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Punishment and pardon: The use of international humanitarian law by the Special Jurisdiction for Peace in Colombia

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Abstract

Transitional justice systems generally aim to achieve two goals. One is to bring the perpetrators of past atrocities to justice to ensure that they do not go unpunished, which involves the State fulfilling its duty to investigate, prosecute and punish serious human rights violations and breaches of international humanitarian law (IHL). The other is to bring about reconciliation to heal a divided society and achieve peace and stability. This normally requires the adoption of measures of clemency, such as granting amnesty, so that those who took part in the country's violent past can return to civilian life. The use of IHL is relevant in attaining both these goals because its complex nature means that it provides the legal basis for their implementation. However, this very complexity can mean that there are contradictions or complementarities between its characteristics. This article looks at the case of the Special Jurisdiction for Peace (JEP) in Colombia, showing how this transitional jurisdiction has used IHL as a legal basis both for investigating, prosecuting and punishing serious violations committed during the Colombian armed conflict and for granting amnesty to those who took part in the hostilities. These different uses by the JEP demonstrate that IHL is a flexible tool that can facilitate the process of delivering both justice and peace after a conflict has ended.

Keywords: international humanitarian law, transitional justice, Colombia, Special Jurisdiction for Peace, justice, peace.

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Introduction

Transitional justice refers to the range of processes and mechanisms established by a society to come to terms with a violent past, with the aim of prosecuting human rights violations and breaches of international humanitarian law (IHL), guaranteeing victims' rights and achieving peace and reconciliation.[1] However, in the implementation of transitional justice processes, tensions tend to arise between these objectives, especially between those concerned with pursuing justice and those concerned with achieving peace and reconciliation. This is because prosecuting those who took part in hostilities hinders their reintegration into society, but the failure to bring perpetrators to justice can undermine efforts to achieve a meaningful peace.[2] Serving justice and guaranteeing victims' rights

1 The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General, UN Doc. S/2004/616, 3 August 2004, p. 4.

2 On the subject of the tension between peace and justice and the debate on the issue, see, in particular, Kai Ambos, Judith Large and Marieke Wierda (eds), *Building a Future on Peace and Justice: Studies on*

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generally requires mechanisms that prevent impunity and ensure that those who committed serious human rights violations or grave breaches of IHL are investigated, prosecuted and punished.[3] On the other hand, the goal of achieving peace and reconciliation commonly requires measures with a degree of flexibility in the application of the rule of law and the logic of ordinary justice, calling for a shift in perspective, in some cases, in the administration of criminal justice.[4] Consequently, societies in transition sometimes choose to adopt measures of clemency, such as granting amnesty. In such cases, the impunity of those who took part in the hostilities is considered a necessary sacrifice to facilitate their reintegration into society and avoid a cycle of vengeance that would perpetuate the conflict.[5]

The mechanisms and processes that societies in transition develop and deploy for the implementation of such measures must be consistent with domestic legislation and the different international standards and obligations that are largely enshrined in three bodies of law: international human rights law, international criminal law (ICL) and IHL.[6] Societies attempting to overcome a non-international armed conflict (NIAC), in particular, need to ensure that transitional justice mechanisms comply with applicable IHL provisions and also fit in with these other legal regimes.[7] The legal context of transitional justice is therefore complex because it is necessary to fit together the different legal regimes used to pursue aims that may be complementary or contradictory, such as punishing and pardoning crimes.[8] When it comes to using IHL, these

Transitional Justice, Peace and Development – The Nuremberg Declaration on Peace and Justice, Springer, Berlin/Heidelberg, 2009; William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals*, Oxford University Press, Oxford, 2012; Karen Engle, Zinaida Miller and D. M. Davis (eds), "Anti-Impunity and the Human Rights Agenda", in *Anti-Impunity and the Human Rights Agenda*, Cambridge University Press, Cambridge, 2016, pp. i–ii; and Mikkel Jarle Christensen, "The Borderlands between Punitive and Non-punitive Transitional Justice: Distinct Elites and Diverging Patterns of Import/export", *International Journal of Transitional Justice*, Vol. 14, No. 3, 2020.

3 Although the concept of "grave breaches of IHL" is specific to international armed conflicts, Article 5 of Legislative Act 01 of 2017, which creates the Comprehensive System for Truth, Justice, Reparation and Non-Repetition (SIVJRNR), determines that one of the purposes of the system is to administer justice in cases involving crimes that qualify as grave breaches of IHL. This term is therefore used throughout the article. On mechanisms for preventing impunity, see the Joinet Principles, available at: http://www.derechos.org/nizkor/impu/joinet2.html (all internet references were accessed in January 2022). See also United Nations (UN) General Assembly Resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 16 December 2005.

4 Tatiana Rincón and Jesús Rodríguez, "Estudio introductorio", in Tatiana Rincón and Jesús Rodríguez (eds), *La justicia y las atrocidades del pasado: Teoría y análisis de la justicia transicional*, Universidad Autónoma Metropolitana, Mexico City, 2012, pp. 5–58.

5 Louise Mallinder, "Can Amnesties and International Justice be Reconciled?", *International Journal of Transitional Justice*, Vol. 1, No. 2, 2007, p. 218.

6 Christine Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'", *International Journal of Transitional Justice*, Vol. 3, No. 1, 2009, p. 19.

7 *Ibid.*

8 Juan Francisco Soto, "Legal Argumentation in Transitional Justice Adjudication: A Land of New Arguments, a Land of New Law", in Camila de Gamboa Tapias and Bert van Roermund (eds), *Just Memories: Remembrance and Restoration in the Aftermath of Political Violence*, Intersentia, Cambridge, 2020.

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contradictions and complementarities will depend on the way the nature of this body of law and its rules are interpreted and how these rules are associated with the transition's goals of delivering justice and peace.[9]

The Colombian experience reflects the different uses of IHL in a society in transition. On 1 December 2016, following arduous negotiations in Havana (Cuba) to end an internal armed conflict spanning more than fifty years, the Colombian Government and the then guerrilla group, the Revolutionary Armed Forces of Colombia – People's Army (FARC-EP) signed the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace. Among other things, this agreement led to the creation of a range of transitional justice mechanisms, including the Special Jurisdiction for Peace (JEP), which has two central aims based on a restorative justice approach: (i) to guarantee the right of victims to the truth, justice, reparation and non-repetition by investigating, prosecuting and punishing crimes committed in the course of the armed conflict; and (ii) to provide legal certainty for those who participated in the hostilities and, where appropriate, grant the broadest possible amnesty and facilitate reconciliation processes. To achieve these aims, the JEP can use different legal sources, including IHL. This leads to the question of what use the JEP has made of IHL and how the different uses relate to the achievement of its goals?

This article shows that the complex nature of IHL and its relation to transitional justice means that the JEP has been able to use IHL as a source of law in imposing punishments and as a basis for granting amnesty in its efforts to bring perpetrators to justice and facilitate the achievement of peace and reconciliation. The article will be developed through three sections. First, it dissects the relationship between transitional justice and the nature of IHL and explains how this body of law relates to the goals of doing justice and making the transition to peace. Second, it describes how the JEP's legal framework establishes IHL as the direct source for the jurisdiction and how its goals of justice and peace are reflected in a design that takes into account the need to use IHL in different ways. Third, it discusses some of the challenges the JEP has faced in applying IHL as the basis for both imposing punishment and pardoning perpetrators by granting a conditional amnesty, highlighting the complex nature of IHL and its relation to transitional justice.

Transitional justice and the nature of IHL: Using IHL to punish and pardon

Transitional justice systems generally include measures for granting conditional amnesties and applying alternative forms of justice. They must ensure, in accordance with international requirements, the fulfilment of the State's duty to

9 Emily Camins, "Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law", *International Journal of Transitional Justice*, Vol. 10, No. 1, 2016, p. 135.

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guarantee victims' rights by investigating, prosecuting and punishing serious human rights violations and grave breaches of IHL. How these goals are pursued will largely depend on how the nature of IHL and the scope of its rules and principles are interpreted. As will be shown in this section, the complex nature of IHL means that it serves as a source of law for two transitional justice goals which may oppose or complement each other – it can be used as a legal basis for punishing crimes and also allows for perpetrators to be pardoned through amnesties.

Debate on the nature of IHL as a restrictive or permissive regime

Determining the nature of IHL is a challenging task because its historical development and use have given it a hybrid or ambiguous character. As indicated by Anne Quintin, there is an ongoing debate about whether IHL is a permissive legal regime, or at least one that authorizes certain conducts during war, or whether it is an exclusively restrictive regime, composed of prescriptions and prohibitions that seek to prohibit or limit means and methods of warfare.[10] This dichotomy, or dual nature, is due to the way IHL has developed historically as a legal regime and as a term. The consideration of IHL as *jus in bello*, or the law that governs the way in which warfare is conducted, is the result of different political and historical developments in which two principles have played a crucial role: the principle of military necessity and the principle of humanity.[11] According to the principle of military necessity, the parties to a conflict are justified in using whatever means are necessary, provided they are lawful, to achieve their military objectives, while the principle of humanity prohibits the employment of means or methods of warfare that are not necessary for the purpose of the war.[12] The principle of military necessity therefore adds a permissive element to IHL, while the principle of humanity makes it a primarily restrictive legal regime.

For some authors, the incorporation of these two defining principles is the result of two historical currents that have contributed to the making of IHL: the law of The Hague and the law of Geneva.[13] There is a common understanding, although not entirely unchallenged, that the law of The Hague incorporates the permissive element of IHL, and the law of Geneva the restrictive element.[14] The former developed as the law governing means and methods of warfare, while the latter

10 Anne Quintin, *The Nature of International Humanitarian Law: A Permissive or Restrictive Regime?*, Edward Elgar Publishing, Cheltenham, 2020.
11 Amanda Alexander, "A Short History of International Humanitarian Law", *European Journal of International Law*, Vol. 26, No. 1, 2015, p. 114.
12 *Ibid.*
13 On the evolution of these different currents, see Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, Cambridge University Press, Cambridge, 2011.
14 A. Quintin, above note 10, p. 31. However, the author points out that this take is not entirely accurate because the overall aim of the law of The Hague was also to limit the effects of war, which means that, to some extent, it too entails a restrictive rather than a permissive vision of IHL.

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evolved as the law governing humanitarian aspects of warfare.[15] The tension between them was eased by the so-called New York current which, through the influence of the United Nations (UN), led to the development of the notion of the duty to punish war crimes, the incorporation of human rights standards into IHL and the adoption of restrictive measures on the use of atomic bombs.[16] The influence of these developments tipped the balance towards a humanitarian approach, particularly after the adoption of Protocols I and II additional to the Geneva Conventions, which definitively cemented IHL as a term and as a concept.[17] From the late 1970s, the shift towards this approach and the relabelling of the law of war or law of armed conflict as IHL contributed to shaping a more humanitarian vision of the nature of IHL under which, at least officially and narratively, its restrictive character prevails.[18]

However, this development of IHL as a primarily restrictive legal regime in which the humanitarian approach takes precedence does not mean that the permissive elements, or the principle of military necessity, have disappeared from the substance of this field of law. On the contrary, this principle has come to be considered as a tool for interpreting or creating the rules that make up IHL.[19] Moreover, in the use and implementation of IHL, a tension persists between the restrictive and permissive vision, or between the principle of military necessity and the principle of humanity, when it comes to assessing or analysing issues such as the distinction between civilians and combatants and those directly participating in hostilities or the legal protection that those affected by armed conflict are entitled to.[20] This tension is explicit in the vague and ambiguous wording used in some IHL instruments, for example, the Additional Protocols, to avoid tipping the balance too far one way or the other.[21]

This characteristic has led some authors to consider that IHL is in constant production because the scope of its rules is contested on a case-by-case basis, with the result that their meaning is not definitively set.[22] In other words, IHL is constantly oscillating to maintain a balance – to the extent possible – between the principle of military necessity and the principle of humanity.[23] Characterizing the nature of IHL therefore calls for an interpretative effort that has practical effects and leads to a recognition that, while the overall purpose of IHL is restrictive, it

15 A. Alexander, above note 11, p. 116.
16 F. Kalshoven and L. Zegveld, above note 13, p. 20.
17 A. Alexander, above note 11, p. 124. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978). Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978).
18 *Ibid.*, p. 135.
19 A. Quintin, above note 10, p. 27.
20 Helen Kinsella and Giovanni Mantilla, "Contestation Before Compliance: History, Politics, and Power in International Humanitarian Law", *International Studies Quarterly*, Vol. 64, No. 3, 2020, p. 655.
21 A. Alexander, above note 11, p. 125.
22 H. Kinsella and G. Mantilla, above note 20, p. 654.
23 Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, International Committee of the Red Cross, Geneva, 2016, p. 17.

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also has some permissive features.[24] These interpretative discussions and the idea of IHL as a body of law in constant production and contestation are relevant to the assessment of acts of violence that occur in international conflicts or NIACs. In particular, the way in which its rules are legally interpreted and the tension between its principles is addressed will have an impact on assessments conducted to determine whether actions carried out in an armed conflict should be classified as hostilities that do not constitute a breach of the rules of IHL, ordinary domestic crimes or war crimes.[25]

Use of IHL in transitional justice

As IHL is regarded as a body of law that applies primarily in armed conflict, there is little in the literature about its potential use in transitional and post-conflict settings.[26] There are, however, studies that have found that IHL and its principles are relevant in transitional processes because they form part of the legal framework that affects the criminal prosecution of grave breaches of IHL, repatriation, the search for missing people and processes for the reintegration of former combatants and other people who took a direct part in the hostilities.[27] Furthermore, some studies have highlighted how IHL provides a crucial grounding for transitions to peace, offering legal resources to make different agreements that allow the opposing sides in a conflict to end hostilities and begin the post-conflict process.[28] Some authors have analysed how IHL can provide a legal basis for individual claims by victims of armed conflict for reparation[29] or for the granting of amnesty.[30]

The use of IHL in such matters will vary depending on the specific circumstances of each transition, the way in which domestic legislation incorporates or relates to its rules and how these rules are interpreted, taking into its complex nature resulting from the tension between the principle of military necessity and the principle of humanity.[31] Two common uses of IHL in transitional justice, in particular, can be identified in relation to this tension. First, as a result of what some authors have dubbed the anti-impunity turn in international law, IHL has become one of the main sources of law for measures

24 A. Quintin, above note 10, p. 336.
25 On the triple classification of acts of violence during a NIAC, see, for example, Yoram Dinstein, *Non-International Armed Conflicts in International Law*, Cambridge University Press, Cambridge, 2014, pp. 11–15.
26 E. Camins, above note 9, p. 126.
27 See Wasantha Seneviratne, "Continued Relevance of International Humanitarian Law in Post-Armed Conflict Situations: A Critical Analysis with Special Reference to Sri Lanka", *Sri Lanka Journal of International Law*, Vol. 24, No. 33, 2012, p. 34.
28 Christine Bell, "Peace Agreements: Their Nature and Legal Status", *American Journal of International Law*, Vol. 100, No. 2, 2006, p. 381; Mark Freeman and Ivan Orozco, *Negotiating Transitional Justice: Firsthand Lessons from Colombia and Beyond*, Cambridge University Press, Cambridge, 2020.
29 E. Camins, above note 9.
30 W. Schabas, above note 2, pp. 177–8; Juana Inés Acosta and Ana María Idárraga, "Alcance del deber de investigar, juzgar y sancionar en transiciones de conflicto armado a una paz negociada: convergencias entre el Sistema Interamericano de Derechos Humanos y la Corte Penal Internacional", *Revista Derecho del Estado,* No. 45, 2019.
31 E. Camins, above note 9; W. Seneviratne, above note 27.

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to investigate, prosecute and punish acts of violence or, in some cases, for justifying the decision not to grant amnesty.[32] The second seemingly contradictory use of IHL has been to justify the need to establish peace agreements with the granting of amnesty as an effective way to facilitate a negotiated end to a conflict and measures for the reintegration of those who took part in the hostilities into civilian and political life.[33] These two uses of IHL, in which it serves as a source of law and an interpretative framework for different transitional justice mechanisms, can have opposing or complementary aims.

The opposition between IHL as a basis for granting amnesty and as a critical source of law that requires States to prosecute serious breaches of its rules has been the subject of extensive academic debate.[34] Comparative experience shows that different amnesties have been justified on the basis of Article 6(5) of Additional Protocol II, which provides that governments must endeavour to grant the broadest possible amnesty to people who have participated in the armed conflict and those deprived of their liberty in connection with it.[35] The contestation of this use is that it is not acceptable to grant blanket amnesties that cover grave breaches of IHL, including war crimes.[36] With regard to international standards, the UN Secretary-General has explicitly stated that societies should not grant amnesties for "genocide, war crimes, crimes against humanity or gross violations of human rights" through transitional justice mechanisms.[37] On the contrary, they have a duty to investigate, prosecute and punish such acts. This same interpretation has been developed by international human rights and criminal tribunals, which have used the legal framework of human rights law and IHL to rule various amnesties unlawful on the grounds that States have a duty to guarantee the right of victims to truth, justice, reparation and non-repetition.[38]

In spite of this tension, there are perspectives that consider that the different uses of IHL as a basis for punishing or pardoning crimes can be complementary. The interpretation of Article 6(5) of Additional Protocol II is nuanced by the recognition that amnesties do not necessarily mean forgoing justice altogether. It is possible to grant different types of amnesty that balance the need to guarantee the rights of victims with the need to uphold other rights,

32 On the subject of the anti-impunity or criminal turn in international law, see Karen Engle, "A Genealogy of the Criminal Turn in Human Rights", in K. Engle Zinaida Miller and D. M. Davis (eds), *Anti-Impunity and the Human Rights Agenda*, Cambridge University Press, Cambridge, 2016.

33 For a typology of amnesties and their political and peace-seeking functions, see Louise Mallinder, *Amnesty, Human Rights and Political Transitions*, Hart Publishing, Oxford, 2008.

34 Schabas and Engle provide an insightful summary of the historical debate on the possibility of societies with a violent past granting or not granting amnesty in the light of international law. W. Schabas, above note 2; K. Engle, Z. Miller and D. M. Davis, above note 2.

35 This was the case in South Africa, a landmark example of transitional justice and the use of amnesty to achieve truth and reconciliation. On this subject, see L. Mallinder, above note 33, p. 227.

36 W. Schabas, above note 2, p. 180.

37 The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General, UN Doc. S/2011/634, 12 October 2011, p. 18.

38 Sebastián Machado Ramírez, "Límites a la exoneración de responsabilidad en el derecho internacional: la selección y priorización de casos en la jurisdicción nacional", *Anuario Colombiano de Derecho Internacional*, Vol. 7, 2014.

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such as the right to peace.[39] An example of this is conditional amnesties which are granted when certain requirements are met, such as contribution to the truth-seeking and reconciliation process, the surrender of weapons, the non-repetition of violence, and reparation and restoration.[40] The duty to ensure that grave breaches of IHL are prosecuted does not necessarily involve meting out a form of retributive justice that prevents or hinders the transition to peace.[41] Different mechanisms can be implemented to bring perpetrators to justice, including imposing alternative penalties and punishments,[42] focusing prosecution efforts on those most responsible,[43] selecting and prioritizing cases[44] and employing restorative justice tools, such as dialogue, participation, apology and reparation.[45] It is, in fact, customary IHL that allows for the use of such tools to enable a society to overcome an armed conflict, by weighing the need for retributive justice against values and principles that might be considered more important, such as other victims' rights or the achievement of a lasting peace.[46]

Use of IHL in the legal framework and functions of the JEP

The Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace between the Government of Colombia and the FARC-EP had two overarching aims that needed to be achieved to ensure a successful transition to peace.[47] The first was to guarantee the right of victims to truth, justice, reparation and non-repetition,[48] and the second was to ensure legal certainty for those involved in the conflict to facilitate their reintegration into society and the reconciliation process.[49] A key focus of the peace agreement was therefore

39 W. Schabas, above note 2, p. 198.
40 L. Mallinder, above note 33, p. 155.
41 S. Machado Ramírez, above note 38, p. 33.
42 L. Mallinder, above note 5, p. 221.
43 W. Schabas, above note 2, p. 180.
44 S. Machado Ramírez, above note 38, p. 33.
45 Kerry Clamp and Jonathan Doak, "More than Words: Restorative Justice Concepts in Transitional Justice Settings", *International Criminal Law Review*, Vol. 12, No. 3, 2012.
46 Rule 159 of customary IHL reads: "At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes." Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1.
47 The Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace contains six sections: (I) Comprehensive rural reform; (II) Political participation; (III) End of the conflict; (IV) Solution to the problem of illicit drugs; (V) Agreement on the victims of the conflict; and (VI) Implementation, verification and public endorsement. This article is concerned with Section V.
48 Colombian Office of the High Commissioner for Peace, Biblioteca del Proceso de Paz con las FARC-EP, "La Discusión del punto 5: Acuerdo sobre las Víctimas de Conflicto: 'Sistema Integral de Verdad, Justicia, Reparación y No Repetición', incluyendo la Jurisdicción Especial para la Paz y el compromiso sobre derechos humanos y de las medidas de construcción de confianza", Bogotá, 2018, p. 42.
49 Article 5 of Legislative Act 01 of 2017. This article establishes that the objectives are to "uphold the right of victims to justice; provide Colombian society with the truth; protect the rights of victims; contribute to

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victims' rights, and the Comprehensive System for Truth, Justice, Reparation and Non-Repetition (SIVJRNR) was created to address this issue.[50] The system is made up of three transitional justice mechanisms: the Commission for Truth, Reconciliation and Non-Repetition, the Special Missing Persons Unit, tasked with finding people who went missing as a result of the armed conflict, and the JEP, which is the component responsible for administering justice.

The principle underlying the operation of the SIVJRNR is the centrality of victims' rights. The JEP must therefore carry out its functions – which are to investigate, prosecute and punish serious human rights violations and grave breaches of IHL and grant legal benefits, such as amnesty, to perpetrators – with a view to guaranteeing the rights of victims and facilitating the reintegration of those who took part in the armed conflict. As will be seen below, in order to do this, the JEP can apply IHL as a direct source of law. The complex nature of IHL, owing to the convergence of the principles of military necessity and humanity, means that it can contribute to this dual function: IHL as a source of law for punishment and IHL as a tool for pardon. This section briefly describes the structure of the JEP, showing how this dual purpose of IHL is evident in its normative design and operation, specifically in the functions of two of its bodies: the Panel for Acknowledgement of the Truth and Responsibility and Determination of the Facts (Acknowledgement Panel) and the Panel for Amnesty and Pardon (Amnesty Panel).

The JEP's structure and legal basis

The JEP was established as part of Colombia's legal system, in accordance with the Peace Agreement, by Legislative Act 01 of 2017 which reformed the Constitution with the addition of transitional provisions. This Act created the JEP as a transitional justice mechanism that would operate independently to deal with acts constituting serious human rights and IHL violations committed in relation to the armed conflict in order to:

> uphold the right of victims to justice; provide Colombian society with the truth; protect the rights of victims; contribute to achieving a stable and lasting peace; and adopt decisions that provide legal certainty to those who participated directly or indirectly in the internal armed conflict with regard to the acts referred to herein.[51]

achieving a stable and lasting peace; and adopt decisions that provide legal certainty to those who participated directly or indirectly in the internal armed conflict with regard to the acts referred to herein".

50 *Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera*, available at: https://www.jep.gov.co/Marco%20Normativo/Normativa_v2/01%20ACUERDOS/Texto-Nuevo-Acuerdo-Final.pdf?csf=1&e=0fpYA0. English translation available at: https://undocs.org/en/S/2017/272.

51 Article 5 of Legislative Act 01 of 2017. For an overview of the operation of the JEP, see, for example, María Camila Correa Flórez and Andrés Felipe Martín Parada, "La Jurisdicción Especial para la Paz: un modelo de justicia transicional en Colombia", *Revista Electrónica de Derecho Internacional*, Vol. 3, No. 3, 2020.

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In order to implement these objectives, the JEP is structured into two levels: the Judicial Panels and the Peace Tribunal. There are three Judicial Panels: the Panel for Amnesty and Pardon, the Panel for Acknowledgement of the Truth and Responsibility and Determination of the Facts and the Panel for the Determination of Legal Situations. The Peace Tribunal is made up of the Trial Chamber for cases in which those accused have not acknowledged the truth or their responsibility, the Trial Chamber for cases in which those accused have acknowledged the truth and their responsibility, the Sentence Review Chamber and the Appeals Chamber, which is the last instance body of the JEP.[52] In this article, the functions of the Acknowledgement Panel and the Amnesty Panel will be described as they are the bodies that have used IHL most since the JEP came into operation.[53]

In order to perform their functions, the Acknowledgement Panel and the Amnesty Panel have a legal framework that relies on different sources of law: international law, ordinary domestic law and the specific legislation concerning the creation and operation of the JEP.[54] Referring to the JEP as a whole, Article 5 of Legislative Act 01 of 2017 provides that:

> For its rulings and judgments, the JEP shall make its own legal assessment of the acts in question under the SIVJRNR, based on the Colombian Penal Code and/or the provisions of international human rights law (IHRL), international humanitarian law (IHL) or international criminal law (ICL), with the mandatory application of the most-favourable-law principle.

This provision is supplemented by Article 23 of the Statutory Act on the Administration of Justice by the JEP (Act 1957 of 2019), which reads as follows:

> For the purposes of the SIVJRNR, the main applicable legal frameworks are international human rights law (IHRL) and international humanitarian law (IHL). For their rulings and judgments, the Peace Tribunal Chambers, the Judicial Panels and the Investigation and Prosecution Unit, shall make their own legal assessment of the acts in question under the SIVJRNR, based on the provisions of the general and special parts of the Colombian Penal Code and/or the rules of international human rights law (IHRL), international humanitarian law (IHL) or international criminal law (ICL), with the mandatory application of the most-favourable-law principle.

52 Article 7 of Legislative Act 01 of 2017.

53 The JEP began operating in March 2018. The Panel for the Determination of Legal Situations is responsible for granting members of the armed forces and police special treatment with regard to criminal matters and, for the discharge of this function, can also use the sources of international law listed in Article 5 of Legislative Act 01 of 2017 and Article 23 of Act 1957 of 2019.

54 The JEP has its own legal framework comprising: (I) Legislative Act 01 of 2017 which creates a section of transitional provisions in the Constitution to end the armed conflict and build a stable and lasting peace; (II) Act 1820 of 2016 which creates provisions on amnesty, pardons and special treatment with regard to criminal matters; (III) Act 1922 of 2018 which adopts rules of procedure for the JEP; (IV) Statutory Act 1957 of 2019 on the Administration of Justice by the JEP; and a battery of implementing regulations.

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> The resulting characterization may differ from a previous assessment made by judicial, disciplinary or administrative authorities as international law is considered to be applicable as a legal framework.

It can therefore be concluded that the JEP can use different legal regimes directly for the assessment of crimes committed in connection with the Colombian armed conflict in the cases brought before it.[55] In making its assessments, the JEP can use IHL to determine, for example, if a certain act constitutes a breach of IHL or, on the contrary, does not contravene the rules of IHL because it was carried out in accordance with the principle of military necessity and complies with the principles of distinction, proportionality and precaution. Every individual case needs to be analysed in the light of each of these principles to determine whether a given act is contrary to IHL or not. As will be seen below, this poses an interpretative challenge for the JEP.

The JEP can classify a particular act as it deems fit even if an ordinary court has already heard the case and made a different assessment. The JEP's assessment is what determines whether the perpetrator is eligible for amnesty or will face punishment. The JEP's power to make such assessments itself, based on IHL, gives it the legal and constitutional capacity to classify certain acts as war crimes in the light of the Rome Statute and/or customary law. Here, IHL, as used by the JEP, can be considered a tool for imposing punishment.[56]

The implications are at least threefold. The first, and most evident, is the imposition of penalties by the JEP; if it can classify acts as war crimes, there must be a punishment system in place.[57] The second is that if perpetrators

55 The JEP has three jurisdictional criteria: personal – members of the FARC-EP and the armed forces and police are required to appear before the JEP for their involvement in acts committed during the armed conflict or in direct or indirect connection with it; and subject matter and temporal – "the JEP only has preferential jurisdiction to hear cases concerning acts directly or indirectly associated with the armed conflict and … only those committed before 1 December 2016. Ordinary courts of law therefore have jurisdiction over crimes committed after this date" (M. Correa Flórez and A. Martín Parada, above note 51, p. 35). State agents and third parties can appear before the JEP voluntarily if the jurisdictional criteria are met.

56 On how war crimes have been a way of incorporating or absorbing grave breaches of IHL, see, for example, Marko Öberg, "The Absorption of Grave Breaches into War Crimes Law", *International Review of the Red Cross*, Vol. 91, No. 873, 2009.

57 The JEP can impose three types of punishment. (I) It can impose penalties, according to its own punishment system, on those who disclose the whole truth and fully acknowledge their responsibility when required before the Acknowledgement Panel. The penalties include participating in works, projects and activities with reparative and restorative purposes and a sentence of five to eight years to be served in a non-prison setting if the person played a determining role or from two to five years if they did not. These penalties, which are imposed by the Trial Chamber for cases in which there has been full disclosure of the truth and admission of responsibility, effectively restrict the rights and freedoms of the perpetrators. (II) Alternative penalties are imposed by the Trial Chamber for non-acknowledgement cases on those who only tell the truth and acknowledge their responsibility at a later stage in the process but before sentencing. They consist of a custodial prison sentence of between five and eight years if the person was a participant in the acts in question. (III) Lastly, ordinary sanctions are imposed on those who are convicted without having acknowledged their responsibility. They consist of custodial prison sentences of between fifteen and twenty years imposed by the Trial Chamber for non-acknowledgement cases. On this subject, see Observatory on the Special Jurisdiction for Peace (ObservaJEP), "Cápsula informativa. Sanciones propias y TOAR: ejes y procedimientos", 8

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acknowledge their responsibility in the commission of such acts, they are admitting to society, themselves and their victims that they are war criminals and must apologize and make reparations to the victims. In the words of the JEP, classifying acts as war crimes helps to restore the "dignity of victims because it acknowledges that what happened was part of a predetermined plan systematically implemented against the population".[58] The third implication is that classifying one or more acts as war crimes means that perpetrators cannot be granted amnesty or exempted from criminal prosecution for those acts.[59]

Use of IHL by the Acknowledgement Panel and the Amnesty Panel

The Acknowledgement Panel's central function is to decide which acts are related to the armed conflict and carry out a legal assessment to classify them so that it can be determined in which cases penalties should be imposed and in which cases amnesty or legal benefits can be granted. The Acknowledgement Panel is therefore the body responsible for exercising the power to establish the legal characterization of the facts, based on the sources of law the JEP can apply, in order to determine what crimes those involved in the conflict are to be charged with. The Panel first prioritizes and selects the cases to be heard and then opens what has been termed a "macro-case". This is the investigative method employed by the JEP, starting from the premise that it would be impossible to investigate all the violations committed during the armed conflict.

This macro-case approach enables the JEP to select the most serious and representative violations and investigate, prosecute and punish those responsible. A series of criteria must be met and certain steps taken to determine whether or not a macro-case should be opened. The assessment takes into account territorial, differential and gender considerations, with some cases being prioritized because they involve a specific situation in a given area or a particular issue.[60] If the criteria are met, a macro-case is opened and the Panel examines reports from victims' organizations and government institutions, the records of cases heard in ordinary courts and the accounts of the perpetrators and the victims.[61] Based on this information, the Panel draws up the findings of fact, and

June 2020, available at: http://observajep.com/images/capsulas/13274137075ee04e480b4100.00617661.pdf.

58 JEP, Acknowledgement Panel, Ruling 019 of 2021, 26 January 2021, footnote 1633, p. 258.

59 While this article is concerned with amnesty granted to guerrilla fighters, it should not be forgotten that there is also the Sentence Review Chamber that can grant legal benefits to soldiers; the condition that benefits cannot be granted for war crimes applies here too.

60 JEP, "Criterios y metodología de priorización de casos y situaciones en la Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas", available at: https://www.jep.gov.co/Documents/CriteriosYMetodologiaDePriorizacion.pdf.

61 The JEP has opened seven macro-cases (Case 001 "Hostage-taking and Other Severe Deprivation of Physical Liberty by FARC-EP Members" opened on 6 July 2018; Case 002 "Serious Human Rights Situation Affecting People in the Municipalities of Tumaco, Ricaurte and Barbacoas (Department of Nariño)" opened on 10 July 2018; Case 003 "Deaths Unlawfully Reported by State Agents as Casualties in Combat" opened on 17 July 2018; Case 004 "Humanitarian Situation in the

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those alleged to have participated in the acts in question either admit their responsibility or deny involvement. The Acknowledgement Panel then submits its conclusions of law to the Peace Tribunal.[62]

In both the findings of fact and the conclusions of law, the Panel can make its own assessment for the legal characterization of the facts, using IHL and other sources of law. IHL provides the legal basis for imposing penalties if the Panel classifies an act as a war crime, in which case the severity of the crime precludes the possibility of the perpetrators being eligible for amnesty or legal benefits. If, on the other hand, the Panel finds that an act is not a war crime, classifying it as an action forming part of the hostilities and not therefore a serious breach of IHL or as an action permissible in an armed conflict on the grounds of military necessary and complying with the principles of proportionality, precaution and distinction, it can refer the case to the corresponding Panel – the Amnesty Panel or the Panel for the Determination of Legal Situations – so that amnesties, pardons or legal benefits can be granted, as appropriate.[63]

The Amnesty Chamber is governed by Act 1820 of 2016, which develops the provisions of the Peace Agreement on this question. Its main function is to assess the granting of transitional justice benefits to former FARC-EP members, including amnesty, pardons and conditional release. In its assessment, the Amnesty Chamber must make various determinations. First, it must establish that the alleged acts are associated with the armed conflict, by making:

> a value judgment on the connection between the unlawful acts the alleged perpetrator is charged with and the conduct of the armed conflict. It must be established whether the act was committed as a result of, in the course of or in direct or indirect connection with the armed conflict.[64]

Municipalities of Turbo, Apartadó, Carepa, Chigorodó, Mutatá and Dabeiba (Department of Antioquia) and El Carmen del Darién, Riosucio, Unguía and Acandí (Department of Chocó)" opened on 11 September 2018; Case 005 "Humanitarian Situation in the Municipalities of Santander de Quilichao, Suárez, Buenos Aires, Morales, Caloto, Corinto, Toribío and Caldono (Department of El Cauca)" opened on 8 November 2018; Case 006 "Victimization of Patriotic Union (UP) Members" opened on 4 March 2019; Case 007 "Recruitment and Use of Children in the Colombian Armed Conflict" opened on 6 March 2019.

62 Those who admit their responsibility are sentenced according to the SIVJRNR punishment system by the Trial Chamber for cases in which there has been full acknowledgement of the truth and responsibility, and proceedings are instituted against those who deny the allegations in the Trial Chamber for non-acknowledgement cases.

63 Article 79 of Act 1957 of 2019.

64 JEP, Panel for Amnesty and Pardon, Ruling SAI-AOI-001-2018, 8 November 2018; JEP, Panel for Amnesty and Pardon, Ruling SAI-AOI-002-2018, 9 November 2018; JEP, Panel for Amnesty and Pardon, Ruling SAI-AOI-003-2018, 27 December 2018; JEP, Panel for Amnesty and Pardon, Ruling SAI-AOI-006-2019, 4 February 2019.

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Second, it must establish if the crime is political in nature,[65] within the meaning of Article 23 of Act 1820 of 2016.[66] The third determination is whether the act is one of the crimes for which no amnesty or legal benefits of any kind are permitted under any circumstances. These crimes are listed in the above-mentioned article.[67] It is at this point, when assessing whether legal benefits can be granted, that the Amnesty Panel has used IHL to establish whether or not the act in question is a war crime.

Article 23 of Act 1820 of 2016 stipulates that the Panel shall grant amnesty for political and related crimes and lists the criteria for establishing the connection. It also provides that:

In no case shall amnesties or pardons be granted for the following crimes:

a) Crimes against humanity, genocide, **war crimes**, hostage-taking or other severe deprivation of physical liberty, torture, extrajudicial executions, enforced disappearance, forcible rape and other forms of sexual violence, child abduction, forced displacement and the recruitment of child soldiers, in accordance with the provisions of the Rome Statute. If the terms "vicious" or "heinous" or any other such term with a similar meaning are used in the sentencing judgment, the bar on amnesties and pardons shall only apply to unlawful acts listed here as not eligible for amnesty (emphasis added).

Amnesty cannot therefore be granted for acts classified as war crimes. To determine whether an act constitutes a war crime, the Panel must use the criteria established by the Appeals Chamber which are based on IHL and its guiding principles and on ICL and which are also consistent with international jurisprudence on the matter:

65 The Colombian Constitutional Court defines "political crime" as "a crime motivated by a sense of justice that leads perpetrators and co-perpetrators to adopt attitudes that are unlawful under the constitutional and legal framework in order to achieve their aim", Colombian Constitutional Court, Judgment C-009 of 1995, 17 January 1995. This definition was supplemented by the affirmation in a Colombian Supreme Court judgment that a political crime is one that harms or jeopardizes "the political, constitutional or legal organization of the state", Criminal Cassation Chamber of the Colombian Supreme Court, Judgment of 5 December 2017 (25931). In view of the altruistic motivation of political crimes, those who commit them cannot be treated in the same way as those who commit other types of crimes. Paragraph 17 of Article 150 of the Colombian Constitution provides that amnesties can only be granted for the political crimes listed in Title XVII of the Penal Code (rebellion, sedition, riot, conspiracy and seduction of troops). Amnesty can also be granted for crimes related to political crimes because, as the Constitutional Court states, "[w]ithout the nexus, political crimes would have no effect within the legal system. It therefore follows that the effects reserved for political crimes should also apply to related crimes", Colombian Constitutional Court, Judgment C-577 of 2014, 6 August 2014.

66 This Act, which establishes provisions on amnesties, pardons and special criminal treatment, among others, forms an integral part of the JEP's legal framework and governs everything relating to the granting of amnesties and special criminal treatment for members of armed and security forces.

67 Article 23. Criteria for determining whether an unlawful act is related to a political crime. "The Panel for Amnesty and Pardon shall grant amnesties for political and related crimes. Crimes considered to be related to political crimes are those that meet any of the following criteria: a) crimes specifically related to the conduct of the rebellion and committed in the course of the armed conflict, such as killing in combat permitted under international humanitarian law and the capture of combatants during military operations; b) crimes directed against the government and constitutional order; and c) crimes committed to facilitate, support, finance or conceal the rebellion. The Panel for Amnesty and Pardon shall determine whether an unlawful act is related to a political crime on a case-by-case basis."

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a. an act committed in the context of an international or non-international armed conflict within the meaning of Article 62(1) of the Statutory Act on the Administration of Justice by the JEP;
b. an act that constitutes a violation of a rule of international humanitarian law applicable to the conflict;
c. an act constituting a gross breach which exceeds the established threshold of seriousness or severity in that it affects the fundamental interests of victims – individuals, groups or society – harming or endangering their fundamental rights in a socially significant manner.[68]

The Amnesty Panel also uses IHL as a source of law for granting amnesty. The JEP's regulations are based on Article 6(5) of Protocol II additional to the Geneva Conventions which requires government authorities to grant the broadest possible amnesty at the end of the hostilities.[69] The Colombian Constitutional Court has itself recognized that the amnesty mechanism was necessary to achieve reconciliation and peace:

> The Court finds that (i) although transitional justice processes implemented in different parts of the world and at different points in time have their own specific characteristics, the granting of legal benefits to those who lay down their weapons is a measure consistently used in the quest for peace through reconciliation processes; (ii) in particular, the granting of the broadest possible amnesty at the end of the hostilities is a mechanism recognized under international humanitarian law, specifically in Article 6(5) of Protocol II additional to the Geneva Conventions; (iii) in view of the situation, it is not only understandable but inevitable that, in the peace process undertaken by the Government of Colombia and the FARC-EP, this should be a central and critical issue in the achievement of a negotiated end to the internal armed conflict;[70]

It is clear from this legal framework and the functions of the two Panels that IHL was incorporated into the JEP as a dual-purpose tool. It serves as a basis for imposing penalties in two ways: the first is when the Acknowledgement Panel exercises its power to make its own legal characterization of the facts in the light of IHL and determine whether the act in question constitutes a war crime or not; the second is when the Amnesty Panel uses IHL and its principles and customary law to establish that a given act constitutes a war crime and is therefore not eligible for amnesty. In making such assessments, the Panels must consider the IHL principle of humanity and demonstrate that the act manifestly exceeded the limits that IHL imposes on behaviour in an armed conflict, such as the principles governing the conduct of hostilities and the rules on the protection of those who are not or are no longer taking part in the hostilities. The next section provides an overview of some examples of such assessments made by the JEP.

68 JEP, Appeals Chamber, Judgment TPSA-AM-203, 27 October 2020, Case of Jaime Aguilar, p. 27.
69 Article 8 of Act 1820 of 2016, "Pursuant to recognition of political crimes and in accordance with international humanitarian law, at the end of the hostilities, the Government of Colombia shall grant the broadest possible amnesty."
70 Colombian Constitutional Court, Judgment C-007 of 2018, 1 March 2018.

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IHL is also used by these Panels as a tool for pardoning crimes. The Acknowledgement Panel uses IHL when it refers cases to the Amnesty Panel because it considers that the act in question does not constitute a grave breach of IHL or can be classified as an action that is lawful in armed conflict. When the Amnesty Panel makes assessments in cases that have not been dealt with by the Acknowledgement Panel, it applies this IHL logic to grant the broadest possible amnesty, as mentioned above. This illustrates how both the principle of humanity and the principle of military necessity play a central role in the JEP. In spite of the antagonism caused by its principles, IHL also seems to facilitate the complementarity of the functions of the two Panels which, through the complex nature of this body of law, can use its provisions to fulfil their objectives.

Some examples of the challenges faced by the JEP in its use of IHL

The work of the Acknowledgement and Amnesty Panels has thrown up a number of challenges for the JEP associated with the complex nature of IHL. This section describes cases that highlight three challenges the JEP has faced when applying IHL to determine whether the acts in the case it is dealing with are eligible for legal benefits, such as amnesty, or whether their severity precludes this option. The first challenge arose in determining whether members of the National Police are protected persons under IHL. This is a complicated issue because of the specific characteristics of the armed conflict and the structure of the police service in Colombia. The second challenge was posed in the assessment of one of the main crimes committed by FARC-EP members: kidnapping. Examining this crime in the light of IHL was a matter of crucial importance because kidnapping was a practice carried out on a massive scale and the conclusions would affect the eligibility of FARC-EP fighters, particularly high-ranking members, for legal benefits. The third challenge was related to the assessment of an attack on the Military Academy in Bogotá involving a car bomb, which was originally classified as an act of terrorism under domestic law. The challenge in this case was to determine whether the crime was eligible for amnesty in the light of IHL principles, despite having previously been classified as an act of terrorism.

Use of IHL to determine whether members of the National Police are protected persons

In Ruling AOI-006 of 2019, the Amnesty Panel assessed various crimes that Jaime Aguilar had been charged with. One of them was a FARC-EP attack on a local police unit (CAI)[71] in the city of Villavicencio in Meta. Explosives and firearms were used

71 *Comandos de Atención Inmediata* (CAI) in Colombia are police units with a relatively small jurisdiction, strategically located in peripheral urban areas of the municipalities, localities, communes and districts of

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in the attack, which resulted in the destruction of the CAI and the death of a police officer.[72] This case is relevant because it brings to the fore the debate about whether police officers can be considered protected persons in NIACs under IHL. The answer to this question will determine whether the killing of a police officer is a breach of IHL and therefore a war crime. The Amnesty Panel recognized that, given the "complexities of Colombia's internal armed conflict, some members of the National Police could be deemed combatants or persons taking a direct part in the hostilities".[73] On the same matter, the Appeals Chamber also mentioned the complexity of IHL, pointing out that there is no consensus on the question of the status of police officers even though, in principle, they are entitled to the same protection as civilians because they are not considered to be persons participating in the hostilities. However, in Colombia, they can lose this status if they: (I) belong to units assigned to carry out military operations or work alongside military forces; or (II) individually take a direct part in the hostilities.[74]

To assess this question, the Amnesty Panel had to analyse whether either of the conditions that would lead to police officers losing their status as protected persons was met in the attack on the CAI. The Panel found that the attack did not comply with the principles of distinction, proportionality or precaution because the police officers stationed at the CAI were not directly participating in the hostilities and CAIs were not assigned to carry out military operations.[75] The Panel therefore held that the attack constituted a grave breach of IHL, which meant that it was a war crime under Article 8.2(c)(i) of the Rome Statute.[76] As the act was classified as a war crime, the Panel ruled that amnesty could not be granted. In this case, a restrictive interpretation was therefore made of the rules of IHL, with the Panel giving precedence to the principle of humanity and rejecting the argument that the attack was lawful because it was a military action.

This debate is important because some police officers could have performed duties or carried out activities during the armed conflict in Colombia that would result in them being considered to have participated in the hostilities. CAIs operate under the authority of the Ministry of National Defence,[77] and it was not unusual, in some parts of the country, for them to accompany or assist in

the main cities with these administrative divisions. The purpose of the CAIs is to orient and strengthen the police presence and protect citizens' rights and freedoms in their local area. By working closely with the community and local authorities, they enhance the decentralization of the services provided by police stations for more community-based policing. Their main function is to remain in "constant contact with the community to prevent crime and wrongdoing and ensure public safety, security and peaceful coexistence in communities, with the efficient and timely use of available resources and technological tools". See Policía Nacional, *Manual para el Comando de Atención Inmediata*, Bogotá, July 2009, available at: https://www.camara.gov.co/sites/default/files/2020-09/RTA.ANEXO_.MINDEFENSA.MANUAL.ESTATUTO%20DE%20OPOSICI%C3%93N.pdf.

72 Although in this case the Amnesty Panel also assessed blasts at a dock and a hotel and the destruction of a bridge, for the purposes of this article, only the CAI attack will be discussed.

73 JEP, Panel for Amnesty and Pardon, Ruling AOI-006 of 2019.

74 JEP, Appeals Chamber, Judgment TP-SA-AM-168, 18 June 2020, Case of Luis Alberto Guzmán Díaz.

75 JEP, Panel for Amnesty and Pardon, Ruling AOI-006 of 2019.

76 *Ibid.*

77 Decree 1814 of 1953.

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military operations. Some of them were assigned to participate in activities related to the conflict on a continuous basis. This makes it difficult to determine whether an attack on the police complied with the principle of distinction because establishing which members of the police were assigned to perform military functions on a continuous basis and which were not is not easy. This debate has also played out in other contexts, for example, in the case involving the Revolutionary United Front brought before the Special Court for Sierra Leone, in which the Trial Chamber ruled that, on occasions, weapon bearers (such as the police in the case of Colombia) that are not a legitimate military target can become one if they participate in the hostilities.[78]

Use of IHL to pardon sentences imposed under domestic law

On 19 October 2006, a bomb exploded outside the Military Academy in Bogotá,[79] causing material damage and injuring thirty-three people at the academy and in the vicinity of the nearby Military University. It was an attack carried out by the FARC-EP involving the detonation of an explosive device placed inside a car. The investigation into the blast established that Ms Marilú Ramírez had participated in the attack, and she was convicted by an ordinary criminal court of the crimes of terrorism, attempted murder and grievous bodily harm.[80] In Ruling SAI-AOI-D-003-2020, the Amnesty Panel found that the attack complied with the principles of distinction, precaution and proportionality and did not therefore constitute a breach of IHL. It also found that the attack did not constitute a war crime because, in addition to complying with the above-mentioned principles, it was not indiscriminate and, in this particular case, the car bomb was not a prohibited means of warfare under IHL.[81] It therefore decided to grant amnesty to Ms Ramírez on the grounds that the act was considered to be related to a political crime because it was part of a lawful military operation carried out by the FARC-EP guerrilla group against the armed forces.[82]

The Panel reached this conclusion on the basis of its determination that the Military Academy was a legitimate military target in accordance with Rule 8 of customary IHL. According to this rule, for an object to be considered a military objective: (I) it must be an object that makes an effective contribution to military action; and (II) its destruction must offer, in the circumstances prevailing at the time, a definite military advantage. In the opinion of the Amnesty Panel, "the military purpose and nature of the Military Academy made it a military objective

78 Special Court for Sierra Leone, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Judgment, 2 March 2009.
79 According to its website (https://esdegue.edu.co/), the Military Academy (Escuela Superior de Guerra) "is a higher military educational institution that trains officers of the armed forces, the future generals and admirals of the Colombian Army, Navy and Air Force and senior figures in Colombian society in national security and defence, with a view to strengthening channels of communication and integration".
80 JEP, Panel for Amnesty and Pardon, Ruling SAI-AOI-D-003-2020, 12 February 2020, Case of Marilú Ramírez Baquero.
81 *Ibid.*
82 *Ibid.*

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at the time of the incident and, based on an assessment of the action in the prevailing circumstances, it offered a definitive military advantage".[83]

The Panel also found that "although a car bomb that explodes at the site of a military target located within an urban area can potentially have indiscriminate effects on civilians and civilian property, based on the information available, in this case no such effects were observed".[84] In the same vein, it established that, in light of Article 3(7) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to the Convention Prohibiting Certain Conventional Weapons), the car bomb used was not a prohibited weapon because the attack was directed against a military target and not civilians or civilian objects.[85]

The conclusion reached by the Panel was at odds with the assessment made by Colombia's ordinary courts, which convicted Ms Ramírez of terrorism, among other crimes. According to domestic criminal law, terrorism is any act that seeks to instil or spread "fear and terror among the population or part of it by carrying out actions that endanger people's lives, safety or freedom or threaten buildings, means of communication, transport, or water and power facilities, using means capable of causing havoc".[86] In the Colombian context, acts carried out by the FARC-EP similar to those reassessed in this case have been classified as terrorism, which would seem to suggest that the political motivation of these acts, and therefore the existence of a NIAC, were ignored. Moreover, the level of severity of terrorist acts was high in both material and symbolic terms. In this case, the JEP granted amnesty for this crime, based on IHL and its principles, evidencing the permissive manifestation of this body of law and its use for pardoning crimes.[87]

Use of IHL to assess unlawful practices committed on a massive scale in the armed conflict

In Ruling 019 of 2021 (findings of fact and conclusions of law), the Acknowledgement Panel indicted a number of former FARC-EP Secretariat members for the war crime of hostage-taking.[88] The ruling established that

83 *Ibid.*, p. 55.
84 *Ibid.*, p. 43.
85 *Ibid.*, p. 48.
86 Article 343 of the Colombian Penal Code.
87 It is important to note that IHL clearly prohibits acts of terrorism targeting civilians and people not taking part in the hostilities. It could therefore be argued that an attack on a military target would not constitute an act of terrorism. See Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Article 33; Additional Protocol I, Article 51(2); and Additional Protocol II, Articles 4 and 13.
88 They were also charged with other acts of severe deprivation of liberty as a crime against humanity. The individuals indicted for war crimes and crimes against humanity were Rodrigo Londoño Echeverry, Jaime Alberto Parra, Miltón de Jesús Toncel, Juan Hermillo Cabrera, Pablo Catatumbo, Pastor Lisandro Alape, Julián Gallo Cubillos and Rodrigo Granda Escobar in Case 001 concerning hostage-taking and other severe deprivation of liberty by the FARC-EP.

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kidnapping, as it is called in domestic criminal law, was a systematic policy pursued by the FARC-EP in the period from 1993 to 2012 in Colombia:

> the policy consisted of indiscriminate acts of deprivation of liberty, as a means of securing funds to finance the armed organization, under the threat of disappearance or murder if the ransom was not paid. This *de facto* policy resulted in a pattern of conduct, particularly with regard to the *modus operandi* (discriminate and indiscriminate deprivation of liberty) and the characteristics of victims (age and financial status).[89]

The Panel was of the opinion that, under Article 8(2)(c)(iii) of the Rome Statute, these acts of deprivation of liberty constituted the war crime of hostage-taking, considered one of "the most serious violations of IHL because it seeks to compel someone to act or refrain from acting as a condition for the release, life or safety of the person held captive".[90] It concluded that the level of severity of this crime was high because:

> (I) the victims of the war crime of hostage-taking are individuals who are taking no part in the conflict or are *hors de combat*, including soldiers and police officers; (II) in the case of combatants *hors de combat* being deprived of their liberty, it could be argued that there was no intention, at the time of their capture, to make their release conditional on the release of guerrilla prisoners [and] that they were deprived of their liberty for reasons of military necessity [but] from the moment the release of guerrilla prisoners is made a condition for their release, this deprivation of liberty becomes the war crime of hostage-taking; and (III) it is not necessary for there to be an intention to demand something in exchange for the release or life of the hostage at the time of the deprivation of liberty. This intention can arise subsequently during the time the person is deprived of their liberty. [Therefore] the act is considered to constitute hostage-taking even when the initial detention was lawful or not prohibited because it is not the manner in which the hostage falls into the hands of the perpetrator that defines the crime but the intention to impose conditions for their release.[91]

This ruling is important for the application of IHL because, in addition to directly applying IHL to acts already determined to be kidnappings by an ordinary criminal court, it changes the name of the case "for technical reasons relating to the legal

89 JEP, Acknowledgement Panel, Ruling 019 of 2021, 26 January 2021, p. 90.

90 The Panel recalled that the elements of this crime are those established in Article 8(2)(c)(iii) of the Rome Statute: "1. The perpetrator seized, detained or otherwise held hostage one or more persons. 2. The perpetrator threatened to kill, injure or continue to detain such person or persons. 3. The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons. 4. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities. 5. The perpetrator was aware of the factual circumstances that established this status." UN General Assembly, Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002).

91 JEP, Acknowledgement Panel, Ruling 019 of 2021, 26 January 2021, para. 719.

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characterization of the facts"[92] because, according to the Acknowledgement Panel, the correct term is "hostage-taking" not "kidnapping". This determination by the Acknowledgement Panel means that amnesty cannot be granted for such acts and recognizes the "international relevance of these [acts] insofar as they could be tried by the International Criminal Court".[93] It is also a recognition that the acts "are more serious than domestic crimes"[94] given that they not only seriously affected the victims, but also "(I) affected humanity as a whole; (II) were not isolated events, but part of a policy; and (III) violated the rules of international law".[95] Although this conclusion leaves open the question of what would happen with reciprocal exchanges of people deprived of their liberty in a NIAC – an issue beyond the scope of this article – in this case, it is clear that the Acknowledgement Panel is applying IHL with a restrictive use of its rules which elevates these kidnappings to the category of international crimes, recognizing their seriousness, and provides the legal basis for punishing them.

A comparison of this case and the Military Academy case highlights the dual use of IHL by the JEP. On the one hand, in the Military Academy case, IHL enabled the Amnesty Panel to pardon an act deemed a serious crime under domestic law. On the other, in the hostage-taking case, IHL enabled the Acknowledgement Panel to elevate a different act, also considered a serious crime under domestic law, to the category of war crime. This dual use of IHL not only has implications for those appearing before the JEP, but also for victims and the recognition of their rights. This is because when it is established that a given act complies with IHL, the rights of the victims are not acknowledged, as in the case of the Military Academy attack. Then again, when it is determined that a given act is a war crime or crime against humanity, as in the findings of fact ruling in Case 001, questions could be raised about whether this violates the right of those appearing before the JEP not to be tried twice for the same crime.

Conclusions

The application of IHL in the transitional justice system in Colombia highlights the complex nature of this body of law, in which restrictive and permissive elements interact. The configuration and interaction of these elements is influenced by the historical development of IHL and the two cardinal principles underlying this entire body of law: the principle of military necessity and the principle of humanity. This characteristic of IHL plays into the twin goals of transitional justice, which are to serve justice and achieve peace. Transitional justice mechanisms such as the JEP use IHL both in their normative design and operation and in adjudicating the cases brought before them. As has been shown,

92 ObservaJEP, "Informative Capsule: Judgment on Case 001", 9 February 2021, p. 1, available at: http://observajep.com/images/capsulas/101562074860252052274128.91650344.pdf.
93 *Ibid.*
94 *Ibid.*
95 *Ibid.*

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IHL is used, on the one hand, as the basis for punishing acts of violence that constitute grave breaches of IHL or qualify as war crimes and, on the other, as a source of law for the adoption of measures such as amnesty, subject to certain conditions (for example, they are not permitted in cases involving war crimes), which facilitate the reintegration of those involved in the armed conflict and contribute to political and negotiated solutions for peace. Cases involving atrocities committed in an armed conflict, such as the FARC-EP kidnappings in Colombia, can be assessed in the light of IHL to establish their severity and ensure that the perpetrators do not go unpunished. Then again, acts considered to constitute terrorism or serious crimes under domestic law can be reassessed in the light of IHL and reclassified as military actions that do not violate the rules of this body of law and can therefore be pardoned.

It can be inferred from these different uses of IHL in transitional justice that its complex nature is not necessarily an undesirable feature. On the contrary, it can facilitate the efforts of transitional justice mechanisms such as the JEP in the pursuit of their goals, which are to serve justice and achieve peace in compliance, in both instances, with international standards. However, the evidence presented in this article, drawn from the Colombian experience, will no doubt be the subject of future debates and contestations. There is no denying that the ambiguities in IHL can also hinder the consistent application of its rules and principles. This can lead to situations in which similar acts and practices are assessed differently, resulting in punishment in some cases and pardon in others. This difficulty underlines the importance of IHL being regarded as a legal regime that is under constant development and construal, as mentioned above, and whose implementation and interpretation, rather than a definitive definition of its nature and principles, determine its scope and purpose as a formula for achieving justice and peace at the end of an armed conflict.

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