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## Article

### Targeting Decisions and Consequences for Civilians in the Colombian Civil Strife

Aaron X. Fellmeth\* & Douglas J. Sylvester\*\*

#### Abstract

The trend in armed conflicts since 1945 has moved away from traditional international wars and toward non-international conflicts between the state and organized rebellions, criminal organizations, or terrorist cells. The difficulty of coping with an enemy that hides among civilians without causing avoidable civilian deaths and damage to civilian property has often been observed and, in practice, the number of civilian deaths in such conflicts frequently overshadows combatant deaths by a significant margin. Yet, it is a homily among international lawyers that the principle of proportionality applies in non-international as well as international conflicts under customary international law. In order to better understand the apparent contradiction of this claim with the quotidian fact of disproportionate civilian casualties, the authors studied the practice of Colombia in its decades-long civil strife against the organized armed groups Revolutionary Armed Forces of Colombia, or FARC, and the National Liberation Army, or ELN. This study summarizes Colombian practice in training and regulating its armed forces with respect to the specific principle of proportionality; examines several incidents of allegedly disproportionate attacks; and analyzes the Colombian government's response to determine whether it considers itself bound to comply with the

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proportionality principle in its internal conflict and, if so, how the state interprets its compliance obligations with that principle.

## I. INTRODUCTION

The trend in armed conflicts since 1945 has moved away from the traditional clash between sovereign states and towards internal strife based on ethnic, religious, or other demographic factors. These conflicts are also the ones that pose the greatest threats to civilian populations, as the tragedies in Rwanda, the former Yugoslavia, the Congo, Syria, and countless zones of recurring hostilities such as occupied Palestine illustrate. One of the obstacles to adequate protection of civilians from the effects of non-international armed conflicts is the absence of sufficient and clear international legal rules restraining the combatants from military tactics that pose a morally unacceptable threat to civilian lives and property. While international law regulating wartime conduct, known as *ius in bello*,<sup>1</sup> is highly developed, its application in non-international armed conflicts is contested and frequently uncertain.<sup>2</sup> There is no universally accepted treaty applying the entire body of the international *ius in bello* developed since 1899 to civil wars, rebellions, counterterrorism operations, and other non-international armed conflicts. The

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1. In much recent scholarship, the laws of war are often termed “international humanitarian law” in recognition of the modern focus on the protection of individuals from unnecessary harm. However, because not all laws of war have primarily humanitarian objectives, we adopt the more general and laconic terms “laws of war,” or *ius in bello*, here.

2. The uncertainty surrounding application of the laws of war to various conflicts has led some to conclude that they no longer serve as a viable limitation on state action. *See generally* Draft Memorandum from Alberto Gonzalez, White House Counsel, to President George W. Bush, *Decision re. Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban* (Jan. 25, 2002), [http://www.hereinreality.com/alberto\\_gonzales\\_torture\\_memo.html](http://www.hereinreality.com/alberto_gonzales_torture_memo.html). To others, this uncertainty has led to calls for redefinition and formulation of old rules to apply to various types of conflict. *See, e.g.*, Amos N. Guiora, *International Law: Where Have We Been; Where are We Going?*, 30 U. PA. J. INT'L L. 1323 (2009) (advocating for a restatement of the law of armed conflict to reflect new methods of warfare); *see also* Aaron Xavier Fellmeth, *Questioning Civilian Immunity*, 43 TEX. INT'L L.J. 453, 483 (2008) (noting that many critiques of modern humanitarian law “are based upon the observation that if modern armed conflicts expose civilians to similar or greater risks than combatants, as is often the case, then the natural conclusion is that the necessity and proportionality principles are either consistently disregarded or are too vague to be useful in making responsible decisions.”).

most widely subscribed treaty on the subject, Additional Protocol II to the 1949 Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts, includes rules for the protection of civilians, but the protections fall short of what is required in its sister treaty applicable to international conflicts, Additional Protocol I, at least in terms of specificity.<sup>3</sup>

The paradox of international law obligating states to protect “enemy” civilians with greater rigor than their own civilians during armed conflicts can be explained better by history than by policy. A state’s treatment of its own civilians was traditionally considered a matter of sovereign internal control, beyond the purview of international law.<sup>4</sup> A government that victimized its own citizens in combating internal strife could perhaps be held responsible under its national constitution and laws, but, before 1945, it was not considered a matter of sufficient concern to the international community except in campaigns of widespread and severe human rights violations of Christians.

Much has changed since the Second World War, however. The general acceptance of human dignity as a foundation of the world public order following the founding of the United Nations has transformed the international community’s view of which matters fall within the exclusive sovereignty of a state, and which fall within the realm of human rights and beyond.<sup>5</sup> Almost all states now openly accept international human rights law as binding, and that the main provisions of the international law of armed conflict apply with equal vigor and scope to non-

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3. See Aaron Fellmeth, *The Proportionality Principle in Operation: Methodological Limitations of Empirical Research and the Need for Transparency*, 45 ISR. L. REV. 125, 126 (2012).

4. See INT’L COMM. OF THE RED CROSS, COMMENTARY ON GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 46 (Jean Picet ed., 1958) (observing that the reason for excluding a belligerent’s own nationals from the category of “protected persons” was concern to avoid interfering with a sovereign state’s relationship with its own nationals).

5. Most states now accept that the observance of international human rights law concerns the entire international community. See generally *The Foundation of Human Rights Law*, UNITED NATIONS, <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (last visited Mar. 22, 2017). Not surprisingly, the exceptions are those states that systematically violate human rights. The Chinese government, for example, has consistently tried to deflect international criticism and pressure by claiming that human rights are merely an “internal affair.” See, e.g., Info. Office of the State Council, People’s Republic of China, White Paper on Human Rights in China, Nov. 1991, pt. X, <http://www.china.org.cn/e-white/7/7-L.htm>.

international conflicts. Among these laws is the requirement that combatants observe the principles of discrimination and proportionality when planning and directing attacks, as provided most explicitly in AP I.<sup>6</sup>

Unfortunately, the coherence of the policies justifying the equal application of civilian protection law in international armed conflicts to internal conflicts has had little effect on state practice in some regions of the world. In the absence of specific treaty provisions relating to targeting in non-international armed conflicts, the primary source for detailed binding rules remains customary international law.<sup>7</sup> For a practice to become binding international custom, formal doctrine dictates that it must be sufficiently longstanding, consistent, widespread, and accompanied by the belief that international law requires the practice (*opinio iuris sive necessitatis*), as opposed to being merely optional or advisable.<sup>8</sup> In making the case for the applicability of the rules of discrimination and proportionality in internal conflicts, commentators and authorities have relied heavily on logic, policy, and public statements, but they have rarely studied actual battlefield practice—a reliance that has not gone unnoticed. The United States government, for example, has criticized the International Committee of the Red Cross (“ICRC”) for positing custom based on published sources rather than state practice and direct evidence of *opinio iuris*.<sup>9</sup>

The common reliance on public sources is hardly surprising. Producing sound empirical evidence of international practice in armed conflicts is a daunting task. Yet, there are reasons to doubt whether practice in internal armed conflicts can merely be assumed to be identical to practice in international armed conflicts without extensive evidence, as any such practice cannot, perforce, have a long history. As noted, the laws of war were not viewed as applicable to a state’s treatment of its own

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6. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 51(5)(b), 57(2)(a)(iii), (b), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 139 [hereinafter Additional Protocol I].

7. See MICHELLE MACK & JELENA PEJIC, INT’L COMM. OF THE RED CROSS, INCREASING RESPECT FOR INTERNATIONAL HUMANITARIAN LAW IN NON-INTERNATIONAL ARMED CONFLICTS 9 (2008).

8. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW INST. 1987).

9. Letter from John B. Bellinger III, Legal Adviser, U.S. Dep’t of State, & William J. Haynes II, Gen. Counsel, U.S. Dep’t of Def., to Jakob Kellenberger, President, Int’l Comm. of the Red Cross (Nov. 3, 2006), <https://www.state.gov/s/l/2006/98860.htm>.

citizens until recently.<sup>10</sup> In addition, whatever customary support may exist will have arisen in contexts radically different from that of classic international armed conflict. Even verbal statements confirming that the laws of war do apply in internal conflicts provide uncertain guidance on whether particular doctrines applicable in international conflicts govern internal conflicts with the same vigor. It would not be surprising to see states engage in a calculus to defeat the regular army of a foreign power quite different from the calculus in an asymmetrical conflict with an enemy indifferent to the safety of civilians, *a fortiori* one willing to use civilians to shield themselves from direct attack.<sup>11</sup> Thus, despite strong evidence of state verbal support for application of the laws of war to internal conflicts, there is a real need to examine state practice to determine whether specific doctrines are customarily treated as fully applicable in internal wars and the manner in which they are interpreted.

In pursuit of evidence of custom in non-international armed conflicts, we have chosen to examine one specific aspect of the laws of war—the doctrine of proportionality. The authors are currently engaged in a multinational, multi-conflict empirical study of state customary practice of proportionality since 1945.<sup>12</sup> As traditionally understood, proportionality requires military commanders to consider whether attacking a given target is “expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objections or a combination thereof, which would be excessive in relation to the concrete and direct

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10. See Richard A. Falk, *Janus Tormented: The International Law of Internal War*, in INTERNATIONAL ASPECTS OF CIVIL STRIFE 185, 220 (James N. Rosenau ed., 1964).

11. See Laurie E. Bank & Amos N. Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT'L SEC. J. 45, 46 (2010) (“The essence of new warfare is that states are engaged with non-state actors.”); Nir Eisikovits, *Proportionality and Self-Interest*, 11 HUM. RTS. REV. 157, 160 (2010) (“The strict distinction between civilians and combatants, which just war theory has focused on, may no longer be the most useful guideline for protecting civilians during war. The changing nature of war in the last decades and specifically the rise in the frequency of asymmetrical conflicts require some adjustments to just war theory.”); Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 809 (2010) (arguing that reforms to modern humanitarian law were largely driven by “two factors . . . guerilla warfare . . . and the spread of non-international armed conflicts. Both phenomena placed civilians and their property at particular risk.”).

12. For more on the methodology of this study, see Fellmeth, *supra* note 3.

military advantage anticipated.”<sup>13</sup> Our study will examine how the principle has played out in internal conflicts, and specifically the role it plays in targeting and planning decisions as well as state responses to alleged violations of the rule. To better understand state practice, we are using a methodology designed to gather empirical information beyond official governmental and NGO publications and news reports.<sup>14</sup>

The purpose of this Article is to examine state practice in applying the proportionality doctrine to the civil strife between the Colombian government and two armed subversive groups, the Revolutionary Armed Forces of Colombia (“FARC”) and the National Liberation Army (“ELN”), from 1982 to the present.<sup>15</sup> This vicious conflict, active since 1964 and still ongoing to a lesser extent today, is notable for the large number of intentional civilian killings and property damage. But it is also notable because it involves numerous incidents of allegedly indiscriminate or disproportionate attacks resulting in accidental but avoidable civilian casualties and property damage. Over the course of the conflict, it is estimated that some 220,000 persons have been killed,<sup>16</sup> most of them civilians, and many of them murdered by FARC, ELN, and paramilitary organizations allied with the Colombian military. Our primary goal is to examine the measures Colombia has taken to train and prepare its armed forces in proportionality doctrine, to monitor and enforce compliance with that doctrine, and to punish disproportionate attacks. By examining training and enforcement mechanisms and incidents of allegedly disproportionate attacks from this persisting conflict, we hope to gain some insight into the role that proportionality considerations play in targeting decisions made by the Colombian armed forces.

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13. Additional Protocol I, *supra* note 6, arts. 51(5)(b), 57(2); *see also* 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 46 (2005).

14. *See infra* Section III.B.

15. We discuss the origins and development of these institutions in Section III.A.

16. CENTRO NACIONAL DE MEMORIA HISTÓRICA, ¡BASTA YA! COLOMBIA: MEMORIAS DE GUERRA Y DIGNIDAD 20 (2013).

## II. PROPORTIONALITY IN NON-INTERNATIONAL ARMED CONFLICTS

Although the doctrine of proportionality is now well established in the *ius in bello*, its application to non-international conflicts is of more recent and, in some respects, controversial origin. As early as Grotius and gaining steady force throughout the eighteenth century, the notion that the “right of belligerents to adopt means of injuring the enemy is not unlimited”<sup>17</sup> began to take shape.<sup>18</sup> Yet, a proportionality principle did not immediately emerge to protect civilians, nor was it yet a formal requirement of the laws of armed conflict before the end of the Second World War. The laws of war first embodied the more pressing doctrines of discrimination, which forbids the intentional targeting of civilians, and of military necessity, which prohibits the gratuitous use of force that could threaten civilian lives or property.<sup>19</sup> The protective value of these rules is limited to those attacks that endanger civilians and that cannot otherwise be justified for military purposes.<sup>20</sup> For example, these principles protected civilians against attacks on undefended towns and the random destruction of civilian

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17. Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 22, Oct. 18, 1907, 36 Stat. 2277. The incorporation of the doctrine into international law can be traced back to the St. Petersburg Declaration of 1868, which states in its preamble that, because the only legitimate purpose of warfare can be to weaken the military forces of one’s opponent, practices that uselessly aggravate the suffering of combatants are illegitimate. See Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29/Dec. 11, 1868, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 31 (Roberts & Guelff eds., 2d ed. 1989) [hereinafter Declaration Renouncing the Use of Explosives].

18. Josef L. Kunz, *The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision*, 45 AM. J. INT’L L. 37, 37–38 (1951).

19. Although contested at times, the doctrine of necessity, as both a limitation on the nature of legal attacks and a basis for potential criminal liability, was best articulated in *The Hostage Case*. In that case, an American Military Tribunal at Nuremberg held that necessity:

[D]oes not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.

United States v. List (The Hostage Case), Case No. 7 (Feb. 19, 1948), *reprinted in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL OF COUNCIL LAW NO. 10, at 1253–54 (1950).

20. Fellmeth, *supra* note 2, at 455, 484.



property.<sup>21</sup> As late as 1952, international lawyers continued to view the principle of discrimination as the principal limitation under customary international law protecting civilians during an armed attack.<sup>22</sup>

However, once the idea that the purpose of warfare was limited to weakening the military forces of the enemy became widely accepted,<sup>23</sup> more detailed legal regulation of the means of attack naturally followed. Throughout the nineteenth century, various regimes were developed to control weapons and tactics viewed as unnecessarily indiscriminate in their ability to distinguish between military targets and civilians or civilian property, and unnecessarily cruel in their effects on their victims, whether combatant or civilian. The focus was mainly on indiscriminate weapons or weapons causing needless suffering, such as chemical weapons and exploding or flattening bullets.<sup>24</sup> The terrible effects of the Second World War on civilians began a movement to extend legal protection of civilians through a more developed law of war. After 1945, international lawyers, nongovernmental organizations ("NGOs"), and scholars began to argue that customary international law forbids attacks that even unintentionally threaten civilian safety and life if they cannot be justified by military necessity.<sup>25</sup> By the early 1970s,

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21. See Geoffrey Best, *Restraints on War by Land Before 1945*, in *RESTRAINTS ON WAR: STUDIES IN THE LIMITATION OF ARMED CONFLICT* 17, 27–29 (Michael Howard ed., 1979).

22. See, e.g., Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 *BRIT. Y.B. INT'L L.* 360, 379 (1952).

23. Declaration Renouncing the Use of Explosives, *supra* note 17, pmbl. ("[T]he only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy . . .").

24. See, e.g., Hague Declaration (II) on the Use of Projectiles the Object of Which is the Diffusion of Asphyxiating or Deleterious Gases, July 29, 1899, *reprinted in* 2 JAMES BROWN SCOTT, *THE HAGUE PEACE CONFERENCES OF 1899 AND 1907* (1909); Hague Declaration (III) on the Use of Bullets Which Expand or Flatten Easily in the Human Body, July 29, 1899, *reprinted in* SCOTT, *id.*; 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 *U.S.T.* 583, 1015 *U.N.T.S.* 163; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (with Protocols), Oct. 10, 1980, 1342 *U.N.T.S.* 137 [hereinafter *Convention on Conventional Weapons*].

25. According to Gregory Best, the work of the ICRC and numerous other groups began to focus on civilian protections in the laws of war after 1945. See Best, *supra* note 21, at 27. Others have discussed the changing landscape of war and the increasing desire to protect civilians in internal conflicts. See Josef L. Kunz, *The Chaotic Status of the Laws of War and the Urgent Necessity for Their*

the thinking of the leaders of the international community had begun to converge on the more nuanced view that, regardless of the precision of the weapon employed, when civilian casualties or property are expected as collateral damage, “the loss of life and damage to property must not be out of proportion to the military advantage to be gained.”<sup>26</sup> The doctrine was enshrined in the first major supplement to the conventional laws of war since 1949—Additional Protocol I (“AP I”) to the Geneva Conventions adopted in 1977.<sup>27</sup>

Additional Protocol I greatly expanded the protections of the laws of war for civilians, but its provisions apply in international conflicts only. Among other protections relating to methods and means of attack,<sup>28</sup> AP I articulates in Article 51 the proportionality principle requiring military commanders to refrain from an attack that is expected to cause civilian casualties excessive in relation to the “concrete and direct military advantage anticipated.”<sup>29</sup> Although the requirements of “direct” and “concrete” give the appearance of strict criteria, in practice the principle’s application remains highly subjective and leaves broad discretion to military commanders. Those states that resisted the inclusion of a proportionality principle in AP I did so for a variety of reasons, one of which was that the substance and scope of many of the rules in AP I went beyond customary understanding and, in some cases, could result in criminal liability for military commanders acting in good faith and with reasonable care to achieve legitimate military objectives.<sup>30</sup> Nonetheless, the principle was included with strong support from most states, possibly because they may not have viewed a violation of the proportionality principle as a war crime. Subsequent history has borne out that expectation; there are exceedingly few known instances of military commanders

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*Revision*, 45 AM. J. INT’L L. 37 (1951).

26. Letter from J. Fred Buzhardt, Gen. Counsel of the Dep’t of Def., to Senator Edward Kennedy, Chairman of the Subcomm. on Refugees of the Comm. of the Judiciary (Sept. 22, 1972), *reprinted in* 67 AM. J. INT’L L. 122, 124–25 (1973).

27. Additional Protocol I, *supra* note 6, art. 51(5)(b).

28. *Id.* arts. 51(4)(c), (5)(a).

29. *Id.* art. 51(5)(b).

30. For a discussion of the numerous objections raised by states to adoption of AP I, see Schmitt, *supra* note 11, at 811–14, and Fellmeth, *supra* note 2, at 485–89.

being prosecuted criminally at the international or national level for having committed a disproportionate attack.<sup>31</sup>

Regardless of whether proportionality in international armed conflicts possessed a strong customary basis prior to adoption of AP I, there is little reason to believe that proportionality enjoyed a similar customary basis for non-international conflicts. Indeed, the promulgation of Additional Protocol II to the 1949 Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts ("AP II"), which was to extend humanitarian legal protection to noncombatants in non-international conflicts such as civil wars or counterterrorism operations, implicitly disclaimed a customary basis for extending international law's protections for a state's own citizens during internal conflicts.<sup>32</sup> Consequently, the promulgation of AP II put protection for civilians in non-international conflicts on a new conventional footing, with that protocol being the primary source of state legal obligations toward civilians beyond the *lex generalis* of international human rights law.<sup>33</sup>

Some states willing to adhere to AP I were less enthusiastic about AP II. First, traditional concerns about state sovereignty, enhanced in the dozens of states emerging from decades of colonization and contested leadership, brought suspicion with new international rules restricting state sovereignty within the state's own borders.<sup>34</sup> In addition, it was widely, though naively, believed that nations were much less likely to disregard the safety of their own nationals during internal conflicts than might be the case for civilians of an enemy state.<sup>35</sup> As a result, such civilians were viewed as less needful of international law's protections. Finally, some states objected to the treatment of irregular armed forces who hide among civilian populations as

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31. See Fellmeth, *supra* note 3, at 127–29.

32. Cf. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of Non-International Armed Conflicts, pmbl., Dec. 7, 1978, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II] (listing a major reason for the protocol as "the need to ensure a better protection for the victims of . . . armed conflicts.").

33. See MACK & PEJIC, *supra* note 7.

34. See, e.g., Mark David Maxwell & Richard V. Meyer, *The Principle of Distinction: Probing the Limits of Its Customariness*, THE ARMY LAWYER, Mar. 2007, at 1, [http://www.loc.gov/rr/frd/Military\\_Law/pdf/03-2007.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/03-2007.pdf).

35. CLAUDE PILLOUD ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1449–51 (Yves Sandoz et al. eds., 1987).

entitled to the same privileges as regular combatants who readily distinguish themselves by the open wearing of uniforms and carrying of arms.<sup>36</sup> Some thirty states (including the United States and Israel) chose not to ratify AP II. More importantly, unlike the rules of war in international conflicts, which most states readily admit qualify as customary, the customary rules of war in non-international armed conflicts were viewed as distinctly limited.<sup>37</sup>

The relative dearth of specific protections for civilians in non-international armed conflicts in AP II, and the absence of several militarily active states from the list of parties to the treaty, leaves custom as the main source of detailed legal obligations for the protection of civilians in internal conflicts. As internal conflicts became increasingly prevalent and destructive during the politically turbulent 1980s and 90s, human rights advocates sought to identify customary rules to buttress their claims that international law mandates respect for the discrimination and proportionality principles in internal as well as international conflict. Decisions of international criminal and human rights tribunals,<sup>38</sup> as well as important studies by the ICRC,<sup>39</sup> argued forcefully that customary international law now fully incorporates the laws of war normally applicable in conflicts between states into purely internal conflicts. International lawyers, too, frequently argue that the laws of war applicable to the treatment of civilians in international armed conflicts apply equally to civilians in non-international conflicts.<sup>40</sup> After all, human dignity does not vary according to

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36. *Id.* at 1451–52.

37. *See, e.g.*, Int'l Comm. of the Red Cross, *Rule 11. Indiscriminate Attacks*, CUSTOMARY IHL, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule11](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule11) (last visited Mar. 22, 2017) (demonstrating the difference between international and non-international conflicts when it comes to having an established customary law principle).

38. *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 119 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (“What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.”); *id.* ¶ 127 (“[I]t cannot be denied that customary rules have developed to govern internal strife. These rules . . . cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks . . . as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.”).

39. The most influential and impressive example so far is JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005) [hereinafter ICRC Study].

40. *See, e.g.*, Michael N. Schmitt, *The Interpretive Guidance on the Notion*

nationality. Consequently, it is desirable and logical for international law to protect civilians in both cases equally.

Unfortunately, there is reason to doubt whether states conceive of the customary legal regime governing non-international armed conflicts, especially the proportionality principle, as coextensive with that applying in international conflicts. To understand the state of customary international law in internal conflicts, it is first necessary to survey state practice and *opinio iuris* to determine whether states do in fact treat proportionality as an operative principle in non-international armed conflicts and, if so, how they interpret that principle. It is a platitude of modern *ius in bello* that the “main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied.”<sup>41</sup> For this, customary practice remains the best source for gaining insight into the nature and extent of proportionality in non-international conflicts. As a result, our project seeks to examine state practice with regard to this very issue and will, we hope, shed light on the nature and extent of the customary law content of proportionality in the *ius in bello*. Our project, in particular, seeks to uncover practice that may illuminate, *inter alia*, the following issues:

- To what extent, and how, do states incorporate training in the proportionality principle into the mandatory military education of commanding officers?
- By what procedures, if any, do military organizations make decisions whether to refrain from or alter an attack on proportionality grounds in planning and executing military operations?
- To what extent, and how, are states influenced in their military engagements with domestic military opponents by the principle of proportionality?
- What level of intentionality (e.g., negligence, recklessness) is required to subject a military

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*of Direct Participation in Hostilities*, 1 HARV. NAT'L SEC. J. 5, 13 (2010) (stating that it is “beyond dispute” that the principle of distinction, in both international and non-international conflicts, is part of customary international law); Maxwell & Meyer, *supra* note 34, at 10 (“The principle [of proportionality] transcends conflict categorization [as international or non-international].”).

41. INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR OF THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA ¶ 48 (2000), <http://www.icty.org/x/file/Press/nato061300.pdf>

commander to responsibility for disproportionate attack?

- Do states monitor compliance with the proportionality principle and punish commanders who engage in disproportionate attacks and, if so, by what sanctions?
- And, in cases where insurgents or terrorists may be supported, politically, morally, or economically, by civilians, do states interpret proportionality differently than in cases where civilians are hostile to these factions?

The present study discusses Colombia's practice in this area over its principal non-international armed conflict since 1990. Because that conflict continued actively for many decades, it furnishes a particularly instructive basis for evaluating how at least one state has conceived and operationalized the principle.

### III. THE COLOMBIAN CIVIL STRIFE

This section sets out the background of the Colombian internal conflict and analyzes a series of actions taken by the government to suppress or defeat FARC. These actions may shed some light on the substance of the proportionality doctrine in non-international conflicts as interpreted by Colombia.

#### A. BRIEF BACKGROUND OF COLOMBIAN CIVIL STRIFE

As of 2016, Colombia maintains a National Army with some 237,000 active personnel, an Air Force with approximately 13,000 active personnel, and a paramilitary National Police Force 159,000 strong.<sup>42</sup> Its equipment is relatively modern, although for the most part it is not highly technologically sophisticated.<sup>43</sup> The size and expertise of the Colombian armed forces is partly attributable to United States financial assistance, which included some \$6 billion to counter-narcotics operations between 2000 and 2008.<sup>44</sup>

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42. Int'l Inst. for Strategic Studies, *Latin America and the Caribbean*, 116 MIL. BALANCE 365, 389 (2016).

43. *See id.* at 389–92.

44. U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-71, PLAN COLOMBIA: DRUG REDUCTION GOALS WERE NOT FULLY MET, BUT SECURITY HAS IMPROVED; U.S. AGENCIES NEED MORE DETAILED PLANS FOR REDUCING ASSISTANCE 2 (2008).

Colombia faces three sets of challengers to its national sovereignty. The largest by far has historically been *Fuerzas Armadas Revolucionarias de Colombia*, or FARC, which has historically varied in membership from about 8,000 to 17,000 fighters.<sup>45</sup> The much less active *Ejército de Liberación Nacional*, or ELN, was formed in 1964<sup>46</sup> and is currently comprised of around 2,000 members.<sup>47</sup> A third, composed of relatively non-unified groups of upwards of 2,600 drug traffickers armed mostly with light weapons, the government calls BACRIM, for *Bandas Criminales Emergentes*.<sup>48</sup> Because it is the best organized and funded of the groups, as well as the most aggressive, the incidents in the present study primarily involved FARC.

Although FARC's rise can be traced back to the failure of agrarian reforms in the 1920s and 30s, its more immediate beginning arose out of a particularly bloody period in Colombia's history, colloquially known as *La Violencia*, lasting from 1948–58.<sup>49</sup> Following a period of tensions between Marxist, liberal, and conservative political factions, the assassination of a prominent leftist politician, Jorge Eliécer Gaitán, in 1948<sup>50</sup> led to a protracted violent clash between conservative government soldiers, conservative and liberal guerilla units, and Marxist peasant militias that lasted until a military coup in 1953.<sup>51</sup> The coup leader declared an amnesty, resulting in the demobilization of most guerilla forces.<sup>52</sup>

Those *bandoleros* who refused to surrender continued fighting. After political factions reached an agreement in 1958,

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45. *Id.* at 25.

46. Stanford University, *National Liberation Army (Colombia)*, MAPPING MILITANT ORG. (Aug. 17, 2015), [http://web.stanford.edu/group/mapping\\_militants/cgi-bin/groups/view/87](http://web.stanford.edu/group/mapping_militants/cgi-bin/groups/view/87).

47. Danielle Renwick & Claire Felter, *Colombia's Civil Conflict*, COUNCIL ON FOREIGN RELATIONS (Jan. 11, 2017), <http://www.cfr.org/colombia/colombias-civil-conflict/p9272>.

48. See Las "*Bandas Criminales Emergentes*," EL ESPECTADOR (Mar. 3, 2009, 11:00 PM), <http://www.elespectador.com/articulo123678-bandas-criminales-emergentes>; Pablo Medina Uribe, *Explainer: After the FARC, Colombia Still Has to Face Bacrim*, AMERICAS SOC'Y/COUNCIL OF THE AMERICAS (Jan 6, 2016), <http://www.as-coa.org/articles/explainer-after-farc-colombia-still-has-face-bacrim>.

49. GARRY LEECH, *THE FARC: THE LONGEST INSURGENCY* 8, 21 (2011).

50. Tasneem Jamal, *Colombia (1964–First Combat Deaths)*, PROJECT PLOUGHSHARES (Mar. 16, 2012), <http://www.ploughshares.ca/libraries/ACR-Text/ACR-Colombia.html#Background>.

51. See LEECH, *supra* note 49, at 9–10.

52. *Id.*

what remained was armed communist peasant groups.<sup>53</sup> The remnants of the communist rebels organized into FARC.<sup>54</sup> FARC initially declared its intention to seize power in Colombia through “armed colonization”<sup>55</sup> and, for more than two decades, organized peasant revolts in mainly rural areas throughout the Colombian countryside.<sup>56</sup> FARC’s methods include ambushing patrols, assassinations, kidnapping and murdering Colombian political leaders, destroying infrastructure, recruiting child soldiers (about one quarter of whom are under 18 years old), and terrorizing villagers in the countryside.<sup>57</sup>

During most of the conflict until the end of the Álvaro Uribe administration from 2002–10, the Colombian government denied it was engaged in an armed conflict, but instead characterized the conflict as a law enforcement action against criminal groups.<sup>58</sup> By the early 1980s, however, FARC had begun to link itself to the burgeoning cocaine trade in the country and, backed by the immense funds from their participation in drug trafficking, greatly expanded its size and military training.<sup>59</sup> Throughout the 1980s, it directly attacked the Colombian military and moved into more urban areas of the

53. *Id.* at 10.

54. See Fernán E. González, *The Colombian Conflict in Historical Perspective*, 14 ACCORD 10, 13 (2004) <http://www.c-r.org/our-work/accord/colombia/historical-perspective.php>.

55. Ricardo Vargas Meza, *The Revolutionary Armed Forces of Colombia (FARC) and the Illicit Drug Trade*, TRANSNAT’L INST. (June 7, 1999), <https://www.tni.org/en/briefing/revolutionary-armed-forces-colombia-farc-and-illicit-drug-trade>.

56. LEECH, *supra* note 49, at 16.

57. See MARIO A. MURRILLO & JESÚS REY AVIRAMA, COLOMBIA AND THE UNITED STATES: WAR, UNREST AND DESTABILIZATION 74 (2004); see also *Colombia: Armed Groups Send Children to War*, HUMAN RTS. WATCH (Feb. 22, 2005), <https://www.hrw.org/news/2005/02/21/colombia-armed-groups-send-children-war>; *FARC-Civilians*, UPPSALA CONFLICT DATA PROGRAM, <http://ucdp.uu.se/#/onesided/1072> (last visited Mar. 4, 2017); HUM. RTS. WATCH, COLOMBIA: BEYOND NEGOTIATION: INTERNATIONAL HUMANITARIAN LAW AND ITS APPLICATION TO THE CONDUCT OF THE FARC-EP, pts. III, VII, VIII & IX, Vol. 13 No. 3B (Aug. 2001), <https://www.hrw.org/reports/2001/farc/index.htm>.

58. Interview with Senator Germán Navas Talero, May 23, 2012, [hereinafter Talero Interview] (on file with the author); Guillermo Otálora Lozano & Sebastián Machado, *The Objective Qualification of Non-International Armed Conflicts: A Colombian Case Study*, 4 AMSTERDAM L.F. 58, 65–66, 70 (2012).

59. Stanford University, *Revolutionary Armed Forces of Colombia – People’s Army*, MAPPING MILITANT ORGANIZATIONS (Aug. 15, 2015), [http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/print\\_view/89](http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/print_view/89).



country.<sup>60</sup> In addition to drug trafficking, in the 1980s FARC began kidnapping affluent and well-connected Colombian citizens and foreigners for ransom, an activity that greatly increased its funding and notoriety.<sup>61</sup>

Following a series of negotiations, amnesties, demobilizations, and some short-lived progress toward reconciliation with FARC, violence once again escalated in the early 1990s as conservatives formed a number of paramilitary forces (known as the *convivir*) and began a campaign of extreme violence against FARC and other guerrilla forces.<sup>62</sup> The level of violence continued to escalate between these paramilitary groups, suspected to be linked to the Colombian government, and FARC. In 2001, the United States declared FARC a “Foreign Terrorist Organization” subject to United States trade and economic sanctions<sup>63</sup> and increased funding and military support for the Colombian government’s efforts to defeat FARC.<sup>64</sup> FARC was also designated a terrorist organization by the European Union, Canada, and, of course, Colombia itself.<sup>65</sup>

Less known than FARC, a second insurgent group, the ELN has also been waging war against the Colombian government since the mid 1960s. ELN, deeply influenced by “liberation theology,” was also listed as a Foreign Terrorist Organization by the United States<sup>66</sup> and, since 2004, has been designated a terrorist organization by the European Union as well.<sup>67</sup> ELN, like FARC, has used kidnapping and extortion to fund its campaigns against the Colombian government.<sup>68</sup> Although in

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60. LEECH, *supra* note 49, at 25.

61. *Id.* at 40.

62. *Id.* at 29–33; see also James Bargent, *The Legacy of Colombia’s Vigilante Security: the Convivir*, INSIGHT CRIME (May 25, 2015), <http://www.insightcrime.org/news-analysis/the-legacy-of-colombia-vigilante-security-the-convivir>.

63. U.S. DEPT OF STATE, 2001 REPORT ON FOREIGN TERRORIST ORGANIZATIONS (Oct. 5, 2001), <https://2001-2009.state.gov/s/ct/rls/rpt/fto/2001/5258.htm>.

64. LEECH, *supra* note 49, at 86–87.

65. *Will a Peace Agreement Boost Trade and Investment in Colombia?*, KNOWLEDGE@WHARTON (Aug. 24, 2016), <http://knowledge.wharton.upenn.edu/article/will-peace-agreement-boost-trade-investment-colombia/>.

66. U.S. DEPT OF STATE, *supra* note 63.

67. Council Decision 2005/930/EC of 21 December 2005, Implementing Article 2(3) of Regulation (EC) No. 2580/2001 on Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism and Repealing Decision 2005/848/EC, 2005 O.J. (L 340/64).

68. Norman Offstein, *An Historical Review and Analysis of Colombian Guerilla Movements: FARC, ELN and EPL*, 52 DESARROLLO Y SOCIEDAD 99,

recent years reconciliation talks with ELN proved effective at reducing violence, the 2009 escape of an ELN leader from prison has since escalated the ELN's profile and activity.<sup>69</sup>

From 2002 to the present, the Colombian military has undertaken a series of increasingly forceful measures to defeat FARC and ELN.<sup>70</sup> The declared intention of these organizations to seize political and military control of the country by force, and their willingness to flout all aspects of the laws of war, furnishes an instructive example of a state coping with intense and protracted warfare against an organized domestic armed group frequently integrated into civilian populations.

## B. OUR METHODOLOGY AND ITS LIMITATIONS

Here, we summarize our methodology for identifying and analyzing the incidents that we deemed relevant to assessing the Colombian government's interpretation of the proportionality principle in the Colombian civil strife. A key goal of the study is to move beyond formal, documentary evidence of customary law and to analyze actual training and battlefield practice and subsequent treatment of incidents by the Colombian military, the civilian government, and international institutions. This entailed a more journalistic and resource-intensive methodology than that typically devoted to the study of custom. Normally, such a study might include treaty obligations, judicial opinions, military manuals, national legislation, public statements of national government officials, UN Security Council resolutions, and similar sources. The ICRC study has already covered most of this ground on a global scale.<sup>71</sup> Although the ICRC study received some criticism for its methodology, commentators implicitly endorse the study's importance by almost acknowledging the nearly insuperable difficulty of assessing state practice and *opinio iuris* based on actual battlefield events on a global scale.<sup>72</sup> Indeed, the

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112 (2003).

69. Jeremy McDermott, *Colombia's ELN Rebels Show New Vigour*, BBC NEWS, <http://news.bbc.co.uk/2/hi/americas/8341093.stm> (last updated Nov. 5, 2009).

70. *Profiles: Columbia's Armed Groups*, BBC NEWS (Aug. 23, 2013), <http://www.bbc.com/news/world-latin-america-11400950>.

71. See generally HENCKAERTS & DOSWALD-BECK, *supra* note 13.

72. See, e.g., Michael N. Schmitt, *The Law of Targeting*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 131, 135, 156 (Elizabeth Wilmhurst & Susan Breau eds., 2007).

International Criminal Tribunal for the Former Yugoslavia observed in the *Tadić* case:

When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour.<sup>73</sup>

In undertaking our study, we attempted to overcome these difficulties by examining a series of incidents of allegedly disproportionate attacks to determine the following: (1) which actors were involved; (2) which military targets were chosen of those reasonably available; (3) what weapons were used; (4) what forces and defenses the attacker faced; (5) which method of attack was used of those reasonably available (e.g., in terms of timing or approach); (6) what precautions were taken for the minimization of civilian casualties; and (7) what military advantage was expected. We began by gathering any information available about military training in the laws of war, how targeting decisions are made, the involvement of legal advisors in the strategic and tactical planning processes, and the enforcement system for alleged violations of the laws of war. For this, we studied Colombian legislation and military manuals, news sources, reports of nongovernmental and intergovernmental organizations, and information supplied by the United States government and United Nations. We also interviewed Colombian military representatives and prominent politicians.

We then turned to studying individual incidents of allegedly disproportionate attack. Once we had identified a military engagement in which claims of disproportionate civilian casualties or property damage were publicized—usually through reports of NGOs, the news media, or intergovernmental organizations such as the United Nations or the Inter-American Commission on Human Rights—our next step was to gather as much information as possible about the circumstances and consequences of the engagement. These initial sources were

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73. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 99 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

documentary. Any clearly intentional killing of civilians was factored out as irrelevant to the question of proportionality.<sup>74</sup>

This research typically yielded a sufficient factual basis to determine whether a serious question of proportionality had been raised. When the facts were insufficiently developed to determine with confidence whether significant civilian casualties or property damage had resulted from the engagement, we discontinued study of the incident and moved on to the next. With sufficient facts, we sought further information on the consequences of the incident from the armed forces involved through published sources. In few cases were such sources available from military organizations, and in none were sources available from irregular forces such as FARC or ELN. This increased the importance of news sources, NGO reports, government publications, and, when possible, obtaining interviews with witnesses. In each case, we contacted the Colombian Embassy in Washington, D.C., and the Colombian Ministry of National Defense to confirm, correct, and expand our information about the general law of war training and enforcement practices, and to seek information about any investigation of and consequences for the claimed violation of the proportionality principle. We also sought information from field reporters and their sources, and from witnesses to the conflict to the extent identifiable and available. Finally, we followed up with interviews with Colombian military representatives and politicians regarding the specific incidents identified. In those cases in which we were unable to identify any consequences that were at least arguably connected to the allegedly disproportionate attack after extensive investigation, we noted the apparent absence of enforcement action. In the event that disciplinary action was taken, or a formal investigation was undertaken, we investigated and recorded the result.

Our findings based on this methodology are subject to several important limitations. The first and most consequential is the absence of direct access to the tactical planning process of Colombian and FARC military commanders during the events in question. By nature, military planning is secretive, and

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74. The challenge here was in separating those killings that were allegedly intentional but for which the evidence was inconclusive. Whenever any significant doubt existed regarding the substantiation of such allegations, we resolved them in favor of the assumption that the killings were accidental. This brought a larger number of incidents within the scope of the study while excluding cases in which civilians were clearly targeted in violation of the principle of discrimination.

decisions not to attack, or to change the mode of attack, in order to reduce civilian casualties are not susceptible to discovery through conventional research. The influence of the rule of proportionality, though invisible to the outside observer, nonetheless may have important consequences in practice. Not all legal rules operate by threat of sanction—indeed, very few do. Many legal rules become integrated into cultural expectations of rectitude and so operate psychologically with greater effect and universality than would be possible through threatened coercion. The difficulty of demonstrating empirically the operation of such influences leaves them susceptible to underestimation. Because there is no real possibility of gaining access to such information in the specific circumstances of this case, our findings should be qualified by the understanding that they may understate the role of proportionality in the protection of civilian populations in Colombia.

A second limitation arises from the secretive nature of the disciplinary process in most military organizations short of criminal conviction.<sup>75</sup> Gathering information about the consequences *vel non* of an alleged violation of the law of armed conflict is difficult in most states. It is possible that, in some instances, disciplinary action was taken against a commander who directed a disproportionate attack without the action becoming publicly known. There are sanctions that fall short of criminal prosecution or dishonorable discharge that could nonetheless punish and deter effectively. Whenever possible, we questioned our informants about whether any given incident could have resulted in such sanctions, but the lack of access to high-level Colombian officers who would know best about individual cases constrains the ability to discover such informal sanctions.

The distortive effect of secrecy should not be overstated, however. A military organization that refrains from publicizing the consequences of a violation of *ius in bello* dampens the deterrent effect on other military commanders. This is not by any means to say that an unpublicized sanction is equivalent to no sanction at all, but silent sanctions are not conducive to the development of a military culture respectful of the *ius in bello*. A commitment to observing the laws of war should be a public one.

Finally, in each case, whether a given attack was disproportionate in the first place remains inexorably unsettled

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75. See Fellmeth, *supra* note 3, at 143.

in most cases. No information dragged from the fog of war can be totally beyond impeachment. The military organization usually perceives itself to possess a vested interest in suppressing publicity regarding its missteps or disrespect of civilian lives and property. The news media and NGOs may fail to verify allegations of disproportionate attacks, may misreport accidental deaths as intentional killings of civilians (or *vice versa*), or may under- or overstate the number of civilian or military casualties. The headline-grabbing effect of intentional executions of civilians in particular tends to overshadow reports of accidental, even if excessive, civilian casualties. This is especially true in long-running conflicts such as the Colombian civil strife, where “man-bites-dog” journalism may cause the unusual case to overshadow the normal case. An investigation by the self-interested military organization that ultimately exonerates the commander concerned cannot be disbelieved out of hand. At the same time, an organization’s failure to seriously investigate credible allegations of disproportionate attack speaks forcefully about the regard in which the organization holds the *ius in bello*.

Because there is no readily available remedy for the deficiencies of this methodology, empirical researchers face the alternatives of a flawed study or none at all. So that the best does not become the enemy of the good, a flawed study is preferable to the extent that it produces at least some useful and accurate data and is regarded with sufficient caution. In the next section, we outline the various incidents we uncovered and investigated.

### C. BACKGROUND TO COLOMBIAN MILITARY LAW AND PROCEDURES

#### 1. Treaties and Legislation

Since 1969, Colombia has been a party to the International Covenant on Civil and Political Rights (“ICCPR”), which guarantees the human right to life.<sup>76</sup> It has been a party to the Pact of San José, which also guarantees of the rights of life and adds a right to property, since 1973.<sup>77</sup> Under the Colombian

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76. International Covenant on Civil and Political Rights art. 6(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

77. Organization of American States, American Convention on Human

constitution, human rights treaties apply directly in domestic law.<sup>78</sup> As for the law of armed conflict, Colombia ratified the 1949 Geneva Conventions in 1961, and both 1977 protocols in 1993 and 1995, respectively.<sup>79</sup> The Colombian Constitutional Court has proclaimed the customary status of these protocols. When reviewing Colombia's ratification of them, the court wrote:

[S]ince the principles of international humanitarian law embodied in the Geneva Conventions and their two Protocols constitute a set of minimum ethical standards applicable to situations of internal or international conflict and widely accepted by the international community, they form part of *jus cogens*<sup>80</sup> or the customary law of nations. Consequently, their binding force derives from their universal acceptance and the recognition which the international community of States as a whole has conferred upon them by adhering to this set of rules and by considering that no contrary rule or practice is acceptable.<sup>81</sup>

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Rights arts. 4(1), 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. Although a human right to property is absent from the ICCPR due to Soviet opposition, it is present in the Universal Declaration of Human Rights as Article 17. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

78. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 93.

79. *State Parties to the Following International Humanitarian Law and Other Related Treaties as of 14-Feb-2017*, INT'L COMM. OF THE RED CROSS, <https://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> (last visited Mar. 20, 2017).

80. *Jus (or Ius) Cogens* norms are, according to one tribunal, those that hold "a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules [which] . . . cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force." Prosecutor v. Furundzija, Case No. IT-95-17/1, Trial Chamber Judgement, ¶ 153 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998); *see also* Vienna Convention on the Law of Treaties arts. 53 & 64, May 23, 1969, 1155 U.N.T.S. 331 (referring to "peremptory norms" of international law that cannot be circumvented by treaty); Alfred Von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571, 572–73 (1937) (arguing that certain norms are "compulsory" or "*contra bonos mores*").

81. Corte Constitucional [C.C.] [Constitutional Court], mayo 18, 1995, Sentencia C-225/95, ¶ 7 (Colomb.). The English translation of this decision comes from MARCO SASSÒLI AND ANTOINE BOUVIER, HOW DOES LAW PROTECT IN WAR: CASES, DOCUMENTS, AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW, 1357 (1999).

The Attorney General of Colombia has also acknowledged legal obligations to conduct military operations, including operations against FARC, in a manner that preserves civilian life, and to halt attacks that might present a serious danger to civilians.<sup>82</sup> These statements, although acknowledging an international legal duty to protect civilians, give no guidance on the type or degree of protection required. Nor do they explicitly adopt “proportionality” as an applicable standard in internal conflicts. As discussed below, Colombia has, however, accepted the obligation to take reasonable precautions to protect civilians and civilian property from attack at all times, during peace as well as in and out of international and non-international armed conflicts.

Colombia has a Penal Code and a Military Criminal Code that both prohibit war crimes. The Military Code, first adopted in 1958 and revised in 1988, is enforced by the Directorate of Military Penal Justice, part of the Ministry of Defense.<sup>83</sup> Title 6 of the Code prohibits intentional attacks on civilian objects; it does not forbid indiscriminate or disproportionate attacks on military targets in violation of the laws of armed conflict.<sup>84</sup> However, the Ministry of Defense distributes an instruction manual on human rights and the laws of armed conflict to members of its military forces.<sup>85</sup> The manual instructs combatants that, among the grave violations of the laws of war is:

Intentionally launching an attack, knowing it will cause loss of life or injury to civilians, or damage to objects of a civilian character, or damage of a grave, lasting and extensive character to the natural environment, that is

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82. ICRC Study, *supra* note 39, Vol. II, at 348.

83. *See* Decreto 1512 de 2000, Agosto 11, 2000, DIARIO OFICIAL [D.O.] No. 44.125, art. 26 (Colom.). [https://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Sobre\\_el\\_Ministerio/fondelibertad/Dec\\_1512\\_2000.pdf](https://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Sobre_el_Ministerio/fondelibertad/Dec_1512_2000.pdf).

84. L. 522/99, Agosto 13, 1999, DIARIO OFICIAL [D.O.] No. 43.665, art. 174 (Colom.) [http://www.secretariasenado.gov.co/senado/basedoc/ley\\_0522\\_1999.html](http://www.secretariasenado.gov.co/senado/basedoc/ley_0522_1999.html).

85. Ejército Nacional, Jefatura de Derechos Humanos y DIH, Cartilla: Derechos Humanos y Derecho Internacional Aplicable a los Conflictos Armados – DICA (undated) (on file with the authors).



clearly excessive in relation to the direct and concrete military advantage anticipated.<sup>86</sup>

These instructions reflect, albeit in a somewhat loose interpretation, the prohibition on disproportionate attack found in AP I. The manual does not distinguish between international and non-international armed conflicts in its guidance.

The Colombian Penal Code includes a more specific chapter on war crimes.<sup>87</sup> The rationale for classifying war crimes against civilians under the civilian penal code seems to be that such acts cannot be performed in the course of military duty.<sup>88</sup> Although during much of the history of Colombia's conflict, the military courts investigated allegations of indiscriminate or disproportionate attack, in 1997, the Colombian Constitutional Court held that acts by the military that include civilian victims should be decided by the civilian criminal courts.<sup>89</sup>

The Penal Code prohibits intentionally attacking or killing civilians or other protected persons.<sup>90</sup> It further prohibits the "use of illicit means and methods of warfare," including those "*destinados a causar sufrimientos o pérdidas innecesarios o males superfluos*," or "intended to cause unnecessary suffering or loss or superfluous damage."<sup>91</sup> In addition, the Code penalizes refusing to provide medical or other humanitarian assistance to civilians, destruction of civilian objects, and attacks on installations that could unleash forces dangerous to civilian populations.<sup>92</sup> Finally, it prohibits the omission "of measures for the protection of the civilian population."<sup>93</sup> The Code applies at all times in Colombian territory, including during armed conflict.

The Code unfortunately does not elaborate on which methods of warfare are "prohibited," although it seems a fair

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86. *Id.* at 74 (our translation).

87. CÓDIGO PENAL [C. PEN.] L. 599 de 2000, julio 24, 2000, DIARIO OFICIAL [D.O.] 44.007 tit. II (Colom.).

88. Interview with Capt. Eric Guerrero Méndez, National Army of Colombia, at National Army of Colombia International Law and Human Rights Headquarters (June 22, 2012) [hereinafter "Guerrero Interview"].

89. Corte Constitucional [C.C.] [Constitutional Court], agosto 5, 1997, Sentencia C-358/97, (Colom.).

90. CÓDIGO PENAL [C. PEN.] L. 599 de 2000, julio 24, 2000, DIARIO OFICIAL [D.O.] arts. 103–110 (Colom.).

91. *Id.* art. 142.

92. *Id.* arts. 152–57.

93. *Id.* art. 161.

reading of the law that binding international law may be the source of such prohibition. As noted, in 1995 the Constitutional Court determined that the two Protocols Additional to the Geneva Conventions of 1949 had become customary and therefore applicable in international and non-international armed conflicts without the need for treaty ratification or municipal legislation.<sup>94</sup> The court further held these rules applicable in the Colombian civil strife.<sup>95</sup> These rulings seem to confirm that “prohibited” means and methods of warfare encompass violations of the international law of armed conflict, which define rules for the permissible conduct of military operations.

In 2011, the Colombian congress enacted Law 1448, the Law for Victims, which provided for a relatively small amount of compensation (between 15 and 25 million pesos, or U.S. \$5,000–8,200) per victim of state human rights violations.<sup>96</sup> However, first it must be determined that said victim was not a member of an illegal armed group.<sup>97</sup> As Amnesty International has noted, “[g]iven that investigations into unlawful killings rarely if ever reach a conclusion,”<sup>98</sup> the qualification is likely to effectively negate any right to reparation in all or nearly all cases.

## 2. Training and Enforcement Institutions

The Colombian National Army has several departments with responsibility for compliance with the international law of armed conflict and international human rights law.<sup>99</sup> The Department of Legal Operational Counsel advises military commanders on compliance with these rules.<sup>100</sup> In addition, in 1995 the National Army created a standing *Jefatura Derecho Internacional Humanitario y Derechos Humanos*, or International Humanitarian Law and Human Rights Headquarters, to supervise compliance with the laws of armed

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94. Corte Constitucional [C.C.] [Constitutional Court], mayo 18, 1995, Sentencia C-225/95 ¶ 7 (Colom.).

95. See Lozano & Machado, *supra* note 58, at 75.

96. L. 1448 de 2011, (junio 10, 2011), DIARIO OFICIAL [D.O.] No. 48.096 art. 3 (Colom.).

97. *Id.*

98. Amnesty Int’l, *Colombia: The Victims and Land Restitution Law* AI Index MR 23/018/2012, at 8 (Apr. 2012).

99. See Guerrero Interview, *supra* note 88.

100. *Id.*

conflict and international human rights law by the Colombian armed forces.<sup>101</sup> This directorate has three departments.<sup>102</sup>

One of these, the Training and Prevention Department, as its name suggests, trains Colombian armed forces personnel in the requirements of *ius in bello* and human rights law.<sup>103</sup> Although the Colombian constitution has long required members of the armed forces to be taught the “fundamentals of democracy and human rights,”<sup>104</sup> only in 2008 did its training program begin teaching officers and soldiers compliance with the international law of armed conflict, and in 2009, producing and distributing a training manual on the law of armed conflict and human rights law.<sup>105</sup> The National Army estimates that some 89% of staff officers—including all field officers—were enrolled in such a training course by 2012.<sup>106</sup> The mandatory education of officers (commissioned and noncommissioned) now includes 80 hours of human rights and humanitarian law training.<sup>107</sup> In addition, this department periodically communicates educational information by live plays and radio transmissions, and has also published a training video that is handed out to units and made available on the National Army intranet.<sup>108</sup> These presentations specifically include instruction on the concept of proportionality.<sup>109</sup>

The Human Rights Department receives and investigates complaints from alleged victims of violations of human rights and *ius in bello*, and works in coordination with the public prosecutor’s office in criminal cases.<sup>110</sup> There is, in addition, a Department for Case Tracking that monitors the status of cases opened by either the military courts or civilian courts.<sup>111</sup>

In the National Army, each brigade is assigned two subsections relevant to compliance with the law of armed

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101. *Id.*

102. *Id.*

103. *Id.*

104. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 222.

105. *See* Guerrero Interview, *supra* note 88.

106. *Id.*

107. *Id.* An introductory presentation on the international law of armed conflict (in Spanish) has been provided to the authors and is available from them.

108. *Id.*

109. *See e.g., id.* (discussing the example of how a soldier would be trained to handle a civilian object, such as a church).

110. *Id.*

111. *Id.*

conflict: A Human Rights and International Humanitarian Law subsection, and a Legal Counsel.<sup>112</sup> These subsections advise the commanding general and other commanding officers about their obligations to comply with the *ius in bello* and human rights law in the planning and execution of military operations.<sup>113</sup> In addition, Operational Legal Advisors from these subsections specializing in operational law<sup>114</sup> are assigned to the smaller, battalion level. These specialists receive special training, including attendance at workshops held by the International Committee of the Red Cross.<sup>115</sup>

During the planning phase of an attack, the proposed strategy is evaluated by both a Human Rights Officer and an Operational Legal Advisor for its compliance with *ius in bello* and in particular its effect on civilian populations.<sup>116</sup> Commanding officers may ask questions of these advisors or seek remote guidance electronically from the department itself.<sup>117</sup> After each attack, if the military unit controls the territory attacked, the Operational Legal Advisor will visit the territory to determine whether the implemented attack coincided with the approved plan. Through this review, collateral damage is assessed and compared with what was expected at the planning stage.<sup>118</sup>

An officer or soldier who is found to have violated a law of armed conflict or rule of engagement in Colombia may be arrested and indicted before a court martial, should a military prosecutor so decide.<sup>119</sup> However, as noted above, members of the armed forces accused of attacks on civilians have recently been subjected to criminal prosecution in the civilian court system by referral of a criminal lawyer in the Legal Counsel. Whether the trial is by court martial or criminal court, the outcome of the trial will be made public.<sup>120</sup>

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112. *Id.*

113. *Id.*

114. “Operational law” includes both *ius in bello* and international human rights law. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *See generally*, CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 221 (discussing how the Colombian Constitution provides courts martial jurisdiction over offenses committed by members of the armed forces “on active service and in relation to their service”).

120. *See* Guerrero Interview, *supra* note 88.

Finally, the Colombian government has recently established two civilian agencies for the accountability of the military for human rights violations. The first is the *Consejería Presidencial para los Derechos Humanos*, or the Presidential Council for Human Rights, established in 2014 to coordinate state action for the protection of human rights and promotion of compliance with the international law of armed conflict.<sup>121</sup> The second is the senate's *Comisión de Derechos Humanos y Audiencias*, or the Commission for Human Rights and Hearings, which serves as an ombudsman to monitor and investigate government compliance with these same bodies of law,<sup>122</sup> although it lacks trial or conviction power.<sup>123</sup>

The consequences of conviction by trial for violation of the laws of armed conflict could of course include imprisonment. However, a convicted violator could also be subject to suspension, demotion, or dishonorable discharge from the military.<sup>124</sup> Discharge is a severe sanction, because aside from job loss, the reason for the discharge will be a matter of public record and is likely to affect future employment prospects adversely.<sup>125</sup> The least severe form of sanction is a cautionary note issued to the soldier and kept in his or her file.<sup>126</sup>

#### D. INCIDENT REPORTS

The incidents discussed below range from 1994 to 2008 and are but a small sample of the number of incidents we investigated. As noted, we chose to include only those incidents about which sufficiently reliable information could be obtained, and in which allegations of disproportionate attack were credible, to provide a factual account of civilian casualties as well as a reliable perspective on the Colombian government or military's justifications for targeting decisions.

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121. Decreto 1649 de 2014, septiembre 2, 2014, DIARIO OFICIAL [D.O.] art. 26 (Colom.).

122. See Ivanys Palencia, *Comisión de Derechos Humanos y Audiencias*, SENADO REPÚBLICA DE COLOMBIA, <http://www.senado.gov.co/comisiones/comisiones-legales/comision-de-derechos-humanos-y-audiencias> (last updated Feb. 20, 2017).

123. Talero Interview, *supra* note 58.

124. See Guerrero Interview, *supra* note 88.

125. *Id.*

126. *Id.*

## 1. 1994 Operation Pincer

On January 3, 1994, FARC or ELN guerrillas carried out a daytime assault on the Colombian army base at Saravena.<sup>127</sup> In retaliation for this brazen attack, members of the *Reveiz Pizarro*—part of the Colombian army’s mechanized cavalry—under the command of a Lieutenant Germán Darío Otálora Amaya, launched “Operation Pincer” against the town of Puerto Lleras in Arauca Department, a suspected terrorist haven.<sup>128</sup> The army went into Puerto Lleras with three battalions and support from two helicopter gunships.<sup>129</sup>

According to witnesses, the attack on the town began with a hail of bullets. The Army “shot indiscriminately at unarmed civilians for 20 minutes, resulting in the death of . . . eight persons.”<sup>130</sup> According to another witness, “the counter-guerrilla force shot many times . . . at civilians who were in their homes.”<sup>131</sup> Following this initial assault, witnesses claim that the Army forced approximately five hundred civilians to evacuate their homes—ostensibly so that the army could search their homes for guerrillas or evidence that they themselves were guerrillas.<sup>132</sup> On January 4, the Colombian National Army, allegedly fearing an imminent counterattack by the guerrillas, was observed to round up the villagers and force them onto the local soccer field to be used as human shields to prevent the counterattack.<sup>133</sup> Part of the motivation for the attacks on civilians was Lt. Amaya’s belief that residents of Puerto Lleras were sympathetic to FARC.<sup>134</sup>

Photographic and eyewitness evidence demonstrates that members of the Colombian military attempted to cover-up the

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127. Amnesty Int’l, *Extrajudicial Executions/Fear for Safety*, AI Index AMR 23/20/94 (Feb. 17, 1994).

128. Colombia v. Alexis Fuentes Guerrero et al., Case 11.519, Inter-Am. Comm’n H.R., Report No. 61/99, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 2 (1999) [hereinafter Guerrero Report]; see generally UNCHR, *International Protection Considerations Regarding Colombian Asylum-Seekers and Refugees*, reprinted in 18 INT’L J. REFUGEE L. 182, 193 (2006) (noting elevated terrorist activity in Arauca compared to other regions).

129. Amnesty Int’l, *supra* note 127.

130. Guerrero Report, *supra* note 128, ¶ 2.

131. *Id.* ¶ 32.

132. Amnesty Int’l, *Further Information on UA 55/94 – Extrajudicial Executions/Fear for Safety*, AI Index AMR 23/71/94 (Sept. 15, 1994).

133. See Guerrero Report, *supra* note 128 ¶ 3.

134. *Id.* ¶ 41.

civilian deaths. Soldiers apparently manipulated the bodies after the attack by planting firearms and dressing victims in combat fatigues.<sup>135</sup> Most bodies were buried but some were made available to authorities after complaints were brought against the military.<sup>136</sup> When authorities came to the area to investigate the deaths, the Colombian Army, through Lt. Amaya, showed them the bodies, now clothed in fatigues and armed, as evidence that all killed were guerrillas.<sup>137</sup>

In February 1994, the Attorney General of Colombia ordered the exhumation of seven of the bodies. Autopsies indicated "the deaths occurred as the result of injuries inflicted by firearms, in some cases from a short distance."<sup>138</sup> A criminal investigation was opened against Amaya and fourteen others on charges of torture, unlawful detention, and aggravated homicide.<sup>139</sup> Following the investigation, all of the defendants were indicted and arrest warrants were issued.<sup>140</sup> On August 11, 1995, the Attorney General Delegate for the Armed Forces requested that Lt. Amaya "be discharged from the Army for his alleged participation in crimes and human right violations."<sup>141</sup> Amaya was indeed discharged following appeals, on November 5, 1995.<sup>142</sup>

That same month, a court martial was set up to try the fifteen accused soldiers. The jury in the case acquitted the soldiers, resulting in a setting-aside of the judge's earlier verdict.<sup>143</sup> This decision was upheld by Colombia Supreme Military Tribunal, which remanded the case back to the original judge for a new trial.<sup>144</sup> The second trial resulted in another acquittal, which is a non-reviewable decision under Colombian law.<sup>145</sup>

Parallel to the criminal investigation, the Attorney General Delegate for Human Rights also opened an investigation and filed charges against numerous high-ranking military officers.<sup>146</sup>

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135. *Id.* ¶ 35.

136. *Id.* ¶ 5.

137. *Id.* ¶ 36.

138. *Id.* ¶ 5.

139. *Id.* ¶ 6.

140. *Id.*

141. *Id.* ¶ 7.

142. *Id.*

143. *Id.* ¶ 8.

144. *Id.* ¶ 9.

145. *Id.*

146. *Id.* ¶ 10.

Allegations of torture and extrajudicial killing were also referred to the Inter-American Commission on Human Rights in 1995.<sup>147</sup> The Commission concluded that:

[T]here is no indication that the deaths of the victims occurred in circumstances that could have justified the action of the members of the Army involved . . . . Therefore, . . . State agents violated the right to life enshrined in Article 4 of the American Convention as well as the standards of common Article 3 of the Geneva Conventions to the detriment of [eight identified victims] in the incident that occurred in the hamlet of Puerto Lleras on January 3, 1994.<sup>148</sup>

The Commission recommended that the Republic of Colombia:

1. Undertake a “serious, impartial, and effective investigation” into the events that occurred so as to put on trial and punish the persons responsible.
2. “Adopt the necessary measures to make reparation to the victims’ next-of-kin, including the payment of fair compensation.”
3. “Adopt the necessary measures so that in the future the persons responsible for [similar acts] . . . may be judged by the regular justice system.”<sup>149</sup>

The Commission gave Colombia one month to submit a report on how it would comply with the recommendations,<sup>150</sup> but there is no record of Colombia having submitted a response within the deadline. No other information could be discovered regarding the final outcome of the trials and investigations against the soldiers.

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147. *Id.* ¶ 1.

148. *Id.* ¶ 42–43.

149. *Id.* ¶ 57.

150. *Id.* ¶ 68.



## 2. Operation Lightning II in Santo Domingo

In 1998, the Colombian military intercepted communications by FARC that indicated there would be a large cocaine shipment to Santo Domingo, Arauca (a small village with known ties to FARC), to occur on December 12.<sup>151</sup> The military operation, known as “*Relámpago II*,”<sup>152</sup> began with an airlift of Counter-Guerilla Battalion 36 to the jungle outside of Santo Domingo, from which location it launched an ambush attack on the FARC guerillas as they went to unload the cocaine from an airplane on the Santo Domingo airstrip.<sup>153</sup> Later, the attack was followed by an aerial bombardment of Santo Domingo, apparently on the view that the town was a rebel stronghold.<sup>154</sup>

The ground attack on December 12, 1998, began smoothly enough. Battalion 36 deployed outside the lone runway (a paved road) in Santo Domingo and, as a small plane landed, awaited the FARC guerillas’ appearance.<sup>155</sup> Unfortunately, as the FARC approached the plane, it became apparent to the Battalion 36 commander that FARC fighters were commingling with dozens of local civilians, including women and children, who were unloading the cocaine.<sup>156</sup> The Colombian Army commander called off the attack, apparently out of concern for civilian casualties, and instead engaged FARC in the jungle rather than in the open where a greater military victory would be expected at lesser danger to Colombian soldiers.<sup>157</sup> As a result of this humane decision, Battalion 36 was forced to engage in a week-long firefight with FARC fighters in the jungles around Santo Domingo.<sup>158</sup>

Notwithstanding the restraint of the ground forces, the Colombian Air Force, under command of Lieutenant Guillermo

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151. Maria Anastasia O’Grady, *Buscando la Verdad Sobre un Massacre en una Aldea Colombiana*, EL DIARIO EXTERIOR (Oct. 5, 2005), <http://www.eldiarioexterior.com/ForoAtlantico2/GaleriadeFotos/www.resultados2007.gov.ar/paginas/buscando-la-verdad-sobre-una-7054.htm>.

152. *Santo Domingo Massacre v. Colombia*, Preliminary Objections, Merits and Reparations, Inter-AM. Ct. H.R. (ser. C) no. 259, ¶ 48 (Nov. 30, 2012).

153. *Id.*

154. *Id.* ¶¶ 51–57.

155. *Id.* ¶ 48.

156. *Id.* ¶ 50.

157. *Id.* ¶ 66.

158. *Id.*

Olaya Acevedo,<sup>159</sup> launched the aerial bombardment of the village without prior warning to the inhabitants the following morning.<sup>160</sup> According to NGO and news reports, the Air Force employed cluster-bombs and large dumb bombs<sup>161</sup> and engaged in a prolonged bombardment of the village using Huey helicopter attack ships.<sup>162</sup> The use of helicopters to undertake the attack, if true, is important to this incident, because their high degree of control may have allowed a clear view of their target. According to all reports, the bombardment occurred while many of the villagers had gathered in the town center to celebrate a cultural event.<sup>163</sup> Many eyewitness accounts claim the helicopters intentionally targeted the village center and its mass of civilians.<sup>164</sup> The attack resulted in the death of at least 17 civilians, including six children, and wounded dozens more.<sup>165</sup> In addition to the bombing, Colombian soldiers illegally raided numerous farms outside the village center<sup>166</sup> and allegedly damaged homes and stole property from them.<sup>167</sup> Finally, it appears ground forces moved into Santo Domingo, occupying the village for more than two weeks—obstructing attempts by civilians to seek redress with the government and destroying potential evidence.<sup>168</sup>

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159. *Id.* ¶ 81.

160. *Id.* ¶ 53.

161. *Id.* ¶ 58 (describing the bombs used as having limited precision); *see generally* Rowan Scarborough, *Putin's Modern Air Force Choosing Devastating Dumb Bombs Over Precision Strikes*, WASH. POST, (Feb. 21, 2016), <http://www.washingtontimes.com/news/2016/feb/21/russia-dropping-dumb-bombs-in-syria-indiscriminate/> (describing how dumb bombs lack an electronic guidance system and are consequently highly inaccurate). In 2009, Colombia obtained a significant number of precision-guided air-to-ground munitions systems from Israel. *See Colombia's Defense Modernization*, DEFENSE INDUSTRY DAILY, (June 23, 2009), <http://www.defenseindustrydaily.com/Colombias-Defense-Modernization-05273/>.

162. *See* Santo Domingo Massacre v. Colombia, Inter-AM. Ct. H.R. (ser. C) No. 259, ¶ 51. Despite numerous inquiries, it remains unclear whether the aerial bombardment was planned as a supporting attack for Battalion 36 or was a separate direct bombardment of the town. As it appears that the ground forces initially engaged FARC militia outside of the town, and most reports focus on the aerial bombardment, our study has focused only on that aspect of the attack.

163. *Id.* ¶ 48.

164. *Id.* ¶ 66.

165. *Id.* ¶ 53.

166. *Id.* ¶ 69.

167. *Id.* ¶ 70.

168. *Id.*

During the bombardment, the Colombian Air Force claims to have relied on intelligence provided by a private company known as Air Scan, a United States security contractor,<sup>169</sup> hired by foreign oil companies to provide intelligence and surveillance for large oil fields in the area.<sup>170</sup> Although the details are nebulous, Air Scan apparently provided evidence to the Colombian Air Force that Santo Domingo housed FARC guerillas and communicated bombing coordinates to Air Force commanders.<sup>171</sup> Because the Colombian Air Force denies having bombed civilian populations in the village,<sup>172</sup> it is unclear whether it perceived Santo Domingo as a legitimate military target. It is also unclear that there were any FARC casualties. However, because the Colombian armed forces believed FARC fighters commingled with civilians in Santo Domingo, critics have claimed that the Colombian Air Force knowingly attacked the village as a reprisal for its support for FARC.<sup>173</sup>

Survivors of the Santo Domingo bombing brought suit in Colombia seeking damages and criminal prosecution against the pilots and commanders of the attack.<sup>174</sup> For its part, the Colombian Air Force has steadfastly denied bombing the village directly, and in particular, has claimed the deaths in the village center were the result of a FARC car bomb.<sup>175</sup> It is unclear why FARC would indiscriminately bomb a town that, according to the Colombian government, was either friendly to FARC or under its outright control. In 1999, following review by a Colombian Military Court, the investigation was closed and the Air Force was exonerated.<sup>176</sup>

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169. *See About*, AIRSCAN, <http://www.airscan.com/about.php> (last visited Feb. 26, 2017).

170. *See Masacre en Santo Domingo, Arauca*, COMISIÓN INTERECLÉSIAL JUSTICIA & PAZ (Dec. 13, 2007), <http://justiciaypazcolombia.com/Masacre-en-Santo-Domingo-Arauca> [hereinafter *Masacre*].

171. *Id.*

172. Technically, a helicopter could be fitted with and use bombs, but such a practice is not usual because, among other reasons, a low-flying helicopter would not have sufficient altitude to clear the resulting blast.

173. *See Masacre*, *supra* note 170.

174. *Id.*

175. Olle Ohlsen Pettersson, *Colombia Denies Blame for 1998 Massacre*, COLOM. REP. (Jun. 29, 2012), <http://colombiareports.com/colombia-denies-blame-for-1998-massacre/>.

176. *See Santo Domingo Massacre v. Colombia*, Preliminary Objections, Merits and Reparations, Inter-AM. Ct. H.R. (ser. C) No. 259, ¶ 85 (Nov. 30, 2012).

However, external pressure, including from the United States Department of State, led to reassignment of the case from the military to civilian justice system.<sup>177</sup> The initial criminal court held a series of evidentiary hearings to determine the circumstances surrounding the deaths of the civilians.<sup>178</sup> At the hearings, the pilots of the helicopters each testified that they had indeed dropped cluster bombs on the village and village center, but had done so under direct orders from Air Force Commander General Hector Fabio Velasco.<sup>179</sup> Velasco, for his part, denied giving any such order, and in particular, continued to allege that any deaths were due to a FARC car bomb.<sup>180</sup> As the hearings progressed, forensic experts from the United States Federal Bureau of Investigation (“FBI”) testified that shrapnel fragments taken from the victims of the bombing matched cluster ordnance used by the Colombian Air Force.<sup>181</sup> Upon the publication of this news, the Air Force claimed that either FARC had obtained a cluster bomb and used it in a car bomb to frame the Air Force, or in the alternative, any bombs that fell on the town were accidentally dropped during a routine flyover.<sup>182</sup> Based on the evidence, the judge recommended that the case be referred to the Colombian Attorney General so that formal charges could be brought against commanders and pilots in the Air Force.<sup>183</sup> In response to this finding, the United States Ambassador to Colombia recommended withdrawing military aid to the Colombian Air Force for failing to properly investigate

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177. *Id.* n.184. In the meantime, a non-governmental organization (NGO) known as the International Labor Rights Fund had filed a lawsuit in the United States against Air Scan and an oilfield operator for their alleged role in the killing of civilians in Santo Domingo. *See Lawsuit Filed Against Occidental Petroleum for Involvement in Colombian Massacre*, INT’L LAB. RTS. F. (Apr. 24, 2003), <http://www.laborrights.org/in-the-news/lawsuit-filed-against-occidental-petroleum-involvement-colombian-massacre>. Two years later, the federal court dismissed the case under the political question doctrine. *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1195 (C.D. Cal. 2005).

178. *See Otras Iniciativas: Genocidio en Arauca*, SINALTRAINAL, <http://www.sinaltrainal.org/index.php/otras-iniciativas/tribunal-permanente-de-lospueblos/tpp-sesi%C3%B3n-colombia/audiencia-petrolera/164-genocidio-enarauca>.

179. *Id.*

180. *Id.*

181. *See* T. Christian Miller, *A Colombian Town Caught in a Cross-Fire*, L.A. TIMES (Mar. 17, 2002), <http://articles.latimes.com/2002/mar/17/news/mn-33272/8>.

182. *See id.*

183. *See, e.g.,* Santo Domingo Massacre v. Colombia, Inter-AM. Ct. H.R. (ser. C) No. 259, ¶¶ 121–22.

the incident.<sup>184</sup> United States aid to the Colombian Air Force was accordingly suspended.<sup>185</sup>

The Attorney General of Colombia, ignoring the responsibility of the commanding officer, charged only the aircrew with criminally negligent bodily harm.<sup>186</sup> In 2011, the pilots were found guilty and sentenced to thirty years in prison following trial.<sup>187</sup> In October 2009, the United States lifted all sanctions and granted \$46 million to the Air Force to improve security at Palenque Airbase—the base where the pilots who conducted the bombing were stationed.<sup>188</sup> Later that year, the civil court ordered the Colombian government to pay the victims of the bombing collectively one billion pesos (approximately \$500,000 USD in today's currency) as compensation.<sup>189</sup> There is no record that any commanders who planned and ordered the assault, including Lieutenant Acevedo or General Velasco, were ever indicted, discharged or otherwise punished for the deaths at Santo Domingo.

### 3. 1998 El Billar Creek Bombing

Early in 1998, Battalion 52 had been actively engaged in search and destroy missions of FARC bases throughout the region.<sup>190</sup> This small, lightly-armed, counter-guerrilla force was

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184. See T. Christian Miller, *Cutoff of Aid a Sign to Bogota*, L.A. TIMES (Jan. 14, 2003), <http://articles.latimes.com/2003/jan/14/world/fg-swamp14> (detailing when the United States eventually cut funding for the failure to investigate the incident).

185. *Id.*

186. See *Santo Domingo Massacre v. Colombia*, Inter-AM. Ct. H.R. (ser. C) No. 259, ¶ 109.

187. COLOM. SUPPORT NETWORK, *THE COLOMBIAN ARMY: TERRORISM, THIEVERY, BUNGLING AND MASSACRES* 40 (2012), <http://colombiasupport.net/wp-content/uploads/2012/04/THE-COLOMBIAN-ARMY-TERRORISM-THIEVERY-BUNGLING-AND-MASSACRES1.pdf>.

188. JUNE S. BEITTEL, CONG. RESEARCH SERV., RL32250, *COLOMBIA: BACKGROUND, U.S. RELATIONS, AND CONGRESSIONAL INTEREST* 39 (2012).

189. *Familiares de Civiles Muertos en Bombardeo del Ejército Recibiran Mil Millones de Pesos*, Portada Terra Colombia (Nov. 27, 2008), <https://web.archive.org/web/20130710000909/http://www.terra.com.co/actualidad/articulo/html/acu16808-familiares-de-civiles-muertos-en-bombardeo-del-ejercito-recibiran-mil-millones-de-pesos.htm>.

190. Jorge Mauricio Cardona Angarita, *La Reestructuración del Ejército de Colombia 1998 - 2000: Estudio de Caso del Ataque en la Quebrada El Billar*, PONTIFICIA UNIVERSIDAD JAVERIANA 33–34 (2015), <https://repository.javeriana.edu.co/bitstream/handle/10554/17072/CardonaAngaritaJorgeMauricio2015.pdf?sequence=1&isAllowed=y>.

meant to move quickly into jungle areas and rugged rural regions to locate FARC bases, and then to call in aerial attacks to destroy the base and kill FARC guerillas.<sup>191</sup> There appears to be no evidence that Battalion 52 called in aerial bombardments, possibly because of the presence of large numbers of civilians around or intermingled with the FARC forces. As a result, each time a base was located, the time it would take for more discerning attacks to unfold (generally with larger, heavily-equipped ground forces) would give FARC members time to abandon the base and disappear into the jungle.

During this period, FARC's military capabilities were at their zenith and its leaders were seeking an opportunity to engage and defeat Colombia's armed forces. Over time, FARC began to track Battalion 52 with an intent to attack and destroy it. On March 2, 1998, 700 FARC fighters, heavily armed and well-trained, ambushed Counter Guerilla Battalion 52 at the small town of Peñas Coloradas.<sup>192</sup>

As the 228 soldiers of Battalion 52 entered Peñas Coloradas on March 2, 1998, they were ambushed by the FARC forces.<sup>193</sup> On the first day, according to media reports, Battalion 52 was savaged with eighty soldiers killed.<sup>194</sup> At the end of the day, Battalion 52 was besieged by the remaining FARC troops and a relief force was launched by the Colombian military to support the beleaguered battalion the next morning.<sup>195</sup>

More than 1,000 Colombian soldiers, airlifted and supported by fighters and helicopters of the Colombian Air Force, moved in to support and evacuate Battalion 52.<sup>196</sup> Initial reports were that the Air Force was there mainly to evacuate Battalion 52 and provide support where necessary.<sup>197</sup> During the operation, bad weather forced a halt to rescue attempts after only forty soldiers had been moved out.<sup>198</sup> As a result, to further protect Battalion 52, the Air Force and artillery allegedly began a massive

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191. *See id.*

192. *See Colombians Reject Peace Deal with FARC: These Five Attacks Help Explain Why*, HISTORY COLLECTION, <http://historycollection.co/colombians-reject-peace-deal-farc-five-attacks-help-explain/2/> (last visited Mar. 20, 2017).

193. *See* Nicaragua Solidarity Network of Greater N.Y., *Weekly News Update on the Americas* (Mar. 8, 1998), <http://colombiasupport.net/archive/wnu/wnuota030898.html> [hereinafter *Weekly News Update*].

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *See* BERT RUIZ, *THE COLOMBIAN CIVIL WAR 19* (2001).

bombardment of the village and surrounding areas near a waterway known as El Billar Creek.<sup>199</sup> Details about the planning of this attack remain unclear, especially as to whether the attack was meant to support retreating Battalion 52 soldiers or as an indiscriminate attack on the area to relieve pressure on Battalion 52. Perhaps it was to send a message to local civilians suspected of supporting FARC. In the end, the result of the bombardment was the death of dozens of civilians, FARC fighters, and Battalion 52 soldiers.<sup>200</sup>

Colombian military commanders initially insisted, “[N]o civilians have been affected by the army operations.”<sup>201</sup> However, the bombardment may have been spurred, in part, as an intentional “strong response” in the region intended to regain tactical control over the area.<sup>202</sup> Despite international and domestic claims that the bombardment was a violation of the doctrines of either distinction or proportionality, there is no evidence that the Colombian government ever conducted an investigation.<sup>203</sup> The authors were ultimately informed that all relevant commanders responsible both for the debacle that befell Battalion 52 and the failed rescue attempts in the days that followed were reassigned soon thereafter, although the Colombian government did not officially report any such measure.

#### 4. Operation Thánatos

Over decades of conflict, the Colombian government has negotiated many cease-fires and peace agreements with FARC.<sup>204</sup> As part of one negotiation, the Colombian government designated a large portion of southern Colombia as a demilitarized zone where the military would allow FARC freedom of movement and control.<sup>205</sup> Over the decade of FARC

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199. See *Weekly News Update*, *supra* note 193.

200. *Id.*

201. *Id.*

202. Carlos Alberto Ospina Ovalle, *Insights from Colombia's "Prolonged War,"* 42 JOINT FORCE Q. (3d Quarter) 57, 60 (2006).

203. Diana Jean Schemo, *Bogota Halts Unit Faulted Over Rights*, N.Y. TIMES (May 25, 1998), <http://www.nytimes.com/1998/05/25/world/bogota-halts-unit-faulted-over-rights.html>.

204. Alfredo Molano, *The Evolution of the FARC: A Guerrilla Group's Long History*, 34 NACLA REP. ON AM. 23, 27 (2000).

205. See *Pastrana Rompe Proceso de Paz y Pone Fin a la Zona de Despeje*, PROCESOS PAZ EN COLOM. (Feb. 21, 2002), <http://www.nodo50.org/>

control, however, it was widely known that this region became a haven for its operations, training, and in particular, cocaine cultivation.<sup>206</sup> Peace negotiations broke down in January 2002, when FARC resumed attacks, perpetrating more than one hundred assaults against Colombian military and government targets.<sup>207</sup> Broken-down peace negotiations culminated in three acts of terrorism on February 20, 2002: the kidnapping of Colombian Senator Jorge Turbay, the destruction of a bridge linking two cities, and the hijacking of a commercial airliner.<sup>208</sup>

Then President Andres Pastrana ordered immediate and massive retaliation focusing on FARC targets in the former demilitarized zone through “Operation Thánatos.”<sup>209</sup> The attack began on February 21, 2002, with the Colombian Air Force bombarding the region, targeting FARC training facilities and infrastructure such as runways and roads.<sup>210</sup> Following sustained bombardment, the Colombian National Army, with more than 13,000 troops, occupied the region and discovered more than 15,000 acres of cocaine-producing crops.<sup>211</sup> According to Army statements, Operation Thánatos was an unqualified success.<sup>212</sup> The Army and Air Force claimed to hit more than

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forosocial/colombia14.htm.

206. See, e.g., *id.* (“Pastrana, en una alocución televisada expresó que las Farc no cumplieron su palabra de adelantar un proceso de paz en la zona despejada en noviembre de 1998 y por el contrario ha sido convertida en ‘una guarida de secuestradores y un depósito de armas y dinamita.’”).

207. *Id.*

208. *Colombian Talks Halted After Rebels Grab Senator*, CHI. TRIB. (Feb. 21, 2002), [http://articles.chicagotribune.com/2002-02-21/news/0202210297\\_1\\_rebel-group-sen-jorge-gechen-turbay-farc](http://articles.chicagotribune.com/2002-02-21/news/0202210297_1_rebel-group-sen-jorge-gechen-turbay-farc); Juan Forero, *Colombian Rebels Hijack a Plane and Kidnap a Senator*, N.Y. TIMES (Feb. 21, 2002), <http://www.nytimes.com/2002/02/21/world/colombian-rebels-hijack-a-plane-and-kidnap-a-senator.html>.

209. Martin Hodgson, *Colombian Army Takes Back Rebel Capital*, GUARDIAN (Feb. 24, 2002), <https://www.theguardian.com/world/2002/feb/25/colombia.martinhodgson>; see also Forero, *supra* note 208.

210. *Bajo Fuego Antiaéreo, Tropas Colombianas Entran en el Área que Dominaba la Guerrilla*, CLARÍN.COM: NOTICIAS (Feb. 23, 2002, 9:00 PM), [http://www.clarin.com/ediciones-antiguas/fuego-antiaereo-tropas-colombianas-entran-area-dominaba-guerrilla\\_0\\_SkJ7FhBl0Yx.html](http://www.clarin.com/ediciones-antiguas/fuego-antiaereo-tropas-colombianas-entran-area-dominaba-guerrilla_0_SkJ7FhBl0Yx.html) [hereinafter *Bajo Fuego Antiaéreo*].

211. *Id.*; *Colombian Jets Heavily Bomb Revolutionaries*, MICH. DAILY (Feb. 22, 2002), <http://www.michigandaily.com/content/colombian-jets-heavily-bomb-revolutionaries>; *Continúan Bombardeos Contra las FARC: Tres Civiles Muertos*, COOPERATIVA.CL (Feb. 21, 2002), [http://www.cooperativa.cl/p4\\_noticias/site/artic/20020221/pags/20020221165200.html](http://www.cooperativa.cl/p4_noticias/site/artic/20020221/pags/20020221165200.html).

212. See *Colombian Jets Heavily Bomb Revolutionaries*, *supra* note 211 (“Army officials said 85 targets were hit in more than 200 sorties against the



eighty-five known FARC targets, flown more than 200 sorties against rebel bases and havens, and retook San Vicente del Cagúan, FARC's nominal capital at the time.<sup>213</sup>

Such an extensive operation posed obvious risks to civilians living in the region. FARC fighters were known to dress as civilians and mix with the population.<sup>214</sup> To protect against accidental civilian deaths President Pastrana declared that the military would follow all international humanitarian legal requirements and avoid civilian casualties.<sup>215</sup> A spokesman for the military recognized the danger of civilian casualties but nevertheless declared, "it's [sic] dicey, and we will surely suffer casualties, but we have a moral obligation to win this war."<sup>216</sup> After the bombardment, the Air Force reported deaths of three civilians—one adult, a fifteen-year-old girl, and a two-year-old boy—but viewed the deaths as unavoidable errors.<sup>217</sup> In the end, however, the military admitted that none of the guerrilla leaders were in the demilitarized zone during the bombardment and that all had previously fled into the deep jungle.<sup>218</sup>

Since Operation Thánatos, international human rights groups have received seventeen different reports of civilian casualties arising out of the bombardment.<sup>219</sup> Also, a paramilitary drug trafficking group operating in collaboration with the Colombian National Army, known as *Autodefensas Unidas de Colombia* ("AUC") are alleged to have attacked civilians in FARC territory who were believed to support FARC.<sup>220</sup> The AUC had recently been declared a terrorist organization by several states, including the United States and the European Union.<sup>221</sup> It does not appear that the Colombian

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rebel safe haven . . .").

213. *Id.*; see also *Continúan Bombardeos Contra Las FARC: Tres Civiles Muertos*, *supra* note 211.

214. *Bajo Fuego Antiaéreo*, *supra* note 210.

215. *Id.*

216. *Colombian Jets Heavily Bomb Revolutionaries*, *supra* note 211.

217. Hodgson, *supra* note 209; see also *Colombian Jets Heavily Bomb Revolutionaries*, *supra* note 211.

218. See Hodgson, *supra* note 209.

219. See, e.g., Press Release, Amnesty International UK, Colombia: San Vicente de Cagúan – A Community Abandoned (Oct. 17, 2002), <https://www.amnesty.org.uk/press-releases/colombia-san-vicente-del-caguan-community-abandoned>.

220. See Joakim Kreutz, *Colombia (1978-Present)*, in 1 CIVIL WARS OF THE WORLD: MAJOR CONFLICTS SINCE WORLD WAR II 267, 283–84 (Karl DeRouen Jr. & Uk Heo eds., 2007).

221. U.S. Dep't of State Public Notice 3770, 66 Fed. Reg. 47054 (Sept. 10,

government ever initiated a serious investigation into civilian casualties.

### 5. Operation Orion

In the early hours of May 21, 2002, more than 3,000 Colombian soldiers and police, backed by helicopter gunships, moved into Comuna 13, a portion of Medellín that the government believed to be controlled by FARC.<sup>222</sup> Ostensibly intended “to put an end to the violence that had put the residents of Comuna 13 in jeopardy for three years,”<sup>223</sup> the operation began with helicopter strafing of the neighborhood followed quickly by teams of heavily armed soldiers seeking to clear buildings and streets.<sup>224</sup> The government deemed the operation a large success.<sup>225</sup> President Uribe and the general in charge, Mario Montoya, were praised both internationally and domestically for its success.<sup>226</sup>

As reports trickled out about the operation, however, they raised questions about its proportionality. In particular, various reports showed deaths of at least fourteen people (claimed by most to be civilians only) and over dozens missing during the operation.<sup>227</sup> Most of these casualties were the result of the spraying of the neighborhood by machine gun fire from helicopters overhead.<sup>228</sup> One report noted that “[h]eroic neighborhood residents tried to rescue the injured and provide medical attention amidst a hail of bullets fired by agents of the state. People hung white sheets, towels, and shirts from their

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2001) (The U.S. Secretary of State designating the AUC as a Foreign Terrorist Organization).

222. See *The Big Exhumation*, SEMANA (Nov. 26, 2008), <http://www.semana.com/international/print-edition/articulo/the-big-exhumation/97687-3>; Benjamin Lessing, *Colombia: Paramilitaries at the Polls*, BERKELEY REV. OF LATIN AM. STUD., <http://clas.berkeley.edu/research/colombia-paramilitaries-polls> (last visited Mar 19, 2017); *Colombia: The Occupied Territories of Medellín*, RELIEFWEB (Oct. 31 2002), <http://reliefweb.int/report/colombia/colombia-occupied-territories-medell%C3%ADn>; see also Paul Richter & Greg Miller, *Colombia Army Chief Linked to Outlaw Militias*, L.A. TIMES (Mar. 25, 2007), <http://articles.latimes.com/2007/mar/25/world/fg-colombia25>.

223. *The Big Exhumation*, *supra* note 222.

224. *Colombia: The Occupied Territories of Medellín*, *supra* note 222.

225. Lessing, *supra* note 222.

226. See, e.g., Richter, *supra* note 222.

227. *Id.*

228. See *Colombia: The Occupied Territories of Medellín*, *supra* note 222.

windows to express their desire for a cease-fire . . . .”<sup>229</sup> To make matters worse for residents of Comuna 13, after the military withdrew, the AUC was allowed to enter into the area to “clean up the zone of guerrillas.”<sup>230</sup> Months later, mass graves containing hundreds of victims were uncovered.<sup>231</sup>

Over time, international human rights groups and the United States Central Intelligence Agency have questioned the success of Operation Orion.<sup>232</sup> Although much of this criticism centered on the military’s connections to AUC, there has also been concern for the allegedly indiscriminate nature of helicopter support during the operation.<sup>233</sup> Indeed, people reported that black hawk helicopters have poured machine gun shots indiscriminately before the dawn.<sup>234</sup> Performing Operation Orion in a dense urban environment exacerbated the physical harm of indiscriminate shootings from the helicopters.<sup>235</sup>

The hero of Operation Orion, General Montoya, came under increasing fire for his involvement with the AUC and, according to some, for his willingness to accept high civilian casualties.<sup>236</sup> The criticism, both at home and abroad, mounted even after General Montoya’s greatest successes—the rescue of presidential candidate Ingrid Betancourt and three other United States defense contractors taken hostage by FARC, and the death of FARC leader Raul Reyes in 2008.<sup>237</sup> As a result of the sustained pressure, General Montoya officially resigned as head

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229. *Id.*

230. *Id.*; see also *The Big Exhumation*, *supra* note 222.

231. See *The Big Exhumation*, *supra* note 222.

232. See Mimi Yagoub, *Intl Court Condemns Colombia for Bloody 2002 Military Operation*, INSIGHTCRIME (Jan. 11, 2017), <http://www.insightcrime.org/news-briefs/intl-court-condemns-colombia-bloody-2002-military-operation>; Richter, *supra* note 222; see also *Breaking the Grip?: Obstacles to Justice for Paramilitary Mafias in Colombia*, HUMAN RTS. WATCH (Oct. 16, 2008), <http://www.hrw.org/en/node/75972/section/7>.

233. See *Colombia: The Occupied Territories of Medellín*, *supra* note 222; Lessing, *supra* note 222.

234. See *Colombia: The Occupied Territories of Medellín*, *supra* note 222.

235. See Yagoub, *supra* note 232.

236. See, e.g., Sibylla Brodzinsky, *In Colombia, Army Acknowledges Killings*, CHRISTIAN SC. MONITOR (Nov. 7, 2008), <http://www.csmonitor.com/2008/1107/p07s02-wogn.html> (associating General Motoya’s resignation with the Colombian army being scrutinized due to, inter alia, its practice of inflating number of killed guerrillas by killing civilians); see also Juan Forero, *Witness Ties Colombian General to Paramilitaries*, WASH. POST: FOREIGN SERV. (Sept. 17, 2008), [http://www.washingtonpost.com/wp-dyn/content/article/2008/09/16/AR2008091603006\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/09/16/AR2008091603006_pf.html).

237. See Brodzinsky, *supra* note 236; Forero, *supra* note 236.

of the Colombian Army in late 2008.<sup>238</sup> His resignation, during a massive wave of the firing of high-level army commanders suspected of human rights violations, was an apparent victory for the law of armed conflict.<sup>239</sup> Indeed, Colombian President Uribe declared in the wake of Montoya's resignation that "[e]very military unit down to the battalion level will have an appointed official who receives and processes allegations of abuse."<sup>240</sup> Only three months later, in February 2009, however, General Montoya's political career took a more positive turn with his appointment as Colombian Ambassador to the Dominican Republic,<sup>241</sup> a prestigious appointment to a state with which Colombia has no extradition treaty.<sup>242</sup>

#### IV. ANALYSIS OF COLOMBIAN PRACTICE OF PROPORTIONALITY

The law and training and enforcement machinery described in Section III.C above were not in force in Colombia during most of the conflict with FARC and ELN, and even AP II bound Colombia only after 1995.<sup>243</sup> Nonetheless, Colombia was bound by Common Article 3 of the 1949 Geneva Conventions to afford human treatment to noncombatants and to respect their lives and bodily integrity.<sup>244</sup> Also, although Additional Protocol II to the 1949 Geneva Conventions does not explicitly prohibit disproportionate attacks in non-international armed conflicts, the ICRC study on customary international humanitarian law asserts that the rule of proportionality applies in non-international conflicts as a matter of binding custom.<sup>245</sup> The

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238. Brodzinsky, *supra* note 236.

239. *See id.* (following after President Uribe fired twenty top officials).

240. *Id.*

241. Press Release, Colombian Presidential Office, Embajador Mario Montoya Presenta Cartas Credenciales Ante Presidente Dominicano (Feb. 24, 2009), <http://historico.presidencia.gov.co/sp/2009/febrero/24/22242009.html>.

242. *See Extradition Agreements Signed by Colombia*, INFO. EXCH. NETWORK FOR MUT. ASSISTANCE IN CRIM. MATTERS, [http://www.oas.org/juridico/mla/en/col/en\\_col-ext-gen-list.html](http://www.oas.org/juridico/mla/en/col/en_col-ext-gen-list.html) (last visited Mar. 19, 2017).

243. UNITED NATIONS, <https://treaties.un.org/Pages/showActionDetails.aspx?objid=08000002800f3da7> (last visited Mar. 19, 2017) (detailing when Colombia became bound by the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II)).

244. *See* Guerrero Report, *supra* note 128, ¶¶ 42–43.

245. HENCKAERTS & LOUISE DOSWALD-BECK, *supra* note 13, at 48–49, 59–60.

study observes that a large number of national military manuals incorporate proportionality as a rule of engagement, and many states have in their national criminal or military laws prohibited disproportionate attacks.<sup>246</sup> The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) has also strongly implied that the rule of proportionality applies under customary law to internal as well as international armed conflicts.<sup>247</sup> Moreover, the Inter-American Commission on Human Rights has asserted the customary nature of the proportionality doctrine in non-international armed conflicts—specifically in the context of the conflict between the Colombian government and FARC.<sup>248</sup>

Although the Colombian government has sometimes recognized the applicability of the international law of armed conflict to its internal conflict, it has not taken a clear position on the issue of proportionality. The public statements of the Colombian Supreme Court and Attorney General do not unequivocally confirm that the principle binds the Colombian military in non-international armed conflicts. They do bespeak recognition of a general obligation to protect civilians from the effects of military operations, as did President Pastrana’s statements during Operation *Thánatos*.<sup>249</sup> The operative questions for purposes of our study are, first, whether the Colombian military and national police force have in practice observed a proportionality norm of some kind in the civil strife against FARC, ELN, and other rebel armed forces, and, if so, how they interpret their obligations.

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246. *Id.* at 48.

247. *Id.* at 49, 59–60; *see also* Prosecutor v. Du[ko Tadi], Case No. IT-94-1-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 119 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (“What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.”), ¶ 127 (“[I]t cannot be denied that customary rules have developed to govern internal strife. These rules . . . cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks . . . as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.”).

248. Third Report on the Human Rights Situation in Colombia, Inter-Am. Comm’n H. R., OEA/Ser.L/V/II.102, doc. 9 rev. 1, ch. IV, ¶¶ 77–80, 106–08, 178–89 (1999).

249. *See generally* Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT’L L.J. 237, 249 (1998) (asserting that no difference in protecting individuals should exist between internal and interstate wars, referring that the goal of both customary international law and international human rights law is protecting individuals).

A. BATTLEFIELD INTERPRETATION OF PROPORTIONALITY BY  
THE COLOMBIAN ARMED FORCE

The record of Colombian battlefield compliance with the principle of proportionality is distinctly mixed. The chief culprit, when attacks against civilians are unintentional, appears to be airborne attacks on ground targets in areas populated by a mixture of FARC fighters and civilians. Although several of the incidents demonstrate a strong commitment to minimizing unnecessary civilian casualties by Colombian ground forces, the number of indiscriminate or disproportionate air attacks casts doubt on the strength of the commitment to observing proportionality in Colombian military forces as a whole. In the 1998 Relámpago II operation in Santo Domingo, the Battalion 36 commander decided to refrain from attacking vulnerable FARC fighters in order to spare civilians, even at the risk of a less effective attack and higher Colombian Army casualties. The commander's decision furnishes a model of thoughtful proportionality analysis, but is followed by the bombardment of a populated village with relatively indiscriminate ordnance. The Battalion 52 commander's admirable restraint at Peñas Coloradas was followed by a similarly indiscriminate bombing campaign at El Billar Creek in 1998. Operation Orion involved helicopter strafing of a highly populated neighborhood, while the Puerto Lleras incident involved intensive bombing of a town populated by civilians over the course of several days, destroying civilian buildings and homes by the score. The usage of intensive aerial bombing in areas of mixed civilian and FARC population must be construed either as a failure to consider proportionality at all or an interpretation of the proportionality principle that imputes very little value to civilian lives and property in FARC-controlled zones.

The use of cluster munitions, which have minimal precision and maximal destructive footprint to unarmored targets, greatly aggravated the risk to civilians in these cases. International concern about the destructive effects of cluster munitions on civilians is sufficiently grave that most states have adopted a treaty banning their production and use, and committing to the destruction of existing stockpiles.<sup>250</sup>

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250. Convention on Cluster Munitions, May 30, 2008, 2688 U.N.T.S. 39 (entered into force Aug. 1, 2010).

The prohibition on use of such munitions is absolute and applies in both international and non-international armed conflicts. Colombia signed the Convention on Cluster Munitions in 2008 and ratified it in 2015.<sup>251</sup> Colombia was never bound by international law to refrain *per se* from using cluster munitions in its operations against FARC. Until Colombia ratified the treaty, there was no absolute ban on the use of cluster munitions under international law. However, the use of such munitions after 2008 could violate Colombia's legal obligation to refrain from acts that would defeat the object and purpose of the Convention.<sup>252</sup> More importantly, the fact that cluster munitions may themselves be permissible munitions does not give belligerents an unfettered privilege to use them in any armed conflict. The proportionality principle applies regardless of the type of weapon used.<sup>253</sup> Combatants using weapons whose effects are difficult to control and inherently pose a greater risk to civilians must necessarily show greater restraint in the use of that weapon if they are bound by a proportionality principle. The main impetus for the conclusion of the Cluster Munitions Convention was not so much that the munitions aggravated the suffering of combatants unnecessarily, but rather they posed an unacceptable risk to civilians.<sup>254</sup>

Also telling is the consistent absence of serious investigations prompted from within the Colombian military or national police force, and of attempts by the Colombian military to conceal evidence of actual events. Reported civilian casualties did sometimes prompt investigation (as in Operation *Thánatos*), and, in a few cases, criminal convictions for "negligent homicide" with compensation to the victims' families (as in *Relámpago*

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251. See *Convention on Cluster Munitions: Status of the Treaty*, UNITED NATIONS OFF. FOR DISARMAMENT AFF., [http://disarmament.un.org/treaties/t/cluster\\_munitions](http://disarmament.un.org/treaties/t/cluster_munitions) (last visited Mar. 8, 2017).

252. See Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

253. This in no way implies that international law obligates Colombia to acquire more discriminating weapons, or to use those weapons it has acquired, in preference to less expensive "dumb" weapons. As noted, Colombia has only recently acquired significant precision-guided weapons capabilities. See *Colombia's Defense Modernization*, *supra* note 161; see also *IAI Delivers First Batch of Kfir Fighter Jets to the Colombian Air Force*, ISRAEL AEROSPACE INDUSTRIES (June 22, 2009), <https://web.archive.org/web/20091201135650/http://www.iai.co.il/32981-39719-EN/default.aspx>.

254. See OSLO CONFERENCE ON CLUSTER MUNITIONS, DECLARATION (Feb. 23, 2007), <http://www.clusterconvention.org/files/2012/11/Oslo-Declaration-final-23-February-2007.pdf>.

II).<sup>255</sup> Although a military trial of the responsible air crew members for violating the laws of war, or more appropriately, a public investigation of the planning and execution of the attack,<sup>256</sup> would have spoken directly to a recognition of the norm of proportionality in non-international armed conflicts, the charge of negligent homicide loosely approximates the legal concept and policy underlying the proportionality doctrine in the criminal or civil tort realm.<sup>257</sup>

However, some incidents provoked either no investigation at all, as in the El Billar Creek bombing, or a trial apparently influenced by military solidarity, as in the Operation Pincer trial.<sup>258</sup> Most disturbingly, in each case we discovered, any investigation that did result was prompted by external pressure from the United States, the Inter-American human rights system, or Colombian civil rights groups rather than an initiative of the Colombian government itself. The apparent impunity of higher level military commanders and the absence of self-motivated investigations of disproportionate attacks attenuates the value of the occasional criminal conviction of combatants or any small compensation paid to the families of some of the victims. Examples of publicized disciplinary action, which may be more appropriate in cases of *bona fide* disproportionate attacks, are exceedingly rare.

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255. See *Genocidio en Arauca*, *supra* note 178.

256. See Fellmeth, *supra* note 3, at 128 (“If the *Blaškić* case tells us anything about proportionality, it is to call into question whether a disproportionate attack can ever rise to the level of a war crime unless the attack qualifies as wholly indiscriminate.”); see also *id.* at 145–46 (arguing that the proportionality principle is ill-suited for enforcement through criminal law).

257. “Reckless” homicide might be a more accurate standard, however. Neither AP I nor AP II impose what could be described as a negligence standard.

258. Quite apart from demonstrating reluctance to enforce the proportionality principle, a failure to investigate objectively and take reasonable measures to avoid future disproportionate attacks violates the human right to life of the victims, which are not suspended during internal armed conflicts. The European Court of Human Rights has held an independent, effective, public investigation to be a requirement for the observation of the human right against arbitrary deprivation of life in the context of the European human rights system. See *Isayeva v. Russia*, App. No. 57947/00, ¶¶ 208–13 (2005).



## B. PROPORTIONALITY IN THE ABSENCE OF CIVILIAN IMMUNITY?

Even more alarming than allegations of disproportionate attacks are those instances in which civilians have been directly targeted by Colombian military or paramilitary forces. On January 23, 1991, the Colombian National Police Special Armed Corps conducted a small-scale counter-guerrilla joint operation with the Colombian Armed Forces in Las Palmeras, located in the southwest of Colombia near the Ecuadorian Border.<sup>259</sup> In the early morning, a Colombia Armed Forces helicopter fired from the air injuring a six-year-old child, Enio Quinayas, who was on his way to a rural school.<sup>260</sup> Police forces on the ground arrested a teacher, Hernán Javier Cuarán, as he was arriving at the school, and detained six other unarmed civilians performing routine tasks.<sup>261</sup> The police force executed six, and possibly all seven, of the civilians.<sup>262</sup> After the victims' families brought legal action against the Colombian Government, the National Police Force and the Colombia Armed Forces both opened investigations into the killings, but no punishment resulted.<sup>263</sup> "The National Police acquitted the accused officers after a five-day internal disciplinary investigation," while the military internal review remained in the investigative stage seven years later.<sup>264</sup> The only fact the investigation has established is the victims were defenseless and performing routine daily labor when they were executed.<sup>265</sup>

In 1994, two nongovernmental organizations filed a complaint on behalf of the victim's families with the Inter-American Commission on Human Rights.<sup>266</sup> The Police and

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259. See *Las Palmeras v. Colombia*, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 67, ¶ 2 (Feb. 4, 2000).

260. *Id.*

261. *Id.*

262. *Id.*

263. ARGENTINE FORENSIC ANTHROPOLOGY TEAM, COLOMBIA: ANNUAL REPORT 2001 30–39 (2001), <http://eaaf.typepad.com/pdf/2001/07/COLOMBIA.PDF>; See Ann C. Mason, *Constructing Authority Alternatives in Colombia: Globalisation and the Transformation of Governance* 18 (Crisis States Programme, Working Paper No. 40, 2004).

264. Cathleen Caron, *News from the Inter-American System*, HUM. RTS. BRIEF, <http://www.wcl.american.edu/hrbrief/v7i3/newsias.htm> (last visited Mar. 18, 2017).

265. See *Las Palmeras v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 90, ¶ 2 (Dec. 6, 2001).

266. See *id.* ¶ 3.

Armed Forces attempted to justify their conduct using the by-now familiar charade of dressing the deceased in guerrilla camouflage uniforms, burning their civilian clothing, and threatening witnesses.<sup>267</sup> After four years, the Inter-American Commission on Human Rights failed to settle the case with the Colombian government and set the case for trial before the Inter-American Court on July 6, 1998.<sup>268</sup> In 2001, the Court found the Colombian government responsible for the deaths of six victims.<sup>269</sup> The Court also determined that the delay and inadequacies in the government investigations violated the victims' families' rights to open access to the judicial process, and ordered the Colombian Government to pay damages to the families of the victims.<sup>270</sup> Colombia was also ordered to adopt criminal procedures to punish the responsible officers, as well as those involved in the subsequent cover-up.<sup>271</sup> The Colombian Government complied with the indemnifications, but there is no evidence that it ever punished the murderers or immediately adopted procedures to prevent future abuses of the same kind.<sup>272</sup>

The Pinzón case, ten years later, differs only in the details and the lack of international publicity. On the night of June 19, 2001, during Operation Arawuac, the Army illegally entered a private home in Tame, Arauca.<sup>273</sup> While in the house, the troops shot to death an 11-year-old girl, Geiny Pinzón, allegedly believing her a FARC member.<sup>274</sup> The Colombian Army

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267. See Frits Kalshoven, *State Sovereignty Versus International Concern in Some Recent Cases of the Inter-American Court of Human Rights*, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 259, 261 (Gerard Kreijen et al. eds., 2002).

268. See *Las Palmeras v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 90, ¶¶ 8–11.

269. *Id.*

270. *Id.*

271. *Id.*

272. See generally Ann C. Mason, *Constructing Authority Alternatives on the Periphery: Vignettes from Colombia*, 26 INT'L POL. SCI. REV. 37, 43 (2005).

273. See *Geiny Jaimes Pinzón*, VIDAS SILENCIADAS, <https://vidas-silenciadas.org/victimas/23682/> (last visited Mar. 22, 2017); Memorandum from Marcela Guerrero, Center for International Policy, to Interested Colleagues (July 29, 2005), <http://web.archive.org/web/20110116194653/http://ciponline.org/colombia/050729cip.pdf> (regarding “Colombian Human-Rights Groups Make the Case Against a U.S. Human-Rights Certification”).

274. See *Cumplimiento de los Condicionamientos de la Asistencia Militar Estadounidense*, COLECTIVO DE ABOGADOS (June 6, 2013), <https://www.colectivodeabogados.org/Cumplimiento-de-los,155>. See Section III *supra* for more thorough discussion of the background that led to this civil unrest.

attempted to present the child's cause of death as part of a nonexistent crossfire with FARC.<sup>275</sup> Eventually, however, the Army claimed negligence as the cause of death.<sup>276</sup> Although many years have passed since this incident, no soldier has been linked to the death of Pinzón. Some have concluded that evidentiary errors and lack of rigor by of the military criminal justice system contributed to the state's impunity.<sup>277</sup>

That the execution or arbitrary killing of civilians, including children, prompted no serious investigation or punishment for the responsible soldiers or their commanding officers, portrays an inconsistent commitment, at best, by the Colombian military and national police force to the protection of civilians. Although some high-profile cases of intentional extrajudicial killings have resulted in criminal convictions of the soldiers responsible, such incidents have been swept under the rug and treated seriously only following a major international outcry.<sup>278</sup> The relevance of these incidents to the present inquiry should be obvious. When extrajudicial killings can be committed with impunity, the less serious case of disproportionate attacks resulting in accidental civilian deaths can hardly be expected to prompt rigorous investigation and remedies.

### C. THE ROLE OF FARC WAR CRIMES

FARC's blatant disregard of the most fundamental rules of *ius in bello* subjects FARC commanders and fighters to potential criminal liability under international law as well as Colombian law. However, FARC military practice, unlike Colombian military practice, does not inform our understanding of customary international law. Private, irregular armed forces have no formal power to change the customary law relating to the conduct of hostilities. This does not mean, however, that FARC behavior has no relevance to the interpretation of Colombian practice with respect to the *ius in bello*.

Colombia has not only a sovereign prerogative, but a positive human rights obligation, to resist and suppress acts by FARC that endanger the lives of Colombian civilians and

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275. See generally *id.*

276. See *id.*

277. See *Masacre Finca la Galleta*, VIDAS SILENCIADAS (July 15, 2004), <http://vidassilenciadas.org/masacre-finca-la-galleta/>.

278. See generally *Las Palmeras*, *supra* note 265, ¶ 2.

undermine a democratically elected government.<sup>279</sup> As elsewhere in asymmetrical armed conflicts, the FARC practice of hiding among the civilian population and using civilians for coerced labor and as human shields drastically increases the difficulty for the Colombian government of ensuring that all attacks minimize civilian casualties.<sup>280</sup>

These difficulties do not excuse the Colombian government from compliance with the *ius in bello*. International law does not require the Colombian military forces to refrain under all circumstances from any attack in which civilians will be endangered, or are certain to suffer casualties. Common Article 3 of the Geneva Conventions and Additional Protocol II merely require that Colombia treat civilians “humanely” and afford them “general protection” from the hostilities.<sup>281</sup> Superimposing on these duties a principle of proportionality would add that attacks against legitimate FARC military targets may foreseeably result in civilian casualties so long as military commanders refrain from engaging in attacks likely to result in civilian casualties disproportionate with the expected military advantage. The *reason* civilians are in the line of fire, whether by accident or intentional endangerment by FARC forces, has no bearing on the proportionality calculus itself. But, the common FARC practice of mingling with civilians does make the risks to civilians easier to foresee. The knowledge that FARC forces are likely to be accompanied or surrounded by civilians would require Colombian military commanders to make targeting decisions with care and tactical finesse in order to minimize—or avoid altogether—civilian casualties under the principle.

It follows that civilian deaths caused knowingly but unintentionally by Colombian armed forces in operations against terrorist organizations are permissible under *ius in bello* if the commander attempts to minimize civilian casualties and weighs the probability and number of such casualties against the military objective to be obtained. War is deadly by nature. It is a harsh but unavoidable reality that securing the lives of Colombian soldiers and civilians, and ensuring a functioning

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279. See ICCPR, *supra* note 76, art. 6; Universal Declaration of Human Rights, G.A. res. 217 (III) A, art. 3, (Dec. 10, 1948).

280. For more on FARC and ELN violations of the international law of armed conflict, see HUM. RTS. WATCH, WAR WITHOUT QUARTER: COLOMBIA AND INTERNATIONAL HUMANITARIAN LAW 131–91 (1998), <https://www.hrw.org/legacy/reports98/colombia/>.

281. See Additional Protocol II, *supra* note 32.

and stable state government, are important goals that may justify the incidental loss of some civilian lives in Colombian military operations.

FARC practices do not, however, justify indiscriminate attacks, much less intentional killings of civilians. Civilians who alternate between roles of FARC combatant and civilian subject themselves to lawful attack.<sup>282</sup> At most, civilians who purposefully aid FARC forces may incur criminal liability under Colombian domestic law, with its accompanying guarantees under international human rights law of due process of law and a fair trial.<sup>283</sup> They do not become subject to intentional attack unless they take an active part in hostilities.

Unfortunately, civilians in towns occupied by FARC are assumed by some in the Colombian government to be complicit in FARC's quest to disrupt and ultimately overthrow the Colombian government.<sup>284</sup> Regardless of whether this perception is justified in any given instance, civilians not actively taking part in an armed conflict benefit from immunity to intentional attack,<sup>285</sup> and the proportionality principle, if applicable, applies with vigor equal to that applicable to any other civilian. To the extent that any reasonable doubt exists as to whether a person is a FARC combatant or civilian, that doubt must be resolved in favor of treating the individual as a civilian under both international humanitarian law and international human rights law.<sup>286</sup> To the extent the principle of proportionality protects civilians in non-international armed

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282. Recent ICRC guidance rejects this position and argues that the civilian is only subject to attack when participating in hostilities. *See* ICRC, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 70 (Nils Melzer ed., 2009). The present authors reject this position as unduly constraining and not reflective of state practice. A combatant is a combatant even when off-duty, and we see no reason why irregular combatants should derive additional privileges from their absence of affiliation with a state military organization. *See also* Schmitt, *supra* note 40, at 37–38.

283. *See* ICCPR, *supra* note 76, art. 9, 14.

284. *See* Tod Robberson, *U.S. Aid Questioned in Colombian Battle*, DALLAS MORNING NEWS (Aug. 16, 1999), <https://web.archive.org/web/20010523023939/http://www.dallasnews.com:80/world/0816wld1colombia.htm> (quoting a civilian whose house was strafed by the Colombian Air Force: “The government acts like we are all with the guerrillas just because they occupied our town . . . We are civilians, not combatants. Why are we being punished?”).

285. *See* Additional Protocol I, *supra* note 6, art. 51(3).

286. *See id.* art. 50(1). The extension of this requirement to internal conflicts follows from the human right against arbitrary deprivation of life. *See* ICCPR, *supra* note 76, art. 6.

conflicts, that protection is not contingent on civilian attitudes toward either the Colombian government or the FARC forces. International law provides no exceptions to the rules of discrimination or proportionality for political loyalties or ideology. That Colombian government officials have implied otherwise, even unofficially, suggests a troubling tolerance for the disregard of civilian immunity among government officials that could easily filter down to military commanders.

## V. CONCLUSIONS

Modern Colombian military practice displays a serious commitment to training and monitoring to prevent and detect disproportionate attacks. Moreover, the incidents discussed here do not demonstrate that in its dealings with FARC and other domestic terrorist groups Colombia has denied that the proportionality principle binds its armed forces. Our research has not uncovered a single incident in which a Colombian military or political elite has denied that the Colombian armed forces are obligated to refrain from disproportionate or indiscriminate attacks in its internal conflict. Denials by Colombian military commanders that accidental civilian casualties occurred in the face of multiple contradictory reports may paradoxically signify recognition of the prohibition on disproportionate attacks under international law in internal armed conflicts even while revealing either a belief in the attack's compliance with the principle or else a lack of consistent commitment in Colombian military culture to observe the law. In either case, Colombian officers at the highest levels have historically been willing to foster a culture of impunity for commanders and soldiers engaged in disproportionate attacks rather than to articulate principles limiting attack methods for the protection of civilians. Colombian political authorities were apparently unable or unwilling to hold military commanders accountable, except under international pressure.

At the same time, the role of the United States government and Inter-American human rights system in successfully pressuring Colombia to observe proportionality, to investigate and try combatants who commit disproportionate attacks, and to compensate the victims of disproportionate attacks, may indicate a belief among legal, political, and military elites that the rule of proportionality binds the government of Colombia in

its internal conflict without a serious commitment to enforce the norm.

It is much easier to condemn the killing of civilians *ex post facto* than to avoid any casualties whatsoever in the heat of hostilities. The guidance of the ICTY in the *Du[ko Tadi]* case illustrates how the lawyerly temptation to judge in hindsight may impose unrealistic constraints on military field commanders:

[I]t is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time.<sup>287</sup>

Combatants may well be expected to judge whether an individual is a civilian or a dangerous enemy based on all the facts available to them, but the facts will often be scarce and more ambiguous in the life-threatening situation of armed combat than in a tranquil *post mortem* conducted in a courtroom or office building.<sup>288</sup> Nonetheless, some provisions of the international law of armed conflict are sufficiently unambiguous to provide meaningful guidance in the hottest conflict. These include the requirement that in case of doubt as to whether an individual is a civilian or combatant the individual must be presumed a civilian, and the prohibition on means of attack that are by their nature indiscriminate.<sup>289</sup> It is hard to imagine a case in which attacking irregular forces by indiscriminately bombing an inhabited village—even a defended one—or machine-gun strafing from a helicopter, without prior warning to the civilians to evacuate, would qualify as a discriminating, much less a proportional, attack.

It is unfortunate that FARC's violations of the laws of armed conflict sometimes force the Colombian government to choose between a disproportionate attack and not attacking at all. This

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287. Prosecutor v. Du[ko Tadi], Case No. IT-94-1-T, Opinion and Judgment, ¶ 616 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

288. See, e.g., CARL VON CLAUSEWITZ, ON WAR 101 (Michael Howard & Peter Paret, eds., trans., 1976) (describing the idea of the fog of war: "War is the realm of uncertainty; three quarters of the factors on which action in war is based are wrapped in a fog of greater or lesser uncertainty.").

289. Additional Protocol I, *supra* note 6, arts. 50(1), 51(4), 52(3).

is a challenge that nearly every professional military force engaging irregular combatants must confront. If the Colombian government does consider itself bound in its conflict with FARC then by a proportionality principle, it has accepted a duty to forgo the benefits of attack in such circumstances. This does not appear to describe Colombian practice, however. Our study reveals a tension between the desire to spare civilians from the worst effects of the conflict on the part of some military commanders with an unwillingness to exert political and military control at a high level to inculcate sensitivity to proportionality concerns and a willingness to investigate and punish irresponsible commanders objectively. An optimistic assessment might accord with the judgment of long-serving Colombian senator Luis Carlos Avellaneda, who described the Colombian military's proportionality doctrine as "still in its infancy."<sup>290</sup> Supporting this view is the recently institutionalized concern with human rights and the law of armed conflict in the Colombian National Army's training and monitoring practices described here. However, a less forgiving interpretation, more consistent with the past readiness of Colombian military officers and courts to excuse the disproportionate, indiscriminate, and in some cases intentional killings of civilians who are allegedly sympathetic to the FARC, suggests not only has the rule of proportionality not been assiduously followed in the Colombian civil strife, but indeed the more fundamental principle of civilian immunity has been sometimes ignored with impunity.

Certainly, logic favors the position that, if disregarding the risk of an armed attack to civilians in an international conflict is unethical, it is no less unethical to do so in an internal conflict. If anything, the moral imperative is stronger in the latter case; the world public order is premised on each state's primary responsibility to protect its own nationals.<sup>291</sup> Ethical theory and international law have not always coincided, in part because, the *ius in bello* developed as a doctrine of international law, which did not historically closely regulate the state's treatment of its own nationals. With the modern expansion of international law to encompass state relations with individuals, most pertinently as holders of internationally recognized human rights and protections from proscribed behavior during an armed conflict,

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290. Interview with Luis Carlos Avellaneda Tarazona, Colombian Senator (May 24, 2012) (transcript on file with the author).

291. *Cf.* 2005 World Summit Outcome, ¶¶ 119–20, 138–39, U.N. Doc. A/60/L.1 (Sept. 15, 2005).



the distinction between state legal obligations for the protection of civilians in international and non-international armed conflicts is no longer viable.<sup>292</sup> The international law protecting civilians is no longer grounded in the state's utilitarian interest in its citizens as producers of wealth or power for the state. It is now grounded in a general concern for the value of individual lives, sometimes expressed as "human dignity," regardless of the presence or absence of an armed conflict. The circumstance of internal disturbance or civil strife may be thought to relax state obligations to protect individual civilians as much as it does during an international armed conflict, but certainly no more so.

To the extent our data permit generalization, the Colombian civil strife neither clearly confirms nor disconfirms recognition that the proportionality principle applies in non-international armed conflicts. Critical evidence of *opinio iuris* has been lacking during almost the entirety of the conflict, i.e. between 1965 and 2008. At most, it can be said with confidence that Colombia has come to openly recognize the applicability to the conflict of Common Article 3 and the mandate of Additional Protocol II to afford "general protection" to the civilian population. While some evidence indicates that the Colombian National Army operates by a *de facto* code of proportionality some of the time, the Colombian Air Force appears to have suffered many lapses in incorporating proportionality analysis into its targeting decisions. Whether these lapses resulted from insufficient training and supervision, or from a conscious decision to disregard risks to civilian lives, is unclear and will perhaps always remain so.

As for the formal criminal enforcement machinery, the Inter-American Court of Human Rights concluded in the case of *Vélez Restrepo v. Colombia* that the Colombian military justice system "is not the competent system of justice to investigate and, as appropriate, prosecute and punish the authors of human rights violations . . ."<sup>293</sup> This pronouncement accords with modern Colombian practice of treating attacks on civilians as outside the scope of military duty. In the case of intentional

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292. This argument has been made at greater length by both Steve Ratner and Emily Crawford. See generally Emily Crawford, *Blurring the Lines Between International and Non-International Armed Conflicts—the Evolution of Customary International Law Applicable in Internal Armed Conflicts*, 15 AUSTL. INT'L L.J. 29 (2008); Ratner, *supra* note 249.

293. *Vélez Restrepo and Family v. Colombia*, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 248, ¶ 240 (Sept. 3, 2012).

attacks, such reasoning makes perfect sense. However, it cannot intelligibly apply to claims of indiscriminate or disproportionate attack, which fit better into the *lex specialis* of the law of armed conflict than international human rights law, and appear to fall within military jurisdiction under article 221 of the Colombian constitution. By definition, such attacks are directed at military objectives, and as such they fall within normal combatant duties.

It appears instead that this doctrine results not from a logical conceptual division, but rather distrust of the Colombian military justice system arising from its troubled history. It reflects the pattern of exoneration by Colombian military tribunals in cases of apparently disproportionate, if not indiscriminate, attacks, as well as straightforward murders of civilians by combatants. The multiple instances of uninvestigated or unpunished killings of civilians viewed as sympathetic to FARC implies that a protective and nuanced proportionality principle, and the respect for civilian lives this principle reflects, were far from pervasively penetrating Colombian military culture during the long history of its internal conflict.

## Appendix

### Initial Interview Protocol for Foreign Military Representatives

1) Las unidades militares en el camp siempre o generalmente incluyen un consejo legal entrenado en las leyes de guerra?

A) En caso de que si, ¿este consejero legal es militar? ¿Qué puesto o rango ocupa?

B) ¿Cuál es la cantidad mínima de unidades militares de la cual un consejero militar es responsable?

C) ¿El consejero militar, esta involucrado automáticamente en tomar decisiones o solo cuando un comandante lo pide? ¿Existen algunas reglas donde se establezca cuando un comandante militar debería consultar ayuda legal durante operaciones activas?

2) Como son entrenados comandantes, soldados y pilotos en las reglas de guerra?

A) ¿El entrenamiento básico incluye instrucción en las leyes de guerra?

B) ¿Los soldados o comandantes, reciben algún manual describiendo sus derechos y obligaciones bajo la convención de Geneva o protocolos adicionales?

C) ¿Si los comandantes tiene preguntas sobre sus obligaciones bajo la ley internacional, tiene manera de preguntarle a algún consejero legal?

3) ¿Cuál es el protocolo para los comandantes al calcular la probabilidad y el número de muertes civiles?

A) ¿Antes de comenzar la operación militar crean una lista de no atacar?

B) ¿Las operaciones y decisiones deben ser aprobados por un oficial de alto rango? En caso que sí, ¿Qué puesto o rango ocupa?

C) ¿La organización militar tiene reglas de enganche en la adición de las reglas generales de las leyes de guerra y la proporcionalidad en particular?

I) En caso de que sí, ¿Son clasificados o publicas?

II) En caso de que sí y sean publicas ¿Dónde podría conseguirlas?

D) ¿La organización militar tiene un método establecido para medir daño colateral?

I) En caso de que sí, ¿Es clasificado o publico?

II) En caso de que sí y sea publico, ¿Dónde podría yo encontrarlo?

III) En case que sí, y sean clasificados, ¿Existe algún resumen? Donde podría encontrarlo?

4) ¿Su organización militar mantiene vigente el número de muertes civiles y el daño a propiedades causado por sus operaciones? ¿Cómo?

A) ¿Cuáles son las consecuencias que hacia un comandante militar al tomar decisiones que causan muertes civiles excesivas?

B) ¿Su organización incluye algún consejero legal u otra persona independiente que evalué lo legal del comportamiento en el camp de batalla?

5) ¿Su organización tiene sus propias cortes y jueces en general?

A) En caso de que si, ¿Están abiertas al público?

I) ¿Existe publicidad en los castigos?

1) Si no, ¿Existen resúmenes del veredicto?

B) En caso de que no, ¿Cómo manejan cuando existe una violación de las leyes de guerra? ¿Por cortes públicas?  
¿Cuál otro motivo?

6) ¿Con quién podríamos hablar para conseguir más información sobre sus entrenamientos, monitoreo y prácticas en forzadas?  
¿Cómo podríamos comunicarnos con esa persona?