INTERNATIONAL HUMANITARIAN LAW IN THE JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS*

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ABSTRACT

The Inter-American Court began to explicitly refer to IHL as of 2000. The study of its jurisprudence enables the identification of the factual bases upon which the Court verified that the facts of the relevant cases had taken place within a context of armed conflict, and of the legal bases establishing its jurisdiction to refer to a legal framework that is external to the Inter-American *corpus juris*. The case law also demonstrates that on the basis of interpretations in light of IHL, the Court has reinforced the content and scope of human rights and of the obligations of States; and that, going beyond mere interpretation, the Court declared the breach of IHL principles and ordered reparation measures to guarantee the implementation of IHL. As such, the Inter-American Court has become an indirect mechanism for the control of IHL.

Keywords

International Human Rights Law;- International Humanitarian Law; Inter-American Court of Human Rights; Inter-American *corpus juris*; *lex specialis;* control mechanism.

1. INTRODUCTION

The convergence of International Human Rights Law (hereinafter: IHRL) and International Humanitarian Law (hereinafter: IHL) regarding the protection of the dignity of the human person is not in doubt. Nevertheless, the approach of these two branches of public international law to this protection differs, resulting in significant distinctions between IHRL and IHL, especially in regard to the mechanisms established to guarantee their implementation. The conventional instruments of IHRL include various international control mechanisms before human rights protection bodies, while IHL relies on more limited mechanisms, with an almost nonexistent level of implementation.[1] In light of this situation, the IHRL control mechanisms appear to have a complementary role in guaranteeing the implementation of IHL.

Within the framework of regional human rights systems, we shall focus on the autonomous judicial body of the Inter-American Human Rights System (hereinafter: Inter-American System), the Inter-American Court of Human Rights (hereinafter: Inter-American Court or Court). The Inter-American Court has developed a long-standing relationship between IHL and the implementation of the American Convention on Human Rights (hereinafter: American Convention, Convention or ACHR), especially in the exercise of its contentious jurisdiction by highlighting throughout its jurisprudence the different manners in which to refer to IHL.

In the Court's first judgments, we identify cases involving situations of internal armed conflict that, nevertheless, do not expressly refer to IHL. In such cases, only "the terms" of IHL are used in a more or less discreet manner to introduce the actors of the armed conflict, as well as the facts that constitute the violations of the rights recognized in the American Convention in this context. In this jurisprudence, IHL thus appears to be present implicitly or "in code."[2]

It is only in 2000, in the *Las Palmeras v. Colombia* case,[3] that the Inter-American

Commission on Human Rights (hereinafter: Inter-American Commission, Commission or IACHR),[4] for the first time, confronts the Court with the possibility of using IHL in the exercise of its competence.[5] This case marks the beginning of a series of explicit references to IHL by the Inter-American Court in its contentious case law, particularly in cases involving four State parties to the Convention that have a history of internal armed conflict, namely Colombia, El Salvador, Guatemala, and Peru. The Court thus postulates the difference between "applying" and "interpreting" IHL, specifying that while it is not competent to apply it, it can interpret the American Convention in light of IHL.

Within the framework of this explicit reference to IHL as of 2000, it is possible still to identify two different approaches: a first one where the Court uses IHL to complement the content and scope of the human rights and general State obligations that are recognized in the Convention; and a second where IHL is truly integrated into the Court's reasoning and in the consequences of the declaration of the State's international responsibility, to the extent that the Court's role seems to go beyond mere interpretation.

In any event, the implicit and explicit references to IHL do not necessarily correspond to stages of "preclusion" in the Court's jurisprudence. Since 2000, when the Court began to refer explicitly to IHL, and up until today, there are judgments in cases involving armed conflicts that have made no explicit reference to IHL. Moreover, despite the Court's more bold jurisprudence, which appears to go beyond mere references to IHL in terms of interpretation, it continues, in parallel, to refer to IHL to supplement the content and scope of human rights and State obligations. Therefore, there is no rule regarding the criteria that determine the Court's use of IHL. It is clear, however, that such use is taking place and is – it seems to us – inevitable; and that the passing of time has demonstrated that there is no turning back from such practice.[6]

In this article, we shall analyze the Inter-American Court's explicit use of IHL by focusing on the identification of the bases justifying its use (**I**), and the study of the evolution of references to IHL throughout the Court's jurisprudence (**II**).

2. THE BASES JUSTIFYING THE INTER-AMERICAN COURT'S USE OF IHL IN ITS IMPLEMENTATION OF THE AMERICAN CONVENTION

The Court's reliance on norms outside of the Inter-American *corpus juris*, including the norms of IHL, requires justifications that go beyond the laudable aim of promoting greater protection of human rights, given that the Court is a supervisory body of IHRL with specific powers that are enshrined in the American Convention. Since the reference to IHL is only relevant in the context of an armed conflict, it has been necessary for the Court to verify in each case that the facts at issue were taking place in such a context (1). Moreover, the Court's use of IHL has required it to identify the legal bases that support its jurisdiction *rationae materiae* to refer to a regulatory framework that is outside of the Inter-American *corpus juris* strictly speaking (2).

2.1 Sources that have enabled the Inter-American Court to confirm the existence of an armed conflict thereby justifying its reference to IHL

The history of the American continent is rife with situations where States' democratic life was interrupted due to, *inter alia*, the imposition of dictatorial governments or the outbreak of armed conflict. These situations have left a mark on the context in the region even despite the establishment of the Inter-American System.[7] As such, the existence of internal armed conflicts in certain State parties to the Convention is an undeniable historical fact.

However, as a judicial body of human rights, it is essential for the Court that the existence of an internal armed conflict, as a factual circumstance in a case, be duly established.[8] In this sense, by relying on different sources in the evidentiary record of the relevant cases, the Inter-American Court has been able not only to confirm the existence of an internal armed conflict, but also to identify whether the conflict was governed at the domestic level solely by common Article 3 of the four 1949 Geneva Conventions (hereinafter: common Article 3) or also by the 1977 Additional Protocol II to the 1949 Geneva Conventions relating to the

protection of victims of non-international armed conflicts (hereinafter: AP II).[9]

A. The recognition of State responsibility and the interpretation of its silence

In some cases, the context of an internal armed conflict has been established as a proven or undisputed fact based on the State's own recognition of responsibility, independently of the fact that the State acknowledged the existence of an armed conflict as such.[10] In this regard, Article 62 of the Rules of Procedure of the Court (Acquiescence) [11] provides that if the respondent State informs the Court "of its acceptance of the facts or its total or partial acquiescence to the claims stated in the presentation of the case or the brief submitted by the alleged victims or their representatives, the Court shall decide, having heard the opinions of all those participating in the proceedings and at the appropriate procedural moment, whether to accept that acquiescence, and shall rule upon its juridical effects." According to Article 64 of the Rules of Procedure (Continuation of a Case), even in cases involving acquiescence, "[b]earing in mind its responsibility to protect human rights, the Court may decide to continue the consideration of a case."

Furthermore, according to Article 41(3) of the Rules of Procedure of the Court (the State's Answer), the Court may consider "those facts that have not been expressly denied and those claims that have not been expressly controverted as accepted," "without this meaning that it will automatically consider them accepted in all cases in which they are not opposed by one of the parties, and without an assessment of the specific circumstances of the case and of the body of evidence." According to the Court's jurisprudence, the silence of the respondent State or any elusive or ambiguous answers "may be interpreted as an acceptance of the facts in the Merits Report while the contrary does not emerge during the proceedings or as a result of the Court's conclusions."[12]

Thus, in respect of Colombia, it can be concluded, on the basis of the interpretation of the State's silence and partial acquiescence of international responsibility in the analysis of the judgments in the cases of *Las Palmeras*,[13] *Mapiripán Massacre*,[14] *Ituango Massacre*,[15] *Santo Domingo Massacre*,[16] *Afro-Descendant communities displaced from the Cacarica River Basin (Operation Genesis)*,[17] and *Rodríguez Vera et al. (The Disappeared from the Palace of Justice)*,[18] that the Court assumed, without the slightest doubt, that the relevant facts took place during an internal armed conflict. As such, the Court has referred to the origin and evolution of the armed conflict in Colombia, highlighting the various state and non-state actors involved in the hostilities.

As for the applicable regime to the Colombian internal armed conflict, the Constitutional Court of Colombia's decision Nº. C-225 of May 18, 1995 on AP II's constitutionality has been of the utmost importance. According to this decision, cited by the Inter-American Court in the cases against Colombia, "the requirements for the application of Article 1 [of AP II] are maximum requirements that States can waive, since Protocol II is a development of and complement to common Article 3." However, given that the Colombian Constitution clearly provides that the rules of IHL must be respected in all cases, the Colombian Constitutional Court concluded that "in accordance with the Constitution, [IHL], obviously including Protocol II, applies in Colombia in any event, without it being necessary to determine whether the conflict reaches the intensity levels required by Article 1."[19]

B. The reports of the Truth Commissions[20]

The Inter-American Court has openly declared that it grants "a special value to reports of Truth Commissions or Commissions for Historical Clarification as relevant evidence in the determination of the facts and of the international responsibility of the States in various cases which have been submitted before it."[21] Nevertheless, in recent jurisprudence, the Court has specified that the establishment of a context, based on truth commission report "does not exempt [it] from assessing the whole body of evidence according to the rules of logic and based on experience, without being subject to rules concerning the *quantum* of evidence."[22]

In the cases of *Bámaca Velásquez*,[23] *Las Dos Erres Massacre*,[24] and *Gudiel Álvarez et al. ("Diario Militar")*[25] against Guatemala, the Court referred, in addition to the State's recognition of responsibility to confirm the existence of an armed conflict, to the reports of the two truth commissions established in the country after the armed conflict ended, namely, "Guatemala:

Memory of Silence" by the Commission for the Historical Clarification of Human Rights Violations and Acts of Violence that have caused suffering to the Guatemalan People (hereinafter: Commission for Historical Clarification),[26] and "Guatemala: Never Again" by the Interdiocesan Project for the Recovery of Historical Memory.[27] Based on these two reports, it was established, in the relevant cases against Guatemala, that between 1962 and 1996 there was an internal armed conflict that pitted armed groups against the State's armed forces.

According to the Report of the Commission for Historical Clarification, although AP II was ratified by Guatemala "at a very late stage in the armed confrontation" and despite the fact that "the government always denied its applicability," it was considered "as part of [Guatemala's] legal framework because many of the norms contained in said Additional Protocol are part of customary international law."[28] Thus, the Commission for Historical Clarification concluded that the provisions of AP II "should be considered as a valid and relevant framework of reference."[29]

With respect to El Salvador, in the judgments in the *Serrano Cruz Sisters*,[30] *Contreras et al.*,[31] *Massacres of El Mozote and nearby places*,[32] and *Rochac Hernández et al.*[33] cases, the Court considered, in addition to the State's recognition of international responsibility, the report of a truth commission to establish the existence of an armed conflict in the country, namely, the Report of the Truth Commission for El Salvador, entitled "From Madness to Hope, the 12-year war in El Salvador,"[34] read in conjunction with the Peace Accords of El Salvador signed with the support of the United Nations.[35] Within that framework, it was proven that from 1980 to 1991, El Salvador underwent an internal armed conflict that opposed the Farabundo Martí National Liberation Front (hereinafter: FMLN) to the State's armed forces.

The Report of the Truth Commission for El Salvador confirmed that the Salvadoran armed conflict "met the requirements" for the application of common Article 3 and AP II, and that, as a result, these provisions were "legally binding for both insurgent and Government forces." Specifically, the Truth Commission for El Salvador indicated that the FMLN "officially stated that certain territories were under its control, and it did in fact exercise that control," justifying therefore the relevance of AP II as "applicable law" for the analysis that the Commission carried out in its report.[36]

Regarding Peru, the judgments in the *De La Cruz Flores*,[37] *Osorio Rivera and family*,[38] *J.*,[39] *Espinoza Gonzáles*,[40] and *Cruz Sánchez et al.*[41] cases have referred mainly to the Report of the Truth and Reconciliation Commission (hereinafter: TRC)[42] and to previous Peruvian cases, as evidence of the existence of an internal armed conflict in the country. According to the Court, the TRC's Report "is an important reference, as it provides a comprehensive view of the armed conflict in Peru."[43] Citing the report, the Court confirmed that since the beginning of the 1980s and until the end of the year 2000, Peru went through an armed conflict between, on the one hand, police officers and the armed forces, and on the other hand, the "Shining Path" and "Tupac Amaru Revolutionary Movement" armed groups.

Similarly, the report of the TRC provided some references regarding the IHL regime applicable to the internal armed conflict that took place in the country during two decades. The TRC stated that the facts in its report only explained themselves "through the existence of an internal armed conflict undoubtedly governed by common Article 3."[44] Although the TRC expressly indicated that it was not the body that should decide whether the Peruvian armed conflict met the necessary requirements for the application of AP II, it concluded that common Article 3 was "the appropriate regulatory framework for the determination of the core non-derogable rights that are in force." It added that this did not constitute "in any way an obstacle to apply the provisions of Protocol II, insofar as they are applicable and relevant."[45]

For these reasons, it is clear that in cases where the Inter-American Court has explicitly referred to IHL, it has not directly determined the existence of an armed conflict, which is an essential precondition for references to IHL. To establish that circumstance as a proven fact, the Court based itself on the recognition of the State's international responsibility, the interpretation of its silence, and the reports of truth commissions. Such sources have also enabled the Court to become aware of the IHL regime applied to the analysis of the internal armed conflict and, as a result, to refer indistinctly in its considerations to the norms of common Article 3 and AP II.

2.2 Sources that have enabled the Inter-American Court to substantiate its *rationae materiae* jurisdiction thereby justifying its reference to IHL

Neither the preamble nor the different provisions of the American Convention refer explicitly to IHL. Nevertheless, there are certain articles in the text of the Convention whose interpretation has provided the Court with elements upon which to substantiate the relevance of the references to IHL in its jurisprudence. In light of the fact that States have questioned the Court's competence *rationae materiae* to use IHL, the Inter-American Court has also made use of extra-conventional references to justify its reading of the Convention under this branch of law.

A. Conventional references to support the Court's use of IHL

Regarding the references to the Convention that permitted the Court to substantiate its use of IHL, it is important to highlight three specific provisions of the American Convention, namely Articles 27, 29, and 64.

Pursuant to Article 29 of the Convention on "Restrictions Regarding Interpretation" and Article 64 which regulates the advisory jurisdiction of the Court, the Court has ruled that the Convention can be interpreted in relation to other international instruments.[46] It has also held that when a State is a party to the Convention and has accepted the Court's contentious jurisdiction, the Court may examine the compatibility of that State's conduct or of a norm of domestic law with the rights and obligations contained in the Convention, interpreted in the light of other treaties.[47] On that basis, the Court has stated that there is an "equivalence" between the content of common Article 3 and the provisions of the Convention and other international instruments regarding inalienable human rights, and that "the relevant provisions of the Geneva Conventions can be taken into account as elements for the interpretation of the American Convention." This clarification has constituted the starting point upon which the Court emphasizes the conceptual difference between "application" and "interpretation," noting that although it is not competent to apply IHL in its cases, it is competent to use it as an interpretive tool of the American Convention.[48]

As such, based on the jurisprudence of its first advisory opinion of 1982,[49] the Court has retained for itself a right of inspection or "*droit de regard*" over the compliance by a State party to the Convention with its IHL obligations, even if it cannot, in principle, derive legal consequences therefrom.[50] The Court has thus pointed out that although it "lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence, it can observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3."[51]

In respect of Article 27 on "Suspension of Guarantees," the fact that the Court has not referred to it in all cases associated with situations of internal armed conflict given, among others, that an alleged suspension of guarantees was not raised, does not represent an obstacle to highlight its relevance as a conventional source justifying references to IHL in the Court's jurisprudence. In any event, the importance of Article 27 lies in the fact that it is the only provision of the American Convention that mentions "war" as a context for the application of the treaty.

On this specific issue, the Court has stated that although "the State has the right and obligation to guarantee its security and maintain public order, its powers are not unlimited, because it has the obligation, at all times, to apply procedures that are in accordance with the law and to respect the fundamental rights of each individual in its jurisdiction."[52] As such, according to the Court, "Article 27(1) of the Convention permits the suspension of the obligations that it establishes, 'to the extent and for the period of time strictly required by the exigencies of the situation' in question. The measures adopted should not violate other international legal obligations of the State Party, and should 'not involve any discrimination […].' This means that the prerogative must also be exercised and interpreted in keeping with the provisions of Article 29)(a) of the Convention, exceptionally and in restrictive terms."[53] For its part, Article 27(2) specifies which rights of the

Convention constitute the inalienable core, that is, those rights that may not be suspended in the event of war, public danger, or other emergency that may threaten the independence or security of a State Party.[54] Finally, Article 27(3) establishes the States' obligation to immediately inform the other States Parties to the Convention, through the Secretary General of the Organization of American States, "of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension." Specifically, the Court stated that a situation of armed conflict does not exonerate a State from its obligations to respect and guarantee the rights of individuals, recognized in Article 1(1) of the Convention, and that, to the contrary, the State is obliged "to act in accordance with said obligations."[55]

B. Extra-conventional references to support the Court's use of IHL

Despite the Inter-American Court's position since 2000, States have continued to raise preliminary objections challenging the Court's jurisdiction to refer to IHL. When answering these States in its considerations, the Court has added extra-conventional references complementing the justification for interpreting the American Convention in light of a body of law that is beyond that of the Inter-American *corpus juris*.

The reference to Article 29 of the Convention has been complemented by a reference to the general rules of treaty interpretation contained in the 1969 Vienna Convention on the Law of Treaties. Thus, the Court has emphasized its competence to interpret the American Convention in light of other international treaties, recalling that for the purpose of interpreting a treaty, "it does not only take into account the agreements and instruments formally related to it" (Article 31(2) of the Vienna Convention), "but also the context" (Article 31(3) of the Vienna Convention). As such, the Court stated that "this concept is particularly important for [IHRL], which has made substantial progress by the evolutive interpretation of the international protection instruments." According to the Court, "[t]hese parameters allow [it] to use the provisions of [IHL], ratified by the defendant State, to give content and scope to the provisions of the American Convention."[56]

Likewise, the Court has expressly referred to the complementarity or convergence between IHRL and IHL and to the applicability of the former during times of peace and during an armed conflict on the basis not only of Article 27 of the Convention, but also of common Article 3, the preamble and Article 4 of AP II, and Article 75 of AP I.[57] According to the Court, the specificity of IHL does not prevent the convergence and the application of the norms of IHRL that are enshrined in the American Convention and in other international treaties, thus reiterating that IHRL remains in effect during an armed conflict.[58] In this manner, the Court has noted that a State "cannot question the full applicability of the human rights embodied in the American Convention, based on the existence of a non-international armed conflict."[59]

In this regard, the Court has stated that by using IHL as a norm for interpretation that complements the Convention, it "is not ranking the different laws, because the applicability and relevance of [IHL] in situations of armed conflict is not in doubt."[60] The Court has also highlighted that this complementary interpretation implies only that it "may observe the rules of [IHL], as a specific law in the matter, in order to apply the norms of the Convention more precisely when defining the scope of the State's obligations."[61] In this sense, the Court has reinforced the principle of *lex specialis* affirming that IHL is better suited to armed conflicts than IHRL.

Furthermore, the Court has completed its reasoning by referring to the jurisprudence of national courts and to domestic legislation on IHL. In a case concerning the State of Colombia, the Court declared, referring to Article 29(b) of the American Convention, that the norms of IHL that were relevant for the analysis of the case (common Article 3 and AP II) were in force in Colombia when the facts of the case took place.[62] The Court also noted that, in the Constitutional Court of Colombia's landmark decision C-225 of 1995,[63] those IHL norms had been declared as "*jus cogens* norms, which are part of the Colombian 'constitutional block' and are mandatory" for the State and for all armed State and non-State actors involved in the armed conflict. Consequently, the Court reaffirmed that individuals protected by the IHL regime "do not, for that reason, lose the rights they have pursuant to the legislation of the State under whose jurisdiction they are."[64]

In addition, in line with what has been previously noted, the Court has had the opportunity to complement the argument regarding its competence to use IHL by referring to the aforementioned reports of truth commissions. As such, the Inter-American Court has referred to the statements made in those reports regarding the relevance of the joint interpretation of IHRL and IHL in the context of an internal armed conflict.[65]

Therefore, we find that the Inter-American Court, as a supervisory human rights body, is not granted express authorization by the American Convention to use IHL within the framework of its contentious jurisdiction. Nevertheless, a bold interpretation thereof and references to extra-conventional sources have enabled the Court to justify the possibility of interpreting the Convention in the light of other treaties, highlighting in this case those concerning IHL.

3. THE EVOLUTION OF EXPLICIT REFERENCES TO IHL IN THE INTER-AMERICAN COURT'S JURISPRUDENCE

The Court's explicit references to IHL norms does not have the same characteristics throughout its jurisprudence. On the one hand, we have identified a consistent approach, based on interpretations in the light of IHL, to strengthen the content and scope of the human rights and State obligations recognized in the Convention (1). On the other hand, the second approach seems to go beyond the simple interpretation of the Convention in light of IHL, which is evidenced through the use and declaration of violations of the basic principles of IHL in the analysis of the facts, and by way of the order of measures of reparations aiming to implement IHL (2).

3.1 IHL as a complement to the content and scope of the rights and obligations recognized in the American Convention

In the merits analysis of cases related to internal armed conflicts, the Court has examined human rights violations and noncompliance of State obligations recognized in the American Convention in relation to IHL norms. Thus, the Court has supplemented the content and scope of the right to life, the right to humane treatment, the right to personal liberty, freedom from ex post facto laws, the rights of the child, the right to private property, and the right of movement and residence. This new interpretation in the light of IHL has led to a "new reading" of the State parties to the Convention's general obligations in the context of an armed conflict.

A. The human rights under the Convention in light of IHL

Regarding the right to life (Article 4 of the ACHR), the Court has noted, citing the International Court of Justice and the European Court of Human Rights (hereinafter: ECtHR),[66] that IHL does not displace the applicability of said provision, "rather it nourishes the interpretation of the Convention's provision that prohibits arbitrary deprivation of life" in the context of events that occurred during an armed conflict (Cruz Sánchez et al. § 272). Likewise, and as a complement to the right to humane treatment (Article 5 of the ACHR), the Court has recalled, as provided in common Article 3, that a State facing an internal armed conflict "should grant those persons who are not participating directly in the hostilities or who have been placed *hors de combat* for whatever reason, humane treatment, without any unfavorable distinctions" because IHL "prohibits attempts against the life and personal integrity of those mentioned above, at any place and time" (Bámaca Velásquez § 207).

In massacre cases, when determining the international responsibility of the State, the Court has indicated that it cannot ignore the existence of general and special State obligations to protect the "civilian population," derived from common Article 3 and Articles 4 (Fundamental Guarantees) and 13 (Protection of the Civilian Population) of AP II, which involve passive obligations (not to kill, not to violate physical integrity, etc.) as well as positive obligations to impede violations against said persons by third parties (Mapiripán Massacre § 114; El Mozote Massacres §§ 148, 153 and 155).

In addition, the Court has recalled the absolute and inderogable prohibition against torture and cruel, inhumane, or degrading treatment or punishment even "under the most difficult circumstances, such as war, threat of war, the fight against terrorism and other crimes, state of siege or emergency, civil commotion or

domestic conflict, suspension of constitutional guarantees, domestic political instability or other public emergencies or catastrophes." In this regard, the Court has referred to common Article 3, GC III (Articles 49, 52, 87, 89, and 97), GC IV (Articles 40, 51, 95, 96, 100, and 119), AP I (Article 75 (2)(a)(ii)) and AP II (Article 4(2)(a)) (J. § 304, Espinoza Gonzalez § 141). Similarly, the Court has held, citing Rule 117 of Customary IHL, which was systematized by the International Committee of the Red Cross (ICRC),[67] that the denial of truth to family members of enforced disappearance victims in the context of an internal armed conflict, concealment of State information during the transition process following the signing of peace agreements ending a conflict, as well as impunity during the investigations, are all violations of the right of the victims' family members to know the truth, in breach of humane treatment (Diario Militar §§ 295-302).

The right to personal liberty (Article 7 of the ACHR) has been analyzed in light of IHL in relation to the deprivation of liberty as one of the concurrent and constitutive elements of enforced disappearance (Osorio Rivera and family § 113). In this regard, the Court has referred to Rule 99 of Customary IHL, which states that "[a]rbitrary deprivation of liberty is prohibited." Accordingly, the Court has indicated that pursuant to international law obligations, especially Article 27(1) of the Convention, the prohibition against arbitrary detention or imprisonment cannot be suspended during a non-international armed conflict (Osorio Rivera and family § 120) and it is applicable even in cases of detention for reasons of public security (The Disappeared from the Palace of Justice § 402). In addition, although it did not expressly refer to Article 7 of the Convention, the Court has recalled that the taking of hostages is prohibited "at any time and place," according to the provisions of common Article 3 and Rule 96 of Customary IHL (Cruz Sánchez et al. § 269).

On the right to freedom from ex post facto laws (Article 9 of the ACHR), the Court has ruled specifically on the "penalization of medical activities" in the context of an armed conflict (De La Cruz Flores §§ 90-93). Citing Articles 16 of AP I, 10 of AP II, and 18 of GC I, the Court found that the State committed a violation of the principle of freedom from ex post facto laws, among others, for having penalized the medical act carried out by the victim in the case which, according to the Court, "is not only an essential lawful act, but also the physician's obligation to provide." The Court also held that the State had violated said principle "for imposing on physicians the obligation to report the possible criminal behavior of their patients, based on information obtained in the exercise of their profession" (De La Cruz Flores § 102).

Regarding the rights of the child (Article 19 of the ACHR), the Court has established that IHL "safeguards, in a general manner, children as part of the civilian population, that is, people who do not actively participate in hostilities, who should be treated humanely and not be attacked" (Rochac Hernandez et al. § 110). In that regard, it noted that the content and scope of these rights in the context of non-international armed conflicts should be specified, taking into account the relevant provisions of the Convention on the Rights of the Child and AP II, especially Article 4(3) pursuant to which children should receive "the care and aid they require," and, in particular, all appropriate measures "to preserve family unity and to facilitate the search, identification, and reunification [...] of families separated due to an armed conflict and, in particular, of unaccompanied and separated children" (Mapiripan Massacre § 153, Dos Erres Massacre § 191, Contreras et al. §§ 86 and 107, Santo Domingo Massacre §§ 238-239, Rochac Hernandez et al. § 110).

Taking into consideration Article 38(4) of the Convention on the Rights of the Child, the Court has stated that children, during an armed conflict, "are in a situation of greater vulnerability and risk of having their rights affected" (Contreras et al. § 108, El Mozote Massacre § 155, Rochac Hernandez et al. § 110), resulting in an "aggravated responsibility" of the State when children are the victims in a case (Mapiripan Massacre §§ 155-156, Ituango Massacre § 246).

Furthermore, the Court has ruled on the violations of the rights of women and girls in the context of an armed conflict by citing to a case in which it had implicitly referred to IHL.[68] In that sense, it recalled that various international bodies have recognized that "during armed conflicts, women and children face specific situations that affect their human rights, such as rape, which is frequently used as a symbolic means of humiliating the opposing party or

as a means of punishment and repression."[69] According to the Court, "[t]he use of the State's power to violate the rights of women in an internal conflict, in addition to affecting them directly, may be intended to produce an effect on society, and send a message or teach a lesson"[70] (El Mozote Massacres § 165, Espinoza Gonzales § 226).

Regarding the right to private property (Article 21 of the ACHR), the Court has emphasized, in relation to the theft of livestock and the burning of houses and shops belonging to civilians, that Articles 13 (Protection of Civilians) and 14 (Protection of Objects Indispensable to the Survival of the Civilian Population) of AP II prohibit, respectively, "acts or threats of violence the primary purpose of which is to spread terror among the civilian population," causing a massive displacement of people, as well as "to attack, destroy, remove or render useless for that purpose objects indispensable to the survival of the civilian population" (Ituango Massacres § 180, El Mozote Massacres § 179). The Court has stressed the "particular gravity" of such violations (Ituango Massacres § 182). Moreover, it has interpreted the scope of that same right in light of the relevant rules of Customary IHL, in particular Rules 7, 8, 9, and 10 on the prohibition of attacks against civilian objects and the distinction between these and military objectives (Santo Domingo Massacre §§ 270-271, Operation Genesis § 349).

In addition, the Court has stated that plundering committed after a massacre, in that it constitutes a taking of private property during an armed conflict without the consent of its owner, is expressly prohibited by Article 4(2)(g) of AP II and Rule 52 of Customary IHL (Santo Domingo Massacre § 272). The Court has also referred to Rule 133 of Customary IHL which states that "[t]he property rights of displaced persons must be respected" (Santo Domingo Massacre § 272, Operation Genesis § 349).

With respect to the right of movement and residence (Article 22 of the ACHR), the Court cited Article 17 of AP II, which prohibits ordering the displacement of civilians "for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand." According to Article 17, in the latter case "all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition" (Mapiripán Massacre §§ 172-173, Ituango Massacre § 209, Operation Genesis § 222). Thus, the Court has referred to a "heightened vulnerability" in the case of displaced persons (Ituango Massacres §§ 125.106 and 212). Moreover, it considered that the *Guiding Principles on Internal Displacement*, drafted by the Representative of the UN Secretary General for Internally Displaced Persons,[71] are particularly relevant to define the content and scope of Article 22 of the American Convention, since they are based on IHRL and IHL norms (Mapiripan Massacre § 171, Ituango Massacre § 209, Santo Domingo Massacre § 256, Operation Genesis §§ 222 and 349).

B. The State's Obligations under the Convention in light of IHL

As has become clear, the Inter-American Court has "redefined" the general obligations of State parties to the Convention as a result of the interpretation, in light of IHL, of the human rights recognized therein. The Court has also provided specific clarifications regarding said obligations.

The obligation to respect and guarantee rights (Article 1(1) of the ACHR) and the obligation to adopt domestic legal effects (Article 2 of the ACHR) have been the subject of recent developments by the Court, which has emphasized the limits on the possibility of granting amnesties in connection with an internal armed conflict, based on a systematic interpretation of Article 6(5) of AP II and Rule 159 of Customary IHL. The Court has held that, according to IHL, in certain instances, the passing of amnesty laws upon the cessation of hostilities in a non-international armed conflict is justified to allow a return to peace. However, it explained that the granting of amnesties under Article 6(5) of AP II is not absolute, since the State obligation to investigate and prosecute war crimes also exists in IHL. As such, the Court stressed, citing Rule 159 of Customary IHL, that although "[a]t the end of the hostilities, the authorities in power must endeavor to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or to those deprived of their liberty for reasons related to the armed conflict," there is an exception in the case of persons suspected of, accused of or sentenced for war crimes or crimes against humanity, such as those categories

defined in the Rome Statute of the International Criminal Court. Pursuant to the Court's reasoning, such persons shall not be covered by an amnesty (El Mozote Massacres §§ 285-286).

Regarding the obligation to investigate, prosecute, and, if applicable, punish those responsible for human rights violations (Article 1(1), in relation to Articles 8 and 25 of the ACHR), the Court has indicated that the fact that the victims' death has taken place in the context of a non-international armed conflict does not exempt the State "of its obligation to initiate an investigation, [...], even though the Court may take into account specific circumstances or limitations determined by the conflict itself when assessing the State's compliance with its obligations" (Cruz Sánchez et al. § 350). Specifically, the Court has held that, "in handling the scene of the crime and the treatment of the corpses, the minimum and indispensable measures should be taken for the preservation of evidence to contribute to the success of the investigation." Thus, based on Articles 17, 20, 120, and 130 of the four Geneva Conventions, respectively, Article 8 of AP II and Rules 112, 113, 115, and 116 of Customary IHL, the Court has warned that, even in a situation of armed conflict, IHL "includes obligations of due diligence concerning the correct and adequate removal of corpses and the efforts that should be made to identify and to bury them in order to facilitate their subsequent identification" (The Disappeared from the Palace of Justice § 496, Cruz Sánchez et al. § 367).

Additionally, on the basis of Rule 117 of Customary IHL, the Court has recalled that States should "take all feasible measures to account for persons reported missing as a result of armed conflict" and provide their family members with any information it has on their fate. According to the Court, this obligation is independent of whether the disappearance of a person is the result of the wrongful act of forced disappearance, or of other circumstances such as their death in an operation or errors in the return of their remains (The Disappeared from the Palace of Justice § 478).

We share with Hélène Tigroudja a possible interrogation regarding the Court's method of using IHL, as it may raise reservations "*quant à la rigueur avec laquelle ces emprunts sont opérés et leur pertinence*."[72] Nevertheless, the jurisprudence developed by the Court through the cases cited above demonstrates not only that the joint use of IHRL and IHL in the Court's reasoning is possible, but also that such use is desirable insofar as the specificity of IHL allows for greater protection of human rights and more demanding State obligations in the analysis of cases linked to armed conflicts.

3.2 IHL integrated into the Inter-American Court's reasoning

The Inter-American Court's jurisprudence reveals another approach in the explicit use of IHL, seemingly in the limit between application and interpretation, the latter being the only "justified" reference to said body of law, according to the Court itself. This use is characterized as being more technical and specialized, analyzing the facts of the cases using the basic principles of IHL and even declaring its violation or noncompliance. Furthermore, in the context of this approach, the Court's jurisprudence has incorporated IHL–although in a more random manner–as reparation measures ordered against States declared internationally responsible, in order to prevent the repetition of acts contrary to this branch of law.

A. The principles of IHL appear "on the stage"

From the year 2012, the Court began to indicate, in advance and in an organized manner, that, pursuant to Article 29 of the Convention, it considered it "useful and appropriate" to interpret the content and scope of the norms of the Convention with the rules of IHL. In that vein, the Court identified the IHL sources to be used in a complementary manner as references for said interpretation, considering its specificity regarding the matter. These are: i) the 1949 Geneva Conventions, particularly GC IV; ii) common Article 3; iii) AP II; and iv) Customary IHL (El Mozote Massacres § 141, Santo Domingo Massacre § 187, Operation Genesis § 221, Rochac Hernandez et al. § 109).

The signs of IHL's greater integration in the Court's reasoning have been highlighted through use of the fundamental IHL principles in the analysis of the *Santo Domingo Massacre*, *Operation Genesis*, and *Cruz Sánchez et al.* cases. This has been accompanied by the prior admission of experts in IHL that have contributed to improve the Court's knowledge of

IHL and the convergence and complementarity between IHL and IHRL.

In *Santo Domingo Massacre v. Colombia*, the IACHR and representatives of the victims proposed that Colombian attorney Alejandro Valencia Villa act as an expert and issue a report on specific matters of IHL and, transversely, on the convergence and complementarity of IHL and IHRL. In the Order of Summons to the Public Hearing,[73] the President of the Court found that the purpose of the expert opinion "transcends the specific interests of the parties in a given proceeding and becomes a matter relevant to the Inter-American public interest."[74] Thus, the Court examined for the first time the State's responsibility for violations of the rights to life and to humane treatment, interpreting the American Convention in light of the relevant principles of IHL, namely, the principle of distinction, the principle of proportionality and the principle of precaution (§ 211).

The principle of distinction between civilians and combatants, and between civilian objects and military objectives has been defined by the Court pursuant to IHL rules, particularly common Article 3, Article 13(2) of AP II and Rules 1, 7, and 87 of the Customary IHL (§ 212). On this basis, the Court concluded that in the context of confrontations with the Revolutionary Armed Forces of Colombia (FARC), the bombing of the village of Santo Domingo by the Colombian Air Force did not comply with the State's obligation to abide by the principle of distinction when conducting that air operation (§ 213). The Court also cited Rules 11 and 12 of Customary IHL according to which indiscriminate attacks are prohibited, such as "those […] which employ a method or means of combat the effects of which cannot be limited as required by [IHL]" (§ 234). The Court further found that the Colombian Air Force aircraft pilots used their machine guns with a manifest lack of concern for the lives and integrity of the civilians who were moving on the highway, in non-compliance with the principle of distinction (§ 235).

The principle of proportionality has been defined by the Court on the basis of Rule 14 of Customary IHL (§ 214). In the case, the Court noted that the air operation's more general military objective had been the members of the guerrilla presumably located in a "wooded area" near the village of Santo Domingo. However, the Court found that it was inappropriate to analyze the launch of the cluster bomb "in light of the principle of proportionality, because an analysis of this type would involve determining whether the deceased and injured among the civilian population could be considered an 'excessive' result in relation to the specific and direct military advantage expected if it had hit a military objective, which did not occur in the circumstances of the case" (§ 215). In this sense, for the Court, an analysis based on the principle of proportionality was not relevant because the Court had already concluded that the State had not complied with the principle of distinction given that the bombing directly affected the civilian population. The Court also found that, "even in the hypothesis that there could be members of the guerrilla among the civilian population, the military advantage sought would not have been so great that it could justify eventual civilian deaths and injuries." According to the Court, "in that hypothesis, these actions would also have affected the principle of proportionality" (§ 235).

The principle of precaution has been defined on the basis of Rules 15, 17, and 18 of Customary IHL (§ 216). Based on the evidence in the case file, the Court characterized the situation as being contrary to the principle of precaution because, *inter alia*, the cluster device that was used is a weapon with limited accuracy; the instruction to launch the device was not accurate; the manuals and regulations in force at the time of the facts indicated that the device could not be used in populated areas or near villages with a civilian population; a few minutes before the launching of the device, errors had already been made with more precise weapons; the need to use that type of weapon in the confrontations that took place had been questioned on the day of the events; and the air operations were disorganized at the time the device was launched. The Court noted that the case file did not indicate whether at any time during the course of the operation, the aircraft pilots had taken into account the fact that there was a village populated by civilians nearby. Moreover, the case file did not specify whether at the time of the launch of the cluster devices or other missiles, the need was expressed to take any kind of precaution or care in relation to the safety of the civilian population (§§ 217-230). In addition, the Court found that the regulations and manuals of the Colombian Air Force that

were in force when the events took place clearly established that machine gun attacks could only be used "in response to subversive attacks or seizure, when there is certainty that the civilian population will not be affected, [and] may never be used in populated or semi-urban areas." Thus, the Court declared that the State also failed to comply with the principle of precaution (§ 236).

About a year later, the Court reiterated its analysis on the principles of IHL in another case, *Operation Genesis v. Colombia*. On this occasion, the IACHR, the representatives of the victims, and the State proposed, among others, expert opinions in IHL. The IACHR proposed Peruvian professor Elizabeth Salmón Gárate, the representatives of the victims proposed Spanish professor Albert Galinsoga, and the State proposed a judge of the Superior Military Tribunal of Colombia, María Paulina Leguizamón Zárate. These experts were all proposed to testify on specific issues of IHL related to the case and on the convergence and complementarity of IHRL and IHL. In the Order of Summons to the Public Hearing,[75] the President of the Court admitted the reports of the three experts, among others, reiterating that the subject of these reports triggered an interest relevant to the "Inter-American public order" in the context of the analysis of a case related to an armed conflict (§§ 24-30).

Thus, in regard to the analysis of the merits of the case, the Court announced, for the second time, its consideration of the relevant principles of IHL concerning "the use of force in the context of non-international armed conflicts" (§ 222), in relation to alleged violations of the right to life and personal integrity due to the direct damage caused by bombardments and machine gun shootings. The Court considered that "no evidence ha[d] been provided that would allow it to conclude that the objectives of the bombardments of Operation Genesis included civilian settlements or property" and that, as a consequence, it could not conclude that there had been a violation of the principle of distinction. Moreover, the Court considered that it had not been proven that the State "was prevented *per se* from conducting counterinsurgency operations on [the concerned] territory, unless the attack on that objective would have involved a direct attack on civilian settlements or property, which, as indicated […], ha[d] not been proved" (§ 239). Therefore, the Court did not carry out the corresponding analysis regarding the principles of proportionality and precaution.

Recently, in the case of *Cruz Sánchez et al. v. Peru*, the IACHR, the representatives of the victims and the State proposed, among others, expert opinions in IHL. The IACHR proposed UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns; the representatives of the victims proposed Colombian attorney Alejandro Valencia Villa, and the State proposed Peruvian attorney Jean Carlo Mejia Azuero. The parties proposed that the three experts would testify on specific issues related to IHL and, again, on the convergence and complementarity of IHL and IHRL in the context of a non-international armed conflict. In the Order of Summons to the Public Hearing,[76] the Acting President of the Court accepted the expert opinions, considering that they could help strengthen the protection capacities of the Inter-American System in cases related to an internal armed conflict and the situation of *hors de combat* persons, highlighting once again the respective interest for the "Inter-American public order of human rights."

In the analysis of the merits of the case, the Court considered it relevant to resort to the IHL *corpus juris* to determine the scope of the State's obligations to respect and guarantee the right to life and of the notion of arbitrariness that characterizes a deprivation of life, in situations of armed conflict (§§ 270 and 273-274). Thus, in respect of the principle of distinction, the Court noted that although the victims in the case were members of an armed group (MRTA) and, therefore, not civilians, they could potentially be the beneficiaries of the safeguards contained in common Article 3 "so long as they had stopped participating in the hostilities and could be identified as *hors de combat*" when the operation to rescue the hostages took place. In this regard, the Court stressed, in accordance with Rule 47 of Customary IHL, common Article 3, the *Bámaca Velásquez* case,[77] and the ECtHR's case law,[78] that any person *hors de combat* may not be attacked and, to that extent, the State must provide such persons humane treatment without any unfavorable distinction (§§ 276-278). That being said, the Court specified that the issue in the case did not revolve around necessity, proportionality and precaution in the use of force, but rather whether the victims died, as a result of the acts of State agents, once they were

hors de combat in terms of IHL or, conversely, were killed when they were taking an active part in the hostilities (§ 287). Specifically, for the Court, the State did not provide a plausible and satisfactory explanation regarding the way in which Eduardo Cruz Sánchez died in an area that was under the State's exclusive control, due to a shot fired when his body was almost motionless, in an *hors de combat* situation, concluding therefore that it was an extrajudicial execution (§§ 316-319).[79]

B. IHL incorporated in the measures of reparation ordered by the Inter-American Court

Among the different judgments cited above in which the Court has used IHL explicitly, certain measures of reparation that the Court ordered refer directly to said branch of law in terms of the consequences of the declaration of the State's international responsibility. Thus, in the *Myrna Mack Chang v. Guatemala*[80] and *La Rochela Massacre v. Colombia*[81] cases, the Court integrated IHL into the measures of reparation, despite not relying thereon in the analysis of the merits. Such measures of reparation basically respond to "*guarantees of non-repetition*," that is, measures aimed at ensuring that IHL violations do not occur again,[82] consisting in the adoption of domestic legal measures and the training of public officials.

Regarding the measures of domestic law, the Court considered, in the judgment on reparations in the *Bámaca Velásquez* case, and in response to the specific request of the IACHR and the victims' representatives (§§ 69.d-70.e), that Guatemala had to adopt domestic legal measures in accordance with Article 2 of the Convention (Domestic Legal Effects). Specifically, the IACHR demanded that "the procedures applied by the military forces in connection with treatment of captured combatants" be adapted to IHRL and IHL norms in order to guarantee his rights, since the victim in this case was a member of an armed group. The Court ordered Guatemala to adopt "legislative measures and any others that may be required" to adapt the Guatemalan legal system to international human rights norms and humanitarian law, and to "make them domestically effective" (§ 85).

Likewise, in the judgment of the *Massacres of El Mozote and nearby places* case, which involved grave human rights violations, the Court ordered the State to refrain from resorting to measures such as amnesties or other similar mechanisms to excuse itself from its obligation to investigate, in consideration of the continuous or permanent nature of enforced disappearance, the effects of which do not cease until the fate or whereabouts of the victims are established and their identity determined. In that regard, the Court ordered the State to ensure that the Law of General Amnesty for the Consolidation of Peace did not continue to represent an obstacle to the investigation of the facts of this case, and the identification, prosecution and punishment of those responsible, and that it did not "have the same or a similar impact in other cases of grave violations of the human rights recognized in the American Convention that may have occurred during the armed conflict in El Salvador" (El Mozote Massacres §§ 296 and 318). Therefore, the Court declared that its decision on the Amnesty Law in El Salvador had general effects.

In respect of the training of public officials, insofar as the human rights violations were perpetrated by paramilitaries acting with the State's collaboration, tolerance or acquiescence, or directly by State agents, the Court has ordered that the State adopt measures aiming to educate and train all members of the armed forces, police, and security bodies on the principles and standards of human rights–even under states of exception–and IHL (Myrna Mack Chang § 282, Mapiripán Massacre § 316, Ituango Massacres § 409, Dos Erres Massacre § 251, Osorio Rivera and family § 274). According to the Court, in order to respond to this measure, the State must implement, within a reasonable period of time and with the respective budget appropriation, permanent and mandatory education programs in human rights and IHL among all levels of its armed forces (Mapiripán Massacre § 316, Ituango Massacres § 409). The Court has specified that special mention of the Court's judgment and of international human rights and humanitarian law instruments must be made as part of those programs (Mapiripán Massacre § 317, The Rochela Massacre § 303, Dos Erres Massacre § 251).

For the training of civil servants, especially judges and prosecutors, the impact of the measures ordered by the Inter-American Court in terms of IHL is of particular importance. Indeed, according to the Court, when a State is party to an international treaty such as

the American Convention, all of its organs, including its judges, the different organs related to the administration of justice at all levels and, in general, all public authorities, are under the obligation to exercise *ex-officio* a "conventionality control" between the domestic norms and practices and the American Convention, within the framework of its respective competences and corresponding procedural regulations. In this task, the authorities concerned should take into account not only the treaty, but also its interpretation by the Inter-American Court, the Convention's ultimate interpreter.[83] Thus, in the relevant cases, these public authorities, in the exercise of "conventionality control," shall have the obligation to abide by the Convention as it has been interpreted in light of IHL, in order to avoid the submission of a case involving its State to the Inter-American System, or for that State again to commit an act resulting in its international responsibility.

In light of the above, we share the opinion of Judge Jean-Paul Costa and Michael O'Boyle that the use of the principles of IHL "will not be an easy job for a Court of Human Rights since it will require distinctions to be made between combatants and civilians – not always a straightforward task." Moreover, "[i]t will also require that the principle of proportionality be applied by balancing military advantage against the duty to protect civilian life. Thus the Court would have to determine whether the military gains of a particular operation justified the risks of civilian casualties."[84] In the case of the Inter-American Court, such use requires reflection on the role and future development of IHL in its jurisprudence, taking into account that references to the principles of IHL and the possible declaration of their violation or noncompliance seem to position the Court at the boundary between interpretation and application of that body of law.[85] Furthermore, despite the fact that the Court cannot apply IHL or declare the responsibility of the State for IHL violations, it has allowed itself, by way of preventive logic, to order measures of reparation involving IHL. Since reparations are the direct consequences of a declaration of the concerned State's international responsibility, we may ask ourselves whether the Court's order of such measures does not exceed the scope of its competence, in that it is acting as a true monitoring body of IHL. This question becomes all the more relevant since the Court itself is in charge of monitoring compliance with the reparation measures that it ordered.

4. CONCLUSION

The Inter-American Court has become an indirect IHL control mechanism. As such, it has assigned to itself the right to verify the compliance of a State party to the American Convention with obligations derived from IHL, before, during, and after an internal armed conflict, to declare, if applicable, violations of human rights and noncompliance of the State's obligations recognized in the Convention.

The dynamics of the last cases related to situations of armed conflict, especially *Santo Domingo Massacre, Operation Genesis*, and *Cruz Sánchez et al.*, seem to demonstrate the Inter-American Court's calling to specialize in IHL. Indeed, the Court has admitted expert opinions on the matter; it has declared that the scope of IHL and its convergence with IHRL is a matter of interest for the Inter-American public order; it has concluded that the use of IHL is "useful and relevant" by incorporating Customary IHL; and it has based its considerations on an analysis of the basic principles of IHL. These are all indications of the Court's decision to take IHL seriously.[86] Yet, the challenges in relation to that body of law are not minor.

The future of Inter-American jurisprudence on the matter has thus become of great interest. As has already been pointed out, the Inter-American Court's use of IHL finds itself at a point of no return, and the evolution of that use reaffirms a contribution to the development of IHL, ensuring its respect.

NOTES

* This article is a summarized and updated version of the author's thesis entitled "International humanitarian law in the case law of the Inter-American Court of Human Rights" ("*Le droit international humanitaire au sein de la jurisprudence contentieuse de la Cour interaméricaine des droits de l'homme*"), which she publicly presented and defended in October 2014 to obtain a Masters degree in human rights ("*Master 2 Recherche en droits de l'homme*") at the Paris X Nanterre La Defense University in Paris, France. This article has previously been published in Spanish and French. See, Ibáñez Rivas, Juana María, "El Derecho Internacional Humanitario en la jurisprudencia de la Corte Interamericana de Derechos Humanos", *Revista Derecho del Estado*, nº 36, 2016, pp. 167-198, and Ibáñez Rivas, Juana María, "Le droit international humanitaire au sein de la jurisprudence de la Cour interaméricaine des droits de l'Homme", *La Revue des droits de l'homme* [Online], nº 11, 2017, published online on December 23, 2016.

1. Marmin, Sébastien, "Les organes de contrôle du droit international des droits de l'homme et le droit international humanitaire", *RTDH*, 23rd year, n° 92, 2012, pp. 818-819.
2. Flauss, Jean-François, "Le droit international humanitaire devant les instances de contrôle des conventions européenne et interaméricaine de droits de l'homme", in Flauss, Jean-Francois (dir.), *Les nouvelles frontières du droit international humanitaire. Actes du colloque du 12 avril 2002 organisé par l'Institut d'études de droit international de l'Université de Lausanne*, Bruxelles, Némésis/Bruylant, 2003, p. 124.
3. The case relates to an operation directed by members of the National Police and the Colombian Army in which 7 people were the victims of extrajudicial executions. I/A Court H.R., *Case of Las Palmeras v. Colombia*. Preliminary Objections. Judgment of February 4, 2000. Series C Nº. 67; *Case of Las Palmeras v. Colombia*. Merits. Judgment of December 6, 2001. Series C Nº. 90; and *Case of Las Palmeras v. Colombia*. Reparations and Costs. Judgment of November 26, 2002. Series C Nº. 96.
4. In this regard, it is noteworthy that the Inter-American Commission has affirmed, since 1997, that it is competent to apply IHL directly. IACHR, *Arturo Ribón Ávila*, Colombia, Case 11.142, Report Nº. 26/97 of September 30, 1997, and *Juan Carlos Abella,* Argentina, Case of 11.137, Report Nº. 55/97 of November 18, 1997.
5. In its application, the Commission asked the Court to declare that Colombia had violated the right to life (Article 4 of the ACHR) and common Article 3 of the 1949 Geneva Conventions. However, the Court noted that the Convention had only conferred on it the 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." Therefore, contrary to the IACHR's position, the Court rejected the possibility of applying IHL and admitted the preliminary objection *ratione materiae* raised by the State. I/A Court H.R., *Case of Las Palmeras v. Colombia.* Preliminary Objections*, op. cit*., para. 33.
6. It is noteworthy that, in respect of the European system of human rights, there are also different approaches to IHL in the jurisprudence of the European Court of Human Rights (ECtHR). Despite the fact that since the beginning of its activities the ECtHR has been confronted with cases related to armed conflicts, both of an international and non-international nature, it has avoided explicit reference to IHL. It is not until much later, towards the end of the first decade of the 21st century, that the ECtHR began to refer explicitly to IHL in a more progressive manner, to the point of defining its position on the interaction between IHRL and IHL during armed conflict in 2014. In this regard, see, Costa, Jean-Paul and O'Boyle, Michael, "The European Court of Human Rights and international humanitarian law", *La Convention européenne des droits de l'homme, un instrument vivant/The European Convention on Human Rights a living instrument, Mélanges en l'honneur de/Essays in Honour of Christos L. Rozakis*, Bruxelles, Bruylant, 2011, pp. 107-129, and Hervieu, Nicolas, "La jurisprudence européenne sur les opérations militaires à l'épreuve du feu", *La Revue des droits de l'homme* [Online], Actualités Droits-Libertés, <http://revdh.revues.org/890> (last visited on December 15, 2015).referencias explfecha altera ion

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7. See, Burgorgue-Larsen, Laurence and Úbeda de Torres, Amaya, "War in the jurisprudence of the Inter-American Court of Human Rights", *HRQ*, vol. 33(1), 2011, pp. 148-174.
8. Unlike the ECtHR, and until today, the Inter-American Court has not had the opportunity to analyze, in light of IHL, cases related to an international armed conflict, understood in terms of common Article 2 to the four 1949 Geneva Conventions and Article 1.4 of AP I. It is noteworthy, however, that the case of *Vásquez Durand and relatives v. Ecuador* is currently pending before the Court, related to the alleged forced disappearance of Mr. Jorge Vásquez Durand, a Peruvian businessman, in the context of the conflict in Alto Cenepa between Ecuador and Peru. I/A Court H.R., Case at the merits stage (judgment pending), <http://www.corteidh.or.cr/docs/tramite/vasquez_durand_y_familiares.pdf>, (last visited on December 15, 2015).
9. The possibility of referring to AP II was reinforced by the fact that the four respective State parties have ratified the treaty: Colombia on September 1, 1993, Guatemala on October 19, 1987, El Salvador on November 23, 1978, and Peru on July 14, 1989.
10. In this regard, it should be recalled that the existence of an internal armed conflict "will depend on the presence of a number of elements, since it is a situation of fact and not a legal classification, like the old notion of 'belligerence.'" Salmón, Elizabeth, *Introducción al derecho internacional humanitario* (3ra ed.), Lima, IDEHPUCP/CICR, 2012, p. 130. In addition, and although there is no normative and exclusive definition of an internal armed conflict, the doctrine and jurisprudence have attempted to define the notion based on the description of the elements that characterize it, namely, "(a) the parties to the conflict are not State[s]; b) the armed confrontations are carried out in the territory of a State; c) the open hostilities must have a minimum of organization; and d) the armed confrontations must have some intensity." Salmón, Elizabeth, *op. cit*., pp. 130-131.
11. Approved by the Court in its 85th Ordinary Period of Sessions, held from November 16 to 28, 2009.
12. I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C Nº. 4, para. 138, and *Case of Rodríguez Vera et al (The Disappeared from the Palace of Justice) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 14, 2014. Series C Nº. 287, para. 82.
13. I/A Court H.R., *Case of Las Palmeras v. Colombia*, *op. cit*.
14. The case relates to the death, injuries, and abuses committed by paramilitary agents against inhabitants of Mapiripán. I/A Court H.R., *Case of the "Mapiripán Massacre" v. Colombia*. Preliminary Objections. Judgment of March 7, 2005. Series C Nº. 122, and *Case of the "Mapiripán Massacre" v. Colombia*. Merits and Reparations. Judgment of September 15, 2005. Series C Nº. 134.
15. The case relates to acts of torture against, and the murder of, inhabitants of Ituango committed by paramilitary groups. I/A Court H.R., *Case of the Ituango Massacre v. Colombia*. Judgment of July 1, 2006. Series C Nº. 148.
16. The case relates to the bombardment of, and machine-gun attacks against, the village of Santo Domingo, committed by the Colombian Air Force, causing the deaths, injuries, and forced displacement of many people. I/A Court H.R., *Case of the Santo Domingo Massacre v. Colombia*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 30, 2012. Series C Nº. 259.
17. The case relates to a counterinsurgency military operation over the territory of afro-descendant communities in the Cacarica river basin, which resulted in one death and the forced displacement of around 3,500 people. I/A Court H.R., *Case of Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 20, 2013. Series C Nº. 270.
18. The case relates to the forced disappearance, extrajudicial execution, detention, and torture of people in the events known as the taking and retaking of the Palace of Justice, in the city of Bogotá. I/A Court H.R., *Case of Rodríguez Vera et al (The Disappeared from the Palace of Justice) v. Colombia*, *op. cit*.
19. Constitutional Court of Colombia, Decision C-225/95 of May 18, 1995, Constitutional review of "Additional Protocol to the Geneva

Conventions of August 12, 1949, on the protection of victims of non-international armed conflicts (Protocol II)" drafted in Geneva on June 8, 1977, and Law 171 of December 16, 1994, through which the Protocol was adopted, <http://www.corteconstitucional.gov.co/relatoria/1995/c-225-95.htm>, (last visited December 15, 2015).

20. Regarding Colombia, the Inter-American Court recently referred to the report of a truth commission in the case of *The Disappeared from the Palace of Justice*. The goal of that Commission, which was established in August 2005 by way of a decision of the Supreme Court of Justice, was to issue a report that would become a point of mandatory reference concerning what really occurred during the taking and retaking of the Palace of Justice. The Truth Commission issued its final report in 2010.

21. I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala*. Merits, Reparations and Costs. Judgment of November 25, 2003. Series C Nº. 101, paras. 131 and 134; *Case of Zambrano Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C Nº. 166, para. 128, and *Case of Radilla Pacheco v. México*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2009. Series C Nº. 209, para. 179.

22. I/A Court H.R., *Case of J. v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 27, 2013. Series C Nº. 275, para. 55, and *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, *op. cit*., para. 88.

23. The case relates to the forced disappearance of a member of an armed group, as a result of a confrontation between the army and the guerrilla. I/A Court H.R., *Case of Bámaca Velásquez v. Guatemala*. Merits. Judgment of November 25, 2000. Series C Nº. 70, and *Case of Bámaca Velásquez v. Guatemala*. Reparations and Costs. Judgment of February 22, 2002, Series C Nº. 91.

24. The case relates to acts of murder, torture, and rape, among others, committed by military agents against many inhabitants of the community of Las Dos Erres. I/A Court H.R., *Case of the Dos Erres Massacre v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 24, 2009. Series C Nº. 211.

25. The case relates to the forced disappearance of 26 people, the extrajudicial execution of one person, and acts of torture against a girl, all carried out by military agents. I/A Court H.R., *Case of Gudiel* Álvarez *et al. ("Diario Militar") v. Guatemala*. Merits, Reparations and Costs. Judgment of November 20, 2012. Series C Nº. 253.

26. United Nations Office for Project Services (UNOPS), Final Report of the Commission for Historical Clarification, "Guatemala: Memory of Silence", Guatemala, 1999.

27. Human Rights Office of the Archbishopric of Guatemala (ODHAG), Final Report of the Interdiocesan Project for the Recovery of Historical Memory "Guatemala: Never Again," 1998.

28. Report of the Commission for Historical Clarification, *op. cit.*, para. 74.

29. Ibid, para. 1685.

30. The case relates to the forced disappearance of two sisters detained by the Armed Forces of El Salvador in the framework of a military operation. I/A Court H.R., *Case of the Serrano Cruz Sisters v. El Salvador*. Preliminary Objections. Judgment of November 23, 2004. Series C Nº. 118, and *Case of the Serrano Cruz Sisters v. El Salvador*. Merits, Reparations and Costs. Judgment of March 1, 2005. Series C Nº. 120.

31. The case relates to the forced disappearances of boys and girls, between 1981 and 1983, by members of different military bodies in El Salvador. I/A Court H.R., *Case of Contreras et al. v. El Salvador*. Merits, Reparations, and Costs. Judgment of August 31, 2011, Series C Nº. 232.

32. The case relates to a military operation in seven locations in the northern part of the department of Morazán, which would have resulted in the deaths of approximately one thousand people. I/A Court H.R., *Case of the Massacres of El Mozote and nearby places v. El Salvador*. Merits, Reparations and Costs. Judgment of October 25, 2012. Series C Nº. 252.

33. The case relates to the forced disappearances of boys and girls between 1980 and 1982 as a result of different military operations organized by the State. I/A Court H.R., *Case of Rochac Hernández et al. v. El Salvador*. Merits, Reparations and Costs. Judgment of October 14, 2014. Series C Nº. 285.

34. Truth Commission for El Salvador, Report "From Madness to Hope, the 12 year war in El Salvador", New York, San Salvador, 1992-1993.

35. UN, El Salvador Accords: the path to peace, 1992, <http://www.pnud.org.sv/2007/content/view/56/102/>, (last visited on December 15, 2015).

36. Report of the Truth Commission for El Salvador, *op. cit*., pp. 11-12.

37. The case concerns the arbitrary detention of a health professional who would have provided medical care to members of an armed group, and her conviction for the crime of terrorism without due process. I/A Court H.R., *Case of De la Cruz Flores v. Peru*. Merits, Reparations and Costs. Judgment of November 18, 2004. Series C Nº. 115.

38. The case relates to the forced disappearance of Jeremías Osorio Rivera, detained by a Peruvian army patrol. I/A Court H.R., *Case of Osorio Rivera and Family v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 26, 2013. Series C Nº. 274.

39. The case relates to the detention, prosecution, and extradition of Mrs. J. for the alleged commission of the crimes of terrorism and apology of terrorism. I/A Court H.R., *Case of J. v. Peru*, *op. cit*.

40. The case concerns the illegal and arbitrary detention of Gladys Carol Espinoza Gonzáles, and acts of torture committed against her by agents of the State, in the framework of an investigation into the crime of treason and terrorism. I/A Court H.R., *Case of Espinoza Gonzáles v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2014. Series C Nº. 289.

41. The case relates to the extrajudicial execution of a member of an armed group by State forces, in the context of a rescue operation of hostages taken by that group. I/A Court H.R., *Case of Cruz Sánchez et al. v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of April 17, 2015. Series C Nº. 292.

42. TRC, Final Report of the TRC, Lima, TRC, 2003, pp. 11-31.

43. I/A Court of H.R. *Case of Cruz Sánchez et al. v. Peru*, *op. cit*., para. 139.

44. Report of the TRC, *op. cit.,* p. 204.

45. Ibid, p. 205.

46. I/A Court H.R., *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, *op. cit*., para. 39.

47. I/A Court H.R., *Case of Las Palmeras v. Colombia*. Preliminary Objections, *op. cit*., para. 32, and *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, *op. cit*., para. 39.

48. I/A Court H.R., *Case of Bámaca Velásquez v. Guatemala*. Merits, *op. cit*., para. 209, and *Case of the "Mapiripan Massacre" v. Colombia*. Merits and Reparations, *op. cit.,* para. 114.

49. I/A Court H.R., "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights) Advisory Opinion OC-1/82 of September 24, 1982. Series A Nº. 1.

50. Marmin, Sébastien, *op. cit.* p. 825.

51. I/A Court H.R., *Case of Bámaca Velásquez v. Guatemala*. Merits, *op. cit*., para. 208.

52. I/A Court H.R., *Case of Bámaca Velásquez v. Guatemala***. Merits**, *op. cit.,* para. 174; *Case of J. v. Peru, op. cit.,* para. 124, and *Case of Espinoza Gonzáles v. Peru*, *op. cit*., paras. 117, 119-120.

53. I/A Court H.R., Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A Nº. 8, para. 19; *Case of J. v. Peru, op. cit.,* para. 139, and *Case of Espinoza Gonzáles v. Peru*, *op. cit*., paras. 117, 119-120.

54. In accordance with Article 27(2), the American Convention "does 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."

55. I/A Court H.R., *Case of Bámaca Velásquez v. Guatemala*. Merits, *op. cit*., para. 207, and *Case of Cruz Sánchez et al. v. Peru*, *op. cit*., para. 271.

56. I/A Court H.R., *Case of the Serrano Cruz Sisters v. El Salvador*. Preliminary Objections, *op. cit*., para. 119, and *Case of Rodríguez Vera et al.*

(The Disappeared from the Palace of Justice) v. Colombia, *op. cit*., para. 39.

57. I/A Court H.R, *Case of the Serrano Cruz Sisters v. El Salvador*. Preliminary Objections*, op. cit*., paras. 114-116.

58. Ibid, paras. 111-113.

59. Ibid, para. 118.

60. I/A Court H.R., *Case of Santo Domingo Massacre v. Colombia*, *op. cit*., para. 24, and *Caso Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, *op. cit*., para. 39.

61. I/A Court H.R., *Case of Santo Domingo Massacre v. Colombia*, *op. cit*., para. 24, and *Caso Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, *op. cit*., para. 39.

62. Law 171 of December 16, 1994, *op. cit*. I/A Court H.R., *Case of the"Mapiripán Massacre" v. Colombia*. Merits and Reparations, *op. cit*., para. 115.

63. Constitutional Court of Colombia, decision C-225/95, *op. cit.*, paras. 30 and 35.

64. I/A Court H.R., *Case of "Mapiripán Massacre" v. Colombia*. Merits and Reparations, *op. cit*., para. 115.

65. I/A Court H.R., *Case of the Serrano Cruz Sisters v. El Salvador*. Preliminary Objections, *op. cit*., para. 117.

66. International Court of Justice (ICJ), *Legality of the threat or use of Nuclear Weapons*, Advisory Opinion of July 8, 1996, para. 25, and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of July 9, 2004, paras. 106-113. Moreover, ECtHR. *Varnava et al. v. Turkey [GS]*, judgment of September 18, 2009, para. 185.

67. The ICRC drafted a publication on Customary IHL applied to international armed conflicts and non-international armed conflicts, as a result of a study on the implementation of IHL in a broad sense. ICRC, *Customary International Humanitarian Law*, vol. I, edited by Jean-Marie Henckaerts and Louise Doswald-Beck, Cambridge University Press, Cambridge, 2007.

68. I/A Court H.R., *Case of Miguel Castro Castro Prison v. Peru*. Merits, Reparations, and Costs. Judgment of November 25, 2006. Series C Nº. 160.

69. Ibid., paras. 223-224. See also I/A Court H.R., *Case of the Massacres of El Mozote and nearby places v. El Salvador*, op. cit., para 165.

70. Ibid., para. 224.

71. UN, Guiding principles on displacement of people within their country, E/CN.4/1998/53/ add.2, of February 11, 1998.

72. Tigroudja, Hélène, "La Cour interaméricaine des droits de l'homme au service de 'l'humanisation du droit international public'. Propos autour des récents arrêts et avis", 52 *AFDI*, 2006, pp. 623-624.

73. I/A Court H.R., *Case of the Santo Domingo Massacre v. Colombia*, Order of the President of the Inter-American Court of Human Rights of June 5, 2012, considering clauses 22-23, and 26.

74. According to Article 35(1)(f) of the Rules of Procedure, the "possible appointment of expert witnesses" can be carried out by the IACHR "when the Inter-American public order of human rights is affected in a significant manner." This provision makes the Commission's appointment of expert witnesses an exceptional fact, subject to such condition.

75. I/A Court H.R., *Case of Marino López et al. (Operation Genesis) v. Colombia*. Order of the President of the Inter-American Court of Human Rights of December 19, 2012, considering clauses 21, 24, and operative paragraph 1(B)(15).

76. I/A Court H.R., *Case of Cruz Sánchez et al. v. Peru*. Order of the Acting President of the Inter-American Court of Human Rights of December 19, 2013, considering clause 20, 54 and 66.

77. I/A Court H.R., *Case of Bámaca Velásquez v. Guatemala*. Merits, *op. cit*., para. 207.

78. ECtHR, *Varnava et al. v. Turkey*, *op. cit*., para. 185.

79. Concerning the two other alleged victims that were involved, the Court concluded that their death occurred when the operation and evacuation of hostages was still ongoing, and that it did not have varied and sufficient evidence that could establish them as having been *hors de combat*. Therefore, the Court held that it could not affirm that the State's conduct vis-à-vis the two individuals "constituted an arbitrary deprivation of life resulting from a use of lethal weapons contrary to the applicable principles of [IHL]." I/A Court H.R., *Case of Cruz Sánchez et al. v. Peru*, *op. cit*., paras. 339-343.

80. I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala*, *op. cit.*

81. I/A Court H.R., *Case of the Rochela Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C Nº. 163.

82. I/A Court H.R., Annual Report 2012, pp. 19-20.

83. I/A Court H.R., *Case of Almonacid Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 26, 2006. Series C Nº. 154, paras. 123-124, and *Case of J. v. Peru*, *op. cit.*, párr. 407.

84. Costa, Jean-Paul and O'Boyle, Michael, *op. cit*., p. 118.

85. See, Salmón, Elizabeth, "Institutional approach between IHL and IHRL: Current Trends in the jurisprudence of the Inter-American Court of Human Rights", *Journal of International Humanitarian Legal Studies*, vol. 5, Issue 1-2, 2014, pp. 152-185.

86. Decaux, Emmanuel, "De l'imprévisibilité de la jurisprudence européenne en matière de droit humanitaire: Cour européenne des droits de l'homme (Grde. Ch.), Kononov c. Lettonie, 17 mai 2010", *RTDH*, 22ème année, n° 86, 2011, p. 357.