Decision

The authors would like to thank Mr Diego Valadares Vasconcelos Neto, LL.M. (Geneva Academy of International Humanitarian Law and Human Rights) for having prepared a summary of this case and its discussion.

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source:** Constitutional Court of Colombia, Decision C-291/07, available in Spanish at www.corteconstitucional.gov.co. Footnotes partially omitted. Unofficial translation.]

Decision C-291/07 of 2007

Complaint challenging the constitutionality of Articles 135, 156 and 157 (in part) of Act 599 of 2000, and Articles 174, 175, 178 and 179 of Act 522 of 1999.

Plaintiff: Alejandro Valencia Villa

[...]

DECISION

I. THE COMPLAINT

1. COMPLAINT CONCERNING ARTICLE 135 OF ACT 599 OF 2000, STATEMENTS AND OPINION OF THE ATTORNEY-GENERAL

1.1. Contested rule

The plaintiff challenges the constitutionality of paragraph 6 of the additional clause of Article 135 of Act 599 of

2000, reproduced below (the contested word is underlined):

“Article 135. Murder of a protected person.

Any person who, in connection with and during an armed conflict, causes the death of a person protected by the international conventions of humanitarian law ratified by Colombia commits [...]

ADDITIONAL CLAUSE. For the purposes of this Article and the other rules within the same title, protected persons are in accordance with international humanitarian law understood to be:

1. Members of the civilian population.
2. Individuals not participating in the hostilities and civilians in the hands of the adverse party.
3. The wounded, sick or shipwrecked placed hors de combat.
4. Medical or religious personnel.
5. Journalists on assignment or accredited war correspondents.
6. Combatants who have laid down their arms owing to capture, surrender or other similar reason.
7. Those who, prior to the onset of hostilities, were considered to be stateless persons or refugees.
8. Any other persons benefiting from this status under the First, Second, Third and Fourth Geneva Conventions of 1949 and their Additional Protocols of 1977 and others that may later be ratified.”

1.2. Allegations of unconstitutionality set out in the complaint

It is the plaintiff’s view that the term “combatants” found in paragraph 6 of the additional clause of Article 135 of Act 599 of 2000 is incompatible with Articles 93[1] and 214[2] of the Constitution and must therefore be declared unconstitutional.

2. COMPLAINT CONCERNING ARTICLE 157 OF ACT 599 OF 2000, STATEMENTS AND OPINION OF THE ATTORNEY-GENERAL

2.1. Contested rule

The underlined phrase from Article 157 of Act 599 of 2000 is called into question:

“Article 157. Attack on works or installations containing dangerous forces. Any person who attacks dams, dykes, nuclear or electric power stations or other works or installations containing dangerous forces, duly marked with the treaty-based signs, in connection with and during an armed conflict, without imperative military necessity, commits [...]”

2.2. Allegations of unconstitutionality set out in the complaint

The plaintiff alleges that the phrase in question is contrary to Articles 93 and 214 of the Constitution.

Establishing a requirement for the objects of attack to be duly marked with the treaty-based signs as a normative element of the offence means that “a punishable act cannot be assimilated to this criminal offence unless this requirement is met.” He stresses that the international rules that are binding on Colombia do not require this.

3. COMPLAINT CONCERNING ARTICLE 156 OF ACT 599 OF 2000, STATEMENTS AND OPINION OF THE ATTORNEY-GENERAL

3.1. Contested rule

The underlined phrase from Article 156 of Act 599 of 2000 is called into question:

“Article 156. Destruction or illegal use of cultural objects and places of worship. Any person who, in connection with and during an armed conflict, without imperative military necessity and without previously taking appropriate and timely protective measures, attacks and destroys historical monuments, works of art, educational establishments or places of worship, which constitute the cultural and spiritual heritage of peoples, duly marked with the treaty-based signs, or uses such objects to support the military effort, commits [...]”

3.2. Allegations of unconstitutionality set out in the complaint

The plaintiff alleges that the phrase in question is contrary to Articles 93 and 214 of the Constitution, for reasons similar to those put forward in connection with the same phrase in Article 157: “since international norms do not make this a requirement”. [...]

4. COMPLAINT CONCERNING ARTICLE 148 OF ACT 599 OF 2000, STATEMENTS AND OPINION OF THE ATTORNEY-GENERAL

4.1. Contested rule

The underlined phrase from Article 148 of Act 599 of 2000 is called into question:

“Article 148. Hostage-taking. [Penalties increased by Article 14 of Act 890 of 2004, with effect from 1 January 2005. The text containing the increased penalties reads as follows:] Any person who, in connection with and during an armed conflict, deprives another person of their liberty and makes their release or their safety conditional on the satisfaction of demands made to the other party, or uses them as a means of defence, commits [...]”

4.2. Allegations of unconstitutionality set out in the complaint

The plaintiff considers this phrase to be incompatible with the aforementioned Articles 93 and 214 and requests that the Court declare it to be conditionally constitutional, for the following reasons:

"[...] we consider that the Constitutional Court must declare it to be conditionally constitutional and must point out that the phrase "to the other party" found in Article 148 has a broad meaning that covers not only the parties to armed conflict but also third parties such as a State, an international organization, a natural or legal person, or a group of persons."

[...]

Footnotes

- [1] [**N.B.**] Article 93. International treaties and agreements ratified by Congress that recognize human rights and prohibit their limitation in states of emergency have priority domestically.
  The rights and duties set forth in this Constitution shall be interpreted in accordance with international human rights treaties ratified by Colombia.
  The Colombian State recognizes the jurisdiction of the International Criminal Court in the terms set forth in the Rome Statute adopted on 17 July 1998 by the United Nations Conference of Plenipotentiaries and hence ratifies this treaty pursuant to the procedure laid down in this Constitution.
  Any alternative treatment by the Rome Statute in substantive matters relating to constitutional guarantees will be accepted only within the spheres regulated by the Statute.
- [2] [**N.B.**] Article 214(2). States of emergency [...] shall be subject to the following provisions: [...] "Neither human rights nor fundamental freedoms may be suspended. In all cases, the rules of international humanitarian law shall be observed. A statutory law shall regulate the powers of the government during states of emergency and shall establish the legal controls and guarantees to protect rights, in accordance with international treaties. The measures which are adopted must be proportionate to the gravity of the events. [...]"

Considerations of the Court - Part 1

C. The legislature's margin of discretion in criminal matters; limits set by the Constitution and the corpus of constitutional law. Role of the corpus of constitutional law in the areas of interpretation and integration.

As previously explained, the principal legal problems brought before the Court in the present complaint require us (1) to determine the constitutional limits on the legislature's discretionary power to establish criminal offences, and (2) to determine the role and the scope of application of the corpus of constitutional

law in the constitutional control of laws establishing criminal offences, in particular those prohibiting violations of international humanitarian law.

The legislature has a broad margin of discretion to draw up criminal policy […]. There are nevertheless limits to this legislative power, which are set forth in the Constitution and in the norms making up the corpus of constitutional law. It is the responsibility of the Constitutional Court to implement these limits whenever the legislature fails to adhere to the principles, values and rights protected therein.

[...]

Hence, not all the international provisions that are binding upon the Colombian State have been incorporated into the corpus of constitutional law. For the matter at hand, suffice to say that the Court has accepted that human rights treaties and the treaty-based and customary rules of international humanitarian law form part of that corpus.

[...]

D. [...]

3.3.1. "Combatants"

The term "combatants" in international humanitarian law has both a generic meaning and a specific meaning. **Generically**, "combatants" refers to individuals who are members of the armed forces or irregular armed groups, or who participate in hostilities, and therefore do not benefit from the protection against attack accorded to civilians. **Specifically**, "combatants" is used only in the context of an international armed conflict to denote a special status, "combatant status," which encompasses not only the right to participate in hostilities and the possibility of being considered a legitimate military target, but also the right to attack other combatants or individuals who are taking part in the hostilities, and an entitlement to special treatment if placed *hors de combat* following surrender, capture or injury – in particular the related or secondary status of "prisoner of war."

The Court observes that when the principle of distinction is applied to internal armed conflicts, and the different rules that it comprises in particular, international humanitarian law uses the term "combatants" generically. There is no doubt that the term "combatants" in the specific sense and the related legal categories, such as "prisoner-of-war status," do not apply to internal armed conflicts.

3.3.2. "Civilians" and "civilian population"

When the principle of distinction is applied to internal armed conflicts, the term "civilian" is used to refer to individuals who fulfil the following two criteria: (i) they are not members of the armed forces or irregular

armed opposition groups; and (ii) they are not participating in the hostilities, whether individually as “civilians” or collectively as the “civilian population.” The definition of “civilians” and “civilian population” is similar for the different purposes these terms have within international humanitarian law in its application to internal armed conflicts – for example, the same definition of “civilian” has been used in case law to classify specific conduct as a war crime or a crime against humanity.[3]

3.3.2.1. “Civilians”

When the principle of distinction is applied to non-international armed conflicts, a “civilian” is someone who meets the dual criteria of not being a member of the armed forces or an irregular armed opposition group, and not participating in hostilities.

The first requirement – that of not being a member of the armed forces or an irregular armed group – was identified in the ICRC’s study as a customary definition of “civilian.”[4] [...]

The second requirement – that of not participating in the hostilities – has been mentioned by numerous international courts. […] The International Criminal Tribunal for the former Yugoslavia has held that in order to establish the civilian character of individuals protected by the guarantees enshrined, for example, in common Article 3 – applicable to internal armed conflicts – “it is necessary to show that the violations were committed against persons not directly involved in the hostilities,”[5] for which the criterion established in the Tadić case must be applied: “whether, at the time of the alleged offence, the alleged victim of the proscribed acts was directly taking part in hostilities, being those hostilities in the context of which the alleged offences are said to have been committed. If the answer to that question is negative, the victim will enjoy the protection of the proscriptions contained in common Article 3.”[6] Therefore, the civilian character of a person or a population is determined by comparing the evidence to the applicable criteria, rather than simply citing their legal status in abstract terms. This must take into consideration that – based on what was stated earlier – the concept of “hostilities,” in common with that of “armed conflict,” concerns more than the specific time and place of the fighting. It depends upon the geographical and temporal criteria governing the application of international humanitarian law.[7]

[...]

3.3.3. “Persons *hors de combat*” as “non-combatants”

[...]

As in the case of civilians, when persons *hors de combat* begin participating directly in the hostilities, they lose their protection under the principle of distinction [8] but only for as long as their participation in the conflict lasts.[9]

[...]

3.4.6. Prohibition on attacking persons *hors de combat*

Finally, as explained above, the principle of distinction protects civilians and the civilian population, as well as those *hors de combat*, within the wider category of “non-combatants.” The term “persons *hors de combat*” is understood to mean those who were participating in the hostilities but are no longer doing so because they have surrendered, been captured, detained or shipwrecked, or are unconscious, wounded, sick or in another analogous situation.

[...]

5.4.3. The fundamental guarantee prohibiting murder

In the case of non-international armed conflicts, the fundamental guarantee prohibiting murder, like most other fundamental guarantees, covers non-combatants, that is, civilians and those *hors de combat*, for as long as they do not take a direct part in the hostilities […]

However, independently of the fact that murdering a civilian or a person *hors de combat* may constitute a war crime, it is the Constitutional Court’s view that the underlying material act, namely taking the life of someone protected by the principle of distinction, may constitute other offences under international humanitarian law, including genocide and crimes against humanity such as extermination, persecution, attacks on civilians or acts causing serious physical or mental harm. In each case, it depends on the context in which the act was committed and whether certain specific conditions have been met. All of the aforementioned offences share a common core of elements with the definition of murder as a war crime: “the death of the victim which results from an act or omission by the accused, committed with the intent either to kill or to cause serious bodily harm with the reasonable knowledge that it would likely lead to death.[10]

[...]

5.4.4. The fundamental guarantee prohibiting hostage-taking

The fundamental guarantee prohibiting hostage-taking during non-international armed conflicts, as part of the principle of humanity and in itself, has the threefold nature of being a treaty-based, customary and peremptory norm of international humanitarian law. Violation thereof constitutes a war crime that entails individual criminal responsibility. It may also constitute a crime against humanity when committed in the context of an internal armed conflict.

[...]

6. People and objects benefiting from special protection under international humanitarian law

During internal armed conflicts, treaty-based and customary international humanitarian law affords special protection to certain categories of people and objects that are particularly vulnerable to the harmful effects of war.

[...]

6.1. Special protection of cultural and religious property

International humanitarian law imposes on the parties to an internal armed conflict a special obligation to respect and protect cultural property [...]

Cultural property falls into the general category of “civilian objects,” and as such, benefits from protection under the principles of distinction and precaution explained above. However, international humanitarian law imposes on the parties to armed conflict duties of special care, respect, prevention and protection with regard to cultural property. Guarantees of protection of cultural property – including criminal guarantees – therefore constitute *lex specialis* in relation to the principles of distinction and precaution.

Violating these guarantees of special protection is a war crime under treaty-based and customary international humanitarian law.

[...]

The protection of cultural and religious property does not depend on their identification with a distinctive emblem. Although Articles 6 and 16 of the 1954 Hague Convention state that cultural property of special importance **may** be identified by an emblem established therein, this can in no way be regarded as an obligation. Full application of the treaty-based and customary safeguards provided for in international humanitarian law is not conditional upon use of the emblem.

6.2. Special protection of works and installations containing dangerous forces

Works and installations containing dangerous forces constitute another category of objects entitled to special protection under both treaty-based and customary international humanitarian law during an internal armed conflict.

[...]

Footnotes

- [3] [FN 123] **See** for example ICTY, Case No. IT-98-29, Prosecutor v. Galić, Judgement of 5 December 2003.
- [4] [FN 124] Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules, ICRC/Cambridge University Press, Cambridge, 2005. Rule 5 [...]
- [5] [FN 127] [...] ICTY, Case No. IT-95-14, Prosecutor v. Blaškić, Judgement of 3 March 2000, para. 177.
- [6] [...] [FN 128] ICTY, Case No. IT-94-1, Prosecutor v. Tadić, Opinion and Judgement of 7 May 1997, para. 615.
- [7] [FN 130] **See** in this regard ICTY, Case No. IT-01-48, Prosecutor v. Halilović, Judgement of 16 November 2005.
- [8] [FN 140] Inter-American Commission on Human Rights, "La Tablada" case – Report No. 55/97, Case 11.137 - Juan Carlos Abella v. Argentina, 18 November 1997: "Specifically, when civilians, such as those who attacked the Tablada base, assume the role of combatants by directly taking part in fighting, whether singly or as a member of a group, they thereby become legitimate military targets. As such, they are subject to direct individualized attack to the same extent as combatants. Thus, by virtue of their hostile acts, the Tablada attackers lost the benefits of the above-mentioned precautions in attack and against the effects of indiscriminate or disproportionate attacks pertaining to peaceable civilians. In contrast, these humanitarian law rules continued to apply in full force with respect to those peaceable civilians present or living in the vicinity of the La Tablada base at the time of the hostilities."
- [9] [FN 141] Inter-American Commission on Human Rights, "La Tablada" case: "The Commission wishes to emphasize, however, that the persons who participated in the attack on the military base were legitimate military targets only for such time as they actively participated in the fighting. Those who surrendered, were captured or wounded and ceased their hostile acts, fell effectively within the power of Argentine state agents, who could no longer lawfully attack or subject them to other acts of violence. Instead, they were absolutely entitled to the non-derogable guarantees of humane treatment set forth both in common Article 3 of the Geneva Conventions and Article 5 of the American Convention. The intentional mistreatment, much less summary execution, of such wounded or captured persons would be a particularly serious violation of both instruments."
- [10] [FN 267] ICTY, Case No. IT-02-60, Prosecutor v. Blagojević and Jokić, Judgement of 17 January 2005, para. 556. [...]

Considerations of the Court - Part 2

E. FINDINGS OF THE COURT REGARDING THE SPECIFIC ALLEGATIONS SET OUT IN THE COMPLAINT

Drawing on the above considerations, the Court will now proceed to discuss the allegations.

1. Examination of the allegations concerning the term "combatants" found in paragraph 6 of the additional clause of Article 135 of Act 599 of 2000.

The plaintiff asserts that the word “combatants” in paragraph 6 of the additional clause of Article 135 of Act 599 of 2000 is contrary to Articles 93 and 94[1] of the Constitution. He argues that “combatants” is not a category used in connection with non-international armed conflicts in the rules of international humanitarian law found in the corpus of constitutional law.

In the first instance, the Court notes that this word must be interpreted in the overall context of the article within which it appears. The legislature placed it in paragraph 6 of the additional clause of Article 135 of the Criminal Code as one of the categories of persons protected by international humanitarian law whose murder is punished by the offence in question, namely, “combatants” who have laid down their arms owing to capture, surrender or other similar reason. Other protected persons listed in the uncontested paragraphs of the offence are “members of the civilian population,” “individuals not participating in the hostilities and civilians in the hands of the adverse party,” “the wounded, sick or shipwrecked placed *hors de combat*,” “medical or religious personnel,” “journalists on assignment or accredited war correspondents,” “those who, prior to the onset of hostilities, were considered to be stateless persons or refugees” and “any other persons benefiting from this status under the First, Second, Third and Fourth Geneva Conventions of 1949 and their Additional Protocols of 1977 and others that may later be ratified.”

This article thus seeks to prohibit the murder of two categories of persons protected by international humanitarian law: non-combatants – including the civilian population and persons *hors de combat* – and certain individuals entitled to special protection – journalists, and medical and religious personnel. It represents the incorporation into the Colombian Criminal Code of the fundamental guarantee prohibiting the murder of non-combatants, which comes under the principle of humane treatment. This [...] is a peremptory norm, treaty-based and customary in nature, which compels national authorities to respect and ensure respect for its content. The scope of this provision must therefore be interpreted in the light of the fundamental guarantee in question.

Interpreted thus within its own normative context and in the light of the applicable international humanitarian law, it is the Court’s view that the term “combatants” refers to one of the sub-categories of persons *hors de combat*, itself one of the categories of persons protected by international humanitarian law – persons who have participated in the hostilities and are no longer doing so because they have laid down their arms as a result of capture, surrender or other similar reason. The term must be interpreted generically, as explained under heading 3.3.1 of section D above [...].

Furthermore, even if we were to interpret it specifically, the use of this term in itself would not be incompatible with the corpus of constitutional law. Its inclusion in the offence does not limit the protection afforded by the fundamental guarantee prohibiting the murder of those not participating in the hostilities during an internal conflict. Legal provisions incorporating the concept of “combatant” into the regulation of internal armed conflicts would only be contrary to the corpus of constitutional law if they diminished or reduced the scope or

the efficacy of the guarantees, or if they prevented the guarantees from upholding the aforementioned principles of humanity [...] and distinction [...].

Viewed from this perspective, the term evidently does not restrict the scope of the protection that the corpus of constitutional law affords to those not taking part in the hostilities during a non-international armed conflict, whether because they are members of the civilian population or because they have ceased to participate in the conflict and hence benefit from the guarantees and safeguards enjoyed by the civilian population. They are legitimately entitled to protection under international humanitarian law and therefore continue to be protected by the safeguard clauses in question, even if the specific meaning were to be applied. This is because, in accordance with the classification of persons protected by international humanitarian law, Article 135 includes other categories of individuals not participating in the hostilities during a non-international armed conflict. The following therefore appear in the list: "members of the civilian population," "individuals not participating in the hostilities and civilians in the hands of the adverse party," "the wounded, sick or shipwrecked placed *hors de combat*," "medical or religious personnel," "journalists on assignment or accredited war correspondents," "those who prior to the onset of hostilities were considered to be stateless persons or refugees," and in a wider sense referring back to international humanitarian law, "any other person benefiting from this status under the First, Second Third and Fourth Geneva Conventions of 1949 and their Additional Protocols of 1977 and others that may later be ratified." In the Court's opinion, these categories cover those who must be distinguished from active participants in a non-international armed conflict so that they may be protected by the humanitarian provisions under examination, described in detail earlier.

In other words, the term "combatants," whether generic or specific, has no impact on the principles of distinction or humanity, or on the guarantees of special protection set forth in international humanitarian law. These therefore retain their full force in situations of internal armed conflict such as that found in Colombia, in respect of all those not participating in the hostilities or those enjoying special protection under international humanitarian law. In the view of this Court, they are all covered by the different categories of "protected persons" listed in Article 135 – for example, someone who previously participated in the hostilities and who has now laid down his arms.

Based on the above, the term "combatants" is compatible with the Constitution (Articles 93 and 94) and, as mandated by the Constitution, with the relevant principles and norms of the corpus of constitutional law [...]. The term must accordingly be declared constitutional. It is clear that whichever interpretation is chosen, the scope of protection provided for under international humanitarian law is not reduced for those who do not take part in the hostilities during a non-international armed conflict.

2. Examination of the allegations concerning the phrase "to the other party" in Article 148 of Act 599 of 2000.

The plaintiff argues that the phrase "to the other party" found in the definition of the offence of hostage-taking

set out in the Colombian Criminal Code is prejudicial to Articles 93 and 94 mentioned above, inasmuch as the provisions in the corpus of constitutional law defining this act do not contain such a requirement. He asserts that domestic legislation reduces the scope of the protection afforded against this international criminal offence as a result.

In the first instance, the Court notes that the definition of the domestic criminal offence containing the contested phrase represents the incorporation within the domestic criminal system of the fundamental guarantee prohibiting hostage-taking established by international humanitarian law. This, as previously explained [...] is a peremptory norm, of a treaty-based and customary nature, binding upon the Colombian State. By defining this offence, the Colombian State is complying with its international obligation to respect and ensure respect for international humanitarian law, and the offence must be interpreted in accordance with the principles of this body of law.

[...] It is clear [...] that on the date this ruling is adopted, the offence of hostage-taking is identified as a punishable act in accordance with peremptory norms which, as part of the corpus of constitutional law, are binding on the Colombian State. These norms constitute a compulsory parameter for exercising constitutional control over the legal provision in question.

It is also relevant to note that the Constitutional Court, in Decision C-578 of 2002 reviewing the constitutionality of the Rome Statute of the International Criminal Court, stated that "[…] States must exercise their sovereign powers to define criminal penalties and procedures for grave breaches of human rights such as […]war crimes in a way that is compatible with international human rights law, with international humanitarian law, and with the aim of fighting impunity set forth in the Rome Statute," from which we may infer that the Colombian legislature, when defining the offence of hostage-taking, must comply with what has already been established regarding this in international humanitarian law, as a constitutive element of the corpus of constitutional law.

On the basis of the customary definition of the international crime of hostage-taking, [...] formalized in the definition found in the Elements of Crimes of the International Criminal Court, the present Court upholds the plaintiff's argument that Article 148 of the Criminal Code violates the corpus of constitutional law by stipulating that any demands to release or protect the hostage be made to the other party in a non-international armed conflict. Customary rules defining the elements of this war crime do not contain this requirement. The introduction of such a condition therefore reduces without justification the scope of protection established by international humanitarian law, by restricting the possible permutations of the offence in question. It leaves unprotected hostages whose captors have made demands not to the other party in the armed conflict, but to other entities – which, as listed in the Elements of Crimes of the International Criminal Court, may be a State, an international organization, a natural or legal person, or a group of persons. Since individuals who find themselves in this situation are entitled to the full protection of international humanitarian law and there are no elements in the constitutional legal system that would justify

a reduction in the level of protection set out in the definition of this war crime, the Court concludes that the introduction of this obligation is incompatible with the corpus of constitutional law and hence with Articles 93 and 94 of the Constitution [...].

It should be clarified at this point that the existence of the offence of kidnapping for extortion in the Colombian Criminal Code[2] does not compensate for the introduction of this phrase into the definition of the criminal offence of hostage-taking and the corresponding reduction in protection. Although the offences have similar constitutive elements – in the sense that both punishable acts involve illegally depriving a person of his freedom in order to demand a specific benefit in return for his release – it is clear that the element which distinguishes them is that hostage-taking, a war crime proscribed by international humanitarian law, applies to armed conflict, both international and non-international.[3] This is confirmed by the fact that it is found in the section on "Offences against persons and objects protected by international humanitarian law" in the Colombian Criminal Code. Kidnapping for extortion meanwhile applies to contexts other than armed conflict.

It is clear to the Court that in the case of a non-international armed conflict – whose existence and character are in no way dependent upon the way that it is described or characterized by the parties to conflict, State or non-State, but rather on the objective factors listed in Section D of this ruling – reducing the scope of protection offered by the criminal offence under examination through the introduction of this phrase is contrary to the protective rules of international humanitarian law. This is not compensated for by the existence of other criminal offences in domestic legislation – given that the offence of kidnapping for extortion does not apply to armed conflict – and is therefore incompatible with the principles of humanity [...] and distinction [...].

Nor is any reduction in the protection offered by the fundamental guarantee prohibiting hostage-taking, a peremptory norm in the corpus of constitutional law, compensated for by Colombia's acceptance of the complementary jurisdiction of the International Criminal Court with regard to war crimes – in relation to which the Colombian State in 2002 made a declaration of conformity with Article 124 of the Rome Statute temporarily excluding the jurisdiction of the International Criminal Court over war crimes. This declaration is only valid for a maximum of seven years. The fact that this international court may assume jurisdiction with regard to the commission of this offence whenever the criteria established in the Rome Statute are met does not give the Colombian State licence to ignore its fundamental duty to ensure that the rights of the civilian population are fully protected should the latter fall victim to one of the parties to conflict. Among other steps, this duty consists of adopting domestic legislative measures that are wholly compatible with the fundamental guarantees of international humanitarian law. [...]

For the above reasons, the Court will declare unconstitutional the contested phrase "to the other party." [...] In accordance with the content of the fundamental guarantee prohibiting hostage-taking – a peremptory norm – with effect from the adoption of the present ruling, the offence of hostage-taking in the Colombian criminal system no longer requires that demands regarding release or protection be directed at the other party in an

armed conflict. Such demands may be made to a third party such as a State, international organization, natural or legal person, or a group of people, without misinterpreting the offence in question.

3. Examination of the allegations concerning the phrase "duly marked with the treaty-based signs" found in Articles 156 and 157 of Act 599 of 2000.

The plaintiff in this case argues that the legislature's use of the expression "duly marked with the treaty-based signs" in Articles 156 and 157 of Act 599 of 2000 (which define the offences of "destruction or illegal use of cultural objects and places of worship" and "attack on works or installations containing dangerous forces" respectively) is incompatible with Articles 93 and 94 of the Constitution on the grounds that the rules of international humanitarian law in the corpus of constitutional law defining these crimes at an international level do not make signalling a requirement. As such, domestic legislation reduces the scope of protection of the corpus of constitutional law in this area.

The allegations of unconstitutionality are upheld. Using a similar line of reasoning to that which guided the Court's decisions on the other allegations, the Court will declare unconstitutional the phrase "duly marked with the treaty-based signs" in Articles 156 and 157. As explained under headings 6.1 and 6.2 of Section D of this ruling, this requirement is not found within the treaty-based and customary rules of international humanitarian law protecting cultural property and works and installations containing dangerous forces. Therefore, introducing a signalling requirement into the definition of this offence restricts the scope of the applicable international safeguards, since any cultural and religious property or works and installations containing dangerous forces not bearing signs are excluded from the protection afforded by these rules.[...]

Footnotes

- [11] [N.B.] Article 94. The enunciation of the rights and guarantees contained in the Constitution and in international agreements in effect should not be understood as a negation of others which, being inherent to the human being, are not expressly mentioned therein.
- [12] [FN 291] Defined in Article 169 of the Criminal Code (Act 599 of 2000) as follows: "Article 169. Any person who seizes, takes, holds or hides another person with the aim of demanding in exchange for his freedom some benefit or profit, or demanding that certain action be taken or not taken, or with a politically or publicity-oriented aim, commits [...]."
- [13] [FN 292] ICTY, Case Nos IT-96-23 & IT-96-23/1-A, Prosecutor v. Kunarac, Kovać and Vuković. Appeals Chamber Judgement of 12 June 2002, para. 58: "What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed."

Decision and dissenting opinions

DECISION

Based on the foregoing, the Constitutional Court of the Republic of Colombia, administering justice on behalf of the people and under the authority given to it by the Constitution,

DECIDES

1. To declare **CONSTITUTIONAL** the term “combatants” found in paragraph 6 of Article 135 of Act 599 of 2000, for the reasons examined herein.

2. To declare **UNCONSTITUTIONAL** the phrase “to the other party” found in Article 148 of Act 599 of 2000.

3. To declare **UNCONSTITUTIONAL** the phrase “duly marked with the treaty-based signs” found in Articles 156 and 157 of Act 599 of 2000.

[...]

DISSENTING OPINION OF JUDGE JAIME ARAÚJO RENTERÍA IN DECISION C-291 OF 2007

[...]

With all due respect for the findings of this Court, I would like to express my dissenting opinion regarding this ruling. I disagree with the decisions adopted concerning paragraph 6 of Article 135 of Act 599 of 2000 [...].

1. Unconstitutionality of paragraph 6 of Article 135 of Act 599 of 2000

In the first instance, I would like to emphasize why paragraph 6 of Article 135 is, in my view, unconstitutional. I consider that this rule, by excluding from special protection individuals who are not considered to be combatants but who participated in the conflict without belonging to a regular army, and for the purposes of the offence defined in this article, conflicts with the rules of international humanitarian law and thus with Articles 93 and 214 of the Constitution.

I also consider that limiting the offence of hostage-taking to the demands made to the other party is incompatible with the prohibition in international humanitarian law of hostage-taking, which is punishable regardless of the person to whom the demands are made.

I believe that the difficulties of the interpretation in case law of the word “combatants” stem from the fact that the word relates solely to internal conflicts – it is not used in connection with international conflicts. I reiterate that, in principle, paragraph 6 does not include members of illegal armed groups participating in the hostilities. Similarly, this word can in no way be understood to mean that those who are fighting the government are not entitled to humane treatment.

I must point out here that the undersigned was not opposed to declaring the contested article “conditionally constitutional,” or accepting the Attorney-General’s proposal. I was opposed to incorporating paragraph 6 into paragraph 8 of the same provision, which to my understanding would lead to greater difficulties. In my view, if the intention is to protect everyone, both combatants and fighters, declaring the contested term unconstitutional would have the desired effect.

Finally, I consider that the difficulty of this rule resides in the fact that it can be understood in a restrictive sense, when, pursuant to the corpus of constitutional law, this is not the case. Hence, for the undersigned, unconstitutionality is the more obvious decision, because it would cover both those who fight and those who do so no longer.

Based on the above arguments, I disagree with the decision to declare paragraph 6 of Article

[...]

JAIME ARAÚJO RENTERÍA

Judge

—

PARTIAL DISSENTING OPINION OF JUDGE HUMBERTO ANTONIO SIERRA PORTO IN DECISION C-291 OF 2007

[...]

With all due respect, I will now explain why I do not agree with Decision C-291 of 2007 adopted by the Court, in which the phrase “to the other party,” found in Article 148 of Act 599 of 2000, was declared unconstitutional.

1. Development of the international prohibition on hostage-taking

The international prohibition on hostage-taking has come about in two, not necessarily complementary, ways: first, through instruments of international humanitarian law; second, in connection with the fight against

international terrorism.

Article 3 common to the four Geneva Conventions of 1949, which deals with the humanitarian rules applicable in situations of internal armed conflict, prohibits the respective parties from the “taking of hostages,” at any time and in any place. Similarly, Article 4 of Additional Protocol II of 1977, which sets forth the fundamental guarantees enjoyed by the civilian population, prohibits combatants from this conduct. Notwithstanding the foregoing, both articles consist of non-self-executing international rules, that is, treaty-based provisions which must be implemented by the respective domestic legislators, exercising their powers to create laws. In other words, we are dealing with incomplete international rules, which require action from Congress in order to be formally incorporated into the Colombian legal system (law approving the international treaty) and to be applied. This means the creation of criminal offences that detail specific conduct and a specific penalty (principle of criminal legality).

In this respect, we might point out that, in international humanitarian law terms, the international prohibition on hostage-taking is highly ambiguous, since the States did not agree on any elements which would enable us to define this criminal conduct easily. This contrasts with, for example, the prohibition on genocide (1948 Convention), torture (1984 Convention against Torture), or enforced disappearance (1994 Inter-American Convention against Enforced Disappearance). In those cases the States did specify certain key elements of the crimes, which domestic legislators could expand upon provided they did not misinterpret them (e.g. genocide of political groups).

[...]

[Towards] the end of the 1970s, the prohibition on hostage-taking was developed further, but in connection with the fight against international terrorism rather than internal or international armed conflicts. In this context, the International Convention against the Taking of Hostages was adopted in 1979 [...]

Article 1 of this Convention provides the following definition:

“Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the “hostage”) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages (“hostage-taking”) within the meaning of this Convention.”

Concerning the scope of this international treaty, Article 12 provides as follows:

“In so far as the Geneva Conventions of 1949 for the protection of war victims or the Protocols Additional to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this

Convention are bound under those conventions to prosecute or hand over the hostage-taker, **the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977**, in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations." (bold and underlining added by author).

Therefore, the International Convention against the Taking of Hostages of 1979 does not apply to internal armed conflicts, since there are usually no international factors, unless the hostage or the perpetrator is a non-national, or the crime was committed in another State. Indeed, we must not forget that this Convention was not designed to combat domestic acts of terrorism. Rather, it is aimed at those acts considered to constitute "international terrorism." In other words, international humanitarian law and the 1979 Convention have different spheres of application.

The treaties of international humanitarian law that are currently binding upon the Colombian State do not state that the act of hostage-taking necessarily involves a demand made upon a State, an international intergovernmental organization, a natural or legal person or a group of persons, as in the Convention against the Taking of Hostages of 1979. Hence, in providing in Article 148 of the Criminal Code that the demand must be made "to the other party," without specifying exactly who this is, the Colombian legislature has not failed to adhere to anything laid down in an international instrument of international humanitarian law. Quite the opposite: this provision is in keeping with the rationale of an internal armed conflict, in which one party makes demands upon the other and threatens to harm the hostages in its power if these are not met. Nor does it in any way breach the 1979 Convention, since, as explained, this does not apply to internal armed conflicts.

In conclusion, the phrase "to the other party" in Article 148 of the Criminal Code does not breach any treaties of international humanitarian law or any international instruments aimed at combating international terrorism, such as the International Convention against the Taking of Hostages of 1979.

2. The Court's decision is based on an inapplicable normative text

Most members of the Court were of the view that the legislature had violated the corpus of constitutional law by limiting the scope of the offence of hostage-taking, contrary to the customary rules of international humanitarian law and to the definition of this offence which appears in the Elements of Crimes of the International Criminal Court. I disagree with this argument for the following reasons.

Article 8 of the Rome Statute of the International Criminal Court deals with war crimes. It defines hostage-taking as an act that violates the laws and customs of war during an internal or international armed conflict. It

does not specify exactly what this criminal conduct consists of, a task which had to be carried out when the Elements of Crimes was drawn up. This is a normative text which complements and develops the Rome Statute of the International Criminal Court.

Hostage-taking is defined in the Elements of Crimes in the following terms:

Article 8 (2) (c) (iii)

War crime of taking hostages

Elements

1. The perpetrator seized, detained or otherwise held hostage one or more persons.
2. The perpetrator threatened to kill, injure or continue to detain such person or persons.
3. **The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.** (bold added by author)
4. Such person or persons were either hors de combat, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
5. The perpetrator was aware of the factual circumstances that established this status.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Prima facie, then, it would appear that the majority were right, in the sense that the Elements of Crimes defines hostage-taking as a conduct by means of which a State, international organization or natural or legal person is compelled to act in a specific way. The phrase “to the other party” employed by the Colombian legislature would accordingly be excessively restrictive.

Notwithstanding the foregoing, the Court did not appreciate that for various reasons the Elements of Crimes is not at present a basis for deciding a constitutional case in Colombia.

[...]

HUMBERTO ANTONIO SIERRA PORTO
Judge

Discussion

I. Duty to adopt legislation/ ensure respect

1. Do States have the obligation to adopt legislation which, like Law 599 of 2000, provides penal sanctions

for persons who commit war crimes? As a minimum, which violations of IHL constitute war crimes? Do all violations of IHL entail criminal responsibility? (GC I-IV, Art. 1, Arts 49/50/129/146 and Arts 50/51/130/147 respectively; P I, Arts 11(4), 85 and 86; 1954 Hague Convention, Art. 28; Second Protocol to the 1954 Hague Convention, Art. 15; CIHL, Rule 161)

II. Definition of combatants/ prohibition of acts against persons *hors de combat*

1. What is the definition of combatants according to IHL? Is it different in international and non-international armed conflicts? What is the definition of civilians? Is it different in international and non-international armed conflicts? Is there any other category of persons under IHL? Does it matter for the classification of the conflict if such persons engage in hostilities? Do civilians who take part in hostilities become combatants? According to the Geneva Conventions and the Additional Protocols? According to the interpretation given by the Colombian Constitutional Court? (GC III, Art. 4; P I, Arts 43 and 50(1))
2. The Colombian Constitutional Court distinguishes between a general definition and a specific (or narrow) definition of "combatant". How do these two definitions differ when it comes to the rights and responsibilities of the persons involved? What are the consequences of adopting the broader definition? Do you agree with the Court's adoption of the general definition of "combatant"?
3. Can civilians take part in hostilities? Can they be criminally prosecuted for doing so? Can combatants take part in hostilities? Can they be criminally prosecuted for doing so?
4. Do civilians who take part in hostilities become legitimate targets of military attacks? For the duration of the conflict or just for as long as they directly participate in the hostilities?
5. Does the Colombian Constitutional Court's citation of the *La Tablada* case in [FN 141] (*section D 5.4.3*) contradict the general position of the Court that civilians engaged in hostilities are combatants lato sensu? [**See** Inter-American Commission on Human Rights, Tablada]
6. Does the decision of the Court to uphold the use of the expression "combatants" in Art. 148 of Law 599 reduce the scope of protection of that article in relation to the applicable rules of IHL, and hence violate the Colombian constitutional block by violating minimum standards of protection of IHL? Is the Court's decision influenced by the fact that other categories of protected persons are already protected by other paragraphs of the same article? (Section E. 1)
7. Judge Jaime Araújo Rentería affirms that the expression "combatants" relates exclusively to internal conflicts and is not used in international conflicts (**See** *separate opinion of Judge Araújo de Rentería, section 1*). Do you agree with him? (GC III, Art. 4; P I, Art. 43)

III. Taking of hostages

1. Is the taking of hostages prohibited under IHL? In international armed conflicts? In non-international armed conflicts? Is it a war crime? (GC I-IV, Art. 3; GC IV, Arts 34 and 147; P I, Art. 75.2(c); P II, Art. 4.2(c); ICC Statute, Art. 8.2(a)(viii) and (c)(iii); CIHL, Rule 96)
2. Does IHL provide a definition of hostage-taking? Does it provide the elements of such crimes? Does the war crime of taking of hostages imply that the perpetrator intended to compel *the other party* to undertake or fail to undertake a particular act? Could the demands be formulated to a third party (natural or legal person)? What other international instruments provide guidance on the interpretation of the elements of such crimes? (Convention on the Taking of Hostages, Art. 1; ICC Elements of Crimes, Art. 8.2(a)(viii))

3. Is the taking of hostages always a war crime? Is the taking of hostages always a war crime in time of armed conflict? Does it necessarily violate Art. 3 common? If not, how can one differentiate between hostage-taking as a war crime and as a regular offence in times of armed conflicts? (*See footnote 292 in section E.2, citing the ICTY distinction between a war crime and a purely domestic offence*). During an armed conflict, when might hostage-taking be considered a purely domestic offence? A war crime? Was the original version of Art. 148 of Law 599 more suitable for the distinction between a purely domestic offence and a war crime?
4. Can combatants be victims of the crime of hostage-taking? What is the difference between taking hostages and interning prisoners of war?

IV. Works containing dangerous forces

1. a. Is attacking works and installations containing dangerous forces prohibited under IHL? In international armed conflicts? In non-international armed conflicts? Do the rules on attacks on such protected objects vary according to the nature of the conflict? (P I, Art. 56; P II, Art. 15; CIHL, Rule 42)
   b. Art. 157 of Law 599 criminalizes attacks against works and installations containing dangerous forces *in the absence of any justification whatsoever based on imperative military necessity*. Can works and installations be attacked if there is an "imperative military necessity"? Even if the attack can result in the release of dangerous forces and consequently in severe losses among the civilian population? Does the prohibition of attacks exclude necessity as a ground for precluding wrongfulness? Are these objects protected as civilian objects? Are they still protected even when they are military objectives, and if so, under what conditions? Can military objectives located at or in the vicinity of such works and installations be made the object of attacks? If so, under what conditions? (P I, Art. 56; P II, Art. 15; CIHL, Rule 42; Articles on State Responsibility, Art. 25 – **See** International Law Commission, Articles on State Responsabitity)
   c. Does the destruction of a work or installation containing dangerous forces through means other than an attack also constitute a violation of IHL? If so, under what circumstances? (HR, Art. 23(g))
   d. Are the protected works and installations containing dangerous forces described in Art. 157 of Law 599 the same as those protected as such under IHL? Are dams, dykes and nuclear electrical generating stations the only works and installations containing dangerous forces afforded special protection as such by IHL? Does the rule include other works and installations that may contain dangerous forces, such as factories producing toxic goods and oil refineries? (Commentary on P I, Art. 56; CIHL, Rule 42)
2. a. Is an attack against a work or installation containing dangerous forces a grave breach of IHL? Is it a war crime in non-international armed conflicts? (P I, Art. 56 and 85.3(c); P II, Art. 15; CIHL, Rule 42)
   b. Is an attack against a work or installation containing dangerous forces a war crime under the ICC Statute? (P I, Art. 85.3(c); ICC Statute, Art. 8.2)
3. a. Do you recognize the international special sign for works and installations containing dangerous forces? Is it as well-known as other recognized emblems? Is there an obligation to identify or endeavour to identify works and installations containing dangerous forces with the respective international special sign? Is there an obligation to identify medical units with the emblems of the Geneva Conventions? Do you think that a different level of exigency should apply to the

identification of medical units as opposed to works and installations containing dangerous forces? Why? (GC I, Art. 42(4); P I, Art. 18; P II, Art. 12)

b. Are works and installations containing dangerous forces only specially protected under IHL when duly marked with the international special sign? Does the marking with any distinctive emblem or sign confer protection to an object? Is this required for the attack to constitute a war crime? (P I, Art. 85.3(c) and Art. 1 of Annex I)

c. In terms of criminal policy, would it not make sense to criminalize only attacks against duly marked protected objects? Would this not amount to greater legal certainty with regard to the accused's mens rea? Are there any examples of war crimes which require that the protected object be indentified with signs or emblems? (ICC Statute, Art. 8.2(b)(xxiv) and (e)(ii))

V. Cultural objects

1. a. What are cultural objects and places of worship? Is it prohibited to attack cultural property under IHL? In international armed conflicts? In non-international armed conflicts? Do the rules on respect for cultural property vary according to the nature of the conflict? (1954 Hague Convention, Art. 1; P I, Art. 53; P II, Art. 16; CIHL, Rules 38-40)

   b. Art. 156 of Law 599 criminalizes attacks against and destruction of cultural objects in the absence of any justification whatsoever based on imperative military necessity and of adequate and suitable prior measures of protection. What is the difference between an attack against cultural objects and the destruction of cultural objects? Can both acts be classified as "acts of hostilities" under IHL? (1954 Hague Convention, Art. 1; P I, Art. 53; P II, Art. 16; CIHL, Rules 38-40)

   c. Can any cultural objects only be attacked under "imperative military necessity"? What does "imperative military necessity" mean in respect of cultural property? Does this meaning conform to the concept of necessity under general international law? Are cultural objects protected as civilian objects? Are they still protected even when they are military objectives? What precautions should parties to a conflict take in relation to cultural objects? (1954 Hague Convention, Art. 4.2; Second Protocol to the 1954 Hague Convention, Arts 6-8; CIHL, Rule 42; Articles on State Responsibility, Art. 25 – **See** International Law Commission, Articles on State Responsabitity)

   d. What is the difference between general protection, special protection and enhanced protection of cultural property? What are the conditions for the loss of protection in each case? (1954 Hague Convention, Arts 2-4 and 8; Second Protocol to the 1954 Hague Convention, Arts 6 and 10)

2. Is an act of hostility against cultural property a grave breach of IHL? Is it a war crime in non-international armed conflicts? Is an act of hostility against cultural property a war crime under the ICC Statute? Is the scope of Art. 156 of Law 599 broader or narrower than the provisions on the criminalization of acts against cultural property under IHL? (P I, Art. 85.4(d);, 1954 Hague Convention, Art. 28; Second Protocol to the 1954 Hague Convention, Art. 15; ICC Statute, Art. 8.2(b)(ix) and (e)(iv))

3. a. Do you recognize the distinctive emblem of the 1954 Hague Convention, also known as the *blue shield*? Is it as well-known as other recognized emblems? Is there an obligation to identify or endeavour to identify cultural property with the distinctive emblem? Was the Colombian Constitutional Court right when it stated that, according to the 1954 Hague Convention, cultural objects of special importance **may** be identified with the distinctive emblem, and that this possibility does not constitute an obligation (*section D.6.1. of the decision*)? Is there an obligation, ignored by the Court, to identify cultural property with the emblem? Does your answer change depending on

whether the cultural property in question is entitled to general, special or enhanced protection? If there is an obligation, what consequences does it entail? Does failure to meet the obligation deprive the object of protection? Do you think it is proper to have different levels of exigency for identification for the different categories? Why? (1954 Hague Convention, Arts 6, 10 and 16)

b. Is the distinctive emblem used differently depending on whether the cultural property benefits from general, special or enhanced protection? (1954 Hague Convention, Art. 17)
c. Is cultural property only protected under IHL when duly marked with the 1954 Hague Convention distinctive sign? Does the marking with any distinctive emblem or sign confer protection to an object? Does an object have to be marked with the distinctive sign for an act of hostility against it to constitute a war crime? If cultural property is a military objective but nonetheless marked with the sign, is an act of hostility against it still a war crime? In terms of criminal policy, would it not make sense to criminalize only attacks against duly marked protected cultural property? (P I, Art. 85.4(d); 1954 Hague Convention, Arts 6 and 10; ICC Statute, Art. 8.2(b)(ix) and (e)(iv))

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