

Targeting drug lords: Challenges to IHL between *lege lata* and *lege ferenda*

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Abstract

This article aims to clarify how international humanitarian law (IHL) rules on targeting apply when drug cartels are party to a non-international armed conflict. The question of distinguishing between a cartel's armed forces and the rest of the cartel members is a pertinent matter. It is crucial to avoid considering every drug dealer a legitimate target, just as we do not consider that everyone working for the government is a legitimate target. Nevertheless, it is unclear at what point a member of a cartel would change from being a criminal to being a member of the armed wing of the cartel, hence becoming a legitimate target. The present article will suggest a teleological approach to solving this conundrum.

Keywords: non-international armed conflicts, targeting, drug cartels, armed non-State actors, international humanitarian law.

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Introduction

Over the past decades, drug cartels have posed a serious threat to public security: some of the most lethal episodes of armed violence take place in countries where these criminal organizations operate. Generally speaking, these groups prefer to work in a clandestine way and to avoid direct confrontations with State forces. Nonetheless, they do sometimes engage in armed violence against governmental armed forces, and in specific contexts, such as Colombia or Mexico, there have been arguments that the violence meets the threshold of a non-international armed conflict (NIAC), provided that the criteria of intensity and organization are fulfilled.

This article aims at clarifying how international humanitarian law (IHL) rules on targeting apply when drug cartels are party to a NIAC. A non-State party to an armed conflict usually comprises an armed wing and other supportive members of the civilian population, such as political or humanitarian wings. Only fighting forces of the non-State party qualify as an armed group under IHL, and accordingly, only the members of the armed wing are legitimate targets. It is therefore of paramount importance to determine whether individuals are members of the armed wing, and hence legitimate targets, or whether they engage in non-military functions within the group party to the NIAC. In practice this determination is challenging, as memberships in armed groups tend to be flexible in nature.

This conundrum is particularly problematic with regard to drug cartels. How can we distinguish the parties to the conflict – i.e., the cartel’s armed forces – from the rest of the cartel members? It is crucial to avoid considering every drug dealer a legitimate target, just as we do not consider that everyone working for the government is a legitimate target. Nevertheless, it is unclear at what point a member of a cartel would shift from being a criminal to being a member of the armed wing of the criminal organization. In fact, it is even dubious whether cartels have military wings in the first place, or if any armed member of the cartel could potentially be considered to have a continuous combat function. If it is established that the cartel has a military wing, could members of this wing be considered legitimate targets even if they are not engaging in armed confrontations?

In order to address these and related conundrums, this article is structured as follow. Firstly, it will focus on the challenges of “criminal” NIACs. Notably, it will analyze whether the cartels are prevented from being party to a NIAC, inasmuch as they are economic actors. As is well known, a NIAC is deemed to exist “whenever there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.¹ However, some scholars posit that a further criterion exists: the motivations of the armed groups involved.

1 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.

Does this mean that criminal organizations can never become party to a NIAC due to the reasons that motivate their fighting? Furthermore, this article will consider the fact that several States which engage in intense armed violence against drug cartels refuse to recognize that the situation amounts to a NIAC, while deploying their armies to fight against these criminal organizations. This leads to confusion as to the applicable legal framework, and this confusion has the potential to jeopardize the protection of the civilian population. The situation in Mexico will be analyzed to exemplify these challenges.

Secondly, the article will focus on the question of targeting of particular members of drug cartels. In practice, determining whether an individual is a member of the armed wing of a group is extremely challenging, as membership in the majority of armed groups tends to be flexible in nature.² The International Committee of the Red Cross (ICRC), in its *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC Interpretive Guidance), has suggested that a member of a non-State party is a legitimate target if they have a continuous combat function – i.e., if they have a “lasting integration into an organized armed group acting as the armed forces of a non-state party to an armed conflict”. In the authors’ view, the ICRC is correct in this regard: it is necessary to distinguish between the party to the conflict (the drug cartels) and their armed forces. The article will investigate whether such distinction is possible with regard to drug cartels and will suggest possible solutions for applying IHL rules on targeting to criminal organizations that are party to NIACs.

“Criminal” non-international armed conflicts

When criminal organizations operate in a country and engage in armed violence against State forces, the question emerges as to whether the situation amounts to a NIAC. This question is not purely theoretical, as its answer determines the applicable legal framework. This part of the article will investigate in what circumstances drug cartels can be considered organized armed groups under IHL, and therefore possibly parties to a NIAC. Furthermore, it will focus on the militarization of the so-called “war on drugs”.

Drug cartels: Criminal organizations or organized armed groups?

Criminal organizations are primarily economic actors. Unlike traditional rebel groups, they do not aim to become the new government; instead, their primary objective is to run their business and make a profit. Armed violence often results from this goal, and it can reach extremely high levels. On the one hand, armed confrontations often take place between cartels that are fighting to gain control of

² Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009 (ICRC Interpretive Guidance), p. 33.

certain areas or specific markets; on the other, the government might engage in armed actions to counter criminal activities or to regain control of part of a State's territory.³ Nevertheless, criminal organizations usually have no interest in confronting the government, unless it is necessary to pursue their business. In light of these peculiarities, the question that arises is whether criminal organizations can be considered organized armed groups and thus become party to a NIAC under IHL.

A number of scholars posit that only organized armed groups that pursue political motives can be a party to a NIAC, provided that they meet the other criteria required by IHL, namely level of organization and intensity of violence. According to this interpretation, only groups aiming at achieving political objectives can be a party to a NIAC. Criminal organizations flourish when the government is weak, and their illicit activities *de facto* challenge the State's control. However, the latter is not the main purpose of their activities, but only a collateral effect.⁴ Accordingly, some scholars assert that the economic purposes of criminal organizations would prevent them from being party to a NIAC. These scholars provide three main arguments to support their claims.⁵

Firstly, a number of authors have pointed out that the motives of the cartels should be taken into consideration "for policy reasons".⁶ In the words of Hauck and Peterke:

While the qualification as an organized armed group is based on objective criteria in order to avoid the application of subjective elements such as the group's motivation, the law is not completely "blind" in that respect. ... [T]he organizational criterion, by demanding an objectively verifiable military strategy or capacity to carry out military operations, rules out entities that rely exclusively on terrorist, guerrilla, and other perfidious methods.⁷

Therefore, the argument goes, the UN Convention against Transnational Organized Crime (UNTOC), rather than IHL, seems a better fit for addressing the challenges posed by criminal organizations.⁸ To be sure, several conventions aimed at tackling drug trafficking have been adopted over the last century, and the UNTOC undoubtedly marked a positive development in the fight against organized crime.

3 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2011, p. 11.

4 Esteban Arratia, "¿Existe un conflicto armado interno en México según el derecho internacional? Los Convenios de Ginebra y su aplicación en la guerra contra el narcotráfico (2006–2012)", *Revista de Estudios en Seguridad Internacional*, Vol. 2, No. 1, 2015, p. 28; Héctor Carreón and Edgar Téllez, "¿Existe un conflicto armado interno en México? Análisis a la luz del Derecho Penal Internacional", *Lex*, Vol. 2, No. 10, 2012, p. 28.

5 See e.g. Emily Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict*, Cambridge University Press, Cambridge, 2015, p. 186; Cecilie Hellestveit, *Tribes, Thugs, Terrorists and the Law: Can Non-Conventional Armed Violence Be Regulated?*, NOREF–Norwegian Peacebuilding Resource Centre, May 2015, p. 8; Pierre Hauck and Sven Peterke, "Organized Crime and Gang Violence in National and International Law", *International Review of the Red Cross*, Vol. 92, No. 878, 2010, p. 5; Andrea Nill Sánchez, "Mexico's Drug 'War': Drawing a Line Between Rhetoric and Reality", *Yale Journal of International Law*, Vol. 38, 2013, pp. 502–503.

6 E. Crawford, above note 5, p. 186.

7 P. Hauck and S. Peterke, above note 5, p. 433.

8 E. Crawford, above note 5, p. 186.

Nevertheless, the fact that specific conventions address transnational organized crimes does not necessarily exclude criminal organizations from the possibility of also becoming party to a NIAC, should they meet the threshold required by IHL.⁹

Secondly, it has been highlighted that it could even be counterproductive to apply IHL to violence between the government and cartels. As explained by Crawford:

One would also have to question whether IHL would aid the parties involved. Designating the violence in Mexico as an armed conflict would allow the Mexican authorities to employ the armed forces in response to the cartels; however, the Mexican armed forces are already being employed against the cartels, if only in a law enforcement capacity.¹⁰

One of the main challenges in this regard would be the principle of proportionality under IHL, which prohibits military attacks that “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.¹¹ In other words, during armed conflicts, collateral damage is lawful as long as it is proportionate to the military advantage anticipated. Crawford concludes:

It seems unlikely that the Mexican government would publicly embrace such an approach, that the loss of dozens, if not hundreds of civilian lives would be acceptable if it meant destroying a major cartel production facility.¹²

However, this conclusion is questionable for two reasons. On the one hand, it is at least doubtful that killing “hundreds of civilians” as collateral damage during a military operation targeting a “major cartel production facility” would be lawful under IHL. On the other, the application of the law governing armed conflicts does not depend on whether a State is willing to apply it or acknowledges the existence of an armed conflict: IHL is applicable as soon as there is an armed conflict, as defined by the relevant treaty and customary rules.

Lastly, part of the scholarship has claimed that allowing criminal organizations to be parties to NIACs would grant them legitimacy and increase their standing, while “[t]his is beyond what international law concedes”.¹³ As explained by Arratia:

9 Chiara Redaelli, “Engaging with Drug Lords: Protecting Civilians in Colombia, Mexico, and Honduras”, in Annyssa Bellal (ed.), *The War Report: Armed Conflict in 2014*, Oxford University Press, Oxford, 2015, pp. 513–514.

10 E. Crawford, above note 5, p. 189.

11 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. 51(5)(b); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 14, available at: <https://ihl-databases.icrc.org/customaryihl/eng/docs/v1> (all internet references were accessed in January 2023).

12 E. Crawford, above note 5, p. 189.

13 C. Hellestveit, above note 5, p. 8.

Misdiagnosing the Aztec situation as a non-international armed conflict has the disadvantage of granting implicit political legitimacy to the cartels, as they would potentially be considered as “belligerents” vis-à-vis the government, making them a *de facto* power.¹⁴

Interestingly, this argument has been raised by States and scholars alike against the classification of a situation as a NIAC even when the non-State actors involved pursue political motives.¹⁵ Nevertheless, from a legal point of view, “the application of parts or all of IHL never confers any legal status upon an armed group”.¹⁶ Indeed, it is widely accepted that applying IHL to a situation of violence involving non-State actors neither changes their status nor grants them legitimacy. There is no reason to believe that this principle would not be applicable to certain non-State actors due to their reasons for fighting, especially if we consider that all opposition groups are substantially unlawful under domestic law.¹⁷

It should also be noted that the inclusion of political motives as a necessary element for classifying a situation of violence as a NIAC does not have a legal basis under the current legal framework.¹⁸ This has been confirmed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Limaj* case, where the Tribunal clarified that

[t]he determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organization of the parties[. T]he purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant.¹⁹

Furthermore, the UN Security Council has acknowledged the possibility that IHL applies to groups which do not pursue political objectives. In its Resolution 1851 of 2008, which addresses the issue of piracy in Somalia, the Security Council authorizes States and regional organizations

to undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea ... provided,

14 E. Arratia, above note 4, p. 32 (authors’ translation). The “Aztec situation” refers to the violence context experienced in Mexico during President Calderon’s six-year term.

15 United Kingdom, *Manual of the Law of Armed Conflict*, 2004, § 15.3.1; Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 2008, § 1202.

16 Marco Sassòli, “Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law”, *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, p. 31.

17 Jean-Marie Henckaerts et al., “Article 3: Conflicts not of an International Character”, in 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), para. 865. See also the opinion of the Constitutional Court of Colombia on the conformity of Additional Protocol II: Constitutional Case No. C-225/95, Judgment, 1995, para. 15.

18 Dapo Akande, “International Law and the Classification of Conflicts”, in Elizabeth Wilmschurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, p. 52; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, pp. 209, 546–549; ICRC Commentary on GC I, above note 17, paras 449–450.

19 ICTY, *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para. 170. 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, p. 78.

however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law.²⁰

Maintaining that only non-State actors which pursue political objectives can become party to a NIAC is not legally sound, and it seems to raise more questions than it answers. Indeed, this approach would open the possibility of other “motives-based reasons” to deny the existence of a NIAC.²¹ Furthermore, the objectives pursued by a non-State actor may vary over time. There might be several reasons – both political and economic – and they might not always be discernible.²² Consequently, the distinction between criminal and political organizations might not always be clear-cut.²³

The situation in Colombia can exemplify this point. Colombia has been engaging for decades in a number of NIACs against different non-State actors.²⁴ The Revolutionary Armed Forces of Colombia – People’s Army (Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, FARC-EP or FARC) and the National Liberation Army (Ejército de Liberación Nacional, ELN) can be considered “traditional” opposition groups pursuing political objectives, but their relationship with criminal organizations in general and the drug market in particular differs substantially. For years, the ELN has been opposed to any involvement in drug cultivation and trafficking, an approach that has enhanced its close ties with the local community.²⁵ Due to a steady military decline and subsequent economic needs, however, the group has started opening itself to the drug market in order to fund its fight against the government, while always being careful in maintaining close links with the local population.²⁶

By contrast, in the 1980s the FARC realized that criminal activities could be an invaluable source of income to finance its military struggle. Accordingly, it started controlling coca fields and then expanded its business from cultivation to trafficking,²⁷ to the point that it was defined as one of the most powerful cartels in Colombia “in terms of numbers, military capability, territorial control and

20 UNSC Res. 1851, 16 December 2008. See also D. Akande, above note 18, p. 52; Robin Geiß, “Armed Violence in Fragile States: Low-Intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009, pp. 139–140.

21 ICRC, above note 3, p. 11.

22 Ana Gabriela Rojo Fierro, “La guerra contra el narcotráfico en México: ¿Un conflicto armado no internacional no reconocido?”, *Foro Internacional*, Vol. 60, No. 4, 2020, p. 1450.

23 ICRC, above note 3, p. 11.

24 According to the ICRC, there are currently six NIACs in Colombia: Colombian government v. ELN; Colombian government v. Autodefensas Gaitanistas de Colombia; Colombian government v. former members of FARC-EP not currently covered by the Peace Agreement; ELN v. Autodefensas Gaitanistas de Colombia; former members of FARC-EP not currently covered by the Peace Agreement v. Segunda Marquetalia; former members of FARC-EP not currently covered by the Peace Agreement v. Comandos de la Frontera – EB. ICRC, *Humanitarian Challenges 2022: Colombia*, Bogotá, 2022.

25 International Crisis Group (ICG), *Left in the Cold? The ELN and Colombia’s Peace Talks*, Latin America Report No. 51, 26 February 2014, p. i.

26 C. Redaelli, above note 9, p. 517.

27 ICG, *Colombia: Peace at Last?*, Latin America Report No. 45, 25 September 2012, p. 11.

earnings from the drug trade”.²⁸ Moreover, before the signing of the 2016 Peace Agreement, the FARC concluded alliances with a number of Colombian criminal organizations as well as Mexican drug cartels.²⁹ At times, the relationship between the FARC and certain BACRIMs (*bandas criminales*, criminal organizations) has been so close that the acronym FARCRIM was coined.³⁰ At other times, however, relationships have turned tense, and the groups have engaged in armed confrontations with each other. In light of the FARC’s close relationship with the drug market, it might be possible to question whether it was a purely political armed group. It is therefore clear that the line between criminal organizations and armed non-State actors pursuing political objectives is often blurred.³¹

Another clear example that emerges from the Colombian context is the coalition of paramilitary groups known as the United Self-Defences of Colombia (Autodefensas Unidas de Colombia, AUC), which demobilized in 2006. Although being recognized as a right-wing-oriented group, they did not express any political ideology or discourse; their primary objective was to eliminate guerrilla groups.³² The AUC’s non-political character was judicially recognized by national courts, which highlighted the fact that this group could not be regarded as being responsible for political crimes, precisely because of their lack of political motives.³³ Since its inception, the AUC has always had strong connections with drug trafficking, and consequently, its demobilization resulted in the birth of a number of criminal organizations. The most prominent example is the group called Los Urabeños, also known as Autodefensas Gaitanistas de Colombia, which is primarily dedicated to transnational drug trafficking, does not pursue political motives,³⁴ and is currently party to a NIAC against the Colombian government.³⁵

28 Jeremy McDermott, “The FARC, the Peace Process and the Potential Criminalisation of the Guerrillas”, *InSight Crime*, May 2013, p. 18.

29 ICG, “Improving Security Policy in Colombia”, Latin America Briefing No. 23, Bogotá and Brussels, 29 June 2010, pp. 9–10.

30 Jeremy McDermott, “The Future of the BACRIM and Post-Conflict Colombia”, *InSight Crime*, 2 May 2014, p. 2.

31 David Petrasek, *Ends and Means: Human Rights Approaches to Armed Groups*, International Council on Human Rights Policy, Versoix, 2000, p. 5; Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law*, Oxford University Press, Oxford, 2018, p. 112; S. Vité, above note 19, p. 78.

32 See e.g. Marcela Barón-Soto and Alejandro Gómez-Velásquez, “New Drug Trafficking Armed Groups in Colombia and the Applicability of International Humanitarian Law”, *EAFIT Journal of International Law*, Vol. 6, No. 1, 2014, p. 54.

33 Corte Suprema de Justicia, Sala de Casación Penal, Proceso 291213, 20 February 2008, Magistrado Ponente: Yesid Ramírez Bastidas; Corte Suprema de Justicia, Sala de Casación Penal, Proceso 28629, 24 April 2008, Magistrado Ponente: Jorge Luis Quintero Milanés; Corte Suprema de Justicia, Sala de Casación Penal, Proceso 31421, 1 April 2009, Magistrado Ponente: Yesid Ramírez Bastidas; Corte Suprema de Justicia, Sala de Casación Penal, Proceso 34958, 21 September 2010, Magistrado Ponente: Sigifredo Espinosa Pérez; Corte Suprema de Justicia, Sala de Casación Penal, Proceso 34482, 24 November 2010, Magistrado Ponente: María del Rosario González de Lemos; Corte Suprema de Justicia, Sala de Casación Penal, Proceso 36965, 27 July 2011, Magistrado Ponente: José Luis Barceló Camacho.

34 “Urabeños – Gulf Clan”, *InSight Crime*, 24 October 2021, available at: <https://insightcrime.org/colombia-organized-crime-news/urabenos-profile/>.

35 ICRC, above note 24, p. 34.

In light of the foregoing, determining whether an armed non-State actor can be a party to a NIAC depending on its motivations for fighting could turn into a challenging – if not impossible – task. Accordingly, drug cartels can be party to a NIAC, should they meet the organization and intensity requirements. However, this is not the end of the story: it is also crucial to analyze how to identify the relevant legal framework in specific circumstances. The next section will be devoted to this complex question.

Militarizing the war on drugs

When criminal organizations in general and drug cartels in particular are parties to a NIAC, the relevant legal framework becomes IHL, as opposed to international human rights law. As is well known, the shift from a law enforcement paradigm to an armed conflict one has crucial consequences on the lawfulness of using force against members of armed non-State groups. Under the law enforcement framework, the lawful use of force, with specific regard to firearms, against individuals is limited to cases of

self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.³⁶

Furthermore, law enforcement officials shall

give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.³⁷

On the other hand, IHL applicable to NIACs rests on the distinction between civilians, members of State forces, and non-State fighters, whereby only the latter two groups are legitimate targets. A number of scholars have suggested that the use of force against legitimate targets would be lawful only when capturing them is not possible. The rationale underpinning this position rests on the principle of military necessity as a restriction on all violence³⁸ and the prohibition against treacherous killing.³⁹ According to this view, killing an enemy when it would be possible to capture them (without causing additional risks for the operating

36 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 7 September 1990, Art. 9.

37 *Ibid.*, Art. 10.

38 Jean Pictet, *Development and Principles of International Humanitarian Law*, Nijhoff, Dordrecht, 1985, pp. 75–76.

39 See e.g. United Kingdom, *Manual on Military Law*, Part III: *The Law of War on Land*, UK War Office, London, 1958, § 115.

forces) would “defy the basic notions of humanity”.⁴⁰ Nevertheless, the majoritarian view seems to support the contrary – namely, that killing the adversary is lawful even when capture would be a feasible option.⁴¹ For instance, it has been clarified that

[i]n evaluating military necessity, one may consider the broader imperatives of winning the war as quickly and efficiently as possible and is not restricted to considering only the demands of the specific situation. ... For example, the law of war does not require that enemy combatants be warned before being made the object of attack, nor does the law of war require that enemy combatants be given an opportunity to surrender before being made the object of attack.⁴²

It is therefore clear that applying IHL or international human rights law has substantial consequences for the parties involved in episodes of violence. While the automatic applicability of IHL to situations that amount to armed conflict is unquestionable, scholars have suggested that the application of IHL to the so-called war on drugs would increase the risk of killing civilians or other non-targetable persons. Kerr, for instance, asserts:

Applying the laws of war to the Mexican drug war, the Mexican government could openly kill a cartel member without any attempt to subdue him, arrest him, or question him. Nor would the government actor have to wait for the cartel member to present an immediate threat before using lethal force.⁴³

Similar concerns have been expressed by other authors.⁴⁴ Notably, they posit that applying IHL to the war on drugs would mean that any member of a cartel could become a legitimate target. In other words, “[i]t would simply be absurd to suggest that police could lawfully employ deadly force against suspected criminals based solely on a determination [that] an individual was a member of a criminal group”.⁴⁵ The situation is further complicated by the fact that often, States deploy the army to fight against criminal organizations in general and drug cartels in particular. One clear example is the militarization of the war on drugs in Mexico.

In December 2006, Felipe Calderón was elected as the president of Mexico, and almost immediately, he launched the so-called “war on drugs”. Since the Mexican government has always claimed that it is not engaging in a NIAC

40 ICRC Interpretative Guidance, above note 2, p. 82.

41 Marco Sassòli and Laura M. Olson, “The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts”, *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 606; Louise Doswald-Beck, “The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?”, *International Review of the Red Cross*, Vol. 88, No. 864, 2006, p. 902; Vincent-Joel Proulx, “If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists”, *Hastings Law Journal*, Vol. 56, No. 5, 2005, pp. 882–883.

42 US Department of Defense, *Law of War Manual*, Office of General Counsel, June 2015, § 2.2.3.1.

43 Callin Kerr, “Mexico’s Drug War: Is It Really a War?”, *South Texas Law Review*, Vol. 54, 2012, p. 218.

44 See e.g. P. Hauck and S. Peterke, above note 5, p. 431; E. Crawford, above note 5, p. 189.

45 Geoffrey Corn, “Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict”, *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, p. 77.

against drug cartels, the expression seems more political rhetoric than reality. Nevertheless, from the beginning of his mandate, Calderón initiated a militarization of the war on drugs, which was then continued by subsequent presidents. Notably, the day after being sworn in, he announced the deployment of thousands of federal troops to counter drug cartels in Michoacán.⁴⁶ Two years later, the Calderón administration started “Operación Chihuahua” as a reaction to the ongoing intense violence between cartels operating in Ciudad Juárez. By 2009, the city was completely militarized.⁴⁷

[T]he government deployed 4,000 troops, 180 vehicles, three Hercules C-130 cargo planes and a Boeing 707 throughout the State of Chihuahua, and provided military training to 1,182 municipal police officers. In February 2009, the federal government sent another 5,000 soldiers to take control of the Ciudad Juarez Police Department.⁴⁸

The following presidents continued the militarization of the war on drugs started by Calderón. Enrique Peña Nieto, who took office in December 2012, created the Gendarmería Nacional, a paramilitary group that was deployed in the rural areas most affected by violence.⁴⁹ Later, President Andrés Manuel López Obrador, who was elected on 2 July 2018, created the National Guard,⁵⁰ which is largely composed of members of the army. While constitutionally the National Guard has a civil nature, in practice its composition is mixed as it is composed of members of the police as well as the army.⁵¹

The militarization of the fight against the drug cartels has raised serious concerns with regard to the protection of individuals. The Inter-American Court of Human Rights (IACtHR) analyzed this phenomenon in 2018 in the case of *Alvarado Espinoza v. México*. Notably, the Court acknowledged the increasing militarization of the war on drugs and highlighted the dangers that this trend poses to human rights:

[A]lthough the States Parties to the [American Convention on Human Rights] could deploy the Armed Forces to perform tasks other than those strictly related to armed conflicts, this use of the military should be limited to the maximum extent possible and respond to conditions of strict exceptionality to address situations of criminality or internal violence, because the military forces are

46 Mike Lasusa, “Mexico’s War on Crime: A Decade of (Militarized) Failure”, *InSight Crime*, 6 December 2016, available at: www.insightcrime.org/news/analysis/mexico-drug-war-decade-failure/.

47 Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, *The Situation of Drug-Related Violence in Mexico from 2006–2017: A Non-International Armed Conflict?*, Guadalajara, 2019, paras 138–139.

48 *Ibid.*

49 George W. Grayson, *The Impact of President Felipe Calderón’s War on Drugs on the Armed Forces: The Prospects for Mexico’s “Militarization” and Bilateral Relations*, US Army War College, Strategic Studies Institute, 2013, pp. 66–67.

50 A. G. Rojo Fierro, above note 22, p. 1432.

51 Elizabeth Melimopoulos, “Mexico’s National Guard: What, Who and When”, *Al Jazeera*, 30 June 2019, available at: www.aljazeera.com/news/2019/06/mexico-national-guard-190630095444350.html.

trained to defeat an enemy and not to protect and control civilians, which is the specific training provided to police forces.⁵²

Accordingly, the Court concluded that “as a general rule, the Court reaffirms that maintaining internal public order and public safety should, above all, be reserved to civil police agencies”.⁵³ As a reaction to this decision, in 2020 President Obrador concluded a presidential agreement authorizing the use of the armed forces in security tasks, which established that the permanent armed forces can “participate in an extraordinary, regulated, supervised, subordinate and complementary manner with the National Guard in the public security functions in charge of the latter, during the time in which said police institution develops its structure, capabilities and territorial implantation”.⁵⁴

The increasing militarization of law enforcement and public security was addressed by the Mexican Supreme Court in a crucial decision, wherein the Court affirmed that

[t]he problem of illicit drug production and trade is not only a public security problem, but also a problem of internal and external security of the State ... all of which makes necessary an increasing participation of the armed forces in their capacity as coadjutants of the federal ministerial authority.⁵⁵

Asked whether the deployment of members of the army to fight against criminal organizations was constitutional, the Court concluded that

[t]he illicit drug trade constitutes a public security problem, and due to its seriousness, it is possible to require the support of the armed forces to assist in the prosecution of such illicit activities, under the command and direction of the federal ministerial authority.⁵⁶

The Court went on to state that the involvement of the army in the fight against the cartels is constitutional under two conditions:

Therefore, from the harmonic interpretation of section VI of Article 89 [of the Political Constitution of the United Mexican States] with numeral 129 [referring to Article 129 of the Political Constitution of the United Mexican States] under analysis, it follows that within the functions that have an exact connection with the military discipline referred to in the latter numeral, there is the function of assisting the civilian authorities when, due to the circumstances of the case, they require military force to safeguard the internal security of the nation. This means that the armed forces cannot, by

52 IACtHR, *Alvarado Espinoza et al. v. México*, Merits, Reparations and Costs, Judgment, Series C, No. 370, 28 November 2018, para. 179.

53 *Ibid.*, para. 182.

54 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, 11 May 2020, Artículo Primero (authors’ translation).

55 Suprema Corte de Justicia de la Nación, Sentencia del Pleno, Acción de Inconstitucionalidad 1/96, 5 March 1996.

56 *Ibid.* (authors’ translation).

themselves, intervene in matters within the competence of civilian authorities. It is imperative that their participation be required. Subsequently, having fulfilled this requirement, it will be necessary that in the operations in which they intervene they are subordinated to the civilian authorities and, in addition, that they adjust to the strict legal framework provided for in the Constitution, the laws emanating from it and the treaties that are in accordance with it, in accordance with the provisions of Article 133 thereof.⁵⁷

Accordingly, the militarization of the war on drugs is constitutional, at least in principle, under Mexican constitutional law. Nevertheless, it has been widely criticized in light of the violations of human rights committed by the forces involved. For instance, following a *visita in loco* of the Inter-American Commission on Human Rights (IACHR) in Mexico in 2015, the IACHR concluded that

[t]his fighting context against drug trafficking and the consequent militarization of areas of the country has resulted on several occasions in an increase in violence and human rights violations, as well as in higher levels of impunity. In other words, the attribution to the armed forces of roles that would correspond to civilian police forces and the deployment of joint operations between the armed forces and State and municipal security institutions in different parts of the country have resulted in greater human rights violations.⁵⁸

Similar concerns have been raised by Human Rights Watch, which has highlighted how violence and victims related to drug violence have dramatically increased since President Calderón started implementing the militarization of the war on drugs.⁵⁹ It is worth recalling that the Mexican government has always denied the existence of any NIACs in Mexico,⁶⁰ and the situation has therefore been assessed vis-à-vis the human rights legal framework. However, the deployment of members of the army and the ensuing increase in violence have a significant impact on the classification of the situation as a NIAC.

The analysis conducted so far has highlighted that the militarization of the war on drugs raises concerns regarding the protection of individuals suspected to be members of cartels. Nevertheless, violence between State forces and drug cartels can amount to a NIAC. Whether the government recognizes the existence of an armed conflict is irrelevant for the purposes of applying IHL; however, the classification made by the State determines the legal framework that it might deem applicable. As mentioned, the situation is further complicated by the deployment of armed forces that are trained to apply IHL but asked to apply a law enforcement paradigm. These circumstances bring particular challenges with regard to

57 *Ibid.* (authors' translation).

58 "Observaciones preliminares de la visita *in loco* de la CIDH a México", 31 December 2015, available at: www.oas.org/es/cidh/prensa/comunicados/2015/112a.asp (authors' translation).

59 Human Rights Watch, *Neither Rights nor Security: Killings, Torture, and Disappearances in Mexico's "War on Drugs"*, 9 November 2011, available at: www.hrw.org/report/2011/11/09/neither-rights-nor-security/killings-torture-and-disappearances-mexicos-war-drugs.

60 A. G. Rojo Fierro, above note 22, p. 1424.

targeting. Furthermore, identifying who is a legitimate target among the members of the cartels is equally problematic. The following sections will address this fascinating conundrum. The discussion will first focus on IHL rules for determining membership in an armed group, and will then analyze how these rules apply to membership in drug cartels.

Targeting drug lords under IHL

When drug cartels are party to a NIAC, one of the main challenges is to understand who is a legitimate target among the members of the group. This part of the article seeks to clarify at what point a member of a cartel would change from being a criminal to being a member of the armed wing of the cartel, hence becoming a legitimate target. In order to solve this conundrum, the authors will suggest a teleological approach.

The notion of membership in an organized armed group

The principle of distinction is the cardinal rule of IHL.⁶¹ It has two prongs. On the one hand, it is necessary to distinguish between civilians and combatants during the targeting process; on the other, members of State forces have to distinguish themselves from the civilian population.⁶² Since the combatant status does not exist in NIACs, according to the majoritarian view, members of State and non-State parties to a conflict can be targeted at all times, by analogy to combatants in international armed conflicts (IACs).⁶³ This seems to be a logical consequence of the rules presented in Additional Protocol II to the 1949 Geneva Conventions. Indeed, according to the Protocol, “armed forces”, “dissident armed forces” and “other organized armed groups” can “carry out sustained and concerted military operations”.⁶⁴ On the other hand, the “civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations ... unless and for such time as they take a direct part in hostilities”.⁶⁵ It therefore seems fairly clear that members of armed non-State groups cannot be considered as civilians. Nevertheless, how their status plays out in practice is controversial.

While State troops are easily identifiable thanks to their distinctive signs, there is debate as to whether members of armed non-State groups have an

61 ICRC Customary Law Study, above note 11, Rules 1, 7.

62 Laurie R. Blank, “Taking Distinction to the Next Level: Accountability for Fighters’ Failure to Distinguish Themselves from Civilians”, *Valparaiso University Law Review*, Vol. 46, No. 3, 2012, p. 766.

63 Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 358. See also Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 4789: “those belonging to armed forces or armed groups may be attacked at any time”.

64 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), Art. 1.

65 *Ibid.*, Art. 13.

obligation to distinguish themselves from the civilian population. While treaty rules applicable to NIACs are silent on the matter, some authors affirm that fighters should have an obligation to distinguish themselves from the civilian population, and that the rules regulating distinction in Additional Protocol I should apply *mutatis mutandis* to NIACs.⁶⁶ The reasoning underpinning this interpretation is that if members of armed groups did not distinguish themselves from civilians, the principle of distinction would be “meaningless and impossible to apply”.⁶⁷ Be that as it may, in practice non-State fighters may not distinguish themselves from civilians, and this is particularly true for members of drug cartels. This raises the challenge of determination of membership in an armed group in practice. Furthermore, it should be recalled that wearing a uniform would not necessarily solve the problem, as not all members of an armed group are legitimate targets – only those belonging to the armed wings of such groups are. However, there are cases when all wings of a specific non-State armed group wear the same uniform.⁶⁸

Membership in an organized armed group determines whether an individual is a legitimate target or not, but since it does not always seem possible to rely on uniforms or other distinctive signs to indicate such membership, how does one determine if an individual can be targeted in a NIAC? In order to solve this problem, scholars have suggested three solutions.

First, membership in an organized armed group could be based on conduct. According to this view, “targeting is justified solely on the manifestation of hostile conduct”.⁶⁹ This approach has the benefit of avoiding, with relative certainty, the possibility of civilians being erroneously considered members of armed groups and therefore targeted. It would be particularly useful when targeting members of drug cartels, most notably as it would synthesize the law enforcement model and the IHL one.⁷⁰ In other words, applying this approach in NIACs to which drug cartels are parties would address the human rights concerns analyzed above. However, this approach could be considered unreasonable because it would create a substantial disparity between members of State forces, who can be targeted at all times, and members of armed non-State groups, who can be lawfully targeted only while they are directly participating in hostilities. Furthermore, it would nullify the distinction between civilians and fighters: if the latter could be targeted only while participating in hostilities, then it would mean that all members of organized armed groups party to a NIAC would “remain part of the civilian population”.⁷¹

Another option could be to look at whether the armed group considers an individual as a member, with the aim of determining membership based on status.⁷²

66 M. Sassòli, above note 63, p. 228.

67 *Ibid.*, p. 276.

68 S. Sivakumaran, above note 18, p. 367.

69 Jimmy Gurule and Geoffrey S. Corn, *Principles of Counter-Terrorism Law*, West, St. Paul, MN, 2011, p. 77.

70 C. Kerr, above note 43, p. 219.

71 ICRC Interpretative Guidance, above note 2, pp. 27–28; Gloria Gaggioli, “Targeting Individuals Belonging to an Armed Group”, *Vanderbilt Journal of Transnational Law*, Vol. 51, No. 3, 2018, p. 911.

72 G. Gaggioli, above note 71, p. 911.

The problem with this approach is that irregularly constituted organized armed groups might determine membership based on a number of idiosyncratic features, to the point that membership might be involuntary, or it might be related to “membership in a clan, tribe, or family”.⁷³ Since such membership depends on the context, it would not be recognizable to State forces and would therefore not be useful for targeting purposes. Furthermore, while the first solution presented above would result in excessively limiting targeting, the second solution under examination would excessively broaden the notion of membership.⁷⁴ Accordingly, the ICRC Interpretive Guidance clarifies that “membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse”.⁷⁵

Lastly, the ICRC has suggested that the crucial criterion for determining if an individual is a member of an armed group is whether the person assumes a continuous combat function.⁷⁶ In other words, individuals whose specific function in the group is “to continuously commit acts that constitute direct participation in hostilities”⁷⁷ are not civilians and are thus legitimate targets. The position put forward by the ICRC, and widely accepted by the scholarship,⁷⁸ rests on the crucial premise that non-State parties to a conflict comprise both fighting forces and a non-military wing. The term “organized armed group” refers only to the armed wing, not also to individuals who support the group without participating in hostilities. However, the question remains as to how to distinguish, in practice, a member of the armed wing from other civilians supporting the group. It has been suggested that “[c]ontinuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict”.⁷⁹ Furthermore, those involved in the planning of attacks, or who command the commission of acts that amount to direct participation in hostilities, similarly are seen to be engaged in a continuous combat function.⁸⁰ On the other hand,

[i]ndividuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, ... remain civilians assuming support functions, similar to private contractors and civilian employees accompanying State armed forces.⁸¹

73 Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, p. 321.

74 Michael John-Hopkins, “Extrapolation of Criminal Law Modes of Liability to Target Analysis under International Humanitarian Law: Developing the Framework for Understanding Direct Participation in Hostilities and Membership in Organized Armed Groups in Non-International Armed Conflict”, *Journal of Conflict and Security Law*, Vol. 22, No. 2, 2017, p. 279.

75 ICRC Interpretative Guidance, above note 2, p. 33.

76 *Ibid.*: an individual is a member of an organized armed group if he or she “assumes a continuous function for the group involving his or her direct participation in hostilities”.

77 M. Sassòli, above note 63, p. 359.

78 G. Gaggioli, above note 71; S. Sivakumaran, above note 18.

79 ICRC Interpretative Guidance, above note 2, p. 34.

80 G. Gaggioli, above note 71, p. 913.

81 ICRC Interpretative Guidance, above note 2, p. 34.

In the absence of clear distinctive signs, how can enemy forces identify a member of an armed group when the person is not directly participating in hostilities? Furthermore, there might be cases when an individual holds both civilian and military functions, hence blurring the lines between the two wings and making it more difficult to assess whether that person is a legitimate target or not. In light of these difficulties, we might be tempted to agree with the idea that members of an organized armed group should be targeted only while they are directly participating in hostilities. However, this conclusion would result in an excessive disparity between members of State forces, who can be targeted at all times, and members of non-State groups, who can be targeted only while engaging in hostile acts. Accordingly, it is necessary to investigate further how to distinguish between legitimate targets and civilians. The next section will focus on this dilemma with specific regard to membership in drug cartels.

Targeting drug dealers: A teleological approach

In order to establish which members of cartels are legitimate targets, we must first consider the belligerent nexus. According to the traditional approach, violent acts of members of an organized armed group are regulated by IHL. On the other hand, when an individual uses force for personal reasons, such as criminal purposes, the applicable legal framework will be law enforcement. The belligerent nexus is expressly required by the ICRC Interpretative Guidance with regard to civilians who are directly participating in hostilities. Notably, the ICRC clarifies that this notion does not refer to the subjective *animus* of the individual; instead, it “relates to the objective purpose of the act”.⁸² This raises crucial challenges with regard to drug cartels. Inasmuch as drug cartels are primarily economic actors that fight in order to pursue their illicit business, the reason why they fight has crucial consequences for the establishment of the belligerent nexus.

This is confirmed by one emblematic episode related to the capture of El Chapo’s son, Ovidio Guzmán. El Chapo was the head of the Sinaloa Cartel, one of the most powerful cartels in Mexico. On 18 October 2019, during a routine search, some police officers found Ovidio Guzmán in the city of Culiacán, the capital of Sinaloa state. Following his capture, members of the cartels launched a heavy-armed attack against State forces: they took control of strategic points in the city, and they “shut down the airport, roads, and government buildings and exchanged fire with security forces for hours, leaving at least eight people dead”.⁸³ This episode clearly highlights how the establishment of the belligerent nexus as interpreted in the traditional sense is problematic. It is therefore suggested that, when cartels are party to NIACs, the belligerent nexus and the criminal one overlap due to the fact that the ultimate reason for cartels to engage

⁸² *Ibid.*, p. 59.

⁸³ Ioan Grillo, “How the Sinaloa Cartel Bested the Mexican Army”, *Time*, 18 October 2019, available at: <https://time.com/5705358/sinaloa-cartel-mexico-culiacan/>. The Sinaloa Cartel and Mexico are parties to a NIAC: see Geneva Academy, “Non-International Armed Conflicts in Mexico”, *RULAC*, available at: www.rulac.org/browse/conflicts/non-international-armed-conflict-in-mexico.

in hostilities is to run their criminal activities. In other words, the objective of cartels is to engage in illegal business, and in order to do so, they might engage in armed violence against the government, to the point that the situation might amount to a NIAC. When the threshold is met, and IHL is applicable, the reason underpinning why the cartels engage in hostilities against governmental forces, or against other cartels, remains economical and criminal in nature.

While drug cartels often do not have a military wing in the traditional sense of the term, there might be cases where some members of the drug cartel can be identified as a military wing in the IHL sense. One clear example is provided by Los Zetas. In 1997, thirty-one members of the Mexican Army's elite Airborne Special Forces Group defected and joined the Gulf Cartel to work as hitmen, bodyguards and drug runners.⁸⁴ Soon thereafter, other former members of the army joined the group, including former members of the Guatemalan army's elite Kaibil unit.⁸⁵ Following the arrest and extradition of Osiel Cárdenas Guillen, head of the Gulf Cartel, tensions started to emerge between Los Zetas and the cartel, until Los Zetas became an independent group in 2010.⁸⁶ While they were within the Gulf Cartel, Los Zetas' role as an elite armed unit would suggest that they had a continuous combat function, and therefore that they qualified as the armed wing of the cartel and would have been legitimate targets under IHL.⁸⁷ However, this does not imply that other members of the Gulf Cartel would not have a continuous combat function. Indeed, while Los Zetas were a special, elite unit, other members of the cartel were armed and engaged in hostilities. How can we establish whether they had a continuous combat function?

In practice, it might be difficult to identify members of the cartel that have a continuous combat function, unless and for such time as they take direct part in hostilities.⁸⁸ However, concluding that they should be targeted only based on their behaviour does not seem to be a feasible solution. Notably, it would create an unreasonable disparity between members of State forces, who can be targeted at all times, and those who have a continuous combat function in the cartel, who would be legitimate targets only while directly engaging in hostilities.⁸⁹

According to the ICRC Interpretative Guidance, "membership in an organized armed group begins in the moment when a civilian starts *de facto* to assume a continuous combat function for the group".⁹⁰ The crucial criterion is continuity: in order to assume a continuous combat function, an individual needs

84 "Zetas", *InSight Crime*, 6 August 2022, available at: <https://insightcrime.org/mexico-organized-crime-news/zetas-profile/>.

85 ICG, *Peña Nieto's Challenge: Criminal Cartels and Rule of Law in Mexico*, Latin America Report No. 48, 19 March 2013, p. 12.

86 *Ibid.*

87 At the time, the Gulf Cartel was party to a NIAC against the Mexican government. See C. Redaelli, above note 9.

88 Fen Osler Hampson, "Afghanistan 2001–2010", in E. Wilmshurst (ed.), above note 18, p. 199.

89 Kenneth Watkin, "Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance", *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, pp. 693–694.

90 ICRC Interpretative Guidance, above note 2, p. 72.

to be integrated into the organization in a permanent and stable fashion. As correctly noted by Gaggioli,

[w]hat matters is continuity regarding membership, which merely means that the person that has been given a specific function in the group has not disengaged from his/her fighting function. The member must become part of a group and his/her acts are not performed outside the organization in a sporadic or unorganized manner.⁹¹

A number of indicia might be used to determine whether an individual has a continuous combat function, such as if they were trained by the organized group, if they received weapons, and if they received selected targets.⁹² How should we apply these criteria to drug cartels?

While the internal organization of the cartels varies substantially, it has some common features. Notably, it is characterized by specialization and detailed division of labour. Furthermore, a number of cartels employ contractors to manage their business, from chemists to armed individuals and assassins.⁹³ How do we identify the legitimate targets? Is it legally correct to posit that all members of the cartel could be the object of an attack?

It is submitted that, lacking a clear military wing, continuous combat function in drug cartels should be assessed using a teleological approach. The rationale underpinning the discussion around the identification of individuals with a continuous combat function, and ultimately the rationale underpinning the principle of distinction, is the fact that fighters can be targeted at all times, while civilians cannot be the object of direct attack.⁹⁴ The reason why fighters can be targeted is that they might also attack enemy forces (while it should be recalled that in NIACs, there is no such thing as combatant privilege). Accordingly, since it is often not possible to identify something comparable to an armed wing in drug cartels, members of the cartels should be considered to have a continuous combat function if their role within the cartel encompasses using force against enemy soldiers. In practical terms, if a drug dealer is trained by the cartel, which provides him or her with weapons and authorizes him or her to use force not only in self-defence but also to attack, then the drug dealer should be considered a legitimate target. This solution seems to be preferable because, should we consider that armed drug dealers are not legitimate targets, we would reach the conclusion that nearly no member of a drug cartel has a continuous combat function, unless the criminal organization has an elite armed unit similar to Los Zetas.

The present authors do acknowledge that this raises crucial human rights issues. Indeed, as Corn has claimed, “[i]t would simply be absurd to suggest that police could lawfully employ deadly force against suspected criminals based solely

91 G. Gaggioli, above note 71, p. 913.

92 *Ibid.*, p. 915; S. Sivakumaran, above note 18, p. 361.

93 Ami C. Carpenter, “Beyond Drug Wars: Transforming Factional Conflict in Mexico”, *Conflict Resolution Quarterly*, Vol. 27, No. 4, 2010, p. 404.

94 ICRC Customary Law Study, above note 11, Rule 1.

on a determination [that] an individual was a member of a criminal group.” In a similar vein, Kerr has asserted that this approach

will not only increase the level of violence in Mexico but will also expose the civilian population to a gruesome war likely to take place on the busy streets of Mexico. Mexican officials will have to take these factors into consideration in determining how to fight the drug cartels.⁹⁵

In order to address these legitimate concerns, it is crucial to analyze in concrete terms how this would play out in practice. How concretely may a State determine that a person has assumed a continuous combat function within a cartel? It is contended that the principle of precaution would play a crucial role here.

It is often propounded that in the “fog of war”, intelligence is limited and is not always reliable or certain. This could have potentially dramatic consequences when soldiers are unable to distinguish between an individual who has a continuous combat function in a drug cartel and an individual who is a member of the cartel but whose activities do not involve the use of force. In practical terms, accountants, lawyers and financial analysts working for the cartel retain their civilian status; the main question concerns drug dealers, who are often armed. However, it has been noted that the idea that the nature of combat is fundamentally chaotic might be outdated.⁹⁶ According to John-Hopkins, “the targeting cycle may not necessarily take place in the ‘fog of war’”; rather, “targeting decisions may be made well in advance of their execution and will often be made jointly at high levels of military and political leadership on the basis of human and signals intelligence”.⁹⁷

This is particularly true for the fight against the drug cartels. Due to the aforementioned peculiarities of having criminal organizations be parties to a conflict, State armed forces often have the opportunity to plan military operations against drug cartels in advance, and this is where the principle of precaution comes into play. This principle requires that

[i]n the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.⁹⁸

Accordingly, when planning an armed attack against a drug cartel, the army needs to take all feasible precautions, including making sure that the individuals who are going to be targeted have a continuous combat function within the group. As clarified by John-Hopkins,

absent a direct and immediate lethal threat, assessing the existence of a “continuous combat function”, and even distinguishing it from many

95 C. Kerr, above note 43, p. 218.

96 M. John-Hopkins, above note 74, p. 289.

97 *Ibid.*, p. 290.

98 ICRC Customary Law Study, above note 11, Rule 15.

supportive forms of direct participation in hostilities, is a process that can only take place in the context of targeted operations that are planned at the operational level of command.⁹⁹

In practical terms, the army can rely not only on intelligence, surveillance and reconnaissance capabilities, but also on social network analysis that seeks to “understand the social dynamic that sustains ongoing fighting”.¹⁰⁰

In sum, while considering armed members of drug cartels as individuals having a continuous combat function, and therefore legitimate targets, could raise concerns with regard to the protection of civilians, in practice these concerns are counterbalanced by the reality of military operations against drug cartels. Notably, the principle of precautions in attack, coupled with the fact that most military operations are planned in advance, would drastically mitigate such risks. Clearly, concerns would remain in a case like the arrest of El Chapo’s son, which led to intense fighting between State forces and the Sinaloa Cartel.¹⁰¹ However, these episodes are relatively rare and do not reflect the nature of the daily fighting.

Conclusion

When a drug cartel is a party to a NIAC, crucial challenges emerge. The first question concerns the fact that drug cartels are primarily economic actors and do not pursue political aims, unless such aims are necessary to run their illicit business. While an organized armed group’s reasons for fighting do not prevent the group from being party to a NIAC, the fact that its ultimate aim is not political raises a number of problems. Notably, the criminal aims of cartels have an impact on their structure as well as on the way they fight. Furthermore, the duration of the conflict might be potentially never-ending. Criminal groups engage in armed confrontations inasmuch as it is necessary to run their illicit activities; accordingly, they do not have strong reasons to take part in peace talks or to put an end to armed confrontations.

Some authors have suggested that applying IHL to the war on drugs would increase the risk of killing civilians, as any member of a drug cartel party to a NIAC would be a legitimate target. IHL applicable to NIACs originally emerged to regulate armed conflicts between governmental forces and rebel groups that engage in armed hostilities for political reasons. The current legal framework may therefore seem unfit to deal with situations of violence between State forces and criminal organizations, or between such organizations.

In light of this observation, it has been suggested that a different legal framework should be negotiated at State level to create new rules that would specifically address violence between State forces and drug cartels, as well as

99 M. John-Hopkins, above note 74, p. 280.

100 *Ibid.*, p. 290.

101 At the time, the Sinaloa Cartel was party to a NIAC against the Mexican government. See Geneva Academy, above note 83.

between such cartels.¹⁰² Categories such as civilians directly participating in hostilities and fighters having a continuous combat function do not reflect the reality on the ground and do not seem useful in guiding enemy soldiers in their targeting decisions. In this article, we have propounded a solution that would allow applying the current IHL rules to drug cartels. Absent a new treaty on the matter, IHL remains the relevant legal framework, and it is paramount to understand how to apply it to NIACs involving the participation of drug cartels.

Do we need new rules? In many ways, we do. IHL was created taking specific conflicts into consideration, namely IACs, at a time when digital technology and high-tech weaponry did not play a major role in warfare and where NIACs were exceptional. As NIACs have largely outnumbered IACs in recent decades, scholarship and practice have been gripped by questions not only on how to adapt IHL, but on whether we should have new rules altogether. While this article has demonstrated that the current legal framework can be applied to drug cartels, the peculiarities of criminal organizations beg for new rules. Notably, while the law enforcement paradigm does not seem adequate to address situations where the intensity of violence meets the IHL requirement, applying IHL and its rules on targeting raises serious challenges and concerns which would be better addressed if new, *ad hoc* rules were negotiated. In the meantime, the teleological interpretation of the current legal framework seems to offer the best solution to address these challenges.

102 C. Kerr, above note 43, p. 221.