

Reflections on international humanitarian law and transitional justice: lessons to be learnt from the Latin American experience

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Abstract

Compliance with or violations of international humanitarian law during an armed conflict undoubtedly influence the conduct of the judiciary, the situations of the victims and the correlation of forces in the post-conflict society. This article seeks to determine the influence of international humanitarian law on the transitional justice process. The author examines the specific experience of certain Latin American states that have been deeply affected by serious violations of human rights and international humanitarian law.

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It is generally known that the scope of application of international humanitarian law (IHL) does not extend to situations existing before or after armed conflict. However, there is unquestionably a close link between the way the parties act during an armed conflict and the chances of achieving peace and reconciliation while restoring the rule of law once the hostilities have ended. Compliance with or

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violations of IHL will undoubtedly influence the conduct of the judiciary, the situation of the victims and the correlation of forces in the post-conflict society.

The term “transitional justice” has come to be used to refer to the various processes accompanying political transition by societies emerging from a period of violence that aim to deal with the serious human rights violations committed during the conflict and to achieve national reconciliation.¹ This analysis seeks to determine the influence of IHL on such a process.

The possible relationship between IHL and the transition process can be considered with respect to two points in time. The first is the period before the outbreak of the conflict, when the preventive role of IHL comes into play. The state has an obligation to ensure national implementation of IHL,² which will contribute to preventing serious violations of its provisions during a conflict, making the transition process after the hostilities have ended much more viable. The second point in time is the period after the conflict has come to an end, that is, the transition phase. During this period, the focus is on the punitive provisions of IHL, which establish the obligation to suppress all violations of IHL and to search for and prosecute those who have committed grave breaches of IHL in international armed conflicts.³ Arguably, there is also a duty under customary law to prosecute those persons who have committed serious violations of the laws and customs of war in non-international armed conflicts, based upon the criminalization of these acts in international customary law, as recognised in case law and statutes of international tribunals.⁴

This analysis examines the specific experience of certain Latin American states that have been deeply affected by serious violations of human rights and IHL. These Latin American states⁵ have basically elected two dissimilar options from those available within the construct of transitional justice, the creation of truth commissions⁶ and the passing of amnesty laws,⁷ which in many cases have neutralized the effects of each other.

1 For the United Nations, the notion of transitional justice comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reforms, vetting and dismissals, or a combination thereof. See “The rule of law and transitional justice in conflict and post-conflict societies”, UN Security Council, S/2004/616, 3 August 2004, p. 4.

2 Common Art. 1 of the four Geneva Conventions of 1949.

3 Articles 49, 50, 129 and 146 respectively of the four Geneva Conventions of 1949.

4 See ICTY, *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 134; Art. 4 of the ICTR Statute; Art. 3 of the SCSL Statute and Art. 6(1)(c) and (e) of the East Timor Special Panel Statute.

5 Diego García Sayán, “Amnistías y procesos democráticos”, in María Ángeles Siemens *et al.* (eds.), *Crisis Humanitarias Post-Conflicto y Reconciliación*, Vol. 1, Siglo XXI de España Editores S.A., Madrid, 2004, p. 91 ff.

6 Mark Osiel, “Respuestas estatales a las atrocidades masivas”, in Angelika Rettberg (ed.), *Entre el perdón y el paredón: Preguntas y dilemas de la justicia transicional*, Corcas Editores Ltda., Colombia, 2005, p. 68.

7 Wilder Tayler, “La problemática de la impunidad y su tratamiento en las Naciones Unidas: Notas para la reflexión”, *Revista Instituto Interamericano de Derechos Humanos (IIDH)*, No. 24, 1996, p. 197.

Implementation and the eminently preventive focus of international humanitarian law

As Marco Sassòli points out, for a branch of law like IHL that applies in a fundamentally anarchic, illegal and often lawless situation such as armed conflict, the focus of implementing mechanisms is, and must always be, on prevention.⁸ Implementation,⁹ in the sense of adopting national measures to give full domestic effect to the rules of international law, is one of the oldest yet least used mechanisms for enforcing international law.¹⁰ Therefore, implementation may be characterized as being a necessary step towards fulfilment of international obligations.

According to Georges Scelle's theory of role-splitting (*dédoublément fonctionnel*),¹¹ states are both the creators and subjects of international law. Thus, as Antonio Cassese observes, "most international rules cannot work without the constant help, cooperation and support of national legal systems."¹² The Inter-American Court of Human Rights also affirmed this relationship between implementation and enforcement in the case of *Hilaire v. Trinidad and Tobago*.¹³ National implementation must be developed by adopting measures that meet the purpose of the norm in question. In the case of IHL, it is important to remember that implementation serves as a palliative for its institutional weakness and as a means to overcome the difficulties posed by the situations that it is intended to regulate, by, for example, helping to establish the rule of law and respect for human dignity in all circumstances.¹⁴

The failure to develop national implementation in a particular domestic legal system reduces the likelihood of compliance with the rules of IHL, thus making the post-conflict reconciliation process more difficult. While reconciliation is not a specific objective of IHL, it is an indirect result of effective

8 Marco Sassòli, "State responsibility for violations of international humanitarian law", *International Review of the Red Cross*, Vol. 84, No. 846, 2002, p. 401.

9 According to the *Oxford English Dictionary*, "implement" means to complete, perform, carry into effect; to fulfil.

10 Antonio Cassese, *International Law*, 2nd edition, Oxford University Press, Oxford, 2005, p. 167.

11 Georges Scelle, *Précis de droit des gens (Principes et systématiques)*, CNURS, Paris, 1984, p. 35.

12 Cassese, above note 10, p. 9.

13 Inter-American Court of Human Rights, *Cantos v. Argentine Republic* (merits), Judgment of November 2002, para. 59: "112...the Court has consistently held that the American Convention establishes the general obligation of States Parties to bring their domestic law into compliance with the norms of the Convention, in order to guarantee the rights set out therein. The provisions of domestic law that are adopted must be effective (principle of *effet utile*). That is to say that the State has the obligation to adopt and to integrate into its domestic legal system such measures as are necessary to allow the provisions of the Convention to be effectively complied with and put into actual practice."; *Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago*, Judgment of 21 June 2002, Series C, No. 94, para. 112. See also "*The Last Temptation of Christ*" Case (*Olmedo Bustos et al. v. Chile*), Judgment of 5 February 2001, Series C, No. 73, para. 87.

14 Cristina Pellandini, "Retos actuales en materia de adopción de medidas nacionales para la aplicación del Derecho internacional humanitario", in Gabriel Valladares, *Derecho internacional humanitario y temas de áreas vinculadas, Lecciones y Ensayos*, No. 78, Lexis Nexis Abeledo Perrot/ICRC, Buenos Aires, 2003, p. 389.

enforcement. The fact that the parties to a conflict have complied with IHL means that the rules of engagement established by this body of law have been observed and, as a general rule, that no serious human rights violations have been committed, and if they have, there are legislative mechanisms in place to take action against them. This fact alone leads to a situation entirely different from that of a society that has been subjected to a conflict in which breaches of IHL on both sides resulted in numerous violations of human rights, including the right to life, physical integrity and due process, and this difference highlights the full importance and positive effects of national IHL implementation.

The experience of Latin America in this regard is particularly interesting because it is a region wracked by a multiplicity of armed conflicts. Countries such as El Salvador, Nicaragua, Peru, Guatemala and Colombia are examples of societies in which efforts to achieve reconciliation and justice have involved the application of IHL or attempts to apply it. Yet implementation has not been a part of state policy in Latin American countries, although they are all bound by IHL, with the result that the compatibility of their domestic legal systems with the rules of IHL is haphazard. In the case of states that have experienced armed conflict and a post-conflict transition process, it can be seen that IHL implementation was inadequate. The point of this analysis is not to show that the lack of implementation constitutes a breach of IHL, but to establish that when implementation is inadequate there is a lesser likelihood of compliance with IHL, resulting in greater difficulties and wider divisions to be bridged when the conflict is over. Significantly, this inextricably close relationship has been highlighted in the reports issued by various truth commissions in the region, which in their final recommendations stress the need to make the domestic legal system consistent with international norms, particularly the rules of IHL. Specifically, Guatemala's Historical Clarification Commission recommended that the government take the necessary measures "to fully incorporate into national legislation the standards of international humanitarian law and ... regularly provide instruction regarding these norms to the personnel of state institutions, particularly the Army, who are responsible for respecting, and in turn ensuring respect in others for said norms."

The punitive role of international humanitarian law: does it limit the chance of reconciliation?

Following analysis of the preventive role of IHL, it is necessary to examine the implications of incorporating IHL criteria into the transition. This is a very complex process, as the different parties involved often have seemingly irreconcilable interests. For example, the victims have non-negotiable moral and legal demands for the truth about violations and for justice, while the perpetrators are anxious to avoid prosecution.¹⁵

15 General Pinochet warned Chile's elected president as he handed over power in 1990: "No one is going to touch my people. The day they do, the state of law will come to an end." See *Chile in Transition*,

In the post-conflict period, the obligation to comply with the rules of IHL requiring perpetrators of violations to be punished could be regarded as an obstacle to the transition process, as groups retaining a share of power could see the application of these rules as a reason to make no compromises in the reconciliation process. The response of some Latin American states to this problem has been to pass what have become known as self-amnesty laws, tantamount to granting impunity for violations, and to set up truth commissions which, while clarifying the facts about violations, have not always succeeded in achieving reconciliation and justice. An analysis of these two mechanisms, the most commonly used in post-conflict situations in the region, provides an insight into the relationship between IHL and reconciliation efforts undertaken in these countries, showing, for example, how IHL is used by truth commissions to uncover the facts surrounding the violations they investigate or how the existence of IHL places constraints on amnesties.

Amnesty laws

The amnesty laws¹⁶ passed in Latin America cancel crimes and thus make acts that were criminal offences no longer punishable, with the result that “a) prosecutors forfeit the right or power to initiate investigations or criminal proceedings; and b) any sentence passed for the crime is obliterated.”¹⁷ As Cassese observes, “...the rationale behind amnesty is that in the aftermath of periods of turmoil and deep rift, such as those following armed conflict, civil strife or revolution, it is best to heal social wounds by forgetting past misdeeds, hence by obliterating all the criminal offences that may have been perpetrated by any side. It is believed that in this way one may more expeditiously bring about cessation of hatred and animosity, thereby attaining national reconciliation...”¹⁸

An amnesty law may have certain legitimacy if it promotes reconciliation as a firm and lasting basis on which to build a democratic society and does not simply grant impunity to those implicated. “Impunity” is the term used to refer to the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account — whether in criminal, civil, administrative or disciplinary proceedings — since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if convicted, sentenced to appropriate penalties and to make reparations to their victims.¹⁹ Therefore, amnesties should not be used to serve the

Americas Watch, 1989, p. 73, cited by Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice*, The New Press, New York, 1999, p. 281.

16 It is interesting to note that the word amnesty has the same derivation as “amnesia,” namely from the Greek “*amnesia*,” meaning “forgetfulness” or “oblivion”. Antonio Cassese, “Reflections on International Criminal Justice”, *Modern Law Review*, Vol. 61, 1998, p. 3.

17 Antonio Cassese, *International Criminal Law*, Oxford University Press, New York, 2003, p. 312.

18 *Ibid.*, pp. 312–313.

19 “Updated Set of Principles for the protection and promotion of human rights through action to combat impunity” (hereinafter “Updated Set of Principles”). Report of the independent expert to update the set

electoral interests²⁰ of the implicated agents or as a realpolitik response in which practical concerns and political expediency override ethical considerations.²¹

Amnesty is thus a formula to be applied in a particular context in compliance with certain requirements and without losing sight of the fact that the demands of the new society for justice must be satisfied. Evidently, this involves an element of opportunity (the amnesty is granted in a particular context, either during a post-conflict transition or a transition from dictatorship to democracy) and competence (the amnesty is a society-wide consensus, established on the basis of the work of a truth commission or some other transitional mechanism).²² Furthermore, the enactment of amnesty laws is no longer considered the exclusive purview of the state, as the requirements established in international human rights law and IHL must also be met, that is, amnesties are only valid when states comply with their obligations owing to all those individuals whose rights have been violated²³ and when they contribute to achieving national reconciliation. The jurisprudence of the Inter-American Court of Human Rights provides a clear example of this constraint on amnesties in Latin America. In the seminal case of *Barrios Altos v. Peru* concerning laws passed by the state of Peru granting amnesty to those involved in crimes against humanity, the court emphatically declared that:

of principles to combat impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1, 8 February 2005. Preserving impunity requires victims to relinquish their rights, without requiring those who violated them to do anything. See Juan Méndez, “Derecho a la verdad frente a las graves violaciones a los derechos humanos”, in Martín Abregú *et al.* (eds.), *La aplicación de los tratados sobre derechos humanos por tribunales locales*, CELS, Buenos Aires, 1997, available at <http://www.aprodeh.org.pe/sem_verdad/documentos/Juan_E_Mendez.pdf>.

20 A good example of this is the recently proposed amnesty for the members of the Army who fought against *Sendero Luminoso* (Shining Path) rebels and the Túpac Amaru Revolutionary Movement in Peru, an initiative that coincided with the run-up to the elections and the battle for the votes that were granted to the members of the Army for the first time in the presidential elections. Regarding this issue, in his most recent Press Conference, on August 19th 2006 the Ministry of Defence [of the elected government] said that the government hasn't pronounced yet on granting amnesty to the members of the Army accused of human rights violations. Likewise, he said that rather than vengeance there should be justice avoiding impunity. Nevertheless he pointed out that the Truth Commission report was not legally binding for Peruvian state and that regarding the procedures and that regarding the procedures before our internal courts, rights such as presumption of innocence and right to defense should be preserved. See: http://www.rpp.com.pe/portada/politica/47129_1.php.

21 Eduardo González Cueva, “Perspectivas teóricas sobre la justicia transicional”, available at <http://www.aprodeh.org.pe/sem_verdad/documentos/Gonzalez_Cueva.pdf>. OR www.aprodeh.org.pe/sem_verdad/documentos.htm.

22 Updated Set of Principles, above note 19. Principle 6 says: “To the greatest extent possible, decisions to establish a truth commission, define its terms of reference and determine its composition should be based upon broad public consultations in which the views of victims and survivors especially are sought.” On the subject of the amnesty law in El Salvador, Boutros Ghali noted that “it would have been better if the amnesty had been taken after a broad degree of national consensus had been created in favor of it.” Secretary-General expresses concern over amnesty law adopted by El Salvador legislative assembly, United Nations Press Release SG/SM 4950, 24 March 1993, cited by Jo M. Pasqualucci in “The whole truth and nothing but the truth: Truth commissions, impunity and the Inter-American human rights system”, *Boston University International Law Journal*, Vol. 12, 1994, p. 345.

23 Santiago Corcuera Cabezut, “Las leyes de amnistía a la luz del derecho internacional de los derechos humanos”, available at <http://www.aprodeh.org.pe/sem_verdad/documentos/Corcuera_Cabezut.pdf>. OR www.aprodeh.org.pe/sem_verdad/documentos.htm.

“43. The Court considers that it should be emphasized that, in the light of the general obligations established in Articles 1(1) and 2 of the American Convention, the States Parties are obliged to take all measures to ensure that no-one is deprived of judicial protection and the exercise of the right to a simple and effective recourse ... Consequently, States Parties to the Convention which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention.

44. Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, 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, nor can they 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.”²⁴

Such laws are generally promoted by the regime that committed the violations so as to shield its own members from prosecution. Therefore, they are not the result of negotiation or consensus and are not passed in the context of a post-conflict transition or a transition to democratic government. On the contrary, they are purely *self-amnesty* laws, as the Inter-American Commission on Human Rights so rightly terms them.²⁵

24 Inter-American Court of Human Rights, *Barrios Altos Case (Chumbipuma Aguirre et al. v. Peru)*, Judgment of 14 March 2001, available at <http://www.corteidh.or.cr/seriecpdf_ing/seriec_75_ing.pdf>. In the Interpretation of the Judgment on the Merits, the court rules that given the nature of the violation that amnesty laws No. 26,479 and No. 26,492 constitute, the decision made in the judgment on the merits in the Barrios Altos Case has generic effects. Judgment of 3 September 2001, operative para. 2, Interpretation of the Judgment on the Merits (Art. 67 of the American Convention on Human Rights), available at <http://www.corteidh.or.cr/seriecpdf_ing/seriec_83_ing.pdf>. Previously, in the *Velásquez Rodríguez Case*, the court ruled: “181. The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains,” Judgment of 29 July 1988, available at <http://www.corteidh.or.cr/seriecpdf_ing/seriec_04_ing.pdf>. In the *Loayza Tamayo Case, Reparations*, Judgment of 27 November 1998, para. 168, the court said: “States ... may not invoke existing provisions of domestic law, such as the amnesty law in this case, to avoid complying with their obligations under international law. In the Court’s judgment, the amnesty law enacted by Peru precludes the obligation to investigate and prevents access to justice. For these reasons, Peru’s argument that it cannot comply with the duty to investigate the facts that gave rise to the present case must be rejected.” Evidently, this type of violation not only arises as a result of the enactment and application of amnesty laws. *De facto* situations resulting from acts of commission or omission by the authorities to secure impunity for their members can have the same effects as an amnesty law that violates international law.

25 See Inter-American Commission on Human Rights, *Annual Report, 1985 – 86, OEA/Ser.L/V./II.68, doc. 8, p. 193*, cited by Pasqualucci, above note 22, p. 145. See also Report 34/96 on cases 11,228, 11,229, 11,231 and 11,282 of 15 October 1996, in which the commission observes: “In the present case, the persons benefiting from the amnesty were not third parties from outside, but the very ones who had taken part in the government plans of the military regime. One thing is to uphold the need to legitimize

Regrettably, this is the model of amnesty law commonly adopted in Latin America, promoting impunity rather than reconciliation.²⁶ Many of the governments that passed such amnesty laws justified their action by alleging that no rule of international law expressly prohibits the granting of amnesties for international crimes.²⁷ One such case was Chile, where the Pinochet dictatorship passed Decree 2191 of 19 April 1978 granting a self-amnesty that benefited members of the armed and security forces and enabled the *Junta* and its agents to enjoy total impunity. This amnesty was upheld in 1990 by the Supreme Court of Chile, which ruled that it was valid.²⁸ Similarly, the Argentine armed forces granted themselves an amnesty in Act 22924 of 22 September 1982. At first, it seemed likely that it would be repealed, but it was eventually reinforced some years later by further legislation, specifically the “Full Stop” Act (*Ley de Punto Final*) of 24 December 1986 and the Due Obedience Act (*Ley de Obediencia Debida*) of 4 June 1987.²⁹

In Peru, Congress passed the General Amnesty Act (No. 26479) on 14 June 1995, which granted a “...general amnesty to military, police and civilian personnel, whatever their status ... who face a formal complaint, investigation, criminal charge, trial, or conviction for common or military crimes ... whether under the jurisdiction of the civil or military courts between May 1980 and the date on which this law is promulgated...” Article 6 of the Act eliminates any possibility of carrying out investigations: “...all legal proceedings pending or in progress shall be closed.” When a judge decided not to apply the provisions of the Act, declaring it to be unconstitutional, Congress passed Act 26492 interpreting the General Amnesty Act, which in Article 2 barred judicial review on the grounds that the power to grant amnesty belonged solely to Congress, and in Article 3 stipulated that all judges must apply the General Amnesty Act.

A particularly illustrative case is that of El Salvador. As part of the Central American peace process, the Esquipulas II Accords granted unconditional blanket amnesties. Decree 805, enacted on 28 October 1987, granted amnesty to all those accused of involvement in political crimes or related common crimes perpetrated before 22 October of that year, when the number of perpetrators was no fewer than twenty. This was a sweeping amnesty covering crimes connected in any way with the armed conflict and committed by any person, regardless of what sector they belonged to. In Uruguay, the state passed Act 15848, published in the country’s official gazette on 31 December 1986, which was more of a statute of

the acts celebrated by society as a whole (to avoid falling into chaos), or those stemming from international responsibility, since the obligations assumed in those areas cannot be shirked; but to extend equal treatment to persons who acted in accord with the unlawful government, thereby violating the Constitution and the laws of Chile, is another matter entirely.”

26 Robert Norris, “Leyes de impunidad y los derechos humanos en las Américas: Una respuesta legal”, in *Revista IIDH*, Vol. 15, 1992, p. 47 ff. He observes that impunity laws proliferated after 1978 in Central and South American countries that had suffered long periods of political violence and systematic, state-sponsored human rights violations.

27 Wilder Tayler, above note 7, p. 198.

28 Robert Norris, above note 26, p. 48 ff.

29 *Ibid.*, p. 71 ff.

limitations than an amnesty law. It proclaimed that the power of the state to punish officers of the armed or police forces for political crimes committed on active duty before 1 March 1985 had expired. A motion was presented to have it declared unconstitutional, but was dismissed by the Supreme Court on 2 May 1988. A referendum held on 16 April 1989 showed 57.5% of the population to be in favour of the act, which remains in force today. An amnesty was also granted in Brazil by virtue of Act 6683 of 28 August 1979, covering the period from 2 September 1961 to 15 August 1979. This act granted amnesty to all those who had committed political crimes, politically related common crimes or electoral offences, those whose political rights had been suspended and public-sector employees, employees of government-related foundations, members of the military and trade union officials, and representatives convicted under the Institutional Acts and supplementary laws. This amnesty, which was the result of action taken by the legislature, stemmed from a popular initiative and remains in force to the present day.

It appears, then, that the amnesty laws passed in these Latin American countries do not comply with the requirements of IHL to prosecute those accused of war crimes and international human rights law to ensure the enjoyment of rights guaranteed and to provide an effective remedy in case of violation. Moreover, in most cases, they were amnesties granted by the abusive regime itself to benefit its own members. It should be noted, however, that in recent years a trend reversing this situation has begun to emerge. The most obvious example is Argentina, where the Supreme Court invalidated the two existing amnesty laws by its judgment of 14 June 2005. This ruling upheld the decisions of lower courts, which had declared the laws unconstitutional, and confirmed Act 25779 of 2003, which had declared them null and void. The judgment emphatically stated that the scope of the power of the legislature to grant general amnesties under the National Constitution has been significantly limited by the obligation to guarantee rights contained in the American Convention on Human Rights and the International Covenant on Civil and Political Rights, thereby rendering the amnesties unconstitutional and null and void. This meant that the amnesties could not present any legal obstacle to investigating and prosecuting cases of serious human rights violations. Consequently, the Argentine state cannot invoke the principle of non-retroactivity of criminal law to relieve it of its duty to investigate and prosecute gross human rights violations.³⁰

In Chile, there have been a number of trials in recent years to prosecute crimes committed during the period covered by the amnesty. This was not because the law was repealed, however, but because certain crimes were classed as ongoing. One such example is the trial of the former head of the secret police, Manuel Contreras, and four other people connected with the *Miguel Ángel Sandoval*

30 Judgment of 14 June 2005. "Recurso de hecho deducido por la defensa de Julio Héctor Simón en la causa Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc., causa N° 17.768", available at <http://www.derechos.org/nizkor/arg/doc/nulidad.html#N_4_#N_4>.

Rodríguez case.³¹ In the case of Peru, the turnaround was not prompted by a state initiative but by the judgment handed down by the Inter-American Court on 14 March 2001, which declared that amnesty laws 26479 and 26492 were incompatible with the American Convention on Human Rights and therefore lacked legal effect.³² This judgment led to the reopening of various cases in Peru, *inter alia* against members of the paramilitary group “Colina” who had committed serious violations of human rights and those accused of killing a university professor and twelve students (“*La Cantuta*” case), among others.³³ In countries where such laws have not been repealed and no efforts have been undertaken to expose the truth and administer justice, such as El Salvador, civil society has called for these issues to be addressed. The situation in that country has now changed, increasing the likelihood of the amnesty law being repealed.³⁴

In conclusion, many countries in Latin America opted to implement exculpatory mechanisms, which did not always promote national reconciliation. These millstones continue to exist in some states, although new trends emerging in the region and particularly in Argentina signal a move towards combating impunity, a process that has moved forward thanks not only to the efforts of international and regional mechanisms, such as the Inter-American human rights protection system, but also to the mobilization of civil society.

International humanitarian law and amnesty laws

In IHL, amnesties are regarded as having a useful contribution to make to national reconciliation. It could even be argued that amnesties serve a specific purpose in the case of armed conflict, insofar as “... amnesty is necessary to facilitate the

31 Human Rights Watch. “World Report 2005. Chile”, available at <<http://hrw.org/english/docs/2005/01/13/chile9846.htm>>. This is without prejudice to the need to repeal such laws, as asserted by the Committee Against Torture in its “Conclusions and recommendations on the third periodic report of Chile”, in which it remarks that this type of legislation has entrenched impunity for the perpetrators of serious human rights violations committed during the military dictatorship: “The self-amnesty was a general procedure by which the state refused to prosecute serious crimes. Moreover, because of the way it was applied by the Chilean courts, the decree not only prevented the possibility of prosecuting the authors of the human rights violations, but also ensured that no accusation could be brought, and that the names of the responsible parties would not be known, so that, legally, those persons were considered as if they had never committed any illegal act at all. The amnesty decree-law rendered the crimes legally without effect, and deprived the victims and their families of any legal recourse through which they might identify those responsible for violating their human rights during the military dictatorship, and bring them to justice.” “Conclusions and recommendations of the Committee against Torture: Committee against Torture reviews third periodic report of Chile”, *Anuario de Derechos Humanos 2005*, University of Chile.

32 See above note 24.

33 “...Six years later, in 2001, as a result of the *Barrios Altos* case brought against the state of Peru before the Inter-American Court of Human Rights, the “amnesty laws” were declared to lack legal effect, leading to the reopening of proceedings and investigations relating to the involvement of members of the security forces in violations between 1980 and 1993, Final Report, Truth and Reconciliation Commission, Vol. VI, 1st edition, Lima, November 2003, p. 178.

34 Joaquín Villalobos, in *El Diario de Hoy*, Editorial, 30 March 2005, available at <<http://www.elsalvador.com/noticias/2005/03/30/editorial/edi4.asp>>.

reintegration of combatants in peaceful political life, and the pressure to grant a symmetrical amnesty for the members of the regular armed forces is very strong,” as Méndez observes.³⁵

Beyond the question of whether an amnesty should or should not be granted, IHL also determines the material scope of application, namely which crimes the state can amnesty without breaching its obligations under international law. It has been posited that 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.³⁶ Therefore, IHL imposes certain limitations, and the amnesties it promotes are not intended to cover war crimes. In fact, the provisions of international human rights law and IHL provide parameters to be taken into account in determining the contours of a legitimate amnesty in transition processes. These parameters can be deduced from the body of international law, of which IHL is a part.³⁷

One of the fundamental constraints on amnesties is that states have the obligation to investigate and prosecute those who have committed serious crimes under international law. This obligation is not affected by the official position of the perpetrator or the desire of the victims to seek justice, since it is in the interest of the state to prosecute certain “violations so serious that they are considered punishable by the international community as a whole.”³⁸ This principle is enshrined in Articles 49, 50, 129 and 146 respectively of the four Geneva Conventions of 1949 and Article 85 of Additional Protocol I, establishing that states have the duty to adopt the measures necessary to search for and prosecute those accused of grave breaches, or otherwise to extradite them to another state that has made out a *prima facie* case. Customary international law, together with Article 8(2)(c) and (e) of the Rome Statute of the International Criminal Court, confirms that there is individual criminal responsibility for war crimes committed in non-international armed conflicts, implying a duty to prosecute those offenders.³⁹ The fact that post-conflict processes and transitions from dictatorship to democracy normally unfold on a domestic scenario does not mean that these rules do not apply. On the contrary, they are part of customary international humanitarian law and as such also apply in these situations.⁴⁰

35 Méndez, above note 19.

36 *Ibid.*

37 Catalina Botero Marino, Esteban Restrepo Saldarriaga, “Estándares internacionales y procesos de transición en Colombia”, in Angelika Rettberg (ed.), *Entre el perdón y el piedad: Preguntas y dilemas de la justicia transicional*, Corcas Editores Ltda., Colombia, 2005, p. 20. See also Updated Set of Principles, above note 19: Principle 24 on restrictions and other measures relating to amnesty says that: “the perpetrators of serious crimes under international law may not benefit from such measures.”

38 González Cueva, above note 21.

39 See also the preamble of the Rome Statute, which refers to: “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”

40 The determination of the rules of IHL belonging to customary international law is based on a study undertaken by the ICRC at the request of the International Conference of the Red Cross and the Red Crescent: Jean-Marie Henckaerts, “Study on customary international humanitarian law”, in *International Review of the Red Cross*, Vol. 87, No. 857, March 2005, pp. 175–212.

Furthermore, Article 91 of Additional Protocol I stipulates that when a party to the conflict violates the provisions of IHL, it has to pay compensation for the injuries it has caused. Customary international humanitarian law also assigns this obligation to the state, but not solely in relation to international armed conflicts, implying that the state must undertake an investigation to establish the facts and the injuries caused.⁴¹

Reconciliation, while not expressly laid down as an objective of IHL, is an issue that was not overlooked by those who drafted the treaties, as a reading of Article 6(5) of Additional Protocol II reveals: “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.” The commentary of the International Committee of the Red Cross states that the purpose of this provision is to “encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided.”⁴² 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.

This interpretation is bolstered by the drafting history of Article 6(5) which indicates that “the provision aims at encouraging amnesty, i.e. a sort of release at the end of hostilities, for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international law...”⁴³

In the same vein, the United Nations Human Rights Committee, on the subject of torture, has stated that: “Amnesties 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.”⁴⁴ For its part, the Inter-American Commission on Human Rights asserts that it is necessary to:

41 Ibid., p. 211, Rule 150: “A state responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.”

42 Sylvie-Stoyanka Junod, “Commentary on Protocol II relative to non-international armed conflicts”, in *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva/Martinus Nijhoff Publishers, Dordrecht, 1987, para. 4618. For Robertson, above note 15, pp. 280–281, the drafting history of the subsections shows that it contemplates an Abraham Lincoln-style amnesty (“to restore the tranquility of the commonwealth”) for combatants who have fought on opposite sides according to the laws of war, “a sort of release at the end of hostilities for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international law.”

43 This was recounted in a letter of the ICRC Legal Division to the ICTY Prosecutor of 24 November 1995 and to the Department of Law at the University of California of 15 April 1997 (referring to CCDH, Official Records, 1997, Vol. IX, p. 319). See also Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974 – 1977, Vol. 9, Berne, 1978, p. 319; Report on the demobilization process in Colombia. OAE/Ser.L/V/II.120. Doc. 60. 13 December 2004, para. 25.

44 UN Human Rights Committee General Comment No. 20, 1992, para. 15.

“...ensure compatibility of recourse to the granting of amnesties or pardons for persons who have risen up in arms against the State with the State’s obligation to clarify, punish, and make reparation for violations of human rights and international humanitarian law...”⁴⁵

The Special Representative of the UN Secretary-General attached a disclaimer to the 1999 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone stating that: “The United Nations interprets that the amnesty and pardon in article nine of this agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.” Along similar lines, in the *Furundzija* case, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia ruled that whenever general rules prohibiting specific international crimes come to acquire the nature of peremptory norms (*jus cogens*), they may be construed as imposing, among other things, the obligation not to cancel by legislative or executive fiat the crimes they proscribe.⁴⁶

In conclusion, granting an amnesty is contrary to a state’s obligations under IHL, which means that only political crimes or related minor common crimes can be amnestied. This is the only kind of amnesty compatible with the

45 Inter-American Commission on Human Rights, “Report on the demobilization process in Colombia”, OEA/Ser.L/V/II.120, Doc. 60, 13 December 2004, para. 11, available at <<http://www.cidh.org/countryrep/Colombia04eng/toc.htm>>. With regard to individual cases, it has reiterated this view in Report No. 25/98 on cases 11505, 11532, 11541, 11546, 11549, 11569, 11572, 11573, 11583, 11585, 11595, 11652, 11657, 11675 and 11705 of 7 April 1998. In this report, it said: “41. The problem of amnesties has been considered by the Commission on various occasions, in claims made against states parties to the American Convention which, seeking mechanisms to foster national peace and reconciliation, have resorted to amnesties. By so doing, they have abandoned an entire group, including many innocent victims of violence, who feel deprived of the right to seek remedy in their rightful claims against those who committed acts of barbarity against them.” It concludes: “45. The denounced acts result, on the one hand, in the non-fulfilment of the obligation assumed by the Chilean state to bring the provisions of its domestic law in line with the precepts of the American Convention, in violation of Articles 1(1) and 2, and, on the other hand, in non-application, leading to the wrongful denial of the right to due legal process for the disappeared persons named in the claims, in violation of Articles 8 and 25 in connection with 1(1).” In Report No. 37/00 on case 11481, *Monsignor Oscar Arnulfo Romero and Galdámez v. El Salvador*, 13 April 2000, the Commission said: “126. The Commission has indicated repeatedly that the application of amnesty laws that impede access to justice in cases of serious human rights violations renders ineffective the obligation of the states parties to the American Convention to respect the rights and freedoms recognized therein, and to guarantee their free and full exercise to all persons subject to their jurisdiction with no discrimination of any kind, as provided in Article 1(1) of the Convention. In effect, the amnesty laws eliminate the most effective measure for the observance of human rights, i.e. the trial and punishment of those responsible for violations of human rights.” See also Report No. 28/92 (2 October 1992), Argentina; Report No. 29/92 (2 October 1992), Uruguay; No. 36/96, Chile; Third Report on Colombia, 1999, para. 345.

46 *Prosecutor v. Anto Furundzija*, Trial Chamber, Judgment of 10 December 1998, at para. 155: “The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally delegitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that 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*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law.”

need to establish the truth and administer justice.⁴⁷ However, the fact that an amnesty complies with the obligations established in IHL does not automatically mean that it can be considered to be valid and to fulfil the objectives of reconciliation, since other factors also come into play, as seen above. In short, amnesty laws should only be passed when it is clear that this is the only possible way of facilitating the transition process,⁴⁸ in other words, when the political and social situation of the nation prevents the authorities from advancing the reconciliation process by other means more consistent with the demands of truth and justice called for by transitional justice.

As Theo Van Boven observes: “it is hard to perceive that a system of justice that cares for the rights of victims can remain at the same time indifferent and inert towards gross misconduct of perpetrators.”⁴⁹ Moreover, the pernicious effects of impunity are also felt at the time and place in which it is permitted,⁵⁰ because the absence of punishment encourages human rights violators to continue committing such crimes, thereby undermining the rule of law doctrine. In the long run this could have a more destabilizing effect than prosecuting the culprits would.⁵¹ In the opinion of Nino, this failure to investigate and prosecute may even be categorized as a passive abuse of human rights if it places those rights in future peril.⁵² Therefore, while amnesty laws may also “contribute to the present assurance of human rights in a particular State, their long term effects on the assurance of human rights is in question. A State’s duty to ensure human rights must be considered from a global, as well as a domestic, perspective.”⁵³

While it is true that punishment is not the only means of ensuring reparation, in practice, by dint of dispensation of justice, victims are likely to be more prepared to be reconciled with their erstwhile tormentors because they know that the latter have now paid for their crimes.⁵⁴ Moreover, without punishment it would be difficult to ensure other forms of reparation. Both theory and experience would seem to show that the coexistence of impunity and reconciliation is a fallacy. As a United Nations report so rightly observes: “experience in the past decade demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot

47 Ibid.

48 Marino Saldarriaga, above note 37, p. 29.

49 Theo Van Boven, “Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms”, UN Human Rights Committee, UN Doc E/CN.4/Sub.2/1993/152, cited by Pasqualucci, above note 22, p. 348.

50 Pasqualucci, above note 19, pp. 352–353. The practice of systematic disappearance, for instance, which was used so effectively by the Argentine military, had previously been a policy of Nazi Germany during World War II. Several Nazis who escaped punishment after World War II fled to Argentina and Paraguay where some of them are rumoured to have been involved in government. A victim who survived torture at the hands of the Argentine military during the “dirty war” testified that there was a picture of Adolf Hitler in the chamber of the clandestine detention centre where he was tortured.

51 Ibid., p. 9.

52 Carlos Nino, “The duty to punish past abuses of human rights put into context: The case of Argentina”, *Yale Law Journal*, No. 100, 1991, pp. 2619 and 2639.

53 Pasqualucci, above note 22, p. 353.

54 Cassese, above note 17, p. 6.

be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.”⁵⁵

Truth commissions

It is now widely believed that the right to information extends beyond the private right of each direct victim or his or her relatives to know the truth about what happened, and that society as a whole has a “right to truth” or a “right to know” all there is to know about its history. The Inter-American Commission on Human Rights defined it as “a collective right that ensures society access to information that is essential for the workings of democratic systems, and it is also a private right for relatives of the victims, which affords a form of compensation, in particular, in cases where amnesty laws are adopted.”⁵⁶ Similarly, the Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, set forth in the report of independent expert Diane Orentlicher, observes that “full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.”⁵⁷

According to Méndez, this coexists with an emerging principle in international law that holds that states have the obligation to investigate, prosecute and punish the perpetrators of violations and to disclose to victims and society everything that can be reliably established about the facts and circumstances surrounding them. This right is not enshrined in international human rights treaties,⁵⁸ but it is an “appealingly consistent and peaceful way of interpreting such rules for situations that were not envisaged when they were drafted.”⁵⁹ The Inter-American Court of Human Rights echoes this view, finding that it is a “...a right that does not exist in the American Convention, although it may correspond to a

55 “The rule of law and transitional justice in conflict and post-conflict societies”, UN Security Council, S/2004/619, 3 August 2004, p. 3.

56 Inter-American Commission on Human Rights, *Ignacio Ellacuría et al. case*, Report 136/99 of 22 December 1999, para. 224. This right to truth cannot be considered as separate from the “right to justice.” This is also established in international doctrine: “the right to truth is an integral part of the right to justice,” and it is not possible to give effect to one without the other. Available at <<http://eaf.typepad.com/pdf/2002/17RightToTruth.pdf>>. Juan Méndez expresses the same view: “not only is the right to truth an integral part of the right to justice, in certain circumstances, it is through transparent criminal proceedings respecting all fair trial guarantees that it is given fullest and most satisfactory effect.” Méndez, above note 19.

57 Updated Set of Principles, above note 19. Principle 2 says: “Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes.”

58 In this regard, the Inter-American Commission on Human Rights found that the obligation arises essentially from the provisions of Articles 1(1), 8(1), 25 and 13 of the American Convention on Human Rights in the *Ignacio Ellacuría et al. case*, Report No. 136/99, Case 10488, Ignacio Ellacuría, S.J.; Segundo Montes, S.J.; Armando López, S.J.; Ignacio Martín Baró, S.J.; Joaquín López y López, S.J.; Juan Ramón Moreno, S.J.; Julia Elba Ramos; and Celina Mariceth Ramos, El Salvador, 22 December 1999, para. 221, available at <<http://www.cidh.org/annualrep/99eng/Merits/ElSalvador10.488b.htm>>.

59 Méndez, above note 19.

concept that is being developed in doctrine and case law, which has already been disposed of in this Case through the Court’s decision to establish Peru’s obligation to investigate the events that produced the violations of the American Convention.”⁶⁰

The obligation corresponding to this right is the state’s “duty to preserve memory.” The Updated Set of Principles to combat impunity says:

“A people’s knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State’s duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.”⁶¹

The commissions of inquiry set up to give effect to this right must be established with certain guarantees, including:

- independence and impartiality;
- clearly defined terms of reference, expressly excluding acting as substitutes for the courts;
- guarantees for the accused, the victims and the witnesses testifying on their behalf;
- testimony given on a strictly voluntary basis and protection and assistance for those testifying;
- preservation of records and evidence relating to human rights violations;
- dissemination of reports.⁶²

Truth commissions are bodies created to investigate a history of violations and to help societies that have suffered political violence or internal conflict to come to terms with the past, with a view to healing the deep rifts and wounds that violence causes and preventing such atrocities from ever happening again.⁶³ The theory is that the truth will make people aware, and this awareness will ensure human rights in the future by minimizing the possibility that such horror will be repeated.⁶⁴ Truth commissions seek to establish the causes of the violence, identify the elements in conflict, investigate the most serious violations of human rights and IHL and sometimes determine legal accountability and reparations.⁶⁵ The

60 Inter-American Court of Human Rights, *Castillo Paéz* case, Judgment of 3 November 1997, para. 86.

61 Updated Set of Principles, above note 16, Principle 3. See also Michael Frühling, “Derecho a la verdad, a la justicia y a la reparación integral en casos de graves violaciones a los derechos humanos”, available at <<http://www.hchr.org.co/publico/pronunciamientos/ponencias/po0435.pdf>>, p. 3.

62 *Ibid.*

63 As used in the Updated Set of Principles, the term “truth commissions” refers to “official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a number of years,” above note 19.

64 *Annual Report 1985 – 86*, Inter-American Commission on Human Rights, pp. 192–193; Carlos Nino, above note 51, pp. 237–240, cited by Jo M. Pasqualucci, above note 22, p. 352.

65 In some cases, truth commissions are created as a result of the efforts of human rights organizations and work almost secretly to investigate serious cases of state-sponsored violence. This was the case in Brazil,

work of a truth commission also contributes to identifying the structures of violence, its ramifications in different sectors of society (armed forces, police, judiciary and church) and other relevant factors.

Truth commissions can therefore make a useful contribution in different ways⁶⁶ by: a) promoting discovery and official acknowledgement of previously ignored facts (revealing a censured, indifferent and terrorized Latin American people); b) identifying sectors involved in committing human rights violations, a finding which, in the case of El Salvador and Guatemala, helped to reorganize training for police and security forces, often trained to carry out acts prohibited under international human rights laws; c) personalizing and humanizing victims, contributing to the important task of ensuring recognition for victims of violations and restoring their dignity; d) providing a measure of reparation for the injuries suffered, establishing policies to provide redress for victims and their relatives, such as constructing commemorative parks, museums and monuments, launching programmes to provide monetary compensation, etc.; e) implementing measures to prevent the recurrence of human rights violations in the future, such as retraining for police and military forces, educational programmes, use of police report records, etc.; and f) promoting reconciliation through truth and justice.⁶⁷ The work of a truth commission can prevent or render superfluous long trials against thousands of alleged perpetrators. This is particularly important when the country has a weak judicial system, incapable of effectively prosecuting those accused of violations. In conclusion, as Cassese observes, these commissions promote “further understanding in lieu of vengeance, reparation in lieu of retaliation, and reconciliation instead of victimization.”⁶⁸

Latin America is no stranger to the phenomenon of truth commissions. In fact, setting up such bodies has become common practice in the region. Some of the truth commissions were created by domestic instruments⁶⁹ while others were set up as part of international agreements mediated by the United

where the Sao Paulo Archdiocese, under the direction of Cardinal Evaristo Arns, produced the report entitled *Brasil Nunca Mais* (Brazil Never Again). In Paraguay, the Comité de Iglesias para Ayudas de Emergencias (CIPAE) also published a series of investigations into the Stroessner dictatorship entitled *Paraguay Nunca Más*. Other similar efforts include those of the Servicio de Paz y Justicia in Uruguay, with its report entitled *Uruguay Nunca Más*, and the group of Colombian and foreign organizations that published the valuable report entitled “*El terrorismo de Estado en Colombia*” (state terrorism in Colombia).

66 Esteban Cuya, “El Impacto de las Comisiones de la Verdad en América Latina”, available at <http://www.aprodeh.org.pe/sem_verdad/documentos/Esteban_cuya.pdf>.

67 On this subject, Méndez observes that “true reconciliation cannot be imposed by decree.” He also agrees with the investigative role of truth commissions, provided that their work is not disregarded and that it is not carried out in the belief that the mere fact of gathering information will lead to reconciliation. He remarks that: “The value of the more successful truth commissions is that they are created not with the presumption that there will be no trials, but to constitute a step towards knowing the truth and, ultimately, making justice prevail.” Méndez, above note 19.

68 Cassese, above note 17, p. 10.

69 As in the case of the truth commissions set up in Argentina (Decree No. 187 of 15 December 1983), Chile (Supreme Decree No. 355 of 24 April 1990) and Peru (Supreme Decree No. 065-2001-PCM of 4 June 2001).

Nations.⁷⁰ On the whole, these commissions investigated cases of human rights violations, although in some countries, such as Chile, El Salvador and Peru, the application of IHL was also required for a full analysis.⁷¹ In Ecuador and Peru, the truth commissions were set up to investigate crimes committed under democratic governments, while commissions and reports conducted in other Latin American states investigated events that had occurred under dictatorships or during internal armed conflicts. Only the truth commissions of Chile and Peru refer explicitly to reconciliation as one of their goals. The tasks and functions of such truth commissions have undoubtedly increased and become more complex over the past two or three decades, and while there is no standard model, the emerging trend is a shift towards increasingly comprehensive official investigations.

In Argentina, Decree-Law No. 187/83 of 15 December 1983 created the National Commission on the Disappearance of Persons (CONADEP) to investigate forced disappearances in the country. Over a period of nine months, it investigated human rights violations committed under the military dictatorship between 1976 and 1983. The failure of its economic policy, defeat in the Falklands/Malvinas War and international condemnation of its human rights record forced the military dictatorship to hand power over to a civilian government at the end of 1983. A policy of systematic state-sponsored terror in Argentina had resulted in human rights violations against thousands of people; repression was exercised by the armed forces using “technology from hell,” as revealed in the thousands of complaints filed and testimonies given by the victims of such violations. As President Raúl Alfonsín said on one occasion after this period of terrible violence, “...there must be no veil of secrecy. No society can begin a new era by shirking its ethical responsibilities.” One of the first constitutional acts carried out by President Alfonsín on coming to power was therefore to create the CONADEP commission.

After nine months of work, CONADEP had gathered more than 50,000 pages of evidence and complaints, and in November 1984 published its report, “*Nunca Más. Informe de la Comisión Nacional sobre la Desaparición de Personas*” (Never again: Report of the National Commission on Forced Disappearances). It disclosed facts relating to the disappearance of 8,960 people, based on duly documented, corroborated complaints, and reported that 80% of the victims who had suffered at the hands of the Argentine military were aged between 21 and 35. The report stated that there were 340 clandestine detention centres in Argentina, run by top-ranking officers from the armed and security forces, where detainees were held in inhumane conditions and subjected to all manner of humiliating and degrading treatment. CONADEP discovered that senior officers in the armed and police forces had established a “blood pact,” involving them all in human rights

70 As in the case of the El Salvador truth commission, created by the UN-brokered Mexico Agreement of 27 April 1991 between the government of El Salvador and the Farabundo Martí National Liberation Front. Similarly, Guatemala’s Historical Clarification Commission was created by the UN-brokered Oslo Agreement of 23 July 1994 between the government and the guerrillas.

71 In this regard, certain acts of violence against the population (such as the massacre of Mayan people in the conflict in Guatemala) constitute a violation of the principle of distinction under IHL.

violations. The commission presented recommendations to various state authorities “with a view to providing reparation and ensuring that such a curtailment of human rights never reoccurs.” The proposals made by CONADEP included continuing its work with judicial investigations, providing monetary assistance, scholarships and employment for the families of people who had disappeared and passing legislation to make forced disappearance a crime against humanity. It also recommended that human rights should be taught as a compulsory subject at civilian, military and police education establishments of the state, that support should be given to human rights organizations and that all repressive legislation in force in Argentina should be repealed. Many of these recommendations have yet to be implemented.

In Chile, Supreme Decree 355 of 24 April 1990 created the National Truth and Reconciliation Commission. Following the moral and political defeat of Pinochet, the people of Chile elected Patricio Aylwin to the presidency. He set up the commission to establish the truth about the most serious human rights violations committed in recent years and to achieve the reconciliation of all Chilean people. The commission was mandated to: i) provide as complete a picture as possible of the gross human rights violations committed in the country, providing background information and establishing the facts and circumstances surrounding them; ii) gather evidence that would make it possible to identify individual victims by name and determine their fate or whereabouts; iii) recommend measures to provide fair and adequate reparation and vindication for victims and their families; and iv) recommend legal and administrative measures that should be adopted to prevent the recurrence of further human rights abuses in the future. It investigated deaths and disappearances that occurred between 11 September 1973 and 11 March 1990 in Chile and elsewhere. It is worth noting that although this commission did not investigate cases of alleged torture, almost fifteen years later the National Commission on Political Imprisonment and Torture was created as an advisory body to President Ricardo Lagos. Following a year of investigations, it presented its report on 10 November 2004. The commission compiled information on people who had been deprived of their freedom or tortured for political reasons in the period between 11 September 1973 and 10 March 1990 by agents of the state or by people in their service. The report contains the testimonies of 27,255 people acknowledged as victims, an account of how political imprisonment and torture were carried out, and criteria and proposals for providing reparations to recognized victims.⁷²

The legal framework used by the commission as a basis for analysing the violations included national and international human rights norms and rules of IHL. On the basis of its thorough investigation into cases of people who had disappeared or been killed at the hands of the security forces, the commission recommended public reparation to restore the dignity of victims, in addition to social welfare benefits, monetary compensation in the form of a lifelong pension,

72 See <<http://www.comisiontortura.cl/index.html>>.

special attention from the state with regard to health care, education and housing, assistance with debts and exemption from compulsory military service for the sons of victims. The commission also presented recommendations on legal and administrative aspects, such as expedited procedures to declare a presumption of death in the case of missing people, making domestic legislation consistent with international human rights law, and ratification of international human rights treaties. It proposed measures aimed at reforming the judiciary and the armed forces and continuing investigations into the fate of missing people. It further recommended that withholding information about the location of illegally buried remains be declared a criminal offence, as there were many families still waiting to claim the remains of their loved ones. In January 1992, the Chilean government passed Act 19123 creating the *Corporación Nacional de Reparación y Reconciliación* (National Reparation and Reconciliation Corporation) to implement the recommendations made by the commission.

The Truth and Justice Commission was set up in Ecuador by Ministerial Decision on 17 September 1996. Its duties and functions included: i) recording complaints relating to human rights violations, particularly forced disappearances, torture and other acts endangering life or physical integrity committed in Ecuador from 1979, whether by agents of the state or individuals; ii) investigating the complaints, using all the means at its disposal; iii) preparing the “Truth and Justice” report over a one-year period to record all the facts, complaints and investigations, in addition to providing background information, conclusions and recommendations.

The creation of this commission was particularly significant, as it was set up to investigate events relating to human rights violations committed under “democratic” governments. Its work involved systemizing the complaints with a view to passing them on to a team of lawyers who would prepare reports to be submitted to the country’s Supreme Court. Many of the complaints referred to the existence of secret burial places in police and military enclosures and remote areas, although it was very difficult to establish the truth of these allegations.⁷³ Various national and international human rights organizations, therefore, called for the creation of another commission to investigate cases relating to forced disappearances, killings and torture during the period under consideration (1985 – 1989). On 2 December 2004, Ecuador’s President Lucio Gutiérrez announced that he would issue a supreme decree to set up a truth commission to examine human rights violations committed under previous governments, which would be formed by courageous, reputable people.

The Truth Commission set up in El Salvador undertook an eight-month investigation, resulting in a report entitled “*De la locura a la esperanza: La guerra de 12 años en El Salvador*” (From madness to hope: The twelve-year war in El

⁷³ For information on the process undertaken to create this commission, see Elsa Curbelo, “Comisión Verdad y Justicia del Ecuador: La impunidad en democracia”, paper delivered at the International Seminar on Impunity and its Effects on Democratization Processes, Santiago de Chile, 14 December 1996, available at <<http://www.derechos.org>>.

Salvador). The commission was created as part of the El Salvador peace accords negotiated between the government and the Farabundo Martí National Liberation Front over more than three years (1989 – 1992), during which time they were engaged in hostilities. The negotiations were mediated by the United Nations, with the collaboration of Colombia, Mexico, Spain and Venezuela, and culminated in the signing of the Chapultepec Peace Agreement in Mexico on 16 January 1992. It determined that an eight-month investigation would be carried out into abuses committed during the violence from 1980 onwards. In addition to the powers granted to it in the peace agreement in relation to impunity and the investigation of violations committed during the violence, the commission was also mandated to make recommendations of a “legal, political and administrative nature, including measures to prevent such atrocities from ever happening again and initiatives aimed at achieving national reconciliation.”

The commission defined the legal norms that it would use for its analysis, determining that during the conflict in El Salvador both parties were bound to comply with rules of international law, including provisions contained in international human rights law or IHL or both. The commission also established that during the internal armed conflict, the state of El Salvador had the obligation to implement the measures necessary to ensure that its domestic legislation was consistent with the provisions of international law. Finally, the commission presented a series of recommendations to: i) reform criminal legislation and the judiciary; ii) purge the armed forces, police force and public authorities; iii) bar people involved in violations of human rights and IHL from public office for at least ten years; iv) investigate and disband illegal groups (death squads); and v) provide material and moral reparations to victims of violence and their immediate families.

The Historical Clarification Commission was created in Guatemala by the Oslo Agreement on 23 June 1994 to establish the facts about cases of human rights violations and acts of violence committed during thirty-four years of internal armed conflict waged in the country, and to formulate recommendations to promote peace. The report produced by the commission describes the causes of the armed conflict, the strategies used during the conflict by both sides, human rights violations and acts of violence. It also provides details of the consequences of the hostilities and presents the commission’s final conclusions and recommendations. The commission further recommended that a national reparations programme be launched for victims of human rights violations and acts of violence connected with the armed conflict and for their families. The programme would establish individual and collective measures based on principles of equity, social participation and respect for cultural identity, which would include: i) material reparations to restore the situation as it was before the violation was committed, particularly in the case of land; ii) monetary compensation for the most serious injuries and damages directly caused by violations of human rights and IHL; iii) psycho-social rehabilitation and reparations, including community health care, psychiatric treatment and legal and social services; and iv) restoration of individual dignity and satisfaction, including action to ensure moral and symbolic reparation.

The Truth Commission created in Panama by Executive Decree No. 2 of 18 January 2001 was set up to establish the facts about human rights violations, particularly forced disappearances, committed under the military regime from 1968 and covering two decades. The commission is still in operation, although its effectiveness has been questioned because it lacks a clear mandate from the government and because other institutions interfere with its work. With the passing of time, Panamas collective memory seems to have faded and, in recent times, there have been clashes between the commission and the judiciary. A series of unfortunate incidents, including the falsification of evidence, has tainted the credibility of the work carried out to date. The families of the victims have therefore been forced to take their cases to the Inter-American Court of Human Rights to seek the justice denied to them by the state.⁷⁴

Valentín Paniagua, president of the transitional government in Peru, created the Truth and Reconciliation Commission there by virtue of Supreme Decree 065-2001-PCM of 2 June 2001. The report produced by the commission is the most important and comprehensive document in the history of Peru on the internal armed conflict waged between 1980 and November 2000. The self-proclaimed Communist Party of Peru, Shining Path (*Sendero Luminoso*), started the hostilities in May 1980 and was joined four years later, initially with a different approach, by the Túpac Amaru Revolutionary Movement. The conflict engendered large-scale violence and terror, resulting in a death toll of more than 69,000 (22,507 documented by the commission). There were thousands more cases of forced displacement, torture and forced disappearance, and the destruction of production and transport infrastructures, etc., resulted in material damage amounting to thousands of millions of soles.

This commission differed from those of other Latin American countries in that the mandate given to it by the state focused on analysing the counterinsurgency operations carried out under democratic governments, extending beyond the coup of 5 April 1992 until the then President Alberto Fujimori fell from power. This was the first truth commission to conclude that insurgent groups had committed gross violations of human rights, although it also acknowledged wrongdoing on the part of members of the security and police forces. More specifically, the commission concluded that Shining Path, the Peruvian Communist Party, was to blame for causing more deaths than any other party in the conflict and was primarily responsible for the violence, because it had started the fighting and resorted to terrorist methods from the outset. It also reported that both the insurgent groups and the state armed forces had, at some time, committed widespread and/or systematic violations of human rights. The commission's terms of reference also included naming the individuals who had committed human rights violations. Although the decree issued to create the commission did not refer specifically to IHL, this was considered essential to preparing the report. The commission recommended that individual and

74 For more information on this, see <<http://www.comisiondelaverdad.org.pa>>. OR www.cverdad.org.pe/comision/enlaces/index.php.

collective reparation programmes be implemented, including measures for health care, psychiatric treatment, education, symbolic reparations, and monetary compensation and identity documents. In February 2004, a top-level, multi-sectoral commission, formed by government representatives and human rights organizations, was set up to plan and supervise the implementation of these recommendations.⁷⁵

In September 2004, Bolivian Attorney General César Suárez announced his intention to contact his counterparts in Argentina and Chile with a view to opening the files on Operation Condor to establish the facts surrounding the forced disappearance of a number of Bolivian, Argentine and Chilean citizens between 1971 and 1976 under the dictatorship of General Hugo Bánzer (1971 – 1977).⁷⁶ Suárez declared that: “The Ministry of Public Prosecution has opened its doors to help resolve this issue, using documentation provided by the families of missing people.” It was in this context that Act 2640 concerning reparations for victims of political violence was passed. It established the procedures to be implemented to compensate people who had suffered political violence at the hands of the agents of unconstitutional governments who had committed human rights violations and abuses, and had failed to maintain the guarantees enshrined in the state’s Political Constitution and the International Covenant on Civil and Political Rights ratified by the state of Bolivia. Entitlement to compensation was laid down for acts of political violence committed between 4 November 1964 and 10 October 1982, including arbitrary detention and imprisonment; torture; forced exile; documented injuries or incapacity; politically motivated killings in Bolivia or elsewhere; forced disappearances; and persecution of trade union and political activists, as established in implementing regulations.

Truth commissions and international humanitarian law

All these countries, and particularly Argentina, Chile, El Salvador, Guatemala and Peru, had ratified the four Geneva Conventions of 1949.⁷⁷ Since none of the foregoing cases involved an international armed conflict, the provisions that apply in all of them are those of Article 3 common to those conventions. In fact, Article 3 would apply even if those states had not ratified the Geneva Conventions, because it is considered to be part of customary law in that it protects fundamental rights and contains protections relating to *jus cogens* norms, and must therefore be

75 Esteban Cuya, “Las Comisiones de la Verdad en América Latina”, in <<http://www.derechos.org/koaga/iii/1/cuya.html>>.

76 Operation Condor was the code name given to the intelligence and coordination plan implemented by the security services of the Southern Cone military dictatorships (Argentina, Chile, Brazil, Paraguay, Uruguay and Bolivia) in the 1970s.

77 Argentina ratified the four Geneva Conventions on 18 September 1956; Chile on 12 October 1950; El Salvador on 17 June 1953; Guatemala on 14 May 1952; and Peru on 15 February 1956. See <[http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf)> (last visited on 13 November 2005).

respected by *all* states.⁷⁸ This is not true, however, of Additional Protocol II, which was ratified by the said states during or after the violence and moreover only applies to some of the conflicts (in El Salvador, for example). The hostilities in the other countries do not fall within the scope of application of the protocol,⁷⁹ because they do not meet its definition of armed conflict, that is, fighting between the state's armed forces and dissident armed forces or other organized groups "under responsible command," which "exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations."

Not all of the commissions acknowledged the existence of an armed conflict, which constituted an obstacle to the application of IHL. The mandate given to CONADEP, the earliest of these commissions, was limited solely to investigating cases of people who had been detained, which meant that it only looked into violations committed by the state. Later truth commissions went further by acknowledging the existence of a conflict between insurgent forces and the armed forces of the state and therefore the applicability of IHL.

The Chilean Truth and Reconciliation Commission admitted that violations could be committed by the insurgent forces as well as by the state, thus acknowledging the obligation of all the parties to the conflict to comply with IHL. In Part 1, Chapter II of its report, the commission sets forth the norms, concepts and standards on which it based its deliberations and conclusions, which include the rules of IHL:

"The norms of international humanitarian law do not consider the question of when it is lawful to resort to war or armed rebellion. ... Indeed, whether having recourse to weapons was justified or not, there are clear norms forbidding certain kinds of behavior in the waging of hostilities, both in international and internal armed conflicts. Among these norms are those that prohibit [sic] killing or torturing prisoners and those that establish fair trial standards for those charged with a criminal offence, however exceptional the character of the trial might be ... Such transgressions, however, are never justified..."⁸⁰

The Truth Commission of El Salvador not only acknowledged the existence of an armed conflict and that the rules of IHL were binding on all the parties to the conflict, but also specifically states that common Article 3 and Additional Protocol II apply in this particular case:

78 Elizabeth Salmón, "El reconocimiento del conflicto armado en el Perú", in *Revista Derecho PUC*, Pontifical Catholic University of Peru, MMIV, No. 57, p. 85.

79 Art. 1 of Additional Protocol II provides that it applies only to internal armed conflicts in which governmental authorities are one of the participants. Furthermore, the armed groups must "exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations" and have a system of "responsible command" and be able to implement the obligations under the protocol.

80 Report of the Truth and Reconciliation Commission of Chile, Part 1, Chapter II, available at <http://www.usip.org/library/tc/doc/reports/chile/chile_1993_toc.html>.

“The principles of international humanitarian law applicable to the Salvadorian conflict are contained in Article 3 common to the four Geneva Conventions of 1949 and in Additional Protocol II thereto. El Salvador ratified these instruments before 1980.

Although the armed conflict in El Salvador was not an international conflict as defined by the Conventions, it did meet the requirements for the application of common Article 3. That article defines some fundamental humanitarian rules applicable to non-international armed conflicts. The same is true of Additional Protocol II, relating to the protection of victims of non-international armed conflicts. The provisions of common Article 3 and of Additional Protocol II are legally binding on both the Government and the insurgent forces.”⁸¹

Furthermore, the recommendations made by the Truth Commission of El Salvador to achieve the longed-for reconciliation include measures to protect subordinates who refuse to obey illegal orders.⁸² This reform to be implemented in the armed forces, police and intelligence services is clearly anchored in the enforcement of IHL, which foresees no defence of superior orders where orders are manifestly illegal. Despite acknowledging the important role of IHL,⁸³ Guatemala’s Historical Clarification Commission, unlike the Truth Commission of El Salvador, did not acknowledge the applicability of Additional Protocol II, although this does not mean that the rules of IHL were not applied. On the contrary, the Historical Clarification Commission did investigate violations of IHL, but only in connection with the “minimum protections established under common Article 3.”⁸⁴

Lastly, the Truth and Reconciliation Commission of Peru acknowledged the obligation of both parties to respect IHL and that common Article 3 applies in the case of Peru’s armed conflict, while adding that: “This shall in no way be an obstacle to applying the provisions of Additional Protocol II, where compatible and relevant.” As contended elsewhere,⁸⁵ the internal conflict in Peru does not qualify as an armed conflict according to the definition established in Additional Protocol II, in that the insurgent forces do not meet the criteria of exercising

81 “From madness to hope: The 12-year war in El Salvador”, Report of the Commission on the Truth for El Salvador, UN Doc. S/25500, 1993, available at <<http://www.derechos.org/nizkor/salvador/informes/truth.html>>.

82 “Cuadro 5: Recomendaciones de anteriores Comisiones de la Verdad, Lista seleccionada”, available at <http://www.aprodeh.org/sem_verdad/documentos/Hayner_cuadros.pdf>. OR www.aprodeh.org.pe/sem_verdad/documentos.htm.

83 “...[IHL] seeks to ensure compliance with certain minimum standards and respect for certain non-derogable rights. In armed conflict situations, it seeks to civilize the conduct of hostilities by establishing certain principles, such as respect for the civilian population, care of the wounded, humane treatment of prisoners and the protection of property essential to the survival of the population. These norms create a space for neutrality, in that they seek to reduce hostilities, minimize their effects on the civilian population and its property and ensure humane treatment for combatants, the wounded and prisoners.”

84 Jan-Michael Simon, “La Comisión para el Esclarecimiento Histórico, Verdad y Justicia en Guatemala”, paper delivered at the international colloquium “Rule of Law and State Crime in Latin America: Comparative Insights into Transitional Processes”, held on 22–24 February 2002, in Sao Paulo, Brazil, available at: <<http://www.juridicas.unam.mx/publica/librev/rev/boletin/cont/106/art/art6.pdf>>.

85 Elizabeth Salmón, above note 77, pp. 84–85.

control over a part of the state's territory and being capable of carrying out sustained and concerted military operations. Nonetheless, the Truth and Reconciliation Commission rightly cites principles of IHL applicable to all armed conflict.⁸⁶

The effectiveness of truth commissions in terms of their contribution to reconciliation of these societies will be determined in the coming years. According to Geoffrey Robertson, for example, “what the history of “transitional justice” — or the lack of it — in Latin America demonstrates in the long term is that the emergence of any measure of truth is not a basis for reconciliation. Quite the contrary, since revelation of the details of official depravity only makes the demands for retribution by victims and their sympathizers more compelling.”⁸⁷ However, the work of the truth commissions in the region has had the irreversible effect of bringing victims of violence into the spotlight and ensuring that their voices are heard. In fact, a shocking truth has emerged from the truth commission reports: governments intentionally used gross and systematic violations to intimidate the populations and thus maintain their control. The reports establish that the human rights abuses perpetrated by certain Latin American governments were not necessarily attacks directed at those who engaged in violence against the state, or even an unfortunate overzealous response to such violence. Rather the reports document a conscious state policy of using human rights violations to achieve governmental objectives.⁸⁸

When commissions did consider IHL, they focused mainly on indicating violations of its provisions, that is, they used it as an additional element, together with international human rights law, to analyse the validity of the acts of violence being investigated. Analysis, in this regard, was therefore limited to acknowledging the existence of an armed conflict and specifying the violations of the provisions of IHL that had been committed. The reports do not, however, provide any examples of compliance with IHL, and it is only possible to infer some such cases from the information given.⁸⁹ The commissions therefore concentrated much more closely

86 Final Report of the Truth and Reconciliation Commission of Peru, Vol. I, Ch. 4, p. 211: “...In addition to the above-mentioned norms, there are also certain non-derogable principles of IHL established in the 19th century (Martens clause), which apply to armed conflict of any kind. Protection of the civilian population is guaranteed by the “principles of humanity”, including the principle of distinction between combatants and non-combatants and the principle of proportionality, which requires that incidental harm to civilians not be excessive in relation to the anticipated military advantage.”

87 Robertson, above note 15, p. 288.

88 Pasqualucci, above note 22, pp. 324–325.

89 The *Final Report of the Truth and Reconciliation Commission of Peru*, in Vol.VII, Ch. 2, includes an account of the extrajudicial executions at Ayacucho Hospital (1982), when Shining Path rebels rescued fellow members imprisoned in the jail in Ayacucho, which was the town that suffered the greatest loss of life in the conflict. However, it provides only a brief analysis of the case, simply indicating that there was a violation of Article 3 common to the Geneva Conventions, without citing specific provisions of IHL or acknowledging that Huamanga Prison was considered a military target. On the other hand, the report issued by Guatemala's Historical Clarification Commission contained the encouraging testimony of a commander of the revolutionary armed forces, who stressed the importance of respect for the rules of IHL (see <<http://shr.aas.org/guatemala/ceh/mds/spanish/cap2/vol4/hech.html>>). According to EGP (Guerrilla Army of the Poor) leaders, although humanitarian law was not included in the training it provided for its combatants, there was an awareness of how prisoners of war should be treated and other

on the punitive or sanctioning aspects of IHL than on the rules governing the conduct of hostilities and the protection of the victims of armed conflict.

In any event, truth commissions in Latin America have gradually come to recognize the importance of respecting international humanitarian law in achieving longed-for reconciliation and preventing such atrocities from ever happening again.⁹⁰ After an armed conflict, it is obviously easier to achieve reconciliation when the parties to the conflict have complied with the rules of IHL. Reconciliation can therefore be regarded as a non-legal benefit of IHL. In this vein, Marco Sassòli and Antoine Bouvier observe: “Finally, the end of all armed conflict is peace. At the conclusion of an armed conflict there remain territorial, political and economic issues to be solved. However, a return to peace proves much easier if it is not also necessary to overcome the hatred between peoples that violations of IHL invariably create and most certainly exacerbate.”⁹¹

notions established in these norms: “...as part of the political training, as part of revolutionary thought, there was always an awareness that prisoners must be respected, and much of this is based on the experience of other revolutionary movements. The writings of Commander Ernesto Guevara and what is known about his involvement in the guerrilla movement in Cuba highlight this respect for the enemy, sharing food and what little medicine is available, treating the wounded when necessary and ensuring that prisoners are not ill-treated. We were very much aware of these issues from the outset ... In the recruitment, instruction and training processes, the aim was to promote respect for people in the community ... this was made part of political discipline; there was also military discipline, the core tenet of which was that weapons were to be used for warfare and never for other purposes ... At some point, all this became bound up with the essence of combatant training ... a spirit of respect for certain norms, which we had not seen in black and white, but which became a part of our training based on experience.” Similarly, the Handbook of the Good Combatant (*Manual del Buen Combatiente*), published by the ORPA (Revolutionary Organization of the People in Arms) in 1984, contains a section on this subject, although it focuses on respect for the civilian population and its property: “Guerrillas, as good sons of the people, must always respect, look after and defend the people ... We must ensure absolute respect for the property of our fellow men, their homes, food, crops and livestock.” ORPA, *Manual del Buen Combatiente*, campaign material, 1984, pp. 53 and 58.

90 See also Principle 38 of the “Updated Set of Principles for the protection and promotion of human rights through action to combat impunity” contained in the Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1, 8 February 2005, which supports this view of IHL implementation as a means of guaranteeing non-recurrence. It proposes that during periods of restoration of or transition to democracy and/or peace, noting that Status “should undertake a comprehensive review of legislation and administrative regulations.”

91 Marco Sassòli, Antoine Bouvier, *How Does Law Protect in War?*, Vol. I, ICRC, Geneva, 2003, p. 340.