

The law of armed conflict and its application in Colombia*

by **Hernando Valencia Villa**

I

Like war itself, which was one of the first and will undoubtedly be the last of mankind's social activities, the effort to regulate violent confrontations has a long history. Indeed, the laws of war in ancient China, 400 and 500 years before Christ, the chivalry of mediaeval knights, and the modern law of armed conflict, which started to take shape in the mid-nineteenth century, are but a few examples of the countless attempts made by different political regimes and legal systems to humanize the use of weapons as a means of settling disputes between States, and even between rulers and those they govern. Colombia is no stranger to this civilizing tradition. On the contrary, its history contains a number of illustrious precedents. The fact that they have fallen into oblivion makes them no less binding on the parties to the conflict ravaging the country at present.

On 25 and 26 November 1820, the recently constituted Republic of Colombia signed two treaties with Spain, the *Tratado de Armisticio y Suspensión de Armas* (the Treaty of Armistice and Laying-down of Arms) and the *Tratado de Regularización de la Guerra* (the Treaty to Regulate Warfare). Foreign specialists cite both as the first modern examples of the law of armed conflict, or *jus in bello*. Signed by

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Bolívar and Morillo in Trujillo (Venezuela) to “avoid bloodshed whenever possible”, the treaties were rediscovered around 1914 by French jurist Jules Basdevant, who drew attention to them in a famous article published in the *Revue générale de droit international public*.¹ Basdevant considered that the 1820 treaties, which contained innovative provisions on the exchange of prisoners of war and humane treatment for the sick and wounded in the field, were of exceptional importance because they constituted the first known application of the customs of war to civil strife, or what we would now call a war of national liberation. What is more, he presented the second treaty, the one “regularizing” war, as a “convention between the Sovereign’s representative and his rebel subjects whose status as belligerents was thereby recognized”. He pointed out that the Colombian Commissioners, Antonio José de Sucre, Pedro Briceño Méndez and José Gabriel Pérez, had proposed an article stating that “It is in civil war that the application of the law of nations should have its greatest scope and that humanity claims most imperatively the application of its precepts”.² The proposal was tuned down by the Spanish negotiators.

A generation later, General Tomás Cipriano de Mosquera again introduced the law of nations as a moderating set of rules in internal armed conflict, with the express purpose of humanizing civil war by distinguishing between combatants and non-combatants. During the 1860-1861 civil war, the only one in Colombia’s history won by the insurgents, Mosquera, the leader of the Liberal party’s radical faction, signed three truce agreements with the forces of the Conservative government for the suspension of hostilities and the exchange of the wounded and prisoners of war: the *Pacto de Chinchiná* (27 August 1860), the *Esponsión de Manizales* (29 August 1860) and the *Armisticio de Chaguani* (3 March 1861). These agreements were known collectively as sponsions (from the Latin *sponsio*, or solemn promise), which under classical international law are engagements on behalf of a State undertaken by an unauthorized agent. This, obviously, was the case of the truce agreements between Mosquera’s troops and the regular army. President Ospina Rodríguez refused to ratify them, all hope of reconciliation was lost, and the conflict ended only with the *coup d’état* of 18 July 1861, when the rebel leaders made a triumphant entry into Bogotá.

¹ See “A Little-Known Convention on the Law of War”, *International Review of the Red Cross*, No. 160, July 1974, pp. 344-354.

² *Ibid.*, pp. 346 and 347.

The advent of the federal system in Colombia, however, did not bring a halt to attempts to humanize war by incorporating the law of nations into internal legislation. Nor did it spell the end of the chronic disruption caused by armed clashes. For this reason, those who drafted the constitution of the United States of Colombia insisted on institutionalizing the application of the ancient laws and customs of international war in internal warfare. The minutes of the Rionegro Convention (session of 5 May 1863) mention that citizens Tomás Cipriano de Mosquera and Salvador Camacho Roldán proposed a new article for inclusion in the constitution. This article is worth printing in its entirety, for it constitutes a compendium of international humanitarian law which the country has forgotten or chosen to ignore:

“The United States of Colombia do not recognize political crimes, only political errors, insofar as no crime has been committed in violation of individual guarantees. When the inhabitants of one State rise up for reasons of domestic differences and marshal troops to overthrow the authorities, there shall be a recognized state of civil war and the belligerents shall be under the obligation to respect the law of war and to wage war in accordance with the principles recognized by civilized peoples.

It is not permitted to wage war to the death, to poison or assassinate enemies, to kill prisoners, to burn buildings and fields, to rape women, or to pillage property. Persons committing such excesses shall be charged with criminal offences and subject to trial under the laws of war. Persons who are neutral in the struggle, children, women and the elderly, and foreigners, shall be immune from attack, and attacks on any such person shall be considered as acts punishable by the law of war. Prisoners shall be exchanged and messengers respected. There shall be a right to suspend hostilities and to agree to armistices and conventions for the restoration of peace. Any party violating these principles renders itself subject to the laws of war of talion and reprisal, but no such measures may be taken against the relatives, partisans or political or personal friends of the offenders. Persons taking such measures render themselves guilty of criminal offences.

Colombians breaching these principles shall be tried as enemies of humanity and their acts shall not be considered to be political errors.

The damage inflicted on the enemy shall not exceed that permitted by the law of war as a means of obliging him to make peace. Nor shall letters of marque be given to foreign vessels, and any such vessels armed by a political party shall be considered to be pirate vessels.

*The National Executive shall appoint a commission of legal advisers and statesmen, up to eleven individuals, to draw up a treatise on natural international law and the law of war to serve as a reference in the United States of Colombia. The treatise shall be used to resolve questions of equity which may arise, and all related procedures and judgments shall be within the competence of the Supreme Court.”*³

Mosquera and Camacho Roldán's ambitious initiative was later replaced by Article 91 of the Rionegro Constitution, which remained in force for almost a quarter of a century. The wording of this article is equally surprising:

“The law of nations is part of national legislation. Its provisions shall govern in particular cases of civil war. Consequently, a civil war may be ended by treaty between the belligerents, who shall respect the humanitarian practices of Christian and civilized nations.”

The men of the Regeneration, who were at the root of the “black legend” obtaining to this day about the federal experience, did not share the radical Liberals' humanitarian ideals regarding internal public order and adopted, in its stead, the unfortunate disciplinary provision of the state of siege mentioned in Article 12 of the Constitution. However, in spite of their policy of reaction and restoration, they were unable to prevent reference being made to the law of nations as a complementary order moderating government action when political peace was disturbed by external war or internal strife. In that event, as has always been maintained by democratic opinion and as recognized by the Supreme Court in its decision of 16 June 1987, the law of nations confers no additional or exceptional powers on the Colombian government or any other government involved in a non-international armed conflict or faced with internal disturbances and tension. Quite to the contrary, the law of nations, or public international law, simply sets limits and imposes obligations on a government purporting to invoke its rules with a view to controlling internal disturbances or dealing with armed insurrection by legal, i.e. civilized and civilizing, means.

The most remarkable thing about these national precedents for the humanization of war, including civil war, is that they emerged at about the time when modern international humanitarian law was being shaped around two traditions: the philanthropic concern of the Swiss Henry

³ See *Constitución Política para los Estados Unidos de Colombia* (1863), facsimile edition, Universidad Externado de Colombia, Bogotá, 1977, folios 275 and 276.

Dunant after he witnessed the battle of Solferino (1859), which gave rise to the International Red Cross Movement; and the thought and codification work of the German-American Francis Lieber on the humanization of irregular warfare, which resulted in his precedent-setting opuscule of 1862 on the application of the laws and customs of conventional warfare in guerrilla war and the well-known General Order No. 100 of 1863, whereby President Lincoln's government gave effect to the first military code to humanize civil strife. The two currents converged in the 1864 Geneva Convention, considered to be the official source of the entire body of the contemporary law of armed conflict. It contained multilateral obligations with regard to the protection of victims of war and gave rise to the two main branches of current *jus in bello*: the law of Geneva, or international humanitarian law, and the law of The Hague, or the law of war.

It would be remiss of us to examine each of these standard-setting traditions and their application in Colombia without first mentioning another attempt to regulate war in the country: the 1881 Military Code, the extensive Book IV of which includes not only specific provisions on the conduct of hostilities and the treatment of victims and prisoners of war, but also the official and complete texts of the 1864 Geneva Convention and the 1868 Saint Petersburg Declaration, which for the first time prohibited the use of certain weapons and types of ammunition. This direct incorporation of two basic instruments of the then emerging law of armed conflict, decided on by the legislator of the time (the 1881 Code was brought into force by a decree of the First Republic), bears eloquent witness to the legal knowledge and, more important, the humanistic, humanitarian ethic of the country's last radical governments. But this was also the time when the federal wars were lost—probably the political event that has had the greatest repercussions on national life in Colombia, as Gabriel García Márquez, the historian of the Colombian soul, recently reminded us.⁴

II

The law of war is contained in the three 1899 and the thirteen 1907 Conventions of The Hague. It governs means of waging war and the hostilities themselves and is based on three fundamental principles:

⁴ See *Semana*, No. 358, Bogota, 14-20 March 1989, p. 31.

- 1) hostilities may be directed only against combatants and military objectives;
- 2) means of warfare which cause superfluous or unnecessary harm are prohibited;
- 3) perfidy and dishonourable conduct are prohibited.

The law of The Hague therefore prohibits particularly vicious weapons such as explosive bullets, flamethrowers and poison gas, and chemical and bacteriological weapons. However the ultimate weapon, the atomic bomb, has not been prohibited because of the balance of terror on which the established disorder we call international order is based. And traditional armed struggle has degenerated to such an extent—terrorist tactics (torture, genocide, forced disappearances), paramilitarism and vigilantism now being a matter of course—that almost all the rules of the law of war have become meaningless.

Colombia is not a party to any of the 16 instruments composing the law of The Hague. The military law in force in the country utterly ignores the question of the humanization of war and, what is worse, both regular and irregular troops increasingly tend to commit extremely violent acts which are unworthy not only of civilized warfare but also of so-called military honour.

For its part, international humanitarian law protects civilians who are not taking part in the fighting, in particular the victims of international and non-international conflicts. It is set down in the four 1949 Geneva Conventions and their two Additional Protocols of 1977. Colombia is party to the Conventions, which were incorporated in national law by Decree 5 of 1960, but not to the Protocols. Although generally speaking the Conventions preserve human rights in international armed conflicts, some of their provisions are also applicable in different kinds of internal conflicts. Protocol II of 1977 is not, however, applicable to the internal conflict in Colombia, since our Government has refused for over a decade to ratify it and submit it for approval to Congress, on the dubious grounds that doing so would give the groups of insurgents fighting the State for the past quarter century the status of belligerents. This interpretation on the part of the Government has given rise to intense debate in recent months.

It is to be hoped that the present Colombian government, in the light of the instruments of humanitarian law applicable in civil strife, will show greater political will to honour the country's external commitments and, at the same time, regain the initiative in the democratic management of public order. A government which claims to be legiti-

mate cannot overlook the fact that Article 3 common to the 1949 Geneva Conventions provides for the full application of humanitarian standards, whether set down in the Conventions or customary, in an internal conflict without that application affecting or modifying the status of the combatants. This means, to put it plainly, that the use of the law of Geneva to humanize the guerrilla war in Colombia cannot be interpreted as, nor can it give rise to, recognition of the rebels as belligerents.

In this respect, the International Court of Justice in The Hague has repeatedly pointed out that the law of armed conflicts as a whole is part of *jus cogens*, or the customary law of nations, and as such must be respected by all civilized members of the international community, even States which are not signatories to the instruments of Geneva and The Hague.⁵ This is also the meaning of the Martens Clause, which reads:

*“... in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized people, from the law of humanity, and the dictates of the public conscience.”*⁶

In any case, it is paradoxical that the insurgents themselves should be the first to emphasize that the Conventions and the Protocols should be applied to humanize the guerrilla war being waged in the country with greater ferocity and violence with each passing day. Both the law of Geneva and the law of The Hague contain many provisions which the State and its armed forces, and civilian society and its movements and organizations, could use to alleviate suffering, avoid deaths, distinguish between combatants and non-combatants, and pave the way for confidence and understanding between the insurgents and the establishment with a view to the democratic reconciliation of Colombians.

III

We must therefore plead for the humanization of the guerrilla war in Colombia, but this should not be interpreted as an obstacle to the search

⁵ See Rosemary Abi-Saab, “El Derecho Humanitario según la Corte de La Haya”, *Boletín de la Comisión Andina de Juristas*, No. 17, Lima, February 1988.

⁶ See César Moyano Bonilla, “El Derecho Humanitario y su Aplicación a los Conflictos Armados”, *Universitas*, No. 72, Bogotá, June 1987, p. 204.

for a negotiated settlement between the government and the insurgents. Humanizing the struggle does not mean legalizing or prolonging it, and even less, as stated above, granting the status of legitimate combatants to the different groups of the armed opposition. It is, rather, an attempt to give the struggle a moral dimension, no matter how incongruous this statement may sound to some people, first by introducing the basic distinction between combatants and non-combatants which is the keystone of all international humanitarian law, and then by laying down minimum standards for regular fighting which are acceptable to and accepted by the parties to the conflict. For this, the State must regain its legitimate monopoly of force throughout the territory and over the entire population. This implies that the State must not only maintain public order through democratic process and punish crimes by State justice, but also ensure by all means possible that paramilitary and self-defence groups do not take the place of the authorities in clashes with insurgents or take the kind of police or preventive action which private individuals can never take without upsetting the democratic rule of law. This new legitimization of the country's institutions must prepare the way for renunciation by all combatants, whether they belong to regular or irregular forces, of the criminal practices they have engaged in during these recent years of spiralling violence. That the government's agents must obey this dictate of civilization and humanity seems obvious for clear legal and moral reasons related to the constitutional responsibility for democratic order and human rights incumbent on the government. As for the insurgents, only by engaging in open and honourable combat against the armed forces of the dominant social sector can they hope to justify themselves ethically in the eyes of the non-combatant civilian population, in which sovereignty is vested and which alone has authority to replace those in power or change institutions. None of these tasks and opportunities could in any way hinder the parties in conflict in their simultaneous search for common ground to end the war and negotiate peace, or at least a truce. Moreover, any peace process would greatly benefit from the humanization of the fighting. There is no point in avoiding all recourse to humanitarian law and allowing the conflict to escalate and degenerate, when there is no possibility of a military victory on either side and it is becoming clearer every day that the victims of the killing are innocent, defenceless Colombians.

Now, given that the law of Geneva is for the most part incorporated in Colombian legislation and could therefore be used to mitigate the harmful effects of the guerrilla war on the unarmed citizenry, what would be the implications of its application in the country's

present situation? The Chilean legal expert, Hernán Montealegre, in line with current thinking, has this to say:

*“While the law of war overrides internal law and legally absorbs the conflict, determining the status of the parties, international humanitarian law co-exists with internal law, which continues to be generally applied and does not affect the legal status of the parties to the conflict.”*⁷

This means that the 1949 Geneva Conventions, in particular their common Article 3, can be immediately and fully applied, and the 1977 Additional Protocols speedily and unconditionally ratified, as demanded by Colombian public opinion. Neither measure would have any effect on the status of the parties to the conflict. The same does not hold true for the law of The Hague, which when invoked raises the thorny problem of recognition or granting of the status of legitimate belligerents to the rebels in respect of the Colombian State, other States and international intergovernmental organizations. Three conditions must be met before an insurgent or irregular force can be recognized:

- 1) there must be hostilities or a relation of war between the State and the rebels;
- 2) there must be an organized rebel force which controls part of the territory and is in a position to apply the laws and customs of war;
- 3) there must be express or tacit recognition of the uprising.⁸

In practice, the Colombian case seems to be one of *de facto* recognition, with limited rights, of a simple insurrection or state of belligerency, as defined by Verdross.⁹ It is indeed a moot point whether the guerrilla groups have real territorial or only political control, as the National Liberation Army itself affirms,¹⁰ and above all whether the rebels are willing to wage war more humanely. There can be no doubt that the last three governments have *de facto* recognized in different ways the different irregular armies as insurgents, rebels or belligerents. The Turbay administration in 1980 negotiated with M-19 for the release

⁷ Cited by Mauricio Hernández Mondragón, *Derecho Internacional Humanitario: Aplicación en los Conflictos Armados Internos*, mimeograph, Bogotá, November 1988.

⁸ See Alfred Verdross, *Derecho Internacional Público*, Aguilar, Madrid, 1980, pp. 190-194, and James E. Bond, *The Rules of Riot: Internal Conflict and the Law of War*, Princeton University Press, Princeton, 1974, pp. 34 and 53.

⁹ Alfred Verdross, *op. cit.*, p. 193.

¹⁰ Letter from the ELN (National Liberation Army) to López, *La Prensa*, Bogotá, 16 February 1989, p. 9.

of the diplomats held in the embassy of the Dominican Republic;¹¹ in 1981 it exercised the right of maritime arrest on the *Karina*, a merchant vessel sailing under the Panamanian flag and transporting contraband weapons for M-19.¹² The Betancur administration signed five armistice agreements with four armed organizations (FARC, M-19, EPL and ADO) in 1984, 1985 and 1986. In 1986 the Attorney General, speaking before the House of Representatives, charged the President of the Republic and the Minister of Defence with violating the law of nations and international humanitarian law in the battle for control of the *Palacio de Justicia*. In 1987, the Barco administration ratified the truce agreements with the FARC and at the beginning of the same year signed a joint communiqué with M-19.

In this complex environment of conflicting rights and crumbling honour in war, the law of armed conflict is not the solution to all our problems. But it is a civilizing and humanizing force which is well worth using, and the current outcry in civilian society would seem to make calls for its application a matter of national purpose.

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¹¹ See Luis Carlos Pérez, *La Guerrilla ante los Jueces Militares*, Editorial Temis, Bogotá, 1987, pp. 108-126.

¹² See Michael Akehurst, *Introducción al Derecho Internacional*, Alianza Editorial, Madrid, 1986, p. 350; A. Verdross, *op. cit.*, pp. 447-450; and Germán Castro Caycedo, *El Karina*, Plaza & Janés, Bogotá, 1986.

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