

# Opening Pandora's box: The case of Mexico and the threshold of non-international armed conflicts

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## Abstract

*This article addresses the situation of Mexican cartels in relation to the applicability of international humanitarian law (IHL). The analysis starts with a theoretical examination of the International Criminal Tribunal for the former Yugoslavia criteria on intensity of violence and level of organization established for assessing the existence of an organized armed group in the context of a non-international armed conflict. The article further examines legal and non-legal literature with the purpose of providing elements to consider the rightness of applying IHL to criminal organizations, also considering similar scenarios in Latin America. The aim of this assessment is to provide additional elements for the consideration of whether IHL is suitable when addressing confrontations between certain criminal gangs and*

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*States. Additionally, the article assesses how the commercial purposes of these groups affect their organization and the nature of the violence in which they engage.*

**Keywords:** Mexico, cartels, organized armed groups, criminal gangs, violence.



## Introduction

During the night of 7 February 2017, a helicopter of the Mexican Navy started shooting, with a machine gun, over a residential area in the state of Nayarit, Mexico. While individuals in the targeted building responded to the fire with automatic weapons and grenades, a joint command composed of units of the Mexican Navy, the Army and the Federal Police advanced on the ground with the intention of capturing Juan Francisco Patrón Sanchez (known as “H2”), leader of the Beltrán Leyva Organization (BLO), a cartel headed by the five Beltrán Leyva brothers.<sup>1</sup> The operation ended with the death of “H2” and seven other members of the cartel.<sup>2</sup>

Two years later, on 17 October 2019, an operation to capture Ovidio Guzmán (son of the leader of the Sinaloa Cartel, Joaquín “El Chapo” Guzmán), in Culiacán, resulted in intense clashes between governmental forces and cartel gunmen.<sup>3</sup> While security forces managed to capture Guzmán, members of the Sinaloa Cartel threatened to start a “massacre” by killing more than 200 individuals while they placed the city under lockdown. The violence stopped only once the officials released Guzmán within minutes of his detention. After the operation, the current president of Mexico, Andrés Manuel López Obrador, made a statement arguing that “there is no war against drug trafficking”.<sup>4</sup> Still, the episodes of violence connected with drug cartels continue to proliferate, even during the current coronavirus pandemic.

- 1 “Así fue la brutal cacería para asesinar al H2”, *Diario Debate*, 10 January 2017, available at: [www.debate.com.mx/mexico/Asi-fue-la-brutal-caceria-para-asesinar-al-H2-VIDEO-20170210-0087.html](http://www.debate.com.mx/mexico/Asi-fue-la-brutal-caceria-para-asesinar-al-H2-VIDEO-20170210-0087.html) (all internet references were accessed in August 2022). The Beltrán Leyva Cartel started as an armed branch for the protection of the Sinaloa Cartel against the armed wing of the enemy Gulf Cartel (Los Zetas). Since the capture of founding member Arturo Beltrán Leyva in 2009, the cartel has been broken up into different cells distributed along the south and northwest of Mexico. See Wilson Center, Mexico Institute, “Beltran Leyva Organization (BLO)”, available at: [www.wilsoncenter.org/beltran-leyva-organization-blo](http://www.wilsoncenter.org/beltran-leyva-organization-blo).
- 2 “Desde hace más de 2 meses, la Marina cazaba a ‘El H2’ en Nayarit”, *Diario Milenio Digital*, 10 February 2017, available at: [www.milenio.com/policia/2-meses-marina-cazaba-h2-nayarit](http://www.milenio.com/policia/2-meses-marina-cazaba-h2-nayarit).
- 3 “El Chapo: Mexican Police Capture then Release Drug Boss’s Son after Battle with Cartel”, *The Guardian*, 18 October 2019, available at: [www.theguardian.com/world/2019/oct/17/el-chapo-violence-breaks-out-in-mexican-city-amid-rumours-of-sons-arrest](http://www.theguardian.com/world/2019/oct/17/el-chapo-violence-breaks-out-in-mexican-city-amid-rumours-of-sons-arrest); Andréa Schmidt, “Episode 20: ‘The Siege of Culiacán’”, *New York Times*, 15 November 2019, available at: [www.nytimes.com/2019/11/15/the-weekly/el-chapo-guzman-son.html](http://www.nytimes.com/2019/11/15/the-weekly/el-chapo-guzman-son.html).
- 4 Fisher Linthicum, “This Was the Moment Mexican Forces Captured the Son of ‘El Chapo.’ Soon After, They Freed Him”, *Los Angeles Times*, 30 October 2019, available at: [www.latimes.com/world-nation/story/2019-10-29/video-shows-mexican-soldier-begging-son-of-el-chapo-to-order-his-cartel-fighters-to-stand-down](http://www.latimes.com/world-nation/story/2019-10-29/video-shows-mexican-soldier-begging-son-of-el-chapo-to-order-his-cartel-fighters-to-stand-down); Ioan Grillo, “How Mexico’s Drug Cartels Are Profiting from the Pandemic”, *New York Times*, 7 July 2020, available at: [www.nytimes.com/2020/07/07/opinion/sunday/mexico-drug-cartels-coronavirus.html](http://www.nytimes.com/2020/07/07/opinion/sunday/mexico-drug-cartels-coronavirus.html).

These episodes reflect the complexity of the situation of Mexico, where incidents linked to drug trafficking erupt in a context of generalized violence. To determine whether these episodes are part of an armed conflict or a situation of tensions or internal disturbances is particularly challenging. Both the Rule of Law in Armed Conflict (RULAC) project and the *War Report* of the Geneva Academy have confirmed the existence of a non-international armed conflict (NIAC) between the Government of Mexico and (at least) the Jalisco New Generation Cartel (Cartel Jalisco Nueva Generación, CJNG) and Sinaloa Cartel.<sup>5</sup> This view has also been supported by the International Humanitarian Law Clinic of Leiden University.<sup>6</sup> Moreover, the International Institute for Strategic Studies has classified this situation as one of the most violent conflicts in the world, even surpassing Iraq and Afghanistan.<sup>7</sup>

The purpose of this article is not to provide a conclusive view on the classification of the confrontation between the cartels and the Mexican government. Instead, the following pages will try to assess whether the requirements of violence and organization needed for international humanitarian law (IHL) are applicable to this type of criminal organization. It will conclude by suggesting a new set of elements that can be applied when analyzing drug cartels. This assessment may also be useful for assessing the applicability of IHL to other criminal groups around the world.

Cartels present an interesting case study for testing the suitability of the parameters used to assess the existence of a NIAC. In order to address the threshold of applicability of Article 3 common to the Geneva Conventions of 1949 (common Article 3, CA3), it is necessary to ascertain whether these groups fulfil the two-pronged test as presented by the International Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case: a degree of organization within the armed group, and protracted armed violence.<sup>8</sup>

5 According to RULAC, “[t]he Government of Mexico is involved in a non-international armed conflict against at least the Cartel Jalisco Nueva Generación”. See Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), “Non-International Armed Conflicts in Mexico”, RULAC, available at: [www.rulac.org/browse/conflicts/non-international-armed-conflict-in-mexico#collapse4accord](http://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-mexico#collapse4accord). See also Annyssa Bellal (ed.), *The War Report: Armed Conflicts in 2018*, Geneva Academy, Geneva, 2019, p. 27; Annyssa Bellal (ed.), *The War Report: Armed Conflicts in 2017*, Geneva Academy, Geneva, 2018, pp. 83–91.

6 Including other cartels as well. See Comision Mexicana de Defensa y Promocion de los Derechos Humanos (CMDPDH), *The Situation of Drug-Related Violence in Mexico from 2006–2017: A Non-International Armed Conflict?*, Leiden IHL Clinic Report Series No. 28, The Hague, 2018, p. 207.

7 Anastasia Voronkova, *Is Mexico Really in a State of conflict?*, International Institute for Strategic Studies, 12 May 2017, available at: [www.iiss.org/blogs/analysis/2017/05/mexico-state-conflict](http://www.iiss.org/blogs/analysis/2017/05/mexico-state-conflict).

8 ICTY, *The Prosecutor v Duško Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70; ICTY, *The Prosecutor v Duško Tadić*, Case No. IT-94-1, Judgment (Trial Chamber), 11 November 1999, para. 562. See also International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4, Judgment (Trial Chamber I), 2 September 1998, para. 620; Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva, 1958 (ICRC Commentary on GC IV), pp. 35–36, 49–50; 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 (ICRC Commentary on GC I), Art. 3, para. 425.

One of the biggest challenges in the interpretation of CA3 is to define which situations fall under its scope.<sup>9</sup> Throughout this article, the author will try to tackle the question of whether the requirements of the two-pronged test are sufficient to classify the situation between the Mexican government and certain drug cartels as a NIAC. As will be explained, the challenge in this particular scenario is that the concepts of organization and violence by drug cartels do not necessarily equate with these concepts under IHL. The author will also argue that the reality of these groups shows that, while their aims may not affect the legal classification, the impact that the ends may have on the organization and the nature of the violence may well do so. This analysis will not go into depth regarding Additional Protocol II, as the degree of control that cartels exercise over territories is still controversial.<sup>10</sup> Territorial control as understood by cartels is equated to the monopoly of distribution of drugs.<sup>11</sup>

Dealing with the situation of Mexico in relation to IHL is opening a Pandora's box. It may well change our perception of other situations where the proliferation of criminality is inciting this discussion, such as in Brazil or El Salvador.<sup>12</sup> Discerning whether and how IHL and/or international human rights law (IHRL) are applicable to criminal organizations<sup>13</sup> is of fundamental importance for determining the proper tools to ameliorate the situation of thousands of victims of criminal violence; for defining the rights that protect individuals and the obligations of States when using force; and for offering transparency and proper legal remedies for victims and preventing human casualties.

## Mexico: A challenge for IHL?

Since President Felipe Calderón (2006–12) declared the “war against drugs”, the question of whether this is a metaphorical war or a proper armed conflict has

- 9 Andrea Bianchi and Yasmin Naqvi, *International Humanitarian Law and Terrorism*, Hart, Oxford, 2011, p. 102.
- 10 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 1.1; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978).
- 11 Angélica Ospina-Escobar, “Territorios bajo control del crimen: El impacto de la guerra contra las drogas más allá de los homicidios”, *Nexos*, 23 November 2017, available at: <https://economia.nexos.com.mx/?p=699>.
- 12 On a similar methodology to this article, it has been argued elsewhere that IHL is applicable to criminal drug gangs in El Salvador. See Ximena Galvez Lima, “Inked or Not: Maras and Their Participation in El Salvador's Recent Armed Conflict”, *Journal of International Humanitarian Legal Studies*, Vol. 10, No. 2, 2019. See also the situation of Brazil in A. Bellal (ed.), *The War Report: 2018*, above note 5, pp. 73–82; and the situation of El Salvador in A. Bellal (ed.), *The War Report: 2017*, above note 5, pp. 64–70. See also Robert Muggah, “Rethinking the Intensity and Organization of Violence in Latin America and the Caribbean”, World Peace Foundation, 16 February 2012, available at: <https://sites.tufts.edu/reinventingpeace/2012/02/16/part-i-rethinking-the-intensity-and-organization-of-violence-in-latin-america-and-the-caribbean/>.
- 13 For the purposes of this article, see the definition of criminal organizations in United Nations Convention against Transnational Organized Crime, UNGA Res. 55/25, 15 November 2000, Art. 2(a).

been raised.<sup>14</sup> Indeed, it seems that highly organized groups operating in Mexico put the governability of the State into question. However, their structure is based on the pursuance of profitable activities that are not necessarily equated to the characteristics of organized armed groups.

Drug cartels can be defined as “large, highly sophisticated organizations composed of multiple DTOs [drug trafficking organizations] and cells with specific assignments such as drug transportation [and] security/enforcement”.<sup>15</sup> DTOs are complex organizations with highly defined command and control structures that produce, transport and/or distribute large quantities of one or more illicit drugs.<sup>16</sup> While drug trafficking started in Mexico in the 1930s, cartels emerged in the 1980s with the purpose of taking control of distribution routes and protecting themselves from government intervention.<sup>17</sup> An agreement between the most prominent gangs in the 1980s divided the market into territories known as *plazas*. The roots of drug violence can be traced to control of these areas.<sup>18</sup> While the cohesion of these criminal structures changes continuously, existing organizations include the Sinaloa Cartel, the CJNG, the BLO and the Juárez Cartel.<sup>19</sup>

The issue of criminality and gang violence in relation to drug cartels reflects one of the current challenges of IHL. While criminality has traditionally been considered to be outside the scope of IHL, Mexico raises questions over the potential applicability of IHL to criminal groups.<sup>20</sup> The impact of violence on the population and the military-grade capacity of some cartels to respond to rival gangs and the State has led many people to believe that Mexico is in a NIAC between the government and some of these groups. While there are also persuasive arguments to suggest the contrary, one thing is certain: waging a “war” against cartels made the country fall into a spiral of violence and death that has continued for the last fourteen years while the official discourse struggles

14 Patrick Gallahue, “Mexico’s ‘War on Drugs’—Real or Rhetorical Armed Conflict?”, *Journal of International Law of Peace and Armed Conflict*, Vol. 24, No. 1, 2011, p. 34.

15 US Department of Justice, “Drug Trafficking Organizations”, in *National Drug Threat Assessment 2010*, National Drug Intelligence Center, February 2010, available at: [www.justice.gov/archive/ndic/pubs38/38661/dtos.htm](http://www.justice.gov/archive/ndic/pubs38/38661/dtos.htm).

16 *Ibid.*

17 Carlos Perez Ricart, “La temprana (y permanente) militarización de la seguridad pública en México: Un estudio histórico”, *Contextualizaciones Latinoamericanas*, Vol. 10, No. 19, 2018, p. 11; Froylan Enciso, “Los fracasos del chantaje: Régimen de prohibición de drogas y narcotráfico”, in Mónica Serrano and Arturo Alvarado Mendoza (coords), *Los grandes problemas de México: Seguridad nacional y seguridad interior*, Colegio de México, Mexico City, 2010, p. 99.

18 Kristina Davis, “A Short History of Mexican Drug Cartels”, *San Diego Union-Tribune*, 21 October 2016, available at: [www.sandiegouniontribune.com/news/border-baja-california/sd-me-prop64-sidebar-20161017-story.html](http://www.sandiegouniontribune.com/news/border-baja-california/sd-me-prop64-sidebar-20161017-story.html); Noel Alvarado, “Pelean las plazas a muerte seis cárteles mexicanos”, *La Prensa*, 7 July 2020, available at: [www.la-prensa.com.mx/policiaca/pelean-las-plazas-a-muerte-seis-carteles-mexicanos-5460859.html](http://www.la-prensa.com.mx/policiaca/pelean-las-plazas-a-muerte-seis-carteles-mexicanos-5460859.html).

19 See, for example, US Drug Enforcement Administration, *National Drug Threat Assessment*, December 2019, pp. 99–100.

20 See 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, p. 78; International Law Association (ILA), Committee on the Use of Force, *Final Report on the Meaning of Armed Conflict in International Law*, The Hague, 2010, p. 3.

to find an appropriate legal response. The lack of a stance on the applicable legal paradigm has found the government without appropriate institutional mechanisms to address cartels.<sup>21</sup> Mexico shows the problems of not reaching a clear legal approach in the implementation of (either or both) the law enforcement and conduct of hostilities paradigms.<sup>22</sup>

This topic illustrates the necessity of revisiting the division line between internal violence and NIACs. The discussion is relevant throughout Latin America. Exponential growth of criminality and drug-related violence can be observed in the entire region, even outside of the context of armed conflicts.<sup>23</sup> This eruption of criminal violence led the Geneva Academy's *War Report* to start addressing the potential applicability of IHL to other Latin American countries besides Mexico.<sup>24</sup> On the other hand, certain clearly defined organized armed groups, like the Revolutionary Armed Forces of Colombia, have engaged in profitable activities in order to fund their endeavours (e.g., taxation, human trafficking, production and selling of drugs).<sup>25</sup> Mexican cartels may be close to both scenarios, as they present analogous features to certain armed groups (particularly access to equipment and weapons) but also to many criminal gangs around the world.

An expert meeting of the International Committee of the Red Cross (ICRC) has explicitly mentioned drug cartels to exemplify that powerful criminal groups resorting to armed violence may fall "short of an armed conflict".<sup>26</sup> This, however, does not lower the importance of ascertaining which are the available

21 See, for example, "Mexican President Sticks to No-War Approach and Refuses to Use Force on Drug Cartels Despite Fighters Showcasing Their Weapons in Viral Videos as Murders Hit New High of 17,439 for the First Half of 2020", *Daily Mail*, 20 July 2020, available at: [www.dailymail.co.uk/news/article-8542137/Mexican-president-sticks-no-war-approach-shocking-cartel-video.html](http://www.dailymail.co.uk/news/article-8542137/Mexican-president-sticks-no-war-approach-shocking-cartel-video.html).

22 "Il y a des situations de chevauchement entre DH [droits humains] et DIH [droit international humanitaire] quant au champ d'application ratione situationis puisque les DH s'appliquent aujourd'hui en période de conflit armé et que le DIH s'applique également dans des situations de conflit purement interne. Rappelons cependant l'évidence: le DIH ne peut pas s'appliquer en temps de paix ou de troubles intérieurs (à moins que les Etats en conviennent par accords spéciaux). Par contre, il est censé s'appliquer automatiquement en période de conflit armé, et les Etats ne peuvent pas déroger à ces règles. Les DH, quant à eux, s'appliquent en tout temps à moins que les Etats décident d'y déroger dans la stricte mesure où la situation l'exige pour faire face à un conflit armé ou à tout autre état d'urgence menaçant la vie de la nation. Cette différence est essentielle; elle est consubstantielle à la nature du DIH conçu pour les conflits armés, contrairement aux DH qui ont une portée plus générale." Gloria Gaggioli, "L'influence mutuelle entre les droits de l'homme et le droit international humanitaire à la lumière du droit à la vie", doctoral thesis, No. D. 833, Université de Genève, Geneva, 2011, p. 148.

23 Most countries in Central America and the Caribbean showed significant increases in homicide rates in the last three decades. See United Nations Office on Drugs and Crime (UNODC), "Victims of Intentional Homicide, 1990-2018", available at: <https://dataunodc.un.org/data/homicide/Homicide%20victims%20worldwide>; Steven Malby, "Homicide", in Stefan Harrendorf, Markku Heiskanen and Steven Malby (eds), *International Statistics on Crime and Justice*, UNODC, 2010, pp. 16–17.

24 See the situation of Brazil in A. Bellal (ed.), *The War Report: 2018*, above note 5, pp. 73–82; and the situation of El Salvador in A. Bellal (ed.), *The War Report: 2017*, above note 5, pp. 64–70.

25 Jennifer Hazen, *What Rebels Want: Resources and Supply Networks in Wartime*, Cornell University Press, Ithaca, NY, 2013, pp. 2, 36, 171.

26 Gloria Gaggioli, *The Use of Force in Armed Conflict: Interplay Between the Conduct of Hostilities and Law Enforcement Hostilities Paradigms*, ICRC Expert Meeting Report, Geneva, 2013, p. 32.

legal tools to address this situation. The fact that the humanitarian consequences of violence in Mexico are similar to those experienced by countries with armed conflict was noted in 2017 by former ICRC president Peter Maurer, who stated: “We have always recognized that the situation of Mexico is very specific and that we cannot simply transfer our experience of conflicts and wars to Mexico, but there are recurrent problems and the humanitarian impact is very similar sometimes.”<sup>27</sup>

## The organization criterion

### Organized to confront?

In relation to the level of organization of armed groups, the ICTY and International Criminal Court (ICC) have developed a series of exemplificative indicators to assess this criterion. These include the existence of a command structure; the ability to gain access to weapons, military equipment, recruits and military training; and the ability to plan, coordinate and carry out military operations.<sup>28</sup> While a loose interpretation has been utilized to define the organization criteria, requiring a case-by-case analysis, three broad elements can be identified from practice and jurisprudence: (1) a collective entity with a command structure; (2) the ability to implement basic humanitarian norms; and (c) the capacity to engage in sufficiently intense violence.<sup>29</sup> Underlying this is the implicit requirement that these groups are not a mere juxtaposition of individuals but a collective entity.<sup>30</sup>

According to international jurisprudence, the organizational capabilities of armed groups must be focused on the capacity of parties “to confront each other with military means”.<sup>31</sup> Nevertheless, according to other theories, analyzing only the ability of groups to confront would make the distinction between organization and armed violence redundant.<sup>32</sup> Therefore, these organizations

27 “Consecuencias de violencia en México, equiparables a países en guerra: Cruz Roja”, *Aristegui Noticias*, 21 October, 2017, available at: <https://aristeguinoticias.com/2110/mexico/consecuencias-de-violencia-en-mexico-equiparables-a-paises-en-guerra-cruz-roja/>.

28 ICTY, *The Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84, Judgment (Trial Chamber I), 3 April 2008, para. 60; ICTY, *The Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, para. 195. See also ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgement Pursuant to Article 74 of the Statute (Trial Chamber I), 14 March 2012, para. 537; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgement Pursuant to Article 74 of the Statute, 21 March 2016, paras 134–136; ICRC Commentary on GC I, above note 8, Art. 3, para. 425.

29 Tillman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law*, Oxford University Press, Oxford, 2018, p. 63.

30 *Ibid.*, p. 64; ICC, *Situation in the Republic of Kenya*, No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Pre-Trial Chamber II), 31 March 2010, para. 102; ICC, *Lubanga*, above note 28, para. 536; ICC, *Bemba*, above note 28, para. 134.

31 ICTY, *Haradinaj*, above note 28, para. 60. UN, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, Geneva, 25 January 2005, para. 131.

32 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 68.

must also be able to implement the obligations imposed by CA3.<sup>33</sup> A third position suggests that the ability of a group to engage in armed violence may compensate for the inability of the organizational structure to implement IHL obligations.<sup>34</sup> Accordingly, these groups must reach at least a “sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict”.<sup>35</sup>

From the perspective of cartels, however, these criteria, used in IHL, may not be suitable. It can be argued that these groups have a commercial structure. While this implies a degree of organization, a society for profit is not sufficient in itself. Moreover, as will be further explained in the following section, the aims of a group, whether commercial or political, do not alter their legal status. Nevertheless, these purposes may well have an impact on the organizational design of the group, altering the legal classification of the group as such. As the degree of organization is key to qualifying a collective as an armed group within the existence of a NIAC, the lack of this element converts these collectives to mere criminal associations, whose legal characterization would depend on domestic criminal legislation.

### Organized for commerce?

In Mexico, the organizational structure of the cartels has been transformed over the past two decades. The implementation of the so-called “kingpin strategy” by President Calderón, which is based on the killing or capture of the leaders of each organization, has resulted in the disintegration of some cartels and the strengthening of others. In general, however, the absence of leaders has occasioned power struggles between ranks, resulting in more violence and less cohesion in each organization.<sup>36</sup> For example, in the case of the BLO, the capture of founding member Arturo Beltrán Leyva in 2009 resulted in the dissolution of the group into independent cells that lost any sense of common membership.<sup>37</sup> The disappearance of kingpins has led to the creation of many smaller and more violent drug gangs, struggling for a share of the market and with no clear cohesive element between them, apart from opportunistic alliances.<sup>38</sup> This shows the difficulties of finding the links between the groups that could allegedly compose a party to a conflict. Cartels such as the BLO do not show a *de facto* relationship of belonging to a hierarchy or the existence of leadership that exerts overall control of these cells.<sup>39</sup>

33 ICTY, *The Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction (Trial Chamber), 12 November 2002, para. 87.

34 A. Bianchi and Y. Naqvi, above note 9, p. 129.

35 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, p. 32.

36 Marcos Palacios and Mónica Serrano, “Colombia y México: Las violencias del narcotráfico”, in M. Serrano and A. Alvarado Mendoza (coords), above note 17, p. 134.

37 CMDPDH, above note 6, p. 206.

38 Council on Foreign Relations, “Mexico’s Long War: Drugs, Crime, and the Cartels”, 26 February 2021, available at: [www.cfr.org/backgrounder/mexicos-drug-war#chapter-title-0-1](http://www.cfr.org/backgrounder/mexicos-drug-war#chapter-title-0-1).

39 For the theoretical discussions on this, see T. Rodenhäuser, above note 29, pp. 80–85.



Some general characteristics can be extracted from the situation of most of these organizations. Most cartels have diversified into other profitable activities (kidnapping, extortion) and have become more decentralized in their organizations in order to maximize their profit.<sup>40</sup> Consequently, these groups present a structure that is organized not with the aim of confronting the government, but with the aim of pursuing profitable activities.<sup>41</sup> The alliances between the cells and the main organization are primarily commercial. Cells are franchises, not branches – they fight each other for drug distribution chains (*plazas*).<sup>42</sup> Moreover, the International Law Association has suggested that as long as the aim of these groups is not to topple the government but to protect their criminal activities, the situation cannot be classified as a NIAC.<sup>43</sup>

In this regard, it should be noted that the ICTY has asserted in the *Limaj* case that “the purpose of the armed forces to engage in acts of violence or also achieve some further objective is ... irrelevant”.<sup>44</sup> In response, Vité has stressed that “[t]he reverse position would, moreover, raise problems that it would be difficult to resolve in practice. The motives of armed groups are never uniform and cannot always be clearly identified.”<sup>45</sup> The applicability of IHL depends on objective elements, irrespective of the approach taken by the parties or how they are denominated.<sup>46</sup> One could argue, however, that the aims of the cartels condition the way in which they are organized. As will be addressed in the section below entitled “A Surge of Violence in Mexico?”, violence, in this context, represents a by-product of drug trafficking and not a direct consequence.<sup>47</sup>

The structure of cartels puts into question their suitability under the organization requirement of CA3. Cartels are designed not to engage in armed confrontation but to protect *plazas*.<sup>48</sup> These organizations fall more appropriately

40 Laura Calderon, Kimberly Heinle, Octavio Rodríguez Ferreira and David A. Shirk, *Organized Crime and Violence in Mexico: Analysis through 2018*, Justice in Mexico Project, University of San Diego, San Diego, CA, 2019, p. 4.

41 ILA, above note 20, p. 3.

42 In regards to Los Zetas’ “franchising model”, Tom Wainwright notes: “[I]t comes with all the same advantages and disadvantages [of franchising]. One of the big advantages is that it has allowed the Zetas to grow much more quickly. One of the disadvantages though, and this is something you often see in the legitimate franchising business, is that the franchisees often start to quarrel among each other, and the trouble is that the interest of these franchisees, the local criminals, aren’t very well-aligned with the interests of the main company.” “‘Narconomics’: How The Drug Cartels Operate Like Wal-Mart and McDonald’s”, *NPR*, 15 February 2016, available at: <https://tinyurl.com/38k2mw8h>.

43 ILA, above note 20, p. 28.

44 ICTY, *The Prosecutor v. Fatmir Limaj, Isak Musliu and Haradin Bala*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para. 170.

45 S. Vité, above note 20, p. 78.

46 “With respect to the beginning of the applicability of common Article 3, no specific provision is necessary: common Article 3 becomes applicable as soon as a non-international armed conflict comes into existence.” ICRC Commentary on GC I, above note 8, para. 484. See also Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 461.

47 Javier Dondé Matute, “¿Por qué considero que no hay crímenes de guerra en México?”, in *México y la Corte Penal Internacional*, Comisión de Derechos Humanos del Distrito Federal, Mexico City, 2014, p. 157.

48 *Ibid.*

under the provisions of the UN Convention against Transnational Organized Crime than the notion of CA3.<sup>49</sup> In other words, the structure of most cartels is not suitable for IHL implementation because they are not usually prepared to engage in armed confrontations as required by CA3, arguably, under the element of organization. Cartels usually outsource violent actions to exogenous organizations or hire hitmen for specific actions.<sup>50</sup> When these branches start to work as an armed wing for a cartel, the experience shows that these links are transitory. Most of the time such associations are sporadic or limited in duration; for example, the BLO started as an armed branch for the protection of the Sinaloa Cartel against the armed wing of the enemy Gulf Cartel (Los Zetas), until it began to operate as an autonomous organization.<sup>51</sup> Another relevant example is the CJNG, which posted a video on social media showing its military-grade weapons and armoured vehicles,<sup>52</sup> but which relies on alliances with local gangs and individuals to advance over new markets within the country.<sup>53</sup> Because of these ephemeral structures, it is doubtful that cartels could have the ability to implement IHL.

It is clear from a legal perspective that, for the purposes of identifying the entity behind violent acts, there must be a cohesive and organized structure with the ability to engage in military confrontations. Without dismissing the interpretation of the ICTY in the *Limaj* case, it can be argued that the aims of the cartels have moulded the way in which they organize, as well as the patterns of violence that are associated with them. This latter element may have an impact on the classification of the situation, so it is therefore necessary to analyze the characteristics of the violence in Mexico to assess whether there is an armed confrontation between the cartels and the government.

## Is it sufficient to talk about protracted armed violence?

In relation to CA3, States argued during the 1949 Diplomatic Conference of Geneva that the scope of the article did not include all forms of violence.<sup>54</sup> Many States

49 Convention against Transnational Organized Crime, above note 13, Art. 2(a); Andrea Nill Sanchez, "Mexico's Drug 'War': Drawing a Line between Rhetoric and Reality", *Yale Journal of International Law*, Vol. 38, No. 2, 2013, p. 504.

50 "Major Mexican drug cartels, such as the Sinaloa or Zetas, ally themselves with local providers of violence and protection according to transnational trafficking needs": Ivan Briscoe, *Non-Conventional Armed Violence and Non-State Actors: Challenges for Mediation and Humanitarian Action*, Norwegian Peacebuilding Resource Centre, May 2013, p. 3; Juliana Fregoso, "Tercerización narco: Los grupos sin fama que hacen el trabajo sucio para los grandes cárteles mexicanos", *Infobae*, 11 June 2017, available at: [www.infobae.com/america/mexico/2017/06/11/tercerizacion-narco-los-grupos-sin-fama-que-hacen-el-trabajo-sucio-para-los-grandes-carteles-mexicanos/](http://www.infobae.com/america/mexico/2017/06/11/tercerizacion-narco-los-grupos-sin-fama-que-hacen-el-trabajo-sucio-para-los-grandes-carteles-mexicanos/)

51 Wilson Center, above note 1.

52 C. Duncan, "Mexican Drug Cartel Shows Off Uniformed Troops with Military Weapons and Armoured Vehicles in Video", *The Independent*, 18 July 2020, available at: [www.independent.co.uk/news/world/americas/mexico-drug-cartel-video-jalisco-new-generation-weapons-military-cjng-a9626246.html](http://www.independent.co.uk/news/world/americas/mexico-drug-cartel-video-jalisco-new-generation-weapons-military-cjng-a9626246.html)

53 Victoria Dittmar, "Why the Jalisco Cartel Does Not Dominate Mexico's Criminal Landscape", *InSight Crime*, 11 June 2020, available at: [www.insightcrime.org/news/analysis/jalisco-cartel-dominate-mexico/](http://www.insightcrime.org/news/analysis/jalisco-cartel-dominate-mexico/).

54 *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2, Section B, Federal Political Department, Berne, 1949, p. 10.

considered at the time that situations of violence between individuals, crimes, and riots, should be excluded, as their inclusion would give criminal organizations a pretext for claiming the benefits of CA3.<sup>55</sup> Still today, however, there is no clear-cut definition of the minimum threshold of violence that must be reached to trigger the applicability of CA3.<sup>56</sup> According to some authors, it is only through “creative ambiguity” that an agreement over the wording of CA3 could be reached at its inception.<sup>57</sup>

The notion of violence, legally and symbolically speaking, is fundamental to understanding the nature of events in Mexico. In relation to the concept of violence within IHL, the ICTY further explored the requirement of protracted armed violence in the *Haradinaj* case. The Trial Chamber established that the analysis must focus on the intensity of the violence rather than on its duration.<sup>58</sup> Regarding the indicative factors to be used, the ICTY has referred to non-exhaustive elements such as the number, duration and intensity of the confrontations; the types of weapons and military equipment used; the number and calibre of the munitions fired; and the number of casualties.<sup>59</sup> The ICTY revisited almost immediately the question of the intensity of violence in the *Boškoski* case. Amongst the indicative factors of violence, it is possible to highlight the existence of armed clashes and the mobilization and distribution of weapons to the parties; the types of weapons and military equipment used; the number of casualties caused by shelling or fighting; the quantity of troops deployed; and the closure of roads.<sup>60</sup> These criteria have also been reaffirmed by the ICC Trial Chamber in the *Lubanga* case.<sup>61</sup>

Yet, it is challenging to interpret these elements in a context of generalized violence, where many of them may get entangled with unrelated crimes. Engagements in activities involving armed force or armed violence do not seem to be an exclusive prerogative of armed groups under IHL, according to the ICRC.<sup>62</sup> Many non-State actors that are not necessarily engaged in armed conflicts are involved in violent actions.<sup>63</sup> In defining armed conflict, the International Law Commission has explicitly referred to armed force in its Draft Articles relating to the Effects of Armed Conflicts on Treaties.<sup>64</sup> The ICRC has defined NIACs as protracted armed confrontations that must reach a minimum

55 *Ibid.*, pp. 10–15, 121, 325–339; ICRC Commentary on GC IV, above note 8, p. 32; ICTY, *The Prosecutor v. Slodoban Milošević*, Case No. IT-02-54-T, Decision on the Motion for Judgement of Acquittal (Trial Chamber), 16 June 2004, para. 26.

56 T. Rodenhäuser, above note 29, p. 38.

57 S. Sivakumaran, above note 32, p. 161.

58 ICTY, *Haradinaj*, above note 28, para. 49.

59 *Ibid.*

60 ICTY, *Boškoski*, above note 28, para. 177.

61 ICC, *Lubanga*, above note 28, para. 538.

62 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 33rd International Conference of the Red Cross and Red Crescent, Geneva, 2019, p. 50.

63 *Ibid.*, fn. 67.

64 International Law Commission, “Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries”, *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2011, Art. 2(b).

level of intensity;<sup>65</sup> this allows us to distinguish NIACs from other situations of mass violence and civil unrest.<sup>66</sup> Still, it seems that the ambiguity persists.

Again, the question of the threshold of intensity for distinguishing NIACs from internal disturbances presents several challenges. A situation involving a high number of casualties would not necessarily entail the existence of a NIAC, as shown by the cautious approach of the ICRC in classifying the unrest in Syria as an armed conflict.<sup>67</sup> The historical patterns of criminality in Mexico demonstrate how ambiguous the implementation of these elements can be.

### A surge of violence in Mexico?

Mexico has experienced a resurgence in violence since 2007 (see [Figure 1](#)), presenting a record number of registered homicides since 2018.<sup>68</sup> These patterns of violence are “highly localized, sporadic, and geographically specific”.<sup>69</sup> At the same time, most of these violent actions have been attributed to organized crime.<sup>70</sup> It is commonly believed that the fragmentation produced by the kingpin strategy has resulted in confrontations between the middle ranks of the leadership and has had a direct impact on the increase in violence.<sup>71</sup>

Moreover, while the resurgence in homicide rates could be attributed to the declaration of the “war against drugs” by President Calderón, there are other factors that may explain this phenomenon, such as the historical roots of violence in Mexico, the weakening of political institutions, and persistent social inequality.<sup>72</sup> While prior to 2007 the homicide rate was diminishing, other crimes (kidnapping, extortion, drug trafficking) were exponentially growing.<sup>73</sup>

The fact that cartels may be involved in thousands of individual homicides does not necessarily discount these actions from being part of a hypothetical armed conflict, as IHL also regulates unlawful acts of violence, such as attacks directed at civilians.<sup>74</sup> However, the core of this question is to define which kinds of acts

65 ICRC, *How Is the Term “Armed Conflict” Defined in International Humanitarian Law?*, Opinion Paper, March 2008, p. 5, available at: [www.icrc.org/en/doc/resources/documents/article/other/armed-conflict-article-170308.htm](http://www.icrc.org/en/doc/resources/documents/article/other/armed-conflict-article-170308.htm).

66 ICTY, *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2, Judgment (Appeals Chamber), 17 December 2004, para. 341.

67 Lindsay Moir, “The Concept of Non-International Armed Conflict”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 412.

68 L. Calderon *et al.*, above note 40, p. 3.

69 *Ibid.*, p. 4.

70 UNODC, *Global Study on Homicide: Executive Summary*, 2019, p. 20.

71 Carlos Pérez Ricart, “La Kingpin Strategy: ¿Qué es y cómo llegó a México?”, *Naxos*, 21 October 2019, available at: <https://seguridad.nexos.com.mx/?p=1646>.

72 Marcelo Bergman, “La violencia en México: Algunas aproximaciones académicas”, *Desacatos: Revista de Ciencias Sociales*, No. 40, 2013, p. 68.

73 *Ibid.*, pp. 70–72; Jaime Arredondo Sánchez Lira, Zulia Orozco, Octavio Rodríguez Ferreira and David A. Shirk, *The Resurgence of Violent Crime in Tijuana*, Justice in Mexico Policy Brief, February 2018, p. 7.

74 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 32nd International Conference of the Red Cross and Red Crescent, 2015, p. 17.



Figure 1. Victims of intentional homicide in Mexico and Central America, 1990–2018. Source: © United Nations Office on Drugs and Crime, 2020.

may fall outside of armed conflict and which may fall within.<sup>75</sup> A common misunderstanding is to attribute all violence that occurs in the context of drug trafficking to specific criminal organizations. While criminal gangs are frequently held responsible for urban violence, there are no reliable data on which crimes are directly linked to group actions.<sup>76</sup> Moreover, high levels of criminality are not exclusive to countries where IHL is (or may be) applicable. Other countries have suffered high levels of homicide associated with criminality and drug trafficking, such as Guatemala and El Salvador.<sup>77</sup>

Another common misconception is to excessively rely on the participation of military forces in law enforcement operations since 2007 for the affirmation of an armed conflict between the government and some cartels.<sup>78</sup> These assessments disregard the historical role of the Mexican armed forces in law enforcement operations against drug trafficking and criminal organizations since the 1930s.<sup>79</sup>

75 *Ibid.*, p. 18.

76 Jennifer Hazen, “Understanding Gangs as Armed Groups”, *International Review of the Red Cross*, Vol. 92, No. 878, 2010, p. 372. See also M. Palacios and M. Serrano, above note 36, p. 110: “[I]n Mexico a great part of the problem of the knowledge of the phenomenon of violence originates from the indeterminacy of the agents of homicide and kidnapping: which are related to the conflict with the guerrillas, which with drug-trafficking and which ones are related to other types and forms of criminality, either organized or spontaneous.”

77 M. Bergman, above note 72, p. 67.

78 CMDPDH, above note 6, p. 209.

79 “The historical analysis provided allows us to make three tentative conclusions: 1) throughout the history of Mexico the military have had a predominant position in public security operations; 2) the police have not been able to function without a strong military dimension; 3) never in the history of this country has it been possible to make a clear delimitation between police and military work.” C. Perez Ricart, above note 17, p. 12.

The intervention of armed forces may be an indicator of IHL applicability, but it is not determinative in itself.<sup>80</sup>

2019 was one of the most violent years in the history of Mexico, with a consistent rise in the number of homicides, which remained stable until the end of 2020.<sup>81</sup> However, many of these homicides cannot necessarily be attributed to the cartels as an entity, as they are related to other sources of criminality.<sup>82</sup> Moreover, with the notable exception of Los Zetas (currently disarticulated),<sup>83</sup> studies show that most cartels use armed violence only as a last resort, prioritizing bribing and extortion.<sup>84</sup> While Los Zetas have resorted frequently to violent actions with visual impact (e.g., decapitated bodies, mass executions), these were part of a communication strategy rather than done for military purposes.<sup>85</sup> The final aim of this strategy was to generate revenues by intimidating and extorting less powerful gangs and the local population.<sup>86</sup>

An analysis of trends in homicide rates is certainly revealing. As shown by data from the United Nations Office on Drugs and Crime (UNODC), Mexico's homicide rate is one of the highest in the world, but it is still lower than those of countries such as El Salvador, Jamaica and Venezuela.<sup>87</sup> In 2021, there were 28,262 intentional homicides in Mexico, of which only 1.41% (401) resulted in the death of security forces officials.<sup>88</sup> At the same time, since López Obrador took power in 2018, there has been a general increase of almost 5.5% in the homicide rate.<sup>89</sup> While there are no public data regarding alleged members of cartels being killed, these trends show that only a small amount of cases are related to violence between State officials and others (groups or individuals). This opens two questions regarding the applicability of IHL: how to establish which

80 S. Sivakumaran, above note 32, p. 169.

81 Instituto Belisario Domínguez, *Temas estratégicos*, No. 85, Senado de la República, Mexico, 2020; Will Grant, "Mexico Crime: Could This Become the Bloodiest Year on Record?", *BBC News*, 12 July 2020, available at: [www.bbc.com/news/world-latin-america-53332756](http://www.bbc.com/news/world-latin-america-53332756).

82 Alberto Nájjar, "Violencia en México: El récord de homicidios en 2019 durante el primer año de gobierno de AMLO", *BBC News*, 21 January 2020.

83 "The Zetas are not like any other large criminal organization in Mexico. They are enforcers first, businessmen second. ... They are less interested in controlling the distribution chains and more interested in controlling the territory in which the business is done." Steven Dudley, "The Zetas and the Battle for Monterrey", *InSight Crime*, 2012, p. 11, available at: [www.insightcrime.org/images/PDFs/2016/zetas\\_monterrey.pdf](http://www.insightcrime.org/images/PDFs/2016/zetas_monterrey.pdf); June Beittel, *Mexico: Organized Crime and Drug Trafficking Organizations*, R41576, US Congressional Research Service, 28 July 2020, pp. 22–23.

84 UNODC, *Transnational Organized Crime in Central America and the Caribbean: A Threat Assessment*, 2012, p. 23.

85 A parallelism can be established in relation to the strategy of terrorist organizations: see A. Bianchi and Y. Naqvi, above note 9, p. 109.

86 George Grayson and Samuel Logan, *The Executioner's Men: Los Zetas, Rogue Soldiers, Criminal Entrepreneurs, and the Shadow State They Created*, Transaction, New Brunswick, NJ, 2012, pp. 90, 94.

87 Statistics can be found on the UNODC data portal, available at: <https://dataunodc.un.org/>.

88 Secretaría de Seguridad y Protección Ciudadana, *Informe de Incidencia Delictiva Fuero Común*, Mexico, 20 January 2022; Causa en Común, "Registro de policías asesinados 2021", available at: <http://causaencomun.org.mx/beta/registro-de-policias-asesinados-2021/>.

89 Arturo Angel, "Pese a Guardia Nacional crece la violencia: Van más de 32 mil homicidios desde su despliegue", *Animal Político*, 30 June 2020, available at: [www.animalpolitico.com/2020/06/guardia-nacional-violencia-homicidios-despliegue-amlo/](http://www.animalpolitico.com/2020/06/guardia-nacional-violencia-homicidios-despliegue-amlo/).

homicides were part of armed confrontations, and how to determine whether the persons engaged in these episodes belonged to a “party”.

The case of the city of Tijuana can be revealing in this regard. As a result of a violent campaign by the Sinaloa Cartel against rivals and former allies, Tijuana went from the national average of homicides to becoming the most violent city in Mexico.<sup>90</sup> Confrontations between former partner cartels resulted in a surge of many new criminal organizations, from small-scale drug traders up to the involvement of macro-organizations such as the Sinaloa Cartel and CJNG.<sup>91</sup> Most confrontations occur between organizations that want to contest the control of the Sinaloa Cartel over the drug distribution in the city.<sup>92</sup> This has shaped the concept of violence in Tijuana, which has converted from high-profile confrontations into a multiplication of lower-profile homicides resulting from battles over the control of shares of the distribution market (from street corners to entire neighbourhoods).<sup>93</sup>

Indeed, there is a link between the increase in the rate of homicides and drug-related homicide. However, sociological studies suggest that the patterns of homicide and violence in Mexico are mainly explained by drug consumption combined with inequality and poverty, which also explains why most of these crimes are concentrated in the marginal neighbourhoods in urban areas.<sup>94</sup> While many of these cases may be connected with cartels, they are not necessarily relevant to assessing the existence of protracted armed violence. Most situations involve cells or individuals that are connected to cartels in a business relationship but do not belong to a hierarchical command structure.<sup>95</sup> In the hypothesis of an armed conflict, the nexus between the parties and the violent actions would be extremely frail.<sup>96</sup>

Therefore, it seems that not all crimes in which Mexican cartels are engaged are suitable for ascertaining the intensity of violence in relation to the requirement of CA3. This challenge is maximized in the case of criminal organizations whose

90 J. Arredondo Sánchez Lira *et al.*, above note 73, p. 4.

91 *Ibid.*, p. 5.

92 V. Dittmar, above note 53.

93 “Still, it is also notable that the character of the violence in 2015–17 differs significantly from the highly visible, high impact violence that characterized the city’s previous public security crisis in 2008–10. In the earlier period of violence, there was a far greater frequency of high profile violence – running gun battles in the streets, mass casualty incidents, bodies hanging from bridges, gangland-style executions ... Violence in 2015–17 has tended to be geographically concentrated in the city’s poor and marginalized areas, with a lesser impact on the daily life of wealthy and middle class residents. ... [R]ather than a few large, powerful criminal organizations whose differences can be settled by a surreptitious “pax mafiosa,” authorities are now confronting many micro-level criminal organizations battling over neighborhoods and street-corners. In this sense, the surge in small-scale, lower profile homicides represents a very different problem than the spectacular violence that authorities confronted in the past.” *Ibid.*, p. 6.

94 See Carlos Villalta and Robert Muggah, “What Explains Criminal Violence in Mexico City? A Test of Two Theories of Crime”, *Stability: International Journal of Security & Development*, Vol. 5, No. 1, 2016. See also Fernando Escalante Gonzalbo, “Panorama del homicidio en México: Esquema del análisis territorial 1990–2007”, in M. Serrano and A. Alvarado Mendoza (coords), above note 17, p. 327.

95 See above section “Organized for Commerce?”.

96 See below section “The Question of the Nexus”.

violent actions are intrinsic to their (profitable) activities.<sup>97</sup> Two potential solutions, when analyzing the intensity of violence and the capacity to fulfil the organization criterion for the purposes of the application of IHL, would be either to focus on the notion of armed confrontation or to dismiss the applicability of IHL altogether and to address the (sole) suitability of the law enforcement paradigm.

## Towards a theory of armed confrontation?

When analyzing the concept of a “party” in NIACs, the *War Report* of the Geneva Academy has referred to a factual requirement. According to the *Report*, these groups must be “in regular and intense armed confrontations with armed forces or other organized armed groups. ... There must be actual combat.”<sup>98</sup> This approach goes in line with the ICRC’s 2016 Commentary on CA3, referring to the capacity to engage in (and the existence of) highly armed confrontations.<sup>99</sup>

International jurisprudence and practice have advanced in defining the content of armed violence. In the *Abella v. Argentina* case, the Inter-American Commission on Human Rights (IACHR) established, whilst affirming that a military engagement that lasted less than forty-eight hours constituted a CA3 NIAC, that “the attackers involved carefully planned, coordinated and executed an armed attack, i.e. a military operation, against a quintessentially military objective – a military base.”<sup>100</sup> The Court of Justice of the European Union<sup>101</sup> and the *San Remo Manual on the Law of Non-International Armed Conflict* have also raised the concept of armed confrontations when referring to the concept of NIACs under IHL. While assessing the level of violence in Kosovo in 1998, the ICTY referred to “armed clashes” between the Kosovo Liberation Army and the Serbian Armed Forces.<sup>102</sup> According to the Geneva Academy *War Report*, certain actions such as emplacing improvised explosive devices or landmines are not sufficient to assess the existence of a NIAC if not combined with direct “hostilities”.<sup>103</sup>

97 “Drug-trafficking is a social, cultural, economic and health phenomenon; insecurity is just one of its expressions.” José Luis Pardo Veiras, “México cumple una década de duelo por el fracaso de la Guerra contra el Narco”, *New York Times*, Spanish ed., 7 October 2016, available at: [www.nytimes.com/es/2016/09/07/espanol/opinion/mexico-cumple-una-decada-de-duelo-por-el-fracaso-de-la-guerra-contra-el-narco.html](http://www.nytimes.com/es/2016/09/07/espanol/opinion/mexico-cumple-una-decada-de-duelo-por-el-fracaso-de-la-guerra-contra-el-narco.html).

98 A. Bellal (ed.), *The War Report: 2017*, above note 5, p. 25.

99 ICRC Commentary on GC I, above note 8, Art. 3, para. 434.

100 IACHR, *Juan Carlos Abella v. Argentina*, Case No. 11.137, Report No. 55/97, 18 November 1997, paras 154–156. “Protracted armed conflict” indicates “the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time”: ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 29 January 2007, para. 243. See also *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I), Case No. ICC-02/05-01/09-1, 4 March 2009, para. 60.

101 The definition was not relevant to the case, but the interpretation can be made from the negative reference. See Court of Justice of the European Union, *Aboubacar Diakité v. Commissaire Général aux Réfugiés et aux Apatrides*, Case No. C-285/12, Judgment (Fourth Chamber), 30 January 2014, para. 35.

102 ICTY, *Limaj*, above note 44, para. 172.

103 A. Bellal (ed.), *The War Report: 2017*, above note 5, p. 26.



As shown in the previous section, defining the violence connected to Mexican cartels as “armed confrontations” can be challenging. Most of the violence related to cartels is connected to limiting competing organizations’ influence over shares of the market or curtailing the expansion of other groups. It is possible to pinpoint certain examples of armed confrontation, such as the targeting of “H2” or the capture of Ovidio Guzman; other notable examples are the failure to capture “El Mencho” (leader of the CJNG) in 2015 when members of the CJNG shot down a Mexican military helicopter, or the recent attack on the secretary of public security in Mexico City.<sup>104</sup> These are notable exceptions, however; most cases of drug-related violence are connected to homicides that cannot be equated to armed confrontations. This can be observed in the wave of isolated and unconnected murders that followed the capture of “El Marro” (head of the Santa Rosa de Lima Cartel).<sup>105</sup> In addition, Cartels usually avoid engaging in open confrontation with State forces; moreover, a tangible trend in the targeting of State officials is connected with cases of corrupt officials who are *de facto* working with other cartels, turning attacks against them into revenge crimes.<sup>106</sup> In many crimes connected to drug-related violence, such as the Ayotzinapa massacre, some State officials acted together with, not against, cartels.<sup>107</sup>

Notably, the analysis of the ICTY in relation to armed confrontations has related to cases of intensive artillery bombardment and prolonged shelling.<sup>108</sup> Again, international tribunals have affirmed that violence (as with organization) must be assessed on a case-by-case basis.<sup>109</sup> It seems that equating cases of direct confrontation with all violence emanating from criminal organizations would entail conflating criminality with armed confrontation. Indeed, Mexico presents a situation of extreme violence that has generated the displacement of over 345,000

104 “Seven Killed in Mexico after Gunmen Down Helicopter in Series of Attacks”, *The Guardian*, 2 May 2015, available at: [www.theguardian.com/weather/2015/may/02/seven-killed-in-mexico-after-gunmen-down-helicopter-in-series-of-attacks](http://www.theguardian.com/weather/2015/may/02/seven-killed-in-mexico-after-gunmen-down-helicopter-in-series-of-attacks); “Jalisco New Generation Cartel Ambushes Mexico City Police Chief in Brazen Attack with Military-Grade Weapons”, *La Política Online*, 2 July 2020, available at: [www.lapoliticaonline.es/nota/84977-jalisco-new-generation-cartel-ambushes-mexico-city-police-chief-in-brazen-attack-with-military-grade-weapons/](http://www.lapoliticaonline.es/nota/84977-jalisco-new-generation-cartel-ambushes-mexico-city-police-chief-in-brazen-attack-with-military-grade-weapons/).

105 Adry Torres, “More than 60 People Are Murdered in Mexico’s Most Dangerous State Following the Arrest of Fuel Theft Cartel Leader El Marro”, *The Daily Mail*, 10 August 2020, available at: [www.dailymail.co.uk/news/article-8612143/More-60-people-murdered-Mexicos-dangerous-state-arrest-cartel-boss-El-Marro.html](http://www.dailymail.co.uk/news/article-8612143/More-60-people-murdered-Mexicos-dangerous-state-arrest-cartel-boss-El-Marro.html).

106 A. Nill Sanchez, above note 49, p. 503.

107 “We have to ask whether a clear-cut distinction between the security forces of the state and criminal organizations does not obscure the fact that what happens in multiple regions of the country, as shown by the Ayotzinapa case, is a phenomenon of macrocriminality that implies mixed criminal structures in which it is hard to draw the line between state and non-state agents”: CMDPDH, above note 6, p. 146. See also Jo Tuckman, “Mexico Ayotzinapa Massacre: New Theory Suggests Illicit Cargo Motivated Attack”, *The Guardian*, 23 October 2015, available at: [www.theguardian.com/world/2015/sep/23/mexico-bush-ambush-43-missing-students-new-report](http://www.theguardian.com/world/2015/sep/23/mexico-bush-ambush-43-missing-students-new-report).

108 See the analysis of the *Haradinaj* and *Tadić* cases in A. Nill Sanchez, above note 49, p. 482.

109 ICTY, *Limaj*, above note 44, para. 84. See also ICTY, *Boškoski*, above note 28, para. 175; ICTR, *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3, Judgment (Trial Chamber), 6 December 1999, para. 92.

persons and thousands of deaths over the years.<sup>110</sup> However, it is difficult to distinguish these episodes of violence from similar situations in El Salvador or Venezuela.

The idea of armed confrontation shows the necessity of ascertaining which violence is relevant for the purposes of affirming the existence of an armed conflict. The statistics in relation to the death of State officials in Mexico reveal that the percentage relevant for this analysis (i.e., in terms of overall homicide cases) may be quite limited. This does not dismiss the applicability of IHL in itself, but it reduces the bulk of pertinent violence, which is relevant to analyzing the fulfilment of the threshold.

### The question of the nexus

In order to affirm the existence of an armed confrontation, it is necessary to assess which acts of violence are relevant for that purpose. In this sense, it is fundamental to focus on the notion of nexus, as not all violent actions that have a link with the group will be relevant. IHL can only apply to conducts connected with an armed conflict. According to Marco Sassòli, the standard for nexus developed by international criminal law may well be suitable for IHL purposes.<sup>111</sup> In this sense, according to the ICTY, there must be a nexus between the acts of individuals and the armed conflict. Action must be “closely related” to the hostilities.<sup>112</sup>

The concept of nexus is fundamental to distinguishing ordinary crimes related to gang violence from violence derived from hostilities.<sup>113</sup> For the purposes of IHL, only those acts with the “impetus to vanquish the foe in the NIAC” are relevant, while ordinary crimes “spurred by personal stimuli (anger, revenge, fear, greed, lust)” are not.<sup>114</sup> Even in the context of a NIAC, fighters can commit ordinary crimes despite their personal connection to the conflict. For the purposes of IHL, there must be a direct link.<sup>115</sup> Notably, in the *Kunarac* case, the ICTY mentioned the purposes of the action and military goals as elements for distinguishing war crimes from domestic offences.<sup>116</sup> Based on this interpretation, Fortin has suggested that issues which do not have a clear nexus with an armed

110 According to data provided by the Internal Displacement Monitoring Centre (IDMC), available at: [www.internal-displacement.org/countries/mexico](http://www.internal-displacement.org/countries/mexico). See also IDMC, *New Humanitarian Frontiers: Addressing Criminal Violence in Mexico and Central America*, 2015; A. Nill Sanchez, above note 49, p. 483.

111 M. Sassòli, above note 46, p. 201.

112 ICTY, *The Prosecutor v Zejnir Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, para. 445; ICTY, *The Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Case No. IT-98-34-T, Judgment (Trial Chamber), 31 March 2003, para. 225.

113 ICTY, *Boškoski*, above note 28, para. 69.

114 Yoram Dinstein, *Non-International Armed Conflicts in International Law*, Cambridge University Press, Cambridge, 2014, p. 12.

115 *Ibid.*, pp. 12, 14; ICTR, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-12, Judgment (Trial Chamber II), 1 May 1999, para. 600.

116 ICTY, *The Prosecutor v. Dragolljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23, IT-96-23/1-A, Judgment (Appeals Chamber), 12 June 2002, para. 58.

conflict (based on individual status, membership, or military strategy) should only be regulated by IHRL.<sup>117</sup>

As seen in the case of Mexico, the statistics show that only a small percentage of violent crimes may be relevant as armed confrontations. This fact does not exclude the possibility that some of these confrontations have become so intense and sustained in relation to a specific cartel as to suggest the existence of a NIAC.

## Comprehending the process of militarization

From the international law perspective, if a situation does not reach the threshold of an armed conflict, the conduct of hostilities paradigm is inapplicable.<sup>118</sup> This entails the sole applicability of human rights obligations of the State involved.<sup>119</sup> In other words, the concept of law enforcement involves all actions taken by a State to impose public security, law and order under IHRL (as applicable to the State).<sup>120</sup> Under the law enforcement paradigm, any situation entailing the use of force must be in accordance with the application of the principles of legality, necessity, proportionality and precaution under IHRL.<sup>121</sup> The use of lethal force is highly restricted and must be limited to what is strictly necessary to achieve a legitimate aim.<sup>122</sup> Furthermore, it is expected that States develop non-lethal incapacitating weapons to reduce potential injuries or casualties.<sup>123</sup> Even when the use of violent means is inevitable, force should be used to “stop a suspect” (“shooting to stop” rule) and only intended to be lethal when unavoidable in order to save another life.<sup>124</sup> Any other scenario would entail a clear violation of the right to life due to arbitrary deprivation of a person’s life.<sup>125</sup> It must be recalled that the fact that military authorities participate in law enforcement operations does not directly entail the application of IHL.<sup>126</sup>

117 Katherine Fortin, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, Oxford, 2017, p. 51.

118 G. Gaggioli, above note 26, p. 32.

119 ICRC, *Violence and the Use of Force*, Geneva, 2015, p. 16.

120 Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2009, pp. 88–89.

121 *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 1990 (BPUFF), Principle 5; UN General Assembly, *Code of Conduct for Law Enforcement Officials*, UNGA Res. 34/169, 17 January 1979 (CCLEO), Art. 3 (strictly necessary and to the extent required).

122 “Law enforcement officials may resort to the use of force only when all other means of achieving a legitimate objective have failed (necessity) and the use of force can be justified (proportionality) in terms of the importance of the legitimate objective (legality) to be achieved”: ICRC, above note 119, p. 43. See also BPUFF, above note 121, Principle 9.

123 BPUFF, above note 121, Principle 3.

124 Stuart Casey-Maslen, *Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council*, Academic In-Brief No. 6, Geneva Academy, 2016, pp. 11–13; Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. A/HRC/26/36, 1 April 2014, para. 70.

125 International Covenant on Civil and Political Rights, 16 December 1966 (entered into force 23 March 1976), Art. 6.

126 CCLEO, above note 121, Art. 1.

The applicability of the law enforcement paradigm was foreseen in the original Commentaries to the Geneva Conventions for situations that fall short of being an armed conflict, particularly for tensions, when force is used preventively to maintain respect for law and order, and for internal disturbances, when the State uses armed force to maintain order.<sup>127</sup>

As we have seen, cartels are involved in numerous violent activities that could certainly trigger the response of the State under the law enforcement paradigm. Notwithstanding the fact that law enforcement operations may occur during armed conflicts, cartels' activities are not necessarily relevant to establishing the existence of an armed conflict.<sup>128</sup>

In 2006, the Government of Mexico started a process of deployment of armed forces to shadow the work of police forces and oversee domestic law enforcement.<sup>129</sup> The institutional participation of armed forces in law enforcement operations has focused on the notion of "internal security", which entails cases of social instability that are not of sufficient gravity to be considered a threat to national security.<sup>130</sup> The government of President Enrique Peña Nieto (2012–18) passed a law of internal security that allowed the direct intervention of the military in law enforcement operations.<sup>131</sup> While the legislation of the Peña Nieto administration was repealed by the Supreme Court of Justice of Mexico as unconstitutional, the issue of participation of the military in law enforcement operations was revisited by the current administration of President López Obrador and ultimately formalized via a presidential decree.<sup>132</sup> While the existent legal framework has faced criticism from an IHRL perspective in relation to the principles of the use of force (legality, necessity, proportionality, prevention and protection of the right to life) by organizations such as Amnesty International, it provides a certain improvement from former regulations in the country and a step forward in a region where many countries lack any regulation on the matter whatsoever.<sup>133</sup> Proper review mechanisms, however, are necessary to provide

127 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 4477. These same definitions are applicable to CA3: see ICRC Commentary on GC I, above note 8, para. 386. See also ICRC, above note 119, p. 19.

128 ICRC, above note 74, p. 36.

129 David Shirk, *The Drug War in Mexico: Confronting a Shared Threat*, Special Report No. 60, Council on Foreign Relations, New York, 2011, p. 10.

130 Víctor Manuel Saavedra Salazar and Joel Romo Navarro, "Seguridad pública en México: Del cuestionamiento teórico-legal, a la realidad empírica del papel militar en responsabilidades civiles", *Revista de Estudios en Seguridad Internacional*, Vol. 5, No. 1, 2019.

131 Congreso General de los Estados Unidos Mexicanos, *Ley de Seguridad Interior*, 21 December 2017.

132 David Agren, "López Obrador accused of Militarizing Mexico with New Security Decree", *The Guardian*, 11 May 2020, available at: [www.theguardian.com/world/2020/may/11/mexico-lopez-obrador-armed-forces-decree](http://www.theguardian.com/world/2020/may/11/mexico-lopez-obrador-armed-forces-decree); *ACUERDO por el que se dispone de la Fuerza Armada permanente para llevar a cabo tareas de seguridad pública de manera extraordinaria, regulada, fiscalizada, subordinada y complementaria*, Presidential Decree, 11 May 2020.

133 Amnesty International, *Mexico: When Words are Not Enough*, 2019, pp. 10–12; Human Rights Watch, "Latin America, It's Time to End Police Abuse", 18 November 2020, available at: [www.hrw.org/news/2020/11/18/latin-america-its-time-end-police-abuse](http://www.hrw.org/news/2020/11/18/latin-america-its-time-end-police-abuse).

effective remedies to the use of force and avoid lack of accountability.<sup>134</sup> Despite the possibilities for improvement, the approach of the government has been explicitly to be consistent in the interpretation of these standards under IHRL, using armed forces in support of public security operations.<sup>135</sup> This may be an additional indication that IHL is not applicable, as it has been argued that the applicability of the law enforcement paradigm systematically may be an indication that IHL is unsuitable.<sup>136</sup>

The current implementation of the law enforcement framework against cartels may be an indicative factor of how the Mexican government interprets the limitation on the use of force below the threshold of armed conflict.<sup>137</sup> A parallelism can be drawn, in this regard, from the experience of the Mexican forces fighting against the Zapatista Army of National Liberation (Ejército Zapatista de Liberación Nacional, EZLN), particularly during the uprising in the State of Chiapas in 1994. While there was a military deployment based on a “war strategy” against the EZLN, the strategy in 2006’s “war against drugs” was one of defence or reaction.<sup>138</sup>

## Concluding observations

When establishing the existence of a NIAC, analyses should focus on the notion of armed confrontation in order to assess the violence. Mexico is an important example of the suitability of the armed confrontation test when assessing the twofold criteria of NIACs. The fluctuant nature of the violence in Mexico makes classification challenging: it is difficult to assess when the intensity of violence has reached the threshold of armed conflict and when to affirm that the conflict has ended.<sup>139</sup> However, the case of Mexico can provide tools for assessing situations in which the dividing line between law enforcement and IHL is even more blurred, such as in Brazil or El Salvador.

Classifying the legal nature of the response of governments and criminal organizations to the issue of drug- and gang-related violence is not a purely legalistic issue. The “war against drugs” has left thousands of severe humanitarian consequences, including the displacement of thousands of persons, enforced disappearances and generalized torture by action (or omission) of State officials.<sup>140</sup> Pragmatic and legally clear definitions are needed to protect people

134 Human Rights Watch, “Mexico: Overhaul Police Forces”, 24 July 2020, available at: [www.hrw.org/news/2020/07/24/mexico-overhaul-police-forces](http://www.hrw.org/news/2020/07/24/mexico-overhaul-police-forces).

135 Comisión Nacional de Derechos Humanos, *Pronunciamiento*, Mexico, 11 May 2020.

136 A. Bianchi and Y. Naqvi, above note 9, p. 128.

137 “In situations falling short of armed conflict, the State has the right to use force to uphold law and order, including lethal force”: ICTY, *Boškoski*, above note 28, para. 178.

138 Carlos Montemayor, “Los movimientos guerrilleros y los servicios de inteligencia (notas reiteradas y nuevas conclusiones)”, in M. Serrano and A. Alvarado Mendoza (coords), above note 17, pp. 42, 45–47.

139 ICRC, above note 74, p. 10.

140 IACHR, *The Human Rights Situation in Mexico*, OEA/Ser.L/V/II, Doc. 44/15, 31 December 2015, pp. 31–39; Comisión Nacional de los Derechos Humanos, *Informe de Actividades 2019*, Mexico, 2020, p. 157.

affected by the scourge of drug-related violence, whether through IHL, IHRL or both.<sup>141</sup>

One should not dismiss the magnitude of the problem of criminality in Mexico and in the region. Nevertheless, when analyzing the suitability of IHL application to the cartels, one should take into account that IHL does not necessarily always provide the best answer for this type of violence. There are several justifications to affirm that applying IHL as broadly as possible could have negative effects.<sup>142</sup> “Over-application” of IHL could lead to depriving persons of better protection applicable in peace and weakens the willingness to apply IHL in situations in which it should be applied.<sup>143</sup> This does not entail accepting the legal vacuum and conceding a *carte blanche* to the State in dealing with the cartels. As explained, IHRL, and more precisely the law enforcement paradigm, provides a legal framework that grants rights to individuals and confers obligations to the State in relation to any use of force against (at least) most of these criminal groups.

Some overall conclusions can be taken from the Mexican case in relation to the applicability of IHL and IHRL:

1. In order to surpass the threshold of CA3, one should distinguish between organizations for commercial purposes (not relevant) and organizations prepared for confrontation.<sup>144</sup> As explained in the above section entitled “Organized for Commerce?”, the purposes or aims of the armed groups are not relevant as an indication of the organization element required for the existence of a NIAC. Protracted armed violence, however, must be committed by identifiable groups that have a degree of organization which enables them to enter into a military confrontation. The fact that these groups are part of a commercial structure is not relevant to the organization criterion under IHL. The ability of a group to engage in armed confrontation cannot exist without an organization to that end. Organized armed violence can only come from organized groups prepared, at least, to confront.<sup>145</sup>
2. In order to analyze violence for the purposes of establishing an armed conflict, one must only examine those acts that show a level of minimum intensity necessary to be considered as armed confrontations between the identifiable parties, and must dismiss criminal actions (criminal homicides) which cannot be clearly attributed to the confrontation as collateral damage from a

141 While Sassòli uses this argument to defend the applicability of IHL, the same argument could be made regarding IHRL applicability. See Marco Sassòli, “L’administration d’un territoire par un groupe armé peut-elle être régie par le droit?”, in Michel Hottelier, Maya Hertig Randall and Alexandre Flückinger (eds), *Études en l’honneur du Professeur Thierry Tanquerel*, Schulthess Éditions Romandes, Zürich, 2019, p. 268.

142 Marco Sassòli, “The Implementation of International Humanitarian Law: Current and Inherent Challenges”, *Yearbook of International Humanitarian Law*, Vol. 10, 2007, p. 51.

143 *Ibid.*

144 ICTY, *Limaj*, above note 44, para. 89. See also ICC, *Lubanga*, above note 28, para. 537; L. Moir, above note 67, p. 408.

145 Konstantinos Mastorodimos, *Armed Non-State Actors in International Humanitarian Law and Human Rights*, Ashgate, Farnham, 2016, p. 18.

particular clash. In order to make such an attribution, there must be a direct nexus between the violent action and the armed confrontation.

3. Membership in a group can only be established when there is a hierarchical relationship in an armed wing that allows for the coordination of military confrontations. In the case of cartels, this can only be observed in the biggest cartels and for a limited period of time (such as through the establishment of armed wings).
4. Unlawful acts that one has to consider under the conduct of hostilities paradigm (e.g., breach of the principle of distinction) may not be suitable when ascertaining the existence of a NIAC. For the purposes of reaching the threshold of armed conflict, the stress should be on the intensity of the armed confrontation between the hypothetical parties.
5. The inapplicability of IHL does not generate a legal vacuum. On the contrary, the law enforcement paradigm provides stringent conditions that governments must comply with when using force against criminal organizations. In order to use force in law enforcement operations, however, countries such as Mexico must establish the proper legal mechanisms to be in compliance with the requirements set out by IHRL.