

# International humanitarian law in Colombia: Going a step beyond

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## Abstract

*Ever since the first quarter of the nineteenth century, Colombia has shifted from one war to the next, be it the War of Independence, the fierce confrontations between liberal and conservative parties or the countless conflicts among guerrillas, paramilitary groups and the State. These wars have brought along a unique contribution to the development of international humanitarian law (IHL). The purpose of this article is to explore the myriad of ways in which Colombia has implemented (and at times made progress on) IHL rules, and to analyze how different conflicts have led the country to explore issues such as the protection of minors, the meaning of the principle of precaution, the compensation of armed conflict victims and the creation of some rather sophisticated transitional justice mechanisms.*

**Keywords:** Colombia, international humanitarian law, protracted armed conflict, conflict classification, use of force, nexus to the conflict, principle of precaution, child recruitment, protection of minors, State

\* The views expressed here are those of the authors and do not necessarily reflect the position of Colombia's Special Jurisdiction for Peace or that of the ICRC. The authors would like to warmly thank Monica Angarita, Legal Adviser at the ICRC's Delegation in Colombia, and María Catalina Usta, Assistant at the Special Jurisdiction for Peace, for their thorough research assistance.

responsibility, compensation of war victims, internally displaced people, transitional justice system, amnesties, prosecution of war crimes, search for the missing.

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Never had a war-torn nation demonstrated such altruism. Destiny bestowed upon Colombia the glory of giving the world lessons not only with regard to courage and determination, but also humanity, and the above took place in the mist of all the hatred and rage that the right of reprisals against one's enemies had spurred in everyone's hearts.

Pedro Briceño Méndez, 28 November 1820<sup>1</sup>

## Introduction: A unique tradition of the laws of war

It is a much-repeated mantra among international humanitarian law (IHL) scholars that “the roots of the modern law of war lie in the 1860s”.<sup>2</sup> The 1861 Lieber Code – a military manual prepared on behalf of President Lincoln during the American Civil War – and the 1863 Geneva Convention are often cited as the origin of present-day IHL.<sup>3</sup> Despite the unprecedented nature of both instruments, our traditionally eurocentric narrative tends to disregard other seminal experiences that also contributed to shaping this branch of public international law. This is particularly true in the case of Colombia, one of the countries that has arguably contributed the most to the development and practical implementation of IHL.

The first example of this long-lasting tradition dates back to 1820, four decades before the notorious battle of Solferino or the American Civil War. At that time, Colombia was entangled in its War of Independence against the Kingdom of Spain, a conflict marked by bloody confrontations that took place between 1810 and 1824. By 1820, reprisals had become commonplace. The country was ravaged by death, wanton retributions and the systematic ill-treatment of all those deprived of liberty. It was in this context that Simón Bolívar, the first president of Colombia, and Pablo Morillo, the representative of the Spanish Empire, agreed upon the signing of an agreement, the Treaty of Trujillo, to regulate the war between the two parties and to put an end to its excesses.<sup>4</sup> In its preamble, the Treaty referred to “the laws of civilised nations”, as well as to

- 1 Letter from Pedro Briceño Méndez, Trujillo, 28 November 1820, cited in Daniel Florencio O'Leary, *Memorias del General O'Leary*, Book XVII, Imprenta de la Gaceta Oficial, Caracas, 1881, p. 580.
- 2 Burris M. Carnahan, “Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity”, *American Journal of International Law*, Vol. 92, No. 2, 1998, p. 213.
- 3 See, for example, Mary Ellen O'Connell, “Historical Development and Legal Basis”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, paras 117–118. See also Gary Solis, *The Law of Armed Conflict*, Cambridge University Press, Cambridge and New York, 2010, p. 39.
- 4 Jules Basdevant, “Deux conventions peu connues sur le droit de la guerre”, *Revue Générale de Droit International Public*, Vol. 21, No. 1, Paris, 1914, p. 17. For a refined historical account of this treaty, including the way in which it preceded the Lieber Code and the Battle of Solferino, see Alejandro

“liberal and philanthropic principles”.<sup>5</sup> In just fourteen brief articles, the Treaty encapsulated the bulk of modern IHL. It provided for the humane treatment of prisoners of war (PoWs), in accordance to their rank, and included an obligation to exchange them with PoWs of the adverse party “as soon as possible”.<sup>6</sup> Unlike the 1949 Geneva Convention III, the agreement considered that spies (“those in charge of exploring, observing, or gathering news on one of the armies to share it with the commander of the other”) should also be entitled to PoW status.<sup>7</sup> In order to ensure that these rules were respected, the parties agreed upon the need to appoint special “commissioners”, who should be granted access to PoW camps with a view to examining the situation of detainees and trying to “improve their condition and make it less dire”.<sup>8</sup>

Far from the sight of IHL scholars, the decisions made by men gathered in the remote Colombian village of Trujillo foreshadowed some of the features of the current system of Protecting Powers and of the monitoring role of the International Committee of the Red Cross (ICRC).<sup>9</sup> Similarly, long before the 1863 Geneva Convention, the belligerents of the Colombian War of Independence acknowledged the duty to treat the wounded and sick “with respect and twice as much consideration” and the need to provide them with “at least the same level of assistance, care and relief than that granted to the wounded and sick of the Party under whose control they are placed”.<sup>10</sup> In addition, the Treaty of Trujillo prefigured many other modern IHL norms, including the existence of limits to impose the death penalty upon a PoW,<sup>11</sup> the responsibility to dispose of the dead in an honourable manner<sup>12</sup> and the obligation to guarantee the liberty and safety of, and respect for, the civilian population.<sup>13</sup> It even foreshadowed the present obligation to respect and ensure respect for IHL.<sup>14</sup>

What is remarkable about this almost forgotten (and exhaustive) epitome of the laws of war is the fact that it did not constitute an isolated example. Throughout the nineteenth century, Colombia came back time and again to the spirit of the 1820 Treaty of Trujillo. For instance, during the 1860–61 Civil War between conservative and liberal factions, the parties signed three truce agreements providing, among other things, for the exchange of the wounded and sick and PoWs.<sup>15</sup> As a result of this

Valencia, *La humanización de la guerra: Derecho internacional humanitario y conflicto armado en Colombia*, Ediciones Uniandes and Tercer Mundo Editores, Bogotá, 1992, pp. 25–37.

5 The whole text of the Treaty of Trujillo, signed in 1820, can be found in D. F. O’Leary, above note 1, pp. 575–577.

6 Treaty of Trujillo, Arts 2, 3, 8.

7 *Ibid.*, Art. 6.

8 *Ibid.*, Art. 9.

9 See common Article 8/8/8/9 and common Article 9/9/9/10 of the 1949 Geneva Conventions.

10 Treaty of Trujillo, Art. 4.

11 *Ibid.*, Art. 7.

12 *Ibid.*, Art. 12.

13 *Ibid.*, Art. 11.

14 *Ibid.*, Art. 13. For more details on the scope of this obligation, see Knut Dörmann and Jose Serralvo, “Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations”, *International Review of the Red Cross*, Vol. 96, No. 895–896, 2014.

15 Hernando Valencia Villa, “The Law of Armed Conflict and its Application in Colombia”, *International Review of the Red Cross*, Vol. 30, No. 274, 1990, p. 6.

conflict, Colombia approved the 1863 Rionegro Constitution, whose Article 91 established that “the law of nations [was] part of national legislation” and that “its provisions shall govern, in particular, cases of civil war”.<sup>16</sup> As shown by the negotiating history, the drafters of the Rionegro Constitution had in mind very broad views regarding the way in which the so-called law of nations limited the means and methods of warfare. The initial draft version of Article 91 – which was deemed excessively detailed and thus rejected – prohibited the use of poison, the murder of prisoners, the burning of buildings or fields, sexual violence against women and the pillage of private property.<sup>17</sup> It also provided for the protection of civilians – including children, women, the elderly and foreigners – and limited the right of reprisals.<sup>18</sup> By way of reminder, it should be noted that the Rionegro Constitution was approved at the same time as the 1863 Geneva Convention (which did not really restrain the conduct of hostilities) and preceded by more than a decade the 1874 Brussels Declaration concerning the Laws and Customs of War, which is often cited as one of the first modern attempts to regulate what was later known as Hague law.

Another example of this unwavering humanizing trend is the exchange of letters between the two commanders that fought against each other at the Battle of Garrapatas, one of the turning points of the 1876 Colombian Civil War, which once again saw confrontation between liberal and conservative factions. On 18 November, the day before the fighting took place, General Vélez – one of the leaders of the conservative rebels – sent a letter to his counterpart, with these opening lines:

I wish to know whether the ambulances, the wounded and those who have surrendered are sacred for you and the army under your command, so that the day of the battle I can adapt my conduct to the one observed by you and your men.<sup>19</sup>

The reply of the liberal General Santos Acosta left no room for doubt:

Our [1863 Rionegro] Constitution and the law of nations are binding upon both you, as chief of a rebellion, and myself, as constitutional representative.

Since the respect of medical units in all its forms is one of the rules of this body of law, there is nothing to be discussed. With regard to the compassion due to the prisoners and those who surrender, I hope that you will harbour the same feelings that inspire me and my army.<sup>20</sup>

By the end of the twentieth century, Colombia’s ripened tradition of incorporating international law, and in particular IHL, as part of its domestic legal system had no trouble finding its way into the 1991 Constitution – which is currently in force.

16 *Ibid.*, p. 8.

17 *Constitución Política para los Estados Unidos de Colombia de 1863*, Facsimile Edition of the Universidad Externado de Colombia, 1977, pp. 275–276.

18 *Ibid.*, p. 276.

19 Iván Orozco Abad, *Combatientes, rebeldes y terroristas: Guerra y derecho en Colombia*, Editorial Temis, Bogotá, 2006, p. 126.

20 *Ibid.*

Nowadays, Colombia is an almost perfectly monist system.<sup>21</sup> Article 93 of the 1991 Colombian Constitution recognizes that international treaties and agreements ratified by Congress have priority over domestic law. Article 214, regulating states of emergency, explicitly mentions that “the rules of international humanitarian law will be observed”. Finally, Colombia’s Constitutional Court has issued countless sentences arguing that IHL is binding “in and of itself, even without prior ratification or in the absence of specific regulations”.<sup>22</sup> This theory has allowed Colombian judges to maintain that international obligations and fundamental rights are part of the so-called “Constitutional Block”, thus upholding a wealth of IHL elements in the domestic order, for instance regarding the notion of command responsibility.<sup>23</sup>

All of the above has laid the groundwork for the emergence of one of the most sophisticated legal systems in the world when it comes to the promotion of the laws of war. The purpose of this article is to provide an overview of the myriad of ways in which Colombia’s contemporary practice has implemented and developed IHL rules, often going beyond what is actually provided for in international treaties and custom. First, the article will address Colombia’s efforts to determine IHL applicability, with particular reference to jurisprudence elucidating the notion of nexus to the conflict and outlining the status of rebels. Second, the article will focus on some of the solutions found by the country’s legislative branch and judiciary for ensuring respect for obligations related to the vicissitudes of the battlefield, especially when it comes to the protection of minors and the implementation of certain rules on the conduct of hostilities. Later on, the article will focus on mechanisms giving expression to the State’s responsibility vis-à-vis victims of serious IHL violations, with reference to the plight of Colombia’s internally displaced people. Finally, the article will explore the country’s experience with transitional justice, linking it to IHL rules such as the obligation to prosecute war crimes, the granting of amnesties at the end of hostilities, and the obligation to search for the missing.

## IHL applicability and the nexus to the conflict

The logical precondition to implementing, respecting and developing IHL is to recognize its applicability. Like many other countries undergoing situations of protracted violence, Colombia has occasionally flirted with the idea of denying the existence of an armed conflict – and thus disputing the relevance of the laws

21 Two main theories have tried to elucidate the interplay between domestic and international law. On the one hand, dualism considers that “the rules of the system of international law and municipal law exist separately and cannot purport to have an effect on, or overrule, the other”. So-called monists, on the other hand, accept a “unitary view of law as a whole” and oppose a strict division between a State’s internal legal system and the international legal order. See Malcolm N. Shaw, *International Law*, 7th ed., Cambridge University Press, Cambridge, 2014, pp. 93–94.

22 Constitutional Court of Colombia, *Sentence C-574*, 1992.

23 Rodrigo Uprimny Yepes, “El bloque de constitucionalidad en Colombia: Un análisis jurisprudencial y un ensayo de sistematización doctrinal”, *Dejusticia*, 12 December 2005.

of war.<sup>24</sup> However, the general rule has been the exact opposite. All of the branches of government have continuously acknowledged the validity of IHL, be it through laws, military manuals, ministerial decrees or judicial decisions.

At the time of writing, the ICRC has classified five non-international armed conflicts (NIACs) in the country. All except one are taking place between the Government of Colombia and the following organized armed groups: the National Liberation Army (Ejército de Liberación Nacional, ELN), the Popular Liberation Army (Ejército Popular de Liberación, EPL), the Gaitanistas Self-Defence Forces of Colombia, and certain armed structures of the former Revolutionary Armed Forces of Colombia–People’s Army (Fuerzas Armadas Revolucionarias de Colombia–Ejército del Pueblo, FARC-EP) that did not join the 2016 peace process.<sup>25</sup> The fifth NIAC involves two armed groups, the ELN and the EPL, who are fighting each other in the Catatumbo region bordering Venezuela. Before characterizing these confrontations as armed conflicts, the ICRC assessed the two “traditional” requirements established by the jurisprudence of international tribunals – namely, the intensity of the violence and the level of organization of the parties.<sup>26</sup> These very same criteria are observed by Colombia’s executive branch. Ministerial Directive 015, issued in 2016 by the Ministry of Defence, starts by recalling the indicative elements of a NIAC as laid down in the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and moves on to clarify that IHL will not apply to situations below this threshold, such as riots or internal disturbances.<sup>27</sup> Furthermore, in a continent where some States have questioned the existence of an armed conflict based on the absence of political motivation of the groups against whom they are fighting, Colombia’s executive branch has adhered without reservations to the most widely accepted view on this matter, whereby “the question of whether a situation of violence amounts to a non-international armed conflict should ... be answered solely by reliance on the criteria of intensity and organization”.<sup>28</sup> Indeed, Directive 015 considers that “[t]he purpose or motivation of the [armed] group will not be relevant to establish the resort to lethal use of force under an IHL framework”.<sup>29</sup>

24 See, for example, Fernando Travesí and Henry Rivera, “Delito político, amnistías e indultos”, *ICTJ Análisis*, March 2016, p. 1. See also Rodrigo Uprimny Yepes, “¿Existe o no conflicto armado en Colombia?”, *Dejusticia*, July 2005.

25 ICRC, *Humanitarian Challenges in 2018*, Geneva, March 2018, pp. 1, 7.

26 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), para. 421. The ICRC Commentary, in turn, incorporates an array of jurisprudence from international tribunals; see, for example, ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Judgment (Trial Chamber), 7 May 1997, para. 562.

27 Republic of Colombia, Ministry of Defence, *Directiva 015 para expedir los lineamientos del Ministerio de Defensa Nacional para caracterizar y enfrentar a los grupos armados organizados*, 22 April 2016, pp. 5–7.

28 ICRC Commentary on GC I, above note 26, para. 451. For a different view on this matter, see Hans-Peter Gasser, “International Humanitarian Law: An Introduction”, in Hans Haug (ed.), *Humanity for All: The International Red Cross and Red Crescent Movement*, Henry Dunant Institute, Geneva, 1993, p. 555.

29 Republic of Colombia, Ministry of Defence, above note 27, p. 7.

If an armed group does not meet the criteria laid down in Directive 015 to trigger IHL applicability, the government will treat it in accordance with the United Nations Convention against Transnational Organized Crime.<sup>30</sup> A second ministerial directive further elaborates on the procedure for carrying out this determination.<sup>31</sup> Directive 016 tasks the so-called Integrated Intelligence Center against Organized Criminal Groups and Organized Armed Groups – made up of both the Military Forces and the National Police – to “receive, combine and assess the information on [armed groups]” and make a proposal with regard to the pertinence of using an IHL framework.<sup>32</sup> This proposal is then validated by the Joint Intelligence Board, which in turn submits it to the National Security Council. The latter has the final word on the application of the laws of war.<sup>33</sup>

Despite the existence of detailed criteria and a well-grounded methodology, the fact that Colombia is affected by a myriad of situations of violence – some of which do not reach the minimum levels of intensity and/or organization mentioned above – has often sown confusion on the applicable legal framework. In a context where parties to a NIAC coexist with many other armed actors, such as urban gangs, it can be troublesome to ascertain whether a particular act is actually related to the conflict and therefore falls under the scope of IHL. Against this backdrop, the importance of determining the nexus to the conflict has gained importance over the last few years.

### The notion of nexus to the conflict

Although IHL applies to the whole territory of a country undergoing one or several NIACs, it will only regulate acts that are actually related to the conflict.<sup>34</sup> In particular, and as pointed out by the ICTY, a specific act will only be governed by IHL if it is “closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict”.<sup>35</sup> This is what is often known as the nexus to the conflict. Most of the reflections that have tried to shed light on this notion evolved around the application of IHL to the conduct of hostilities.<sup>36</sup> Colombia’s Constitutional Court has explored this very same question from a completely different perspective – namely, the need to compensate victims of war.

Customary IHL provides that “a State responsible for violations of international humanitarian law is required to make full reparation for the loss or

30 *Ibid.*

31 Republic of Colombia, Ministry of Defence, *Directiva 016 sobre instancias de coordinación Directiva 015 de 2016*, 17 May 2016.

32 *Ibid.*, pp. 2–4.

33 *Ibid.*, pp. 4–5.

34 ICRC Commentary on GC I, above note 26, para. 460.

35 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 70. This interpretation has also been followed by the International Criminal Court (ICC). See ICC, *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Trial Judgment, 2014, para. 1176; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Trial Judgment, 2016, paras 142–144.

36 See ICRC Commentary on GC I, above note 26, paras 460–463.

injury caused”.<sup>37</sup> To give effect to this provision, Colombia enacted the 2011 Law to Assist and Compensate Victims of the Internal Armed Conflict, also known as the Victims’ Law. In accordance with this piece of legislation – to which we will return further below – the State shall treat as victims “persons who, either individually or collectively, have suffered harm ... as a consequence of violations of international humanitarian law ... which occurred in the framework of the internal armed conflict”.<sup>38</sup> The existence of a link to the conflict became a prerequisite for receiving the indemnities of the State. This, in turn, led to an array of legal debates. In a country with thousands of missing people and millions of forcibly displaced, the arduous task of determining whether certain conducts occurred (or not) “in the framework of the internal armed conflict” was eventually left to the judiciary. Colombia’s Constitutional Court was thus obliged to tackle the notion of nexus to the conflict. This question, in turn, has an impact on the scope of application of IHL – and, therefore, on the legal classification of the conflict.

Earlier jurisprudence anteceding the Victims’ Law had considered – in line with the ICTY – that “the conflict must not necessarily constitute the cause of the crime, but the existence of a conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it”.<sup>39</sup> To clarify the scope of application of IHL, Colombia’s Constitutional Court also resorted to a set of criteria established a few years earlier by international tribunals – for instance, the fact that the perpetrator was a “combatant”, the fact that the victim was a “non-combatant”, the fact that the victim was a member of the opposing party or the fact that the crime was committed as part of or in the context of the perpetrator’s official duties.<sup>40</sup> Over time, however, the Court had to acknowledge that there were also grey areas in which it was burdensome to elucidate whether the act causing the harm was linked to the armed conflict or simply stemmed from ordinary violence.<sup>41</sup> To overcome these hurdles, the Court considered that, in case of doubt, the presumption must always be in favour of the victims – meaning, in this case, that a nexus to the conflict had to be acknowledged.<sup>42</sup> It also argued that the notion of nexus to the conflict should be construed in the broadest possible way, especially in situations in which applying IHL led to a more protective outcome.<sup>43</sup> In one of its most recent cases on this subject, Colombia’s judiciary restated its previous decisions and listed the following considerations:

37 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), pp. 537–550.

38 Law 1448 of 2011, “Por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno” (Victims’ Law), Art. 3.

39 Constitutional Court of Colombia, *Sentence C-291*, 25 April 2007. See also ICTY, *Prosecutor v. Dragoljub Kunarac Kovac and Zoran Vukovic*, Case No. IT-96-23, IT-96-23/1-A, Appeals Chamber, 12 June 2002, paras 58–59.

40 Constitutional Court of Colombia, *Sentence C-291*, 25 April 2007; ICTY, *Kunarac*, above note 39.

41 Constitutional Court of Colombia, *Sentence C-253A*, 29 March 2012.

42 *Ibid.*

43 Constitutional Court of Colombia, *Sentence C-781*, 10 October 2012.

1. First and foremost, the notion of armed conflict must be understood in the broadest possible manner – i.e., as opposed to a restrictive view of such situations, since the latter would violate the rights of the victims.
2. The authorities should take into consideration objective criteria to determine the nexus to the conflict, and use such criteria to decide whether an act should be excluded therefrom and attributed to common violence.
3. In the event of grey areas, it is paramount to weigh both the concrete case and the context before assessing whether there exists a “close and sufficient relationship” to the internal confrontation.
4. Finally, the authorities should apply the definition of “nexus to the conflict” that better protects the rights of the victims.<sup>44</sup>

All the above are but a few examples of the manner in which Colombia has dealt with the applicability of IHL and clarified the notion of nexus to the conflict, thus contributing to ongoing legal debates on the laws of war. However, as will be seen further below, the issue of the nexus to the conflict is now being revisited by Colombia’s Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, JEP). But before moving forward, it is worthwhile to say a word on the unprecedented history of the country’s criminalization of the act of rebellion.

### The status of “rebel” and its legal consequences

Under IHL applicable to international armed conflict, a combatant is someone who has “the right to participate directly in hostilities”.<sup>45</sup> This basically means that combatants must not be punished for the mere act of fighting, provided that they respect the limits imposed by the laws of war, including the rules on the means and methods of combat and the respect of people deprived of liberty.<sup>46</sup> In other words, if they respect such rules, combatants “may attack and be attacked; they may kill and be killed”.<sup>47</sup> However, States have always rejected the application of this “combatant’s privilege” to internal conflicts.<sup>48</sup> This stance has been based on States’ concerns about restraining their own ability to sanction rebels under their domestic legislation for belligerent acts.<sup>49</sup> Furthermore, States have wished to avoid “imply[ing] that their own armed forces are legitimate targets in a civil war”.<sup>50</sup> They have argued that applying the combatant’s privilege to a NIAC would be tantamount to accepting that the member of an organized armed group should not be punished for killing a soldier from the national armed forces or for

44 Constitutional Court of Colombia, *Sentence T-478*, 24 July 2017.

45 See Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 21 October 1950) (AP I), Art. 43(2).

46 Knut Ipsen, “Combatants and Non-Combatants”, in D. Fleck (ed.), above note 3, paras 301–302.

47 G. Solis, above note 3, p. 188.

48 Dieter Fleck, “The Law of Non-International Armed Conflict”, in D. Fleck (ed.), above note 3, para. 1202.

49 *Ibid.*

50 *Ibid.*

attacking a military base. Surprising as it may be, this was for many decades the position of the Colombian State.

A thorough analysis of the crime of rebellion under Colombian legislation goes well beyond the scope of this article.<sup>51</sup> We will simply illustrate through a few examples the way in which domestic criminal law was used to put into effect the laws of nations – and later IHL – in the context of a civil war, and all in a very *sui generis* manner.

As was seen in the introduction to this article, Colombia's nineteenth century was awash with conflict and confrontations. When the country enacted its 1890 Criminal Code, there was no doubt that rebellion, or the act of "raising in arms against the government, either to overthrow it, or to change the Constitution", had to be considered an offence.<sup>52</sup> This crime was nothing but a logical consequence of Colombia's history. What was unexpected is the fact that the same law considered that, as part of the act of rebellion, the rebels were somehow allowed to seize arms and munitions, recruit men, usurp official functions, collect taxes and fight against the constitutionally elected authorities.<sup>53</sup> In other words, fighting against the government was deemed a crime, but conducts intertwined (*conexas*) with the rebellion were not addressed as separate offences. Instead, they were simply seen as part of the crime of rebellion and led to no additional sanction.

The 1936 Criminal Code went one step further by considering that "rebels will not be responsible for death and harm caused on the battlefield", although – in line with the laws of war of the time – it explicitly prohibited murders outside the battlefield, arson, pillage, the poisoning of wells and reservoirs, and, "in general, all acts of ferocity and barbarism".<sup>54</sup> This meant that acts which violated IHL were prosecuted separately. A similar provision found its way into the 1980 Criminal Code,<sup>55</sup> and in fact, the 1980 Code was even broader – instead of referring to "death and harm caused on the battlefield", as done by its 1936 equivalent, it excluded from penal prosecution all acts related to the combat. This gave rise to much jurisprudence on the notion of combat. In general, courts admitted that acts taking place outside the fighting were covered by this exemption, "provided that they have a direct connection with the hostilities".<sup>56</sup> At the same time, the 1980 Criminal Code excluded from this exemption not only acts of ferocity and barbarism, but also acts of terror.<sup>57</sup>

51 For a more detailed historical account of this issue, see I. Orozco Abad, above note 19, pp. 99–192.

52 See Law 19 of 1890 enacting the Penal Code, Art. 169.

53 *Ibid.*, Art. 177.

54 See Law 95 of 1936 enacting the Penal Code, Arts 140–142.

55 See Law 100 of 1980 enacting the Penal Code, Art. 127.

56 Cited in I. Orozco Abad, above note 19, p. 177. Needless to say, the debate on the "connection" (*conexidad*) between the act and the rebellion is closely related to the debate on the nexus to the conflict. Leaving aside the question of compensating victims of war, the bulk of this debate took place while discussing the granting of amnesties, and it will be addressed in more depth in the section below on transitional justice.

57 See the last sentence of Article 127 of Law 100 of 1980 enacting the Penal Code.

All the above had two main consequences. On the one hand, it created some sort of “combatant’s privilege” for NIAC. If the member of an organized armed group acted in accordance with the laws of war, he or she might have been prosecuted for the act of rebellion, but other conducts – from the killing of a soldier to the destruction of legitimate military objectives – would have been subsumed as part of the rebellion itself. Moreover, punishments imposed for the crime of rebellion were usually very lenient.<sup>58</sup> On the other hand, these provisions led to unprecedented jurisprudential developments regarding the prosecution of war crimes. Well before other States had started to criminalize serious violations of IHL as part of their adherence to the Rome Statute of the International Criminal Court, Colombian judges gained a great wealth of experience sanctioning the perpetrators of breaches to the laws of war.<sup>59</sup> This was done by construing what should be understood by acts of ferocity and barbarism. According to Colombia’s Supreme Court:

Acts of ferocity and barbarism are those condemned by international humanitarian law and the laws of nations, precisely because they lead to unnecessary suffering due to the means and methods used, or because they imply hostility, affliction, fear or exposure to equally unnecessary damage to children, women, the weak or the disabled, and in general the civilian population.<sup>60</sup>

In some instances, the judges were far more specific. For instance, in February 1992 a member of an organized armed group planted a bomb in the city of San Vicente de Chucurí. Although the device exploded when a military convoy was passing by, it affected the civilians in the neighbourhood. Apart from killing one soldier and wounding a captain of the armed forces, the blast also put an end to the life of two young students and affected several other civilians. The bomb was filled with nail heads, screws and other pieces of metal. According to the judge in charge of the case, this act could not be seen as part of the rebellion because “the screws and other pieces of iron ... [were] aimed at aggravating the wounds and increasing the suffering of the victims affected by the explosion, rendering the act barbaric”.<sup>61</sup>

This long-standing tradition of incorporating certain domestic crimes as part of the act of rebellion came to an end in 1997, when the Constitutional Court ruled that the exemptions of the Criminal Code amounted to a “general clause of impunity” or a “general and indiscriminate amnesty”.<sup>62</sup> Nevertheless, by that time IHL had already permeated the whole Colombian legal system, from

58 Alejandro Aponte Cardona, “Civiles y conflicto armado en la jurisprudencia de la Sala Penal de la Corte Suprema”, *Revista de Derecho Penal y Criminología*, No. 19, 2007, p. 90.

59 *Ibid.*, pp. 91–97.

60 Supreme Court of Colombia, *Sentence 12.051*, 25 September 1996.

61 Supreme Court of Colombia, *Sentence 12.661*, 27 May 1999. For more jurisprudence on the definition of “acts of ferocity and barbarism”, see Alejandro Aponte Cardona, *Derecho penal internacional: Textos escogidos*, Pontificia Universidad Javeriana, 2014, pp. 256–259.

62 A. Aponte Cardona, above note 58, pp. 93–94.

the Constitution to the rulings of local judges. When in 2016 the JEP was tasked with investigating the alleged war crimes of the NIAC between the Government of Colombia and the FARC-EP, both its mandate and its understanding of international law were rooted in fertile ground.

## Limiting the consequences of war

For many decades, Colombia has striven to protect those who do not participate in hostilities – the civilian population – as well as those who no longer take part in the fighting – mostly detainees and the wounded and sick. One of the instruments used to accomplish this objective is the criminalization of certain conducts. The current Colombian Criminal Code includes a whole title on offences committed against “people and objects protected by international humanitarian law”.<sup>63</sup> It criminalizes, among other things, the murder of or sexual violence against protected persons, the act of torture of people deprived of liberty in the context of an armed conflict, perfidy, the use of unlawful means and methods of warfare, the pillage of dead bodies on the battlefield, and the hindering of humanitarian relief.<sup>64</sup> Together with the preventive nature of penal sanctions, Colombia’s judiciary has thoroughly analyzed *ex post facto* the conduct of the warring parties and has often attributed responsibility to one of them in the event of IHL violations. Furthermore, it has issued countless decisions requesting the State to take corrective measures, either to prevent future breaches of the laws of war or to compensate the victims of certain military operations. The Council of State – the supreme tribunal of the country when it comes to administrative issues – has been particularly active in this regard and has condemned the State on numerous occasions for acts such as the use of anti-personnel landmines, the killing of “non-combatants”, lack of respect for judicial guarantees, the carrying out of massacres, forced displacement, attacks against health-care personnel and the destruction of civilian objects.<sup>65</sup> Exploring the nuances of some of these issues would merit a separate article in itself, but by way of illustration, we will simply outline two particular matters of concern: the implementation of the principle of precaution when it comes to the location of police stations, and the obligation to protect minors.

### Police stations and the principle of precaution

IHL obliges a party to an armed conflict to take all feasible precautions “to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians

63 Law 599 of 24 July 2000 enacting the Criminal Code, Title II.

64 *Ibid.*

65 For a detailed account of this jurisprudence, see Council of State of Colombia, “Graves violaciones a los derechos humanos e infracciones al derecho internacional humanitario”, in *Jurisprudencia Básica del Consejo de Estado desde 1916*, Third Section, 2017, pp. 308–498.

and damage to civilian objects”.<sup>66</sup> This is part of the so-called principle of precautions in attack, which requests the warring factions, among other things, to suspend an attack if it turns out that the target is not a military objective and to give advance warning of any attack that might affect the civilian population, unless circumstances do not permit.<sup>67</sup> A second prong of this principle implies that those involved in the fighting “must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks” and, “to the extent feasible, avoid locating military objectives within or near densely populated areas”.<sup>68</sup> The latter has been applied in Colombia with regard to the placing of police stations.

Colombia’s Constitutional Court has held that the National Police possesses a hybrid nature.<sup>69</sup> On the one hand, it is a civil organ in charge of law enforcement. On the other hand, it participates in “counter-insurgency operations, thus fitting the category of combatants”.<sup>70</sup> According to the Court, the proximity to a police station in peaceful areas of the country can be seen as an additional safeguard for the civilian population. However, in more volatile regions, closeness to a police station “dramatically increases the risk for the civilian population”.<sup>71</sup> Indeed, and partly as a consequence of its role in “counter-insurgency operations”, organized armed groups have often launched attacks against the National Police, including police stations.<sup>72</sup> And since police stations have traditionally been located in the centre of urban areas – sometimes in the neighbourhood of schools, churches or civilian houses – these hostilities created a risk because of the launching of inaccurate improvised explosive devices and the hazard of stray bullets. To mitigate such risks, and arguing on the basis of IHL rules on the conduct of hostilities, the Constitutional Court called upon the government to “rethink traditional schemes of [urban] planning, designed for situations in which the level of violence could be countered by the police itself”, and in some cases, to remove police stations from urban centers.<sup>73</sup> The court concluded that “the civilian population must be exposed to the minimum risk possible, not only vis-à-vis ‘military’ operations in a strict sense, but also vis-à-vis any service provided by the State security apparatus”.<sup>74</sup> In addition, the Council of State further strengthened this position by developing the so-called theory of “exceptional risk”, according to which:

[The location of police stations can give rise to the responsibility of the State] because State agents participate and promote the harm caused in the framework of their constitutional mandate ... by exposing the community to

66 ICRC Customary Law Study, above note 37, p. 51.

67 *Ibid.*, pp. 60, 62.

68 *Ibid.*, pp. 68–74.

69 Constitutional Court of Colombia, *Sentence T-1206*, 16 November 2001.

70 *Ibid.*

71 *Ibid.*

72 See, for instance, “Hostigamientos de las FARC a la estación de Policía de Jambaló”, *El País*, 27 July 2012; “Atacaron con ‘taticos’ la estación de Policía de Toribío”, *W Radio*, 8 August 2018; “Diez policías resistieron ataques del ELN contra la estación de Los Angeles”, *RCN*, 22 December 2016.

73 Constitutional Court of Colombia, *Sentence T-1206*, 16 November 2001.

74 *Ibid.*

a situation of hazard .... Therefore, the risk generated due to the location of a representative of the State in the midst of an armed conflict, as well as the materialization of this hazard in the form of the harm caused to someone unrelated to the parties to the conflict, gives rise to the State responsibility, regardless of who was at the origin of the wrong-doing.<sup>75</sup>

### Sparing minors from the effects of the conflict

Another domain in which Colombia's legal regime has strengthened the safeguards afforded by international law is the protection of minors. Customary IHL prohibits the recruitment of child soldiers, and this is also a rule under treaty law. For instance, Article 4(3)(c) of Additional Protocol II to the Geneva Conventions states that "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities".<sup>76</sup> International human rights law (IHRL) has gone a step further. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, ratified by Colombia in 2005, provides that "States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities" and that "armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years".<sup>77</sup> All in all, international law strictly prohibits that children under 15 are involved in the conflict. However, even the more protective IHRL framework allows the State to voluntarily recruit teenagers between 15 and 18, while recommending that they do not take a direct part in hostilities.

Since 1993, Colombia has categorically precluded the recruitment of minors below 18 years of age into the armed forces of the State.<sup>78</sup> At the same time, the country's legislative branch has criminalized not only the recruitment itself, but also the fact of forcing minors to participate in hostilities in any manner. Article 162 of the 2000 Criminal Code considers that the crime of illicit recruitment will be committed by anyone who, "on the occasion and in the development of the armed conflict, recruits minors under eighteen (18) years old or compels them to *participate directly or indirectly* in the hostilities or armed actions".<sup>79</sup>

Once more, the above-mentioned provision has been construed very broadly by Colombia's Constitutional Court. Interestingly, this broad interpretation was carried out with full knowledge of the fact that domestic norms on this matter were actually more protective—as in other domains—than their international law

75 Council of State of Colombia, *Sentence No. 28711*, 27 September 2013.

76 See also AP I, Art. 77(2), applicable in international armed conflict.

77 See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, UN Doc. A/RES/54/263, 25 May 2000, Arts 1, 4(1).

78 See Law 48 of 1993, Art. 10, regulating compulsory military service.

79 Law 599 of 2000, Art. 162 (emphasis added).

equivalent. In a landmark ruling on the use of minors by organized armed groups, the highest tribunal of the country shared the following views:

[Recruitment of minors is prohibited] regardless of the tasks they are carrying out, since the participation or use of minors, either directly or indirectly, is tantamount to admitting them to the ranks of irregular armed groups. The notion of admission should be understood as the mere participation in the activities of the group, regardless of whether they are involved as combatants or not, thus going beyond the framework laid down in international law .... [The prohibition is] independent from the type of activities, that is, independent of whether they participate in the hostilities or serve as couriers, messengers, cooks, etc.<sup>80</sup>

A similar approach has been taken by the law regulating intelligence operations, which has also excluded minors from the duties it regulates,<sup>81</sup> as well as by the Code of Minors and Teenagers, which calls upon State authorities to protect minors from the consequences of war and armed conflict, from their recruitment or use by organized armed groups, and even from the scourge of anti-personnel mines.<sup>82</sup>

But as in any other armed conflict, and despite the existence of legal instruments to ensure respect for IHL on the battlefield, violations do still take place. Luckily, Colombia has also adopted many measures to protect the rights of victims.

## Compensating victims of war

As mentioned earlier, in 2011 Colombia enacted the so-called Victims' Law, the aim of which was to provide humanitarian aid, attention, assistance and reparation to anyone who had seen his or her rights violated in the context of the armed conflict.<sup>83</sup> This piece of legislation gave effect to – and at times clarified – many of the concepts included in the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The latter considers that in order to grant effective reparation to a victim for the harm he or she has suffered, State authorities should not only (whenever possible) restore the victim to the original situation,<sup>84</sup> but should also compensate him or her, give him or her satisfaction and provide him or her with guarantees of non-repetition.<sup>85</sup> In a similar vein, Colombia's Victim's Law enshrines a broad list of entitlements for those who have been affected by the

80 Constitutional Court of Colombia, *Sentence C-240*, 1 April 2009, para. 7.3.4.

81 Law 1621 of 2013, Art. 60, establishing the normative framework for intelligence and counterintelligence operations conducted by the armed forces.

82 Law 1098 of 2006, Art. 20.

83 Victims' Law, above note 38, Art. 2.

84 UNGA Res. 60/147, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", 16 December 2005, para. 19.

85 *Ibid.*, paras 20–23.

plight of war, including the right to receive humanitarian relief “in accordance to their immediate needs”,<sup>86</sup> the right to education<sup>87</sup> and the right to have an adequate level of access to health-care services,<sup>88</sup> to name but a few of its provisions. That said, the most revolutionary aspect of this statute is the way in which it deals with internally displaced persons (IDPs).

## Making a difference for those who flee their homes

IHL contains a series of provisions regarding IDPs. First and foremost, the laws of war prohibit the displacement of the civilian population “in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand”.<sup>89</sup> But in the event that an act of displacement takes place, IHL emphasizes that IDPs must receive “satisfactory conditions of shelter, hygiene, health, safety and nutrition” and that members of the same family must not be separated.<sup>90</sup> In addition, it also establishes that IDPs have a right to “voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist”<sup>91</sup> and that their property rights must be respected.<sup>92</sup> One of the most innovative features of the Victims’ Law is precisely that it regulates all of these aspects.

Colombia has one of the highest numbers of IDPs in the world. According to recent estimates, the last few decades of conflict have led 6,509,000 Colombians to flee their homes.<sup>93</sup> This figure is only surpassed (slightly) by Syria, with 6,784,000 IDPs, and goes well beyond equivalent numbers in other war-torn countries such as the Democratic Republic of the Congo (4,480,000), Iraq (2,648,000), Sudan (2,072,000) or Yemen (2,014,000).<sup>94</sup> With a view to mitigating this humanitarian calamity, Colombia has put in place a mature institutional framework. In the late 1990s, it established the Social Solidarity Network, whose aim was to cover the needs of displaced people in a rather holistic manner, covering aspects such as emergency transport and psychological support.<sup>95</sup> Colombia’s Congress also enacted legislation to ensure that local and regional authorities would create special plans to assist those who flee internal violence, and even to try to prevent

86 Victims’ Law, above note 38, Art. 47.

87 *Ibid.*, Art. 51.

88 *Ibid.*, Art. 52.

89 See ICRC Customary Law Study, above note 37, p. 457. The current Colombian Criminal Code, adopted by Law 599 of 24 July 2000, states in Article 180 that it is a crime to “arbitrarily cause that one or several individuals change their residence, either by violence or through other acts of coercion targeting a specific group of the population”. However, the same provision lays down that “the crime of forced displacement will not cover movements of the population conducted by the State security apparatus, provided that the purpose is either to ensure the security of the population itself, or imperative military reasons, in accordance with international humanitarian law”.

90 ICRC Customary Law Study, above note 37, p. 463.

91 *Ibid.*, p. 468.

92 *Ibid.*, p. 472.

93 Internal Displacement Monitoring Center and Norwegian Refugee Council, *Global Report on Internal Displacement*, 2018, p. 48.

94 *Ibid.*

95 See Law 368 of 1997, creating the Social Solidarity Network.

and curb this widespread phenomenon.<sup>96</sup> According to these early norms, an IDP was someone

forced to migrate inside the national territory, abandoning his or her hometown or usual economic activities because his/her life, physical integrity, safety or personal liberty have been infringed or are immediately threatened due to the internal armed conflict, internal disturbances or riots, generalized violence, mass violations of human rights, breaches to international humanitarian law or other circumstances arising from any of the above.<sup>97</sup>

The condition of displacement was deemed to cease whenever the person achieved “socioeconomic stability, either in his or her place of origin or in the resettlement area”.<sup>98</sup>

Therefore, when the Victims’ Law was approved in 2011, Colombia had already taken several measures to tackle this problem. The main differences between the Victims’ Law and previous initiatives were the broad notion of “victim” and the scope of the proposals to compensate such victims, which sought to address the “individual, collective, material, moral and symbolic dimensions” of the violation.<sup>99</sup> In the context of land restitution, the Victims’ Law gave birth to several State organs in charge of restoring the rights of IDPs to their dispossessed land and of facilitating their return,<sup>100</sup> such as the Registry of Land Allegedly Disposed or Forcibly Abandoned.<sup>101</sup> Moreover, it established a series of legal presumptions in favour of victims. For instance, it considered that the claim of a victim to his or her land could not be rejected on the basis of valid administrative acts that took place after the dispossession or forced abandonment.<sup>102</sup> It also recognized a reversed onus clause for those who had been recognized as IDPs by judicial authorities and were trying to gain back their property rights.<sup>103</sup> In other words, it shifted the burden of proof from the IDP to the individual opposing the rights of the victim during the restitution process.<sup>104</sup> All this was done to comply not only with the above-mentioned IHL rules but also with IHRL instruments, including the so-called Pinheiro Principles.<sup>105</sup>

96 See Law 387 of 1997, adopting measures to prevent forced displacement and to ensure the assistance, protection and socio-economic stability of people internally displaced by violence. See also Decree No. 2569 of 12 December 2000, clarifying the different obligations of each State authority when it comes to IDPs, and Decree No. 173 of 26 January 1998, adopting the national plan for holistic assistance to IDPs.

97 Law 387 of 1997, Art. 1.

98 *Ibid.*, Art. 18.

99 Victims’ Law, above note 38, Art. 69.

100 For an overview of this law, see Jemima García-Godos and Henrik Wiig, “Ideals and Realities of Restitution: The Colombian Land Restitution Programme”, *Journal of Human Rights Practice*, Vol. 10, No. 1, 2018.

101 Victims’ Law, above note 38, Art. 76.

102 *Ibid.*, Art. 77.

103 *Ibid.*, Art. 78.

104 *Ibid.*

105 Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons*, UN Doc. E/CN.4/Sub.2/2005/17, 2005. According to Principle 2, “all refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or

Furthermore, Colombia's judiciary has strengthened even further the protection afforded by the Victim's Law. According to Article 3 of this piece of legislation, members of an organized armed group "cannot be considered as victims for the purposes of benefiting from [the State's compensation programmes], except in the event of children who were forcefully recruited". In 2019, a Colombian citizen challenged this provision. The plaintiff had been forcefully recruited by the FARC-EP at the age of 14, suffered sexual abuse at the hands of her comrades, and eventually quit the group and became an IDP.<sup>106</sup> She claimed that she was entitled to be considered a victim under the laws of war, including because of the violence to which she was subjected. The Court agreed that IHL protects not only those at the hand of the enemy, but also those who are faced with so-called "intra-group" violence.<sup>107</sup> It also provided that the plaintiff was entitled to receive compensation from the State and to receive specialized medical treatment to overcome her traumas.<sup>108</sup> The judge in charge of the case based her decision not only on the jurisprudence of international tribunals but also on Colombia's own developments on issues such as the notion of nexus to the conflict and the right to effective remedy.<sup>109</sup> Needless to say, the main challenge in the implementation of the provisions of land restoration of the Victims' Law – other than lack of financial resources – was the fact that Colombia was (and still is) undergoing several NIACs, making it difficult for IDPs to go back to their places of origin in safety.<sup>110</sup> This is also one of the hurdles of Colombia's transitional justice mechanisms, and yet is one of the underlying reasons for the country's unmatched will to find legal solutions to some of the vicissitudes of war.

## Transitional justice after the peace agreement with the FARC-EP

During the last few decades, Colombia has undergone several transitional justice processes.<sup>111</sup> The most recent one took place between 2012 and 2016 and

unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal".

106 Constitutional Court of Colombia, *Sentence SU599/19*, 11 December 2019.

107 *Ibid.*

108 *Ibid.*

109 *Ibid.*

110 See Jose Serralvo, "Internal Displacement, Land Restoration, and the Ongoing Conflict in Colombia", *Journal of Humanitarian Assistance*, June 2011. It should be reiterated that the purpose of this article is not to evaluate the success in implementing Colombia's legislation; instead, and as mentioned earlier, it focuses on the development of IHL both in the domestic legal framework and through judicial decisions. As a matter of fact, and leaving aside the issue of land restitution, State authorities have had many difficulties coping with the over 6 million IDPs in the country. Interestingly, this has led the Constitutional Court to declare an "unconstitutional state of affairs", since the rights of people forced to flee their homes due to the conflict were not being respected. See Constitutional Court of Colombia, *Sentence T-025*, 2004.

111 One of the most notorious examples was the agreement that put an end to the conflict with the Movimiento 19 de Abril, also known as M-19, during the government of President Virgilio Barco in the early 1990s. More recently, President Alvaro Uribe Vélez signed a peace agreement with the

involved the Government of Colombia and the FARC-EP. This process concluded with the signing of the so-called Final Agreement for Ending the Conflict and Building a Stable and Long-Lasting Peace (Final Agreement). Due to the humanitarian nature of many of its provisions, the Final Agreement has often been referred to as a Special Agreement in the sense of Article 3 common to the four Geneva Conventions; according to the Constitutional Court, its content must be used as a basis for construing all IHL-related norms giving effect to the peace negotiations.<sup>112</sup>

One of the main outcomes of the Final Agreement was the creation of the Comprehensive System for Truth, Justice, Reparation and Non-Repetition (Sistema Integral de Verdad, Justicia, Reparación y No Repetición, SIVJRNR). The purpose of the SIVJRNR is to deal with the consequences of the armed conflict bearing in mind the central position of the victims. In order to do so, it has developed a series of IHL norms, particularly in relation to the prosecution of war crimes, the granting of amnesties and the search for the missing. Most notably, Colombia has enacted new legislation to incorporate these obligations into the domestic legal framework. As mentioned in the Final Agreement itself:

The underlying principles on which the Comprehensive System is founded are the recognition of the victims as citizens with rights; the acknowledgement that the full truth about what has happened must be uncovered; the acknowledgment of responsibility by all those who took part, directly or indirectly, in the conflict and were involved in one way or another in serious human rights violations and serious infringements of international humanitarian law; [and] the realisation of victims' rights to the truth, justice, reparations and non-recurrence, based on the premise of non-negotiation on impunity, additionally taking into account the basic principles of the Special Jurisdiction for Peace, one of which is that "damage caused shall be repaired and made good whenever possible".<sup>113</sup>

In order to achieve this, the Government of Colombia and the FARC-EP agreed upon a system which includes both judicial and non-judicial mechanisms. More specifically, the SIVJRNR comprises five components: (1) a Truth, Coexistence and Non-Recurrence Commission; (2) a Search Unit for Missing Persons; (3) a Special Jurisdiction for Peace; (4) reparation measures for peacebuilding purposes; and so-called (5) guarantees of non-recurrence.<sup>114</sup> All of these pillars are supposed to work in an articulated manner to successfully contribute to achieving justice, knowing the truth of what happened during the

Autodefensas Unidas de Colombia. This was regulated by Law 975 of 2005, often referred to as the Justice and Peace Law, which provided for reduced sentences in exchange for full confessions and a contribution to the reparation of the victims.

112 See, for example, Alejandro Ramelli, *La naturaleza jurídica del Acuerdo de Paz en Colombia: Aspectos controversiales*, Editorial Académica Española, 2019.

113 Final Agreement for Ending the Conflict and Building a Stable and Long-Lasting Peace, 2016 (Final Agreement), p. 135.

114 *Ibid.*, p. 9.

NIAC, repairing the wrongful acts committed, and avoiding their repetition.<sup>115</sup> Because of their relationship to salient IHL norms, the rest of this section will focus on components (2) and (3) of the system.

## The Search Unit for Missing Persons

As a result of the long-lasting armed conflicts in Colombia, countless people have gone missing. Conservative estimates point to over 60,000 enforced disappearances between 1970 and 2014.<sup>116</sup> IHL provides that each party to the conflict must “take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate”.<sup>117</sup> This duty to locate the missing and share the information with their relatives persists even after the cessation of hostilities.<sup>118</sup> The Search Unit for Missing Persons was conceived to comply with this obligation and to contribute to the satisfaction of the victims’ rights to truth and reparation.<sup>119</sup> Although this organ was not the first Colombian attempt to tackle the thorny issue of enforced disappearances in the midst of war, its scope is much broader than that of previous initiatives.<sup>120</sup> Its mandate includes “searching for and locating people reported missing in the context and because of the armed conflict that are alive and, in cases of death, when possible, the recovery, identification and dignified delivery of skeletonized bodies”.<sup>121</sup> One of the most innovative aspects of this legal framework is the so-called “differential approach”, which basically implies that State organs have an obligation to take into consideration the particularities of those who went missing—including their gender and ethnicity. To strengthen this broad mandate, the country’s Constitutional Court has recognized the humanitarian and extrajudicial nature of the Search Unit. This means, on the one hand, that it cannot substitute or prevent judicial investigations to be carried by the State’s judiciary.<sup>122</sup> On the other hand, it also entails that the Search Unit’s staff enjoys functional immunity and cannot be called to testify in judicial proceedings. Regarding the latter, it should be noted that the legislation implementing the Final Agreement states:

In order to guarantee the effectiveness of the [Search Unit’s] humanitarian work to satisfy as much as possible the victim’s rights to truth and reparation and, above all, to alleviate their suffering, the information received or

115 *Ibid.*

116 ICRC, *Balance Humanitario*, Geneva, 2018, p. 2.

117 ICRC Customary Law Study, above note 37, p. 421.

118 *Ibid.* p. 427. See also UNGA Res. 3220 (XXIX), 1974, para. 76.

119 Decree 589 of 2017, Art. 1.

120 For an overview of some of the experiences of searching for the missing in Colombia, and some insightful comments on best practices in other contexts, see Ximena Londoño and Alexandra Ortiz Signoret, “Implementing International Law: An Avenue for Preventing Disappearances, Resolving Cases of Missing Persons and Addressing the Needs of Their Families”, *International Review of the Red Cross*, Vol. 99, No. 2, 2017, pp. 557–564.

121 Decree 589 of 2017, Arts 2, 3; see also Legislative Act 01 of 2017, Transitory Art. 3.

122 Legislative Act 01 of 2017, Transitory Art. 3.

produced by the [Search Unit] cannot be used with the purpose of attributing responsibilities in judicial processes and will not have probatory value .... In any case, the forensic-technical reports and the material elements associated with the corpse may be required by the competent judicial authorities and will have probative value.<sup>123</sup>

In other words, most of the information in the hands of the Search Unit – such as data allowing for the identification of perpetrators or the circumstances of the death – will remain confidential. The Government of Colombia and the FARC-EP agreed upon this under the understanding that it would facilitate the Search Unit’s access to information on the fate of the missing – including at the hands of weapons bearers – thus making it easier for family members to discover the fate and whereabouts of their loved ones.

As per Legislative Act 01 of 2017 (one of the main pieces of legislation implementing the Final Agreement), the Search Unit is in charge of producing a national registry of graves, illegal cemeteries and burial grounds. In addition, it is entitled to request the cooperation of any State organ in the whole national territory. Moreover, all the above must be done while promoting the participation of the relatives of the missing in the search process, bestowing upon them a sense of purpose. Article 3 of this law states the following:

[T]he State’s entities will provide all the collaboration required by the Unit. The participation of the victims and their organizations in all phases of the search, location, recovery, identification and dignified delivery of remains of people reported missing in the context and because of the armed conflict should be promoted.<sup>124</sup>

Although an in-depth analysis of the Search Unit would go beyond the scope of this article, it is worthwhile to note that this very same piece of legislation recognizes that the return to the relatives of the remains of the missing people should be done “in accordance with their different ethnic and cultural traditions”.<sup>125</sup> During its review of the law, and in line with the latter, Colombia’s Constitutional Court laid down the principles that should be enforced so that the search for the missing would respect indigenous rights. Much of the conflict between the Government of Colombia and the FARC-EP took place in rural areas scattered along indigenous reserves (*resguardos*), which enjoy special protection under Colombia’s Constitution. Hence, exhumation of dead bodies buried in these reserves must be done with the consent of local authorities and respecting the principle of prior consultation of indigenous people.<sup>126</sup> To say the least, all this constitutes a unique example of the articulation between the laws of war and indigenous rights – a refined legal hodgepodge that one can only find in Colombia.

123 Decree 589 of 2017, Art. 1; Legislative Act 01 of 2017, Transitory Art. 4.

124 Legislative Act 01 of 2017, Transitory Art. 3.

125 Decree Law 589 of 2017, Art. 5.3F.

126 Constitutional Court of Colombia, *Sentence C-067/18*, 20 June 2018.

All in all, the creation of the Search Unit goes well beyond the stipulations of IHL. To give effect to the IHL obligation to locate those who went missing in the context of the armed conflict,<sup>127</sup> Colombia has created a specialized entity whose tasks will surely have a profound impact on the whole State apparatus, and it has done so while respecting an ethnic, cultural and gender approach, as well as the need to promote the participation of victims and human rights organizations.

## The Special Jurisdiction for Peace

An equally remarkable component of the transitional justice system created after the Final Agreement with the FARC-EP is the Special Jurisdiction for Peace, or JEP. The JEP is the judicial component of the SIVJRNR. It exercises autonomous and prevalent judicial functions over issues within its jurisdiction, particularly regarding acts considered to be serious breaches of IHL or serious violations of human rights. In accordance with the Final Agreement:

The objectives of the judicial component of the Comprehensive System are to give effect to the victims' right to justice, offer truth to the Colombian society, protect victims' rights, contribute to achieving a stable and lasting peace, and take decisions that offer full legal certainty to those who participated directly or indirectly in the internal armed conflict with regard to acts committed in the context of and during said conflict and which represent serious breaches of international humanitarian law and serious violations of human rights.<sup>128</sup>

IHL provides that States must “investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects”.<sup>129</sup> At the same time, IHL lays down an obligation to grant the broadest possible amnesty at the cessation of hostilities to persons who participated in an internal armed conflict or who are deprived of liberty for reasons related to the conflict.<sup>130</sup> The goal of the JEP is to comply with both of these rules simultaneously.<sup>131</sup> On the one hand, it must investigate serious breaches of IHL and serious violations of human rights. On the other, as a transitional justice mechanism, and following the long-standing treatment of “rebels” in Colombia's legal system, it seeks to concede amnesties to those who acted in accordance with the laws of war. In other words, the JEP can grant amnesties to those who were members of the FARC-EP or collaborators of this armed group, and whose crimes committed in relation to the NIAC before 1 December 2016 were

127 Or armed *conflicts*, plural, since the Search Unit is authorized to locate those who disappeared in the framework of hostilities involving organized armed groups other than the FARC-EP.

128 Final Agreement, above note 113, p. 153.

129 ICRC Customary Law Study, above note 37, Rule 158, p. 607.

130 *Ibid.*, p. 611. See also Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) Art. 6(5).

131 Law 1820 of 2016, Art. 2.

“political crimes” (*delitos políticos*) or, if they were common crimes, had a connection to political crimes and are not included in the list of conducts that cannot be a matter of amnesty.<sup>132</sup>

As per Legislative Act 01 of 2017, the JEP has “prevalent jurisdiction” above other Colombian jurisdictions when it comes to acts committed “by cause of, on occasion of or in direct or indirect relation to the armed conflict, by those who participated in it, especially with regard to behaviors considered serious breaches of [IHL] or serious violations of Human Rights”.<sup>133</sup> The JEP’s Appeal Section has reaffirmed this “prevalent jurisdiction” rule since its early jurisprudence.<sup>134</sup>

The JEP is divided into several sections and chambers.<sup>135</sup> Each of the chambers consists of six judges who—as is the case with the whole SIVJNRN—must reflect Colombia’s diversity on issues such as gender, ethnicity and geography.<sup>136</sup> The JEP’s structure is both ambitious and complex. First, it is composed of three chambers: the Chamber for Recognition of Truth, Responsibility and Determination of Facts and Conduct; the Chamber for Amnesty or Pardon; and the Chamber for Determination of Legal Situations. In addition, a Tribunal for Peace has been established with four sections, each made up of five judges. It includes a First Instance Section of the Tribunal for Peace in Cases of Acknowledgement of Truth and Responsibility and a First Instance Section of the Tribunal for Peace in Cases of Absence of Acknowledgement of Truth and Responsibility. Both sections will hand down rulings, either acquitting or convicting the person and imposing special, alternative or ordinary sanctions depending on the acknowledgement of truth and responsibility and the moment of such acknowledgement.

The Tribunal also has a Review Section with several tasks. Among other things, it is in charge of examining, at the request of the convicted person, rulings passed by the ordinary justice system.<sup>137</sup> Finally, the Tribunal has an Appeal Section to decide on objections to rulings passed by any of the other sections or chambers of the JEP. However, the Appeal Section will not be able “to increase the sentence at the second instance when the appellant is the only person sanctioned”.<sup>138</sup> Likewise,

132 *Ibid.*, Art. 23.

133 Legislative Act 01 of 2017, Transitory Arts 5, 6; Statutory Law 1957 of 2019 for the Administration of Justice in the Special Jurisdiction for Peace, Art. 36.

134 JEP Appeal Section, *Sentence TP-SA 001*, 20 April 2018, para. 36: “one must address without hesitation the preferential character granted by Transitory Article [6] of Legislative Act 01 of 2017 to the [JEP] over other [Colombian] jurisdictions to know of any acts committed prior to 1 December 2016 by cause of, on occasion of or in direct or indirect relation to the armed conflict”.

135 Legislative Act 01 of 2017, Transitory Art. 7; Statutory Law 1957 of 2019 for the Administration of Justice in the Special Jurisdiction for Peace, Art. 72.

136 See Final Agreement, above note 113, p. 178: “All these individuals will need to be highly qualified and they must include experts in different areas of law, with a focus on knowledge of international humanitarian law, human rights or conflict resolution. The Tribunal will need to be formed according to criteria of equal participation by men and women and respect for ethnic and cultural diversity, and members will be elected through a selection process that reassures Colombian society and its different sectors.”

137 *Ibid.*, p. 170.

138 Statutory Law 1957 of 2019 for the Administration of Justice in the Special Jurisdiction for Peace, Art. 91.

[t]he resolutions of the [chambers] and [sections] of the judicial component may be internally appealed before the [chamber or section] that passed them, or appealed before the Appeal [Section] of the Tribunal, solely at the request of the person on whom the resolution or ruling was handed out, and of the victims with direct and legitimate interest or their representatives.<sup>139</sup>

The JEP also has a Registry and an Investigation and Prosecution Unit, “which must realize the victims’ right to justice when there is no collective or individual acknowledgement of responsibility”.<sup>140</sup>

To say the least, Colombia’s latest transitional justice mechanism was designed in a rather unique way. Those appearing before it do not need to follow the same path within the JEP. In other words, there is no single “door” to enter through; rather, there are several different options depending on the conduct being scrutinized, the benefits being sought and the role of the individual appearing before the JEP. As a result, for example, the three chambers as well as the Review Section can be deemed “doors” to the JEP, and those appearing before them can take different pathways once inside it. Likewise, the Section in Cases of Absence of Acknowledgement of Truth and Responsibility can also be a door to enter the JEP, especially when it comes to studying and adopting precautionary measures.<sup>141</sup>

The JEP has an unprecedented nature. Its design was not decided unilaterally by one of the parties to the conflict – instead, it was the result of a negotiation process between a State and an armed group. Moreover, the selection process of its magistrates and of the director of the Investigation and Prosecution Unit aimed at reflecting Colombia’s diversity. In addition, the process was completely open to the public – in fact, the interviews and *résúmenes* of the applicants were published online. Finally, the JEP is a robust model of transitional justice with several organs – each of them with specific tasks – working simultaneously and in a coordinated manner. Its ultimate goal is to establish the truth regarding the armed conflict with the FARC-EP and define the legal status of those who participated in it. Given its unprecedented nature, and the way in which it has contributed to developing the laws of war, we will now outline the main defining elements of the JEP.

## Several IHL-friendly manners to end a conflict

Although there is no single pathway to fall under the jurisdiction of the JEP, the so-called Chamber for Recognition of Truth, Responsibility and Determination of Facts and Conduct is arguably the main point of entry. Members of any of the two parties

<sup>139</sup> *Ibid.*, Art. 144.

<sup>140</sup> Final Agreement, above note 113, p. 161; Statutory Law 1957 of 2019 for the Administration of Justice in the Special Jurisdiction for Peace, Art. 87.

<sup>141</sup> Such as the study on the request for precautionary measures for the protection, preservation and conservation of sixteen places throughout the country where it is indicated that there are presumably missing persons.

to the conflict, including alleged perpetrators of war crimes, are called to testify and openly share all they know about the dynamics of the conflict and acknowledge their responsibility. With this as a basis, among many other tasks, the Chamber will

[p]resent resolutions of conclusions to the first section of the Tribunal for Peace for cases of recognition of truth and responsibilities, with the identification of the most serious cases and the most representative conducts or practices, the individualization of responsibilities, particularly of those who had a decisive participation, the legal qualification of the behaviors, the acknowledgments of truth and responsibility and the proposed sanction project according to the list provided in Article 141 of [the Statutory Law]. ... In the definition of serious cases, ... conducts or practices committed within the framework of the armed conflict against the indigenous peoples or their members, criteria will be taken into account that allow the differentiated impact generated on the peoples, and its relationship with the risk of physical and cultural extermination, to be evidenced.<sup>142</sup>

At the time of writing, the JEP is focusing its efforts on seven particular cases, which combine thematic and geographical concerns. For instance, Case No. 01 deals with “illegal retention of persons by the FARC-EP”, Case No. 03 Case tackles “deaths illegitimately presented as casualties in combat by State agents”, and Case No. 07 addresses the issue of “recruitment and the use of girls and boys in the armed conflict”. Other cases are set to scrutinize different conducts committed in some of the most war-ravaged regions of the country, such as Nariño, north Cauca and the Urabá region.<sup>143</sup> If an alleged perpetrator cooperates with the system, he or she might end up receiving some of the benefits of the JEP, which include penalties that fall short of deprivation of liberty. On the other hand, if the person refuses to cooperate or attempts to hide the truth, he or she might face heavier penalties. Indeed, more severe measures, such as deprivation of liberty, are foreseen in cases of “absence of acknowledgement of truth and responsibility”.

Among the different branches of the JEP, probably the most innovative from an IHL perspective is the Chamber of Amnesty or Pardon, whose procedure was established by Colombia’s Law 1820 of 2016 and the internal regulations of the JEP.<sup>144</sup> This chamber has the responsibility to analyze – case by case, either at the request of a party or *ex officio* – the possibility of granting amnesties or pardons for conducts that were committed by members or collaborators of the

142 Final Agreement, above note 113, p. 157; Statutory Law 1957 of 2019 for the Administration of Justice in the Special Jurisdiction for Peace, Art. 79.

143 Case No. 02 “prioritizes the serious human rights situation suffered by the population of the municipalities of Tumaco, Ricaurte and Barbacoas (Nariño)”. Case No. 04 “prioritizes the serious human rights situations suffered by the population in the municipalities of Turbo, Apartadó, Carepa, Chigorodó, Muta, Dabeiba (Antioquia) and El Carmen del Darién, Riosucio, Unquía and Acandí (Chocó)”. Case No. 05 “prioritizes the serious human rights situation suffered by the population of the municipalities of Santander de Quilichao, Suárez, Buenos Aires, Morales, Caloto, Corinto, Toribío and Caldono (Cauca)”. Case No. 06 concerns the “victimization of members of the Patriotic Union (UP) by agents of the State”.

144 Law 1820 of 2016, Art. 21.

FARC-EP and that have been caused by, or on occasion of, or have a direct or indirect relation to the internal armed conflict. Moreover, and as per the Statutory Law interpreted by the jurisprudence of the Appeal Section, this chamber is also the one that must decide whether or not to grant “conditional release” to members or collaborators of the FARC-EP who had been condemned for crimes committed in the framework of the NIAC prior to the signing of the Final Agreement.<sup>145</sup> Those benefiting from this transitional justice regime may remain at liberty, at least until their situation has been determined by another organ of the judiciary. This means that they do not need to be detained in prison while the competent chamber or section of the JEP defines their situation. A similar regime is granted to State agents, whose cases are studied by the Chamber for Determination of Legal Situations.

It should be noted that all those who benefit from any of the special regimes mentioned above must honour a set of rules in order to maintain the said benefits. Indeed, the “conditionality regime” entails the following obligations: (1) reporting any change of residence to the JEP; (2) not leaving the country without prior authorization from the concerned chamber or section; (3) guaranteeing the abandonment of arms and committing not to relapse in the commission of intentional crimes; (4) participating in programmes that seek to contribute to the reparation of victims; (5) appearing before Colombia’s Truth, Coexistence and Non-Recurrence Commission, as well as before the Search Unit for Missing Persons, whenever required, and providing these organs with the complete truth; and (6) appearing in judicial proceedings before the JEP whenever required, including, but not limited to, proceedings involving the beneficiary himself/herself.<sup>146</sup>

That said, in the Chamber for Amnesty or Pardon the “conditionality regime” is only applied to members or collaborators of the FARC-EP who have committed a so-called “political crime” or a common crime related to a political one.<sup>147</sup> Once again, this is very much in line with Colombia’s tradition of granting a special regime to “rebels” and waiving prosecution for acts intertwined with the rebellion itself. However, the powers of the Chamber of Amnesty or Pardon have very clear limits. Article 23 of Law 1820 establishes that in no case could an amnesty or pardon be granted regarding the following conducts:

- a) Crimes against humanity, genocide, war crimes, hostage-taking or other serious deprivation of liberty, torture, extrajudicial executions, enforced

145 Statutory Law 1957 of 2019 for the Administration of Justice in the Special Jurisdiction for Peace, Art. 81; JEP Appeal Section, *Sentence TP-SA-SENIT 2 de 2019*, 9 October 2019, paras 129–134; JEP Appeal Section, *Sentence TP-SA 004 de 2018*, 30 April 2018.

146 Constitutional Court of Colombia, *Decision 007/2018*, 2018; Law 1820 of 2016, Art. 14; Legislative Act 01 of 2017, Transitory Arts 1, 5.

147 See Law 1820 of 2018, Art. 23, which establishes the criteria to determine the nexus to the political crime. Additionally, the Constitutional Court pointed out that the JEP cannot exercise its competence over conducts whose primary goal was the personal enrichment of the individual, although it opened the door to an exception if the enrichment was not “the determining cause of the criminal conduct”. Constitutional Court of Colombia, *Decision C-007*, 2018, para. 540.

disappearance, violent carnal access and other forms of sexual violence, the abduction of minors, forced displacement, in addition to the recruitment of minors, in accordance with the provisions of the Rome Statute. In the event that any criminal judicial sentence has used the terms ferocity, barbarism or other equivalent, amnesty and pardon cannot be granted exclusively for the criminal conducts that correspond to those listed here as not amnestiable.

b) Common crimes that have no relation to the rebellion, that is to say, those that have not been committed in the context and because of the rebellion during the armed conflict or whose motivation has been to obtain personal benefit, either for the person himself/herself or for a third party.

In relation to these criteria for exclusion, Colombia's Constitutional Court has established – in its review of Law 1820 of 2018 – that their goal is precisely to respect victims' rights and to abide by the State's obligation to investigate, prosecute and punish violations of the laws of war.<sup>148</sup>

In order to grant an amnesty, the Chamber must verify that three conditions are met. First, it must establish that the person was a member or a collaborator of the FARC-EP.<sup>149</sup> Second, it is necessary to ascertain whether the person participated in the NIAC prior to 1 December 2016, the date on which the Final Agreement entered into force, since the JEP cannot exercise its jurisdiction over more recent conduct.<sup>150</sup> Finally, it must determine the nexus to the conflict, thus revisiting some of the jurisprudence from the Constitutional Court mentioned earlier.<sup>151</sup> According to Legislative Act 01 of 2017, to fall under the jurisdiction of the JEP the conduct must have been caused “by, on occasion, or in direct or indirect relation to the armed conflict” and by one of its parties.<sup>152</sup>

There is already some case law detailing how to assess whether a conduct has been caused by, on occasion of, or in direct or indirect relation to the NIAC. The Appeal Section of the Tribunal for Peace has understood “caused by” as a causality assessment that requires establishing whether the conduct originated, or not, in the midst of the NIAC.<sup>153</sup> On the other hand, the Appeal Section has considered that the term “on occasion” should be seen as a synonym for a close and sufficient *relationship* with the development of the NIAC.<sup>154</sup> Regarding this relationship – and in line with what was outlined earlier – the Colombian Constitutional Court has argued that

far from being understood under a restrictive perspective that limits it to strictly military confrontations, or to a specific group of armed actors excluding others,

148 Constitutional Court of Colombia, *Sentence C-007*, 2018, para. 774.

149 Law 1820 of 2018, Arts 17, 22.

150 Legislative Act 01 of 2017, Transitory Art. 5 of Art. 1; Law 1820 of 2016, Art. 3.

151 Law 1820 of 2016, Arts 15, 16, 23, 24.

152 *Ibid.*, Art. 5.

153 JEP Appeal Section, *Sentence TP-SA 19*, 21 August 2018, para. 11.13; JEP Appeal Section, *Sentence TP-SA 110*, 30 January 2019, para. 41.4.

154 JEP Appeal Section, *Sentence TP-SA 19*, 21 August 2018, para. 11.12; JEP Appeal Section, *Sentence TP-SA 110*, 30 January 2019, para. 41.4.

it has been interpreted in a broad sense that includes all the complexity and factual and historical evolution of the Colombian internal armed conflict.<sup>155</sup>

The Appeal Section has held that the expression “in direct relation to the armed conflict” is similar to the expression “caused by”, and that “an examination of causality between the conduct and the conflict must be made to establish whether the conduct has its origin in the conflict and, therefore, verify the link between them”.<sup>156</sup>

Additionally, the Appeal Section has established that these criteria laid down in Constitutional Transitional Article 23 must be taken into consideration in order to establish whether a conduct is directly or indirectly related to the NIAC.<sup>157</sup> Indeed, the Appeal Section has argued that in order to understand the relationship of causality, one must assess “if the armed conflict was the direct or indirect cause of the crime”. It also indicates, following the wording of Article 23, that there is a subjective criterion – namely, whether the existence of the conflict “influenced the author, participant or cover-up of the punishable conduct committed by cause, on occasion or in direct or indirect relationship with the conflict”.<sup>158</sup>

In relation to the material scope of application, there are two levels in the analysis pursued by the Chamber for Amnesty or Pardon. In the first, the Chamber establishes whether the conduct studied is related to the NIAC. If the conduct does indeed have a link to the NIAC, the Chamber takes the case to the second level. The latter implies carrying out an assessment of whether the conduct in question was a “political crime” (for which an amnesty would be granted) or, if it was not a political crime, the Chamber has to establish if it was a common crime related to the political crime and that it is not included in the list of conducts that, according to the law, cannot be the object of an amnesty. If the conduct is related to the NIAC but is within the list of exceptions that cannot be the object of an amnesty, the Chamber will refer the case to one of the other two chambers for them to exercise their competence over it.<sup>159</sup>

155 Constitutional Court of Colombia, *Decision C-253 A*, 2012, para. 6.3.3.

156 JEP Appeal Section, *Sentence TP-SA 19*, 21 August 2018, para. 11.15.

157 Legislative Act 01 of 2017, Constitutional Transitional Art. 23: “a) that the armed conflict had been the direct or indirect cause of the commission of the criminal conduct; b) that the existence of the armed conflict had influenced the author, participant or concealer of the criminal conduct committed by cause of, on occasion of or in direct or indirect relation to the conflict, with regard to: his or her ability to commit it, that is, because of the armed conflict the perpetrator has acquired greater skills that served him or her to execute the conduct; his or her decision to commit it, that is, the resolution or disposition of the person to commit it; the manner in which it was committed, that is, the fact that, as a result of the armed conflict, the perpetrator of the conduct had the opportunity to count on the means that served him or her to consummate it; and the selection of the objective that was intended to be reached with the commission of the crime.” *Cf.* Final Agreement, above note 113, p. 145, 5.1.2, para. 9; JEP Appeal Section, *Sentence TP-SA 110*, 30 January 2019, para. 41.3; JEP Appeal Section, *Sentence TP-SA 166*, 28 May 2019, para. 15.

158 JEP’s Appeal Section, *Sentence TP-SA 110*, 30 January 2019, para. 41.2; JEP Appeal Section, *Sentence TP-SA 166*, 28 May 2019, para. 15.

159 *Ibid.*

In this scenario, the Chamber for Amnesty or Pardon has referred to the competent chamber—either the Chamber for Recognition or the Chamber for Determination—many cases related to conducts for which it has denied the granting of amnesty or has declared a non-amnesty (*la no amnistiabilidad*), as well as cases related to conducts that *prima facie* cannot be the object of an amnesty.<sup>160</sup>

For example, the Chamber for Amnesty or Pardon referred forty-two cases of request for amnesty related to extortive kidnapping (*secuestro extorsivo*) to the Chamber for Recognition of Truth, Responsibility and Determination of Facts. In its decision, the Chamber for Amnesty considered that it

is of vital importance for the development of Case No. 01 that the Chamber for Recognition be aware of the cases that the [Chamber for Amnesty] advances on conducts that could be adapted to the illegal retention of persons by the FARC-EP, and that have been prioritized by the said Chamber for Recognition.<sup>161</sup>

All of these forty-two cases had in common the type of conduct involved, the fact that they were committed before 1 December 2016 by members or collaborators of the FARC-EP, and the fact that they had a *prima facie* relation to the NIAC.<sup>162</sup> Additionally, the Chamber established that there were reasons to believe that the conducts in question might amount to war crimes or crimes against humanity.<sup>163</sup>

To give a more concrete example, and one that constitutes a relevant development in international law, the Chamber for Amnesty or Pardon decided that the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, known as the Ottawa Convention, is also binding for organized armed groups. To reach this conclusion, the Chamber relied, among other things, on the Vienna Convention on the Law of Treaties. In particular, the Chamber considered that

the Ottawa Convention, in its quality as an IHL norm, is built on the declaration of prohibiting totally and globally anti-personnel mines ... as the most effective response to end the humanitarian crisis that has occurred due to their employment and which is a reflection of the lack of respect for the minimum norms of humanity that apply in any armed conflict.<sup>164</sup>

160 For example, JEP Chamber for Amnesty or Pardon, *Sentence SAI-AOI-RC-011-2019*, 26 August 2019 (extortive kidnapping); JEP Chamber for Amnesty or Pardon, *Sentence SAI-AOI-D-014-2019*, 8 October 2019 (homicide of protected persons, attempted homicide of protected persons, attempted aggravated homicide and terrorism); JEP Chamber for Amnesty or Pardon, *Sentence SAI-AOI-006-2019*, 4 February 2019 (aggravated homicide, acts of terrorism, homicide of protected persons, attempted homicide of protected persons); JEP Chamber for Amnesty or Pardon, *Sentence SAI-AOI-T-MGM-254-2019*, 31 December 2019 (extortive kidnapping, forced displacement, homicide of protected persons, forced disappearance); JEP Chamber for Amnesty or Pardon, *Sentence SAI-LC-AOI-D-MGM-126-2019*, 5 December 2019 (illicit recruitment); JEP Chamber for Amnesty or Pardon, *Sentence SAI-LC-AOI-D-MGM-075-2020*, 4 February 2020 (forced displacement).

161 JEP Chamber for Amnesty or Pardon, *Sentence SAI-AOI-RC-011-2019*, 26 August 2019, para. 11. After this decision, there have been many others referring cases to the other two chambers.

162 *Ibid.*, paras. 12, 13.

163 *Ibid.*, para. 17.

164 JEP Chamber for Amnesty or Pardon, *Sentence SAI-AOI-010-2019*, 8 August 2019, paras 182, 183. See also JEP Chamber for Amnesty or Pardon, *Sentence SAI-SUBA-AOI-D-067-2019*, 2 December 2019 (terrorism,

In the case in question, the Chamber concluded that an infraction of IHL was committed and that it could amount to a war crime, framing the case within the list of conducts that cannot be the object of an amnesty.<sup>165</sup>

Despite the fact that the JEP has been functional for barely two years, it has already given birth to an array of decisions that have tackled and advanced relevant IHL discussions on issues such as amnesties, war crimes, means and methods of warfare, the use of force in the conduct of hostilities, and missing persons, among many others. There is no doubt that in the near future it will continue to contribute to the development and understanding of IHL from the Colombian experience.

## Conclusion

Ever since the first half of the nineteenth century, Colombians realized that wars must have limits. What started as the inspiring and humanizing vision of Simón Bolívar and Pablo Morillo in 1820—an attitude that to a certain extent prefigured that of the philanthropist Henry Dunant, who founded the ICRC over four decades later—became a pattern in how the country decided to tackle the scourges of war and, over the course of two centuries, has permeated all layers of society and the State apparatus.

The purpose of this article was not to focus on one particular aspect of this tradition. Instead, it aimed at providing a series of examples to demonstrate that Colombia has developed IHL on matters as varied as the need to clarify the nexus to the conflict, the combatant's privilege, the protection of minors, the implementation of the principle of precaution, the reparation of victims of war, the rights of IDPs, the search for the missing, the prosecution of war crimes and the granting of amnesties at the cessation of hostilities. Each of these topics would merit a separate contribution. If IHL scholars wish to provide a faithful account of the development of the laws of war, one would expect that they will pay more attention to Colombia in the coming years.

Wars always bring about death and wanton destruction. Civilian property is occupied or pillaged, children are forcefully recruited or used to gather intelligence, anti-personnel landmines kill and mangle whoever happens to detonate them, the environment is affected, explosive remnants of war restrain freedom of movement, and cultural traditions become less vibrant or perish. In the case of Colombia, war has also led to the disappearance of thousands of people and the internal displacement of over 6 million individuals. But amidst all this endless tragedy, the country has managed to create one of the most sophisticated legal systems to protect those who do not participate—or who no

employment, production, commercialization and storage of anti-personnel mines and aggravated environmental pollution).

165 JEP Chamber for Amnesty or Pardon, *Sentence SAI-AOI-010-2019*, 8 August 2019, para. 211: “la Sala concluye que, en el caso particular, se cometió una infracción al DIH que tiene la entidad para adquirir la connotación de crimen de guerra”.

longer participate – in the hostilities. As is often the case, the main hurdles seem to arise in the implementation of, and respect for, the existing legal framework.<sup>166</sup> This might sound like a meagre consolation to the countless victims of Colombian armed conflicts, but nevertheless, thanks to these laws and judicial decisions, many citizens have received State support after their displacement, or have benefited from a State pardon, or have been spared the anxiety of living next to a military objective. No matter the numbers, each of these individual stories is a compelling case for the importance of IHL in situations of protracted armed violence.

<sup>166</sup> Human Rights Watch, *Guerra sin cuartel: Colombia y el derecho internacional humanitario*, 1998; ICRC, *Aplicación y respeto del DIH: Un reto para Colombia*, 28 November 2016.