

## THE OBJECTIVE QUALIFICATION OF NON-INTERNATIONAL ARMED CONFLICTS: A COLOMBIAN CASE STUDY

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### Abstract

Armed conflict has raged in Colombia since at least the 1960s, involving governmental forces, rebel groups and paramilitary forces. The government of Álvaro Uribe (2002-2010) declared that Colombia was not in a 'state of armed conflict' but was rather facing a 'terrorist threat.' This declaration was done in fear of conferring a political status to the armed groups and, most particularly, in fear that a recognition of armed conflict would open the possibility of endowing the Revolutionary Armed Forces of Colombia (FARC) with 'belligerency status'. From a legal point of view, the government's fears were unfounded, since contemporary international humanitarian law does not require formal recognition for a situation to qualify as armed conflict. During the Uribe administration, efforts were made by the Ministry of Defence to identify operational rules of engagement with precision, violations of international humanitarian law were publicly denounced and the apex courts adjudicated on issues of international humanitarian law. This seemingly paradoxical situation illustrates the importance of the objective definition of armed conflict, which has been an essential characteristic of international humanitarian law since 1949.

### Introduction

For over fifty years, several armed groups inside the Colombian territory have been engaged in armed violence against the State and amongst themselves. Originally, these groups had a leftist political ideology born out of Marxist ideals, which were common in Latin America during the 1950s. Out of the violence inflicted by leftist groups during the 1980s and 1990s, right leaning paramilitary groups emerged. Depending on the historical interpretation, these appeared either as a backlash against the leftist groups, as an armed tool of drug cartels and militaristic factions of government, or both. These different

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groups have tormented civil society and have made Colombia one of the countries with the highest number of internally displaced persons in the world.

The armed violence that has been occurring in Colombia is a paradigmatic case of guerrilla warfare. It is fought between organised and irregular armed groups and the State and among such groups themselves. There has been surprisingly little analysis on the regulation of this confrontation throughout the years and there has been much controversy on the qualification of this armed violence. In the last years the administration has attempted to deny the existence of an armed conflict in order to avoid the application of international humanitarian law.

In this article we analyse the efforts of the past Colombian government to qualify the armed violence in Colombia and the effects it could possibly have. We first look at the language used by the administration in order to avoid giving legal protection or conferring a specific legal status on the armed groups. We then evaluate the effects of the qualification given by the government to an armed conflict and how this might affect the application of the Geneva Conventions<sup>1</sup> and their Additional Protocols.<sup>2</sup> In the third section, we analyse the modern application of the legal institution of belligerency, as it has been a common device in Colombian public discourse. In the fourth section we offer an overview of the application of international humanitarian law in Colombia and, lastly, we suggest some conclusions as to the legal status of the ongoing armed conflict in Colombia.

## **I. The Counterterrorist Rhetoric of the Uribe Administration**

Álvaro Uribe's rise to presidency was the product of a failed negotiation attempt between the Colombian government and the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*, or FARC), where the most prominent political figures had fought for a successful agreement with the armed rebels. Álvaro Uribe had staunchly refused to recognize any political legitimacy in the peace negotiations with the FARC between 1999 and 2002, referring to this group as 'armed terrorists' and

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<sup>1</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 [hereinafter, 'First Geneva Convention'], Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 [hereinafter, 'Second Geneva Convention'], Convention Relative to the Treatment of the Prisoners of War of 12 August 1949 [hereinafter, 'Third Geneva Convention'], Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 [hereinafter, 'Fourth Geneva Convention', and collectively, 'the Geneva Conventions'].

<sup>2</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 [hereinafter, 'First Additional Protocol'], Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977 [hereinafter, 'Second Additional Protocol' and collectively, 'Additional Protocols'].

'bandits'. During those three years, a total of 42,000 kilometres, comprising five municipalities in two different provinces, had been demilitarised in order to give the rebel groups a safe haven for the ongoing negotiation. After the peace talks came to an abrupt end, having discovered that the armed groups had used the demilitarised zone to regroup, train and prepare for future attacks and hostage takings, the Colombian public reacted harshly against the FARC. A small sector of society which had previously advocated for a political solution to the armed conflict started to support a more aggressive military campaign. It was this particular political climate that made Álvaro Uribe the most popular candidate and allowed him to win the presidential bid by a very wide margin. During his term of office, Uribe's approach to the Colombian armed conflict made him the most popular politician in the country.

What made Uribe's stance on armed conflict so attractive was his discourse against the armed groups, which he insisted on calling *terrorists* instead of guerrillas. A few months after he took office, in a ceremony where several military officers were being promoted to the rank of General, President Uribe urged the Colombian public to refer to the FARC and other armed groups "not as parties to the armed conflict, but as terrorists" since the former would "place both the rebels and the Armed Forces on equal footing."<sup>3</sup> This rhetorical device became the underlying tone of all his public appearances, reaching one of its peaks during 2006, when President Uribe ran for a second term in office. The more leftist candidates had engaged in this semantic debate with the President, refusing to refer to the guerrillas as 'terrorists', as this would undermine an eventual peace agreement. In his second bid for the presidency, Uribe remarked "peace is not reached by refusing to call the FARC 'terrorists' [...] peace is not made by those who call the terrorists 'angels' in order to connive with them."<sup>4</sup> As expected, Álvaro Uribe won his second presidential race by an overwhelming margin, fuelled mostly by his passionate and rhetorical discourse against the FARC. By this point, there was strong criticism from inside and outside Colombia. In a conference presenting a report of Amnesty International in Madrid, one of its directors accused President Uribe of distorting reality by denying the existence of an armed conflict and attempting to offer an "optimist version" of Colombia.<sup>5</sup>

More specifically, Uribe was concerned that the recognition of an armed conflict, and thus the implicit recognition of the FARC as an armed group party

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<sup>3</sup> "Fuerte Llamado de Uribe", *El Tiempo* (Bogotá, 6 December 2002), at: <http://www.eltiempo.com/archivo/documento/MAM-1339366> (accessed on 12 December 2011).

<sup>4</sup> "Dilema es seguridad o comunismo", *El Tiempo* (Bogotá, 6 May 2006), at: <http://www.eltiempo.com/archivo/documento/MAM-2012895> (accessed on 12 December 2011).

<sup>5</sup> "Amnistía internacional critica a Álvaro Uribe por no admitir conflicto en Colombia", *El Tiempo* (Bogotá, 28 October 2008), at: <http://www.eltiempo.com/archivo/documento/CMS-4629551> (accessed on 12 December 2011).

to an armed conflict, would result in the application of international humanitarian law, which he suspected would grant some special protection to the rebels. This fear triggered a major diplomatic agenda of discussion, by which the President requested other countries in South America to qualify the FARC as 'terrorists'. In 2003, Nicaragua, Panamá, El Salvador, Honduras, Costa Rica, Guatemala and Argentina all accepted Colombia's request and issued a joint communiqué acceding to Colombia's request, presumably to "impede the FARC from having a logistical footing and an international voice."<sup>6</sup> However, two of Colombia's most important neighbours refused to give the FARC any special qualification based on similar grounds. Rafael Correa, who later became President of Ecuador, declared during his candidacy that "the FARC are not terrorists, they are guerrillas; they fight wars, while terrorists kill indiscriminately and spread terror."<sup>7</sup> For his part, Hugo Chavez of Venezuela advanced the argument that the recognition of belligerency by the Colombian government would lead to the application of the Geneva Conventions.<sup>8</sup>

Once President Uribe left office in 2010, he held public confrontations with various political figures in order to maintain his counterterrorist discourse. As late as May 2011 Uribe demanded a change from several congressmen who still refrained from qualifying the FARC as armed groups and would deny the existence of an armed conflict, so as to avoid placing the State armed forces and the rebel groups on equal footing.<sup>9</sup> However, as we will see, the Uribe rhetoric has very little legal significance since the application of international humanitarian law does not depend on the subjective views of the parties involved, but rather on objective factors.

## II. The Definition of Armed Conflict: Objective v. Subjective Qualification

From the outset, it should be clear that the ongoing armed violence in Colombia is not, and cannot, amount to an international armed conflict. The reason for this is simple: the different armed groups inside Colombia act out of their own volition and are not under the control of any other State, which is a necessary precondition to trigger the application of the different Geneva

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<sup>6</sup> "7 Países Declaran Terroristas a las FARC", *El Tiempo* (Bogotá, 12 February 2003), at: <http://www.eltiempo.com/archivo/documento/MAM-971718> (accessed on 12 December 2011).

<sup>7</sup> "Las FARC no son terroristas, según el candidato a la presidencia de Ecuador Rafael Correa", *El Tiempo* (Bogotá, 5 October 2006), at: <http://www.eltiempo.com/archivo/documento/CMS-3272919> (accessed on 12 December 2011).

<sup>8</sup> "Si Uribe Reconoce Estatus a las FARC, entrarían de inmediato los protocolos de Ginebra: Chavez", *El Tiempo* (Bogotá, 13 January 2008), at: <http://www.eltiempo.com/archivo/documento/CMS-3918788> (accessed on 12 December 2011).

<sup>9</sup> "Uribe Pidió no Nivelar a Fuerzas Armadas con terroristas", *El Tiempo* (Bogotá, 9 May 2008), at: <http://www.eltiempo.com/archivo/documento/CMS-9315541> (accessed on 12 December 2011).

Conventions.<sup>10</sup> Even under the more flexible test of ‘overall control’ espoused in the *Tadić* judgement,<sup>11</sup> there is simply no evidence of control from a third State over any of the armed groups inside Colombian territory.

On the other hand, non-international armed conflicts are governed –on a conventional level– by the Second Additional Protocol and common Article 3 to the Geneva Conventions. Common Article 3 defines its scope of application in a very broad manner:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions [...]

The Second Additional Protocol adopted a more complex formula for its scope of application:

This Protocol [...] shall apply to all armed conflicts [...] which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.<sup>12</sup>

The adoption of common Article 3 was highly controversial and, by the time the Diplomatic Conference met to agree on the text of an instrument which would deal exclusively with non-international armed conflicts, a broad and general formula similar to common Article 3 received no consensus. The agreement that was reached when Article 1(1) of the Second Additional Protocol was adopted was to make its material field of application independent of common Article 3,<sup>13</sup> opting instead to “specify the characteristics of a non-international armed conflict by means of *objective criteria* so that the Protocol could be applied when those criteria were met and not be made subject to other considerations.”<sup>14</sup>

The twofold intention of leaving the application of common Article 3 untouched and of creating objective criteria for the application of the Second

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<sup>10</sup> Common Article 2 of the Geneva Conventions limits the material field of application to conflicts between the high contracting parties, i.e. States.

<sup>11</sup> *Prosecutor v. Tadić*, Judgement, Case No. IT-94-1, A. Ch., 10 August 1995, para. 120. [Hereinafter, ‘*Tadić Judgement*’].

<sup>12</sup> Second Additional Protocol, art. 1(1).

<sup>13</sup> Y. Sandoz et. al, *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva: International Committee of the Red Cross 1987, para. 4453. [Hereinafter ‘*Commentaries on the Additional Protocols*’].

<sup>14</sup> *Ibid.*

Additional Protocol, led to the creation of two different thresholds for the conventional application of the different instruments governing non-international armed conflicts. This way, the Second Additional Protocol would only apply to conflicts that achieved a certain level of intensity, while common Article 3 covers all cases of non-international armed conflicts.

In practice, this double threshold has been challenged and, in some cases, completely ignored. A careful reading of Article 1(1) of the Second Additional Protocol reveals that the criteria therein contained are descriptive and redundant, insofar as a responsible command or the control over a territory suggests a level of organisation of the armed group. Similarly, the language of the Second Additional Protocol does not require that the armed group comply with international humanitarian law, but merely that it has the capacity to do so. This is only logical, considering that in order to comply with a rule, a subject of law must first be able to do so.<sup>15</sup> This is the same conclusion that was reached by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* jurisdiction decision, where the Appeals Chamber collected the different conditions contained in Article 1(1) of the Second Additional Protocol under two general criteria to determine the existence of a non-international armed conflict: (1) the intensity of hostilities between the State and the armed groups; and (2) the level of organisation of the armed group.<sup>16</sup> It should also be noted that according to the ICTY Appeals Chamber, these general criteria are equally applicable to conflicts under common article 3.<sup>17</sup>

Although part of the academic literature still defends the dual threshold for the application of common Article 3 and the Second Additional Protocol, in practice, this gap has been filled by state practice and judicial decisions. A unified threshold of application is most convenient for modern humanitarian law, where the characterisation of armed conflicts is not the ultimate goal, but rather the protection of civilians from the effects of war.<sup>18</sup> Furthermore, customary rules of international humanitarian law have watered the conventional distinction down to a historical reflection of the law. It is both legally accurate and politically convenient to refer only to the two general requirements for the existence of a non-international armed conflict. The remaining criteria, such as territorial control, should be taken into account to determine the intensity of the hostilities or the organisation of the armed group. The same goes for the other factors discussed in the subcommittee of the Diplomatic Conference, which were airbrushed out of history for one

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<sup>15</sup> Ibid.

<sup>16</sup> *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, A. Ch, 1995. para. 70. [Hereinafter '*Tadić decision on jurisdiction*'].

<sup>17</sup> *Tadić Judgement*, supra note 11, paras. 561-568.

<sup>18</sup> On the modern tendency to eliminate the distinction between different types of armed conflicts and their thresholds, see: E. Crawford, 'Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts', *Leiden Journal of International Law* 2007-20, p. 441.

reason or another.<sup>19</sup> The scope *ratione persona* of both the Second Additional Protocol and common Article 3 has been subject to similar discussions. While the former refers to conflicts taking place ‘in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups’, the latter makes no distinction. Consequently, some have argued that the Second Additional Protocol only applies to conflicts between military forces of a State and irregular armed forces,<sup>20</sup> while others have maintained that it applies to any conflict that gathers the intensity and organisation criteria.<sup>21</sup>

One of the leading authorities in the conditional requirements for the application of international humanitarian law is the *Boskoski* judgement, which lists all the criteria that are used to determine whether a sufficient degree of organisation and intensity has been reached. On the level of organisation, the *Boskoski* judgement lists five standards:

- 1) the existence of a command structure;
- 2) the ability to undertake organized military operations;
- 3) a certain level of logistics, such as the ability to recruit or the issuance of uniforms; 4) a certain level of disciplinary enforcement; and
- 4) the ability to speak with one voice.<sup>22</sup>

While these are neither exhaustive nor cumulative conditions, they are criteria that help to find whether the group in question is sufficiently organised.

On the intensity of the hostilities, the *Boskoski* trial judgement also suggested a variety of standards:

- 1) the seriousness of the attacks and whether there has been an increase in armed clashes;
- 2) the spread of clashes over the territory and over a period of time;
- 3) an increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict;
- 4) whether the conflict has attracted the attention of the Security Council;
- 5) the number of civilians forced to flee from combat zones;
- 6) the type of weapons used;

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<sup>19</sup> At the Diplomatic Conference, it was extremely difficult to agree on the criteria that ultimately made it to the language of article 1(1). Seeing that there were too many amendments proposed to the drafting committee, a working group was formed which had to meet six different times to decide on the three criteria that are now part of article 1(1). See *Commentaries to the Additional Protocols*, supra note 13, para. 1453.

<sup>20</sup> International Committee of the Red Cross Opinion Paper, ‘How is the term “armed conflict” defined in international humanitarian law?’, para. 4., at: <http://www.icrc.org> (accessed on 12 December 2011).

<sup>21</sup> *Tadić decision on jurisdiction*, supra note 16, para. 70.

<sup>22</sup> *Prosecutor v. Boškoski & Tarčulovski*, Judgement, Case No. IT-04-82-T, T.Ch.I, 2008, paras. 194-206. [Hereinafter ‘*Boskoski*’].

- 7) the besieging of towns and the heavy shelling of these towns;
- 8) the extent of destruction and the number of casualties caused by shelling or fighting;
- 9) the quantity of troops and units deployed;
- 10) the existence and change of front lines between the parties;
- 11) the occupation of territory, towns and villages;
- 12) the deployment of government forces to the crisis area;
- 13) the closure of roads,
- 14) the existence of cease fire orders and agreements; and
- 15) other attempts of representatives from international organisations to broker and enforce cease fire agreements.<sup>23</sup>

The continuous character of a terrorist campaign may also be considered in order to assess the gravity of the conflict<sup>24</sup> and, at least in one case, the intensity of one single attack has triggered the application of international humanitarian law.<sup>25</sup>

### III. Belligerent Status: A Case of Desuetude

The Uribe administration was particularly concerned with the recognition of a non-international armed conflict in Colombian territory *vis-à-vis* the legal standing of the rebel groups. As early as 2003, only one year after being elected to office, family members of kidnapped individuals, congressmen and academics were already demanding that the administration recognise the existence of a non-international armed conflict, which was denied by the government.<sup>26</sup> In 2008, the debate on belligerency and rebel armed groups reached its peak. President Uribe addressed the 38<sup>th</sup> general assembly of the Organisation of American States and once again denied the existence of a non-international armed conflict in order to avoid recognising as belligerent the different armed groups.<sup>27</sup> The climactic moment of the discussion of belligerent status and armed conflict, however, came after President Uribe had left office and his former Defence Minister, Juan Manuel Santos, was elected. President Santos did not maintain the line of argument of his predecessor and quickly recognised that there was a non-international armed conflict underway

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<sup>23</sup> Ibid, para. 177.

<sup>24</sup> *Public Committee against Torture in Israel v. State of Israel*, Case No. HCJ 769/02, 2005, para. 16.

<sup>25</sup> *Abella v. Argentina*, Interamerican Commission of Human Rights, Report No. 55/97, 1997, para. 155.

<sup>26</sup> "Piden a Uribe reconocer el conflicto", *El Tiempo* (Bogotá, 24 September 2003), at: <http://www.eltiempo.com/archivo/documento/MAM-1013678> (accessed on 12 December 2011).

<sup>27</sup> "No dar estatus de beligerancia a las guerrillas: Uribe", *El Tiempo* (Bogotá, 2 June 2008), at: <http://www.eltiempo.com/archivo/documento/MAM-2959160> (accessed on 12 December 2011).

in the Colombian territory.<sup>28</sup> This recognition was inserted in the language of the newly enacted Victims' Law and was a major source of conflict between Presidents Uribe and Santos.

The entire public debate on the *recognition* of a non-international armed conflict that controlled most of the public discourse and the media during 2011 seems to have been largely irrelevant. As already explained, the existence of an armed conflict does not hinge upon the subjective views and declarations of the different groups involved, but rather on the existence of objective criteria. Furthermore, the belligerent status of an armed group does not depend on the mere existence of an armed conflict and its standing as a modern legal institution is highly questionable.

As for the irrelevance of the subjective views of the parties to a non-international armed conflict, it should be highlighted that the adoption of *any* regulation specific to non-international armed conflicts has been resisted for a long time. Most States privilege the police and military forces within their domestic legal framework when confronted with rebel groups. The acceptance of rules of humanitarian law for a domestic conflict did not only limit the State's freedom of action, but led to a general fear that the application of international law to civil war would somehow confer legitimacy or protection based on the belligerent status of the armed groups.<sup>29</sup> The only way by which common Article 3 was finally agreed upon was by inserting a fourth clause to common Article 3, which states that 'the application of the preceding provisions shall not affect the legal status of the Parties to the conflict.'

The objective qualification of non-international armed conflicts and the lack of connection between the existence of an armed conflict and the conferral of belligerent status is best seen by Pictet's commentary on the fourth clause of common Article 3:

This clause is essential. Without it neither Article 3, nor any other Article in its place, would ever have been adopted. It meets the fear - always the same one - that the application of the Convention, even to a very limited extent, in cases of civil war may interfere with the *de jure* Government's lawful suppression of the revolt, *or that it may confer belligerent status*, and consequently increased authority, upon the adverse Party. [...] It makes it absolutely clear that the object of the Convention is a purely humanitarian one, that it is in no way concerned with the internal affairs of States, and that it merely ensures respect for the few essential rules of

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<sup>28</sup> E. López Gomez, "Sí hay conflicto armado!", *El Tiempo* (Bogotá, 7 May 2011), at: <http://www.eltiempo.com/archivo/documento/CMS-9302787> (accessed on 12 December 2011).

<sup>29</sup> D. Fleck (ed.), *The handbook of International Humanitarian Law*, Oxford: Oxford University Press 2008, p. 612.

humanity which all civilised nations consider as valid everywhere and under all circumstances and as being above and outside war itself. *Consequently, the fact of applying Article 3 does not in itself constitute any recognition by the de jure Government that the adverse Party has authority of any kind*; it does not limit in any way the Government's right to suppress a rebellion using all the means - including arms - provided for under its own laws; it does not in any way affect its right to prosecute, try and sentence its adversaries for their crimes, according to its own laws. In the same way, the fact of the adverse Party applying the Article does not give it any right to special protection or any immunity, whatever it may be and whatever title it may give itself or claim.<sup>30</sup>

Regardless of the objective qualification of a non-international armed conflict, the very institution of belligerency has fallen into desuetude. The scant and outdated practice on the recognition of belligerency is hardly sufficient to deem it applicable or legally consequential for international humanitarian law.

An important distinction is called for when it comes to the issue of belligerent status. Recognition of belligerency could come from two different sources: either the government struggling with the rebel groups inside its territory could recognise the belligerent status of those groups or, alternatively, third States that do not partake in the hostilities could do so. In theory, recognition of belligerency by the government would render the existing humanitarian regime applicable to the civil war, while recognition of belligerency by third States would render the existing body of customary law of neutrality applicable.<sup>31</sup> In practice, however, the recognition of belligerency by the territorial government has been extremely rare and recognition by third States has been mostly reduced to situations of maritime hostilities.

In the case of recognition of belligerency by third States, the most important features are that it does not confer legitimacy to the insurgent party, nor does it carry an expression of approval or disapproval for or against any of the causes fought by either party.<sup>32</sup> The effect is that it creates a situation of neutrality, whereby the recognising State cannot interfere in the conflict in favour of one of the parties. The motivation behind the recognition of belligerency is the infringement on the rights and interests of third parties, which is why it occurs almost exclusively in situations of conflict at sea where trade with other States can be hampered<sup>33</sup> and where the main legal incident

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<sup>30</sup> J. Pictet, *The Geneva Conventions of 12 August 1949: Commentary*, Geneva: International Committee of the Red Cross 1952, pp. 60-61.

<sup>31</sup> L. Brierly, *The Law of Nations* (Humphrey Waldock ed.), Oxford: Clarendon Press 1963, p. 141.

<sup>32</sup> J. W. Garner, 'Recognition of Belligerency', *AJIL* 1938-32, pp. 111-112.

<sup>33</sup> H. Wheaton, *Elements of International Law* (R. H. Dana ed.), London: The Clarendon Press 1866, p. 34.

of belligerency is the right of both parties to search neutral ships for contraband on the high seas.<sup>34</sup> The most significant example occurred during the American civil war, where the confederate States were recognised as belligerents and afforded neutrality, most notably by Great Britain. However, the lack of uniformity or even cases of State practice has led Crawford to observe that “even in its heyday in the nineteenth century, the status of recognition of belligerency in civil war situations was thus precarious.”<sup>35</sup>

For the recognition of belligerency by the parent government, the purpose is to bring into effect the *jus in bello* between State forces and the armed groups. The most salient feature, however, is that the recognition of belligerency is entirely discretionary so it is afforded only in extremely rare cases and only if reciprocity has become an issue.<sup>36</sup> During the 20<sup>th</sup> century, the only documented case of recognition of belligerency occurred in the Nigerian civil war, where rebel armed groups attempted to secede as the ‘Republic of Biafra’ by blockading the ports and coasts under their control. The Nigerian government conducted hostilities in compliance with the Third Geneva Convention and, at the termination of the war, set free all of the captured rebels without pressing any charges against them.<sup>37</sup> Apart from this isolated case, domestic conflicts during the last century have not been conducted on the basis of belligerency. Most notably, the Spanish and the Soviet civil wars, the two largest non-international armed conflicts of the 20<sup>th</sup> century, were fought without the recognition of a belligerent status. Furthermore, during the 1990s the question of belligerency for non-state actors in the Yugoslav wars was not even raised within the Badinter Commission which examined legal questions of statehood. Entities such as the Republika Srpska or the Republika Srpska Krajina were later treated by the ICTY as non-state armed groups to which the law of internal armed conflict applied, unless ‘overall control’ by a second State, in this case Serbia, could be proven before the Tribunal.

There is little point in discussing the risks of recognising a non-international armed conflict. Not only is its existence determined by objective factors, but the declarations of the parties involved have no legal significance for the application of international humanitarian law. Furthermore, the recognition of an armed conflict has no bearing on the recognition of belligerency on one of the parties, be it by the parent government or by third States. Belligerent status, was historically afforded on a discretionary basis, for the purpose of triggering the application of international law to a conflict which would otherwise be conducted unrestrictedly. Considering that international humanitarian law applies to non-international armed conflicts as a matter of

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<sup>34</sup> J. Crawford, *The Creation of States in International Law*, Cambridge: Cambridge University Press 2006, p. 381.

<sup>35</sup> *Ibid*, p. 382.

<sup>36</sup> L. Moir, *The Law of Internal Armed Conflict*, Cambridge: Cambridge University Press 2002, p. 10.

<sup>37</sup> Note from the Nigerian Minister of Defence to the ICRC delegation in Lagos, 14 May 1970, ICRC Archives, file 219 (186); *ICRC Annual Report 1970*, p. 10.

law, independently from the will of the parties involved, there is no use in recognising the belligerency of armed groups, which is perhaps the best explanation for the desuetude of a legal institution which remains largely irrelevant in light of modern humanitarian law.

#### **IV. Application of International Humanitarian Law in Colombia**

As we have argued, the standard view of international humanitarian law holds that the subjective views of the parties should have no effect on the objective legal conditions of an armed conflict. This view no longer reflects an aspiration of international lawyers for the continued application of international humanitarian law. Nowadays governments have a much greater incentive to apply international humanitarian law rather than deny its existence. The use of international humanitarian law is a strategic advantage for many governmental purposes.<sup>38</sup> Being a body of law aimed at regulating, among other things, the use of lethal force, it imposes far less restrictions upon governments than human rights law in its operation against armed groups.<sup>39</sup> Legal argument on behalf of humanitarian circles doesn't result in the application of international humanitarian law nowadays, but on the continued application of human rights law even in situations of armed conflict.

The official views of the Uribe administration posed a potential obstacle to the use of international humanitarian law. However, the experience during the Uribe years –especially during the later stages of the Uribe government – showed that government officials, legislators and judges were able to successfully use international humanitarian law regardless of the official political position. Laws were made that referenced international humanitarian law and pre-existing laws doing the same thing continued to be applied. The Ministry of Defence issued a Policy on Human Rights and International Humanitarian Law and an Operational Law Manual for the armed forces based on the rules of international humanitarian law. Judicial decisions were also rendered by the highest courts. The Constitutional Court ruled on several issues of international humanitarian law and ratified the 'objective qualification' view in one important judgement. Meanwhile, the Criminal Chamber of the Supreme Court of Justice began to apply the underused war crimes provisions in the Criminal Code enacted in 2000, holding that the lack of *political* recognition of an armed conflict by the government was not an obstacle to a *judicial* recognition by a criminal law judge. Violations of international humanitarian law by all non-State actors were denounced as such by the government and international litigation on alleged violations by governmental forces has been carried out also on the basis of international humanitarian law.

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<sup>38</sup> D. Kennedy, *Of War and Law*, Princeton: Princeton University Press 2006, pp. 13-45.

<sup>39</sup> Thus, humanitarian lawyers have at times chosen to apply human rights law over some aspects of humanitarian law. See for instance, L. Doswald-Beck, 'The right to life in armed conflict: does international humanitarian law provide all the answers?', *International Review of the Red Cross* 2006-864, pp. 883-887.

#### IV.1 Policies and Legislation on International Humanitarian Law

*Since the ratification of the Second Additional Protocol by Colombia, legislation has continually referred to international humanitarian law. This was triggered in part by two Constitutional Court rulings which forcefully called for the application of the Second Additional Protocol and dismissed the widespread worries that this would lead to an international recognition in favour of the guerrillas<sup>40</sup> and in part by the calls of leading academics who advocated for the 'humanisation of war' in Colombia through the application of international humanitarian law.<sup>41</sup>*

An armed conflict was officially recognised by Congress in Law 1448 of 2011 which regulates reparations for victims. This recognition was widely contested in political circles and even seen as a sign of treason and hostility by former President Uribe. Notwithstanding, several previous laws already referred to armed conflict and international humanitarian law.

Law 418 of 1997, enacted as a legal framework for peace negotiations and demobilisations by members of armed groups, repeatedly refers to the application of international humanitarian law. One stated goal of governmental negotiation with armed groups is to "achieve the effective application of international humanitarian law."<sup>42</sup> The armed groups are defined in a provision which follows verbatim the threshold requirement of the Second Additional Protocol by establishing that an 'organised armed group' is that "which, under responsible command, exercises such control over a part of its territory as to enable it to carry out sustained and concerted military operations."<sup>43</sup> The Office of the Prosecutor General is charged with protecting witnesses of human rights violations and breaches of international humanitarian law,<sup>44</sup> and, under a more recent version of the law, governors and mayors are obligated to follow recommendations and alerts by the national government so as to prevent "possible violations of human rights or international humanitarian law."<sup>45</sup>

Law 418 has been amended and re-enacted several times, including one time in 2006 under the Uribe government. The international humanitarian law provisions were kept and even expanded in 2006.<sup>46</sup> The government's official policy of non-recognition of an armed conflict was not seen as a bar to the use of and reference to international humanitarian law in legislation on the armed conflict. Demobilisations by paramilitary groups were even carried out under this legislation which provides for pardon, disarmament and rehabilitation for members of armed groups which are not prosecuted for non-political crimes.

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<sup>40</sup> Colombia, Constitutional Court, Judgement C-225 of 1995.

<sup>41</sup> A. Valencia Villa, *La humanización de la guerra: Derecho internacional humanitario y conflicto armado en Colombia*, Bogotá: Tercer Mundo, 1991.

<sup>42</sup> Colombia, Law 418 of 1997, Article 8.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Idem*, Articles 67, 78 and 81.

<sup>45</sup> *Idem*, Article 105.

<sup>46</sup> *Ibid.*

The 1980 Criminal Code, another form of legislation that existed before the Uribe administration, was overhauled in 2000. Several provisions were added to address situations of atrocity in armed conflict. Four specific offences, defined locally as ‘crimes against humanity’, were added: genocide, torture, forced disappearances and forced displacement.<sup>47</sup> In addition, at the behest of the International Committee of the Red Cross, a whole chapter on war crimes was added. These war crimes provisions have been chronically underused by prosecutors and judges. However, the legislation was retained during the Uribe years and the government did not seek to change it. Moreover, war crimes were included in a government-proposed amendment to the Military Criminal Code in 2008 seeking to specifically prosecute members of the military, under the military justice system, for violations of international humanitarian law. Part of the amendment was ultimately struck down as an unconstitutional extension of military jurisdiction.<sup>48</sup>

Some laws that continued to refer to international humanitarian law and particularly war crimes were passed during the tenure of President Uribe. For example, the case of Law 906 of 2004, the Code of Criminal Procedure that revolutionized criminal trials in Colombia by adopting a new adversarial system, which regulated the ‘*principio de oportunidad*’: a set of exhaustive cases in which prosecutors may opt not to prosecute a case.<sup>49</sup> The law prohibited prosecutors from using this principle in cases of war crimes “as defined in the Rome Statute.”<sup>50</sup> The Constitutional Court struck down this last proviso holding that mandatory prosecution should hold for all war crimes, as generally defined in international law.<sup>51</sup>

In addition to continued legislation referring to international humanitarian law, a number of government programs used international humanitarian law. Most importantly, the Ministry of Defence issued in 2008 a Comprehensive Policy on Human Rights and International Humanitarian Law, outlining the government’s main objectives for the implementation of international humanitarian law among the military forces.<sup>52</sup> The Policy focused on the interplay between human rights and humanitarian law, the commitment of the military forces to compliance with international humanitarian law, the need for education, supervision and expert advice on humanitarian law and several other themes. The following year and still under the Uribe administration, the Ministry of Defence issued a Manual on Operational Law for the Military Forces. This Manual explicitly set out the applicable rules of international humanitarian law, including the law on direct participation in hostilities.<sup>53</sup>

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<sup>47</sup> Colombia, Law 599 of 2000.

<sup>48</sup> Colombia, Constitutional Court, Judgement C-533 of 2008.

<sup>49</sup> Colombia, Law 906 of 2004.

<sup>50</sup> *Idem*, Article 341.

<sup>51</sup> Colombia, Constitutional Court, Judgement C-095 of 2007.

<sup>52</sup> Ministry of National Defence, Comprehensive Human Rights and IHL Policy, at: [http://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Asuntos\\_de\\_Interes/Derechos\\_Humanos/docs\\_nweb/Politica\\_DDHH\\_MDN\\_ENG.pdf](http://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Asuntos_de_Interes/Derechos_Humanos/docs_nweb/Politica_DDHH_MDN_ENG.pdf).

<sup>53</sup> C. Von der Groeben, ‘The Conflict in Colombia and the Relationship between Humanitarian Law and Human Rights Law in Practice: Analysis of the New Operational

Lack of recognition on behalf of the Colombian government did not hinder humanitarian law. While the government's political statements on the status and moral standing of FARC were controversial, they did not seem to block the application of humanitarian law regarding legislation and official governmental policy.

#### IV.2 National Adjudication on the Basis of International Humanitarian Law

National adjudication on the basis of humanitarian law goes a long way back in Colombia. In 1992, the Constitutional Court reviewed governmental ratification of Protocol I and held that "the text of Protocol I coincides with the Constitution, since it is aimed at the protection of the integrity of the civilian population in case of an international war."<sup>54</sup> Then in 1995, the Court reviewed congressional ratification of the Second Additional Protocol. The Court held the somewhat controversial position that Additional Protocols codified *jus cogens* norms and therefore were *ipso jure* applicable to international and non-international armed conflicts respectively, with no need for ratification or incorporation.<sup>55</sup> In 1999, the Constitutional Court ordered the relocation of a police station whose presence near an elementary school placed civilian population at risk. The decision was taken on the basis of, among other considerations, the principle of distinction in international humanitarian law.<sup>56</sup> This holding was reiterated at the height of the Uribe government, in March 2006. In Judgement T-165 of 2006 the Court decided a similar case but found no proof of a 'grave and imminent threat' to civilian life in the relevant town.<sup>57</sup> A year later, the Court again referred to the application of international humanitarian law in Colombia. One of the abovementioned laws, Law 418 of 1997, contained provisions on State reparations for victims of breaches of international humanitarian law. In 2001 a man was murdered by four members of a paramilitary group. The men shot him from a motorbike and fled. His spouse filed for reparations pursuant to Article 15, according to which:

Victims are those persons which form part of the civilian population who suffer prejudice in their lives, serious detriment of their personal integrity and/or personal possessions, as a consequence of acts which may arise in the context of the internal armed conflict, such as terrorist attempts, combat, attacks, and massacres, among others.

The government denied reparations, arguing that victims were only those affected by "terrorist acts, combat, and massacres [...] committed for ideological and political motives." This narrow interpretation of the meaning of 'victim' was related to the government's narrow interpretation of the meaning

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Law of the Colombian Armed Forces', *Journal of Conflict & Security Law* 2011-16, pp. 141-164.

<sup>54</sup> Colombia, Constitutional Court, Judgement C-574 of 1992.

<sup>55</sup> Colombia, Constitutional Court, Judgement C-225 of 1995.

<sup>56</sup> Colombia, Constitutional Court, Judgement SU-256 of 1999.

<sup>57</sup> Colombia, Constitutional Court, Judgement T-165 of 2006.

of 'conflict'. For the government, a conflict necessarily involved an ideological struggle reflected in armed confrontation. This position, which is shared in some legal circles, led to further complications in the paramilitary demobilisations of 2003 and the operation of the Justice and Peace Law.

The Constitutional Court rejected this narrow reading of the legal provision. Interestingly, although the case could have been decided on the basis of statutory construction alone, the Court decided to refer broadly to international humanitarian law. The Court cited Article 8(c) of the Rome Statute, which codifies a group of war crimes applicable to internal armed conflict, namely violations of common Article 3 to the Geneva Conventions and concluded that "the aim of this international provision is to protect the civilian population affected by armed conflict from acts of violence against life, human dignity, and personal freedom, whatever the modality of the breach may be."<sup>58</sup>

The Court thus held that the government was not entitled to

deny the victims of armed conflict the assistance that they demand, based on the circumstances in which their rights were violated, since, whatever the method used by the perpetrators, international humanitarian law proscribes [...] all acts of violence against life and person, against personal dignity, hostage taking, and executions without previous judgement, pronounced by a competent tribunal and subject to constitutional guaranties.<sup>59</sup>

The Court also held, without an explicit legal basis, that international humanitarian law entitled victims to reparations.<sup>60</sup> The importance of this judgement lies in the Constitutional Court's implicit rejection of Uribe's argument: an armed conflict existed in 2001 and therefore international humanitarian law applied, regardless of any narrow interpretation that the government might espouse.

A more important judgement followed that same year. In judgement C-291 of 2007, the Court ruled on the constitutionality of some of the criminal offences that had been enacted in 2000 to codify some war crimes provisions into Colombian criminal law. In Colombian constitutional law, legal provisions may be reviewed against some international law norms including international humanitarian law. In this case the issue before the Court was whether some of the legal definitions of war crimes in Colombia were unduly narrow and thus failed to reflect the corresponding prohibitions of international humanitarian law. The Court answered affirmatively with regard to some provisions and negatively with regard to others.

In order to support its reasoning, the Court decided to refer broadly to international humanitarian law. The Court held that "the existence of an armed conflict is legally determined on the basis of objective factors, regardless of the denomination or qualification given to it by States, governments or armed groups involved therein."<sup>61</sup> The Court also clarified some important points of

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<sup>58</sup> Colombia, Constitutional Court, Judgement T-188 of 2007.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Colombia, Constitutional Court, Judgement C-291 of 2007.

the law. It drew a distinction between ‘combatants *stricto sensu*’, that is, combatants who are entitled to participate in hostilities in the context of an international armed conflict and ‘combatants in a general sense’, which the Court took to mean “persons who, through membership in armed forces and irregular armed groups, or by taking part in hostilities, are not entitled to the protection given to civilians.”<sup>62</sup> The Court also took the chance to clarify its earlier position on the *jus cogens* status of international humanitarian law, holding that, as far as this decision was concerned, only the principles of distinction, precaution and humanitarian treatment enjoyed *jus cogens* status.<sup>63</sup>

The Supreme Court of Justice also adjudicated on international humanitarian law during the Uribe administration. It first signalled a willingness to do so *in dicta* contained in a large procedural decision on the charges against an accused former paramilitary member. The Criminal Chamber of the Supreme Court of Justice announced in its decision that prosecutors should charge former members of paramilitary groups with reference to the war crimes provisions adopted in 2000. In support of this conclusion, the Supreme Court said:

Judicial notice of the existence of a non-international armed conflict, that is, a factual situation, is a completely different question from that of recognition of a status of belligerency for certain actors in the conflict. Nowadays, common Article 3 of the Geneva Conventions holds that the application of humanitarian norms has no juridical effect on the status of the warring parties.<sup>64</sup>

The Supreme Court went on to clarify that it did not seek to contest the official governmental position about the absence of an armed conflict:

The Chamber is aware that recognising the existence of an armed conflict is a political act of complex consequences, which the judiciary has no role in making, but that situation does not bar judges from verifying the existence of an armed conflict, exclusively for the purpose of applying the Justice and Peace Law, when investigating and judging on conduct that may fit with the description of the ‘*offences against persons and objects protected by international humanitarian law*’ [enacted in the 2000 Criminal Code], with a view to safeguarding the values protected by international humanitarian law, which are beyond any political consideration.<sup>65</sup>

A year later, the Supreme Court of Justice quashed the judgements with respect to two paramilitaries who had murdered four members of an indigenous community, since one of them had been acquitted and the other

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<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Colombia, Supreme Court of Justice, Chamber of Criminal Cassation, Decision No. 32.022, 21 September 2009.

<sup>65</sup> Ibid.

convicted of the ordinary crime of murder. The Supreme Court held that these crimes should be treated as war crimes and therefore both paramilitaries should have been convicted of the offence of 'murder against a protected person' which specifically criminalises the killing of persons not taking direct part in hostilities. The Court reasoned that in this case, despite the absence of a combat situation, the crimes committed were connected to the armed conflict. The Court further reasoned:

[the Court] recognises an irrefutable truth, which is the existence of organised armed groups that, as irregular military apparatuses, carry out military operations in a dispute for the control of vast portions of Colombian territory, among which is the place where the deaths under investigation took place.

The Court further stated:

[...] the Colombian State has recognised the existence of a non-international armed conflict through several means, and has recognised guerrilla and paramilitary groups as parties to that conflict, by enacting Laws 782 of 2002 [re-enactment of Law 418 of 1997 mentioned above] and 975 of 2005 [Justice and Peace Law].

The Court thus held that the murder of four indigenous persons was connected to an armed conflict whose existence could be judicially noted and, therefore, the perpetrators had to be convicted of a war crime and not the ordinary crime of murder.

While the Supreme Court of Justice did not apply an 'objective factors' test as the Constitutional Court suggested and the ICTY has repeatedly done so, the Court did explicitly hold that its application of international humanitarian law would not modify the legal status of the parties to the conflict. Therefore, there was no reason why international humanitarian law should not be applied in the Colombian case. The decisions by two of Colombia's highest courts demonstrate that, due to the objective qualification of an armed conflict, the official rhetoric coming from Uribe's presidency was not an obstacle to the continued application of international humanitarian law by domestic courts.

### **IV.3 International Litigation on the Basis of International Humanitarian Law**

The issue of the application of international humanitarian law in Colombia has presented itself twice before the Inter-American Court of Human Rights. In the 2000 *Las Palmeras* case, Colombia was charged with the summary execution of at least six persons. The Inter-American Commission on Human Rights petitioned the Court to hold Colombia responsible for a breach of Article 4 of the American Convention on Human Rights, which establishes the right to life, along with a breach of common Article 3 of the Geneva Conventions.

Colombia objected to the Court's jurisdiction to adjudicate on international humanitarian law. The jurisdictional objection was upheld by the Court, which held that "the American Convention [...] has only given the Court competence

to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions.”<sup>66</sup>

The Court’s holding was at odds with the Commissions own decision in the *Abella* case three years earlier. The Inter-American Court seems to have trailed back on its steps in subsequent cases in which it held that

all persons, during internal or international armed conflict, are protected by the provisions of international human rights law, such as the American Convention, and by the specific provisions of international humanitarian law. Consequently, there is a convergence of international norms protecting those who are in such situations.<sup>67</sup>

The Colombian government did not seem to realise in the 2000 *Las Palmeras* case that international humanitarian law provided a more flexible legal framework than human rights law with regard to military operations where lethal force is envisaged. This lesson was learned and in the litigation following Colombia’s attack on a FARC camp located in Ecuadorean territory, Colombia argued *for* the application of international humanitarian law.

In its report on admissibility the Inter-American Commission on Human Rights dismissed Colombia’s jurisdictional objections. Colombia objected to the jurisdiction of the Commission contending that international humanitarian law, as *lex specialis*, displaced the application of human rights law and that it provided a more detailed legal framework than human rights law for the assessment of whether a killing was arbitrary or not.<sup>68</sup> The Inter-American Commission rejected Colombia’s objection, holding that international humanitarian law would serve as an interpretive aid for the decision on whether Colombia violated Article 4, the right to life provision of the American Convention on Human Rights.<sup>69</sup>

International legal argument by the Colombian government was thus based on international humanitarian law. This argument was not barred by the government’s official rhetoric regarding the inexistence of an armed conflict in Colombia. In a way, it could be said that in Colombia between 2002 and 2010, the term ‘armed conflict’ acquired two different meanings: one political and one judicial. The political term referred to an armed struggle against a legitimate political actor with the obvious exclusion of terrorists with whom the government’s position was not to negotiate. The legal term referred to the pre-condition to the application of international humanitarian law, which was continually applied and used by legislators, judges and government officials during the tenure of President Álvaro Uribe.

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<sup>66</sup> *Las Palmeras v. Colombia*, Preliminary Objections, Judgement of February 4 2000, Series C No. 67, para. 33.

<sup>67</sup> *Serrano Cruz Sisters v. El Salvador*, Preliminary Objections, Judgement of November 23 2004, Series C No. 118, para. 112.

<sup>68</sup> *Ecuador v. Colombia*, Inter-State petition PI-02, Admissibility, Franklin Guillermo Aisalla Molina, 21 October 2010, para. 114-116.

<sup>69</sup> *Idem*, para. 118.

## Conclusion

Between 2002 and 2010 the Colombian government refused to recognise a state of internal armed conflict in Colombia out of fear of conferring a special status to the FARC. That fear, as this article has strived to demonstrate, was unfounded. First, the existence of an armed conflict does not depend on the subjective views of the parties but on objective factors which are fulfilled in the Colombian situation. Second, the existence of an armed conflict entails the application of international humanitarian law, but does not entail a special legal recognition for the armed groups. Belligerency is a contested legal institution which may have been in force in the 19<sup>th</sup> century but finds no place in modern humanitarian law.

The official governmental policy, however, was also ineffectual. International humanitarian law was continuously applied by legislators, judges and government officials. Laws were passed, judgements were made and arguments were advanced, using the tools of contemporary international humanitarian law. The Colombian case serves to illustrate the importance of the objective qualification rule expounded in section II of this article: by rendering official governmental positions irrelevant, international humanitarian law can be applied unhindered by governmental politics, whilst governmental politics can act without hindering international humanitarian law. The Colombian case is thus an example of how Pictet's goal of applying humanitarian law seems to have succeeded, regardless of the way governments choose to label armed conflicts.