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The Conflict in Colombia and the Relationship between Humanitarian Law and Human Rights Law in Practice: Analysis of the New Operational Law of the Colombian Armed Forces

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Abstract

When dealing with non-State actors such as terrorists or guerilla groups, States often have to act in a grey area between International Humanitarian Law (IHL) and International Human Rights Law (IHRL). The constant question is which of these two legal regimes is applicable and what their relationship is. Colombia, a veteran in dealing with non-State actors and internal conflicts, has recently set out to answer that question by applying a new approach of combining IHL and IHRL in a hybrid model. The legal basis for this approach is the new operational law for the Colombian armed forces, which offers guidance to the acting soldiers in the field. The Colombian approach is novel and unique and has to be scrutinized and analysed against the broader background of States' struggles with non-State armed groups.

1. Introduction

When talking about States' struggles with rebels, guerillas, insurgents or terrorists, the Republic of Colombia is an all time veteran. Colombia has suffered from internal violence for more than five decades and is still involved in a fight against a number of non-State armed groups. Over the past few years, the Government has made visible progress in regaining full control over the country, increasing security and overpowering these various violent actors.[1]

Parallel to its success, the Government has worked towards a new operational law for its armed forces.[2] This new operational law has finally been implemented

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1 Editorial, 'Golpe al Terror', *La Semana*, 27 September 2010 at 24.

2 Ministry of National Defence, *Comprehensive Human Rights and IHL Policy* (2007) para 33 <http://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Documentos_Home/Politica_DDHH_MDN.pdf> accessed 23 February 2011.

and is laid down in the new Operational Legal Manual for the armed forces of Colombia.[3] This article will examine this new operational law, outline its main structures and give a brief legal assessment of the new Colombian approach, which comprises an interesting inter-connection of International Humanitarian Law (IHL) and International Human Rights Law (IHRL). This article only attempts to roughly describe the Colombian operational law and does not intend to present an in-depth analysis thereof. The article will conclude with a brief analysis of how the Colombian approach might prove useful for other States' struggles with non-State armed groups and terrorists, especially if it can provide some guidance for the regulation of what is known as the 'Global War on Terrorism'.

2. Background

A. History of the Conflict

This article focuses on the armed struggle between the Colombian Government and non-State armed groups. The history of this conflict is more than 40 years old and 'the longest endured by any country in modern times'.[4] Obviously, it cannot be restated here to a satisfying amount. However, it is necessary to give a brief overview of the past and current situation of the conflict.[5]

The conflict in Colombia is very complex, involving a number of actors and parties. It started after the assassination of Jorge Eliécer Gaitan in 1948, which was followed by a violent clash between Liberal and Conservatives that lasted for five years, often referred to as 'La Violencia'.[6] La Violencia ended in 1953 by a military coup under the command of General Gustavo Rojas Pinilla. The reign of the military lasted for about four years and ended in 1957 with the reconciliation of Liberal and Conservatives who eventually joined together to create what is known as The National Front, an agreement dividing the power among the two parties. It has been claimed as one among several theories that it was in opposition to the National Front, which excluded any other actor from political participation, that the guerillas emerged, fighting for a leftist

[3] Comando General Fuerzas Militares, *Manuel de Derecho Operacional* (2009) on file with author.

[4] P Alston, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions - Mission to Colombia' (31 March 2010) UN Doc A/HRC/14/24/Add.2, para 3.

[5] For a more comprehensive overview over the conflict in Colombia, *see* D Bushnell, *The Making of Modern Colombia: A Nation In Spite of Itself* (University of California Press, London 1993); JL Esquirol, 'Can International Law Help: An Analysis of the Colombian Peace Process' (2000) 16 *Connecticut J Intl L* 23–94; C Díaz, 'Colombia's Bid for Justice' in K Ambos, J Large and M Wierde (eds), *Building a Future on Peace and Justice* (Springer, Heidelberg 2009) 469–503.

[6] Esquirol (n5) 23, 28.

alternative governance.[7] In the mid-1980s, paramilitary forces fighting against guerillas as private contractors joined the conflict and further complicated the situation.

In general, the actors in the conflict can be divided into four 'parties' that have fought and are fighting against each other. The first 'party' is the Colombian Government itself along with its army and police forces. The second consists of guerilla groups such as the National Liberation Army (ELN—Ejército de Liberación Nacional), Revolutionary Armed Forces of Colombia (FARC—The Fuerzas Armadas Revolucionarias de Colombia, Popular Liberation Army (EPL—Ejército Popular de Liberación) or the April 19 Movement (M-19—Movimiento 19 de Abril). These guerilla groups do not form one coherent party, but their violent struggle against the Government shares the more or less common aim of establishing a new Marxist–Socialist Government in Colombia.

The third party to the conflict consists of paramilitary groups that evolved from civilian militias once formed to protect landowners from attacks of the guerillas.[8] The formation of civilian militias (*grupos de autodefensa*) against the guerilla violence happened in the late 1960s legitimized by State decrees.[9] In the late 1990s, the paramilitaries formed an umbrella organization called the United Self-Defense Units of Colombia (AUC—Autodefensas Unidas de Colombia).[10] The AUC is said to have often worked side by side with the Government in military operations against the guerillas. In a process of transitional justice that took place mainly between 2003 and 2006, the paramilitaries have widely been demobilized. They are, therefore, only of minor importance for the analysis of the actual situation.

Finally, as a fourth player in the Colombian conflict various criminal bands, drug cartels and other illegal armed groups have to be mentioned, the BACRIM (Bandas Criminales). Their activities are of a wide variety and they do not form one comprehensive group. However, their capability to perform violence and threaten the country's security makes them an important player in the Colombian Conflict. Today they often consist of former paramilitaries.[11]

The most dominant feature of the conflict, especially after the demobilization of the paramilitaries, is the struggle between the guerilla groups and the Government.

[7] *Ibid* 28. (With further references regarding the question of whether the political system under the National Front was really closed.)

[8] *See* I/A Court HR, *Case of the 19 Tradesmen v Colombia*, Merits, Reparations and Costs. Judgment of 5 July 2004, Series C No 109, para 84 (giving a brief account on the history of the paramilitaries and their evolvement form state-backed civil militias); JS Easterday, 'Deciding the Fate of Complementarity: A Colombian Case Study' (2009) 26 *Ariz J Intl & Comp L* 49, 65–8.

[9] I/A Court HR (n 8); Inter-Am CHR, 'Report on the Demobilization Process in Colombia' (13 December 2004) OEA/SerL/V/II120, doc 60 para 36 <http://www.cidh.oas.org/countryrep/Colombia04eng/toc.htm> accessed 23 February 2011.

[10] Inter-Am CHR (n 9) para 42.

[11] Alston (n 4) para 61.

The most famous of the guerilla groups is the FARC. It was founded in the 1960s as a Marxist–Leninist revolutionary guerilla organization. Back in those days, it was limited in its military operations to small-scale confrontations with the Colombian National Army and mostly operated in Colombia's rural areas. Throughout its history, the organization underwent several changes. One of the most important changes occurred in 1982 following the Seventh Guerrilla Conference of the FARC. This conference was a meeting of FARC leaders who agreed upon a change of strategy at whose core stood the development of the FARC into an irregular army. This change was possible mainly due to the increase of income from the drug trade. The rise of the FARC during the 1980s was followed by a period of negotiations with them and other guerrilla groups until 2002.[12] Although some guerrilla groups were successfully demobilized, the FARC refused to surrender to the Government.

From 2002 onwards, with the assumption of office of Álvaro Uribe as Colombia's new President, the negotiations were put on hold and military and police action against the FARC was intensified. During the same time the demobilization of the paramilitary forces was undertaken.

Apparently this recent push of the Government against the FARC has brought some success.[13] According to the Colombian Government the number of rebel fighters has decreased from 16 000 in 2001 to 6000–8000 in 2008.[14] In addition, a number of top FARC leaders have been killed recently by Government forces.[15] Altogether, it can be stated that recently the FARC has substantially lost power and might even be on permanent decline. According to a statement by former Vice-President Francisco Santos, the once biggest guerilla group of Latin America has become a mere 'paper tiger'.[16] This might be slightly exaggerated as the threat does still exist and the Government still does continuously conduct military operations against the FARC. Also the power of the other criminal bands has risen, especially since they were able to recruit a lot of former paramilitaries.[17]

However, the story of the past decade of the conflict is a story of growing stability and success for the Government and Colombia is now at the critical point in time when it has to take advantage of this momentum to establish an enduring peace. Of special importance therefore is a new legal approach adopted in the past few years that seems to be a gradual shift from applying

[12] Inter-Am CHR (n 9) para 54–9.

[13] *See* CIA World Factbook on Colombia <https://www.cia.gov/library/publications/the-world-factbook/geos/co.html> assessed 25 November 2010.

[14] J McDermott, 'Colombia's Rebels: A Fading Force?' *BBC News* (1 February 2008) <http://news.bbc.co.uk/2/hi/americas/7217817.stm>.

[15] —, 'Colombia Forces Kill "Key Rebel" ' *BBC News* (23 September 2008) <http://news.bbc.co.uk/2/hi/americas/7630663.stm> accessed 23 February 2011.

[16] H Murphy and B Lo, 'FARC Is a 'Paper Tiger' After Offensive Desertions' (29 October 2009) <http://bloomberg.com/apps/news?pid=newsarchive&sid=aCsN3xsYNIOM&refer=latin_america>.

[17] Alston (n 4) para 61ff.

full-scale IHL to an enforcement approach that is more Human Rights Law based. This article will study the legal aspects of this new policy of combating non-State violent actors outlining the core elements of this policy and analysing whether it might serve as a model for other conflict situations, especially for what is known as the 'Global War on Terrorism'.

B. Qualification of the Conflict—Non-International Armed Conflict

The position of the Colombian Government is that Colombia is not engaged in an armed conflict against the FARC, other guerilla groups or other non-State actors. Instead, it labels members of the FARC as terrorists and treats them as common criminals, not as belligerents under IHL.[18]

It has to be recalled that, as a matter of law, it is not up to the conflict parties to determine the character of the conflict.[19] Instead, this has to be done according to objective criteria stated in the corpus of IHL.[20] In the case of Colombia, where the question is whether a non-international armed conflict (NIAC) exists, the relevant provisions of IHL are Article 3 of the Geneva Conventions (GC) and the Additional Protocol to the GCs II (AP II). There is no clear cut definition of NIACs.[21] It is therefore particularly difficult to distinguish NIACs from conflicts that do not amount to armed conflicts.[22] In general, Article 3 GC is applicable if a conflict reaches 'a minimum level of intensity and duration and when the opposing armed group is organized and

[18] This position is being upheld in spite of the Constitutional Court's view that Colombia is engaged in an armed conflict, see, for example, Judgment T-981 (2001); Judgment T-602 (2003); Judgment T-417 (2006); Judgment T-444 (2008); Judgment T-496 (2008); Judgment T-045 (2010); Judgment C-225 (1995); Judgment C-040 (1997); Judgment C-251 (2002); Judgment C-802 (2002); Judgment C-172 (2004); Judgment SU-256 (1999); see further J Römer, *Killing in a Gray Area between Humanitarian Law and Human Rights* (Springer, Heidelberg 2010) 10.

[19] Contra, D Jinks, 'The Applicability of the Geneva Conventions to the "Global War on Terrorism" ' (2005) 46 *Virginia J Intl L* 165, 186 (stating that at least in case the states accept the existence of an armed conflict the hostilities should be understood as such 'irrespective of the objective conditions'.)

[20] M Sassòli, 'Transnational Armed Groups and International Humanitarian Law, Occasional Paper Series, Program on Humanitarian Policy and Conflict Research' Harvard University Occasional Paper No 6, 2006, 7 <http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf> accessed 23 February 2011 ('In law [...] legal classification depend upon facts themselves and not upon the views on the facts of those subject to the law.').

[21] J Pejic, 'Terrorist Acts and Groups: A Role for International Law?' (2004) 75 *Brit Yearbook Intl L* 71, 86; Sassòli (n 20) 6; International Law Association, *Final Report on the Meaning of Armed Conflict in International Law* (International Law Association, London 2010) 1.

[22] SR Ratner and JS Abrams, *Accountability for Human Rights Atrocities in International Law* (2001) 96 ('The level of conflict necessary to trigger these protections [of Art. 3] has been a source of uncertainty and contention since the Conventions' drafting.').

itself has the capacity to engage in military operations'.[23] AP II sets an even higher threshold,[24] requiring that the opposing forces be under a responsible command and exercise such control over a territory as to enable them to carry out sustained and concerted military operations, and to implement Protocol II.[25] The field of application of AP II is therefore narrower and more restricted than that of Article 3 GC.[26] However, when AP II was introduced it was not meant to amend the scope of application of Article 3 GC, but supplement it 'without modifying its existing conditions of application'.[27] This eventually led to the split of the legal regime of NIAC. The minimum protections of Article 3 GC apply to all armed conflicts, along with the customary rules of IHL applicable to armed conflicts. In addition to the treaty, provisions of AP II only apply when the additional requirements of Article 1.1 AP II are met.

For the sake of assessing whether a NIAC exists in a State, it is sufficient to ascertain whether an Article 3 GC conflict exists, since this in itself triggers the application of IHL. The decisive criteria are therefore the intensity of violence and the degree of organization of the parties.[28] It is therefore appropriate to assess whether the conflict in Colombia is sufficiently violent to cross the threshold of an armed conflict and whether the actors in the conflict are organized enough to be seen as parties to an armed conflict.

A clear threshold for a sufficient intensity has not been established in International Law. Factors such as duration, number of victims and means employed are all relevant for the qualification of the conflict.[29] In Colombia these factors clearly indicate that the threshold of armed conflict has been crossed: the conflict has lasted for over 40 years, only in 2009 the number of fatalities was between 395 and 439 persons, a figure analogous to those recorded on average over the past decades,[30] and all actors, especially the Government and the guerillas, employ military means.

[23] Alston (n 4) para 8.

[24] International Committee of the Red Cross, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (2008) 4 <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/$file/Opinion-paper-armed-conflict.pdf> assessed 6 April 2009.

[25] Art 1.1 AP II.

[26] C Greenwood, 'Scope of Application of Humanitarian Law' in D Fleck and M Bothe (eds), *The Handbook of International Humanitarian Law* (Oxford University Press, Oxford 2008) 45, 55; M Bothe, KJ Partsch and WA Solf, *New Rules for Victims of Armed Conflicts* (Martinus Nijhoff Publishers, The Hague 1982) 623.

[27] Art 1.1 AP II; Cf Bothe, Partsch and Solf (n 26) 628; Y Sandoz, C Swinarski and B Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) para 4359, 4453; A Paulus and M Vashakmadze, 'Asymmetrical War and the Notion of Armed Conflict - A Tentative Conceptualization' (2009) 91 *Intl Rev Red Cross* 95, 105.

[28] International Law Association (n 21), 2.

[29] See *ibid* 30.

[30] See Uppsala Conflict Data Program (UCDP) at <http://www.ucdp.uu.se/gpdatabase/gpcountry.php?id=35&regionSelect=5-Southern_Americas#> accessed 23 February 2011.

More difficult to assess is whether non-State actors meet the organizational requirements to qualify as a party to a NIAC.[31] The criterion of organization can be determined alongside different factors amongst which are 'the existence of headquarters, designated zones of operations, the ability to procure, transport and distribute arms',[32] as well as the existence of a command structure, disciplinary rules and mechanisms, control of territory, the ability to gain access to weapons and other military equipment, to recruit members and provide them with military training and to carry out military operations using tactics and strategy and the ability of the group to speak with one voice.[33] With respect to the FARC or the ELN, these criteria have been met.[34] Both organizations have a developed command structure with a central command, have their zones of operations, recruit and train new combatants, have access to weapons and in general operate like a military entity. Also with respect to the paramilitaries there is little doubt that before their demobilization they met the criteria to be party to a NIAC.[35] Whether the same holds true for the other criminal bands and the drug cartels armed groups, the BACRIM, is very questionable and has to be determined on a case by case basis.[36] However, from a legal perspective today a NIAC exists in Colombia at least between the Government and the guerilla groups; as for the other armed groups, if they meet the above criteria they are included in the conflict, if not, they remain violent actors and criminals acting in the course of a NIAC.

3. The Colombian Approach

A. Rejection of the Existence of an Armed Conflict in Political Statements

The Colombian Government in their policy statements rejects a characterization of the conflict in Colombia as a NIAC. The guerillas and the other violent

[31] On the criterion of organization see International Law Association (n 21) 28–9.

[32] *Prosecutor v Farnir Limaj et al* (Trial Judgment) Case No IT-03-66-T (30 November 1995) para 90.

[33] *See Prosecutor v Ramush Haradinaj et al* (Trial Judgment) Case No IT-04-84-I (3 April 2008) para 64.

[34] Alston (n 4) para 8. ('This will often mean that IHL will apply in the context of military operations against the FARC or ELN'); cf Ministry of National Defence (n 2) para 18 ('... the National Security Forces are faced with a wide range of illegal organizations, ranging from mafias responsible for crime in the cities to groups with military organization and capacity which pretend to control remote parts of the country'); Comando General Fuerzas Militares (n 3) 97 ('Si bien en Colombia existen organizaciones armadas ilegales como las FARC y el ELN que sin dificultad cumplen con los criterios de organización y despliegue de hostilidades contenidos en la definición de "grupo armado organizado" del CICR, y por décadas han sido combatidos como tales ...'); Römer (n 18) 17–9.

[35] Römer (n 18) 19–21.

[36] *Ibid* 22.

groups are indiscriminately characterized as terrorists and criminal bands rather than parties to an armed conflict.[37]

With this position, the Colombian Government is in line with a number of other governments that dealt with terrorism to a various extent. Neither the UK, dealing with the Irish Republican Army (IRA), Spain with the Euskadi Ta Askatasuna (ETA) or Germany fighting the Red Army Faction (RAF) ever considered these conflicts as armed conflicts under International Law,[38] and Russia refuses to qualify its conflict in Chechnya as a NIAC.[39] It follows that from a merely political standpoint, no State is willing to accept easily that its authority and sovereignty is being challenged.[40] Another reason for the reluctance of States to speak of armed conflicts is the inner political tension that this may give rise to in modern democracies. The German administration, for example, has long eschewed labelling the conflict in Afghanistan as 'war' or 'armed conflict', as this would have further undermined the sympathy for the mission among the German population.[41]

However, in their fight against the guerillas and other violent actors, the Colombian Government employs military means and consequently applied IHL. As the then Vice-Minister of defense pointed out, 'It may turn out that we are in agreement on a legal characterization that encourages the application of IHL. But one needs to be careful about the political and strategic consequences that may flow from that characterization. So rather than actually saying "this is an armed conflict", what matters is to be able to say "this is the kind of force I need to use because these criteria have been met".'[42]

This brief citation reflects the Colombian approach of distinguishing between a political language and a legal qualification. Unlike the governments of the UK, Spain or Germany, Colombia does actually apply IHL in its operations against the guerillas.[43] This includes IHL training for the members of the military and

[37] Cf Office of the President and Ministry of Defense, *Democratic Security and Defense Policy* (Republic of Colombia Ministry of Defense, Bogotá, 2003).

[38] R Arnold, *The ICC as a New Instrument for Repressing Terrorism* (2004) 119f (on the RAF); N Quénivet, 'The Application of International Humanitarian Law to Situations of a (Counter-)Terrorist Nature, in R Arnold and P-A Hildebrand (eds), *International Humanitarian Law and the 21st Century's Conflicts* (2005) 25, 31 (on the ETA and IRA); M Sassòli, 'Terrorism and War' (2006) 4 *JICJ* 959, 966.

[39] See W Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 *EJIL* 741, 754 (with further references).

[40] Paulus and Vashakmadze (n 27) 95, 103.

[41] For the new government position, admitting to be involved in an armed conflict, *see* Government Statement from 10 February 2010 <http://www.auswaertiges-amt.de/DE/Infoservice/Presse/Reden/2010/100210-BM-BT-Afghanistan.html> accessed 23 February 2011.

[42] —, 'Interview with Sergio Jaramillo Caro' (2008) 90 *Intl Rev Red Cross* 823, 825.

[43] Ministry of National Defence (n 2) para 8.

the formulation of detailed guidelines on how to apply IHL,[44] including the recent publication of a military handbook on operational law.[45] The situation in Colombia is therefore one in which the State does not recognize the existence of an armed conflict, but still acts as if it were the case, including as regards the application of IHL.

This approach tries to strike the balance between fulfilling the State's international legal obligations and meeting the internal threats to the established government. The reasons for not publicly admitting the existence of an armed conflict are manifold. The existence of an armed conflict generally damages the country's reputation as a good place to live, it harms the tourism industry and it might scare potential foreign investors. From a political perspective, it is therefore quite understandable that the Government avoids any reference to NIACs or even civil wars. Of course, it would be preferable, for the purpose of legal clarity, if the Government called the situation by its name. However, what really matters is arguably what laws the Government applies. In addition, as long as the right legal framework is applied, it is futile to argue about the existence of an armed conflict or not and to present a lengthy argument for why the conflict in Colombia is a NIAC in spite of the Government's political statements. Therefore, this article analyses the operational legal framework that the Colombian Government applies to the conflict and the mechanisms it introduced to implement this legal framework.

B. The Actual Regulation of the Conduct of the Conflict

In times of internal conflicts, especially when it is debated whether the conflict amounts to a NIAC, it is always difficult to identify the right legal framework that regulates the conduct of the players involved. During times of peace, the Government's actions are regulated by their domestic laws of law enforcement, which are by definition supposed to be in compliance with human rights law. During times of armed conflicts, instead, the primary legal regime applicable is IHL, which is itself integrated by the norms of IHRL, to the extent that they do not undermine IHL's specific purpose.[46] In other words, the decision is between a peacetime law enforcement approach and an IHL approach, depending on whether the State is fighting criminals in a struggle against violent crime or combatants in a civil war. However, a conflict like the one in Colombia, in which the borders between a socialist-motivated revolutionary movement,

[44] Alston (n 4) para 7.

[45] Comando General Fuerzas Militares (n 3).

[46] For the relationship between IHL and HRL, see generally R Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, Cambridge 2004); B Schäfer, *Zum Verhältnis Menschenrechte und humanitäres Völkerrecht* (Universitätsverlag Potsdam, Potsdam 2006).

terrorism and drug criminality are blurred, the distinction is not easy to draw. From the political language used by the Colombian authorities, one would expect that they follow a law enforcement approach, rejecting the application of IHL. However, as mentioned above, the Colombian approach is not applying either a law enforcement or an IHL approach exclusively, instead, it represents the attempt to create a more suitable symbiosis of both regimes in which recourse to the police does not exclude *a priori* the military intervention, and vice versa.[47] The next part will examine what legal framework the Colombian administration has developed in order to regulate the conduct of its public forces. The key legal source is the new military handbook on operational law.[48] It contains the rules that all members of the Colombian armed forces have to abide by while conducting an operation. It is not a Statute or another Act of Parliament but ranks as an administrative order. A third person, not a member of the military, cannot directly base any claim against the State on the violation of its provisions. However, it may be of use as an indirect source to reinforce a claimant's argument in the course of another domestic remedy. In addition, the operational law has binding force on all members of the armed forces and any violation of its provisions might lead to disciplinary measures.

(i) Two kinds of operations

The Colombian military, when resorting to force inside Colombia, distinguishes between two kinds of operations: first, operations during hostile scenarios (Operaciones en escenarios de hostilidades) and second, operations to maintain security (Operaciones para el mantenimiento de la seguridad).[49] The first are considered rather classical military operations against a military objective that is controlled by an organized armed group. Resort to full force is allowed and the rules of combat according to IHL provide legal guidance. The second kind of operations are all other operations that are performed not against a specific military objective, but against all sorts of violent criminals. In these situations, a framework of normal peacetime law enforcement including human rights law is generally applicable, the resort to force only being allowed as *ultima ratio.*

The Colombian operational rules therefore foresee a two-step resort to force, adapting the permissible amount of force to the actual character of the operation. The operations during hostile situations are laid down in the 'red card' (tarjeta roja), whereas the 'blue card' (tarjeta azul) instructions apply to operations aimed at the protection of security.

[47] It is worth mentioning that a combined approach is already invested in the constitution that does not distinguish sharply between police and military but sees them as two elements of one 'public force', see Art 38, 216 Constitution of Colombia (1991).

[48] Comando General Fuerzas Militares (n 3).

[49] *Ibid* 94ff.

(ii) Red card operations—an IHRL understanding of necessity

The red card contains four 'Rules of engagement for land combat:

1. The force against a military objective or licit target may be used whenever:
   The use of force falls within an operational order; and
   It is identified as military objective or licit target, at the moment of using weaponry.
2. If the circumstances permit, demobilization and capture are favored over deaths in combat.
3. Force shall be used in a directed way and not indiscriminately, reducing as far as possible harm against goods and protected people.
4. The use of force is always permissible in self-defense or if another person's life is in danger.'[50]

These rules primarily reflect IHL, but there is one interesting diversion from pure IHL application, namely the second rule requiring an attempt to demobilize and capture a target to avoid unnecessary killing, to whatever extent possible. This element is alien to classic IHL and although there are indications that a more restrictive understanding of military necessity is an emerging tendency,[51]

[50] *Ibid* 106; translation by the author, original in Spanish:

Reglas de enfrentamiento para el combate terrestre
1. Podrá hacer uso de la fuerza contra un objetivo militar o blanco lícito, siempre y cuando:
   Esté enmarcado en una orden de operaciones; y
   Lo identifique como el objetivo militar o blanco lícito, al momento de hacer uso de las armas.
2. Cuando las circunstancias lo permitan, favorezca las desmovilizaciones y las capturas sobre las muertes en combate.
3. Haga uso de las armas en forma dirigida y no indiscriminada reduciendo al máximo daños contra bienes y personas protegidas.
4. Siempre podrá hacer uso de las armas en legítima defensa cuando esté en peligro su vida o la de terceros.

[51] The International Committee of the Red Cross claims that in IHL the principle of military necessity is complemented by the principle of humanity, thus leading to a limitation of the use of force inherent in IHL, International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (International Committee of the Red Cross, Geneva 2009) 79, citing United Kingdom: Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP, Oxford 2004), s 2.2 (Military Necessity); NATO: Glossary of Terms and Definitions (AAP-6V), 2-M-5; United States: Department of the Army, Field Manual 27-10 (1956) s 3; US Department of the Navy, The Commander's Handbook on the Law of Naval Operations, NWP 1–14M/MCWP 5–12-1/

the requirement to attempt capture before killing reflects an IHRL paradigm.[52] IHL distinguishes between combatants and civilians and, while it protects civilians, allows for combatants to be attacked at all times during armed conflicts.[53] The purpose of IHL is not to protect the combatants by requiring a previous attempt to capture, but to protect civilians (and other protected persons), by requiring the parties not to attack them, and to act proportionally if civilian casualties are unavoidable as collateral damages.[54] According to IHL, therefore, any use of force that is necessary to achieve a legitimate military objective and that is proportionate with respect to expected civilian losses is legitimate. By introducing a mechanism to protect enemy combatants from being killed, as long as demobilization or capture is possible, the red card rules reflect the IHRL principle of necessity which allows the State and its agents only to employ as much force as necessary to meet the threat.[55] Whereas in IHL the

COMDTPUB P5800.7A (2007) s 5.3.1, 5-2; France: Ministry of Defence, Manuel de Droit des Conflits Armés (2001) 86ff; Germany: Federal Ministry of Defense, Triservice Manual ZDv 15/2: Humanitarian Law in Armed Conflicts (August 1992) s 130; Switzerland: Swiss Army, Regulations 51.007/IV, Bases légales du comportement à l'engagement (2005) s 160. Historically, the modern concept of military necessity has been strongly influenced by the definition provided in Art 14 of the 'Lieber Code' (United States: Adjutant General's Office, General Orders No 100, 24 April 1863).

Against this understanding of the cited military manuals and the principle of military necessity, see H Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, no Expertise, and Legally Incorrect' (2010) 42 *J Intl L Polit* 769, 802ff (Parks sees the ICRC's approach as a misguided attempt to introduce law enforcement paradigms into IHL which contradicts the *lex specialis* principle. He argues that the manual definitions were not intended to apply to the individual soldier in his engagement of enemy combatants, but reflect a general obligation of nations or military commanders at relatively senior levels.).

For a response to Parks' critique, see N Melzer, 'Keeping the Balance between Miliatary Necessity and Humanity: A Response to four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 *J Intl L Polit* 831, 899ff (Melzer argues that the ICRC approach does not contradict the *lex specialis* principle because the ICRC does not apply a law enforcement paradigm to IHL but rather depicts that the limitations of the use of force through the principle of humanity are already inherent in IHL).

52 *Interview with Sergio Jaramillo Caro* (n 42) 823, 828 ('When applying IHL in such contexts, I actually want to use the human rights principle – if it is practical and possible – of making sure that I capture instead of killing or wounding, because that furthers my goal of consolidating the rule of law.').

53 Combatants in a technical sense only exist in an international armed conflict (IAC), while in NIACs armed groups are not granted the privilege of belligerency. However, even in NIACs a distinction is made between those who participate in the fighting ('combatants' or 'fighters') and those who do not ('civilians'); see further International Committee of the Red Cross (n 51).

54 K Ipsen, E Menzel and Volker Epping, *Völkerrecht* (C.H. Beck, München 2004) 1211f.

55 It has to be noted that, since the Colombian Government does not accept the existence of an armed conflict, any captured member of FARC or ELN is seen as ordinary criminal and not as prisoner of war. Also the question whether there can be prisoners

force must only be proportionate to the anticipated civilian losses, in IHRL the force must also be proportionate with respect to the threat that shall be averted.

It is not the first time that an IHRL principle has been applied to a situation for which in principle IHL is seen as an appropriate legal framework. Most prominently, the Supreme Court of Israel has introduced IHRL elements as a requirement for the lawful attack of civilians directly participating in hostilities.[56] The Supreme Court's approach is distinct from the Colombian approach in that the Supreme Court qualifies the situation in Israel as IAC and therefore directly applies IHL. However, it modifies the application of IHL in order to grant a higher protection to civilians. In this respect, it is very similar to the Colombian approach. Just like the red card rules, the Supreme Court of Israel too requires the State agents to refrain from using lethal force if less harmful means like capturing are available. This has to be understood as seeking to soften the application of the rather harsh legal regime of IHL by introducing law enforcement elements to the regulation of conduct. The Supreme Court of Israel considers this to be necessary in order to uphold the protection of civilians during conflicts with terrorists who disguise themselves as civilians, making it extremely difficult for State agents to identify legitimate targets. Especially in Colombia aiming for the highest possible protection of innocent civilians is an element of the process of transitional justice—initiated while the conflict is actually still going on—that tries to gradually move away from the application of IHL in favour of applying a peacetime legal framework of IHRL.[57] Therefore, even red card operations—representing the tougher and more robust alternative available—are not quite fully fledged IHL operations as they appear to be mitigated by the tentative introduction of an IHRL understanding of necessity.

However, this should not hide the fact that in many cases, especially in the course of fights with the FARC, a possibility of capture is precluded and the operation will be performed according to classical military necessity, permitting the targeting of FARC members without any prior attempt to arrest them.

of war or something comparable in NIACs was never addressed by the Colombian authorities.

[56] HCJ 769/02 *Public Committee against Torture in Israel v Israel* (13 December 2006) para 40 ('Second, a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed.') <http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf> accessed February 2011.

[57] *Interview with Sergio Jaramillo Caro* (n 42) 823, 828 ('We have called our security policy the policy of consolidation, and that means that we want progressively to reduce the application of IHL as we continue to make headway in the extension and consolidation of the rule of law.').

(iii) Blue card operations—law enforcement by the military

The blue card foresees a far more stringent set of regulations. It contains five 'Rules of the use of force for the conduction of land operations for the maintenance of security

1. Resort to the use of force shall remain the last option.
2. Identify yourself as a member of the Military Forces.
3. Give a clear warning of your intention to use firearms.
4. Use force proportionally to the threat which is to be averted.
5. The use of force is always permissible in self-defense or if another person's life is in danger.'[58]

During blue card operations, the use of force is clearly understood to be only an option of *ultima ratio*, used only to face a threat and in a proportionate manner. With those rules, blue card operations cannot be understood anymore as operations shaped by IHL, but have to be identified as law enforcement operations. Whereas the red card operations have to be seen as rooted in IHL and complemented by certain IHRL elements, blue card operations are of a genuine law enforcement nature, with the particularity that they are addressed at soldiers, rather than the police forces. The blue card establishes a legal framework for robust law enforcement by the military and can be understood as an attempt to bridge the divide between police and military forces, reflecting the constitutional term of 'public forces'.[59] The blue card instructions are intended to regulate situations where the threat surpasses the capacities of ordinary police forces, especially when the intensity of the violence or its territorial extensions are of such a nature that the police is not equipped to fight it.[60] In other words,

[58] Comando General Fuerzas Militares (n 3) 107; translation by the author, original in Spanish:

Reglas de uso de la fuerza para la conducción de operaciones terrestres de mantenimiento de la seguridad

1. Haga uso de la fuerza como última opción.
2. Identifíquese como miembro de las FFMM.
3. De una clara advertencia de su intención de emplear armas de fuego.
4. Haga uso de su arma de manera proporcional a la amenaza que está enfrentando.
5. Siempre podrá hacer uso de su arma en legítima defensa cuando esté en peligro su vida o la de terceros.

[59] Art 38, 216 Constitution of Colombia (1991).

[60] Comando General Fuerzas Militares (n 3) 113.

the blue card establishes the rules for cases in which military forces serve as an auxiliary law enforcement agent.

In the case of Colombia, this is especially necessary with respect to the BACRIM. While the FARC will from the outset surpass the capacities of the ordinary police forces and require the application of red card rules, fighting the BACRIM will only sometimes require the military to step in. In those situations, the military is meant to perform robust law enforcement operations meaning that the military may act with military means while applying law enforcement methods. Blue card rules were designed precisely for this purpose. They allow the soldiers to use their military weapons but require them to act as if they were policemen. The blue card rules result in creating a new law-enforcement function for the military in general, giving rise to a legal regime that is a hybrid between IHRL and IHL. Dividing the military tasks in combat and law enforcement functions allows for a more adjusted employment of the armed forces in an internal fight against violent actors of all sorts.

(iv) The decisive distinction: membership of organized armed groups

What is the reason for the differentiation between those two kinds of operations with such diverging rules? How can it be decided whether an IHL operation has to be performed or whether the situation calls for law enforcement measures? The answer to these questions lies in the understanding of the genuine disparity of IHL and law enforcement with respect to the primary legitimacy for the State to use force. While in an armed conflict environment, the permissibility of the use of force against a person follows from the person's status as an enemy combatant, during law enforcement the State's entitlement to use force follows from the fact that the targeted person poses a threat. Therefore, the primary justification for the State is fundamentally different: under IHL it is status-related, whereas during law enforcement it is only an action or threat-related entitlement. In the end, the qualification of the non-State actors is decisive for the choice of the legal framework.[61] If they can be qualified as an organized armed group that is as a counterparty in a military struggle, they become a military objective and red card rules become applicable. If, on the other hand, they cannot qualify as an organized armed group, any operation against them can only be of a law enforcement character and therefore the permissible use of force is regulated by the blue card.

Again, the underlying policy is based on the assumption that an organized armed group is more dangerous and the fight against it requires States to afford a broader host of options with respect to the available measures. In those cases, the expedience of a law enforcement approach, even if performed by the military, is not a given anymore: instead classic IHL has to be applied.

[61] *Ibid* ('La pregunta fundamental es: ¿la operación va dirigida contra un objetivo militar preciso (personas, campamentos, medios, etc), relacionado por definición con un grupo armado organizado?').

C. Elements of Procedure and Enforcement

The creation of new rules, however thoughtful they might be, is insufficient without the concurrent creation of the appropriate procedural environment for them to be applied. This is primarily important with respect to the *ex ante* decision as to what set of rules is applicable, as well as the *ex post* assessment as to whether such rules were properly applied and respected. Those two aspects are the key pillars for enhancing the rule of law through procedural measures during the deployment of armed forces internally. Colombia has set up a procedural framework for both issues.

(i) Determination of the applicable law

The interesting aspect of the Colombian approach is its flexibility regarding the assessment of the status of non-State actors. Instead of a general and static assessment of a group's qualification as party to an armed conflict and a person's membership in that group, the Colombian authorities decide on a case by case base. This of course bears the risk of ending up with arbitrary assessments by the respective commanders in the field. Colombia has responded to that risk by establishing two mechanisms, the 'Grupo Asesor' (advisory board) and the legal operation advisors (AJO—Asesor Jurídico Operacional). The 'Grupo Asesor' is comprised of the heads of the national police, the armed forces and intelligence agencies[62] and has the task of providing a legal qualification of the situation. The board decides about the competence of the military and whether, in a fight against a certain armed group, red card rules or blue card rules are applicable.[63] They come to their decision by assessing the level of hostilities and organization of the violent actors. This assessment, in turn, is based mostly on intelligence data which is not open to the public.

With the existence of the 'Grupo Asesor', the responsibility regarding the correct choice of methods is taken to a higher level. This has three key advantages. First, it increases legal certainty for the soldiers and commanders in the field. Second, the decisions are more likely to be accurate because the board has a better overview of the situation. Third, it brings about a certain consistency to the qualification of similar situations—that does not depend any longer on the possible diverging views of different commanders—while at the same time allowing for flexibility to assess situations as they occur.

Of course, the 'Grupo Asesor' cannot come together before every single military operation and decide individually for every case. Its members are expected to meet ever 6–12 months, in order to issue an overarching assessment regarding the qualification of certain violent actors in Colombia. In fact, these meetings

[62] *Ibid* (n 3) 96ff.

[63] Ministero de Defensa Nacional & Fuerzas Militares de Colombia, Comando General, Directive 208, 3. B) 1) b (at 6) (2008).

have hardly taken place at all thus far and it remains to be seen how effectively the 'Grupo Asesor' will work in the future and how valuable its contribution will be to the legal regulation of the conflict.

In addition to the 'Grupo Asesor', a legal operation advisor (the AJO—*Asesor Jurídico Operacional*) assists the military forces in planning, carrying out, controlling and evaluating every operation monitoring its compliance with the legal framework.[64] The AJO implements Article 82 AP I, which foresees the existence of a legal advisor in the armed forces of the Parties of the Protocol. The task of the AJO is to advise the military commander in legal questions and specially in choosing either red or blue card rules in any specific situation. In other words, whereas the 'Grupo Asesor' decides on a more general level about the qualification of an armed group, the AJO identifies the legal rules applicable to a specific operation. In doing this, he has to rely on that qualification of the 'Grupo Asesor', which means he cannot advise the use of red card rules if the 'Grupo Asesor' has qualified the situation as a blue card situation. However, if the 'Grupo Asesor' has given the general qualification as a red card situation, the AJO can advise in certain situations to limit the use of force to blue card rules. The efficiency of the AJO's work is at this point hard to fully asses. Although legal advisors are standard in the armed forces of other countries, for Colombia legal advisors to the military are a rather new institution. In any event, it is definitively a huge step towards the reinforcement of the rule of law in the field of actions based on the use of force.

(ii) Mandatory *ex-post*-investigations

The second pillar of granting obedience to the rule of law is a credible *post facto* investigation on military operations. The Colombian approach foresees two crucial elements of these investigations. First, they have to be performed after any killing performed by State forces; second, they are to be performed by the ordinary judiciary. Whereas, according to IHL an investigation is only mandatory where a violation of IHL is likely to have happened,[65] according to the Colombian standard an investigation shall be performed whenever somebody was harmed as a result of an operation. This is first, because it was decided by the Inter-American Court of Human Rights (IACHR) that a State has such an obligation whenever a killing of its citizens occurs[66] and this obligation has been

[64] Comando General Fuerzas Militares (n 3) 141.

[65] D Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflicts' (2009) 42 *Israel L Rev* 8, 26.

[66] I/A Court HR, *Case of the Pueblo Bello Massacre v Colombia*, Merits, Reparations and Costs, Judgment of 31 January 2006, para 145; I/A Court HR, *Case of Ríos et al v Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 28 January 2009, para 283, I/A Court HR, *Case of Perozo et al v Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 28 January 2009, para 298; I/A Court HR, *Case of Kawas Fernandez v Honduras*, Merits, Reparations and Costs,

implemented into Colombian domestic law by the Justice and Peace Law.[67] Second, abiding by this obligation it is part of the State's policy of being guided by the rule of law, even when fighting the unlawful.

The fact that the Office of the Prosecutor General performs these investigations, rather than the military justice system, adds a further aspect of credibility to this system. The Government has worked towards a closer collaboration between the military and the ordinary justice system.[68] According to the current Military Criminal Code,[69] every investigation in connection with active service is under the authority of the military criminal justice system. But the Ministry of Defense and the Prosecutor General's Office have agreed on 14 June 2006 that the Prosecutor General's technical investigation unit (CTI - *Cuerpo Técnico de Investigación*) should be responsible for every investigation.[70] The CTI will then send a report to the Quick Response Unit of the Prosecutor's Office, who will assess if the Prosecutor's Office retains the investigation or if there are subjective or functional factors that justify the acceptance of military jurisdiction.

The June 2006 agreement was made for a number of reasons. First, the criminal accusatory system was introduced to the ordinary jurisdiction but not to the military criminal jurisdiction. Second, the Constitutional Court decided that the Armed Forces have no competence to carry out the functions of the judicial police[71] and the Supreme Court of Justice ruled that the Prosecutor General's Office is competent for the preliminary investigations.[72] Third, the permanent

Judgment of 3 April 2009, para 75. (The decisions of the Inter-American Court of Human Rights were not decided against Colombia, but the obligation of investigate applies to all countries who are part of the Inter-American Human Rights system.)

67 *See* Law 975 of 2005 'Justice and Peace Law' arts 6, 7 and 15 <http://www.secretariasenado.gov.co/senado/basedoc/ley/2005/ley_0975_2005.html> accessed 23 February 2011; see further Constitutional Court of Colombia Judgment C-370 (2006).

68 Ministry of National Defence (n 2) paras 49, 167; Ministerio de Defensa National, Directiva Permanente 19 (2007).

69 The new Military Penal Code that was approved by Congress and that is awaiting Presidential approval states that it will be the Technical Investigation Unit of the Military Criminal Justice System that will inspect the crime scene and the corpse. (arts 366 and 375).

70 Ministry of National Defence (n 2) para 167 ('In June 2006 the Ministry of Defence and the Prosecutor General's Office signed a document supporting Military Criminal Justice, in which it was specified that CTI officials should carry out inspections in locations where combat deaths had occurred during the conduct of military operations.').

71 See Constitutional Court of Colombia Judgments C-034 (1993); C-179 (1994); C-251 (2000); C-1024 (2002).

72 Supreme Court of Justice, Process No 26137, Criminal Appellate Division ('Sala de Casación Penal'), MP SIGIFREDO ESPINOSA PÉREZ, Approved Act No 127, Bogotá, DC 6 May 2009 ('It is always the responsibility of the Prosecutor General's Office, which has priority and primacy, to carry out the preliminary investigation of those punishable acts committed by members of the Security Forces and which can be considered as a serious violation of Human Rights. Only when the Prosecutor's Office establishes, with respect to these events, the existence of subjective or functional

judicial police staff is more experienced and has better technical resources regarding the development of investigative work and urgent acts. Fourth, it guarantees transparency in the investigations related to operations by the military. The Ministry of Defense has recently reiterated the agreement with the Prosecutor General's Office, obliging all military commanders to provide all available means to guarantee that in case of deaths in combat, the first investigations are carried out by the authorities of the judicial police.[73] Only in cases where the CTI cannot get to the scene due to the peculiarity of the circumstances, for instance because the combat is still going on, will the military prosecutor carry out the investigation.

In practice, however, the CTI does not investigate all cases. First, their resources are limited (making it difficult for instance to access remote areas that can be reached only by helicopters). Second, it can be noted that the military is at times reluctant to cooperate with the CTI and prefers an investigation carried out by its own military prosecutors. Unfortunately, it seems that the numbers of CTI investigations have decreased lately and that the military investigators are taking over more and more cases. It is a question of paradigm change until the military accepts that 'outsiders' investigate their operations and see the benefit in that for their own reputation.

4. Assessment

The recent Colombian approach of dealing with cases of internal conflict reflects the country's struggle to uphold the rule of law while trying to strike a balance between international standards and domestic demands—between security and liberty. The overall aim is reconciliation and the establishment of lasting peace in Colombia. The official position is that no armed conflict exists; however, a closer look reveals that the laws of armed conflicts are applied. Nevertheless, on even closer scrutiny it turns out that those laws are significantly complemented through the application of IHRL principles. This constitutes an innovative approach, also in light of the complexity of the situation.[74]

A. Detriments of a Traditional IHL Approach

The question is why does Colombia make this effort of developing a new hybrid model if they could just apply plain IHL since, at least according to international

factors that justify the acceptance of the jurisdiction instituted by article 221 can the incident be referred to that authority thereby guaranteeing the exceptional and restrictive nature of military jurisdiction, on the terms referred to in the previous point.')

[73] Ministerio de Defensa National (n 68) 3f.

[74] It has to be noted that in 2005 Colombia has passed the Justice and Peace Law introducing a complex process of reconciliation and disarmament which is yet another facet of the process of transitional justice, initiated while the conflict is still going on.

law, a NIAC conflict exists on their territory? Is not a clear cut straightforward NIAC approach superior to a hybrid model in which the States agents are further restrained by IHRL? A brief look at a pure IHL approach shall reveal that it entails a huge detriment that endangers the overall aim of Colombia, namely the establishment of lasting peace. This detriment is the implicit reduction of protection for civilians. The application of humanitarian law means applying more permissive rules for the use of lethal force and for detention[75] and an increase of liberty costs.[76] It is sometimes forgotten that the application of IHL to an internal situation no longer increases the protection of civilians but reduces it. Before HRL came into force, the laws of NIAC were the only international legal source providing protection for civilians during internal conflicts. Their application therefore meant an advantage for civilians and the imposition of legal restraints on the State. However, as David Kretzmer has pointed out correctly, with the existence of HRL, the applicability of NIAC no longer means an increase of legal protection but a decrease:[77] unlike before, States are now bound by HRL at all times, so the application of the laws of NIAC does not fill an 'international legal vacuum'[78] anymore but replaces HRL as *lex specialis*. Since the legal restraints that HRL imposes on States, especially regarding targeting and detention, are substantially higher than those of IHL, the application of IHL opens a door for States to get around those restrictions. The most sensitive issue showing the effects of an IHL application as *lex specialis* is not the permissibility of targeting anybody who has been identified as an enemy combatant without specific justification in each case, but is above all the acceptability of civilian casualties as 'collateral damages'. The authority of States to sacrifice civilians in order to achieve a military objective is unique in IHL. In contrast, according to law enforcement principles, a State can only act to avoid an imminent threat and the advantage of eliminating that threat has to be balanced against the detriments in form of civilian casualties. The permissibility of those civilian casualties during a peacetime law enforcement operation is therefore much more stringent than under an armed conflict paradigm.

[75] P Alston, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (28 May 2010) UN Doc A/HRC/14/24/Add.6, para 47 ('... the IHL applicable in armed conflict arguably has more permissive rules for killing than does human rights law or a State's domestic law, and generally provides immunity to State armed forces.').

[76] M Hakimi, 'International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide' 33 *Yale J Intl L* 369, 395 ('... its [the armed-conflict model's] liberty costs are prohibitive: innocents easily could be detained, for extended periods if not for life, based only on a reasonable suspicion of threat and without judicial guarantees.').

[77] Kretzmer (n 65) 8, 18 ('To the extent that IHL is less protective of certain rights, such as the right to life, than the applicable human rights regime, its application as *lex specialis* narrows protection of these rights.').

[78] *Ibid* 8, 20.

The adherents of a pure IHL approach might argue that the described liberty costs are permissible and that more power and freedom to act for the State's forces entails greater security for the society as a whole. This argument might have its value with respect to some conflict situations; but with respect to the Colombian conflict it is flawed: first, the long history of the Colombian conflict shows that formerly taken pure IHL approaches did not lead to the establishment of lasting peace. Second, the application of IHL means deciding the balancing process between security and freedom in favour of security. To predetermine this balancing process might be fair where the threat is extreme and existential but where it is just a latent and smoldering one, there is no reason to not allow a case by case balancing of security against liberty based upon the assessment of the actual threat. Third, one has to understand that IHL is a legal body designed for extreme situations, for situations of emergency that are time limited. But when, like in Colombia, the situation of emergency lasts for over 40 years and becomes a normality, the legitimacy of applying IHL has to be questioned. If the citizens have to live with a continuous conflict situation, the State owes them a higher degree of diligence than during time limited situations of emergency because the situation loses its exceptional character. Anything else would lead to a permanent derogation of IHRL and would eventually mean nothing else but its disregard. Therefore, a pure IHL approach with its decrease in protections for civilians is not only impractical in a scenario like the Colombian conflict but probably also inconsistent with the State's obligations under IHRL. Finally, it has to be emphasized that the alternative to the pure IHL approach is not a pure IHRL approach in which the existence of an armed conflict is completely denied. Instead, the Colombian authorities aim for a hybrid approach of IHL and IHRL that allows them to adapt as best as possible to the exigencies of the conflict.

B. The Necessary Hybrid of IHRL and IHL

The new operational manual of the Colombian armed forces lays down rules that provide regulation for both an IHL-based operation against combatants and a law enforcement-based operation against other persons who constitute a threat to the security of the State. Apart from the introduction of a procedural framework of legal scrutiny before and after every operation to guarantee the respect for the rule of law, the key element of the Colombian approach is this new, hybrid understanding of IHRL and IHL. Armed forces are given a hybrid status between law enforcement agents and combatants that, depending on each situation perform limited law enforcement or full-scale military operations. This is put into practice by developing two different kinds of operational rules, red card and blue card rules, which limit the amount of permissible force to the exigencies of the situation. Of course soldiers have to be capable of being law enforcement agents, but it is eventually a question of training and providing for a procedural framework and the Colombian Government seems committed to

do both.[79] This can of course not be achieved in the short term, but is a long-term enterprise aiming eventually at a paradigm shift regarding the understanding of the tasks of the armed forces.

The core idea behind the Colombian approach is that only the lasting re-establishment of the rule of law can bring permanent peace. Hence, all efforts, even military, must be subordinate to this policy aim of enforcing the rule of law.[80] This conflict is in essence one between legality versus illegality, but instead of invoking just war theories aiming to justify an even larger amount of violence, the Government restrains itself by following a law enforcement pattern. In other words, the aim of the Colombian fight against their opponents is not only primarily to annihilate them but also to bring them to justice.

At the same time this approach aims at the highest possible protection of civilians and takes into account that applying the laws of armed conflict to a NIAC does not provide for that higher standard of protection.[81] This is why, even when IHL is applied, it is complemented by IHRL, especially the IHRL principle of necessity.

This does not preclude the application of a classic IHL understanding—with a principle of necessity measured against a military aim—for other scenarios where it is in effect meant to regulate the combat between combatants of two proper parties of an armed conflict and where the risks for the own man would be too high.[82] Especially with respect to the FARC, the Colombian armed forces have and will regularly resort to the full scale of authorities they have under IHL, for here the conflict clearly follows a NIAC pattern.[83] The key advantage of the new operational law of the Colombian armed forces is its flexibility and adaptability to the exigencies of every situation and to the respective opponent that the forces are fighting.

[79] Ministry of National Defence (n 2) para 10.

[80] *Ibid* para 12 (2007) ('[it is] absolutely unquestionable and clear that the highest point in the conduct of war, from which all guidance must flow, cannot be other than policy') (quoting C von Clausewitz, *Vom Kriege* (Frankfurt 1980) 677).

[81] See Paulus and Vashakmadze (n 27) 95, 102–3. ('While stretching Common Article 3 to include anti-terrorist measures may serve humanitarian purposes in some situations, its application to ordinary (even wide-spread) human rights violations would not be a desirable result, because human rights – which remain applicable – generally provide more protection and are better tailored to situations that do not amount to an armed conflict.').

[82] Comando General Fuerzas Militares (n 3) 92 ('El hecho de que se le exija al oficial, suboficial o soldado modular el principio de necesidad militar a la hora de planear y ejecutar una operación no significa que en todo escenario de hostilidades sea posible modular la necesidad militar de esta manera. Hay muchas situaciones de combate donde no es posible, sin exponer a los propios hombres a riesgos inaceptables y sin perder la eficacia operacional.').

[83] The FARC also have the option to demobilize under the Justice and Peace Law, but other than the paramilitary groups only a few FARC members have taken advantage of this option. Cf Römer (n 18) p 18 note 57.

C. The Colombian Approach and the Global War on Terrorism

A final question that shall be addressed is whether the Colombian approach could serve as model for other countries' fights against violent non-State actors, especially for the fight of the USA and its allies against Al-Qaida.

In general, a hybrid approach of applying IHRL and IHL seems interesting and adequate if one agrees that on a global level too, the long-term aim is bringing the terrorist to justice and establish the rule of law rather than annihilating an enemy combatant and winning a war. Maybe it is time to conceptually rethink the relationship between IHRL and IHL. In practice, applying the Colombian approach globally would mean that military forces in general distinguish between red and blue card operations and achieve the ability to act as law enforcement agents rather than soldiers. An independent body would decide which non-State actor would have to be fought with red and which with blue card rules and legal advisers would observe the conduct of the operations. The fighting of a dangerous terrorist organization like Al Qaida acting in a rather unstable country like Afghanistan could thus be conducted as before—as a military operation; but other, less dangerous terrorist groups which might act in generally stable countries like India, Egypt or others could be addressed by soldiers acting as law enforcement agents. This would allow for a better fine-tuning of the used force with respect to the varying degree of threat that the different terrorist organizations in different places of the world pose.

The biggest obstacle, however, is that other than the conflict in Colombia, the 'Global War on Terrorism' is global, meaning it involves more than just one State. This has three main effects.

First, any transnational conflict raises the still unresolved *ius ad bellum* questions under which circumstances a State can take action against terrorists who are staying and hiding on another State's territory.[84] Answering this question is not the purpose of this article. However, it has to be emphasized that this question is of a more general nature and arises whatever *ius in bello* legal approach one applies. A US-like approach of applying Article 3 GC, an Israeli approach of applying the laws of international armed conflicts or a Colombian-like approach would have to deal with *ius ad bellum* questions alike.

Second, there is a lack of procedural rules, like the ones in Colombia, in other domestic legal systems and on the international level. A Grupo Asesor would be needed as well as a proper system of AJOs. Especially in many countries that are showplaces of the war on terrorism, like Afghanistan, Somalia or Yemen, a properly working judiciary is not yet in place. However, this should be seen as an incentive to create that judicial framework, in order to achieve the aim of

[84] See generally, C Kreß, Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater (Duncker & Humblodt, Berlin 1995) 23ff.

lasting peace.[85] Also, it is not impossible to think of the creation of a board like the Grupo Asesor at a supranational level, for example, under the auspice of the United Nations Security Council (UNSC).

Third, the transnational nature of the conflict raises the question of whether IHRL is at all applicable extraterritorially.[86] It is necessary to note that the Colombian Government rejects the extraterritorial application of IHRL and would therefore not apply the same operational legal framework that it applies to the fight against FARC and ELN inside Colombia. Only if they, along with other key players in the fight against terrorism such as the USA and Israel, can be convinced to give up their position in favour of a hybrid application of IHRL and IHL, could the Colombian approach become a model for those conflicts between States and terrorist organizations that have a transnational character.

In conclusion, it can be said that the basic concept of establishing a legal framework that allows and obliges military forces to operate under a law enforcement framework (depending on the concrete situation) is the right approach. With respect to the overall political aim of establishing the rule of law and bringing the terrorists to justice, it is better than applying only the laws of NIACs. Eventually, it is hoped that all States come to reason and see the chances of applying IHRL extraterritorially. Even then, of course the *ius ad bellum* questions have to be resolved and a procedural framework has to be put into effect, allowing for proper scrutiny before and after military operations. Nevertheless, from an *ius in bello* perspective the Colombian approach offers many helpful ideas that should be taken into account in any fight against terrorists and other violent non-State actors. Obviously, the obstacles will remain manifold but nobody expects an easy solution to a difficult conflict which is one of mankind's key challenges in the next decades.

[85] *Interview with Sergio Jaramillo Caro* (n 42) 823, 829 ('It is true that co-ordination with the judiciary in a place like Afghanistan is a very different proposition, but you want to use the pressure of the security situation precisely to get some form of judiciary up and running. Otherwise, there is no way out, unless the United States and the NATO troops want to stay there for the next few decades.').

[86] For positions against the extraterritorial applicability of Human Rights, see Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, Cambridge 2004) 25; MJ Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 *AJIL* 119, 141.
For positions in favour of the extraterritorial application of Human Rights, see ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 9 July 2004, Rn 111-113; *Armed Activities on the Territory of the Congo* (*Dem Rep Congo v Uganda*) [2005] ICJ Rep 116, para 216; ECtHR, *Loizidou v Turkey* (App no 15318/89) 18 December 1996, para 62; UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 10; Inter-American Commission on Human Rights, *Coard v United States of America* (1999) Case 10.951, para 37; T Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89 *AJIL* 78, 80; N Lubell, 'Challenges in Applying Human Rights Law to Armed Conflicts' (2005) 860 *Intl Rev Red Cross* 737, 754.