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CAN INTERNATIONAL LAW HELP? AN ANALYSIS OF THE COLOMBIAN PEACE PROCESS

*Jorge L. Esquirol**

“Colombia is the last site of major civil strife in our hemisphere.”

President Bill Clinton,
October 28, 1998.

“Colombia’s people... should know that we understand the many dimensions and long-term nature of the problems they face, and that we will do all we can to help them.”

Secretary of State Madeleine Albright,
August 10, 1999.

I. INTRODUCTION

In recent months, the guerrilla war in Colombia has dramatically entered the world stage. While Colombian governments for decades resisted the internationalization of the internal conflict, they are now lobbying for U.S. and European financial support, accepting bi-lateral conditions, and invoking international norms. This approach offers new possibilities for resolving the forty year conflict. Upon closer analysis, it could also prolong it.

By internationalization, here, is not meant the mandatory application of the laws of interstate war nor the recognition of rights to self-determination. It refers to attempts to manage, and potentially resolve, the internal conflict through international legal formulas, rather than through simply national or constitutional means. International legality, in this setting, appears to offer a neutral language in which to conduct peace talks. Free of the limitations inherent in municipal law, its doctrines and rules are not settled exclusively by reference to the state. Moreover, the general policy underlying international law is presumed to promote peace and, at a minimum, to humanize the war.

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Internationalization in the sense used here also extends to financial assistance from the international community. The multiple dimensions of the Colombian conflict require considerable resources. Securing the needed support is integral to a comprehensive peace settlement. Bi-lateral or multi-lateral aid and its conditions, whatever they may be, open the process to international interests. Presumably, any such conditions would set incentives for peace and not war. As such, an international law approach coupled with multi-lateral support presents a rather attractive package, at first blush.

The actual form that internationalization would take and the interests which it stands to promote, however, are part of a different and more complicated story. In Colombia, the terrain of international law is dominated by legal experts not so clearly in favor of a negotiated solution. Colombian publicists routinely invoke international law to frustrate negotiations and compromise. Their version of law, held to be singularly authoritative, is actually quite unreflective of contemporary international practice; dismissive of legal alternatives; and un-conducive to resolving the conflict. As such, an "internationalization" that advances primarily the use of international law authority by local actors as the vehicle for peace talks will likely fail. The dominant conception of law, in this setting, is generally directed against lending legal legitimacy to political compromise.

Alternatively, an international approach in the hands of the U.S. would not fare much better. Internationalization in this context quickly reveals that negotiating the guerrilla war is not the priority. Indeed, the largely bi-partisan support for a hefty assistance package, now working its way through Congress, is quite telling. Domestic interests and the political benefits of fighting drugs are at the forefront of U.S. involvement. As a result, addressing the underlying bases of Colombia's historical conflict is not paramount. Quite the opposite, the emphasis on a military strategy against drugs will surely entrench the guerrilla war.

As a result, the projected benefits of internationalization as currently envisaged are mostly illusory. This is the case since both groups, Colombian publicists and U.S. policy-makers, who stand in the position of stewards to an international approach oppose substantial political negotiation. The shift to internationalization, thus, would merely reinforce the particular interests of these groups, instead of promoting the purported legality, neutrality and peace associated with internationalism. This is not to say that an international approach should be abandoned all together. Quite the contrary, this Article attempts to identify the particular interests, poised to control an international effort, which undermine a broad-based peace initiative. In their place, a more successful program would focus on the centrality of Colombia's legacy of internal war and would offer wide room for legal alternatives, facilitating the agreements reached by local negotiators.

The bulk of this Article examines the positions of international law taken by Colombian publicists. I focus on two issues which have been the subject of much recent debate. The first is the status of Colombia's guerrilla forces. This question draws on the international law doctrine of belligerency, which purportedly offers insurgents international standing. The guerrillas lay claim to this formal status. The

government is opposed for fear of undermining its international position. International law, as presented by Colombian authorities, is used to caution against governmental action which would reinforce the guerrillas' claims. Citing elements of belligerency, international law arguments are marshaled to forestall negotiation and compromise rather than to facilitate them.

The second issue concerns the rules of conduct of non-international war. The relevant law is common Article 3 of the Geneva Conventions of 1949 and its Protocol II of 1977. These provisions establish the formal rules for internal conflicts; at the same time, they allow parties to the conflict to enter into humanitarian agreements of their own. Prior to official peace talks, one of Colombia's two main guerrilla groups agreed, at least in principle, to such an agreement. However, the terms were rejected by Colombia's international law establishment, if not by the government directly, for falling below the minimum standards of international humanitarian law. In this instance, law as presented by Colombian publicists sets the outer boundary to negotiation and compromise. That boundary, though, is drawn too tightly. As a result, it functions simply to condemn those on the other side of the negotiating table, rather than to promote humanitarian conduct.

The last portion of this Article examines the meaning of U.S.-led internationalization of the Colombian conflict. In this section, I focus on the preeminence of the drug war over the internal conflict. Here the problem is not one of excessive rigidity in terms of international law doctrines, as is the case with Colombian publicists. The contrary is true. Domestic U.S. policy threatens to overrun the primacy of another nation's sovereign priorities. Turning a peace process among internal political rivals into a battlefield against drugs transgresses the limits of policy pragmatism. It advances U.S. concerns, through the leverage of international assistance, over and above the will of Colombia's people: in contravention of national plebiscites which overwhelmingly endorse a negotiated solution to the guerrilla war.

Of course, most Colombians themselves are anxious to combat the illegal drug trade as well. They more than anyone else experience the ravages of its effects. The drug trade is closely linked to the on-going conflict: war is financed in part through illegal drug revenues. As such, Colombian officials have not hesitated to accept counter-narcotics conditions in exchange for assistance with the peace process. sovereignty concerns, per se, have not been raised. Peace and counter-narcotics, proponents of aid to Colombia contend, are compatible goals. While that is no doubt correct, the realities of the U.S. political process have put the accent on the drug war. Counter-narcotics conditionality may jeopardize the centrality of the peace process. Putting the drug war ahead of the peace process is at best a questionable strategy: one that is not likely to lead to results in either case.

II. BACKGROUND

Political violence and specifically guerrilla war are permanent features of Colombian history.¹ The issues and the actors have changed over time, but violence has remained a consistent and troubling mode of politics.² In its early history, fighting erupted over questions of political organization, regional power and its institutional representatives. During the 19th and most of the 20th century, political party factionalism was a constant source of ethnic-like strife. For the past forty years, guerrilla violence shaped by Cold War divisions has continued to engulf the nation. On the left, a well-armed insurgency has grown and continues to advance against the state. On the right, paramilitaries have since the 1980's emerged as an organized, armed force. Throughout, drug-related terrorism has not ceased. In the late 1980's, the drug lords directly challenged the government and lost, still massive drug revenues continue to fuel the society's generalized violence.

The historical account that follows is a deliberate attempt to highlight the disjunctures of Colombia's political system.³ Often, representations of Colombia and its past are limited to accounts of drug-trafficking, violence and human rights abuses. The political background of this situation is as, if not more, important. Colombia's history is marked by the efforts of its leaders to resist oppositional groups through the twin devices of exclusion and co-optation. The current state has been preserved by repeatedly coopting implacable enemies, offering them a share of state power, while excluding and repressing less powerful forces. Ironically, this closed system of power sharing, at times de jure at others de facto, has been able to sustain itself and is responsible for the ostensible uninterruptedness of Colombia's long-lasting democracy. However, the system of exclusion and co-optation has now all but broken down.

1. See EDUARDO PIZARRO LEONGÓMEZ, *INSURGENCIA SIN REVOLUCIÓN: LA GUERRILLA EN COLOMBIA EN UNA PERSPECTIVA COMPARADA* 114 (1996) [hereinafter PIZARRO]. (Pizarro affirms that political violence is characteristic of all of Latin America; by contrast, a history of guerrilla violence is more particular to Colombia.) Translation of all Spanish sources in this article were provided by the author.

2. See Malcolm Deas, *Violent Exchanges: Reflections on Political Violence in Colombia*, in *THE LEGITIMIZATION OF VIOLENCE*. (David E. Apter ed., 1997). Malcolm Deas notes the complexity of political violence in Colombia and its unamenability to totalizing explanations. He does note that: "Prolonged violence has not convinced Colombians that only drastic solutions will work, or that any authority is better than none." *Id.* at 389. While rejecting an explanation that Colombia is condemned to political violence by heritage alone, he does give considerable weight to the particular tradition of violence as an explanation, which is not so different: "One can begin to isolate the peculiar nature of Colombian political conflict in the nineteenth century. It seems to have involved more strata of the local society, . . . more frequently and repeatedly . . . Nor did the conflict ever resolve . . . the Liberal-Conservative divide. I shall suggest that this peculiar nature is part of an explanation of the persistently high level of political violence in Colombia." *Id.* at 354.

3. The events related in this Article describe the situation in Colombia through the first quarter of 2000. This piece explores primarily the early period of the Colombian peace process. It is an attempt to memorialize and analyze the arguments and positions of international law affecting this time. In any case, considering the quickly changing nature of the subject matter, the factual situation described may have evolved significantly by the time this Article is actually published.

Efforts aimed at Colombia's troubling situation cannot overlook, and indeed must specifically target, the unworkability of the current political system. Assistance aimed at human rights compliance and counter-narcotics operations must take account of the institutional framework in which these would take place. In this light, the account below argues for political and institutional reform as fundamental. Only upon the achievement of some measure of political and societal stability can the problems of drugs, criminality and violence be effectively addressed.

A. Alternating Political Repression and Co-optation

Beginning at independence in the 1820's, northern South America emerged from Spanish colonialism along the lines of the former vice-royalty of New Granada. The nation was comprised of modern-day Colombia, Ecuador, Panama and Venezuela.⁴ Despite regional tensions, a centralized form of government was adopted. It was only dictatorial rule which toward the end kept the republic intact.⁵ By the 1830's, Ecuador and Venezuela could no longer be contained and seceded, seeking greater autonomy.⁶

Struggles over the political system did not end there. Colombia's territory is marked by strong regional differences, and the nineteenth century is a record of rural violence and conflict among quasi-sovereign regions. After a period of experimenting with federalist formulas, the model of partially autonomous states was discredited as a result of its inability to secure peace and to provide for stable administration. Further controversy was avoided — roughly — by the Constitution of 1886 which established a highly centralized political form: the national executive was to select all governors of departments (smaller territorial units than the regional extension of former states) who in turn selected all municipal mayors.⁷ Not until the Constitution of 1991 was this arrangement to change, granting increased powers to departmental and local authorities.

The twentieth century ushered in civil war between the two political parties consolidated by that time: the Liberals and the Conservatives. Since the 1886

4. See generally Malcolm Deas, *Venezuela, Colombia and Ecuador: The First Half-Century of Independence*, in 3 THE CAMBRIDGE HISTORY OF LATIN AMERICA: FROM INDEPENDENCE TO C.1870 (Leslie Bethell ed., 1985).

5. The Congress of Cúcuta in 1821 established a rigidly centralized form of government for a trial period of ten years, in part on the basis of providing for a mutual defense against renewed Spanish attack. Before 1831, a new constitutional assembly was held due to growing regional dissatisfaction. Upon the convention's dissolving without any agreement, the Republic's president, Simón Bolívar, assumed dictatorial powers. This quickly hastened the demise of a unified Gran Colombia. See generally *id.*

6. Panama did not become independent from Colombia until 1902. Its independence was gained through the intervention of U.S. interests in building the Panama Canal. With the support of the U.S., the Panamanians declared their independence and immediately proceeded to grant the U.S. the canal concession. See ROBERT FREEMAN SMITH, *Latin America, the United States and the European Powers, 1830-1930*, in THE CAMBRIDGE HISTORY OF LATIN AMERICA, VOL. IV C. 1870 to 1930, 101 (1986).

7. See DAVID BUSHNELL, *THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF* 143 (1993) [hereinafter BUSHNELL].

Constitution, Conservatives had a lock grip on the state.⁸ Liberals sought power by whatever means they could. A formal war began in late 1899 and officially lasted 1,000 days, therefore the descriptive Thousand Days' War, but on the battlefield the Liberals were soon crushed. Faced with few options, they turned to a course of guerrilla action.⁹ Increased brutality on all sides did not produce either party's defeat. Rather, faced with the impending secession of Panama, encouraged by the U.S., the parties signed a peace treaty aboard a U.S. warship anchored off the coast of their shores.¹⁰

In the 1930's, the Conservative reign was finally disrupted by a Liberal victory at the polls. Unaccustomed to sharing power, a period of uneasy co-existence ensued. It ultimately broke down, following the return of Conservatives to elected power, in mass rioting known as *el Bogotazo* or *9 de abril* in 1948, marking the beginning of a five year war between Liberals and Conservatives. This period of Colombian history is recalled as *La Violencia*. Its end was achieved only as a result of a military coup in 1953 under the command of General Gustavo Rojas Pinillas, in power until 1957.

The return to civilian rule came under the form of a revised electoral system. Under a sort of peace agreement, the country was run by alternating administrations of Liberals and Conservatives. Under the agreement, the sitting administration appointed roughly equal numbers from each party to government posts. The arrangement was known as the National Front, and it formally lasted until 1973. Since then, Liberals and Conservatives have not taken up arms against each other, their battles now limited to the political arena.¹¹

During the National Front, a different force emerged: guerrilla groups steeped in the ideology of the radical left. Numerous reasons have been advanced for their emergence in Colombia, but salient among them is the political exclusion that the National Front engendered. While it secured peace between the two main political camps, it did so at the expense of other politics. The guerrillas identify themselves as a reaction to this restricted system. Still, scholars continue to debate whether or not the political system was closed, in fact.¹² Regardless of one's position, the point

8. *See id.* at 147-48. "Between 1896 and 1904 the Liberals were able to elect only two members of the Chamber of Representatives; and though their party undoubtedly enjoyed only minority support in the nation at large, there were many election districts where it could still have won under conditions of fair competition."

9. *See id.* at 150.

10. *See id.* at 152.

11. The last official National Front president was Misael Pastrana, father to current President Andrés Pastrana. *See* BUSHNELL, *supra* note 7, at 143.

12. *Cf.* DANIEL PECAUT, *CRÓNICA DE DOS DÉCADAS DE POLÍTICA COLOMBIANA 1968-1988* (1989) (rejecting the actual exclusiveness of the political system as an explanation for Colombian violence); *see also*, Deas, *supra* note 2, at 363. Yet Deas notes: "[t]his rhetorical tradition (claiming a closed political system as the reason for political violence) may well contribute to Colombia's continued propensity for political violence: it diabolizes, polarizes, and it can be used by both sides of the partisan divide." *Id.* at 363.

remains that the National Front was at a minimum perceived as exclusionary and incapable of channeling these particular group demands.¹³

Possibly even more telling, however, are the insurgent groups' origins.¹⁴ Guerrilla activity commenced predominantly in the same areas plagued by La Violencia and in many cases by the same people.¹⁵ A re-alignment of factions occurred. This time the warring camps consisted of the coalition government on one side and left-wing rebels on the other: in other words, those pacified by the National Front arrangement on the one side and with those that were not on the other. The rebels demonstrated some of the very techniques of rural strife of the party wars and earlier federalism controversies. Their ideology, however, was more a product of Cold War divisions. Today, much of their political program appears more in line with progressive democracy than doctrinaire Marxism — although not in some important respects.

Faced with continuing unrest, in 1991 the Supreme Court of Colombia made way for a citizen-sponsored constitutional initiative. A popularly-elected assembly was charged with widening the scope of representative politics and restructuring the institutions of the state. The constitutional process itself was rather free-wielding and brought together delegates from a wide sector of society. Represented were former guerrillas, indigenous peoples, the clergy, Afro-Colombians and a wide array of political interests. The 1991 Constitution was a response to the widespread perception of institutionalized exclusion. Notably missing were the country's main guerrilla groups, still active in the war, who refused to participate in the process.

B. The Current Guerrilla Conflict

The guerrillas today consist of two main groups. The largest is the Fuerzas Armadas Revolucionarias de Colombia - Ejército del Pueblo (more commonly known as the FARC), which is estimated to consist of approximately 10,000-15,000 full-time combatants¹⁶ scattered throughout Colombia's mountain ranges. The organization is an outgrowth of the Colombian Communist Party. Under a dual program of political and violent action, the FARC initially promoted agrarian

13. Currently, both major guerrilla groups list broader political participation at the top of their demands. Citing a FARC pronouncement: "The proposal to form a broad political movement, different in its programmatic objectives and ends is a necessity so that the masses can express their thoughts and needs by way of a political vehicle other than the bi-partisanism of Liberals and Conservatives." [Comité Internacional de la Cruz Roja, Comisión de Conciliación Nacional & Cambio 16] LA PAZ SOBRE LA MESA 41(1998) [hereinafter LA PAZ].

14. See PIZARRO, *supra* note 1, at 17-18.

15. See *id.* at 111. "The historical evidence suggests that the guerrilla experiments undertaken in the 60's flourished exactly in the same rural areas and in the same populations that had just experienced the phenomenon known as 'La Violencia.' This evidence cannot be ignored or considered a mere coincidence." *Id.*

16. *Anti-drug Efforts in Colombia: Hearings Before the Senate Comm. On Foreign Relation*, 106th Cong. 16 (1999) [hereinafter *Hearings*] (Testimony of Ambassador Thomas R. Pickering, Under Secretary for Political Affairs). See also U.S. DEP'T OF STATE, COLOMBIA COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1998 (1999) [hereinafter COLOMBIA COUNTRY REPORT] available at www.state.gov/www/global/human.rights/1999.hrp.report (last visited Oct. 14, 2000).

reform, development of the peasant economy, and political autonomy.¹⁷ After various attempts by the military to eradicate them, they were radicalized and came to embrace more revolutionary goals. Their political wing, active in the 1980's, was eliminated through the progressive assassination of its representatives by right-wing extremists.

While self-identified Marxists, the FARC's political pronouncements begin to reflect the end of the Cold War.¹⁸ They advance the formation of a New Colombia based on principles of social justice and economic self-determination. Specifically, they propose institutions for broad political participation, more state control over the economy, and land redistribution through expropriation: in furtherance of these objectives the FARC imagines for itself a leadership role.¹⁹ Additionally, the group considers American interests as antagonistic to their program. They oppose the Colombian state because of its subservience to U.S. dictates but also because of the corruption and oligarchy in control. They finance themselves mostly by providing protection for drug producers and traffickers and by kidnapping civilians for ransom.²⁰ The FARC currently holds 42,000 sq. km. of territory in southeastern Colombia, ceded to them as a good will gesture by the government to initiate peace talks.

The second largest group is the Unión Camilista Ejército de Liberación Nacional (more commonly known as the ELN) estimated at near 5,000 strong.²¹ The ELN's formation was strongly influenced by the Cuban revolution. Their early strategy drew on Ernesto Guevara's catalyzing rural "focos." Elenos (as members of the ELN are known) were also strongly impacted by liberation theology. Some of their most revered leaders were ex-Catholic priests. The founder, Camilo Torres, was a priest from an upper middle class family in Bogotá.²² The group's leader throughout a large part of its existence was el cura Pérez (the priest Manuel Pérez), who died in 1998 of natural causes, in his camp in the mountains of Colombia. The group's theological leaders, responsible for the ELN's repeated appeals to international humanitarian law and pronouncements against the drug trade,²³ are

17. See PIZARRO, *supra* note 1, at 39.

18. See, e.g., ALFREDO RANGEL SUÁREZ, COLOMBIA: GUERRA EN EL FIN DE SIGLO 27 (1998) [hereinafter RANGEL]. "[I]n a relatively short time, the guerrilla phenomenon in Colombia has radically changed in nature and dynamic. The guerrillas have gone from being essentially ideological, very poor in economic resources and with scarce military capacity, to being politically pragmatic — even while basically maintaining their Marxist ideology, very economically solvent and with increasing military strength." *Id.*

19. LA PAZ, *supra* note 13, at 24-25, 33-34. Of course, these are simply the public statements of the insurgency force. Substantial discrepancies are known to exist between internal and external FARC communications. It is not clear whether the FARC would in fact implement a democratic governance structure, as currently understood, if they secured effective control over the country.

20. See HUMAN RIGHTS WATCH, WAR WITHOUT QUARTER: COLOMBIAN AND INTERNATIONAL HUMANITARIAN LAW 132 (1998) [hereinafter WAR WITHOUT QUARTER]; see also *Hearings, supra* note 16, at 16.

21. See *Hearings, supra* note 16, at 16.

22. See generally Walter J. Broderick, CAMILO TORRES: EL CURA GUERRILLERO (1977).

23. See LA PAZ, *supra* note 13, at 24-25, 33-34.

counterbalanced by a more radical faction with fewer ethical qualms. It is this latter faction which is expected to gain more control.²⁴

The ELN has recently received widespread attention in 1999 due to a number of high profile kidnappings. The subversive group hijacked an Avianca airliner en route from Bucaramanga to Bogotá. And, in 1999, it kidnapped an entire congregation of churchgoers at the La María church outside of Cali. These events and a number of other related kidnappings were undertaken to pressure the government to cede to its demand for a second demilitarized zone for peace talks with the ELN. Serving an economic function as well, kidnapping and extortion are principal sources of revenue for all guerrilla groups.

In terms of military strategy, the guerrillas principally target towns and villages. They are more circumspect around the better fortified urban centers and seats of elite power. Specifically, their war effort is aimed at local police and municipal officials more so than at the military directly. Overpowering local authorities ensures their effective control over political offices and area finances.²⁵ Ironically, the decentralization of political administration following the 1991 Constitution has worked in their favor. Without a strong state to safeguard the political process and fiscal integrity, the guerrillas have been able to control local officials and siphon state funds.

C. The Colombian State's Response

The current administration of Andrés Pastrana was elected on his platform for peace. After half a century of guerrilla war, many sectors are convinced that the only viable option is political negotiation. It appears that the government's approach is, not unlike the National Front arrangement or the Constitution of 1991, another political pact to bring the guerrillas within current state institutions. During his campaign, Pastrana opened channels with the FARC. The image of a Colombian presidential hopeful meeting with guerrilla leaders caused a sufficient stir to help turn the electoral tide in Pastrana's favor.

This is not to say that other issues were not important in the 1998 vote. The prior administration of Ernesto Samper was riddled with scandal and controversy. Most saliently, Samper was accused of knowingly taking money from drug

24. See RANGEL, *supra* note 18, at 61-64.

25. See *id.* at 40-41. Rangel describes it this way: "the guerrilla sends to the new locality which is going to serve as the center of action for the future new front an organizational and financial commission composed of a few political cadres whose objective is to explore the territory, establish the conditions for citizen safety in the zone, find the possible sources of financing and inquire about community relations with the local police. Afterwards, another commission styled of public order is sent whose first objective is to eliminate delinquents from the area and whose second purpose — once obtaining the sympathy of the population as a result of the improved security conditions which those murders, paradoxically, provoked — is to attack the local police barracks with the goal of neutralizing them in the urban center. The systematic and reiterated attacks of the guerrilla on police units, with the objective of causing their withdrawal or to neutralize their activity, have the purpose of monopolizing the force to impose their own rules of the game to which, sooner or later, all end up adapting and accommodating." *Id.*

traffickers to finance his 1994 presidential campaign.²⁶ High ranking members of his administration were implicated and went to jail. After impeachment proceedings in the Colombian Congress, Samper was absolved of any wrongdoing. The Congressional vote, however, was not sufficient to quell public outrage at what seemed convincing proof of the president's involvement. The U.S. government was not so easily convinced either. Samper's visa was withdrawn, and U.S. relations were at a decisive low point.²⁷ Pastrana's opponent in the presidential campaign, Horacio Serpa, was Samper's former minister of the interior.

In any event, Pastrana's administration has made the peace process his priority throughout his time in office. Critics question the president's excessive focus to the detriment of other questions of domestic policy. For one, the Colombian economy at the end of 1999 was in the middle of one of the worst recessions of the century.²⁸ Still, the president has been personally handling the peace process, with only one senior aide.²⁹ With his conservative political credentials, he has been able to get Colombia's traditional political class behind him.³⁰ No less important, he has also established a strong working relationship with President Clinton and the U.S. administration. His Plan Colombia was elaborated in concert with White House advisors, and his program is clearly attuned to Washington politics.

Pastrana has thus far maintained the support of the Colombian military. Their relationship has withstood several blows. Disagreement over the demilitarized zone, discussed below, reached particularly troubling levels. Furthermore, continuing accusations of human rights violations also add to existing tensions. The Colombian military is near 150,000 strong,³¹ of which only about 50,000 are actual

26. Ironically, the question of extradition was settled by the 1991 Constitutional Assembly. The possibility existed that extradition would form part of the final document. The Medellín cartel was adamant against it. Ultimately decided by secret vote, extradition did not form part of Colombia's 1991 Constitution. However, a subsequent constitutional amendment in 1997, submitted by the Samper administration, amended the constitution and revived the constitutionality of extradition.

27. *Prepared Testimony Before the House Comm. on Int'l Relations Subcomm. on W. Hemisphere Affairs*, 105th Cong. (Aug. 5, 1998) (statement of Michael Shifter) [hereinafter Shifter], available at <http://web.lexis-nexis.com/congcomp/printdoc> (last visited Oct. 14, 2000).

28. See James Wilson, *Civil Strife Holds Bogotá in Thrall*, FIN. TIMES (London), May 16, 2000, at 52.

29. The first High Commissioner for Peace was Victor G. Ricardo, a career politician. Despite Pastrana's high priority on the peace process, his hand-picked advisor was often questioned for his lack of background in this area. Ricardo resigned his post effective late April 2000, under serious death threats from the paramilitaries. His successor is Camilo Gómez, private secretary to the President since 1998 and already a government negotiator in the current peace process. See *Camilo Gómez, Nuevo comisionado de Paz*, EL TIEMPO (Bogotá, Colom.), Apr. 27, 2000.

30. The Pastrana administration weathered an important battle with the Colombian Congress in May 2000. The crisis was unleashed when the President reacted sternly to evidence of massive fraud by Congressional leaders. When implicated, high-ranking legislators refused to resign. The President launched a referendum project for early elections to choose a new Congress. In reaction, legislators led by the Liberal opposition proposed to hold the President himself to new elections. Debate turned on whether the referendum would be effected through Congress or through a citizen-based petition. The former option more clearly threatened Pastrana, by including the presidency within the new elections. Ultimately, the Pastrana administration backed down. See *Supervivencia o chantaje?*, EL TIEMPO (Bogotá, Colom.), May 14, 2000.

31. James L. Zackrisson & Eileen Bradley, *Colombian Sovereignty Under Siege*, in 112 NATIONAL DEFENSE UNIVERSITY, INSTITUTE FOR NATIONAL STRATEGIC STUDIES 3 (Strategic Forum Series, 1997)

combatants.³² Colombian officials acknowledge that they lack the training and intelligence capabilities for effective counterinsurgency operations.³³

The military's operations have been mostly reactive — responding to guerrilla attacks and recovering areas under rebel control.³⁴ A strategy of containment has resulted in military personnel garrisoned across areas of recurrent guerrilla action. The enemy's greater mobility, though, works to disperse government forces thinly.³⁵ Their outposts have proven quite ineffective at repelling assaults and tracking down attackers.³⁶ Military offensives, by contrast, are infrequent and then have only achieved limited success. The overall strategy has been not much of a strategy at all: responding to flashpoints rather than challenging the guerrillas' strongholds.³⁷ In its current configuration, it is apparent that the Colombian military is unable to hold down the country's irregular forces operating at any one time.

During the early 1990's, then president Cesar Gaviria attempted a more aggressive course. His "integral war" was intended to uproot all guerrilla groups rejecting the 1991 constitutional conciliation. In the 60's and 70's as well, Cold War tensions supported a different strategy. National security doctrines polarized the conflict and proposed to exterminate the guerrilla threat.³⁸ A peaceful end to the

[hereinafter Zackrisson & Bradley], available at <http://www.ndu.edu/inss/strfrom/forum112.html> (last visited Oct. 14, 2000).

32. See Center for International Policy's Demilitarization Program, available at <http://www.cipoline.org/clombia/infocombat.htm#govt> (on file with author).

33. Zackrisson and Bradley, *supra* note 31, at 3 (referring to comments of Former Minister of Defense Juan Carlos Esguerra).

34. Cf. RANGEL, *supra* note 18, at 81-94. Rangel argues that the Colombian military has pursued a strategy of annihilating the guerrillas, but that it has pursued it ineffectually for lack of resources and political will. At the same time, however, Rangel acknowledges that the military often falls prey to passivity and a merely defensive posture. He proposes the progressive weakening of the adversary through partial but cumulative victories; selecting prime objectives and territories of importance to the guerrillas and recuperating them for the state; achieving both real and symbolic successes over the guerrillas' organization, finances and morale, reducing its expectations of growth and denying it the possibility of success.

35. See Gonzalo de Francisco, *La Fuerza Pública y la Estrategia para enfrentar el fenómeno guerrillero*, in RECONOCER LA GUERRA PARA CONSTRUIR LA PAZ 494-96 (Grupo Editorial Norma ed., 1999). De Francisco describes the guerrillas' "leap of the flea" (salto de la pulga) strategy which places military posts in the position of splitting their forces to recapture an area of guerrilla attack as well as to pursue guerrilla forces in retreat. Part of the government's troops are forced to stay behind in the newly recaptured area to ward off a likely guerrilla "leap" back into the same area. See *id.*

36. See RANGEL, *supra* note 18, at 88-94. Rangel warns against the foreseeable, in his estimation, progression of internal warfare from a guerrilla war to a war of entrenched positions. He argues that the guerrillas' long-term planning and recent tactical successes support this development. See *id.*

37. See *id.* Rangel argues that, taking into consideration the modern guerrilla movement, a negotiated solution will only be possible if the guerrillas have an incentive to negotiate. Under the present conditions, no such incentives exist. As such, a military strategy based on limited warfare and intermediate goals is required. Rangel believes that a focus on territorial strongholds and well-paced military objectives are key. Only by containing the guerrilla movement, he believes, will peace be possible. See *id.*

38. See generally Álvaro Villarraga Sarmiento, *Antecedentes y Elementos de Diagnóstico: Rasgos del Conflicto Armado y del Derecho Humanitario en Colombia*, in DERECHO INTERNACIONAL HUMANITARIO APLICADO (Tercer Mundo eds., 1998) [hereinafter Sarmiento].

conflict was conceived only in terms of surrender.³⁹ All of these attempts clearly failed. Colombia's vast mountains and uneven terrain make guerrilla warfare impossible to eradicate. Furthermore, the guerrillas often enjoy the support of villagers and farmers who are either willing or forced to assist them. As a result, the military has defaulted into a defense strategy, which has become increasingly difficult to uphold.

D. Paramilitary Activities

Paramilitarism has increased in notoriety in the latter part of the 1990's. Some of these bands were initiated as self-help groups to protect landowners from guerrilla violence.⁴⁰ Others were begun as private armies to the drug traffickers. And yet, additional groups were formed as vigilantes engaged in social cleansing of street children and other undesirables. Now all rather indistinguishable, these have blossomed into full-fledged fighting forces. Their numbers are estimated at around 5000 to 7000,⁴¹ and a national association claims to represent them. They demand political standing and a seat at the peace process.⁴²

The guerrillas are vehemently opposed to the recognition of paramilitaries and to their participation in peace talks. They assert that, as allies of the state, paramilitaries are already well-represented by government negotiators. The guerrillas have refused to sit at the same table with them.

By some estimates, paramilitaries are deemed responsible for almost 70% of the human rights abuses in Colombia.⁴³ Their preferred method of warfare is the massacre⁴⁴ of townspeople suspected of sympathizing with the guerrillas. The paramilitaries have also targeted assassinations of human rights workers, pro-peace activists, and even political centrists residing in Colombia's major cities.⁴⁵ The

39. See Zackrisson & Bradley, *supra* note 31, at 3 (discussing the need to change from traditional defensive operations based on stationing troops in garrisons to more sustained offensive operations).

40. See CARLOS MEDINA GALLEGO AND MIREYA TÉLEZ ARDILA, *LA VIOLENCIA PARAINSTITUCIONAL, PARAMILITAR Y PARAPOLICIAL EN COLOMBIA* (Rodriguez Quito ed., 1994) (attributing the emergence of paramilitarism to outright government policy, resulting from Cold War national security doctrine and U.S. instigation, to combat the guerrillas. The authors argue that paramilitarism has organized sectors of civil society as its primary target, the potential base of support for guerrillas.).

41. See COLOMBIA COUNTRY REPORT, *supra* note 16, at 16.

42. See WAR WITHOUT QUARTER, *supra* note 20, at 100. Human Rights Watch has identified seven distinct groups comprising Colombia's paramilitary forces allied under the name Autodefensas Unidas de Colombia, AUC. *Id.*

43. See *id.* at 18.

44. In Colombia, "massacre" is defined as a homicidal action in which there are at least four deaths. REPUBLIC OF COLOM. MINISTRY OF NAT'L DEFENSE, *THE PUBLIC FORCE AND HUMAN RIGHTS IN COLOMBIA* (Mar. 2000). Paramilitaries, or illegal self-defense groups as they are called by the government, were deemed responsible for 74% of the 551 massacres reported in 1999. *Id.*

45. The increasingly regional dimensions of the Colombian conflict have been made clear by the statements of paramilitary leader, Carlos Castaño, accusing the Venezuelan and Panamanian governments of assisting the left-wing guerrillas and declaring some members of the Panamanian National Guard to be military objectives. Castaño *declara guerra a Guardia Nacional de Panamá*, EL TIEMPO (Bogotá, Colom.), Sept. 13, 1999.

paramilitaries skill in penetrating even apparently safe zones makes them an especially feared element of the internal conflict.

These groups are also linked to Colombia's military.⁴⁶ They are said to perform the dirty work that regular forces are incapable of because of heightened national and international scrutiny.⁴⁷ Indeed, the complicity of Colombia's military has been documented, not so much in active assistance but more commonly in failing to prevent paramilitary operations. The strongest objections to international assistance to Colombia stem from this reported link between the right-wing terrorists and the state.

E. The Drug Trade

The high point of Colombian drug violence was in the mid 1980's to early 1990's. In response to the threat of extradition to the U.S., the drug traffickers headed by Pablo Escobar launched an effective war against the government.⁴⁸ Urban violence, bombings, and kidnapping were at the heart of the drug traffickers' intimidation methods. A series of high-profile kidnappings and assassinations led to intense negotiations in which Escobar gave himself up in return for not being extradited to the United States. After a short time in prison, Escobar escaped and was killed while trying to flee. The demise of Escobar precipitated the end of his Medellín cartel.

The other major drug organization in the country, the Cali drug cartel, was soon to follow suit. Stung by a number of government operations, the drug lords were progressively jailed by Colombian police. With the virtual extermination of the major menaces, drug trafficking became more decentralized or at least went underground in the latter part of the 1990's. Not until some recent arrests in 1999 has the fearsome power of the drug lords again erupted into full view.

Nonetheless, drug trafficking is an important factor in the civil conflict. It has been linked to the operations of all of Colombia's political actors.⁴⁹ The guerrillas especially are tarred by charges of drug conspiracy if not outright production and

46. See WAR WITHOUT QUARTER, *supra* note 20, at 100. The Colombian government sternly denies this assertion while maintaining that isolated links between military commanders and paramilitaries have occurred in the past. Government statistics demonstrate that public forces have captured 741 paramilitaries and inflicted 98 casualties while in combat. Additionally, these numbers reflect an upward trend during the past year in terms of total captures and casualties of illegal armed groups (subversion and paramilitaries combined). THE PUBLIC FORCE AND HUMAN RIGHTS IN COLOMBIA, *supra* note 44.

47. See generally, WAR WITHOUT QUARTER, *supra* note 20.

48. For a gripping account of this period of Colombian history, see GABRIEL GARCÍA MÁRQUEZ, NEWS OF A KIDNAPPING (Knopf 1997).

49. By some accounts, the Colombian military is not by any means exempt from this charge. On the contrary, even Colombian leaders concede the military's drug links. Sergio Gómez Maseri, *Ayuda de E.U. peligra en narcotizarse: Piedad Córdoba*, EL TIEMPO (Bogotá, Colom.), Oct. 15, 1999 (citing Colombian Senator Piedad Córdoba: "What is ridiculous to think is that an army like ours, which is the one that is most involved in drug-trafficking, would take these resources to fight against what passes right under their very noses.").

trade.⁵⁰ Both U.S. and Colombian officials have routinely referred to the rebels as narco-guerrillas.⁵¹ It is estimated that 30% to 40% of their revenues come from the drug trade.⁵² Paramilitary groups, as noted above, also have strong drug ties.⁵³ Indeed, some of the most feared of these are connected to the drug lords' private armies.

F. Past Peace Initiatives: Repression or Co-optation

The Colombian peace process has had a tortuous history and a number of false starts. Serious initiatives in recent history began in the 1980's with the election of a rather conciliatory administration. The presidency of Belisario Betancur (1982-1986) attempted to negotiate with all existing rebel factions at the time.⁵⁴ Truce agreements were reached in 1984 with the FARC and several others, although not with the ELN.⁵⁵ They lasted less than a year.⁵⁶

New initiatives were not undertaken until late in the administration of Virgilio Barco (1986-1990).⁵⁷ By this time, a number of guerrilla groups had formed an

50. According to reports by the U.S. Drug Enforcement Agency (DEA), that agency "has not reached the conclusion that the FARC are drug-traffickers." However, the DEA has no doubt that these groups are associated with drug-traffickers, offering them protection and extorting them. Sergio Gómez Maseri, '*Farc no son narcotraficantes*': *DEA*, *EL TIEMPO* (Bogotá, Colom.), Aug. 2, 1999 (reporting comments by Donnie Marshall, DEA Administrator, before the House Subcomm. on Crime and Drugs).

51. See also MALCOLM DEAS, *EL PROCESO DE PAZ COLOMBIANO, 1982-1985 Y SUS IMPLICACIONES PARA CENTROAMÉRICA*. Centro de Estudios Internacionales de la Universidad de los Andes. (Sept.-Oct. 1988). "The connection between the [guerrilla] movement and cocaine traffic is not an invention of the ambassador of the United States."

52. See *Hearings*, *supra* note 16, at 2 (testimony of Under Sec. Pickering).

53. See Television Interview by Darío Arizmendi with Carlos Castaño, Colombian paramilitary leader (Mar. 1, 2000) (admitting publicly that 70% of his organization's resources hail from drug-related activities).

54. See generally DEAS, *supra* note 51. Deas notes Betancur's emphasis on expanding political participation as an objective of peace negotiations. In contrast to Pastrana, Betancur's approach was to emphasize the uniquely national nature of the problem and its resolution. *Id.*

55. See generally Sarmiento, *supra* note 38.

56. One of the main criticisms of Belisario Betancur's peace attempts is that it did not have the support of the state institutions, most importantly the armed forces. His peace initiatives were perceived as based simply on his indomitable will. Also significant was the brutal taking of the Palace of Justice (seat of the Supreme Court) by the M-19 guerrilla forces in 1985. The bloody recapture of the building by the armed forces, independent of Betancur's control, crippled the already teetering peace plan. See JESUS ANTONIO BEJARANO ÁVILA, *LA POLÍTICA DE PAZ DURANTE LA ADMINISTRACIÓN BARCO*. In *EL GOBIERNO BARCO: POLÍTICA, ECONOMÍA, Y DESARROLLO SOCIAL EN COLOMBIA 1986-90*. Coordinated by Malcolm Deas and Carlos Ossa. Fedesarrollo and Fondo Cultural Cafetero: Colombia (1994) (hereinafter *POLÍTICA*).

57. Virgilio Barco's peace policy was double-pronged. First, it aimed at re-establishing negotiations with the guerrillas. Second, it aimed at institutional reform: obtaining support for the peace process from all sectors of the state and armed forces; opening the institutions of the state to more accessible and democratic participation; changing the policy of repression against labor strikes, student uprisings, peasant demonstrations and other forms of political expression; extending the reach of the state to marginalized areas and communities. The second prong was an effort to address the failures attendant Belisario Betancur's attempts as well as to undercut the guerrillas' *raison d'être*. The reality of this period was, though, that a dirty war by the armed forces against guerrillas turned political participants, human rights defenders, and even plain democrats obliterated the possibilities for peace. See *id.*

umbrella organization, the Simón Bolívar National Guerrilla Coordinator. Yet, a peace settlement was reached separately with the Movimiento 19 de Abril (M-19) band.⁵⁸ Subsequent agreements were also obtained from the Movimiento Quintín Lame, the Partido Revolucionario de los Trabajadores and the Ejército Popular de Liberación⁵⁹ toward the end of Barco's administration and beginning of César Gaviria's term (1990-1994). The FARC and ELN did not participate, signaling the end of a unified guerrilla stance.

Nonetheless, negotiations paved the way for a new constitution. In 1991, human rights, judicial guarantees and political participation were high on the list of former guerrillas, some of them elected to the national constituent assembly. Replacing Colombia's long-standing 1886 constitution, the new founding document offers a new basis for political participation. The FARC and ELN, however, did not take part in its adoption. By late 1991 and then 1992, peace talks were re-initiated, but under intensified combat they soon stalled.⁶⁰ By 1993, Gaviria launched a full military offensive against the remaining guerrilla groups.

Peace initiatives were re-taken by Ernesto Samper (1994-1998) but never crystallized.⁶¹ The most recent round is now led by Andrés Pastrana (1998-2002), keeping to his campaign promises.⁶² Preliminary talks actually began, as mentioned above, during his presidential race. Pastrana was photographed shaking hands with the country's most prominent rebels on their turf. It was the first time, but not the last, that a leading figure of traditional Colombian politics would meet with the guerrillas on their terms. It signaled a humbling step but a significant one for national reconciliation. Pastrana appeared to have somehow found common ground with the guerrillas.

The period since then has marked a renewed determination across Colombian society to achieve peace. From governmental agencies to concerned citizens, all have joined in pressing for an end to the war. Nonetheless, during this same time, rebel forces have continued and even increased their attacks on the civilian population. Individual and group kidnappings are a common guerrilla tactic. The ransoms extorted are a major source of financing.⁶³ Despite continuing attacks,⁶⁴

58. See *id.* at 95. Bejarano notes that the concessions obtained by the M-19 were spare: advantages relating to the nomination of its candidates to elections, a pardon for criminal sentences, assistance with the reinsertion of its troops in civil society, and some financial resources for areas formerly zones of conflict.

59. Negotiation of a peace settlement with the EPL produced a split within its ranks. The majoritarian strand made peace. A dissident group continues to wage guerrilla war. See *id.* at 96. While not one of the main groups, not slated for separate negotiations, they would still need to be incorporated within one of the tracks of the current peace process.

60. See generally Sarmiento, *supra* note 38.

61. The most ambitious attempt made was a secret meeting in Spain by Samper officials and representatives of the ELN. When news of the secret negotiation attempt was leaked to the press, the ELN refused to proceed. See RANGEL, *supra* note 18, at 63.

62. See Doctor Andrés Pastrana Arango, Discurso de Posesión como Presidente de la República, Santafé de Bogotá (Aug. 7, 1998) ("Por eso, ante todo, quiero la paz, que es paz y pan.").

63. COLOMBIA COUNTRY REPORT, *supra* note 16. See also Larry Rohter, *Colombian Rebel Group Gains Notice, Loses Sympathy*, N.Y. TIMES, June 21, 1999, at A3. Note kidnapping of congregation in

delays, and even legal obstacles threatening to derail its momentum, the framework for peace talks is in place.⁶⁵

G. Current Peace Processes

The peace process has advanced on two separate tracks: one with the ELN and one with the FARC. A first level of contacts was initiated by President Pastrana himself with the FARC. His meeting with guerrilla leaders during the presidential campaign were the starting point. Shortly after assuming the presidency, Pastrana cleared the way for peace talks by declaring a de-militarized zone in southeastern Colombia. As a concession to the FARC's conditions for negotiation, the national military was completely withdrawn from five municipalities (approximately 42,000 square kilometers). Despite its name, the de-militarized zone places the FARC in control of this area, and increasingly they have assumed a range of governmental functions.

This concession sparked considerable controversy both inside and outside Colombia. Most importantly were questions over the expanse of area and activities of the guerrillas within the zone. Pastrana's first Minister of Defense and a number of high ranking military officers ultimately resigned over this issue. Not unrelated, the U.S. government voiced significant concern over the de-militarized zone's use as a staging ground for drug-trafficking. It was believed that the United States might attempt to frustrate this step of the peace process in order to uphold its own national security concerns. Ultimately, the State Department issued a statement that it would not interfere in the Colombian peace process.

On a parallel track have been contacts with the ELN. The initiative was headed not by the government but by representatives of civil society and the ELN meeting in Mainz Germany under the auspices of the Catholic Church. The group was able to negotiate an international humanitarian agreement⁶⁴ and agree on a rough agenda for further peace talks.

Negotiations with the ELN later broke down over the question of their own demilitarized zone. The ELN argued it should be treated no less than the FARC and therefore should be granted a safe zone to hold its peace talks. The government rejected the demand. Since then the ELN has stepped up their aggression to force the government's hand. They have undertaken a series of high-profile, mass kidnappings. However, instead of gaining them leverage, their actions have been

Cali and kidnapping of Avianca passengers on flight from Bucaramanga and kidnapping of businessmen in Barranquilla.

64. For example, the town of Gutierrez, in the department of Cundinamarca (near Bogotá), was the site of a guerrilla offensive approximately ten days before formal negotiations are to begin with Las Farc. COLOMBIA COUNTRY REPORT, *supra* note 16, at 33. Also, noted peace activists such as Jesús Antonio Bejarano and Jaime Garzón were assassinated, presumably by paramilitaries. *Id.* at 13. Numerous other scholars, quoted throughout this article, have narrowly escaped with their lives.

65. See *La paciencia del Gobierno tiene límites*, EL TIEMPO (Bogotá, Colom.), July 22, 1999. Pastrana notes that the government's patience and the patience of the Colombian people is not endless.

widely condemned throughout Colombian society.⁶⁶ The ELN continues to refuse further negotiations until a de-militarized zone is declared. The latest proposals by certain sectors in the government are that the national convention — a sort of constitutional assembly envisaged for peace talks with the ELN — proceed despite the retention of the kidnapped and despite the government's refusal to concede a second demilitarized zone.⁶⁷ Recently, Pastrana's government has come around to the idea of a separate de-militarized zone. As this article was going to print, Pastrana's government acceded to an ELN de-militarized zone, despite stiff resistance from inhabitants of the area that would actually be de-militarized.

The main stumbling block to peace is the issue of Colombia's traditional political system. In this respect, Pastrana's strategy is a replay of the traditional mechanisms: this time extended to some of the state's most recalcitrant foes. The guerrillas on their part are more resistant to the traditional process of co-optation. Wisened by past peace processes and experimentation with their own political parties, the subversives are rejecting a pact with the government that would merely provide access to the current electoral system. Such a position is not unreasonable. Colombia's history demonstrates that electoral politics are ineffective for instituting major change. Victories are too dependent on personal connections, economic influences, and established party machineries. Furthermore, the physical extermination of Unión Patriótica members in the past, the FARC's political party, serves as a harsh reminder of the risks of trading in arms for political campaigns.⁶⁸ For these reasons, guerrillas are making claims for separate territory, questioning majority voting, and demanding financial autonomy through their own taxing authority.

III. THE STATUS OF GUERRILLAS

In line with their extensive control over towns and rural areas, the guerrillas claim the legal standing of belligerents at war. These groups profess to have met the formal requirements stated under international law. Belligerency status within traditional legal doctrine signifies that the guerrillas would enjoy equal standing with the Colombian state. It constitutes a prior step, although not by any means a necessary one, to claim full recognition as the sole government of Colombia or, alternatively, to claim recognition as a separate state within the current nation's

66. Indeed, even the Catholic hierarchy threatened members of the ELN with excommunication if they did not release those kidnapped during religious services at La María Church in Cali. See *Hostage Takers Excommunicated*, LOS ANGELES TIMES, Aug. 1, 1999, at 8.

67. See *Contacts Between the Government and the ELN are reestablished*, EL TIEMPO (Bogotá, Colom.), Oct. 22, 1999.

68. The Peace Process with the FARC at San Vicente del Caguan has been delayed numerous times. Indeed, the government was required to extend the initial 6 month declaration of a de-militarize zone — a FARC condition for the peace talks — since negotiations had not even begun at the end of that period. The peace talks were definitively set to begin on July 7, 1999. Three days before, they were indefinitely postponed because of the FARC's rejection of international observers in the de-militarized zone.

territory. Interestingly, one of the earliest instances of a recognition of belligerency occurred during the Latin American wars of independence.⁶⁹

For the Colombian state, a state of belligerency recognized by the international community would be a serious reversal in the legal and institutional weapons at its disposal. Belligerency status would in theory terminate its access to external assistance or even lead to foreign intervention on the side of the guerrillas. Any explicit action or implication by the government of the conditions of belligerency would, arguably, propel such a result: it would provide third-party states with the basis to accord the guerrillas belligerent rights. Thus, the government has been exceedingly cautious in its range of action. Its foreign policy, treaty ratification, and dealings with the rebels are marked by an over-riding apprehension with this question. So much so that the government, across a number of issues discussed below, is hamstrung for fear of losing its sovereignty over the conflict.

However, this preoccupation with belligerency is the result of a misreading of the current state of legal play. An idiosyncratic interpretation of international law, predominating in Colombia, is responsible for this misconception. In reviving the figure of belligerency and its relevance to the state's international standing, Colombian publicists have, wittingly or unwittingly, misdirected government policy and restricted its range of action. Fearing an erosion of its authority, the state has been incapacitated from taking action which might lead to internal transformation and which may lead to alternatives to armed conflict.

This Section and Section IV, below, examine the partialized renditions of international law which are held to be authoritative in Colombia. The analysis reveals the political orientation advanced by what I call here Colombia's orthodox internationalism. It also reveals the flawed legal arguments that support it.

A. Ratification of Protocol II

An example of the impact of orthodox thought on government policy is Colombia's delayed ratification of Protocol II to the Geneva Conventions.⁷⁰ International humanitarian treaties, such as Protocol II, are the main body of law applicable to the Colombian conflict.⁷¹ More specifically, the centerpiece of international regulation is common Article 3 to the Geneva Conventions of 1949.⁷²

69. The U.S. and Great Britain, de facto if not de jure, recognized toward the end of the Latin American revolutions the belligerency status of nationalist movements. See HERSH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW 175-82* (Cambridge University Press 1947) [hereinafter LAUTERPACHT].

70. Protocol II to the Geneva Conventions was adopted in 1994 in Colombia, pursuant to Ley 171 de 1994, constitutionally reviewed and approved by CORTE CONSTITUCIONAL DE COLOMBIA, C-225/95. Protocol Additional to the Geneva Convention of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, (Protocol II) June 8, 1977, U.N. Doc. A/32/144, 16 I.L.M. 1442 (1977) [hereinafter Protocol II]. See generally, Sylvie Junod, *Additional Protocol II: History and Scope*, 33 AM. U. L. REV. 29 (1983) [hereinafter Junod].

71. For an overview of international humanitarian law, see DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., Clarendon Press, 1982).

72. Colombia adopted the 1949 Geneva Conventions in 1960 (Ley 5 de 1960).

This provision sets guidelines on the conduct of internal wars. Protocol II of 1977 expands upon the letter of common Article 3.

The ratification of Protocol II was stalled in Colombia for many years.⁷³ It was ultimately adopted, effective February 16, 1996,⁷⁴ but its effectiveness is still the subject of continuing debate. The Protocol is resisted for fear of undermining the state.⁷⁵ To recognize the applicability of international humanitarian law, and specifically of Protocol II, is portrayed as conceding the existence of a state of belligerency. This idea is fueled by a quite peculiar perspective on international law.⁷⁶

This is not to say that commentators worldwide are not divided on the question of Protocol II's threshold of applicability.⁷⁷ In fact, there has been significant debate over whether its text mirrors the same requirements as for belligerency or

73. The Protocol is the extension of obligations of parties in a non-international armed conflict. It was developed in response to the abbreviated guidelines provided in Article 3 of the Geneva Conventions.

74. See FRITS KALSHOVEN, *El Protocolo II, la CDDH y Colombia*, DERECHO INTERNACIONAL HUMANITARIO APLICADO 37-78 (Tercer Mundo Editores 1998) (Kalshoven recounts the Colombian governments initially strong aversion to Protocol II and the subsequent sea change in policy. Passing Protocol II was an essential element of the Samper administration's peace policy) [hereinafter KALSHOVEN]. See also Arturo Carrillo-Suarez, *Hors de Logique: Contemporary Issues in International Law as Applied to Internal Armed Conflict*, 15 AM. U. INT'L L. REV. 1 (1999) [hereinafter Carrillo-Suarez], noting the large role played by national and international non-governmental organizations pressuring for passage of Protocol II).

75. See ALEJANDRO VALENCIA VILLA, DERECHO HUMANITARIO PARA COLOMBIA 89 (Defensoría del Pueblo 1994) [hereinafter VALENCIA VILLA]; see also Héctor Charry Samper, *La Aplicación del Protocolo II de Derecho Humanitario*, EL TIEMPO (Bogotá, Colom.), Feb. 8, 1989 cited in, Alejandro Valencia Villa, *La Humanización de la Guerra* (Derecho Internacional Humanitario y Conflicto Armado en Colombia. Ediciones Uniandes-Tercer Mundo Editores 1991). (Colombia's ambassador to the Diplomatic Conference responsible for Protocol II stated that the instrument's vague scope of applicability left the door open for third states to interpret and thus "place a State in international difficulties of diverse order."); see generally Carrillo-Suarez, *supra* note 74.

76. For example, Arturo Carrillo-Suarez describes the efforts of a particular NGO to dispel the idiosyncratic views on belligerency which long frustrated the adoption of Protocol II. See Carrillo-Suarez, *supra* note 74, at 49. ("One well-known NGO, the Colombian Section of the Andean Commission of Jurists organized a seminar series over the course of several years . . . dedicated to the subject of applying international human rights and humanitarian law instruments in Colombia. These influential seminars brought together renowned experts who exposed the Colombian authorities and public to the mechanics of international law and its interplay with domestic jurisdiction. At the time, this was a largely unfamiliar and unexplored domain for the majority of the Colombian legal community." *Id.* What was "unfamiliar and unexplored" was not international law but a non-orthodox version of international law.

77. See e.g., Junod, *supra* note 70, at 32. "The work of the Conference of Government Experts showed how many divergent views and possible solutions existed. Six variants were formulated, based on thirteen proposals. The first was based on the view that a single Protocol should apply to all types of armed conflict without distinguishing between them; the other five, which only applied to non-international armed conflicts, ranged from the broadest conceivable definition, covering all situations, including those where the level of strife was very low, to the narrowest possible definition, covering only very intense conflicts with all the material characteristics of a war. Taking the views that were expressed into account, the ICRC attempted in its draft to propose a formula defining the characteristics of non-international armed conflicts, while remaining sufficiently general and flexible to be able to apply to all such situations." *Id.*

even civil war.⁷⁸ These debates draw on a wide range of interpretive techniques which are used to argue either for or against a certain threshold. My aim, here, however is not to partake in this debate or even to place Colombian scholars within this larger discourse: although the mainstream clearly supports a high threshold.⁷⁹ Rather, it is to analyze the basis and potential motivation for such a legal argument in Colombia.

Colombian governments and particularly its military, backed by mainstream legal doctrine, long resisted the adoption of Protocol II.⁸⁰ The relevance of Protocol II to any actual event occurring in Colombia was consistently denied.⁸¹ Former President Cesar Gaviria asserted:

*In relation to Protocol II . . . , the conditions for its application in Colombia are not present, . . . rather the present circumstances fall under 'internal tensions, internal disturbances, such as riots, sporadic and isolated acts of violence and other analogous acts, that are not armed conflicts' and as such the norms of this protocol are not applicable.*⁸²

As a result, it was argued, there was no reason for its adoption.⁸³

This argument may seem merely a disingenuous denial of events, considering Colombia's embattled state.⁸⁴ Key to its significance, however, is the particular understanding of international law it reflects. At the heart of the Colombian government's objection were formal notions of the legal distinctions between insurgency and belligerency.⁸⁵ While these doctrines on internal conflicts are now quite obsolete in international practice, they are crucially important in Colombia.

78. See, e.g., Carrillo-Suarez, *supra* note 74, at 66-91 (Carrillo-Suarez carefully delineates the contours of this debate).

79. On a peripheral note, the most disputed material element of applicability, territorial control, faces strong authority against a high threshold, according to the International Committee for the Red Cross's Commentaries on Protocol II: "If the insurgent armed groups are organized in accordance with the requirements of the Protocol, the extent of territory they can claim to control will be that which escapes the control of the government armed forces." *Noted in* Protocol II, *supra* note 70.

80. See generally Sarmiento, *supra* note 38.

81. See, e.g. Carrillo-Suarez, *supra* note 74, at 88-89. "[T]he experience in Colombia has been that certain humanitarian law experts will quote several of the critical academic arguments . . . in order to sustain that Protocol II does not apply to the conflict there as a matter of law, despite clear, objective evidence to the contrary. It is disingenuous to accept that state practice shapes international law without recognizing the basic role of international law scholars in shaping this very practice under certain circumstances. Unfortunately, the aforementioned experts provide the Colombian state with the grounds for justifying its entrenched policy against acknowledging Protocol II's legal applicability, and not the other way around." *Id.*

82. Quoted in ALEJANDRO VALENCIA VILLA, *supra* note 75, at 101.

83. See generally VALENCIA VILLA.

84. Iván Orozco Abad finds the government's then stated reasons against ratification of Protocol II to be unconvincing. Orozco notes that the then-current peace talks in Caracas with the Simón Bolívar Guerrilla Coordinator proceeded on the acknowledged basis of the guerrillas' "politico-territorial dominion" over parts of the country. See Iván Orozco Abad, *Ética y Proceso de Paz, in* COMBATIENTES, REBELDES Y TERRORISTAS: GUERRA Y DERECHO EN COLOMBIA 219 (1992).

85. See generally MARCO GERARDO MONROY CABRA, *DERECHO INTERNACIONAL PÚBLICO* (Editorial Temis S.A. 2d ed. 1986).

They are seen as marking the difference between the success and failure of the guerrilla uprising. They are a key element of the government's long-standing (now modified) position against internationalizing the civil conflict.

The language of Protocol II is quoted below:

This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by . . . (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and *dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.*⁸⁶

For Colombian internationalists, the elements of "control over territory," an "organized administrative structure" and "the ability to carry out the obligations under Protocol II" are seen as troublesome. They parallel the traditional elements of belligerency too closely.⁸⁷ Thus, ratifying Protocol II would bring the government one step closer to agreeing to its current applicability in Colombia and so conceding the existence of a state of belligerency. The text of Protocol II itself rejects this reading.⁸⁸ Instead, it calls for its application according solely to the document's internal provisions. The objective is to widen the scope of applicability of international humanitarian law to all internal conflicts. At the same time, Protocol II attempts to avoid the precise situation feared by Colombian governments: that the treaty's implementation will become the basis for rebels claiming an upgraded legal status.⁸⁹ Still, while not the only interpretation and

86. See Protocol II, *supra* note 70, at 1443.

87. See generally VALENCIA VILLA, *supra* note 82; see also MARCO GERARDO MONROY CABRA, DERECHO INTERNACIONAL PÚBLICO at 134-35 (3d ed. 1995). Prof. Monroy Cabra's textbooks states that one of the effects following a recognition of belligerency is the application of international humanitarian law, especially the Geneva Conventions of 1949 and the two Protocols of 1977. This follows a discussion in which the constitutive elements of belligerency are described in essentially the same terms as in Protocol II, Article 1. See *id.*

88. See Protocol II, *supra* note 70, at 1443-1444.

89. See INT'L COMM. ON THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1987); see also INT'L COMM. ON THE RED CROSS, *supra* note 76, at 1322. With respect to the Geneva Conventions of 1949, the proceedings register the delegates' concerns with common Article 3, potentially granting insurgents greater political standing. The issue was raised in terms of implicit recognition of belligerent rights through the acknowledgment of common Article 3 applicability. The text of common Article 3 was written explicitly to reject its use as a predicate for granting belligerency rights. In any case, this historical discussion reflects the interest in belligerency doctrine immediately post-WWII. However, the discussion did not extend to contemporary practices. Even by the time of Protocol II's negotiation, the ICRC's Commentary relates "[t]he institution of recognition of belligerency has proved to be extremely difficult to apply in practice and has given rise to many controversies. [I]t is often, though incorrectly, invoked as a consequence of the application of common Article 3 and of Protocol II." *Id.*

possibly not the most authoritative one, orthodox publicists equated the adoption of Protocol II with the granting of belligerency status to the guerrillas.⁹⁰

The account of law that follows is not intended as a doctrinal argument, in itself, either in favor or against the guerrillas' belligerency claims. A principal point of this article is that doctrinal arguments may be forcefully made both for and against recognizing a state of belligerency in Colombia, without any neutral way of deciding between them.⁹¹ The purpose of this succinct description, though, is to frame the general contours of the doctrine. Commentators have differed as to its specific content and attendant effects. But, for the most part, its elements are traditionally described as: an armed conflict of a general character; insurgents occupying and administering a substantial portion of the national territory; insurgent hostilities conducted in accordance with the rules of war and under a responsible authority; and finally, circumstances that necessarily precipitate third-party states, in defense of their sovereign interests, to recognize the belligerency of the irregular forces.⁹²

90. See KALSHOVEN, *supra* note 74, at 44. Kalvoshen argues that Héctor Charry Samper, the Colombian delegate to the Diplomatic Conference which drafted Protocol II, attempted to insert the granting of belligerency status as a condition to Protocol II's applicability. At a minimum, Samper attempted to make the Protocol's applicability subject to state discretion. His amendment, which was not approved, read: "The determination of the conditions referred to above shall be an issue for the State in which the conflict occurs." *Id.*

91. Belligerency doctrine offers authority for both sides. Some examples of the rules, many of which can cut either way, include: (1) formal recognition by an incumbent government entails third-party state recognition as well; (2) an incumbent government taking the posture of a belligerent, with respect to an internal movement, automatically implies recognition; (3) an attempt by the incumbent government to assume the position of a belligerent, even if unsuccessful, such as establishing an ineffective naval blockade, results in belligerent status automatically conferred; (4) individual third-party states make independent calculations — not subject to the determination of a different or incumbent government — as to whether the factual conditions of the belligerency have in fact been met; (5) even admission of certain belligerency-type characteristics by the incumbent government does not result in extending full belligerency rights. Drawing on one or another of these interpretations, factual assertions may also cut either way. For example, the Colombian government's actions to date could qualify as recognition: e.g. the declared war on narco-guerrillas; ex-President Cesar Gaviria's 1990 "integral war;" and, the engagement of broad sectors of civilians (paramilitaries) in combat; official sanctioning of self-defense groups (Convivir). Jailing of insurgents, beyond their purely criminal sentences (to the extent this occurs), may also constitute a recognition of their status as belligerents. See, e.g. LAUTERPACHT, *supra* note 69, at 158-226. Contrary fact-based arguments also abound: the guerrillas do not control territory uninterruptedly (taken a step further, guerrilla warfare may simply not satisfy the requirements for belligerency); the guerrillas do not adhere to international humanitarian law; they are active in the drug trade; they kidnap civilians for ransom; the guerrillas have not established stable governmental offices (the reason for U.S. refusal to extend belligerency rights to Cuban insurrection of 1868-78); and, no third-party state finds itself in need of extending international status (beyond acknowledging their insurgent standing) in order to protect their sovereign interests (the reason for Great Britain and the U.S. to refuse belligerency rights to Polish rebels of 1831 and Hungarian revolution of 1848).

92. See CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW (James Brown Scott ed., 1916) [hereinafter CARNEGIE ENDOWMENT]; see also LAUTERPACHT, *supra* note 69, at 176.

Traditionally, the distinctions between rebellion, insurgency and belligerency were intended to regulate outside intervention in a national conflict.⁹³ While none of these categories are hermetic, they attempt to distinguish purely domestic affairs from subjects of international concern. Localized rebellions come purely within the state's jurisdiction. More generalized revolts amount to an insurgency when recognized as such by the government or a third-party state. Still, they are subject to the full force of the law of the state in question. Additionally, incumbent governments retain a monopoly over international support, even if foreign states decide how much, if any, support. It is only when an internal war rises to the level of a recognized belligerency, however, that third-party states may openly side with the state's opponents or decide to remain neutral as between them.

Generally, belligerency standing signifies that internal conflict has escalated to the level of a full-scale international war.⁹⁴ Incumbent governments have wide discretion to decide whether or not to recognize a condition of belligerency.⁹⁵ This recognition may be made explicitly through a declaration of war. Or, recognition by an incumbent government may be implicit by way of government blockade of a national port, prisoner exchange, or agreement to a peace treaty.⁹⁶ Recognition by an incumbent government confers certain rights and obligations on the insurgents as well as on the government itself. The chief benefit for the government is that it eschews responsibility for the acts of insurgents to third-party states and their citizens. Convention has it that a recognition of belligerency relieves the incumbent government of responsibility for military and political acts of opposing forces.⁹⁷ The government is then also free to prosecute its efforts in terms of a full-scale war. Fewer legal protections are owed by the state to inhabitants under or loyal to belligerents.

Belligerent forces, under most accounts, have rights as external enemies with full protections for prisoners of war and the complete range of the laws of war.⁹⁸ The latter constitutes the main policy rationale for recognizing states of belligerency, now attenuated by the extension of humanitarian norms to internal

93. See CARNEGIE ENDOWMENT, *supra* note 92, art. II; see also Convention of Havana, Feb. 20, 1928, art. II; see generally RICHARD A. FALK, *THE INTERNATIONAL LAW OF CIVIL WAR* 11 (1971) [hereinafter FALK].

94. See NORMAN J. PADEFORD, *INTERNATIONAL LAW AND DIPLOMACY IN THE SPANISH CIVIL STRIFE* 7-23 (1939) [hereinafter PADEFORD].

95. Conventional doctrinal writers differ as to the conditions; however, there is authority for concluding that incumbent governments may declare a state of belligerency independent of the underlying factual situation. That is, the conditions restricting recognition by foreign governments would not apply. See generally CHARLES ZORGBIBE, *LA GUERRE CIVILE* (1975).

96. *Id.* at 36-47.

97. See PADEFORD, *supra* note 94, at 2-3, 197; cf. LAUTERPACHT, *supra* note 94, at 247-48 (Lauterpacht argues that not only are incumbent governments not responsible to foreign states for the acts of belligerent forces but they are also not responsible for acts of insurgents in areas 'not under its actual control.').

98. Other rights attaching to the attainment of belligerency status include "the right to obtain credit abroad, to enter foreign ports, to maintain blockades, to engage in visit and search procedures, and to confiscate contraband." Richard A. Falk, *Janus Tormented: The International Law of Internal War*, in *INTERNATIONAL ASPECTS OF CIVIL STRIFE* 185, 205 (James N. Rosenau ed., 1964).

conflicts. Belligerent rights also include, vis-a-vis the recognizing state, the right to visit and search neutral merchant ships and to condemn vessels breaching a blockade or carrying contraband or munitions to the enemy.

It is argued that once an incumbent government takes action amounting to a recognition of belligerency all other states are bound to follow suit.⁹⁹ This position is a main premise of orthodox scholars in Colombia. Their scrutiny of governmental action is justified on these grounds. According to this line of thinking, foreign states may find themselves under the legal duty to recognize the guerrillas and terminate any assistance to the incumbent government, based on the Colombian government's dealings with the rebel forces.

Traditionally, foreign states may make a separate belligerency determination, even if the incumbent government does not, provided the factual preconditions (enumerated above) exist. Once that step is taken, recognizing states would be expected to refrain from assisting either side, if they are to remain uninvolved in the conflict. They may, for example, agree to respect blockades on commercial shipping erected by the rebels. They may also agree to look only to the belligerent community for injury to their citizens and their property. Of course foreign states could recognize a belligerency situation only to then forsake neutrality and join one or the other party's struggle.¹⁰⁰

During the twentieth century the soundness of belligerency doctrine was thoroughly challenged. Even conventional scholars of the discipline acknowledged its vast malleability.¹⁰¹ In early debates, polemic focused not so much on the elements of the legal doctrine, which were generally agreed, but on whether the doctrine was legal at all.¹⁰² Legalists insisted that once the factual preconditions were ascertained, third-party states were under a duty to recognize the belligerency

99. See generally Arnold D. McNair, *The Law Relating to the Civil War in Spain*, 53 LAW Q. REV. 471 (Oct. 1937) [hereinafter McNair]; see also George Grafton Wilson, *Insurgency and International Maritime Law*, 1 AM. J. INT'L L. 46, 53 (1907) (a foreign state is not bound to recognize an act of an insurgent as proper because some other foreign state has recognized the insurgents as belligerents).

100. See LAUTERPACHT, *supra* note 69, at 175-76.

101. See W. E. HALL, A TREATISE OF INTERNATIONAL LAW 36-39 (1924) (maintaining that belligerency "is from a legal point of view a concession of pure grace"); see also HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL ORGANIZATIONS AND CIVIL WARS 72-74 (1995).

102. Even the traditional controversy over constitutive versus declaratory theories of recognition understates the skepticism over belligerency doctrine. That is, even the more legalistic theory, holding the status of belligerency to be created upon the satisfaction of its conditions with recognition merely acting to acknowledge this situation, must contend with the fact that belligerency vis-à-vis a third-party state arises by definition only when that state's sovereign interests are affected. See TI-CHIANG CHEN, THE INTERNATIONAL LAW OF RECOGNITION: WITH SPECIAL REFERENCE TO PRACTICE IN GREAT BRITAIN AND THE UNITED STATES 364-68 (L.C. Green, 1951)) (attempting, in an effort to defend the legal nature of belligerency rights, to distinguish between objective conditions, which are clearly legal, and subjective conditions, which the author attempts to minimize); cf. LAUTERPACHT, *supra* note 69, at 77-78 (arguing that the "affect on sovereign interests" element, which is part of the preconditions of belligerency, does not defeat the legal objectivity of the doctrine—it merely narrows the scope of third-party states which are in a position to decide the question). In this case, however, the legal duty which insurgents may then claim is quite limited in scope.

of insurgents.¹⁰³ Critics, on the other hand, maintained that no legal right existed on the part of insurgents and conversely that the decision to recognize by third-party states conformed only to their own sovereign interests.¹⁰⁴ The doctrine's unworkability as an objective legal rule is typically exemplified by the events surrounding the Spanish Civil War.¹⁰⁵ There, the belligerency status of Franco's Nationalist forces was never recognized, notwithstanding the insurgents' ultimate and complete success in the war.¹⁰⁶ Moreover, even the fact that they controlled over half the territory during the conflict was not enough to secure the recognition of their belligerency status.¹⁰⁷

Doctrinal disagreements were numerous in the first half of the twentieth century. These debates show the existence of significant legal authority contrary to the orthodox positions expressed in Colombia.¹⁰⁸ Again, my objective here is not to

103. The most sophisticated proponent of this position was Hersh Lauterpacht, who based his claim on the actual practice of states. Despite the abundance of counter-evidence, he attempted to craft a legal duty chiefly from the practices of the United States and Great Britain to respect incumbent governments' blockades of certain national ports held by insurgents. Lauterpacht believed that "[o]n occasions governments emphasize the wide element of discretion open to them in the matter (belligerency determinations). But the discretion which they invoke is discretion in estimating the existence of the conditions of recognition as postulated by international law. They do not appeal to an arbitrary liberty of action *after the presence of those conditions has been clearly ascertained.*" LAUTERPACHT, *supra* note 69, at 158 (emphasis added). Additionally, Lauterpacht espoused the normative principle, the backbone of the doctrine that the right to national independence, in the absence of international institutionality capable of securing the fundamental rights of individuals, required that internal conflicts result in the neutrality or non-intervention of third-party states. In other words, incumbent governments and insurgents should be left to their own devices, even prior to the satisfaction of belligerency conditions: "any unilateral and extended grant of advantages to the lawful government amounts, even prior to the recognition of the belligerency of the insurgents, to interference and to a denial of the right of the nation to decide for itself" by a physical contest, if necessary, between the rival forces: the nature and the form of its government. This is especially so when some but not all of the requirements of recognition of belligerency are present. *Id.* at 233. For Lauterpacht, anything other than non-intervention in internal conflict would amount to an interference in national independence. Thus, his belligerency doctrine argues for its quality as a legal duty incumbent upon third-parties and for a relatively low threshold.

104. See McNair, *supra* note 99, at 471; see also PADEFORD, *supra* note 94, at 8 ("belligerent rights are accorded when the factual situation and the self-interest of foreign states coincide in such a manner as to make the move expedient or necessary").

105. See PADEFORD, *supra* note 94, at 119 (Speaking of the Spanish Civil War, "[the] 'normal practice' in time of insurgency, . . . the established government should have been allowed to purchase supplies for the suppression of the illegal revolt, . . . belligerent rights should have been accorded when the conflict reached the magnitude and nature of public war waged by two organized regimes, . . . foreign states should have kept their hands off while the disturbance took its natural course. A glance backward over the major civil wars and insurrections of the past century and a quarter will reveal that in actuality there has been far less of this so-called normal practice than has been commonly supposed."):

106. *Id.* at 8-9.

107. Vast territorial control, in the case of Spanish Nationalists, was perceived as merely incident to insurgency status. *Id.* "The admission of insurgency relieves the government of responsibility for the political and military acts of the insurgents in the territory under their control, and normally results in the treating of captured insurgents as prisoners of war rather than as traitors Admission of insurgency by foreign states confirms their *de facto* existence, and to that extent gives them a position and a personality, albeit anomalous and temporary. It admits that in fact they exercise control over foreign property and persons within the territorial area subject to their physical control." *Id.* at 2-4.

108. An interesting exposition of the doctrine states: "The truth is, that . . . the normal duty of non-intervention in the internal dissensions of foreign countries dictates neither the one choice nor the other

present doctrinal arguments to refute orthodox views. Rather, it is to demonstrate the multiplicity of possible doctrinal positions, if we were to take belligerency law seriously. Simply by way of example, also relevant to the Colombian situation, is the differential effects of recognition. Some commentators have attributed quite different effects to recognition by an incumbent government as opposed to recognition by a third-party state.¹⁰⁹ In the former case, the government — rather than losing status — is considered to retain its national sovereignty and to “grant insurgents merely a sort of legal personality as subject of rights and duties within the confines of the laws of war.”¹¹⁰ The contrary, it is argued, would allow the incumbent government too much power to confer upon itself and upon insurgents the rights of belligerents. Third-party states, the argument goes, must be able to extend those rights based on their own estimation of their interests. Under this legal principle, then, the Colombian government could not readily undermine its sovereignty by merely implying some condition of belligerency. Be that as it may, this doctrinal snippet is intended merely to suggest the wide range of authority available under belligerency law.

Beyond the factual and doctrinal play of the concept, Cold War scholars also criticized belligerency doctrine as an ideological weapon.¹¹¹ The recognition of insurgency or belligerency, effectively placing the *de jure* government at a disadvantage, came to be seen as merely dependent on superpower interests. The possibility of applying these doctrines neutrally and objectively was dismissed. Still, scholars of the period did not extrapolate these lessons to other times and other contexts. Instead of finding fault with the doctrine they found fault with the context making its neutral application impossible.

The modern-day obsolescence of belligerency rules has been further demonstrated by critical theorists. In a thorough reworking of the Spanish Civil War scholarship, Nathaniel Berman examines the supervening legal solution produced as a consequence of the traditional doctrine's limitations.¹¹² While belligerency status is typically identified with neutrality, it can also produce the

[recognition or non-recognition], because each has the practical effect of intervention though not intended as such, and the foreign state is free, so far as that duty is concerned, to consult its own interest and the general political good of the world.” See McNair, *supra* note 99, at 482 (citing I J. WESTLAKE, INTERNATIONAL LAW 53 (2d ed. 1910)).

109. The main international effect of an incumbent government recognition of belligerency has been described as the incumbent government “becomes powerless to criticize the recognition accorded by a third power.” McNair *supra* note 99, at 475-76 (citing CARNEGIE ENDOWMENT, *supra* note 92, at Art. (3)). Relinquishing the power to criticize is a far cry from the effects that orthodox publicists attribute to incumbent government recognition, and even to the implicit acknowledgment of belligerency conditions.

110. *Noted in Protocol II, supra* note 70; see also CHARLES ZORGBIBE, LA GUERRE CIVILE 45-51 (1958).

111. See FALK, *supra* note 93, at 11. “There is almost no reliance in recent diplomatic practice upon the gradation of civil-war situations implicit in the scale of rebellion, insurgency, and belligerency. These symbols of legal status have themselves been virtually discarded, and governments determine their relations to competing political elites on the basis of their preferences, capabilities, and foreign policy goals, as well as on the basis of what their adversaries are doing or would tolerate.”

112. Nathaniel Berman, *Between “Alliance” and “Localization”*: Nationalism and the New Oscillationism, 26 N.Y.U. J. INT'L L. & POL. 449 (Spring 1994) [hereinafter Berman].

opposite effect. It provides the springboard for alliances between third-party states and the parties to the internal conflict. Berman recounts the London Non-Intervention Committee's role in patrolling against foreign involvement in the Spanish conflict. Bypassing belligerency law altogether, a novel non-intervention arrangement was developed alongside the formal rules.

Traditionally, sovereignty rights would have precluded the international isolation of Spain's Republican government in the absence of a formal recognition of belligerency of Franco's forces. Yet, the international Committee upheld the principle of non-intervention despite not formally recognizing a state of belligerency. Recognizing belligerency would have, in their estimation, merely accentuated the divisions in the international community at the time, precipitating an internationalization of the civil war: that is, rather than evoke neutrality it would have precipitated alliances with one and the other of Spain's fighting factions. In this way, the Committee expanded its competence over the conflict without recourse to belligerency status and had a substantial impact on the course of the Spanish Civil War. Berman makes the point that belligerency rules did not stand in the way of international legal action. By contrast, the formal rules in this case, by precipitating third-party intervention on either side of the conflict after a declaration of belligerency, would have merely internationalized the conflict then brewing on Spanish soil.

In current international practice, belligerency doctrine is at most the subject of historical curiosity or neo-formalist projects.¹¹³ Traditionally, the question of belligerency is framed in terms of isolating internal conflict, by withdrawing support to the incumbent government and declaring neutrality as to both sides. Today, instead of belligerency rules, decisions over international involvement in internal conflicts are resolved along different axes.¹¹⁴ Contemporary practice is framed in terms of adducing whether a sufficient basis exists for direct international involvement. Rising immediately to the fore are questions of human rights compliance, political legitimacy, and maintaining international peace. As a result, fine distinctions over territorial control and the organizational structure of insurgents would hardly come into play. Colombian publicists who propose to control the international response to the current conflict by reference to belligerency rules are, at best, misguided.

113. See, e.g. Robert W. Gomulkiewicz, *International Law Governing Aid to Opposition Groups in Civil War: Resurrecting the Standards of Belligerency*, 63 WASH. L. REV. 43, 61 (1988). Gomulkiewicz acknowledges the bad faith potential of belligerency rules during the Cold War; however, he proposes to revitalize the rules as a basis for U.S. foreign policy. Under his reformulation, the requirement of "territorial control" should be strictly adhered to prior to the U.S.'s intervention on the side of insurgents. Such a rule is, for Gomulkiewicz, a good proxy for legitimacy and representativeness: "The belligerency standards are a good guide to political legitimacy, however, and could be an important factor on those occasions when the United States decides to side with the armed opposition against an old incumbent ally." *Id.*

114. See David Wippman, *Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict*, 27 COLUM. L. REV. 435, 444 (Spring 1996). "The viability of the traditional rules governing civil war became increasingly doubtful after World War II. As a practical matter, states simply disregarded these rules." *Id.*

Yet, despite contemporary international practice and Protocol II's own disclaimers, orthodox internationalism provided the backdrop against ratification. Its teachings undergirded, and continue to do so, the local understanding of belligerency rules. Any position or compromise which appears to acknowledge belligerency-like conditions is thus rejected for fear of down-grading the state's international status and conversely upgrading the guerrillas'. The main point, here, is that these arguments have the effect of constraining governmental action. Fear of international recognition of the guerrillas, a most unlikely event, threatens to derail the peace process.

As the example of Protocol II demonstrates, agreeing to the instrument's applicability is equated with recognizing the belligerency status of rebel forces.¹¹⁵ By reading in this presumption, Colombian publicists raise the bar. It is true that the guerrillas have not been widely recognized as belligerents by the world community. Implying that this is the result of orthodox legal rules though would be inaccurate. The guerrilla's abysmal international projection has more to do with their own connections to drug-trafficking and kidnapping, and current international politics, than with belligerency doctrine. This position is not likely to change even if the Colombian government weaved across the line that local publicists have drawn. Telling is the fact that Colombia's ratification of Protocol II, ultimately in 1994, did not provoke the much feared international recognition of the guerrillas.

B. Continuing Opposition

Although Protocol II was ultimately adopted, it was and in some quarters still is vehemently rejected. Some continue to question its applicability.¹¹⁶ They argue that Colombia's situation still does not rise to the level of conflict contemplated by the convention. As such, the argument is made, the Colombian government's determination to apply it is merely voluntary.¹¹⁷ This position is both adaptive to

115. See Daniel García-Peña, *El Derecho Internacional Humanitario y La Paz Negociada*, in *DERECHO INTERNACIONAL HUMANITARIO APLICADO* 330 (Tercer Mundo, ed., 1998) [hereinafter García-Peña]. "[T]he possibility of applying international humanitarian law has been discussed under the assumption that it would be equivalent to recognizing a status of belligerency for insurgent groups. During many years this theme was taboo, prohibited; it was only proposed by 'friends of the guerrillas,' and at the same time it was used by them for propaganda . . ." *Id.*

116. See Rafael Nieto Loaiza, *Algunas Observaciones Acerca del Delito Político y la Aplicación del DIH en Colombia*, in *DERECHO INTERNACIONAL HUMANITARIO APLICADO* 371 (Tercer Mundo ed., 1998) [hereinafter Nieto]. My understanding, from informal sources, is that Mr. Nieto Loaiza has recently conceded that Colombia now meets Protocol II's factual preconditions. Nonetheless, more interesting than this acknowledgment is his and others' position until this point; see generally Sarmiento, *supra* note 38 (noting the continuing rejection of Protocol II's applicability).

117. Acknowledging the implacable debate over Protocol II's applicability, President Ernesto Samper's High Commissioner for Peace stated: "[T]he government, in November 1995, . . . deliberately avoiding an extremely long debate over whether the armed groups satisfied the criteria established under article 1 of Protocol II, recognized the necessity that humanitarian law be respected in Colombia and [we] made a call to the guerrilla groups for them to respect it as well." García-Peña, *supra* note 115, at 331.

the fact of Protocol II's ratification, and it also defends against any belligerency implication that its application in Colombia may have.

Humanitarian advocates have found themselves struggling against this position.¹¹⁸ Voluntary applicability undermines their enforcement efforts. Several ways around this conundrum have been developed. The first registers the disagreement over the meaning of Protocol II's scope.¹¹⁹ Proponents of this position simply insist that the Protocol does apply to all of Colombia's fighting forces.¹²⁰ Representatives of the Colombian Red Cross, for example, argue that the required threshold is lower than the level of "intensity, duration, territorial control or extension than that of civil war."¹²¹ This however does nothing more than exacerbate the resistance to Protocol II in some quarters. A lower threshold is perceived as indirectly lowering the threshold for belligerency status: from an orthodox perspective this is a route to be rejected at all costs.

A different approach, upholding the application of Protocol II regardless of its purported scope,¹²² has been articulated by Colombia's Constitutional Court.¹²³ That entity has held the provisions of Protocol II to be peremptory international law.¹²⁴ The Court considers them *ius cogens* norms.¹²⁵ They are thus fully

118. See Sarmiento, *supra* note 38, at 273 (noting the anomaly of the government's "political" decision to abide by Protocol II which leaves open the question of its applicability to the guerrillas, effectively remitting it to the discretion of each individual subversive organization.).

119. This is the position taken by many human rights advocates both inside and outside Colombia. Human Rights Watch, for example, dismisses any contrary interpretation: "Protocol II is applicable when . . . all of which Colombia clearly satisfies." WAR WITHOUT QUARTER, *supra* note 20, at 26; "In interviews with Human Rights Watch, all groups engaged in the conflict said they support some form of enforcement of minimum humanitarian standards." *Id.* at 24; "While some disagreement may be the subject of honest debate, much of the opposition to the full compliance with laws of war in Colombia is a cynical justification for continued, deliberate, and atrocious violations of the minimum standards necessary to protect human life." *Id.* at 2. This Article, rather than merely dismiss them, specifically addresses the interpretations of the laws of war prevalent in Colombia, which turn out to have more than just bad faith behind them.

120. For an example of this argument, see generally Carrillo-Suarez, *supra* note 74. Carrillo-Suarez argues that Protocol II's having come to be seen in Colombia as applying only to civil wars is the product of "inappropriate interpretation" and the "distracting discourse of 'civil war.'" My objective in this section is to demonstrate that this restrictive interpretation of Protocol II is not merely a haphazard error. Rather it responds to the political motives of mainstream Colombian publicists, and it can be identified as part of a larger program which makes use of an idiosyncratic interpretation of international law.

121. Brief to the Constitutional Court supporting the constitutionality of Protocol II following its approval by Colombia's Congress, CORTE CONSTITUCIONAL DE COLOMBIA, C-225/95, at 393 [hereinafter CORTE CONSTITUCIONAL DE COLOMBIA, C-225/95]; see also International Committee for the Red Cross, Special Report: The Role of a Neutral Intermediary in Colombia (1998).

122. See KALSHOVEN, *supra* note 74, at 37-38.

123. See CORTE CONSTITUCIONAL DE COLOMBIA, C-225/95, *supra* note 121, at 393.

124. This approach owes much to Magistrate Ciro Angarita Baron who wrote the earlier opinion on the constitutionality of Protocol I, in 1993. See CORTE CONSTITUCIONAL DE COLOMBIA, C-574/92. Prior even to the introduction of Protocol II for approval by Colombia's Congress, Angarita announced the *ius cogens* quality of international humanitarian law. As such, Protocol II need not be formally incorporated in the national legal order. Instead, it is supreme law.

125. Notably orthodox internationalists have rejected the Constitutional Court's opinion that Protocol II constitutes imperative international law. Instead, they assert that only common Article 3 enjoys that status, pursuant to the International Court of Justice's decision on the Nicaragua case, June 27, 1986. See Nieto, *supra* note 116, at 362: "[this] only demonstrates . . . the profound lack of

applicable in Colombia by operation of the 1991 Constitution's incorporation of international humanitarian norms as supreme law.¹²⁶ No material conditions to its application are thus binding.¹²⁷ The Court goes on to say that Protocol II norms are applicable even in the context of public riots and civil disturbances, which are otherwise excluded within the Protocol's very text. Nonetheless, the Court upholds its applicability on the basis of a mix of constitutional and international law: *ius cogens* humanitarian law, just like core human rights law, is binding under any circumstance under the Colombian constitution.¹²⁸

This holding has not been widely accepted.¹²⁹ Indeed, orthodox internationalists question its legal validity. They insist that Protocol II is not *ius cogens*. As a result, it would not be directly applicable to the Colombian situation without regard to its textual preconditions.

Outside Colombia, commentators have acknowledged that common Article 3 fits within the category of peremptory law. Its extension to Protocol II is not clear.¹³⁰ Still, the Court's holding is a plausible position, at a minimum not excluded by international opinion.¹³¹ It is a position, not unlike orthodox-type

knowledge of the Court not only in terms of the legal character of international humanitarian law of non-international armed conflicts, but, also more gravely, of the nature even of imperative law as well as customary law."

126. CONSTITUCIÓN POLÍTICA DE COLOMBIA 1991, art. 214.

127. See RODRIGO UPRIMNY, *Sentido y aplicabilidad del derecho internacional humanitario en Colombia, in Conflicto Armado y Derecho Humanitario* (1994), for a discussion and support of the Court's decision. Uprimny argues that since these norms of international humanitarian law are *ius cogens* and thus not subject to factual preconditions to their applicability, then by extension the substantive norms of Protocol I (applicable to wars of national liberation) are also applicable to the Colombian conflict. See *id.* at 172.

128. CORTE CONSTITUCIONAL DE COLOMBIA, C-225/95, *supra* note 121, at 393 (stating that the formal adoption of Protocol II merely functioned to give effect to the constitutional norm, to incorporate the Protocol within national legislation, and to notify the international community that Colombia committed itself to respecting and enforcing respect of these norms).

129. The International Court of Justice has assented to the *ius cogens* character of common Article 3 to the Geneva Conventions of 1949. *Military and Paramilitary Activities*, (Nicar. V. U.S.), 1986 I.C.J. 14, (June 27). The Court has not expressly held that Protocol II enjoys the same rank. However, it leaves the door open for such argument: "[A] great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' . . . these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law." (1986 I.C.J. 226).

130. For an argument in support of Protocol II's inderogability, see William Walker, *The International Law Applicable to Guerrilla Movements in Internal Armed Conflicts: A Case Study of Contra Attacks on Nicaraguan Farming Cooperatives*, 21 N.Y.U. J. INT'L L. & POL. 147, 151 (1988); see also M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199, 217 [hereinafter Bassiouni]: "Among the international crimes that fall within this category [*ius cogens*] are: aggression, genocide, 'crimes against humanity', war crimes, slavery and slave-related practices, torture and piracy. In time, other international crimes may rise to that level and be deemed *ius cogens* crimes."

131. See Bassiouni, *supra* note 130, at 220 ("The 'Law of Geneva' (four Geneva Conventions of 1949 and portions of Protocols I and II which embody customary law) are deemed to have risen to the level of a general custom."); cf. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995) Meron finds that Protocol II has "not yet been universally recognized as part of customary international law," however its inclusion within the subject matter jurisdiction of the Rwandan war crimes tribunal is a big step in that direction. He argues in favor of individual criminal

arguments, to the question of international humanitarian law's applicability. It is simply a different answer than the one given by orthodox publicists.

In any case, arguments in favor of Protocol II have not dislodged reflexive, orthodox assumptions.¹³² The orthodox notion of belligerency has not been displaced. It remains a strong international law argument, marshaled to prevent significant compromises against the state.

For Pastrana's government, the result has been, instead of reinforcing his position, to limit his range of action. Working under strict belligerency constraints, the government has to present itself as retaining complete territorial control. And, it has to claim the safeguard of its population and enforcement of its laws. Its actual incapacity to perform these functions places it in a vulnerable position. Reasonable options, such as Protocol II or other situations described in this Article, are rejected by Colombia's legal intelligentsia who argue they would contribute to the guerrilla's belligerency claims. Their arguments carry considerable weight. They claim to represent unquestioned and unquestionable international law. Under the all-or-nothing view of orthodox law, the stakes are then raised. Options equated with belligerency status are in most instances taken off the table. Their acceptance would entail nothing short of relinquishing state sovereignty on the international plane.

As a result, the heightened definition of belligerency is left to reinforce the logic of war. Either the government asserts complete control or the guerrillas achieve virtual statehood. Conversely, either the guerrillas acquire permanent control or the government monopolizes the terms of peace and war. In this way, the stalemate on the military field is merely replicated by legal discourse.¹³³ Outwardly, the standard of belligerency promises to keep the guerrillas at bay. More ominously, it straitjackets the government into intensifying, rather than humanizing, the war.

C. *The De-Militarized Zone*

A separate example of international legal argument in Colombia relates to the establishment of a de-militarized zone in which to conduct peace talks. To initiate the process, Pastrana declared the demilitarization of a part of southeastern Colombia. The area consists of 42,000 square kilometers and covers five municipalities. A demilitarized zone has been a long-standing FARC demand as a condition for negotiations. Ostensibly, the area is intended to provide a safe zone for conducting peace talks. Pastrana's concession was a bold move not lacking in critics.

responsibility and universal jurisdiction to prosecute violations of common Article 3 and Protocol II. *See id.*

132. For an example of the argument limited to insisting on the applicability of international humanitarian law in Colombia, see Carillo-Suarez, *supra* note 74.

133. See Jorge L. Esquirol, *El Proceso de Paz: Conforme al Derecho Internacional*, in LA OTRA GUERRA: EL DERECHO COMO CONTINUACIÓN DEL CONFLICTO Y LENGUAJE DE LA PAZ 95 (Óscar Eduardo Guardiola Rivera et al. eds., 1999).

The U.S. reaction actually beat local antagonists to the punch. The demilitarized zone was interpreted as a safe haven for drug-traffickers. Considering the FARC's well-established association with the drug trade, granting this organization free reign over a sizable portion of Colombia was incomprehensible to many U.S. observers. Within Colombia, the reaction presented U.S. interests as at odds with the peace process.

However, U.S. skeptics did not constitute the greatest challenge to Pastrana's leadership. Instead, a crucial part of his proposal consisted of managing the government's credibility and continued sovereignty over the region. Not surprisingly, the local authorities and populace in the area were alarmed about the meaning of the action. More broadly, Pastrana's concession of a huge tract of land to his opponents appeared to be a renunciation of the zeal with which previous governments had defended the state's sovereignty and guarded against acknowledging a state of belligerency.

Pastrana was forced to enact a critical maneuver. It was clear that the specter of belligerency was at loggerheads with peace negotiations. The guerrillas' condition of a safe zone — clearly with a strategic eye toward their own belligerency arguments — created a standstill. The government was, thus, forced to reformulate the conceptual bases for the concession. Rather than acquiesce in the meaning of demilitarization as relinquishment of control, territorial control was reconceived as a procedural mechanism. Under a law adopted by Congress in 1997 enabling the president to take measures in furtherance of the peace process, Pastrana withdrew the military while retaining “control” over the zone.¹³⁴ Thus, instead of conceding a territorial claim or even acquiescing to a safe zone — which could be then used by the guerrillas to argue for belligerency — the action was redefined as procedural, strictly related to the peace process, therefore offering no substantive basis for belligerency rights. Withdrawing troops from the zone voluntarily, in furtherance of the President's peace powers under the statute, reinforces the state's lawful authority over the territory.

This maneuver bespeaks the pragmatism of Colombian policy makers. In this same way, Pastrana has injected a great deal of realism in his peace making. However, this is not to say that the formal notions of belligerency do not play a strong role and may even play a defeating role. Notably, international law experts have not supported his action by, for example, distinguishing between the government's concession and the requisites for belligerency or even sovereignty. Clearly, occupation of land alone is not the contemporary standard for recognizing sovereignty. Protection of human rights and guarantees for political rights are common incidents to international recognition. Thus, rather than constituting the *sine qua non* for international recognition, Pastrana's actions are not likely to propel

134. Ley 418, Art. 8, Dec. 26, 1997 (Specifically, Chapter I, Article 8, Paragraph 1: “The Government can agree . . . with the armed organizations outside the law... to their temporary quartering or that of their members in precise and determinate zones within the national territory. In such zones, arrest warrants will be suspended against those with warrants outstanding until the Government so determines or declares that such process has concluded.”).

the international community's endorsement of the FARC. Still, orthodox commentators have declined to make room for these actions in terms of international law.

As a result, the implementation of a demilitarized zone has come at great political cost. Indeed, tension over the area led to the resignation of a highly popular minister of defense and along with him the resignation of five of the nation's top military commanders. The country has never been so close to a military revolt since the 1950's. The action came uncomfortably close to outright rejection of Pastrana's leadership. The concession greatly undermined confidence in the direction of the peace process.¹³⁵

Military leaders especially objected to the zone. Initially granted for a period of six months to end February 1999, the time frame for peace negotiations has been repeatedly extended and delayed. At this point, there is no firm deadline to re-incorporate the territory. As a result, military operations have been made more difficult. From the perspective of the internal war, the guerrillas have used the zone to stage attacks and stockpile weapons and home-made gas bombs. Furthermore, the FARC has been insisting on assuming more governmental functions. While the government continues to assert its jurisdiction and authority over the area, criticism has not been muted.¹³⁶

Adding to the internal skepticism, the position of conservative U.S. lawmakers fuels dissent. In relation to U.S. funding of Pastrana's "Plan Colombia," some of the potential conditions surfacing from Congressional hearings is the abolishment of the demilitarized zone. Even after meeting with President Pastrana, Rep. Benjamin Gilman, chairman of the House International Relations Committee, has maintained that: "Support for increased military aid to Colombia should be dependent on the restoration of government access to the narco-guerrillas' 16,000-square-mile zone of impunity."¹³⁷ From the U.S. perspective, the zone has effectively been the site of rampant drug trafficking activity. As a result, more conservative Congressmen are calling for the dismantling of the zone as a condition for U.S. assistance.

With appropriations not yet firm, it is unclear as of this writing whether or not the U.S. will insist on this condition. When the zone was implemented, State Department officials ultimately decided to support Pastrana after obtaining assurances that the area would not become a drug zone. This time with the carrot of financial assistance and the play of Congressional politics, it is not clear if the U.S. will attempt to micro-manage the de-militarized zone.

135. A Gallup Poll of the country's business leaders demonstrates that: 56.6% are opposed to the concession of a demilitarized zone and 56.2% give Pastrana's peace strategy failing marks. *Paz sí, pero sin Victor G. y sin canje*, EL TIEMPO (Bogotá, Colom.), Oct. 24, 1999.

136. See, e.g., General Alvaro Valencia Tovar, *Realidad de la zona de despeje*, EL TIEMPO (Bogotá, Colom.) July 30, 1999. The General outlines the FARC's assumption of governmental powers. He also decries the zone's use as a drug sanctuary sheltering the cultivation and processing of coca.

137. John Diamond, *Capital Hill Divided Over Colombian Aid Appeal*, CHICAGO TRIBUNE, Sept. 23, 1999.

D. "Restricted" Belligerency

A recent proposal by one of Colombia's most respected ex-presidents, Alfonso López Michelsen, sparked a fiery replay of the belligerency debate.¹³⁸ Specifically, López Michelsen advanced the feasibility of recognizing belligerency status for the guerrillas in order to facilitate an exchange of captured combatants.¹³⁹

*How can we exchange inmates of justice, indicted for crimes under the Penal Code, for soldiers in the service of the Republic, fallen as prisoners in actions of war? And how can we call such retentions (of soldiers) kidnappings when the character of a kidnapping is the element of surprise on a defenseless citizen? . . . The obvious conclusion is that to put in practice the healthy objectives inspired by the representatives of civil society and the political class, the most adequate procedure is to recognize a restricted belligerency.*¹⁴⁰

The piece was highly polemical and generated a broad range of published responses from different sectors of Colombian society.¹⁴¹ Defenders¹⁴² but mostly opponents laid out their arguments on the topic. The controversy was documented in several weeks of national press coverage.

López Michelsen proposed that the government recognize restricted belligerency status for the guerrillas. His claim was that this international status would facilitate two government objectives: humanizing the internal war and

138. Alfonso López Michelsen, *Para legitimizar el canje Beligerancia Restringida*, EL TIEMPO (Bogotá, Colom.), Oct. 10, 1999 [hereinafter López].

139. Citing unnamed international experts, one of Colombia's largest weeklies, *Semana*, reported that the major danger from an exchange of captured combatants lies, not in military considerations or impunity concerns, but rather with the resulting recognition of the guerrillas' belligerency status. *El golazo del canje*, SEMANA (Bogotá, Colom.), Jan. 18, 1999 [hereinafter *El golazo*]. Reciting Colombia's brand of orthodox international law, the magazine cited three forms of belligerency recognition: by third party states, multilateral organizations, and explicitly or implicitly by the incumbent government. An exchange of combatants, it went on, would constitute recognition which "the Pastrana administration knows it must protect itself to the maximum in this matter because a false step could represent not a peaceful solution to the conflict but the beginning of the territorial division of Colombia." *Id.* An implicit recognition by Pastrana would produce the "obligation on the part of the international community to abide by and recognize the belligerency status of the armed group." *Id.* In other words, according to the article, the peace process itself may constitute an implicit recognition of belligerency. If the conflict is not resolved, the gamble would leave in its place "territorial division with two armies with similarly internationally-recognized legitimacy." *Id.* *Semana's* reporting of orthodox views, as unquestionable international law, contributes to the stranglehold of the former, threatening the viability of negotiations.

140. López, *supra* note 138.

141. López *plantea beligerancia para Farc*, EL TIEMPO (Bogotá, Colom.), Oct. 10, 1999.

142. Pointing to the underlying issue of civilian kidnappings, Colombia's major daily *El Tiempo's* peace bureau supported the idea of creating a new status of "humanitarian belligerency." The piece advanced the notion that such status would have no bearing on any actual international recognition of the guerrilla forces. Indeed, international recognition, it was asserted, is unlikely due to the guerrillas' drug links and violations of civil liberties. See *La realidad virtual de la beligerancia*, EL TIEMPO (Bogotá, Colom.), Oct. 18, 1999.

facilitating a prisoner exchange with the guerrillas. These two issues are high on the government's agenda. Humanizing the war has been proposed in the context of ad hoc agreements either in tandem to the peace negotiations or as part of the peace agenda itself. While the guerrillas, in principle, agree to be bound by the laws of war, there are no effective enforcement mechanisms.¹⁴³ In addition, the rebels insist that their internal codes take precedence over inconsistent international rules. Prisoner exchanges stem from the demands of the guerrillas and family members of soldiers. The government is contemplating a response as part of the peace process. Formal legislation, in order to effectuate the process, is currently pending in the Colombian Congress.¹⁴⁴ One principal obstacle is the legal basis for the release of convicted criminals, as opposed to prisoners of war.

In any case, the ex-president reasoned that by conceding this long sought after status to the guerrillas, the latter may be better held to international humanitarian rules and a legal basis would be established for prisoner exchanges. López Michelsen hoped to offer status in exchange for a commitment to the laws of war. Not surprisingly, the proposal was greeted with alarm by orthodox internationalists and government spokespersons alike.

The proposal was soundly pronounced legally infirm. One of Colombia's premier publicists stated in response to López Michelsen's proposal:

*There is no state of restricted belligerency foreseen in International Law. If the Colombian state grants the rebels the status of belligerency, it converts them into subjects of international law with all the rights and responsibilities attending this quality. Furthermore, it would not be possible to impede other States from recognizing the state of belligerency which would formalize civil war. Finally, the peace process does not require a declaration of belligerency which, as has been seen, does not follow as the requirements of International Law are not met.*¹⁴⁵

First, the existence of a restricted belligerency status was dismissed. Mainstream experts insisted that either a belligerency exists or it does not: but nothing in between.¹⁴⁶ Another of the country's international law authorities expounded his position in the national press:

143. See RANGEL, *supra* note 18, at 95-103. Noted expert on the Colombian conflict, Rangel supports a recognition of belligerency with the goal of international humanitarian law compliance on the part of the guerrillas. Rangel reasons that complying with international law is tremendously costly to the guerrillas in terms of reducing their revenues, possibly as much as half. By contrast, the government's costs in granting belligerency, conditioning it on humanitarian compliance of course, is comparatively costless. Few nations, if any, would follow suit as a result of to the guerrillas' drug ties and ideological unpopularity. See *id.*

144. General Alvaro Valencia Tovar, *La Ley del 'canje'*, EL TIEMPO (Bogotá, Colom.), Oct. 8, 1999 [hereinafter Tovar].

145. Marco Gerardo Monroy Cabra, *Reflexiones sobre el estado de beligerancia*, in *ÁMBITO JURÍDICO*, (Year 2, No. 44, Oct. 25 to Nov. 7, 1999) (hereinafter Cabra).

146. The Government's official response re-iterated the position of orthodox publicists. The High Commissioner for Peace stated: "restricted belligerency does not coincide with internal or international

Some academics have affirmed that the figure of belligerency is "out of fashion" and its discussion, useless and uncondusive. Maybe this is so in relation to other internal conflicts of the many geographically, but the facts show the contrary in relation to the Colombian (case).¹⁴⁷

As a result, it is argued, belligerency doctrine is relevant, and a contextual definition of it is simply erroneous. Here is a clear instance of the idiosyncratic handling of international law in Colombia. The concepts are depicted as monolithic and impervious to specific situations. Needless to say, this is quite a peculiar theory of international law's development.

The granting of status as a bargaining chip is not novel, even in the Colombian context. A type of status for the guerrillas is already in place. The government has recognized the rebels as "political actors" as a prelude to peace talks. Within Colombia's national laws, it would have been inconsistent to negotiate with a criminal group. As a result, the enabling law, Law 418 of 1997, granting the executive the power to negotiate with armed insurgents also provides for the recognition of "political" status. It is handled in an openly contingent way. When the ELN staged several mass kidnappings in early 1999, the government withdrew their "political" status. In addition, the concept is significant for the paramilitaries as well: it offers them the potential of participating in peace negotiations. Because of their gross humanitarian violations, the government has refused to recognize them, which is also the position of the left-wing guerrillas. In any case, although not linked to any traditional belligerency right, status is significant to irregular forces wishing to be recognized as interlocutors.

This way of proceeding also has a precedent in the case of third-party state negotiations with the guerrillas. It is the route that the Venezuelan government has taken. Venezuelan agro-businessmen are routinely kidnapped, taken across the border, and ransomed by the guerrillas. Attempting to halt these activities, Venezuelan diplomats have recognized a state of "political belligerency" in Colombia in order to make contact with guerrilla forces. The status accorded does not extend any right which may be attributed to the legal version of the concept. It is simply limited to the issue of Venezuelan security. The ensuing negotiations have, at least officially, alleviated this problem.

What the Colombian and Venezuelan solutions demonstrate, at a minimum, is an alternative to the monolithic concept of status. Disaggregating status has created

norms. In the internal plane, no basis or legal support exists; in the international order, there is no precedent nor has it been framed in international instruments." *El Memorando de Victor G. Ricardo*, EL TIEMPO (Bogotá, Colom.), Oct. 13, 1999.

147. See Rafael Nieto Loaiza, *Los Argumentos de López Están Equivocados*, EL TIEMPO (Bogotá, Colom.), Oct. 12, 1999 [hereinafter Loaiza]. (Text continues: "The FARC have expressly requested this status, columnists discuss it, the High Commissioner for Peace issues a communique in which he sustains that no action by the government has the intention or significance of conceding belligerency status, and to remove any further doubt, President Chávez [of Venezuela] and his chancellor, in relation to his polemical declaration of neutrality, has affirmed that it is not Venezuela but the Colombian Government that has conceded it. Unfortunately, this figure is for Colombia and its context more alive than ever. And the risks are very great.")

room to negotiate against kidnapping and to engage in peace negotiations. However, taking the route of a political solution, while it does sidestep the legal orthodoxy, does not do the work of transforming or transcending it. Orthodox positions remain intact. And, the political solution in question is constantly at risk of transgressing the lines set by orthodox authorities. Government action thus does not escape the law: on the contrary, it merely replays the typical dichotomy between law and politics. The result is that law retains the high ground, potentially inhibiting certain actions and undermining the legitimacy of others which are contrary to its dictates. In the Colombian case, an anachronous law of belligerency is used to constrain a wide array of negotiation.

A second objection to López Michelsen was based on the impact it would have on international humanitarian law. Conditioning respect for the laws of war on the granting of belligerency status was thoroughly rejected as inconsistent with international law. The laws of war are held to be binding irrespective of status.¹⁴⁸ Furthermore, orthodox adherents affirmed that respect for the law is a pre-condition to the recognition of belligerency status and not the other way around.

Insistence on the hierarchy of norms is a commonplace within most legal analysis. However, insisting on this order of affairs in the face of non-compliance refuses to engage in the problem of enforcement. Although it may well serve one's ideology or the programmatic imperatives of a political program, it obfuscates rather than helps to clarify the issue. In other words, arguing over which comes first belligerency or the rules of war does not begin to address the question of what incentives can be set to induce compliance with humanitarian norms. Ideally, all guerrilla groups would have internalized the laws of war, and there would be no need to argue for its primacy. However, since such is not the case, merely reiterating the hierarchy, while morally satisfying, does not stand much of a chance of being effective. In fact, one of the aims behind the development of belligerency notions was precisely securing compliance with the laws of war by rebel forces. In this same way, an effective mechanism may be the recognition of some type of status and international oversight.

In the main, the arguments described above demonstrate the stranglehold of orthodox internationalism on debates over the peace process. Only a minority of voices have interjected to endorse a different version of international law.¹⁴⁹ Some critical commentators have decried the phantasmagoric or taboo quality that the concept of belligerency has taken within Colombian discourse. Belligerency status, it was pointed out, has no real bearing on Colombia's international position. Third-party states are not motivated by the decision of the Colombian government to grant

148. See, e.g., Cabra, *supra* note 145 (arguing against belligerency on the basis of the FARC's failure to meet the formal requirement of "territorial control" since the demilitarized zone is based on a government grant; and on the basis of the FARC's failure to comply with international humanitarian law).

149. See López *Plantea Beligerancia para FARC*, EL TIEMPO (Bogotá, Colom.), Oct. 11, 1999; see also Alfredo Rangel Suarez, *Por Que el Miedo ?*, EL TIEMPO (Bogotá, Colom.), Oct. 15, 1999.

or withhold formal legal status to the guerrillas.¹⁵⁰ Furthermore, the Colombian guerrillas' terrorist and drug ties effectively rule out any blanket international recognition. Therefore, recognizing its negligible practical effect, the concept is unjustifiably significant. In other words, there is no reason to fear it.

Orthodox internationalists have retorted by rejecting head-on the purported obsolescence of belligerency doctrine, at least in Colombia.¹⁵¹ Indeed, internationalists reinforce the significance of the concept. However it is not so much out of fear of international reaction as out of fear of internal reaction.¹⁵² Tellingly, they are prepared to defend the concept's applicability in Colombia even while recognizing its demise internationally. In this way, belligerency doctrine is given new life but a very peculiar one at that.

It may be acknowledged that the international impact of recognizing a belligerency situation — especially a limited one — would be small to nothing. Yet, it is argued that outright recognition would provide the springboard for ever increasing demands by the rebels. By way of example, the demilitarized zone could be claimed as occupied territory and the claim to organized government would become harder to resist. While these demands may indeed be forthcoming, they could well arise with or without the recognition of some belligerency status. Quite transparently, the importance of the belligerency question lies in the internal politics it demarcates.

Specifically, the issue which belligerency holds at bay in the context of this recent exchange concerns prisoner exchanges. Understandably, exchanging guerrillas for regular soldiers in the hands of the insurgents, although politically popular, is militarily problematic. It entails the release of jailed rebels who will no doubt return to guerrilla ranks. Top military commanders have questioned outright the wisdom of this exchange.¹⁵³ Resisting its implementation on the basis of international law concepts, however, is not helpful. It places a purported

150. The third-party state which has the greatest incentive to recognize the Colombian guerrillas' belligerency status is Venezuela. Venezuelan nationals have been routinely kidnapped and extorted by the guerrilla forces. Border incursions are not uncommon. The Venezuelan government would thus be in a position to take advantage of one of the main incidents of recognizing belligerency: the protection of its nationals. See LAUTERPACHT, *supra* note 69, at 238. Additionally, President Hugo Chávez's "Bolivarian" government has in the past expressed sympathy toward Colombia's insurgents. Nonetheless, the Venezuelan chancellor has announced that it distinguishes "political" belligerency from legal belligerency. It recognizes the former in the case of the guerrillas exclusively for the purpose of halting cross-border incursions. This distinction is not unlike the Colombian government's own differentiation between political standing, for the purpose of initiating peace talks, and belligerency status. Still, it should be noted that notwithstanding Venezuela's reluctance to recognize other belligerency rights, Chávez speaks in terms of Venezuelan neutrality vis a vis the actors to the Colombian conflict. See *Presidente Chávez Reitera Neutralidad*, EL TIEMPO (Bogotá, Colom.), Sept. 12, 1999. Separately, the Venezuelan government has also made overtures to hosting the peace talks with the ELN in Venezuelan territory. See Maria Cristancho, *Chávez Estudia Convención del ELN en Venezuela*, EL TIEMPO (Bogotá, Colom.), Oct. 9, 1999.

151. See generally Loiza, *supra* note 147.

152. See Vicente R. Torrijos, *El Todo por el Todo*, EL TIEMPO (Bogotá, Colom.), Oct. 12, 1999. ("In a synthesis, it would suppose a much more complex negotiation than the one now . . . that would directly target the redistribution of political and economic power in Colombia.")

153. See generally Tovar, *supra* note 143.

authoritative interpretation of law over and above the actual concerns with the policy and the actual range of alternatives.

In this way, international law concepts are inscribed with the political choices of orthodox internationalists. Of course, any legal argument is inherently linked to some political position. However, the difference in Colombia is that only one legal argument is held to be valid law. And that law is defined by publicists reluctant to political compromise.

IV. REGULATING THE CONDUCT OF WAR

A The Mainz Agreement

During July 12-15, 1998, a promising initiative for peace was spearheaded by members of civil society.¹⁵⁴ Under the auspices of the Catholic Church, the ELN met in Mainz, Germany with prominent members of Colombia's political class in their capacity as private citizens. The government was not officially represented. After more than three decades of civil conflict, this initiative was perceived as the people of Colombia taking matters into their own hands. While government representatives were present, they participated in their personal and not official capacities. Thus, the government did not formally participate in this early initiative with the ELN.

Participants included an eclectic mix of politicians, judges and representatives of non-government organizations (NGO's). Over the course of three days, the participants met in closed session. Upon concluding, two important accomplishments emerged. The first was an international humanitarian agreement. The second was a commitment and a schedule for peace negotiations.

A follow-up meeting, to which the government was ultimately invited, was to set the timetable and the framework for broad-based peace negotiations. While retaining the possibility of a different structure, the most discussed scenario was a constitutional assembly. The model would be the 1991 Constituent Assembly that the country had witnessed not long ago. A new assembly would attempt to be even more representative and of course include representatives of the guerrilla groups who had not been present at the earlier convention.

Attracting immediate attention were the agreements providing for the humanization of the war. Several important concessions were obtained from the

154. An objection to civil society initiatives often heard within Colombia is that this device is frequently manipulated by the country's main political forces. "Whose civil society?" is often rhetorically asked to designate the beholdenness of civil society groupings to particular actors in the internal conflict. In any case, the Mainz grouping of civil society, while clearly pro-peace identified individuals, hailed from various sectors. If any particular allegiance can be outwardly surmised, it would be to the Colombian state. Many participants were actually public officials acting in their personal capacities.

ELN.¹⁵⁵ Among the most salient, the rebels committed to restrict their kidnapping activities. Kidnapping is widely practiced by Colombia's rebel groups as both a mode of pressuring the government¹⁵⁶ and a method of financing their activities. Indeed, most of the kidnappings across the country have the ultimate goal of extorting large ransoms from family members. While the guerrillas target wealthy individuals, many kidnappings end in tragedy when it is discovered that families are unable to pay. The Mainz Agreement provided that the ELN would cease financially-motivated kidnappings of minors, the elderly,¹⁵⁷ and pregnant women. Men and non-pregnant women would continue to be subject to retention until other financing methods could be achieved.

Other key provisions of the Agreement included a series of restraints on military targets. The guerrillas would henceforth not attack any civilian or medical installation plainly marked with the symbol of the International Red Cross. Indigenous territories were to be treated as neutral and outside the conflict.¹⁵⁸ In addition, the ELN agreed to cease its sabotage operations of the country's oil pipelines until the national convention that was also planned during the Mainz meetings.¹⁵⁹

The Mainz Agreement met with enthusiastic popular support.¹⁶⁰ It signaled a scaling down of the war. The government's immediate reaction was at first highly supportive.¹⁶¹ Official support soon began to unravel. The Minister of Defense rejected the validity of the accord and challenged its legality. His sharp criticism raised doubts as to the Pastrana administration's objectives. Quickly thereafter, a

155. Since at least 1995, the ELN has declared itself subject to International Humanitarian Law. Specifically, the group has agreed to comply with Protocol II and Article 3 of the Geneva Conventions of 1949. Still, the interpretation of these treaties was questioned by the ELN, specifically as to the meaning of "hostages," "non-combatants" and key terms of that sort. See Commandant Manuel Perez, *Public Declaration* (July 15, 1995).

156. For example, the ELN's kidnapping of a church congregation during Sunday services was meant to pressure the government into granting them a demilitarized zone to begin negotiations. Peace talks with the ELN have been stalled during 1999 as a result of the ELN's insistence that they be accorded the same terms as the FARC, i.e. a demilitarized territory within Colombia's borders in which to proceed with negotiations. The governments has thus far refused this demand.

157. Defined in the Mainz Agreement as persons 65 years of age or over.

158. Indigenous populations caught in the cross-fire is one of the high casualties of the internal conflict. In 1998, the Embera Katio population of the province of Cordoba appealed to the international community for assistance. See <http://www.colombiasupport.net/chapters/chicago/texts/orewa.html> (last visited Oct. 14, 2000). Their tribal territory was the site of intensive fighting between the guerrillas and paramilitaries.

159. Exploding oil pipelines is the signature of ELN attacks. See <http://www.colombiasupport.net/chapters/chicago/texts/orewa.html> (last visited Oct. 14, 2000).

160. See *Ni tan cerca, ni tan lejos*, SEMANA (Bogotá, Colom.), July 18, 1998, at 7 34-38. Even the right-wing paramilitaries, the ELN's declared mortal enemies, celebrated the announcements within the Mainz agreement, although considering its entirety to constitute a declaration of war. See *Acuerdo de Mainz es Una Declaración de Guerra*, EL NUEVO SIGLO, July 18, 1998, at 7.

161. President Ernesto Samper, still in office, supported the agreement describing it as "legitimate." See *Samper Avaló Acuerdos de Maguncia*, EL COLOMBIANO (Bogotá, Colom.), July 24, 1998. President-elect Andrés Pastrana also indicated his support. See *Pastrana Acoge Pacto de Puertas del Cielo*, EL TIEMPO (Bogotá, Colom.), July 17, 1998. ("It is really a very important step and the new government supports it decisively. . . ."); see also, Carlos V. De Roux, *Alcances Humanitarios del Acuedo de Mainz*, EL TIEMPO (Bogotá, Colom.), July 19, 1998.

chorus of legal arguments joined in pronouncing the agreement a dead letter. In a detailed commentary, noted publicist Ernesto Borda Medina did not mince words:

The problem arises when there exists and there is an intention to promote the application of a "heterodox" International Humanitarian Law, improvised to the rhythm of the moment in the conflict, attempting to base such argument on the particularities of the Colombian case. This constitutes not only a grave legal error, but also a political miscalculation with terrible consequences, as the attempt to relativize its precepts ends in liquidating its universal value and its importance as the common language upon which to demand its enforcement. "Heterodox" International Humanitarian Law simply and flatly does not exist . . . (my underline)".¹⁶²

The accord was rejected on two grounds. First, it was argued that the state was not a party and thus the agreement could not qualify as a humanitarian agreement under common Article 3. Second, it was argued that the commitments obtained fell below the minimum standards already required by international humanitarian law.

The first type of objection refused to recognize the agency of the representatives of civil society. This view held firmly to the position that only states have the authority to enter into humanitarian negotiations with rebel forces. It is a formal reading of common Article 3 which ignores current international practice. Non-governmental organizations and representatives of civil society have been intensively involved in initiating and crafting international instruments. Indeed, they have been so much as recognized as subjects of international law in a number of contexts. Nonetheless, the mainstream interpretation adhered to the formal conception of the subjects of international law.

The second type of objection addressed the document's illegality as a matter of humanitarian law. Its provisions were deemed to fall below the minimum international requirements. The claim of Rafael Nieto Loaiza captures orthodox objections:

Much in spite of the affirmations of some of the participants (to the agreement) in the sense that what was signed in Mainz is a "humanitarian accord a la Colombian," from the start it should be noted that said document cannot be considered a humanitarian accord and that, if it were, it would be null by full rights, because it is contrary to the fundamental principles of (International Humanitarian Law) and the basic

162. See Ernesto Borda Medina, *Comentarios Sobre los Aspectos Humanitarios del "Acuerdo de Puerta del Cielo."* in *Mandato Ciudadano por la Paz, la Vida y la Libertad* (Ed.), *Conversaciones de paz frente al horror: Acuerdos Humanitarios 102-122* (1998) (emphasis added).

content of Article 3 common, the referenced rule of imperative international law.¹⁶³

Objections were directed to the acknowledgment and codification of lower standards for the Colombian conflict than those generally applicable under international law. For example, critics rejected the commitment to reduce kidnappings. Kidnapping was equated with hostage-taking which is prohibited under international humanitarian law. As a result, agreeing to the limits on kidnapping, it was argued, implicitly condoned the hostage-taking of others. In this way, this provision was found in dereliction of international obligations.¹⁶⁴

In the same way, the commitment against attacking civilian installations was challenged. The Mainz Agreement provided that civilian sites marked as such would not be the target of guerrilla attacks. Mainstream publicists decried the agreement as a subversion of the requirements of the laws of war. The international norm, it was argued, is that all civilian installations are protected and that only military targets are subject to attack. The Mainz Agreement would invert that order by allowing for attacks on all installations not marked as civilian.

Also the proposed neutrality of indigenous communities was challenged. The orthodox position was that, in the context of an insurgency, the civilian population is never neutral. That is, only the recognition of belligerency allows third parties to assume a position of neutrality vis a vis the government and guerrillas. Since no belligerency is recognized, the civilian population — indigenous territories included — remains subject to the laws of the state and thus cannot be neutral.

Strikingly, no legal arguments of similar weight were broadly disseminated in support of the Mainz Agreement's validity. Instead, it was defended on political grounds. The Agreement was deemed a necessary first step toward a peace process. If anything, the document was described as embodying Colombian exceptionalism to international legality. Orthodox publicists denounced its creole, particularly Colombian and non-legal character.

Interestingly, both the FARC and the paramilitary groups have advanced precisely such a particularist approach to international humanitarian rules. Citing the uniqueness of the Colombian conflict, these parties propose a set of ground rules tailored to their actual conditions. These have been described in terms of a creole or particular version of international humanitarian law. Specifically, the

163. Rafael Nieto Loaiza, *El Acuerdo de Maguncia a la luz del Derecho Internacional Humanitario* (1998) (unpublished manuscript, on file with author).

164. Clearly, kidnapping is widely perceived as falling under proscriptions on hostage-taking under international humanitarian law. See INTERNATIONAL COMMITTEE FOR THE RED CROSS, COMMENTARIES ON PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II), (1977) "It should be noted that hostages are persons who are in the power of a party to the conflict or its agent, willingly or unwillingly, and who answer with their freedom, their physical integrity or their life for the execution of orders given by those in whose hands they have fallen, or for any hostile acts committed against them." *Id.*

FARC holds that humanitarian law is "open to interpretation."¹⁶⁵ The paramilitaries advocate a creole humanitarian law, by name.¹⁶⁶

In essence, these arguments claim that the Colombian conflict is exceptional and not readily amenable to general humanitarian norms. As such, a more conflict-specific set of rules are in order. Critics of this position, as well as of the Mainz Agreement, perceive these proposals as merely disdainful of international law. In other words, they are not taken seriously but rather equated with bad faith attempts to justify these groups' flagrant violations. Rather than merely denounce what may be at some level self-justifications for non-compliance, the distinction between a universal law promoted by orthodox publicists and creole law pursued by others deserves some attention, which is the topic of Section V below.

In any case, the Mainz Agreement controversy is another instance in which law and peace were presented as opposing each other. Clearly, some of the Agreement's provisions were not in keeping with the strict scope of international norms. Still, many of its provisions did reinforce humanitarian protections. Others could be recognized for what they were: incremental application efforts, undeniably short of full compliance.¹⁶⁷ In fact the Agreement does address the actual conditions of Colombia's internal war. It directly confronted this reality and attempted to regulate some of the more aberrant practices. The achievement of reaching an agreement and securing some commitment to its enforcement is a hugely significant step. It should not be so readily dismissed. And, more importantly, there is no necessary reason to reject its legality based on international law.

Under significant pressure, Colombia's Defense Minister ultimately retracted his position and offered instead a tepid endorsement of the peace process. The damage, however, was done. Once the experts had spoken, the document was perceived as legally infirm and its chances for implementation were seriously eroded. Significantly for the peace process, ad hoc humanitarian agreements are high on the agenda for negotiations with the FARC. An overly narrow interpretation of the possibilities under international law will only make agreements, and for that matter peace, more difficult to achieve.

165. WAR WITHOUT QUARTER, *supra* note 20, at 133 (citing interview with Marco León Calarcá, Frente Internacional - FARC, Mexico City (July 15, 1996)).

166. *Id.* at 110 (citing Bibiana Mercado & Orlando León Restrepo, *Las Farc Infiltran los Partidos Tradicionales*, EL TIEMPO (Bogotá, Colom.), Sept. 29, 1997).

167. See, e.g. Claude Bruderlein, *Desarrollo del Derecho Humanitario en Colombia: El Acuerdo "Puerta del Cielo" en una Perspectiva Jurídica Internacional*. In *La Otra Guerra: El Derecho como Continuación del Conflicto y Lenguaje de la Paz*. (Mauricio Duque Ortiz trans., Óscar Eduardo Guardiola Rivera et al. eds., 1999). 1999). Bruderlein finds in favor of the legal validity of the Mainz Agreement as a whole under international law, with the possibility of denying validity to provisions running afoul of common Article 3 and Additional Protocol II.

B. Political Crimes: Amnesties and Pardons

On September 23, 1997, the Constitutional Court of Colombia limited the scope of political crimes.¹⁶⁸ Historically, Colombian law accorded deferential treatment to political crimes, particularly rebellion and sedition.¹⁶⁹ The Penal Code provides so by legislating relatively light sentences for these crimes and excluding any additional sanction for any related offenses, committed while "in combat." That is, assault, homicide and any other combat-related crime are subsumed within the penalties for rebellion and sedition. It is this latter provision that the Court found objectionable.¹⁷⁰

The Court's majority embraced an alternative construction of the Penal Code. It rejected the notion that combat-related crimes are to be subsumed under rebellion and sedition. It viewed such crimes not as subsumed, but as separate. And, it held the Code's provision on subsumable combat-related offenses to be a blanket amnesty for independently triable offenses. Under this interpretation, it found such an amnesty within the Penal Code to be procedurally and substantively unconstitutional.¹⁷¹

Indirectly, the Court's decision leaves up for grabs the scope of amnesties and pardons permissible under Colombian law.¹⁷² This is so because, under the Colombian constitution,¹⁷³ amnesties and pardons may be granted only for political crimes.¹⁷⁴ Criminal offenses are excluded, and so are war crimes.¹⁷⁵ By narrowing

168. CORTE CONSTITUCIONAL DE COLOMBIA, C-456/97 (Sept. 23, 1997).

169. Colombian Penal Code of 1980, Article 127, before it was found unconstitutional, stated: "Excluded Sentences: The rebels and seditious will not be subject to sentences for the criminal acts committed in combat, provided that they do not constitute acts of ferocity, barbarity or terrorism." Note that rebellion and sedition are themselves punishable offenses: the former by a 5 to 9 year prison term and the latter by 2 to 8 years. Articles 125 and 126, as modified by Decree 1857 of 1989. COLOMBIAN PENAL CODE OF 1980, art. 127 (Colom.).

170. The Court's majority ruling is based on a peculiar understanding of the workings of the Penal Codes' provisions on political crimes. Rather than interpreting Article 127 as acting to subsume all combat-related offenses as part of the (more lenient) sanctions for rebellion and sedition, respectively, it takes another approach. The Court firmly distinguishes between "political crimes" and their "connected crimes." The Court then interprets Article 127 as providing a blanket amnesty for all connected crimes. This result it finds unconstitutional because such an amnesty does not conform to the procedural requirements under Article 150 of the Colombian Constitutional and for a number of other fundamental rights violations. CORTE CONSTITUCIONAL DE COLOMBIA, C-456/97 (Sept. 23, 1997).

171. CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 150 (1995). *See also* CORTE CONSTITUCIONAL DE COLOMBIA, C-456/97 (Sept. 23, 1997). The Constitution requires that amnesties obtain a two-thirds vote of Congress: the Penal Code requires only a majority vote for its adoption. Additionally, the Court found that the provision violated the state's duty to ensure the right to life and full protection of the laws of citizens and armed forces.

172. Notably, the ruling affects extraditions from Colombia. Extradition of Colombians has been recently reinstated except in the case of political crimes. (CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 35(amended 1997) (amendment allows extradition of Colombian nationals, previously forbidden under the criminal language of the 1991 constitution). Thus, a narrow definition of political crimes would expand extradition. Considering the much drawn connections between guerrillas and drug-traffickers, the Court's ruling considerably narrows the scope of the constitutional exception.

173. *Id.* at art. 150 and 201. *See also* CORTE CONSTITUCIONAL DE COLOMBIA, C-456/97 (Sept. 23, 1997).

174. CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 150 and 201 (1995).

the category of political crimes, the Court deprived combat-related activity, otherwise criminal, of the possibility of amnesty as political crime. An attempt to forgive these actions would, thus, require an exemption from the prosecution of common crime for which there is no general authority.

Amnesties and pardons, after the Court's ruling, are thus circumscribed to crimes of opinion: the only meaning left for political crime. What were previously connected offenses are now separately triable. It should be noted that the Court did acknowledge that certain connected crimes may be separately pardoned by Congress.¹⁷⁶ In other words, Congress can legislatively determine the scope of political crimes and consequently the scope of available pardons. However, the unconstitutionality of the criterion of combat-relatedness left the scope of "permissibly connected" political crimes uncertain.¹⁷⁷

In terms of the overall peace process, this legal obstacle has been overcome by a constitutional amendment granting the president "superpowers" to exonerate all types of crimes upon the signing of a peace accord.¹⁷⁸ For purposes of this discussion, however, the more interesting point is the controversy surrounding the Court's interpretation of the Penal Code. The ruling had a direct impact on the outstanding political issue, once again, of prisoner exchanges of government soldiers for incarcerated rebels.

The FARC particularly has been interested in obtaining the release of 500 or so confederates in Colombian jails in exchange for approximately 245-300 soldiers under their control.¹⁷⁹ The mothers of the captured soldiers have exhorted the

175. See *Violadores de DD.HH. no son canjeables*, EL TIEMPO (Bogotá, Colom.). Oct. 23, 1998.

176. CORTE CONSTITUCIONAL DE COLOMBIA, C-456/97 (Sept. 23, 1997).

To the Congress will correspond, by way of extraordinary law [amnesty], the determination of common crimes considered to be connected with those strictly political and that, by the same token, can be covered by an amnesty or pardon. And which, by reason of their ferocity, barbarity, or for being crimes of lesser humanity, cannot be covered The above demonstrates the error of those that affirm that this declaration of unconstitutionality of Article 127 makes more difficult a peace process with those outside the law. No, in an eventual peace process, Congress can exercise its power, conferred by Article 150, numeral 17 of the Constitution. Peace need not be achieved by means of consecrating to permanent impunity the worst criminal conduct.

177. *Id.*

In reality, Article 127 of the Penal Code pursues one sole purpose: "to remove criminal sanction from punishable offenses committed in combat by rebels." After rejecting the standard of combat-relatedness for its overbreadth and after emphasizing that political crimes must be interpreted narrowly, the Court offers little direction in determining the scope of their reach: "Rebellion and sedition are usually considered per se political crimes in our legislation. In connection with these, other [crimes] may be committed that would separately be common crimes, but because of their relation acquire the condition of connected crimes and receive, or may receive, the favorable treatment reserved to political crimes.

178. See *Pastrana con amplio poder para indultar*, EL ESPECTADOR, Oct. 3, 1998.

179. See *Carta abierta al Señor Presidente de la República* from Manuel Marulanda Vélez, FARC leader, to President Andrés Pastrana (Sept. 21, 1998) reprinted at <http://www.presidencia.gov.co/paz1/farc1/21setie/htm> (last visited Oct. 14, 2000). (Requesting a prisoner exchange prior to the commencement of peace negotiations. In it, Vélez insists that the jailed guerrillas are prisoners of war and not common criminals).

government to undertake the exchange.¹⁸⁰ The state, however, has resisted for various reasons. As mentioned, returning FARC fighters to the field undercuts the armed forces' military efforts.¹⁸¹ The exchange has been stalled in part on the basis of national legal impediments surrounding the release of common criminals from jail.

The Court's decision is thus instrumental in this regard. It sets up the impediment against prisoner exchanges. This decision, for our purposes, is supported by international law arguments and by orthodox publicists. The arguments here are twofold. First, undertaking a prisoner exchange, it is argued once again, would strengthen the guerrillas' belligerency claims. As discussed in detail above, prisoner exchanges are highlighted as the key element of an implicit recognition. Second, international humanitarian law is irrelevant to this question. Indeed, they affirm that Protocol II (now that it has been adopted), different from the law applicable to belligerents, affirms state sovereignty and state discretion on this point.

As such, internationalists support the Constitutional Court's decision which more effectively criminalizes opponents of the state. The argument goes that international humanitarian law for non-international conflict does not regulate criminal penalties. Instead, the state has full discretion to criminalize insurgents to whatever extent. In Colombia, the Constitutional Court's ruling more fully criminalizes by narrowing the scope of constitutional pardons. To circumvent this difficulty, various proposals have been advanced such as a national plebiscite on the issue¹⁸² or granting conditional liberty, instead of a pardon.¹⁸³ Still, the legislature has made use of the constitutional doubts raised by the Court to avoid action.

Opposing this state of affairs, the dissenting opinion and several commentators have criticized the Court's opinion.¹⁸⁴ They argue against both its constitutionality and its restrictions on amnesties and pardons. Pointedly, they advance their latter claims also in terms of international humanitarian law.¹⁸⁵ Critics claim that the

180. See Rafael Guerrero, *Libertad provisional en vez de canje*, EL TIEMPO (Bogotá, Colom.), Dec. 2, 1999.

181. See General Álvaro Valencia Tovar, *La ley de 'canje'*, EL TIEMPO (Bogotá, Colom.), Oct. 8, 1999.

182. See *Canje, a consulta popular*, EL TIEMPO, Aug. 28, 1999, (under Article 104 of the Constitution).

183. CORTE CONSTITUCIONAL DE COLOMBIA C-456/97 (Sept. 23, 1997).

184. See Juan Gabriel Gómez Albarello, *La Realización de Acuerdos Ad Hoc sobre Derechos Humanos y Derecho Humanitario en El Salvador y la Ex-Yugoslavia* in DERECHO INTERNACIONAL HUMANITARIO APPLICADO (Tercer Mundo Editores) (1998); IVÁN OROZCO ABAD, EL DERECHO INTERNACIONAL HUMANITARIO Y EL DELITO POLÍTICO: LA AGONÍA DEL DELITO POLÍTICO. In *Derecho Internacional Humanitario Aplicado*. Tercer Mundo Editores (1998) [hereinafter OROZCO].

185. Iván Orozco Abad characterizes the negative consequences of orthodox internationalism, or the criminalization of the internal conflict, in the following way: "1) [it] makes invisible the political nature of the war, in detriment of the distinction between political delinquents and common delinquents, as well as [in detriment] of the negotiability of the conflict, and 2) [it] escalates the potential criminalization of the armed political enemy of the State and expands the jurisdiction of judges over the war." Furthermore, Orozco's argument holds that the emphasis in Protocol II, Article 3, on sovereignty should not be understood as favoring the harsh criminalization of internal conflict. Instead, Article 3 should be viewed in its historical terms as a necessary gesture to the times'

Court violated the spirit if not the letter of Protocol II.¹⁸⁶ An expanded conception of political crime, it is argued, is more in keeping with the spirit of international humanitarian law.¹⁸⁷

The argument is that Protocol II's cornerstone is the distinction between combatant and non-combatant. The Protocol holds all parties to the conflict to the same standard for the benefit of those outside the conflict. This principle, it is asserted, supports the Penal Code's criterion of combat-relatedness in the determination of political crimes. The Court's rejection of this criterion, it is argued, transgresses the line dividing parties to the conflict and those outside the conflict. The criminalization of combat would thus make it equally criminal to fight against government soldiers and unprotected civilians: thus violating the central distinction between combatant and non-combatant and putting non-combatants in jeopardy.

Whatever the merits of this argument, it stands as an alternative international law-based argument.¹⁸⁸ And, it supports a broadened scope for political crimes which would in turn permit extending an amnesty or pardon to many (but not all) captured guerrillas under Colombia's constitution. Advocates of prisoner exchanges highlight the authority provided under Protocol II and common Article 3 of the Geneva Conventions to facilitate this process. Specifically, they point to the favorable treatment of detainee releases in Protocol II. Additionally, they argue in favor of a humanitarian accord under Article 3 which could provide the framework for such an exchange.

Orthodox internationalists deny the relevance of international law all together. On this point, they argue against international constraint in favor of state sovereignty. Furthermore, they stand against prisoner exchanges, cautioning against the implicit recognition of belligerency that it suggests.

Of course, maybe Colombia should not afford lenient treatment to rebels at all. It may be argued that amnesties for political crimes should require a constitutional amendment. It would also not be far-fetched to presume that the more lenient treatment in Colombia's criminal law has contributed to the institutionalization of political crime in that country. However, a shift to criminalization, at this juncture, merely exacerbates the legal obstacles to a negotiated solution. Similar to "narcotizing" the conflict, general criminalization swings the balance toward

sovereignist concerns. In its application today, however, current notions of sovereignty should prevail. In other words, international law should apply to the determination of political crimes. OROZCO, *supra* note 184, at 345.

186. CORTE CONSTITUCIONAL DE COLOMBIA, C-456/97 (Dissenting opinion by Magistrate Carlos Gaviria Díaz).

187. See OROZCO, *supra* note 184, at 340-353.

188. See Laura Lopez, *Uncivil Wars: The Challenges of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U. L. REV. 916, 934-5 (1994). Lopez argues in favor of extending prisoner-of-war privileges to internal combatants: "By refusing to accord the protections of the Geneva Conventions to insurgents, governments may well be ensuring that rebels will use brutal tactics After all, if the usual protections against prosecution for treason do not apply to the rebels, then the usual criminal responsibility for violation of the Conventions is also inapplicable. Rebels must win at all costs in order to avoid prosecution"

repression of political insurgents. Furthermore, it constrains conciliatory government action, as the example of prisoner exchanges demonstrates.

Moreover, the muting of international law by its orthodox proponents on this issue underscores the prevailing militaristic valence of this legal discourse. While in other settings international law is interpreted as pervasive, in this issue it is presented as resoundingly silent. The state has broad latitude to do as it wishes. Curiously, Colombian internationalists emphasize international humanitarian law when it buttresses the state and criminalizes opponents, and dismiss it when it might be used to negotiate. This is not to say that the opponents of the state do not work in the same way. Indeed, international human rights observers note the purely strategic use made of international humanitarian law by the guerrillas. However, this realization merely reinforces the points made in this Article concerning law's currently limited role in promoting peace.

Toward the end of 1999, legislation was introduced in the Colombian legislature to authorize prisoner exchanges.¹⁸⁹ The bill provides for the signing of humanitarian agreements that would serve as the basis for such exchanges. Political crimes and connected offenses are both included as amenable to pardon. However, the decision whether or not a criminal offense is a connected political crime is vested in the Attorney General. The latter will be charged with the final determination of "connectedness" in light of factual circumstances. Clearly, this is an instance of legislative delegation, to put it kindly. Notably, the nation's Attorney General has in the past endorsed using the legal system as an effective mode of counter-insurgency. In other words, pardons are likely to be narrowly construed thus adding another obstacle to prisoner exchanges.

V. ORTHODOX INTERNATIONALISM

Law figures prominently in Colombia's peace debate. As noted in the pages above, international law, especially, informs discussions on prisoner exchanges, demilitarized zones, humanitarian rules and the legal recognition of armed groups. It is also expected to be instrumental in the context of current negotiations. Disconcertingly, one particular version of international law precludes broad-ranging debate.

In the main, publicists depict necessitarian rules of international law.¹⁹⁰ Legal certainty is upheld while alternative solutions are simultaneously denied.¹⁹¹ Texts

189. *Tema del 'canje' por fin llegó al Congreso*, EL TIEMPO (Bogotá, Colom.), Oct. 5, 1999.

190. The observations in this Article go beyond describing the traditional differences between monist and dualist theories of international jurisdiction. Instead, they describe the narrowed conception of international law produced by mainstream Colombian publicists. See MARCO GERARDO MONROY CABRA, *DERECHO INTERNACIONAL PÚBLICO* 37-42, 183-89 (3a Edición, Editorial Temis: Santafé de Bogotá 1995), arguing against Colombian Constitutional Court review of international treaties as required by constitutional mandate); PEDRO PABLO CAMARGO, *TRATADO DE DERECHO INTERNACIONAL* (Editorial Temis: Bogotá 1983) (advancing essentialist definitions of state sovereignty and subjects of international law) See, e.g., ENRIQUE GAVIRIA LIÉVANO, *DERECHO INTERNACIONAL PÚBLICO*, (Tercera Edición, Editorial Temis: 1988). Gaviria implements a positivist conception of international law while maintaining a case-by-case approach to the question of international law's preeminence over municipal

are limited to single interpretations, and otherwise expansive doctrines are cast in narrow terms. Past practices and informal arrangements are minimized or ignored.¹⁹² The result is an unduly limited and limiting depiction of law.¹⁹³

The category of orthodox internationalism, used in this article, amalgamates the writings of Colombia's leading international law authorities. Clearly, this is not a study of any particular scholar: nor can it attempt to represent the full complexities of any individual or the whole group's work. As a result, it is limited to representing certain characteristics displayed by the body of work cited in the pages and footnotes of this article. The analysis presented here, thus, focuses on the structure of arguments, rhetoric of argumentation, and political impact of this selection.¹⁹⁴

It is worth noting that what I describe as orthodox internationalism is not simply privileging principles over pragmatism or politics. Some of its proponents do indeed base their positions on principles. Others however insist on their own correct reading of contemporary international law. In either case, orthodox arguments demonstrate no less strategic positioning and political motivation than other more openly pragmatic conceptions of law. Rhetorically, they claim to stand for unchanging truths and the necessary nature of their positions.¹⁹⁵ In this way, orthodox publicists have firmly lodged their policy choices as the dominant, national understanding of international law.¹⁹⁶

law (at least in the abstract); RAFAEL NIETO NAVIA, *SOBRE DERECHO INTERNACIONAL PUBLICO* 215-62 (Pontificia Universidad Javeriana: Santafe de Bogotá 1992) (advancing a framework of natural law derived through reason, based on the works of Saint Thomas Aquinas); CABRA, *LOS DERECHOS HUMANOS* 134-35, 139-50 (Editorial Temis 1980) (arguing in favor of individuals as subjects of international law); ALBERTO VERGARA MOLANO, *DERECHO INTERNACIONAL PUBLICO* (1a. Edición. Editorial Imprenta Nacional: Bogotá 1989) (formal presentations of contested international doctrines).

191. *Id.*

192. *Id.*

193. My characterization of method, here, is not intended as a description of a necessarily coherent or unwavering logic or methodology. Indeed, a strongly held political position may no doubt trump methodological coherence on any one issue for any particular scholar. Conversely, however, the methodological habit that I describe appears sufficiently established that it may also produce the contrary situation of method trumping political preference on some particular issue. My aim in this piece though is not testing the methodological consistency of what I call "orthodox internationalism." Rather than a theory of method, my objective is to describe the political impact of mainstream international law arguments in Colombia.

194. My apologies in advance to the scholars cited, for the picture presented here does not do justice to the quality of any one individual's work. Rather, it sketches the general lines of a body of work.

195. Using Marti Koskienniemi's terms, orthodox argument in Colombia can be characterized as a descending type, rule approach to legal argument, which according to him constitutes only one side of a plausible legal argument in contemporary international law. See MARTI KOSKIENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989). The mode in which orthodox arguments are nonetheless sustained is one of the objects of this Article.

196. By orthodox legality, I do not mean that law or international law is forcefully enforced. Clearly, the problem of legal enforcement and respect for international humanitarian law and human rights is endemic in Colombia. I do not discuss those issues here. Rather, my focus is on the construction of legality which is then the subject of enforcement actions. This is not to say that Colombia should be held to lower standards or that by merely lowering the standards enforcement will improve. Quite differently, I argue that the political project to which international law is put in Colombia contributes to the pattern of selective enforcement.

My reference to orthodox publicists also deserves another comment. The phenomenon I describe here is the sort of legal scholarship associated typically with civilian legal systems. The model is a hierarchical arrangement of legal authority known as "la doctrine."¹⁹⁷ Under this scheme, a handful or possibly only one or two institutionally positioned authorities dominate a particular field. As a result, these scholars wield significant power to speak for the law. This aspect of legal authority surely contributes to the predominance of orthodox views in Colombia. It does not however fully explain its sustaining force.

I have refrained, quite deliberately, from calling orthodox internationalism just another version of legal formalist thinking. Indeed, one of the more common ideas about law in Latin America is that it is uniformly formalist, especially indebted to Hans Kelsen's positivism. This observation, without more, does not actually capture either the methodological eclecticism or the political edge of the practice. Thus, while positivism and formalism are clearly part of the argumentative repertoire, the phenomenon described in the pages above cannot be reduced to just these. They alone do not sustain orthodox arguments. The following sections examine the strengths and especially the disadvantages of this particular, national version of international law.

A. A Critique of its Practical Effects

In terms of issues, orthodox arguments take aim against political recognition of guerrilla groups and against mutual exchanges of captured combatants. They support all-or-nothing humanitarian rules and rigid sovereignty standards. Furthermore, orthodox publicists resist gradualist proposals for humanizing the war, as much as they oppose eroding the current state. To this end, they reject doctrinal innovation in dealing with the insurgents, and they erect formal obstacles against prisoner exchanges.

Closing off most debate, orthodox publicists have established a hermetic conception of international law. Stressing the authority and rigidity of its constraints, they shield existing institutions from substantive change. Their account of legality advances this objective. Passing as unequivocal law, their viewpoint is raised above others, undermining reform-oriented opponents. Rather than expand options, orthodox argument in fact limits the range of alternatives. Curiously, this use of legal discourse has not been effectively challenged. Quite the opposite, orthodox thinking dominates public discussions and for the most part determines government policy. While divergent views, of course, exist they are not regarded as law.

Notably, the current administration of Andrés Pastrana in Colombia has resisted orthodox internationalism on key issues. On these questions, his critics

197. See generally, Philippe Jestaz and Christophe Jamin, *The entity of French doctrine: some thoughts on the community of French legal writers*, 18 LEGAL STUDIES. THE SOCIETY OF PUBLIC TEACHERS OF LAW, UNITED KINGDOM (1998) (excellent description of the phenomenon of "la doctrine" in France).

have abounded. Indeed, most lawyers and non-lawyers alike have been trained in the orthodoxy. Instances where the government and internationalists are at odds have demonstrated the dissonance between a peace policy and orthodox legality.¹⁹⁸ The government, even one as committed to the peace process as Pastrana's, has not been able to supply sound, alternative legal arguments. Instead, it has mostly justified its actions on the basis of over-riding political goals.¹⁹⁹ Peace negotiations are thus narrowly close to illegal and thus illegitimate. Compromise beyond the legal limits, moreover, endangers the government's own legitimacy and its authority to act. Proceeding in this way risks a peace accord that is either legally invalid or one so narrowly legal that it has virtually no effect.

This orthodox reading of international law threatens to defeat the peace process and to reinforce the likelihood of continued war in Colombia. Its terms refuse to engage the sources of internal violence and to structure broad-ranging institutional reform. Left unchallenged, it stands to supply quite limited arrangements, foregoing the peace process's potential for redistributing power. This narrowing of alternatives vastly undermines the type of reform needed to end the confrontation. It places a pro-peace government, such as the current one, in a precarious position.²⁰⁰

Furthermore, orthodox arguments actually undermine any potential utility to which an international approach may be put. The narrowness of its positions is likely to frustrate the flow of negotiations. Instead of hemming in the process, it could lead to a rejection of broader international terms all together. This likelihood is foreshadowed in the statements of rebel leaders this past year.²⁰¹ Pointedly, in the course of pre-negotiations, the FARC refused to submit to international jurisdiction.²⁰² Specifically, they rejected an international verification commission within the de-militarized zone during the course of peace negotiations. Pastrana had initially demanded an international verification. International verification

198. Responding to the observation that in Colombia pursuing peace through law is perceived as war-mongering, the leader of the Conservative Party, Enrique Gomez Hurtado insists: "If I were to say, in any country in the world, that what is needed is the empire of law, I would be seen as a fool, because that is like saying it is daytime." *Apoyo al proceso de paz tiene limites: Enrique Gómez*, EL TIEMPO (Bogotá, Colom.), Aug. 20, 1999.

199. The situation of past President Ernesto Samper Pizano, although different, is illustrative. The Administration's perceived illegality in running its campaign financing undermined its ability to negotiate a peace agreement with rebel groups. While the rebels refusal may be taken as mere opportunism, it does demonstrate the link between government legality and the ability to conduct the peace process.

200. President Pastrana's inability to make significant headway on the peace process threatens his political program. One year after his election, his approval rating has dropped from a 65 to 30%. Support for his peace program has similarly eroded from 74 to 40% of those surveyed. *El país, por mal camino*, EL TIEMPO (Bogotá, Colom.), Aug. 1, 1999.

201. The FARC declared themselves not bound to the letter of international humanitarian law but only to the extent it coincided with their internal regulation.

202. Larry Rohter, *Like Carrot, Stick Fails with Rebels in Colombia*. N.Y. TIMES, Sept. 27, 1999, at A9.

beyond giving the government added leverage also responded to U.S. pressure for greater control over the zone.²⁰³

As fall-back positions, Pastrana then proposed a joint commission of FARC and government officials and later an international humanitarian agreement covering the zone. Both were again rejected by the FARC. Furthermore, contrary to their long-standing position, they then declared themselves not bound by international humanitarian law.²⁰⁴ Clearly, this is a substantial retrenchment. In the past, the FARC have consistently affirmed their humanitarian obligations.²⁰⁵ Indeed, they have used it to bolster their arguments in support of belligerency status.

Pastrana's condition of international verification and later his fall-back humanitarian agreement seem to have backfired. Coupled with the government's past insistence on a highly formal and rigid interpretation of humanitarian law, it is not that surprising that the guerrillas have rejected their application. Instead of international law, the FARC now sustain the applicability of their own internal humanitarian rules.²⁰⁶

Of course, it may be said this merely shows the guerrillas' bad faith with respect to international humanitarian law: using it as a shield against the government and discarding it when turned against them. This is no doubt true. All sides use legal argument strategically. This is different, though, than upholding only one set of positions as lawful, as a matter of international law. Monopolizing legal argument in this way undermines the utility of law as an instrument for peace.

Faced with purportedly intractable norms, the peace process may be forced to proceed, if at all, on a purely national footing. While not necessarily determinative of success or failure, such a result would sideline international advantages, not to mention the risks of international isolation. In any event, the process would become more insular as well as more vulnerable to destabilizing pressure from both the radical right and the radical left.

Less overtly, orthodox positions also restrict the potential scope of international law. Indeed, this particular reading of the law circumscribes international jurisdiction rather than enlarges it. Its insistence on strict notions of sovereignty and belligerency attempt to constrain outside involvement that may

203. See generally *La encrucijada del gobierno*, EL TIEMPO (Bogotá, Colom.), Oct. 11, 1999. (Presenting the dilemma of either losing U.S. assistance as a result of not asserting control over the demilitarized zone or insisting on an international commission and jeopardizing the peace talks).

204. See generally WAR WITHOUT QUARTER, *supra* note 20, at 133-41 (points out that the FARC pays only lip service to international humanitarian law, proclaiming their adherence when politically beneficial and violating its norms whenever else. While no doubt the humanitarian record of all the parties is inconsistent at best, still the outright rejection of international humanitarian norms is a significant change in position).

205. See, e.g., Sarmiento, *supra* note 38, at 273 (citing the Resolución Política de la Cumbre Constitutiva de la Coordinadora Nacional Guerrillera Simón Bolívar, Oct. 1987: the umbrella guerrilla organization in the 1980's committed itself to respecting the Geneva Agreements); see also LA PAZ, *supra* note 13, at 39-40 (in which the FARC reaffirm the pronouncement of the guerrilla coordinator).

206. Pastrana's government ultimately went forward with initiating talks upon the FARC's recognizing the constitutional authority of town mayors, within the demilitarized zone, to receive complaints from local citizens of human rights abuses. *Clave, comenzar por la humanización*, EL TIEMPO (Bogotá, Colom.), Oct. 18, 1999.

threaten the Colombian state. The attention paid to traditional belligerency doctrine attests to this concern. As such, the range of possible international involvement deemed acceptable is diminished. International jurisdiction is relegated to merely identifying the state as the winner of this contest.

Rejecting orthodox legality while advocating internationalism, however, entails more than merely replacing one set of propositions for another. It requires redrawing the lines of legality and illegality that orthodox discourse has made so natural. In the alternative, the habit of orthodox argument will continue to define the legitimate and the illegitimate; the legal and the political; war and transformation. In short, the lines must be redrawn to recognize peace and transformation as both legitimate and legal. A different and more expansive conception of international law could expand the range of options for both the government and the guerrillas. Options that are completely in keeping with actual international practice may then more effectively form part of the negotiations.

Possibly for many Colombians, international law — and not much else — holds the promise of disinterested rules and neutral authority: a means to resolve the conflict. However, as this Article illustrates, orthodox internationalism is neither disinterested nor is it the best promise for an enduring peace. As shown in the examples above, the mainstream Colombian position has more to do with holding the guerrillas at bay, on any one point, than with applying a coherent legal methodology or upholding a transnational ideological position.

B. Critique of Cultural Rhetoric

Another way to understand the hold of orthodox internationalism is provided by references to its alternatives. While orthodox internationalism depicts legality as clear and inflexible, alternative positions are presented within the discourse as ad hoc, heterodox, creolized,²⁰⁷ or merely political. In this way, for example, local humanitarian agreements are dismissed as invalid creole versions of international law. Also, novel doctrinal approaches to accommodate prisoner exchanges or human rights enforcement are rejected as not part of the international regime. In short, positions at odds with orthodox readings are cast as native solutions or half-breeds not belonging to the order of international law.

While no doubt the political project of conservative publicists draws adherents on its own strength, it does not explain the vast marginalization of counter-arguments of international law. Understanding orthodox internationalism less in terms of its particular politics in each case and more a rejection of a devalued identity or cultural position may also provide a key to its pervasiveness. Indeed the alternative, criollo identity, marks a distinctive project of Latin American particularity within international law. Its proponents over the past two centuries

207. My use of “creole” refers to the mixed race and/or mixed culture aspect of the term; my use of “criollo” denotes the particular way in which this concept was elaborated in Spanish colonized America.

gained no few objectives,²⁰⁸ to which their work stands witness today. However, a Latin American or criollo internationalism has remained at most an unrealized endeavor and a marginal stream of scholarship. The current debates in Colombia demonstrate how marginal indeed. Specifically, positions of international law rejected by the orthodoxy are not only branded as not law but also denigrated as criollo.

The term "criollo" was not always a racial marker.²⁰⁹ Instead, it distinguished between white Spaniards born in Spain, peninsulares, and white Spaniards born in the Spanish colonies, criollos.²¹⁰ The designation was particularly burdensome for criollos,²¹¹ especially towards the latter part of Spanish rule, since it entailed a preclusion from high-ranking posts in the colonial administration.²¹² Leaders of Latin American independence seized on criollo-ness as a sign of national identity.²¹³

208. See generally Rubén Darío López Z., *Bolívar y el Derecho de Gentes*, 45 ESTUDIOS DE DERECHO 143 (1986) (tracing several foundational notions of a Latin American international law to Bolívar, such as the principle of non-intervention, the doctrine of *uti possidetis iure*, the peaceful mediation of international controversies, and humanitarian law).

209. See Anthony Pagden, *Identity Formation in Spanish America, in THE LANGUAGES OF POLITICAL THEORY IN EARLY MODERN EUROPE* (1987). The term simply means "native-born." Its multiple references in Mexico, for example, are described by Pagden in the following way: by 1579 it became a term of abuse; in 1634 the white population of Mexico was described as constituted by two nations, "criollos and Castilians"; by 1681 a promoter of Indian culture posited the "criollo nation." *Id.* at 79. Based on eighteenth-century theories of environmental and climactic determination of character and disposition, traits associated with the Indians came to be ascribed to the criollos, triggering a particular and valuable identity. *Id.* at 80-83. By the late eighteenth century, oppression of the Indians was assimilated to criollo oppression by Spain and formed the basis of independence uprisings. *Id.* at 77-79.

210. See *id.* Pagden traces the internal conflict embodied in "criollo" identity: "the criollos . . . had been accused by the peninsular Spaniards of being half-breeds (mestizos). But because the term mestizo suggested racial inferiority, it could not be applied to those who had married into the Indian nobility. They, in some unspecified sense, were pure. Yet too close an association with Indian blood, however noble, might imply an uncomfortably close link with living Indians . . . The criollos wished to assume a direct link through kin with an ancient Indian past that would provide them with an independent historical identity; at the same time they needed to avoid, in a society so obsessed with racial purity, any suggestions that this association might have contaminated their blood. This undertaking proved ultimately to be a ludicrous one." *Id.*

211. See John Lynch, *The Origins of Spanish American Independence, in THE CAMBRIDGE HISTORY OF LATIN AMERICA 3* (Leslie Bethell ed., 1985). "All Spaniards might be equal before the law, whether they were *peninsulares* or creoles. But the law was not all. Essentially Spain did not trust Americans for positions of political responsibility; peninsular-born Spaniards were still preferred in higher office and transatlantic commerce." *Id.* at 26.

212. See *id.* at 27. "The imperial government emerged from its inertia and from 1750 it began to reassert its authority, reducing creole participation in both church and state, and breaking the links between bureaucrats and local families. Higher appointments in the Church were restored to Europeans. Among the new intendants it was rare to find a creole. A growing number of senior financial officials were appointed from the peninsula. Creole military officers were replaced by Spaniards on retirement. The object of the new policy was to de-Americanize the government of America, and in this it was successful." *Id.* at 27.

213. See SIMÓN BOLÍVAR, *THE JAMAICA LETTER* (1815). "[W]e are neither Indian nor European, but a species midway between the legitimate owners of this country and the Spanish subjugators . . . Though Americans by birth we derive our rights from Europe, and we have to assert these rights against the rights of the natives, and . . . against the invaders."

Indeed, the notion was widely propagated by 19th century nation-builders.²¹⁴ It came to encompass both European and non-European elements and marked a distinctive resolution to the question of Latin America's membership within the civilized world.²¹⁵

In the field of international law, the criollo was associated with the project of a uniquely Latin American version of international law. To describe the specific content of this criollo law would fill the pages of a different article.²¹⁶ However, in general terms, it reinforced concepts of non-intervention and sovereignty based on, as opposed to despite,²¹⁷ racial heterogeneity. It was never fully embraced by Latin American publicists. Indeed, the foremost Latin American jurist, Andrés Bello, acknowledged its existence only to question its viability at the time. Instead, he advanced an essentially natural law approach to the then existing world order, by emphasizing Latin America's place within the universe of civilized nations.²¹⁸

A Latin American or criollo version of international law did not expire completely. On the contrary, it gave rise to the Organization of American States

214. SIMÓN BOLÍVAR, DISCURSO ANTE EL CONGRESO DE ANGOSTURA (Feb. 15, 1819) "We do not even maintain the vestiges of what once was; we are not Europeans, [nor] are we Indians, instead [we are] a middle species between the aborigines and the Spanish. Americans by birth, Europeans by right." *Id.*

215. See J. Jorge Klor de Alva, *The Postcolonization of the (Latin) American Experience: A Reconsideration of "Colonialism," "Postcolonialism," and "Mestizaje"*, in AFTER COLONIALISM: IMPERIAL HISTORIES AND POSTCOLONIAL DISPLACEMENTS 241 (1995). Klor de Alva notes, "Together with Euro-Americans—most of whom, by the eighteenth century, were of mixed genes although culturally criollo—and some Europeans (commonly called peninsulares) . . . substantially Westernized mestizos, in subaltern and elite sectors, made up the bulk of the forces that defeated Spain during the anti-imperialist, nineteenth-century wars of independence. The newly independent countries, under criollo/mestizo leadership, sought to construct their national identities through three sets of maneuvers" promoting Euro-American practices, weakening local "Indian" identities, and championing a common ethnicity out of a supposed shared experience of mestizaje/criollismo and/or imperial exploitation." *Id.* at 246-47.

216. This article on a criollo version of international law is currently in progress: LILIANA OBREGÓN, BETWEEN CIVILIZATION AND SAVAGERY: NATION BUILDING AND (SPANISH) AMERICAN INTERNATIONAL LAW IN THE EARLY 19TH CENTURY (manuscript on file with author).

217. Possibly a more strategic stance, Simón Bolívar presents the argument of recognition despite heterogeneity: "Of the . . . indigenous, African, Spanish and mixed nations, the minority is certainly white; but it is also true that whites possess the intellectual qualities that give a relative numerical equality and a vast influence of moral quality and physical circumstances which will be apparent to those who judge us." SIMÓN BOLÍVAR, CARTA DE JAMAICA (1815), at <http://www.analitica.com/biblioteca/bolivar/jamaica.asp>.

218. Andrés Bello made the argument for Latin America's inclusion within the European system based on its membership in "a family of states, which recognizes a common law infinitely more liberal than anything that has borne this name in antiquity and in the rest of the globe, they owe it to the establishment of Christianity and the progress of civilization and culture, accelerated by the printing press, the spirit of trade that has come to be one of the chief regulators of politics, and the system of actions and reactions which, in the bosom of that great family as in the bosom of each state, unceasingly struggles against preponderance of any kind." ANDRÉS BELLO, SELECTED WRITINGS OF ANDRÉS BELLO, 232 (1997). See also EDUARDO PLAZA A., INTRODUCCIÓN AL DERECHO INTERNACIONAL DE ANDRÉS BELLO (1955) (noting Bello's alternative articulation of this belief as including "the development of the species" as an attribute of state kinship).

and projects of Latin American unification.²¹⁹ More poignantly, certain international law doctrines²²⁰ are at least nominally identified with Latin American particularity.²²¹ The argument for a separate identity within international law was forcefully made, in our era, by Alejandro Alvarez:²²²

*There is no doubt then that an American International Law exists, not only as a combination of doctrines, problems, institutions proper to the New World, but a veritable continental Law possessing a proper existence and founded on the conditions of international life on the American continent.*²²³

Regardless of the longevity of this tradition within Latin America, it has not attained the status of mainstream discourse. Colombia today is a case in point. Rather than criollo exceptionalism, the legal orthodoxy stands for a classical

219. See Institut américain de Droit International, *Fundamental Rights of the American Continent (American Public International Law)*, *Acte final de la Session de la Havane, 22-27 janvier 1917 in ALEJANDRO ALVAREZ, THE MONROE DOCTRINE 197-98 (1924)* [hereinafter ALVAREZ].

220. See *id.* at 255. Note that Dr. Drago articulates his doctrine as resting on an American international policy as opposed to a juridical doctrine: “[I]t would perhaps not be impossible for England to accept the Argentine doctrine with respect to the South American States, as it has admitted the Monroe Doctrine with respect to them, but it is a mistake to suppose that it would ever declare its intervention in Egypt illegal . . . As a thesis of American policy, we can maintain the doctrine . . . with some hope of more or less remote success.” *Id.* at 255. See also Luis Maria Drago, *State Loans in Their Relation to International Policy*, 1 AM. J. INT’L L. 710 (1907). Cf. ALEJANDRO ALVAREZ, *LE DROIT INTERNATIONAL AMÉRICAIN* (1910). Alvarez raises the Monroe Doctrine to the level of a principle of international law as a result of the number of states laying claim to it and the justice in the name of which it is claimed. Note that while Alvarez adopts the Monroe Doctrine as a cornerstone of an American international law, he does so by stripping it of the hegemonic policy carried out by the U.S. Cf. Santiago Perez Triana, *Letter to José Vicente Concha, President of Colombia, of September 1914 in ALVAREZ, supra note 219* (urging the adoption and expansion of the Monroe Doctrine, clearly in more strategic terms, as a way to stem further U.S. imperialism).

221. See Raymundo Wilmart, *The Monroe Doctrine—The Drago Doctrine—Views*, in ALVAREZ, *supra* note 219, at 371. Distinguishing between an American and European international law: “The international community is often directed *velis nolis* by the so-called ‘European concert’; the time has come for the smaller nations to demand a legitimate share in the direction of international affairs . . . Latin-American nations especially may demand voice and vote . . .” *Id.*

222. Alvarez adopts a sociological account of international law: “Law is a social and psychological phenomenon . . . in international life, when this [juridical] conscience is shared by all states, [it] gives birth to the law of peoples. And if a juridical conscience exists that is proper to a region or to a determinate group of states, this gives birth to a particular law relative to said region or said group of states to which universal international law should pay heed . . . The states of the New World create, in the interior of universal society, a soul, a personality of their own and, from that fact, can give birth to specific institutions and principles of international law . . . The existence of American international law confers on world international law the character which should be its own in the future, namely that the precepts of this law are not all nor always universal.” ALEJANDRO ALVAREZ, *LE DROIT INTERNATIONAL NOUVEAU DANS SES RAPPORTS AVEC LA VIE ACTUELLE DES PEUPLES* 99-100 (1959).

223. ALVAREZ, *supra* note 219, at 99. Note Alvarez’s general description of an “American” rather than an exclusively Latin American or criollo legality: “For an institution, an organism, a principle to be considered as being American International Law, it is not necessary that they be accepted by all states of the New World. The same thing occurs here as with universal international law. If it is the case, however, that a very important country, the United States for example, does not admit certain of these principles, such as asylum, then one can say that they are just Latin American.” *Id.* at 100.

version of internationalism. As a mode of argumentation, it rejects alternative interpretations of international law as invalidly criollo. While the epithet mobilizes the historical baggage of racial impurity, heterogeneity, and questionable legitimacy, it also signals the rejection of Latin America's tradition of particularity within international law. Of course, it is not the object of this piece to examine the actual particularity or distinctiveness of a criollo or Latin American international law. More importantly for this analysis is the way the legal orthodoxy excludes common-sense proposals from consideration.

Thus, when orthodox proponents devalue opposing positions as creolized versions of formal law, it reflects more than a legal argument or even a political view. They invoke the racial identity of law. They also assume the superior racial position. In terms of sovereignty, orthodoxism makes the case for equal standing with "civilized nations" based on the membership of universal law. To the extent that sovereignty has been racialized in this way, its continuing defense requires upholding the position of racial superiority. Considering that respect for sovereignty has been a hard fought demand of Latin American countries,²²⁴ the tenacity of this identification becomes all the more clear.²²⁵ Cast as creole, opponents of orthodox views are placed in the position of arguing both from and for the position of racial inferiority, a significant disadvantage. Indeed, it requires arguing against the very sovereignty of the state, for its international standing is premised on the exclusion of creole variants from the international system.

Ironically, criollo internationalism was historically about expanding state sovereignty, although via a different strategy. Its purported genesis in the Monroe Doctrine, later elaboration through the Drago and Calvo doctrines, and subsequent development responded to European and later U.S. imperialism. Thus, a universal law approach was not the unrivaled standard bearer of sovereignty demands. Actually, universalism has offered the basis for European colonialism as well. As such, orthodox arguments are no more singularly protective of sovereignty rights than what a well-elaborated criollo alternative might offer.²²⁶ Criollismo, by modern standards, is in fact more in line with Third Worldism and militant sovereignty. In any case, both orthodox and criollo discourses offer well-developed defenses of state sovereignty. Thus, the current dichotomization of the two can be little sustained on the basis of this point.

224. See Berman, *supra* note 112, at 475-77 (discussing proposals to exclude non-European states from the reach of codified belligerency doctrine at the 1900 meeting of the Institut de Droit International in Neuchâtel). Although the proposal was rejected, the understanding was that the rules were intended for "civilized powers." See *id.*

225. See generally Antolín Díaz Martínez, *Derecho Internacional Público*, in DERECHO DE GENTES - GEO POLÍTICA (2d ed. 1986) Díaz Martínez presents an unrelenting position on the universality of international law: "The contrary (to universalism) is inane in the face of science, in the same way that the criterion of 'the sovereignties' to an extreme may come to parcel culture, and with that to expect to parcel the human intellect." *Id.* at 54. He decries panamericanism in international law as a result of its cooptation by the U.S., which deployed it to further its own interests in Latin America. *Id.* at 215.

226. See *id.* at 215. See also, ALVAREZ, *supra* note 219 (Alvarez demonstrates how the Monroe Doctrine became an instrument of U.S. imperialism under Theodore Roosevelt. Alvarez, however, attempts to rescue its principles as the basis for an American international law).

In most instances, the underlying *criollo* argument, in Colombian debates, reflects nothing more than a commonly-accepted alternative of international law or practice. Still, such alternatives are projected as threatening to the formal conception of the state. Thus, labeling arguments for belligerency, for instance, as hybrid or *criollo*, calls into question their standing as acceptable law. In fact, it recalls the very opposite: lawless societies.

As a result, Colombian publicists' preoccupation with the current state contributes to its rejection of plausible alternatives — not otherwise rejected in international practice. Mainstream internationalists deploy a racialized ordering of arguments to buttress their own positions. In this way, alternatives are categorized as non-law. Rebutting orthodox internationalism therefore requires addressing its racial and cultural dimensions. The task entails not merely replacing one set of propositions for another as would be, for example, the elaboration of a system of creole law. This would do nothing to prevent, say, a creole orthodoxy from taking form. Moreover, it re-emphasizes the distinction between creole and European.²²⁷ In fact, there is not much basis to believe anything substantially different would result from such a shift.

By contrast, embracing creole positions as equally law recognizes a broader band of political and cultural perspectives. No separate system of law need be devised. Instead, the local creativity that gives rise to the epithet should be valued. At a minimum, the expanded field may provide some impetus for the peace process. The interests that stand against its acceptance — orthodox internationalism, preserving the current state, and social hierarchy — are also the ones with the least stake in a negotiated solution.

My claim here is not that every objection to a heterodox or *criollo* law is a deliberate rejection of the project of a Latin American international law. Clearly, such objections are obviously not well-considered judgments against particularism in international law. Nor are they even well-considered votes against a separate body of law. Ascribing to them either of these meanings would overstate my point.

The use of these same notions does, however, seek to reinforce the expositor's own position. Specifically, orthodox internationalists mobilize the tropes of particularism and relativity to characterize the positions they reject. By stark contrast, orthodox positions claim the high ground of principledness and universalism. Of course, as we have seen, they are no more so: they are as political and as particular as the alternatives may be. They stand, though, for a different praxis and different set of particulars.

Curiously, orthodox internationalism is itself the particular, national version of international law which its proponents claim to reject. Not so much that it stands

227. Curiously, the Colombian guerrilla group, the ELN, espouses this dichotomous idea about cultural identity. *Mestizaje* — as opposed to a national identity — is posited as the essential base of Latin American identity. It is described as a tendency to action over theory, consciousness that combines feeling and thought in a spiritual way, and an appreciation of the world grasped more through intuition than reason. See PROCEEDINGS OF THE SECOND NATIONAL CONVENTION OF THE UNION CAMILISTA- ELN at 214 (1965).

for an autochthonous version of international law; on the contrary, it deploys the language of universalism. However, by suppressing the full range of international law authority from national discourse, orthodox publicists have in effect created a local version of the practice of international law. This type of particularity, however, looks to exclude other viewpoints and to place its own positions beyond scrutiny.

C. Critique of Political Effectiveness

In terms of repressing a guerrilla take-over, orthodox internationalism also fails on this score. Advancing a rigid set of prescriptions for sovereignty, belligerency and humanitarian accords has the primary effect of demonstrating the vast shortcomings of state institutions. By most accounts, the Colombian state is vulnerable over wide areas of its territory. Its military and law enforcement capabilities are seriously challenged. Thus, as a yardstick, orthodox internationalism is a greater indictment of current institutions than the guerrilla uprising itself may represent.

By contrast, a modern version of international law may actually benefit the existing state. Humanitarian accords, while not necessarily more lax, may acknowledge the particularities of Colombia's guerrilla warfare and its protagonists.

Civil society may take a more prominent role in crafting humanitarian accords and peace agreements, without the threat of compromising the state's international standing. More international pressure may be brought to bear on groups which systematically violate human rights and displace entire populations. Legal incentives may be fitted to advance policy interests such as greater humanitarian law compliance and possibly the extended detention of captured insurgents. International verification of de-militarized zones and foreign mediators may be more seamlessly introduced.

Of course, the motivation of defeating the guerrillas may overstate the political zeal of some orthodox internationalists. These may have no interest in simply articulating an international law framework for the state's self-preservation. This observation however would leave the peculiarity of orthodox internationalism to be explained by nothing more than a quirk of professionalized practice. Mere disciplinary convention would account for its continued authority. As discussed in detail above, orthodoxism does not conform to the modern practice of international law. And, under the hypothesis here, it would also not comport with the political beliefs of its practitioners. Thus, under this scenario, its persistence can only be understood either as an idealistic faith or simply a miscalculation. In either case, orthodox internationalism does not provide a way out of Colombia's internal conflict.

VI. U.S.-DRIVEN INTERNATIONAL APPROACH

Beyond the shortcomings of an orthodox version, which can be corrected for, international law discourse more broadly speaking presents other significant disadvantages to the peace process. Its range and political orientation are driven by the interests of the international community and its leading members. In the case of Colombia, those interests reach as far as effective law enforcement against the drug trade and greater security for foreign investment. While clearly important, an exclusive focus on these objectives sorely misses the longer-standing causes of this civil conflict.

International solutions backed by multilateral support are likely to emphasize the transnational consequences of the Colombian crisis. That is, international support and international pressure are sure to be forthcoming in areas that affect regional stability or the critical drug trade. To the extent that these are important factors in the Colombian conflict, they have a receptive international audience. However, other important if not more important factors involve the redistribution of political power and an equitable increase in economic wealth across Colombian society. These causes of political violence precede the drug trade and surely precede the recent cross-border activity by the rebels. The changes that may be necessary, in the course of peace negotiations, may not be well supported by international consensus.

As concerns economic policy, developing countries such as Colombia have little effective recourse in the international sphere. The currently prevailing neo-liberalism may not be sufficiently synchronized so as to encourage redistributive policies and programs. In terms of drug policy, little independence can be asserted in light of the overwhelming international pressure Colombia faces. However, drug eradication efforts may need to take a back seat to a peace convention. At least in the short term, a de-militarized zone or more than one may be necessary in which to conduct peace talks. As such, international pressure against de-militarization, for example, or other aspects of the peace talks may run counter to ending the war.

Without a doubt, the lion's share of international support will be U.S. driven.²²⁸ As such, U.S. objectives and preoccupations immediately rise to the forefront.²²⁹

228. A foreign assistance bill in the amount of U.S.\$1.3 billion over the next three years was introduced in Congress in October 1999. The bill conditions assistance on the military's severing its ties with paramilitarism; respect for human rights, state control over the demilitarized zone; and extradition of Colombian nationals to the U.S. The bill also calls on the Clinton Administration to develop a strategy on Colombia within 60 days. See *Military Aid Conditioned on Control over the Demilitarized Zone*, EL TIEMPO (Bogotá, Colom.), Oct. 21, 1999. President Clinton announced that he will ask Congress early next year to increase economic and anti-narcotics aid but not anti-insurgency aid. *More Colombia Aid Urged*, N.Y. TIMES, Nov. 11, 1999, at A10.

229. Peter Hakim, President of the Inter-American Dialogue in Washington, presents a clear picture of U.S. political interests: conservative Republicans focused exclusively on battling drugs, micro-managing aid exclusively to the anti-narcotics police and opposed peace negotiations; Democrats concerned about the Colombian army's human rights record and links to paramilitaries who want to withhold support from the military and rely on the peace process to deal with guerrillas; and Pastrana's Plan, supported by the Clinton Administration, of economic aid (\$1.5 billion from the U.S.) to

The left-wing guerrillas recognize as much and have threatened to withdraw from the talks if U.S. involvement continues. Disregarding this position, which the U.S. has resolved to do, may very well be correct. However, making U.S. interests the matrix for assistance will not resolve the problem of political violence in Colombia nor will it be effective.²³⁰ The words of Ambassador Thomas Pickering, the Clinton administration's Colombia expert, reveal the incongruity of current policy:

*"[P]eace at any price" is fool's gold. . . . We have made clear to all parties that the peace process must support and not interfere with counternarcotics cooperation, and that any agreement must permit continued expansions of all aspects of our cooperation.*²³¹

First, it must be remembered that drug-trafficking is not the root cause of political violence — even if it does help to finance it. Thus, eradicating drugs will not eliminate political violence. Second, placing drug interdiction ahead of the peace process inverts the common wisdom on the interrelatedness of Colombia's problems.²³² Finally, a peace process subject to the short-term dictates of U.S. drug policy puts the cart before the horse. In this order both are likely to fail. Without a stable institutional order, no policy much less an aggressive drug policy stands a chance.

Thus, international competence over negotiations is a double-edged sword. An internationally-overseen process would introduce a set of additional interests. Stronger than the international goal posts to which the Colombians may themselves adhere, direct foreign participation will have an impact on negotiations, in what direction remains to be seen. Conditions could foreseeably include the eradication of the drug trade, military control over the entire territory, extradition of former narco-insurgents, as well as, respect for human rights, severing links to paramilitarism, and democratic governance among others. While these may be characterized as simply implementing the current world consensus, they are more controversial. Some of them foster a peace-oriented engagement with Colombia, others reflect interests less conducive to peace.

strengthen the Colombian army and reinvigorate the economy. Peter Hakim, *Backing Colombia's Fight, Money Well-spent*, THE CHRISTIAN SCIENCE MONITOR, Sept. 30, 1999 at 11.

230. Even right-wing Colombian commentators worry about the primacy of a U.S. agenda in exchange for aid. The concern is that not enough military aid will be forthcoming as a result of liberal sentiment in the U.S. *Id.* See also, Miguel Posada, *No dan putada sin dedal*, EL TIEMPO (Bogotá, Colom.), Oct. 15, 1999.

231. *Hearings*, *supra* note 16, at 16.

232. Of course, this wisdom is not shared by all U.S. politicians who see Colombia's internal conflict solely in terms of the drug war. For example, Senator Jesse Helms has stated: "Without U.S. help, Colombia could lose this war — or seek to appease the narco-guerrillas. Either scenario would spell disaster for Colombia, her neighbors . . . and the American people." *Id.* (statement of Senator Jesse Helms).

A. Proposals for U.S. Assistance

Threatening the potential for peace, a sort of orthodox thinking also threatens to dominate U.S. policy on Colombia.²³³ Although broader international relations may not be affected,²³⁴ Colombia policy has succumbed to this thinking.²³⁵ Beyond other effects, its implementation would reinforce the general orientation of orthodox thinking in Colombia: heightening the confrontation and limiting international mediation. Following is a discussion of three salient U.S. positions which have emerged with respect to Colombia.

The main issue driving U.S. policy on Colombia is the drug war.²³⁶ Undoubtedly, this issue is inescapable. However, at one end of the political spectrum, the concern with drugs rises to the level of eclipsing all other questions raised by the Colombian conflict. To the extent proponents of this position focus on Colombia's political war at all, they attribute its causes to the overwhelming drug trade. While the history of political violence in Colombia is generally acknowledged, its newly alarming levels are associated with the flood of drug money financing opponents of the state.²³⁷ Animating their reaction, proponents view the Colombian situation as a direct danger to U.S. national security. For them, the U.S. is already at war in Colombia. Assistance proposals are thus necessarily

233. U.S. officials overwhelmingly endorse a negotiated solution to the Colombian conflict. *See, e.g.,* U.S. State Department Delegation's Trip to Colombia and Venezuela, Foreign Press Center Briefing Transcript (Aug. 18, 1999) [hereinafter Press Center Briefing], available at <http://www.vsia.gov/regional/ar/colombia/fpcpick899.htm> (last visited Oct. 14, 2000). Undersecretary of State Thomas Pickering stated in the briefing: "I think [it] is inevitably true in Colombia, that there isn't a military solution to this problem — that there is a negotiated solution to this problem, and that a negotiated solution, obviously, is something that requires that both sides negotiate." *Id.* *See generally* Assistant Secretary for Democracy, Human Rights, and Labor, Harold Hongu Koh, remarks to the Conference on Human Rights in Colombia, (Apr. 10, 1999) [hereinafter Remarks of Hongju Koh]. However, this Article attempts to identify how U.S. policy and the arguments upon which it is built may in fact contribute to an intensification of the conflict. By normalizing a set of perceptions and beliefs as natural or even logically entailed, U.S. action may be more in line with opponents of the peace process in Colombia than with its supporters.

234. Interestingly, Assistant Secretary for Democracy, Human Rights, and Labor Harold Hongju Koh, speaking in the frame of human rights proposes five steps toward peace: (1) negotiating an end to the conflict; (2) cutting the ties between paramilitaries and the military; (3) addressing issues of impunity of the security forces; (4) reforming the civilian judiciary; and (5) protecting human rights defenders from attack. Curiously, speaking in the context of Colombia specifically, Assistant Secretary Koh does not mention the war on drugs as Colombia's priority. In fact, he does not mention it at all. *See generally* Remarks of Hongju Koh, *supra* note 233.

235. Indeed, the U.S. Ambassador in Colombia, speaking in Washington, declared that drugs are the problem in the issue of U.S. assistance. *See* Sergio Gómez Maseri, *Las Expectativas las Generó E.U.: Moreno*, EL TIEMPO (Bogotá, Colom.), Nov. 15, 1999 [hereinafter *Las Expectativas*]. Clearly, drugs are the problem from the U.S. perspective. This is not to say that they are not a problem for Colombia, but drugs are by no means the single nor the principal problem.

236. *See* Press Center Briefing, *supra* note 233. (Undersecretary of State for Political Affairs, Thomas Pickering stating, "But the focal point, the center pivot of American policy, the spear point of American policy, is to work together with Colombia to deal with its narcotics trafficking. That will, I think, inevitably affect some of the guerrilla organizations, but it is directed at the narcotics effort.")

237. U.S. Ambassador in Colombia, Curtis Kamman, has stated that the U.S.'s priority in Colombia continues to be the drug problem, the "root of all evils" in the country. *Las Expectativas*, *supra* note 235.

bound to questions of military strategy. And, funding is targeted to Colombia's armed forces.

The arguments supporting this position are presented as a natural response to the threat presented. They draw on the impact of international law ideas such as sovereignty and national defense.²³⁸ Ever increasing levels of drug production and trade are characterized as loosening the Colombian state's grip on sovereignty. Colombia's eroding sovereignty, the argument goes, risks being replaced by a narco-state or narco-districts, directly challenging U.S. security interests.²³⁹ While direct military action has been repeatedly rejected by U.S. officials,²⁴⁰ its logic still permeates policy on the matter.²⁴¹

The connections between the drug war and the Cold War have already been well demonstrated by international scholars. The blurring of the lines between leftist insurgents and narco-guerrillas is rather complete. Quite clearly, the rhetoric of a narco-state's threat to national security reinforces a Cold War approach to Latin American relations. Upholding cooperating states, becomes the justification for fortifying and influencing governments beholden to U.S. policy interests, with little regard to the internal political situation. Ironically, this course is the least mindful of Colombia's sovereignty.

The U.S. reaction over the de-militarized zone is particularly illustrative.²⁴² Washington's initial position was not reassuring; in fact, it was outright hostile. Legislators were more concerned about drug interdiction programs — despite their dismal track record in Colombia— than about paving the way for a negotiated

238. See generally, Zackrisson & Bradley, *supra* note 31 (arguing that the Colombian insurgency's increasing links to the drug trade threaten the sovereignty of the Colombian state).

239. See, e.g., *Hearings, supra* note 16. Ambassador Thomas R. Pickering, Under Secretary of State for Political Affairs testified that, "Colombia's national sovereignty is now increasingly threatened by well-armed and ruthless guerrillas, by paramilitaries and by the narco-trafficking interests which are directly interlinked in many ways Although the Government is not directly at risk, these threats are slowly eroding the authority of the central government and depriving it of the ability to govern outlying areas. . . . As a result, large swaths of Colombia are in danger of being narco-districts . . ." (emphasis added).

240. See 'A Military Solution is not possible' Clinton, EL TIEMPO (Bogotá, Colom.), July 22, 1999 (reporting on President Clinton's letter to President Pastrana which emphasizes the U.S. leader's rejection of military means to solve the Colombian crisis); see also, Press Center Briefing, *supra* note 233 (In response to a question about multilateral intervention in Colombia, Undersecretary of State Thomas Pickering responded, "Well, I would first like to use this opportunity for the hundredth time to deny as crazy, loco, whatever words you want to use, this particular concept, which seems to have a life of its own.").

241. See Douglas Farah, *U.S. Ready to Boost Aid to Troubled Colombia*, WASH. POST, Aug. 23, 1999, at A01 [hereinafter Farah] (reporting on the U.S. position articulated by Drug Czar General Barry McCaffery and Undersecretary of State Thomas Pickering: "[Pastrana] . . . risks losing U.S. support if he makes further concession to the insurgents [T]he U. S. will sharply increase aid if [Pastrana] develops a comprehensive plan to strengthen the military . . .").

242. See Ana Carrigan, *Colombia differs with U.S. on Narco-War Tactics*, BOSTON GLOBE, Sept. 20, 1998, at 5 [hereinafter Carrigan], ("In the view of Congress, Pastrana's bold new policies are at best unwelcome, at worst downright dangerous. Congress has only two things in mind when it focuses on Colombia: drugs, and narco-guerrillas.").

peace.²⁴³ U.S. authorities opposed the withdrawal of Colombian armed forces from the area because of its potential impact on drug trafficking and cultivation.²⁴⁴ According to this long-standing FARC demand revealed a bold move on the part of Pastrana. Still, in the U.S., it was greeted with widespread suspicion.²⁴⁵ Not because of a disagreement over strategy or the impact on local populations, instead, it was opposed because of potential effect on the drug war. While the U.S. position changed after some intense shuttle diplomacy by Colombian officials, the priority of concerns was clear. To the extent U.S. drug policy becomes the exclusive framework,²⁴⁶ international-based assistance would not advance the cause of peace.

Alternatively, on the left of the spectrum are calls to deny U.S. assistance altogether. These arguments draw mostly on the reported links between the Colombian military and outlaw paramilitary groups.²⁴⁷ The Colombian military has been widely condemned as a major violator of international human rights. Indeed, the U.S. government suspended military assistance to the Colombians precisely on these grounds.²⁴⁸ Reports troublingly continue to link the Colombian military to right-wing terrorism.²⁴⁹ As the main violator of human rights in the country, paramilitaries are perceived as a particularly heinous protagonist.²⁵⁰ The military's complicity, by commission or omission, threatens to exacerbate the abuses. Furthermore, proponents of this position caution against supporting the wrong ally. In the face of Colombia's dizzyingly complex internal war, human rights advocates present localization of the conflict as a preferable course. Clearly, this argument could easily extend beyond current proposals and include a curtailment of existing aid or even an embargo on arms or other assistance.

243. See also, *De Colombia no se habla en E.U.*, EL TIEMPO (Bogotá, Colom.), Aug. 20, 1999 (citing foreign relations expert Prof. Abraham F. Lowenthal's assertion that the U.S. Congress's single concern in Colombia is drug-trafficking and not the internal war).

244. See Carrigan, *supra* note, 242 at 5. ("Odds are that Pastrana's commitment to honor his overwhelming mandate from the electorate to negotiate will again collide with the only Colombian policy in town: U.S. drug czar Barry McCaffrey's counter-narcotics war.")

245. *Id.* Citing a State Department source: "This peace process has frightened the heck out of people here."

246. See MAX HILLAIRE, INTERNATIONAL LAW AND THE UNITED STATES MILITARY INTERVENTION IN THE WESTERN HEMISPHERE (1997) (tracing the body of international law advanced by U.S. authorities in defense of military intervention in Latin America. Interestingly, based on past U.S. international legal practices, armed intervention in Colombia today can be amply justified in legal terms even if it is not a political or practical objective). See also Press Center Briefing, *supra* note 233.

247. Despite the widely reported connections by human rights groups and others, the current U.S. Ambassador in Bogotá has asserted that these links are not demonstrable. Cited in Sergio Gómez Maseri, *E.U. condiciona ayuda para susitución*, EL TIEMPO (Bogotá, Colom.), Nov. 2, 1999.

248. Acting Assistant Secretary of State for Western Hemisphere Affairs, Peter Romero, has stated that there has been significant improvement on this front and a couple of general officers and a couple of colonels have been arrested because of their links to paramilitaries. See On-the-Record Briefing of the Department of State, Aug. 16, 1999 [hereinafter State Dept. Briefing] available at <http://secretary.state.gov/www/briefings/9908/990823db.htm> (last visited Oct. 14, 2000).

249. Amidst U.S.'s consideration of a U.S.\$ 1 billion military aid proposal, the Colombian armed forces are embroiled in controversy over rumblings of a dirty war. To mention one internationally-known case, the assassination of political satirist and representative of civil society in the ELN peace process, Jaime Garzón, focused the point. National grief over the beloved figure's death turned to anger when reports filtered that the military was a likely suspect. See *id.*

250. See generally Remarks of Hongju Koh, *supra* note 233.

However, this type of argument is based on several faulty presuppositions. Proponents presume that concerted or even bi-lateral disengagement is less compromising than a program of structured assistance. These arguments draw on apprehensions about further involvement in a foreign conflict. They also draw on ambivalence about taking sides in a murky war. However, the call for isolationism or non-intervention is not value free in Colombia. On the contrary, it has its own set of backers. Indeed, this position has quite significant supporters within Colombian politics. And, it is not simply the leftist insurgents and narcotraffickers who stand to benefit. Although, of course, they will. More broadly, this position aligns with those in favor of a confrontational solution. Torpedoing international involvement has the effect of hastening the failure of proposed negotiations. Indeed, narrowing the possibility for an internationally-based initiative helps clear the way for the likely alternative of continued hostilities.

As a result, this position is not tenable as a mode of tempering the internal war. Quite the contrary, it has much in common with orthodox internationalism. While outwardly presented as an international prescription for peace, it in fact excludes more ambitious proposals that could support the peace process. Human rights organizations and others that vehemently oppose assistance also foreclose the gains that international engagement may bring. In this same manner, Colombian publicists profess to champion internationalist proposals while actually limiting the range of internationalist creativity. Moreover, eschewing financial support for Pastrana's program threatens to undermine the institutional representatives of peace in Colombia. Undeniably, the military's human rights record makes this less than an optimal choice. And this is by no means a defense of military wrongdoing. However, any quick survey of the Colombian situation demonstrates there is no unproblematic alternative and no untroubling ally.

Finally, there is support for yet a third alternative. This scheme attempts to reconcile the previously mentioned concerns and addresses the conflict more globally. Specifically, the proposal is for military assistance coupled with social and economic aid which is subject to a number of conditions. This third alternative actually describes all of the major assistance proposals currently on the table. From Pastrana's Plan Colombia to legislation introduced by Senators Coverdale and DeWine to the Clinton administration's proposal, all fall within the type of assistance package described here. All three proposals pay heed to the political and economic dimensions of the Colombian conflict. They also acknowledge the need to extend the military's accountability for human rights abuses whether directly or through paramilitaries.

However, they differ sharply in terms of their proportions of military versus social assistance. They also differ in terms of the range of conditions to be imposed. Indeed, Congressional consideration may further add to the list of possible requirements. These decisions will have a vast impact on the course of the peace process. As such, they are crucial questions which will be decided as this Article is being published. Still, the questions raised in this section are applicable

across a number of international contexts. Furthermore, they will continue to be key in terms of developing policy on Colombia.

B. Drug War Conditions versus Conditions for Peace

In Washington circles, some of the potential conditions that have surfaced include: limiting military aid to counternarcotics as opposed to counter-insurgency actions; recovery by the Colombian state of territorial control over the demilitarized zone, non-interference with current extradition laws relating to Colombian nationals, strengthening of the military forces, professionalization of the military justice system. While these policy conditions no doubt have advocates inside Colombia, they decisively impact on controversial questions as to the handling of the internal war.

Imposing conditions on aid, while clearly a valuable tool, risks some unexpected alliances with actors in Colombia. Specifically, certain conditions threaten to escalate the internal war rather than to assist peace. Certain currently proposed conditions threaten to redefine Colombia's political conflict solely in terms of a drug war, reducing the potential for an effective reconciliation and narrowing the range of international responses.

Furthermore, conditions limiting military assistance to counternarcotics as opposed to counterinsurgency are disingenuous. For in fact, the impetus for increased aid is based on the very indistinguishability of leftist guerrillas and narco-traffickers, the so-called narco-guerrilla.²⁵¹ The guerrillas's deep involvement in the drug trade, it is asserted, makes it impossible to defeat one without the other. Differentiating them through the backdoor of conditionality corresponds, rather fantastically, to a domestic political contortion.²⁵² Indeed, it attempts to mollify the opponents of U.S. aid by adopting a course of military counter-insurgency while pretending to avoid such an intervention.

The impact of this stance is to escalate Colombia's domestic political violence to an international drug war. Indeed, conditions of this type have the effect of

251. Since Cesar Gaviria's administration, left wing guerrillas have been linked with the drug trade. This association has been emphasized in the government's public relations campaign against the insurgents. The link has also been emphasized by U.S. leaders in an effort to secure more assistance for the Colombian military under the rubric of counter-narcotics. Indeed, the link has been so strongly drawn that it has become the basis for assertions about Colombia's threat to regional stability. These assertions are frequently accompanied by rumors of U.S. military intervention, regional intervention, or third-country recognition of guerrilla groups. See Tim Padgett & Cathleen Farrell, *A Shift in the Balance of Power: In a Risky Bid for Peace, Colombia's Government Cedes Political Control in Parts of the Country to Marxist Guerrillas. Will it Work?* TIME, Sept. 28, 1998, at 14.

252. See Press Center Briefing, *supra* note 233. In response to a journalist's question pointing out the contradiction in asserting the interrelatedness of Colombia's problems while emphasizing the threat singularly as narcotics, Undersecretary of State Thomas Pickering responded: "Unfortunately, there is enough of an area of narcotics development in both production and trafficking to absorb a lot of Colombian effort and a lot of American assistance. ... But the focal point, the center pivot of American policy, the spear point of American policy, is to work together with Colombia to deal with its narcotics trafficking. That will, I think, inevitably affect some of the guerrilla organizations, but it is directed at the narcotics effort." *Id.*

repackaging Colombia's civil strife for the worse. The political dimension of the conflict is bracketed out. In turn, in order to obtain support, Colombian officials are forced to sustain the rhetoric of a pervasive narco-war.

This framework has grave consequences for the fledgling peace process. Indeed, it has already forced the Pastrana government into compromising positions.

Walking a thin line between justifying aid and not endangering peace talks, the president has had a difficult job. In public and international fora, he has had to assert that the guerrillas both are drug-traffickers and are not purely criminals — the former justifies aid, the latter justifies negotiating with them.²⁵³ While the actual situation is difficult to quantify, most agree that the guerrillas at a minimum provide protection for drug-related activities. In any case, the position has won him the enmity of the political right and doubts from others. Faced with the breakdown of peace talks, Pastrana is forced to defend the guerrillas, thereby compromising his own political position. All this, it seems, in an effort to proceed with the peace process and to sustain his leadership. The U.S. State Department has continued to concentrate on the guerrilla's drug link despite Pastrana's statements.²⁵⁴

Whatever the reality, the framework of a drug war undermines the Colombian government's range of autonomy. Faced with U.S. conditions, the internal political situation is eclipsed.²⁵⁵ As a drug issue, it also narrows the range of alternatives and international arrangements which might be brought to bear on the conflict. Indeed, it places U.S. drug policy over and above the objective of peace. In terms of its impact inside Colombia, this course runs counter to securing negotiations. Notably, the type of conditions that are set may end up mandating U.S. drug policy as a condition for assistance.

Another type of condition on aid being contemplated relates to the demilitarized zone and military activities directly. This type of condition is less tied to the type of war, either counter-insurgency or counter-narcotics, that is being waged. Instead, it directs the mode in which the conflict should be conducted. In this connection, conditions over the demilitarized zone as well as requirements for a strengthening of the military point toward an escalation of the war. Clearly, these

253. President Pastrana declared to the Argentine press: "No evidence exists that the FARC are drug-traffickers. Yes, they charge fees to the narcos. But the FARC have always said that they are interested in the eradication of illicit crops. It is also said that the demilitarized zone is flooded with drug-trafficking and that is also not true." Following these comments, he insisted: "While I am president of Colombia there will be no foreign intervention." *EL CLARÍN* (Buenos Aires, Arg.). July 29, 1999.

254. Acting Assistant Secretary for Western Hemisphere Affairs, Peter Romero: "I think that it would be naive to think that they [the FARC] are not involved in production; we believe that they are involved, in some cases, in production. But by and large they reap profits from trafficking, whether they're involved in cultivation or actually trafficking into the United States. They are deeply involved in the whole enterprise." *See* State Dept. Briefing *supra* note 248.

255. The different but related rationale for the ouster of General Manuel Noriega in Panama surely raises concern. No matter how unlikely in the eyes of U.S. policymakers today, facing the pointedness of a justification for intervention that a narco-war might entail, Pastrana is particularly in a difficult diplomatic position.

conditions spring from similar criminal enforcement perspectives. By delimiting the strategy, the U.S. may indirectly pull the strings of the peace process.²⁵⁶

In significant part, U.S. policy is already aimed at strengthening the Colombian military.²⁵⁷ No doubt this is a sensible fall-back position for the Colombian government, however it is problematic as the central piece of the United States' Colombia policy. To the extent that the United States sets this agenda for the Colombian peace process,²⁵⁸ military expansion will become a background fact. Political and financial responsibility for its implementation would no longer lie with Colombian leaders but would instead become part of the peace package.

Peace assistance that has the drug war as its central feature risks defeating the ultimate goal. Despite other social assistance, U.S. concerns are primarily framed in terms of propping up Colombia's diminished sovereignty and military control in order to make counter-narcotics more effective. While Clinton administration officials have lauded the peace initiative, significant pressure has been directed to Colombia's government to re-establish sovereign control over its territory. Indeed, military expansion is a centerpiece of the Clinton administration's recommendations. Even objections to military assistance because of human rights abuses have given way. Military control has taken precedence over peace negotiations, human rights or foreign assistance.²⁵⁹ While this, of course, reflects U.S. interests, holding the Colombian government to this standard of sovereignty — whether overtly characterized as such or more subtly implied — ignores the political as well as the military situation in that country. Not so different from

256. Indeed some of the parameters for a peace agreement advanced by Undersecretary of State Thomas Pickering go farther than public statements made by President Pastrana: "[I]f the guerrillas would accept to participate in an open democracy in an open and democratic way, as has happened with other insurgencies in the hemisphere, then he [Pastrana] would work to find the space to permit that to happen." Press Center Briefing, *supra* note 232.

257. Secretary of Defense William Cohen, speaking in Cartagena last year, made his position clear regarding the need to strengthen the Colombian military to combat narco-terrorism. See *U.S. pushes Colombia to build stronger military*, REUTERS, Nov. 30, 1998. This news item reports that "U.S. military commanders admit the line between anti-drug and counter insurgency operations has become blurred." *Id.*

258. The preeminence of U.S. interests in the process was reported by the Washington Post. In separate visits to Colombia, senior U.S. officials warned President Andrés Pastrana that he risks losing U.S. support if he makes further concessions to the insurgents in an effort to restart stalled peace negotiations, according to sources familiar with the talks. But the officials, White House drug policy director Barry R. McCaffrey and Undersecretary of State Thomas Pickering, also told Pastrana the United States will sharply increase aid if he develops a comprehensive plan to strengthen the military, halt the nation's economic free fall and fight drug trafficking. Farah, *supra* note 241, A01. In response to the Washington Post article, the U.S. State Department commented: "Well, the idea that we're going to try to micro-manage the Colombian Government's counter-insurgency strategy is wrong." U.S. Department of State, Daily Press Briefing, Aug. 23, 1999.

259. See *U.S. Counternarcotics Efforts with the Government of Colombia: Hearing Before the Western Hemisphere, Peace Corps, Narcotics and Terrorism Subcomm. Of the Senate Comm. on Foreign Relations*, 106th Cong. (Mar. 24, 1999) (testimony of Rand Beers, Assistant Sec'y Int'l Narcotics and Law Enforcement) [hereinafter Beers Testimony]. "We have made it clear to the Government of Colombia that we will not support alternative development in areas of the country that are not under Colombian government control — which is the case for most of the coca cultivation areas. Our initial support will be confined to projects in the opium poppy cultivation region until such time as the Government of Colombia can assure adequate control of the coca production region."

Colombian publicists, reinforcing the state by insisting on its formal functions is counterproductive. It places all hopes with a set of "sovereign" institutions incapable of fulfilling the agenda set by conservatives in Colombia or the U.S. government. Instead, conditions must be tailored to allow for a renegotiation of the Colombian state which would then provide the backdrop for sovereign accountability.

U.S. interests will be better served in this instance by not rushing to set the agenda.²⁶⁰ Siding effectively with conservative publicists, while appearing to befriend the Pastrana administration,²⁶¹ will neither defeat the guerrillas nor will it secure peace.²⁶² On the contrary, it may further choke the Colombian government and reintensify the long-running guerrilla conflict, making the drug trade more difficult to combat in the end.

Rather than mandate military expansion, the U.S. should stand for the widening of democratic rights. Considering the diagnosis of highly limited political participation in Colombia, this may be a more effective requirement upon which to condition aid. In addition, aid can be tied to progress on negotiations, preliminary accords reached by the parties, and even transparency in the use of funds. In short, the U.S. could help propel Colombia over some of the stumbling blocks of its current political system.

V. ALTERNATIVES FOR AN INTERNATIONAL LAW FRAMEWORK

Colombia's internal violence is deeply-rooted in its history of exclusionary politics, and it is not a marginal phenomenon. A solution that is, itself, exclusionary and repressive will only aggravate this dynamic. A framework that would give priority to the drug war is also not likely to foster political development. On the contrary, constraints of this nature merely reproduce the exclusive and hierarchical political structure already in place in Colombia. Moreover, if such arrangements are presented as conditions for assistance or as dictated by international requirement, they undermine a legal regime open to political participation and debate over national priorities.

Both the orthodox publicist and the rhetoric of the drug-war conditionality attempt to stand above contrary viewpoints. Indeed, both present themselves as impervious to alternative proposals: even when alternative proposals may be more in line with ending the guerrilla war and reducing the flow of drugs.

260. This recommendation coincides with the remarks of Michael Shifter of the Inter-American Dialogue. See Shifter, *supra* note 27 ("The United States has an opportunity to establish greater cooperation on a variety of fronts with a very important country in this hemisphere. This does not mean setting down firm conditions for a peace agreement as the outset of the process, but rather stepping back and allowing the new Colombian government to shape what it deems acceptable terms.").

261. See Press Release, James Rubin, U.S. Department of State (Sept. 23, 1999) (on file with author), praising President Pastrana's integrated approach. U.S. Department of State, Press Releases, Sept. 23, 1999.

262. See Beers Testimony, *supra* note 259, at 2. ("This Administration has also made the point that the Colombian effort cannot exclude counternarcotics operations in the demilitarized zone created by the peace process"). *Id.*

Orthodox internationalism clearly works a disservice to the cause of peace. The landscape of doctrines it advances blunts the potential benefits of international proposals. In the place of incentives to peace, orthodox thinking fuels further war. Instead of international accountability, it stands as a defense of the state. International doctrines are used to stifle the possibility for political reform. This result is achieved by defining reform as beyond the power of the state. International law, in this context, furnishes the limits, narrow limits that make the state virtually non-negotiable.

The point here is not to argue against any limits on political compromise. Rather, the objective is to consider how those limits are drawn. Ones that are too narrowly defined may either break or not offer enough room for negotiation. Orthodox internationalism is clearly in this category. The fear is that a loosening of the legal rules will result in the demise of limits and accountability. As such, law would no longer provide constraints against extremist or non-democratic demands. Even a demand like the elimination of popular elections and majority rule may need to be taken seriously if not restricted by a higher law. In light of the guerrilla challenge to state institutionalism; national norms would clearly be of no consequence in this connection.

Orthodox interpretations of international law, however, turn out to be rather counter-productive as a source of limits. In its place, contemporary international practice presents some alternatives, providing less of a focus on sovereignty and belligerency constraints in favor of broader authority for rights-based guarantees for individuals. These guarantees, however, do not extend to preserving the existing Colombian state as is. In the context of political reconfiguration, the most salient international obligations would involve human rights and, increasingly, democratic rights. Although possibly not endorsed by all sectors of society, this agenda is already a priority for both of Colombia's national parties. As such, the growing body of pronouncements on human rights, democratic government, and international crimes offers a legally-bounded framework in which international law may serve effectively as the language of the peace talks.

VI. CONCLUSION

Despite its current limitations, there is a role for international law to play in Colombia's peace process. Clearly, orthodox versions of internationalism merely have the state as its project, and thus act to hinder rather than lead the peace talks. Additionally, U.S.-driven proposals harbor the pitfalls addressed above. While they do offer a legal framework, they threaten to marginalize the primacy of the political conflict. Nonetheless, a shift in legal discourse has the ability to produce some needed movement. That is, a switch in the established and normalized rhetoric of power has the potential, if only in the short term, of providing some room for negotiation.

Considering the monopoly of orthodox internationalism, a turn to more modern precedents or creative innovation may unsettle some of the long entrenched

positions. Additionally, securing multi-lateral participation and assistance would provide a beneficial counter-balance to the single-mindedness of U.S. policy. Injecting some alternatives to discussions on prisoner exchanges or humanitarian agreements may strengthen the process. In this regard, Colombian internationalists need not despair. The current international consensus is by no means devoid of limits. Thus, it is not the case that impunity will be condoned or democracy will be abandoned. That would hardly be the case in light of the general movement to global accountability in the form of an international criminal court, for example. Moreover, it is not the case that human rights demands or democratic mechanisms will be tossed aside. If anything, these principles will be more uniformly required by the world community.

Opening up debate on international norms, however, is not sufficient in the long run. Broadly participatory national politics will require a more accessible and responsive conception of law. If the Colombian experience teaches anything, it is that the law itself can be a source of disorder.

