

Militarization and privatization of security: From the War on Drugs to the fight against organized crime in Latin America

Antoine Perret*

Civil Society Organization Development Manager, International Code of Conduct Association, Geneva, Switzerland

Email: antoine.perret@gmail.com

Abstract

Fifty-two years ago, in 1971, President Nixon declared the “War on Drugs”, identifying drug abuse as a public enemy in the United States. Since then, US drug policy has been militarized and, more recently, privatized. Every year, the US government increasingly contracts private military and security companies to provide intelligence, logistical support and training to armed forces in drug-producing or drug-transit States. In Latin America, this militarization and privatization has increased the intensity of violence and has complexified domestic

* Antoine Perret holds a PhD and an LLM in international Law from the European University Institute, and was Research Fellow at the Universidad de Los Andes (Bogotá), Columbia University (New York), the Centro de Investigación y Docencia Económicas (Mexico City) and American University (Washington, DC). The views expressed in this article reflect the author’s views only. Thanks are due to Anjela Jenkins and Cristina Valdés, as well as the peer reviewers and editors of the *Review*, for their constructive comments on previous versions of this article.

The advice, opinions and statements contained in this article are those of the author/s and do not necessarily reflect the views of the ICRC. The ICRC does not necessarily represent or endorse the accuracy or reliability of any advice, opinion, statement or other information provided in this article.

situations, to the extent that the existing international legal regimes now seem inappropriate to respond to the challenges posed by the War on Drugs. On the one hand, human rights law does not adequately address situations where the State faces organized crime groups that are able to control territory. On the other hand, international humanitarian law (IHL) was not created to address law enforcement situations, which the War on Drugs and the fight against organized crime ostensibly are.

This article examines the situation in Latin America, looking at examples of different types of situations through the lens of intensity and organization of the group involved and, in some cases, the group's control over territory. It discusses the application of IHL and human rights law (focusing on the inter-American system of human rights) in these situations and their complementarity, and debates how these bodies of law are adapting or may need to be adapted.

Keywords: Latin America, Mexico, Colombia, War on Drugs, organized crime, IHL, human rights.

⋮⋮⋮⋮⋮⋮

Introduction

Fifty-two years ago, in 1971, President Nixon declared the “War on Drugs”, identifying drug abuse as a public enemy in the United States.¹ This declaration represented a change in rhetoric for the United States, foreshadowing a change in the country’s approach to fighting drug abuse and drug trafficking.² In 1973, Nixon created the Drug Enforcement Administration (DEA) in order to execute “an all-out global war on the drug menace”.³ Since the mid-1970s, the US government has invested billions of dollars in anti-drug assistance programmes around the world.⁴ Initially, the focus was on source countries such as Colombia, Bolivia and Peru.⁵ At the beginning of the War on Drugs, the United States treated the fight against drugs as a police problem, providing equipment and supplies to the police for counter-narcotic efforts. Since the 1980s, however, US drug policy has been militarized and, more recently, privatized – every year, the US government contracts more private military and security companies (PMSCs) to provide intelligence, logistical support and training to armed forces in drug-producing or drug-transit States.

1 PBS, “Thirty Years of America’s Drug War: A Chronology”, available at: www.pbs.org/wgbh/pages/frontline/shows/drugs/cron (all internet references were accessed in March 2023).

2 Clare Ribando Seelke, Liana Sun Wyler, June S. Beittel and Mark P. Sullivan, *Latin America and the Caribbean: Illicit Drug Trafficking and U.S. Counterdrug Programs*, Congressional Research Service, Washington, DC, 12 May 2011, pp. 9–10, available at: www.fas.org/sgp/crs/row/R41215.pdf.

3 Claire Suddath, “A Brief History of The War on Drugs”, *Time*, 25 May 2009, available at: <http://content.time.com/time/world/article/0,8599,1887488,00.html>.

4 C. R. Seelke *et al.*, above note 2, pp. 9–10.

5 *Ibid.*, pp. 9–10.

Data suggest that drug trafficking constitutes one of the main activities of organized crime,⁶ and large-scale criminal organizations have emerged in a number of contexts of weak governance, such as Colombia and Mexico.⁷ These two countries are the site of major investments in militarizing drug policy under US cooperation frameworks known as the Plan Colombia⁸ for Colombia and the Merida Initiative⁹ for Mexico. In both situations, fighting between State security forces and sophisticated organized groups has been ongoing for decades, and the two countries have been influenced by US anti-narcotics policy implementing the same approach of militarization and privatization of security to fight organized crime, raising questions about the applicability of international humanitarian law (IHL).

The existing international legal regimes seem inappropriate to respond to the challenges posed by the War on Drugs. On the one hand, international human rights law (IHRL) does not adequately address situations where the State faces organized groups with the ability to challenge State authority and control territory. On the other hand, IHL applies only in situations of armed conflict; despite the “War on Drugs” label and the increasing use of military forces, this remains primarily a law enforcement initiative in which a determination of whether IHL applies should depend on an analysis of each context where anti-drug activities are carried out.¹⁰

The militarization and privatization of security have blurred the line between situations of armed conflict and peacetime, between the military and civilians. The Latin American continent has been the theatre of this evolution for decades, ever since the War on Drugs – long before the “War on Terror” – hit the continent. This article begins by providing a descriptive review of the

- 6 Letizia Paoli, “What Is the Link between Organized Crime and Drug Trafficking?”, *Rausch*, Vol. 6, No. 4-2017, 2018. The UN Convention on Transnational Organized Crime defines an organized crime group as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences ... in order to obtain, directly or indirectly, a financial or other material benefit”. UN Convention against Transnational Organized Crime and the Protocols Thereto, 2004, Art. 2.
- 7 Jonathan D. Rosen and Roberto Zepeda, *Organized Crime, Drug Trafficking, and Violence in Mexico: The Transition from Felipe Calderón to Enrique Peña Nieto*, Lexington Books, Lanham, MD, 2016.
- 8 See, for instance, Michael Shifter, “Plan Colombia: A Retrospective”, *Americas Quarterly*, 18 July 2012, available at: www.americasquarterly.org/fulltextarticle/plan-colombia-a-retrospective/.
- 9 See, for instance, Ocampomi, “The Merida Initiative”, US Embassy and Consulates in Mexico, 7 September 2021, available at: <https://mx.usembassy.gov/the-merida-initiative/>.
- 10 IHL applies to law enforcement situations, while IHL applies to armed conflict. Even though military forces are often involved in law enforcement, the principal actor in law enforcement is the police (who are civilians). The concrete difference is the regulation of the use of force: the principles of necessity, proportionality and precaution are conceived differently. For instance, “under the conduct of hostilities paradigm, the *principle of precaution* requires belligerents to take constant care to spare the civilian population, civilians and civilian objects. On the contrary, under the law enforcement paradigm, all precautions must be taken to avoid, as far as possible, the use of force as such, and not merely incidental civilian death or injury or damage to civilian objects.” Gloria Gaggioli, “Legal Basis and Distinguishing Features of the Two Paradigms”, in Gloria Gaggioli (ed), *Expert Meeting: The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*, Geneva, 2013, p. 9.

evolution of the drug war in Mexico and Colombia and the role of various organized groups, and discusses the application of IHL in this context. The article then analyzes the long-standing approach of the inter-American system of human rights on the interpretation and application of human rights law in light of IHL, concluding that the path opened by the Inter-American Court of Human Rights and its quasi-criminal function could be a model for addressing these hybrid situations of violence.

Militarization of domestic security: Mexico

Although drug traffickers have operated in Mexico for more than half a century, drug-related violence started around the 1990s, when the drug market became more lucrative and the centralized power of the Mexican government started to slip.¹¹ Nevertheless, the Mexican government maintained a relatively passive approach to drug trafficking and its related violence until the election of President Calderón in 2006.¹² Shortly after, Calderón “declared war” on organized crime.¹³ The United States put its support behind the Calderón administration, supporting the militarization of the fight against drug traffickers, which dramatically escalated the situation of violence.¹⁴ The extent of the violence, in conjunction with other factors, suggests that the situation in Mexico may be an appropriate context in which to apply IHL. This part of the article analyzes and defines the situation of violence in Mexico, suggesting that it meets the legal criteria to be considered an armed conflict in which IHL should apply.

The War on Drugs in Mexico

Tougher counter-drug efforts in the Gulf of Mexico shifted drug trafficking routes to Mexico in the 1980s,¹⁵ and since 2000, Mexico has risen as a transit country and has

- 11 June S. Beittel, *Mexico: Organized Crime and Drug Trafficking Organizations*, Congressional Research Service, Washington, DC, 2022, available at: www.fas.org/sgp/crs/row/R41576.pdf.
- 12 On the one side, the relationship between Mexican traffickers was cooperative during the 1980s. It can be described as a *Pax Padrino* or “Peace of the Godfather”: see Nathan P. Jones, “The State Reaction: A Theory of Illicit Network Resilience”, PhD diss., University of California Irvine, 2013.
- 13 “Mexico Troops Sent to Fight Drugs”, *BBC News*, 12 December 2006, available at: <http://news.bbc.co.uk/2/hi/americas/6170981.stm>.
- 14 On US–Mexican cooperation, see Clare Ribando Seelke and Kristin Finklea, *U.S.–Mexican Security Cooperation: The Mérida Initiative and Beyond*, Congressional Research Service, Washington, DC, 2017, available at: www.fas.org/sgp/crs/row/R41349.pdf. On the escalation of violence, see, for example, Human Right Watch (HRW), *Neither Rights nor Security: Killings, Torture, and Disappearances in Mexico’s “War on Drugs”*, 2011, available at: www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf.
- 15 David A. Shirk, *The Drug War in Mexico: Confronting a Shared Threat*, Council on Foreign Relations Special Report No. 60, March 2011, available at: www.cfr.org/sites/default/files/pdf/2011/03/Mexico_CSR60.pdf. See also Luis Astorga and David A. Shirk, *Drug Trafficking Organizations and Counter-Drug Strategies in the U.S.-Mexican Context*, Mexico and the United States: Confronting the Twenty-First Century Working Paper Series, 2010, available at: <https://escholarship.org/uc/item/8j647429>.

become a target of US anti-drug assistance programmes.¹⁶ Mexico is now a major supplier for all kinds of drugs – heroin, methamphetamine, marijuana and cocaine – to the US drug market.¹⁷ The drug market between the United States and Mexico is estimated in US government reports as ranging from \$18 billion to \$39 billion in profits annually.¹⁸

By the time President Calderón took office in 2006, drug violence was already rising.¹⁹ His administration chose to engage in the War on Drugs and heavily militarized the intervention of the Mexican State against the drug trafficking organizations (DTOs).²⁰ Efforts to counter police corruption, long a problem in Mexico, included replacing the police with military forces for law enforcement.²¹ In 2006, the federal government deployed “tens of thousands of troops to man checkpoints, establish street patrols, shadow local police forces, and oversee other domestic law enforcement functions in high-drug violence states”.²² The following administration did not change the government’s main strategy and continued to militarize the fight against DTOs, the latest example of this being the militarization of the border agency, which has been under military supervision since 2021 in order to support the fight against drug trafficking.²³

Instead of stabilizing and de-escalating the situation, the involvement of the military in Mexico has caused things to deteriorate further, with increased rates of fatalities and frequency of episodes of violence.²⁴ The number of deaths related to organized crime has increased each year, from 2,826 in 2007 and 15,273 in 2010²⁵ to almost 30,000 in 2018.²⁶

16 C. R. Seelke *et al.*, above note 2, pp. 9–10.

17 Council on Foreign Relations, “Mexico’s Long War: Drugs, Crime, and the Cartels”, 7 September 2022, available at: www.cfr.org/background/mexicos-long-war-drugs-crime-and-cartels.

18 Steven Scott Whitworth, “The Untold Story of Mexico’s Rise and Eventual Monopoly of Methamphetamine Trade”, master’s thesis, Naval Postgraduate School, Monterey, CA, 2008. See also US Department of Justice, Drug Enforcement Administration, 2013 *National Drug Threat Assessment Summary*, Springfield, VA, 2013, available at: www.dea.gov/sites/default/files/2018-07/DIR-017-13%20NDDTA%20Summary%20final.pdf; US Department of Justice, National Drug Intelligence Center, *National Drug Threat Assessment 2011*, 2011, available at: www.justice.gov/archive/ndic/pubs44/44849/44849p.pdf.

19 Council on Foreign Relations, above note 17.

20 “Mexico Troops Sent to Fight Drugs”, above note 13.

21 Guillermo Valdés, former director of Mexico’s National Intelligence and Security Center, said in an interview that the military option was the only option available to fight against DTOs in Mexico. Juan Diego Quesada, “El Chapo es un genio de los negocios”, *El País*, 11 December 2013, available at: http://internacional.elpais.com/internacional/2013/12/11/actualidad/1386718386_361181.html. On police corruption, see Colleen W. Cook, *Mexico’s Drug Cartels*, Congressional Research Service, Washington, DC, 16 October 2007, p. 10, available at: www.fas.org/sgp/crs/row/RL34215.pdf.

22 D. A. Shirk, above note 15, p. 10.

23 Darinka Rodriguez, “El Ejército desplaza a Hacienda y se hace cargo de las aduanas mediante una nueva agencia nacional”, *El País*, 15 July 2021, available at: <https://elpais.com/mexico/2021-07-15/el-ejercito-desplaza-a-hacienda-y-se-hace-cargo-de-las-aduanas-mediante-una-nueva-agencia-nacional.html>. On the administration of Peña Nieto (2012–18), see, for instance, Patrick Corcoran, “Mexico Security Under Enrique Peña Nieto, 1 Year Review”, *InSight Crime*, 4 December 2013, available at: www.insightcrime.org/news-analysis/mexico-security-under-enrique-pena-nieto-one-year-in.

24 J. S. Beittel, above note 11, p. 7.

25 HRW, above note 14, p. 4.

26 Karina Suárez, “México alcanza un nuevo récord de asesinatos”, *El País*, 22 June 2018, available at: https://elpais.com/internacional/2018/06/22/mexico/1529620697_155674.html#?rel=mas.

DTOs previously assumed a primarily defensive stance in the face of the War on Drugs.²⁷ However, starting in 2010, the nature of the violence has been evolving.²⁸ Attacks by DTOs have increasingly targeted politicians, killing them or making them disappear “presumably because they refused to cooperate with cartels”.²⁹ Massacres of civilians have become more common.³⁰

DTOs in Mexico have evolved into military-type groups. They have access to military artillery, including rockets, grenade launchers and assault rifles,³¹ mostly coming from the United States.³² They have also developed their own new weaponry, such as *narcotanques* (improvised infantry-fighting vehicles),³³ and more recently they have used drones with C4 explosives and ball bearings strapped to them.³⁴ They are able to enter into direct confrontations and coordinated military actions against government security forces – on 23 July 2013, for example, six separate attacks on police left fifteen officers injured, as well as two dead.³⁵ Another spectacular example of the strength of Mexican DTOs occurred when State forces arrested Ovidio Guzmán López, son of the former leader of the Sinaloa Cartel: “[a]rmed men were seen firing on police with bodies strewn in the road”, forcing the police to withdraw without Guzmán in their custody in order to avoid further violence.³⁶ Sullivan and Logan write that the Los Zetas cartel “remain[s] one of the few criminal groups in the Americas willing to deliberately take head on a military checkpoint or patrol”,³⁷ which means that its military actions more closely resemble those of an insurgent group than a criminal group.

27 Ioan Grillo, “Reporting on the Front Lines of Mexico’s Drug War”, interview with National Public Radio, 24 October 2011.

28 Daniel Tovrov, “Mexico’s President Calderon to Keep Fighting Drug War”, *International Business Times*, 5 December 2011, available at: www.ibtimes.com/mexicos-president-calderon-keep-fighting-drug-war-378914.

29 *Ibid.*

30 For a list of massacres of civilians, see “Factbox: Worst Atrocities in Mexico’s drug war”, *Reuters*, 13 August 2012, available at: www.reuters.com/article/us-mexico-drugs-idUSBRE87C06820120813.

31 Including the AK-47 (and its variant known as the *cuerno de chivo*), as well as modified AR-15s and M-16s. John P. Sullivan and Samuel Logan, “Los Zetas: Massacres, Assassinations and Infantry Tactics,” *The Counter Terrorist*, 24 November 2010, available at: www.police1.com/terrorism/articles/los-zetas-massacres-assassinations-and-infantry-tactics-P55C81YakRLYCYk5/.

32 Out of the total number of guns that are recovered in crimes in Mexico and traced, 90% are traced back to the United States. N. P. Jones, above note 12, p. 160.

33 John P. Sullivan, “From Drug Wars to Criminal Insurgency: Mexican Cartels, Criminal Enclaves and Criminal Insurgency in Mexico and Central America: Implications for Global Security”, Fondation Maison des Sciences de l’Homme Working Paper Series No. 9, April 2012, p. 5, available at: http://halshs.archives-ouvertes.fr/docs/00/69/40/83/PDF/FMSH-WP-2012-09_Sullivan.pdf.

34 “CJNG usa drones con explosivos C4 y balines como forma de ataque”, *El Universal*, 18 August 2020, available at: www.eluniversal.com.mx/nacion/cjng-usa-drones-con-explosivos-c4-y-balines-como-forma-de-ataque.

35 Dalia Martínez and Marcos Muedano, “Saldo de 22 muertos en emboscadas contra PF”, *El Universal*, 24 July 2013, available at: www.eluniversal.com.mx/estados/2013/impreso/saldo-de-22-muertos-en-emboscadas-contra-pf-91788.html.

36 “El Chapo: Mexican Police Free Drug Lord’s Son as Culiacán Battle Erupts”, *BBC News*, 18 October 2019, available at: www.bbc.com/news/world-latin-america-50092641.

37 J. P. Sullivan and S. Logan, above note 31.

The strategy of militarization, implemented to tackle the DTOs' evolution into military-type groups, has had a consequent impact on human rights. Several criticisms have been raised against the Mexican government for human rights abuses.³⁸ Since the Mexican government declared war on organized crime in 2006, documented human rights violations have increased substantially.³⁹ In 2011, Human Rights Watch (HRW) found “credible evidence of torture in more than 170 cases across ... five states”⁴⁰ and documented many “disappearances” in which security forces had apparently participated.⁴¹ As part of the same investigation, HRW also found “credible evidence” that security forces had committed extrajudicial killings.⁴² HRW concluded that “rather than strengthening public security in Mexico, Calderón’s ‘war’ has exacerbated a climate of violence, lawlessness, and fear in many parts of the country”.⁴³

Despite a change of administration in 2012 and another in 2018, the militarization of the War on Drugs is still the strategy being implemented in Mexico. In 2018, the current administration backed constitutional reforms to authorize continued military involvement in public security for five years.⁴⁴ On the ground, military forces deployed by the previous administration are still in charge, “including in the exact places where Calderon famously sent them at the beginning of his administration”.⁴⁵

The militarization of the War on Drugs in Mexico and the significant number of fatalities involved raise the question of the classification of the situation. International lawyers have started to classify the situation as an armed conflict, which would mean that IHL applies in Mexico.⁴⁶ However, IHL was not intended to apply to law enforcement initiatives, and such an adaptation would arguably run counter to IHL's goals.

The applicability of IHL in Mexico: defining the situation and the actors

The legal classification of the situation in Mexico has important consequences, particularly regarding the rules governing the use of force.⁴⁷ In case of an armed

38 See, for instance, Transform Drug Policy Foundations, *The War on Drugs: Undermining Human Rights*, Bristol, 1 June 2015, available at: <https://transformdrugs.org/assets/files/PDFs/count-the-costs-human-rights.pdf>.

39 HRW, above note 14, p. 5.

40 *Ibid.*, p. 5.

41 *Ibid.*, p. 6.

42 *Ibid.*, p. 7.

43 *Ibid.*, p. 5.

44 J. S. Beittel, above note 11, p. 12.

45 P. Corcoran, above note 23.

46 See, for instance, Stuart Casey-Maslen (ed.), *The War Report 2012*, Oxford University Press, Oxford, 2013, p. 4; Antoine Perret, “The Role of the Inter-American System of Human Rights in the Regulation of Private Military and Security Companies (PMSCs) in Latin America”, doctoral thesis, European University Institute, Florence, 2014, available at: https://cadmus.eui.eu/bitstream/handle/1814/33870/2014_Perret.pdf; Chiara Redaelli, “La guerra contra las drogas: Desafíos para el derecho internacional humanitario”, *Anuario Iberoamericano sobre Derecho Internacional Humanitario*, Vol. 2, 2021, available at: <https://tinyurl.com/ynr2dw9e>.

47 G. Gaggioli, above note 10.

conflict, IHL must govern the conduct of hostilities, and both parties to an armed conflict are bound by it.⁴⁸ In situations of peace, by contrast, only IHRL applies and “all precautions must be taken to avoid, as far as possible, the use of force”.⁴⁹ As for Mexico’s war on organized crime, as there is no international armed conflict (State versus State), the legal classification of the situation is either a non-international armed conflict (NIAC) or a situation of internal tensions.

Even though there is no definition of armed conflict in IHL, international jurisprudence provides two conditions to determine if a situation is one of internal tensions or of armed conflict: the intensity of the violence and the degree of organization of the parties.⁵⁰ The intensity of the violence can be analyzed through an examination of factors including the duration of the conflict, the frequency of the acts of violence and military operations, and the nature of the weapons used.⁵¹ Meanwhile, the degree of organization of the parties is often evaluated by considering whether or not an armed group has a chain of command; disciplinary rules and mechanisms within the group; headquarters; the ability to access weapons and military equipment; and the ability to plan, coordinate and carry out operations.⁵²

As estimated drug-related violent deaths in Mexico now exceed 30,000 per year, and military forces have been deployed on a large scale,⁵³ the intensity of the violence is not controversial. With violence ongoing for more than seventeen years, there is also no doubt that the duration requirement is met.⁵⁴ Added to this is the fact that DTOs have access to military artillery and are capable of coordinating attacks against State forces. All of these factors suggest that the Mexican situation satisfies the requirement of intensity for classifying the situation as an armed conflict.

One of the most prominent organized crime groups active in Mexico is the Sinaloa Cartel (also known as the Sinaloa Federation), particularly during the period

48 It also important to note that “many rules previously applicable in international armed conflicts are now binding as a matter of customary law in non-international armed conflicts as well”, including the principle of distinction, the prohibition against indiscriminate attacks, and the duty to take precautions in attack. International Committee of the Red Cross (ICRC), *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2003, p. 4, available at: www.icrc.org/en/doc/assets/files/other/ihlcontemp_armedconflicts_final_ang.pdf.

49 G. Gaggioli, above note 10, p. 9.

50 International Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Duško Tadić*, Case No. IT-94-1, Judgment (Trial Chamber), 7 May 1997, para. 562; ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66, Judgment (Trial Chamber II), 30 November 2005, paras 84–92. See also Sylvain Vité, “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009, pp. 69–70.

51 S. Vité, above note 50.

52 ICTY, *Tadić*, above note 50, para. 60.

53 Almost 30,000 violent deaths were reported in 2018: see K. Suárez, above note 26. The level of violence is not new and has lasted for more than ten years: the Mexican newspaper *Reforma* put the figure at 9,577 organized-crime-style homicides in 2012, while *Milenio* reported 12,390 for that year. See Cory Molzahn, Octavio Rodríguez Ferreira and David A. Shirk, “Drug Violence in Mexico: Data and Analysis through 2012”, Trans-Border Institute, University of San Diego, 2013, available at: <http://justiceinmexico.files.wordpress.com/2013/02/130206-dvm-2013-final.pdf>; Ioan Grillo, above note 27.

54 The Inter-American Commission on Human Rights (IACHR) has characterized a thirty-hour-long confrontation as an armed conflict. See IACHR, *Juan Carlos Abella v. Argentina*, Case No. 11.137, 13 April 1998.

of 2010 to 2014.⁵⁵ In order to evaluate the Sinaloa Federation, it is necessary to understand how the organization works. It was established in the 1990s by Joaquín “El Chapo” Guzmán and Héctor Luis Palma Salazar, and was built through a process of alliances between groups and inter-marriages among the leaders’ families.⁵⁶ Unlike other DTOs, the Sinaloa Federation concentrates solely on drug trafficking and does not seem to engage in other lucrative activities, such as extortion.⁵⁷ It is well known for its innovativeness in achieving its goals, such as building tunnels under the US–Mexico border or using catapults to send drugs over the international border fence.⁵⁸

Although the Sinaloa Federation “is responsible for a great deal of carnage”, its “approach to killing has traditionally been discreet”.⁵⁹ The group’s leitmotif is that “[y]ou need to use violence frequently enough that the threat is believable. But overuse it, and it’s bad for business.”⁶⁰ That said, the Federation has engaged in at least two confrontations against other drug cartels: Los Zetas and, more recently, the Cartel de Jalisco Nueva Generación (Jalisco New Generation Cartel, CJNG).⁶¹ The Sinaloa Federation began developing armed enforcer groups in 2005 and 2006 to counter Los Zetas’ attacks.⁶² These affiliated armed groups were used to carry out paramilitary-style operations;⁶³ for instance, they were involved in the two-year battle for control of Ciudad Juárez that killed more than 5,000 people.⁶⁴ The violence used by the Sinaloa Federation is targeted more against other DTOs than against the State or the population, and its main purpose has been to maintain control over territories for the Federation’s drug trafficking activities.⁶⁵ As discussed above, the Federation’s ability to access weapons and military equipment and to plan, coordinate and carry out operations is well established.

55 “Sinaloa Cartel Profile”, *InSight Crime*, 4 May 2021, available at: <https://insightcrime.org/mexico-organized-crime-news/sinaloa-cartel-profile/>.

56 Patrick Radden Keefe, “Cocaine Incorporated”, *New York Times Magazine*, 15 June 2012, available at: www.nytimes.com/2012/06/17/magazine/how-a-mexican-drug-cartel-makes-its-billions.html.

57 *Ibid.*

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

61 For a history of the CJNG, see “Jalisco Cartel New Generation (CJNG)”, *InSight Crime*, 8 July 2020, available at: <https://insightcrime.org/mexico-organized-crime-news/jalisco-cartel-new-generation/>.

62 Wilson Center, “Sinaloa OCG/Organización del Pacífico [sic]”, available at: www.wilsoncenter.org/sinaloa-ocgorganizaci%C3%B3n-del-pacifco.

63 *Ibid.*

64 Ed Vulliamy, “Has ‘El Chapo’ Turned the World’s Former Most Dangerous Place into a Calm City?”, *The Guardian*, 19 July 2015, available at: www.theguardian.com/world/2015/jul/19/mexico-drugs-cartel-joaquin-guzman.

65 As explained by Malcolm Beith, “[t]here is a level-headedness about the [Sinaloa] leadership that the other groups lack[.] ... To the authorities, first priority always has to be quelling violence. When other groups throw grenades into a crowd of innocents or behead people, it’s obvious what needs to be done. Sinaloa has perpetrated its share of violence, but by and large it did not cause disruption to the general well-being of the population.” Quoted in “How the Sinaloa Cartel Won Mexico’s Drug War”, *GlobalPost*, 28 February 2013, available at: www.globalpost.com/dispatch/news/regions/americas/mexico/130227/sinaloa-cartel-mexico-drug-war-US-global-economy-conflict-zones.

In terms of organization, the Sinaloa Federation is an international or transnational enterprise.⁶⁶ It is based in the state of Sinaloa in northwestern Mexico and has operatives in at least seventeen Mexican states.⁶⁷ It works in numerous countries, such as Panama,⁶⁸ El Salvador,⁶⁹ Colombia,⁷⁰ the United States⁷¹ and Australia.⁷² Under the supervision of El Chapo, and now “El Mayo” and Chapo’s sons, the organization works as a federation of smaller groups, in which individual groups “run their operations like franchises”.⁷³ According to Keefe, “[t]he organizational structure of the cartel also seems fashioned to protect the leadership. No one knows how many people work for Sinaloa.”⁷⁴ Thus, it is not clear if the Sinaloa Federation fulfils the requirement of organization of an armed group. On the one hand, the organization is comparable to a multinational enterprise with “cells” around the world – this implies a great capacity of communication.⁷⁵ On the other hand, different independent organized crime groups compose the Sinaloa Federation, which means that, even though they receive orders from the same boss, the “chain of command” is flexible and depends on each group within the Federation. However, this *modus operandi* – the use of franchises and the resultant flexibility – is a strategy used for improving the Federation’s efficiency, not the mark of a lack of organization.

To summarize, and considering all the elements of the situation in Mexico discussed above (namely, the organization of some non-State armed groups and the intensity of the violence associated with these groups, including the types of weapons used), the conclusion is that during a specific period of time, the government of Mexico was/is involved in two parallel NIACs.⁷⁶ Even though the

66 Samuel Logan, “Tracking the Sinaloa Federation’s International Presence”, *InSight Crime*, 30 April 2013, available at: <https://insightcrime.org/news/analysis/tracking-the-sinaloa-federation-s-international-presence/>; <http://www.insightcrime.org/news-analysis/tracking-the-sinaloa-federations-international-presence>

67 Malcolm Beith, “The Current State of Mexico’s Many Drug Cartels”, *CTC Sentinel*, Vol. 6, No. 9, 2013, available at: <https://ctc.westpoint.edu/the-current-state-of-mexicos-many-drug-cartels/>.

68 See Marguerite Cawley, “4 of Mexico’s Cartels Operate in Panama: Officials”, *InSight Crime*, 17 September 2013, available at: www.insightcrime.org/news-briefs/four-mexican-cartels-operate-in-panama-officials.

69 See Héctor Silva Ávalos, “UN Confirms Links between El Salvador’s Perrones and Pacific Cartel”, *InSight Crime*, 19 August 2013, available at: www.insightcrime.org/news-analysis/unodc-study-confirms-links-between-perrones-and-pacific-cartel.

70 See, for instance, Marguerite Cawley, “Colombia Seizes FARC Cocaine Destined for Sinaloa Cartel: Army”, *InSight Crime*, 18 August 2013, available at: www.insightcrime.org/news-briefs/colombian-authorities-seize-farc-cocaine-destined-for-sinaloa-cartel; Marguerite Cawley, “Sinaloa Cartel May Have Presence in Southwest Colombia: Santos”, *InSight Crime*, 15 February 2013, available at: www.insightcrime.org/news-briefs/sinaloa-cartel-presence-colombia-santos.

71 See C. W. Cook, above note 21, pp. 5–6, 8.

72 See Elyssa Pachico, “Court Docs Describe Sinaloa Cartel Expansion in Australia”, *InSight Crime*, 11 February 2013, available at: <https://insightcrime.org/news/brief/court-docs-describe-sinaloa-cartel-expansion-in-australia/>.

73 M. Beith, above note 67.

74 P. R. Keefe, above note 56.

75 *Ibid.*

76 Several authors have discussed the application of IHL to Mexico: see, for instance, A. Perret, above note 46; C. Redaelli, above note 46. The Geneva Academy’s Rule of Law in Armed Conflict (RULAC) portal has previously defined the situation as an armed conflict but recently changed its assessment, explaining that it is now difficult to attribute the ongoing violence and clashes to any particular party. Geneva Academy, “Mexico: Declassification of the Three Armed Conflicts Involving Drug Cartels on RULAC”, *RULAC*,

government does not recognize them as such, the level of organization of the Sinaloa Cartel and the CJNG, as well as the intensity of the armed violence between them and the Mexican armed forces, allows us to classify these two situations as NIACs, at least for some period of time.

However, it is important to note that IHL regulates armed conflict between two or more parties, not law enforcement initiatives. An over-application of IHL does not always yield positive results because it typically occurs at the expense of the application of IHRL, which is potentially detrimental because in certain cases, human rights law can offer better protection against the use of force and the deprivation of freedom.⁷⁷

Privatization of military intervention: Colombia

This part of the article explores the US intervention in Colombia. The War on Drugs in Colombia takes place in the midst of a NIAC, and the US supports the State in its fight against armed groups that also participate in drug trafficking. The following sections describe the privatization of US support to Colombia and how it must be classified using IHL, concluding that the US government's lack of control over the activities of the PMSCs which it has contracted limits the United States' participation in the NIAC, hence limiting the application of IHL.

The US War on Drugs in the Colombian armed conflict

For sixty years, Colombia has experienced an armed conflict, which is considered as a NIAC. The presence of various organized armed groups, the intensity of the violence and the duration of the conflict make the classification of the situation as an armed conflict unproblematic, and the NIAC has been recognized for many years.⁷⁸ The peace process and the signature of a historical agreement in August 2016 ended the confrontation between the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, FARC) and the Colombian government.⁷⁹ However, several NIACs continue to exist between the government and various armed groups.⁸⁰ The International Committee of the

12 December 2022, available at: www.rulac.org/news/mexico-declassification-of-the-three-armed-conflicts-involving-drug-cartels.

77 Marco Sassòli, "The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts", in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, Oxford, 2011, p. 19.

78 See, for example, Rafael Nieto Navia, "¿Hay o no hay conflicto armado en Colombia?", *Anuario Colombiano de Derecho Internacional*, Vol. 1, 2008.

79 National Government of Colombia and FARC, *Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera*, 2016, available at: www.jep.gov.co/Normativa/Paginas/Acuerdo-Final.aspx.

80 Angélica Padilla and Ángela Bermudez, "Normalizar el conflicto y des-normalizar la violencia: Retos y posibilidades de la enseñanza crítica de la historia del conflicto armado colombiano", *Revista Colombiana de Educación*, No. 71, 2016, pp. 201–202, available at: <https://revistas.pedagogica.edu.co/index.php/RCE/article/view/4087/3481>.

Red Cross (ICRC) identifies at least five ongoing armed conflicts in Colombia: (1) the National Liberation Army (Ejército de Liberación Nacional, ELN) versus the State; (2) the Gulf Clan versus the State; (3) the Popular Liberation Army (Ejército Popular de Liberación, EPL) versus the State; (4) FARC dissidents versus the State; and (5) clashes between the ELN and EPL.⁸¹

Since the beginning of the Colombian armed conflict, the United States has been collaborating militarily with the Colombian government. The launch of Plan Colombia in 2000 increasingly militarized the fight against drugs and promoted its privatization, as the US Departments of State and Defense have contracted PMSCs to carry out activities such as providing logistics support for reconnaissance airplanes and maintaining an intelligence database.⁸²

As noted above, the concurrent War on Drugs and fight against organized crime in Colombia take place in a situation of armed conflict,⁸³ and the United States intervenes in Colombia to support the government in its fight against armed groups that also participate in drug trafficking. As the US intervention/support and the NIAC overlap, IHL applies to conduct that has a nexus to the conflict; however, the US intervention has been privatized and its execution outsourced to PMSCs, blurring the line between military and civilian activities.

Qualification of the US intervention under IHL

In order to assess the applicability of IHL to the US intervention in Colombia, there is a need to classify this intervention. For the ICRC, “armed conflicts involving foreign intervention do not form a third category of conflicts, but merely constitute a specific manifestation, in a particular context, of an IAC [international armed conflict], a NIAC or both types of conflict simultaneously”.⁸⁴ As mentioned above, in Colombia there are several NIACs; US support to the Colombian government therefore fits into the situation where there is a foreign intervention in support of the State party to a NIAC.⁸⁵

This is possible to contemplate because the International Court of Justice (ICJ) accepted a fragmented application of IHL in the *Military and Paramilitary Activities in and against Nicaragua* case.⁸⁶ In this case, the Court considered two different conflicts: one between the Nicaraguan government and the Contras, and another between the Nicaraguan and US governments.⁸⁷ The ICRC refers to this

81 Catalina Oquendo, “Hay cinco conflictos armados hoy en Colombia”, *El País*, 21 July 2019, available at: https://elpais.com/internacional/2019/07/20/colombia/1563649226_997490.html.

82 US Department of State, *Report to Congress on Certain Counternarcotics Activities in Colombia*, 2010.

83 R. Nieto Navia, above note 78.

84 Tristan Ferraro, “The ICRC’s Legal Position on the Notion of Armed Conflict involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict”, *International Review of the Red Cross*, Vol. 97, No. 900, 2015, p. 1229.

85 *Ibid.*

86 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986.

87 *Ibid.*

approach as “double classification”, which is a “compromise solution according to which IHL of IACs would apply ... between the intervening State and the territorial State, while IHL of NIACs would apply in parallel between the intervening State and the non-State armed group”.⁸⁸

In this case, as the involvement of the United States in Colombia has been privatized, it complexifies the classification of a potential armed conflict. The activities of a private actor, such as a PMSC, can be understood as reflecting the involvement of a State in an armed conflict only if two conditions are met: (1) if the private actor actually takes part in hostilities, *and* (2) if it is acting as an agent of the foreign State when assisting one of the parties to the conflict.⁸⁹

The first condition – the private actor actually taking part in hostilities – is officially not met in the Colombian context because US PMSCs working under Plan Colombia should not participate in hostilities, since the US Congress prohibited all activities that involve direct participation in the armed conflict.⁹⁰ Despite this *de jure* prohibition on such participation, however, some US PMSCs, such as DynCorp, *de facto* have participated in the conflict.⁹¹

The US State Department has contracted DynCorp to fumigate illegally cultivated coca plants.⁹² During DynCorp’s fumigation operations, two or three combat helicopters accompany the planes that drop the glyphosate.⁹³ The helicopters “have a mixed crew composed of both contractors and members of the National Police”.⁹⁴ DynCorp’s fumigation contract started in 2000, and between 2001 and 2002, around ten aircraft were attacked per month; this increased in 2003 to reach a peak of seventy-three attacks per month.⁹⁵ The number of attacks on fumigation planes decreased for several years, but in 2013, several serious attacks forced the United States and Colombia to stop the fumigation for some time.⁹⁶

88 Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, para. 6.10. See also ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016, paras 257–264.

89 Éric David, *Principes de droit des conflits armés*, 5th ed., Bruylant, Brussels, 2012.

90 US law limits the outsourcing of inherently governmental functions; combat is one of these functions. See US Office of Management and Budget, “Circular No. A-76: Performance of Commercial Activities”, revised 2003. See also a detailed study on US law in Kristine A. Huskey and Scott M. Sullivan, *The American Way: Private Military Contractors and U.S. Law after 9/11*, PRIV-WAR National Reports Series No. 02/08, 30 April 2009.

91 Antoine Perret, “Las compañías militares y de seguridad privadas en Colombia: ¿Una nueva forma de mercenarismo?”, Universidad Externado de Colombia, Bogotá, 2009.

92 US Department of State, above note 82.

93 US General Accounting Office, “Drug Control: U.S. Non Military Assistance to Colombia is Beginning to Show Intended Results, but Programs Are not Readily Sustainable” Report to the Honorable Charles E. Grassley, Chairman, Caucus on International Narcotics Control, U.S. Senate, GAO-04-726, 2004, p. 9, available at: www.gao.gov/new.items/d04726.pdf.

94 “Mercenarios”, *Semana*, 13 August 2001, available at: www.semana.com/nacion/articulo/mercenarios/46935-3.

95 US General Accounting Office, above note 93, p. 1.

96 Andrés Bermúdez Liévano, “Dos meses sin fumigación de coca”, *La Silla Vacía*, 15 December 2013, available at: www.lasillavacia.com/historias/silla-nacional/dos-meses-sin-fumigacion-de-coca/. See also Chris Kraul, “Anti-Coca Spraying Halted in Colombia after 2 U.S. Pilots Shot Down”, *Los Angeles*

DynCorp manages its own fumigation operations, but the legal restrictions on contractors' participation in the conflict mean that the Colombian National Police are responsible for managing and overseeing the helicopter gunship portion of the fumigation operation.⁹⁷ However, this oversight does not guarantee that contractors are not participating in the conflict, and it appears that the contractors retain decision-making power regarding the use of force, and use it "preventively".⁹⁸ Thus, the presence of DynCorp contractors in these helicopters and their participation in repelling attacks should be considered direct participation in the Colombian armed conflict.

The second condition to classify US participation in a parallel armed conflict in Colombia is to determine whether the PMSCs are acting as an agent of a foreign State (the United States) when assisting one of the parties to the conflict. International law provides that the actions of persons acting *de facto* as an organ of a State on behalf of a State can be attributed to that State.⁹⁹ In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, the ICJ stated¹⁰⁰ that "complete dependence" should be demonstrated:

persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument.¹⁰¹

The acts of a private actor that are directed, controlled or under the instructions¹⁰² of a State can also be attributed to that State.¹⁰³ This control has been defined differently in several cases. From the lowest to the highest threshold, the International Criminal Tribunal for the former Yugoslavia (ICTY) defined "overall control" in the *Tadić* case,¹⁰⁴ while the ICJ referred to "effective control" in the *Nicaragua* case.¹⁰⁵

Translated to the context in Colombia, acts committed by US-contracted PMSCs in the Colombian conflict can only be attributed to the US government if there is a very close relationship, beyond mere supervision, between the PMSCs and the US government, or, to use the same language as the ICJ, if the PMSCs act in "complete dependence" on the sending State.

Times, 16 December 2013, available at: <http://articles.latimes.com/2013/dec/16/world/la-fg-colombia-us-planes-20131217>.

97 "Mercenarios", above note 94.

98 Employee of PMSC, Bogotá, September 2008, quoted in A. Perret, above note 91.

99 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001 (ARSIWA), Art. 4.

100 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007.

101 *Ibid.*, para. 392.

102 ARSIWA, above note 99, Art. 8.

103 ICTY, *Tadić*, above note 50, paras 116–119.

104 Overall control is defined as "control going beyond the mere financing and equipping of ... forces and involving also participation in the planning and supervision of ... military operations". *Ibid.*, paras 131, 145.

105 ICJ, *Nicaragua*, above note 86, paras 116, 123.

However, the problem in the Colombian context is that supervision is missing: the US Embassy, which is supposed to monitor all contracts performed under Plan Colombia, is only interested in the results of the contracted-for services and activities, not the process of fulfilling the contracts.¹⁰⁶ A report on “contracting oversight” by the US Senate Committee on Homeland Security and Governmental Affairs reached similar conclusions about the lack of supervision, stating that the “State Department, which has awarded over \$1 billion in counternarcotics contracts in Latin America to one company, DynCorp, has conducted sporadic oversight of that company”.¹⁰⁷ In sum, in light of these facts, the control exercised by the United States is not likely to allow the conclusion that US PMSCs are acting as agents of the United States when assisting the Colombian government.

The lack of control of the US over its Plan Colombia contractors means that the Colombian NIAC is not internationalized and that IHL does not apply to the United States in its War on Drugs in Colombia. Even though PMSC employees perform military work for a State, under IHL, they are civilians who sometimes participate in hostilities – a conclusion that undermines the critical IHL distinction between “civilian” and “military”.

As a result of the above, in Colombia, the United States is supporting the Colombian government in the latter’s fight against several armed groups. The United States’ War on Drugs in Colombia does not internationalize the Colombian NIAC because the United States lends its efforts at the service of, rather than against, the Colombian government. Moreover, there is no parallel armed conflict between the United States and Colombian armed groups. Even though US PMSCs *do*, in some cases, participate in hostilities, inadequate supervision on the part of the United States makes it impossible to conclude that the PMSCs’ acts are attributable to the United States and, hence, that the United States is taking part in the hostilities. To conclude, the manner in which the War on Drugs is implemented is contrary to the logic of IHL. IHL *should* apply to the War on Drugs, but the tactic employed to implement it – through private actors on behalf of the United States – prevents the application of IHL.

In light of the above, it can be observed that the privatization of the War on Drugs challenges the application of IHL and compromises its main objective. In Colombia, as in Mexico, the evolution of the use of force by both States and criminal organizations challenges IHL’s goal of distinguishing between those who participate to hostilities – *military personnel or persons with a continuous fighting function* – and those who do not – *civilians*. International law needs to evolve in order to face these challenges.

106 Employee of the US embassy, Bogotá, 2007, quoted in A. Perret, above note 91.

107 Subcommittee on Contracting Oversight, Committee on Homeland Security and Governmental Affairs of the US Senate, *New Information about Counternarcotics Contracts in Latin America: Majority Staff Analysis*, 2011, p. 11.

The next part of the article will analyze how the inter-American system of human rights has dealt with similar issues, in order to explore the possibilities stemming from its experience.

IHL and human rights law: Following the Inter-American Court of Human Rights' lead

This article has analyzed how the implementation of the War on Drugs in Mexico and Colombia challenges the applicability of IHL. Firstly, the two cases illustrate that the conduct of the War on Drugs presents challenges for determining what body of law applies to the situation. Secondly, the evolution of criminal groups into organized armed groups (such as the Sinaloa Federation) and the shift to provision of security through the use of PMSCs make it difficult to distinguish between situations in which IHL or IHRL applies. This third part of the article first explores the inter-American system of human rights' practice of using IHL to interpret the American Convention on Human Rights (ACHR), and argues that its "humanitarization" of human rights could help address the challenges posed by the evolution of the use of force in situations of armed conflict, internal tensions, and peace.¹⁰⁸ It then focuses on the relevance of such practice for situations like Mexico and Colombia.

The development of the inter-American system occurred in a context where military and other authoritarian governments were almost the norm in Latin America, from the mid-twentieth century until the early 1980s. "States of emergency have been common in Latin America, the domestic judiciary has often been extremely weak or corrupt, and large-scale practices involving torture, disappearances and executions have not been uncommon."¹⁰⁹ Until the 1980s, the Latin American context was marked by systematic murder, torture, disappearances, censorship of the media, and limitations on political rights. This historical context has shaped inter-American jurisprudence in a manner that it is now – in a context of endless "war" – a relevant example for the international application of IHL and IHRL.

On several occasions the Inter-American Court of Human Rights (IACtHR) has used external sources, such as international treaties other than the ACHR, case law, and even soft law, to interpret the ACHR.¹¹⁰ This practice has roots in Article 64 of the ACHR, which has been interpreted by the Court in its Advisory Opinion on "*Other Treaties*" *Subject to the Consultative Jurisdiction of*

108 Hélène Tigroudja, "The Inter-American Court of Human Rights and International Humanitarian Law", in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar, Cheltenham, 2013.

109 Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*, 2nd ed, Oxford University Press, New York, 2000, p. 869.

110 See, for instance, IACtHR, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/2002, 28 August 2002.

the Court (Article 64 American Convention on Human Rights). The Court held that “other treaties” in the sentence of Article 64 meant

any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto.¹¹¹

In its first case, the IACtHR cited the UN Human Rights Committee’s views on indemnification for human rights violations.¹¹² Since then, the Inter-American Commission on Human Rights (IACHR) and the IACtHR have repeatedly sought guidance in sources ranging from international conventions to soft-law instruments in order to inform their interpretation of the ACHR. This practice of referencing non-inter-American international law instruments to interpret the ACHR has occurred frequently enough in the area of IHL that it is accepted that the Court “makes room for extending its competence to assessing IHL concerns”.¹¹³

The Court has limited the use of external sources to “only” interpreting the ACHR and not directly interpreting IHL. In 1999, however, the IACHR suggested that it could interpret IHL directly and issued an opinion directly addressing violations of IHL.¹¹⁴ The IACtHR subsequently rectified this position, holding that neither the Commission nor the Court were competent to determine whether a rule of IHL had been breached; rather, these bodies could use Article 3 common to the four Geneva Conventions in interpreting a breach of the ACHR.¹¹⁵ The ACHR “has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself and not with the 1949 Geneva Conventions”.¹¹⁶

The IACtHR has used its ability to interpret the substance and the scope of the ACHR in armed conflict in accordance with the latter’s Article 29(b). For instance, in the *Las Palmeras v. Colombia* case, the Court used IHL to interpret the substance and scope of the ACHR in armed conflict.¹¹⁷ In the *Mapiripán Massacre v. Colombia* case, the Court referred to common Article 3, as well as Additional Protocol II.¹¹⁸ Similarly, in the *Ituango Massacres v. Colombia* case,

111 IACtHR, “Other Treaties” *Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82, 24 September 1982, p. 12, para. 52.

112 IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment (Reparations and Costs), 21 July 1989, para. 28.

113 Lucas Lixinski, “Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law”, *European Journal of International Law*, Vol. 21, No. 3, 2010. See also H. Tigroudja, above note 108.

114 The IACHR declared that Argentina had violated common Article 3. IACHR, *Abella*, above note 54.

115 IACtHR, *Bámaca-Velásquez v. Guatemala*, Judgment (Merits), 25 November 2000, paras 208–209.

116 IACtHR, *Las Palmeras v. Colombia*, Judgment (Preliminary Objections), 4 February 2000, para. 33.

117 *Ibid.*, para. 33; American Convention on Human Rights, 1969 (ACHR), Art. 29. Restrictions regarding interpretation: “No provision of this Convention shall be interpreted as: ... restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.”

118 IACtHR, *Mapiripán Massacre v. Colombia*, Judgment (Merits, Reparations and Costs), 15 September 2005, para. 114.

the Court interpreted the freedoms of movement, property, and private and family life in light of IHL.¹¹⁹

The late Judge Cançado Trindade played a significant role in integrating other international jurisprudence and promoting the universalism of human rights.¹²⁰ He argued, for instance, that common Article 3 is part of *jus cogens*, and that regional courts are encouraged to abandon a traditional legal approach based on a material breach of their constitutive instrument in favour of a focus on the obligation *erga omnes* to protect individuals.¹²¹ He justified his argument by explaining that the ICJ has not been able to protect the human person at the international level, and thus specialized courts have to assume this role.¹²²

Using IHL in a human rights framework, as the IACtHR and IACHR have repeatedly done, results in a “humanitarization of the International Law of Human Rights”.¹²³ This has “contributed to the bridging of rules that are technically different but aim for the same goal, that is, the protection of private persons”.¹²⁴ This could be one solution for tackling the current evolution of the use of force if followed by both domestic and international courts.

The way the IACtHR has worked is also relevant for dealing with the current challenges of the militarization and privatization of the fight against organized crime in Latin America. As mentioned above, the Court was confronted with mass State-sponsored violations of fundamental rights from its first contentious case. The dynamics of these violations, in which the State itself systematically committed and then concealed crimes against its citizens, came to shape the Court’s remedial practice. The Court has supervised prosecution,

119 IACtHR, *Ituango Massacres v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 1 July 2006, paras 201–235 (freedom of movement), 169–200 (property and private and family life). See also IACtHR, *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 20 November 2013, paras 221, 349, 352, 353.

120 Judge Cançado Trindade himself stated: “I feel grateful because the Court has adopted my reasoning, which today is an *acquis*, a conquest of its *jurisprudence constante* on the matter. Now that my time as Incumbent Judge of this Court expires, a Court which has assumed a vanguard position among the contemporary international courts regarding to this matter in particular, I feel entirely free to point out that this is an advance that admits no stepping back. I insist (considering that very soon, on January 1, 2007, the time to silence *sic* in my present office shall come) that this Court cannot let itself stop or regress its own jurisprudence regarding imperative law (*jus cogens*) within this scope of protection of the human being, regarding both substantive and procedural law.” IACHR, *La Cantuta v. Peru*, Separate Opinion of Judge A. A. Cançado Trindade, 29 November 2006, para. 61. On the influence of Judge Cançado Trindade on the jurisprudence of the Court, see Elise Hansbury, *Le juge interaméricain et le jus cogens*, eCahiers de l’Institut No. 11, 2011, Chap. 3.

121 IACtHR, *Las Palmeras v. Colombia*, Judgment (Merits), Joint Separate Opinion of Judges A. A. Cançado Trindade and M. Pacheco Gómez, 6 December 2001, paras 7–8. See also IACtHR, *Serrano-Cruz Sisters v. El Salvador*, Judgment (Merits, Reparations and Costs), Dissenting Opinion of Judge A. A. Cançado Trindade, 1 March 2005, para. 40.

122 See also IACtHR, *Serrano-Cruz*, Dissenting Opinion of Judge A. A. Cançado Trindade, above note 121, para. 45.

123 H. Tigroudja, above note 108, p. 473.

124 *Ibid.*, p. 473.

telling the State what lines of investigation it must explore, and it has named individuals that should be investigated. This is an extension of the Court's mandate into a form of quasi-criminal review.¹²⁵ The Court has interpreted its "mandate to allow it to order, monitor and guide – in great detail, at random intervals, over an indefinite number of years, and in dialogue with all the litigating parties – the substantive and procedural aspects of national prosecutions as they unfold."¹²⁶

The IACtHR itself will not conduct prosecutorial acts, but its "quasi-criminal jurisdiction should be considered as a complement and, in certain situations, an alternative to the work of the current international and hybrid criminal tribunals".¹²⁷ Again, this quasi-criminal jurisdiction is particularly relevant in the current context of evolution of the use of force against organized crime groups and should be replicated internationally or domestically as it allows better accountability and access to justice for the victims.

This approach brings several benefits for the regulation of State activities (particularly the use of force) and for bringing justice to victims, especially in the context of the War on Drugs or the fight against organized crime as it is happening in Mexico and Colombia. The benefits can be listed as follows.

First, the mere existence of the regional Court is a benefit as it is cost-effective compared to any other international justice body and has a better understanding of the reality within the region due to constant monitoring of the situation. Each regional system, in the Americas, Africa and Europe, includes a complaints mechanism through which individuals can seek justice and reparation for human rights violations committed by a State party.¹²⁸

The second benefit comes from the fact that the approach is operational and linked to the existing situation. As discussed above, the evolution of the situation surrounding the fight against organized crime and the War on Drugs, such as in Mexico and Colombia, illustrates the need for the international legal framework to adapt. This adaptation needs to be pragmatic, recognizing the reality of the situation (the threat to the State and its institutions) and the urgent need to regulate the use of force in order to provide justice when needed. As suggested by Clapham, "rather than looking for an overarching theory, the time has come to focus on particular contexts and consider the policy choices available and what is at stake".¹²⁹ In this vein, this article suggests following the IACtHR's practice of using IHL to interpret human rights obligations. This will continue to

125 Alexandra V. Huneeus, "International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts", *American Journal of International Law*, Vol. 107, No. 1, 2013.

126 *Ibid.*, p. 31.

127 *Ibid.*, p. 9.

128 For a comparative analysis of the existing regional systems of human rights, see Alexandra V. Huneeus and Mikael Rask Madsen, "Between Universalism and Regional Law and Politics: A Comparative History of the American, European, and African Human Rights Systems", *International Journal of Constitutional Law*, Vol. 16, No. 1, 2018.

129 Andrew Clapham, "Human Rights in Armed Conflict: Metaphors, Maxims, and the Move to Interoperability", *Human Rights and International Legal Discourse*, Vol. 12, No. 1, 2018, p. 9.

deepen the relationship between IHL and IHRL,¹³⁰ following the interoperability¹³¹ or operational approach.¹³²

Interoperability is a central concept in communications and information technology, and “refers to the ability of two complex systems to interact together in a harmonious way to achieve effective functionality, compatibility and mutual outcomes, through various processes including innovation, adaptation and partial standardisation”.¹³³ The operational approach, meanwhile, has been described in the *Practitioners’ Guide to Human Rights Law in Armed Conflict*, suggesting that in the context of armed conflict there is “not just a choice of frameworks, but that the obligations are cumulative”.¹³⁴ In the *Practitioner’s Guide* the “extra obligations that stem from human rights law, even in the context of taking precautions before an attack, are detailed, and the alternative frameworks of ‘active hostilities’ or ‘security operations’ are explained”.¹³⁵

To conclude, IHL and IHRL are complementary, and these two branches of law need to be analyzed and used in combination. The IACtHR has proved its ability to take advantage of this complementarity and could (should) continue to implement it in situations such as Mexico and Colombia.¹³⁶ And even though it is often complicated to universalize a regional practice, the example of the IACHR deserves to be seen by other international and regional actors, as States are increasingly using PMSCs and a militarization approach to tackle the challenges posed by organized crime or organized armed groups.

130 The relation between IHL and IHRL has been analyzed by many scholars and is aptly summarized as “concurrent, coexisting, consistent, convergent, coterminous, congruent, confluent, corresponding, cumulative, complementary, compatible, cross-fertilizing, contradictory, competitive, or even in conflict. Our contribution to the debate is best summarized as follows: ‘It’s contextual and it’s complicated.’” Andrew Clapham, “The Complex Relationship between the Geneva Conventions and International Human Rights Law”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 735.

131 Sarah McCosker, “The Limitations of Legal Reasoning: Negotiating the Relationships between International Humanitarian Law and Human Rights Law in Detention Situations”, in Gregory Rose and Bruce Oswald (eds), *Detention of Non-State Actors Engaged in Hostilities*, Brill, Leiden, 2016. See also Françoise J. Hampson, “Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law,” *International Law Studies*, Vol. 87, 2011.

132 Kenneth Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict*, Oxford University Press, Oxford, 2016, Chap. 5.

133 S. McCosker, above note 131, p. 58.

134 Daragh Murray, *Practitioners’ Guide to Human Rights Law in Armed Conflict*, ed. Dapo Akande, Charles Garraway, Françoise J. Hampson, Noam Lubell and Elizabeth Wilmschurst, Oxford University Press, Oxford, 2016, quoted in A. Clapham, above note 129, pp. 21–22.

135 A. Clapham, above note 129, p. 22. For example: “In non-international armed conflict the ‘active hostilities’ framework regulates the use of force in (a) situations of high intensity fighting involving sustained and concerted military operations and (b) situations where a State does not exercise effective territorial control. The ‘security operations’ framework regulates all other situations, including situations of low-intensity fighting.” A. Clapham, above note 129, p. 22, quoting D. Murray, above note 134.

136 Note that Colombia has repeatedly objected to the IACtHR’s position, arguing the Court does not have a direct competence to apply IHL based on Articles 33 and 62.3 of the ACHR.

Conclusion

This article has analyzed two cases with the purpose of illustrating the challenge posed by the evolution of violence and security and how it impacts the application of international law, specifically IHL and IHRL. In Mexico, the intensity of the violence and the organization of drug trafficking cartels imply that IHL should technically apply in some cases. However, because the State is implementing a law enforcement paradigm, applying IHL would be inappropriate, as it would make an already vulnerable civilian population even more vulnerable. In Colombia, the challenges to IHL come from a different aspect. IHL applies in the Colombian NIAC, but US support to the Colombian government has been privatized. This privatization means that military contractors – with a civilian status, following IHL rules, as they are not part of armed group or the States forces, nor combatants – are working within the Colombian armed conflict context and are possibly participating in hostilities occasionally. The use of civilians in armed conflict situations tends to blur the distinction between the military and civilians.

These two cases illustrate that IHL and IHRL are not adapted to regulate situations like the War on Drugs and the fight against organized crime. In armed conflict situations, the application of human rights law to complement IHL is widely accepted practice.¹³⁷ However, an application of IHL as complementary to human rights law, in peacetime situations, is less common and can be problematic. Nevertheless, the law must adapt to respond to evolving realities, which include the militarization of law enforcement operations, the privatization of military services, and the increasing organization and threat of criminal groups.

This article suggests following the path of the inter-American system of human rights, interpreting human rights obligations by using IHL when the situation meets the requirements. As in Mexico and Colombia, a confrontation between a DTO and government forces in the context of the War on Drugs and the fight against organized crime can meet the requirements to classify the situation as an armed conflict for the duration of the confrontation. The IACHR has characterized a thirty-hour-long confrontation in one location as an armed conflict, making it possible to apply IHL in a localized armed conflict that took place in a confined space, for a short duration of time, even in the absence of an all-out armed conflict over the rest of the country.¹³⁸

Following the inter-American system's practice of using IHL to interpret the ACHR in specific and limited contexts might offer an option for tackling the challenges posed by the evolution of the use of force, while protecting the population.

137 A. Clapham, above note 129, p. 19.

138 IACHR, *Abella*, above note 54.