

# Legal challenges posed by the war on drugs and the fight against organized crime in Colombia

## Desafíos jurídicos planteados por la guerra contra las drogas y la lucha contra el crimen organizado en Colombia

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### *Abstract*

This article aims to highlight the evolution of crime in Colombia and how it is a drawback to the current understanding of the applicability of international humanitarian law. The peace agreement between the Revolutionary Armed Forces of Colombia-FARC, the government and the emerging armed actors are a challenge to Colombian law and legal institutions. Accordingly, the article concluded that the use of force by the Colombian government against drug trafficking organizations, or so-called Criminal Gangs-BACRIM, does not seem to be the legal way to combat them since these organizations do not necessarily participate in hostilities, which means that the government has to follow a specific procedure.

**Keywords:** International humanitarian law; organized crime; armed conflict; government

### *Resumen*

Este trabajo tiene como objeto exponer la evolución del crimen en Colombia y como esta desafía la comprensión actual de la aplicabilidad del derecho internacional humanitario. El acuerdo de paz entre las Fuerzas Armadas Revolucionarias de Colombia-FARC, el gobierno y los actores armados emergentes son un reto para el derecho y las instituciones jurídicas colombianas. Luego del análisis de estos factores se concluye que el uso de la fuerza por parte del gobierno colombiano contra las organizaciones de narcotráfico, o las llamadas Bandas Criminales-BACRIM, no parece ser la forma legal para combatirlos, toda vez que estas organizaciones no necesariamente participan en las hostilidades, lo cual significa que el estado tiene que seguir un procedimiento específico.

**Palabras clave:** Derecho internacional humanitario; crimen organizado; conflicto armado; gobierno



## INTRODUCTION

The existing international legal regimes regulating the use of force seem inappropriate to respond to the challenges posed by the fight against organized crime which is known in Latin America as the War on Drugs. On the one hand, International Human Rights Law (IHRL) does not adequately address situations where the state faces drug trafficking organizations with the ability to challenge state authority and control territory. On the other hand, International Humanitarian Law (IHL) applies only in situations of armed conflict; despite the “War on Drugs” label and the increasing use of military forces therein, this remains primarily a law enforcement initiative in which a determination of whether IHL applies should depend on an analysis of each context where anti-drug activities are carried out.

Colombia, and particularly the recent evolution of the situation, exemplifies all these challenges. The peace agreement between the government and the Fuerzas Armadas Revolucionarias de Colombia - Ejército del Pueblo (FARC, Revolutionary Armed Forces of Colombia) has change the context, but other armed conflicts are still ongoing such as, for instance, with Ejército de Liberación Nacional (ELN, National Liberation Army). IHL regulate the use of force within these conflicts, however, there is a parallel fight against organizations called BACRIM that are not involve in hostilities and focus in drug trafficking or other type of illicit activities.

Analysis conducted in the department of Antioquia, determined:

A few years after the demobilization of the AUC new groups called BACRIMs (Bandas Criminals, Criminal Bands) emerged, sometimes described as a new generation of paramilitaries. While these groups are mostly composed of demobilized paramilitaries, they are not a direct reorganization of the paramilitaries —for instance, they are not receiving any state support— however, there are some similarities between the BACRIMs and their paramilitary predecessors. Like the paramilitaries, the BACRIMs’ activities are closely related to drug trafficking, but they use violence to secure drug trafficking routes rather than having any counterinsurgency objective ([Wienand y Tremaria, 2017](#), p. 38).

As in armed conflict, human rights law complements IHL when it is appropriate. However, the reverse is not true: applying IHL in situations of peace (or internal tensions), when human rights law is the relevant authority, is inappropriate and endangers the protection of the population. This article discusses the definition of armed conflict, the classification of the situation in Colombia and specifically the definition of the fights against BACRIM, in order to conclude on the legality of the use force in different context.

### METHODOLOGY

This analysis is conducted through the theoretical and practical study of the norms of international humanitarian law and their application in cases, likewise, the study of the criminal policy of the Colombian state. It is a descriptive type of research since it illustrates the evolution and transformation that the armed actors in Colombia and the legal procedures for their sanction and combat.

### DEFINITION OF ARMED CONFLICT

IHL is rooted in ancient civilization principles and custom surrounding the warfare. The modern codification of IHL started in the nineteenth century and now represents a set of rules seeking to limit the effects of armed conflict, while acknowledging military requirements of States. IHL “protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare” (International Committee of the Red Cross-[ICRC, 2004a](#)). IHL applies only in armed conflict —after the conflict actually begun— and distinguishes between International Armed Conflict (IAC) and Non-International Armed Conflict (NIAC). IAC involved at least two states and NIAC are “restricted to the territory of a single State, involving either regular armed forces fighting groups of armed dissidents, or armed groups fighting each other” ([ICRC, 2004a](#); [Melzer, 2016](#), p. 66).

As IHL does not apply to international tension or disturbances, a recurrent problem is to differentiate internal tension to NIAC; because there is no definition of armed conflict in IHL and the differentiation between those types of situation is left to a case-by-case study. In some opportunities international courts have developed jurisprudence on the matter. They state that two conditions are to be met to determine if a situation is one of armed conflict: The intensity of the conflict and the organization of the parties (Vité, 2009). For instance, the International Criminal Tribunal for the former Yugoslavia (ICTY, 1997) first stated:

The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal [...] character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law [...] (p. 562).

The Tribunal reiterated the same two conditions (ICTY, 2005):

Determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organization of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant (ICTY, 2005, n. 23. par. 170; Vité, 2009, p. 78).

The intensity of the conflict can be analyzed through an examination of factors including the duration of the conflict, the frequency of the acts of violence and military operations, and the nature of the weapons used. Meanwhile, the organization of the parties is often evaluated by considering whether or not at least one-armed group has a chain of command (Vité, 2009).

And, the ICTY (2004), in a case within its jurisdiction, exposes:

Further details can be found in the Milosevic case. The Chamber found the existence of an armed conflict because the Kosovo Liberation Army “conducted many operations against the police, including killing people who had been employees of the police and those who had cooperated with the police, amounting to about 20 persons in 1997.” Explaining that both parties were using weapons, including rifles, guns, and mortars (pp. 28–31).

The International Committee of the Red Cross (ICRC) has developed these criteria, which even though the interpretation of the ICRC is not binding it offers guidance on how to interpret IHL. It identifies a Non-International Armed Conflict (NIAC) in the following terms:

In general, in non-international armed conflict: nongovernmental armed groups fight either among themselves or against governmental forces; with a level of intensity exceeding that of isolated and sporadic acts of violence; and with a level of collective organization enabling them to carry out sustained and concerted operations. In addition, the armed groups may also exercise a certain minimum control over the territory. Exercising such control entails no change in the status of the parties, but it does determine which legal instruments are applicable ([Vité, 2009](#), p. 75–76).

And interpreting Article 1(2) of Additional Protocol II and Common Article 3, the ICRC states:

First, the hostilities must reach a minimum level of intensity. This may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces. Second, nongovernmental groups involved in the conflict must be considered as “parties to the conflict,” meaning that they possess organized armed forces. This means for example that these forces have to be under a certain command structure and have the capacity to sustain military operations ([ICRC, 2014](#)).

Following current international jurisprudence and doctrine only two criteria —intensity of violence and organization of armed groups— to classifies a situation of violence as an armed conflict.

The subsequent part will analyze first the Mexican War on Drugs and then the Colombian upcoming armed conflict using the light of those criteria.

### COLOMBIA:

#### FROM ARMED CONFLICT TO THE FIGHT AGAINST ORGANIZED CRIME

The history of violence in Colombia is long and complex.

The presence of various organized armed groups, the intensity of the violence, and the duration of the conflict make the classification of the situation as an armed conflict unproblematic, and the NIAC has been recognized for many years now. The peace process and the signature of an historical agreement in August 2016 ended the confrontation between the FARC and the Colombian government. However, several NIAC continue to exist between the government and several armed groups ([Padilla & Bermúdez, 2016](#), pp. 201–202).

In this section we will not focus on the long time and ongoing NIAC but on the fight against criminal bands which, until May 2016 were not considered as organized armed groups and there was no armed conflict between the Colombian government and these criminal bands. In May 2016 the Colombian government changed its strategy to fight them and declare that it will bomb some criminal groups (called BACRIM for *Bandas Criminales*, [Criminal Band]), arguing IHL applies because those groups are organized armed groups

The Colombian government uses the pretext of applying IHL to justify the use of military forces. By doing so, Colombian state simply ignore the fact that there are no previous hostilities between the government and the BACRIM, which mean the situation does not meet the requirement to be classified as an armed conflict. By extension, acting undermines the rule of law. This section explores the recent evolution of the fight against the BACRIM in Colombia illustrating the argument that the implementation of the law enforcement initiative, namely the War on Drugs, is contrary to existing international law ([Perret, 2014](#)).

## COLOMBIAN ARMED CONFLICT

For sixty years, Colombia has experienced an armed conflict, which is usually considered as a NIAC (Nieto, 2008). Although the Uribe government (2002-2010) long tried to deny the armed conflict, calling the situation a “fight against terrorism,” the current administration has recognized the existence of a conflict (Semana, 2011, p. 1). Indeed, it is easily characterized as a situation of armed conflict due to the presence of several organized armed groups with a responsible command which control some parts of the territory—for instance, the Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia, FARC), the Ejército de Liberación Nacional (National Liberation Army, ELN), or the new generation of paramilitaries—as well as the intensity of violence against the state and civilians (Massé, 2011). In September 2012, the Colombian government and the FARC started to negotiate the end of the armed conflict and signed a peace agreement in August 2016 (Semana, 2012; Republic of Colombia & FARC-EP, 2016). Nevertheless, the armed conflict is still ongoing. The ICRC still identifies at least five ongoing armed conflict in Colombia: 1) The National Liberation Army (ELN); 2) the Gulf Clan; 3) the EPL (Popular Liberation Army); 4) FARC dissidents, specifically Front 1, 7 and 40; 5) clashes between ELN and EPL (EL País, 2019).

Then, IHL (Common Article 3 and Additional Protocol II) applies to the Colombian NIAC.

## ORGANIZATION AND HISTORY OF THE BACRIM

The question of their structure and classification as part of the NIAC is not new. Before the Colombian government proclaimed them organized armed groups in May 2016, several organizations suggested that BACRIM should be considered part of the ongoing NIAC. Reacting on the 2012 on a legal framework for peace outlining the terms of a possible peace negotiation, which excluded the BACRIMs from the framework, because criminals are not part of the Colombian armed conflict (Pérez-Santiago, 2012), organization such

as International Crisis Group (ICG, 2007) or Human Rights Watch (HRW, 2010) suggested that certain BACRIM meets the requirement to be considered part of the armed conflict. Even the Defensor del Pueblo—principal public official responsible for the protection of human rights in Colombia—declared that some BACRIM have sufficient structure and command authority and structure to constitute illegal armed groups under IHL (El Espectador, 2012; El Tiempo, 2012). As their current organization and activities is built through their history it is necessary to go back in history.

After a failed attempt of peace negotiation with guerilla group FARC between 1998 and 2012, the following administration of president Uribe (2002-2010) chose a different tactic. On the one hand, the administration strongly attacked the guerrillas and increased its cooperation with the US (Rojas, 2013). And on the other hand, it negotiated with the AUC and managed to demobilize most of the paramilitary forces (Grajales, 2011). A few years after the demobilization of the AUC new groups called BACRIMs emerged, sometimes described as a new generation of paramilitaries (Granada, Restrepo, & Tobón, 2009; Massé, 2010). While these groups are mostly composed of demobilized paramilitaries, they are not a direct reorganization of the paramilitaries—for instance, they are not receiving any state support—however, there are some similarities between the BACRIMs and their paramilitary predecessors (Rico, 2013). Like the paramilitaries, the BACRIMs' activities are closely related to drug trafficking, but they use violence to secure drug trafficking routes rather than having any counterinsurgency objective (Arias & Restrepo, 2010).

The evolution of BACRIMs—and their structure—has been marked by alliance, pacts, and fights between them and with/against guerilla groups such as FARC and ELN, “They went from 22 small armed structures with local presence in 2007, to 5 criminal networks articulating actions by a number of local armed franchises in 14% of Colombia's municipalities by 2013” (Massé & Munévar, 2017, pp. 12–13).



As Mexican Drug Trafficking Organizations (DTOs), Colombian narco-traffickers have adapted to new realities. They are no longer family business or integrated organizations but work as networks. They have also adapted their structure depending the environment and their necessity: in rural regions, such as the department of Cauca, their structure is more hierarchically with a purpose of “direct combat and coordinated military actions” while in urban areas they rely on local street gangs to exercise violence on their behalf (McDermott, 2014, p. 4). A similar comment made on Mexican DTOs can be made for Colombian BACRIM a network of cells and is not necessarily synonym of poorly organized group.

The most powerful groups are the Urabeños (Autodefensas Gaitanistas de Colombia), Rastrojos, ERPAC, and Águilas Negras. The Colombian forces have constantly attacked the BACRIM targeting and vanishing their original leadership (United Nations High Commissioner for Refugees-UNHCR, 2015) However, they maintain over 2,500 men (or 10,000 depending of the estimation) and their structure and traffic are intact. Their military capacity has also been maintained strong. Insight Crime considers that they are:

Upon highly trained and well-armed units, often made up of former members of the security forces. These units are able to carry out conventional military actions, have specialized weaponry and explosives skills. Some BACRIM can carry out these operations internationally (McDermott, 2014, p. 1).

By 2009, the combined military capacity of these groups exceeded that of Colombia’s FARC rebels, executing double the total number of militant actions (Romero & Arias, 2010).

However, even though there is no doubt they are well armed (with automatic and heavy weapons) their willingness to fight —either the state or guerrilla groups— is no evident. BACRIM have control of “rural areas suitable for the manufacturing or transportation of cocaine and impoverished zones in cities such as Medellin” where the state has not a lot of interests (Attanasio, 2013). Then confrontations are not common which raise question about the intensity of violence

to classify the situation as an armed conflict between the state and the BACRIM.

INTENSITY OF THE CONFRONTATION BETWEEN  
BACRIM AND COLOMBIAN GOVERNMENT

As mentioned before, the intensity of an armed conflict can be analyzed through an examination of factors including the duration of the conflict, the frequency of the acts of violence and military operations, and the nature of the weapons used (Vité, 2009). It also has been said that the BACRIM exist since the process of the demobilization of the paramilitaries (2005), which mean that the duration of the potential conflict is met. As BACRIM inherits directly from paramilitaries groups they have kept heavy weapons and military techniques. However, the frequency of the acts of violence and military operations is subject to debate.

In January 2014, the International Criminal Court (ICC) stated that the BACRIM group Urabeños had reached a level that merits monitoring. The group is organized enough and “could become part of the armed civil conflict” but the current level of conflict between the BACRIM and the state forces, or the BACRIM and the guerrillas is not “sufficiently intense” to be considered an armed conflict (Barón & Gómez, 2015, p. 41). Then, the question is if the intensity of the confrontation between the state and the BACRIM groups has increased in the past 2 years.

First looking at the state initiative against BACRIM groups, police forces mostly lead the operations against those groups. Even though Colombian police is highly militarized, the difference exist and make sense as —until May 2016— BACRIM were not considered as part of the armed conflict. In a similar vein the use of force by Colombian army depend on the classification of the situation as law enforcement or combat. “They distinguish between two kinds of operations: first, operations during hostile scenarios (Operaciones en escenarios de hostilidades) and second, operations to maintain security (Operaciones para el mantenimiento de la seguridad)” (Von, 2011, p. 160).

Until May 2016, operations against BACRIM were considered as law enforcement. Many operations leads to arrest BACRIM members, as well as drugs and weapons, successfully. For instance, between 2009 and 2015 “around 6,700 members of the Urabeños have been arrested, with authorities seizing 2,282 weapons, 55 tons of drugs, and around \$26.2 million from the group” (Lohmuller, 2015, p. 1). Some of those operations include military personnel and equipment, as it was the case for missions against the leaders of the Urabeños: “over 20 Black Hawk helicopters and 1,200 police and military officers have been sent to support the mission in Uraba” (Semana, 2015, p. 1).

From the side of the BACRIM fewer examples are available. The lack of data on the subject is disturbing in Colombia (several public entities recollect statistic on the conflict and related violence)<sup>1</sup>. The few data available reports “during the period from 2006 to 2008, 55% [BACRIM] group activities were offensive actions, 26% were threats, and only 12% were combat with public forces” (Perret, 2014, p. 136). Then the data are anecdotal: in 2012, the Urabeños showed their capacity to coordinated actions organizing an armed or enforced strike (paro armado); however, even though they succeed in showing their capacity there were no hostilities. Another potential example happened in September 2014, when the Colombian government suspected Urabeños (alongside with FARC) to be responsible for an attack on police forces which left seven killed (Janes, 2014).

Considering the fact that these examples are scattered in time, not necessarily intense, and the number of victims is not comparable to any other armed conflict situation it is hard to consider that there is an armed conflict opposing the Colombian government to BACRIM groups. The situation is more likely a situation of the government fighting organized crime and the law governing this situation is human rights law and not international humanitarian law as the Colombian government have stated.

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<sup>1</sup> Several interviews to academics and officials suggest that there is no data on the question.

CONCLUSIONS: CONSIDERATION ON THE USE OF FORCE

The law of NIAC allows targeting members of an armed group during the hostilities and, if they have a continuous fighting function, “not only while directly participating in hostilities through specific acts but also [...] as long as they do not fall into the power of the enemy or are otherwise hors de combat” ([Sassoli, Bouvier & Quintin, 2011](#), p. 235). Therefore, to know if the drug traffickers or BACRIM member can be lawful targets, it is necessary to identify them as members of an armed group who are participating directly in hostilities or who have a continuous fighting function.

In a NIAC, is it difficult to distinguish members of an armed group from the population: “you can’t easily distinguish a group of ordinary people doing their ordinary business from armed groups. In an insurgency, you are dealing with civilian-clothed opponents” ([BBC, 2010](#), p. 1). IHL of NIAC does not provide any elements of definition of members of armed groups<sup>2</sup>, and the definition of “combatant” and “civilian” provided in the law of IAC<sup>3</sup> is not helpful because “[t]he distinction between the first and the second category ... is a negative one: all persons who are not combatants are civilians” ([ICRC, 2004b](#), p. 8).

Although there is no real definition of “civilian,” it is generally accepted that civilians are people “who are neither members of state armed forces nor of organized armed groups and who do not otherwise participate in hostilities” ([Melzer, 2005](#), p. 13). Applying this last definition to BACRIM member in Colombia, or drug traffickers and considering that armed groups in a NIAC are not easily identifiable, the potential affiliation of drug traffickers to the BACRIM depends whether they directly participate in the hostilities.

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<sup>2</sup> The only reference to this distinction is in which asserts that, “persons taking no active part in the hostilities ... be treated humanely” ([ICRC, 1949](#), art. 3).

<sup>3</sup> [ICRC, 2014](#), Additional Protocol I arts. 43(1), 50(1).

In the wording of the ICRC, “the notion direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict” (Melzer, 2009, p. 70). Hostilities should be understood as “offensive or defensive acts and military operations” in an armed conflict (Quéguiner, 2003, p. 11).

IHL permits, under certain circumstances, the targeted killing of individuals supporting the parties to an armed conflict, workers in ammunition factories, for example (Sassoli, 2003, p. 9). Thus, the remaining question is if the activities of drug trafficking and financial support to an armed group can be considered direct participation in hostilities.

The distinction between whether certain activities might be considered as a direct participation has been subject to extensive debate (Melzer, 2005). For instance, the Inter-American Commission on Human Rights (IACHR) explains:

Indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party (OAS, IACHR, 1999).

Providing food and clothing to fighters, for example, is not direct participation because it does not “pose an immediate threat of actual harm to the adverse party” (Melzer, 2005, p. 21). Similarly, drug trafficking—transportation and sale of narcotics—does not in and of itself represent a threat to the “adverse party”. Nevertheless, the revenue from drug trafficking could enable traffickers to provide financial support to a party of the armed conflict.

To conclude, most of the BACRIM are not part of the Colombian armed conflict and cannot be targeted to be killed but should benefit of civil protection in an armed conflict unless they participate in hostilities. The law governing the fights against BACRIM is human rights law and not international humanitarian law as the Colombian government have stated.

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