

1999

## Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict

Arturo Carrillo-Suárez

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# ***HORS DE LOGIQUE: CONTEMPORARY ISSUES IN INTERNATIONAL HUMANITARIAN LAW AS APPLIED TO INTERNAL ARMED CONFLICT***

ARTURO CARRILLO-SUÁREZ\*

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## INTRODUCTION

Given the primacy of internal wars in contemporary international society,<sup>1</sup> and the fact that they are responsible for the vast majority

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1. See HUMAN RIGHTS WATCH, *WAR WITHOUT QUARTER: COLOMBIA AND INTERNATIONAL HUMANITARIAN LAW* (1998) [hereinafter *WAR WITHOUT QUARTER*] (providing a detailed analysis of the internal war in Colombia); Steven R. David, *The Primacy of Internal War*, in *INTERNATIONAL RELATIONS*

of the victims of armed conflict in general,<sup>2</sup> it is surprising to find that much of the attention of international law scholars lies elsewhere. Indeed, most discussion in the field of international humanitarian law ("IHL") focuses on subjects not directly related to the problem of applying it in internal conflicts. Some common topics include the law of international armed conflicts<sup>3</sup> and the conduct of hostilities,<sup>4</sup> the progressive development of conventional and customary norms, especially as concerns international criminal tribunals<sup>5</sup> and humanitarian intervention and assistance.<sup>6</sup> It is true

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THEORY AND THE THIRD WORLD 77 (Stephanie G. Nueman ed., 1995) (noting the threat of internal wars on global security); *see also* John R. Crook, *Strengthening Legal Protection in Internal Conflicts: Introductory Remarks: Panel on Internal Conflicts*, 3 ILSA J. INT'L & COMP. L. 491 (1997).

2. *See* David, *supra* note 1, at 77 (noting that a majority of the 150 wars after World War II had been internal wars of one type or another).

3. *See, e.g.*, THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS (Dieter Fleck ed., 1995); THE GULF WAR OF 1980-88: THE IRAN-IRAQ WAR IN INTERNATIONAL LEGAL PERSPECTIVE (Ige F. Dekker et al. eds., 1994); HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT (1992); EDWARD KWAKWA, THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION (1992); Louise Doswald-Beck, *Current Development: The San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 89 AM. J. INT'L L. 192 (1995).

4. *See, e.g.*, ARMED CONFLICT AND THE NEW LAW: ASPECTS OF THE 1977 GENEVA PROTOCOLS AND THE 1981 WEAPONS CONVENTION (Michael A. Meyer ed., 1989); R.J. Arajua, S.J., *Anti-Personnel Mines and Peremptory Norms of International Law: Argument and Catalyst*, 30 VAND. J. TRANSNAT'L L. 1 (1997); Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AM. J. INT'L L. 417 (1997).

5. *See, e.g.*, VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDERS GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1995); THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES (Timothy L.H. McCormack et al. eds., 1997); WAR CRIMES IN INTERNATIONAL LAW (Yoram Dinstein et al. eds., 1996); Payam Akhavan, *The International Criminal Tribunal for Rwanda: The politics and pragmatics of punishment*, 90 AM. J. INT'L L. 501 (1996); Christopher Keith Hall, *Current Development: The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 AM. J. INT'L L. 548 (1998); Marie-Claude Roberge, *Jurisdiction of the ad hoc Tribunals for the Former Yugoslavia and Rwanda over Crimes against Humanity and Genocide*, 321 INT'L REV. RED CROSS 651 (1997); Paul Tavernier, *The Experience of the International Criminal Tribunals for the former Yugoslavia and for Rwanda*, 321 INT'L REV. RED CROSS 605 (1997).

6. *See, e.g.*, FRANCOIS BUNGION, LE COMITÉ INTERNATIONAL DE LA CROIX-



that the recent creation of an International Criminal Court, and especially the prior establishment by the United Nations Security Council of the ad hoc tribunals for the former Yugoslavia and Rwanda, have led to new developments in the international criminalization of internal atrocities.<sup>7</sup> Yet the fact remains that, this notwithstanding, relatively little attention is paid to how existing humanitarian norms apply in the specific context of internal wars.

The present Article aims to rectify this state of affairs by focusing on the internal war in Colombia as a case study. The long-standing conflict in Colombia provides an ideal factual and conceptual framework within which to examine key issues relating to the humanitarian law of non-international armed conflicts. By concentrating on several practical questions raised by the application of the laws of war in Colombia, I want to suggest that, despite formidable obstacles, deeper legal analysis and non-conventional methods of promoting compliance may provide the best route to revitalizing humanitarian norms and increasing their effectiveness in real conflict situations. The overall objective is to provide a fresh perspective from which to evaluate the terms of the ongoing debate on the development of humanitarian law in this field.

Part of the problem addressed by this study arises from the fact that rarely is there an in-depth consultation of concrete cases or situations occurring within a particular internal conflict aside from those, of course, covered by the international criminal tribunals. Leaving the international tribunals aside, most of the literature on the humanitarian law of non-interstate armed conflict tends to be cursory or critical, or both. Most scholarly work on this subject,

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ROUGE ET LA PROTECTION DES VICTIMES DE LA GUERRE (1995); HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL ORGANIZATIONS AND CIVIL WARS (1995); Ravi Mahalingam, Comment, *The Compatibility of the Principle of Nonintervention with the Right of Humanitarian Intervention*, 1 UCLA J. INT'L L. & FOREIGN AFF. 221 (1996).

7. See Theodore Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995); see also Theodor Meron, *War Crimes Law Comes of Age*, 92 AM. J. INT'L L. 462 (1998) [hereinafter *War Crimes Law*]; José E. Álvarez, *The Likely Legacies of Tadic*, 3 ILSA J. INT'L & COMP. L. 613 (1997); Theodore Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238 (1996).

with few exceptions,<sup>8</sup> is limited in scope and tends not to evolve beyond a discussion of the historical development or the basic framework of the pertinent norms.<sup>9</sup> When arguments are developed, emphasis frequently is placed on the normative shortcomings and other perceived obstacles to application, without more than a passing reference to a specific country or conflict situation.<sup>10</sup> Humanitarian norms are usually discussed with only a general reference to certain countries believed to suffer internal conflicts, without establishing as a legal or factual matter why one conflict is deemed a more fitting example than another is.<sup>11</sup>

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8. See, e.g., ROSEMARY ABI-SAAB, *DROIT HUMANITAIRE ET CONFLICTS INTERNES* (1986) (tracing the origins and evolution of the law of non-international conflict); ARACELY MANGAS MARTÍN, *CONFLICTOS ARMADOS INTERNOS Y DERECHO INTERNACIONAL HUMANITARIO* (1990); THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: PROTOCOL II TO THE 1949 GENEVA CONVENTIONS (Howard S. Levie ed., 1987) (containing the negotiating history of the substantive provisions of Protocol II); Robert Kogod Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM. U. J. INT'L L. & POL'Y 49 (1993).

9. See, e.g., HILAIRE MCCOUBREY, *INTERNATIONAL HUMANITARIAN LAW* (1990), at 171-86; Georges Abi-Saab, *Non-International Armed Conflicts*, in *INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW* 217-39 (UNESCO, Henry Dunant Institute, 1988); L.C. Green, *Low Intensity Conflict and the Law*, 3 ILSA J. INT'L & COMP. L. 493 (1997); Herman Salinas Burgos, *The application of international humanitarian law as compared to human rights law in situations qualified as internal armed conflict, internal disturbances and tensions, or public emergency, with special references to war crimes and political crimes*, in *MISE EN OEUVRE DU DROIT INTERNATIONAL HUMANITAIRE* (Frits Kalshoven et al. eds., 1989).

10. See Green, *supra* note 9, at 16-17; Burgos, *supra* note 9, at 9, 22-23; *Geneva Conventions, Protocol II: The Confrontation of Sovereignty and International Law*, in ASIL INSIGHT (American Society of International Law, Washington, D.C.), Nov. 1995, at 1 [hereinafter ASIL INSIGHT]; see also KWAKWA, *supra* note 3, at 23-27; MCCOUBREY & WHITE, *supra* note 3, at vii-x. McCoubrey and White insist that:

[t]he problems of legal prescription are largely set by the very fact of the non-international nature of the armed conflicts in question. There are problems of definition, largely founded upon considerations of intensity. . . . [T]here remain serious legal difficulties [which] largely turn upon issues of inevitable sovereign sensitivity. . . . So far as the conduct of hostilities in non-international armed conflicts is concerned, even more intractable conceptual and practical difficulties arise.

*Id.*

11. See KWAKWA, *supra* note 3, at 23-24 (mentioning conflicts in Angola,

Legal scholars cite a litany of reasons to explain why the foregoing is so. The principal sources of the humanitarian law in this field, aside from custom, are common Article 3 of the Geneva Conventions of August 12, 1949 for the Protection of Victims of War,<sup>12</sup> and Protocol II Additional to the same Geneva Conventions.<sup>13</sup> Although these norms are still an integral part of IHL, the view seems to prevail among many scholars that non-judicial attempts to apply humanitarian law to internal conflicts are not viable, or, at least, are not viable enough to warrant in-depth study.

Commentators are quick to point out, for example, that States' reluctance to recognize the international legal consequences of internal strife, coupled with their haste to defend the principles of sovereignty and non-interference, make any effective national implementation by States of the pertinent rules a remote possibility at best.<sup>14</sup> Moreover, the difficulties involved in actually measuring the intensity of internal conflicts with legal precision make attempts at classification a largely pointless exercise.<sup>15</sup> This situation is further

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Mozambique, Afghanistan and El Salvador); MCCOUBREY, *supra* note 9, at 175 (citing conflicts in Afghanistan, Ethiopia, Nicaragua and Sudan); *see also* ASIL INSIGHT, *supra* note 10, at 1 (citing Chiapas in Mexico and Chechnya in Russia as "two examples from a long roll call of ethnic and local violence....").

12. *See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva Convention No. I, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (1949) [hereinafter *First Geneva Convention*]; *Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea*, Geneva Convention No. II, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (1949) [hereinafter *Second Geneva Convention*]; *Convention Relative to the Treatment of Prisoners of War*, Geneva Convention No. III, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (1949) [hereinafter *Third Geneva Convention*]; *Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva Convention No. IV, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (1949) [hereinafter *Fourth Geneva Convention*].

13. *See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, Protocol II, opened for signature Dec. 12, 1977, U.N. Doc. A/32/144, Annexes I & II, 1977, reprinted in 16 I.L.M. 1442 [hereinafter Protocol II].

14. *See* KWAKWA, *supra* note 3, at 22-23; MANGAS MARTÍN, *supra* note 8, at 60-61; MCCOUBREY, *supra* note 9, at 175; MCCOUBREY & WHITE, *supra* note 6, at viii-ix; Burgos, *supra* note 9, at 6-7, 9; *see also* ASIL INSIGHT, *supra* note 10, at 2, 4.

15. *See* Theodor Meron, *On the Inadequate Reach of Humanitarian and Hu-*

complicated by the fact that most commentators interpret Protocol II's threshold for material application as requiring nothing less than a full-blown civil war, the highest possible standard, and, as such, a relatively uncommon phenomenon on today's global scene.<sup>16</sup> On the other hand, common Article 3's—and even Protocol II's—provisions are largely insufficient to deal effectively with the complexity of modern internal armed conflict.<sup>17</sup> All of this has motivated many observers to begin searching for better alternatives, such as the development of minimum humanitarian standards.<sup>18</sup>

This Article will show why the foregoing arguments, while reflecting elements of truth, seem nevertheless to miss the point. There are important reasons in favor of evaluating the relevance of common Article 3 and Protocol II more positively than most international legal literature does today. Several are developed in the course of this Article. What follows is a brief presentation of the three basic issues around which the discussion of these reasons will

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*man Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L L. 589, 602-03 (1983); see also Burgos, *supra* note 9, at 7; KWAKWA, *supra* note 3, at 24; MANGAS MARTÍN, *supra* note 8, at 60; MCCOUBREY & WHITE, *supra* note 6, at viii, 19.

16. See *Analytical Report of the Secretary-General*, submitted pursuant to Commission on Human Rights Resolution 1997/21, paras. 79-80, UN Doc. E/CN.4/1998/87 [hereinafter *Analytical Report*]; MANGAS MARTÍN, *supra* note 8, at 59-61, 64; Burgos, *supra* note 9, at 9; Crook, *supra* note 1, at 491; Green, *supra* note 9, at 16-17; MCCOUBREY, *supra* note 9, at 172; Meron, *supra* note 15, at 599.

17. See *Analytical Report*, *supra* note 16, paras. 71, 74, 75, 77. With respect to common Article 3, see also KEITH SUTER, AN INTERNATIONAL LAW OF GUERRILLA WARFARE 171-76 (1984); ASIL INSIGHT, *supra* note 10, at 3; MANGAS MARTÍN, *supra* note 8, at 68; Burgos, *supra* note 9, at 6-7. As concerns Protocol II, see also KWAKWA, *supra* note 3, at 22-23.

18. See David Petrasek, *Current Development: Moving Forward on the Development of Minimum Humanitarian Standards*, 92 AM. J. INT'L L. 557 (1998) (asserting that the development of minimum international humanitarian standards would provide greater protection for human rights in situations of internal conflict). A dissatisfaction with the humanitarian law of internal conflict has fed recent initiatives to develop a code of minimum humanitarian standards applicable at all times and in all situations of internal violence. Although originally intended to fill the "gaps" left by humanitarian and human rights law, the sponsors of this initiative view it as a way of redressing the normative and logistical shortcomings of Protocol II and common Article 3. See *id.* at 560-62; see also Asbjorn Eide et al., *Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards*, 89 AM. J. INT'L L. 215 (1995).

revolve. The objective is to demonstrate that the law of non-international conflict can respond adequately to many of the complex problems raised by modern internal wars like the one in Colombia, and that this response is useful to people and organizations everywhere that work towards the humanization of conflict.

Conventional wisdom holds that the problem of applying IHL to situations of internal violence "rests essentially on two points: first, that there are difficulties in determining under which circumstances the treaty rules regulating internal conflicts become operable, and second, that even when these rules do apply they only provide a minimum of protection."<sup>19</sup>

The first main issue, then, is one of application. Many of the critical views described are premised on an unnecessarily restrictive view of the scope of applicability of Protocol II. A careful analysis of the criteria established in Article 1 of Protocol II will reveal, however, that this instrument is probably applicable to certain internal armed conflicts excluded by many from its purview, such as the one in Colombia.<sup>20</sup> Contrary to popular belief, there is no definitive reason, legal or practical, to believe that internal conflicts cannot meet Protocol II's criteria for material applicability without rising to the elevated level of a classic civil war. Nor is there any reason to believe that international lawyers and observers should not or cannot reasonably engage in this type of objective analysis under Article 1 for purposes of determining when Protocol II applies to a given conflict. This Article intends to show that engaging in such legal analysis is both possible and necessary.

The second issue raised by conventional wisdom relates to the interpretation and sufficiency of existing norms. Under this view, common Article 3's provisions, and even those in Protocol II, are considered insufficient or deficient for the purpose of protecting the victims of internal wars, leading to an "unsatisfactory state of af-

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19. See *Analytical Report*, *supra* note 16, para. 71.

20. See discussion *infra* Part II.A.3. In 1995, Colombia ratified Protocol II. See Cruz Roja Colombiana, *Consejería Presidencial para los Derechos Humanos and Universidad Jorge Tadeo Lozano, Investigación académica de medidas nacionales de aplicación del derecho internacional humanitario* 38 (1996) [hereinafter *Colombian Red Cross*].

fairs.”<sup>21</sup> Yet if even just this “minimum” were to be respected by the parties to the Colombian conflict, more than two-thirds of all civilian deaths would be avoided! With respect to this issue, this Article will explore the responsibility of the parties under international law in order to suggest that, although imperfect, existing humanitarian norms provide ample legal grounds for censuring the most grievous and systematic violations, which occur in this conflict. The discussion will center on the treatment of Colombia’s notorious paramilitary groups since they are the armed actors most responsible for these violations. In this regard, it becomes necessary to explore the fundamental question of state responsibility for the criminal actions of these groups.

This brings us to the third and overarching issue of implementation. One commentator summed up the problem in the following terms:

The principal difficulty regarding the application of international humanitarian law has been the refusal of states ‘to apply the conventions in situations where they clearly should be applied ....’ There are, in fact, so many situations in which the applicability of the Geneva Conventions as a whole or of their common Article 3 has been denied that the rule has been the rejection of the law, rather than its formal acknowledgment and recognition. . . . Although the conditions for the applicability of Protocol II are satisfied in a number of internal conflicts, *it is unlikely that many states involved in internal conflicts will be prepared to acknowledge it. Consequently, the prospects for the formal application of the Protocol are poor.*<sup>22</sup>

The case will be made here that, notwithstanding this view, humanitarian law plays a critical role in modern internal conflicts, even in the absence of state recognition and implementation, or of international enforcement mechanisms. This Article will analyze the problem of applying humanitarian law in internal wars under a paradigm that emphasizes the construction of compliance through the constant interplay of legal and non-legal forces rather than formal implementation or legal enforcement. It will show that these

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21. See *Analytical Report*, *supra* note 16, para. 81.

22. Meron, *supra* note 15, at 599-600 (citing Aldrich, *Human Rights and Armed Conflict: Conflicting Views*, 67 ASIL PROC. 141, 142 (1973)) (emphasis added).

forces, which derive from a great variety of sources at both national and international levels, tend to reinforce each other and promote greater *acceptance* of humanitarian norms and principles. Although acceptance is not the same as observance or compliance, this Article argues that it is a crucial first step in the right direction, and a harbinger of increased respect for humanitarian law.

The conflict in Colombia—one of the world's longest running non-international wars—provides an excellent backdrop for analyzing these issues. This Article begins, therefore, by describing the pertinent aspects of the war in Colombia and its dire humanitarian consequences. It then reviews the principal efforts to implement IHL in Colombia, and the central role that humanitarian law plays in the ongoing peace talks between the government and the other parties to the conflict. This lengthy initial part is required to properly introduce the Colombian case study and to set the stage for the rest of the Article. The second main part then turns to the more specific issues of application and interpretation of humanitarian norms in this context. In the third and final part, this Article builds on prior discussion and addresses the major criticisms regarding the implementation and enforcement of IHL. Drawing upon the Colombian experience, it suggests that compliance can be constructed and evaluated in significant, non-conventional ways that should be recognized and encouraged.

## I. THE CASE STUDY: CIVIL CONFLICT AND HUMANITARIAN LAW IN COLOMBIA

### A. BACKGROUND

The contemporary conflict in Colombia dates back to the mid-1960s when the first Marxist guerrilla organizations were established seeking land reform, as well as greater economic and social justice.<sup>23</sup> The traditional political system, which is comprised of the Liberal and the Conservative parties, concentrated privilege and power in the hands of a small economic elite at the expense of the

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23. See Alejandro Reyes, *The Geography of Political Violence and Drug Trafficking in Colombia*, Conference at the Johns Hopkins University School of Advanced International Studies (Apr. 1, 1998) (unpublished manuscript, on file with author).

majority of the population.<sup>24</sup> The exclusionary nature of the Colombian political system, together with a repressive military response to the insurgency movement in the early 1980s, led to a sharp escalation of the conflict. From 1988 to 1997 it is estimated that over 35,000 Colombians died as a result of the political violence, including both combat casualties and civilian victims.<sup>25</sup> Since 1988, when the conflict heated up to its current intensity, the war has caused an average of over 3,600 deaths *per year*.<sup>26</sup> This means that since 1988, more people are killed for political reasons in one year in Colombia than died during the *entire* 25-year conflict in Northern Ireland.<sup>27</sup> Before discussing the war and its humanitarian consequences in more detail, it is necessary to briefly introduce each of the parties to the conflict.

### *1. Military and Security Forces*

The Colombian Armed Forces consist of 121,000 soldiers, 18,000 Navy sailors and 7,300 Air Force members, all under the formal command of the Nation's President.<sup>28</sup> Of these troops, about

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24. See *id.* at 1. Reyes notes:

The history of these problems can be summarized by saying it has been a very long struggle between large owners and small peasants; between cattle raising and agriculture; between upper class rural society people who own most of the land and have political influence in a regional context, against small peasants who have no influence, resources or access to credit. It is a very deep struggle in which the state apparatus has been mostly on the side of the regional landed elite.

*Id.*

25. See Colombian Commission of Jurists, *Evolución de la Situación de Derechos Humanos y Violencia Sociopolítica en Colombia: 1970-1997* (unpublished graph, on file with author) (1998) [hereinafter CCJ Graph I].

26. See *id.* This figure includes all persons killed as a result of combat, as well as civilians executed outside the scope of military confrontation, as explained below in Part I.B.

27. Juan Gasparini, *Impunidad va en contra de los Derechos Humanos: M. Robinson*, EL TIEMPO, Oct. 20, 1998, at A1 (presenting excerpts from interview with Mary Robinson, UN High Commissioner for Human Rights, on her first visit to Colombia).

28. See THE INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES, THE MILITARY BALANCE 1997/98, 213-14 (1997), cited in WAR WITHOUT QUARTER, *supra* note 1, at 43.



50,000 actively participate in the conflict as armed combatants.<sup>29</sup> Civilian authorities are politically weak *vis-à-vis* their military counterparts, and normally have little say in most military decisions. These decisions tend to be taken by the Commander of the Armed Forces and by the commanders of the respective branches.<sup>30</sup> The Colombian Army, the branch most relevant to this study, is divided into five divisions, arranged in twenty-four brigades; these in turn are divided into 154 battalions, not including the three mobile brigades consisting of up to 2,000 professional soldiers and specialized in counterinsurgency actions.<sup>31</sup> A series of recent defeats at the hands of the major guerrilla groups has underscored the need to restructure and modernize the armed forces.<sup>32</sup>

The National Police, together with the armed forces, comprise the state's security forces ("*fuerza pública*").<sup>33</sup> Although civilian in nature, the police were joined with the armed forces into one "military force" within the Ministry of Defense and under the direct command of the military Commander of the Armed Forces.<sup>34</sup> The police number over 100,000 and are present in over ninety percent of Colombia's municipalities.<sup>35</sup> Since they tend to be the only authority in remote areas, the National Police are often a primary military target of guerrilla attacks on small towns. For purposes of this study, the term "military forces" or "security forces" should be understood to mean both the armed forces and the National Police.

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29. See *Radiografía de los actores*, EL TIEMPO, Jan. 6, 1999, at A9 [hereinafter *Radiografía*].

30. See WAR WITHOUT QUARTER, *supra* note 1, at 43.

31. See *id.*

32. See COLETTA YOUNGERS, WAGING WAR: U.S. POLICY TOWARD COLOMBIA 7 (Sept. 1998) (unpublished manuscript, on file with author); Patricia Lara, *Un civil de tres soles*, CAMBIO 16, Aug. 17, 1998, at 22-23 (interviewing the incoming Minister of Defense about, *inter alia*, his plans to modernize the Armed Forces).

33. See CONSTITUCIÓN POLÍTICA DE COLOMBIA DE 1991, art. 216 [hereinafter COLOM. CONST.].

34. See WAR WITHOUT QUARTER, *supra* note 1, at 76-77.

35. See *id.* at 77.

## 2. Guerrilla Groups

The Colombian insurgency movement is composed primarily of two guerrilla groups, the *Fuerzas Armadas Revolucionarias de Colombia* ("Revolutionary Armed Forces of Colombia" or "FARC") and the *Ejército de Liberación Nacional* ("National Liberation Army" or "ELN"). Respectively, they accounted for sixty-six percent and twenty-eight percent of all guerrilla military actions carried out during most of 1997; other splinter groups account for the remaining six percent.<sup>36</sup>

The FARC guerrillas are the oldest, largest and strongest guerrilla movement in Colombia. They are estimated to have anywhere between 10,000 and 15,000 troops organized in sixty-two rural fronts, three urban fronts, and nine elite units.<sup>37</sup> They possess a unified central command structure called the "General Secretariat" ("*Secretariado General*") headed by Manuel "Tirofijo" Marulanda Velez, who helped found the guerrilla group in 1964.<sup>38</sup> He and the six other members of the Secretariat divide command responsibilities among themselves by subject and by region; they are supported by a general staff ("*estado mayor*") responsible for military operations, and by blocks ("*bloques*") that are regional military alliances between FARC fronts.<sup>39</sup> Various sources confirm that the FARC's high command imposes a tight control on the military and political activities of the organization, notwithstanding the vast territory within which it operates.<sup>40</sup>

The FARC operate in many different regions of the country, but dominate in the southern territories of Colombia where their mili-

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36. See Mary Sánchez, *Estado del Conflicto Armado 2* (Aug. 1998) (unpublished manuscript, on file with author) (reviewing the military activity of the armed groups participating in the conflict); see also WAR WITHOUT QUARTER, *supra* note 1, at 184-86. The smallest of the active guerrilla groups is the Popular Liberation Army ("EPL") with less than 1,000 active members and fronts in only a few departments. See *id.*

37. See WAR WITHOUT QUARTER, *supra* note 1, at 131; see also YOUNGERS, *supra* note 32, at 7.

38. See WAR WITHOUT QUARTER, *supra* note 1, at 131-32; Jesús Ortiz Nieves, *¿Por qué ahora?*, CAMBIO 16, July 13, 1998, at 20.

39. See WAR WITHOUT QUARTER, *supra* note 1, at 132.

40. See *id.*

tary presence is the strongest, and where they are the *de facto* authority in many areas.<sup>41</sup> Their ranks are primarily made up of peasants ("*campesinos*"). Socio-economic inequality and agrarian reform traditionally have been the main issues of concern to this guerrilla group.<sup>42</sup> In recent years, however, the FARC have expanded their agenda to cover a broader range of topics, including social policy towards the cultivation of illicit crops by *campesinos*, as well as constitutional and political reform.<sup>43</sup> They are not dependent on external financing sources, deriving their income from kidnapping, extortion, and special "taxes" levied on drug cultivation and trafficking activities carried out in the areas under their control.<sup>44</sup> They do not, however, appear to engage in international trafficking, and thus are not comparable to Colombia's infamous drug cartels.<sup>45</sup>

Since 1996, the FARC have displayed an increased capacity to wage war, attacking and inflicting important losses on the Colombian military forces. In recent years, the FARC have handed the Army a series of unprecedented and devastating military defeats, which have led to the capture and detention of several hundred military personnel by the guerrilla group.<sup>46</sup> In one surprise attack on a counter-narcotics base run jointly by the Army and the National Police in August of 1998, over 1,000 FARC guerrillas completely

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41. See *id.* at 131. In the regions under their control, young men go off to join the guerrilla ranks "just as naturally as high school graduates who sign up for [obligatory] military service." *Radiografía*, *supra* note 29, at A9; see also discussion *infra* Part II.A.3.

42. See *Radiografía*, *supra* note 29, at A9.

43. See *infra* notes 252-53 and accompanying text for a discussion on the current negotiation agenda of the FARC.

44. See WAR WITHOUT QUARTER, *supra* note 1, at 132-33.

45. See YOUNGERS, *supra* note 32, at 7 (explaining that both the FARC and the ELN are essentially political organizations and, according to a U.S. study conducted by the DEA, neither the FARC nor the ELN are involved in international drug trafficking). The FARC are very distinct from the Colombian drug mafia. Their involvement in the drug trafficking process is primarily through the levying of "taxes" as a means to finance their war machinery. For this reason, despite the overlap, they are best viewed as "two absolutely different phenomena." Reyes, *supra* note 23, at 6.

46. See *infra* notes 419-22 and accompanying text; see also *¿La hora de la paz?*, SEMANA, Aug. 10, 1998; *El síndrome de Jacobo*, SEMANA, Nov. 9, 1998.

destroyed the military installations, killed at least 30 members of the armed forces, and took another 130 or so prisoner.<sup>47</sup> Negotiations are currently under way between the government and the FARC to exchange captured military personnel, which by 1999 totaled over 400 persons, for imprisoned political prisoners.<sup>48</sup>

The ELN is the second most important guerrilla group after the FARC. This group contains at least 5,000 armed militants, and is divided into approximately thirty-five rural fronts, five urban fronts and several urban militias.<sup>49</sup> The ELN forces are concentrated in several of Colombia's northern territories, especially those bordering Venezuela, which is the location of most Colombian oil reserves.<sup>50</sup> The top leadership of the ELN is organized in the group's National Directorate ("*Dirección Nacional*"), headed by two veteran guerrillas, Nicolás Rodríguez Bautista, *alias* "Gabino," and Antonio García.<sup>51</sup> Subordinate to the Directorate is the Central Command ("*Comando Central*") composed of the leaders of the ELN's military units or fronts; these leaders enjoy more autonomy in their respective regions than their FARC counterparts, giving rise to contradictions in policy and action between them and the Directorate.<sup>52</sup> One frequent subject of discussion regards the practice of kidnapping civilians for ransom, a major source of income for the ELN.<sup>53</sup>

The ELN's main issue has been traditionally the exploitation of the country's natural resources, especially its petroleum reserves by state companies and foreign multinationals. As a result, they regularly extort protection money from multinational corporations in-

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47. See *la Muerte se tomó la selva*, EL TIEMPO, Aug. 6, 1998, at A1, A6.

48. See '*Tirofijo*' se destapa, SEMANA, Jan. 18, 1999; *infra* note 429 and accompanying text.

49. See WAR WITHOUT QUARTER, *supra* note 1, at 161; see also YOUNGERS, *supra* note 32, at 7. The most recent estimates put the total at 6,000 combatants spread out over 45 fronts, both urban and rural. See *Radiografía*, *supra* note 29, at A9.

50. See Reyes, *supra* note 23, at 5.

51. See Nieves, *supra* note 38, at 18-19; see also WAR WITHOUT QUARTER, *supra* note 1, at 161.

52. See WAR WITHOUT QUARTER, *supra* note 1, at 162.

53. See *id.*

volved in the extraction and transport of oil, Colombia's principal export.<sup>54</sup> "When they refuse to pay, the oil installations . . . are subject to sabotage and destruction."<sup>55</sup> This is why the ELN is the principal source of attacks on oil and gas pipelines in the country.<sup>56</sup> Nonetheless, their current demands on the government include the need for more general political and economic reforms, in addition to the nationalization of natural resources.<sup>57</sup> They have been especially hard hit in recent years by the counter insurgency efforts of the paramilitary groups that operate in many of the ELN's traditional zones of influence.<sup>58</sup>

### 3. *Paramilitary Groups*

Paramilitary groups have a long history in Colombia (though not as long as that of the guerrillas). They began in the early 1980s as private armies organized by local drug barons for the purpose of protecting their regional economic interests from guerrilla threats and extortion.<sup>59</sup> They rapidly allied themselves with the Colombian Army, which helped train and arm the paramilitary groups, and which coordinated much of their activity during the 1980s.<sup>60</sup> The paramilitary groups traditionally were—and continue to be—financed by drug traffickers, large landowners ("*hacendados*") and cattlemen ("*ganaderos*") in the regions where they operate.<sup>61</sup> There is also significant evidence that many paramilitary groups, including the *Autodefensas Campesinas de Córdoba y Urabá* ("Peasant

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54. See THE ECONOMIST, WORLD IN FIGURES: 1999, 121 (1999).

55. Reyes, *supra* note 23, at 6.

56. DEFENSORÍA DEL PUEBLO, EN DEFENSA DEL PUEBLO ACUSO: IMPACTOS DE LA VIOLENCIA DE OLEODUCTOS EN COLOMBIA 22 (1997).

57. See Nieves, *supra* note 38, at 18.

58. See *Radiografía*, *supra* note 29, at A9.

59. See N.C.O.S. et al., TRAS LOS PASOS PERDIDOS DE LA GUERRA SUCIA 115-139 (1995). See generally CARLOS MEDINA GALLEGU, AUTODEFENSAS, PARAMILITARES Y NARCOTRÁFICO EN COLOMBIA (1990) (describing the evolution of the relationship between the paramilitary groups and the Colombian Armed Forces).

60. See Reyes, *supra* note 23, at 10; see also N.C.O.S. et al., *supra* note 59 (describing the relationship between the Colombian Armed Forces and the paramilitary groups in the 1980s).

61. See Reyes, *supra* note 23, at 9-12.

Self-Defense Group of Córdoba y Urabá" or "ACCU"), participate in, and derive income from, drug trafficking activities, although their leadership persistently denies such allegations.<sup>62</sup>

The *Autodefensas Unidas de Colombia* ("United Self-Defense Groups of Colombia" or "AUC") are a federation of several regional paramilitary groups, the most important of which is the ACCU.<sup>63</sup> Carlos Castaño is the leader of the ACCU and the commander-in-chief of the AUC, which by most accounts is currently made up of at least 5,000 thousand armed men, spread out over twenty-nine fronts.<sup>64</sup> Although organized regionally, these groups coordinate their strategy through a general staff or war council ("*estado mayor conjunto*"). They are self-proclaimed "armed political organizations of a civilian nature dedicated to combating subversion."<sup>65</sup>

A recent study by Human Rights Watch reveals the levels of sophistication attained by contemporary Colombian paramilitaries:

[L]ike the guerrillas they consciously emulate, the AUC has a general staff (*estado mayor conjunto*) made up of leaders of each regional paramilitary group. Regional groups also have a general staff (*estados mayores regionales*). The fighting force is divided into two types of units: stationary groups, known as local self-defense associations (*juntas de autodefensas locales*), and support groups (*grupos de apoyo*); and mobile groups (*frentes de choque*), better trained, equipped, and able to move quickly throughout Colombia .... Both local and special fighters receive a base salary plus food, a uniform, weapons, and munitions. The funds to cover these expenses come from local ranchers and business-people.<sup>66</sup>

Paramilitary groups combat the guerrillas by targeting the civil-

62. See WAR WITHOUT QUARTER, *supra* note 1, at 107 (claiming that Castaño's involvement in drug trafficking has earned his family millions); *Habla Castaño*, SEMANA, Aug. 17, 1998, at 41 (denying that the paramilitary groups receive funding from the drug trade); see also THE ECONOMIST, Jan. 16, 1999, at 34 (stating that paramilitary groups often rely on drug trafficking to fund their operations).

63. See WAR WITHOUT QUARTER, *supra* note 1, at 100.

64. See *Radiografía*, *supra* note 29, at A9.

65. *Id.*

66. WAR WITHOUT QUARTER, *supra* note 1, at 106.

ian population, which they view as sympathetic to the insurgency movement. These groups systematically engage in death threats, summary executions, massacres, torture, and the forced disappearance of civilians as a way to spread terror among the population.<sup>67</sup> Their links with the Colombian armed forces are notorious, and the two continue to operate in frequent coordination. According to the United Nations High Commissioner for Human Rights, there is evidence that the aforementioned atrocities often are perpetrated in joint actions carried out by members of the security forces and paramilitaries or in direct actions by paramilitaries enjoying the support or acquiescence of the state forces.<sup>68</sup>

#### B. INTERNAL CONFLICT AND HUMANITARIAN LAW

The conflict in Colombia is an intense and cruel one.<sup>69</sup> In the ten-year period between 1988 and 1997, approximately 11,500 combatants and civilians were killed as a direct result of the hostilities, an average of 1,144 a year or three persons a day.<sup>70</sup> During 1997, there were a total of 368 open combat situations registered between state forces and the guerrilla groups.<sup>71</sup> In addition to these direct military

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67. See WAR WITHOUT QUARTER, *supra* note 1, at 100-31.

68. See Report by the United Nations High Commissioner for Human Rights, U.N. Commission on Human Rights, 54th Sess., Agenda Item 3, at 27, U.N. Doc. E/CN.4/1998/16 (1998) [hereinafter *HCHR Report*]; see also discussion *infra* Part II.B.1.

69. The following statistics are derived from two major sources: the *Banco de Datos de Derechos Humanos y Violencia Política* (Human Rights and Political Violence Data Bank), run jointly by the *Centro de Investigación y Educación Popular* (Center for Research and Popular Education – CINEP), and the *Comisión Intercongregacional de Justicia y Paz* (Inter-congregational Commission for Justice and Peace, “Justice and Peace”) [hereinafter CINEP and Justice and Peace Data Bank]; and the Data Bank on political violence of the Colombian Commission of Jurists (*Comisión Colombiana de Juristas*) [hereinafter CCJ Data Bank]. The CCJ’s Data Bank relies heavily on the CINEP-Justice and Peace Data Bank as a primary source, but complements its information with other sources as well. Moreover, it applies a slightly different legal methodology for the classification of the violations.

70. See CCJ Graph I, *supra* note 25.

71. See CINEP and Justice and Peace Data Bank, NOCHE Y NIEBLA: PANORAMA DE DERECHOS HUMANOS Y VIOLENCIA POLÍTICA EN COLOMBIA, Jan.-Mar. 1997, at 127-50; NOCHE Y NIEBLA: PANORAMA DE DERECHOS HUMANOS Y VIOLENCIA POLÍTICA EN COLOMBIA, Apr.-June, 1997, at 136-53; NOCHE Y

confrontations, the guerrillas were active harassing military personnel with hit and run tactics; ambushing enemy targets, such as transport vehicles and troops; taking over towns and villages; and setting up roadblocks.<sup>72</sup> As was already pointed out, the FARC currently have over 400 members of the Colombian military and police in their custody as a result of many of these actions.<sup>73</sup> In sum, almost 750 belligerent actions ("*acciones bélicas*") by the parties were registered during 1997, affecting 27 of Colombia's 32 departments.<sup>74</sup> These actions resulted in the death of at least 1,100 people and injuries to approximately another 660.<sup>75</sup>

All evidence indicates that the war actually intensified during 1998. By September of that year, 1,078 people already had been killed as a result of military actions like those just described, and another 832 were injured.<sup>76</sup> At least 260 open combat situations between guerrilla and state forces were registered, bringing the total of belligerent actions for this period to 555. The conflict continued to affect over eighty percent of the country's departments in one way or another.<sup>77</sup>

Most of the killing in Colombia's conflict, however, does not

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NIEBLA: PANORAMA DE DERECHOS HUMANOS Y VIOLENCIA POLÍTICA EN COLOMBIA, July-Sept., 1997, at 140-67; NOCHE Y NIEBLA: PANORAMA DE DERECHOS HUMANOS Y VIOLENCIA POLÍTICA EN COLOMBIA, Oct.-Dec., 1997, at 140-61.

72. *See id.*

73. *See 'Tirofijo' se destapa, supra* note 48.

74. *See supra* note 71. The belligerent actions referred to in these statistics do not include violations of IHL, such as the blowing up of oil pipelines, extra-judicial executions or the kidnapping of civilians for ransom. *See id.* These are considered separately below.

75. *See* Mary Sánchez, *supra* note 36, at 3. These casualties' figures are a one-year estimate based on data received for the period between October 1996 and September 1997. *See id.*

76. *See* CINEP and Justice and Peace Data Bank, *supra* note 71; NOCHE Y NIEBLA: PANORAMA DE DERECHOS HUMANOS Y VIOLENCIA POLÍTICA EN COLOMBIA, Jan.-June, 1998, at 14, 17; NOCHE Y NIEBLA: PANORAMA DE DERECHOS HUMANOS Y VIOLENCIA POLÍTICA EN COLOMBIA, July-Sept., 1998, at 16, 19.

77. *See* CINEP and Justice and Peace Data Bank, *supra* note 71; Noche Y NIEBLA: PANORAMA DE DERECHOS HUMANOS Y VIOLENCIA POLÍTICA EN COLOMBIA, Jan.-June, 1998, at 18.



take place on the battlefield or in other belligerent activity. A deeper analysis of the available statistics reveals why. The *total* of politically motivated deaths for the ten-year period between 1988 and 1997 was over 35,000.<sup>78</sup> During that period, the average of politically motivated or presumably politically motivated deaths was 3,628 a year, including combat casualties. This averages out to *ten victims per day* for ten years! Of these victims, only three correspond to civilian and military casualties as a result of combat.<sup>79</sup> The substantial remainder—six to seven persons a day—corresponds primarily to executions in violation of human rights and/or humanitarian law. Thus, for example, between October of 1996 and September of 1997, there were six extra-judicial executions or political homicides a day *in addition to* the three deaths resulting from combat between the parties, plus a person forcibly disappeared every other day.<sup>80</sup>

Most politically motivated deaths are, in fact, the result of widespread human rights and humanitarian law violations resulting from attacks on civilians *outside* the scope of combat or direct action against the enemy.<sup>81</sup> Less than a third of politically motivated killings in Colombia are a consequence of actual combat or other military activities not prohibited by IHL: human rights and humanitarian law violations account for over seventy percent of all such deaths. The victims of these political executions or homicides tend to be members of the civilian population who do not directly take part in the hostilities, such as peasants and rural workers, community activists and leaders, trade unionists, leftist opposition

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78. See CCJ GRAPH I, *supra* note 25 and accompanying text.

79. See *id.*

80. See Colombian Commission of Jurists, *Derechos humanos y violencia sociopolítica: Derecho a la vida*, Sept. 1996 - Oct. 1997 (Aug. 1998) (unpublished graph, on file with author) [hereinafter CCJ Graph II].

81. See *Guerra Sucia*, SEMANA, Apr. 27, 1998, at 24 (discussing that in Colombia, this phenomenon of politically motivated deaths is sometimes referred to as the “dirty war”). The author defines “dirty war” in the Colombian context as politically motivated attacks by frequently unidentified armed actors against social and political activists, or other persons viewed as sympathetic to the rebels or aiding their cause. The term “dirty war” is inherited from the clandestine, brutal repression of the Southern Cone dictatorships against their civilian populations, especially Chile and Argentina, during the 1970s and 1980s.

leaders, human rights defenders, and indigenous persons.<sup>82</sup> All available evidence indicates that the same pace and pattern of killings continued during 1998.<sup>83</sup>

Who is responsible for all these killings? Although it is not possible to have a precise statistical account, reliable Colombian non-governmental sources have made a point of tracking these cases in order to gain a reasonable indication of authorship.<sup>84</sup> Their research shows that for the past five years, paramilitary groups have been the armed actors most identified with these violations of the right to life, accounting for an estimated seventy-six percent of all politically motivated homicides in 1997.<sup>85</sup> It is important to note that this figure has increased steadily during this period, inversely mirroring a commensurate drop in the percentage of actions attributable to state actors, namely the Army.

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82. See *Report of the United Nations High Commissioner for Human Rights on the Office in Colombia*, U.N. Doc. E/CN.4/1999/8, para. 45 [hereinafter *HCHR 1999*]; see also COLOMBIAN COMMISSION OF JURISTS, COLOMBIA, DERECHOS HUMANOS, Y DERECHO HUMANITARIO: 1996, 19-30 (1997) [hereinafter *CCJ 1996*].

83. See HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT: 1999, 109 (1999) [hereinafter *HRW 1999*] (citing Colombian NGO sources as reporting 619 killings carried out presumably for political reasons during the first six months of 1998, not including combatants killed in action).

84. See COMISIÓN COLOMBIANA DE JURISTAS, COLOMBIA, DERECHOS HUMANOS Y DERECHO HUMANITARIO: 1995 3-9 (1996) [hereinafter *CCJ 1995*]; *CCJ 1996*, *supra* note 82, at 3-19 (calculating estimates of responsibility based on those cases in which some evidence of authorship was available). Between 1993 and 1995, cases where some evidence of authorship was available represented only 28% of the total. In 1996, however, this figure rose to 65%, thanks largely to the drastic increase in paramilitary activity and its express objective of disseminating terror among the civilian population. Based on these cases, projections are made to arrive at the proportional responsibility figures cited in the *CCJ* graphs.

85. See COMISIÓN COLOMBIANA DE JURISTAS, COLOMBIA, DERECHOS HUMANOS Y DERECHO HUMANITARIO: 1995, 3-9 (1996) [hereinafter *CCJ 1995*]; *CCJ 1996*, *supra* note 82, at 3-19. Preliminary finding for 1998 confirm that paramilitary responsibility for violations of the right to life continues to hover around 70%. See *HRW 1999*, *supra* note 83, at 109.

Table 1

EVOLUTION OF THE RESPONSIBILITY OF ARMED ACTORS FOR EXTRA-JUDICIAL EXECUTIONS AND POLITICAL HOMICIDES IN CASES WHERE THE AUTHOR WAS IDENTIFIED: 1993-1997<sup>86</sup>

<i>Year</i>	1	2	3
	<i>State agents</i>	<i>Paramilitary groups</i>	<i>Guerrilla groups</i>
1993	54.26%	17.91%	27.48%
1994	32.76%	35.33%	31.91%
1995	15.68%	46.03%	38.29%
1996	10.52%	62.69%	26.79%
1997	4.18%	76.07%	19.75%

To many observers, these statistics are merely a reflection of what already has been established through evidence compiled over many years by national and international investigators: paramilitary groups are a central component of the Colombian security forces' anti-insurgency strategy, notwithstanding the civilian and military authorities' staunch and consistent denial of this relationship.<sup>87</sup> The Colombian Human Rights Ombudsman ("*Defensor del Pueblo*"), an independent state watchdog on these issues, summarized it best when he informed the Colombian Congress that paramilitary groups:

[Have] become the illegal arm of the armed forces and police, for whom they carry out the dirty work, which the armed forces and police cannot do as authorities subject to the rule of law. This is about a new form of exercising illegal repression with no strings attached which some analysts have called, quite rightly, violence through delegation.<sup>88</sup>

86. See COMISIÓN COLOMBIANA DE JURISTAS, DATA BANK, Bogotá, 1998 [hereinafter CCJ DATA BANK]; see also CCJ 1996, *supra* note 82, at 7.

87. See HCHR Report, *supra* note 68, paras. 27, 178, 190, Recommendations 7 and 8; WAR WITHOUT QUARTER, *supra* note 1, at 43-48, 100-09; see also CCJ 1996, *supra* note 82, at 5-7.

88. DEFENSORÍA DEL PUEBLO, IV INFORME ANUAL DEL DEFENSOR DEL

The collaboration, complicity and acquiescence of important sectors of the Colombian security forces, and some government officials, must be taken into account when analyzing the abuses and violations committed by paramilitary groups. In certain cases, paramilitary groups act as *de facto* state agents and commit violations of human rights and humanitarian law directly imputable to the state.<sup>89</sup> Even where there is no agency relationship, it is evident that Colombia violates its international obligations by permitting the paramilitaries to commit grave abuses of human rights and humanitarian norms, and by not pursuing the perpetrators to bring them to justice.<sup>90</sup> These issues are addressed in the second part of the Article. For purposes of the current discussion, it is sufficient to note that the primary responsibility for the majority of political homicides attributed today to paramilitary groups in Colombia entails serious legal consequences for the state as well.

This symbiotic relationship between security and paramilitary forces is central to understanding one of the most egregious of humanitarian violations prevalent in Colombia: the massacre of civilians. The Human Rights Ombudsman's Office registered 288 massacres of at least three persons during 1997, with the number of victims totaling well over a thousand.<sup>91</sup> The Colombian Commission of Jurists ("CCJ"), a Bogotá based human rights non-governmental organization, counted 117 massacres of four or more persons for the year period between October 1996 and September 1997, for a total of 669 victims.<sup>92</sup> By all accounts, the paramilitary groups were responsible for the vast majority of these massacres.

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PUEBLO AL CONGRESO DE COLOMBIA 59-60 (1997) (translation by author).

89. See *infra* notes 470-49 and accompanying text (discussing the responsibility of the Colombian State for the illegal actions of paramilitaries who, through their collaboration with the State, act as its agents under international law).

90. See *infra* notes 480-85 and accompanying text (showing that the Colombian State, in the absence of collaboration, is still responsible for the illegal actions of paramilitaries, because of widespread state acquiescence).

91. See DEFENSORÍA DEL PUEBLO, INFORME DE LA COMISIÓN DE ESTUDIOS NO. 053 PARA LAS MASACRES DE 1997 (1998) (unpublished manuscript, on file with author) (containing 1997 massacre statistics).

92. See COMISIÓN COLOMBIANA DE JURISTAS, STUDY ON MASSACRES (1998) [hereinafter CCJ STUDY 1998] (unpublished study, on file with author) (containing massacre statistics for Oct. 1996- Sept. 1997).

The CCJ found in its study that, while state security forces were apparently responsible for only four massacres and 22 victims, 86 massacres with over 500 victims were attributable to the paramilitaries.<sup>93</sup>

This trend shows no signs of relenting. During the first eight months of 1998, for example, paramilitary groups “were linked to most of the massacres committed [including many in which] bodies were also dismembered, decapitated, and mutilated with machetes, chain saws, and acid.”<sup>94</sup> Over the course of one long weekend in early January 1999, paramilitary forces went on a rampage. In less than seventy-two hours, they carried out a series of massacres in several different regions of the country, which left 139 civilians dead.<sup>95</sup> The breadth, range, and duration of paramilitary action reflected in these statistics would not be possible without the support and acquiescence of many Colombian military and civilian authorities. Paramilitary groups do not only violate IHL through the massacres and selective assassinations; other frequent practices in violation of humanitarian law include systematic torture and death threats, hostage taking, and the internal displacement of the civilian population residing in conflictive zones.<sup>96</sup>

Following the paramilitary groups, the guerrillas are the second most frequent violators of IHL. According to the CCJ study cited above, the guerrillas were accountable for eleven massacres and forty-eight civilian deaths.<sup>97</sup> Human Rights Watch identified twelve FARC sponsored massacres and one sponsored by the ELN in 1997.<sup>98</sup> The execution of combatant's *hors de combat* by guerrilla forces, as well as selective political killings by guerrilla forces of

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93. See *id.*

94. HRW 1999, *supra* note 83, at 111; see also HCHR 1999, *supra* note 82, para. 49 (stating that in March 1999, the United Nations High Commissioner for Human Rights identified paramilitary group members as responsible for two-thirds of all executions).

95. See *Garrote y mano extendida a 'paras'*, EL TIEMPO, Jan. 12, 1999, at A8.

96. See WAR WITHOUT QUARTER, *supra* note 1, at 109-30; see also HCHR Report, *supra* note 68, paras. 97-102.

97. See CCJ DATA BANK, *supra* note 86.

98. See WAR WITHOUT QUARTER, *supra* note 1, at 135, 171.

alleged army and paramilitary collaborators, are common.” The ELN has gone so far as to torture and execute the girlfriends of soldiers and officers for consorting with the enemy.<sup>100</sup> As indicated earlier, these two guerrilla organizations were responsible for approximately nineteen percent of all violations of the right to life under humanitarian law in 1997, encompassing both massacres and selective political homicides or executions.<sup>101</sup> This situation does not appear to have improved substantially during 1998.<sup>102</sup>

Once other violations of IHL are tabulated, especially regarding the common practice of kidnapping for ransom, the guerrillas’ responsibility skyrockets. Kidnapping for extortion purposes is considered hostage taking under the relevant humanitarian law instruments and, as such, is an egregious violation of the law.<sup>103</sup> Between October 1995 and September 1996, 1436 kidnappings for ransom took place in Colombia, of which 583 or forty percent were attributable to guerrilla forces.<sup>104</sup> For the period between October of 1996 and September 1997, the number dropped to 814 kidnappings of which 363 or forty-five percent were attributable to guerrilla forces.<sup>105</sup> The number rose again, however, during the first seven months of 1998 to 1,088 kidnappings, half for which the guerrillas allegedly were responsible.<sup>106</sup> It is relevant to note that almost fifty percent of *all* kidnappings for ransom carried out in the world today take place in Colombia.<sup>107</sup>

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99. *See id.* at 133-51, 162-75.

100. *See id.* at 170.

101. *See supra* note 86 and accompanying text.

102. *See* HRW 1999, *supra* note 83, at 109 (interpreting preliminary findings for 1998 to suggest that guerrilla responsibility for executions in violation of the right to life is about 17%).

103. *See* INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, THIRD REPORT ON THE SITUATION OF HUMAN RIGHTS IN COLOMBIA. ch. IV, paras. 120-23 (1999) <<http://www.cidh.org>> [hereinafter IACHR THIRD REPORT].

104. CCJ 1996, *supra* note 82, at 65-66.

105. *See* MARY SÁNCHEZ, INFRACCIONES AL DIH (Aug. 1998) (unpublished manuscript, on file with author).

106. *See* HRW 1999, *supra* note 83, at 112.

107. *See* Arturo Carrillo Suárez, *Apuntes sobre el secuestro y el derecho internacional humanitario en el conflicto armado colombiano*, in CCJ 1996, *supra* note 82, at 181.

Other violations of IHL by guerrillas include death threats against civilians who do not comply with their demands or who are considered "military targets"; torture, sometimes as a prelude to execution; the indiscriminate use of antipersonnel mines and indiscriminate attacks prejudicing civilians and civilian property; the recruitment of minors and the violation of due process guarantees when trials are undertaken; the internal displacement of civilian population; attacks on protected medical personnel, vehicles and installations; and perfidy.<sup>108</sup> With the exception of death threats, these violations are quantitatively less significant than those relating to political killings and hostage-taking. Finally, it should be noted that the ELN continues to attack oil installations and infrastructure, such as pipelines carrying petroleum and gas, often resulting in grave consequences for civilians and the surrounding environment.<sup>109</sup>

The Colombian security forces, notwithstanding a quantitative drop in the level of abuses directly attributable to their members in recent years, continue to commit serious violations of human rights and humanitarian law, including massacres, summary executions, forced disappearances, torture, death threats, and arbitrary detentions, all with little apparent effort or desire to punish those responsible.<sup>110</sup> In addition, there is also substantial evidence that state security forces, especially the army, have carried out indiscriminate and disproportionate attacks resulting in the loss of civilian lives and damage to civilian installations, in some cases through intense aerial bombings.<sup>111</sup> On occasion, the indiscriminate and disproportionate use of lethal force at military roadblocks produces civilian casualties in violation of basic humanitarian principles.<sup>112</sup>

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108. See *HCHR Report*, *supra* note 68, paras. 97, 102; *WAR WITHOUT QUARTER*, *supra* note 1, at 131-91.

109. See HRW 1999, *supra* note 83, at 112 (noting that in 1998 alone, one particular pipeline was bombed over forty times); see also Marisol Gómez Giraldo, *A Machuca la arrasó el fuego*, *EL TIEMPO*, Oct. 19, 1998, at A1 (reporting a case where a resulting spill caught on fire and incinerated 69 villagers sleeping nearby).

110. See IACHR THIRD REPORT, *supra* note 103, paras. 166-233; see also HRW 1999, *supra* note 83, at 109-10.

111. See IACHR THIRD REPORT, *supra* note 103, ch. IV, paras. 178-89.

112. See *id.* paras. 190-95.

Frequently at the heart of these violations is the “Colombian army’s consistent and pervasive failure or unwillingness to distinguish civilians from combatants in accordance with the laws of war.”<sup>113</sup> This view is grounded in the army’s publicly stated belief that only fifteen percent of the insurgents against whom they are waging the war are armed guerrilla fighters; the other eighty-five percent engage in what the army calls the “political war” carried out—they say—by members of Colombian human rights non-governmental organizations (“NGOs”), trade unions, and political parties.<sup>114</sup> It is this attitude ingrained in the armed forces, which has fueled the “dirty war” in Colombia. During 1998, in those regions where paramilitary forces were weak,

the army was directly implicated in the killing of civilians and prisoners taken *hors de combat*, as well as torture and death threats. In the rest of the country, where paramilitaries had developed a pronounced presence over the past decade, the army still failed to move against them and tolerated their activity, including egregious violations of international humanitarian law; provided some paramilitary groups with intelligence and logistical support to carry out operations; and actively promoted and coordinated joint maneuvers with them.<sup>115</sup>

The National Police, to a lesser degree, were also implicated in human rights and humanitarian law violations during 1998, including extra-judicial executions, death threats, and association with paramilitary groups in much the same way as the Colombian army.<sup>116</sup>

The intense levels of political violence described above contributed to the increase in the already significant numbers of internally displaced persons (“IDPs”) in Colombia, such that by 1998, the displaced population in the country totaled well over one million.<sup>117</sup> As in years past, the principal causes of internal displacement continued to be violations of human rights and the laws of war by all

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113. WAR WITHOUT QUARTER, *supra* note 1, at 44.

114. See HCHR Report, *supra* note 68, para. 112.

115. HRW 1999, *supra* note 83, at 109-10.

116. See *id.* at 111.

117. See *id.* at 112; see also HCHR Report, *supra* note 68, at 96, 103.



parties to the conflict.<sup>118</sup> Not surprisingly, the paramilitaries are responsible for generating the vast majority of internal displacement, followed by the guerrillas and the army.<sup>119</sup> In this respect, the High Commissioner for Human Rights expressed concern that “[t]he enforced displacement of the civilian population is being used as a war strategy by the armed forces, police and paramilitary groups.”<sup>120</sup>

Impunity is a longstanding phenomenon in Colombia, which both underlies and compounds this crisis. Official statistics corroborated by independent observation of international experts confirm that impunity for violent crimes in Colombia is—and has been for many years—nearly 100 percent, especially when those crimes are carried out for political reasons.<sup>121</sup> The Human Rights Unit of the Office of the Prosecutor General reported that between October 1995 and September 1997, it was aware of only 260 criminal investigations being carried out for crimes considered human rights or humanitarian law violations, of which 137 were still in their preliminary stages. Of these investigations, twenty-seven were for massacres, thirty for cases of forced disappearances, and eighty-eight for politically motivated homicides.<sup>122</sup> Even though slight progress has recently been made by the Prosecutor’s Office in the judicial pursuit of paramilitary members and their supporters,<sup>123</sup> the vast majority of politically motivated crimes carried out by illegal armed groups, as well as state agents, continues to go unpunished.<sup>124</sup>

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118. See HRW 1999, *supra* note 83, at 112.

119. See HCHR Report, *supra* note 68, para. 102.

120. *Id.* para. 97.

121. See IACHR THIRD REPORT, *supra* note 103, ch. V, paras. 12-14; see also HCHR Report, *supra* note 68, paras. 117-24.

122. See HCHR Report, *supra* note 68, para. 120.

123. See No coinciden cifras de Fiscalía y Mindefensa sobre “paras”, *El Espectador*, Jan. 15, 1999, at 7A (reporting that 418 persons were arrested during 1998 on charges related to paramilitary activity, according to the Prosecutor’s Office).

124. A major underlying factor is the incapacity of the military justice system to operate impartially and independently and, consequently, its flagrant disregard for alleged human rights and IHL violations. As a general rule with no known exceptions, military personnel charged with crimes relating to these types of violations are routinely absolved, even where the evidence of participation in

### C. NATIONAL IMPLEMENTATION OF IHL

The foregoing sections outlined the nature of the conflict and described the human rights and humanitarian law crisis it has generated. This section addresses national efforts to implement IHL and opens with an introduction to the Colombian political system. The next and final section of Part I touches upon the ongoing peace process initiated by recently elected President Andrés Pastrana. It concentrates on the positions adopted by the parties to the conflict in relation to humanitarian law.

It will be evident throughout the remainder of Part I that the broad normative overlap between IHL and the international law of human rights reflects an essential concept underpinning the discussion.<sup>125</sup> In practice, the lines dividing these two related domains of international law are frequently blurred, especially in non-international conflicts like the one in Colombia. For purposes of this study, the reader should assume, as is usually the case, that human rights violations committed by state agents in the course of the armed conflict also constitute violations of the applicable laws of war. Although there may be cases where state agents transgress humanitarian norms without violating human rights (by failing to respect the neutrality of medical personnel, for example), all the grave violations of humanitarian law by the Colombian security forces entail serious violations of human rights law as well.

Consequently, all measures directed at curbing or sanctioning conventional human rights violations in Colombia should be construed as directly relevant to the analysis of humanitarian law violations, which result from the action of state forces. On the other hand, the abuses and atrocities committed by paramilitary groups, when they are not acting as state agents, or by the guerrillas, are *only* violations of the laws of war in the terms described below in

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these crimes is "irrefutable." See HRW 1999, *supra* note 83, at 110; HCHR 1999, *supra* note 82, paras. 61, 151.

125. See generally THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION (1987); see also Antonio Augusto Cancado Trindade, *Aproximaciones o convergencias entre el derecho internacional humanitario y la protección internacional de los derechos humanos*, MEMORIA: SEMINARIO INTERAMERICANO SOBRE LA PROTECCION DE LA PERSONA EN SITUACIONES DE EMERGENCIA 33 (1996).

Part II, Section B.2, of this Article. While it is true that individuals who commit crimes against humanity or war crimes will be subject to international criminal responsibility,<sup>126</sup> under traditional principles of international law, private actors do not violate human rights because human rights obligations attach primarily to government and state agents.<sup>127</sup> IHL, on the other hand, contemplates international responsibility for individuals and non-state actors who act in contravention of its provisions. The nature of these obligations with respect to state, paramilitary and guerrilla forces are explored further in Part II.

### 1. *Introduction to the Colombian Political System*

The 1991 Constitution establishes Colombia as a social-democratic state based on the rule of law ("*Estado social de derecho*").<sup>128</sup> It provides for the separation of the executive, legislative and judicial branches and their respective autonomy and independence.<sup>129</sup> The Congress is bicameral, consisting of the Senate and the House of Representatives ("*Cámara de Representantes*"); it is charged with making the laws and exercising "political control" over the government and its administration.<sup>130</sup> The President,<sup>131</sup> who

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126. See *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9, arts. 7, 8 [hereinafter *ICC Statute*]; see also *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (holding that Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity). This subject is developed *infra* in Part II.B.3.

127. It is beyond the purview of this Article to engage the vanguard question of whether individuals or private entities violate international human rights. For one view that private individuals may violate another's human rights, see ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* (1993). For the contrary view, see Ramiro de Jesus Pazos and Juan Fernando Jaramillo, *Responsabilidad de agentes particulares en violaciones de derechos humanos y conflicto armado*, Serie: Investigaciones Plataforma de Derechos Humanos, Democracia y Desarrollo (No.2), Novib, Santiago, Chile (1995).

128. See COLOM. CONST. art. 1.

129. See *id.* arts. 113-16, 228. See generally TULIO ELÍ CHINCHILLA, *CONSTITUCIÓN POLÍTICA DE COLOMBIA COMENTADA POR LA COMISIÓN COLOMBIANA DE JURISTAS: DE LA ORGANIZACIÓN DEL ESTADO* 30-33 (1996) [hereinafter *ORGANIZATION OF THE STATE*].

130. COLOM. CONST. art. 114.

131. See *id.* art. 115.

is directly elected every four years, heads the government along with his ministers and the directors of administrative departments.<sup>132</sup> The judicial branch is comprised of the Constitutional Court, the Supreme Court, the Council of State ("*Consejo de Estado*"), the Office of the Prosecutor General ("*Fiscalía General de la Nación*"), the Superior Judiciary Council ("*Consejo Superior de la Judicatura*"), the lower tribunals and the judges who administer justice.<sup>133</sup> The court system is composed essentially of two main jurisdictions, the ordinary and the military.<sup>134</sup>

In the ordinary jurisdiction, the Supreme Court of Justice is the highest judicial organ, followed by the appellate level courts and the trial level courts consisting of one judge. These appellate and trial level courts have jurisdiction over civil, criminal, family, agrarian and labor matters. The Military Courts function separately with jurisdiction over members of the armed forces and police charged with crimes carried out "in relation to" their public service.<sup>135</sup> The military jurisdiction is organized into lower courts, one appellate level court called the Military Appeals Court ("*Tribunal Superior Militar*"), and the Supreme Court of Justice as a court of cassation ("*casación*"). A parallel system of Public Order, or "Regional" courts as they are officially known, operates within the ordinary criminal jurisdiction for crimes deemed to represent a threat to national security, such as terrorism, drug trafficking, kidnapping and subversion.<sup>136</sup>

The Council of State is the maximum administrative law body,<sup>137</sup> while the Superior Judiciary Council is charged with the admini-

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132. See *id.* arts. 115, 190.

133. See *id.* arts. 116, 228.

134. See generally *Report of the Special rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy, to the 54th Commission on Human Rights on the mission to Colombia*, E/CN.4/1998/39/Add.2 [hereinafter *Cumaraswamy*] (providing a detailed description of the Colombian political and judicial system).

135. See COLOM. CONST. art. 221.

136. See *Cumaraswamy*, *supra* note 134, Part II (noting that these courts are infamous for relying on "faceless" or anonymous judges, prosecutors and even witnesses).

137. See COLOM. CONST. art. 237.

stration of the judiciary in general,<sup>138</sup> which includes selecting candidates for vacant posts and internal disciplinary matters.<sup>139</sup> The Superior Judiciary Council also decides conflict of law cases between the military and ordinary jurisdictions.<sup>140</sup> Criminal proceedings are brought by the Office of the General Prosecutor ("*Fiscalía General de la Nación*"),<sup>141</sup> which is responsible, directly or as a result of a complaint or a claim, for investigating offenses and bringing charges against suspects in the competent tribunals.<sup>142</sup> As already noted, prosecutors try crimes deemed to present a threat to national security in the Regional Court system.<sup>143</sup> It is necessary to point out, however, that in the investigative phase, the Prosecutor acts as the *judicial* authority and can issue arrest warrants and writs of detention, order searches, and embargo property. When the case is elevated to trial status, a judge is assigned and the Prosecutor then assumes the exclusive role of accusing.<sup>144</sup>

The Constitutional Court has become in many ways the backbone of the Colombian judiciary since its establishment in 1991 under the new Constitution. The Court is composed of nine judges elected for one period only of eight years by the Senate, upon proposals made by the President, the Supreme Court and the Council of State.<sup>145</sup> Article 241 affirms that the Constitutional Court is charged with "guarding the integrity and supremacy of the Constitution."<sup>146</sup> Article 241 also deems the Constitutional Court the final arbiter of constitutionality with respect to proposed constitutional amendments, executive declarations of a state of emergency, legislative decrees, referendums, international treaties ratified by Congress, ordinary laws and special constitutional remedies.<sup>147</sup> The pur-

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138. *See id.* art. 254.

139. *See id.* art. 256.

140. *See id.*

141. *See id.* art. 249.

142. *See* COLOM. CONST. art. 250.

143. *See supra* note 136 and accompanying text.

144. *See* COLOM. CONST. art. 251.

145. *See id.* arts. 231, 233.

146. *See id.* art. 241 (translation by author).

147. *See id.*

pose behind establishing a special jurisdiction and centralized judiciary body for constitutional review was to remove these and other related issues from the ambit of political deliberation.<sup>148</sup>

Rounding out the constitutional system in Colombia is the Public Ministry ("*Ministerio Público*"), an authority with oversight functions established by the Constitution as a sort of "fourth branch" independent of the others.<sup>149</sup> The Public Ministry is headed by the Procurator General ("*Procurador General*") who is the highest authority on disciplinary matters relating to the official conduct of persons in public service.<sup>150</sup> As maximum guardian of the public interest, human rights and the rule of law, the Procurator's Office monitors the official conduct of public servants, including members of the police and the armed forces.<sup>151</sup> It has the authority to investigate misconduct and impose the appropriate administrative sanctions, such as suspension or dismissal from office. More generally, the Procurator may also present draft laws to Congress on any matter relating to its legal mandate.<sup>152</sup>

Just below the Procurator in the Public Ministry is the Human Rights Ombudsman or Defender of the People ("*Defensor del Pueblo*").<sup>153</sup> The Ombudsman's Office is constitutionally mandated to oversee the "promotion, exercise and dissemination of human rights," which under Colombian constitutional jurisprudence are interpreted as including humanitarian law norms.<sup>154</sup> In furtherance of this objective, the Constitution expressly authorizes the Ombudsman to counsel citizens and the public with respect to their rights, and to assume the public defense of indigents in criminal cases. Like the Procurator, the Ombudsman's constitutional faculties include the promotion of draft laws before Congress relating to any of the subjects within his or her competence. By law, the Om-

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148. See ORGANIZATION OF THE STATE, *supra* note 129, at 46 (commenting on the motives behind the creation of a constitutional court).

149. See COLOM. CONST. arts. 275-79.

150. See *id.* art. 275, 277.

151. See *id.* art. 277.

152. See *id.* art. 278.

153. See *id.* art. 281.

154. See *id.* art. 282; *infra* note 160 and accompanying text.

budsman's Office can receive and give course to individual complaints of human rights and humanitarian law violations.<sup>155</sup> Although it does not act as a jurisdictional body on these matters, it can refer these cases to the appropriate judicial or disciplinary authorities for action.

## 2. *Implementation of International Humanitarian Law*

In this section, national implementation of IHL is examined with reference to three distinct types of actors: government and state authorities, non-state actors, in particular NGOs, and the International Committee of the Red Cross ("ICRC"). With respect to the national authorities, implementation refers to all legal and non-legal measures—legislative, judicial, administrative, disciplinary, promotional, or practical—adopted in furtherance of the state's international obligations to apply and respect IHL, and to guarantee that it is complied with. Non-governmental actors such as NGOs and the ICRC are considered to the extent that they direct their activities and efforts at promoting the application of IHL by all the parties to the conflict. Finally, it should be underscored that the armed non-state actors who are parties to the conflict—the guerrilla and certain paramilitary groups—are under a duty to "implement" humanitarian law by adopting the practices and regulations required to ensure respect for its provisions insofar as their belligerent activity is concerned.<sup>156</sup>

### a. Government and State Authorities

Colombia falls squarely within the international regime for the regulation of non-international armed conflict. Colombia is a party

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155. Law 24 of 1992 established four distinct bureaus or dependencies within the Ombudsman's Office, one of which is the National Directorate for the Reception and Processing of Complaints [*Dirección Nacional de Atención y Trámite de Quejas*]. See Defensoría Del Pueblo, IV Informe Annual Del Defensor Del Pueblo Al Congreso de Colombia, 77 (1997).

156. See Colombian Red Cross, *supra* note 20, at 16-20; see also Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 14 (1995) (explaining how the actions of non-governmental bodies not directly involved in a conflict can affect implementation through efforts to secure compliance by belligerents, including situations where belligerents have committed major violations of the rules).

to the Geneva Conventions of August 12, 1949 for the Protection of Victims of War,<sup>157</sup> and to Protocol II Additional to the same Geneva Conventions.<sup>158</sup> Article 93 of the Colombian Constitution states that the “international treaties and conventions ratified by Congress which recognize human rights . . . will prevail in the internal [legal] order [over ordinary laws]. The rights and duties consecrated in this Charter shall be interpreted in conformity with the international human rights treaties ratified by Colombia.”<sup>159</sup> The Constitutional Court has held that Article 93 covers humanitarian law treaties as well since they are part of the same generic body of norms as human rights and belong to the same international regime for the protection of the rights of all human beings.<sup>160</sup>

Moreover, the Constitutional Court has expressly held that *all* IHL has constitutional rank in Colombia and is, therefore, the supreme law of the land.<sup>161</sup> The Court found that humanitarian norms are an integral part of what it calls the “‘bloc of constitutionality’ which comprises those rules which, whether formally articulated in the Constitution or not, are used as parameters to test the constitutionality of the laws.”<sup>162</sup> The Court arrives at this conclusion by interpreting the express terms of Article 214, cited below, in light of Article 93, as follows:

In the case of Colombia, these humanitarian norms are especially im-

157. The four Geneva Conventions of 1949, *supra* note 12, were ratified in Colombia by Law 5 of 1960.

158. Protocol II, *supra* note 13, was ratified by Law 171 of 1994 and has been in force since February 15, 1996.

159. COLOM. CONST. art. 93 (translation by author).

160. See C.C., 1993, C-027, *quoted in* MANUEL BARRETO AND LIBARDO SARMIENTO, CONSTITUCIÓN POLÍTICA DE COLOMBIA COMENTADA POR LA COMISIÓN COLOMBIANA DE JURISTAS: TÍTULO II: DE LOS DERECHOS, LAS GARANTÍAS Y LOS DEBERES 436 (1997) [hereinafter TITLE II] (discussing the scope and nature of the Constitutional Court’s human rights jurisdiction).

161. See C.C., 1995, C-225, at 41-42.

162. Frits Kalshoven, Protocol II, the CDDH and Colombia 11 (undated) [hereinafter Kalshoven Protocol II]; see also, Frits Kalshoven, *El Protocolo II, la CDDH y Colombia*, in DERECHO INTERNACIONAL HUMANITARIO APLICADO: CASOS DE COLOMBIA, EL SALVADOR, GUATEMALA, YUGOSLAVIA Y RUANDA (Álvaro Villarraga ed., 1998) (all subsequent citations will be to the original text in English).



perative; since article 214 paragraph 2 of the Constitution states that, 'the rules of international humanitarian law shall in all cases be respected'. This means . . . that in Colombia international humanitarian law not only is valid at all times but also that it is automatically incorporated into 'the internal national order' . . . . Consequently, the members of the irregular armed groups as well as all state officials, especially all the members of the security forces who are the natural subjects of humanitarian norms, are obligated to respect the rules of international humanitarian law at all times and in all places.<sup>163</sup>

The foregoing establishes that there is a constitutional obligation on the government, as well as on the legislative and judicial authorities, to ensure that humanitarian law is fully integrated into the internal legal order and duly enforced. In addition to the Constitutional Court, a few other national authorities such as the Council of State, the Office of the Procurator General and the Human Rights Ombudsman have made efforts to interpret domestic norms in conformity with Colombia's obligations under IHL.<sup>164</sup> Unfortunately, this incipient practice, while significant, is not indicative of the prevalent view and practice displayed by many other authorities, including the government, that tend to restrict the legal operation of IHL in the country. In particular, it contrasts sharply with the absence of any formal legislation implementing IHL and with the general lack of judicial enforcement of humanitarian norms by most courts.

The progressive jurisprudence of the Constitutional Court with respect to IHL has not been matched by the formal legislative and regulatory efforts necessary, as a practical matter, to implement humanitarian norms and to have them applied as law by most Colombian authorities. Colombia has, at the very least, been subject to

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163. C.C., 1995, C-225, at 40 (translation by author); *see also* TITLE II, *supra* note 160, at 436. It is interesting to note that in the same decision, the Court, referring to the Geneva Conventions and both Protocols, expressed the view that humanitarian law has achieved peremptory status under international law and is considered *jus cogens*. *See id.*

164. *See* Cruz Roja Colombiana, Estudio Consuetudinario sobre Derecho Internacional Humanitario en Colombia, Bogotá (1998) (unpublished manuscript, on file with author) [hereinafter CRC Study]. This study was commissioned by the ICRC as part of an ongoing world-wide review of the status of humanitarian norms under customary international law.

the common Article 3 regime of protection since the late 1960s.<sup>165</sup> Yet a 1995 study carried out by the Colombian Red Cross in conjunction with government authorities and a local university found that there was no legislation incorporating humanitarian law violations *per se* into Colombian criminal law.<sup>166</sup> It is true that related crimes such as homicide, kidnapping and torture, among others, are proscribed in the Colombian Penal Code and the new Military Penal Code.<sup>167</sup> No specific legal consideration, however, is given to the laws of war in these criminal codes, except for a handful of articles in the latter promisingly entitled "Crimes Against the Civilian Population." Unfortunately, the only IHL-inspired crimes stipulated in this section are the wanton destruction of temples, monuments or other structures of "public utility," attacks against hospitals, pillage and plunder, and the unwarranted search of persons.<sup>168</sup> This nod to Geneva-based IHL replaces an equally minimalist article in the previous Military Penal Code that focused on norms derived from the Law of the Hague.<sup>169</sup>

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165. See Alvaro Villarraga, *Antecedentes y elementos de diagnóstico: rasgos del conflicto armado y del derecho humanitario en Colombia*, in DERECHO INTERNACIONAL HUMANITARIO APLICADO: CASOS DE COLOMBIA, EL SALVADOR, GUATEMALA, YUGOSLAVIA Y RUANDA 262 (Alvaro Villarraga ed., 1998).

166. See Colombian Red Cross, *supra* note 20, at 27-28.

167. See, e.g., COLOMBIAN PENAL CODE (C.P.C.), arts. 268, 269 (kidnapping), and 323 (homicide). The new Military Penal Code [C.P.M.] which became law in August of 1999 (Law 522 of August 12, 1999) states in Article 195: "When a member of the Security Forces in active service and in relation to this service commits a crime established in the ordinary Penal Code [. . .], he or she shall be investigated and tried in conformity with the provisions of the Military Penal Code." *Id.* (translation by author). A similar rule prevailed under the prior Code as well.

168. See C.P.M. arts. 174-79 (translation by author). For a further discussion of the Military Penal Code, see *infra* notes 192-96 and accompanying text.

169. The only reference to the IHL in the prior Military Penal Code adopted in 1988 was Article 169, which read:

Modalities: Imprisonment from one (1) to five (5) years will be imposed on anyone who 1) Obligates a prisoner of war to engage in combat against his own country, or submits him to physical or moral mistreatment, or relieves him of his belongings with the intent to appropriate them for himself. 2) Takes the belongings of dead persons on the battlefield. 3) Employs in undue fashion the insignias, flags or emblems of the Red Cross or of organiza-

The second obstacle to the practical application of IHL in Colombia is that without specific implementing legislation, most national courts will not apply international law norms "directly" in specific cases, even where they are of constitutional rank, as is the case here.<sup>170</sup> Many Colombian jurists believe that these norms are "directly and immediately applicable" by judges, and that they do not "require any type of additional legislative development . . . ."<sup>171</sup> This was, in fact, the import of the holding in the 1995 Constitutional Court case cited at the outset of this section. Yet the Colombian Supreme Court previously held that international law "is for-

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tions [*organismos*] accepted under international law. 4) Employs weapons prohibited by international law for making war or carries it out contrary to the law of nations [*derecho de gentes*].

*Id.* (translation by author). Neither this article nor any of its contents appears in the new Military Penal Code.

170. See Mario Madrid-Malo, *Aplicación actual de los instrumentos internacionales sobre derechos humanos y derecho humanitario*, in ESPACIOS INTERNACIONALES PARA LA JUSTICIA COLOMBIANA: VOL. III 31 (1992) [hereinafter Madrid-Malo]; See also Kalshoven, *supra* note 162, at 17. Humanitarian law treaties, like human rights treaties, must necessarily be applied by the courts once they have been ratified by the state and "acquired formal validity in the domestic legal system." See Benedetto Conforti, *National Courts and the International Law of Human Rights*, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 7 (Benedetto Conforti & Francesco Francioni eds., 1997).

171. See, e.g., Ivan Orozco Abad, *El derecho humanitario en la nueva Constitución nacional*, in ESPACIOS INTERNACIONALES PARA LA JUSTICIA COLOMBIANA VOL. III 187 (1993) (translation by author). Several complex constitutional questions arise from the obligation to apply self-executing conventional norms of IHL. For a relevant and useful discussion of these questions in relation to international human rights treaties and their enforcement in national courts, see generally Conforti, *supra* note 170. It seems evident, for instance, that the direct application of IHL in criminal proceedings may contravene the general principle that there can be no crime without a law to prescribe it (*nullum crimen sine lege*). Specifically at issue is the principle of maximum certainty or legality, since the alleged offenses, strictly speaking, would not be found in the codified criminal law. See ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 59, 64 (1991) (outlining the non-retroactivity and maximum certainty principles). In both civil and criminal actions (where the latter is allowed, say, under a *jus cogens* theory), the direct application of IHL by national courts would give rise to the question of whether they are competent to fashion a remedy or impose a penalty in the absence of specific legislation, a question which presents thorny separation of powers problems in many jurisdictions. I am particularly indebted to Professors Lori Damrosch and Peter Danchin for their contribution to the analysis of these considerations.

eign to the Court's national jurisdiction," and had in several instances refused to apply it.<sup>172</sup> As a general rule, most lower courts and judicial officials today continue to conform to the tenets reflected in the latter view, and will not base their decisions on IHL in the absence of a national norm to support it.<sup>173</sup> As a result, Colombian jurists in the past have observed that "some sort of juridical technology" impedes international humanitarian norms from transforming into "authentic law" within Colombian legal society in the absence of express legislative action,<sup>174</sup> an observation that largely holds true today.

An example of this complex legal dynamic is provided by the Special Human Rights Unit of the Office of the Prosecutor General, established in 1995. The Human Rights Unit defines its subject matter as covering humanitarian law violations by the parties to the conflict, including those committed by the guerrillas, despite the fact that it can only act based on the Colombian Penal Code.<sup>175</sup> Thus, the Human Rights Unit may carry out investigations of military personnel, guerrillas, and paramilitaries for alleged IHL violations, but can only *prosecute* these actors when their acts constitute crimes defined under Colombian criminal law:

The lack of proscription of the grave infractions of IHL in the ordinary penal code may constitute the principal limitation on the Prosecutor's Office to pursue the conduct of state agents, private individuals acting illegally with the formers support or tolerance, and members of insurgent groups who commit with each passing day greater attacks on the laws of war.<sup>176</sup>

That fact that humanitarian law has not been formally integrated into Colombian criminal law is a major impediment to its legal enforcement in the country. Notwithstanding this factor, some public

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172. Colombian Supreme Court, Judgement of September 12, 1991, *quoted in* Madrid-Malo, *supra* note 170, at 31.

173. See Interview with Raúl Hernández Rodríguez, Consultant to the Colombian Red Cross, in Bogotá, Colombia (Jan. 14, 1999) [hereinafter Raúl Hernández].

174. Madrid-Malo, *supra* note 170, at 31 (translation by author).

175. See Colombian Red Cross, *supra* note 20, at 101.

176. *Id.* (translation by author).

authorities have succeeded in incorporating IHL standards into national jurisprudence and applying them in practice. The Constitutional Court has been at the vanguard of such efforts, and is particularly active in this respect. Similarly, the administrative courts, including the Council of State, have repeatedly found the state responsible and ordered compensation for breaches of public duty by its agents through the interpretation and application of humanitarian standards under Colombian law.<sup>177</sup> Since 1995, administrative investigations leading to sanctions, such as dismissal from public office, in theory can be carried out by the Human Rights Unit of the Procurator General's Office for violations of the pertinent human rights and humanitarian law instruments ratified by Colombia.<sup>178</sup> Since public officials in the Procurator's Office are wary of exercising this unorthodox capacity, they have tended to base their often-controversial decisions on the more conventional rules contained in the Unified Disciplinary Code rather than citing to humanitarian norms.<sup>179</sup> According to public statements recently made by the Deputy Procurator, however, efforts are underway to reform the Code in order to incorporate IHL formally into its provisions and this allows for the adoption of disciplinary measures expressly on the basis of humanitarian law violations.

Overall, most government and state authorities that have the legal authority to promote a greater implementation of humanitarian norms by adopting internal regulations or sponsoring legislative initiatives to this effect have not done so.<sup>180</sup> With a few notable exceptions discussed below, the Executive Branch's general lack of initiative in this respect has been notorious.<sup>181</sup> The Ministry of the Interior, for instance, has constitutional competence over the subject of IHL and its application in the domestic sphere, but by the end of 1998 had failed to act upon it. One exception to this institutional lack of initiative is the Prosecutor General (part of the Judicial Branch) who recently took concrete steps to advance the inte-

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177. CRC Study, *supra* note 164, *passim*.

178. See Colombian Red Cross, *supra* note 20, at 103-04.

179. See *id.* at 105-06.

180. See *id.* at 27-28.

181. See generally *id.* at 37-95.

gration of IHL into the domestic legal order. The Prosecutor General presented a proposed reform of the Colombian Penal Code to the Colombian Congress, which, if passed, would incorporate many humanitarian norms into ordinary criminal law.<sup>182</sup> The proposed legislation, aimed at strengthening the legal bases for prosecution of guerrillas and non-state agents who are members of the paramilitary groups, is currently under consideration by the Colombian Congress.<sup>183</sup>

The Colombian government's acceptance of IHL has been better than its efforts at implementation. Former President Ernesto Samper (1994-1998) established that Protocol II would apply to all public servants, particularly those in the armed forces and police, as a matter of constitutional law and presidential policy.<sup>184</sup> Under the Samper Administration, the President issued an order in his capacity as Commander-in-Chief stating that public servants would be bound to "unilaterally" apply the rules of Protocol II.<sup>185</sup> The government (like its predecessors) did not want to accept that Protocol II applies objectively under the terms of Article 1 defining the scope of material application, nor engage in what it considered a "political debate" on the issue.<sup>186</sup> In all fairness, the government under President Samper did initiate a study of legal mechanisms for incorporating IHL into Colombian legislation,<sup>187</sup> although this particular process seems to have been sidelined after the election of the current President and his installation in August of 1998.

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182. See HCHR 1999, *supra* note 82, para. 135. "The new draft Penal Code, which has still not been enacted, criminalizes genocide, enforced disappearance, torture, the killing of protected persons, hostage-taking, forced displacement and other acts against persons and property protected by international humanitarian law." *Id.*

183. See *id.*

184. See Colombian Red Cross, *supra* note 20, at 25-26.

185. See *id.*

186. *Id.* at 26.

187. See, e.g., *id.* This study was commissioned as a first step towards defining a government policy for the legal implementation of IHL norms, a process for which the Colombian government has received technical assistance from the ICRC. See Raúl Hernández, *supra* note 173. Mr. Hernández is one of the authors of the report sponsored by the Colombian Red Cross and the Colombian Government cited, *supra* note 20, an updated version of which is due out in 1999.

Recently elected President Andres Pastrana (1998-2002) apparently maintains the view that Protocol II applies to the internal war as a matter of express government policy. In its most recent report on the situation in Colombia, the Inter-American Commission on Human Rights affirmed that:

[i]t is not necessary [to] establish if the nature and intensity of the domestic violence in Colombia constitute an internal armed conflict nor identify the specific rules of humanitarian law which govern the conflict. This is because Colombia. . . has openly recognized the factual reality that it is engaged in a conflict of said nature and that common Article 3 . . . , Protocol II . . . , and other customary rules and principles which govern internal armed conflicts are applicable.<sup>188</sup>

It must be emphasized, however, that the question of whether Protocol II applies directly to the conflict under international law is still contested in many circles. The outstanding issue remains whether Article 1's criteria for application are met by the conditions of Colombia's war.<sup>189</sup> In any case, President Pastrana has given IHL high political priority by making it the first item on the government's agenda in its negotiations with the FARC guerrillas which began in January of 1999.<sup>190</sup> The new government's policy with respect to IHL is further examined in the last section of this part, which discusses the ongoing peace process.

Given their role in the conflict, special attention should be paid to the efforts made by the Ministry of Defense and the Colombian military forces in furthering the civilian government's policy of improving the level of respect for human rights and humanitarian law. In 1995, the government of President Samper, responding to intense national and international pressure to establish formal accountability over violations of human rights and IHL, undertook a process to reform the Military Penal Code in order to align it with international standards.<sup>191</sup> The resulting commission charged with

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188. IACHR THIRD REPORT, *supra* note 103, ch. IV, para. 20.

189. See Gustavo Gallón Giraldo & Carlos Rodríguez Mejía, *Aplicación del derecho internacional humanitario en Colombia: posibilidades y dificultades*, in CCJ 1996, *supra* note 82, at 199-214; Villarraga, *supra* note 165, at 277.

190. See discussion *infra* Part I.D.1.

191. See CCJ 1995, *supra* note 84, at 71-73.

the reform produced a draft military penal code that made some headway in this direction. The proposed draft code eventually presented to Congress by the Samper Administration, for example, incorporated egregious human rights and humanitarian law violations into its substantive provisions.<sup>192</sup> This modernization of the Military Penal Code met strong resistance in the Congress, where it appeared to be mired in parliamentary procedure with little possibility of passage in the near future.<sup>193</sup> In June of 1999, however, the Colombian Congress, with little advance warning and virtually no debate, adopted a totally revised version of the draft penal code in which almost all reference to IHL was removed, except for a small handful of minor crimes already mentioned.<sup>194</sup> The new Military Penal Code, whose furtive adoption and rapid ratification left many observers baffled, was signed into law in August of 1999.<sup>195</sup>

More progress has been made in the field of promotion and dissemination of humanitarian norms. In 1995, the Ministry of Defense issued a key directive or internal regulation aimed at developing the government's policy with respect to human rights and IHL.<sup>196</sup> The 1995 Directive developed three central points. First, it

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192. See Draft text of the military penal code (Feb. 1999) (unpublished text, on file with author). Title II of the proposed draft code under discussion was dedicated to crimes arising from the violations of humanitarian law protections, i.e., ch. V, art. 133, which deals with the treatment of prisoners of war.

193. See HCHR 1999, *supra* note 82, para. 137; see also HRW 1999, *supra* note 83, at 111; Patricia Lara, *supra* note 32, at 23-24.

194. See generally *Lo felicito*, EL TIEMPO, June 19, 1999, at A9; *Tortura, fuera de justicia militar* EL TIEMPO, June 17, 1999, at A7. On June 16, 1999, the Senate approved the draft code "in a blink of an eye," notwithstanding that it contains over 650 articles. *Lo felicito* at A9. Its sudden appearance the same day before the House of Representatives was, to say the least, surprising, but it was nonetheless adopted almost immediately and without debate. See *Pupitrazo a 36 proyectos*, EL TIEMPO, June 16, 1999, at A7.

195. See Interview with Andrés Sánchez, Congressional Liaison for the Colombian Commission of Jurists, August 30, 1990, Bogotá, Colombia. According to Andrés Sánchez, the new Military Penal Code was quietly rammed through Congress before any opposition could be rallied, apparently as a result of a political compromise between the Pastrana government and its congressional supporters, and the military High Command.

196. See Directiva Permanente No. 024 Julio 5 de 1995, Desarrollo de la política gubernamental en materia de derechos humanos y derecho internacional humanitario en el Ministerio de Defensa Nacional (July 1995) (copy on file with



established the Secretariat for Human Rights and Political Affairs as the principal advisor to the Minister of Defense on these issues. Second, it promoted the establishment of operative Human Rights and Humanitarian Law Offices ("HRHL Offices") in every military and police unit. Third, it sought to orient the operation of the Military Criminal Justice system towards greater respect for human rights and humanitarian law.<sup>197</sup>

Although it advanced related proposals made by prior administrations, the 1995 Directive was the first comprehensive policy statement with institutional consequences adopted by the Colombian government for its military forces on the subject.<sup>198</sup> It includes detailed guidelines that take into account international human rights and humanitarian standards. These guidelines instruct the Secretariat, the HRHL Offices and the military legal authorities on the activities expected of them in order to carry out their duties accordingly.<sup>199</sup> The institutional and policy innovations of this and other similar Directives contributed, albeit in a largely formal sense, to making respect for these standards a part of the operational framework of the military forces at key levels.<sup>200</sup>

The most tangible results of the 1995 Directive and its kin have been the creation of HRHL Offices in most military and police units. By the end of 1995, the Armed Forces alone had established over 140 Human Rights and Humanitarian Law Offices, carrying out extensive training and education in this field.<sup>201</sup> The Army continues to promote training in IHL for all of its members, and officers seeking promotion must take courses in the laws of war.<sup>202</sup> The

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author) [hereinafter 1995 Directive].

197. *See id.* at 6-8.

198. Two of the more relevant orders preceding the 1995 Directive are Directiva Permanente No. 018 del 25 de mayo de 1994: Reestructuración y Ampliación de la Oficina de Derechos Humanos del Ministerio de Defensa y Creación de las mismas en las Fuerzas Armadas (May 1994); and Directiva Permanente No. 100-5 de septiembre 8 de 1993, sobre Normas del Derecho Internacional Humanitario (Sept. 1993), *cited in* Colombian Red Cross, *supra* note 20, at 52 n.78.

199. *See* 1995 Directive, *supra* note 196, Annexes A, B, and C.

200. *See* Colombian Red Cross, *supra* note 20, at 52.

201. *See* CCJ 1995, *supra* note 84, at 74.

202. *See* WAR WITHOUT QUARTER, *supra* note 1, at 43.

International Committee of the Red Cross, which participates actively in the training of Army personnel,<sup>203</sup> has found that its curriculum has been adopted by the military for its educational purposes.<sup>204</sup> Similarly, the National Police have not only made advances in adopting the language of human rights and humanitarian law, but also conduct regular training for its members on the subject.<sup>205</sup>

Despite some progress, the overall impact of the 1995 Directive and other internal regulations should not be overstated. Overwhelming difficulties remain to an effective implementation of humanitarian standards by the Colombian military. By the end of 1998 the Army had yet to develop its own operations manual to guide the application of IHL in conflict situations by official forces.<sup>206</sup> With respect to the HRHL Offices, "it appears that the primary work of the human rights offices established in military installations involves the collection of information regarding attacks by armed dissident groups, which are treated by the military as "human rights violations," rather than addressing abuses committed by members of the military."<sup>207</sup> This situation reflects the fact that IHL is still viewed suspiciously by many officials in the Ministry of Defense and the armed forces that believe that it is inappropriate when applied to non-international armed conflicts. These officials insist that humanitarian norms impede military efficiency in the context of internal war, and bestow military advantages and increased political status upon the insurgents.<sup>208</sup>

The reality is that the human rights and humanitarian law situation has shown no substantial improvement for over a decade, throwing doubt on the effectiveness of the measures discussed. It is

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203. See Roland Bigler, *Disseminating International Humanitarian Law in Colombia*, 319 INT'L REV. RED CROSS 421, 423-25 (1997), available in, <<http://www.icrc.org>> [hereinafter Bigler].

204. See WAR WITHOUT QUARTER, *supra* note 1, at 44.

205. See *id.* at 76.

206. See *id.* at 48; see also Raúl Hernández, *supra* note 173 (noting that the armed forces have not developed their own operations manual which includes international humanitarian norms).

207. IACHR THIRD REPORT, *supra* note 103, ch. IV, para. 163.

208. See Colombian Red Cross, *supra* note 20, at 50, 54, 102.

true, as noted above, that the responsibility for human rights and IHL violations by state agents has dropped in recent years.<sup>209</sup> Yet, there is substantial evidence indicating that the paramilitary groups, with notorious support and complicity on the part of the military authorities, have assumed many illegal activities and “dirty war” tactics.<sup>210</sup> The Army’s steadfast resistance to pursuing these groups belies its continued and fundamental lack of commitment to the humanitarian values protected by human rights and humanitarian law.<sup>211</sup> The existence of political will to implement IHL on the part of the government and its security forces, as well as its capacity to guarantee respect for humanitarian norms, is thus frequently questioned.

It is for these and other related reasons that observers continue to perceive a strong internal resistance to accepting a greater implementation of humanitarian norms in practice within the Colombian military establishment. Further evidence is provided by the fact that the Directive has not had much if any impact on the operation of the military justice system. The unwillingness of military authorities to pursue violators of IHL within the army ranks feeds impunity, which, as was seen, remains virtually absolute.<sup>212</sup> Most recently, the failure to reform the Military Penal Code to expressly incorporate fundamental humanitarian law norms, is, quite unfortunately, eloquent testimony to this continued resistance. While it is true that the reform produced some important structural and normative changes, in essence the government of Colombia successfully sidestepped a clear opportunity to comply with its international and constitutional obligations that require implementation of humanitarian law (and many key human rights) by formally integrating them into domestic legal order.<sup>213</sup> Moreover, it is unlikely

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209. See *supra* notes 86 and accompanying text.

210. See *supra* notes 85-88 and accompanying text; see also discussion *infra* Part II.B.1.

211. See *HCHR Report*, *supra* note 68, paras. 175, 178; *WAR WITHOUT QUARTER*, *supra* note 1, at 47.

212. See *supra* notes 121-24 and accompanying text.

213. In contrast, President Pastrana has publicly stated that his government will promote the proposed codification of humanitarian law violations in the Colombian Penal Code by supporting legislative initiatives directed at establish-

that the changes that were affected will alter the Colombian Military's longstanding record of blatant disregard for human rights and humanitarian law standards, or impede impunity.<sup>214</sup> Insofar as its stated objectives are concerned, then, the 1995 Directive overall has had little practical effect on improving—be it *de jure* or *de facto*—the overall situation in Colombia.

The Office of the Human Rights Ombudsman has also contributed significantly to implementation measures. An institution established only in 1991, it has facilitated the dissemination of humanitarian law within Colombian society by publishing studies on the matter, and through the reception of claims of violations of IHL.<sup>215</sup> Unfortunately, these efforts have not been part of a concerted or long-term institutional strategy, and have suffered from inconsistencies as well as substantive deficiencies. Under the current Ombudsman, for example, a project to develop a humanitarian law methodology for application in the internal conflict by the Office's field personnel has stalled.<sup>216</sup> The recent creation of a department of humanitarian affairs within the Ombudsman's Office should contribute to improving its handling of this critical subject matter.<sup>217</sup>

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ing certain IHL-derived crimes. See *Gobierno tras acuerdo humanitario*, EL TIEMPO, Aug. 13, 1999, at B11.

214. The U.N. High Commissioner for Human Rights in March of 1999 noted "with the utmost concern the alarming level of impunity regarding violations of human rights and breaches of international humanitarian law" in Colombia. HCHR 1999, *supra* note 82, para. 151; HRW 1999, *supra* note 83, at 110-11; see also HCHR Report, *supra* note 68, paras. 121-23.

215. See, e.g., DEFENSORÍA DEL PUEBLO, EN DEFENSA DE LA POBLACIÓN CIVIL: INFORME SOBRE INFRACCIONES DEL DERECHO INTERNACIONAL HUMANITARIO EN 1992 (1993); DEFENSORÍA DEL PUEBLO, EN DEFENSA DEL PUEBLO ACUSO: IMPACTOS DE LA VIOLENCIA DE OLEODUCTOS EN COLOMBIA (1997); DEFENSOR DEL PUEBLO, CUARTO INFORME ANUAL DEL DEFENSOR DEL PUEBLO AL CONGRESO DE COLOMBIA 59-73 (1997).

216. See Interview with Ines Margarita Uprimny, Staff Attorney, Colombian Commission of Jurists (formerly with the Office of the Human Rights Ombudsman), in Bogotá, Colombia (June 16, 1998) (commenting that during Uprimny's time as a staff attorney with the Ombudsman, she was called upon to work on the IHL project, which was subsequently shelved).

217. See Interview with Roberto Molina, Director of Research, Colombian Commission of Jurists, in Bogotá, Colombia (Jan. 14, 1999) (discussing recent changes within the Ombudsman office relating to humanitarian law).

The purpose of this sub-section has been to examine the extent to which IHL has been incorporated into the domestic legal and political orders. Emphasis has been placed on the role of the government and other relevant authorities upon whom the obligation to guarantee respect for humanitarian law is most incumbent. In the next two sub-sections, the contribution of local non-governmental organizations in implementing IHL, and the role of the International Committee of the Red Cross in this process, are reviewed.

#### b. Non-state actors

The important role played by NGOs and civil society in promoting the application of IHL in Colombia is difficult to define but impossible to dismiss. One example is the campaign organized by NGOs around the ratification of Protocol II. This instrument was ratified in 1994, seventeen years after Colombia participated in the 1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts ("CDDH"). At the time, Colombia expressed serious misgivings about the interpretation of Article 1 (Material field of application), and declined to become a signatory to the Protocols.<sup>218</sup> Since then, the military and their civilian allies in the government maintained that the ratification of Protocol II was unnecessary and inappropriate, not least because it would bestow upon the guerrillas the condition of belligerents and open the door to international intervention.<sup>219</sup> This position continued to impede ratification of Protocol II for nearly two decades. By the end of the 1980s, however, national and international pressure on successive governments in favor of both Protocols had reached a head. César Gaviria (1990-1994) was the first President to submit them to Congress for approval in 1990, although only Protocol I was ratified.<sup>220</sup> It then fell

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218. See Kalshoven, *supra* note 162, at 4-5.

219. See Colombian Red Cross, *supra* note 20, at 33, 36; see also Hernando Valencia Villa, *The law of armed conflict and its application in Colombia*, 274 INT'L REV. RED CROSS 5, 13 (1991).

220. See ALEJANDRO VALENCIA VILLA, *LA HUMANIZACIÓN DE LA GUERRA* 77-80 (1991). With respect to the Protocols, the author states:

As a result of the visit by Cornelio Sommaruga in May of 1989, and the pressures from civil society itself, the Barco government created an internal

upon the Government of Ernesto Samper to resubmit Protocol II in August of 1994.<sup>221</sup>

Some NGOs and sectors of civil society made ratification of Protocol II a battle cry during the late 1980s and early 1990s. Their primary objective was to dispel the legal and political misgivings raised by the Ministry of Defense in opposition to its ratification, for instance by debunking the Ministry's claim that ratification would confer legal and political status upon the insurgents.<sup>222</sup> One well-known NGO, the Colombian Section of the Andean Commission of Jurists organized a seminar series over the course of several years (the first three were held between 1989 and 1992) dedicated to the subject of applying international human rights and humanitarian law instruments in Colombia.<sup>223</sup> These influential seminars brought together renowned experts who exposed the Colombian authorities and public to the mechanics of international law and its interplay with domestic jurisdiction.<sup>224</sup> At the time, this was a largely unfamiliar and unexplored domain for the majority of the Colombian legal community. Not surprisingly, special attention was given in these seminars to the plight of Protocol II.<sup>225</sup>

After intense debate in the Colombian Congress during 1994, Protocol II was finally approved without reservation in December

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commission to study the possibility of submitting the Protocols for legislative approval in 1990. Nevertheless, the task was left for decision by the government of César Gaviria Trujillo. . . .

*Id.* (translation by author).

221. See Colombian Red Cross, *supra* note 20, at 36.

222. See Hernando Valencia Villa, *supra* note 219, at 10-13 (exemplifying the pre-1994 argument for why Colombia should ratify Protocol II).

223. Hernando Valencia Villa, whose article is cited *supra* note 219, is a founding member of the Andean Commission of Jurists Colombian Section, CAJ-SC, (since 1995 known as the Colombian Commission of Jurists). Valencia's article is based on a lecture given at the First Seminar on the Application of International Human Rights Instruments in Colombia organized by the CAJ-SC in Bogotá from the March 30 to the April 1, 1989.

224. Other experts on IHL participating in the CAJ-SC-sponsored event included Professor Robert Goldman, Phillipe Gaillard of the ICRC, and Rodolfo Mattarollo.

225. See, e.g., Madrid-Malo, *supra* note 170.

of that year.<sup>226</sup> Thus:

[d]uring [Congress'] discussion, national and international human rights NGOs carried out an important job of persuasion *vis-à-vis* the Congressmen and participated actively in the sessions held by . . . the Senate and the House, underlining the importance and necessity of endowing the Colombian State with an instrument of international character to protect the civilian population victim of the intense armed conflict ongoing in the country.<sup>227</sup>

Although the law formalizing the ratification of Protocol II was given Presidential sanction on December 16, 1994, in a high profile public signing, the NGO's struggle was not yet finished.<sup>228</sup> In the final stage of the ratification process, Protocol II was subjected to review by the Constitutional Court, at which time several NGOs went before the Court and presented oral arguments in favor of its constitutionality.<sup>229</sup> Many of the arguments raised by this "impressive series of non-governmental voices" were recounted in the Court's decision of May 18, 1995, confirming the treaty's constitutionality.<sup>230</sup> Protocol II finally entered into force in Colombia on February 15, 1996.<sup>231</sup>

There can be little doubt that these activities by local NGOs in support of Protocol II dovetailed with those of international entities such as the ICRC, and produced a significant impact at various levels on the national debate that took place during the long ratification process. Something similar continues to take place with respect to the Fact-Finding Commission ("Commission") created by Arti-

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226. See Colombian Red Cross, *supra* note 20, at 37.

227. CCJ 1995, *supra* note 84, at 106 (translation by author).

228. See Colombian Red Cross, *supra* note 20, at 37.

229. See Kalshoven, *supra* note 162, at 9-10 (citing arguments by the Colombian Red Cross, the Episcopal Conference of Colombia, the Andean Commission of Jurists, the Colombian Association of Democratic Lawyers, and the *Comité Nacional de Víctimas de la Guerrilla*). Article 241 of the Colombian Constitution dictates that the Constitutional Court must review the constitutionality of international instruments adopted by Congress and any implementing legislation.

230. See *id.*

231. See Colombian Red Cross, *supra* note 20, at 38.

cle 90 of Protocol I.<sup>232</sup> Article 90 establishes the Commission as a mechanism designed to monitor compliance with that Protocol and the Geneva Conventions, and to verify grave breaches or other serious violations of the same. Its operation requires “*ipso facto* and without special agreement,” that a Party to Protocol I recognize the competence of the Commission to inquire into the allegations of non-compliance or breach.<sup>233</sup> Paragraph 2(d) of Article 90 states further that “[i]n other situations, the Commission shall institute an inquiry at the request of a Party to the conflict only with consent of the other Party or Parties concerned.”<sup>234</sup>

Since its installation in 1991, the Fact-Finding Commission has interpreted paragraph 2(d) as making it “equally competent to perform its functions in situation of internal armed conflict.”<sup>235</sup> Immediately following Congress’ adoption of Protocol I, some NGOs began to push the Colombian government to accept the competence of the Protocol’s Article 90 mechanism in accordance with the Protocol’s terms and the Commission’s interpretation.<sup>236</sup> This, they argued, would enhance the probability and practicality of deploying an impartial, international body prepared to monitor and verify compliance with IHL during the conflict in the event that the other parties to the conflict were to agree.<sup>237</sup> As was the case with Protocol II, the synchronized insistence from international and national non-governmental sources apparently had a positive effect. On February 16, 1996, during his speech acknowledging Colombia’s adherence to Protocol II and its entry into force, President Samper announced his government’s intention to recognize the competence of

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232. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3,7, 16 I.L.M. 1391, 1396 [hereinafter Protocol I]; see also Ley 011 de 1992 (Colom.), Diario Oficial [D.O.] 40510, July 28, 1992.

233. Protocol I, *supra* note 232, 1125 U.N.T.S. at 43 (Art. 90 sec. 2(d)), 16 I.L.M. at 1430.

234. *Id.* at 44.

235. Kalshoven, *supra* note 162, at 15.

236. See, e.g., CCJ 1996, *supra* note 82, at 155 (recommending that the Commission verify an eventual humanitarian agreement, and noting that the government accepted its competence “as repeatedly suggested by Colombian human rights organizations.”).

237. Gallón Giraldo & Rodríguez Mejía, *supra* note 189, at 213-14.



the Commission, and the government did so officially three months later.<sup>238</sup>

Since accepting the competence of the Commission in 1996, Colombia has been one of the primary candidates for potential Commission action. Through one of its most prestigious members, Professor Frits Kalshoven, the Commission has repeatedly, albeit discretely, expressed interest in a future role for itself in Colombia's internal conflict. For instance, Professor Kalshoven's visits, during what he calls his "propaganda tour" of Colombia in April 1995, were critical to achieving the government's recognition of the Commission's competence.<sup>239</sup> At that time, as well as on subsequent visits, he met with both government and NGO representatives in order to rally support for this objective.

It is possible to exaggerate the impact of the NGO community in Colombia. NGOs are by no means unified on all issues or even on the particulars of IHL implementation. One observer suggested recently that, while acknowledging that NGOs "in their own way have made concrete and efficient contributions" to the promotion and application of IHL, their participation in this process historically has been "weak."<sup>240</sup> While it is true that Colombian NGOs do not have the political or legal weight to participate directly in governmental decision-making processes, this limited view seems nonetheless unfair. It does not, for example, give due credit to NGOs for their role in the promotion of IHL instruments and mechanisms previously described. Nor does this view seem to take into account the rapid evolution of non-governmental work with respect to the application of IHL, both in Colombia and abroad.

NGOs have labored both individually and in concert to provide the only systematic public monitoring of IHL violations in Colombia. Two prominent NGOs, *Centro de Investigación y Educación Popular* ("CINEP") and the Justice and Peace Commission, have established an important data bank on political violence, which explicitly covers violations of IHL by the parties to the conflict.<sup>241</sup>

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238. See Kalshoven, *supra* note 162, at 15-16.

239. See *id.* at 16.

240. Villarraga, *supra* note 165, at 278.

241. See *supra* notes 69, 71-72, 74 and accompanying text.

Published quarterly, their bulletin on political violence is a critical source of data for any person or institution interested in the human rights and humanitarian law situation in Colombia.<sup>242</sup> Other well-known human rights NGOs such as the Colombian Commission of Jurists and the Lawyer's Collective have highlighted IHL violations by the parties to the conflict in their reports and other publications.<sup>243</sup> These too are essential reference materials for intergovernmental agencies and NGOs covering the human rights situation in Colombia.

It is clear that many organizations and individuals in the Colombian non-governmental and academic community have expanded their range of activities in recent years to include humanitarian law. While initially slow, this evolution has rapidly gained momentum and undoubtedly shaped national and international perceptions of the internal conflict. Through research, publication, education, and participation in political debates, the NGOs and their allies have exerted, and continue to exert, a positive influence on Colombian government and society. This influence has been critical to elevating IHL acceptance to where it is today. The NGO's influence in Colombia and the role of the international community in reinforcing and supporting national civic movements like the NGOs, are discussed further in the final part of this Article.

c. The International Committee of the Red Cross

It will come as a surprise to few people that the International Committee of the Red Cross ("ICRC") carries out a significant part of the work being done today in Colombia with respect to IHL. The ICRC began its work in Colombia in 1969 by visiting detainees, but it did not establish a permanent delegation in Bogotá, until 1980.<sup>244</sup>

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242. See, e.g., HRW 1999, *supra* note 83, at 109 (citing statistics drawn from the CINEP and Justice and Peace Data Bank). See generally Part I.B of this Article, which relies heavily on the Data Bank's information. Many sources cited in the Article do the same, such as the reports published by the CCJ. See *supra* note 69.

243. See generally CCJ 1995, *supra* note 84, 37-61; CCJ 1996, *supra* note 82, at 55-81; COLECTIVO DE ABOGADOS "JOSÉ ALVEAR RESTREPO," DE ESPALDAS AL CIELO DE CARA A LA MUERTE 113-16 (1997).

244. See International Committee of the Red Cross, *ICRC Special Report: The Role of a Neutral Intermediary in Colombia* (visited Dec. 4, 1998)

The ICRC delegation was first expanded in 1991, but it was not until 1996 that it grew to its current proportions after a seminal framework agreement was signed with the Colombian government in February of that year.<sup>245</sup> The February 1996 Memorandum of Understanding greatly expanded the ICRC's legal basis and the scope of its humanitarian assistance and dissemination operations in the country.<sup>246</sup> As a result, the ICRC initiated unprecedented levels of activity, including increased dissemination of knowledge of IHL, confidential documentation and reporting of human rights violations, humanitarian assistance to civilian victims, and acting as a "neutral intermediary" between the parties to the conflict.<sup>247</sup>

The ICRC's role as a neutral mediator, made possible by the 1996 Agreement, is of critical importance. The ICRC has developed and maintained close ties with all the parties to the conflict, including civilian and military authorities, the major paramilitary groups, and the guerrilla groups, which are spread out over at least one hundred military "fronts": "Through [these] contacts . . . and because of its international status, the ICRC has acquired the universally recognized status of neutral intermediary, to whom groups naturally turn in their attempts to make contact and solve their differences by non-violent means."<sup>248</sup> This role of neutral intermediary, for example, was essential in permitting the ICRC to mediate the liberation in June of 1997 of seventy captured state agents by the FARC guerrillas.<sup>249</sup> All in all, the ICRC helped liberate some 300 persons deprived of their liberty as a result of the conflict during 1997 through such contacts.<sup>250</sup>

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<<http://www.icrc.org/unicc/icrcnews.nsf/5>> at 12 [hereinafter *ICRC Special Report*].

245. See *id.* (noting that the ICRC's Colombian delegation, as of March 1998, included 44 delegates and 110 Colombian employees in 12 offices).

246. See Int'l Comm. of the Red Cross, *Colombia: signed in Bogotá* (visited Dec. 4, 1998) <<http://www.icrc.org/icrceng.nsf/Index/>>.

247. See *ICRC Annual Report 1996* (visited Dec. 4, 1998), <<http://www.icrc.org/unicc/icrcnews.nsf/5>>.

248. *ICRC Special Report*, *supra* note 244, at 12.

249. See Thomas Jenatsch, *The ICRC as a Humanitarian Mediator in the Colombian conflict: Possibilities and Limits*, 323 INT'L REV. RED CROSS 306, 304-06 (1998).

250. See *ICRC Annual Report 1997* (visited Dec. 4, 1998)

By 1998, the ICRC planned to have nearly fifty delegates working in fifteen regional offices throughout the country, making it the largest wartime presence in the hemisphere and an ICRC priority in the Americas.<sup>251</sup> Its expanded presence and contacts permit the ICRC to carry out its promotion and dissemination activities throughout Colombia. These activities are directed not just at the Colombian Armed Forces and Police, but are also carried out with respect to paramilitary and guerrilla groups.<sup>252</sup> Others are more geared towards reaching Colombian civil society at all levels—universities, NGOs, and the media.<sup>253</sup> In 1997 alone the ICRC, in conjunction with the Colombian Red Cross, held some 950 dissemination sessions and events for over 47,000 people.<sup>254</sup>

The role of non-state actors and of the ICRC in the promotion and implementation of IHL undeniably complements that of the Colombian authorities. Having reviewed the principal actors and advances made in this field, this Article now turns to the final section of this first part, which examines the nascent peace process in Colombia.

#### D. THE NEW PEACE PROCESS<sup>255</sup>

Current efforts towards a negotiated solution to Colombia's internal war represent the first significant move in this direction since 1995. President Andrés Pastrana, elected in June 1998 and in office since that August, made the achievement of peace one of his immediate priorities. His initiatives have opened channels for dialogue with the FARC and ELN guerrilla groups, despite their persistent military actions, which frequently cause civilian casualties. The

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<<http://www.icrc.org/unicc/icrcnews.nsf/5>> [hereinafter *Annual Report 1997*].

251. See *id.*; *ICRC Special Report*, *supra* note 244.

252. See *ICRC Special Report*, *supra* note 244.

253. See Bigler, *supra* note 203, at 423-31.

254. See *Annual Report 1997*, *supra* note 250.

255. The following account of the current peace process in Colombia is drawn from principally four sources: EL TIEMPO and EL ESPECTADOR, Colombia's two largest dailies, and SEMANA and CAMBIO 16, the two most important weekly magazines. The period covered is from May of 1998 to the August 1999. The material on which this discussion is based is on file with the author. For practical purposes specific citations will be made where necessary.

treatment that the government has in mind for the paramilitary forces who insist on equal political status with the guerrillas in the negotiation process, and who continue to carry out their scorched earth campaign against civilians, is not yet clear. Both the FARC and the ELN appear unalterably opposed to any independent recognition within the peace process for the paramilitaries. Pastrana has stated, however, that the government must initiate dialogue with all the armed actors in the conflict, even if it requires a separate negotiating table for each.<sup>256</sup>

The objective of this section is to canvass the principal events taking place under the Pastrana Administration in relation to the quest for peace and a negotiated solution to the armed conflict. The discussion focuses on the positions and actions adopted by the different armed actors with respect to IHL.

### 1. *The FARC*

On January 7, 1999, President Andrés Pastrana and the maximum leader of the FARC, Manuel Marulanda, were scheduled to meet in a small rural town situated in the "demilitarized zone," an area cleared of army and police units for purposes of initiating talks between the government of Colombia and its largest and oldest insurgent group. The encounter was the product of difficult negotiations between the recently elected President Pastrana and the FARC High Command carried out during the latter half of 1998. Although the historic meeting did not take place (Marulanda did not show up at the last minute, citing security reasons), the peace talks nonetheless got under way. Immediately after the ceremony inaugurating the peace talks, and a preliminary agreement on procedural protocol, the two delegations exchanged their respective agendas for the substantive negotiations, with a view toward defining a common agenda and a corresponding timetable for its discussion.<sup>257</sup>

First on the government's ten-item agenda was the issue of "unconditional respect for human rights and international humanitarian

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256. See *Paras bajo fuego*, SEMANA (visited Feb. 2, 1999) <<http://www.semana.com/users/semana/semana99/ene25/nacion2.htm>>.

257. See José Navia, *Buscan unificar agendas*, EL TIEMPO, Jan. 12, 1999, at 3A.

law.”<sup>258</sup> The government made it perfectly clear that its priority in this respect was to reach an agreement that would put an end to the guerrillas’ practice of kidnapping and extortion.<sup>259</sup> The FARC responded with a ten-point document entitled “Platform for a Government of Reconciliation and National Reconstruction,” which included among its leading issues the need to reform the armed forces and to guarantee full respect for human rights.<sup>260</sup> Related to this is the FARC’s constant insistence that the government dismantle the paramilitary groups, which they view as direct extensions of the state’s security forces rather than a third party to the conflict.<sup>261</sup> Following an offensive by paramilitary forces in January 1999, the FARC unilaterally suspended the peace talks, and demanded effective action against paramilitary groups as a precondition for re-commencing the negotiation process in April.<sup>262</sup>

The FARC in their proposed agenda of January 1999 avoided mentioning international humanitarian law. One reason for this omission is discernible from recent press statements made by members of the FARC’s High Command. Both Marulanda and the FARC’s primary military strategist and second-in-command, Jorge Briceño, (a.k.a. “El Mono Jojoy”) have publicly insisted that they do not accept IHL as applicable to them because the Colombian

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258. *Esto propone Pastrana a las Farc*, EL TIEMPO, Jan. 12, 1999, at 6A (translation by author). The other nine items included (ii) the analysis of the social and economic issues such as poverty and unequal wealth distribution; (iii) political reform and the strengthening of democratic institutions; (iv) a crop substitution policy to combat the cultivation of coca and amapola; (v) protection of the environment, (vi) the combating of corruption and the strengthening of the justice system; (vii) agrarian reform; (viii) combating the paramilitary groups; and (ix) international support for the peace process; and (x) ensuring broad participation by civil society in the negotiation and signing of any peace agreements. *See id.*

259. *See Desafíos de la agenda para la paz*, EL TIEMPO, Jan. 13, 1999, at 8A.

260. *Esto propone Pastrana a las Farc*, *supra* note 258, at A6. Other items on the FARC’s platform address political and tax reform, social development and investment, reform of agrarian and natural resources policy, and the issue of the cultivation of illicit crops used in the drug trade. *See id.*

261. *See ‘Tirofijo’ se destapa*, SEMANA (visited Feb. 2, 1999) <<http://www.semana.com/users/semana/semana99/ene18/nacion.htm>>.

262. *See Paras bajo fuego*, *supra* note 256; *see also La guerra de las fechas*, SEMANA, (visited Feb. 2, 1999) <<http://www.semana.com/users/semana/semana99/feb1/nacion4.htm>>.

government has not recognized the FARC's status as belligerents in the conflict:<sup>263</sup> "[w]e have our own humanitarian law statute. We do not accept any other, for the time being [because] we have not been recognized as a belligerent force. We have our own disciplinary rules, our own documents."<sup>264</sup> The FARC insist that their military might and territorial control elevate them to the level of belligerents in the classical sense, thereby suggesting that the only humanitarian law they consider relevant is that pertaining to international conflicts.<sup>265</sup> In past negotiations, however, a humanitarian agreement has been one of the items on the FARC's agenda for talks with the government.<sup>266</sup>

For a variety of reasons relating to the conditions under which negotiations were to take place, the peace talks remained stalled during the second trimester of 1999. In a bold attempt to jumpstart the talks and overcome the impasse, President Pastrana proposed that the FARC and the government negotiate humanitarian agreements to protect the civilian population constructed around five basic points: (1) special protection for children, pregnant women, and elderly persons; (2) the establishment of "protection zones" for the internally displaced population; (3) the prohibition against the recruitment of minors under the age of 18; (4) prevention of sexual exploitation of women and violence against children participating in, or affected by, the conflict; and (5) eradication of anti-personnel landmines.<sup>267</sup> It is equally significant that, at the same time, diverse

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263. See '*Tirofijo*' se destapa, *supra* note 261; see also *Cese al fuego con las Farc está lejano*, EL ESPECTADOR, Jan. 10, 1999, at 5A.

264. See *Cese al fuego con las Farc está lejano*, *supra* note 263, at 5A.

265. See '*Tirofijo*' se destapa, *supra* note 261 (setting forth the FARC's positions that until the Colombian government recognizes the FARC as belligerents, they will not accept the intervention of international organizations); see also *El golazo del canje*, SEMANA (visited July 31, 1999) <<http://www.semana.com/users/semana/semana99/ene18/nacion2.htm>> (opining that once the Colombian government recognizes the FARC as a belligerent, the internal conflict converts into an international armed conflict and FARC guerrillas would benefit from the protections for prisoners of war).

266. See José Ortiz Nieves, *¿Por qué ahora?*, CAMBIO 16, July 13, 1998, at 20 (listing a prior 10-point platform proposed by the FARC, which includes negotiating a humanitarian agreement).

267. See *Cinco propuestas para humanizar el conflicto*, EL TIEMPO, Aug. 27, 1999, at A1 (translation by author). It is important to note that President Pastrana

sectors of Colombian civil society have spoken out on the need to begin negotiations immediately, urging the parties to work towards a humanitarian agreement as a first step in the right direction.<sup>268</sup> The FARC, unfortunately, have responded negatively to the government's specific proposals regarding IHL.

The position of the FARC *vis-à-vis* humanitarian law is a complicated one, though the basis of their refusal to submit to IHL is without merit. The FARC at times purport to respect humanitarian norms, and seem to do so when it is practical or politically convenient.<sup>269</sup> Yet they have made clear that they do not consider themselves bound by common Article 3 or Protocol II, as the statements cited in the previous paragraph indicate. When questioned on this point by Human Rights Watch, an international human rights organization, the FARC, through their international spokesperson responded that, in their view, these basic instruments and norms were "open to interpretation."<sup>270</sup> In a letter to the civilian population published in July of 1998, the FARC explain that they "do not avail themselves of the technical terms of International Humanitarian Law," although some of their internal regulations "coincide with basic Humanitarian Law principles."<sup>271</sup> When Human Rights Watch reviewed a FARC combat manual, however, it found only one minor reference to such principles, which was qualified and contradicted by the other rules.<sup>272</sup>

In sum, it is evident that the FARC, as they maintain, will only recognize and apply international humanitarian norms "in accor-

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originally proposed only the application of Protocol II in the demilitarized zone where the FARC has established a firm foothold. See *Comisión ya no es condición*, EL TIEMPO, Aug. 8, 1999, at A8. He subsequently expanded upon the original proposal and offered the negotiation of the aforementioned agreements that are broader and directed at protecting the civilian population throughout the entire country.

268. See *Cinco propuestas para humanizar el conflicto*, *supra* note 267.

269. See WAR WITHOUT QUARTER, *supra* note 1, at 133.

270. *Id.*

271. See Comisión Internacional de las FARC, *A la población civil* (visited Dec. 15, 1998) <<http://www.burn.ucsd.edu/~farc-ep/comunicados>> [hereinafter FARC] (translation by author).

272. See WAR WITHOUT QUARTER, *supra* note 1, at 134.



dance with the conditions of [their] revolutionary war.”<sup>273</sup> Moreover, as a practical matter, the FARC’s flagrant and persistent violations of IHL, including periodic massacres, reveal a profound disdain for its provisions.<sup>274</sup> Nonetheless, recent events confirm that the subject of respect for basic humanitarian norms remains at the heart of the nascent peace talks with Colombia’s largest insurgent group.

## 2. *The ELN*

The ELN traditionally has been much more receptive to IHL in its political and military discourse than the FARC. The ELN leadership has reiterated on numerous occasions its position that humanitarian law should be respected by the parties to the conflict, and even called for negotiations on the subject before the Colombian government was prepared to ratify Protocol II!<sup>275</sup> It has incorporated humanitarian norms into a number of its internal codes and regulations.<sup>276</sup> In a lengthy 1996 treatise entitled “Humanization of the War: A Path towards Peace,” the ELN presents a comprehensive and sophisticated analysis of the application of IHL in Colombia insofar as its own activities are concerned. It concludes by proposing that the parties to the conflict should “proceed to elaborate, subscribe and put into effect a special agreement” implementing humanitarian law.<sup>277</sup>

In that document, the ELN concludes: “We are a political-military organization with responsible command and territorial control, guided by a political and ideological line according to which we have been constructing a Popular Power [base] for several decades; this gives us the capacity to apply Protocol II for purposes of regulating the internal conflict.”<sup>278</sup> The document goes on to explain and defend the rebel’s position with respect to paramili-

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273. See FARC, *supra* note 271, at 2.

274. See discussion *supra* Part I.B.

275. See Valencia Villa, *supra* note 220, at 74.

276. See WAR WITHOUT QUARTER, *supra* note 1, at 162-63.

277. See *Humanización de la guerra: Un camino hacia la paz*, 18 (May 1996) <<http://www.voces.org>> [hereinafter ELN].

278. *Id.* at 12 (translation by author).

tary groups, hostage taking, trials and the meting out of “revolutionary justice,” as well as the use of anti-personnel land mines. The ELN has gone so far as to express regret for acts constituting violations of IHL. After indiscriminate attacks resulted in the death and injury of several children in 1997, this guerrilla group recognized that they had been “killed or wounded as a result of our acts of war and we feel that it is an imperative to recognize these as serious errors of lack of foresight or crossfire in the midst of conflict. . . . [W]e will make an effort to avoid repeating this type of regrettable action.”<sup>279</sup>

Although the ELN’s express commitment to IHL stands in sharp contrast to that of the FARC, its conduct on the war front is equally at odds with humanitarian practice. There is convincing evidence that “the UC-ELN flouts the laws of war in the field by targeting and killing civilians and combatants *hors de combat*, taking hostages and launching indiscriminate attacks” affecting the civilian population.<sup>280</sup> Their persistent attacks on the petroleum producing and transport infrastructure, as well as their corresponding extortion of the oil companies, are further examples of acts in violation of basic IHL principles.<sup>281</sup> Moreover, ELN leaders have stated that although they accept Protocol II, and humanitarian law in general, they take issue with certain of its definitions and categories, especially those relating to “hostage-taking.” Echoing the views of some paramilitary leaders (discussed below), top ELN commanders have insisted that IHL is an “unattainable ideal” that has to be adapted to the Colombian situation before it can ever become a reality.<sup>282</sup>

Although contradictory, the ELN’s position has provided fertile grounds for jump-starting its own peace process. In July 1998, in Mainz, Germany, the ELN signed an agreement with a group of individuals invited to participate as the “representatives” of Colombian civil society.<sup>283</sup> Although it was more of a written “under-

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279. WAR WITHOUT QUARTER, *supra* note 1, at 164.

280. *Id.* at 164.

281. See *supra* notes 54-56 and accompanying text.

282. See WAR WITHOUT QUARTER, *supra* note 1, at 165.

283. Among the 30 or so representatives present at the historic meeting were

standing” between the *ad hoc* group of civilians and the ELN than a formal peace accord, in the resulting document, the ELN accepted that it would unilaterally respect important norms of humanitarian law. The most significant commitment in this regard was the one not to carry out kidnappings for ransom under certain circumstances, namely, where the potential victims were elderly persons, pregnant women, or children. Other commitments assumed by the ELN included those to cease using anti-personnel mines in civilian areas and to stop recruiting children into the guerrilla ranks.<sup>284</sup> It is remarkable that in the text of the agreement, the ELN “reaffirms its unilateral acceptance of the recommendations made by Amnesty International [in 1994] with respect to the insurgency movement,” and then restates them one by one.<sup>285</sup>

The *Puerta del Cielo* or “Heaven’s Gate” agreement was heralded as the first humanitarian agreement signed by a guerrilla group in Colombia, and the commencement of the peace process with the ELN.<sup>286</sup> But it was also strongly criticized by some observers, including the Pastrana Government, for its selective and non-technical use of humanitarian norms that failed to take into account the proper legal character of the obligations involved.<sup>287</sup> One influential academic publication that has contributed to defining the official position highlights the technical inaccuracies and inconsistencies in several of the agreement’s provisions.<sup>288</sup> Countenancing a

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high-ranking members of the Colombian Catholic Church, which was instrumental in organizing the meeting, a Constitutional Court magistrate, the Procurator General, ex government Ministers, leading journalists, business leaders from the private sector, trade union leaders, members of opposition political parties, and well-respected academics. No official from the government was invited or allowed to participate.

284. See *Primer paso con el ELN*, EL TIEMPO, July 16, 1998 at A1.

285. See *id.* (reproducing the text of the agreement in full).

286. See *id.*

287. See generally *Acuerdo de Mainz tiene serias inconsistencias*, EL TIEMPO, Aug. 24, 1998, at A1.

288. See Ernestó Borda Medina, *Comentarios sobre los aspectos humanitarios del “Acuerdo de puerta del cielo,”* (July 1998) (unpublished manuscript, on file with author). Ernestó Borda is Director of the Alfredo Vazquez Carrizosa Institute for Human Rights and International Relations of the prestigious Pontificia Universidad Javeriana in Bogotá. It was circulated among the representatives who were present in Mainz, as well as key members of the Pastrana Government.

practice of “selective” kidnappings, for example, was deemed an unacceptable variant on the unconditional prohibition against hostage taking.<sup>289</sup> The study warned further that the agreement contained “nothing with respect to the reaffirmation of the commitments each of the parties has under International Humanitarian Law, a key initial element in order to dispel all doubt regarding the objective of the agreement, which cannot be to ‘liberate’ any of the parties from its obligations in force.”<sup>290</sup>

The Pastrana government has made strides in advancing towards a humanitarian agreement with the ELN. In October 1998, it permitted the temporary release of two jailed ELN leaders from prison under the condition that they give their word to return. It did so to permit them to participate in the meeting held as a follow-up to the one three months earlier in Mainz, Germany, again with members of Colombian civil-society.<sup>291</sup> The main objective of this clandestine follow-up meeting between the ELN High-Command and a delegation of the civilian representatives was to plan the organization of the “National Convention” with over 200 representatives of civil society, an event first announced in the “Heaven’s Gate” agreement.<sup>292</sup> The encounter was an apparent success, and the eight-month Convention—which is an ELN pre-condition for starting peace talks with the government—was scheduled to start in February 1999.<sup>293</sup> Heading up the tentative agenda agreed upon in the October meeting of the parties is the subject of IHL and human

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In early 1999, the government named Borda its special commissioner for talks with the ELN guerrillas.

289. Ernestó Borda Medina states that, “In a document [like the Heaven’s Gate agreement], there can be no commitments, not even unilateral ones, which limit or condition imperative norms [of IHL] without expressly and clearly indicating beforehand that said commitments do not modify the [legal] effects of these norms vis-a-vis the party in violation.” *Id.* at 7 (translation by author).

290. *See id.* at 6.

291. *See Vestida para la Paz*, SEMANA, Oct. 19, 1998 <<http://www.semana.com>> (reporting that the participation of Felipe Torres and Francisco Galan of the ELN High Command boosted confidence in the peace process); *see also Valle del Rio Verde: escenario de paz con el ELN*, EL ESPECTADOR, Oct. 12, 1998, at A1.

292. *See Primer paso con el ELN*, EL TIEMPO, July 16, 1998, at A3-A4.

293. *See ‘Paras’ y ELN, un pulso al proceso*, EL TIEMPO, Jan. 10, 1999, at A6.

rights.<sup>294</sup>

### 3. *The AUC/ACCU*

The paramilitary groups, as part of their quest for political recognition, have jumped on the IHL bandwagon. Several official AUC documents emphasize the importance of humanitarian law in regulating the conflict, and even the need to protect the civilian population from its dangers.<sup>295</sup> In one policy paper entitled "Positions on the political and negotiated solution to the internal armed conflict," the AUC go so far as to propose a "regional humanitarian agreement" between the parties as a means of implementing it.<sup>296</sup> Carlos Castaño, leader of both the ACCU and the AUC, has insisted publicly on numerous occasions that these groups respect humanitarian principles, and it appears that paramilitary troops even receive training in IHL from the ICRC.<sup>297</sup> Yet affirmations to the contrary, and especially the AUC's horrendous track record, reveal a deliberate, calculated and systematic paramilitary strategy premised expressly on the flagrant violation of the laws of war in order to obtain the stated objective of defeating the guerrillas.<sup>298</sup>

"Throughout 1996 and 1997, AUC units established a clear pattern of violations of the laws of war. A unit would enter a village, execute civilians believed to support guerrillas, and leave."<sup>299</sup> Castaño defends the paramilitary *modus operandi* of targeting and executing unarmed civilians by alleging that they only kill "combatants *hors de combat*" and persons suspected of sympathizing or aiding the guerrillas.<sup>300</sup> This amounts to the proverbial "exception"

294. See *Vestida para la Paz*, *supra* note 291, at 7 (listing the tentative agenda items for the convention as proposed by the ELN).

295. See, e.g., *Naturaleza Político-Militar del Movimiento*, June 26, 1997, at 4-5 [hereinafter *Political Nature*] <<http://www.colombialibre.org>>; see also *Planteamientos sobre la solución política negociada al conflicto armado interno*, Apr. 13, 1998, at 4 <<http://www.colombialibre.org>> [hereinafter *Positions*].

296. *Positions*, *supra* note 295, at 4 (translation by author).

297. See WAR WITHOUT QUARTER, *supra* note 1, at 109.

298. See generally WAR WITHOUT QUARTER, *supra* note 1, at 100-30; *supra* Part I.B.

299. See WAR WITHOUT QUARTER, *supra* note 1, at 109.

300. See *id.* at 100. This was the same justification Castaño gave after the 72

that swallows the rule, given that the AUC/ACCU statutes define any person simply *living* in a region with a guerrilla presence to be suspect as “potential combatants”—even if they do not take part in the hostilities—and thus a valid military target.<sup>301</sup> Castaño responds to such observations by arguing that the irregular nature of Colombia’s war—combatants not clearly identified or out of uniform—make application of IHL impracticable if not impossible; he advocates, therefore, the need to apply a “Colombianized” version of humanitarian law to the conflict.<sup>302</sup>

Less than two weeks after the signing of the “Heaven’s Gate” Agreement with the ELN, on July 16, 1998, members of the same group of civil society representatives met with Carlos Castaño and other paramilitary leaders at their stronghold known as *El Nudo de Paramillo* (Department of Córdoba). There they signed a humanitarian agreement even more ambitious than the one that had been signed ten days earlier in Mainz, Germany, with the ELN. In the agreement, Castaño and fifteen other paramilitary leaders commit themselves to abide by IHL as an “ethical minimum,” with specific provisions for protecting the civilian population and persons *hors de combat*.<sup>303</sup> The agreement was hailed as the commencement of a peace process with the paramilitary movement.<sup>304</sup>

Three weeks after, Castaño confessed in an interview with *Semana* magazine that he had no intention of complying with the provisions of the accord.<sup>305</sup> This position was subsequently qualified in a letter from the AUC General Staff (“*Estado Mayor*”) to the leaders of the civil society delegation in which, among other points, they purport to reaffirm the organization’s commitment to IHL and

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hour killing spree of January, 1999, in which nearly 140 civilians were executed by paramilitary forces. See *supra* note 95 and accompanying text.

301. *Political Nature*, *supra* note 295, at 4.

302. See WAR WITHOUT QUARTER, *supra* note 1, at 110 (noting the exact term used is *version criolla*, sometimes translated as a “creole” version of IHL). The idea is that of a modified or “home-grown” version of this body of law, adapted to the perceived idiosyncrasies of the Colombian conflict. See *id.*

303. See *Acuerdo del Nudo de Paramillo* (July 26, 1998) <<http://www.colombialibre.org>> (visited Nov. 29, 1998).

304. See *Aproximación con los jefes ‘paras’*, EL TIEMPO, July 28, at A1.

305. See *Habla Castaño*, *supra* note 62, at 42.

to the *Nudo del Paramillo* agreement. In it, the AUC General Staff explained that while the conflict continues, it “is difficult to achieve full compliance with what has been agreed to in *el Paramillo* due to the fact that the ELN has not fulfilled its commitments assumed in the [Mainz] agreement and the FARC have not committed themselves to respecting IHL.”<sup>306</sup> Subsequent events, such as the wave of massacres carried out by the AUC in January of 1999, confirm that the AUC’s commitment to humanitarian principles is, at best, rhetorical.

This review of the ongoing peace process with its emphasis on humanitarian law closes for the moment the presentation of the Colombian case study. Part II below addresses the first two seminal issues identified in the Introduction, namely, those dealing with the application and interpretation of IHL, respectively. Each will be explored with reference to the conflict in Colombia as outlined above. The case study will be revisited in Part III, which analyzes the third and final issue of implementation.

## II. THE APPLICATION AND INTERPRETATION OF HUMANITARIAN LAW IN CIVIL CONFLICT

In this second part of the Article, our attention will turn to the study of certain legal issues arising from the application and interpretation of IHL in the context of internal armed conflicts like the one in Colombia. It begins by confronting threshold problems arising under the hierarchy of humanitarian norms relating to non-international conflicts, and by focusing on the critical question of how and when the conditions for material application defined in Protocol II are met. The Colombian case study is utilized to demonstrate how Article 1’s scope of application criteria can be successfully analyzed with reference to a specific conflict. The latter half of this part of the Article is dedicated to rebutting the allegations that, even if they apply, existing norms of humanitarian law directed at non-interstate conflict represent an incomplete and deficient minimum of protection. It examines the nature and extent of

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306. *Carta del Estado Mayor de las AUC a los firmantes del Acuerdo del Nudo de Paramillo en representación de la sociedad civil* (Aug. 20, 1998) <<http://www.colombialibre.org>> (translation by author).

the international responsibility generated by the violations of humanitarian law in Colombia, with a view to establishing the parameters of accountability covering the parties to the conflict. An evaluation of the main violations and the corresponding responsibilities under international law produced in the course of the Colombian conflict will shed new light on the substance of humanitarian norms and reveal why, contrary to popular belief, they are indeed sufficient to deal with the cruelty of modern civil conflicts.

#### A. THE SCOPE OF APPLICATION OF PROTOCOL II

The introduction to this Article signaled various obstacles that contemporary commentators suggest make the application of humanitarian norms, especially those contained in Protocol II, difficult to manage.<sup>307</sup> The primary obstacle stems from the complaint that the legal classification of internal conflicts by intensity is an imprecise and unworkable mechanism for arriving at the determination of when Protocol II applies.<sup>308</sup> It is notoriously difficult, they affirm, to establish when the humanitarian rules contained in this instrument enter into effect in a given set of circumstances under the existing hierarchy of conflict categorization. This view is premised in large part on the widely held belief that Article 1 of Protocol II enshrines an elevated threshold for material applicability which presumes the existence of a "civil war," and that this standard is rarely if ever met by the "low-intensity" armed conflicts prevalent today.<sup>309</sup> As was already indicated, scholars and international lawyers routinely advance these arguments as a limitation on the modern relevance and effectiveness of IHL.<sup>310</sup>

It will be argued here that this problem springs more from an inappropriate interpretation of the relevant provisions than from the inadequacy of IHL as it pertains to internal conflict. The lack of clarity and precision in the definition of "civil war" under international law is the source of many difficulties pointed to in the debate on the contemporary significance of Protocol II. From a legal per-

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307. *See supra* notes 14-18 and accompanying text.

308. *See supra* note 15 and accompanying text.

309. *See supra* note 16 and accompanying text.

310. *See supra* note 18 and accompanying text.



spective, over reliance upon—and insistent reference to—this muddled benchmark has become the major obstacle to Protocol II's application in theory. This is so because, as it turns out, the answer to the question, "When is an internal armed conflict a civil war?" is not *per se* determinative of the answer to the related but distinct question of "When does an internal war become a non-international armed conflict for purposes of Protocol II?" Keeping the two lines of inquiry separate when referring to issues of applicability, as will be shown, is the key to resolving the aforementioned difficulties in a manner more favorable to optimizing the operation of humanitarian law in the internal sphere.

Reviewing the evolution of the concept of "civil war" is necessary to understand how and why its historical interpretation continues to impact negatively on the modern debate regarding the adequacy of humanitarian law.<sup>311</sup> This first section of Part II begins, therefore, by examining this evolution under traditional international law, including the central role which "civil war" has played in the development of humanitarian law standards. It then goes on to show why Protocol II's scope of application—once it is distinguished from the distracting discourse of "civil war"—is actually broader and more flexible than commonly believed. Finally, Article 1 of Protocol II under this revised standard is applied to the Colombian case study as a means of demonstrating that Protocol II is applicable by its own terms to that conflict (and others like it) as a matter of law.

### 1. *The Evolution and Background of Article 1 of Protocol II*

There is no precise definition of what constitutes a civil war<sup>312</sup> or

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311. *Id.*

312. See Hernán Montealegre, *Conflictos armados internos y derechos humanos*, in ETUDES ET ESSAIS SUR LE DROIT INTERNATIONAL HUMANITAIRE ET SUR LES PRINCIPES DE LA CROIX-ROUGE 735, 735 (C. Swinarski ed., 1984). The author states:

The traditional law of nations, preoccupied with war between States, has failed to develop a generic concept to encompass all internal struggles not rising to the level of [international] war, the effect of which has been that authors do not employ a uniform terminology when referring to these conflicts.

*Id.* (translation by author).

even a non-international armed conflict,<sup>313</sup> although the latter concept has been the subject of more recent development. Common Article 3 speaks of an "armed conflict not of an international character," which is broadly interpreted as meaning one in which armed opposition groups operating in the territory of a state have a degree of organization and are able to carry out a minimum of sustained military activity.<sup>314</sup> A non-international armed conflict is best described as the range of conflicts that exists between two thresholds in opposition to each other. The high end of the spectrum is occupied by international armed conflicts as defined by Common Article 2 of the Geneva Conventions.<sup>315</sup> The minimum threshold is set by those "situations of internal disturbances and tensions" which Article 1, paragraph 2, of Protocol II asserts "are not armed conflicts."<sup>316</sup> In broad terms, then, a non-international armed conflict is everything in between, that is, any conflict taking place in the territory of a state that rises above the level of sporadic violence or internal unrest, but falls short of inter-state war.

The question of when a non-international armed conflict becomes a civil war has long been the subject of debate among scholars and practitioners alike.<sup>317</sup> Traditional international law provided guidelines for determining the legal status of civil wars, which served essentially two purposes. On the one hand, international law sought to define the duties and obligations of third party states with respect to both the government and rebel parties, especially regarding when intervention by such states was prohibited or justified. On the other hand, international law was interested in pro-

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313. See COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II) 1319, 1348 (Y. Sandoz et al. eds., 1987) [hereinafter COMMENTARY PROTOCOL II].

314. See COMMENTARY ON THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 49-50 (J. Pictet ed., 1952) [hereinafter COMMENTARY GENEVA I].

315. See COMMENTARY PROTOCOL II, *supra* note 313, at 1349, 1351.

316. *Id.* at 1349.

317. See, e.g., Tom J. Farer, *The Humanitarian Laws of War in Civil Strife: Towards a Definition of "International Armed Conflict,"* in DROIT HUMANITAIRE ET CONFLITS ARMES (1976).

moting the application of minimum humanitarian standards to internal conflict. Traditionally, such standards were reserved for the conduct of hostilities of wars between states.<sup>318</sup> Accordingly, two categories of civil armed conflict were recognized, each with its own set of legal consequences:

Where a status of *insurgency* exists, there is in effect an international acknowledgment of an internal war, but third parties are left substantially free to determine the consequences .... However, the criteria for the recognition of insurgency are elusive .... Traditional international law also speaks of the status of *belligerency*. This is rather more precise than the status of insurgency, and entails the meeting of four criteria: first, the existence within a state of a widely spread armed conflict; second, the occupation and administration by rebels of a substantial portion of territory; thirdly, the conduct of hostilities in accordance with the rules of war and through armed forces responsible to an identifiable authority; and fourth, the existence of circumstances which make it necessary for third parties to define their attitude by acknowledging the status of belligerency.<sup>319</sup>

One set of legal consequences primarily addressed the obligations of third states *vis-à-vis* the parties to the internal conflict. The recognition of belligerency meant that the recognizing state was required to remain neutral, and, therefore, was barred from aiding either the rebels or the government.<sup>320</sup> This is because recognition of belligerency was governed by essentially the same principles recognizing states and governments under international law.<sup>321</sup> Naturally there was no similar duty where the status of insurgency was invoked. Thus, in the circumstance "[w]here country A, noting civil war in country B, acknowledges the rebels as insurgents, it is regarding them as contestants-at-law, and not as mere law-breakers."<sup>322</sup> But in the absence of an acknowledged state of belligerency, third party states were obliged only to desist from helping

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318. See Rosalyn Higgins, *International Law and Civil Conflict*, in THE INTERNATIONAL REGULATION OF CIVIL WAR 169 (E. Luard ed., 1972).

319. *Id.* at 170-71 (citations omitted) (emphasis added).

320. See *id.* at 171.

321. See 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 249 (7th ed., H. Lauterpacht ed., 1952).

322. Higgins, *supra* note 318, at 170.

the rebels, though they remained free to aid the legitimate government.<sup>323</sup> The obligations arising from the recognition of insurgency status were even less clear than those relating to belligerency, which was in itself a highly problematic concept.<sup>324</sup>

Other legal consequences related to the conduct of hostilities during internal war. International law in its traditional form could only reach those situations of internal conflict rising to the intensity and characteristics of inter-state war. Additionally, the standard required that the insurgents be, in fact, recognized as belligerents.<sup>325</sup> In this earlier epoch, recognizing the status of belligerency was a means to bootstrap the insurgent movement onto the same playing field as states. This enabled the full application of existing international rules to that conflict, including the laws of war.<sup>326</sup> As concerns IHL, the "recognition of belligerency constituted the first step in the regulation of non-international armed conflicts," because it was the only way, at least in theory, to extend international law protections to the victims of large-scale civil disputes.<sup>327</sup>

This doctrine, however, proved to be too politically complex for implementation in the sphere of international relations, causing it to lose all practical significance. Historically, one finds only a few examples of the recognition of belligerency through a formal declaration of neutrality. One example is the case of British recognition of the Confederate States in 1861 during the American Civil War.<sup>328</sup> In contrast, no such declaration was made during the Spanish Civil War (1936-1939),<sup>329</sup> though it appears that the conditions were amply met. Governments in general did not wish "to harness themselves to the legal consequences of a recognition of insurgency or belligerency ...."<sup>330</sup> The lack of clear criteria for determining the status of either belligerency or insurgency was a recurring problem.

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323. *See id.*

324. *See* COMMENTARY PROTOCOL II, *supra* note 313, at 1322.

325. *See* OPPENHEIM, *supra* note 321, at 248-50.

326. *See* COMMENTARY PROTOCOL II, *supra* note 313, at 1320.

327. *Id.* at 1322.

328. *See* OPPENHEIM, *supra* note 321, at 250-51.

329. *See id.* at 251.

330. Higgins, *supra* note 318, at 171.

The impossibility of objectively verifying or corroborating a state's claim of either condition was another.<sup>331</sup> Moreover, it was "common practice" for states to violate the traditional principle of neutrality, even in cases of clear-cut civil war,<sup>332</sup> which undoubtedly contributed to the controversy surrounding the subject.<sup>333</sup>

These reasons explain why the doctrine of the recognition of belligerency "virtually lapsed": it was lacking in practical relevance to most discussions of internal conflict, even by traditional legal standards.<sup>334</sup> Still, at another level, international law's struggle to address the issues raised by civil conflicts continued to generate heated debate. In particular, it led to the disparate use of key terminology by scholars and practitioners alike. This is especially true of the term "civil war." For one set of authors and jurists, "[civil war] allud[ed] specifically to what is an internal situation of *belligerency*."<sup>335</sup> This view held that:

[i]t is preferable .... to utilize the generic denomination of *civil struggles* ("*luchas civiles*") to designate all actions of force produced by a group of persons that does not recognize the constituted authority; and to reserve in particular the name of civil war for certain events which present the material contours of war, such that it is possible to submit them to a juridical regimen analogous, in large part, to international war.<sup>336</sup>

Technically, this definition best reflected the traditional legal concept. At the turn of the century, the Institute of International Law defined civil war as a conflict in which three basic conditions justifying the recognition of belligerency were present. Article 8 of the Institute's Regulations for civil war stated in relevant part as follows:

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331. See *id.* at 171-72.

332. See *id.* at 173.

333. See COMMENTARY PROTOCOL II, *supra* note 313, at 1322.

334. See Higgins, *supra* note 318, at 173.

335. Montealegre, *supra* note 312, at 736.

336. L. PODESTÁ COSTA, DERECHO INTERNACIONAL PÚBLICO 22 (4th ed. 1961), cited in Montealegre, *supra* note 312, at 736 (translation by author) (emphasis in the original).

Third States may not give recognition to the belligerency of the insurgent party: if it has not won for itself a territorial existence by taking possession of a given part of the national territory; it does not fulfill the conditions which must be met to constitute a regular government *de facto* exercising in that part of the territory the ostensible rights belonging to sovereignty; and if the struggle waged in its name is not conducted by organized forces subject to military discipline and complying with the laws and customs of war.<sup>337</sup>

It is important to note that these criteria, especially the elements of territorial possession and *de facto* sovereignty, were understood to be the necessary corollaries of "an organization purporting to have the characteristics of a State."<sup>338</sup> It was the insurgent's quasi-sovereign status that justified the recognition of belligerency in cases of "genuine" civil war, and transformed an internal armed conflict into one of an international character for purposes of the juridical regimen applied.<sup>339</sup>

Yet in clear opposition to this interpretation, another set of scholars and practitioners were referring to civil war "precisely as the generic term ... inclusive of all internal conflict *not* rising to the level of belligerency (*contienda interna infrabélica*)."<sup>340</sup> Thus, Kelsen posited, "a civil war, the fight of a revolutionary group against the legitimate government, is not an international war. There is an exception to the rule that war can exist only in relation among states: If in a civil war, the insurgents are recognized as a belligerent power."<sup>341</sup> Oppenheim suggested a similar characterization:

In the proper sense of the term a civil war exists when two opposing parties within a State have recourse to arms for the purpose of obtaining power in the State .... As war is an armed contention between *States*, such a civil war need not be war from the beginning, nor become war at all, in the technical sense of the term. But it may become war through

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337. COMMENTARY PROTOCOL II, *supra* note 313, at 1321-22.

338. See COMMENTARY GENEVA I, *supra* note 314, at 49-50 (listing convenient criteria for determining when a non-international armed conflict for purposes of common Article 3 exists, derived from the deliberations and amendments presented during the Conference with respect to that Article).

339. See COMMENTARY PROTOCOL II, *supra* note 313, at 1320-21.

340. Montealegre, *supra* note 312, at 736 (emphasis added).

341. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 32 (1952).

the recognition of the .... insurgents, as a belligerent Power.<sup>342</sup>

Implicit in both Kelsen's and Oppenheim's descriptions of civil war is the belief that it is a conflict normally carried out either at a level below that of full belligerency, or where the recognition of belligerency is lacking.<sup>343</sup> Contrasted with the first, more technical definition cited above, the one suggested by Kelsen and Oppenheim is surely the more common and utilized of the two in contemporary international relations. The longstanding practice of the United Nations in its deliberations, decisions, and reports is to refer to precisely this type of sub-belligerent conflict as "civil wars" corroborates this proposition.<sup>344</sup> Before turning to the contemporary implications of this historical debate, it is necessary to first examine its impact on the development of basic IHL standards.

There is no doubt that the legal concept of civil war was originally linked to the recognition of belligerency under traditional international law. It was the search for objective criteria to justify "a situation of belligerency without committing the inadmissible act of interfering with the internal affairs of [an]other State" that led to the development of this concept.<sup>345</sup> It is similarly evident, however, that the decline of the doctrine of belligerency, coupled with the generalized practice of states and observers of referring to large-scale internal conflicts not of an international character as "civil wars," led to a different and broader understanding of the term. The intractable nature of this debate in diplomatic circles gave rise to a new category of conflict under international law, the "armed conflict not of an international character," that was first adopted by the Diplomatic Conference that drafted the Geneva Conventions of 1949.<sup>346</sup>

It is not surprising that the parameters of the international law discussion on civil wars were also considered in the development of the first humanitarian norms addressing internal conflict. The

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342. OPPENHEIM, *supra* note 321, at 209 (emphasis in the original).

343. *See* Montealegre, *supra* note 312, at 736-37.

344. *See id.* at 736-37.

345. COMMENTARY PROTOCOL II, *supra* note 313, at 1321.

346. *See* Montealegre, *supra* note 312, at 737.

Commentary to the Geneva Conventions of 1949 makes clear that “civil war” was a principal concern of the drafters of common Article 3, but they were unable to arrive at a consensus on a definition, for the reasons suggested in the preceding paragraphs.<sup>347</sup> The initial discussion in the Diplomatic Conference, shaped by the extensive preparatory efforts of the ICRC, was over *which* internal conflicts the four Geneva Conventions under consideration would cover.<sup>348</sup> In light of the impasse reached on this point, the discussion was deliberately transformed into one about which specific norms and imperatives of the Conventions were applicable to *all* “armed conflict[s] not of an international character ...”<sup>349</sup> This shift in focus away from the definition of civil war in favor of a blanket application of core principles was critical to the negotiations and facilitated consensus on the final text of common Article 3. It also guaranteed that the debate relating to a more precise definition of internal conflict would remain unresolved.<sup>350</sup>

Subsequent developments, culminating in the negotiation of Protocol II in the mid-1970s, led to the progressive differentiation of non-international armed conflicts from civil wars under international law. During the preparatory phase leading up to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-1977), and in the early drafts of Protocol II, many experts and country representatives proposed maintaining the same threshold of application in this Protocol established by common Article 3, but to define it more precisely.<sup>351</sup> This tactic was largely abandoned before the Conference even began because of the perceived “tendency to move towards a rather restrictive definition of non-international armed conflict ...”<sup>352</sup> In the ICRC draft Additional Protocol II that formed the basis for the Conference’s work, the proposed version of Article 1 recognized that “common Article 3 and Protocol II

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347. See COMMENTARY GENEVA I, *supra* note 314, at 43-46.

348. See *id.* at 41-46.

349. See *id.* at 46-47.

350. See *id.* at 49-50.

351. See COMMENTARY PROTOCOL II, *supra* note 313, at 1327-29, 1331.

352. *Id.* at 1331.



should co-exist autonomously: in fact, to link the Protocol to common Article 3 would have resulted in restricting the latter's scope."<sup>353</sup> As a consequence, the scope of application of Protocol II became one of the most debated matters at the Conference, with the very fate of the entire instrument riding on its final adoption.<sup>354</sup>

The enormous challenge facing the drafters of Protocol II was to balance the wide range of divergent views expressed during the Diplomatic Conference regarding the scope of its application. Most of these views were already discussed in the course of the preparatory meetings leading up to the Conference organized by the ICRC.<sup>355</sup> "Taking the views that [had already been] expressed into account, the ICRC attempted in its [original] draft [of Article 1] to propose a formula defining the characteristics of non-international armed conflicts, while remaining sufficiently general and flexible to be able to apply to all such situations."<sup>356</sup> The proposal was considered a reasoned attempt at finding a broadly acceptable middle ground and circumventing the most radical positions from either end of the political spectrum. On the one extreme were those seeking the broadest application possible of Protocol II, including coverage of low-level strife and internal disturbances. On the other side were those wishing to keep the scope of application to "the narrowest possible definition covering only very intense conflicts with *all*

353. *See id.* at 1333; THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 30 (Howard S. Levie ed., 1987) [hereinafter PROTOCOL II PROCEEDINGS] (reproducing the pertinent intervention by the ICRC in the meeting of the drafting Committee).

354. *See* COMMENTARY PROTOCOL II, *supra* note 313, at 1348.

355. *See id.* at 1327-36, 1348-49.

356. *See id.* at 1349. The text of the draft article proposed by the ICRC is as follows:

Article 1.- Material field of application 1. The present Protocol shall apply to all armed conflicts not covered by Article 2 common to the Geneva Conventions of August 12, 1949, taking place between armed forces or other organized armed groups under responsible command. 2. The present Protocol shall not apply to situations of internal disturbances and tensions, inter alia riots, isolated and sporadic acts of violence and other acts of a similar nature. 3. The foregoing provisions do not modify the conditions governing the application of Article 3 common to the Geneva Conventions of August 12, 1949.

PROTOCOL II PROCEEDINGS, *supra* note 353, at 23.

the material characteristics of a war.”<sup>357</sup>

The ICRC’s initiative served as the starting point towards bridging the opposing positions and facilitating eventual compromise acceptable to the majority of the delegations present. The thrust of the ICRC’s proposal was to formally define the scope of application in terms of the characteristics of a non-international armed conflict by referencing specific objective criteria, both positive and negative. The ICRC intended the Protocol to be applied when these elements were met as a factual and practical matter, and without regard to any other considerations.<sup>358</sup>

Although both the Committee and its Working Group charged with drafting a text of Article 1 accepted this format and the principle behind it, participating delegations proposed numerous amendments to the ICRC draft article.<sup>359</sup> This led to the creation of a special Sub-Group charged with the sole task of processing these amendments through “informal consultations among the delegations, on the basis of all the proposals that had been submitted to it ...”<sup>360</sup> The Sub-Group, with the participation of twenty-eight delegations in six sessions, proceeded to hammer out a compromise on the elements and language of the text of Article 1. The compromise was adopted by the Committee and subsequently by the Conference as a whole, with only minor changes.<sup>361</sup>

In the plenary session of the Conference, the final text of Article 1 was adopted with some controversy, mostly relating to the objective nature of its elements. Many states, however, were of the view that great pains had been taken to reach a worthy compromise after lengthy and complicated negotiations.<sup>362</sup> Delegations expressed dif-

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357. COMMENTARY PROTOCOL II, *supra* note 313, at 1349.

358. See PROTOCOL II PROCEEDINGS, *supra* note 353, at 29 (transcribing the intervention of the ICRC representative in which she submits and explains the ICRC proposal in Committee).

359. See COMMENTARY PROTOCOL II, *supra* note 313, at 1349. See generally PROTOCOL II PROCEEDINGS, *supra* note 353, at 23-57.

360. PROTOCOL II PROCEEDINGS, *supra* note 353, at 67.

361. See *id.* at 57-78.

362. See PROTOCOL II PROCEEDINGS, *supra* note 353, at 82 (interventions of Canada), 84 (Germany), 85 (Ghana), 89 (Italy); see also COMMENTARY PROTOCOL II, *supra* note 313, at 1348.

fering perceptions of the established threshold before and after the final vote on the article.<sup>363</sup> It was evident that the elements of the compromise solution produced in the Working Group and adopted by the Conference elevated the threshold of Article 1, as originally proposed by the ICRC, in order to respect “fully the sovereignty of future Contracting Parties.” At the same time, it was also clear to many participants that they “could not raise the threshold of application to a prohibitive level.”<sup>364</sup> The following explanation of the vote offered by the Canadian delegation best sums up the general debate on this point:

Like any compromise, the text is subject to certain interpretations not always of the same nature. Some delegations argue that because of the number of qualifications contained in it, only conflicts of a very high threshold such as civil wars are covered. Others, like [the Canadian] delegation, underline that these qualifications are a reflection of the factual and practical circumstances that would in fact have to exist if a Party to the conflict could be expected to implement the provisions of the Protocol. Furthermore, we do not agree that this necessarily means that these conditions could exist only in civil war situations.<sup>365</sup>

The text of Protocol II, including Article 1, was adopted by consensus at the end of the Diplomatic Conference in June 1977.<sup>366</sup> The article in pertinent part reads as follows:

This Protocol ... shall apply to all [non-international] armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.<sup>367</sup>

The foregoing historical review goes a long way in explaining why many international legal scholars continue today to read the language of Article 1 as requiring a “civil war,” despite the fact that

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363. See PROTOCOL II PROCEEDINGS, *supra* note 353, at 74-90.

364. See *id.* at 62.

365. *Id.* at 82.

366. See COMMENTARY PROTOCOL II, *supra* note 313, at 1336.

367. Protocol II, *supra* note 13, art. 1(1).

the term does not appear anywhere in the text of the Protocol. It clarifies further the extent to which the criteria adopted in relation to armed opposition groups were derived from the criteria associated with traditional definitions of civil war. It also confirms that Article 1's conditions do "restrict the applicability of the Protocol to conflicts of a certain degree of intensity."<sup>368</sup> But these indisputable observations do not alone resolve the larger problem of application, as identified in the opening paragraphs of this section. In particular, important questions remain as to how best to determine what the "certain degree of intensity" should be and when it is present in situations of internal violence. It is to these questions that the discussion now turns.

## 2. *The Modern Interpretation of Article 1 of Protocol II*

The prevailing view in most legal literature seems to be that Article 1 basically speaks of civil war understood in the traditional sense of the term, and that the intensity of a Protocol II non-international armed conflict must be "virtually commensurate with [that of] a classic civil war."<sup>369</sup> Commentators maintaining this view claim that the same characteristics, which under traditional international law would have justified the recognition of belligerency, must be present in order for Protocol II to apply.<sup>370</sup> Their position is that the Diplomatic Conference selected "that set of conditions which, in addition to raising a very elevated threshold for the application of Protocol II, are, at the same time, *the* classic conditions of belligerency."<sup>371</sup> The following quote exemplifies the foregoing understanding of the definition of civil war under Article 1:

[T]he notion of civil war does not correspond to that for internal armed conflict. *Civil war*, of all internal armed conflicts originating at the heart of the State, is the one most characterized by the *widespread division of civil society* and the military confrontation of one or more groups as well as being qualified by a certain duration of the conflict, the intensity of the military operations, the open character of the hostilities ... , the size and organization of the armed groups and, finally, the dominion

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368. *Id.* at 1349.

369. Meron, *supra* note 15, at 599 (citations omitted).

370. See MANGAS MARTÍN, *supra* note 8, at 73-74.

371. *Id.* at 76 (emphasis added) (translation by author).

over a sizable [*notable*] and significant part of the national territory.<sup>372</sup>

Not surprisingly, authors subscribing to this interpretation believe that since traditional civil wars, or those where the status of belligerency could be formally acknowledged, are uncommon in contemporary international society, Protocol II's chances of actually becoming applicable are remote. "[A] conflict which is characterized to such an extent by the accumulation of [the aforementioned] elements is an increasingly rare occurrence, and it is for that reason that Protocol II, *which is applicable to these situations*, has been much criticized. *The notion of civil war is very strict.*"<sup>373</sup> One humanitarian law scholar who espouses this "strict" view of Article 1 asserts, for example, that the internal war in El Salvador is the only case in the Americas where the Article's stringent conditions have been met.<sup>374</sup>

A variant on this theme is offered by authors who cite "civil war" as the appropriate standard under Article 1, but do not define it further. Indeed, it is not uncommon today to find references to this article as dictating Protocol II's application "to situations at or near the level of a full-scale civil war," without any explanation of what is meant by this terminology nor an indication of how real conflicts in contemporary context may or may not qualify.<sup>375</sup> One author defines civil wars simply as those "[a]rmed conflicts arising within states," adding that "[t]he application of moderating legal norms to such a situation invokes very severe difficulty."<sup>376</sup> It remains unclear whether these observers are appealing to the "strict" definition of civil war and its consequences, or to some other non-technical understanding of the term, such as the ones reported in the preceding sub-section.<sup>377</sup> In other words, this terminology could very well

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372. *Id.* at 59 (second emphasis added) (translation by author). Please note that the word *notable* refers to the original Spanish term.

373. *Id.* at 59-60 (emphasis added) (translation by author).

374. See Goldman, *supra* note 8, at 64 (arguing that even if Colombia were a party to Protocol II, the magnitude of the hostilities would have been insufficient to meet the requirements of Article 1).

375. See *Analytical Report*, *supra* note 16, para. 79.

376. MCCOUBREY & WHITE, *supra* note 3, at 317.

377. See *supra* notes 340-43 and accompanying text.

refer to large-scale civil conflicts that meet the Article 1 conditions *without* rising to “classic” levels, but which are considered “civil wars” for practical purposes by most commentators. This imprecision is not without substantive repercussions since Protocol II’s scope of application, as commented above, tends to contract or expand according to the “label” placed upon the type of conflict dictated by Article 1’s conditions. In any case, it is apparent that authors who subscribe to this version of the civil war standard also tend to conclude that Protocol II’s application is too problematic to be practical.<sup>378</sup>

There are several compelling reasons for arriving at the conclusion that interpretations of Article 1 founded on some notion of “civil war” are not the most appropriate ones. First, while it is true that the conditions required by Article 1 are descendants of the elements associated with the traditional concept of civil war, there is no conclusive argument, legal or otherwise, for why the two must be considered to be substantially identical or interchangeable. Second, the express language of Article 1 as well as its negotiating history provide evidence to the contrary and serve as the basis for a different reading of the article more in line with Protocol II’s unambiguous object and purpose. Finally, the historical evolution of the civil war concept reveals the absence of a precise definition of the term, and thus confirms the difficulties involved in ascertaining and applying its different meanings.

A strong resemblance between Article 1’s positive elements and the classic civil war criteria does not, in the absence of clear language or intent to that effect, justify the assertion that the whole of the latter was directly imported into Protocol II as the substantive benchmarks by which its application is to be determined. Jean Pictet, former Director of the ICRC, agreed that Protocol II “applies only to conflicts of a relatively high degree of intensity,” but recognized that these “do not have to be typical civil wars since recognition of a state of belligerency is not required, *nor the existence of a governmental power on the insurgent side.*”<sup>379</sup> By “governmental power” Pictet meant the critical element of “*de facto* sovereignty”

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378. See *Analytical Report*, *supra* note 16, paras. 79-82.

379. JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 48 (1985) (emphasis added).

which was one of the attributes of a State which insurgencies historically had to assert (and display) in order to qualify for belligerency status.<sup>380</sup> Pictet insisted that Article 1 is by its own terms "limited to armed conflicts between governmental forces and organized armed forces under responsible command, which exercise such control over part of the national territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol."<sup>381</sup> The crucial point being made is that the classic civil war criteria, strictly speaking, are not valid in the Protocol II context for purposes of determining applicability; only the conditions described in Article 1 are valid, and in the terms they are drafted.

Nor can it be said that the two are substantially the same. The Article 1 elements for a Protocol II non-interstate conflict and their wording reflect a qualitative difference *vis-à-vis* those required for "civil war" status under traditional international law. It simply is not the same, for instance, to say that insurgents must "*constitute a regular government de facto exercising in [a given] part of the territory [they control] the ostensible rights belonging to sovereignty,*"<sup>382</sup> as to say that they must "*exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement*" humanitarian law.<sup>383</sup> The latter standard is, by its own terms, conditional and clearly more restricted in scope and content than the first, narrowing it significantly. Nor can it be suggested that the condition to be "subject to military discipline and [to comply] with the laws and customs of war,"<sup>384</sup> when these referred to the body of traditional *jus in bello* norms applicable to interstate conflicts, is substantially similar to the condition of being able to implement the less developed provisions of Protocol II. Again, the latter fixes a markedly more modest threshold than the former. Efforts to read, explicitly or implicitly, the elements of "classic" civil wars directly into the in-

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380. See *supra* notes 337-39 and accompanying text.

381. PICTET, *supra* note 379, at 48.

382. See *supra* note 337 and accompanying text (emphasis added).

383. Protocol II, *supra* note 13, art. 1(1) (emphasis added).

384. See *supra* note 337 and accompanying text.

terpretation of Article 1 are, for these reasons, seriously misleading.

The problem with resting one's interpretation of this article on the concept of civil war is that it artificially inflates Protocol II's threshold of application to prohibitive levels not supported by the text itself. Protocol II must be read in good faith and in accordance with "the ordinary meaning" of its terms taken in context, always in light of the Protocol's "object and purpose."<sup>385</sup> Under established principles of interpretation, Article 1 cannot be presumed to require extraneous criteria or elements if they are not among those listed in the text of paragraphs 1 or 2. For this very reason it is commonly acknowledged that Article 1 does not specify the *proportion* of the territory over which control must be exercised nor fix a specific duration for the conflict as elements necessary to trigger applicability.<sup>386</sup> Since neither "civil war" nor "belligerency" appear anywhere in Protocol II, and given that the elements associated with these concepts are in many respects qualitatively different than those listed in Article 1, it is difficult to see how conditions derived from the former, such as the "widespread division of civil society"<sup>387</sup> or the exercise of "*de facto* sovereignty" by the insurgents, can be presumed to be incorporated into an analysis of applicability.

An examination of the preparatory work and the circumstances of Protocol II's conclusion confirm the plain meaning of Article 1's terms, which is discernible once the interpretative rules enunciated above are applied.<sup>388</sup> As a legal matter, the positive and negative criteria introduced in Article 1 of Protocol II, taken together with

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385. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31, U.N. Doc. A/CONF. 39/27 (1969), 8 I.L.M. 679 (1969) [hereinafter Vienna Convention]; see also Farer, *supra* note 317, at 15-29 (providing a detailed discussion on the interpretation of international humanitarian law and its scope of application under international law). In this regard, the author shares Professor Farer's determination that "[w]hether one approaches these articles from the perspective of a textualist, an intentionist or a teleologist, recognition of the triumph of the 'plain meaning' school is unavoidable." *Id.* at 19.

386. See MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 627 (1982) [hereinafter NEW RULES]; see also discussion *infra* Part II.A.3.

387. See *supra* note 372 and accompanying text.

388. See Vienna Convention, *supra* note 385, art. 32.



those established by Article 1 of Protocol I, permit the differentiation of only four categories of non-interstate conflicts for purposes of IHL:

- (a) internal disturbances and tensions to which international human rights instruments are applicable;
- (b) non-interstate armed conflicts [within the scope of] common Art. 3 of the [Geneva] Conventions
- (c) *non-interstate armed conflicts defined in Art. 1 of Protocol II*;
- (d) non-interstate armed conflicts falling under the definition of Art. 1 of Protocol I (wars of national liberation).<sup>389</sup>

It cannot be said that the concept of non-interstate armed conflict integrated into the text of Protocol II was necessarily intended to be synonymous with that of "classic" civil war. The *travaux préparatoire* of the Diplomatic Conference reveal the extent to which lengthy and complex negotiations were carried out for the specific purpose of reaching a compromise solution on Article 1. This goal, in the view of many of the participating delegations, was achieved. In the course of this process, amendments which would have restricted Protocol II's application to "only very intense conflicts with *all* the material characteristics of a war"<sup>390</sup>—the very definition of a "classic" civil war—were rejected in favor of less exacting formulas like the one finally adopted. Although the compromise embodied in Article 1 does set a certain threshold for application elevated in comparison with that found in common Article 3, it does so, as remarked above, in substantially more modest terms than those relating to civil conflicts with "*all* the material characteristics of war." Any other reading of Article 1 not only is not supported by the text, it impairs the manifest intent of those delegations participating in the Diplomatic Conference who voted for the "compromise solution."<sup>391</sup> It does so precisely because the compromise reached reconciled the call by sovereign states for a stricter definition of Protocol II's scope of application, with the objective

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389. NEW RULES, *supra* note 386, at 624 (emphasis added).

390. *See supra* note 357 and accompanying text.

391. *See* SUTER, *supra* note 17, at 170-72 (describing the different approaches during the Diplomatic Conference to the interpretation of the application threshold and the compromise outcome).

need for application of its humanitarian protections to internal conflicts of significant intensity.

What, then, is the most appropriate interpretation of Protocol II's scope of application? Given that the undisputed *raison d'être* of the Protocol is to "ensure a better protection for victims of non-international armed conflict,"<sup>392</sup> the interpretation most in conformity with the humanitarian object and purpose of Protocol II is the one which, without deviating from the express language of Article 1, tends to provide the highest levels of protection to these victims. All would agree (although for different reasons) that the "civil war" standard probably does not fit this bill. The better interpretation, therefore, is the one which advocates a textual or "plain meaning" reading of the Article 1 criteria as reflecting merely "the factual and practical *circumstances* that would have to exist if a Party to the conflict could be expected to implement the provisions of the Protocol."<sup>393</sup> Under this view, which is essentially the same one espoused by Pictet in prior paragraphs:

[the] organized armed groups would need to have a responsible command, to exercise control over some territory, and to have sustained military operations in order, *practically speaking* to implement the Protocol. The key to the height of the threshold ( . . . ) lies in the expression "to implement this Protocol," for the threshold of the Protocol [depends] upon the contents of the Protocol.<sup>394</sup>

This interpretation of Article 1 is not only the most appropriate, it is also the most viable, as evidenced by the straightforward application of the "plain meaning" standard to the war in Colombia in Part II.A.3 below. In contrast, the complex evolution of the "civil war" concept, as well as the divergent views under international law and practice it has generated, ensure that specific reference to it in the context of Article 1 raises more questions than it answers. This is hardly surprising if one recalls that the criteria and procedures for determining belligerency status historically were the subject of intense debate, in addition to being virtually impossible to

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392. Protocol II, *supra* note 13, Preamble, para. 3; *see also* COMMENTARY PROTOCOL II, *supra* note 313, at 1341.

393. *See supra* note 359 and accompanying text (emphasis added).

394. PROTOCOL II PROCEEDINGS, *supra* note 353, at 82.

implement. Professor Tom Farer has referred to this quest for ascertaining the contextual factors justifying the characterization of civil war as an armed conflict of an "international character" in the following terms: "On this critical issue, the Text's communications are finally Delphic. The *travaux préparatoires* do little more than supplement our uncertainty. And, as one would expect, the practice of states contributes a rich harvest of ambiguity."<sup>395</sup> Although he was referring to common Article 3 in years prior to the adoption of Protocol II, his words ring equally true for those who embark upon the parallel quest under Article 1 of the Protocol.

Skeptics of Protocol II insist that even where the "civil war" conditions are satisfied, "it is unlikely that many states involved in internal conflicts will be prepared to acknowledge it."<sup>396</sup> At the same time, they maintain that this is nevertheless the correct standard, since "certainly few Governments are prepared to admit the application of the Protocol to situations of lesser intensity."<sup>397</sup> Apparently trumped by this Catch-22, most modern commentators conclude that the existing norms are inadequate and turn their attention to the search for better alternatives.<sup>398</sup> The application below of the "plain meaning" standard under Article 1 to the conflict in Colombia will show why this apparent impasse is not insurmountable. Moreover, the analysis of the Colombian case study presented in this Article contests the *a priori* assumption reflected in these criticisms that the humanitarian law of non-international armed conflict is unlikely to affect the way governments act, or have tangible effects on a society at war. The possibility or even probability that states will not want to acknowledge Protocol II's legal applicability does not spell the end of its practical utility or relevance to their internal armed conflicts.<sup>399</sup>

In sum, the conventional wisdom on Article 1 applicability under Protocol II is untenable for three reasons. First, it reinforces the eclectic, confusing, and non-viable interpretation of Article 1 based

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395. Farer, *supra* note 317, at 49.

396. Meron, *supra* note 15, at 600.

397. *Analytical Report*, *supra* note 16, para. 79.

398. *See id.* paras. 78-83, 89-107.

399. *See generally* discussion *infra* Part III.

on traditional notions of civil war that is maintained, as far as this author can tell, mostly by what one calls "the habit of international lawyers to repeat received opinions."<sup>400</sup> Second, it ignores the golden rule of Article 1 interpretation, which states that the criteria for application must be established objectively, and that Protocol II applies automatically once it is determined that the stipulated conditions are met.<sup>401</sup> It does so by suggesting—if not conceding—that states' positions on the conditions for application are by and large definitive as a practical matter. The role of scholars and other active players on the field of international relations should be to promote and reinforce IHL principles in favor of their greater effectiveness.<sup>402</sup> As Professor Tom Farer has cogently remarked:

Where the application of legal techniques leaves a residuum of logically defensible alternatives . . . , decision must then either be wholly arbitrary (flip of a coin) or policy guided. There can be little serious doubt about which alternative will be chosen. Among the scholar's functions is clarification of those policies, often covert, which will inevitably govern the processes of claim and of decision in the various international arenas. By so doing, he [or she] both promotes rationality in the decision process and augurs the directions in which it will move.<sup>403</sup>

Insistence on the rule of objective interpretation with respect to Article 1 of Protocol II, notwithstanding states' lack of political will to recognize its applicability or to implement its provisions, is at the heart of constructive humanitarian activism in this field today. This rule guides the proper standard of interpretation and provides the most legitimate foundation from which to launch a wide range of positive initiatives—legal, political and social—directed at achieving greater *de jure* and *de facto* application of humanitarian norms during intense civil conflicts.<sup>404</sup> It is necessary that these initiatives be undertaken with greater frequency at both the national

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400. IAN BROWNLIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY (PART I)* 37 (1983).

401. See *infra* note 416 and accompanying text.

402. This is one of the conclusions echoed in Part III of this Article, which is dedicated to the issue of implementation.

403. Farer, *supra* note 317, at 21.

404. See, e.g., discussion *infra* Parts II.A.3 and III.B.1-3.

and international levels in order to ensure heightened protection under international law for the victims of internal wars, present and future.

In keeping with this perspective, the third and final reason for debunking conventional wisdom is that it tends to reinforce positions which, whether intended to or not, work against a greater application of humanitarian norms in civil conflict. In Colombia, the persistent debate as to whether Protocol II applies by operation of law is at the heart of the struggle for effective implementation of its provisions.<sup>405</sup> Moreover, the Protocol's legal applicability lays the juridical groundwork for addressing the central question of what international responsibility is generated by the transgression of its provisions.<sup>406</sup> Yet the experience in Colombia has been that certain humanitarian law experts will quote several of the critical academic arguments reviewed in this section in order to sustain that Protocol II does *not* apply to the conflict there as a matter of law,<sup>407</sup> despite clear, objective evidence to the contrary.<sup>408</sup> It is disingenuous to accept that state practice shapes international law without recognizing

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405. See *supra* note 189 and accompanying text.

406. See discussion *infra* Part II.B.1.

407. See, e.g., Rafael Nieto Loaiza, *Algunas observaciones acerca del delito político y la aplicación del DIH en Colombia*, in DERECHO INTERNACIONAL HUMANITARIO APLICADO: CASOS DE COLOMBIA, EL SALVADOR, GUATEMALA, YUGOSLAVIA Y RUANDA 363-64 (1998). Mr. Nieto is a former Defense Ministry advisor on human rights and humanitarian law who has contributed significantly to the Armed Forces position on these subjects, reviewed in some detail in Part I.C.2.a. He is fond of citing Professor Robert Goldman as stating that El Salvador is the only conflict in the hemisphere to which Protocol II has applied by its own terms. See *supra* note 374 and accompanying text. Similarly, Mr. Nieto has cited Professor Goldman as holding that the objective conditions that must be met with respect to Protocol II are essentially those constituting a civil war comparable to the classic state of belligerency required under international customary law. See *id.* at 364 n.42. Nieto concludes that Protocol II does not apply to the Colombian case as a matter of law; it applies only because the Colombian government has stated that it will do so as a matter of executive policy. See *id.* at 364-65. See *supra* notes 184-90 and accompanying text for the Colombian government's position on Protocol II applicability.

408. See ICRC *Special Report*, *supra* note 244, at 4 (affirming that Protocol II applies to the conflict in Colombia by its own terms); Interview with Reinaldo Botero, Legal Advisor, Committee of the ICRC in Bogotá, Colombia (July 28, 1998) (discussing the clear legal applicability of Protocol II to the Colombian conflict); see also discussion *infra* Part II.A.3.

the basic role of international law scholars in shaping this very practice under certain circumstances. Unfortunately, the aforementioned experts provide the Colombian state with the grounds for justifying its entrenched policy against acknowledging Protocol II's legal applicability, and not the other way around.<sup>409</sup>

The ramifications of this debate are also apparent within the regional system for the protection and promotion of human rights under the Organization of American States ("OAS"). The Inter-American Commission on Human Rights ("IACHR") in a recent case argued before the Inter-American Court of Human Rights alleges that extra-judicial executions carried out by Colombian police in the course of the internal conflict were violations of Article 3 common to the Geneva Conventions of 1949 and custom under IHL.<sup>410</sup> In its petition, the Commission does not make specific reference to Protocol II, which is as pertinent to the American Convention on Human Rights<sup>411</sup> and as applicable to the case of Colombia as is common Article 3.<sup>412</sup> The IACHR's interpretation of the American Convention as incorporating humanitarian law norms

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409. As earlier noted, the government recognizes the *factual* existence of a civil conflict, and has even committed itself to applying Protocol II as an internal *political* matter. This means, however, that it does not recognize that the war is a non-interstate conflict for purposes of Article 1, thus denying Protocol II's automatic applicability and trumping the operation of its binding force under conventional international law. This distinction is critical from a legal point of view. If there is no binding obligation, there can be no breach of duty and, therefore, no international responsibility for the acts committed in violation of the treaty's specific provisions.

410. Comisión Interamericana de Derechos Humanos, Demanda ante la Corte Interamericana de Derechos Humanos contra el Estado de Colombia Caso de Artemio Pantoja Ordoñez y Otros 2, 9 (1998) (unpublished brief, on file with author) [hereinafter IACHR Case]. It should be evident that this finding was *in addition to* that relating to the violations of the American Convention determined by the IACHR, especially Article 4 (the right to life). *See id.*

411. American Convention on Human Rights, "Pact of San Jose, Costa Rica," *opened for signature* Nov. 22, 1969, 144 U.N.T.S. 123, 9 I.L.M. 673 (1970) (entered into force on July 18, 1978) (ratified by Colombia on May 28, 1973 and adopted by Law 16 of 1972 (D.O. 33,780)).

412. *See* IACHR case, *supra* note 410, at 10-12. The Commission itself has recognized Protocol II's relevance and applied its provisions to the conflict in Colombia in its Third Report on the Human Rights Situation in Colombia. *See supra* note 189 and accompanying text (relating the Commission's findings that common Article 3 and Protocol II apply).

and authorizing their application to member states is legally sound and unavoidable where violations arise in the context of civil armed conflict.<sup>413</sup> It is unfortunate, therefore, that the Commission fails to take this reasoning to its logical conclusion by recognizing neither the *objective* applicability of Protocol II to the war in Colombia, nor the corresponding violation of its provisions on the facts of this case.<sup>414</sup> This omission not only weakens the Commission's own position with respect to the case before the Court, it undermines the regional rule of law.

### 3. *Article 1 Analysis of the Colombian Conflict*

Outside the world of academia, most practitioners and observers having direct contact with Colombia's internal war assume that it meets Protocol II's conditions for applicability. The ICRC, Human Rights Watch, the United Nations, the United States Department of State, in addition to most Colombian NGOs and academics, for example, all exercise their oversight of the Colombian situation with reference to the provisions of Protocol II on the premise that Article I's conditions have been amply met.<sup>415</sup> And they are absolutely right to do so because, as a legal matter, the application of Protocol II does not "depend on the discretionary judgment of the parties."<sup>416</sup>

[Paragraph 1] lays down a number of *objective* criteria for determining the field of application of the Protocol . . . . The Protocol applies *automatically* as soon as the material conditions as defined in the article are fulfilled. [This principle] is one of the cornerstones of international humanitarian law and already applied [even before the drafting of Protocol II] to Articles 2 and 3 common to the 1949 Conventions.<sup>417</sup>

413. See IACHR THIRD REPORT, *supra* note 103, ch. IV, paras. 12-13.

414. See *id.*, ch. IV, para. 20.

415. See *supra* note 408 and accompanying text; HCHR Report, *supra* note 68, para. 22; WAR WITHOUT QUARTER, *supra* note 1, at 26; see also U.S. Department of State, *Colombia Country Report on Human Rights Practices for 1998*, Feb. 26, 1999, sec. 1.g. <[http://www.state.gov/www/global/human\\_rights/1998\\_hrp\\_report/colombia](http://www.state.gov/www/global/human_rights/1998_hrp_report/colombia)> [hereinafter *Colombia Country Report for 1998*]; CCJ 1996, *supra* note 82, at 55-81.

416. COMMENTARY PROTOCOL II, *supra* note 313, at 1351.

417. *Id.* (emphasis added). See also NEW RULES, *supra* note 386, at 628.

As previously established, Protocol II refers to internal armed conflicts between governmental forces and armed groups organized under responsible command that exercise such control over territory as to permit them to maintain a certain level of military activity and to apply the Protocol's humanitarian provisions. Article 1's applicability turns on an analysis of the actual circumstances prevailing in such conflicts in order to determine if, as a practical matter, the armed groups in opposition to the Contracting Party *can be expected* to implement the provisions of Protocol II and are in fact *capable* of doing so.<sup>418</sup> Thus, aside from the existence of an internal conflict between official and dissident forces or rebels, there are four other factual conditions which must be established in this regard: the organized armed groups must (i) be under a responsible command, (ii) exercise control over any part of the national territory sufficient (iii) to carry out sustained and concerted military operations, and (iv) to apply the provisions of the Protocol.<sup>419</sup>

What follows is a step-by-step application of the individual criteria set out in paragraph 1 of Article 1 to the case study of Colombia's internal war presented in Part I. Each element is addressed (though not in its original order) and explained before making specific reference to the situation in the country. In light of the expressly interrelated nature of the stipulated conditions, they must be considered and weighed in conjunction to each other. "[These] conditions . . . correspond with [the] actual circumstances in which the parties may reasonably be expected to apply the rules developed in the Protocol, since they [would] have the minimum of infrastructure required therefore."<sup>420</sup> Given these parameters, it is difficult to imagine a modern day conflict more appropriate for Protocol II coverage than Colombia's.

#### a. Ability to Implement the Protocol

Since this is the "fundamental criterion" of the applicability equation,<sup>421</sup> this is where Article 1 analysis should begin. The other

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418. See Protocol II, *supra* note 13, Article 2, para. 1.

419. See COMMENTARY PROTOCOL II, *supra* note 313, at 1353.

420. *Id.* at 1353.

421. See *id.*



elements are considered explicitly in relation to the armed groups' factual capacity to apply the Protocol II provisions. Without organization and a responsible command, or in the absence of territorial control and continuous military activity by rebel groups, Protocol II could not be applied and thus would lose all practical relevance for purposes of the conflict. Furthermore, the condition that adverse armed groups possess this capacity to apply the Protocol is the basis for their "obligation to do so."<sup>422</sup> As a practical matter, then, Protocol II applies *because* armed groups in opposition to government forces are in a position to implement its provisions in the course of an intense war effort. This means, for example, caring for the wounded and the sick, or detaining prisoners and treating them decently in accordance with Articles 4 and 5 of Protocol II.<sup>423</sup>

There is no doubt that the Colombian guerrillas can apply IHL including Protocol II and that, on occasion, they have expressly done so. The ELN has long recognized the need to impose humanitarian restrictions on the conduct of hostilities and has even promoted the signing of a humanitarian agreement by all the parties to the conflict.<sup>424</sup> It has publicly affirmed that the ELN is a "political-military organization with responsible command and territorial control [which give it] the capacity to apply Protocol II for purposes of regulating the internal conflict."<sup>425</sup> After it signed an agreement with representatives of civil society committing itself, *inter alia*, to restrict its practice of kidnapping for ransom, it released several elderly and infirm captives as a sign of its intention *and capacity* to comply.<sup>426</sup> It is worth recalling that the ELN traditionally have been much more receptive and vocal than their colleagues from the FARC regarding the application of IHL to the Colombian conflict.

Yet the FARC have also displayed an incontrovertible capacity to apply IHL and Protocol II in the course of their war effort. After

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422. See FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 139 (1987); see also *infra* Part II.B.2.

423. See Protocol II, *supra* note 13, arts. 4-5.

424. See *supra* notes 275-77 and accompanying text.

425. See *supra* note 278 and accompanying text.

426. See *supra* notes 283-85 and accompanying text.

capturing 60 soldiers in an assault on the jungle outpost of Las Delicias (Caquetá department) in August of 1996, the FARC issued a statement in which they claimed to be providing their captives with the humane treatment dictated “by the provisions established in Protocol II additional to the Geneva Conventions for prisoners of war [sic].”<sup>427</sup> The captives, who were safely released ten months later under the auspices of the ICRC and other international observers, showed no signs of abuse or mistreatment.<sup>428</sup> It should be recalled that the FARC currently hold upwards of 400 police and army personnel captive for purposes of negotiating an exchange of prisoners with the government, presumably under the same humanitarian conditions as their predecessors from Las Delicias.<sup>429</sup> The undisputed ability to capture significant numbers of enemy agents in combat and to keep them under detention in accordance with humanitarian standards for months on end is conclusive evidence of the FARC’s capacity to apply Protocol II.

#### b. Control Over a Part of the Territory

Article 1 does not specify the exact part or proportion of the territory to be controlled.<sup>430</sup> During its drafting, various attempts by states to specify the proportion of territory that should be subject to control were expressly rejected by the Diplomatic Conference.<sup>431</sup> “In practical terms, if the insurgent armed groups are organized in accordance with the requirements of the Protocol, the extent of territory they can claim to control will be that which escapes the control of the government [sic] armed forces.”<sup>432</sup> This element is de-

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427. *Farc propone entrega de rehenes*, EL ESPECTADOR, Oct. 16, 1996, at 8A.

428. See *Guerrilla*, SEMANA, June 9, 1997 (discussing the FARC’s demonstrated ability to respect international humanitarian law by releasing the captive soldiers in good health). “The laws of war applicable in Colombia give captured combatants no special status, but provide for their humane treatment and safe release, which the FARC respected.” WAR WITHOUT QUARTER, *supra* note 1, at 133.

429. See *Colombia Country Report for 1998*, *supra* note 415, at sec. 1.d; see also *supra* 48 and accompanying text.

430. See Commentary Protocol II, *supra* note 313, at 1352.

431. See *id.* (detailing proposals advocating a “substantial” or a “non-negligible” control of territory).

432. *Id.* at 1353.

fined in purely *functional* terms because the *extent* of the control “must be *only* such ‘as to enable’” the armed groups to carry out sustained and concerted military operations and to apply the Protocol. Control under Article 1, in other words, need not be absolute; it can take the form of a sustained presence by members of the armed group that allows them to operate in both military and humanitarian terms within a given part of the national territory.

Most objective observers today do not dispute that the main Colombian guerrilla groups exercise significant control over large areas of the country in the terms stipulated by Article 1. According to the IACHR, the FARC *alone* “control or maintain a strong presence in 40 to 50% of the 1,071 municipalities in Colombia.”<sup>433</sup> The U.S. State Department estimates that “the FARC and the ELN, along with other smaller groups, exercised a significant degree of influence and initiated armed action in nearly 700 of the country’s . . . municipalities during [1998], roughly comparable to their level of activity in 1997. . . . Guerrillas supplanted absent state institutions in many sparsely populated areas of the national territory.”<sup>434</sup> The main guerrilla organizations themselves often refer to this territorial control in their public statements, as did the ELN in the statement defending their capacity to apply Protocol II quoted above. Manuel Marulanda, the FARC’s maximum leader, described the situation even more bluntly:

[W]e are the *de facto* authority in a large part of the national territory. You can observe it visually on all our [military] fronts. . . . The authority in these territories is the guerrillas. The mayors cannot work unless they speak with the guerrillas about how they should govern. As a practical matter, we are like a government within the government.”<sup>435</sup>

An expert confirms the substance of Marulanda’s statement in the following terms: “[The] guerrillas are a kind of primitive state structure: They . . . have territorial control, and control over the population, and as they apply some primitive law, . . . they have a

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433. IACHR THIRD REPORT, *supra* note 103, ch. I, para. 29.

434. *Colombia Country Report for 1998*, *supra* note 415, Introduction.

435. ‘*Tirofijo*’ *se destapa*, SEMANA, Jan. 18, 1999 (translation by author).

vocation of being a state apparatus.”<sup>436</sup> The scope of the control exercised by the FARC and ELN guerrillas, as was seen, covers roughly 70% of the national territory.<sup>437</sup> This explains in large part their capacity to apply Protocol II and other humanitarian law norms as examined above. It also explains how they manage to carry out the sustained military operations that have characterized their activity in the course of the conflict for almost a decade.

c. Sustained and Concerted Military Operations

The essence of this element is that the military operations should be continuous and persistent, and the product of strategic planning and organizational coordination. “Thus, we are talking about military operations conceived and planned by organized armed groups.”<sup>438</sup> Isolated, sporadic or unrelated acts of violence have been expressly excluded by paragraph 2 of Article 1. It is important to note what else has been omitted from the text of this article. The criteria of *duration* and *intensity* “were not retained as such in the definition” in order to keep the assessment of applicability as tied to *objective* conditions as possible.<sup>439</sup> By this point in the analysis, setting out to show that the Colombian guerrillas maintain high levels of organized military activity is largely a redundant exercise, not least because the concerted war effort led by the guerrillas was already examined in some detail in Part I of this Article.<sup>440</sup>

It is insightful, nonetheless, to canvass recent opinion testifying to the fact that the Colombian guerrillas continue to carry out “sustained and concerted” military operations by virtue of their control over parts of the territory. The IACHR in its March 1999 report remarked that the FARC’s military power had increased in recent years, and cited a string of devastating FARC victories since 1996, including those at Las Delicias, Patascoy and Miraflores, all of

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436. Reyes, *supra* note 23, at 6 (translation by author). Reyes is a highly respected Colombian researcher who has worked extensively on the subject of political violence and guerrilla activity throughout the entire country.

437. See *Colombia Country Report for 1998*, *supra* note 415, Introduction.

438. COMMENTARY PROTOCOL II, *supra* note 313, at 1353.

439. *Id.* (emphasis added).

440. See discussion *supra* Part I.A and B.

which resulted in the capture of numerous military personnel.<sup>441</sup> In a similar vein, the U.S. State Department pointed to the nation-wide joint guerrilla offensive (FARC and ELN) in August of 1998 in which army and police posts in 18 of the country's 31 mainland departments were attacked more or less simultaneously. "In some areas, guerrillas shut down basic utility services, such as electricity and water, and attacked infrastructure facilities such as hydroelectric plants and power lines."<sup>442</sup> Three months later, in a major strategic victory, the FARC guerrillas overran the Vaupés departmental capital of Mitú and took dozens of police and army prisoners.<sup>443</sup> Once these *tours de force* are viewed in the context of the belligerent activity carried out by the guerrilla forces on a regular basis, there can be little question that these armed groups meet even the elevated standard for military activity under Article 1.

#### d. The Responsible Command

This element speaks to some degree of organization on the part of the armed opposition group that allows it to carry out sustained military activity and impose internal discipline under a structured authority.<sup>444</sup> Otherwise, they could not meet the other conditions stipulated under Article 1 and examined above. It does not mean that the insurgent or dissident armed groups should be arranged in a hierarchical military organization mirroring that of regular armed forces, but they must "possess organs [and] have a system for allocating authority and responsibility."<sup>445</sup> As is evident from both the description of the FARC and the ELN guerrilla organizations outlined in Part I and the foregoing discussion, these armed groups clearly possess a *responsible command* structure in the pertinent sense, and thus satisfy the requirement.<sup>446</sup> Indeed, the substantial fulfillment of the preceding criteria by these groups—the capacity

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441. See IACHR THIRD REPORT, *supra* note 103, ch. I, paras. 31-33; see also *supra* note 428 and accompanying text.

442. *Colombia Country Report for 1998*, *supra* note 415, sec. 1.g.

443. See *id.*

444. See *id.* at sec. 1.g.

445. NEW RULES, *supra* note 386, at 626.

446. See *supra* notes 37-58 and accompanying text.

to apply the Protocol, territorial control and a sustained military activity—is as much a consequence of this fact as it is a corroboration.

e. Conclusion

This case-based analysis of the Article 1 criteria confirms what most organizations and activists working on Colombia already know to be true: Protocol II applies because its requirements are objectively and substantially met under the circumstances of the ongoing war there. These circumstances, however, did not arise overnight. It is apparent that they have been present for years,<sup>447</sup> despite repeated denials by the Colombian Government and those who have argued its case.<sup>448</sup> As a matter of international law, Protocol II applies by its own terms to the war in Colombia, as it almost certainly has since its ratification and entry into force in early 1996, at the very least. As we have seen, some scholars maintain that the “classic civil war of the type to which Protocol II would be applicable is today an anachronism or an exception as might be the war in El Salvador.”<sup>449</sup> They are half-right—classic civil wars are rare—and half-wrong—Protocol II applicability is not limited to that type of conflict. But when they suggest that “the Spanish Civil War . . . was the last civil war to which application of the 1977 [Protocol] would have been useful,”<sup>450</sup> they are plainly mistaken. The case study analyzed in Parts II and III of this Article aims to set that record straight.

B. THE INTERPRETATION OF IHL IN THE COLOMBIAN CONFLICT

In addition to threshold problems, the other major issue raised by the conventional wisdom relating to IHL cited in the Introduction is the “unsatisfactory state of affairs” perceived by many to exist with

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447. See VALENCIA VILLA, *supra* note 220, at 83-90 (arguing persuasively that the conditions for Protocol II’s applicability were already met in 1990).

448. See *supra* notes 407-09 and accompanying text.

449. MANGAS MARTÍN, *supra* note 8, at 76 (translation by author).

450. *Id.* (translation by author); Green, *supra* note 9, at 17 (stating that Protocol II’s threshold is so high that the Protocol does not really apply until the conflict takes on the form of a civil war, similar to the one waged in Spain between the Republican government and the Nationalist authorities).

respect to the *sufficiency* of humanitarian law as applied to civil strife.<sup>451</sup> Common Article 3 is viewed as “insufficient and imprecise for the case of the intense and widespread hostilities that characterize the classic civil war.”<sup>452</sup> Even with respect to lesser conflicts, it is viewed as too bare a minimum since, “for example, it is silent on issues relating to freedom of movement, does not expressly prohibit rape, and does not explicitly address matters relating to the methods and means of warfare.”<sup>453</sup> Nor does it cover relief agencies.<sup>454</sup> The general perception with respect to common Article 3, then, is that it is “not sufficient to the needs of civilians or of combatants in cases of internal strife.”<sup>455</sup>

Protocol II’s protections fare no better because “measured against the rules for inter-state wars, they are still quite basic. The most serious omissions concern the many specific protections for civilians against the effects of hostilities found in Protocol I.”<sup>456</sup> Another view in the same direction is:

“[the] difficulty with Protocol II is that it provides third parties with few or inadequate rights. For example, there is no provision for third party resolution of competing or conflicting claims under the Protocol; nor are there any rules pertaining to third party supervision or the conduct or implementation of the law.”<sup>457</sup>

So deficient is Protocol II from a normative point of view, that one author concludes, “it does very little by the way of filling the *lacunae* in Common Article 3. If anything, it probably weakens Common Article 3 of the Geneva Conventions.”<sup>458</sup>

The absurdity of this final comment highlights the principal weakness of these criticisms: they seem more concerned with conceptual purity than concrete reality. It will be argued here that, al-

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451. See *supra* note 21 and accompanying text.

452. MANGAS MARTÍN, *supra* note 8, at 68 (translation by author).

453. *Analytical Report*, *supra* note 16, para. 74.

454. See ASIL INSIGHT, *supra* note 10, at 2.

455. *Id.*

456. *Analytical Report*, *supra* note 16, para. 77.

457. KWAKWA, *supra* note 3, at 22.

458. *Id.* at 22.

though valid perhaps from an academic perspective, these criticisms lose much of their persuasive force and relevance when viewed from the perspective of a contemporary internal armed conflict such as the one in Colombia. Existing norms not only cover the vast majority of serious humanitarian law violations occurring in the course of the war there, they provide a more than adequate theoretical groundwork for scholars, government officials and activists striving to promote greater compliance with humanitarian principles. It will be argued that these norms should be measured by their practical utility and potential effects in real civil conflict situations, not by their normative deficiency in comparison with the much more developed rules applicable to wars of an international character.

In other words, the “omissions” and other deficiencies pointed to above do not speak to the heart of the problem. In order to show why this is so, the present section begins by reviewing the status of state and individual responsibility under international law for violations of IHL. It will explain why, even in a complex and multilateral military confrontation like Colombia’s, existing humanitarian norms will encompass the actions of all armed groups that are parties to the conflict, regardless of whether they are in opposition to the legitimate authority of the state or not. This section will then re-examine the humanitarian law situation in Colombia in order to demonstrate how, as a practical matter, current norms provide ample grounds upon which to construct comprehensive legal diagnoses of the conduct of the parties. It emphasizes the extensive international and national practice with respect to Colombia founded upon the application and analysis of IHL to the war there in order to conclude that, although far from perfect, IHL is equally as far from insufficient.

For purposes of the following discussion, it will prove helpful to keep the three paradigmatic cases presented below in mind and to refer back to them while addressing the various questions relating to international responsibility examined in this section:

1. On the 20th of June, 1997, in the Department of Bolívar, Colombia, an Army unit summarily executed six ELN guerrillas wounded in combat with state forces, along with two civilians, including a police inspector, who were in the process of transporting



the injured guerrillas for medical attention. The civilians were unarmed, and the guerrillas were *hors de combat*. No resistance was made to the capture by military forces. After they were executed, their bodies were transferred to a military base in a different department where they were presented to the public as guerrilla fighters killed in combat.<sup>459</sup>

2. On the 15th of July, 1997, 200 well-armed paramilitaries from the Autodefensas Campesinas de Córdoba y Urabá ("ACCU") took control of Mapiripán, a rural town in the Department of Meta in Colombia. With a list in hand, they sought out and detained several of the town's inhabitants who were then taken to the local slaughterhouse. There they were tortured and executed, and their mutilated bodies thrown into the nearby river. Over the next five days the paramilitaries imposed a reign of terror in Mapiripán by continuing to detain, torture and execute persons suspected of being guerrilla sympathizers. By the time the authorities showed up, on the 21st of July, at least fourteen persons had been brutally tortured and killed, or disappeared, by the paramilitary group. The complicity of the local police and military authorities, which ignored repeated calls for assistance from the town's judge during the rampage, was notorious.<sup>460</sup>

3. In the early morning hours of Sunday, the 18th of October, 1998, an explosion was heard in the small rural mining town of Machuca, Department of Segovia, Colombia. Guerrillas from the ELN, which operates in the region had blown up a section of the oil and gas pipeline that ran through the municipality only a short distance from the village. Minutes later, a river of flame poured through Machuca, setting fire to the frail huts and to many of the towns' sleeping residents. The ELN admitted to the sabotage but alleged that Army units in the area had set the fire, charges denied by both the authorities and the locals. A total of 69 men, women and children died in the conflagration.<sup>461</sup>

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459. See NOCHE Y NIEBLA, Apr.-June 1997, *supra* note 71, at 125.

460. See NOCHE Y NIEBLA, July-Sept. 1997, *supra* note 71, at 84; see also WAR WITHOUT QUARTER, *supra* note 1, at 118.

461. See Marisol Gómez Giraldo, *A Machuca la arrasó el fuego*, EL TIEMPO, Oct. 19, 1998, at A1; see also *El Eln es el responsable*, EL ESPECTADOR, Oct. 30, 1998 <<http://www.elespectador.com>>.

### 1. State Responsibility

Traditional state responsibility is based on the acts or omissions of state organs that give rise to the breach of an obligation or standard of conduct incumbent on the state, whether it is by virtue of a treaty or some principle of customary law.<sup>462</sup> States are also responsible for *ultra vires* acts of their officials when these are committed within their apparent or general scope of authority.<sup>463</sup> "It is beyond dispute that the state may be held responsible for the acts of officials, even when a private [or illegal] motive was operating. . . ."<sup>464</sup> This is because the general principle under international law is one of objective responsibility: "provided that agency and causal connection are established, there is a breach of duty by result alone."<sup>465</sup> It is also well settled that states will be responsible for the conduct and harm caused by private persons or groups if "it is established that such person or group of persons was in fact acting on behalf of that State . . . ."<sup>466</sup> The International Court of Justice ("ICJ") in the Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Merits)<sup>467</sup> (*Nicaragua*) determined that the basic question is whether the relationship between the governmental authority and the alleged *de facto* agents "was so much one of dependence on the one side and control on the other that it would be right to equate [the two], for legal purposes . . . ."<sup>468</sup> The "dependency and control" test for agency sets a high threshold which has been construed in practice as requiring "*great* dependency" in

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462. See BROWNIE, *supra* note 400, at 132; see also *Report of the International Law Commission* 48th Sess., ch. III, arts. 5-11, U.N. Doc. A/51/10 (1996) [hereinafter *Draft Articles*].

463. See BROWNIE, *supra* note 400, at 145; see also *Report of the International Law Commission*, *supra* note 462, ch. 3, art. 10.

464. BROWNIE, *supra* note 400, at 162. See also IACHR THIRD REPORT, *supra* note 103, ch. I, para. 4.

465. BROWNIE, *supra* note 400, at 38.

466. *Report of the International Law Commission*, *supra* note 462, ch. III, art. 8(a).

467. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

468. *Prosecutor v. Tadic*, Opinion and Judgment, No. IT-94-I-T, para. 585 (May 7, 1997), excerpted in 36 I.L.M. 908, 927 (1997).

conjunction with “effective control.”<sup>469</sup> This elevated threshold led the ICJ in *Nicaragua* and a majority of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in *Prosecutor v. Tadic* (*Tadic*) to find in their respective judgments that the alleged agency relationship had not been established on the facts of each case.<sup>470</sup> More recently, however, the Appeals Chamber in the *Tadic* case has determined that a less stringent standard than that established by *Nicaragua* applies when organized or military groups are alleged to be acting as *de facto* organs of a state:

One should distinguish the situation of individuals acting on behalf of a state without specific instructions from that of individuals making up *an organized and hierarchically structured group*, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels. (...) Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.<sup>471</sup>

In addition to these sources of responsibility, a state may be held accountable for acts committed by private persons when they are “based upon some ultimate default by the organs of the state.”<sup>472</sup> Generally, the illegal actions that are not imputable to the state do not compromise the state’s international responsibility. Yet, when

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469. *Id.* at 928-31, paras. 588, 600. *But see* *Prosecutor v. Tadic*, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, Case IT-94-1-T, paras. 3-4 (May 7, 1997), 36 I.L.M. at 970-71 (concluding that the evidence supported a finding of effective control).

470. *See* *Military and Paramilitary Activities*, *supra* note 467, at 159; *see also* *Prosecutor v. Tadic*, *supra* note 468, para. 607. The Appeals Chamber in *Tadic* reversed on this issue, for the reasons explained below.

471. *Prosecutor v. Tadic*, Judgment of the Appeals Chamber, No. IT-94-1, para. 120 (July 15, 1999) (emphasis in the original). Overall control under international law “may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions of the military group*, in addition to financing, training and equipping or providing operational support to that group.” *Id.* para. 137. The adoption of this new standard by the Appeals Chamber led to the holding in *Tadic* that the Bosnian Serb Forces or VRS were indeed acting as organs of the Yugoslav Army under international law. *Id.* at para. 156.

472. *Military and Paramilitary Activities*, *supra* note 467, at 159; *see also* *Report of the International Law Commission*, *supra* note 462, ch. III, arts. 8, 11.

there is a duty to exercise due diligence *vis-à-vis* private actors in some particular respect or context, responsibility may arise if a state fails to do so. Thus, depending on the nature of the pertinent norms, the violent acts of private individuals may constitute “the objective conditions which give rise to a breach of a principle, or standard, of general international law, or relevant treaty provisions, on the part of the state.”<sup>473</sup>

The Colombian State is responsible for the actions of its officials and agents in direct violation of common Article 3 and Protocol II. There is, of course, no question of the responsibility generated by violations of humanitarian and human rights law where state officials, military or otherwise, are the perpetrators. This is the first of the three paradigmatic cases presented above.<sup>474</sup> Before addressing the key issue of state responsibility for the conduct of the paramilitary groups in Colombia, it is helpful to make two basic distinctions. The first is that between paramilitary groups acting *in conjunction* with state officials, and those acting with the *acquiescence* of state authorities. Within the first category, there are two types of collaborative efforts between paramilitaries and state officials. On the one hand, there are cases of state agent participation in joint military operations carried out with paramilitary groups (“direct collaboration”); on the other, there are cases where the paramilitary groups are the material authors of a violation the commission of which depends upon the contribution or support of state agents in an active way (“indirect collaboration”). This is the second basic distinction.

Where there is either direct or indirect collaboration, paramilitaries are deemed to operate as *de facto* state agents. With respect to direct collaboration, if paramilitaries and military personnel engage in “joint activity between the military and paramilitaries, particularly when carried out with knowledge by [military] superiors,” the members of the paramilitary groups are acting as state agents and violate both human rights and humanitarian law obligations incum-

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473. Military and Paramilitary Activities, *supra* note 467, at 159, 161.

474. See *supra* notes 69-124 and accompanying text; see also *supra* notes 110-16 and accompanying text.

bent upon the state.<sup>475</sup> There is substantial and credible evidence from a variety of sources of the “marked collaboration” between military personnel and paramilitaries in certain parts of the country; for example, soldiers and paramilitaries patrol together or provide each other with mutual support during military operations.<sup>476</sup> In cases of indirect collaboration, the paramilitary groups act separately from military and police personnel but count upon the active contribution or support from state officials in order to define or guarantee the success of the action. Under these conditions, the paramilitaries are still considered to be acting on behalf of the state:

These people act with the cooperation and support of [official] State agents and often receive information about possible [civilian] targets from members of the State's security forces. They also receive protection from these State agents against investigation and [criminal] sanction. The persons whom they act against with violence or threats generally understand that the paramilitaries enjoy special strength and authority derived from their collaboration with the State. The members of these paramilitary groups [in these cases] thus effectively act under color of official authority. Their actions must therefore be judged by the standards set forth in human rights law as well as humanitarian law.<sup>477</sup> In sum, when the paramilitaries operate under circumstances of direct or indirect collaboration to violate human rights and humanitarian principles, they are acting as auxiliaries of the Colombian military apparatus and on behalf of the state itself. Under these circumstances, the levels of dependency and control required by the international law regime for state responsibility are readily established. Unlike the situation of the “contras” in Nicaragua or the Bosnian Serb Forces (“VRS”) in Bosnia-Herzegovina, the paramilitary groups in Colombia exist almost unencumbered *within* the national territory of the state accused of sponsoring them. They operate freely in heavily militarized zones where they carry out the majority of their crimes.<sup>478</sup> As a consequence, Colombian paramilitaries in most cases are utterly dependent upon state collaboration and active complicity in order to maintain their scorched earth anti-insurgency campaign.

Where paramilitary groups like these rely upon the direct or indi-

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475. IACHR THIRD REPORT, *supra* note 103, ch. IV, para. 258.

476. *See id.* ch. IV, para. 250; HCHR 1999, *supra* note 82, para. 36; *see also supra* notes 68, 88 and 115 and accompanying text.

477. IACHR THIRD REPORT, *supra* note 103, ch. IV, para. 262.

478. *See id.* ch. IV, paras. 250-70.

rect collaboration of the security forces in order to carry out their atrocities, they must be deemed to be under the overall control of the state. In this regard, establishing the degree of control that is required by international law in the context of internal conflicts like Colombia's may be substantially easier than in those cases where the paramilitary groups alleged to be *de facto* organs of a state were operating in conflicts waged entirely on *foreign* soil. The Appeals Chamber in *Tadic* justified its ratcheting down of the *Nicaragua* test by underscoring that "the whole body of international law on State responsibility is based on the realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions."<sup>479</sup> The judges of the Appeals Chamber "fail[ed] to see why in each and every circumstance international law should require a high threshold for the test of control[, and held instead that the] *degree of control* may (...) vary according to the factual circumstances of each case."<sup>480</sup> Such reasoning would seem to dictate a similarly flexible approach to applying the control standard in situations of internal conflict, such as the one in Colombia.<sup>481</sup>

In any case, it is evident that the Colombian authorities through direct and indirect collaboration have maintained sufficient control over the paramilitary groups so as to hold the Colombian State accountable for the latter's actions in violation of international human

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479. *Id.* para. 121.

480. *Id.* para. 117 (emphasis in original).

481. Oddly enough, the Appeals Chamber, in *dicta*, seems to suggest a different conclusion. It states that if "the controlling State is *not the territorial State* where the armed clashes occur (...), more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups ...." *Id.* at 138 (emphasis in original). The Appeals Chamber then goes on to say, however, that "[t]he same substantial evidence is required when, *although the State in question is the territorial State where armed clashes occur*, the general situation is one of turmoil, civil strife and weakened State authority." *Id.* at 139 (emphasis added). It is unclear why the standard should be substantially the same in these two very different situations. As this case study amply demonstrates, the means, methods and opportunities for state forces to exercise the requisite control over organized groups operating within their own territory may in fact be *multiplied and facilitated* in situations of internal armed conflict, especially where they are fighting a common enemy.

rights and humanitarian law, whatever the standard applied. Most major paramilitary groups in Colombia have been organized, trained and/or directly supported for over a decade by state forces and authorities inside the country.<sup>482</sup> Their ideological, tactical and physical proximity place each squarely on the same side in the war against the insurgency. The two collaborate constantly through military actions designed and executed in order to achieve shared strategic and political objectives, all of which take place—it bears repeating—wholly *within* the national territory. In addition, the Colombian State has persistently proved unwilling to combat the paramilitary phenomenon in an effective manner. Not surprisingly, when it does announce measures to counteract the paramilitary violence, these are either insufficient or simply not implemented.<sup>483</sup> Most independent commentators agree that the military-paramilitary partnership is a “new form of exercising illegal repression with no strings attached [for state agents] called, quite rightly, violence through delegation.”<sup>484</sup> Accordingly, the Colombian State is directly responsible under international law for the criminal actions of such paramilitary groups, and must answer for them before the community of nations.<sup>485</sup>

Even in those cases or situations where agency cannot be established, the state is responsible for actions by paramilitary groups carried out with the *acquiescence* of its officials and resulting in the abuse of human rights and humanitarian norms. “[T]he State becomes responsible for the illegal acts of private protagonists when it has permitted such acts to occur without adopting the pertinent measures to avoid them or to subsequently punish those who per-

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482. See *supra* notes 59-68 and accompanying text; HUMAN RIGHTS WATCH, COLOMBIA'S KILLER NETWORKS: THE MILITARY-PARAMILITARY PARTNERSHIP AND THE UNITED STATES chs. II-IV (1996).

483. See IACHR THIRD REPORT, *supra* note 103, ch. IV, paras. 236-49. “Even as the State has expressed increased interest in combating the paramilitaries over the last several years, the [Inter-American] Commission has continued to receive information regarding cooperation between paramilitary groups and the State’s public security forces. This information calls into question the State’s commitment to eliminating the paramilitaries.” *Id.* para. 249.

484. IV INFORME, *supra* note 88, at 59-60.

485. See, e.g., IACHR THIRD REPORT, *supra* note 103 ch. IV, sec. I (Recommendations).

petrate them.”<sup>486</sup> This occurs because the state is under a duty to exercise due diligence to prevent abuses of human rights and humanitarian law within its jurisdiction by private persons and groups.<sup>487</sup> Thus, the Colombian State is bound under international law not only to respect its obligations in this regard, but also to ensure that the paramilitary groups do not engage in harmful conduct in violation of these norms.<sup>488</sup> When such abuses by private persons or groups do occur, the state is furthermore bound to initiate serious judicial investigations with a view to bringing the perpetrators to justice.<sup>489</sup> Failure to comply with these duties constitutes a separate basis for state responsibility.

As concerns the situation in Colombia, there is abundant evidence that systematic and widespread acquiescence by state officials in open violation of their public duties facilitates the activity of the paramilitary groups in many regions of the country.<sup>490</sup> In most of these cases, acquiescence takes the form of acts or omissions not amounting to the direct or active collaboration with paramilitary groups described in prior paragraphs. It nonetheless entails levels of complicity with the illegal actions taken by private persons and groups sufficient to ground state responsibility for failure

486. IACHR THIRD REPORT, *supra* note 103, ch. I, para. 4.

487. See Velásquez Rodríguez Case (Honduras), Case 68, Inter-Am. C.H.R. 61, OEA/ser.C/J4 (1988), reprinted in HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 946-48 (1996). The parallel duty of due diligence under IHL derives from the obligation of states party to the Geneva Conventions and their regulatory regime to “undertake to respect and ensure respect” for humanitarian law, especially within their own territory. GENEVA CONVENTIONS OF 1949, *supra* note 12, common Article 1. See also Roberts, *supra* note 156, at 29 (interpreting the language of Common Article 1 of the four 1949 Geneva Conventions).

488. See *Draft Articles*, *supra* note 462, art. 14. Note that under international law, this duty probably would not extend to insurgent groups for two reasons. First, by the very nature of their opposition to the “legitimate authority,” they are, under most circumstances, expressly exempted from the state responsibility regime. See *id.* Second, IHL expressly contemplates the existence of insurgent groups and directly addresses their actions, thereby establishing the grounds for the international responsibility of these groups for the failure to comply with their humanitarian law obligations. See Part II.B.2 *infra* (discussing the responsibilities of the guerrilla and paramilitary groups pursuant to IHL).

489. See Velásquez Rodríguez Case, *supra* note 487, at 947.

490. See IACHR THIRD REPORT, *supra* note 103, ch. IV, paras. 263-70.



to act against them. It is for this reason that "[t]he State becomes internationally responsible for harm caused to individual rights by private actors when it acquiesces in the acts of those private actors or when it fails to take reasonable measures to prevent the violation or, subsequently, to investigate and sanction those responsible for the harm caused."<sup>491</sup>

The massacre in *Mapiripán*, depicted in the second paradigmatic case above, is a chilling study of state acquiescence (and probably indirect collaboration) in relation to paramilitary atrocities. It was, in effect, a chronicle of death foretold. The AUC had announced that they would initiate an offensive in the southern part of the country, to the government's mostly mute indifference. "Many organizations and even state officials have found significant evidence that the State could have but did not stop the massacre."<sup>492</sup> Carlos Castaño flew 60 of his men by private plane to the area of operations, landing and passing through the heavily militarized town of San José del Guaviare, without leaving the slightest trace or record (the plane's departure had been registered at the point of departure).<sup>493</sup> Once in the area, the paramilitaries traveled some distance through an area controlled by the army to reach the town of Mapiripán, where they initiated their campaign to terrorize the population. The first day they arrived, the town judge called the nearby military battalion for help, repeating his plea eight times over the next five days, before the soldiers finally appeared on the last day of the massacre. As a result of this tragedy, several members of the mentioned battalion are under arrest for their complicity in the crime.<sup>494</sup>

The foregoing discussion explains why the Colombian State is responsible not only for the acts of its officials in violation of international human rights and humanitarian law, but also for the vast majority of the abuses of these same norms committed by the principal paramilitary groups in Colombia. Indeed, the legal framework for state responsibility outlined in the preceding paragraph covers

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491. *Id.* ch. IV, para. 271.

492. *Id.* ch. IV, para. 264.

493. *See id.* ch. IV, para. 265.

494. *See id.*

most, if not all, of the actions taken by the paramilitary groups in Colombia. State responsibility arises where the paramilitaries act as *de facto* state agents to violate international norms, just as it does when state officials violate these norms directly through their own acts or omissions. Moreover, Colombia has a duty under international law to adopt reasonable measures aimed at guaranteeing respect for human rights and humanitarian norms by private persons and groups, and to take serious steps towards their judicial enforcement when they are violated.<sup>495</sup> Similarly, acquiescence on the part of military personnel and state officials, which permits paramilitaries to carry out their criminal activity with impunity, also gives rise to state responsibility under international law.

## 2. *Guerrilla and Paramilitary Responsibility under IHL*

It is well settled that IHL, which is applicable in internal conflicts speaks to the actions of certain private individuals. Common Article 3 states that its provisions shall be respected by "each Party to the conflict," while Protocol II expressly contemplates and encompasses the conduct of "organized armed groups" in opposition to the security forces of the State. It seems evident, furthermore, that humanitarian law governs the conduct of private individuals participating in the hostilities as combatants, whether or not they are in opposition to the government.<sup>496</sup> Combatants are viewed collectively under certain circumstances as the armed forces of a party to the conflict. The key issue is how to determine when a group of combatants becomes a party to the conflict such that it may be expected to comply with the applicable dictates of humanitarian law.<sup>497</sup> This determination is similar to, but qualitatively distinct from, that made under Article 1 analysis for purposes of Protocol II applicability.<sup>498</sup> It should be obvious that the main Colombian guer-

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495. See *supra* note 487 and accompanying text.

496. See Thomas Graditsky, *Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-international Armed Conflicts*, 322 INT'L REV. RED CROSS 29, 31 (1998).

497. See IACHR THIRD REPORT, *supra* note 103, ch. IV, paras. 13, 45-46, 61, 84, 234.

498. See, e.g., WAR WITHOUT QUARTER, *supra* note 1, at 184-87. An armed group may well meet the criteria for constituting a party to the conflict without

rilla groups are parties to the internal armed conflict; it is less clear whether the same can be said with respect to the paramilitary groups.

The guidelines for determining when private persons and groups become combatants and armed forces in an internal conflict, respectively, are “inferentially” drawn from the basic provisions of Protocol I.<sup>499</sup> A combatant may be defined as a member of the armed forces of a party to the conflict, or anyone else who takes a direct part in the hostilities.<sup>500</sup> Traditionally, the general characteristics of any armed forces are that they be organized under a responsible command, and linked to one of the parties to the conflict.<sup>501</sup> “[C]ombatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.”<sup>502</sup> Under circumstances where it is difficult to mark this distinction through the use of uniforms, for example, the combatant distinguishes him or herself by carrying his or her arms openly during military engagement or in a military deployment preceding the launch of an attack.<sup>503</sup> One important consequence of this principle of distinction is that it seeks

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qualifying under the higher standard established by Article 1 as an “organized armed group” for purposes of Protocol II applicability. This is the case in Colombia, where the EPL (Popular Liberation Army) guerrillas do not control a portion of the national territory sufficient to carry out sustained and concerted military operations, but clearly are considered a party to the conflict for all other intents and purposes. *See id.*

499. *See* NEW RULES, *supra* note 386, at 672; *see also* Protocol I, *supra* note 233, arts. 43-44, 50 (defining a civilian as a person who does not fit one of the categories of combatants defined in Article 4 A (1), (2), (3) and (6) of the Third Convention and Article 43). It is accepted practice to refer to certain provisions of Protocol I, which is relevant to inter-state wars, as reflecting a codification of basic humanitarian concepts under customary international law and, therefore, as a “substantive guide” for purposes of interpreting Protocol II and IHL principles applicable to internal wars. *See* IACHR THIRD REPORT, *supra* note 103, ch. IV, paras. 44-46.

500. *See* Third Geneva Convention, *supra* note 12, arts. 4 A (1), (2), (3) and (6); Protocol I, *supra* note 233, arts. 43-44, 50; Protocol II, *supra* note 13, art. 4; *see also* IACHR THIRD REPORT, *supra* note 103, ch. IV, paras. 43-46.

501. *See* NEW RULES, *supra* note 386, at 673; Third Geneva Convention, *supra* note 12, art. 4(A).

502. Protocol I, *supra* note 233, art. 44 (3).

503. *See id.*

to guarantee that the fundamental protections afforded the civilian population are observed and respected, at the same time that it serves to identify those actors participating in the hostilities to whom the restrictions of IHL will apply in a given conflict situation.<sup>504</sup>

The fundamental distinction between civilian and combatant is important for another reason: it helps define when an armed group is a party to an internal armed conflict. Essentially, such a group will be a military organization comprised of armed forces under a responsible command structure and displaying some distinctive sign that identifies its members as combatants for that organization.<sup>505</sup> These combatants should wear a distinctive sign and/or carry their arms openly, as well as conduct "their operations in accordance with the laws and customs of war."<sup>506</sup> This final element—the capacity to implement the rules of humanitarian law—presupposes an obligation to do so, and serves as the foundation upon which the obligations for a party under international law are derived.<sup>507</sup> It should be emphasized that being recognized as a party to the conflict for purposes of IHL in no way affects the *legal* status of the armed groups under international law.<sup>508</sup> It does not constitute recognition of the status of belligerency on the part of the insurgents, nor does it raise the armed opposition groups, or any other armed group for that matter, to the same level as the state under international law.<sup>509</sup>

Once a group meets these criteria, its members who are combatants will be held to the humanitarian standards established by the

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504. See IACHR THIRD REPORT, *supra* note 103, ch. IV, paras. 43–44.

505. See NEW RULES, *supra* note 386, at 672; Protocol I, *supra* note 233, arts. 43–44, 50; Third Geneva Convention, *supra* note 12, art. 4 A (1), (2), (3) and (6); see also IACHR THIRD REPORT, *supra* note 103, ch. IV, paras. 13, 45–46, 61, 84, 234.

506. See Third Geneva Convention, *supra* note 12, art. 4 (A).

507. See KALSHOVEN, *supra* note 422, at 139; see also discussion *supra* Part II.A.3.

508. See Third Geneva Convention, *supra* note 12, art. 3; COMMENTARY PROTOCOL II, *supra* note 313, at 1344.

509. See *supra* notes 337–39 and accompanying text; see also IACHR THIRD REPORT, *supra* note 103, ch. IV, paras. 17–19.

rules that are applicable to the internal conflict under both convention and custom.<sup>510</sup> "As parties to the conflict, these groups are directly covered by the laws of international humanitarian law and their belligerent acts fall within the provisions of this normative body."<sup>511</sup> Colombia's active insurgent organizations—the FARC, the ELN, and even the small Popular Liberation Army ("EPL") guerrillas—clearly meet these conditions.<sup>512</sup> By now it should be evident that the AUC and several regional paramilitary groups like the ACCU also meet the criteria utilized under IHL for purposes of identifying parties to a conflict.<sup>513</sup> The ICRC in Colombia maintains that the principal paramilitary groups are parties to the internal conflict because in fact they meet the objective conditions recognized by Protocol I and analyzed in this sub-section. For this reason, the ICRC in its dealings with these groups holds them accountable for the full range of humanitarian law norms applicable to the conflict, to wit, Protocol II, common Article 3, and custom.<sup>514</sup> The only question that remains is what type of responsibility accrues to these actors for the violation of the applicable IHL norms.

### 3. *International Criminal Responsibility for Individuals*

Recent developments in international law already noted confirm an "increasing readiness to recognize that some rules of international humanitarian law once considered to involve only the responsibility of states may also be a basis for individual criminal responsibility."<sup>515</sup> This readiness is rapidly being translated into law, on at least two fronts. The Criminal Tribunal for the former Yugo-

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510. See IACHR THIRD REPORT, *supra* note 103, ch. IV, paras. 84, 234; see also WAR WITHOUT QUARTER, *supra* note 1, at 16-41.

511. IACHR THIRD REPORT, *supra* note 103, ch. IV, para. 84.

512. See discussion *supra* Part II.A.3; WAR WITHOUT QUARTER, *supra* note 1, at 184-91.

513. See IACHR THIRD REPORT, *supra* note 103, ch. IV, paras. 61, 234; see also WAR WITHOUT QUARTER, *supra* note 1, at 16-41.

514. See Interview with Reinaldo Botero, Legal Advisor, Committee of the International Red Cross, in Bogotá, Colombia (July 28, 1998) (explaining why the ICRC treats the paramilitary groups in the same way as it does the other parties to the conflict); see also Part I.B.2.c.

515. *War Crimes Law*, *supra* note 7, at 467. See also *supra* notes 5-7 and accompanying text.

slavia has conclusively held that Article 3 common to the Geneva Conventions of 1949, is “a reflection of elementary considerations of humanity,” and forms a fundamental part of the laws and customs of war made justiciable under its Statute.<sup>516</sup> The Tribunal concluded that customary international law “imposes [individual] criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.”<sup>517</sup> The Appeals Chamber of the Tribunal had previously found that Article 3 of its Statute (“Violations of the laws or customs of war”) grants jurisdiction over any and all serious violations of IHL not already covered by the other articles of the Tribunal’s Statute on grave breaches, genocide and crimes against humanity.<sup>518</sup> These would include serious violations of humanitarian law rules established by custom or under a treaty when the required conditions are met, which entail the individual criminal responsibility of the person breaching the rule.<sup>519</sup>

The second active front is that involving the establishment of an International Criminal Court (“ICC”) constructed upon the pioneering work of the International Law Commission, which has recognized the principle of individual criminal responsibility for violations of humanitarian law applicable in internal conflicts.<sup>520</sup> Article 8 of the ICC Statute reflects the progress made in international criminal law by incorporating into the definition of war crimes both serious violations of common Article 3, and “other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.”<sup>521</sup> The list of prohibited acts giving rise to individual criminal responsibility under Article 8 covers

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516. *Prosecutor v. Tadic*, *supra* note 468, para. 609.

517. *Id.* para. 613.

518. *See Prosecutor v. Tadic*, No. IT-94-I-AR72, Appeal on Jurisdiction, paras. 89-91 (Oct. 2, 1995), 35 I.L.M. 32 (1996) [hereinafter Interlocutory Appeal].

519. *See Prosecutor v. Tadic*, *supra* note 468, para. 610.

520. *See generally* Graditsky, *supra* note 496, at 39-41.

521. *ICC Statute*, *supra* note 126, art. 8, para. 2(c), (e).

a wide spectrum of protections ranging from the most basic guarantees reflected in common Article 3, to prohibitions on deliberate attacks against the civilian population, medical personnel and civilian installations. Sexual crimes, including rape, and the conscription of children under 15 years of age as combatants also figure prominently on this list.<sup>522</sup> It is no exaggeration to state that inclusion of internal atrocities as war crimes under international law is one of the most significant advances achieved by the Rome Statute and the establishment of the ICC.

The Inter-American Commission on Human Rights, in the context of its recent study of the human rights and humanitarian law situation in Colombia, made reference to these developments in the following terms:

The international community has sent a clear and unmistakable message through [these] recent actions. It will not tolerate serious infractions of norms that consecrate the elementary considerations of humanity. The international community has considered serious violations like these of the laws and customs of war, as in the case of crimes against humanity, to be infractions with universal jurisdiction, and has catalogued the perpetrators as international criminals.<sup>523</sup>

#### 4. *The Myth of Insufficiency*

The purpose of this final sub-section is to demonstrate why the criticisms of common Article 3 and Protocol II summarized at the outset fail to state a case against the sufficiency of IHL as applied to internal conflict. The first two components in the case for a more favorable perspective have already been put forward: a revamped reading of Protocol II's scope of application, and an evolving system of international responsibility that not only encompasses state authorities and their agents but also extends to individuals from any armed group who commit international crimes. The third and final component addressed here rebuts the myth of insufficiency from a normative and functional point of view. It maintains that existing rules under common Article 3 and especially Protocol II cover a vast portion of the most grievous violations that can occur in an in-

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522. See *id.* art. 8, para. 2(e).

523. IACHR THIRD REPORT, *supra* note 103, ch. IV, para. 346.

ternal war, and thus are a central ingredient in the productive study and evaluation of states' compliance with their obligations under international law.

Suppose for a moment that the "minimum" principles contained in common Article 3 were fully applied in the Colombian conflict and enforced to perfection: over two-thirds of the violent deaths produced year after year as a result of the war would simply cease to tabulate.<sup>524</sup> Assuming this best-case scenario for argument's sake, common Article 3's protections relating to the life and integrity of persons not taking active part in the hostilities *alone* would effectively impede the massacres, political homicides, tortures, forced disappearances, hostage taking and internal displacement (achieved through death threats and intimidation) affecting several *thousand* Colombian civilians and non-combatants every year.<sup>525</sup> Not only are

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524. See *supra* notes 69-83 and accompanying text. Common Article 3 reads textually as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provision: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties in conflict. The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

*First Geneva Convention*, *supra* note 12, ch. I, art. 3; *Second Geneva Convention*, *supra* note 12, ch. I, art. 3; *Third Geneva Convention*, *supra* note 12, pt. I, art. 3; *Fourth Geneva Convention*, *supra* note 12, pt. I, art. 1.

525. See discussion *supra* Parts I.A and I.B; see also IACHR THIRD REPORT,



these the most egregious violations human cruelty can conceive of under the circumstances, they also represent the primary violations actually occurring in the course of the conflict in Colombia. In light of the nature and extent of the covered violations, the silence on freedom of movement, to name one example of the "deficiencies" cited above, can hardly be considered a debilitating weakness.

The legal framework erected upon customary and conventional sources of IHL provides ample grounds for the monitoring, analysis and censure of abusive conduct occurring during civil conflicts like the one in Colombia. In that country, it is clear that the normative combination of Protocol II and common Article 3 has been more than adequate to deal with the vast majority of the abuses committed by the parties to the conflict.<sup>526</sup> Where important actions constituting serious violations are not covered by common Article 3, such as the indiscriminate attacks affecting the civilian population or against civilian targets, these omissions are either addressed by Protocol II,<sup>527</sup> or oftentimes can be resolved through interpretation.

The process of interpreting existing norms can be utilized by scholars and activists to fill in many of the gaps that might still exist within this legal framework, whether taken in part (just common Article 3) or as a whole. Certainly this is a practice in which those of us who work on Colombia have had to engage.<sup>528</sup> For instance, it was suggested that the lack of an explicit reference to rapes is a weakness of existing humanitarian instruments. Yet the express provisions of common Article 3, as well as Articles 4 and 5 of Protocol II, clearly would prohibit rape despite the fact that it is not expressly mentioned in these instruments. Just as kidnapping for ransom is deemed a hostage taking and therefore illegal under

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*supra* note 103, ch. IV.

526. See *supra* notes 69-83 and accompanying text; CCJ 1996, *supra* note 82, ch. I(III); *Colombia Country Report for 1998*, *supra* note 415, sec. 1(g); *HCHR Report*, *supra* note 68, *passim*; IACHR THIRD REPORT, *supra* note 103, ch. IV; WAR WITHOUT QUARTER, *supra* note 1, *passim*.

527. See Protocol II, *supra* note 13, arts. 13-15.

528. See Carrillo-Suárez, *supra* note 107, at 181-82 (describing how international law has been interpreted to apply to situations of kidnappings for ransom by the guerrillas in Colombia).

IHL,<sup>529</sup> sexual violence of any sort is, to say the least, “violence to life and person ... , cruel ... , humiliating and degrading treatment,” and probably rises to the level of torture, which *is* explicitly prohibited.<sup>530</sup>

Protocol II’s perceived deficiencies, much like those regarding common Article 3, do not pan out as negatively under conditions of practical application as its critics would believe. It is true, as many commentators point out, that the Protocol’s final text and articles (only 28) were severely pruned down from the working draft under consideration by the Diplomatic Conference during most of the negotiations, doing away at the last minute with many of its most ambitious provisions.<sup>531</sup> Nonetheless, what remains—and this is worth repeating—is more than adequate for addressing the most egregious and widespread violations of basic humanitarian guarantees taking place during internal conflicts similar to the one in Colombia.

The basic problem reflected by the conventional criticisms of Protocol II is not the deficiency of the humanitarian norms *per se*, but rather the choice of standard or reference utilized by those commentators to determine whether IHL norms are “sufficient” or not. At this point in the evolution of the IHL regime, the standard for measuring the sufficiency of IHL applicable to non-interstate conflict should not be the humanitarian law of international armed conflict, against which, in comparison, it is bound to fail. A more appropriate standard by which to measure these norms is the *utility* and *practical relevance* to actual hostilities ongoing in those civil conflicts where it applies. We should aspire to achieve the same level of theoretical protection under the latter regime as has been reached with respect to the former, but not at the expense of undermining its potential for effectiveness, as is.

As it stands, Protocol II and the rest of the IHL regime are well suited for addressing the tactics utilized by armed groups engaged in “dirty war.” Armed groups that carry out this “war” through

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529. See IACHR THIRD REPORT, *supra* note 103, ch. IV, paras. 122-23.

530. Third Geneva Convention, *supra* note 12, art. 3. In addition, rape can be viewed as physical abuse that discriminates on the basis of sex, an act that is also clearly prohibited. See *id.*

531. See, e.g., Kalshoven, *supra* note 162, at 2.

massacres, forced disappearances, torture, arbitrary executions and other forms of intimidation and abuse directed against the civilian population, will be covered. In this type of conflict, it is unrealistic to limit any legal characterization of the term "hostilities" to conventional combat situations where the guerrillas directly square off against the army. Hostilities under these conditions have a distinctly broader connotation and thus are more correctly viewed as including *all* actions that are taken by any of the parties for military or political purposes, or which otherwise have a nexus to the conflict.<sup>532</sup> These actions would include paramilitary commandos gunning down victims in their exclusive uptown apartment in the heart of Bogotá at 2:00 a.m., just as they would the execution by guerrillas of an injured, unarmed soldier *hors de combat*.<sup>533</sup> It is for this reason that distinguishing between a low intensity conflict and a high intensity conflict only in terms of battlefield casualties misses the point altogether and renders any such classification largely irrelevant.<sup>534</sup>

The irregular nature of the hostilities in modern civil conflicts like Colombia's is also part of the reason why existing IHL can be surprisingly sufficient with regard to war's atrocities. Where internal armed conflicts degenerate into "dirty wars," humanitarian law merges with that of human rights such that many IHL violations overlap with those traditionally managed under the international

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532. See *Prosecutor v. Tadic*, *supra* note 468, para. 632; IACHR THIRD REPORT, *supra* note 103, ch. IV, para. 53. Both the Tribunal for the former Yugoslavia and the IACHR refuse to limit the definition of hostilities to conventional combat between armed forces. Instead, they focus on the circumstances and the intent of the actions to inflict harm on the enemy or otherwise contribute to the war effort of one of the parties.

533. See CCJ 1996, *supra* note 82 (*in memoriam*). The CCJ dedicates its report to two human rights workers (and the father of one of them) who were assassinated in May of 1997 under the circumstances described, presumably for maintaining links with the guerrillas.

534. See *Analytical Report*, *supra* note 16, para. 18. This influential report noted that "in 1996, there were 19 situations of internal violence in which at least 1,000 people were killed (high intensity conflicts) and another 40 "internal situations causing between 100 and 1,000 deaths," which were deemed low-intensity conflicts. *Id.* In cases like Colombia's, where most of the victims are not killed on the battlefield and thus are not counted for purposes of this classification, the distinction between low and high intensity conflicts can prove utterly misleading.

human rights regime.<sup>535</sup> In other words, “[a]t these crucial junctions of life and death, human rights law runs over the same tracks as humanitarian law, seeking the protection of the same people at the same time for the same sort of armed abuses.”<sup>536</sup> And where they do not overlap, regarding abuses by the guerrillas and certain paramilitaries, for instance, IHL literally fills the gap. In Colombia, where nearly two-thirds of the killings by the parties in the context of an internal conflict occur illegally *off* the battlefield,<sup>537</sup> IHL plays a crucial role. It addresses abuses by non-state actors at the same time that it covers similar actions by state agents. It thus provides a separate basis for finding international responsibility, which results from violations of its provisions. Under these circumstances, international humanitarian law, which reaches beyond the limits of traditional human rights to cover abuses by non-traditional actors, takes on a whole new significance.

Another alleged failing of Protocol II in particular appears to be that “it prescribes no method for its implementation and is silent on enforcement. Nor is there any provision as to breaches or their punishment . . . .”<sup>538</sup> These criticisms are not persuasive for at least three reasons. First, mechanisms established originally for other purposes such as the Article 90 Fact Finding Commission may be adapted for use under the Protocol II regime, a solution being actively promoted in the case of Colombia.<sup>539</sup> Other international mechanisms, like a United Nations’ peace forging mission, may be established and specially tailored to fulfill a monitoring function with respect to human rights and humanitarian law.<sup>540</sup> Second, the international criminalization of international atrocities, which finds its maximum expression in the Statute of the ICC, provides solid grounds for optimism towards the future enforcement of humani-

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535. See discussion *supra* Parts I.C.2 and II.B.1.

536. GEOFFREY BEST, *WAR AND LAW SINCE 1945* 69 (1994).

537. See discussion *supra* Part I.B.

538. Green, *supra* note 9, at 17.

539. See discussion *supra* Part I.C.2.b.

540. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *IMPROVISING HISTORY: A CRITICAL EVALUATION OF THE UNITED NATIONS’ OBSERVER MISSION IN EL SALVADOR* (1995) (providing a detailed and critical analysis of the Human Rights Division and its role within ONUSAL).

tarian principles where war crimes and crimes against humanity are committed in the internal sphere.<sup>541</sup> Certainly the fact that certain violations of humanitarian law applicable in non-international armed conflict have been elevated to the status of war crimes under international law is an enormous step forward in the future suppression of illegal conduct under this regime. Finally, states are bound under international law to comply with their treaty obligations in good faith, which means that they must adopt the necessary measures internally to implement and enforce the relevant provisions, regardless of whether this obligation is made explicit in the pertinent instrument or not.<sup>542</sup>

Seen in this light, the question of the sufficiency of existing IHL norms should take on a more positive hue. At the very least, it should become more apparent that the direct comparison of international conflict with internal war from the point of view of the normative regulation under IHL is not necessarily the most appropriate. The question of implementation is much more complex and multi-faceted than that covered by formal provisions or legal enforcement, as the next and final Part of this Article explains in some detail. The idea here is not to suggest that the normative development of IHL is so adequate as to leave no room for improvement. On the contrary, the conflict in Colombia also reveals some practical shortcomings and thus suggests certain areas in which the further evolution of existing norms is required in order to optimize humanitarian protections in real conflict situations. One such area, for instance, relates to the capture and exchange of prisoners by insurgent forces.<sup>543</sup> Another, undoubtedly, relates to the means and

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541. See *supra* notes 520-23 and accompanying text (noting that the provisions contained in the ICC Statute apply to crimes committed during internal conflicts).

542. See Vienna Convention, *supra* note 385, arts. 26, 27; see also discussion *infra* Part III.C.1.

543. See *supra* note 48 and accompanying text. No express provisions are made for the exchange of prisoners under the IHL regime for non-international armed conflict, although the ICRC has gone on record as stating that such an exchange could be arranged under the special agreements clause of common Article 3. See *Canje no implica beligerancia*, EL TIEMPO, Apr. 28, 1999, at A1. In the meantime, captured soldiers and police offered in exchange for political prisoners must be considered hostages held in violation of basic IHL guarantees.

methods of waging war. But on the whole, there is no need to dismiss the framework in place for internal wars as “unsatisfactory” because it is not yet as complete as that in place for international conflicts.

To conclude, the constant reference in this Article to a variety of recent publications applying humanitarian law derived from common Article 3 and Protocol II to the war in Colombia offers eloquent testimony to the broad utility of these norms.<sup>544</sup> The cited works of scholars, activists, intergovernmental agencies, non-governmental organizations and other observers concerned with the situation on the ground in Colombia would not have been possible without a viable normative framework and the desire to put it to work. Although far from perfect, it is equally far from insufficient, and it serves to comprehensively analyze and evaluate complex conduct in violation of international principles by all the parties to the Colombian conflict. The IACHR’s innovative use of humanitarian law as a source of guidance in interpreting the American Convention on Human Rights, in addition to its direct application of the legal framework to the general situation there, is a particularly instructive example of how the common Article 3/Protocol II regime can be utilized quite effectively to promote greater protection for victims of internal wars.<sup>545</sup> In these situations, as in the many others cited in this Article, the capacity to apply humanitarian law in a rigorous and systematic fashion, and demand accountability for its violations under conditions of internal war, is of paramount importance.

### III. THE IMPLEMENTATION OF HUMANITARIAN LAW IN CIVIL CONFLICT

#### A. THE COLOMBIAN CASE STUDY REVISITED

The human rights and humanitarian law crisis in Colombia seems to confirm the conventional view held by most legal scholars

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544. See, e.g., *HCHR 1999*, *supra* note 82; *IACHR THIRD REPORT*, *supra* note 103; *CCJ 1996*, *supra* note 82.

545. See *IACHR THIRD REPORT*, *supra* note 103, ch. IV, paras. 10-16.

that humanitarian rules applicable to non-interstate armed conflicts are largely unenforceable and almost universally disregarded.<sup>546</sup> The atrocities committed in the course of the war in Colombia, outlined in Part I, section A, and graphically depicted in Part II, section B, of this Article, substantiate the view that “[t]he increase in the intensity of the conflict has not led to a greater commitment by the parties to respecting international humanitarian law; if anything, the frank disrespect shown by all the actors towards humanitarian norms is ostensible.”<sup>547</sup> Rampant massacres by the paramilitary groups, widespread kidnapping and hostage taking by the guerrillas, and a practice of executing guerrilla sympathizers on the part of the armed forces, are among the most common violations of humanitarian law carried out by the parties to the Colombian civil conflict. A near total breakdown of the rule of law guarantees that very few of the persons responsible for these crimes will be brought to justice.<sup>548</sup>

What has been done in the way of substantive implementation and legal enforcement of IHL by the Colombian authorities is minimal in comparison with the scope and magnitude of the humanitarian crises suffered by the country. Despite recent initiatives in the right direction, including the government’s decision to recognize the existence of an internal armed conflict to which IHL applies, specific legislative or regulatory measures *implementing* humanitarian norms have not yet been adopted. Courts and other judicial authorities, in the absence of implementing legislation, will not apply humanitarian norms as law, despite their express constitutional stature. Even the enforcement of existing criminal law when it overlaps with humanitarian norms is sporadic and problematic, while impunity for such violations reigns. Although the Public Ministry, the ICRC and national NGOs have made progress in the way of education and dissemination of IHL, the violations continue unabated. The Colombian Armed Forces, despite an official shift in policy, maintain a staunch resistance to the practical application of international human rights and humanitarian law norms to their members and to the conflict itself. Members of the paramilitary

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546. See *supra* note 22 and accompanying text.

547. CCJ 1996, *supra* note 82, at 55 (translation by author).

548. See *Cumaraswamy*, *supra* note 134, para. 156.

groups receive instruction on IHL from ICRC representatives, but then systematically massacre hundreds of civilians, frequently with the assistance or acquiescence of the military.

At the international level, no legal mechanism yet exists for monitoring compliance with humanitarian law in Colombia, nor is there any procedure for sanctioning the persistent, widespread, and egregious violations currently taking place in the country.<sup>549</sup> Efforts to engage the Article 90 Fact-Finding Commission established under Protocol I have not advanced since Colombia formally recognized the Commission's competence in 1996. The recent establishment of an International Criminal Court to try war crimes and crimes against humanity, although an important step, is still far from becoming a reality of any kind in Colombia. Part II of this Article demonstrated that humanitarian norms applicable in Colombia substantially cover the most serious abuses committed by the parties to the conflict. It was demonstrated further that these violations of humanitarian law give rise to forms of international responsibility for which the parties can be held accountable. Unfortunately, this theoretical groundwork has yet to find an institutional corollary in the establishment of an international mechanism or procedure created for the purpose of enforcing compliance with IHL.

The Colombian case, in other words, appears to be exemplary of the widely held belief that IHL, generally speaking, is disregarded in and by states with internal conflicts. The purpose of this third and final Part is to show why this characterization of the Colombian situation, while accurate in some aspects, does not reflect the full impact of humanitarian law on the conduct of the parties to the conflict. In particular, this conventional view overlooks the fundamental role IHL plays in the national debate on the search for peace, and in the efforts undertaken by the parties to negotiate a political solution to the conflict. To better evaluate this critical dimension of humanitarian law in the Colombian context, a non-conventional view of enforcement under international law is required. The basis for this alternative perspective will be a novel theory of compliance with international regulatory agreements de-

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549. See generally Roberts, *supra* note 156.



veloped by Abram and Antonia Chayes and adapted to the focus of this case study.<sup>550</sup>

The two Chayes, Abram and Antonia, advance an unorthodox but insightful theory of compliance with international regulatory agreements based on a “managerial” rather than an “enforcement” model.<sup>551</sup> They develop a paradigm for the analysis of compliance that is not premised on coercive or adversarial legal measures, but rather on the complex interaction of a dense network of factors constituting the very fabric of international relations. Foremost among these factors are the oversight activities of intergovernmental and non-governmental organizations, in addition to those of states. The dynamic sketched by Abram and Antonia Chayes stresses cooperation, persuasion, and “peer pressure” as a means of motivating and managing the compliance of states with their international commitments. The following sections of this Article will borrow freely from their theory—and add to it—in order to understand why in Colombia, despite the desperate situation just described, compliance with IHL is being slowly constructed in non-conventional ways.

## B. CONSTRUCTING COMPLIANCE IN COLOMBIA

Under the Chayes’ model of international regulatory regimes, acceptable levels of compliance are not coerced, they are constructed; substantial deviance from treaty norms is not “punished,” it is made the subject of explanation and justification.<sup>552</sup> Numerous factors are identified which further contribute to “managing compliance” and creating the conditions necessary for states to comply with their obligations under regulatory treaty regimes. Among these factors are transparency in the requirements and expectations imposed on states under a given regime, capacity building and cooperation through discourse with other parties, and the persuasion or pressure produced through the action of international actors, in-

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550. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 1-28 (1995).

551. See *id.* at 3.

552. See *infra* note 563 and accompanying text.

cluding intergovernmental and non-governmental organizations.”<sup>553</sup> Thus, once the lawyer’s tendency to “think in terms of enforcement through legal processes after a violation” is set aside,<sup>554</sup> a more comprehensive approach to understanding the dynamic behind the implementation of humanitarian norms in specific countries with internal conflicts is possible. Colombia provides a perfect example of why this is so.

In keeping with this view, Professor Frits Kalshoven has remarked with respect to the development of IHL that:

The sequence of events . . . from the [1977 Diplomatic Conference] of the 1970s to Colombia in the 1990s, leads me to this first comment that a change of attitude [on the part of the Government] could hardly have been more radical. The step from Colombia’s initial refusal to even sign the Protocols of 1977 to its unqualified adherence to these instruments, completed with acceptance of the competence of the International Humanitarian Fact-Finding Commission [under Protocol I], surely qualifies as a quantum jump.<sup>555</sup>

The central observation here derives from the fact that, before 1988 when discussion on the Protocols was first revived, practically no one was talking about humanitarian law in Colombia.<sup>556</sup> Very few people outside the Colombian Ministry of Foreign Affairs were even aware that this body of international law existed. The painstaking and persistent work of visionary individuals, both within and outside of government, was necessary to set the bases for the “radical” change observed by Kalshoven. This change required a lengthy struggle, as was evidenced by the story behind the ratification of the two Protocols additional to the Geneva Conventions of 1949 summarized in Part I of this case study.<sup>557</sup>

Professor Kalshoven argues that in Colombia, progress has been made with respect to the implementation of IHL, and suggests that it continues. “[This] progress is agonizingly slow, at times barely

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553. See CHAYES & HANDLER CHAYES, *supra* note 550, at 22-28.

554. See Roberts, *supra* note 156, at 16.

555. Kalshoven, *supra* note 162, at 16.

556. See Valencia Villa, *supra* note 220, at 73.

557. See discussion *supra* Part I.C.2.b.

noticeable, and occasionally interrupted by veritable setbacks. Yet . . . a higher speed could hardly have been expected in a country w[h]ere violence and terror have reigned for over forty years.”<sup>558</sup> The latter conclusion is certainly debatable,<sup>559</sup> but it points up nonetheless a key distinction inherent in the concept of compliance that is frequently overlooked and sorely undervalued. It is the distinction between *acceptance* and *observance*. Little doubt remains that the *observance* of humanitarian law in Colombia has been and remains poor, a consequence in great part of the lack of legal implementation and effective enforcement described at length in this Article. But it is in the tremendous degree of *acceptance* of IHL that has been achieved in just over a decade in Colombia where, according to Kalshoven, the true achievement lies.

And he has a point. It is axiomatic that *observance* must be preceded by some degree of *acceptance*, just as *compliance* entails a substantial level of *observance*. Colombia's express recognition of the applicability of humanitarian norms including Protocol II to the internal armed conflict is of enormous practical import, even if it is presented as a purely political decision by the government, and not as the objective and automatic operation of international law.<sup>560</sup> It represents a significant development in the progressive evolution of IHL's acceptance in the country, and is closely linked to the prior ratification of the two Protocols and the recognition of the Article 90 Fact-Finding Commission's competence under Protocol I. As was already seen, there is an important (though still insufficient) practice by state and government officials that reveals the increasing interpretation and application of humanitarian law by national authorities.<sup>561</sup> The legislative initiative currently pending before the Colombian Congress that would incorporate humanitarian principles into the Colombian Penal Code is another critical step forward in the implementation process, however far it may still be from reaching its objective.

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558. Kalshoven, *supra* note 162, at 20.

559. See discussion *infra* Part III.C.1 (explaining that lack of political will on the part of successive governments is the principal source of non-compliance).

560. See *supra* notes 188-90 and accompanying text.

561. See discussion *supra* Part I.C.2.a.

The first step on the path to compliance under any international regulatory regime is *acceptance* by the state of that regime's rules and the progressive integration of the rules into the national legal and political order. The progress achieved with respect to the acceptance of IHL in Colombia must be understood as a direct consequence of the internal and external pressures that have been brought to bear over the past decade upon national authorities and policy makers. "[M]uch of the compliance process consists of a kind of discourse among states, international organizations, and, to some extent interested publics, elaborating the meaning of [the pertinent] norms and specifying the performance required in particular circumstances."<sup>562</sup> As will be shown below, the complex interaction between and among states, international agencies, and non-governmental organizations has been a motivating force behind the realignment of government policy in Colombia with respect to humanitarian law. This crucial dynamic and its impact are undoubtedly behind the meteoric growth in acceptance of IHL by the Colombian authorities.

In order to complete the Colombian case study and fully engage the Chayes' theory of regime management, it is necessary to present additional information on the activities of key international actors and their impact on national authorities and civil society. This analysis of compliance would not be complete without prior reference to at least three international players whose activities have been definitive in shaping the scope of IHL discourse in Colombia: (1) other states, in particular the United States of America given its enormous impact on policy makers and society in general; (2) international organizations including intergovernmental institutions such as the United Nations and the Organization of American States; and (3) international non-governmental organizations. For purposes of this analysis, the information presented in the following three sub-sections should be taken as complementary to that which was presented in section C of Part I on national implementation measures.

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562. CHAYES & HANDLER CHAYES, *supra* note 550, at 110.

### 1. *The Role of the United States*

The state parties to a treaty regime are primarily responsible for monitoring the conduct of their peers. The leverage that states can exercise bilaterally and multilaterally *vis-à-vis* another state whose activities do not conform to shared commitments under a regulatory agreement can be significant. Membership in today's international community dictates that states are presumed to comply with their international obligations "in the absence of strong countervailing considerations;" they are, consequently, subject to the demand of "justifying departures from treaty norms that is both a practical and a legal requirement in the international system."<sup>563</sup> State parties to a regime can promote compliance through a series of means at their disposal, such as persuasion and advocacy, or protest and exposure, depending on the circumstances.<sup>564</sup> "This process works because modern states are bound in a tightly woven fabric of international agreements, organizations, and institutions that shape their relations with each other and penetrate deeply into their internal economic and politics."<sup>565</sup> This is the general framework within which the following discussion should be considered.

Colombia receives more security assistance from the United States than any other country in the Western Hemisphere, with aid levels reminding policy analysts of those under U.S. involvement in El Salvador in the mid 1980s.<sup>566</sup> Until recently, one issue—counter-narcotics—dominated the bilateral agenda between the two coun-

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563. *Id.* at 110, 118-23.

The dynamic of justification is the search for a common understanding of the significance of the norm in the specific situation presented. The participants seek, almost in Socratic fashion, to persuade each other of the validity of the successive steps in the dialectic. In the course of this debate, the performance required of a party in a particular case is progressively defined and specified. Since the party has participated in each stage of the argument, the pressures to conform to the final judgment are great. The process by which egoists learn to cooperate is at the same time a process of reconstructing their interests in terms of shared commitments to social norms.

*Id.* at 123 (citation omitted).

564. *See id.* at 109-11.

565. *Id.* at 26.

566. *See* YOUNGERS, *supra* note 32, at 9.

tries and all U.S. security aid was explicitly funneled in that direction. The United States had no qualms about throwing its enormous political weight around on the issue, and as a result Colombia was “decertified” in 1996 and 1997 under congressional procedures unilaterally evaluating the effectiveness of countries’ efforts in the war against drugs.<sup>567</sup> By the end of 1996, however, a reformulated U.S. policy opened the door to a broader and more comprehensive bilateral agenda. By mid-1998, one high-ranking official listed U.S. priorities in Colombia as “combating drugs, getting the economy back on track, and promoting human rights, democracy and peace.”<sup>568</sup> The election of Andrés Pastrana as President in June of 1998 guaranteed that relations between the two nations would improve markedly.<sup>569</sup>

The shift towards emphasis on human rights and peace in U.S. policy towards Colombia, and the commensurate impact on promoting respect for IHL, has been tangible. The U.S. Congress on human rights grounds has on various occasions conditioned the sales of military equipment to the Colombian army, as well as direct counter-narcotics assistance. “Under congressional pressure, aid to the Colombian army was reprogrammed in FY1994 and was not resumed until FY1997,” although assistance to the National Police and other branches of the Armed Forces was not affected.<sup>570</sup> The strongest example of human rights conditionality is the Leahy amendment to legislation appropriating U.S. foreign assistance for FY1997, which states that no anti-narcotics assistance can be “provided to any unit of the security forces of a foreign country if the Secretary of State has credible evidence to believe such unit has committed gross violations of human rights,” unless the responsible parties are brought to justice.<sup>571</sup>

The Clinton administration committed itself to applying the Leahy amendment (which was strengthened in 1998) to all kinds of security assistance, and sent strict guidelines to the relevant embas-

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567. *See id.* at 1-2.

568. *Id.* at 3.

569. *See id.* at 3-4.

570. *Id.* at 11.

571. YOUNGERS, *supra* note 32, at 11.

sies as to the measures to be adopted to comply with the amendment.<sup>572</sup> When Human Rights Watch and especially Amnesty International went public with solid evidence that Colombian army units responsible for some of the worst human rights violations in the early 1990s had received either U.S. weapons or training, the relevance and urgency of conditionality were confirmed.<sup>573</sup> At the very least, the scandal contributed to the Clinton administration's decision to obtain a formal written agreement with the Colombian government to abide by the Leahy amendment, a demand that infuriated the Colombian army.<sup>574</sup> The army's refusal to go along held up the release of U.S. military assistance during all of 1997, until a change in the military command led to the signing of a "memorandum of understanding" between the United States and Colombian governments in August of that year.<sup>575</sup>

Nearly 300 million dollars of aid were released to the Colombian military for 1999, primarily "out of concern that the leftist Marxist guerrillas pose a serious threat to the State—and hence to American efforts to staunch the flow of drugs."<sup>576</sup> But the massacre campaign by paramilitary forces in early January, 1999, re-ignited the debate "of whether the United States funded Colombian military, which has long been accused of supporting the paramilitary groups, is willing to crack down on them and their drug networks."<sup>577</sup> Attacks by these illegal bands on human rights defenders in February, 1999, led to further, energetic protests by both the U.S. State Department

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572. *See id.*

573. *See id.* at 11-12.

574. *See La Otra certificación*, SEMANA, July 14, 1997.

575. *See* Memorandum of Understanding Between the Government of the Republic of Colombia and the Government of the United States of America Concerning the Transfer, Use, Security, and Monitoring of Articles, Services, or Related Training that may be Furnished to the Government of the Republic of Colombia by the Government of the United States of America, Aug. 1, 1997 [hereinafter MOU] (on file with author) (providing that the United States will not furnish counter-narcotic assistance if it has "credible evidence" that the Colombian security forces have committed human rights violations); *see also* YOUNGERS, *supra* note 32, at 12.

576. Douglas Farah, *Massacres Imperil U.S. Aid to Colombia: Paramilitary Groups Linked to Army*, WASH. POST, Jan. 31, 1999, at A1.

577. *Id.*

and a bipartisan coalition of congresspersons from the House and Senate, including an urgent demand that concrete action be taken by the government of Colombia to combat the paramilitary groups.<sup>578</sup> Failure to do so, U.S. officials fear, could once again put U.S. military aid to Colombia in check. Unfortunately, numerous obstacles make the verification of compliance with the Leahy amendment and the executive memorandum extremely difficult, not least of which is the U.S. government's refusal to provide information on how the security assistance is actually disbursed.<sup>579</sup>

There is no doubt that a very strong message is being sent to the Colombian civilian and military authorities through various channels, some of them quite public. Newly appointed Assistant Secretary of State for Human Rights and Humanitarian Affairs, Harold Koh, shocked the Colombian authorities in April of 1999 by openly criticizing the armed forces' human rights record and their partnership with the paramilitary groups.<sup>580</sup> He made his statements in Colombia while attending a conference on human rights sponsored by the American Embassy. In May of 1998, the State Department spokesman chided the Colombian army commander for disputing reports of human rights violations by the Colombian armed forces made by Human Rights Watch and the Washington Post: "We disagree with the general's decision to single out those who express criticism over the extremely serious human rights situation in Colombia. We do not believe that this is a helpful approach to dealing with the very real problems identified by these critics, problems which the Colombian military itself has acknowledged."<sup>581</sup> The U.S.

578. See Sergio Gómez Maseri, *E.U. Pide Acciones Contra 'Paras'*, EL TIEMPO, Feb. 3, 1999, at A1.

579. See YOUNGERS, *supra* note 32, at 13-14 (discussing the lack of policies and procedures for monitoring anti-drug support to Colombia). A detailed follow-up to the Leahy Amendment's application with respect to the recent release of aid to the Colombian military is urgently needed in Congress, as well as in the non-governmental sector that provides crucial oversight in these matters. It is beyond the scope of this Article, however, to do more than signal the importance of this research and of the role it should play in further shaping U.S. foreign policy.

580. See Bibiana Mercado and Francisco Jaramillo, *Dura polémica por regano de E.U.*, EL TIEMPO, Apr. 13, 1999, at A1.

581. Press Statement by James P. Rubin, U.S. State Department Spokesman, May 12, 1998 (on file with author).



government in 1998 also began revoking the visas of military officials notoriously implicated in human rights violations, a practice that in the past had been reserved for officials implicated in narcotics trafficking.<sup>582</sup>

A particularly effective tool for making the Clinton Administration's new policy felt has been the U.S. State Department's Country Reports on Human Rights Practices that include a section on violations of IHL and which are required for all countries receiving American aid.<sup>583</sup> One commentator noted that these reports under President Clinton began to "provide strong and well-documented critiques of Colombia's human rights crisis, prompting strong rebukes from Colombia's military high command."<sup>584</sup> The 1997 Country Report, for example, states that:

[t]he Government's human rights record continued to be poor, although there were some improvements in certain areas. Government forces continued to commit numerous serious abuses, including extra-judicial killings . . . . There were targeted killings by elements of the Army, notably the 20th Intelligence Brigade. Security forces were responsible for several instances of forced disappearance, and police and soldiers continued to torture and beat some detainees. At times the security forces collaborated with paramilitary groups that committed abuses.<sup>585</sup>

In response to this particular report, top military commanders did not hesitate to lash out again in defense of their institution. In a "harshly worded statement, [they said] the report violated the 'dig-

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582. See Youngers, *supra* note 32, at 17.

583. This report is submitted to the Congress by the Department of State in compliance with secs. 116(d) and 502(b) of the Foreign Assistance Act of 1961 (FAA), as amended, and sec. 505(c) of the Trade Act of 1974, as amended. As stated in sec. 116(d)(1) of the FAA: 'The Secretary of State shall transmit to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate, by January 31 of each year, a full and complete report regarding the status of internationally recognized human rights, within the meaning of sub-section (A) in countries that receive assistance under this part, and (B) in all other foreign countries which are members of the United Nations and which are not otherwise the subject of a human rights report under this Act.' U.S. STATE DEP'T, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1997 XI (1998) [hereinafter COUNTRY REPORTS 1997].

584. YOUNGERS, *supra* note 32, at 17.

585. COUNTRY REPORTS 1997, *supra* note 583, at 452.

nity and institutional honour' of all those who serve in Colombia's military and contained 'a series of baseless accusations.'"<sup>586</sup> The Colombian Government through its Foreign Ministry dispatched a formal reply to the 1997 Report criticizing its "unilateral" character and taking issue with several of its conclusions.<sup>587</sup> But continued U.S. pressure on the Colombian authorities eventually led to the disbanding in June of 1998 of the 20th Intelligence Brigade, linked to selective killings of human rights defenders and others accused by military officials of being guerrilla members or sympathizers.<sup>588</sup>

It is extremely important that the U.S. Country Reports on Colombia critically analyze the state of compliance with IHL by all parties to the conflict.<sup>589</sup> The 1999 Report, for instance, emphasizes violations of the laws of war by the guerrillas, as well as the paramilitary groups acting with state "collaboration," and the illegal reliance of these parties on massacres, internal displacement, and the use of landmines in the furtherance of the war effort.<sup>590</sup> The technical analysis of these violations and those of state agents in the Country Reports by the State Department is a novel and effective application of international humanitarian norms to the situation in Colombia. The specific attention paid to human rights and humanitarian law issues in the bilateral relations between the two countries, in a broader sense, is a laudable and constructive feature of U.S. foreign policy.

The tremendous leverage exercised by the United States on these issues through its foreign policy toward Colombia, and the tangible impact it has had in governmental circles, undoubtedly have been key factors in the move towards greater implementation and compliance in Colombia. All of the activity described above receives

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586. *Colombian Military Slams U.S. Human Rights Report*, Reuter News Serv., Feb. 5, 1998.

587. See Declaración del Gobierno Nacional acerca del "Informe sobre derechos humanos, Colombia: 1996" elaborado por el Departamento de Estado de los Estados Unidos (1997) (on file with author) (issued in response to the U.S. State Department's Country Report).

588. See YOUNGERS, *supra* note 32, at 18.

589. Cf. *Colombia Country Report for 1998*, *supra* note 415, at 557-61, with COUNTRY REPORT FOR 1997, *supra* note 583, at 461-65.

590. See *Colombia Country Report for 1998*, *supra* note 415, at 559-60.

wide press and media coverage in the country. By mid-1997, one Colombian weekly summarized the shift in U.S. policy this way: "The subject of human rights is gathering great strength in the United States. Absolute respect for the principles of International Humanitarian Law [sic] is a fundamental part of the [American] Democratic [Party's] platform . . . [Under Clinton's Presidency, it] is probable that the subject will [continue to] move up notches within the American diplomatic agenda, and, consequently, in the agenda with Colombia."<sup>591</sup> The accuracy, completeness, and objectivity of the 1999 State Department's Country Report on Colombia confirms that the Clinton Administration's official policy on human rights and humanitarian law continues to move in the right direction.

## 2. *International Organizations*

Ideally, international organizations play a strong and effective role in overseeing the implementation of a treaty regime. The number of organizations competent to act with respect to a given regime will vary according to its nature and the commitments assumed under its provisions. In most cases, however, these organizations perform similar functions, such as the collection and processing of data through reporting and other fact-finding procedures; they also play a key role in the identification and verification of unconformity in the conduct of state parties.<sup>592</sup> Moreover, international organizations provide a natural multilateral arena within which states can exercise their discourse and diplomatic leverage in the interactive process of managing compliance with treaty regimes. The good standing of states in these organizations will frequently depend on the status of their compliance with the pertinent international obligations, or their ability to justify serious non-conformity or deviance from established treaty norms.<sup>593</sup> The potential for effective action on the part of these organizations is palpable in the following description of the international scrutiny given the Colombian human rights and humanitarian law crisis.

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591. *La otra certificación*, *supra* note 574 (translation by author).

592. See CHAYES & HANDLER CHAYES, *supra* note 550, chs. 7, 8 & 12.

593. See *id.* at 27.

Scrutiny of the Colombian conflict by international organizations is relatively recent. In the late 1980s, the human rights situation began to attract the focused attention of the United Nations ("UN")<sup>594</sup> and the Organization of American States ("OAS"),<sup>595</sup> as well as non-governmental organizations such as Amnesty International and Human Rights Watch.<sup>596</sup> Today, the observations and recommendations on the Colombian situation formulated by the UN and the OAS are alone sufficient to fill a book.<sup>597</sup> Many of them directly address the dire humanitarian consequences of the conflict and the need to promote observance of IHL by the parties to the conflict. The UN Commission on Human Rights has been outspoken in this regard, expressing concern for violations of human rights and IHL in Colombia every year since 1996.<sup>598</sup> The Human Rights Committee recently addressed the broader but largely overlapping problem of political violence in its conclusions resulting from the periodic review of Colombia's compliance under the regime established by

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594. See UN Doc. E/CN.4/1990/22/Add.1 (1990) (noting that in 1989, the UN Special Rapporteur on Summary and Arbitrary Executions visited Colombia for the first time and presented his report to the UN Commission on Human Rights the following year). The UN Special Rapporteur on Summary and Arbitrary Executions was preceded by the U.N. Working Group on Enforced or Involuntary Disappearances in 1988. See U.N. Doc. E/CN.4/1989/18/Add.1 (1989).

595. The Inter-American Commission on Human Rights carried out its second *in situ* visit to Colombia in 1990, although its report was not published until 1993. See INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS IN COLOMBIA, OEA/ser.L/V/II.84, doc. 39 rev. (1993) [hereinafter IACHR REPORT].

596. See, e.g., AMERICAS WATCH, THE CENTRAL-AMERICANIZATION OF COLOMBIA? (1986); AMERICAS WATCH, THE KILLINGS IN COLOMBIA (1989); AMERICAS WATCH, THE DRUG WAR IN COLOMBIA: THE NEGLECTED TRAGEDY OF POLITICAL VIOLENCE (1990). The work of these organizations with respect to Colombia is the subject of the next sub-section.

597. See, e.g., DEFENSORÍA DEL PUEBLO Y EL COLOMBIAN COMMISSION OF JURISTS, CONTRA VIENTO Y MAREA: CONCLUSIONES Y RECOMENDACIONES DE LA ONU Y LA OEA PARA GARANTIZAR LA VIGENCIA DE LOS DERECHOS HUMANOS EN COLOMBIA: 1980-1997 (1997) [hereinafter CONTRA VIENTO].

598. See *id.* at 47, 50; HCHR 1999, *supra* note 82, para. 1; Elizabeth Olson, *Colombia: Rights Abuses Condemned*, N.Y. TIMES, Apr. 28, 1999, at 10A (summarizing the 1999 statement on the human rights problem in Colombia made by the Chairman of the UN Commission on Human Rights).

the International Covenant on Civil and Political Rights.<sup>599</sup> The Committee went on record in 1997 as deploring “the extra-judicial executions, the assassination, the torture and other degrading treatment, the enforced disappearances and arbitrary detentions carried out by members of the armed forces, the police, paramilitary groups and the guerrillas.”<sup>600</sup>

Extremely important in this regard is the permanent monitoring of human rights and humanitarian law carried out in Colombia by the Office of the United Nations High Commissioner for Human Rights (“HCHR”). The authority to monitor alleged violations of IHL by all the parties to the conflict was insisted upon in the negotiations of the underlying agreement between the High Commissioner and the government of Colombia, and was expressly provided for in the text of the Office’s mandate.<sup>601</sup> Accordingly, a significant portion of the HCHR’s annual report to the Commission on Human Rights is dedicated to analyzing violations of humanitarian law,<sup>602</sup> many of which are brought to the Office’s attention through the complaints that the office regularly receives from “State institutions, non-governmental organizations . . . and private individuals.”<sup>603</sup> In the HCHR’s 1999 report on the Office in Colombia, specific attention is given to the “deterioration of the human rights situation [and] the disregard for international humanitarian law on the part of both the guerrilla and the paramilitary forces.”<sup>604</sup> A section dedicated to the “main breaches of international humanitarian law” covers murders, threats, hostage taking, attacks on the civilian population, forced displacement, torture and ill-treatment, violations of the general protection afforded sanitary personnel and transports, the recruitment of children, the use of anti-personnel

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599. See *Concluding Observations by the Human Rights Committee: Colombia*, U.N. Human Rights Committee, U.N. Doc. CCPR/C/79/Add.75 (1997), Part IV.

600. *Id.* para. 15.

601. See *Report of the United Nations High Commissioner for Human Rights on Colombia*, U.N. Doc. E/CN.4/1997/11, para. 8, annex.

602. See generally *HCHR Report*, *supra* note 68, paras. 21-73, 86-116, 174, 192.

603. *Id.* para. 24.

604. *HCHR 1999*, *supra* note 82, para. 40; see also *id.* para. 33.

mines, and attacks on civilian property.<sup>605</sup> The visit by the High Commissioner herself to Colombia in October of 1998 provided a high profile boost to the Office's presence and work in the country.<sup>606</sup>

The Inter-American Commission on Human Rights has in a similar fashion repeatedly expressed concern over the persistence of serious violations of IHL in Colombia.<sup>607</sup> Immediately after its record third *in situ* visit to the country in December of 1997, the IACHR issued a lengthy press statement in which it sharply criticized the lamentable state of respect for IHL in the conflict by the different armed groups, including state forces.<sup>608</sup> This position was greatly reinforced and substantiated by the comprehensive report on the human rights and humanitarian law situation in Colombia released by the IACHR in March of 1999. This groundbreaking report and its observations form the backbone for much of the analysis on international responsibility presented in Part II.B. of this Article. Moreover, in a major advance under the regional system, the IACHR recently determined that it is empowered to apply IHL in individual cases arising under the American Convention on Human Rights, and asked the Inter-American Court of Human Rights to do the same.<sup>609</sup> The basis for this landmark decision is a case from Colombia involving the extra-judicial execution of civilians by the Colombian Police in the context of a military operation.

Colombian officials feel obliged to respond, both privately and publicly, to the findings made by the human rights organs of these regional and universal intergovernmental organizations. One telling example is the Colombian Government's public response to the first report by the HCHR's Permanent Office in Bogotá, in which it

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605. *See id.* ch. IV.H.

606. *See id.* paras. 19-26.

607. The IACHR has visited Colombia a record three times since 1980. *See* Report on the situation of Human Rights in the Republic of Colombia, Inter-Am. C.H.R., OAS/Ser.L/V/II.53, doc. 22 (1981); IACHR REPORT *supra* note 595; IACHR THIRD REPORT, *supra* note 103.

608. *See* Inter-American Commission on Human Rights, *Press Communiqué No. 20/97* (visited Sept. 26, 1999) <http://www.cidh.oas.org/Comunicados/English/1997/Pres%2014-21.htm> [hereinafter IACHR Press Release].

609. *See supra* notes 410-13 and accompanying text.

underscored the "shared concern of the Colombian Government, human rights organizations and the international community to find ways of resolving the issue of violations of human rights and of international humanitarian law in our country."<sup>610</sup> Although it took issue with many of the reports' affirmations, it accepted that "the Office of the High Commissioner in Colombia has devoted its efforts to cooperation, support, observation and advice in the search for solutions that will improve the situation of human rights and international humanitarian law in Colombia . . . and has made a valued contribution to the country."<sup>611</sup> Since most of the reports and statements issued by the IACHR and its UN counterparts receive significant press coverage, this kind of public discourse on the issue of Government compliance with human rights and humanitarian norms is a frequent consequence of international oversight.

### 3. *International Non-governmental Organizations*

Within a given regulatory regime, NGOs fulfill basic functions such as (1) setting objective standards and defining the levels at which compliance is "acceptable," (2) providing independent monitoring and reporting on party performance, (3) performing independent evaluations and assessments of party compliance, and (4) where noncompliance is at issue, marshalling public opinion through exposure and "shaming" in order to generate the corresponding political backlash.<sup>612</sup> Many of these tasks can also be performed by intergovernmental organizations or specialized bodies recognized by treaty regimes for that purpose. Experience has shown, however, that international institutions tend to be extremely bureaucratic, and can sometimes fall prey to inefficiency.<sup>613</sup> At

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610. *Letter dated 10 March 1998 from the Deputy Minister for Foreign Affairs of Colombia addressed to the United Nations High Commissioner for Human Rights*, U.N. Doc. E/CN.4/1998/135, at para. 1 (1998).

611. *Id.* para. 198.

612. See CHAYES & HANDLER CHAYES, *supra* note 550, at 17-22 (defining acceptable compliance as tolerating those violations which pose little or no threat to the overall agreement based on the nature of the situation); *id.* at 250-70 (citing the successes of NGOs in enhancing information collection, verification, and compliance, and presenting several case studies in which NGOs played an important role in these capacities).

613. See *id.* at 271, 283-84.

other times, the controlling hand of states in the process of monitoring and verification through intergovernmental organizations may lead to an undesirable politicization of the compliance process.<sup>614</sup> It is for this reason that, within the interactive international community, the “deficiencies of public organizations are supplied in part by the growth in importance and influence of non-governmental organizations.”<sup>615</sup>

The relatively recent attention focused on the situation in Colombia by governments and intergovernmental agencies is a consequence, in large part, of the concerted efforts by NGOs working at international levels.<sup>616</sup> NGO participation in the UN Commission on Human Rights throughout the 1990s has contributed substantially to the deliberations among government delegations on violations of human rights and humanitarian law by the parties to the conflict in Colombia. The concern for this situation on the part of the European Union and other key delegations was critical to promoting the adoption of strong public statements by the Commission’s Chairman on numerous occasions already mentioned. The EU and delegations such as Canada’s relied heavily on NGO information for their negotiations with other governments carried out during the sessions of the Commission, including Colombia’s. In the regional system for the protection and promotion of human rights, the constant participation of both local and international NGOs is crucial. When the IACHR visited the country in December of 1997, local NGO data on human rights and IHL violations was an essential source of invaluable input.<sup>617</sup> International NGOs like the Center for Justice and International Law (“CEJIL”) litigate extensively before the IACHR and the Inter-American Court of Human Rights, and generally provide a constant and reliable source of information for

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614. See Carlos Lozano Bedoya & Arturo Carrillo Suárez, *La protección internacional de los derechos humanos*, in CONTRA VIENTO, *supra* note 597, at 13 (noting that the UN Commission on Human Rights is often criticized for being too politicized and, consequently, for lacking objectivity).

615. CHAYES & HANDLER CHAYES, *supra* note 550, at 111.

616. As attorney for United Nations Affairs with the Colombian Commission of Jurists from 1994 to 1998, the author personally participated in the lobbying of intergovernmental agencies both in Colombia and abroad, and was responsible for coordinating this work with international NGOs.

617. See IACHR Press Release, *supra* note 608, para. 5.



the different mechanisms and procedures under the regional system.

The role of international human rights NGOs in generating concern and eliciting positive reactions from the international community is paramount. The intensive lobbying and litigation described in the previous paragraph is possible only through close-knit cooperation between international human rights NGOs and their national NGO counterparts. Without organizations like Human Rights Watch, Amnesty International, the Lawyers Committee for Human Rights, and others, Colombian NGOs would have a difficult time by themselves getting the message across at the international level.<sup>618</sup> One clear example of this was when Colombia went before the UN Human Rights Committee in 1996 under the periodic review procedure established by the International Covenant on Civil and Political rights.<sup>619</sup> Coordinated efforts led by the Lawyers Committee for Human Rights resulted in a strong Colombian NGO presence at the preliminary hearings arranged by the Committee as a channel for non-governmental input. It is safe to say, furthermore, that the international NGOs' periodic publications and press statements provide a constant stream of up-to-date information on the situation in Colombia which concerned governments, as well as the inter-governmental agencies mentioned, frequently find pertinent and extraordinarily useful.

The interwoven effects of the activities carried out by the international actors studied in this section strongly impact upon Colombian policy makers and civil society representatives working on human rights and humanitarian issues inside the country. These activities provoke strong reactions and responses from government officials, the general public, and even the armed groups in conflict. One startling manifestation of this reality occurred when the ELN

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618. Other NGOs that play a crucial role in this respect are the Washington Office on Latin America (WOLA), the International Service for Human Rights in Geneva, and the Federation Internationale des Ligues de Droits de l'Hommes (FIDH), based in Paris.

619. See 999 U.N.T.S 171, 6 I.L.M. 368 (1968). Adopted by the General Assembly of the United Nations on Dec. 16, 1966 (G.A. Res. 2200, 21 GAOR, Supp. 16, U.N. Doc. A/6316, at 52) (entered into force on Mar. 23, 1976). See Part IV of the ICCPR on the Human Rights Committee and its procedure for periodic reviews.

guerrillas, in a letter to Amnesty International, stated that they were willing to adopt the NGO's recommendations made in a 1994 report criticizing the groups' conduct in violation of humanitarian law.<sup>620</sup> Disclaimers and debate are common in the press after one of the aforementioned actors—whether it be the United Nations, the U.S. State Department or Human Rights Watch—releases a report criticizing the human rights and humanitarian law situation in the country.<sup>621</sup> The point here is that the impact of these organizations *within* Colombia has been, and continues to be, crucial to promoting consciousness and comprehension of humanitarian norms in the country.

### C. AN ANALYSIS OF COMPLIANCE AND ITS FUTURE PROSPECTS

Before returning to the discussion of how the compliance process has been initiated in Colombia through the burgeoning acceptance of IHL instruments and principles, a diagnosis of the reasons for the persistent lack of greater formal implementation and substantive compliance by the Colombian State is in order. Only by going to the root of the problem and examining its causes can a possible path to its resolution be discerned and mapped out.

#### 1. *The Causes of Non-compliance with IHL*

International law is very clear on the nature of the conventional obligations assumed by governments when they enter into agreements with other states. *Pacta sunt servanda*—treaties are to be obeyed—is the rule, and in general “states acknowledge [the] obligation to comply with the agreements they have signed.”<sup>622</sup> At an international level, this legal obligation to execute treaties in good faith gives rise to a “presumption of compliance, in the absence of

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620. See WAR WITHOUT QUARTER, *supra* note 1, at 163.

621. A recent controversial report presented by Human Rights Watch on December 3, 1998 received extensive coverage in EL ESPECTADOR, Dec. 4, 1998. See *Los violentos no distinguen civiles de combatientes* (visited Dec. 4, 1998) <<http://www.elespectador.com/9812/04/genotici.htm>>.

622. CHAYES & HANDLER CHAYES, *supra* note 550, at 4, 8; see also Vienna Convention, *supra* note 385, arts. 26, 27; see also Vienna Convention, *supra* note 385, at 4.

strong countervailing circumstances.”<sup>623</sup> Within most countries, the provisions of ratified international agreements become national law entailing a similar legal obligation to obey, and acting as a presumptive “guide to action” in the domestic sphere.<sup>624</sup> As we have seen with respect to the case of Colombia, the IHL regime for non-interstate armed conflict is no exception. This regime is unconventional, however, insofar as it covers the conduct of non-state actors, such as insurgency movements and certain paramilitary groups, when these are considered parties to an internal armed conflict that meets the thresholds established, respectively, by common Article 3 and Protocol II.

Although it may sound somewhat optimistic, “the general propensity of states [is] to comply with international obligations.”<sup>625</sup> The main sources of non-compliance with international regulatory regimes like the one established by IHL are a “lack of capability or clarity or priority.”<sup>626</sup> One central factor contributing to non-compliance is the “temporal dimension of the social, economic and political changes contemplated by regulatory treaties.”<sup>627</sup> It is argued in reference to international human rights treaties and their corresponding regimes that these, “like other regulatory treaties, were designed to initiate a process that over time, perhaps a long time, would bring behavior into greater congruence” with the ideals embodied in those instruments.<sup>628</sup> The other key factors influencing non-compliance by states are ambiguity and indeterminacy of treaty language, in addition to that of a frequently limited capacity of the parties to carry out their express undertakings.<sup>629</sup> These factors serve, individually and in combination, to illuminate and explain most cases in which states fail to live up to their commitments.

All three factors identified are valid with respect to Colombia’s basic problem of substantive noncompliance under the humanitar-

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623. CHAYES & HANDLER CHAYES, *supra* note 550, at 8.

624. *See id.*

625. *Id.* at 3.

626. *Id.* at 22.

627. *Id.* at 10.

628. *Id.* at 17.

629. *See id.* at 10.

ian law regime regulating internal armed conflict. With respect to the factor of textual “clarity,” it should be recalled from prior sections how debates on the scope of applicability and on the political and legal consequences of Protocol II held up the ratification process in that country for almost two decades. The lack of greater precision in the text provided opponents of Protocol II in Colombia with ample grounds on which to construct their resistance, despite the fact that many proponents of Protocol II would argue (and, in fact, did) that its provisions are not ambiguous. Debate on the scope of application and on the legal consequences of many of its provisions continues to this day, well after ratification, though it is still largely politicized.<sup>630</sup> The guidance of international organizations such as the ICRC and the major human rights NGOs on the proper interpretation and application of IHL has contributed to orienting this debate in positive directions, but has not succeeded in ending it.

Regarding the “capability” factor, it is evident that the institutional weakness characteristic of many national authorities, in addition to the breakdown of the rule of law, plays an undeniable role in ensuring that positive initiatives toward greater implementation or enforcement do not get very far. How can one expect investigators from the Prosecutor General’s Human Rights Office to bring paramilitary warlord Carlos Castaño to justice when neither the Police nor the Army will execute any of the several warrants out for his arrest?<sup>631</sup> Other related factors shed further light on the question of governmental non-compliance. The “time lag between undertaking and performance”<sup>632</sup> cited in relation to human rights treaties is equally as applicable to humanitarian law instruments; it may explain (though not justify) the absence of greater and more immediate implementation of IHL in the internal sphere. It is also true that “a cross section [of the situation] at any particular moment may give a misleading picture of the state of compliance.”<sup>633</sup> It is arguable, therefore, that the relatively recent ratification of Protocol II is

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630. See discussion *supra* Part I.C.2.b.

631. See IACHR THIRD REPORT, *supra* note 103, ch. IV, paras. 239-40.

632. CHAYES & HANDLER CHAYES, *supra* note 550, at 16.

633. *Id.* at 15.

a factor contributing to the absence of greater formal implementation of its provisions under domestic law. This, of course, would not be true with respect to common Article 3, which has been applicable in theory, though not in practice, for decades.

In any case, it would be wholly disingenuous to maintain that either textual ambiguity or institutional incapacity is at the heart of the Colombian government's substantive non-compliance with IHL. These are aggravating factors that complicate a more fundamental problem: the lack of *priority* given humanitarian law obligations by Colombian authorities under the difficult circumstances generated by the civil conflict. Historically, it has been the lack of *political will* on the part of successive administrations and state institutions to confront the military establishment and its allies, which underlies the nation's long-standing resistance to implementing and enforcing IHL.<sup>634</sup> Although there have been notable exceptions to this general rule in recent times, support among Colombian authorities for the effective implementation and enforcement of humanitarian norms within the domestic legal order is still uneven and lukewarm at best.

Although this conclusion may appear to echo the pessimistic opinions cited in the Introduction criticizing the effectiveness of IHL, there is an important difference. Recognition that a lack of political *priority* exacerbated by other factors is at the heart of Colombia's non-compliance with IHL is a diagnosis that suggests that there is room for improvement *under the existing regime*. It accepts that a wide range of humanitarian norms applies to internal wars like Colombia's, and that these rules are sufficient to cover many if not most of the major evils associated with modern civil conflicts. More importantly, it acknowledges that, despite the lack of formal implementation and legal enforcement, significant advances can be made at a national level that contribute directly to improving the situation. As will be argued below, the express recognition of the

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634. See, e.g., HCHR 1999, *supra* 82, paras. 151-53. "The High Commissioner regrets that many of the recommendations of the various United Nations mechanisms have still not been acted on, despite the fact that they are specific recommendations which have been reiterated for a number of years." *Id.* para. 153. Foremost, among these recommendations are those aimed at harmonizing the Colombian penal and military justice codes with international standards.

applicability of IHL by government authorities and civil society alike gives rise to conditions that are crucial to the process of generating political will and redefining official priorities.

## 2. *Why Acceptance of IHL Matters*

Professor Kalshoven was right: the introduction of IHL into the political and legal discourse of the nation is undeniably a marked improvement over the situation only a decade ago, notwithstanding a persistent non-compliance with its provisions on the part of the Colombian state. The “regime management” paradigm allows us to see how and why this change came about, or at least to understand many of the circumstances that led to its realization. In this respect, the Colombian case study is a credit to the work of the universal and regional systems for the protection of human rights, and vindicates the often underestimated role of NGOs in this process, at both national and international levels. Similarly, the persistent scrutiny and pressure by third states, bilaterally and through multilateral action, contributed enormously to promoting official acceptance of IHL in Colombia. The process of ratification in Colombia of the Protocols additional to the Geneva Conventions 1949 is a case in point. Once the government finally revived this process as a consequence of international pressure, the legitimacy brought to the relevant debates by the ICRC, and to a lesser extent by the United Nations and the OAS, greatly advanced the goal of ratification. The campaign by Colombian NGOs and members of the concerned public added local flavor and force to these efforts. All of these factors, acting separately and in concert, were the impetus behind the “quantum jump” of ratification and acceptance applauded by Kalshoven.

But acceptance is not *per se* the same as compliance, and without the requisite political will needed to convert it into effective action, the impact of government receptivity to the subject of humanitarian law in Colombia will continue to be extremely limited. Further progress must be made, and official acceptance of IHL converted into full implementation and substantial compliance with all its pertinent provisions. The diagnosis of the causes of non-compliance presented above provides a useful starting point. As concerns the Colombian government, the national and international actors who comprise the IHL regime must intensify the process of

“managing” compliance analyzed in this Part. The force of the compliance dynamic should be channeled and focused squarely on those factors impeding further progress on legal implementation and enforcement. Concerned governments like those represented in the European Union, as well as that of the United States, must continue to monitor the Colombian Government’s compliance with its legal obligations under the IHL and human rights regimes, making effective use of the bilateral and multilateral channels at their disposal.<sup>635</sup>

Using acceptance as a stepping-stone to compliance under the IHL regime means, among other things, supporting and strengthening the work of the Inter-American system and its organs, as well as those under the United Nations umbrella. The monitoring function they fulfill from both a human rights and humanitarian law perspective is absolutely crucial to maintaining the ground that has been won, and to ensuring that further progress can be made. Similarly, the fundamental role of non-governmental organizations within this process must be recognized and encouraged. Publications like those by Human Rights Watch, which place IHL at the center of their legal analysis, are critical to promoting a stronger and more effective compliance dynamic within this regime. The work of national NGOs in this same vein, carried out despite the enormous personal risk involved, have proved to be the foundation upon which much, if not most, of the international monitoring of IHL is based. Once the conjugation of forces represented by these actors is understood to be a motivating factor behind the important changes in Colombia with respect to IHL, it becomes evident that continued progress—and the march towards substantive compliance—depends upon the reinforcement and intensification of these forces.

Professor Kalshoven may not have been aware of the extent to which his calculations of a “radical change” would extend when he made his insightful observations. There is no denying that in Co-

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635. One critical area for attention relates to the legislative initiatives—past, present, and future—that seek to incorporate humanitarian law into the domestic legal order. A close scrutiny of the process underway to reform the Colombian Penal Code, for example, is essential to guarantee that some effective implementation and enforcement of humanitarian norms may still be achieved.

Colombia today, IHL is at the forefront of the search for a political solution to the conflict and thus at the top of the national agenda. In the context of the peace process, where it has assumed cardinal importance, humanitarian law is, in one form or another, an express priority of each of the parties to the conflict. The parties and most observers agree, for example, that the humanization of the war through some sort of agreement, which would include the component of impartial verification, is the surest step down the path to peace. Even the paramilitary groups have stated that they are willing to limit their conduct in violation of IHL if the ELN guerrillas do the same, a proposal that has served as a basis for direct talks with the insurgent groups on the subject of a humanitarian agreement.<sup>636</sup> At the very least, this unorthodox initiative by the paramilitary groups, the worst violators of IHL in the war, testifies to the extent to which humanitarian law is considered political currency in the process of bargaining for peace.

But acceptance of humanitarian law is not limited to the Colombian Government or even to the context of the peace talks. High levels of general acceptance are to be found in modern Colombian society, ranging from government and military officials trained in humanitarian law by the ICRC, to school children and internally displaced persons counseled by the Human Rights Ombudsman on their rights and how these are violated by parties to the conflict. A case in point was made by the "civil society" representatives who signed (quasi) humanitarian agreements with the ELN and the paramilitary groups on behalf of all Colombians.<sup>637</sup> These and other civilian sectors of Colombian society have repeatedly insisted on the need to "humanize" the conflict as a necessary first step in the peace process they envision.<sup>638</sup> It is civil society looking out for itself in a way that simply was not possible ten years ago. The parties further reflect this reality in the wide press and media coverage of

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636. See Juan Carlos Escobar, *La historia del diálogo secreto entre ELN y Castaño*, EL TIEMPO, Dec. 13, 1998, at A1.

637. See Patricia Lara Salive, *A Dulcificar la Guerra*, CAMBIO 16, July 20-27, 1998, at 23.

638. See *Colombianos ¡No Más!*, EL ESPECTADOR, Oct. 25, 1999, at A1. Anywhere between five and ten million Colombians demonstrated to protest the war and political violence with three basic demands: a cease-fire, uninterrupted negotiations and respect for IHL.



the war that makes constant reference to IHL and to the alleged violations of its norms. Indeed, it is impressive to see the range and relative depth with which Colombian journalists today incorporate humanitarian law considerations into their reporting of the conflict.<sup>639</sup>

Incredible as it may seem, more or less the same holds true for the other parties to the conflict. The status of IHL as political if not legal currency in the peace talks is a direct consequence of the advanced degree of recognition by the guerrilla and paramilitary groups of humanitarian law's relevance to the conflict and their own war effort. The increased recourse to humanitarian law terminology by these groups may be considered cynical and largely motivated by political expediency, but it nevertheless represents an ostensible if rhetorical improvement over past attitudes. It also points to the possibility of further progress in the future. This Article has demonstrated how the Colombian guerrillas and paramilitary groups are in some way receptive to—or at the very least affected by—the monitoring of their actions performed by international and national actors under the IHL regime. Like the Colombian Government, they have been frequently pressed to explain and justify their abuses in contravention of humanitarian norms, obliging them to come to terms with their responsibilities under international law:

A crucial element in the process by which international norms operate to control conduct, is that, as a matter of international practice, questionable action must be explained and justified—sometimes in advance, but almost without exception after the fact. Accountability ... is a critical rule—and norm—enforcement mechanism .... The fact that people are ultimately accountable for their decisions is an implicit and explicit constraint on virtually everything they do. Failure to behave in ways for which one can construct acceptable accounts leads to varying degrees of censure—depending of course on the gravity of the offense and the norms of the organizations.<sup>640</sup>

The very same forces of persuasion and justification which “shame” state deviance from the IHL regime have, at times, a sur-

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639. See, e.g., *id.*; *Primer paso con el ELN*, EL TIEMPO, July 16, at A1.

640. CHAYES & HANDLER CHAYES, *supra* note 550, at 118-19.

prisingly similar effect on the guerrillas and, to a lesser extent, on their paramilitary enemies. Given that they both purport to speak for broad sectors of Colombian society and profess political legitimacy as popular movements acting in the public interest, the guerrillas and the paramilitary groups are obliged to engage in the public debate on IHL, to develop policy positions on it and, above all, to explain and justify their aberrant conduct. This introduction into the national and international "discourse" within the IHL regime ensures that these armed groups become susceptible to many of the same forces promoting compliance which mold the conduct of states. In light of the fact that these non-traditional subjects of international law purport to exercise certain characteristics of sovereignty normally reserved for the state,<sup>641</sup> this progressive development in international law and relations is neither inappropriate nor unwarranted. Needless to say, the monitoring of the guerrillas and the paramilitary groups by the state and non-governmental actors participating in the compliance process must be maintained if not intensified in order that their conduct may also be brought more into line with the dictates of IHL.

## CONCLUSION

The bottom line remains that the parties to the conflict in Colombia generally do not respect humanitarian principles on the battlefield or in practice. Thousands upon thousands of Colombians continue to fall victim to the violation of the most basic humanitarian guarantees, with little legal protection or recourse. Such abuse and constant threat from all the armed groups participating in the conflict converts the Colombian civil conflict into a full-fledged humanitarian crisis. The worst perpetrators, by and large, go free, and are even considered heroes by their sympathizers. In light of the prevailing situation, one might well ask: "Why does *acceptance* of IHL matter?"

I have argued that despite the harsh and undeniable realities of the war in Colombia, there has been progress made in the advancement of the humanitarian cause. It has not been my intent to paint a rosy picture of the Colombian situation. My objective has

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641. See *supra* Part II.B.2.

been simply to place the case in proper perspective, coming at it from an alternative angle that emphasizes the progressive construction and management of compliance with IHL rather than its enforcement in conventional terms. The broad acceptance of IHL by the parties, and within Colombian society in general, despite the practical difficulties that continue to impede its application, is a tangible step in the right direction. It is also a condition *sine qua non* for achieving the twin goals of full implementation of IHL and substantial compliance with its norms. It is likely that this paradigm will be equally as relevant to the analysis of other internal conflicts taking place in the world today—or in the future.

One final observation is in order concerning the conventional wisdom relating to the issues of application and interpretation addressed in Part II. The Colombian case study as analyzed indicates that the formulation of new rules is not necessarily the most viable solution to the problems examined with respect to these issues. It suggests that efforts are better directed at deepening the interpretation and promotion of existing humanitarian norms, rather than emphasizing their deficiencies or dismissing them as unsatisfactory. The fact is that the observance of even the most basic guarantees reflected in existing instruments would represent an enormous contribution in practical terms to the protection of civilians and other potential victims of internal armed conflict. It is imperative that greater scholarly analysis be brought to bear on issues arising from the application of these humanitarian norms in order to lay the theoretical bases for a clearer understanding of the real potential for practical application which they possess. The potential of existing humanitarian law to protect the victims of internal wars should not be minimized; it should be recognized, developed, and eventually made reality.