



**HAL**  
open science

## ” War ” in the Jurisprudence of the Inter- American Court of Human Rights

Laurence Burgorgue-Larsen, Amaya Úbeda de Torres

► **To cite this version:**

Laurence Burgorgue-Larsen, Amaya Úbeda de Torres. ” War ” in the Jurisprudence of the Inter- American Court of Human Rights. *Human Rights Quarterly*, 2011, 33 (1), pp.148-174. 10.1353/hrq.2011.0007 . hal-01744325

**HAL Id: hal-01744325**

**<https://hal.science/hal-01744325>**

Submitted on 30 Mar 2018

**HAL** is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

## “War” in the Jurisprudence of the Inter-American Court of Human Rights

Laurence Burgorgue-Larsen\* & Amaya Úbeda de Torres\*\*

---

\* *Laurence Burgorgue-Larsen* is Professor of Law at the University Paris I Panthéon Sorbonne and co-director of the Institut de Recherche en droit international et européen de la Sorbonne (IREDIES). She also teaches in Madrid (Institute Ortega y Gasset, Master of Law and International Relations; University Autónoma, Master of European Law). She researches in the areas of Human Rights Law, Comparative Law, and European and International Law. She has edited *La France face à la Charte des droits fondamentaux de l'Union européenne* (Bruylant, 2005); with L. Azoulai, *L'Autorité de l'Union européenne* (Bruylant, 2006); with A. Levade and F. Picod, *Traité établissant une Constitution pour l'Europe. Commentaire article par article* (Partie II, *La Charte des droits fondamentaux de l'Union européenne*, Bruylant, 2005 and Parties I et IV, *L'architecture constitutionnelle*, Bruylant, 2007). She is the author of *L'Espagne et la Communauté européenne* (ULB, 1995); *Libertés fondamentales* (LGDJ, 2003) and, more recently, with A. Úbeda de Torres, *Les grandes décisions de la Cour interaméricaine des droits de l'homme* (Bruylant, 2008). A synthesis has been published in Spanish (*Las decisiones básicas de las Corte interamericana de los derechos humanos*, Madrid, Civitas-Thomson-Reuters, 2009) and an English updated version is forthcoming (*The Inter-American Court of Human Rights. Case-Law and Commentary*, OUP, 2011).

\*\* *Amaya Úbeda de Torres* is a Researcher at the Center for Political and Constitutional Studies of Madrid and has taught in several universities, such as the University Complutense of Madrid, the Free University of Brussels, the London School of Economics, and the University College of London, where she teaches at present. She completed her Ph. D. at both the University of Strasbourg and the University Complutense of Madrid on the protection of democracy through Human Rights Courts in Europe and America. Her dissertation was awarded the Human Rights Prize René Cassin and has also been published in Spanish (*Democracia y derechos humanos en Europa y en América. Estudio de los sistemas europeo e interamericano de protección de los derechos humanos*, Reus, Madrid, 2007). Dr. Úbeda has conducted research on International Law and International Human Rights Law, focusing on the role of the European and the Inter-American Courts of Human Rights, refugees' rights, asylum seekers and foreigners' rights, freedom of expression and the legitimacy of the International Criminal Law in the quest for peace. She has also edited a book on the relationship between different courts in Europe (*L'Europe des Cours*, Bruylant, Brussels, forthcoming) and has written many articles on the dialogue of judges and on the role of International legal actors shaping rule of law and democracy at the domestic level. With professor Burgorgue-Larsen, she has published a systematic study on the Inter-American Court on Human Rights' case-law in French (*Les grandes décisions de la Cour interaméricaine des droits de l'homme*, Bruylant, 2008) and in English (*The Inter-American Court of Human Rights Case-Law and Commentary*, OUP, 2011, forthcoming).

## ABSTRACT

How have the Inter-American human rights bodies dealt with the notion of war, which has been transformed over time into the notion of (internal and international) “armed conflicts”? This question has guided the first part of this study, which sets out the various types of conflicts that have occurred in the American continent. These situations (armed conflicts, internal strife, State terrorism) have produced a wide range of legal qualifications, used by both the Inter-American Commission and Court of human rights in their case-law. This conceptual delimitation carried out by these two bodies is all the more important as it affects the law that applies to armed conflicts. Indeed, by analyzing this question, the everlasting debate on the relationship between International Law on Human Rights and International Humanitarian Law reappears. The second part of this study therefore focuses on the issue of discovering whether and in which way *jus in bello* has found its place in the Inter-American Human Rights bodies’ case-law. As the active political life of Latin American societies has shown, the study of the different applicable legal regimes also requires looking into the “state of emergency” Law, an issue which has been shaped by the Inter-American Court and Commission’s work.

## I. INTRODUCTION

Mankind has torn itself apart during the course of the twentieth century to such a degree and in so many ways that the concept of war, which hitherto penetrated all the international instruments between both world wars,<sup>1</sup> has become dated. Since 1945, it has given way to the broader concept of “armed conflict.”<sup>2</sup> Whereas the twentieth century was the scene of radical changes, the twenty first century carries the hallmarks of a spreading geopolitical disorder. The era of “American hyper-power”<sup>3</sup> has replaced the bipolar order of the Cold War; “internal armed conflicts” have eclipsed traditional warfare between states,<sup>4</sup> so much so that the politics of terror have invaded every

- 
1. See, e.g., League of Nations Covenant art. 11, 12, 13, 15, 16; see also Kellogg-Briand Pact art. 1, 27 Aug. 1928, 46 Stat. 2343.
  2. Moreover, it is symptomatic to note the proliferation of works not based on “wars” but focusing instead on “crises.” See JEAN-LOUIS DUFOUR, LES CRISES INTERNATIONALES DE PÉKIN (1900) À BAGDAD (2004) 120 HISTORIQUES, 1 (2004); see also the seminal work of the former French judge at the International Court of Justice, GILBERT GUILLAUME, LES GRANDES CRISES INTERNATIONALES ET LE DROIT (1994).
  3. Hubert Vedrine, *Anxious French Mutter as U.S. Envoy Tries To Sell Globalism*, N.Y. Times, 2 Dec. 1999, available at [www.nytimes.com/1999/12/02/world/anxious-french-mutter-as-us-envoy-tries-to-sell-globalism.html](http://www.nytimes.com/1999/12/02/world/anxious-french-mutter-as-us-envoy-tries-to-sell-globalism.html).
  4. See, e.g., ÈVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS (2008).

nook and cranny of the “global village”<sup>5</sup> by unsettling every known order of importance and by allowing obscurantism to spread on all sides.

The American continent has been particularly affected by this upheaval in international relations inherently tied to contemporary forms of armed conflict: guerrilla warfare, counter-guerrilla operations, civil wars, and state-sponsored terror.<sup>6</sup> The use of armed force and/or terror by the state and by other groups, acting with and without government support, often to establish authoritarian political regimes and eliminate alleged subversive individuals marked the past of many countries in South America. Furthermore, authoritarian regimes and armed conflict were often preceded by some internal crises that sadly led some governments to adopt exceptional measures, which would often expand rapidly through the region.<sup>7</sup> In some countries,

- 
5. All the way to the skyscrapers of New York: the Twin Towers attack has put the United States in a difficult and contradictory position whereby they recognized that they were at “war,” but that, nevertheless, they would not acknowledge *al-Qaida* combatants as “regular combatants.” See Gilles Andreani, *La guerre contre le terrorisme. Le piège des mots*, Annuaire Français de Relations Internationales, volume IV, 102–14 (2003); Manuel Pérez González & José Luis Rodríguez-Villasante y Prieto, *El caso de los detenidos de Guantánamo ante el Derecho Internacional humanitario y de los derechos humanos*, 54 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 11 (2002). See generally, LE DROIT INTERNATIONAL FACE AU TERRORISME (Karine Bannelier, Theodore Christakis, Olivier Corten, Barbara Delcourt eds. 2002). (On all the questions raised in international law by mass terrorism.) Consider especially the jurisprudence of the United States Supreme Court which has undermined this interpretation in the very important judgment of *Boumediene v. Bush*, 553 U.S. 723 (2008); see also Helen Duffy, *Human Rights Litigation and the “War on Terror”*, 90 INT’L REV. RED CROSS 573 (2008), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-871-p573/\\$File/irc-871-Duffy.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-871-p573/$File/irc-871-Duffy.pdf). The decision in *Boumediene* is in keeping with the line of Supreme Court decisions handed down in 2004 and 2006, which Congress, at that time dominated by the “neoconservatives,” had nonetheless systematically circumvented. The two pioneering decisions of 2004 considered that both “enemy combatants” (United States citizens arrested in the context of the war on terror) and “irregular combatants” (non-US detainees) should be able to have access to the American justice system. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004). For a broad view of the US approach to the international justice system, see Laurence Burgogue-Larsen, *Les États-Unis d’Amérique et la justice internationale: Entre l’utilisation et l’instrumentalisation du droit international*, in LE DROIT INTERNATIONAL À LA CROISÉE DES CHEMINS. FORCE DU DROIT ET DROIT DE LA FORCE 233 (R. Ben Achour & S. Laghmani eds., 2004).
  6. See D. MOMTAZ, *LES RÈGLES ET LES INSTITUTIONS DU DROIT INTERNATIONAL HUMANITAIRE À L’ÉPREUVE DES CONFLITS ARMÉS RÉCENTS*, Martinus Nijhoff Publishers (2008) (concerning different types of conflicts and their legal implications); S. Perrakis et al. (eds.), *Armed conflicts and International Humanitarian Law 150 years after Solferino: caquis and prospects*, Bruylant, Brussels, (2009); Rafael Nieto Navia, *¿Hay o no hay conflicto armado en Colombia?*, ANUARIO COLOMBIANO DE DERECHO INTERNACIONAL 139 (2008) (concerning the specificities of the Colombian conflict).
  7. See *infra*, Part II.B, concerning the different regimes and the legal implications of civil wars and dictatorships present in the continent in the 1970s and the 1980s.

this legacy continues to be an obstacle to the development and spread of democracy in the region.<sup>8</sup>

The variety in the expressions of violence, which are not always akin to traditional warfare, shows that the *nature of the conflict* is a central question when seeking to clarify the Inter-American jurisprudence in the region. Following the identification of the different types of conflict situations the agencies of the Inter-American system have addressed in the past, this article evaluates the positions of the Inter-American Commission and the Inter-American Court on the law applicable to the identified conflicts.

## II. THE PROTEAN NATURE OF CONFLICTS

The Inter-American Court has been called upon to examine matters where the scars of radical violence, perpetrated by private individuals as well as by state agents, have torn apart the civil peace of many Latin-American communities through the orchestration of massacres, forced disappearances, extrajudicial killings, and torture. The first obstacle the Court met was that of identifying the different types of conflicts which are particularly difficult, sometimes even impossible, to perceive. The determination of the nature of the conflict is crucial in light of the political instrumentalization of the terms "war," "armed conflict," or even "state of emergency" by some governments, which have almost exclusively based their policies on the vital need to fight terrorism.<sup>9</sup>

To categorize the types of conflicts that have afflicted the American continent, one could start by differentiating armed conflicts from internal disturbances. However, even if the theoretical line of demarcation separating these two situations were based on the degree of intensity of violence, this line would prove extremely difficult to plot with any great precision. In addition, the history of the continent shows that violence has not at all been confined to the aforementioned types of violence. State-sponsored terrorism was a feature during the darkest hours of the dictatorships of the 1970s and 1980s in the "Southern Cone" and of the authoritarian regimes

---

8. Among many works enumerating how democracy is threatened and weakened in transitional societies, see *LATIN AMERICAN DEMOCRACY: EMERGING REALITY OR ENDANGERED SPECIES?* (Richard L. Millet et al. eds., 2009); JULIE MAZZEI, *DEATH SQUADS OR SELF-DEFENSE FORCES? HOW PARAMILITARY GROUPS EMERGE AND THREATEN DEMOCRACY IN LATIN AMERICA* (2009).

9. Whereas the case of the Bush government has been indicative of this process of instrumentalization the same type of considerations apply with regard to the Colombian conflict and the refusal on the part of the government of President Uribe to recognize the armed groups known as "rebels." See Rafael Nieto Navia, *¿Hay o no hay conflicto armado en Colombia?*, ANUARIO COLOMBIANO DE DERECHO INTERNACIONAL 139 (2008).

of Central America. The specificity of state-sponsored terrorism is such that it needs to be analyzed separately.

### A. Armed Conflicts versus Internal Disturbances

Situations described as “armed conflict” have been analyzed through the classical approach of applying the relevant body of rules of international humanitarian law as expounded by the International Committee of the Red Cross (ICRC). Under this approach, a distinction was thus logically drawn between the notion of armed conflict (internal or international) on the one hand, and simple “internal disturbances and tensions” on the other.<sup>10</sup> The Inter-American Commission has expressly noted the systemic differences between the two situations and has highlighted the importance of making that distinction.

The Court has had the opportunity—initially within the ambit of its advisory function<sup>11</sup> and, subsequently through its judicial function<sup>12</sup> to outline the broad parameters of the legal regime of emergency.<sup>13</sup> However, the Court has not dealt with the task of qualifying the nature of facts so as to determine whether they indicate “simple” internal disturbances, which are outside the scope of humanitarian law, or armed conflicts characterized by more extreme violence, which are subject to *jus in bello*.<sup>14</sup> To the extent that the Inter-American Commission has jurisdiction, it has full discretion in drawing a firm and steady line between cases which are sufficiently serious and ones that are not. Yet, the Commission affirmed early on that an “objective analysis of the facts in each particular case” is required in order to determine with any precision the nature of a conflict.<sup>15</sup> The Inter-American bodies follow the principles expounded by the ICRC. The Commission

---

10. Int’l Comm. of the Red Cross, *What is International Humanitarian Law?*, Sept. 2004, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/humanitarian-law-factsheet>.

11. Habeas Corpus in Emergency Situations (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights), Advisory Opinion OC-8/87, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8 (30 Jan. 1987); Judicial Guarantees in States of Emergency, Advisory Opinion OC-9/87, 1987 Inter-Am. Ct. H.R., (ser. A) No. 9, ¶ 2 (6 Oct. 1987).

12. Case of Castillo-Petruzzi et al. v. Peru, 1999 Inter-Am. Ct. H.R. (ser. C) No. 52, ¶ 109 (30 May 1999); Merits, Reparations and Costs; Case of the Gómez-Paquiyaui Brothers v. Peru, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 85 (8 July 2004); Merits, Reparations and Costs; see Case of Zambrano-Vélez et al. v. Ecuador, 2007 Inter-Am. Ct. H.R. (ser. C) No. 166, ¶¶ 42–71 (4 Jul. 2007).

13. The legal regime of emergency will be analyzed within Part II of this article. See Habeas Corpus in Emergency Situations, Advisory Opinion OC-8/87, 1987 Inter-Am. Ct. H.R., *supra* note 11.

14. *Id.*

15. Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. ¶¶ 152–153 (1997).

recently stated that the determination of the nature of a conflict should be based on the factual conditions, not on the recognition or on the qualification of the situation made by the parties to the conflict.<sup>16</sup>

The above is of particular importance in the case of Colombia whose former President launched a “war of words” that was symptomatic of the political instrumentalization of terror. In a hearing before the Inter-American Court, President Uribe denied the recognition of the guerrilla and paramilitaries as combatants indicating that they are “terrorists” and should not be qualified as combatants.<sup>17</sup> Of course, this type of political discourse is not taken into account by the Inter-American Court which consistently strives to place human rights violations within their historical context in order to juridically qualify the conflict. With regards to the Colombian cases,<sup>18</sup> the Court has consistently applied this contextual approach in its categorization and legal evaluation of the acts of the parties involved (guerrilla, governmental armed forces and “paramilitaries”). It explicitly includes in its judgments, starting with the case of the *Mapiripán Massacre*, an *ad hoc* section entitled

- 
16. We note that the ICRC has, in an Opinion Paper published in March 2008, dealt with the definition of armed conflict under international humanitarian law. The ICRC highlights, on the one hand, the recognition of two types of armed conflict (international and non-international) by highlighting in each case the legal texts, cases and doctrine; in addition, it stresses the importance of the facts and their configuration and dismisses the issue of “recognition of the situation” by the intervening parties. See Int’l Comm. of the Red Cross, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, Opinion Paper (Mar. 2008) ; DIETER FLECK, *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT* 45 (1995).
  17. Statement of President Uribe made on 19 June 2003 before the Inter-American Court: “*No reconozco a los grupos violentos de Colombia, ni a la guerrilla ni a los paramilitares, la condición de combatientes; mi gobierno los señala como terroristas,*” Nieto, *supra* note 9, at 140.
  18. The “Colombian cases,” virtually all linked in a systematic fashion to the internal armed conflict facing the country for the past forty years, is of the most prolific, after Peru (twenty-three cases) and Guatemala (twelve cases). As of 5 April 2009, there have been ten significant cases against Colombia (and not just ten decisions as a case has sometimes given rise to separate decisions on preliminary objections, merits and reparations). See Caballero Delgado & Santana Case, 1995 Inter-Am. Ct. H.R. (ser. C) No. 22 (8 Dec. 1995); Case of Las Palmeras v. Colombia, 2001 Inter-Am. Ct. H.R. (ser. C) No. 90, (6 Dec. 2001); Merits; Case of the 19 Merchants v. Colombia, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109 (5 July 2004); Merits, Reparations and Costs.; Case of Gutiérrez-Soler v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132 (12 Sept. 2005); Case of the “Mapiripán Massacre” v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134 (15 Sept. 2005); Case of the Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140 (31 Jan. 2006); Case of the Ituango Massacres v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, (1 Jul. 2006); Preliminary Objection, Merits, Reparations and Cost; .Case of the Rochela Massacre v. Colombia, 2007 Inter-Am. Ct. H.R. (ser. C) No. 163 (11 May 2007); Merits, Reparations and Cost; Case of Escué-Zapata v. Colombia, 2007 Inter-Am. Ct. H.R. (ser. C) No. 165 (4 Jul 2007); Case of Valle-Jaramillo et al. v. Colombia, 2008 Inter-Am. Ct. H.R. (ser. C) No. 192 (27 Nov. 2008), in chronological order.

"The internal armed conflict in Colombia and the illegal armed groups, known as 'paramilitary groups.'"<sup>19</sup>

The Court begins with a historical analysis of the conflict and the paramilitary groups. The conflict was said to have originated at the beginning of the 1960s with the appearance of armed guerilla groups, and then identifies the response of the state.<sup>20</sup> By highlighting the context in which the famous "self-defense groups" arose, the Court puts forth the idea that it was the state who promoted the creation of said groups by recruiting and arming civilians whose declared purpose was to protect themselves against guerilla groups.<sup>21</sup>

The resulting conflict was to be expected as the state had delegated its powers to private groups with impunity. During the middle of the 1980s, the self-defense groups changed and managed to escape the control of the state. The Court indicates they became criminal groups, usually known as "paramilitaries"<sup>22</sup> who committed many human rights violations and, in some instances, colluded with governmental armed forces.<sup>23</sup>

The *Valle Jaramillo* case illustrates the macabre and fatal understanding between the paramilitaries and the national army which acted jointly to assassinate Jesús María Valle Jaramillo.<sup>24</sup> As a lawyer working for the defense of human rights, Valle Jaramillo actively denounced, as of 1996, the crimes perpetrated by the paramilitaries as well as their collaboration with the national army.<sup>25</sup> While the Colombian government recognized its failure to duly protect his life and used all means possible to ensure that the parties were investigated and prosecuted, it refused to recognize any collusion resulted from a state-induced "context of persecution" against human rights defenders.<sup>26</sup> This legal tactic—refusing to accept the political involvement as part of the analytical framework<sup>27</sup>—is regularly used by the government of Bogota, but was not accepted by the Court in San José. The historic ap-

19. Case of the "Mapiripán Massacre" v. Colombia, 2005 Inter-Am. Ct. H.R., (ser. C) No. 134, at ¶¶ 96.1–96.20; Case of the Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 95(1); Case of the Ituango Massacres v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶¶ 125.1–125.25.

20. Case of the Ituango Massacres v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 125.

21. *Id.*

22. Case of the "Mapiripán Massacre" v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 96.3; Case of the Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 95(3); Case of the Ituango Massacres v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 125.2.

23. Case of the Ituango Massacres v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148.

24. Case of Valle Jaramillo et al. v. Colombia 2008 Inter-Am. Ct. H.R. (ser. C) No. 192, ¶ 147: Merits, Reparations, and Costs.

25. *Id.* ¶ 73.

26. *Id.* ¶ 20.d.

27. See, e.g., Case of the Mapiripán Massacre v. Colombia, Merits, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, ¶¶ 10–11.



proach kept by the Inter-American Court and the systematic transcription it makes of the history in Colombia enables the Court in cases of serious violations of human rights to define the limits of state responsibility<sup>28</sup> and to refuse State's allegations, namely in cases where it is believed that the violations were committed by third parties.<sup>29</sup> It is precisely history and its systematic transcription in cases of serious violations of human rights what enables the Court to define the limits of state responsibility,

The Court based its decision on the state's obligations to respect and guarantee the rights contained in Articles 1(1) and 2—*erga omnes* obligations<sup>30</sup>—and held the state accountable through the application of sanctions for breaching their obligations.<sup>31</sup> Thus, the Court sidestepped the government's jurisdictional strategy of denying any links with private actors by enforcing the obligations of prevention and protection. Also, even if by this decision the Court has set out the limits of state responsibility for acts committed by private individuals or groups, it has not yet applied those limits in favor of states.<sup>32</sup>

---

28. For recent examples where the Court “contextualizes” the massive violations of human rights perpetrated by agents of the State, see two cases dealing with forced disappearances under authoritarian governments. Thus, stemming from the coup in Bolivia in 1980 and the establishment of the dictatorship of General Luis García Meza, see Case of Ticona-Estada et al. v. Bolivia, 2008 Inter-Am. Ct. H.R. (ser. C) No. 191, ¶¶ 45–49 (27 Nov. 2008); from the internal armed conflict in Guatemala between 1962 and 1996 which resulted in more than 200,000 extrajudicial executions and forced disappearances, see Case of Tiu-Tojín v. Guatemala, 2008 Inter-Am. Ct. H.R. (ser. C) No. 190, ¶¶ 48–51 (26 Nov. 2008).

29. It is a question regularly analyzed by legal commentators. See, e.g., Stephanie Farrior, *State Responsibility for Human Rights Abuses by Non-State Actors*, 92 AM. SOC'Y OF INT'L L. PROC., 299 (1998); see, e.g., M. Pinto, *Responsabilidad internacional por la violación de los derechos humanos y los entes no estatales*, in HÉCTOR GROS ESPIELL AMICORUM 1155 (1997).

30. For an analysis of the dogmatic construction on which this qualification is based, see generally L. BURGORGUE-LARSEN & A. ÚBEDA DE TORRES, *LES GRANDES DÉCISIONS DE LA COUR INTERAMÉRICAINNE DES DROITS DE L'HOMME* 270–303 (2008).

31. Case of the “Mapiripán Massacre” v. Colombia, Merits, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 111:

The State may be found responsible for acts by private individuals in cases in which, through actions or omissions by its agents when they are in the position of guarantors, the State does not fulfill these *erga omnes* obligations embodied in Articles 1(1) and 2 of the Convention.

See also Case of the Rochela Massacre v. Colombia, 2007 Inter-Am. Ct. H.R. (ser. C) No. 163, ¶¶ 67–68 (11 May 2007).

32. Case of the Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 123 (31 Jan. 2006):

Indeed, the nature *erga omnes* of the treaty-based guarantee obligations of the States does not imply their unlimited responsibility for all acts or deeds of individuals, because its obligations to adopt prevention and protection measures for individuals in their relationships with each other are conditioned by *the awareness of a situation of real and imminent danger* for a specific individual or group of individuals and to *the reasonable possibilities of preventing or avoiding that danger*.

(Emphasis added).

The Inter-American Court caught up with the European Court—or is it the other way round?—and set out the conditions for establishing state responsibility, which go even further than its European counterpart.<sup>33</sup> Indeed, while the Court often acknowledges, namely in the Colombian cases, that the state has adopted legal reforms to prevent and punish the activities of paramilitary groups, the Court also notes that these measures have not resulted in an effective deactivation of the existing risk. Thus, not only is the state responsible for errors of the past—in spite of its current attempts to resolve the conflict—but it also bears an “aggravated responsibility” for such acts.

The existence of this real and objective risk, resulting from the participation of paramilitary groups in the Colombian conflict, accentuates the special obligations of prevention and protection borne by the state in areas where paramilitary groups are present. The Court in San José solemnly recalled this factor in relation to human rights defenders,<sup>34</sup> whose vulnerability the Court has highlighted. Vulnerability is a major interpretive criterion used regularly to impose stronger obligations on states,<sup>35</sup> and it is also one of the key considerations of the Inter-American judiciary. The Inter-American Court does not hesitate to trigger mechanisms of positive discrimination in order to require states to adopt policies that combat glaring structural inequalities.<sup>36</sup>

## B. State Terrorism

To leave state terrorism out of this analysis would fail to account for the multifaceted “dirty” war(s) which raged in the continent at a time where it

- 
33. Kiliç v. Turkey, App. No. 22492/93, 2000-III Eur. Ct. H.R. Reports of Judgments and Decisions 77, ¶¶ 62–63 (2000); Osman v. United Kingdom, App. No. 23452/94, 1998–VIII Eur. Ct. H.R. Reports of Judgments and Decisions 3124, ¶¶ 115–16 (1998).
  34. Case of Valle-Jaramillo et al. v. Colombia, 2008 Inter-Am. Ct. H.R. (ser. C) No. 192, ¶ 80.
  35. We know that children, women, hospital patients, detainees, migrant workers, displaced persons, and even indigenous communities are all vulnerable groups identified as such by the Court and with respect to whom it will impose on States “special obligations” of protection. See Villagrán Morales et al. Case, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 185 (19 Nov. 1999); Case of the Miguel Castro-Castro Prison v. Peru, 2006 Inter-Am. Ct. H.R. (ser. C) No. 160 (25 Nov. 2006); Case of Ximenes-Lopes v. Brazil, 2006 Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 3 (4 Jul. 2006); Tibi v. Ecuador Case, 2004 Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 147 (7 Sep. 2004); Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18 (17 Sep. 2003); Case of the Ituango Massacres v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 159, ¶ 125 (106) (1 Jul. 2006); Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 104(n) (31 Aug. 2001).
  36. On non-discrimination and its corollaries, see generally L. Burgorgue-Larsen, *Le principe et d'égalité et de non-discrimination dans la jurisprudence interaméricaine des droits de l'Homme*, in *LE DROIT À LA NON-DISCRIMINATION AU SENS DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME*, 242–447, 266–268, 282–287, 291–293, 309, 319–23 (F. Sudre & H. Surrel, eds., 2008).

was locked down by dictatorships, each one more ruthless than the other. The dictatorships of the Argentinean Jorge Videla,<sup>37</sup> the Bolivian Hugo Banzer,<sup>38</sup> the Brazilians Humberto Castello Branco,<sup>39</sup> and Arthur da Costa e Silva,<sup>40</sup> the Chilean Augusto Pinochet,<sup>41</sup> the Paraguayan Alfredo Stroessner and even the Uruguayan Juan María Bordaberry<sup>42</sup> were at the source of a trans-border terror code named Operation Condor given to an “alliance of security forces and intelligence services” of the dictatorships of the Southern Cone.<sup>43</sup> They were the lethal agents of undertakings where state terrorism reached its climax.

This period of authoritarian dictatorships has been illustrated in numerous art works, notably in the field of cinema,<sup>44</sup> and has been the subject of many research projects. These works are historical,<sup>45</sup> literary,<sup>46</sup> and of course legal in nature. The legal works are available in abundance.<sup>47</sup> They can be exceptionally valuable when they use sociological tools to decipher the intricacies of massive violations of human rights. In that regard, the French publication of the work of the American academic Mark Oisel is significant in that it reveals the shortcomings of transitional justice as part of the makeup of the collective memory of nations and communities.<sup>48</sup>

The state-sponsored terror was not only identified but also condemned by the Court in San José through “historical” cases. Indeed, the judgments in

- 
37. Between 1976 and 1983. MARÍA SEOANE & VICENTE MULEIRO, *EL DICTADOR: LA HISTORIA SECRETA Y PÚBLICA DE JORGE VIDELA* (2001). For a chronology of all the dictatorship regimes and an excellent analysis of the national security doctrine, see JOSEPH COMBLIN, *LE POUVOIR MILITAIRE EN AMÉRIQUE LATINE. L'IDÉOLOGIE DE LA SÉCURITÉ NATIONAL* 15–16 (1977).
  38. Between 1971 and 1978. See COMBLIN, *supra* note 37, at 15–16; Robert J. Alexander, *Bolivia, Past, Present and Future of its Politics* (1982).
  39. Between 1964 and 1967. See COMBLIN, *supra* note 37, at 15–16; SEVERO SALLÉS, *DICTATURE ET LUTTE POUR LA DÉMOCRATIE AU BRÉSIL (1964–1985)* (2005).
  40. Between 1964–1967. See COMBLIN, *supra* note 37, at 15–16; SALLÉS, *supra* note 39.
  41. Between 1973–1980. See Comblin, *supra* note 37, at 15–16; Jorge Tapia-Valdes, *CHILI, LA FORCE CONTRE LE DROIT: CRITIQUE DE LA LÉGALITÉ DU SYSTÈME CHILIEN* (1989); ROBERT BARROS, *CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION* (2002).
  42. Between 1973–1976. See COMBLIN, *supra* note 37, at 15–16.
  43. Case of Almonacid-Arellano et al. v. Chile, 2006 Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 64 (26 Sept. 2006): Preliminary Objections, Merits, Reparations and Costs.
  44. Here, we have in mind the must-see film *MISSING* (Universal Studios 1982) directed by Costa Gavras that won the Palme d'Or at Cannes in 1982 and earned Jack Lemmon his award of best actor that year. The film depicts the bloody terror between Viñas del Mar and Santiago which prevailed in the immediate aftermath of the coup of 11 September 1973.
  45. JOHN DINGES, *LES ANNÉES CONDOR: COMMENT PINOCHET ET SES ALLIÉS ONT PROPAGÉ LE TERRORISME SUR TROIS CONTINENTS* (2008).
  46. ADRIÁN MELO & MARCEL RAFFIN, *OBSESIONES Y FANTASMAS DE LA ARGENTINA: EL ANTISEMITISMO, EVITA, LOS DESAPARECIDOS Y MALVINAS EN LA FICCIÓN LITERARIA* (2005).
  47. See, e.g., MÓNICA PINTO, *L'AMÉRIQUE LATINE ET LE TRAITEMENT DES VIOLATIONS MASSIVES DES DROITS DE L'HOMME* 7 (2007).
  48. M. OSIEL, *JUGER LES CRIMES DE MASSE: LA MÉMOIRE COLLECTIVE ET LE DROIT* (2006).

*Almonacid Arellano*<sup>49</sup> and *Goiburú*<sup>50</sup> brought to judicial light the trans-border terror<sup>51</sup> and the subsequent responsibility of states for having orchestrated the perpetration of crimes against humanity. The Court declared, in accordance with the body of international law, such crimes could not remain unpunished and would not be susceptible to amnesty.<sup>52</sup>

The *Goiburú* case was also an opportunity for the Court to affirm, once again in a pioneering effort, that the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible would obtain the status of *jus cogens*.<sup>53</sup> Thus, the Court in its effort to fight impunity developed the theory of the presumption of death in the ground-breaking case *Velásquez Rodríguez*,<sup>54</sup> and came full circle in determining that access to justice in the case of forced disappearances formed part of *jus cogens*.

Even if today the face of litigation under the Inter-American system is slowly changing—now dealing with questions more “typical” of democratic societies<sup>55</sup>—the Court will still have to deal with cases stemming from

---

49. Case of *Almonacid-Arellano et al. v. Chile*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 154 Preliminary Objections, Merits, Reparations and Costs.

50. Case of *Goiburú et al. v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153 (22 Sept. 2006).

51. *Id.* ¶ 62:

The crimes occurred in the context of the systematic practice of arbitrary detention, torture, execution and disappearance perpetrated by the intelligence and security forces of the dictatorship of Alfredo Stroessner, under “Operation Condor.” [...] the grave acts took place in the context of the flagrant, massive and systematic repression to which the population was subjected on an inter-State scale, because State security agencies were let loose against the people at a trans-border level in a coordinated manner by the dictatorial Governments concerned. (Emphasis added).

The case of *Goiburú et al. v. Paraguay* clearly shows the existence of an entangled international order of human rights. The Human Rights Committee of the United Nations has also had the opportunity to examine State terrorism and the practice of trans-border detention and torture. See, e.g., Case of *Sergio Euben Lopez Burgos v. Uruguay*, *Communication No. R.12/52*, dated 6 Jun. 1979, U.N. Doc. A/36/40, at 189. (The state was condemned for acts perpetrated in Argentina with the collaboration of the Argentinean police and army.)

52. Case of *Almonacid-Arellano et al. v. Chile*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 154 ¶¶ 105–14.

53. Case of *Goiburú et al. v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153, ¶¶ 84, 93, 128, 131. It confirmed this *dictum* on several occasions. See, e.g., Case of *La Cantuta v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 157 (29 Nov. 2006); Case of *Tiu-Tojín v. Guatemala*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 190, ¶ 91.

54. Claudio Grossman, *The Velásquez Rodríguez Case: The Development of the Inter-American Human Rights System*, in *INTERNATIONAL LAW STORIES 77*, (John E. Noyes et al. eds., 2007).

55. The diversification of litigation under the Inter-American system has been observed for several years now, addressing issues such as the right to nationality and even the very important right to freedom of expression. These themes have burst onto the Inter-American judicial scene. See Laurence Burgorgue-Larsen, *Les nouvelles tendances de la jurisprudence interaméricaine des droits de l’homme*, *CURSOS DE DERECHO INTERNACIONAL Y RELACIONES INTERNACIONALES DE VITORIA-GASTEIZ* 149 (2009); see, e.g., Case of the *Girls Yean*

“wars” or other types of conflict mainly because some countries are finding it hard to get rid of their old demons and, most importantly, because of the time factor. Often, a lot of time goes by—sometimes long after the events occurred—before a case brought before the Commission by nongovernmental organizations (NGOs) and/or victims or their relatives are heard by the Inter-American Court.<sup>56</sup> In this regard, the determination of the existence of an aggravated responsibility as a way of confronting trans-border assassinations, disappearances, torture, and detentions, all tied to state terrorism, is of capital importance for the Court in its own attempts to avert a repetition of these occurrences as well as in its fight against impunity.

While the Court has highlighted the aggravated responsibility and the “special obligations” of the state in cases where the violations of the American Convention of Human Rights were perpetrated by groups of private individuals, it goes without saying that the Court was able to reiterate its views in cases where massive violations were directly perpetrated by agents of the state. Therefore, the Court condemns the fact that “the State’s power was orchestrated as a means and resource to violate rights that should have

---

and *Busico v. Dominican Republic*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 130 (8 Sept. 2005): Preliminary Objections, Merits, Reparations and Costs, property rights; Case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (31 Aug. 2001): Merits, Reparations and Costs; Case of *Case of Salvador-Chiriboga v. Ecuador*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 79 (6 May 2008): Preliminary Objections and Merits, political rights; Case of *Yatama v. Nicaragua*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127 (23 June 2008): Preliminary Objections, Merits, Reparations and Costs; Case of *Castañeda-Gutman v. Mexico*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 184 (6 Aug. 2008): Preliminary Objections, Merits, Reparations, and Costs, the rights of hospital patients; Case of *Ximenes-Lopes v. Brazil*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 149 (4 July 2006): Merits, Reparations and Costs; Case of *Ivcher-Bronstein v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74 (6 Feb. 2001): Merits, Reparations and Costs; Case of *Palamara-Iribarne v. Chile*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135 (22 Nov. 2005): Merits, Reparations and Costs; Case of *Claude-Reyes et al. v. Chile*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 151 (19 Sept. 2006): Merits, Reparations and Costs; Case of *Kimel v. Argentina*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 177 (2 May 2008): Merits, Reparations and Costs; Case of *Tristán-Donoso v. Panama*, 2009 Inter-Am. Ct. H.R. (ser. C) No. 193 (27 Jan. 2009): Preliminary Objection, Merits, Reparations and Costs.

56. See *generally* Case of *Heliodoro-Portugal v. Panama*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 186, ¶¶ 4–8 (12 Aug. 2008). (A recent case that shows how long it can take before the Court makes a decision on facts originating from serious violations. The victim, Mr. Heliodoro Portugal, disappeared on 14 May 1970 when the military dictatorship was in full swing. His daughter, Patria Portugal, was not able to commence legal proceedings until the beginning of the 1990s, a time when democracy was just starting in the country. The Inter-American Commission received a petition from both the Centro por la Justicia y el Derecho Internacional (CEJIL) and the daughter of the victim on 2 June 2001. After its review of the case, the Commission then referred it to the Court on 23 January 2007. Judgment was brought on 12 August 2008, 48 years after the occurrence of the facts, and Panama was held accountable for the violation of several rules under both the American Convention and the Inter-American Conventions against forced disappearances and torture, to the detriment of both the victim and next-of-kin.)

been respected and safeguarded . . . In other words, the State became the principal factor in the grave crimes committed, constituting a clear situation of State terrorism."<sup>57</sup> State responsibility becomes aggravated when forced disappearances, torture and detentions become part of a systematic pattern (*patrón*) of violations tolerated or perpetrated by the state in a situation of general impunity. Notwithstanding criticism within the Court itself,<sup>58</sup> this principle pervades the Inter-American Court's jurisprudence in the present day. This is a judicial construction significantly drawn from the theory of international crimes elaborated by the International Law Commission in its renowned Article 19 regarding the State Responsibility Project.<sup>59</sup>

### III. THE LAW APPLICABLE TO CONFLICTS

The importance of distinguishing between the notion of armed conflict and simple internal disturbances is that it will indicate the law that shall govern the particular situation. The Inter-American Commission, in accordance with current international law,<sup>60</sup> has expressly noted the regime differences between the two types of disturbances and illustrated the importance of the distinction. It finds that "riots, sporadic acts of violence and non-organized rebellions"—if they are short-lived and are not characterized as serious—are in principle excluded from the protection of the laws of war in accordance with Article 1(2) of the Additional Protocol II to the Geneva Conventions.<sup>61</sup>

57. Case of Goiburú et al. v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 66.

58. See, e.g., Case of Goiburú et al. v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 4: Separate Opinion by Judge S. García Ramírez. (The former President of the Court, Judge S. García Ramírez, expressed his concerns as to the use of the concept of aggravated responsibility:

[T]his aggravated responsibility does not exist, and neither does attenuated responsibility, because simple responsibility (without considerations of intensity or nuance) implies the possibility or need to respond for certain acts owing to legal evidence of attribution that links specific conduct to a particular person who must respond for it juridically by the establishment of certain consequences.

59. See Case of Myrna Mack-Chang v. Guatemala, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 41 (25 Nov. 2003): Separate opinion by A. Cançado Trindade.

60. For an excellent synthesis of all the normative and jurisprudential developments on the *jus in bello*, see the work of MICHAEL J. MATHESON & DJAMCHID MOMTAZ, *LES RÈGLES ET LES INSTITUTIONS DU DROIT INTERNATIONAL HUMANITAIRE À L'ÉPREUVE DES CONFLITS ARMÉS RÉCENTS* (2008).

61. Indeed, this provision excludes from its scope situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature. Since then, other international instruments have similarly excluded such situations from their scope. See Rome Statute of the International Criminal Court, *adopted* 17 July 1998, art. 8 ¶ 2(f), U.N. Doc. A/CONF.183/9 (1998), 2187 U.N.T.S. 90 (*entered into force* 1 July 2002) establishing the International Criminal Court (ICC) and Article 22(2) of the Second Protocol to the Hague Convention of 1954 for the protection of cultural property in the event of armed conflict, which exclude, using the same terminology, internal disturbances and tensions from their scope.

On the other hand, even if the laws of war do not apply to internal crises, human rights law continues to play a part. Certainly, state's recourse to a state of emergency does not amount to the complete exclusion of the rule of law nor does it endow the state with arbitrary powers. Also, the "state of emergency" clause does not exempt the state's obligations under human rights conventions, especially the American Convention.<sup>62</sup>

In tackling the topic of the law applicable to armed conflicts, we are faced with the recurring problem of the interconnection between two main branches of international law: human rights and international humanitarian law.<sup>63</sup> This question has recently taken on a much less academic turn with the burgeoning of international courts<sup>64</sup> which, in the course of their work have directly or indirectly dealt with this issue. From human rights courts to international criminal courts, the question<sup>65</sup> has been addressed by judges.

Nevertheless, while the debate was reopened with renewed vigor, the position taken by the International Court of Justice (ICJ) reflects the state of the art. The ICJ's opinion on *Legality of the Threat or Use of Nuclear Weapons* recognized that the protection offered by the International Covenant of Civil and Political Rights "does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."<sup>66</sup> The law holds that no one can be arbitrarily deprived of his life, but the definition of what is considered to be arbitrary corresponds, according to the ICJ, to "the applicable *lex specialis*, namely, the law applicable in armed conflict."<sup>67</sup>

---

62. *States of Emergency*, General Comment No. 29, adopted 2001, U.N. GAOR, Hum. Rts. comm., U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

63. See generally Henri Meyrowitz, *Le Droit de la Guerre et les droits de l'homme*, 88 *Revue du Droit Public et de la Science Politique en France et à l'étranger* 1059 (1972); see generally Keith D. Suter, *An inquiry into the meaning of the phrase "Human rights in armed conflicts"*, 15 *REVUE DE DROIT PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE* 393 (1976). (The problem is, so to speak, an "old chestnut." As noted here, legal commentators were already studying the issue during the 1970s.)

64. SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL, *LA JURIDICTIONNALISATION DU DROIT INTERNATIONAL*, COLLOQUE DE LILLE (2003).

65. See generally ANTOINE GARAPON & JULIE ALLARD, *LES JUGES DANS LA MONDIALISATION: LA NOUVELLE RÉVOLUTION DU DROIT* (2005). (Garapon's insightful analysis of the recent sociological development of the role of the judge, both nationally and internationally, in the context of systems of economic integration and treaty-based systems of human rights protection implies a constructive dialogue of judges.); ROBERT BADINTER ET AL., *LE DIALOGUE DES JUGES: MÉLANGES EN L'HONNEUR DU PRÉSIDENT BRUNO GENEVOIS* (2009) (Providing forays into domestic law); see generally L'EUROPE DES COURS (E. Bribosia, L. Scheeck & A. Ubada de Torres eds., 2009) (an analysis within the European context).

66. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J., ¶ 25 (8 July 1996).

67. *Id.*

The ICJ has reaffirmed this position in the case of the *Wall in the Palestinian Occupied Territory*, noting that, in a situation of armed conflict, the governing law over the right to life is international humanitarian law, as opposed to human rights law.<sup>68</sup> However, its position was nuanced by the statement that “[in] regards [to] the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”<sup>69</sup> The Court went one step further in abandoning this radical division between the two legal branches in a case concerning armed activities on the territory of the Congo.<sup>70</sup> In this case there was no reference to *lex specialis* by the ICJ, which indicated that “both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration.”<sup>71</sup>

Such positions taken by the ICJ provided the impetus for much legal commentary where some authors took the opportunity to put forth the idea that the Inter-American Commission together with the Inter-American Court had, for a long time, had to deal with the complex relationship between human rights law and humanitarian law.<sup>72</sup> While the law of armed conflicts is at the heart of the debate (Part A), one must not ignore the law of emergency situations. The Inter-American Court has worked hard to set out with precision the limits of the derogation clause of Article 27 of the American Convention and the necessary respect by the states of the principles inherent to any democratic society (Part B).

## A. The Law of Armed Conflicts

The central question posed to the Commission and then to the Inter-American Court has been the question of the law applicable to armed conflicts while

---

68. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J., 136 (9 Jul. 2004).

69. *Id.* ¶ 106.

70. Democratic Republic of the Congo v. Uganda, 2005 I.C.J., ¶ 216 (19 Dec. 2005).

71. *Id.*

72. One may refer to the special edition of the *International Review of the Red Cross* (IRRC) of September 2008, in particular, the very rich contribution of Cordula Droegge, *Effective Affinities? Human Rights and Humanitarian Law*, IRRC-RICR 501–548 (2008) or similarly, the special edition of the 2008 *European Human Rights Law Review* for contributions entirely focused on the Inter-American system, see, Conor MacCarthy, *Human Rights and the laws of war under the American Convention on Human Rights*, EUR. HUM. RTS. L. REV. 762 (2008).



neither their function nor their terms of reference bear any relation, at first glance, to the law of war. While the role of international humanitarian law in the Inter-American system once appeared problematic—as with respect to the difference in approach between the two legal branches of the system—the situation has now been resolved and the Inter-American system, on this question too, appears to be one step ahead of the European system.

The *jus in bello* is not the body of law which human rights judges are responsible for applying; the Inter-American system of law functions independently from this rule.<sup>73</sup> Article 62(3) of the American Convention clearly defines the limits of the Court's jurisdiction *ratione materiae*<sup>74</sup> and nowhere does it include the law of armed conflicts. The Court in San José highlighted from an early stage that it reserved the possibility of relying on “international treaties” other than the American Convention for the purpose of interpreting the latter<sup>75</sup>—while at the same time turning this approach into a genuine interpretative strategy—there is nevertheless room for doubt on the question of their application to the facts of cases examined by the Court.

Whereas interpretation does not formally mean application, nevertheless the Inter-American Commission tried to ignore this distinction. The case of *La Tablada*<sup>76</sup> is at the heart of a dispute of importance between the Commission and the Court on this question.<sup>77</sup> This was a very famous case in South America, which involved an attack of several Argentinean military barracks by a group of individuals belonging to the movement “All for the Fatherland” (*Todos por la Patria*).<sup>78</sup> The armed confrontation, which lasted almost thirty hours, led to the death of twenty-nine people among them assailants and many members of the armed forces. Survivors of the attack alleged that the military refused their offer of surrender and at the end of the combat, four individuals were summarily executed and six others were the victims of forced disappearances.<sup>79</sup> In its examination of the petition, the

---

73. American Convention on Human Rights, Article 1, November 22, 1969, 1144 U.N.T.S. 123.

74. *Id.* It reads as follows :

The jurisdiction of the Court shall comprise all cases concerning the *interpretation and application of the provisions of this Convention* that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement. (Emphasis added).

75. “Other treaties” Subject to the Advisory Jurisdiction of the Court, Advisory Opinion OC-1/82, 1982 Inter-Am. Ct. H.R. (ser. A) No. 1 ¶ 19 (24 Sep. 1982).

76. Int'l Comm. Red Cross *La Comision Interamericana de Derechos Humanos y el derecho internacional humanitario: comentario acerca del caso La Tablada*, No. 147, 547–554 (30 Sept. 1998).

77. Abella, Inter-Am. C.H.R., Report No. 55/97.

78. *Id.* ¶ 7.

79. Abella, Inter-Am. C.H.R., Report No. 55/97, ¶ 9.

Commission considered that it had the jurisdiction to directly apply international humanitarian law. This assertion was, to say the least, audacious.<sup>80</sup> The Court settled this issue in the case of *Las Palmeras*.<sup>81</sup>

In the case of *Las Palmeras*, the national police acted in concert with Colombian armed forces to carry out an armed operation in the locality of *Las Palmeras* causing the death of six individuals. Those responsible for the killings tried to justify their conduct by explaining that the deaths of the villagers were the consequence of combat between “subversive” groups; they tampered with the evidence and threatened the witnesses in order to hush up the events. While the disciplinary proceedings resulted in acquittal of the perpetrators, the military criminal procedures were still at the investigative phase when the Inter-American Commission—following receipt of a petition dated 27 January 1994—submitted its report four years later.<sup>82</sup>

- 
80. See, e.g., Abella, Inter-Am. C.H.R., Report No. 55/97. The Commission provided several arguments to justify this interpretation. First, it asserted that reference to treaties such as the American Convention on Human Rights alone was not sufficient to deal with conflicts of growing amplitude. Second, it considered that, in the case of internal armed conflicts, there was convergence between Article 3 common to the four Geneva Conventions and the American Convention given that both international humanitarian law and Article 4 of the American Convention prohibit summary executions. In particular, the American Convention “contains no rules that either define or distinguish civilians from combatants.” Consequently, “the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance,” given that otherwise its jurisdiction would be greatly restricted, even non-existent. Abella, Inter-Am. C.H.R., Report No. 55/97, ¶ 161. Third, all the member States of the OAS and the States Parties to the Convention have ratified at least one of the Geneva Conventions. Therefore, these Conventions will be applicable in their domestic law and, in accordance with Article 25, the Commission is competent to deal with the absence of effective right of redress “recognized by the constitution or laws of the state concerned or by this Convention.” Abella, Inter-Am. C.H.R., Report No. 55/97, ¶ 163. Finally, the Commission held that there were two possible legal bases which indirectly require the Commission to apply international humanitarian law. On the one hand, Article 29(b)—which requires the application of the principle *pro homine*—could indirectly require the Commission to apply international humanitarian law insofar as that norm contains “the higher standard(s) applicable to the right(s) or freedom(s) in question.” Abella, Inter-Am. C.H.R., Report No. 55/97, ¶ 165. On the other hand, Article 27 requires consistency with “other obligations under international law.” The Inter-American Commission concluded that when reviewing the legality of derogation measures taken in the context of a state of emergency, it “should conclude that these derogation measures are in violation of the State Parties obligations under both the American Convention and the humanitarian law treaties.” Abella, Inter-Am. C.H.R., Report No. 55/97, ¶ 170.
81. Case of *Las Palmeras v. Colombia*, 2000 Inter-Am. Ct. H.R. (ser. C) No. 67, (4 Feb. 2000): Preliminary Objections; Case of *Las Palmeras v. Colombia*, 2001 Inter-Am Ct. H.R. (ser. C) No. 90 (6 Dec. 2001): Merits; see Fanny Martin, *Application du droit international humanitaire par la Cour interaméricaine des droits de l’homme*, RICR 1037–1066 (2001).
82. Case of *Las Palmeras v. Colombia* 2001 Inter-Am. Ct. H.R. (ser. C) No. 90, ¶ 8.

The Colombian government filed five preliminary objections, which the Court had to respond to before considering the merits of the case.<sup>83</sup> These objections respectively dealt with a violation of due process by the Inter-American Commission (first objection), the lack of competence of the Court and the Commission to apply international humanitarian law (second and third objections), the failure to exhaust remedies under domestic law (fourth objection) and finally, the lack of competence of the Court to act as a trial court (fifth objection).<sup>84</sup> The Court admitted two of the five preliminary objections and, in so doing, defined the limits of the law it was able to apply. The Court's response was clear and unequivocal. The American Convention "has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself and not with the 1949 Geneva Conventions."<sup>85</sup> Such deference by the Court in San José to the principle of the attribution of competences has been criticized in the name of the mutual relationship between human rights law and international humanitarian law, which the Court may not have wanted to acknowledge and promote. While the Court's position remained unchanged in the case of *Bámaca Velásquez*, it did however take the time to demonstrate that the failure to apply international humanitarian law did not entail its exclusion as a tool for interpretation.<sup>86</sup>

The Court has not strayed away from this approach characterized by the use of diverse external sources in the interpretation of rights guaranteed by the Convention. Whether in the Colombian cases—systematically gripped by war—or in other cases revealing the scars of past conflicts, such as the civil war which ravaged El Salvador between 1980 and 1991,<sup>87</sup> the Court has had

---

83. *Id.*

84. Case of Las Palmeras v. Colombia, 2000 Inter-Am. Ct. H.R. (ser. C) No. 67, (4 Feb. 2000): Preliminary Objections.

85. Case of Las Palmeras v. Colombia 2001 Inter-Am. Ct. H.R. (ser. C) No. 90, ¶ 33, (2001).

86. Case of Bámaca-Velásquez v. Guatemala, 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, ¶¶ 208–09 (25 Nov. 2000):

Although the Court lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence, it can observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3. 209. Indeed, there is a similarity between the content of Article 3, common to the 1949 Geneva Conventions, and the provisions of the American Convention and other international instruments regarding non-derogable human rights (such as the right to life and the right not to be submitted to torture or cruel, inhuman or degrading treatment). This Court has already indicated in the Las Palmeras Case (2000), that the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention.

87. See, e.g., Case of Serrano-Cruz Sisters v. El Salvador, 2005 Inter-Am. Ct. H.R. (ser. C) No. 120, ¶¶ 48.1–48.14 (1 Mar. 2005). In accordance with its approach consisting of setting human rights violations in their historical context, the Court takes care in the important case of *Serrano Cruz* to devote part of the section on "Proven Facts" (*Hechos*

no qualms in using the Geneva Conventions to interpret the substance and the scope of human rights in the context of armed conflicts in accordance with Article 29(b) of the American Convention.<sup>88</sup> Thus in the case of the *Mapiripán Massacre*, the Court did not hesitate in restating the fundamentals of its method of interpretation and goes so far as to highlight the position of the Colombian Constitutional Court. It affirmed that the constitutional judge in Bogotá—one of the most innovative on the American continent—had incorporated international humanitarian law within the “constitutional bloc,” and declared them to be *jus cogens* provisions mandatory for all state and non-state actors in an armed conflict.<sup>89</sup>

Similarly, in the case of the *Ituango Massacres*, the Court analyzes, in one breath, the right to property (Article 21 of the Convention) and the freedom of movement (Article 22) in the light of the provisions of Protocol II of 8 June 1977 to the Geneva Conventions.<sup>90</sup> All of these elements—always related to the promotion of Colombian constitutional law—allowed the Court to note a “grave deprivation of the use and enjoyment of property”

---

*probados*) to the presentation of the “Background and historical context.” Moreover, it commented in that section on the combats stating that:

[From] approximately 1980 to 1991, *El Salvador was engaged in an internal armed conflict* during which forced disappearances occurred. The consequences of the latter were examined and discussed by the Truth Commission for El Salvador sponsored by the United Nations, the Inter-American Commission on Human Rights.

Case of *Serrano-Cruz Sisters v. El Salvador*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 48 (1). (Emphasis added).

However, it is in the Court’s judgment on the preliminary objections that the Court solemnly recalls (in order to reject El Salvador’s objection to a lack of jurisdiction *ratione materiae*) that there is a “complementarity of international human rights law and international humanitarian law,” a “convergence.” Case of *Serrano-Cruz Sisters v. El Salvador*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 120, ¶¶ 112, 113. The Court has also adopted interim measures for the protection of persons in a situation of extreme gravity and urgency in the context of an armed conflict. It solemnly affirmed that

[T]he State cannot question the full applicability of the human rights embodied in the American Convention, based on the existence of a non international armed conflict. [The] existence of a non international armed conflict does not exempt the State from fulfilling its obligations to respect and guarantee the rights embodied in the American Convention to all persons subject to its jurisdiction.

Case of the *Serrano-Cruz Sisters v. El Salvador*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 118, ¶ 118 (23 Nov. 2004).

88. American Convention, *supra* note 73, art. 29. Restrictions regarding interpretation: “No provision of this Convention shall be interpreted as: . . . restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.”
89. See, e.g., Case of the “*Mapiripán Massacre*” v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 115. It refers to judgment C-225/95 of 18 May 1995, issued by the Colombian Constitutional Court.
90. Case of *Ituango Massacres v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 18 (1 Jul. 2006).

of the villagers of the locality of *El Aro*,<sup>91</sup> as constituting a “violation of the rights embodied in Article 22 (Freedom of Movement and Residence) of the Convention,” read in conjunction with “Article 1(1) (Obligation to Respect Rights) thereof, to the detriment of the seven hundred and two (702) persons displaced from El Aro.”<sup>92</sup>

We find within the European universe a similar exemplary demonstration of constructive interpretation.<sup>93</sup> Nevertheless, there features a notable exception that continues to raise a lot of criticism: the *express* exclusion of The Hague and Geneva Conventions from the external sources of law used to support a purposive interpretation.<sup>94</sup> Will there be a reversal in the European Court’s approach perhaps inspired by the Inter-American jurisprudence? While, in the very important case of *Serguei Zolotoukhine*,<sup>95</sup>

- 
91. Case of the Ituango Massacres v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 179 (1 July 2006): Preliminary Objection, Merits, Reparations and Costs. (The Court highlights in particular in § 180 the importance of Articles 13 (protection of the civilian population) and 14 (protection of the objects indispensable to the survival of the civilian population) of Protocol II which prohibit respectively “acts or threats of violence the primary purpose of which is to spread terror among the civilian population” and also to “to attack, destroy, remove or render useless [. . .] objects indispensable to the survival of the civilian population.” By the same token (¶ 182), the Court affirms that “[the] purpose of setting fire to and destroying the homes of the people of El Aro was to spread terror and cause their displacement, so as to gain territory in the fight against the guerrilla in Colombia.” Thus, “the theft of the livestock and the destruction of the homes by the paramilitary group, perpetrated with the direct collaboration of State agents, constitute a grave deprivation of the use and enjoyment of property.”) 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 183.
92. Case of the Ituango Massacres v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 235; see generally Brett Thiele, *Litigating Against Forced Evictions under the American Convention on Human Rights*, 21 NETHERLANDS Q. HUM. RTS. 463 (2003). (On the general issue of forced evictions).
93. We note that the Strasbourg Court is wide open to the use of other international instruments in order to interpret the provisions of the European Convention. This reflects an underlying approach, in the last few years, that makes reference to *soft law* as well as *hard law*. The judgment of the Grand Chamber of 12 Nov. 2008 Demir and Baykara v. Turkey shows for the first time, in a well-structured and pedagogical manner, the global methodology of the European Court on the matter (see esp. ¶¶ 60–86), see equally F. Sudre, *L’interprétation constructive de la liberté syndicale au sens de l’article 11 de la Convention EDH*, JCP 2009.1.5.
94. The ECHR has not accepted to extend its constructive method of interpretation to the use of international humanitarian law which it expressly fails to incorporate within its technique of purposive interpretation. See, e.g., Issayeva v. Russia, 41 E.H.R.R. 38 (24 Feb. 2005); see also J.-F. Flauss and G. Cohen-Jonathan, *Cour européenne des droits de l’Homme et droit international general*, 51 ANNUAIRE FRANÇAISE DE DROIT INTERNATIONAL 675, 676–677 (2005); see generally A. BLANC ARTEMIR, *El conflicto de Chechenia : implicaciones en el ámbito del Derecho Internacional Humanitario y de los Derechos humanos, in CONFLICTOS Y PROTECCIÓN DE DERECHOS HUMANOS EN EL ORDEN INTERNACIONAL, CURSOS DE DERECHOS HUMANOS DE DONOSTIA-SAN SEBASTIÁN 67–148* (J. Soroeta Liceran ed., 2006) (on the situation in Chechnya).
95. Sergey Zolotukhine v. Russia, Eur. Ct. H.R., ¶¶ 39–40, 79 (10 Feb. 2009). We need to mention here that it is the combination of EU case law (ECJ) together with that of the Inter-American Court (I/ACHR) which has enabled the Court to affirm: “Accordingly, the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting

the European Court was inspired *expressis verbis*<sup>96</sup> by both the case law of the Inter-American Court<sup>97</sup> and that of the European Court of Justice to significantly change its approach on the meaning of the double-jeopardy principle *non bis in idem*, we can easily imagine that, will demonstrate a similar attitude in relation to the role of the Geneva Conventions as a guide for interpretation. This reversal is to be expected if we take into account the criticism, albeit indirect, addressed by the Inter-American Court to its European counterpart. Indeed, it has affirmed on several occasions that even if the principle of proportionality is important and useful—in the context of determining the scope of an individual right—this principle is not so well adapted when applied to military operations and a context of generalized violence.<sup>98</sup>

## B. The Law of States of Emergency

Latin-American authoritarian regimes indulged, in the course of the 1970s and 1980s, in an abuse, if not an instrumentalization, of the theory of exceptional circumstances.<sup>99</sup> The Uruguayan lawyer Hector Gros Espiell—who was President of the Inter-American Court between 1989 and 1990—describes it very clearly in one of his lectures at The Hague Academy.<sup>100</sup> Mr. Espiell's discussion indicates that exceptional measures—which must not at all lead to the suspension of either the constitution or the rule of law—have served, on many occasions in Latin America, to abolish the constitution and to overthrow legitimate governments in order to usurp power. In the same vein, he argues that states of emergency have often been used to conceal a

---

the prosecution or trial of a second "offence *in so far as it arises from identical facts or facts which are substantially the same.*" (Emphasis added). *Sergey Zolotukhine v. Russia*, Eur. Ct. H.R., ¶ 82.

96. *Sergey Zolotukhine v. Russia*, Eur. Ct. H.R., ¶ 23.
97. *Case of Loayza-Tamayo v. Peru*, 1997 Inter-Am. Ct. H.R. (ser. C) No. 33, ¶ 66 (17 Sept. 1997). The Court in San José highlights the terms of Art 8(4) of the American Convention which unlike other international instruments, e.g., International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., art. 14(7), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 Mar. 1976) uses the expression "the same cause," terms broader and therefore more favorable to the victim.
98. *Case of the Pueblo Bello Massacre v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 133 (31 Jan. 2006); see BURGORGUE-LARSEN & ÚBEDA DE TORRES, *supra* note 34, at 383.
99. For a pioneering analysis of the response of the Inter-American Commission to these situations of emergency, see generally Joan Fitzpatrick, *States of Emergency in the Inter-American Human Rights System*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* 371 (David J. Harris & Stephen Livingstone eds., 1998).
100. Hector Gros Espiell, *La Convention américaine et la Convention européenne des droits de l'Homme—Analyse comparative*, REC. COURS LA HAYE (1989).

military coup or as a curtain to hide the early stages of tyrannical regimes.<sup>101</sup> The observation is undeniable and points to a pattern which has long been part of the political culture of emergency within the Americas.

If the use of exceptional circumstances was, and perhaps still is, common in the continent, it is nevertheless not easy to grasp. Indeed, the many expressions used in constitutional law—"state of siege," "state of emergency," "state of war," "state of exception"—are not always appropriate while the international legal doctrine wraps up all the possibilities under the expression "state of emergency" or "exception."<sup>102</sup> In particular, it is not easy to define a state of emergency. The American Convention does not contain a detailed definition<sup>103</sup> and it would be almost impossible to create a unique category to encompass such a variety of situations.<sup>104</sup>

---

101. *Id.* at 296. The original text in French reads:

Les mesures exceptionnelles—qui ne doivent nullement aboutir, ni à la suspension de la constitution ni à la suppression de l'état de droit [. . .] ont servi en Amérique latine, en maintes occasions, aux fins d'abolir la constitution, de renverser les gouvernements légitimes pour usurper le pouvoir. Les états d'exception ont souvent été utilisés pour dissimuler les coups d'État ou en guise de rideau pour occulter le début de régimes tyranniques.

102. AMAYA ÚBEDA DE TORRES, *DEMOCRACIA Y DERECHOS HUMANOS EN EUROPA Y EN AMÉRICA. ESTUDIO COMPARADO DE LOS SISTEMA EUROPEO E INTERMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS* 579 (2007).

103. Even if Article 27 mentions "war, public danger, or other emergency," which point to a willingness on the part of the authors of the Convention not to define *a priori* the situations so as to avoid the risk of being too limiting.

104. Two possible definitions arise out of this notion. The first would define the state of emergency in light of its effects on the respect for fundamental rights and the State's obligations in this regard. Thus, it would be a matter of linking the concept to the arising exceptional circumstances in contrast with a situation of "normality." The second possibility would be to ascertain the existence of a set of conditions required to distinguish *de jure* states, officially proclaimed and which adhere to a legal order, from *de facto* states, which exist even if the State does not recognize them. See FITZPATRICK, *HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY* 4–18 (1994). Both definitions are characterized by significant shortcomings. The first, a substantive definition, would require the causes, which provide grounds for a state of emergency to be declared, to be established. Thus, that situation can then be distinguished from situations which, even if exceptional, could not lead to the adoption of extreme measures by governments. The second definition, more formal, would depend on the recognition of the situation by the State. This mechanism carries its own risks and would also require a scale of different levels of seriousness in order to match the development of the state's emergency powers. The *rapporteur* to the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Nicole Questiaux, undertook a study on states of emergencies at the start of the 1980s. The study showed that natural disasters, under-development and war were among the causes of emergencies. Subject to strictly formal conditions, she established a typology of the different possible "deviations": *formal* emergency not notified to the international monitoring bodies; *permanent* emergency, based on the continued extension in time of the formal conditions of the emergency; *complex* emergency, involving the confusion of legal regimes through the partial suspension of constitutional guarantees and the issuing of a large volume of "decrees," and finally, *institutionalized* emergency, where the transitional emergency regime is extended with the aim of returning to democracy; see *Question of the Human Rights of Persons Subjected to Any Form of Detention or Imprisonment*,

Article 27 (1) of the American Convention<sup>105</sup>—like its European counterpart at Article 15—provides for the possibility that States may suspend treaty obligations, born out of democratic requirements, precisely in the name of the preservation of liberal democracy.<sup>106</sup> This article entrusts states with the ability to make an overall assessment of the existence of circumstances which, should these constitute a threat to the country, allow them to “suspend”—usually on a provisional basis—certain guarantees.<sup>107</sup> The identification of exceptional circumstances allowing the suspension of treaty obligations is not an easy task; nevertheless, the Court has grappled with it. The circumstances providing grounds for “exception” are, according to the first sentence of Article 27(1): “war, public danger, or other emergency that threatens the independence or security of a State Party.”<sup>108</sup> This partly casuistic approach presents certain drawbacks on account of the uncertainty and the lack of precision of the concepts used. War and public danger appear to be sub-categories that can be distinguished from the third category of “exception” aiming at “other emergency.” In addition, the grounds of a threat to the independence or security of a state do not wholly refer to the “life” or the “survival” of the state, and are thus open to the possibility that the justification may not be as exceptional as hoped for.<sup>109</sup> On the one hand, the first threat (to independence), which is illustrative of the gravitational force of the principle of non-intervention in the Inter-American system, appears to arise out of factors external to the autonomous functioning of the institutions of the state. On the other hand, the second threat (to security) is more dangerous given its links with the infamous “*doctrine of national security*,” which we know was used and abused by dictatorial regimes of the 1970s and 1980s.<sup>110</sup> Therefore, the interpretation of this expression by

---

*Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency, Report of the Special Rapporteur Mrs. N. Questiaux, U.N. ESCOR, Comm'n on Hum. Rights., 35th Sess., Agenda Item 10, U.N. Doc. E/CN.4/Sub.2/1982/15 (1982).*

105. American Convention on Human Rights, O.A.S. Treaty Series No. 36, 18 July 1978, art. 27, 1144 U.N.T.S. 123.

The article is entitled *Suspension of Guarantees* and reads as follows:

In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin. (Emphasis added).

106. *Id.* p.mbl.

107. American Convention on Human Rights, *supra* note 105, art 27.

108. *Id.*

109. ÚBEDA DE TORRES, *supra* note 102, at 585.

110. DANIEL ZOVATTO, LOS ESTADOS DE EXCEPCIÓN Y LOS DERECHOS HUMANOS EN AMÉRICA LATINA 51 ([Editorial Jurídica Venezolana] 1990).



state authorities requires a rigorous international monitoring of the restrictions placed on rights.

These are all elements which have been clarified by the doctrine of the Commission and by the Court's case law. In one of its reports on Colombia, the Inter-American Commission stated that the conditions deriving from the state of siege "which has been in effect almost without interruption for several decades have become an endemic situation which has hampered, to a certain extent, the full enjoyment of civil freedoms and rights in that, among other things, it has permitted trials of civilians by military courts."<sup>111</sup> It recommends that the state put an end to this situation,<sup>112</sup> which reflects a constant aspect of its analysis, given that the state of emergency must be exceptional and should neither be extended nor used as a means of justifying continued violations of human rights.<sup>113</sup> Thus, the Inter-American Court has relied on a restrictive interpretation of Article 27(1) of the American Convention—consistent with European case law<sup>114</sup>—and has said that "the suspension of guarantees may not exceed the limits of that strictly required to deal with the emergency, any action on the part of the public authorities that goes beyond those limits . . . would also be unlawful notwithstanding the existence of the emergency situation."<sup>115</sup>

Similarly, in the important case of *Zambrano Vélez*, the Court took care to show the particularities of the use of armed forces to control serious social unrest were more related to a phenomenon of widespread criminal delinquency.<sup>116</sup> In addition to finding that the Ecuadorian state had not complied in that case with any of the required formalities of Article 27(3) of the

---

111. See Report on the Situation of Human Rights in Colombia, Inter-Am. C.H.R., OEA/Ser.LV/II.53, doc. 22, Conclusion (1981).

112. *Report on the situation of human rights in the Republic of Colombia*, Inter-Am. C.H.R., OEA/Ser.LV/II.53, Doc. 22, 30 June 1981.

113. In its report on Chile published in the immediate aftermath of the military coup and General Pinochet's rise to power, the Commission stated that it "does not count as violations of human rights, the losses of life that occurred on both sides in the first few days of this process, so that it may entirely avoid the consideration, which otherwise would be essential, on the legality or illegality and the justice or injustice, of the actions of the previous regime." However, it was able to state that, on account of the repeated human rights violations, Chile had violated a number of human rights set out in the American Declaration; Report on the Status of Human Rights in Chile, 1974 Inter-Am. C.H.R., OEA/Ser.L/II.34, doc. 21, Ch. XVI (1974).

114. It is interesting to note that, in the case *Zambrano-Vélez* (¶ 46, n.118), the Court refers to the ECHR judgment *Lawless v. Ireland* (no. 3), judgment of 1 July 1961, Series A No. 3, at 14, ¶ 28, to remind us that a state of emergency must a) occur in an exceptional period of crisis or emergency, b) which affects the whole population, c) which constitutes a threat to the organized life of the community.

115. *Habeas Corpus in Emergency Situations*, *supra* note 11, ¶¶ 38–40.

116. *Case of Zambrano-Vélez et al. v. Ecuador*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 166.

American Convention,<sup>117</sup> it highlighted that states should observe extreme care in the use of military intervention as “a mean[s] for controlling social protests, domestic disturbances, internal violence, public emergencies and common crime.”<sup>118</sup> In that case, the Inter-American Court not only carried out a strict scrutiny of state activities in the event of tensions and conflicts, but also assessed the proportionality of the measures taken by the state in relation the gravity of the situation.<sup>119</sup> It referred, once again, to sources of law outside the Inter-American system, namely to the standards of the *Turku Declaration* regarding the minimum humanitarian standards applicable in a state of emergency.<sup>120</sup>

Article 27(2) of the American Convention<sup>121</sup> emphasizes the limits to any state of emergency by listing eleven rights that may not be suspended.<sup>122</sup> From the perspective of a “hierarchy” of democratic rights, the American Convention upholds, even in a situation of emergency, its “common democratic heritage,” to the extent that basic voting rights are protected. By contrast, in the case of the European Convention, none of the freedoms that are guaranteed in “normal” democratic circumstances are given the same protection in a period of emergency.<sup>123</sup> Thus, the democratic principle finds itself better protected by the American Convention and this is again reinforced by the protection of the rule of law provided for by the Inter-American system.

---

117. *Id.* ¶ 69; see also American Convention on Human Rights, *supra* note 105, art 27(3) reads as follows:

Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

118. Case of Zambrano-Vélez et al. v. Ecuador, 2007 Inter-Am Ct. H.R. (ser. C) No. 166, ¶ 51.

119. Case of Zambrano-Vélez et al. v. Ecuador, 2007 Inter-Am Ct. H.R. (ser. C) No. 166, ¶¶ 47–52; see also Amaya Úbeda de Torres, *L'état de droit dans la jurisprudence de la Cour interaméricaine des droits de l'Homme*, in SFDI, *L'ÉTAT DE DROIT EN DROIT INTERNATIONAL, COLLOQUE ANNUEL DE LA SOCIÉTÉ FRANÇAISE DE DROIT INTERNATIONAL DE BRUXELLES 2008* 185 (2009).

120. Turku Declaration of Minimum Humanitarian Standards, adopted 2 Dec. 1990, U.N. Doc E/CN.4/Sub.2/1991/55 (1990) adopted in 1990 in Finland and revised in Oslo, Norway in 1994.

121. American Convention, *supra* note 105, art. 27(2):

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

122. Here, it is interesting to note that the list of nonderogable rights under the ECHR is much shorter; Article 15 only refers to the rights protected under Articles 2, 3, 7.

123. LOUIS-EDMOND PETITI ET AL., *LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME: COMMENTAIRE ARTICLE PAR ARTICLE* 499 (1995).

The American Convention's protection has been enhanced by a special interpretation of the Inter-American Court in two very important advisory opinions dated 30 January 1987 and 6 October 1988.<sup>124</sup> The first opinion dealt with the specific legal remedy of *habeas corpus* under Article 7(6) and the more general remedy of *amparo* under Article 25(1).<sup>125</sup> The second opinion, in contrast, was a response to Uruguay's submission of a request for an advisory opinion on the possible suspension of the guarantees provided by Articles 8 and 25(1) during a state of emergency.<sup>126</sup> The underlying problem raised in both advisory opinion requests was whether the expression "essential" judicial guarantees found in Article 27(2) in fine included the above-mentioned legal remedies.<sup>127</sup> In other words, do states of emergency authorize the suspension of judicial guarantees? Using a reasoning based on the recent history of the South-American continent and on precise legal arguments derived from democratic systems of law, the Court in San José concluded that the legal guarantees provided by Articles 7(6), 8(1) and 25(1) may not be suspended in a system governed by the rule of law given that they are all essential to the effective exercise of rights and freedoms. The Court reaffirmed this Convention-based prohibition as fundamental for the protection of the principle of democracy as shown in several cases against Peru.<sup>128</sup>

#### IV. CONCLUSION

As a system providing for the collective guarantee of rights, the Inter-American system was the first to have been faced with massive violations of human rights. The *golpes de Estado* at the hands of Caudillos of all kinds have destroyed many lives and dislocated a great number of communities.<sup>129</sup> Both

124. BURGORGUE-LARSEN & ÚBEDA DE TORRES, *supra* note 30, at esp. 667 s., 707 s.

125. Habeas Corpus in Emergency Situations, *supra* note 11.

126. Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987).

127. Advisory Opinion OC-9/87, 1987 Inter-Am. Ct. H.R. ¶ 2; Habeas Corpus in Emergency Situations (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights), Advisory Opinion OC-8/87, ¶ 2.

128. Case of Durand and Ugarte v. Peru, 2000 Inter-Am. Ct. H.R. (ser. C) No. 68 (16 Aug. 2000): Merits. Case of Cantoral-Benavides v. Peru 2000 Inter-Am Ct. H.R. (ser. C) No. 69, (18 Aug. 2000): Merits. Case of the Gómez-Paquiyaui Brothers v. Peru, 2004, Inter-Am. Ct. H.R. (ser. C) No. 110 (8 July 2004): Merits, Reparations and Costs.

129. The tragic reality of authoritarian regimes has inspired the great authors of Latin-American literature to produce stunning works that speak of despair. One such masterpiece is the novel by MIGUEL ÁNGEL ASTURIAS, *EL SEÑOR PRESIDENTE*, (EDITORIAL LOSADA, S.A. 1948).

the doctrine of the Commission and the Court's case law have developed in a landscape characterized by dictatorships. Their contribution to both international human rights law and international humanitarian law is essential and certainly provides food for thought on the topical issue of the complementarity between these two great branches of international law.