SYMPOSIUM ON THE COLOMBIAN PEACE TALKS AND INTERNATIONAL LAW

IUS POST BELLUM AND THE IMPERATIVE TO SUPERSEDE IHL

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In recent debates about the interplay between international humanitarian law (IHL) and human rights law (IHRL), two broad camps have emerged. On the one hand, defenders of what may be called the *convergence thesis* have emphasized the inclusion of basic rights protections in the so-called "Geneva instruments" of IHL, as well as the role of human rights bodies in interpreting and amplifying rights protections in IHL through juridical or quasi-juridical interpretation and pronouncements. In armed conflicts, it is said, human rights apply concurrently and in ways that strengthen the protective constraints of IHL.[1] Critics of the convergence thesis, on the other hand, have protested that pressing human rights obligations on state forces misunderstands the nature of both IHL and IHRL, and generates misplaced and impossibly onerous demands on belligerents—ultimately and perversely, the effect of emphasizing convergence may be less, not more, human rights protection.[2]

While convergence has arguably become the dominant position in recent years, it has not gone as far as identifying the two legal regimes. Individual rights protections in IHL coexist with permissions regarding e.g. targeting and detention that are incompatible with IHRL obligations. The International Court of Justice's opinions on the matter have emphasized the distinct character of IHL—which according to the Court stands as *lex specialis* relative to the *lex generalis* of IHRL—while affirming the concurrent application of both regimes.[3] In so doing, the Court reflected the unstable and dynamic interaction between the two regimes: different emphases and discursive purposes reveal more or less converging or diverging dimensions of their complex relationship.

In what follows, I want to look at IHL and IHRL not from the perspective of the *ius in bello*, as is usually done, but from the *ius post bellum*—the rights and obligations that belong to the conclusion and aftermath of armed conflicts.[4] Specifically, I want to reconstruct summarily how the debate over convergence has played out in the Colombian context, and discuss some implications for the debate of an eventual peace accord

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[1] For a classic statement and defense of convergence, see Theodor Meron, *The Humanization of Humanitarian Law*, 94 AJIL 239 (2000), and for a more nuanced discussion, Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AJIL 1 (2004).

[2] *E.g.* Michael Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795 (2010); and Naz Modirzadeh, *The Dark Sides of Convergence*, 86 U.S. NAVAL WAR COLLEGE INT'L L. STUD. 349 (2010).

[3] See in particular Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226, paras. 24-25 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 136, paras. 102-113 (July 9).

[4] *See generally*, *JUS POST BELLUM*: MAPPING THE NORMATIVE FOUNDATIONS (Carsten Stahn et al. eds., 2014).

between the FARC guerrillas and the Colombian government. My main claim is that a central imperative of *ius post bellum* cannot be properly articulated and voiced unless important differences between IHL and IHRL are adequately recognized. This central imperative is that the use of state force in peacetime be fully constrained by IHRL, not by IHRL "complemented by" or "harmonized with" IHL. Superseding IHL, I will argue, must be one of the central goals of the *political* project of transitioning from war to peace.

Convergence Thesis

Some publicists have argued that the irruption of human rights norms in the late 1960s propelled a transition from a "Hague regime" which governs the use of force among regular state forces, into a "Geneva regime" that emphasizes individual protections and immunities in those not taking direct part in hostilities. Since then, the compartmentalization of IHL and IHRL has progressively given way to their complementarity and convergence.[5]

There is certainly no denying that human rights belong in IHL in the broad sense that the basic protection of human personhood is a central element of the Geneva instruments of IHL.[6] Having ratified all Geneva instruments, Colombia is bound by these protective obligations. In virtue of the 1991 Constitution, moreover, human rights and humanitarian treaties apply directly in the internal legal order, which means that national courts have the power to hear direct citizen appeals for alleged breaches of these instruments. The Constitution also contains a remarkable article in its section on states of emergency which states that IHL "shall apply under all circumstances" in the country (Article 214.2). This has empowered domestic courts to oversee compliance with IHL in the country, and in particular has authorized the Constitutional Court to test the compatibility of bills in Congress with both IHRL and IHL.

Soon after its creation, the Constitutional Court signaled its adherence to the convergence thesis in its constitutionality reviews of Additional Protocol I and II (C-574/92 and C-225/95 respectively). IHL should be understood as aiming at the protection of a particularly important core of human rights, the Court stated, and the legal technique that allows this in practice is the doctrine of "constitutionality block," which the Court borrowed from French constitutionalism (first introduced in C-225/95, but later applied widely beyond IHL). In a significant number of rulings, the Court has consistently found that humanitarian, human rights, and constitutional norms complement each other and constitute a single "constitutional block," the ultimate purpose of which is the protection of human dignity and basic rights. In this holistic understanding of IHL and IHRL, IHL has been interpreted as a primarily constraining regime, imposing on armed forces obligations of protection.

For nearly twenty-five years now, the Court has applied its review powers in the spirit of convergence in a large number of cases. A good portion of them has aimed at ensuring that grave breaches of IHL are investigated by civilian prosecutors and tried in civilian criminal courts, instead of under the more lenient and harder to access military criminal jurisdiction, as was common practice in Colombia for decades.[7] Other rulings have limited or struck down military powers of detention and search and seizure without judicial

[5] For these formulations, see FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR 8-29 (4th ed. 2011); Antonio Cançado Trindade, *Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario: Aproximaciones y Convergencias*, 30 ESTUDIOS INTERNACIONALES 321 (1997).

[6] Key human rights elements in IHL include of course Common Article 3 protections to life and bodily integrity in those not participating directly in hostilities, as well as categorical proscriptions of torture and cruel treatment, and basic due process guarantees. Additional human rights provisions appear in Additional Protocol I art. 75 and Additional Protocol II arts. 4-6.

[7] *E.g.,* C-034/93, C-179/94, C-578/95, C-358/97, SU-1184/01, C-251/02, C-740/13.

warrant, favoring due process protections over imperatives of military necessity or expediency.[8] In a landmark ruling reviewing the constitutionality of a new military penal code (C-291/07), the Court restated that IHL and IHRL apply concurrently in Colombia and emphasized the obligations of protection, while commenting profusely on, and citing as binding the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and the International Committee of the Red Cross 2005 study on customary IHL.

Reports and rulings by the Inter-American Commission and Court of Human Rights have added force to the convergence thesis in Colombia. In 1997, the Inter-American Commission issued a Report implicating Colombia in which it invoked Common Article 3 in order to determine whether the death of Arturo Ribón Avilán and ten others constituted a violation of Article 4 of the American Convention or a legitimate death in combat.[9] In that and ensuing reports, the Commission found that IHL and IHRL "converge" and "reinforce one another."[10] The proper scope and entailed obligations of human rights to life, freedom of movement, due process, and others, must be interpreted in light of IHL when alleged violations occur in contexts of armed conflict, and vice versa: basic rights protections in IHL should be interpreted in light of Inter-American doctrine.[11]

The Inter-American Court has followed suit, if somewhat ambivalently and at times contradicting the Commission's early pronouncements. In response to state challenges to the Court's competence to invoke IHL, a subtle distinction was introduced between interpreting the American Convention in light of IHL and directly applying IHL. But if the Court was initially cautious, in recent rulings it has resolutely engaged with more specific and technical aspects of IHL, moving far beyond Common Article 3 and becoming, according to some commentators, an indirect enforcer of IHL in the region.[12] Be this as it may, the Court has consistently emphasized the protective and constraining dimensions of IHL. In its landmark *Masacre de Mapiripán v. Colombia* of 2005, it held that during armed conflicts states are liable not only for attacking protected persons but also for failing to effectively protect civilians from attacks by third parties.[13]

This virtually exclusive focus on the constraining and protective dimension of IHL by the Inter-American Court, and by the Colombian Constitutional Court in a large number of rulings, has been reinforced and amplified by human rights activists and NGOs in the country, which since the early 1990s have advocated forcefully for IHL compliance, often at serious risk to their lives. To give an illustration, last May the influential director of the Colombian Commission of Jurists, Gustavo Gallón, wrote in his weekly op-ed in the newspaper *El Espectador* that IHL "does not contain authorizations, only prohibitions: its norms are oriented towards the protection of non-combatants in an armed conflict."[14] This was said in the context of a surpris-

[8] *E.g.,* C-024/94, C-1024/02, C-251/02.

[9] Arturo Ribón Avilán v. Colombia, Case 11.142, Inter-Am. Comm'n H.R., Report No. 26/97, OEA/Ser.L./V/II.98 doc. 6 rev. (1997).

[10] *Id.* at para. 174.

[11] For general commentary on IHL in the Inter-American System, see Alejandro Aponte Cardona, *El Sistema Interamericano de Derechos Humanos y el Derecho Internacional Humanitario: Una Relación Problemática*, *in* SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS Y DERECHO PENAL INTERNACIONAL 125, (Gisela Elsner ed., 2010); Laurence Burgorgue-Larsen & Amaya Úbeda de Torres, *"War" in the Jurisprudence of the Inter-American Court of Human Rights*, 33 HUM. RTS. Q. 148 (2011).

[12] *See* Masacre de Mapiripán v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005); Masacre de Santo Domingo v. Colombia, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 259 (Nov. 30, 2012); Operación Génesis v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 270 (Nov. 20, 2013). On the Court as an enforcer of IHL, see Aponte Cardona, *supra* note 11, at 135; Juana María Ibánez Rivas, *El Derecho Internacional Humanitario en la Jurisprudencia de la Corte Interamericana de Derechos Humanos*, 36 REVISTA DE DERECHO DEL ESTADO 167, 168 (2016).

[13] Masacre de Mapiripán v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005).

[14] Gustavo Gallón Giraldo, *La directiva 15 del Ministerio de Defensa*, EL ESPECTADOR (May 12, 2016).

ing defense of a directive issued by the Colombian Ministry of Defense in April this year (Directive 0015 of 2016) which authorizes bombing the camps of some large criminal organizations. These organizations are now treated as military targets, that is, opposition armed groups in the technical sense of IHL.

A Divergence Thesis?

That humanitarian NGOs and activists have focused on the constraining and protective dimensions of IHL instruments is of course understandable, given their constitutive vocation. Yet there is certainly something troubling in the policy of the Colombian Ministry of Defense to treat criminal gangs as organized armed groups, and thus to invoke IHL when using force against them. As some international legal commentators have been keen to emphasize, IHL *does* contain considerable authorizations and permissions relative to the use of force, alongside the protections and constraints that figure more prominently in humanitarian discourse.[15]

The authorizing dimension of IHL was marginal but not altogether absent in the Inter-American Commission Report on Arturo Ribón Avilán. In Paragraph 168, the Report states that, "humanitarian law may be a defense available to a State to rebut charged violations of human rights during internal hostilities. For example, State agents who kill or wound armed dissidents in accordance with applicable laws and customs of warfare incur no liability under international law."[16] This now somewhat outdated language points to a paradigmatic case of IHL permission: in armed conflicts, states may use lethal force as a first resort against members of hostile armed groups. What is troubling about Directive 15 of the Ministry of Defense is precisely that it authorizes the use of lethal force, instead of incapacitation or detention, against members of criminal organizations.

In addition to permitting the lethal targeting of combatants, IHL contains an important form of authorization which derives from its rule of proportionality.[17] As is well known, the rule does two things: it allows for incidental (but not excessive) injury and damage to protected persons and goods, and, more importantly, it authorizes military officers to assess the advantage of a military action and its proportion to incidental injury. In effect, in virtue of the proportionality rule, tactical considerations—which, as Clausewitz taught us, are ultimately tied to political goals, notably to assessments of national security—may override the imperative to protect goods and persons.

In Colombia, this authorizing side of IHL has been reflected in various official documents and directives. In 2009, the Colombian Armed Forces put into effect for the first time an Operational Law Manual which was built around a clear distinction between law enforcement operations, which are regulated by human rights criteria, and operations in "scenarios of hostilities," which are governed by IHL.[18] Importantly for present purposes, the Manual stipulates that, in the former, lethal force can be used only as a last resort, and military personnel must identify themselves prior to engagement; in the latter, IHL permissions apply, which means

[15] DAVID KENNEDY, OF WAR AND LAW 99-164 (2006); Martti Koskenniemi, *The Lady Doth Protest Too Much: Kosovo and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159, 167-171 (2002); Janina Dill, *The American Way of Bombing and International Law*, *in* THE AMERICAN WAY OF BOMBING 131 (Henry Shue & Matthew Evangelista eds., 2014).

[16] Arturo Ribón Avilán v. Colombia, Case 11.142, Inter-Am. Comm'n H.R., Report No. 26/97, OEA/Ser.L./V/II.98 doc. 6 rev., para. 168 (1997).

[17] In the formulation of Additional Protocol I art. 57.2.a.iii:

> those who plan or decide upon an attack shall refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

[18] Operational Law Manual FFMM 3-41 (1st ed. 2009).

that force may be used as first resort when the target is legitimate, and commanders are called to assess the proportionality of incidental damage.

This relative permissibility of IHL, as compared to policing standards, is also manifest in a directive issued by the National Prosecutor's Office (*Fiscalía General de la Nación*) in December of 2015 (Directive 0003 of 2015). The Directive provides standards of investigation for prosecutors dealing with alleged war crimes, and again distinguishes clearly between law enforcement and military operations. For the latter, the Directive instructs judicial operators to take into consideration the open texture of the principle of military necessity, and the fact that military operators must have a "margin of appreciation" when it comes to assessing the tactical advantage and proportionality of incidental damages. While such room for military discretion does not amount to an open license, it does reflect the technical and highly contextual character of military operations, which is not amenable to objective legal regulation (Paragraph 3.6). Deference to a "military margin of appreciation," the Directive states categorically, is a clear limit to prosecutorial action.

Superseding IHL in Transitions to Peace

Why is this all relevant from the standpoint of *ius post bellum*? It seems to me undisputable that an essential element in a transition from war to peace—part of its very definition—is that the use of armed force, particularly by state agents, be drastically reduced. This entails that the catalogue of public justifications for the use of force be limited, in particular that invocations of military necessity and proportionality (and thus ultimately of national security) be excluded. A transition from war to peace should restore—or guarantee for the first time, as would be the case in large areas in Colombia—the full, nonderogated catalogue of human rights. These are the *iura* that must be recognized and protected *post bellum*, once the nation has decided to transition from war to peace. Correspondingly, the use of state force should progressively be put in the hands of a civilian, not militarized, police force, which should fight criminal organizations in close association with independent prosecutors and courts—strategies of all-out force should be replaced by police and criminal investigations and prosecution.

It may be objected that IHL cannot be simply thrown away once the accords are signed. State authorities still have to confront serious threats from nonstate armed groups, including the small-sized but persistent ELN guerrillas and dissident factions from the FARC. No doubt, superseding IHL cannot be accomplished all at once, but if the government takes seriously the political project of transitioning to peace, then it must devise and undertake policies that lead to a domestic rule of law consistent with IHRL in its full extent. This will require, most challengingly, nonmilitarized approaches to persecuting and dismantling large-scale criminal organizations that have access to huge profits from drug trafficking and illegal mining.

So far, the prospects of IHL supersession in Colombia have not been encouraging. Security sector reform may well be one of the hardest political tasks in the post-accords period, given the power and historical autonomy of the Colombian Armed Forces. The government avoided addressing or even recognizing the need for military downsizing during the peace negotiations, if arguably for sound political reasons. Moreover, the political leadership of the "No" vote in the 2 October plebiscite, in particular former president Uribe, has been historically inclined to resort to military force to fight large-scale criminality. Yet, while no sector of the political establishment seems willing to seriously address military downsizing, nonetheless it makes no sense to maintain the size and budget of the military once the most serious threat to Colombian security has disarmed and demobilized. The task of downsizing and superseding IHL cannot be postponed for long—not without giving up the project of transitioning to peace.

It may also be objected that the applicability of IHL does not depend on the subjective determination of governments or the military but rather on objective legal criteria of the existence of an armed conflict.

Ultimately, the applicability of IHL has to be determined by a competent judge, not by governments or the military. This, however, seems both incorrect and irrelevant. It is incorrect because the satisfaction of the objective criteria will depend partly on the decision of governments to actually engage in armed conflict.[19] And it is irrelevant because even if a suitable judge could find that the existence criteria were objectively satisfied, state forces can autonomously adopt more limiting policies than what IHL permits. In Colombia, the imperative of *ius post bellum* involves devising alternatives to all-out military force when confronting large-scale criminal organizations, even if all-out force carried no liabilities in court.

[19] SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 155-180 (2012).