merits, Reparations and Costs).

objective was to attack the life and integrity of prisoners of pavilions accommodating those people who had been accused or sentenced for terrorism or treason, the final report of TC was determining evidence when establishing proven facts related to criminal centers and armed conflict. The I/A Court H.R. (Judgment Series C No.160, 2006) referred to the final report of TC, stating that the prisons were not "only areas for the imprisonment of those accused or convicted for crimes of terrorism, but scenarios in which the Communist Party of Peru . . . and, in less measure, the Revolutionary Movement Túpac Amaru, extended the armed conflict" (§197(8)).

In the *Case of La Cantuta v. Peru*[59] regarding extrajudicial executions and enforced disappearance of one professor and some students of La Cantuta university, committed by members of the Peruvian Army and Grupo Colina in 1992, following the expulsion of former President Alberto Fujimori during a visit to this university in 1991, perpetrated in the framework of systematic practice of extrajudicial executions, enforced disappearances and torture against persons suspected of belonging to insurgent groups or who opposed to the government, the final report of TC constituted evidence of the existence of systematic practice of human rights violations. The I/A Court H.R. (Judgment Series C No.162, 2006) quoted TC, and concluded that during the period 1989-1992 "arbitrary executions spread to a great part of the national territory, they were more selective and were carried out in combination with other forms of elimination of persons who were suspected of participating, co-operating or sympathizing with subversive organizations" (§80(2)).

Considering that TCs are official but non-judicial bodies, the truth obtained through their proceedings has been, before the eyes of the I/A Court H.R., a means of evidence for setting out the facts matter of dispute, but never a proof, by itself, of the fulfillment of the State duty to investigate, prosecute and punish serious human rights violations. Since TCs are not jurisdictional bodies, they lack investigative tools and State authority to collect evidence compulsively, unlike courts of justice (Méndez, 1997). Under these conditions, the historical truth represented in the findings of TCs must thus be completed with judicial truth obtained in court proceedings.

In cases such as the *Case of the Massacres of El Mozote and nearby places v. El Salvador*, the I/A Court H.R. (Judgment Series C No.252, 2012) considered that TCs can "contribute to the creation and preservation of the historical memory, the elucidation of the

[59] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of La Cantuta v. Peru*, Judgment Series C No.162, 2006 (Merits, Reparations and Costs); Judgment Series C No.173, 2007 (Interpretation of the Judgment on Merits, Reparations and Costs).

facts, and the determination of the institutional, social and political responsibilities during certain historical periods of a society" (§298). Nevertheless, the labor of TCs does not override the State obligation to punish the perpetrators of serious human rights violations.

Regarding procedures before TCs and courts, in cases such as *Gudiel-Álvarez et al. ("Diario Militar") v. Guatemala*,[60] the I/A Court H.R. (Judgment Series C No.253, 2012) concluded that both kinds of proceedings "complement each other, because each has its own meaning and scope, as well as particular potentials and constraints that depend on the context in which they arise and the specific cases and circumstances they analyze" (§298). The *Case of Gudiel-Álvarez et al. ("Diario Militar") v. Guatemala* concerns enforced disappearance of 26 people, extrajudicial execution of one person, and sexual violence and torture committed against one girl, occurred from August 1983 to March 1985, as planned in an intelligence document known as *Diario Militar*, containing a list of people with their personal data, organization membership, activities and, in most cases, a photograph of the person, and indicating the acts perpetrated against the said person including clandestine detention, kidnapping and murder.

Despite the undeniable importance and usefulness of TCs, "both the Commission and the Court have repeatedly pointed out that an effective, diligent judicial investigation, conducted within a reasonable period of time, is what is required to respect and guarantee the right to the truth" (IACHR, 2014, §133). Cançado Trindade (2006) argues that the right to the truth is linked to the duty of the State to conduct a serious and effective investigation of the facts that resulted in serious human rights violations, and to identify, prosecute and punish perpetrators in order to avoid the defenselessness of the victims and their relatives and to ensure non-recurrence. Similarly, Méndez (1997) claims that confronting society with the truth about gross human rights violations is an important step towards justice, but this, only if setting up a TC is regarded as a part of a policy of overcoming impunity, and not as an attempt to exchange the right to justice by a report.

The links between TCs and judicial systems can be diverse. On the one hand, TCs can contribute to elucidate human rights violations by providing the gathered information to the judicial system in order to institute and follow up with judicial proceedings (IACHR, 2014). On the other hand, TCs can be instituted seeking to pursue different purposes to those ones arising from penal causes–such as reconciliation–, so ". . . prosecution was

[60] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of Gudiel-Álvarez et al. ("Diario Militar") v. Guatemala,* Judgment Series C No.253, 2012 (Merits, Reparations and Costs); Judgment Series C No.262, 2013 (Interpretation of the Judgment on Merits, Reparations and Costs).

expressly excluded from the work of the truth commissions, inasmuch as the proceedings were sealed" (IACHR, 2014, §199). Keeping in mind the rights of the victims to the truth, justice and reparation, the I/A Court H.R. applauds the establishment of TCs serving as resources to further investigations, prosecutions and punishments of serious human rights violations.[61] Méndez (1997) affirms that the most successful TCs were not created based on the premise that there would be no trials, but that they would represent a step in restoring the truth and, promptly, also the justice.

Following Parra Vera (2012), the I/A Court H.R. has pointed out that historical truths possibly achieved through a TC should not be seen as a substitute of the State duty to ensure the judicial attribution of individual or State responsibilities by the corresponding jurisdictional means, nor with the attribution of international responsibility competence of the I/A Court H.R. The positioning of the I/A Court H.R. on the subject can be explained by the fact that in the American Convention on Human Rights, the right to the truth is not expressly protected, so in transitional justice contexts, the duty to investigate, prosecute and punish serious human rights violations through criminal proceedings is the option chosen with a view to protect the rights of the victims (Gutiérrez Ramírez, 2014).

Although the right to truth is not explicitly enshrined in the American Convention on Human Rights, its significance has been progressively affirmed since associated to the rights to judicial guarantees and judicial protection, as well as the right to freedom of expression.[62] The American States, for instance, have recognized the value for victims of human rights violations, their relatives and the society as a whole, to know the truth about those acts as fully as possible, particularly, the identity of perpetrators and their reasons, the facts and circumstances of the commission of serious human rights violations (OAS, 2011). The IACHR (2014) considers, similarly, that "[d]issemination of the 'official' truth about systematic and gross human rights violations dignifies the victims and contributes to strengthening democratic societies and the rule of law" (§204).

The fulfillment of the State duty to investigate, prosecute and punish serious human rights violations shall be done through proceedings conducted before the ordinary criminal justice. Based on Articles 8(1) and 25(1), the I/A Court H.R. has rejected the jurisdiction of MCJ over serious human rights violations, while restating, simultaneously, the jurisdiction

[61] This positioning of the I/A Court H.R. regarding TCs and criminal proceedings would be reinforced in cases related to TCs restricted to determine the identity of the victims, or to which publishing the names of the perpetrators or imposing any sanction was forbidden.

[62] The right to the truth would be linked not only to the rights to judicial guarantees and judicial protection, but also to the freedom of expression, considering that the possibility to access and obtain information related to serious human rights violations must be guaranteed by the State (Méndez, 1997).

of the ordinary criminal justice to investigate, prosecute and punish these offenses. In the same vein, the IACHR (2013) in *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia,* considered that "the history of the countries of the Americas has shown that the exercise of the military jurisdiction to try cases of human rights violations has led to impunity" (§459).

MCJ is not the natural judge to investigate, prosecute and punish serious human rights violations before the bodies of the Inter-American Human Rights System. Firstly, as "the impartiality of a court depends on its members not having a direct interest, a position already taken, or a preference for one of the parties, and on the members not being involved in the dispute" (IACHR, 2013, §443), MCJ cannot legitimately be the natural judge to investigate, prosecute and punish gross human rights violations. Secondly, as ". . . in most of the countries of the region, the military criminal courts are under the Ministry of Defense, which is why they are part of the Executive branch, and their officials are under that Ministry" (IACHR, 2013, §457), MCJ cannot be regarded as independent. All of this has resulted in repeated denial of justice in trials related to serious human rights violations.

The I/A Court H.R. has reaffirmed the jurisdiction of the ordinary criminal justice to prosecute gross human rights violations. In the *Case of the 19 Merchants v. Colombia*[63] about the murder of 17 merchants and dismemberment of their bodies committed by the paramilitary group operating in Puerto Boyacá, Department of Boyacá in 1987, because the tradesmen did not pay the "taxes" charged by that armed group to transit the region with merchandise, and since they thought that the victims sold weapons to guerrillas operating in the Magdalena Medio region, as well as the murder of two of their relatives who tried to discover their whereabouts, the I/A Court H.R. (Judgment Series C No.109, 2004) stated that "[w]hen the military courts assume jurisdiction over a matter that should be heard by the ordinary courts, the right to the natural judge is violated as is, *a fortiori*, due process" (§167).

In the *Case of Escué-Zapata v. Colombia*[64] about arbitrary detention, ill-treatment and extrajudicial execution of Mr. Escué Zapata, indigenous leader, committed by military agents in 1988, and the subsequent presentation of his dead as caused in a cross fire with a guerrilla group, the I/A Court H.R. (Judgment Series C No.165, 2007) considered that "in a

[63] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of the 19 Merchants v. Colombia,* Judgment Series C No.93, 2002 (Preliminary Objection); Judgment Series C No.109, 2004 (Merits, Reparations and Costs).

[64] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of Escué-Zapata v. Colombia,* Judgment Series C No.165, 2007 (Merits, Reparations and Costs); Judgment Series C No.178, 2008 (Interpretation of the Judgment on the Merits, Reparations and Costs).

Democratic Rule of Law the military criminal jurisdiction has a restrictive and exceptional scope [since] [i]t can only be prosecuted military personnel who have committed some crime or felony that affects the legal interests of the military order" (§105). Before the I/A Court H.R., the exercise of MCJ meets the standards set in the American Convention on Human Rights both when accused and victim are active members of the armed forces, and when the crime is of a military nature committed by military personnel in exercise of their duties (Ferrer Mac-Gregor, 2014).

The partiality of the MCJ joins a limited participation of victims in cases processed before this special jurisdiction. As the military criminal law intends to protect legal assets of military order,[65] victims and others who have been adversely affected usually adhere to the representation performed by the military prosecution as one of the two parties of this judicial process. As the ordinary criminal law intends to protect the most valuable legal assets to societies, victims are entitled to actively participate in criminal proceedings. The I/A Court H.R. has established that legal assets protected by domestic criminal law and the American Convention on Human Rights such as integrity and personal dignity are not in any case related to the military discipline or mission, so that the conduct of military agents affecting these legal assets must be excluded from MCJ (Ferrer Mac-Gregor, 2014).

In the *Case of Vélez Restrepo and family v. Colombia*[66] about serious ill-treatment committed by military agents to the detriment of Mr. Vélez Restrepo, as well as subsequent death threats to the detriment of him and his family due to his activities as a cameraman who used to cover news about public order, at that time covering protests against the spraying of coca crops governmental policy occurred in Morelia, Department of Caquetá, in 1996, and ill-treatments perpetrated by military agents against protestors, the I/A Court H.R. (Judgment Series C No.248, 2012) emphasized that "the criteria to investigate and prosecute human rights violations before the ordinary jurisdiction reside not on the gravity of the violations, but rather on their very nature and on that of the protected juridical right" (§244).

The ordinary criminal justice shall assume jurisdiction *ipso facto* since it represents the general jurisdiction, as opposed to the exceptional ones. The IACHR (2013) stresses "the importance of the first investigative steps being carried out by the regular courts in

[65] Welzel (1976) understands the legal assets as goods protected by the law considering their value to human beings and groups, as they are seen as necessary means to achieve an ideal model of life.
[66] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of Vélez Restrepo and family v. Colombia*, Judgment Series C No.248, 2012 (Preliminary Objection, Merits, Reparations and Costs).

order to preserve the crime scene and ensure the chain of custody of any evidence" (§452). The I/A Court H.R., basically, has emphasized the non-compliance with the American Convention on Human Rights of rules extending the military jurisdiction to crimes not strictly related to military discipline or to legal assets inherent to the military realm (Parra Vera, 2012).

On this point, H. R. Solano Vélez (lecture notes, 15 May 2009) claims that as MCJ has as premise assuming jurisdiction in cases involving security agents who committed service-related offenses while being active members, some criticism arises since there are not service-related crimes because every crime entails, at least, acting beyond functions. In this sense, Ferrer Mac-Gregor (2014) affirms that human rights violations committed by military officers cannot be considered as a part of the fulfillment of their duty.

In the *Case of Radilla-Pacheco v. Mexico*[67] related to the enforced disappearance of Mr. Radilla Pacheco committed by security agents, the I/A Court H.R. (Judgment Series C No.209, 2009) stated that "in a Constitutional State, the commission of acts such as the forced disappearances of persons against civilians by the members of the military can never be considered as a legitimate and acceptable means for compliance with the military mission" (§277). Serious human rights violations thus are "openly contrary to the duties of respect and protection of human rights and, therefore, are excluded from the competence of the military jurisdiction" (I/A Court H.R., Judgment Series C No.209, 2009, §277).

In the Merits Report No.2/06, *Miguel Orlando Muñoz Guzmán (Mexico)* related to the enforced disappearance of Mr. Muñoz Guzmán, who was a lieutenant in the Mexican Army, occurred in 1993, the IACHR (2006) added that MCJ impede access to an effective and impartial remedy since judges in the military judicial system are generally active-duty members of the Army, which place them "in the position of sitting in judgment of their *comrades-in-arms*, rendering illusory the requirement of impartiality, since the members of the Army often feel compelled to protect those who fight alongside them in a difficult and dangerous context" (§83). In conclusion, MCJ cannot be regarded as the natural judge to investigate, prosecute and punish serious human rights violations, considering that "the judge in charge of hearing a case must be competent, independent and impartial" (I/A Court H.R., Judgment Series C No.109, 2004, §167). The same requirements extend to any jurisdiction being in charge of prosecuting serious human rights violations.

[67] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of Radilla-Pacheco v. Mexico*, Judgment Series C No.209, 2009 (Preliminary Objections, Merits, Reparations and Costs).

The State duty to investigate, prosecute and punish serious human rights violations committed in situations of armed conflict necessarily rejects amnesties for these offenses and requires the execution of criminal proceedings. Even if setting up TCs is considered as a laudable initiative, TCs are regarded as resources for investigations, prosecutions and punishments of serious human rights violations further conducted before the criminal jurisdiction. Setting up a TC does not substitute or override the State duty to prosecute perpetrators of serious human rights violations through criminal proceedings. Recognizing and guaranteeing the rights of the victims to an effective judicial remedy and to judicial protection also demands criminal proceedings conducted before competent, independent and impartial judges, who necessarily belong to the ordinary criminal justice.

2.2 THE SCOPE OF SERIOUS HUMAN RIGHTS VIOLATIONS

Having established that amnesties for serious human rights violations, even if they are popularly approved, are prohibited, it is necessary to define the understanding of the I/A Court H.R. on the scope of crimes threatening non-derogable human rights in order to shape this proscription. Firstly, it is worth noting that serious human rights violations can be committed in any political context and, in turn, can represent war crimes, crimes against humanity or genocide under certain circumstances. This section starts by exposing non-derogable human rights before the Inter-American Human Rights System and continues by defining the scope of serious human rights violations as breaches of certain of those rights that cannot, under any circumstances, be derogated.

Non-derogable human rights are originally defined in Article 27(2) of the American Convention on Human Rights. Contained in Chapter IV about suspension of guarantees, interpretation and application, Article 27(1) provides that *"[i]n time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention . . ."* Article 27(1) thus allows the suspension of guarantees in states of emergency. However, Article 27(2) then states that the previous provision

> [D]oes not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

In addition, Article 7(6) of the American Convention on Human Rights, enshrining *habeas corpus,* has been integrated to the Articles containing non-derogable human rights, as outlined in the Advisory Opinion OC-8/87 concerning *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights).*[68] With that in mind, Article 27(2) of the American Convention on Human Rights and Advisory Opinion OC-8/87 set out the scope of non-derogable human rights–whether in peacetime or wartime–before the Inter-American Human Rights System.

The existence of non-derogable human rights is founded on the *awakening of a universal juridical conscience,* concept broadly discussed by former Judge of the I/A Court H.R., Cançado Trindade. Judge Cançado Trindade, in his Concurring Opinion rendered in the *Case of Barrios Altos v. Peru* (I/A Court H.R., Judgment Series C No.75, 2001), established that "the international case-law, and the practice of States and international organizations, as well as the more lucid juridical doctrine, provide elements wherefrom one may detect *the awakening of a universal juridical conscience"* (§16).

Due to the emergence of this universal juridical conscience, at the beginning of the 21st century, international law was rethought based on a paradigm no longer State-centered, but rather anthropocentric, placing human beings in a central position (I/A Court H.R., Judgment Series C No.75, 2001, Concurring Opinion of Judge Cançado Trindade). In the same vein, Aguilar Cavallo (2006) affirms that one of the most important effects of globalization is the acceleration of the humanization of international law, which consists in placing human dignity, both individually and collectively, at the center of the concerns of this legal system.

One of the legal categories that have played a fundamental role in this evolutionary dynamic of international law has been the imperative norms of international law or *jus cogens* rules (Aguilar Cavallo, 2006). Article 53 and 64 of 1969 Vienna Convention on the Law of Treaties, contained in Part V about invalidity, termination and suspension of the operation of treaties, make reference to *jus cogens* rules.

Article 53 of the Vienna Convention on the Law of Treaties (1969) about treaties conflicting with a peremptory norm of general international law ("*jus cogens*"), states that

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and

[68] *See* section "1.3.1 War crimes as serious violations of Common Article 3 in the contentious case-law of the Inter-American Court of Human Rights."

> which can be modified only by a subsequent norm of general international law having the same character.

Article 64 of the Vienna Convention on the Law of Treaties (1969) concerning the emergence of a new peremptory norm of general international law ("*jus cogens*"), disposes that *"[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."* The conclusion of an international agreement that violates a peremptory norm of general international law thus results in the invalidity of such an agreement, by virtue of Articles 53 and 64 of 1969 Vienna Convention on the Law of Treaties (Aguilar Cavallo, 2006).

Firstly, Article 53 defines absolute nullity as a preventive sanction for opposing a preexisting *jus cogens* rule (Valencia Restrepo, 2005). In this case, Aguilar Cavallo (2006) claims that the effects of the absolute nullity extend to the whole treaty, and not only to the dispositions contrary to the *jus cogens* rule, and that the nullity produces its effects *ab initio*–from the entry into force of the respective international treaty–having, therefore, *ex tunc* efficiency–producing retroactive effects–and requiring the elimination of the effects or consequences of the opposition and the reconstruction of the situation to the previous state of the conclusion of the treaty.

Secondly, regarding Article 64 related to the consequences of an international treaty contrary to a *superveniens jus cogens* rule, Aguilar Cavallo (2006) affirms that the consequence is the termination of the treaty, which remains valid until then. In this case, the prior effects to the emergence of the new *jus cogens* rule are valid, and those ones that are not completed will end if they are contrary to the *jus cogens* rule, but if they do not oppose to the new *jus cogens* rule, they will remain valid by virtue of the principle of divisibility of the provisions of the agreement (Aguilar Cavallo, 2006).

Jus cogens norms are rules or structural principles of the international order that represent fundamental values generally accepted by the international community, which, by virtue of their imperative nature, bind all the States independently of their will (Aguilar Cavallo, 2006). According to Alston and Steiner (2000, as quoted by Aguilar Cavallo, 2006), there is a set of rules whose existence as *jus cogens* is not discussed, such as the rules prohibiting genocide, slavery, racial discrimination, torture and apartheid. In the same vein, Valencia Restrepo (2005) claims that the right of every human being to life, liberty and security of person, as well as the duties to respect and guarantee these rights are *jus cogens* rules, since any infringement of these duties implies an attack against fundamental values of the international community.

According to Ago (1971, as quoted by Chetail, 2003), former Judge of the ICJ, *jus cogens* rules include fundamental humanitarian standards such as the prohibition of genocide, slavery and racial discrimination, as well as the protection of the fundamental rights of human person in peacetime or wartime. Similarly, with a more comprehensive positioning before *jus cogens* rules, the Colombian Constitutional Court (Judgment C-177, 2001) concluded that human rights treaties and IHL conventions are complementary norms of *jus cogens,* which, under the common idea of protection of the principles of humanity, belong to the international regime for the protection of the rights of the human person.

Cassese (1993, as quoted by Aguilar Cavallo, 2006) claims that almost all States seem to agree that genocide, racial discrimination–especially apartheid–and torture are among the most serious human rights violations, and this means that almost all States seem to agree in considering as fundamental, at least, some great values. In conclusion, as Henkin (1996) has pointed out, "[International non-conventional HRL,] [a]s *ius cogens* (or a close kin), it is not the result of practice but the product of common consensus from which few dare dissent" (p.39), and he continues adding that "the few who might dare [to dissent] are compelled to obey, the cost of living in the state system at the end of the 20th century" (p.39).

Non-derogable human rights, representing fundamental values of the international community, constitute *jus cogens* rules. The I/A Court H.R. has insistently considered non-derogable human rights as *jus cogens* rules. In the *Case of the "Las Dos Erres" Massacre v. Guatemala,* for instance, the I/A Court H.R. stated that the right not to be subjected to torture or to cruel, inhuman, or degrading punishment or treatment, enshrined in Article 5(2) of the American Convention on Human Rights, is considered as a rule from which no derogation is allowed. It was also concluded that "the lack of investigation of grave facts against humane treatment such as torture and sexual violence in armed conflicts and/or systematic patterns, constitutes a breach of the State's obligations in relation to grave human rights violations, which infringe non-revocable laws (*jus cogens)*" (I/A Court H.R., Judgment Series C No.211, 2009, §140).

Considering that a peremptory norm of general international law is thus *"a norm from which no derogation is permitted",* willingness of States expressed in international treaties, unilateral acts, facts or omissions is limited by *jus cogens* rules, and any manifestation contravening their content will be vitiated of absolute nullity. According to Combacau and Sur (2001, as quoted by Aguilar Cavallo, 2006), absolute effectiveness of the *jus cogens* rules would not be limited to the conventional framework of the law of

treaties, but would extend to the condemnation of certain State conduct, even in domestic law, related to IHL rules and to rules protecting human rights. This is the case of amnesties shielding serious human rights violations from investigation, prosecution and punishment.

On this point, Judge Cançado Trindade in his Concurring Opinion in the *Case of Barrios Altos v. Peru* (I/A Court H.R., Judgment Series C No.75, 2001) argued that

> The *corpus juris* of the International Law of Human Rights makes it clear that not everything that is lawful in the domestic legal order is so in the international legal order, and even more forcefully when superior values (such as truth and justice) are at stake. In reality, what came to be called laws of amnesty, and particularly the perverse modality of the so-called laws of self-amnesty, even if they are considered laws under a given domestic legal order, *are not so* in the ambit of the International Law of Human Rights. (§6)

Even if serious human rights violations shall be necessarily investigated, prosecuted and punished for being considered as crimes threatening non-derogable human rights, some doubts concerning the scope of amnesties prohibited from the interpretation made of Article 6(5) of 1977 Additional Protocol II have emerged. Specifically, Colombia contends that "from the Inter-American Court's analysis in the case of the *Massacres of El Mozote and Nearby Places*, the Commission must conclude that international law prohibits amnesties in contexts in which peace is being sought, solely with respect to 'international crimes'" (IACHR, 2013, §263).

In view of this approach, the IACHR (2013) in *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia,* pointed out, firstly, that "acting upon its mandate under the American Convention and the American Declaration, the Commission is called upon to verify compliance with the obligation to investigate serious human rights violations taking into account each case's distinctive features" (§264), and then added that the "exercise of that authority cannot be conditional upon classifications of violations and/or crimes established *a priori*" (§264).

The IACHR and the I/A Court H.R. have concluded that amnesties prohibited from the interpretation of Article 6(5) are not limited to war crimes, crimes against humanity and genocide, but also extend to serious human rights violations. In the *Case Gelman v. Uruguay,* the I/A Court H.R. mentioned that Article 6(5) of 1977 Additional Protocol II "had been revisited in statements and decisions issued by the Inter-American Commission and the United Nations Committee in which they make reference to the prohibition of amnesty laws with respect to serious violations of human rights" (IACHR, 2013, §270).

The UN Human Rights Committee (2001), in its *Concluding Observations on the Human Rights Situation in Croatia*, recommended that "in practice the Amnesty Law is not

applied or utilized for granting impunity to persons accused of serious human rights violations" (§11), taking into account that while the Amnesty Law specifically provides that it does not apply to war crimes, "the term 'war crimes' is not defined and there is a danger that the law will be applied so as to grant impunity to persons accused of serious human rights violations" (§11).

The UN Human Rights Committee (1997), in its *Concluding Observations on the Human Rights Situation in Lebanon*, regarding the amnesty granted to civilian and military personnel for human rights violations they may have committed against civilians during the civil war, concluded that "[s]uch a sweeping amnesty may prevent the appropriate investigation and punishment of the perpetrators of past human rights violations, undermine efforts to establish respect for human rights, and constitute an impediment to efforts undertaken to consolidate democracy" (§12).

Bearing in mind the adherence of States to human rights treaties, specifically, to the American Convention on Human Rights, it should be emphasized that "conduct that may be legal under the Geneva Conventions may not be so under the American Convention" (Jean-Baptiste, 2017, p.38). The IACHR (2013) has stated that "the State is still obligated to investigate, in accordance with the norms of international humanitarian law and international human rights law, the serious human rights violations committed during the armed conflict" (§273), and that to override this obligation "either by enforcing amnesty laws or any other type of domestic provision, is incompatible with the American Convention" (§273).

Under these conditions, amnesties prohibited in international law are not limited to granting immunity for war crimes, crimes against humanity and genocide–or international crimes–but also extend to serious human rights violations. On the one hand, because Article 6(5) of 1977 Additional Protocol II has been revisited by some human rights bodies having authoritative interpretation. On the other hand, since the State duty to investigate, prosecute and punish serious human rights violations is an international obligation arising from HRL that cannot be overridden. Amnesties cannot validly grant immunity for serious human rights violations, even if they are not assessed as international crimes.

In the *Case of the Moiwana Community v. Suriname,*[69] the I/A Court H.R. decided on an amnesty law condemning crimes against humanity, but leaving the door open to be

[69] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of the Moiwana Community v. Suriname*, Judgment Series C No.124, 2005 (Preliminary Objections,

applied to serious human rights violations. This case concerns the extrajudicial execution of at least 39 people–including children, women and elderly–, and personal injuries caused to another group of people during a military operation conducted in 1986 at Moiwana Village, as well as the destruction of their property and the displacement of the survivors, committed in the context of systematic practice of human rights violations during the military regime and the armed conflict against the National Liberation Army of Suriname.

Before the Amnesty Act 1989–promulgated in 1992–, granting immunity to those who had committed certain criminal acts, excluding crimes against humanity, from January 1985 to August 1992, the I/A Court H.R. (Judgment Series C No.124, 2005) considered that in response to the extrajudicial executions committed against people of the Moiwana Village in 1986, "the foremost remedy to be provided by the State is an effective, swift investigation and judicial process, leading to the clarification of the facts, punishment of the responsible parties, and appropriate compensation of the victims" (§166).

The issue was that "[t]he amnesty law excluded crimes against humanity, but the domestic courts had classified a series of extrajudicial executions as ordinary crimes, not crimes against humanity, and applied the amnesty to the case" (Jean-Baptiste, 2017, p.39). As the State obligation to investigate, prosecute and punish serious human rights violations cannot be overridden, the I/A Court H.R. (Judgment Series C No.124, 2005) ordered that "Suriname must repeal the 'Amnesty Act 1989' and declare that it was devoid of legal effect *ab initio*" (§199(e)), and concluded that "amnesty laws, statutes of limitation and related provisions that hinder the investigation and punishment of serious human rights violations . . . are inadmissible, as said violations contravene non-derogable rights recognized in international human rights law" (§206).

This being the case, Uprimny Yepes et al. (2014) affirm that the State international responsibility is better defined in accordance with the broad formulation of the State duty to investigate, prosecute and punish. According to Uprimny Yepes et al. (2014), the State international responsibility under these terms includes not only investigation, prosecution and punishment of international crimes, but also all serious human rights violations such as torture, extrajudicial execution and enforced disappearance, even if they were not part of a widespread or systematic attack or committed in the context of an armed conflict. Uprimny Yepes et al. (2014) argue that this is the conception of State international responsibility that most consistently articulates the various sources of applicable international law.

Merits, Reparations and Costs); Judgment Series C No.145, 2006 (Interpretation of the Judgment on Merits, Reparations and Costs).

The I/A Court H.R. relies on the particularly severe character of some human rights violations based on their impairment to rights recognized as non-derogable, even in states of emergency. This justifies the condemnation and nullification of amnesties for serious human rights violations, whose scope has been established in cases such as *Barrios Altos v. Peru* and *"Las Dos Erres" Massacre v. Guatemala*, when stating that dispositions that are "intended to prevent the investigation and punishment of those responsible for serious violations to human rights *such as torture, summary, extrajudicial, or arbitrary executions, and enforced disappearance* are not admissible" [emphasis added] (I/A Court H.R., Judgment Series C No.75, 2001, §41; Judgment Series C No.211, 2009, §129).

In this sense, Olásolo Alonso, Mateus Rugeles and Contreras Fonseca (2016) claim that gross human rights violations concern acts that seriously undermine some of the most precious legal assets of the victim, so it can be said that the systematic or large-scale nature of violence does not dilute the consequences of each individual act. Following the case-law of the I/A Court H.R., the seriousness of torture, extrajudicial execution and enforced disappearance does not depend on their widespread or systematic perpetration (Uprimny Yepes et al., 2014), and the same applies to slavery, the above by virtue of *jus cogens* rules prohibiting these offenses even when they are committed as isolated acts (Olásolo Alonso et al., 2016).

In using the term *"such as",* the scope of serious human rights violations remains open to further jurisprudential positioning assessing certain crimes as grave breaches of HRL, so to speak. Similarly, Uprimny Yepes et al. (2014) argue that following the current state of Inter-American jurisprudence, it is not clear whether conduct other than torture, extrajudicial execution and enforced disappearance, that do not respond to generalized or systematic patterns, could be classified as serious human rights violations. This can be exemplified in the Concurring Opinion of Judge García Ramírez in the *Case of Barrios Altos v. Peru* (I/A Court H.R. Judgment Series C No.75, 2001), when claiming that "extrajudicial executions, the forced disappearance of persons, genocide, torture, specific crimes against humanity and certain very serious human rights violations must be punished surely and effectively at the national and the international level" (§13).

It is necessary to define the understanding of the I/A Court H.R. on the scope of three crimes threatening non-derogable human rights, repeatedly defined in its case-law as gross human rights violations: torture, extrajudicial execution and enforced disappearance. Considering that most of the contentious cases judged by the I/A Court H.R. are directly related to criminal matters or to criminal procedures, and that among these cases most of

them involve these three kinds of serious human rights violations (Ferrer Mac-Gregor, 2014), this subsection does not intend to address all existing case-law related to torture, extrajudicial execution and enforced disappearance, but to settle the understanding of the I/A Court H.R. about the scope of these offenses in order to clarify what kind of facts shall be investigated, prosecuted and punished, and cannot be shield by an amnesty.

2.2.1 Torture

Article 2 of 1985 Inter-American Convention to Prevent and Punish Torture shapes the understanding of the I/A Court H.R. on this act. In the *Case of Tibi v. Ecuador*[70] related to torture perpetrated against Mr. Tibi, French citizen, committed by Ecuadorian prison officers, the I/A Court H.R. (Judgment Series C No.114, 2004) considered that as 1985 Inter-American Convention to Prevent and Punish Torture integrates the Inter-American *corpus juris*, it shall be used in order to define the scope of application and content of Article 5(2). Article 5(2) of the American Convention on Human Rights (1969) states that *"[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment"* and that *"[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."*

Article 2 of the Inter-American Convention to Prevent and Punish Torture (1985) then develops the proscription contained in Article 5(2) of the American Convention on Human Rights, and provides that for the purposes of that international treaty

> [T]orture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.
> The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

Torture is defined as an intentional act aimed to cause physical or mental suffering, or to diminish physical or mental capacities of a person, committed with any purpose, such as criminal investigation, as a means of intimidation, personal punishment, preventive measure, or penalty, excluding physical or mental suffering inherent to lawful measures

[70] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of Tibi v. Ecuador*, Judgment Series C No.114, 2004 (Preliminary Objections, Merits, Reparations and Costs).

that do not comprehend methods previously mentioned. The I/A Court H.R. shares the positioning of the ECtHR in the sense that the understanding of torture is continuously under review in light of existing conditions and values of democratic societies (Martin & Rodríguez Pinzón, 2006), as a consequence of which certain current inhuman or degrading treatments could further be considered as a form of torture (I/A Court H.R., Judgment Series C No.70, 2000, Separate Opinion of Judge Cançado Trindade).

The I/A Court H.R. has judged numerous cases involving torture, as previously stated. Concerning the prohibition of torture in situations of armed conflict, in the *Case of Espinoza Gonzáles v. Peru*[71] regarding sexual violence and torture committed against Mrs. Espinoza Gonzáles while being detained for her alleged participation in the kidnapping of a businessman, in 1993, perpetrated within the framework of systematic practice of torture against people indicted for treason or terrorism, the I/A Court H.R. (Judgment Series C No.289, 2014) concluded that

> The prohibition of torture and cruel, inhuman or degrading treatment or punishment is absolute and non-derogable, even under the most difficult circumstances, such as war, threat of war, the fight against terrorism and any other crimes, states of emergency, or internal unrest or conflict, suspension of constitutional guarantees, internal political instability or other public emergencies or catastrophes. Nowadays, this prohibition is part of international *jus cogens.* (§141)

The I/A Court H.R. also referred to all treaties condemning torture and establishing the international duty to investigate, prosecute and punish this offense. "Both universal and regional treaties establish this prohibition and the non-derogable right not to be subjected to any form of torture. Also, numerous international instruments recognize this right and reiterate the same prohibition, including international humanitarian law" (I/A Court H.R., Judgment Series C No.289, 2014, §141). At the regional level, for instance, Article 1 of the Inter-American Convention to Prevent and Punish Torture (1985) provides that *"[t]he State Parties undertake to prevent and punish torture in accordance with the terms of this Convention."*

The tragic events that took place especially throughout the second half of the 20th century have been the opportune moment for a reaffirmation of the *jus cogens* status of the norm that prohibits torture (Aguilar Cavallo, 2006). These events include death camps to exterminate Jews organized by the Nazi Germany, prisons to torture intellectuals during the genocide in Cambodia, and dehumanization and subsequent extermination of Tutsis

[71] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of Espinoza Gonzáles v. Peru*, Judgment Series C No.289, 2014 (Preliminary Objections, Merits, Reparations and Costs); Judgment Series C No.295, 2015 (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs).

into the hands of Hutus during the armed conflict in Rwanda. An obligation to enforce the law and to impose sanctions for perpetrating torture emerged from then. The I/A Court H.R. considers that the crime of torture shall be integrated into domestic law in accordance with the definition provided by international law, which sets a minimum standard for behaviors and elements that such criminalization shall observe (Ferrer Mac-Gregor, 2014).

From the rule prohibiting torture clearly emerges an obligation of prevention for the State, but also of investigation and prosecution, all of which has *erga omnes* status and belongs to the *jus cogens* level (Aguilar Cavallo, 2006). Before the I/A Court H.R., this State duty arises as soon as the national authorities are aware of complaints or reasons to believe that an act of torture has occurred, in whose case they must conduct a serious, impartial and effective investigation, *ex officio* and without further delay (Ferrer Mac-Gregor, 2014).

The prohibition of torture as a *jus cogens* rule has been recognized by human rights bodies and other international courts. The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2006), in a joint report about the Guantanamo Bay detainees[72] submitted to the UN Commission on Human Rights, stated that "the prohibition of torture is part of *jus cogens*" (§43), and specified that torture and other cruel, inhuman or degrading treatments or punishments causing serious injury to the body or to mental or physical health are "also prohibited under international criminal law and in certain instances can amount to crimes against humanity and war crimes" (§43).

In *Prosecutor v. Furundžija*[73] about crimes committed against Bosnian Muslims, interrogated at the headquarters of the Jokers in Nadioci, Bosnia and Herzegovina in 1993, including sexual assaults, rape, physical and mental suffering, the ICTY (Case No.IT-95-17/1-T, 1998) concluded that "the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community" (§154). The ICTY (Case No.IT-95-17/1-T, 1998) also stated that the prohibition against torture is "designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate" (§154).

[72] Joint report submitted by the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the UN Special Rapporteur on the Independence of Judges and Lawyers, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the UN Special Rapporteur on Freedom of Religion or Belief, and the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health.

[73] Anto Furundžija was the commander of a special unit of the Croatian Defense Council called the "Jokers."

Two consequences for willingness of States expressed in the sense of contravening the *jus cogens* rule prohibiting torture arise from *Prosecutor v. Furundžija* at the inter-State and individual levels. On the one hand, at the inter-State level, it serves to internationally delegitimize any legislative, administrative or judicial act that authorizes torture since "on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*" (ICTY, Case No.IT-95-17/1-T 1998, §155). On the other hand, it would be "unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law" (ICTY, Case No.IT-95-17/1-T, 1998, §155).

Pursuant to Aguilar Cavallo (2006), the rules criminalizing torture are linked to the principle of the prohibition of impunity and, consequently, are also related to *jus cogens* rules through this way. Regarding amnesties granted by some States in respect of acts of torture, the UN Human Rights Committee (1992), in its *General Comment No.20 about Article 7 (Prohibition of torture or other cruel, inhuman or degrading treatment or punishment) of 1966 International Covenant on Civil and Political Rights*, affirmed that "[a]mnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future" (§15), so by virtue of the prohibition of impunity for acts of torture, "States may not deprive individuals of the right to an effective remedy" (§15).

2.2.2 Summary, Extrajudicial or Arbitrary Execution

Summary, extrajudicial or arbitrary executions can be committed against one single person or against a group of people at the same event. The I/A Court H.R. has considered that summary, extrajudicial or arbitrary executions result particularly serious because they infringe Article 4(1) of the American Convention on Human Rights (1969), core prerequisite to the realization of all other human rights, and by virtue of which *"[n]o one shall be arbitrarily deprived of his life."* Therefore, "States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces" (UN Human Rights Committee, 1982, §3; Ferrer Mac-Gregor, 2014).

Summary, extrajudicial or arbitrary executions take place when a public authority, or persons or groups of persons acting with the authorization, support, or acquiescence of the State, deprive arbitrarily or deliberately a human being of his life in circumstances that

do not correspond to the legitimate use of force (Ferrer Mac-Gregor, 2014). On this point, the UN Human Rights Committee (1982), in its *General Comment No.6 about Article 6 (Right to life) of 1966 International Covenant on Civil and Political Rights,* affirmed that "[t]he deprivation of life by the authorities of the State is a matter of the utmost gravity" (§3), thus, before this situation, "the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities" (§3).

Bearing in mind that the State holds the legitimate monopoly over forces of law and order, not every death at the hands of public servants means an arbitrary deprivation of life. There are two determining and concurrent criteria which allow the assessment of a death as a summary, extrajudicial or arbitrary execution. One the one side, the death must have been caused intentionally (Ferrer Mac-Gregor, 2014). On the other side, the force must have been used illegitimately or disproportionately by the public authority (Ferrer Mac-Gregor, 2014), or have been exercised by persons acting with the authorization, support, or acquiescence of the State, since the latter must have the monopoly over forces of law and order.

Firstly, regarding the intentionality to cause the death of the victim, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (2011), in a report filed to the UN Human Rights Council, reaffirmed that "[i]n the context of the mandate, targeted killing has been defined as the intentional and deliberate use of lethal force, 'with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator'" (§66). The expression *"with a degree of premeditation"* thus encompasses arbitrary deprivations of life intentionally caused or committed under *dolus directus,* as well as deprivations of life caused recklessly or committed under *dolus eventualis,* that is to say, having anticipated the death as an anti-juridical result and leaving its materialization to chance.

Secondly, the illegitimate or disproportionate use of force by the public authority is defined in relation to the principle of necessity. The I/A Court H.R. considers that the use of lethal force by security forces is permissible when necessary to preserve the life of the State agent or the life of others, or when seeking to avoid serious injury, provided that the force results proportional to the threat that seeks to repel (Ferrer Mac-Gregor, 2014). According to the I/A Court H.R., the use of force by public authorities shall be guided by preconditions such as exceptionality, proportionality and humanity, and shall be prohibited as a general rule (Ferrer Mac-Gregor, 2014). The use of force by third parties, or persons acting with the authorization, support, or acquiescence of the State is illegitimate *per se.*

In relation to the State obligation to investigate, prosecute and punish summary, extrajudicial or arbitrary executions as a serious human rights violation infringing the right to life, a non-derogable human right in accordance with Article 27(2) of the American Convention on Human Rights–among others–, the I/A Court H.R., in cases such as the *Case of the Pueblo Bello Massacre v. Colombia*[74] considered that "since full enjoyment of the right to life is a prior condition for the exercise of all the other rights . . . the obligation to investigate any violations of this right is a conditions [*sic*] for ensuring this right effectively" (I/A Court H.R., Judgment Series C No.140, 2006, §143).

The *Case of the Pueblo Bello Massacre v. Colombia* concerns the murder of a group of people for their alleged collaboration with guerrillas, committed by a paramilitary group with acquiescence or tolerance of members of the security forces in Pueblo Bello, Department of Antioquia, in 1990, because the paramilitary leader thought that inhabitants of this hamlet participated in a theft of his cattle. Before these extrajudicial executions, the I/A Court H.R. (Judgment Series C No.140, 2006) concluded that proceedings must be conducted "by all available legal means with the aim of determining the truth and the investigation, pursuit, capture, prosecution and punishment of the masterminds and perpetrators of the facts, particularly when State agents are or may be involved" (§143).

2.2.3 Enforced Disappearance

In the case of enforced disappearance, the I/A Court H.R. relies on Article 2 of the Inter-American Convention on Forced Disappearance of Persons (1994) as integral part of the *corpus juris* on this matter, which states that for the purposes of that treaty, enforced disappearance is considered to be

> [T]he act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

The enforced disappearance begins with the deprivation of liberty executed by State agents or agents directly or indirectly supported by the State, whether it is an illegal or legal deprivation, followed by the denial of information on the whereabouts of the

[74] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of the Pueblo Bello Massacre v. Colombia*, Judgment Series C No.140, 2006 (Merits, Reparations and Costs); Judgment Series C No.159, 2006 (Interpretation of the Judgment on Merits, Reparations and Costs).

victim (Ferrer Mac-Gregor, 2014). The enforced disappearance persists until whereabouts of the victim are known, and represents one of the most serious human rights violations since it threatens the rights to life, to humane treatment and to personal liberty, as well as the right to juridical personality–in some cases–because of the abduction of a person from all areas of the legal system, the denial of his very existence and the placement in a kind of legal indetermination before the society (Ferrer Mac-Gregor, 2014).

The enforced disappearance is considered as a multiple and continuing violation of non-derogable human rights. In this sense, Article 3 of the Inter-American Convention on Forced Disappearance of Persons (1994) provides that *"[t]his offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined."* Moreover, in the *Case of Gómez-Palomino v. Peru*[75] regarding the enforced disappearance of Mr. Gómez Palomino, which started with the illegal deprivation of his liberty occurred in 1992, committed in the framework of systematic practice of this crime, used as mechanism of anti-subversive struggle against people suspected of or accused of terrorism or treason, the I/A Court H.R. (Judgment Series C No.136, 2005) considered that

> Forced disappearance of persons is a distinct phenomenon characterized by constant and multiple violations of several rights enshrined in the Convention insofar as it not only involves the arbitrary deprivation of liberty, but also violates the detained person's integrity and security, threatens his life, leaving him completely defenseless, and involves other related crimes as well. (§92)

Considering that the American Convention on Human Rights does not expressly prohibit the enforced disappearance of persons, its prohibition has been a development of the case-law of the I/A Court H.R., as well as the Inter-American *corpus juris*, represented in 1994 Inter-American Convention on Forced Disappearance of Persons. In the *Case of Rodríguez Vera et al. (the disappeared from the Palace of Justice) v. Colombia*[76] about responsibility for enforced disappearance of 12 people, extrajudicial execution of one person, and detention and torture of four people, all of them survivors of the "taking of the Palace of Justice" by the guerrilla group Movimiento 19 de Abril (M-19),[77] committed during an excessive and disproportionate military operation known as the "retaking of the

[75] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of Gómez-Palomino v. Peru*, Judgment Series C No.136, 2005 (Merits, Reparations and Costs).
[76] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of Rodríguez Vera et al. (the disappeared from the Palace of Justice) v. Colombia*, Judgment Series C No.287, 2014 (Preliminary Objections, Merits, Reparations and Costs).
[77] M-19 emerged as a protest against the supposed electoral fraud of the elections of April 19, 1970, won by Misael Pastrana. One of the most serious human rights violations committed by this guerrilla group was kidnapping of political and industrial leaders (Semana, 1997).

Palace of Justice" conducted in 1985, the I/A Court H.R. distinguished between the disappearance of a person–whose whereabouts are unknown–and the crime of enforced disappearance.

Following the I/A Court H.R. (Judgment Series C No.287, 2014), three concurring elements define the crime of enforced disappearance: "(a) the deprivation of liberty; (b) the direct intervention of State agents or their acquiescence, and (c) the refusal to acknowledge the detention and to reveal the fate or the whereabouts of the person concerned" (§226). These elements are also present in Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance (2006), providing that

> "[E]nforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

Firstly, any form of deprivation of liberty–whether legal or illegal–meets the first requirement. The I/A Court H.R., (Judgment Series C No.287, 2014) has stressed that "the way in which the deprivation of liberty was implemented is irrelevant when characterizing an enforced disappearance" (§232). Similarly, the UN Working Group on Enforced or Involuntary Disappearances (2008), in a report filed to the UN Human Rights Council, affirmed that "the protection of a victim from enforced disappearance must be effective upon the act of deprivation of liberty, whatever form such deprivation of liberty takes, and not be limited to cases of illegitimate deprivations of liberty" (§26).

Secondly, the deprivation of liberty can be conducted either by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, such as paramilitary groups. Thirdly, one defining feature of enforced disappearance, unlike extrajudicial execution, "is the State's refusal to acknowledge that the victim is in its custody and to provide information in this regard in order to create uncertainty about his or her whereabouts, life or death, to instill fear, and to eliminate rights" (I/A Court H.R., Judgment Series C No.287, 2014, §366).

The State obligation to investigate, prosecute and punish enforced disappearance as a gross human rights violation has *jus cogens* status. The Preamble of Inter-American Convention on Forced Disappearance of Persons (1994) declares that the enforced disappearance is *"an affront to the conscience of the Hemisphere and a grave and abominable offense against the inherent dignity of the human being",* as well as that this

crime *"violates numerous non-derogable and essential human rights."* Aguilar Cavallo (2006) claims that the previous statements make an allusion to *jus cogens* rules which aim to protect deeper values of the international community. The State duty to investigate, prosecute and punish enforced disappearance, as a serious human rights violation, cannot thus be overridden.

2.3 CONCLUSIONS OF THE CHAPTER

As a consequence of the unconditional application of HRL, serious human rights violations as breaches of non-derogable human rights can be committed in any political context. Regarding the question raised at the beginning on whether the I/A Court H.R. introduced IHL in order to analyze the duties of the States such as to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict with the exception of persons suspected of, accused of or sentenced for war crimes at the end of the hostilities, *what would happen to investigations, prosecutions and punishments of serious human rights violations that cannot be assessed as international crimes?* We provided an answer from the two sections of this chapter.

First of all, the State obligation to investigate, prosecute and punish serious human rights violations not only rejects amnesties for these offenses, but also demands executing criminal proceedings conducted before competent, independent and impartial judges, who necessarily belong to the ordinary criminal justice. The rejection of amnesties by the I/A Court H.R. does not discriminate between self-amnesties benefiting certain regime and amnesties issued in democratic periods, since regardless the legitimacy of the government, both intend to shield perpetrators of serious human rights violations from prosecution and result incompatible with the duty of States to investigate such acts, to guarantee freedom from such acts within their jurisdiction, and to ensure that they do not occur in the future.

Secondly, serious human rights violations undermine non-derogable rights, even in states of emergency. The State duties related to the respect and guarantee of non-derogable human rights, representing fundamental values of the international community, constitute *jus cogens* rules. All States, independently of their will, are bound by *jus cogens* rules, as a consequence of which willingness of States expressed in international treaties, unilateral acts, facts or omissions contravening their content will be vitiated of absolute nullity. This is the case of amnesties preventing the investigation, prosecution and punishment of gross

human rights violations such as torture, summary, extrajudicial or arbitrary executions and enforced disappearance.

Amnesties prohibited in international law are not limited to granting immunity for war crimes, crimes against humanity and genocide, but also extend to serious human rights violations. On the one hand, because Article 6(5) of 1977 Additional Protocol II has been revisited by some human rights bodies having authoritative interpretation. On the other hand, since the State obligation to investigate, prosecute and punish serious human rights violations is an international duty arising from HRL that cannot be overridden. Taking into account the process of humanization of international law and the placement of human dignity at the center of the concerns of this legal system, it would be misguided to think about permissions of amnesties for serious human rights violations, even when they are not assessed as international crimes.

Following this reasoning, the I/A Court H.R. in the *Case of Espinoza Gonzáles v. Peru,* for instance, concluded that "the lack of investigation of grave facts against humane treatment such as torture and sexual violence in armed conflicts and/or systematic patterns, constitutes a breach of the State's obligations in relation to grave human rights violations, which infringe non-revocable laws (*jus cogens*)." Furthermore, in the *Case of the Moiwana Community v. Suriname,* whereby an amnesty law condemned crimes against humanity but left the door open to be applied in cases of serious human rights violations, the I/A Court H.R. reiterated its jurisprudence regarding prohibition of amnesties for gross human rights violations based on their impairment to non-derogable human rights.

Colombia has contended that "from the Inter-American Court's analysis in the case of the *Massacres of El Mozote and Nearby Places,* the Commission must conclude that international law prohibits amnesties in contexts in which peace is being sought, solely with respect to 'international crimes'" (IACHR, 2013, §263). Nevertheless, we conclude that amnesties for serious human rights violations are also prohibited from Article 6(5), considering that 1977 Additional Protocol II intends to protect victims of non-international armed conflicts and the Preamble thereof recalls that international instruments relating to human rights offer a basic protection to human being. A restrictive interpretation of Article 6(5) would not find acceptance before a human rights tribunal.

Furthermore, we conclude that the recourse to IHL as an interpretative resource of the American Convention on Human Rights does not displace the applicability of HRL, applicable law by nature before the I/A Court H.R. as a human rights tribunal. State duties arising from the use of IHL as an interpretative resource to detail provisions contained in

the American Convention on Human Rights do not override State obligations arising from the exclusive use of HRL. 1977 Additional Protocol II cannot thus be interpreted to cover violations of human rights contained in the American Convention on Human Rights. The State duty to investigate, prosecute and punish serious human rights violations remains in effect, even if the facts that give rise to the human rights impairments are not assessed as international crimes because of the absence of declaration of contextual elements.

3 AMNESTIES EXONERATING PARTIALLY AND CONDITIONALLY FROM LIABILITY: THE COLOMBIAN CASE

Transitions from armed conflict to negotiated peace by virtue of a peace agreement pose to societies the complex task of overcoming a past of grave and widespread violations of human rights and laying the necessary foundations to prevent atrocities from recurring in the future (Uprimny Yepes et al., 2014). In the specific case of Colombia, Sánchez León (2016) argues that "[i]t is very unlikely–if not impossible–that a guerrilla movement would voluntarily agree to demobilize if the cost is that a majority of its members will receive long prison sentences" (p.172). According to Sánchez León (2016), "[f]or this reason, any peace accord between the Colombian government and the FARC . . . will not be able to adapt to a strict interpretation of the duty to investigate, judge, and penalize" (p.172). In this context, partial and conditional amnesties are enacted to facilitate the transition.

The 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace devises a nationally-based selection and prioritization system over human rights violations, as well as alternative penalties and reduced sentences. These mechanisms involve the application of partial and conditional amnesties since not all the offenders and gross human rights violations will be investigated, prosecuted and punished, or if they are, punishments will not be strictly proportional in accordance with seriousness of the crimes and level of responsibility. "The purpose of the Accord is to end one of the longest internal armed conflicts in the world and the last ongoing armed conflict in the Western Hemisphere" (Sánchez León, 2016, p.172), purpose for which some mechanisms aimed at limiting criminal responsibility have been devised.

This chapter intends to define international standards on the protection of human rights and State responsibility from mechanisms enshrined in the 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace entailing partial and conditional amnesties, as this system causes controversy among legal scholars. Specifically, it should be defined if *"is it possible to concentrate the penal action on those most responsible for the most serious crimes or is it necessary to domestically prosecute all those who are responsible?"* (Sánchez León, 2016, p.175) and if it possible to impose restorative and attenuated punishments for perpetrators of gross human rights violations by having fulfilled other rights of the victims, the above in the light of the Inter-American standards on the protection of human rights.

The first part of this chapter presents a discussion regarding the weighing of State obligations for serious human rights violations in times of transition from armed conflict to peace. This section begins by exposing the positioning of some legal scholars arguing that State international duties remain intact in spite of the transition from an armed conflict, and continues by introducing the ideas of some authors in favor of nuancing State obligations in this respect and claiming that justice and peace are both values that shall be ensured by the State and that one is not an alternative to the other. We conclude that from the HRL perspective, gross human rights violations committed in situation of armed conflict require from the States the fulfillment of a set of duties that must be understood as accumulative, not as alternative.

The second part addresses the nationally-based selection and prioritization system over human rights violations devised from 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace between the Government of Colombia and FARC before HRL. This section begins by referring to views on the alleged bases of this system on the functioning of the ICC and ICL; continues by exposing current positioning of the bodies of the Inter-American Human Rights System on this issue; and concludes by presenting some ideas brought by legal scholars about transitional policies on selection and prioritization of cases as well as perpetrators to be investigated, prosecuted and punished. We conclude that standards on the protection of human rights in the Inter-American Human Rights System do not differentiate relying on the level of responsibility of the perpetrators or among conducts which constitute all serious human rights violations.

The third part discusses the proportionality of punishment and alternative penalties from those sanctions devised in 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace before HRL. This section addresses current prescriptions of treaties as well as positioning of international bodies including the IACHR and the I/A Court H.R., and concludes by presenting some ideas brought by legal scholars about transitional policies regarding punishments to be imposed to perpetrators of serious human rights violations. We conclude that even if the bodies of the Inter-American Human Rights System have emphasized the strict observance of the proportionality of punishment, alternative penalties and reduced sentences may be accepted provided that the rights of the victims to truth, reparation and non-recurrence are fulfilled, and as long as they preserve certain reasonable degree of proportionality attending the seriousness of the offense and the level of responsibility of the perpetrator.

3.1 THE WEIGHING OF STATE OBLIGATIONS FOR SERIOUS HUMAN RIGHTS VIOLATIONS IN TIMES OF TRANSITION FROM ARMED CONFLICT TO PEACE

According to Méndez (1997), the issue about what to do with the legacy of serious human rights violations continuously comes back to the national agendas, even in those cases where the transition or the national reconciliation were declared as accomplished. In Latin America, Argentina and Chile are examples of countries whose societies still revisit decisions made in the context of transition. Transitional justice "pursues manifold aims in a post-conflict situation in which those in government are faced with other pressing needs such as disarming fighting forces, improving civilian security, compensating victims and relaunching the economy of a society in ruins" (Sottas, 2008, p.372).

This section exposes the positioning of some legal scholars in favor of or against the weighing of State obligations regarding serious human rights violations committed in situations of armed conflict, intending to present a broad overview of this subject before addressing specific aspects about prosecution and punishment of perpetrators in the next sections. We conclude, as it will be more comprehensively developed in the course of this chapter, that serious human rights violations committed in situations of armed conflict require from the States the fulfillment of a set of obligations that must be understood as accumulative, not as alternative.

Some mechanisms designed in order to facilitate the transition–such as nationally-based selection and prioritization systems over human rights violations and alternative penalties or reduced sentences–appear to be justified by the need to prevent further human rights violations, whereby criminal responsibility of perpetrators will be limited. However, Méndez (2001) argues that investigations, prosecutions and punishments of serious human rights violations are aimed at recognizing the intrinsic value of the victims, who usually are among the most vulnerable and defenseless groups of societies, and frequently belong to political, religious or racial minorities. The above is particularly true in Latin American countries affected by armed conflicts.

The weighing of State duties regarding serious human rights violations committed in situations of armed conflict arises with the emergence of some questions. Firstly, how the legitimate interest related to the punishment of the perpetrators could be balanced with the need for national reconciliation in a country that was close to the destruction because of the conflict (Méndez, 2001). Secondly, if the efforts made in national communities in order to achieve national reconciliation with justice were made in good faith, how much

deference the rest of the world should give them if perfect truth and justice could not be achieved anyway (Méndez, 2001). Different answers from a variety of disciplines emerge regarding the frequent tension in transitions from armed conflict to negotiated peace of values defined as justice and reconciliation.

Some legal scholars argue that State international obligations remain intact in spite of the transition from an armed conflict to a negotiated peace. Chinchón Álvarez (2013), claims that international duties that are breached under any crime of international law and/or serious violation to human rights are also enforceable in a transition process, and are not or should not be distinct by invoking an argument such as peace, and that is why there is no different legal regime with the name of "transitional law." García Sayán and Giraldo Muñoz (2016) refer to these contexts as essentially political processes in which some legal elements are inserted.

Chinchón Álvarez (2013) illustrates this point by referring to the Draft Code of Crimes against the Peace and Security of Mankind (1996), which, in Article 2 states that *"[a] crime against the peace and security of mankind entails individual responsibility",* and he argues that adding to this provision that "legally it is not, cannot be or cannot exactly be like that if we are in a transitional context" would require a legal basis, which does not exist. This would also be the case of other rules prescribing investigations, prosecutions and punishments of serious human rights violations and international crimes. Chinchón Álvarez (2013) challenges the existence of rules of "transitional law" defining differences in relation to general rules regarding individual criminal responsibility or State international responsibility for international crimes.

Olásolo Alonso et al. (2016) argue that taking into account ambiguities surrounding the concept of transitional justice, it cannot be said that it is part of customary international law and much less of *jus cogens* rules, since it not only lacks determination and specificity of content, but does not enjoy the necessary consensus for its normative consolidation. This is why, according to Olásolo Alonso et al. (2016), the concept of transitional justice appears in international instruments proposing principles for its application, but being far to constitute peremptory norms of general international law or *jus cogens* rules. Olásolo Alonso et al. (2016) conclude that standards promoted from transitional justice regarding compliance with the principles of fight against impunity, compensation of the victims and obtaining the truth must be compatible with the international criminal responsibility for international crimes and correlative State obligations of investigation, prosecution and punishment of perpetrators.

Loyo Cabezudo (2017) affirms that even if transitional contexts present certain difficulties in order to meet commitments made at the international level, the international duties, specifically, the obligation to investigate, prosecute and punish international crimes does not provide for exceptions that justify a special, alternative or attenuated regime. Under these circumstances, Loyo Cabezudo (2017) concludes that we are faced with a situation in which we should not ask ourselves whether obligations should be fulfilled, but how to do it.

Chinchón Álvarez (2013) notes that the reasoning of Judge García Sayán in the *Case of the Massacres of El Mozote and nearby places v. El Salvador* intended to nuance and even challenge the general international appreciation of amnesties reaffirmed by the I/A Court H.R. itself, invoking peace as an essential element allowing the weighting of rights and international obligations. Chinchón Álvarez (2013) refers to the Preamble of the Santiago Declaration on the Human Right to Peace (2010), which affirms that *"peace must be based on justice, and that therefore all victims have a right to recognition of their status as victims without discrimination, to justice, to truth and to an effective reparation"* (§22), and stresses that it can be drawn from this Declaration that peace cannot overlap the rights of the victims of serious human rights violations and international crimes.

According to Chinchón Álvarez (2013) what has really happened for a long period has been a constant effort to affirm that international duties pertaining to serious human rights violations and international crimes are also enforceable in a transition process, and not that they are or should be different under appeals to peace, reconciliation, interests of justice, among others. Similarly, González Morales (2012) affirms that

> The treatment of grave violations of human rights has experienced a notable evolution the last 15 years . . . This development has gone in the direction of establishing in a peremptory manner a series of state obligations in relation to the types of abuses in question, in opposition to the criterion that prevailed before that and according to which the democratic states possessed a wide discretion on these matters. (p.55)

Chinchón Álvarez (2013) recognizes that transitional contexts may present major factual differences regarding situations that could be assessed as standard; however, in his opinion, there is not any consolidated legal regime specific to transitional contexts that can be classified as "transitional law" until now. Chinchón Álvarez (2013) argues that another issue is interpreting general international obligations for gross human rights violations and international crimes in the light of the specific transitional circumstances, which present as the most significant point not the ongoing process of transition itself but the high number of victims and perpetrators.

According to Chinchón Álvarez (2013), this situation requires attending principles such as the effectiveness of international rules or *effet utile,* in the sense that before several possible interpretations, it should be chosen that one allowing its specific, effective and practical application, avoiding the consideration of international obligations as absolute duties which may lead to situations of absolute impossibility. However, Chinchón Álvarez (2013) also emphasizes that as this principle has a limit prescribing that any interpretation cannot result in infringing the letter and spirit of the rule, neither can neglect other relevant criteria such as *principio pro personae,* the interpretative margin for serious human rights violations and international crimes would be very limited.

Under these circumstances, Sottas (2008) affirms that taking into account views of transitional justice theorists about tensions between justice and peace, even if they agree that measures adopted belong to different spheres, "when they claim that they balance two imperatives as part of a justice system with a new dimension, they weaken the very fundaments of justice even though they do facilitate the transition process" (p.381). "We should therefore speak rather of transitional 'policies' and make it clear that, through these measures, we are attempting to guarantee a minimum level of justice in dealing with past violations" (Sottas, 2008, p.381).

Daza González (2016) affirms that even if States were experiencing a peace process or a period of transitional justice, they shall comply with their international obligations, including the State duty to investigate, prosecute and punish perpetrators of serious human rights violations. Serrano Suárez (2015) claims that even if peace is a primary interest for societies, it cannot be achieved without resolving, in the first place, the demands of justice; therefore, although peace is an essential foundation of the coexistence of every society of organized individuals, ensuring peace depends largely on the validity of justice.

Loyo Cabezudo (2017) argues that incorporating basic pillars of transitional justice through an integral system is not enough, since for them to contribute to the eradication of impunity, it is necessary that the scope provided for by international law is respected in their implementation. Considering that transitional justice concerns serious human rights violations and international crimes whose criminalization intends to protect human rights broadly accepted and recognized as non-derogable in accordance with *jus cogens* rules, Sottas (2008) says that "[t]his rules out the possibility of any rule, national or international, under which the impugned practice would be defined as non-criminal" (p.378).

Loyo Cabezudo (2017) argues that it is fundamental that the complementarity in the system created does not allow for the compensation of measures, and in particular, does

not have as purpose limiting the scope of criminal justice. In this sense, Loyo Cabezudo (2017) notes that before the commission of international crimes, ICL imposes binding duties on the States of investigation, prosecution and punishment, which independently of the measures taken on truth, reparation and non-recurrence, shall be fulfilled in compliance with the international standards in force. Loyo Cabezudo (2017) says that the integrity of the transitional process does not imply that the international obligations constituting the legal base of each one of the components can be partially met.

Sottas (2008) finds dangerous this idea of balance "to the extent that it makes an act of justice conditional on political imperatives" (p.378). Sottas (2008) argues that it would "doubtless be pointed out that, in practice, impunity is rife in those very places where societies and those who compose them are incapable of achieving peace and democracy" (p.378). From this reasoning, Sottas (2008) thus wonders if it would be logical to foster the establishment of conditions allowing a return to the rule of law at the risk of failing to punish crimes committed in the past, putting off the punishment of perpetrators of serious human rights violations or limiting the criminal penalties inflicted on them.

Finally, some legal scholars advocate for nuancing State obligations on this matter, claiming that justice and peace are both values that shall be guaranteed by the States and one is not an alternative to the other. Uprimny Yepes et al. (2014) argue that the State duty to investigate, prosecute and punish should not only be weighed against the duty to ensure peace, but also against the rights to truth and reparation of the victims, since if the former is assumed to be an absolute duty, there is a risk that the State will disregard the fulfillment of other obligations in matter of truth and reparation.

Acosta López (2016) argues that in accordance with the American Convention on Human Rights, the States not only have the obligations to investigate, judge, and punish, "but also the international obligation to prevent violations of human rights; to guarantee the non-repetition of such violations; to clarify the truth; to guarantee security; and to maintain the public order" (p.179). Acosta López (2016) clarifies that "[t]hese obligations cannot be interpreted in isolation, since they are interdependent, particularly in a context of transition" (p.179), therefore, "[u]nder exceptional circumstances, especially when it is necessary to balance several principles, states must direct their efforts to guarantee the highest possible level of all of their obligations" (p.179).

Méndez (1997) affirms that the obligations of the States emerging from serious human rights violations are quadruple: obligation to investigate and make known facts that can be established truthfully–truth–, obligation to prosecute and punish those responsible–

justice–, obligation to fully repair the moral and material damages caused–reparation–and obligation to remove from security forces those ones who committed, ordered or tolerated these abuses–creation of security forces worthy of a democratic State–. These obligations, according to Méndez (1997), are not alternative to each other, nor are they optional, so the responsible State must fulfill each of them to the extent of its possibilities and in good faith.

The IACHR (2015) in *follow up on the recommendations made by the IACHR in the Report Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia*, regarding the State duty to investigate, prosecute and punish gross human rights violations in transitions from armed conflict to peace, based on an analysis of the case-law of the I/A Court H.R., defined that the bodies of the Inter-American Human Rights System "have consistently held that the State has a non-derogable duty to investigate serious human rights violations and that amnesty laws and any other provision that obstructs observance of that obligation are incompatible with the American Convention" (§98).

Against this background, the weighing of State obligations for serious human rights violations committed in times of armed conflict intends to achieve national reconciliation. Suárez López and Jaramillo Ruiz (2014) claim that reconciliation is a construction that is not consolidated all of a sudden, but must be accompanied by a process that is perceived as legitimate since reconciliation aims to eradicate the will to seek revenge by private means. Sottas (2008) argues that "even forgiveness by a victim cannot exonerate the perpetrator" (p.380) from investigation, prosecution and punishment by the State, and supports that "[t]he damage done to the victims and society through violation of the rules that protect fundamental rights gives rise to an obligation on the part of the state to prosecute and punish the perpetrator" (p.380).

Cançado Trindade (2006) argues that forgiveness cannot be appreciated in isolation since it is linked to responsibility and justice. Cançado Trindade (2006) explores this idea and affirms that forgiveness is requested by repentant offenders, but may or may not be accepted by the victims considering that for some victims, the request for forgiveness can constitute a satisfactory act of justice, but for others, pardon must be accompanied by other acts of justice that properly claim and acknowledge their sufferings and end impunity. The notion of reparation in HRL renders the lives of surviving relatives perhaps bearable by the fact that silence and forgetfulness have not succeeded in overcoming atrocities, and that the evil perpetrated has not prevailed over the perennial search for justice (Cançado Trindade, 2006).

According to Gómez Isa (2014), flexibility and generosity can be accepted if this really contributes to the effectiveness of the right to the truth, reparation and non-repetition of atrocious acts, that is to say, if they are an effective means for the achievement of peace and reconciliation. Uprimny Yepes (2006), more specifically, argues that granting criminal benefits should be governed by the principle of proportionality, since the pardon of the perpetrators is only justifiable when it constitutes the only existing measure to achieve peace and reconciliation and when it is proportional to the gravity of the acts committed, the level of command and the contributions made to justice.

We conclude, as it will be more comprehensively developed in the next sections of chapter, that serious human rights violations committed in situations of armed conflict require from the States the fulfillment of a set of obligations that must be understood as accumulative, not as alternative, in the light of HRL. The State has the duties to investigate and make known facts related to serious human rights violations, prosecute and punish offenders, compensate the victims for material and moral damages, and dismiss the public servants involved in these violations through action or omission. These State obligations amount to rights to the truth, justice and reparation, and the need to build institutions consistent with a democratic State (Méndez, 1997).

3.2 NATIONALLY-BASED SELECTION AND PRIORITIZATION SYSTEM OVER HUMAN RIGHTS VIOLATIONS BEFORE HUMAN RIGHTS LAW

The jurisprudential rules on the rights of victims and on State obligations on these issues are expressed in absolute terms. These are clear parameters whose fulfillment is not usually subject to any kind of nuance since the State must always investigate, must always punish, must always repair, and must always seek and spread the truth based on parameters established (Acosta Alvarado, 2014). This section addresses nationally-based selection and prioritization systems over human rights violations before HRL, using as an example in the region that system devised from 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace between the Government of Colombia and FARC, referring to views on the functioning of the ICC and ICL and current positioning of the bodies of the Inter-American Human Rights System, and concluding with some ideas about transitional policies and prosecution on this specific issue.

Taking into consideration inherent obstacles of transitions from armed conflict to negotiated peace referred to weighing justice and reconciliation, one question arises: how

to fulfill requirements of justice prescribed in international treaties and, at the same time, to achieve peace when amnesties for international crimes and serious human rights violations are out of the negotiation table? (Loyo Cabezudo, 2017). And then, specifically, *"is it possible to concentrate the penal action on those most responsible for the most serious crimes or is it necessary to domestically prosecute all those who are responsible?"* (Sánchez León, 2016, p.175), the above in the light of the interpretation reached by the I/A Court H.R. on the American Convention on Human Rights and other human rights treaties integrating the Inter-American *corpus juris*, as ultimate interpreter thereof.

In an effort to weigh justice and peace, a selection and prioritization system over human rights violations emerges as a mechanism to facilitate the transition. Colombia has devised a Special Jurisdiction for Peace which, for the purpose of this section, will be composed of the Truth, Responsibility and Determination of Facts and Conducts Chamber *(Sala de Reconocimiento de Verdad, Responsabilidad y de Determinación de los Hechos y las Conductas)* and the Definition of Legal Situations Chamber *(Sala de Definición de las Situaciones Jurídicas),* which will exercise their functions in accordance with prioritization criteria defined from the seriousness and representativeness of the crimes and the degree of responsibility (Legislative Act 01, 2017, Transitory Article 7). There are other bodies also integrating the Special Jurisdiction for Peace.

The 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace[78] in relation to the functions of the Truth, Responsibility and Determination of Facts and Conducts Chamber, defined that in order to issue its resolution, it must concentrate, from the beginning, on the most serious cases and on the most representative conducts or practices (§48(o)). Regarding the competences of both Chambers, it was established that they will have the broadest powers to set priorities, accumulate similar cases and define the sequence in which they will be addressed, as well as to adopt criteria selection and decongestion, and that in exercising these powers, they will take into account the need to prevent serious and representative conducts from going unpunished and to prevent congestion of the Court (Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace, 2016, §48(s), 50(g)).

Article 3 of Legislative Act 01/2017, states that prioritization and selection criteria are inherent in transitional justice instruments and defines responsibilities in this respect. Firstly, the Attorney General shall determine the criteria of prioritization for the exercise of

[78] *See* 2016 Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera.

criminal action, except in matters that fall within the jurisdiction of the Special Jurisdiction for Peace. Secondly, the Congress may, through statutory law, determine selection criteria to focus efforts on criminal investigations of the highest perpetrators of all crimes assessed as crimes against humanity, genocide, or war crimes systematically committed; establish requisites, cases and conditions in which the suspension of the execution of the judgment would proceed; define cases in which extrajudicial sanctions, alternative penalties, or special execution and enforcement procedure apply, and authorize conditioned renouncing to criminal prosecution of cases not selected, always following the Agreement to create the Special Jurisdiction for Peace. Thirdly, the statutory law shall take into consideration the severity and representativeness of the cases in order to determine the selection criteria.[79]

According to Gómez Isa (2014), in order to guarantee the human right to peace, certain crimes and persons belonging to an illegal armed group may not be prosecuted with a view to focus on those most responsible for the most serious crimes, and it can be stated that selection criteria will be based on the severity and the representativeness of the cases. A nationally-based selection and prioritization system over human rights violations aimed at prosecuting the most responsible for the most serious crimes, allegedly based on that one used by the ICC, has thus emerged as a mechanism to facilitate the transition.

Some legal scholars support the nationally-based selection and prioritization system over human rights violations. First of all, referring to Article 1 of the Rome Statute of the ICC, Machado Ramírez (2014) concludes that the ICC can only exercise jurisdiction over the most responsible for the most serious crimes, excluding from its scope of competence mid- and low-level offenders and common crimes that cannot be assessed as international crimes. Machado Ramírez (2014) thus argues that peace processes granting conditional amnesties to offenders who cannot be identified as belonging to the highest perpetrators of the most serious crimes are consistent with the Rome Statute of the ICC.

[79] Acto Legislativo 01/2017, Artículo 3: "Tanto los criterios de priorización como los de selección son inherentes a los instrumentos de justicia transicional. El Fiscal General de la Nación determinará los criterios de priorización para el ejercicio de la acción penal, salvo en los asuntos que sean de competencia de la Jurisdicción Especial para la Paz. Sin perjuicio del deber general del Estado de investigar y sancionar las graves violaciones a los Derechos Humanos y al Derecho Internacional Humanitario, en el marco de la justicia transicional, *el Congreso de la República, por iniciativa del Gobierno Nacional, podrá mediante ley estatutaria determinar criterios de selección que permitan centrar los esfuerzos en la investigación penal de los máximos responsables de todos los delitos que adquieran la connotación de crímenes de lesa humanidad, genocidio, o crímenes de guerra cometidos de manera sistemática;* establecer los casos, requisitos y condiciones en los que procedería la suspensión de la ejecución de la pena; establecer los casos en los que proceda la aplicación de sanciones extrajudiciales, de penas alternativas, o de modalidades especiales de ejecución y cumplimiento de la pena; y autorizar la renuncia condicionada a la persecución judicial penal de todos los casos no seleccionados, siempre sin alterar lo establecido en el Acuerdo de creación de la JEP y en sus normas de desarrollo. La ley estatutaria tendrá en cuenta la gravedad y representatividad de los casos para determinar los criterios de selección" [emphasis added].

Secondly, making reference to Article 53(1)(c) about the possibility of archiving investigations that *"would not serve the interests of justice"* as well as to Article 16 that enshrines a prerogative granted to the UN Security Council in order to request to suspend investigations or prosecutions conducted by the ICC that could affect international peace and security, Machado Ramírez (2014) argues that the Rome Statute of the ICC could be recognizing some deference to transitional justice processes.

Torres Argüelles (2015, as quoted by Serrano Suárez, 2015) argues that a formula that allows to respect the legality includes granting an amnesty to those who are the least responsible–"combatants" in general–of gross human rights violations, conditioned to repentance, truth and reparation, and submitting the most responsible for these crimes to reductions of penalty based on the degree of collaboration in construction of peace and democratic order, satisfaction of the rights of the victims and guarantees of non-repetition. Similarly, Machado Ramírez (2014) argues that international practice of the States points to a duty to prosecute those most responsible for the most serious crimes.

According to Uprimny Yepes et al. (2014), setting up a selection and prioritization system seems inevitable in peace processes of magnitude and length as the Colombian one, since intending to prosecute all gross human rights violations as well as all perpetrators in a situation of a prolonged non-international armed conflict has insurmountable difficulties. Gómez Isa (2014) argues that one criterion for accepting selection and prioritization over human rights violations is based on pragmatic reasons, because considering the high level of victimization after so many years of armed conflict and the multiplicity and complexity of actors involved, it is materially impossible to ensure justice in all cases.

Notwithstanding, in justifying the legitimacy of the nationally-based selection and prioritization system, the operation of the ICC is partially misrepresented. The Deputy Prosecutor of the ICC, Stewart (2015) in a report about *Transitional Justice in Colombia and the role of the International Criminal Court* affirmed that the Office of the Prosecutor of the ICC generally focuses its prosecutorial capacities upon the highest level perpetrators of the most serious crimes because of "the global reach of the ICC's jurisdiction, the statutory provisions governing its operations, and practical logistical constraints it faces" (p.14), but in reality, the Rome Statute of the ICC "contains no limitation on prosecutions based on the level of authority the perpetrator occupied" (p.14).

Article 1 of the Rome Statute (1998), by virtue of which an International Criminal Court is established, provides that *"[i]t shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international*

concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions." Accordingly, as Machado Ramírez (2014) points out, common crimes that cannot be categorized as international crimes do not have the capacity to activate the complementary jurisdiction of the ICC. Nevertheless, Article 1 does not exclude the jurisdiction of the ICC upon mid- and low-level perpetrators, or upon those offenders who cannot be indicated as being among the most responsible, opposing the positioning of Machado Ramírez outlined above.

García Sayán and Giraldo Muñoz (2016) emphasize that the Appeals Chamber of the ICC has established that the Preamble of the Rome Statute makes reference to "more serious crimes" but not to "more responsible perpetrators." Indeed, the Appeals Chamber of the ICC (Case No. ICC-01/04, 2006) in *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I, considered that

> [T]he Preamble to the Rome Statute mentions "most serious crimes" but not "most serious perpetrators". The Preamble to the Statute in paragraphs five and six respectively states "perpetrators" and "those responsible for international crimes". The reference in paragraph five of the Preamble to "perpetrators" is not prefixed by the delineation "most serious" or "most responsible". Such language does not appear elsewhere in the Statute in relation to the category of perpetrators. Had the drafters of the Statute intended to limit its application to only the most senior leaders suspected of being most responsible they could have done so expressly. (§79)

As a matter of prosecutorial discretion–for practical, but not for normative reasons–the Office of the Prosecutor of the ICC usually conducts investigations and prosecutions with a view to reach those most responsible for the most serious crimes. Nevertheless, "as a matter of prosecutorial strategy, [the Office of the Prosecutor of the ICC] will sometimes investigate and prosecute mid-level perpetrators, or even notorious low-level perpetrators" (Stewart, 2015, p.14). Stewart (2015) concludes that "[t]he differences between the ICC's mandate and that of national judicial systems means, however, that ICC prosecutorial strategy cannot be taken as authority for how national jurisdictions should determine who to investigate or prosecute"[80] (p.15).

Furthermore, Article 53(1) of the Rome Statute of the ICC (1998), provides that *"[t]he Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute"* and then disposes in literal (c) that in deciding whether to

[80] Olásolo Alonso (2014) illustrates this point claiming that ICL, unlike national criminal law–which addresses the vast majority of human beings or "normal citizens"–is addressed, in particular, to all those who have traditionally been above the law by virtue of the notion of reason of State.

initiate an investigation, the Prosecutor shall consider whether *"[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."*

Regarding the possibility of archiving investigations that *"would not serve the interests of justice"* Stewart (2015) specifies that this option "would allow the Prosecutor to decline to open an investigation, despite the existence of a reasonable basis for one, in certain exceptional circumstances" (p.15) and that "[i]n assessing the interests of justice, the Prosecutor is obliged by the Rome Statute to consider the interests of victims and the gravity of the crimes" (p.16). According to Olásolo Alonso et al. (2016), the content of the concept *"interests of justice"* only allows the Office of the Prosecutor of the ICC to stop initiating an investigation or not to attribute criminal responsibility to the most responsible, due to lack of seriousness of the facts, to difficulties in accessing evidence, or to problems of protection of witnesses and victims.

Chinchón Álvarez (2013) argues that one thing is what the States have defined as elements of jurisdiction of an international body like the ICC, but another thing is that such an element collects a kind of a general rule that can be transferred to the generic. Chinchón Álvarez (2013) uses as an example the Convention on the Prevention and Punishment of the Crime of Genocide (1948), which states that *"genocide, whether committed in time of peace or in time of war, is a crime under international law"* (Article 1) and that persons charged with this crime *"shall be tried by a competent tribunal"* (Article 6) and *"shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals"* (Article 4), resulting that in any case it is not stated that it should not be like that when it is considered that doing it would not benefit the *"interests of justice."*

Uprimny Yepes et al. (2014) affirm that the ICC has pointed out that the *"interests of justice"* are different from the *"interests of peace",* which explains, for example, that in the case of Uganda, where it is at stake the settlement of the armed conflict between the State and the Lord's Resistance Army (LRA),[81] the Office of the Prosecutor of the ICC has maintained its decision to investigate and prosecute leaders of this armed group who had commenced negotiations with the Government of Uganda.

In relation to the possibility of deferring an investigation or prosecution, contained in Article 16 of the Rome Statute of the ICC, Borjas (2011) affirms that this provision was adopted due to a discussion on the incompatibility of judicial proceedings with situations

[81] Lord's Resistance Army (LRA) is one of the oldest and most violent armed groups in Africa, which has committed serious human rights violations such as rape and sexual slavery (Amnesty International, 2017).

involving the action of the Security Council under Chapter VII of 1945 United Nations Charter because these proceedings could hinder maintenance or restoration of international peace and security. Article 16 of the Rome Statute of the ICC (1998) provides that

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Borjas (2011) argues that the purpose of Article 16 is to allow the Security Council to delay the exercise of the jurisdiction of the ICC in situations where the settlement of a specific conflict warrants the deferral of a judgment, and that perhaps the classic example is suspension or omission of procedures that could destabilize peace negotiations. Borjas (2011) also affirms that the competences of the Security Council to block the initiation of an investigation by virtue of Article 16 of the Rome Statute of the ICC can be interpreted only as meaning that this body may defer it following the authorization of the Pre Trial Chamber, but not to intervene in the activities of the ICC before this stage, so it can be concluded that these requests respond to specific and non-generic situations.

Sánchez León (2016) argues that "States have a wide margin of autonomy to define their criminal policy [but] the question is whether a domestic case selection strategy would amount to the unwillingness standard of Article 17" (p.175). Article 17 of the Rome Statute of the ICC (1998), about issues of admissibility, provides in numeral 2 that *"[i]n order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable"* and then disposes: *"(a) [t]he proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5."*[82]

Olásolo Alonso (2014) summarizes the role of the ICC saying that the States Party have voluntarily established an international judicial body to remind them of their duties to investigate and prosecute perpetrators of international crimes and to provide reparations to victims, to encourage them to comply with these duties, and to assume jurisdiction because of inaction, unwillingness or inability. The ICC is aimed at ensuring an end to impunity for

[82] Article 5(1) of the Rome Statute of the ICC (1998), concerning crimes within the jurisdiction of the Court, provides: "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression."

those who use their leadership position in order to plan, promote or favor crimes under the jurisdiction of the Rome Statute (Olásolo Alonso, 2014), assuming the prosecution when the State is unwilling or unable to investigate and punish them (Machado Ramírez, 2014).

Article 17(1) of the Rome Statute of the ICC (1998) states that *"the Court shall determine that a case is inadmissible"* where *"(b) [t]he case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute."* Machado Ramírez (2014) argues that this provision could be read as recognizing transitional justice processes as adequate proceedings that would not justify the exercise of the complementary jurisdiction of the ICC, provided that the State decision not to prosecute a specific person is preceded by a serious investigation based on legitimate grounds and does not result from unwillingness or inability to provide justice.

Pursuant to Ambos (2006, as quoted by Loyo Cabezudo, 2017), the Rome Statute of the ICC is not a dogmatic and inflexible treaty, but flexible and open to peace processes. In this sense, Machado Ramírez (2014) claims that the Rome Statute of the ICC confers certain margin of discretion to the State in order to adjust its domestic procedures to those of transitional justice that could satisfy the standard of justice fixed therein, and that ICL grants some degree of freedom to the States in order to define which crimes committed in a situation of armed conflict shall criminally prosecute. Loyo Cabezudo (2017) affirms that this flexibility has a limit which is the eradication of impunity, to the extent that every peace agreement that does not respect this minimum should make admissible the situation before the ICC. Loyo Cabezudo (2017) also claims that it is worrying that the principle of complementarity is used as a "license for minimalism," which would increase impunity.

Machado Ramírez (2014) concludes that the exercise of criminal jurisdiction from the principle of prioritization or by concentrating criminal action on the most responsible for the most serious crimes, finds support in the practice of international criminal tribunals. In accordance with this reasoning, Stewart (2015) in *Transitional Justice in Colombia and the Role of the International Criminal Court* declared that "the Prosecutor's admissibility assessment will be limited, as a practical matter, to those potential cases coming within the scope of [the] policy of investigating and prosecuting those most responsible for the most serious crimes"[83] (p.15) conducted by the Office of the Prosecutor of the ICC.

[83] It must be taken into account that Colombia made a declaration in the following terms: "Availing itself of the option provided in article 124 of the Statute and subject to the conditions established therein, the Government of Colombia declares that it does not accept the jurisdiction of the Court with respect to the

Uprimny Yepes et al. (2014) argue that a transitional formula based on prosecuting the most responsible for committing serious human rights violations could be a factor that would discourage the ICC of assuming jurisdiction. Nevertheless, according to Uprimny Yepes et al. (2014), this does not imply assimilating the duties of the States with those of the ICC, since the criteria for defining the jurisdiction of the ICC and the investigation policy of the Office of the Prosecutor are not comparable to those ones of the States, nor do they constitute a model to be emulated by them.

A nationally-based selection and prioritization system over human rights violations focusing its prosecutorial capacities upon the highest level perpetrators of the most serious crimes does not derive its legitimacy from the functioning of the ICC, whose prosecutorial strategy is justified by the global reach of its jurisdiction, statutory provisions governing its operations, and practical logistical constraints it faces. It should not be forgotten that ICC as well as ICL, differ from national criminal courts and national criminal law, mainly, in their *raison d'être.* However, as long as the most responsible for the most serious crimes are duly investigated, prosecuted and punished in accordance with the ICC prosecutorial practice, and provided that the State decision not to prosecute a specific person is preceded by a serious investigation and does not result from unwillingness or inability to provide justice, it seems that the States can enjoy some margin of discretion before the ICC.

Trying to outline current views of the I/A Court H.R. on nationally-based selection and prioritization systems over human rights violations, some opposite answers emerge. Machado Ramírez (2014) claims that there is no provision in HRL preventing the States from exercising case selection and prioritization because the only limit is found in enacting "self-amnesty" laws.[84] Machado Ramírez (2014) argues that the selection and prioritization of cases have different criminal implications to those ones arising from amnesties since the former entail lack of investigation but do not affect criminal liability. From another perspective, Uprimny Yepes et al. (2014) affirm that it is still not entirely clear whether

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category of crimes referred to in article 8 when a crime is alleged to have been committed by Colombian nationals or on Colombian territory." Article 124 of the Rome Statute of the ICC (1998), in turn, provides that "a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory." Article 8 of the Rome Statute of the ICC addresses war crimes. Under these conditions, the ICC has jurisdiction only over war crimes committed after November 01, 2009, but can assume jurisdiction over genocide and crimes against humanity committed from the entry into force of the Rome Statute for the specific State, that is to say, from November 01, 2002.

[84] The I/A Court H.R. considers that the incompatibility with the American Convention on Human Rights includes all amnesties for serious human rights violations and is not limited to "self-amnesties," the above considering that their *ratio legis* is to leave unpunished serious violations committed in international law. *See* section "2.1 The State obligation to investigate, prosecute and punish serious human rights violations."

granting conditional and partial amnesties, as would be those operating if a selection policy over crimes and perpetrators were adopted, would meet international law standards.

According to Machado Ramírez (2014), before the I/A Court H.R., impunity entails *overall* absence of investigation, capture, prosecution and conviction and structural failures in investigation and punishment, meaning that the notion of impunity does not necessarily include lack of criminal prosecution in specific cases since exhaustive or total prosecutions are not required. Machado Ramírez (2014) also affirms that no State has been found internationally responsible for implementing criminal policies exonerating some cases or granting alternative penalties, as long as there is no widespread impunity or releasing from criminal liability in cases related to gross human rights violations, so the concentration of resources in specific cases or the decision not to submit some criminal acts to justice does not imply, in itself, a violation of international law standards.

Other legal scholars interpret differently the notion of impunity for the I/A Court H.R. Dondé Matute (2010) claims that, in general terms, the I/A Court H.R. has been very rigid in dealing with issues that could imply impunity. For instance, in the *Case of Radilla-Pacheco v. Mexico,* the I/A Court H.R. (Judgment Series C No.209, 2009) considered that impunity refers to "the lack of a complete investigation, persecution, capture, prosecution, and conviction of those responsible for the violations of the rights protected by the American Convention" (§212). In the *Case of the Miguel Castro-Castro Prison v. Peru,* the I/A Court H.R. (Judgment Series C No.160, 2006) concluded that "[i]mpunity must be fought through all means available, taking into account the need to make justice in a specific case and that promotes the chronicle repetition of violations to human rights and the total defenselessness of the victims" (§405).

Loyo Cabezudo (2017) affirms that although this selection and prioritization system is used by the international criminal courts created to date, the I/A Court H.R. and IACHR have stressed that implementing a nationally-based selection and prioritization system can be incompatible with international standards. In the *Case of the Rochela Massacre v. Colombia,* the I/A Court H.R. (Judgment Series C No.163, 2007) concluded that "[e]ven though there have been some investigations and convictions, impunity remains in this case, to the extent that the entire truth about the events has not been determined and all those responsible for the events have not been identified" (§178). In its Annual Report, in the light of international law standards applicable in this field, the IACHR (2015) considered that "the strategy of prioritizing certain cases over others when it comes to investigating

grave violations in the conflicts cannot be cited to justify the failure of the State to act with respect to those cases not prioritized" (§113).

Olásolo Alonso (2014) says that the first decade of the 21st century has emphasized that State obligations and corresponding rights of victims in relation to genocide, crimes against humanity and war crimes have an impact on ongoing peace processes, which generally deal with demands for exemption from criminal liability of actors involved. In this respect, it is relevant to bring up the Concurring Opinion of Judge García Sayán (I/A Court H.R., Judgment Series C No.252, 2012) in the *Case of the Massacres of El Mozote and nearby places v. El Salvador,* in arguing that

> These fundamental components can serve, in whole or in part, in the design of procedures that are suitable for the specificity of a process of negotiated solution to a non-international armed conflict. This, within a perspective in which the greater or lesser severity of the facts can make a specific processing of the facts viable–or not. Thus, for example, facts that can be categorized as war crimes or crimes against humanity in the definitions of the Statute of the International Criminal Court should merit being processed specifically and with priority, and this is not necessarily the same for the other crimes or human rights violations. (§24)

Olásolo Alonso (2014) affirms that by questioning the principle in accordance to which *"there is no peace without justice"* the Concurring Opinion of Judge García Sayán in the *Case of the Massacres of El Mozote and nearby places v. El Salvador* is inconsistent with numerous jurisprudential precedents of the I/A Court H.R. itself, as well as with the Rome Statute of the ICC and the treatment that international law has provided to genocide, crimes against humanity and war crimes since the 50s. Against this background, Olásolo Alonso (2014) also claims that this Concurring Opinion reflects a resistance to changing the paradigm about the peace processes conducted before setting up international criminal tribunals in the 90s.

Helfer and Slaughter (1997, as quoted by Acosta Alvarado, 2014), from another perspective, argue that international tribunals rely on the work of national authorities in order to ensure their effectiveness. Under these circumstances, Acosta Alvarado (2014) concludes that the I/A Court H.R. must decide whether or not to grant discretion to the national authorities when designing transitional process or, in other words, must decide whether or not to nuance its case-law to facilitate transitions and ensure effectiveness of its judgments. This is where the Concurring Opinion of Judge García Sayán in the *Case of the Massacres of El Mozote and nearby places v. El Salvador* gains in importance, when it is conceived as a vehicle for improving the relations between national judges and the regional judge (Acosta Alvarado, 2014).

Two criteria arising from this Concurring Opinion could support the setting up of a nationally-based selection and prioritization system over human rights violations. Firstly, investigations, prosecutions and redress of serious human rights violations can be opposed to national reconciliation and negotiated peace, then "[t]here is no universally applicable solution to the dilemmas posed by these opposing forces, because it depends on the specific context" (I/A Court H.R., Judgment Series C No.252, 2012, Concurring Opinion of Judge García Sayán, §20). Secondly, it has to be considered that "the anomalous and exceptional situation of a non-international armed conflict signifies that there are many thousands of violent offenders and, above all, victims [so] [t]his exceptional situation usually requires exceptional mechanisms of response" (I/A Court H.R., Judgment Series C No.252, 2012, Concurring Opinion of Judge García Sayán, §22).

Pursuant to Gómez Isa (2014), it is emerging a principle in accordance to which genocide, crimes against humanity and war crimes impose general obligations to prosecute and punish perpetrators, but in genuinely exceptional cases during transitional periods, the State could partially limit these duties. There are some divergences regarding the scope of these limitations (Gómez Isa, 2014). Orentlicher (1995, as quoted by Gómez Isa, 2014) claims that only when criminal prosecutions seriously endanger the life of the nation or irreversibly threaten a peace process, certain limitations resulting from the application of the principle of state of necessity could be allowed. Zalaquett Daher (1995, as quoted by Gómez Isa, 2014) argues that the margin of appreciation enjoyed by the States is broader since they have to balance the right to justice with collective demands for peace.

Supporters of the nationally-based selection and prioritization system over human rights violations argue that from the *Case of the Massacres of El Mozote and nearby places v. El Salvador*, the I/A Court H.R. created a new *ratio decidendi* for cases concerning transitions from armed conflict to negotiated peace. For instance, Acosta López (2016) claims that "[t]he prioritization or selection of cases–as part of a holistic transitional justice strategy that is different from any the Inter-American Court has ever had the opportunity to review–seemingly fits within these parameters" (p.180) previously exposed regarding the Concurring Opinion of Judge García Sayán. "This allows us to dismiss the argument that states must investigate, judge, and punish all human rights violations in any context, and to affirm, by contrast, that not all serious human rights violations must be necessarily investigated, judged, and punished" (Acosta López, 2016, p.180).

We do not conclude that a new *ratio decidendi* allowing nationally-based selection and prioritization systems over human rights violations in transitions from armed conflict

to negotiated peace has arisen from this Concurring Opinion. First of all, legal scholars such as Acosta López (2016) emphasize that this Concurring Opinion was endorsed by five out of seven judges, including the President of the I/A Court H.R., which would confer it some particular legitimacy. Nevertheless, we consider that even if this Concurring Opinion was broadly embraced by other judges, there is a consolidated case-law of the I/A Court H.R. on this specific matter that does not lose or question its binding force because of the emergence of a Concurring Opinion.

As Loyo Cabezudo (2017) points out, it can be drawn from the case-law of the I/A Court H.R. that implementing a nationally-based selection and prioritization system can be incompatible with international standards. Not only in the *Case of the Rochela Massacre v. Colombia*, but also in some other cases against Colombia, the I/A Court H.R. has ordered to end impunity for human rights violations by investigating, prosecuting and punishing the perpetrators, regardless their command level. In the *Case of the Ituango Massacres v. Colombia*, for instance, the I/A Court H.R. (Judgment Series C No.148, 2006) stated that "the partial impunity and lack of effectiveness of the criminal proceedings in this case are reflected in . . . [that] most of those responsible have not been investigated or have not been identified or processed" (§325).

Similarly, in the *Case of the "Mapiripán Massacre" v. Colombia,* the I/A Court H.R. (Judgment Series C No.134, 2005) stated that

> . . . even though some of those responsible for the massacre have been convicted, there is still widespread impunity in the instant case, insofar as the truth of all the facts has not been established and not all the masterminds and direct perpetrators of those facts have been identified. (§236)

The IACHR has also been emphatic in the need to end impunity for human rights violations by duly investigating, prosecuting and punishing these offenses. In *follow up on the recommendations made by the IACHR in the Report Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia*, the IACHR (2015) considered that "[a] law that contains an *a priori* limitation by providing for the selection of some grave human rights violations for investigation and the eventual renunciation of others is incompatible with the conventional obligations of the State" (§21) and that "States have the duty to investigate all cases of grave human rights violations that occurred in a conflict, and to prosecute and punish the responsible persons" (§87).

According to Sottas (2008), "[t]o violate a rule–particularly one of *jus cogens*, is a serious matter, but to actively challenge the rule itself, its scope and its consequences, is even worse" (p.397). Sottas (2008) argues that debating on the nature of punishment in

transitional contexts "is likely to aggravate the danger of relativism in respect of the rule itself, particularly when the debate addresses the need to lighten the prescribed punishment to favour the transition" (p.397-398). Forcada Barona (2011, as quoted by Serrano Suárez, 2015) summarizes this point by affirming that any limitation of criminal liability must respect rights of the victims to an effective judicial remedy, guarantee of the right to know the truth about violations of HRL and IHL, and the State duty to investigate, prosecute–or extradite–and punish the perpetrators of genocide, crimes against humanity, war crimes, torture, enforced disappearance and other serious human rights violations.[85]

The State duty to investigate, prosecute and punish serious human rights violations in the Inter-American Human Rights System does not differentiate between perpetrators who are "the most responsible" and those ones who are "the least responsible," or among conducts which constitute all serious human rights violations. Partial and conditional amnesties represented in this system do not find support in the steady positioning of the IACHR and the consolidated case-law of the I/A Court H.R. Therefore, there is a strong possibility of declaring State international responsibility in further cases for having limited criminal responsibility based on the level of participation of the perpetrator, or on the greater severity and representativeness of cases already assessed as serious human rights violations.

3.3 THE PROPORTIONALITY OF PUNISHMENT AND ALTERNATIVE PENALTIES BEFORE HUMAN RIGHTS LAW

Although the principle of proportionality of punishment–in accordance to which penalties must be proportional to the seriousness of the offenses committed–has been widely recognized, its non-derogability in transitions from armed conflict to negotiated peace has also been challenged. In its Observations on the Draft Report of the Inter-American Commission on Human Rights (2013, §200, as quoted by IACHR, 2013), Colombia referred to Article 6(5) of 1977 Additional Protocol II and pointed out that "it is not true that [international law] orders prosecution of 'all' serious human rights violations and 'all' serious violations of international humanitarian law, and punishment of 'all' those responsible for them" (§244).

[85] Related to this, Sottas (2008) considers that "amnesty for middle-ranking officials will not only help to reinforce the hierarchical position of perpetrators of serious violations, especially in the provinces . . . but will also constitute a major obstacle to the establishment of the truth" (p.394).

Once the State duty to investigate and prosecute has been reinforced, one question arises: how severe and burdensome must penalties be in order to fulfill the State obligation to punish perpetrators of gross human rights violations? (García Sayán & Giraldo Muñoz, 2016). Then, specifically, if punishments for serious human rights violations must consist of imprisonment, or if it would be possible to apply alternative penalties (Uprimny Yepes et al., 2014), taking into account that punishments imposed will have an effect in transition itself (García Sayán & Giraldo Muñoz, 2016), the above in the light of the interpretation reached by the I/A Court H.R. on the American Convention on Human Rights and other human rights treaties integrating the Inter-American *corpus juris.*

This section addresses alternative punishments and reduced sentences before the proportionality of punishment in HRL, using as an example in the region penalties devised from 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace between the Government of Colombia and FARC, referring to current prescriptions of treaties as well as positioning of international bodies including the IACHR and the I/A Court H.R., and concluding with some ideas about transitional policies and prosecution on this specific issue.

In an effort to weigh justice and peace, alternative penalties and reduced sentences may emerge as a mechanism to facilitate the transition from armed conflict to a negotiated peace. The 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace[86] enshrines some criminal benefits imposed by the Special Jurisdiction for Peace to participants of the armed conflict who decided to join the peace process, distinguishing between perpetrators who recognize comprehensive, detailed and complete truth and those ones who do not; level of participation in serious human rights violations; and stage of the procedure where the recognition of responsibility is given.

First of all, high- and mid-level perpetrators of serious human rights violations who offer comprehensive, detailed and complete truth and recognize responsibility before the Truth, Responsibility and Determination of Facts and Conducts Chamber will be charged with an alternative penalty of a minimum of five and a maximum of eight years–eight years also in case of concurrence of felonies–which in no case will be understood as imprisonment or similar assurance measures, and would be conditioned to non-recurrence. Some alternative penalties that could be imposed in this case are participation in programs of effective reparation for displaced peasants, environmental protection of reserve areas,

[86] *See* 2016 Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, p.164-166, §60.

construction and repair of infrastructures in rural areas, and cleaning and eradication of explosive remnants of war, unexploded ordnance and antipersonnel mines in areas of the national territory that would have been affected by these devices.

Secondly, high- and mid-level perpetrators of serious human rights violations who offer comprehensive, detailed and complete truth and recognize responsibility in the adversarial process in the First Instance of the Tribunal for Peace, before judgment is pronounced, will be charged with a punishment whose main purpose will be deprivation of liberty, from five to eight years, eight years also for concurrence of felonies.

Thirdly, high- and mid-level perpetrators of serious human rights violations who do not offer truth and recognize responsibility in the First Instance of the Tribunal for Peace and are convicted, will be charged with ordinary penalties consisting of imprisonment from 15 to 20 years–20 years also in case of concurrence of felonies–, but criminal arrangements or additional benefits may then be applicable if the offender contributes to his or her reincorporation into society through work, training or study during deprivation of liberty, and promotes activities aimed at non-recurrence once freedom is recovered.

The 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace also states that those who did not have a decisive participation in the most serious and representative crimes, even if they intervened in these offenses–low-level perpetrators–will be charged with a penalty from two to five years, five years also in case of concurrence of felonies. In all the previous cases, the period of permanence in the Transitional Zonal Areas for the Normalization *(Zonas Veredales Transitorias de Normalización)* will be considered as time of execution of the sanction, provided that during that permanence, works or activities with restorative content have been carried out.

In these conditions, the 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace enshrines alternative penalties and reduced sentences for participants of the armed conflict who joined the peace process, some of them perpetrators of serious human rights violations, in order to facilitate the transition to a negotiated peace. Acosta López (2016) summarizes the basic issue on this matter, arguing that the Special Jurisdiction for Peace "would have authority to prioritize both the most responsible perpetrators and the most serious crimes . . . [and] even those convicted for the most serious crimes would be eligible for alternative punishments, including the deprivation of liberty without imprisonment" (p.178).

It should be defined if international law allows the imposition of restorative and attenuated punishments for perpetrators of gross human rights violations by having told the

truth, assumed their responsibility and committed themselves to compensate the victims and to guarantee non-recurrence (Loyo Cabezudo, 2017), and specifically, if this form of punishment would comply with the Inter-American standards on the protection of human rights. This question involves reflecting about if a "flexible punishment . . . runs the risk of becoming simply the latest incarnation of impunity" (Roht-Arriaza, 2015, p.382), the above in the light of State international responsibility before the I/A Court H.R.

Even if international treaties do not provide for corresponding sanctions following a breach of the conducts regulated therein, they determine that penalties shall be appropriate and effective (Loyo Cabezudo, 2017). The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), for instance, provides in Article 4(2) that *"[e]ach State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."* The Convention on the Prevention and Punishment of the Crime of Genocide (1948) in Article V disposes that *"[t]he Contracting Parties undertake to . . . provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III."* The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989) state that the States shall *"ensure that any such executions . . . are punishable by appropriate penalties which take into account the seriousness of such offences."*

The fulfillment of the principle of proportionality between criminal offenses and penalties has also been emphasized before the Universal Human Rights System. The UN Commission on Human Rights (2005), in the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, concerning duties of States about the administration of justice related to serious violations of human rights and IHL, concluded that States shall "take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished" (principle 19).

In Resolution 12/11, the UN Human Rights Council (2009) considered that a sustainable transitional justice strategy needs to "develop national prosecutorial capacities that are based on a clear commitment to combat impunity, to take into account the victim's perspective and to ensure compliance with human rights obligations with regard to the holding of fair trials" (§6). In a report submitted to the UN Human Rights Council, the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence (2014) argued that "low sentences not in line with underlying evidence, [could be] further eroding the trustworthiness of the judicial system" (§36(b)).

The UN Commission on Human Rights (2005) in a resolution on *Impunity* calls upon all States not only "to ensure that criminal proceedings are conducted in accordance with the right to a fair and public hearing by a competent, independent, impartial and duly constituted tribunal in accordance with applicable international law" (§15), but also "to ensure that penalties are appropriate and proportionate to the gravity of the crime committed" (§15). Moreover, the OHCHR (2009) in *Rule-of-Law Tools for Post-Conflict States: Amnesties,* considers that "a perpetrator's full disclosure of what he or she knows about such violations may justify a reduction in sentence, as long as the sentence is still proportionate to the gravity of the crime" (p.34).

In the Inter-American Human Rights System, two international treaties emphasize the need to impose adequate punishments for serious human rights violations. On the one hand, the Inter-American Convention on Forced Disappearance of Persons (1994) provides in Article III that *"[t]he States Parties undertake to . . . impose an appropriate punishment commensurate with its extreme gravity."* On the other hand, the Inter-American Convention to Prevent and Punish Torture (1985), in Article 6, disposes that *"[t]he States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature."*

On the basis of these broad terms, international jurisprudence becomes essential in order to limit the discretion of States in their interpretation (Loyo Cabezudo, 2017). For instance, in the *Case of the Rochela Massacre v. Colombia,*[87] the I/A Court H.R. ruled on the enforcement of Law 975/2005–or Justice and Peace Law–and criminal benefits derived thereof, in the light of the American Convention on Human Rights. The I/A Court H.R. (Judgment Series C No.163, 2007) stated that in order for the State to guarantee the rights protected by the American Convention on Human Rights "including the right to judicial recourse . . . the State should observe due process and guarantee the principles of expeditious justice, adversarial defense, effective recourse, implementation of the judgment, and the proportionality of punishment, among other principles" (§193).

The *Case of the Rochela Massacre v. Colombia* concerns extrajudicial execution of 12 people and personal injuries caused to three more persons, committed in 1989 by a paramilitary group acting with cooperation and acquiescence of State agents, perpetrated

[87] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of the Rochela Massacre v. Colombia*, Judgment Series C No.163, 2007 (Merits, Reparations and Costs); Judgment Series C No.175, 2008 (Interpretation of the Judgment on Merits, Reparations and Costs).

against members of a Judicial Commission who were responsible for investigating serious human rights violations related to murders and disappearances occurred in the region of Magdalena Medio, Department of Santander, such as the disappearance of 19 merchants– whose case was even judged as *Case of the 19 Merchants v. Colombia*–. Some years later, in the framework of the demobilization process of paramilitary groups, Law 975/2005 or Justice and Peace Law granting criminal benefits, was enacted.

Broadly speaking and for the purposes of this specific topic, benefits of alternative sentencing were enshrined in this regulation. Article 3 and 29 of Law 975/2005 provided that if the convicted person had fulfilled the conditions set out in this law, his or her sentence could be suspended and then replaced with an alternative sentence consisting of deprivation of liberty for a minimum period of five years and not exceeding eight years, considering his or her contribution to the achievement of national peace, collaboration with justice, compensation for the victims and adequate resocialization.[88]

The IACHR suggested that the I/A Court H.R. ruled on principles leading to a demobilization process that observes the rights to truth, justice and reparation, including, "*inter alia,* a principle of proportionality that does not benefit only the accused, but rather which constitutes a right for the victim of grave violations of human rights" (I/A Court H.R., Judgment Series C No.163, 2007, §191). The IACHR also pointed out that "in the investigation of grave violations of human rights it is impossible to reconcile soft or illusory punishment, or punishments which represent the mere appearance of justice with the American Convention" (I/A Court H.R., Judgment Series C No.163, 2007, §191). For its part, Colombia, "when referring to the proportionality of the punishment, maintained that although the Court might not indicate 'precisely and mathematically what would be the minimum and maximum penalties applicable to a particular case' it could 'give general criteria for evaluation'" (I/A Court H.R., Judgment Series C No.163, 2007, §191).

The I/A Court H.R. did not define the suitable form or length of punishments for gross human rights violations, "[g]iven that uncertainty exists with regard to the content and scope of Law 975. . ." (I/A Court H.R., Judgment Series C No.163, 2007, §192), but

[88] Ley 975 de 2005, "Artículo 3. Alternatividad. Alternatividad es un beneficio consistente en suspender la ejecución de la pena determinada en la respectiva sentencia, reemplazándola por una pena alternativa que se concede por la contribución del beneficiario a la consecución de la paz nacional, la colaboración con la justicia, la reparación a las víctimas y su adecuada resocialización. La concesión del beneficio se otorga según las condiciones establecidas en la presente ley". "Artículo 29. Pena alternativa . . . En caso que el condenado haya cumplido las condiciones previstas en esta ley, la Sala le impondrá una pena alternativa que consiste en privación de la libertad por un período mínimo de cinco (5) años y no superior a ocho (8) años, tasada de acuerdo con la gravedad de los delitos y su colaboración efectiva en el esclarecimiento de los mismos".

indeed ruled on principles, guarantees and obligations that must accompany the application of juridical frameworks for a demobilization process. The I/A Court H.R. (Judgment Series C No.163, 2007) considered that criminal penalties "should be proportional to the rights recognized by law and the culpability with which the perpetrated [*sic*] acted, which in turn should be established as a function of the nature and gravity of the events" (§196), and that "[w]ith regard to the principle of lenity based upon the existence of an earlier more lenient law, this principle should be harmonized with the principle of proportionality of punishment, such that criminal justice does not become illusory" (§196).

The I/A Court H.R. had the opportunity to stress that penalties must be proportional to the seriousness of the offenses committed in other cases against this same State. In the *Case of Manuel Cepeda Vargas v. Colombia*[89] regarding the extrajudicial execution of one of the leaders of the Colombian Communist Party and Unión Patriótica, committed in 1994 in a context of systematic violence perpetrated against political activists belonging to the opposition, the I/A Court H.R. (Judgment Series C No.213, 2010) stated that

> Even though the Court cannot substitute the domestic authorities in determining the punishment for the crimes established by domestic law, and has no intention of doing so, an analysis of the effectiveness of criminal proceedings and of access to justice can lead the Court, in cases of serious human rights violations, to examine the proportionality between the State's response to the unlawful conduct of a State agent and the legal right allegedly affected by the human rights violation. Under the rule of proportionality, in the exercise of their obligation to prosecute such serious violations, States must ensure that the sentences imposed and their execution do not constitute factors that contribute to impunity, taking into account aspects such as the characteristics of the crime, and the participation and guilt of the accused. Indeed, there is an international legal framework which establishes that the punishments established for crimes involving acts that constitute serious human rights violations must be appropriate to their gravity. (§150)

The I/A Court H.R. (Judgment Series C No.213, 2010) also stated that imposing "an appropriate punishment duly founded and proportionate to the seriousness of the facts, by the competent authority, permits verification that the sentence imposed is not arbitrary, thus ensuring that it does not become a type of *de facto* impunity" (§153).

In the *Case of Rodríguez Vera et al. (the disappeared from the Palace of Justice) v. Colombia*, the I/A Court H.R. (Judgment Series C No.287, 2014) concluded that "when exercising its punitive powers, the State's actions should be guided by rationality and proportionality, thus avoiding both the leniency characteristic of impunity, and also excesses and abuse in the determination of punishments" (§459). Taking into account the

[89] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of Manuel Cepeda Vargas v. Colombia*, Judgment Series C No.213, 2010 (Preliminary Objections, Merits, Reparations and Costs).

duty to prosecute wrongful acts that violate rights recognized in the American Convention on Human Rights, the I/A Court H.R. (Judgment Series C No.287, 2014) stated that "this prosecution should be consequent with the obligation to guarantee the rights in question; hence, illusory measures that only appear to meet the formal requirements of justice should be avoided" (§459).

The pronouncements of the I/A Court H.R. about the proportionality of punishment, at the present time, are thus related to alternative penalties contained in Law 975/2005 and a positioning regarding sanctions in the Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace is pending. Pursuant to Uprimny Yepes et al. (2014), international sources support the idea that executing criminal proceedings and acting with due diligence to identify perpetrators are not enough since punishments for those ones found guilty are required. We conclude that international standards on this topic do not neglect the need to reconcile rights of the victims with other social concerns and interests (DPLF, 2014), therefore, alternative penalties and reduced sentences provided that certain degree of proportionality or consistency of the punishment is maintained, could be accepted in the Inter-American Human Rights System.

Some authors support the imposition of alternative penalties and reduced sentences. García Sayán and Giraldo Muñoz (2016) argue that nowadays some legal scholars affirm, without any support in positive international law, a kind of punitive maximalism, which assumes that imposing lengthy and severe punishments is a State international duty. García Sayán and Giraldo Muñoz (2016) also claim that alternative penalties, reduced sentences and other forms of restoring the damage can be accepted, as long as they do not constitute an isolated act but integrate a larger set of measures and policies aimed at satisfying rights of the victims to the truth, justice and reparation. Pursuant to García Sayán and Giraldo Muñoz (2016), these kinds of penalties would not amount to impunity, but can constitute valuable tools to facilitate the negotiation, and at the same time, satisfy the State obligation to punish, prior investigation and prosecution of those responsible.

Similarly, Acosta López (2016) affirms that "[r]egarding suspended, reduced, and alternative sentences, neither the American Convention on Human Rights nor the system's jurisprudence excludes their application; nor are prison penalties required" (p.182). This being the case and making reference to statements made by the ICC on this specific point, Acosta López (2016) establishes that "as *lex specialis*, the human rights organs should show deference to the international criminal law dispositions, which here seem to endorse the margin of appreciation doctrine" (p.182).

Suárez López and Jaramillo Ruiz (2014) argue that justice does not only refer to deprivation of liberty through imprisonment, and that although the States should avoid impunity at all costs, some margin of discretion regarding penalties arises from transitional justice. García Sayán and Giraldo Muñoz (2016) establish that if only lengthy and prison sentences were sought for perpetrators of human rights violations, the real possibilities of achieving a negotiated peace through agreements that allow a transition from an armed conflict and chart a common way towards reconciliation would be put at risk.

Some authors reaffirm the need to maintain proportional prison sentences before gross human rights violations. According to Daza González (2016), the criminal retribution makes it possible to comply with the general negative prevention, by virtue of which, through imposing criminal penalties, society is negatively motivated or discouraged from engaging in punishable conducts.[90] Supported on this reasoning and taking into account the quantum of penalty defined in the Law 975/2005 when compared to the maximum penalty established in the Colombian Criminal Code, Daza González (2016) emphasizes that punishments imposed to participants of the armed conflict, some of them perpetrators of serious human rights violations, can be derisory.

Daza González (2016) condemns these kinds of alternative punishments, arguing that they generate inequality in relation to actions and omissions of common citizens–who should be subject to the rigor of penalties defined in criminal codes–, neglect the general prevention and retribution as functions of criminal penalties,[91] and shield perpetrators of gross human rights violations from prosecution by the ICC. Daza González (2016) claims that attending trials conducted in other countries against those responsible for committing serious human rights violations, criminal punishments to be imposed taking into account the seriousness of the facts and conducts, shall be in the maximum limits established by the current criminal law.

Sottas (2008) affirms that "[w]hatever form it may take, a punitive sanction for a serious crime is the only possible response to a violation" (p.398). Sottas (2008) argues that punishment "serves to send a clear message to society as a whole on the values that subtend it and on the sacrosanct nature of the law that underpins and protects those values" (p.396). At the same time, according to Sottas (2008), punishment "serves to ensure that

[90] Daza González (2016) argues that punishment of crimes is not an end in itself, but is imposed for the achievement of other purposes, such as prevention or social harmonization.

[91] Regarding the functions of criminal penalties, Article 4 of the Colombian Criminal Code (Ley 599/2000), provides that: "[l]a pena cumplirá las funciones de prevención general, retribución justa, prevención especial, reinserción social y protección al condenado".

perpetrators of violations or those who countenance them and justify them by refusing to accept the primacy of the rule of law are kept out of positions of authority in the country's institutions" (p.397). Under these conditions,

> The perpetrator's remorse, his efforts to restore the *status quo* ante or at least to compensate the victims or help to establish the truth are elements that can influence the punishment inflicted. However, they are no substitute for it and do not justify reducing it to a level below the minima prescribed by law before the act was committed. (Sottas, 2008, p.398)

Loyo Cabezudo (2017) claims that considering that from now, as for those the most responsible for committing the most serious crimes when they have recognized truth and responsibility, an effective sanction consist in the imposition of a restorative penalty for a short period, one question arises regarding limits between light punishments and impunity. Sottas (2008) claims that "there is a likelihood that the punishment of very serious crimes may be questioned–or at least considerably attenuated–for noble reasons such as the restoration of democracy" (p.398). Nevertheless, if these punishments are presented as arising from a justice system, they would have all the consequences such as *res judicata* and *non bis in ídem*, and that would constitute a risk (Sottas, 2008).

According to Uprimny Yepes et al. (2014), inasmuch as alternative penalties are imposed following an investigation, prosecution and condemnatory sentence, cases where offenders are subsequently pardoned remain, *prima facie*, outside the scope of application of the principle of complementarity governing the action of ICC by virtue of *res judicata.* Considering that Article 20(3) of the Rome Statute of the ICC (1998) provides that *"[n]o person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct"*, Uprimny Yepes et al. (2014) affirm that alternative punishments do not appear to trigger the jurisdiction of the ICC, provided that the proceeding was conducted independently and impartially and does not result from an intent to shield the person concerned from criminal responsibility (Article 20(3)(b)).

Indeed, the Deputy Prosecutor of the ICC, Stewart (2015) affirmed that "[e]ffective penal sanctions may thus take many different forms" (p.10) provided that investigations, prosecutions and punishments seek ". . . to end impunity for mass atrocity crimes" (p.10). Therefore, alternative penalties can be accepted by the ICC as appropriate punishments if "the gravity of the crimes and the role and responsibility of the convicted persons in their commission" (Stewart, 2015, p.13) are considered. Stewart (2015) emphasized, however, that punishments should "serve appropriate sentencing goals, such as public condemnation

of the criminal conduct, recognition of victims' suffering, and deterrence of further criminal conduct" (p.10).

Loyo Cabezudo (2017) argues that it should be considered that the statutes of the international criminal tribunals created up to now limit the punishment to be imposed to imprisonment, being the gravity of the crime one of the determining elements to define its length. Article 24 of the Statute of the ICTY (1993), in numeral 1, provides that *"[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment"* and then states, in numeral 2, that *"[i]n imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person."* In these same terms, Article 23 of the Statute of the ICTR defines deprivation of liberty through imprisonment.

Regarding the Rome Statute (1998), the ICC

> . . . may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute: (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. (Article 77(1))

Loyo Cabezudo (2017) concludes that regarding international crimes, the State duty to impose appropriate punishments demands certain degree of severity, which has only been reflected in deprivation of liberty through imprisonment, until now. Loyo Cabezudo (2017) also establishes that being aware of the special gravity of committing international crimes, criminal codes punish their perpetrators with the most severe penalties. This is also the case of serious human rights violations. Nevertheless, Stewart (2015) has stressed that "[w]hile the Rome Statute does provide for sentences in ICC proceedings, it does not prescribe the specific type or length of sentences that States should impose for ICC crimes" (p.10), and pointed out that "[i]n sentencing, States have wide discretion" (p.10).

Regarding punishments for gross human rights violations, in the *Case of X and Y vs. The Netherlands* concerning sexual violence committed against a disable underage girl and regulatory barriers to investigate, prosecute and punish the offender in these specific conditions, the ECtHR (Case No.16/1983/72/110, 1985) stated that criminal punishment is the only appropriate means of deterring serious human rights violations, affirming that

> The Court finds that the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated. (§27)

According to Uprimny Yepes et al. (2014), in the absence of an express provision in international treaties on the type of punishment to be imposed, the thesis that it must be a criminal punishment is supported in the general negative prevention, which attributes to punishment a deterrent function. Uprimny Yepes et al. (2014) affirm that if, in fact, the penalty is to fulfill its deterrent function, it is reasonable to impose a proportional penalty; therefore, given that in most modern States, the most serious punishment consist of the effective deprivation of liberty for the maximum time allowed by the criminal system, this would thus be the one to be imposed in the case of serious human rights violations.

Against this background, Loyo Cabezudo (2017) establishes that the Concurring Opinion of Judge García Sayán in the *Case of the Massacres of El Mozote and nearby places v. El Salvador*, specifically, paragraphs 30 and 31 move away from the consolidated case-law of the I/A Court H.R. requiring that States impose appropriate and proportional punishments and avoid illusory measures. Understanding this positioning indeed requires a combined reading of paragraphs 30 and 31.

The Concurring Opinion of Judge García Sayán (I/A Court H.R., Judgment Series C No.252, 2012) in the *Case of the Massacres of El Mozote and nearby places v. El Salvador* firstly advocates for punishing in accordance with the level of responsibility of the perpetrator, arguing that

> [I]n the difficult exercise of weighing and the complex search for this equilibrium, routes towards alternative or suspended sentences could be designed and implemented; but, without losing sight of the fact that this may vary substantially according to both the degree of responsibility for serious crimes and the extent to which responsibility is acknowledged and information is provided about what happened. This may give rise to important differences between the "perpetrators" and those who performed functions of high command and gave the orders. (§30)

However, the possibility of imposing alternative penalties and reduced sentences for the most responsible is subsequently left open

> It is relevant to consider the shared responsibilities of those involved in an armed conflict with regard to serious crimes. The acknowledgment of responsibility by the most senior leaders can help promote a process of clarifying both the facts and the structures that made such violations possible. Reduction of sentences, alternative punishments, direct reparation from the perpetrator to the victim, and public acknowledgment of responsibility are other ways that can be considered. (I/A Court H.R., Judgment Series C No.252, 2012, Concurring Opinion of Judge García Sayán, §31)

The issue is that the Special Jurisdiction for Peace is entitled to impose "alternative-reduced" punishments, even for the most responsible for the most serious crimes. Against this background, Loyo Cabezudo (2017) says that imposing merely restorative and highly attenuated punishments to senior leaders, regardless recognition of truth and responsibility,

does not observe international law. Loyo Cabezudo (2017) stresses that penalties can be alternative to imprisonment or reduced sentences if some degree of proportionality based on the crimes and level of responsibility of perpetrators is maintained. Even if punishments may appear as more restorative in transitions from armed conflict to negotiated peace, their proportionality–judging the crime and level of command–shall always be observed.

"In its own proceedings, the ICC seeks to impose sanctions that are proportionate to the gravity of the crimes and the degree of responsibility of the convicted persons" (Stewart, 2015, p.11). In this sense, Stewart (2015) established that "[a]t the national level, a sentence that was manifestly inadequate, in light of the gravity of the crime and the degree of responsibility of the convicted person, could vitiate the apparent genuineness of the proceedings" (p.11), in a way that "[s]uspending sentences for those most responsible for war crimes and crimes against humanity would amount to shielding the persons concerned from criminal responsibility" (p.11). The proportionality of penalties is linked to rulings attending the seriousness of the crimes and level of responsibility of the offenders.

The Colombian Constitutional Court, in Judgment C-370/2006, stated that the value of peace is not of absolute importance, since it is also necessary to guarantee the right of the victims to justice. Despite its importance within the constitutional order, peace cannot become a kind of reason of State that automatically prevails over any other constitutional value because in that case, peace–which is still a concept of high indeterminacy–could be invoked to justify any kind of measure, including some nugatory of constitutional rights (Colombian Constitutional Court, Judgment C-370, 2006). Justice has also constitutional importance, which can be noted in the enshrining of justice as a founding value of the constitutional order,[92] an essential aim of the State,[93] a right of every person manifested in the rules of due process and the right of access to justice, and its foundation as one of the branches of public power (Colombian Constitutional Court, Judgment C-370, 2006).

Nevertheless, the Colombian Constitutional Court (Judgment C-370, 2006) stressed as well that justice cannot be considered as an absolute right to such an extent that the

[92] Constitución Política de Colombia (1991), Preámbulo: "EL PUEBLO DE COLOMBIA, en ejercicio de su poder soberano, representado por sus delegatarios a la Asamblea Nacional Constituyente, invocando la protección de Dios, y con el fin de fortalecer la unidad de la Nación y asegurar a sus integrantes la vida, la convivencia, el trabajo, la justicia, la igualdad, el conocimiento, la libertad y la paz, dentro de un marco jurídico, democrático y participativo que garantice un orden político, económico y social justo, y comprometido a impulsar la integración de la comunidad latinoamericana. . ."

[93] Constitución Política de Colombia (1991), Artículo 2: "[s]on fines esenciales del Estado: servir a la comunidad, promover la prosperidad general y garantizar la efectividad de los principios, derechos y deberes consagrados en la Constitución; facilitar la participación de todos en las decisiones que los afectan y en la vida económica, política, administrativa y cultural de la Nación; defender la independencia nacional, mantener la integridad territorial y asegurar la convivencia pacífica y la vigencia de un orden justo".

realization of peace is prevented. Alternative sentencing would seem to disproportionately affect the rights of victims if "collaboration with justice" did not demand from those who aspire to access to that benefit, concrete actions aimed at ensuring the effective enjoyment of the rights of victims (Colombian Constitutional Court, Judgment C-370, 2006). Thus, lighter sentences become legitimate if the rights of victims to truth, reparation and non-recurrence are fulfilled. This is the way in which the right to peace and rights of the victims can be weighed (Colombian Constitutional Court, Judgment C-370, 2006).

In its *Statement on the Application and Scope of the Justice and Peace Law in the Republic of Colombia,* the IACHR (2006) declared that implementing this justice system would "satisfy international standards only if, and to the extent that, the granting of lower penalties is made strictly contingent on eliciting the truth and does not rely exclusively or primarily on the defendant's confession" (§41). The IACHR (2013) in *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia,* then affirmed that "in order for any transitional justice system to establish a lasting peace, it must function as an incentives system useful in getting at the truth, identifying and punishing those responsible, and redressing the victims" (§251).

Before the IACHR, the State obligation to investigate, prosecute and punish gross human rights violations cannot be overridden;[94] however, "the possibility of softening the State's punitive authority, specifically by applying lighter sentences" (IACHR, 2013, §255) does exist. Regarding the I/A Court H.R., García Sayán and Giraldo Muñoz (2016) argue that even if in its case-law it has been defined that criminal proceedings are crucial, States have the power to define corresponding penalties as long as they are proportional to legal assets affected, contribute in preventing impunity, and take into account factors such as the nature of the offense, participation and culpability of the accused.

At first, the proportionality of penalty should be strictly observed, but applying alternative or lighter sentences that preserve certain reasonable degree of proportionality between criminal offenses and punishments may also be an acceptable option before the bodies of the Inter-American Human Rights System. Uprimny Yepes et al. (2014) say that it is not realistic to think that a negotiation process could culminate in an agreement if what is offered to combatants who decide to lay down their weapons is a prison in which they will be locked up for decades. Lighter sentences are thus allowed because of inherent

[94] On this point, the IACHR (2013) observed that "the non-derogable obligation to investigate serious human rights violations has been acknowledged in situations that arose amid a variety of social situations that various countries of the region have experienced, either in transitions from dictatorships to democracy or processes seeking to establish and strengthen peace" (§258).

obstacles of transitions from armed conflict to negotiated peace, provided that perpetrators effectively contribute to satisfy the rights to the truth, reparation and non-recurrence of the victims.

The IACHR (2013) in *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia* affirmed that taking into account the "recognition of the fact that transitional justice can be a valid means to help achieve peace . . . when devising such frameworks certain obligations must be observed for the sake of compliance with international human rights" (§247). These obligations include, following the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* adopted by the UN General Assembly (1985), that "[o]ffenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants" (§8).

Lighter sentences preserving some reasonable degree of proportionality, together with guarantees for fulfilling the rights of the victims are a mechanism to facilitate the transition. The UN Secretary-General (2011), in a report about the *rule of law and transitional justice in conflict and post-conflict societies* stated that "[t]ransitional justice initiatives may encompass both judicial and non-judicial mechanisms, including individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals" (§17). These mechanisms have been promoted by the UN Secretary-General, stating that "[t]ransitional justice initiatives promote accountability, reinforce respect for human rights and are critical to fostering the strong levels of civic trust required to bolster rule of law reform, economic development and democratic governance" (§17).

On this matter, Loyo Cabezudo (2017) establishes that punishments with a more restorative component could be imposed to the least responsible or regarding less serious offenses. Indeed, international bodies and international law have not been indifferent to alternative and reduced sentences. The UN Secretary-General (2011), in the *rule of law and transitional justice in conflict and post-conflict societies,* considered that "[a]s deprivation of liberty remains a common form of punishment for juvenile offenders, more focus on diversion, alternatives to detention and restorative justice is required" (§35).

The Statute of the Special Court for Sierra Leone contains alternative punishments. Article 7 about jurisdiction over persons of 15 years of age provides that in the disposition of a case against a juvenile offender, understanding as such *"any person who was at the time of the alleged commission of the crime between 15 and 18 years of age"* (numeral 1), the Special Court for Sierra Leone shall order, by virtue of numeral 2, *"care guidance and*

supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies." Article 15(5) thereof states, as well, that *"[i]n the prosecution of juvenile offenders, the Prosecutor shall ensure . . . resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability."*

The UN Commission on Human Rights (2005) in the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, for instance, in Principle 28 states that "[t]he fact that a perpetrator discloses the violations that he, she or others have committed in order to benefit from the favourable provisions of legislation on disclosure or repentance cannot exempt him or her from criminal or other responsibility", but then provides that "[t]he disclosure may only provide grounds for a reduction of sentence in order to encourage revelation of the truth." Similarly, Article III of the Inter-American Convention on Forced Disappearance of Persons (1994) provides that States may establish *"mitigating circumstances for persons who have participated in acts constituting forced disappearance when they help to cause the victim to reappear alive or provide information that sheds light on the forced disappearance of a person."*

The UN Special Rapporteur on Truth, Justice, Reparation and Guarantees of Non-recurrence (2012), in a report submitted to the UN Human Rights Council, stressed that "reconciliation should not be conceived as either an *alternative* to justice or an aim that can be achieved independently of the implementation of the comprehensive approach to the four measures (truth, justice, reparations and guarantees of non-recurrence)" (§37). The Colombian Constitutional Court (Judgment C-370, 2006) considered that justice is not opposed to peace since the administration of justice contributes to peace by resolving disputes and conflicts through institutional channels.

We conclude that even if the bodies of the Inter-American Human Rights System have reinforced the strict observance of the principle of proportionality of punishment and have stated that "punishments established for crimes involving acts that constitute serious human rights violations must be appropriate to their gravity" (I/A Court H.R., Judgment Series C No.213, 2010, §150), alternative penalties or reduced sentences may be accepted as long as the level of responsibility of the perpetrators is considered and certain degree of proportionality is preserved, and provided that perpetrators fulfill the rights of the victims to the truth, reparation and non-recurrence, such that criminal justice does not become illusory.

3.4 CONCLUSIONS OF THE CHAPTER

After some decades of armed conflict, the Government of Colombia and FARC guerrilla group signed a peace agreement referred to as 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace. Intending to achieve national reconciliation, this agreement devised two exceptional mechanisms for investigation, prosecution and punishment of perpetrators of gross human rights violations: a nationally-based selection and prioritization system relying on greater representativeness of serious human rights violations and level of command, and some alternative penalties. These mechanisms embody a form of amnesty partially and conditionally exonerating from criminal liability.

Firstly, 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace devised a Special Jurisdiction for Peace, which will exercise its functions in accordance with prioritization criteria defined from the seriousness and representativeness of crimes and level of command. In this sense, Article 3 of Legislative Act 01/2017 provided that the Congress may determine selection criteria to focus efforts on criminal investigations of the highest perpetrators of all crimes assessed as crimes against humanity, genocide or war crimes systematically committed, as well as authorize conditioned renouncing to criminal prosecution of cases not selected.

Different viewpoints from legal scholars emerge around this system of selection and prioritization over human rights violations aimed at prosecuting the most responsible for the most serious crimes. Some supporters of this system claim that it is legitimate since it is based on the functioning of the ICC; some other supporters appeal to insurmountable difficulties of prosecuting all serious human rights violations, as well as all perpetrators in situations of prolonged non-international armed conflict. For their part, some detractors of this system argue that the ICC and ICL differ from national criminal courts and national criminal law, and that the ICC prosecutorial strategy cannot be taken as authority.

On this matter, the Concurring Opinion of Judge García Sayán (I/A Court H.R., Judgment Series C No.252, 2012) in the *Case of the Massacres of El Mozote and nearby places v. El Salvador*, arguing that "facts that can be categorized as war crimes or crimes against humanity in the definitions of the Statute of the International Criminal Court should merit being processed specifically and with priority, and this is not necessarily the same for the other crimes or human rights violations" (§24), brings a point of discussion regarding State international responsibility in this respect.

Two conclusions are reached on this matter. On the one hand, this system does not derive its legitimacy from the ICC, whose prosecutorial strategy is justified by the global reach of its jurisdiction, statutory provisions governing its operations and practical logistical constraints it faces. However, as long as the most responsible for the most serious crimes are duly investigated, prosecuted and punished following the ICC prosecutorial practice, and provided that the State decision not to prosecute a specific person is preceded by a serious investigation and does not result from unwillingness or inability to provide justice, the States may enjoy some margin of discretion before the ICC.

On the other hand, selection and prioritization of cases do not find recognition from a HRL perspective since the State duty to investigate, prosecute and punish gross human rights violations does not differentiate between those who are the most responsible and those who are the least responsible, or among facts constituting all serious human rights violations. Against this background, there is a possibility of declaring State international responsibility before the I/A Court H.R. for disregarding investigations, prosecutions and punishments based on the level of participation of the perpetrators, or relying on the greater severity and representativeness of cases already found among serious human rights violations.

Secondly, alternative penalties to be imposed to participants of the armed conflict who decided to join the peace process were enshrined. These criminal benefits distinguish between perpetrators who recognize comprehensive, detailed and complete truth and those ones who do not; level of participation in serious human rights violations, and stage of the procedure where the recognition of responsibility is given. Some legal scholars support the imposition of alternative penalties arguing a margin of discretion arising from transitional justice. Other legal scholars reaffirm the need to maintain proportional prison sentences for perpetrators of international crimes and serious human rights violations.

The fact is that several international treaties in this area enshrine the principle of proportionality of punishment, so international jurisprudence becomes essential in order to limit the discretion of the States in their interpretation. The I/A Court H.R. has considered that criminal punishments should be proportional to the seriousness of the offenses and culpability of the perpetrator, with a view that criminal justice does not become illusory; however, it has not defined the specific type or length of sentences to be imposed. The IACHR, more specifically, has recognized the possibility of softening the State’s punitive authority by applying lighter sentences.

We conclude that even if both bodies of the Inter-American Human Rights System have reinforced the strict observance of the principle of proportionality of punishment, the possibility of applying alternative and reduced sentences may be accepted provided that perpetrators fulfill the rights of the victims to the truth, reparation and non-recurrence, and as long as certain reasonable degree of proportionality taking into account the gravity of the offense and level of responsibility of the offender is maintained, seeking that criminal justice does not become illusory. The imposition of "alternative-reduced" punishments, if they were to become derisory penalties, could represent an amnesty *de facto.*

Finally, from the conclusions reached regarding the nationally-based selection and prioritization system over human rights violations and alternative penalties in relation with the principle of proportionality of punishment, we reassert the argument exposed in the first section of this chapter. Serious human rights violations committed in situations of armed conflict thus require from the State the fulfillment of a set of duties that must be understood as accumulative, not as alternative. This set of duties is composed by the State obligation to investigate and make known facts related to serious human rights violations, prosecute and punish perpetrators, compensate the victims for material and moral damages suffered, and dismiss public servants involved in these crimes through action or omission. These obligations shall be fulfilled to the greatest extent possible and in good faith.

CONCLUSION

In 2012, Judge García Sayán appended a Concurring Opinion in the *Case of the Massacres of El Mozote and nearby places v. El Salvador* from which some legal scholars have claimed the emergence of some awareness on the part of the I/A Court H.R. regarding tensions in transitions from armed conflict to negotiated peace justifying a reassessment of the State obligation to investigate, prosecute and punish serious human rights violations in these specific transitional contexts. Through the analysis of Colombia, measures proscribed by international law that cannot be negotiated by actors involved in serious human rights violations committed in situations of armed conflict will be accurately defined. This work discussed exonerations and limitations from liability represented in amnesties enacted at the end of the hostilities in the light of standards of human rights protection and State international responsibility.

Some distinct and complementary ideas can be drawn from the Concurring Opinion of Judge García Sayán (I/A Court H.R., Judgment Series C No.252, 2012): ". . . a negotiated peace process attempts to ensure that the combatants choose peace and submit to justice" (§30), and if criminal punishes become difficult, "routes towards alternative or suspended sentences" (§30) such as "[r]eduction of sentences, alternative punishments, direct reparation from the perpetrator to the victim, and public acknowledgment of responsibility" (§31) could be designed and implemented, giving priority to the cases of those involved in the most serious human rights violations (§29) like "facts that can be categorized as war crimes or crimes against humanity in the definitions of the Statue of the International Criminal Court" (§24) and distinguishing "between the 'perpetrators' and those who performed functions of high command and gave the orders" (§30).

The discussion of the standards of human rights protection and State international responsibility begins by considering that in the Concurring Opinion of Judge García Sayán rendered in the *Case of the Massacres of El Mozote and nearby places v. El Salvador*, it was argued that there is no norm in positive international law that has explicitly proscribed any kind of amnesty, and that the only explicit mention of amnesty in a multilateral treaty is contained in Article 6(5) of 1977 Additional Protocol II. Under these circumstances, it was necessary to define what crimes could be validly covered by those amnesties, which required attending a joint analysis of IHL rules and HRL, applicable laws in situations of non-international armed conflict.

Considering that some cases concern serious human rights violations committed in situations of non-international armed conflict, the I/A Court H.R. has attended IHL as an interpretative resource in order to make a more specific application of the provisions of the American Convention on Human Rights when defining the scope of the State obligations. The recourse to this *corpus juris* has been legally based on Article 29(b) in accordance to which human rights shall be broadly interpreted; therefore, when interpreting the American Convention on Human Rights, it is always necessary to choose the alternative that is most favorable to the protection of the rights enshrined therein.

The recourse to IHL, particularly, to 1977 Additional Protocol II gains importance since this treaty is the only multilateral instrument in international law explicitly referring to amnesties. Furthermore, in the specific case under analysis, the armed conflict between the State of Colombia, a High Contracting Party to 1977 Additional Protocol II from August 14, 1995 and FARC guerrilla, a dissident armed group with territorial control, falls under the criteria for the application of this specific international treaty, and therefore, it can be validly used as an interpretative resource for the rights and obligations contained in the American Convention on Human Rights.

Article 6(5) of 1977 Additional Protocol II encourages States 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, at the end of the hostilities. From a joint analysis of IHL rules and HRL, it follows from Article 6(5) that war crimes, crimes against humanity, genocide and serious human rights violations cannot be amnestied, but offenses strictly related to the armed uprising against the State and minor infractions of the laws of war can be decriminalized.

There is a well-established duty to investigate, prosecute and punish war crimes, crimes against humanity and genocide committed in situations of non-international armed conflict. The I/A Court H.R. has stated that being involved in an armed conflict does not exonerate the State from respecting and guaranteeing human rights, but obliges it to act in accordance with these duties. It could not be different since the I/A Court H.R. has ruled over cases surrounded by cruelty to people taking no active part in the hostilities. The I/A Court H.R. has emphasized that from the existence of non-derogable human rights, serious human rights violations such as torture, extrajudicial execution and enforced disappearance cannot be committed even in states of emergency and even against guerrilla fighters placed *hors de combat.*

Colombia has contended that "from the Inter-American Court's analysis in the case of the *Massacres of El Mozote and Nearby Places,* the Commission must conclude that international law prohibits amnesties in contexts in which peace is being sought, solely with respect to 'international crimes'" (IACHR, 2013, §263). Nevertheless, we conclude that amnesties for serious human rights violations are also prohibited from Article 6(5), considering that 1977 Additional Protocol II intends to protect victims of non-international armed conflicts and the Preamble thereof recalls that international instruments relating to human rights offer a basic protection to human being. A restrictive interpretation of Article 6(5) would not find acceptance before a human rights tribunal.

It should also be considered that HRL is unconditionally applied. The State duty to investigate, prosecute and punish serious human rights violations is a non-derogable duty arising from HRL. In order words, interpretations emerging from the exclusive use of IHL do not override State obligations arising from HRL, for several reasons. Firstly, since IHL and HRL are both applicable to situations of armed conflict. Secondly, because attending IHL does not displace HRL as applicable law by nature before a human rights court. And thirdly, since by virtue of Article 29(b), the I/A Court H.R. attends IHL in order to enhance protection to people not taking part in the hostilities through a joint enforcement of IHL and HRL. Even if it was stated that amnesties for serious human rights violations are not prohibited from Article 6(5), 1977 Additional Protocol II cannot be interpreted to cover violations of human rights contained in the American Convention on Human Rights.

The State duty to investigate, prosecute and punish serious human rights violations not only rejects amnesties for these offenses, but also demands criminal proceedings before competent, independent and impartial judges. The rejection of amnesties by the I/A Court H.R. does not discriminate between self-amnesties benefiting certain regime and amnesties issued in democratic periods, but attends their *ratio legis:* to shield perpetrators of serious human rights violations from prosecution. The I/A Court H.R. has emphasized that serious human rights violations undermine non-derogable rights, even in states of emergency, and that the respect and guarantee of non-derogable human rights constitute *jus cogens* rules.

Amnesties for serious human rights violations result incompatible with State duties to investigate such acts, to guarantee freedom from such acts within their jurisdiction, and to ensure that they do not occur in the future. In addition, considering that non-derogable human rights represent fundamental values of the international community, acquiring the status of *jus cogens* rules that bind all the States independently of their will, amnesties preventing investigations, prosecutions, and punishments of gross human rights violations

such as torture, extrajudicial executions and enforced disappearance, even if they are not assessed as international crimes, would be vitiated of absolute nullity.

The reality is that the legal assets of the victims affected by conducts constituting gross human rights violations do not differ in the presence of their systematic commission or large-scale nature, that is to say, the existence or non-existence of elements allowing the assessment of the conduct as an international crime do not dilute the consequences of each individual act. In accordance with the case-law of the I/A Court H.R., the gravity of acts defined as gross human rights violations such torture, extrajudicial execution and enforced disappearance does not depend on their widespread or systematic perpetration, in a way that the presence of elements allowing the classification of the conduct as an international crime constitute aggravating circumstances, but not sole determinants of the State duty to investigate, prosecute and punish conducts undermining the most precious legal assets.

Before the condemnation of total amnesties for serious human rights violations and international crimes, the possibility of enacting some amnesties partially and conditionally exonerating from criminal liability started to be discussed. In particular, two exceptional mechanisms for investigation, prosecution and punishment of perpetrators of gross human rights violations set out in 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace signed between Colombia and FARC guerrilla: a nationally-based selection and prioritization system relying on greater representativeness of gross human rights violations and level of command, and alternative penalties.

Firstly, regarding the nationally-based selection and prioritization system, Article 3 of Legislative Act 01/2017 provided that the Congress may determine selection criteria to focus efforts on criminal investigations of the highest perpetrators of all crimes assessed as crimes against humanity, genocide or war crimes *systematically committed*, and authorize conditioned renouncing to criminal prosecution of cases not selected. In accordance with the contextual elements of international crimes, the above would mean the possibility of prosecuting exclusively the most responsible for facts that are assessed as crimes against humanity. In order to be prosecuted, a serious human rights violation would thus require to be classified as an international crime, and then, verify its systematic commission.

There is already a precedent in the contentious jurisprudence of the I/A Court H.R. condemning amnesties approached in those terms. In the *Case of the Moiwana Community v. Suriname*, concerning serious human rights violations committed during the military regime and the armed conflict against the National Liberation Army of Suriname, whereby an amnesty law condemned crimes against humanity but left the door open to be applied to

gross human rights violations, the I/A Court H.R. reiterated its jurisprudence regarding prohibition of amnesties for serious human rights violations based on their impairment to non-derogable human rights.

Against this background, we concluded that amnesties limiting criminal liability in these conditions do not comply with Inter-American standards for the protection of human rights. The State duty to investigate, prosecute and punish gross human rights violations before the I/A Court H.R. does not distinguish between those who are the most responsible and those ones who are the least responsible, or among facts constituting all serious human rights violations. There is a possibility of declaring State international responsibility before the I/A Court H.R. for disregarding investigations, prosecutions and punishments based on the level of participation of the perpetrators, or relying on the greater representativeness and severity of cases already found among serious human rights violations.

It should be recalled that international responsibility can be attributed to a State not only by action or omission of State agents and acquiescence or tolerance regarding certain individuals who violate human rights–such as paramilitary groups–but also for neglecting investigations, prosecutions and punishments of serious human rights violations. In this sense, the I/A Court H.R. has progressively strengthened its role in the protection of human rights in the region, a continent marked by widespread atrocities, for the particular case, arising from non-international armed conflicts that have made of people taking no active part in the hostilities, target of the most blameworthy conducts.

Secondly, alternative punishments consisting of substitutes of imprisonment and reduced sentences were enshrined. These criminal benefits distinguish between offenders who recognize comprehensive, detailed and complete truth and those ones who do not; level of participation in serious human rights violations; and stage of the procedure where the recognition of responsibility is given. We concluded that Inter-American standards for the protection of human rights do not oppose to alternative penalties as long as rights of the victims to truth, reparation and non-recurrence are fulfilled and certain reasonable degree of proportionality is maintained in accordance with the seriousness of the offense and level of responsibility of the perpetrator. The imposition of "alternative-reduced" punishments, if they were to become derisory penalties, could represent an amnesty *de facto.*

In the light of HRL, gross human rights violations committed in situations of armed conflict demand from the States the fulfillment of a set of duties that must be understood as accumulative, not as alternative. The State has the duty to investigate and make known facts related to gross human rights violations, prosecute and punish offenders, compensate

the victims for material and moral damages, and dismiss public servants involved in these crimes. These obligations shall be fulfilled to the greatest extent possible and in good faith. This is the way to achieve real national reconciliation. In words of J. E. Méndez, former UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment: just as peace is not only the absence of combat, reconciliation is not liable to be imposed by decree.

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ANNEX – Concurring Opinion of Judge García Sayán in the *Case of the Massacres of El Mozote and nearby places v. El Salvador*

CONCURRING OPINION OF JUDGE DIEGO GARCIA-SAYÁN
JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF *THE MASSACRES OF EL MOZOTE AND NEARBY PLACES v. EL SALVADOR*
OF OCTOBER 25, 2012

1. On several occasions, the Inter-American Court of Human Rights has referred in its judgments to the issue of amnesties in relation to the protection of human rights and the obligation of the State to investigate and, as appropriate, punish serious human rights violations.

2. For a long time, the question of amnesties has been a significant issue in international law, in international relations, and in the examination of non-international armed conflicts. In Latin America, throughout the twentieth century, amnesties were routinely used as a tool to end civil wars, outbreaks of violence, failed coups d'état, and different armed conflicts. At least until the early 1990s, these amnesties were used without any preliminary discussion or analysis.

3. In more recent times, they are a matter of growing relevance in international human rights law, as indicated in various judgments of the Inter-American Court that refer to the issue. The problem concerns horrendous events and contexts that usually give rise to these controversial responses by the law. Authoritarian or dictatorial regimes, political transition processes, internal tensions or armed conflicts, among other matters, within frameworks that are usually very complex, from a political and social perspective, usually provide the objective conditions based on which amnesties are proposed.

4. Regardless of the decision in previous cases, the question of amnesties and their relationship to the obligation to investigate and punish serious human rights violations requires an analysis that provides appropriate criteria for a considered opinion in contexts in which tensions could arise between the demands of justice and the requirements of a negotiated peace in the framework of a non-international armed conflict. This concurring opinion addresses precisely these issues, based on the Court's judgment in this case.

5. It is well-known that the "exemplary" case establishing what, for some, is the Court's interpretation of this issue is the *case of Barrios Altos v. Peru* decided on March 14, 2001. In the most known and most quoted paragraph of this judgment, the Court established that:

> *"41. […] amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."*

6. In that specific case, this approach was in response to two laws enacted in Peru in 1995, which the Court described in its judgment as "self-amnesties." The

condition of "self-amnesty" of the laws examined was so relevant, that it appeared that the Court had limited its interpretation to that type of amnesty.[1]

7. On that occasion, the concurring opinions of Judges García Ramírez and Cançado Trindade, whose reasoning I share, emphasized the contradiction between the "self-amnesty laws" and *"the general obligations of the State under the American Convention on Human Rights."*[2] It was affirmed that *"[t]he so-called self-amnesties are, in sum, an inadmissible offence against the right to truth and the right to justice (starting with the very access to justice)"*;[3] that *"[…] the perverse modality of the so-called laws of self-amnesty, even if they are considered laws under a given domestic legal order, are not so in the sphere of international human rights law of"*;[4] that *"[…] 'laws' of this kind are devoid of a general nature, as they are measures of exception"*[5], and that *"[…] the so-called "laws" of self-amnesty are not truly laws: they are nothing but an aberration, an inadmissible affront to the juridical conscience of humanity."*[6]

8. Since then, the Inter-American Court has had the opportunity to examine and rule on different cases on amnesty laws and their application. In these cases, the Court focused on the substantive incompatibility between the amnesty provisions and the State's obligations in relation to human rights violations. This was based on the underlying purpose of the law, its *ratio legis:* to leave these grave violations unpunished, rather than on the process of the adoption of the law or the authority that enacted it. These are the cases of *Almonacid Arellano et al. v. Chile* (2006), *La Cantuta v. Peru* (2006), *Gomes Lund et al. v. Brazil* (2010) and *Gelman v. Uruguay* (2011). In these cases, the Court followed its case law in the *Barrios Altos* case and further developed some aspects. In general, it reiterated what it had already indicated regarding the *"the incompatibility of amnesty laws relating to serious human rights violations with international law and the international obligations of States"*[7] and that the provisions of amnesty laws that prevent the investigation and punishment of serious human rights violations have no legal effects and, therefore, cannot obstruct the investigation of the facts and the identification and punishment of those responsible for human rights violations.[8]

9. Each of the cases on amnesty laws examined by the Court up until the massacres of El Mozote and nearby places had its own characteristics, nuances and emphasis, either with regard to the context in which the law originated or its scope. However, they all had in common that none of these amnesty laws was created in the context of a process aimed at ending, through negotiations, a non-international armed conflict.

10. This amnesty case arises from a different context to all the previous ones. This has implications for the analysis and legal characterization of the facts, and for the Court's concepts and considerations on this amnesty law enacted following an armed conflict and a peace negotiation process. That is why, according to the

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1 This interpretation could arise from the considerations in paragraph 43 of this judgment: "43. That is why the States Parties to the Convention that adopt laws that have this effect, such as self-amnesty laws, incur in a violation of Articles 8 and 25 in relation to Articles 1(1) and 2 of the Convention" (underlining added).

2 Concurring opinion of Judge Sergio García Ramírez, para. 1.

3 Concurring opinion of Judge Antonio A. Cançado Trindade, para. 5.

4 Ibid., para. 6.

5 Ibid., para. 7.

6 Ibid., para. 26.

7 *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010, para. 147.

8 *Case of Gelman v. Uruguay.* Judgment of February 24, 2011, para. 232.

Court's reasoning, it has been necessary to take into account not only the norms and principles of international human rights law, but also the relevant provisions of international humanitarian law in view of the context in which the events occurred.

11. As described throughout this judgment, the facts of the massacres of El Mozote and nearby places occurred in the context of a non-international armed conflict. As it developed throughout the 1980s it had reached a point at which the global and regional conditions arose coalesced to seek and achieve peace through negotiation. Under the Esquipulas II Agreement, signed in August 1987, the Presidents of five Central American countries agreed to seek a solution to the internal armed conflicts underway in El Salvador and other Central American countries. Among other matters, dialogue and reconciliation were proposed as solutions to the conflicts, and the cessation of hostilities and the democratization of Central American societies were counseled.[9]

12. The Salvadoran peace negotiations began, as the judgment recalls,[10] after the Central American Presidents requested the intervention of the Secretary-General of the United Nations. In September 1989, an agreement was signed between the Government of El Salvador and the Farabundo Martí National Liberation Front (FMLN) to initiate a dialogue process and to end, by political means, the armed conflict in El Salvador. Following the signature of the partial agreements (the first was the Human Rights Accord signed on July 26, 1990), the peace agreement was finally completed on December 31, 1991, and was formally signed on January 16, 1992, at Chapultepec Castle in Mexico City.

13. As this was a negotiated end to a long and intense armed conflict, it was no surprise that the question of what to do about the past was raised. First in the process that led to the signature of the peace and its implementation and, then, within the framework of the on-site verification by ONUSAL, the United Nations Mission in El Salvador. Thus, the Mexico Accords of April 27, 1991, referred specifically to the effects of the violence during the armed conflict and, to this end, established the creation of the Truth Commission, whose recommendations the parties undertook to comply with. In the final peace accord of January 16, 1992, there was agreement on "*the need to clarify and to overcome any indication of impunity regarding the officers of the Armed Forces, especially in cases where there was a commitment to respect human rights"* and the Truth Commission was cited to this end, emphasizing that events of this kind must "[…] *be used as exemplary action by the courts of justice*."

14. A few days after the signature of the Peace Accord,[11] the "National Reconciliation Law" of January 23, 1992, was adopted. It granted amnesty to those who had "*participated as masterminds, perpetrators or accomplices in committing ordinary political offenses and ordinary offenses committed by no less than twenty persons, prior to January 1, 1992, with the exception, in all cases, of the common offense of kidnapping, defined in article 220 of the Criminal Code*."[12] The same law excluded from this pardon those who *"[…] according to the report of the Truth Commission,*

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[9] Among other aspects, the Esquipulas II Agreement contained an explicit reference to amnesty: "In every Central American country, with the exception of those in which the International Support and Verification Committee determines that it is not necessary, amnesty decrees shall be issued that shall establish all the provisions that guarantee the inviolability of life, liberty in all its forms, property and the safety of the people to whom these decrees apply. Simultaneously with the issue of the amnesty decrees, the irregular forces of the respective country shall release all those who are in its power. "

[10] Para. 266 of the Judgment.

[11] Para. 274 of the Judgment.

[12] National Reconciliation Law. Legislative Decree Nº 147, published on January 23, 1992.

had participated in serious acts of violence since January 1, 1980, whose impact on society demands public awareness of the truth with greater urgency, irrespective of the sector to which they belong."

15. Subsequently, the Truth Commission explained[13] the need to meet the requirements of justice in two ways: *"[o]ne is the punishment of those responsible; another is the reparation due to the victims and their families."* Thus, according to the agreement reached by the parties, the route proposed by the Truth Commission, whose recommendations the parties had undertaken to comply with, was that of justice and reparation with regard to the cases it handled. This was consistent with the spirit and letter of what the parties had negotiated and specified in the Peace Accord. Nevertheless, within days of the publication of the Truth Commission's report, the General Amnesty Law was enacted with a very different purpose.

16. A context such as the one outlined here – and that is described in more detail in the judgment – is different from the one that preceded the other amnesty laws to which the Court's case law has referred. Thus, as previously indicated, the Court's analysis and reasoning has characteristics that led it to incorporate elements of international humanitarian law elements to produce an interpretation that harmonized with the obligations established in the American Convention, in order to make a juridical assessment of amnesty in a context such as this one.

17. There is no norm in positive international law that has explicitly prescribed any kind of amnesty. The only explicit mention of amnesty in a multilateral treaty is contained in article 6(5) of Protocol II Additional to the Geneva Conventions of August 12, 1949.[14] In the commentaries to that article, the International Committee of the Red Cross (ICRC) indicated that its purpose "[…] *is to encourage a gesture of reconciliation that will help restore the normal course of life in a people that has been divided."*[15] According to the Proceedings of the Diplomatic Conference in which Additional Protocol II was adopted in 1977,[16] the meaning of that norm was to grant immunity to those detained or punished for involvement in the armed conflict.

18. Pursuant to the foregoing, in this judgment, the Court has indicated that, even though amnesties may be permitted as a component of the ending of a non-international armed conflict, they have a limit which is in relation to war crimes and crimes against humanity, so that these crimes cannot remain unpunished or be forgotten (see paragraphs 285 and 286 of the judgment). These limits are also found in what some call "*sources implicitly related to amnesty."*[17]

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[13] Para. 290 of the Judgment.

[14] Article 6(5) of Protocol II, establishes that *"at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."*

[15] ICRC. Comments to the Protocol of June 8, 1997, additional to the Geneva Convention of August 12, 1949, relating to the protection of victims of non-international armed conflict. Colombia. 1998. Page 168.

[16] Proceedings of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977). Volume 9. Geneva, Switzerland.

[17] Freeman, Mark. Necessary Evils. Amnesties and the Search for Justice. Cambridge University Press. 2009. Page 36. It underscores Article I of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, certain regulations contained in the Geneva Conventions and Protocol I on international conflicts, Article 7 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment (1984); Article 6 of the Convention to Prevent and Punish Torture 1985; Article IV of the Inter-American Convention on Forced Disappearance of Persons,1994, and the International Convention for the Protection of All Persons from Enforced Disappearances, 2006.

19. Moreover, within the United Nations it has been stated "*that peace agreements approved by the United Nations can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights.*"[18] For its part, the Rome Statute of the International Criminal Court, although applicable only to crimes falling within its competence and jurisdiction, entails the obligation of the States parties to hold credible trials for the crimes defined therein (genocide, crimes against humanity and war crimes).

20. The fact is that, in the specific context of processes of widespread violence and non-international armed conflicts, amnesties may lead, at least in theory and according to the specific case or circumstance, in different directions. Consequently, this creates a whole range of possible outcomes that can delimit the exercise of assessing the interests at stake in order to combine the aim of investigating, punishing, and repairing gross human rights violations, on the one hand, with that of national reconciliation and a negotiated solution to a non-international armed conflict, on the other. There is no universally applicable solution to the dilemmas posed by these opposing forces, because it depends on the specific context, although there are guidelines that must be taken into account.

21. Based on international human rights law and, particularly the American Convention, some fundamental criteria can be outlined in order to deal with these opposing forces, which are basically justice and reconciliation.

22. A first and obvious starting point is that the anomalous and exceptional situation of a non-international armed conflict signifies that there are many thousands of violent offenders and, above all, victims. This exceptional situation usually requires exceptional mechanisms of response. The crucial element is to develop a method of assessment that deals, to the greatest extent possible, with this tension between justice and the ending of the conflict. To this end, several components must be taken into consideration, both judicial and non-judicial, that are focused, simultaneously, on seeking the truth, justice and reparation. This is because the demands that arise from massive violations, the responses to the aftermath of the conflict, and the search for long-lasting peace, require both the States and society as a whole to apply concurrent measures that permit the greatest simultaneous attention to these three rights.

23. In this context, the rights of the victims to truth, justice and reparation must be understood as interdependent. Only the integrated application of measures in favor of victims in all these areas can achieve results that are effective and consistent with the inter-American human rights system. Thus, the simple application of criminal sanctions, without these implying a serious effort to find and report the whole truth, could become a bureaucratic process that does not satisfy the valid objective of the victims to obtain the greatest possible truth. Furthermore, the award of reparations without knowledge of the truth about the violations that occurred, and without establishing conditions for a lasting peace, would only produce an apparent relief for the victims, but not a change in the conditions that would permit a recurrence of the violations.

24. These fundamental components can serve, in whole or in part, in the design of procedures that are suitable for the specificity of a process of negotiated solution to a non-international armed conflict. This, within a perspective in which the greater or lesser severity of the facts can make a specific processing of the facts viable – or not. Thus, for example, facts that can be categorized as war crimes or crimes against humanity in the definitions of the Statute of the International

[18] Report of the Secretary-General on the rule of law and transitional justice in societies experiencing or emerging from conflict. U.N. Doc S/2004/616. 3 August 2004. para. 10.

Criminal Court should merit being processed specifically and with priority, and this is not necessarily the same for the other crimes or human rights violations.

25. As for the truth component, in addition to the essential issue of the "judicial truth," which I discuss below in relation to the element of justice, on many occasions, this has led to the implementation of mechanisms such as truth commissions. However, the concept of "truth" is not unique and opens the door to different interpretations. Alex Boraine,[19] former vice-chairperson of the Truth and Reconciliation Commission of South Africa conceptualized the "truth" in this type of situation at three levels: factual truth, personal truth, and social truth. The "factual" truth gives the family specific information on the whereabouts of the mortal remains of the victim or on what happened. The "personal" truth seeks a cathartic effect on the person who expresses or manifests that truth. The "social" truth is that which is adopted by society through dialogue and debate. In pursuit of this "social truth", an important role is played by measures such as access to the documentation held by the State, the revision of scholarly texts, and the construction of museums or memorials relating to what happened.

26. With regard to the element of justice, the State's legal obligation to investigate and punish the most serious human rights violations is - as the Court has repeatedly stated – an obligation of means and forms part of the obligation of guarantee established in the Convention. Thus, States must make adequate remedies available for victims to exercise their rights. However, armed conflict and negotiated solutions give rise to various issues and introduce enormous legal and ethical requirements in the search to harmonize criminal justice and negotiated peace

27. This harmonization must be carried out by weighing these rights in the context of transitional justice itself. Thus, particularities and specificities may admittedly arise when processing these obligations in the context of a negotiated peace. Therefore, in these circumstances, States must weigh the effect of criminal justice both on the rights of the victims and on the need to end the conflict. But to be valid in international law, they must abide by certain basic standards relating to what can be processed and implemented in several ways, including the role of truth and reparation.

28. It can be understood that this State obligation is broken down into three elements. First, the actions aimed at investigating and establishing the facts. Second, the identification of individual responsibilities. Third, the application of punishments proportionate to the gravity of the violations. Even though the aim of criminal justice should be to accomplish all three tasks satisfactorily, if applying criminal sanctions is complicated, the other components should not be affected or delayed.

29. The right of the victims and of society to access the truth of what happened acquires a special weight that must be considered by an adequate assessment in order to delineate the specifics of justice in such a way that it is not antagonistic to the transitional justice required in peace and reconciliation processes. In that context, specific guidelines can be designed for processing those responsible for the most serious violations, opening the way, for example, to giving priority to the most serious cases as a way to handle a problem which, in theory, could apply to many thousands of those held for trial, dealing with less serious cases by other mechanisms.

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[19] Boraine, Alex. *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission*. Oxford University Press. Oxford and New York, 2000.

30. In this context, it is necessary to devise ways to process those accused of committing serious crimes such as the ones mentioned, in the understanding that a negotiated peace process attempts to ensure that the combatants choose peace and submit to justice. Thus, for example, in the difficult exercise of weighing and the complex search for this equilibrium, routes towards alternative or suspended sentences could be designed and implemented; but, without losing sight of the fact that this may vary substantially according to both the degree of responsibility for serious crimes and the extent to which responsibility is acknowledged and information is provided about what happened. This may give rise to important differences between the "perpetrators" and those who performed functions of high command and gave the orders.

31. It is relevant to consider the shared responsibilities of those involved in an armed conflict with regard to serious crimes. The acknowledgment of responsibility by the most senior leaders can help promote a process of clarifying both the facts and the structures that made such violations possible. Reduction of sentences, alternative punishments, direct reparation from the perpetrator to the victim, and public acknowledgment of responsibility are other ways that can be considered.

32. Full reparation is the third essential element of transitional justice in such a context. It aims to restore relationships of trust within society and seeks to lay the foundations for processes that prevent the repetition of the tragedy that violated this trust, because of the non-international armed conflict. Evidently, this is based on the principle that all violations of international law entail an obligation that they must be repaired and, in this respect, the case law of the Inter-American Court of Human Rights has made a significant contribution.[20] Regarding reparations, there is an extensive array of options that range from pecuniary compensation to measures of rehabilitation and satisfaction, among others.

33. As has been noted in some studies, the component of reparation has its own difficulties – and even impossibilities – in the case of massive and widespread violations of the human rights.[21] In these situations, it would seem that the objectives of these massive programs of reparations is not so much to reinstate the victims to the *status quo ante,* but rather to provide clear signals that the rights and dignity of people will be fully respected.[22] In any case, the legitimacy and effectiveness of reparation programs in these circumstances requires, as an essential ingredient, the design and implementation of effective mechanisms for the participation of those people at whom the programs are directed.[23]

34. Finally, an essential ingredient of reparation, not only for the victims but also for society as a whole, consists in the apologies and accounts of the perpetrators and the acknowledgments of responsibility. The full confession of the facts for which they may have been responsible is an inevitable ingredient - but not the only one - for reparation. It is also a message to society in order to close the door on violence as a way to deal with political or social differences. These "didactic monuments,"[24] as they are an account of atrocities, remind society about what can happen when

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[20] International law has established this principle explicitly, not only in Articles 10, 63 and 68 of the American Convention, but in many other international instruments such as the Universal Declaration of Human Rights (Article 8), the European Convention on Human Rights (art. 50), the International Covenant on Civil and Political Rights (Article 9), and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment (art. 14).

[21] De Greiff, Pablo. *Repairing the Past: Confronting the Legacies of Slavery, Genocide, & Caste*. Yale University, Connecticut. October, 2005. Page 8.

[22] Ibid. Page. 10.

[23] Ibid. Pages 10-11.

[24] Osiel, Mark. *Mass Atrocity, Collective Memory and the Law.* Transaction Publishers, New Brnswick, 1999. Page. 4.

an armed conflict breaks out and reinforce the capabilities of society in the face of future threats that something like that could happen again.

35. The acknowledgment of responsibility by senior State officials has been introduced consistently in the case law of the Inter-American Court. This is an essential ingredient of transitional justice that seeks to reconstruct the conditions for democratic institutional viability in a society. Although there are many precedents for this kind of act, they multiplied in certain parts of the world at the end of the Cold War.[25] Tony Blair in Great Britain apologized for British responsibility in the nineteenth century Irish famine, Jacques Chirac for the deportation of French Jews to Nazi concentration camps during World War II, and Bill Clinton for the inaction of the United States government during the Rwanda genocide or for the support to dictatorships in Latin America.[26] In the context of processes of transition from internal armed conflict to peace, these acknowledgments acquire special relevance and significance as an ingredient that strengthens and sustains the others.

36. Thus, according to the context derived from the conclusion of the armed conflict, societies can demand that mechanisms exist that are complementary to the obligation of criminal justice and that satisfy the aspirations of the victims to a greater or lesser extent. Truth commissions, instruments for integral reparation, mechanisms to provide care and attention, the protection of vulnerable populations, purges in the public sector, and institutional reforms are some of the options that legislators and leaders have when deciding State policies, in combination with the application of criminal justice developed within a framework of weighing the elements.

37. A negotiated solution to the internal armed conflict raises several issues regarding the weighing of these rights, within the legitimate discussion on the need to conclude the conflict and put an end to future serious human rights violations. States have a legal obligation to address the rights of the victims and, with the same intensity, the obligation to prevent further acts of violence and to achieve peace in an armed conflict by the means at its disposal. Peace as a product of a negotiation is offered as a morally and politically superior alternative to peace as a result of the annihilation of the opponent. Therefore, international human rights law should consider that peace is a right and that the State must achieve it.

38. Thus, in certain transitional situations between armed conflicts and peace, it can happen that a State is not in a position to implement fully and simultaneously, the various international rights and obligations it has assumed. In these circumstances, taking into consideration that none of those rights and obligations is of an absolute nature, it is legitimate that they be weighed in such a way that the satisfaction of some does not affect the exercise of the others disproportionately. Thus, the degree of justice that can be achieved is not an isolated component from which legitimate frustrations and dissatisfactions can arise, but part of an ambitious process of transition towards mutual tolerance and peace.

Diego García-Sayán

Judge

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[25] Hazan, Pierre. *Measuring the impact of punishment and forgiveness: a Framework for evaluating transitional justice.* International Review of the Red Cross. Volume 88, Number 861. March 2006. Page 24.

[26] Ibid.

Pablo Saavedra Alessandri

Secretary

Judges Leonardo A. Franco, Margarette May Macaulay, Rhadys Abreu Blondet and Alberto Pérez Pérez adhered to this Opinion of Judge Diego García-Sayán.

Leonardo A. Franco

Judge

Margarette May Macaulay

Judge

Rhadys Abreu Blondet

Judge

Alberto Pérez Pérez

Judge

Pablo Saavedra Alessandri

Secretary