

Implementation of War Crimes in Latin America: An Assessment of the Impact of the Rome Statute of the International Criminal Court

Salvador Herencia Carrasco*

Senior jurisdictional advisor, Constitutional Court of Peru, Peru
Researcher, Human Rights Research and Education Centre, University of Ottawa,
Ottawa, ON, Canada

Abstract

The implementation of the Rome Statute in Latin America continues to face structural gaps caused by a lack of comprehensive implementation of all the elements of the treaty. In the case of war crimes legislation, only seven countries have adopted specific regulations implementing Article 8 of the Rome Statute or grave violations of international humanitarian law. The main problem persists in the fact that there has not been a significant implementation of Additional Protocol I to the 1949 Geneva Conventions as a complement to Article 8 of the Rome Statute. Also, regulation has focused on persons and property, leaving the criminalization of means and methods of warfare as well as the use of certain weapons behind.

Keywords

Rome Statute; international humanitarian law (IHL); war crimes; Latin America; implementation; complementarity

1. Introduction

Latin America has been a strong supporter of the Rome Statute of the International Criminal Court (“ICC”).¹ Since the adoption of the treaty, fifteen² out of nineteen³ Latin American countries have become State Parties. At the regional level,

*¹ E-mail: salvadorherencia@yahoo.com. This article solely reflects the personal opinion of the author and does not represent the institutional position of the Andean Commission of Jurists, the Constitutional Court of Peru or the Human Rights Research and Education Centre of the University of Ottawa.

¹ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 3, 37 I.L.M. 999 (entered into force 1 July 2002).

² As of 11 June 2010, the fifteen Latin American States that have ratified the Rome Statute are the following: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela.

³ As of 11 June 2010, the four Latin American States that have not ratified the Rome Statute are the following: Cuba, El Salvador, Guatemala and Nicaragua.

since 1999 the Organization of American States (“OAS”) has adopted annual resolutions on the promotion of the ICC,⁴ as well as guiding principles on judicial cooperation with the Court.⁵ Considering that Latin America has an ongoing issue of “dealing with the past”,⁶ these efforts constitute basic yet significant steps toward strengthening and ensuring not only the integrity of the Rome Statute but also the rule of law in general.

Regarding the promotion and application of international humanitarian law (IHL), the Rome Statute has contributed for the implementation of the Geneva Conventions, especially regarding war crimes. Before the ICC, IHL legislation was circumscribed to specific crimes committed during an international armed conflict⁷ under the jurisdiction of military tribunals.⁸ On the political level, the OAS has also adopted annual resolutions regarding the promotion and respect of IHL.⁹

Despite these achievements, the implementation of the Rome Statute in Latin America continues to face structural gaps caused by a lack of comprehensive implementation of all the elements of the treaty. In this sense, there has been only a partial fulfilment in the obligations regarding the complementarity principle of the Rome Statute and, to a lesser degree, of the cooperation principle.

National legislation efforts could best be described as a *chiaroscuro* situation. On one hand, there has been significant progress concerning the adoption of specific crimes, as genocide and crimes against humanity (mainly enforced disappearances and torture) have been regulated by national legislations along with a substantial interpretation and enforcement by national courts,¹⁰ as well as the core general principles of international criminal law.¹¹ However, there is a deficit in the implementation of the other elements of the international crimes;

⁴ OAS, General Assembly, 40th Regular Sess., *Promotion of the International Criminal Court*, AG/RES. 2577 (XL-O/10), 2010.

⁵ OAS, Inter-Juridical Committee, 72nd Regular Sess., *Promotion of the International Criminal Court*, CJI/Res. 140 (LXXII-O/08), 2008.

⁶ See: Kai Ambos, Gisela Elsner and Ezequiel Malarino (eds.), *Justicia de Transición. Con Informes de América Latina, Alemania, Italia y España* (Montevideo: Fundación Konrad Adenauer, 2009).

⁷ See: Kai Ambos and Ezequiel Malarino (eds.), *Persecución Penal Nacional de Crímenes Internacionales en América Latina y España*, Montevideo: Fundación Konrad Adenauer, 2003, pp. 593–742.

⁸ In the majority of the Latin American cases, Military Codes were adopted in the 60’s and 70’s, not reflecting current IHL, especially the 1977 II Additional Protocols to the Geneva Conventions.

⁹ OAS, General Assembly, 40th Regular Sess., *Promotion of and Respect of International Humanitarian Law*, AG/RES. 2575 (XL-O/10), 2010.

¹⁰ See: Kai Ambos, Gisela Elsner and Ezequiel Malarino (eds.), *Jurisprudencia latinoamericana sobre Derecho Penal Internacional*, Montevideo: Fundación Konrad Adenauer, 2008.

¹¹ See: Kai Ambos, Ezequiel Malarino and Jan Woishnick (eds.), *Dificultades Políticas y Jurídicas en la Ratificación o Implementación del Estatuto de Roma de la Corte Penal Internacional*, Montevideo: Fundación Konrad Adenauer, 2006.

especially war crimes established under Article 8 of the Rome Statute as well as judicial cooperation mechanisms with the ICC set in Part IX and Part X of the treaty.¹²

The reason for this situation comprehends technical and political challenges. Under a political scope, with the sole exception of Colombia, Latin American countries do not assess as a feasible possibility the perpetration of violations of IHL or war crimes in their territories, instead focusing their efforts on the other core international crimes. On a legislative level, the great number of offenses contemplated in Article 8 presents a challenge for national parliaments, despite sustained efforts by the International Committee of the Red Cross and other organizations to provide technical assistance.¹³

The purpose of this article is to highlight the main characteristics of the treatment of war crimes in Latin American countries after the adoption of the Rome Statute in 1998 and to determine the major challenges regarding implementing legislation and the interpretation of IHL by courts.

2. Interpretation of IHL Norms by the IACHR

An element that must be taken into consideration is that the prosecution of international crimes in Latin America, especially crimes against humanity, would not have been possible without the judicial framework developed by the Inter-American Court of Human Rights (“IACHR”).¹⁴ This regional court has drafted a judicial cross-fertilization between international human rights law, international criminal law and, in a minimal degree, IHL to address human rights violations. Under the terms of the American Convention on Human Rights,¹⁵ IHL violations are not subject to the competence of the IACHR, halting the advancement of jurisprudence over the matter.

Although the cases examined by the IACHR are different than those that fall within the jurisdiction of the ICC, the Rome Statute and international criminal law as a whole have been a source of interpretation and for the determination of

¹² See: Kai Ambos, Gisela Elsner and Ezequiel Malarino (eds.), *Cooperación y Asistencia Judicial con la Corte Penal Internacional*, Montevideo: Fundación Konrad Adenauer, 2007.

¹³ See: International Committee of the Red Cross, *Implementing IHL: Participation of American States in International Humanitarian Law treaties and their national implementation- 2008-2009 Report*, Buenos Aires: International Committee of the Red Cross, 2009.

¹⁴ Morse H. Tan, ‘Upholding Human Rights in the Hemisphere: Casting Down Impunity through the Inter-American Court of Human Rights’, 43 *Tex. Int’l L.J.* (2008) 243.

¹⁵ *American Convention on Human Rights*, 22 November 1969, 1144 U.N.T.S. 123, 9 I.L.M. 99 (entered into force 7 July 1978).

State duties regarding the protection of human rights. Under a systemic interpretation of the rights to life, dignity, and personal integrity, a judicial framework has been developed to fight impunity against gross violations of human rights. Some of these set rules include:

- a. The inapplicability of blanket amnesties, pardons, and other measures aimed at avoiding criminal investigations;¹⁶
- b. The right to truth as a means to ensure the effective and active participation of victims in judicial proceedings;¹⁷ and
- c. The irrelevance of personal immunity *vis-à-vis* the perpetration of international crimes.¹⁸ This principle, acknowledged in the Rome Statute¹⁹ and in rulings of the IACHR, was applied during the *Fujimori* trial²⁰ and consolidates the rule that no one is above the law, especially when they are responsible of planning and/or executing international crimes.

The IACHR only has jurisdiction to determine the State responsibility of State violations to the American Convention on Human Rights. It has a complementary competence and will only assume jurisdiction when a State is unable or unwilling to act. Its judicial decisions are final and binding upon the State and its jurisprudence has focused on cases regarding crimes against humanity and gross human rights violations, thereby advancing criminal investigations by national courts.

In this sense, the IACHR does not have competence to investigate cases dealing with IHL obligations. Nonetheless, recent rulings have progressively shifted this absolute prohibition under a dynamic interpretation of the rights to life, integrity, and dignity of the American Convention on Human Rights. Under this framework, the IACHR determined that although it could not ascertain the international responsibility of a State for violations of IHL, the violation of certain human rights protected by the American Convention could also amount to infringement of other international treaties, including the 1949 Geneva Conventions.²¹

¹⁶ See: *Barrios Altos case (Peru)* (2001), Inter-Am. Ct. H.R. (Ser. C) No. 75.

¹⁷ See: *La Cantuta case (Peru)* (2006), Inter-Am. Ct. H.R. (Ser. C) No. 162

¹⁸ See: *Castro Castro case (Peru)* (2006), Inter-Am. Ct. H.R. (Ser. C) No. 160.

¹⁹ See: Article 27 of the Rome Statute.

²⁰ See: *Alberto Fujimori Fujimori case* (2009), Sala Penal Especial de la Corte Suprema de Justicia del Peru. Exp. No. A.V. 19-2001. See also the article by Carlos Caro, 'Prosecuting International Crimes in Peru', 10 *Int. Crim Law Rev.* (2010) 583-600, this issue,

²¹ See: *Bamaca Velasquez case (Nicaragua)* (2000), Inter-Am. Ct. H.R. (Ser. C) No. 70, paras. 203-204.

This position is confirmed later by the IACHR,²² adding that the specificity of IHL dispositions do not halt the application and enforcement of the human rights acknowledged in the American Convention. In this sense, the Court tends to suggest that it could be possible for the perpetration of crimes against humanity and war crimes to occur in the same armed conflict.

Evidently, the IACHR has used a wide variety of interpretative tools to determine State responsibility under international human rights law, international criminal law, and even IHL. This overarching process has created a complex program of reparations, where non-pecuniary measures include the duty to investigate and convict those responsible for international crimes as well as determine guidelines under which a national Congress should implement specific crimes against humanity.²³

Regarding IHL, the fact that the IACHR has accepted the link between the Geneva Conventions and the American Convention on Human Rights could amount to future cases where, under *obiter dicta*, the Court develops a State duty on IHL despite the fact that it only has competence to determine the responsibility of international human rights law.

3. National Legislation on War Crimes after the Adoption of the Rome Statute

As stated in the introduction, the Rome Statute played a significant role in the *aggiornamento* of international criminal law in Latin America, either through the drafting of laws or the enforcement of specific international crimes by Supreme and Constitutional Courts²⁴ as well as by the IACHR. However, eight years after the entry into force of the ICC, only seven countries have enacted specific complementarity legislation, including war crimes.

In this sense, an overview on the implementation of international crimes in Latin America²⁵ and grave breaches of IHL²⁶ is as shown in Table 1.²⁷

²² See: *Hermanas Serrano Cruz case (El Salvador)* (2005), Inter-Am. Ct. H.R. (Ser. C) No. 120.

²³ See: *Goiburú case (Paraguay)* (2006), Inter-Am. Ct. H.R. (Ser. C) No. 153.

²⁴ See: Fundación para el Debido Proceso Legal, *Digesto de Jurisprudencia Latinoamericana sobre Crímenes de Derecho Internacional* (Washington: Fundación para el Debido Proceso Legal, 2009).

²⁵ See: Amnesty International, *Rome Statute Implementation Report Card - Part One* (London: Amnesty International, 2010).

²⁶ See: International Committee of the Red Cross National Implementation of International Humanitarian Law database: <http://www.icrc.org/ihl-nat>

²⁷ As of June 2010.

Table 1

Country with war crimes and/or grave breaches of IHL legislation before the entry into force of the Rome Statute	Colombia ²⁸
Countries with war crimes and/or grave breaches of IHL legislation after the entry into force of the Rome Statute	Argentina, ²⁹ Chile, ³⁰ Costa Rica, ³¹ Nicaragua, ³² Panama, ³³ and Uruguay. ³⁴
Countries with draft implementing legislation on international crimes, including war crimes and/or grave breaches of IHL	Bolivia, Brazil, Dominican Republic, Ecuador, Paraguay, and Peru.
Countries with no draft implementing legislation on international crimes or war crimes or grave breaches of IHL	Cuba, ³⁵ El Salvador, ³⁶ Guatemala, ³⁷ Honduras, Mexico, and Venezuela.

Article 8 of the Rome Statute comprehends a wide variety of war crimes, which are classified in four categories:³⁸

- (i) *eight grave breaches of the Geneva Conventions of 12 August 1949;*
- (ii) *twenty-six other serious violations of the laws and customs applicable in international armed conflict;*
- (iii) *four serious violations of article 3 common to the four Geneva Conventions of 12 August 1949; and*
- (iv) *twelve other serious violations of the laws and customs applicable in armed conflicts not of an international character.*

In order to understand the main characteristics of war crimes in Latin America, it is important to analyze the implementation mechanisms that have been adopted

²⁸) See: *Código Penal de Colombia*, Ley No. 599, 2000, Articles 135-164.

²⁹) See: *Ley de Implementación del Estatuto de Roma (Argentina)*, Ley No. 26.200, 2007.

³⁰) See: *Ley que Tipifica Crímenes de Lesa Humanidad y Genocidio y Crímenes de Guerra (Chile)*, Ley No. 20.357, 2009.

³¹) See: *Represión Penal como Castigo por los Crímenes de Guerra y de Lesa Humanidad (Costa Rica)*, Ley No. 8.272, 2002.

³²) This country is not a State Party to the Rome Statute of the ICC. See: *Código Penal de Nicaragua*, Ley No. 641, 2008, Articles 489-522.

³³) See: *Código Penal de Panamá*, Ley No. 14, 2007, Articles 434-446.

³⁴) See: *Ley de Cooperación con la Corte Penal Internacional en materia de lucha contra el Genocidio, los Crímenes de Guerra y de Lesa Humanidad (Uruguay)*, Ley No. 18.026, 2006.

³⁵) This country is not a State Party to the Rome Statute of the ICC.

³⁶) This country is not a State Party to the Rome Statute of the ICC.

³⁷) This country is not a State Party to the Rome Statute of the ICC.

³⁸) See: Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge: Cambridge University Press and International Committee of the Red Cross, 2003.

by governments to fulfil the complementarity principle of the Rome Statute. In this regard, the Latin American implementation of legislation regarding the adoption of international crimes has been enacted by one of the following techniques:³⁹ (i) by referral; (ii) by adopting a special legislation to address international crimes and cooperation mechanisms with the ICC; or (iii) by incorporating international crimes in national Criminal Codes.

4. Referral of National Legislation to International Treaties

The referral technique has been adopted by *Costa Rica* and by the implementing legislation of *Argentina*. In the case of *Costa Rica*, Law No. 8272 amends the national Criminal Code, incorporating a general clause criminalizing serious violations of IHL and war crimes, and determines a sentencing of ten to twenty-five years. The referral element is that the violations of IHL and war crimes will be determined and interpreted according to the treaties Costa Rica has ratified.⁴⁰ Despite this initial effort, the Costa Rican government has been working on a secondary legislation of international crimes, leading to the conclusion that the purpose of Law No. 8272 is to cooperate with the ICC rather than to be applied by national courts.

In the case of *Argentina*, despite the fact that Law No. 26.200 fully implements international crimes and cooperation mechanisms with the ICC, the first section of Article 10 of Law 26.200 incorporates war crimes by referring directly to Article 8 of the Rome Statute. Similar to the Costa Rican case, it establishes that penalties will generally be between three and twenty-five years and, in the case of death of the victim, life in prison is prescribed.⁴¹ Therefore, national legislation on war crimes in Argentina is bound to what is regulated under the Rome Statute and its subsequent reforms.

The positive aspect of this technique is that it contributes to bridge national legislation to international treaties, forcing a dynamic interpretation of international obligation by national courts. However, a problematic aspect is that this

³⁹ See: Salvador Herencia Carrasco, *La Implementación del Estatuto de Roma en la Región Andina: Los casos de Bolivia, Colombia y Perú*, Lima: Comisión Andina de Juristas, 2005.

⁴⁰ Article 2 of Law No. 8272 (Costa Rica) states the following: Se impondrá prisión de diez a veinticinco años a quien, con ocasión de un conflicto armado, realice u ordene realizar actos que puedan calificarse como violaciones graves o crímenes de guerra, de conformidad con las prescripciones de los tratados internacionales de los que Costa Rica sea parte, relativos a la conducción de las hostilidades, la protección de heridos, enfermos y náufragos, el trato a los prisioneros de guerra, la protección de las personas civiles y la protección de los bienes culturales, en casos de conflictos armados, y según cualesquier otro instrumento del Derecho Internacional Humanitario.

⁴¹ The first section of Article 10 of Law No. 26.200 (Argentina) states the following: “En los casos previstos en el artículo 8° del Estatuto de Roma y en el artículo 85 párrafo 3 incisos c) y d) y párrafo 4 inciso b) del Protocolo Adicional I a los Convenios de Ginebra del 12 de agosto de 1949 la pena aplicable es de 3 a 25 años de prisión. Si ocurre la muerte, la pena será de prisión perpetua”.

type of legislation could present, under civil law legal tradition, incompatibilities between the implementing law and Constitutional guarantees, namely the principle of legality and the discretionary/arbitrary faculty of judges to determine a specific penalty.

Another element that is problematic is that Article 8 of the Rome Statute separates war crimes perpetrated in an international conflict from those committed in a non-international conflict. In this sense, the referral technique accepts this dual regime that has been progressively diluted in national war crimes legislation.

5. Adoption of Specific Laws to Implement Complementarity and Cooperation Obligations of the Rome Statute

The second model used in Latin America to implement international crimes has been the adoption of specific legislation. This mechanism has been widely employed to draft legislations in Latin America.⁴² Due to the technical and specific nature of international criminal law, specific draft bills have lost priority within the Parliamentary agenda, causing some projects to acquire a *sempiterno* condition of draft bills.⁴³

5.1. Chile

In the case of *Chile*,⁴⁴ Articles 16–34 of Law No. 20.357 incorporate war crimes within Chile's national legislation, comprehending basic definitions of international and non-international armed conflict,⁴⁵ including a list of persons and property that is protected under IHL⁴⁶ and the specific offenses. The regulations set on Articles 18–26 are applicable to both international and non-international armed conflicts, focusing on crimes committed on protected persons⁴⁷ and a specific disposition on offenses to property,⁴⁸ including the pillaging of towns or plazas even when taken by assault.

Articles 28–34 of Law No. 20.357 regulate war crimes exclusively to international armed conflicts, focusing on the misuse of flag of truce or the distinctive

⁴² This has been the case in Bolivia, Brazil, Chile, Ecuador, Paraguay, Peru and Uruguay.

⁴³ As an example, Ecuador presented its first draft implementing legislation in 2002; Peru began the discussion of its international crimes bill in 2002 and in Bolivia, the implementing bill was presented in 2005.

⁴⁴ See: Salvador Herencia Carrasco, *La Implementación del Estatuto de Roma en la Región Andina: Los casos de Chile, Ecuador y Venezuela*, Lima: Comisión Andina de Juristas, 2010.

⁴⁵ See: Article 16 of Law No. 20.357 (Chile).

⁴⁶ See: Article 17 of Law No. 20.357 (Chile).

⁴⁷ See: Articles 18–26 of Law No. 20.357 (Chile).

⁴⁸ See: Article 27 of Law No. 20.357 (Chile).

emblems of the Geneva Conventions,⁴⁹ offenses perpetrated on the means and methods of warfare,⁵⁰ the intentional use of starvation as a method of warfare,⁵¹ the abolition of rights in a court of law as well as the forced deportation or transfer of the population,⁵² and the employment and use of prohibited weapons.⁵³

Finally, Articles 35–40 of the Chilean legislation regulates the general principle of law, establishing the criminal responsibility of commanders, the irrelevance of superior orders as an exclusion of criminal responsibility, and the non-statutory limitations of international crimes.⁵⁴

5.2. *Uruguay*

In the case of *Uruguay*, Article 26 of Law 18.026 regulates war crimes legislation, where section 3 enlists forty-nine offenses. These offenses are divided in three categories: (i) war crimes that consist of grave breaches of the Geneva Conventions of 12 August 1949;⁵⁵ (ii) war crimes that amount to serious violations of the laws and customs;⁵⁶ and (iii) other grave breaches of IHL stated in Additional Protocol I to the Geneva Conventions.⁵⁷

The Uruguayan legislation does not take into account the different regimes applicable to international and non-international armed conflicts. Therefore, the offenses established in Articles 8.2(a) and 8.2(b) of the Rome Statute are transcribed into national law and are applicable to both conflicts. The other grave breaches of IHL are taken from the Additional Protocol I and include harm to the environment,⁵⁸ attacks on works and installations containing dangerous forces,⁵⁹ and attacks on demilitarized zones,⁶⁰ among others.

As can be seen, the Uruguayan legislation makes a literal incorporation of the war crimes established in the Rome Statute and Addition Protocol I. A significant variation in the Chilean and Uruguayan legislation and all the enacted legislation regarding war crimes in Latin America is that the war crime of conscripting of children is limited to children of age eighteen, and not fifteen as established in Art. 8.2(b)(xxvi) of the Rome Statute.

⁴⁹ See: Articles 28 and 34 of Law No. 20.357 (Chile).

⁵⁰ See: Article 29 of Law No. 20.357 (Chile).

⁵¹ See: Article 30 of Law No. 20.357 (Chile).

⁵² See: Articles 32 and 33 of Law No. 20.357 (Chile).

⁵³ See: Article 31 of Law No. 20.357 (Chile).

⁵⁴ See: Articles 35–40 of Law No. 20.357 (Chile).

⁵⁵ See: Articles 26.3.1–26.3.8 of Law No. 18.026 (Uruguay).

⁵⁶ See: Articles 26.3.9–26.3.34 of Law No. 18.026 (Uruguay).

⁵⁷ See: Articles 26.3.35–26.3.49 of Law No. 18.026 (Uruguay).

⁵⁸ See: Article 26.3.48 of Law No. 18.026 (Uruguay).

⁵⁹ See: Article 26.3.40 of Law No. 18.026 (Uruguay).

⁶⁰ See: Article 26.3.41 of Law No. 18.026 (Uruguay).

6. Incorporation of International Crimes in National Criminal Codes

The third legislative technique that has been employed by national legislations is the incorporation of international crimes, including war crimes, within national Criminal Codes. The importance of this method is that it integrates all offenses into one systematized Statute, therefore providing the general principles of international criminal law as interpretative statutory tools for all national legislation. Another element that is worth taking into account is that by incorporating these provisions within the Criminal Code, ordinary tribunals—as opposed to military tribunals—are competent to try these cases. In Latin America, this has been a subject of constant analysis by regarding the role of the Armed Forces in democratic regimes. However, taking into account the jurisprudence of the IACHR,⁶¹ the general rule is that war crimes should also be under the jurisdiction of civil courts, except for those war crimes that are related to military activities.

The political setback with these types of reforms is that usually the enactment or amendment of Criminal Codes require Constitutional qualified majority in Congress, making its enactment politically more complex.⁶²

6.1. Colombia

In the case of *Colombia*, the Criminal Code was enacted in 2000 and has a specific section (Articles 135–164) regulating violations on persons and property protected by IHL.⁶³ It is worth mentioning that in Colombia IHL has a Constitutional guarantee under Article 214.2 of the Constitution,⁶⁴ which states that human rights fundamental liberties cannot be suspended and that IHL rules will be enforced. The ratification of Additional Protocol II in 1995 and the jurisprudence of the Constitutional Court have contributed to determine that IHL is an integral part of the Constitution,⁶⁵ granting it the highest hierarchy of protection via the *bloc de constitucionalité*.⁶⁶

⁶¹ Among others, see: *Castillo Petruzzi Et. Al. case (Peru)* (1999), Inter-Am. Ct. H.R. (Ser. C) No. 52.

⁶² As an example, the Peruvian draft implementing bill on international crimes was originally conceived as the third part (*Libro Tercero*) of a new Criminal Code but it was later redrafted as a specific legislation due to the halt in the discussions of the new Code.

⁶³ See: Section II of the Second Part (*Libro Segundo*) of the Criminal Code (Colombia): *Delitos contra Personas y Bienes protegidos por el Derecho Internacional Humanitario*.

⁶⁴ Art. 214.2 of the Colombian Constitution states “No podrán suspenderse los derechos humanos ni las libertades fundamentales. En todo caso se respetarán las reglas de derecho internacional humanitario. (...)”.

⁶⁵ See: Alejandro Ramelli Arteaga, *La Constitución Colombiana y el Derecho Internacional Humanitario*, Bogota: Universidad Externado de Colombia, 2nd ed., 2003.

⁶⁶ See: *Sentencia C-225/95* (1995), Corte Constitucional de Colombia. Sentencia del 18 de mayo de 1995.

Under this context, the Colombian Criminal Code can be divided into four main categories: (i) the definition of persons protected by IHL;⁶⁷ (ii) offenses committed against protected persons, such as the murder, torture, and sexual crimes;⁶⁸ (iii) offenses perpetrated on the means and methods of warfare,⁶⁹ including acts of terrorism as a violation of IHL;⁷⁰ (iv) attacks on humanitarian missions;⁷¹ (v) attacks on property protected by IHL,⁷² and (vi) other grave breaches of IHL as defined in the terms of Additional Protocol I.⁷³

In a way similar to the Uruguayan legislation, the dispositions in the Colombian Criminal Code are applicable to both international and non-international armed conflicts. In addition, national legislation regulates acts of terrorism and attacks on the environment. Despite the fact that not all war crimes contemplated in Article 8 of the Rome Statute are present, one could conclude that the IHL violations that are regulated in the Colombian legislation respond to potential war crimes that may be perpetrated in the country.

6.2. *Panama*

In the case of *Panama*, the Criminal Code regulates in Articles 434–446 the offenses committed against persons and property protected by IHL. In this case, the legislation emphasizes on the general protection of civilian population⁷⁴ and property,⁷⁵ having generic dispositions concerning offenses on the methods and means of warfare⁷⁶ as well as the prohibition on the use of biological, bacteriological, toxic, and chemical weapons, along with the banning of landmines.⁷⁷ Just like the other Latin American statutes, there is no difference between international and non-international armed conflict and the age of conscripting of children is raised to eighteen, as set forth in the terms and conditions of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

⁶⁷ See: Article 135 of the Criminal Code (Colombia).

⁶⁸ See: Articles 136–141, Articles 147–151, Article 159 and Articles 161–162 of the Criminal Code (Colombia).

⁶⁹ See: Articles 142–145 of the Criminal Code (Colombia).

⁷⁰ See: Article 144 of the Criminal Code (Colombia).

⁷¹ See: Articles 152–153 and Article 160 of the Criminal Code (Colombia).

⁷² See: Articles 154–158 of the Criminal Code (Colombia).

⁷³ See: Articles 163–164 of the Criminal Code (Colombia).

⁷⁴ See: Articles 434–435 and Article 439 of the Criminal Code (Panama).

⁷⁵ See: Article 438 and Articles 442–443 of the Criminal Code (Panama).

⁷⁶ See: Articles 440–441 and Article 444 of the Criminal Code (Panama).

⁷⁷ See: Articles 436–438 and Article of the Criminal Code (Panama).

6.3. *Nicaragua*

Finally, the *Nicaraguan* Criminal Code regulates in Articles 489–522 offenses perpetrated against persons and property protected by IHL. As stated before, it is worth highlighting that Nicaragua is not a State Party to the Rome Statute. However, its national Criminal Code implements the core IHL violations and war crimes established in Article 8 of the Rome Statute.

The core violations that are criminalized in the *Nicaraguan* Criminal Code are those against persons protected by IHL,⁷⁸ followed by offenses committed on property protected by IHL,⁷⁹ regulation on the means and methods of warfare,⁸⁰ on the use of certain weapons⁸¹ and attacks on humanitarian missions.⁸² Just like the other Codes that have been described, it follows a similar structure based on the dispositions of the Rome Statute and Additional Protocol I to the Geneva Conventions.

As stated before, the importance of the incorporation of war crimes within the Criminal Code is that it establishes that ordinary courts are the competent forum to prosecute such offenses. Another element of consideration is that regulation emphasizes the protection of protected persons and property under IHL, leaving generic clauses for the means and methods of warfare as well as for the use of certain weapons. The fact that these dispositions are applicable to either international or non-international crimes increases the criminal enforcement of IHL, settling the difference in regulation between different types of armed conflicts.

7. Conclusions

The analysis of the implementation of war crimes in Latin America shows that the general structure used in war crimes legislation has been: (i) the protection of persons and property covered by IHL; (ii) the protection of humanitarian missions; (iii) the prohibition of certain methods and means of warfare; and (iv) the prohibition on the use, distribution and production of certain weapons.

- a. *The protection of persons covered by IHL*: The most common offenses include: (i) homicide, torture and other degraded treatment; (ii) deportation; (iii) the taking of hostages; (iv) scientific experiments; (v) crimes of

⁷⁸ See: Articles 489-497, Articles 501-505 and Articles 508-509 of the Criminal Code (Nicaragua).

⁷⁹ See: Article 507, Article 516 and Article 519 of the Criminal Code (Nicaragua).

⁸⁰ See: Articles 510-514 of the Criminal Code (Nicaragua).

⁸¹ See: Article 521 of the Criminal Code (Nicaragua).

⁸² See: Article 500 and Article 521 of the Criminal Code (Nicaragua).

- sexual nature; (vi) the use of human shields; (vii) the conscripting or enlisting of children under the age of eighteen; and (viii) the forced displacement of civilian population, among others.
- b. *The protection of property by IHL*: These include: (i) the destruction or seizure of the property of an enemy; (ii) attacks on cultural and/or historic sites, among others.
 - c. *The protection of humanitarian missions*: These included intentional attacks against personnel, facilities, materials and vehicles that will be used in humanitarian missions and other offenses established under the terms of the Geneva Conventions.
 - d. *The prohibition on certain means and methods of warfare*: These include: (i) direct intentional attacks against civilian population; (ii) the bombing or pillaging of towns or places; and (iii) declaring that no quarter will be given, among other measures.
 - e. *The prohibition on the use, production and distribution of certain weapons*: These include: (i) the use of poison or poisoned weapons; (ii) the use of asphyxiating or poisonous gases; and (iii) the use of bullets that expand or flatten easily on the human body.

Despite the fact that war crimes have not had the same analysis by national parliaments and the judiciary as crimes against humanity or genocide, the complexity of its dispositions are, to a greater scale, incorporated in Latin American legislation. The generic dispositions contemplated in the law (and draft bills) could suffice to deal with core IHL violations. The main problem persists in the fact that there has not been a significant implementation of Additional Protocol I as a complement to Art. 8 of the Rome Statute and that regulation has focused on persons and property, leaving to a lesser degree the criminalization of means and methods of warfare as well as the use of certain weapons.

Another challenge is the actual adoption of these regulations. Of the fifteen Latin American State Parties, only seven have actually adopted complementarity legislations and the conclusion of the Review Conference of the Rome Statute in June 2010 would hopefully contribute to push States to enact pending legislation.

The positive aspect is that Latin American legislation has eliminated the different systems applicable to international and non-international armed conflicts, increasing the level of protection of IHL under domestic jurisdictions.