

Preamble

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: RULING No. C-225/95, Re: File No. L.A.T.-040; original in Spanish, unofficial translation, footnotes partially omitted.]

REPUBLIC OF COLOMBIA, CONSTITUTIONAL COURT

Constitutional review of the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), drawn up in Geneva on June 8, 1977, and of Law 171 of December 16, 1994, whereby said Protocol is approved. [...]

II. LEGAL BASIS - Paragraphs 1 to 10

Jurisdiction and scope of the powers of the Court

1. The Constitutional Court has jurisdiction to review the constitutionality [...] [of] Protocol II and the law approving it, in conformity with Article 241, para. 10, of the Constitution. Moreover, as this Body has repeatedly stated, this is a preliminary, full and automatic procedure for confirming the constitutionality of the draft treaty and the law approving it, for reasons of substance as well as form. [...]

[...]

The nature of international humanitarian law and its mandatory character at the international and internal levels [...]

6. As regards the law of armed conflicts, traditional doctrine made a distinction between the law of The Hague, as it is known, or the law of war in the strict sense, as codified in the Hague Conventions of 1899 and 1907, the aim of which was to regulate the conduct of hostilities and lawful means of combat, and the law of Geneva, or international humanitarian law in the strict sense, the purpose of which is to protect persons not participating directly in hostilities. This might suggest that when the Constitution speaks of humanitarian law it is referring only to what is known as the Geneva Law. Such is not the case, however, since legal opinion considers that nowadays it is impossible to make a clear-cut distinction between these two bodies of law, because protection of the civilian population (i.e., the conventional aim of international humanitarian law in its strict sense) logically implies the regulation of legitimate means of combat (i.e., the aim of the traditional law of war), and vice-versa. Furthermore, Hague Law has been absorbed to some extent by Geneva Law, as demonstrated by the broad regulation of means of combat in Part III of Protocol I additional to the Geneva Conventions of 1949. [...]

7. International humanitarian law essentially stems from a number of practices which are understood to form part of what is known as the customary law of civilized peoples. Most of the treaties of international humanitarian law should consequently be viewed more as a simple codification of existing obligations than as the creation of new rules and principles. In the aforementioned rulings, and in accordance with the authoritative nature of international doctrine and jurisprudence, this Body has therefore considered the rules of international humanitarian law as forming an integral part of *jus cogens*. Now, Article 53 of the 1969 Vienna Convention on the Law of Treaties defines a *jus cogens* norm, or peremptory norm of general international law, as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. Consequently, according to the same article of the Vienna Convention, a treaty that conflicts with the above principles is void under international law. This explains why the humanitarian rules are binding on States and parties to a conflict, even if they have not approved the treaties in question, since the mandatory nature of these rules does not derive from the consent of the States but from their customary character. This Body has already stated the following, in this respect:

“To summarize, since 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 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. It does not derive from their codification as rules of international law, as will be explained in greater detail below. Hence respect for these principles does not depend on whether or not States have ratified or acceded to the international instruments enshrining those principles.

International humanitarian law is, above all, a set of ethical standards whose absolute and universal

validity does not depend on it being enshrined in positive law”.

8. [...]

It can therefore be concluded from the foregoing that the compulsory nature of international humanitarian law applies to all parties to an armed conflict, and not only to the armed forces of States which have ratified the relevant treaties. Irregular armed individuals or national armed forces may not then legitimately consider that they do not have to respect the minimum standards of humanity in an armed conflict because they are not party to the relevant international agreements, since, once again, the regulatory force of international humanitarian law derives from the universal acceptance of its rules by civilized peoples and from the fundamental humanitarian values enshrined in these international instruments. All armed individuals, whether or not they are part of a State force, are therefore under the obligation to respect the rules embodying those basic humanitarian principles, from which there is no possible derogation even in the extreme situation of armed conflict.

9. An armed individual may not cite failure to comply with humanitarian law by his adversary as an excuse for his own violations of these rules, since the restrictions pertaining to behaviour in combat apply for the benefit of the individual. The distinctive feature of this law is therefore that its rules constitute inalienable guarantees that are unique in that they impose obligations on armed individuals not for their own benefit but for that of third parties, namely the non-combatant population and the victims of the conflict. That explains why humanitarian obligations are not based on reciprocity; indeed, they are incumbent upon each of the parties and do not depend on compliance by the other party, because the beneficiary of those guarantees is the non-combatant third party – not the parties to the conflict. In this respect, this Court has already noted that “the traditional principle of reciprocity does not operate in these treaties and, as the International Court of Justice states in the case of the conflict between the USA and Nicaragua, no exception can be made”.

Colombia has the honour of being one of the first independent nations to have defended the principle that humanitarian obligations are not based on reciprocity. Indeed, long before the first Geneva or Hague Conventions were signed in Europe, “El Libertador”, Simón Bolívar, signed a “treaty to regulate warfare” with General Morillo to “avoid bloodshed whenever possible”. According to the French jurist Jules Basdevant, this agreement is one of the most important precursors of international law applicable to armed conflict, since not only does it contain innovative provisions on humane treatment for the wounded, the sick and prisoners, but it is also the first known application of the customs of war to what we would now call a war of national liberation. Soon after, on April 25, 1821, Bolívar issued a proclamation to his soldiers, ordering them to respect the rules regulating warfare. According to Bolívar, “even when our enemies break those rules, we must respect them, so that the glory of Colombia is not stained with blood”.

10. In the case of Colombia, the humanitarian provisions are especially binding due to the fact that Article 214, para. 2, of the Constitution provides that “the rules of international humanitarian law shall be respected in all cases”. As already stated by this Body, this means not only that international humanitarian law is valid

at all times in Colombia, but also that it is automatically incorporated in the “national legal order, which is, moreover, consistent with the mandatory nature (as already explained) of the axioms which make this body of law an integral part of *jus cogens*”. Consequently both the members of irregular armed forces and all State officials, particularly all members of the police force whose duty it is to apply the humanitarian rules, are under the obligation to respect the provisions of international humanitarian law at all times and in all places, not merely because these are mandatory rules of international law (*jus cogens*) but also because they are binding rules per se of the legal order and must be adhered to by all inhabitants of the territory of Colombia. Indeed, the rules of international humanitarian law preserve that intangible and obvious core of human rights which can on no account be disregarded, even in the extreme situation of armed conflict. They represent the “elementary considerations of humanity” which the International Court of Justice referred to in its 1949 ruling on the Corfu Channel case. Hence there can be no justification, whether before the international community or before the laws of Colombia, for committing acts which clearly violate the dictates of the public conscience, such as arbitrary killings, torture, ill-treatment, hostage-taking, forced disappearances, trial without judicial guarantees and the imposition of *ex post facto* penalties.

Paragraphs 11 to 18

Constitutional incorporation of the rules of international humanitarian law

11. [...]

The human rights treaties and the conventions of international humanitarian law are complementary sets of regulations which, under the common concept of protection of the principles of humanity, form part of the international system for the protection of the rights of the individual. The difference between them is therefore one of applicability, since the former are intended essentially for peacetime situations and the latter for situations of armed conflict, but both bodies of law are designed for the protection of human rights. This Court has already stated in this respect that “international humanitarian law constitutes the application of the essential, minimum and inalienable principles enshrined in the human rights instruments to the extreme situation of armed conflict”.

Now, Article 93 of the Constitution establishes that certain parts of the human rights treaties ratified by Colombia take precedence over domestic legislation. This Court has previously specified that two conditions need to be fulfilled in order for these treaties to prevail over internal law. “The first is recognition that a human rights issue is involved, and the second is that that issue is connected with one of the rights which may not be restricted during states of emergency.” It is obvious that international humanitarian law treaties, such as the Geneva Conventions of 1949 or Protocol I, or this Protocol II under review, meet those conditions, since they recognize human rights which may not be limited either in times of armed conflict or in states of emergency. [...]

[...]

Protocol II, Common Article 3 and respect for national sovereignty [...]

14. On the one hand, Common Article 3 states that the application of its provisions “shall not affect the legal status of the Parties to the conflict”. From the legal standpoint this short phrase was of revolutionary import at the time, because it meant that, in internal conflicts, application of the humanitarian rules ceased to be dependent on the recognition of insurgents as belligerents.

Before the 1949 Geneva Conventions, some legal experts considered that the law of armed conflicts only applied once the State involved, or third-party States, had recognized those who had taken up arms as belligerents. This meant that for a rebel group to be considered subject to international humanitarian law, it was necessary for it to have been acknowledged as being subject to international law, since, in very simple terms, recognition of belligerent status gives rebels or irregular armed groups the right to wage war under equal conditions and with equal international guarantees as the State. Once belligerents have been recognized as such, they cease to be subject to the national legal order, and the internal conflict becomes a civil war governed by the rules applicable to international conflict, since those who have taken up arms have been recognized, either by their own State or by third-party States, as a “belligerent community” with the right to wage war. In such circumstances, belligerents captured by the State automatically enjoy the status of prisoners of war and may not therefore be punished simply for taking up arms and participating in the hostilities, as their recognition as belligerents entitles them to serve as combatants.

Such a situation obviously resulted in disregard for the humanitarian rules in non-international conflicts, since acknowledgement of belligerent status has a significant impact in terms of national sovereignty. The 1949 Conventions therefore distinguished strictly between recognition of belligerent status and the application of humanitarian law, by stating that their provisions could not be invoked to alter the legal status of the parties. The phrase quoted above consequently removes any doubt that humanitarian law might erode the sovereignty of a State. In practice, it means that application of the humanitarian rules by a State in an internal conflict does not imply recognition of belligerent status for those who have taken up arms.

In a non-international armed conflict, individuals who take up arms are therefore subject to international humanitarian law, since they are under the obligation to respect the humanitarian rules on account of these being *jus cogens* provisions binding on all the parties in conflict. Nevertheless, rebels do not become subject to public international law simply by virtue of the application of humanitarian law, because they continue to be subject to the penal legislation of the State, and may be punished for taking up arms and disturbing the public order. [...]

15. [...]

The conclusion that may be drawn from the above is that Protocol II does not interfere with national sovereignty, nor does it imply recognition of groups of insurgents as belligerents. It is therefore wrong to assume, as some speakers have done, that by implementing Protocol II the State of Colombia would be conferring legitimacy upon irregular armed groups, since application of the humanitarian rules has no effect on the legal status of the parties. In an explanation of the reasons for the draft law approving this international instrument, the Government rightly stated as follows:

“What is important is that in international practice there are no known examples of States using the adherence of another State to the Protocol as a justification for recognizing subversive groups operating on the territory of that State as belligerents. Furthermore, with or without Protocol II, belligerent status can be acknowledged at any time, regardless of whether the State in which such groups are operating is a party to this instrument. [...]”

[footnote 25 reads: “Explanation of the reasons for the draft law approving the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts”, in Gaceta del Congreso [Gazette of the Congress], No. 123/94, August 17, 1994, p. 7.]

16. The foregoing does not mean that humanitarian law has no impact on the concept of sovereignty because, as pointed out by the Government Procurator’s Office, these rules presuppose a new perspective of the relationship between the State and its citizens. Indeed, the fact that parties in conflict are restricted in the means of warfare they are entitled to use by the obligation to ensure protection of the individual means that the State no longer has absolute sovereignty over its citizens, and there is no longer a vertical relationship between the governing body and those governed by it, since State attributions are restricted by the rights of the individual. [...]

17. On the other hand, Common Article 3 states that the parties to a conflict can reach special agreements to strengthen application of the humanitarian rules. Agreements of this nature are not, strictly speaking, treaties, as they are not established between entities subject to public international law but between the parties to an internal conflict, which are subject to international humanitarian law. Furthermore, the legal validity of the humanitarian rules does not depend on the existence of such agreements. The latter do, on the other hand, serve a perfectly reasonable political purpose, because the practical and effective validity of international humanitarian law depends to a large extent on the resolve and commitment of the parties to respect its provisions. Obviously this does not mean that humanitarian obligations are subject to reciprocity, as they are independently binding on each of the parties, as was pointed out in paragraph 9 of this Ruling. The existence of such reciprocal undertakings appears to be politically desirable, however, because this will gradually ensure a more effective application of the humanitarian rules set out in Protocol II. [...]

18. The Constitutional Court similarly considers that the presence of neutral organizations, such as the International Red Cross, as provided for in Article 3 common to the 1949 Geneva Conventions and in Article

18 of Protocol II, does not constitute a threat to the sovereignty of the Colombian State, because the latter has freedom of decision whether or not to request their services or accept their offers. Furthermore, the Court agrees with the Government Procurator's Opinion that the activities of such organizations may play a crucial role in ensuring that international humanitarian law is truly put into practice and does not simply have regulatory validity. Experience at the international level has shown, moreover, that the participation of these organizations in monitoring compliance with the humanitarian rules can help not only to render armed conflicts more humane but also to promote the restoration of peace.

Paragraphs 20 to 29

Protocol II, the humanization of warfare, the protection of human dignity and the rights and duties of peace [...]

20. [...]

This Body has already stated that a de jure State must not seek to deny the existence of conflicts, as these are inevitable in life in society. What the State can and must provide for are "adequate institutional channels, since the function of a constitutional system is not to suppress conflict, which is intrinsic to life in society, but to control it so that it is a source of wealth and develops peacefully and democratically". Consequently, the primary duty of the State with regard to armed conflicts is to prevent them from happening; to achieve this, it must establish mechanisms that leave sufficient room at the social and institutional levels for the peaceful resolution of the various types of conflict that may arise in society. This is a major component of the State's duty to preserve public order and guarantee peaceful coexistence.

Once conflict has broken out, ensuring that the war is waged in a humane manner does not absolve the State of its responsibility to restore public order, using the range of resources provided for in the country's legal order, since, as stated earlier in this Ruling, application of international humanitarian law does not suspend the validity of national legislation.

21. This clearly shows that humanitarian law does not in any way legitimate war. Its purpose is to ensure that the warring parties adopt measures to protect the individual. As pointed out in the Government Procurator's Opinion, and by government representatives and others, the humanization of war is, moreover, of special constitutional significance when it comes to efforts aimed at restoring peace. Both national and international legal opinion has, in fact, repeatedly emphasized that the humanitarian rules are not confined to limiting the ravages of war, but also have an unspoken goal that may, on occasion, be more valuable still. Indeed, by preventing unnecessary cruelty in military operations, they can also foster reconciliation between the parties. Thus, by recognizing a minimum set of applicable rules and ethical standards, international humanitarian law encourages mutual recognition by the protagonists and therefore promotes the peace process and the reconciliation of societies disrupted by armed conflict. [...]

The “Martens clause” and the relationship between Protocol II and the rules of international humanitarian law

22. The preamble [to Protocol II] also contains what international legal opinion refers to as the “Martens clause”, which is the principle according to which “in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience”.

The clause indicates that Protocol II must not be interpreted in isolation but must be viewed at all times within the context of the entire body of humanitarian principles, as the treaty simply extends the application of these principles to non-international armed conflicts. Hence the Constitutional Court considers that the absence of specific rules in Protocol II relating to the protection of the civilian population and to the conduct of hostilities in no way signifies that the Protocol authorizes behaviour contrary to those rules by the parties in conflict. The rules contained in other international humanitarian conventions that are compatible with the nature of non-international conflicts should in general be considered applicable to the latter, even if they are not set out in Protocol II, since, once again, the codified rules in this field are the expression of the principles of *jus cogens* that are understood to be automatically incorporated in Colombian domestic legislation, as ruled by this Body in previous decisions.

23. Accordingly, none of the rules of international humanitarian law that expressly apply to internal conflicts, namely Common Article 3 and this Protocol under review, contains detailed provisions governing legitimate means of warfare and the conduct of hostilities. However, international legal opinion holds that these rules, which derive from the law of war, are applicable to internal armed conflicts, as this is the only way of affording effective protection to the potential victims of such conflicts.

At a meeting in Taormina, Italy, on April 7, 1990, the Council of the International Institute of Humanitarian Law adopted a Declaration on the rules of international humanitarian law governing the conduct of hostilities in non-international armed conflicts. [footnote 29 reads: “See the text of this declaration in the International Review of the Red Cross, September-October 1990, No. 278, pp. 404-408”]

According to this declaration, which may be considered the most authoritative expression of international legal opinion in this field, non-international conflicts are governed by the rules relating to the conduct of hostilities which, by virtue of the principle of proportionality, limit the right of the parties to choose means of warfare, in order to prevent superfluous injury or unnecessary suffering. Although none of the treaty rules expressly applicable to internal conflicts prohibits indiscriminate attacks or the use of certain weapons, the Taormina Declaration consequently considers that the bans (established partly by customary law and partly by treaty law) on the use of chemical or bacteriological weapons, mines, booby-traps, “dum-dum” bullets and similar devices apply to non-international armed conflicts, not only because they form part of customary international law but also because they evidently derive from the general rule prohibiting attacks against the civilian population.

24. In the case of Colombia, the applicability of these rules to internal armed conflicts is all the more obvious since the Constitution states that “the rules of international humanitarian law shall be respected in all cases” (Constitution, Art. 214, para. 2). [...]

Applicability of Protocol II in Colombia

25. Article 1 specifies the field of application of Protocol II and establishes certain requirements “ratione situationis” that are stricter than those contained in Article 3 common to the 1949 Geneva Conventions. Whereas Common Article 3 governs any internal armed conflict that extends beyond internal disturbances and tension, Protocol II requires that irregular armed groups be under responsible command and exercise such territorial control as to enable them to carry out sustained and concerted military operations and to apply the rules of international humanitarian law.

The requirements set out in Article 1 could give rise to wide-ranging legal and empirical discussions on whether Protocol II is applicable in the case of Colombia. The Court considers that such discussions may be relevant in terms of the international obligations of the State of Colombia. With regard to Colombian constitutional law, however, the Court concludes that discussion is unnecessary because, as stated in the Government Procurator’s Opinion, the requirements for the applicability of Article 1 are maximum requirements which may be waived by States, since Protocol II expands on and supplements Article 3 common to the 1949 Geneva Conventions. Now the Colombian Constitution clearly establishes that the rules of international humanitarian law shall be respected in all cases (Constitution, Art. 214, para. 2). This means that, in accordance with the Constitution, international humanitarian law – obviously including Protocol II – applies in all cases in Colombia, without it being necessary to determine whether the conflict in question reaches the level of intensity required by said Article 1.

Similarly, Article 1, para. 2, states that Protocol II does not apply “to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”. The Court considers that this too constitutes a requirement for applicability as regards the international obligations of the State of Colombia, but that, by virtue of Colombian constitutional law, the peremptory rule contained in Article 214, para. 2, of the Constitution takes precedence. Consequently, the requirements of humane treatment, as set out in international humanitarian law, are maintained in any case in situations of violence which are not defined as war and do not have the characteristics of an armed conflict. The humanitarian rules are thus extended in practical terms to cover such cases, since they can also serve as a model for regulating internal disturbances. This means that the rules of humanitarian law apply permanently and consistently at the domestic level, as they are not confined to international conflicts or declared civil wars. The humanitarian principles must be respected not only in states of emergency but also in all circumstances in which they are necessary to protect the dignity of the individual. [...]

The principle of distinction between combatants and non-combatants

28. One of the basic rules of international humanitarian law is the principle of distinction according to which the parties in conflict must differentiate between combatants and non-combatants, since the latter may never be the targets of acts of war. There is an elementary reason for this: although war seeks to weaken the enemy's military capacity, it may not target those who do not actively participate in the hostilities – either because they have never taken up arms (civilian population), or because they have ceased to be combatants (disarmed enemy troops) – since they are not military personnel. The law of armed conflicts therefore considers that military attacks against such persons are unlawful, as stated in Article 48 of Protocol I, applicable in this respect to internal conflicts, which establishes that the “Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”.

Article 4 of the treaty under review takes up this rule, which is essential in introducing an effective measure of humanity in any armed conflict, because it states that non-combatants, whether or not their liberty has been restricted, have the right to be treated humanely and are entitled to respect for their person, honour, convictions and religious practices.

29. Article 4 also sets out objective criteria for the application of the principle of distinction, since the parties in conflict may not define at will who is and is not a combatant, and therefore who may or may not be a legitimate object of attack. Under this article, which must be interpreted in the light of the provisions of Articles 50 and 43 of Protocol I, combatants are persons who take a direct part in hostilities as active members of the armed forces or of an armed organization incorporated in those armed forces. Hence Article 4 protects, as non-combatants, “all persons who do not take a direct part or who have ceased to take part in hostilities”. Furthermore, Article 50 of Protocol I provides that in case of doubt whether a person is a civilian, that person shall be considered to be a civilian; this means that he or she may not be the object of attack. Article 50 also stipulates that “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”. As stated in Article 13, para. 3, of the treaty under review, civilians do not lose that status, and may not therefore be the object of attack, “unless and for such time as they take a direct part in hostilities”.

Paragraphs 30 to 36

Obligations deriving from the principle of distinction

30. The distinction between combatants and non-combatants has fundamental consequences. Firstly, as stated in the rule regarding immunity of the civilian population (Art. 13), the parties have the general obligation to protect civilians from the dangers arising from military operations. From this follows, as stated in paragraph 2 of this same article, that the civilian population as such may not be the object of attack, and acts or threats of violence the primary purpose of which is to spread terror are prohibited. General protection of the civilian population from the dangers of war also implies that it is not in keeping with international humanitarian law for one of the parties to involve the population in the armed conflict, as in so doing it would

turn civilians into participants in the conflict and would thus expose them to military attacks by the adverse party.

31. This general protection of the civilian population also covers objects indispensable to the latter's survival, which are not military objectives (Art. 14). Cultural objects and places of worship (Art. 16) may not be used for military purposes or be the object of attack, and it is prohibited to attack works and installations containing dangerous forces, if such attack may cause severe losses among the civilian population (Art. 15). Finally, Protocol II also prohibits ordering the displacement of the civilian population for reasons related to the conflict, unless the security of civilians or imperative military reasons so demand. In the latter case, the Protocol states that "all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, health, hygiene, safety and nutrition" (Art. 17).

32. Humanitarian protection extends, without discrimination, to the wounded, the sick and the shipwrecked, whether or not they have taken part in hostilities. Protocol II thus stipulates that all possible measures must be taken to search for and collect the wounded, sick and shipwrecked, to protect them and to provide them with the necessary assistance (Art. 8). They must therefore be treated humanely and must receive, to the fullest extent possible and with the least possible delay, the medical care and attention required by their condition (Art. 7).

These rules providing for humanitarian assistance to the wounded, the sick and the shipwrecked obviously imply that guarantees and immunities must be granted to persons entrusted with giving such aid; Protocol II thus protects medical and religious personnel (Art. 9), medical duties (Art. 10) and medical units and transports (Arts 11 and 12), which must be respected at all times by the parties in conflict.

33. [...]

As regards the situation in Colombia, application of these rules by the parties to a conflict is particularly binding and important, since the armed conflict currently affecting the country has seriously affected the civilian population, as evidenced by the alarming data on the forced displacement of persons included in this case. The Court cannot disregard the fact that, according to the statistics compiled by the Colombian Episcopacy, more than half a million Colombians have been displaced from their homes as a result of the violence and that, as stated in the investigation in question, the principal cause of displacement involves violations of international humanitarian law associated with the internal armed conflict.

34. The Court does not share the rather confused argument put forward by one of the speakers that the protection of the civilian population is unconstitutional since combatants could use the population as a shield, thereby exposing it "to suffer the consequences of the conflict". On the contrary, the Court considers that, pursuant to the principle of distinction, the parties to the conflict may not use and endanger the civilian population in order to gain a military advantage, as that contradicts their obligations to afford general protection to the civilian population and to direct their military operations exclusively against military

objectives.

Furthermore, the feigning of civilian status to injure, kill or capture an adversary constitutes an act of perfidy which is prohibited by the rules of international humanitarian law, as clearly stipulated in Article 37 of Protocol I. Protocol II admittedly does not explicitly forbid this form of conduct by the parties in conflict, but, as already pointed out in this Ruling, that does not mean that it is authorized, since the treaty must be interpreted in the light of all the humanitarian principles. As stated in the Taormina Declaration, the prohibition of perfidy is one of the general rules governing the conduct of hostilities that applies in non-international armed conflicts.

Fundamental prohibitions and guarantees

35. Article 4 of the treaty under review not only provides for the general protection of non-combatants but also, expanding on Article 3 common to the 1949 Geneva Conventions, lays down a series of absolute prohibitions which may be regarded as the hard core of guarantees afforded by international humanitarian law. [...]

36. By virtue of their direct and obvious link with the protection of the life, dignity and integrity of the individual, these prohibitions under international humanitarian law also have major consequences in constitutional terms, because they require the military principle of due obedience, set out in Article 91, sub-para. 2, of the Constitution, to be assessed in the light of those overriding constitutional values. This Body has in fact already pointed out that, since military discipline must be reconciled with respect for constitutional legislation, a distinction inevitably needs to be drawn between military obedience “which must be observed by subordinates so that discipline does not break down, and obedience which, by overstepping the limits of a reasonable order, involves blindly following instructions issued by superiors”. The Constitutional Court thus stated as follows:

“Accordingly, by virtue of the criterion which has been established, a subordinate may indeed refuse to obey an order given by his superior if it involves torturing a prisoner or causing the death of someone hors de combat, because the mere statement of such an act, without the person concerned requiring any special level of legal knowledge, shows that such conduct is clearly detrimental to human rights and in obvious contradiction with the Constitution.

The notion of a legitimate order, upheld by the Constitution in its preamble, could not be interpreted in any other way, nor could Article 93 of the Constitution, according to which “the international conventions and treaties ratified by the Congress, which recognize human rights and prohibit their restriction in states of emergency, take precedence over the domestic legal order.

Under the terms of the First Geneva Convention of August 12, 1949, approved by Law 5a of 1960 (Official Gazette No. 30318), which the High Contracting Parties undertook to respect and for which they pledged to

ensure respect “in all circumstances”, there are serious violations against which States must take appropriate measures. [...]”

The above considerations show that the article regarding due military obedience (Constitution, Art. 91) cannot be interpreted in isolation, but its meaning needs to be determined systematically. It is therefore necessary to set this principle against the other principles, rights and duties enshrined in the Constitution, and in particular its scope must be brought in line with the minimal obligations imposed upon parties to a conflict by international humanitarian law. [...]

The circumstances described above lead to one obvious conclusion: due military obedience cannot be invoked to justify committing acts that are clearly detrimental to human rights. [...] This is established, for example, in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, [...] which takes precedence over the internal legal order, since it recognizes rights that cannot be suspended in states of emergency (Constitution, Art. 93), [and] states unequivocally that “an order from a superior officer or a public authority may not be invoked as a justification of torture”. [...]

Paragraphs 41 to 42

Optional clause on the granting of amnesty upon the cessation of hostilities, for reasons related to the armed conflict

41. Article 6, para. 5, stipulates that once hostilities have ended, “the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”.

One of the speakers regards this provision as unconstitutional because of the unacceptable impunity it implies, since amnesty would be granted in advance for atrocious crimes. Furthermore, the speaker maintains that the granting of amnesty would cease to be a prerogative of the State and would become a commitment agreed beforehand and a kind of “pirate’s licence” for offences perpetrated during the armed conflict.

42. The Court does not share this opinion, and considers that the above interpretation of the scope of Article 6 is incorrect. Indeed, in order to understand the meaning of the aforementioned provision, it is necessary to take into consideration its purpose in a humanitarian law treaty designed to apply in internal conflicts, as this type of rule does not appear in the humanitarian treaties relating to international wars. A close examination of Protocol I applicable to international conflicts does not show any provision relating to the granting of amnesties and pardons between the parties in conflict, at the end of hostilities, even though this treaty contains more than one hundred articles. Moreover, the provision in Article 75 of Protocol I that establishes procedural guarantees is almost identical to Article 6 of Protocol II, but makes no reference to the question of

amnesty.

This omission from Protocol I is not a careless oversight, nor does it mean that combatants captured by one of the parties will continue to be deprived of their liberty after the armed conflict has come to an end. The omission is clearly justified, because in the case of international wars, combatants captured by the enemy automatically enjoy the status of prisoners of war, as stipulated in Article 44 of Protocol I and Article 4 of the Third Geneva Convention relative to the Treatment of Prisoners of War. Now, as already stated in this Ruling, one of the essential characteristics of prisoner-of-war status is that prisoners may not be punished simply for having taken up arms and having participated in hostilities; indeed, if States are at war, the members of their respective armed forces are considered to have the right to serve as combatants. The party that captures them may retain them only in order to limit the enemy's potential to wage war, but it may not punish them for having fought. Consequently, if a prisoner of war has not violated humanitarian law, he must be released and repatriated without delay after the cessation of active hostilities, as stated in Article 118 of the Third Geneva Convention. Any prisoner who has violated humanitarian law should be punished as a war criminal in the instance of a grave breach, or could be subject to other penalties for other violations, but he may in no case be punished for having served as a combatant.

It is thus unnecessary for States to grant reciprocal amnesty after the end of an international war, because prisoners of war must be automatically repatriated. In internal armed conflicts, however, those who have taken up arms do not in principle enjoy prisoner-of-war status and are consequently subject to penal sanctions imposed by the State, since they are not legally entitled to fight or to take up arms. In so doing they are guilty of an offence, such as rebellion or sedition, which is punishable under domestic legislation. [...]

In situations such as those of internal conflict, where those who have taken up arms do not in principle enjoy prisoner-of-war status, it is easy to understand the purpose of a provision designed to ensure that the authorities in power will grant the broadest possible amnesty for reasons related to the conflict, once hostilities are over, as this can pave the way towards national reconciliation. [...]

III. DECISION

With regard to the foregoing, the Constitutional Court of the Republic of Colombia, in the name of the Colombian people and pursuant to the Constitution,

DECIDES:

1. To declare the Protocol Additional to the Geneva Conventions of August 12, 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), drawn up in Geneva on June 8, 1977, to be APPLICABLE.
2. To declare Law 171 of December 16, 1994, approving the Protocol Additional to the Geneva Conventions of August 12, 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),

to be APPLICABLE. [...]

Discussion

1. What are the advantages and disadvantages of the Colombian system, which prescribes a preliminary review by the Constitutional Court of whether an international treaty by which Colombia is about to be bound is compatible with the Colombian Constitution?
 - a. Are States not party to a treaty which contains a rule of IHL still bound by that rule if it is a rule of customary law or it belongs to jus cogens? Do all rules of IHL belong to jus cogens? Is a rule of IHL not belonging to jus cogens binding?
 - b. Is every rule belonging to customary law or to jus cogens also binding on an armed group fighting within a State against the government? Are only such rules binding on such a group?
 - c. Did Protocol II become part of Colombian law through Art. 214(2) of the Colombian Constitution even before Colombia became a party to Protocol II?
2. Are the rules of IHL subject to possible derogation in exceptional situations, e.g., in armed conflicts? In emergency situations not amounting to armed conflicts?
3. In which sense do rebels fighting against a government become subjects of international law thanks to IHL? Does your answer depend on whether the State in question is a party to Protocol II?
4. Are special agreements under common Art. 3(3) of the Conventions subject to the law of treaties? Are they legally binding? Do the humanitarian obligations such agreements foresee exist independently of such agreements? What purpose do they have in this case?
5. In which sense does a distinction between jus ad bellum and jus in bello exist in non-international armed conflicts? Are non-international armed conflicts prohibited under international law?
6.
 - a. Under the reasoning of para. 22 of the ruling, are all rules of IHL applicable in non-international armed conflicts? Because or insofar as they belong to jus cogens? At least in Colombia, owing to Art. 214(2) of the Colombian Constitution? Does Art. 214(2) make them applicable even outside armed conflicts? Does Art. 214(2) incorporate the treaties of IHL independently of their rules on their material scope of application?
 - b. Why is the principle of distinction applicable in non-international armed conflicts? Because it is the only way to protect the civilian population? Because it is a rule of customary law applicable to international armed conflicts? Because parties to non-international armed conflicts have created, through their behaviour, this rule of customary law? Because it is implicit in the prohibition to attack the civilian population set out in Art. 13(2) of Protocol II?
 - c. Do the laws of international and of non-international armed conflicts distinguish between the same categories of individuals under the principle of distinction? Does Protocol II, Art. 4 establish the principle of distinction between civilians and combatants? Is that principle mentioned anywhere else in Protocol II? Why do you think Protocol II is not worded the same way as Art. 48 of Protocol I?
 - d. According to the Court, did a non-international armed conflict exist in Colombia at the time of the decision? Were the conditions for the applicability of Protocol II fulfilled?
 - e. Why should Protocol II be read with Protocol I, Arts 43 and 50? How does the Court conclude that the rules of the law of international armed conflict not mentioned in Protocol II (or GC I-IV, Art. 3) nevertheless apply to non-international armed conflicts? Because they are customary? Because without them the guarantees foreseen in Protocol II are void? Are all paragraphs of Protocol I, Art.

50 equally applicable in non-international armed conflicts even if they do not appear in Protocol II, Art. 13? What elements of Protocol I, Art. 50 do not apply even by analogy in non-international armed conflicts?

- f. Why is the prohibition of feigning civilian status not mentioned in Protocol II? Why is such behaviour nevertheless prohibited in non-international armed conflicts? Because of the Martens clause? Because it is prohibited by customary law? Because it is implicit in the prohibition to attack civilians?
- 7. Why may a superior order to commit a serious violation of IHL not be carried out?
- 8. In what respect does the interpretation of Protocol II, Art. 6(5) given in this decision contradict that of the Supreme Court of South Africa in *South Africa, AZAPO v. Republic of South Africa*? Which arguments are similar? What additional arguments on the interpretation of Protocol II, Art. 6(5) appear in the Colombian decision?