New drug trafficking armed groups in Colombia and the applicability of International Humanitarian Law

Los nuevos grupos armados narcotraficantes en Colombia y la aplicabilidad del Derecho Internacional Humanitario

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Abstract

Colombian's new drug trafficking groups show us a violent scenario that must be carefully analyze. The level of violence and deathly consequences that can be attributable to them must make us pay attention of the law that is applicable to them and to the Colombian armed forces when they are acting against those groups. In Colombia, the government and authorities have admitted an easy position, establishing that these new groups –called BACRIM- are simply gangs or common delinquency, while they in many occasions act as something else. Accordingly, the purpose on this paper is to analyze the particular case of one of these groups in relation to the applicability of International Humanitarian Law rules of non-international armed conflicts, seeking to contribute to the discussion about which regulatory framework is applicable to this phenomenon.

Key words: *Non-international armed conflict, BACRIM, International Humanitarian Law, combatants*

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Resumen

Los nuevos grupos narcotraficantes en Colombia plantean un escenario violento que merece ser analizado cuidadosamente. El nivel de violencia y el número de muertes atribuibles a estos grupos ameritan analizar con sumo rigor jurídico el marco normativo aplicable para su combate por parte de las autoridades colombianas. En Colombia, el gobierno y las demás autoridades han asumido una posición simple al respecto considerando que muchos de estos nuevos grupos, denominados indistintamente BACRIM, son solo bandas de delincuencia común, mientras que en muchas ocasiones actúan como algo más. En este sentido, el propósito de este artículo es analizar el caso particular de uno de estos grupos denominados como BACRIM y analizar según su accionar la aplicabilidad de las normas del Derecho Internacional Humanitario de los conflictos no- internacionales, buscando con ello contribuir de alguna manera a la discusión sobre los marcos jurídicos aplicables a dicho fenómeno criminal.

Palabras clave: *Conflicto armado no internacional, BACRIM, Derecho Internacional Humanitario, combatientes.*

Introduction

The existent international legal framework on non-international armed conflicts is now an evolving framework and it is facing new realities. Its complexity is evident in the rules that have been established, but mainly in its application. Constantly we have to face political discussions concerning the applicability of international humanitarian law, when what is really need and is required is legal analysis about it. Thus, the world will see in coming years how the new realities and conflicts will necessarily generate the creation of new regulatory changes in this topic or at least new interpretations of the existing law by case law development.

Colombian's new drug trafficking groups show us a violent scenario that must be carefully analyze. The level of violence and deathly consequences that can be attributable to them must make us pay attention of the law that is applicable to them and to the Colombian armed forces when they are acting against those groups. In Colombia the authorities have admitted an easy position, establishing that these new groups –called BACRIM- are simply gangs or common delinquency, while they in many occasions act as something else. Accordingly, the purpose on this paper is to analyze the particular case of these groups in relation to the international humanitarian law rules of non-international armed conflicts, seeking to contribute to the discussion about which regulatory framework is applicable to this phenomenon.

To develop this topic, the paper will be divided in four sections. First, it will present the historical background of the Colombian's armed conflict, introducing to the reader some of the causes that lead us to face today with these new armed groups. The analysis of these new armed structures is not possible if we do not understand the past that gave them life. Consequently, as a background, this first part will describe the most important facts, but will not constitute an exhaustive analysis of the armed conflict in Colombia.

Second, the analysis will be focus on these new armed groups known as BACRIMs or neo-paramilitaries. It will expose the reasons of their emergence, the way they were understood by the government of president Alvaro Uribe Velez, and their presence and activities in the territory. This analysis will be carried out in a general way, thus, even though today we can speak of different groups that act in different ways, this part of the paper will be focused on their similarities.

The third part of this paper will present the most important aspects of the regulatory framework applicable to non-international armed conflicts. To do this, it will analyze the provisions of common Article 3, the decision in the *Prosecutor v. Tadic* case and the Additional Protocol II to the Geneva Conventions. There will be a special emphasis on the complementarity of these rules and the most important aspects and consequences of them.

Fourth, this paper will compare the facts presented about the BACRIMs with the existing framework relative to non-international armed conflict. To do this, it will use the example of Los *Urabeños* or *Clan Usuga* a dangerous BACRIM in Colombia that have many similarities with the other BACRIMs. With this comparison it will be possible to determine if it is likely to understand BACRIM as parties to Colombian conflict. Finally, the conclusions will set out the consequences and impacts of a possible application of international humanitarian law to the actions of these kinds of groups. Three fundamental aspect will be describe: (i) changes in the way the Colombian state has been fighting these groups, (ii) implications for the victims of these groups and (iii) the law of transitional justice.

Armed conflict in Colombia: Multiple actors, multiple stages

1. The roots of the armed conflict and the guerrillas' emergence

Colombia has experienced in the last sixty years -more or less- the progressive advancement of a complex non-international armed conflict. This conflict grew from the periphery of its territory to the center of the country. During a first phase, the guerrillas became strong in rural areas with limited government presence, where they imposed a local order marked by their political ideals. Accordingly, Liberal guerrillas were the beginning of many current subversive groups, which were born because of the traditional bipartisan fight between conservatives and liberals.

These two political parties-consumed by their lust for power- forgot their principles and ideologies and waged a war against each other for at least 60 years, ending with a political agreement called *Frente Nacional*. This arrangement was an electoral and political coalition between liberals and conservatives since 1958 to 1974, years in which within the Colombian democracy it was only possible to elect candidates from these two parties. The agreement involved the alternation of the presidency over these 16 years and an identical number of liberal and conservative members in Congress and other public offices. Clearly, other political parties or movements were excluded from the political and electoral platform. In consequence, during this period the idea of fundamental plurality in democracy was refused, leaving little or no spaces for the opposition.

During these years, different ideas were never heard, diversity was never respected and political opposition of social movement was closed. This situation led many people to join and strengthen the rebels, seeing arms as the only source of political opposition.[3] On this point, it is necessary to emphasis that exactly during these years the communist movements were growing in Latin America. Thus, Colombia was witness of the creation of new illegal movements including some that are still in the conflict, like it is the case of the E*jército de Liberación Nacional* (from now on ELN) and the *Fuerzas Armadas Revolucionarias de Colombia* (from now on FARC). However, political exclusion was not the only cause for the development of the armed conflict in Colombia. In addition, Colombia has been historically a country with huge social inequalities, with a continuous land concentration in the hands of a few, with weak institutional presence and with a development model that has primarily benefited large economic groups.

As a result, at the beginning of their existence, the guerrilla movement's motivation was to achieve a just agrarian and land reform and the equitable redistribution of national resources. In sum, they intended to achieve a significant social transformation. But as their financing capacity grew, they became more autonomous with respect to local communities and also less dependent on ideological or political justifications for their violent actions.

2. Drug-Trafficking and counterinsurgency groups

Within this scenario, another event took active part of reality in the late seventies: the rise of marijuana and cocaine plantations. The incredible revenues from the illegal activities and the drug trafficking business-in addition to the delegitimization and absence of governance by the State- increased the problem of violence in the country. Thus, the drug trafficking illegal business permeated all spheres of Colombian society. The ethics of each sector in the country fell in an unprecedented way. In the lower classes, the phenomenon of being paid for

3 Daniel Pecaut and Liliana González, *Presente, pasado y futuro de la violencia en Colombia, Desarrollo Económico*, Vol. 36, No. 144, [online], available in: http://www.jstor.org/stable/3467131, (Last visited June 29, 2015)

killings converged with the culture of opportunism and drug selling; while the political class was tempted by the capital fund of the mafia, placing the country in a political situation that was called "narco-democracy".

The expansion of guerrilla's domains coincided with the accumulation of the first capital of drug trafficking. The generalization of kidnapping and attacks add new characters to the conflict and affected all sectors of the Colombian society. The reaction from some guerrilla's victims, some business men and from the same drug trafficking groups was to support the creation of private paramilitary groups, whose organization was promoted initially by the army and government. Accordingly, the Colombian government authorized the creation of self-defense groups which in theory would execute preventive actions to alert the authorities about possible guerrilla attacks, but which in practice acted in different ways.[4] The idea of the self-defense groups against the guerrillas – counterinsurgency- was materialized with the creation of the *Autodefensas Unidas de Colombia* (from now on AUC) which rapidly absorbed the members of the initial legal peasant self-defense groups and the illegal ones that have begun to operate. [5,6,7]

Like the guerrillas, the AUC were financed mainly from their drug-trafficking business and the extortions to business men and land owners. This criminal group was known by their brutality and violent actions. It can be said that the AUC did not have a specific political ideology or discourse, but they were clearly recognized as an organization towards the principles of the right oriented ideology. The reality is that they did not express a concrete ideology or desire for political reforms, but they directly oppose and fight against the guerrillas, especially against the FARC.[8]

By the years of appearance of these groups, the guerrillas had intensified their actions against all civil society, so paramilitaries took advantage of the weakness of the state to "legitimize" their actions against these guerrillas. Sadly they received approval and support from many sectors of Colombian society. But, although they based their actions on the idea of counterinsurgency, it is clear at this point that drug-trafficking was one -if not their first- purposes.

4 D. 3398/1965, diciembre 24, 1965, Diario Oficial [D. O. 31.842, enero 25, 1966] (Colom.). and L. 48/1968, diciembre 16, 1968, Diario Oficial [D.O. 32.679, diciembre 26,1968] (Colom.).

5 Colombian Government withdrew it sanction of self-defense groups in 1989. D. 815/1989, abril, 19. 1989 Diario Oficial [D. O.38.785, abril, 19, 1989] (Colom.).

6 Katie Kerr, *Making Peace with Criminals: An Economic Approach to Assessing Punishment Options in the Colombian Peace Process,* The University of Miami Inter-American Law Review, Vol. 37, No. 1, p.58, [online], available in: http://www.jstor.org/stable/40176604, (Last visited June 29,2015). I/A Court H.R., Case of the Rochela Massacre v. Colombia. Merits, Reparations and Costs. Judgment of May 11, 2007. Parr.82.

7 Cynthia J. Arnson, The peace process in Colombia with the Autodefensas Unidas de Colombia-AUC, Woodrow Wilson Center Reports on the Americas #13, Woodrow Wilson International Center for Scholars, Washington DC, 2005. p. 2.

8 David E. Spencer, Colombia camino a la recuperación: Seguridad y gobernabilidad 1982-2010, Center for Hemispheric Defense Studies, National Defense University, Washington DC, 2011.p.50.

Paramilitary groups become part of the conflict and established themselves as highly structured groups with a responsible command and a permanent struggle for territorial control. The presence of the AUC increased from approximately 279 municipalities in 1997 to 455 in 2002. Their stuctrure was divided into blocks, among which highlights the ones called: Norte, Centauros, Tolima, Calima, Élmer Cárdenas, Metro, Cacique Nutibara, Autodefensas Campesinas del Magdalena Medio, Autodefensas Campesinas de Cundinamarca and Autodefensas Campesinas de Puerto Boyacá.[9] All these blocks, -through violence- achieved territorial control in many regions of the country. Massive displacement of peasants, terror against the leaders of organizations, massacres and land grabbing, are only examples of their terrible means to achieve their goal: territorial control.

3. The demobilization process of the paramilitaries

Since 2002 and during the presidency of Alvaro Uribe Velez, public security became the main topic in the public agenda. Thus, Uribe's government established as priority the security policy named as "democratic security", which was based on the idea of strengthening institutional capacity to the fight against illegal armed groups and regain control over all national territory. As part of the execution of this strategy, between 2003 and 2006, the government promoted and developed the process of demobilization of the paramilitary groups. This process of three years negotiations ended with the collective demobilization of 31,689 members of the AUC, 3.554 individual demobilization, 1.579 deaths in combat of members of these groups and the capture of 12,100 more.[10]

Also, as a result of the negotiation, the National Congress enacted the Law No. 975 of 2004, named as the "Justice and Peace Law". This law was enacted as a typical measure of transitional justice, but today, seven years later, its balance is quite complex. One of the most important problem of this transitional process is that some of those demobilize people continued committing crimes and they have also formed new drug-trafficking armed groups that right now could be even consider as parties in the currently armed conflict. Only as an example the top leaders of the paramilitary groups were extradited to the United States under charges of drug- smuggling because of the government of Colombia's allegations according to which they continued committing crimes from their cells.

A second big problem of this process is related with impunity, because although within this process, 39.546 presumable crimes with 51.906 presumed victims have been revealed or confessed, today only few judgments have been pronounced.[11] Accordingly, this groups' demobilization had some success because violence in the country decreased in some

9 Fundación Ideas para la Paz, Narcotráfico: Génesis de los paramilitares y herencia de bandas criminales, Informe numero19, p.11, [online], available in: http://www.ideaspaz.org/images/Info%2019%20dimensiones%20geograficas_final%20web.pdf, (Last visited June 29, 2015)

10 Ibíd. p.19

11 Fiscalia General de la Nacion, Republica de Colombia, Unidad Nacional de Fiscalias para la Justicia y Paz, Estadísticas, [online], available in: http://www.fiscalia.gov.co/jyp/unidad-de-justicia-y-paz/, (last visited June 29, 2015)

point. But, its results fell short because while it stopped most of the violence based on counterinsurgency purpose, the process left intact the drug-trafficking structure of these paramilitary groups.[12] Now, members of the paramilitary that backslider the process or those who never demobilized do not commit acts of violence against guerillas, but they are committing innumerable violent actions to gain control of the drug trade business. As a result, today the guerrillas stop being their enemy and have become their partner or competition for the drug trafficking business.

Since 2005, the persistence of armed groups related with the ex-paramilitaries become evident. These new armed groups which are dedicated to drug-trafficking have received the name of BACRIM–*Bandas criminales*- or *neoparamilitares*.[13] In consequence, the demobilization process failed to completely deactivate the AUC "military" apparatus and nowadays the territories that were in hands of the paramilitaries are controlled by different groups of BACRIM.

BACRIM: Concept and structure

1. Emergence and definition

As announced, after the demobilization of the paramilitaries groups in Colombia, new armed structure appeared and become one of the most challenging risks for the State. These new groups are dedicated to the drug-trafficking business and other illegal economies such as illegal mining and extortion. At this moment, there are different kind of these groups with different capacities and activities, but all of them are similar in brutality, desire of territorial control and the violation of civil society's rights.

After demobilization and the continuous proliferation of this reality, the government of Alvaro Uribe gave the name of BACRIM –*Bandas criminales*- to the biggest of these new armed groups and defined them as emerging criminal gangs groups which are formed in areas where demobilized paramilitary groups used to exercise territorial control. These groups have members who were paramilitaries and did not enter in the demobilization process, but also some demobilized ones who were rearmed and some of the existing common delinquency gangs. Accordingly BACRIMs had been defined as macro-criminal organizations that are significantly armed and that develop control over illegal activities. Also, a very important

12 Jorge Giraldo, *et al., Medellin: El complejo camino de la competencia armada*, Parapolítica, La ruta de la expansión paramilitar y los acuerdos políticos, Corporación Nuevo Arco Iris, p. 109-164, [online], available in: http://www.semana.com/documents/Doc-1493_200796.pdf, (last visited June 29, 2015)

13 *"no hay claridad acerca de la naturaleza del fenómeno. Las Fuerzas Armadas y el Gobierno Nacional denominan estos grupos como bandas criminales (bacrim) o bandas que son inherentes al problema del narcotráfico (bandas al servicio del narcotráfico) (Policía Nacional, s.f.; Ministerio de Defensa Nacional, s.f.).* Soledad Granada and others. Neoparamilitarismo en Colombia: una herramienta conceptual para la interpretación de dinámicas recientes del conflicto armado colombiano. Guerra y violencias en Colombia: Herramientas e interpretaciones. Pontificia Universidad Javeriana. Bogotá. 2009.p.468.

characteristic is that normally they use violence as a mean to achieve and improve their internal discipline, their territory control and to increase their spheres of influence.

The emergence of the term BACRIM during the Alvaro Uribe's mandate has enormous relation with their general speech about violence in Colombia. With the public policy of Democratic Security, the government continuously affirmed that Colombia was facing only a fight against terrorism, a problem that could not be resolved under the international humanitarian law. By his statements, he put in the same sac: FARC, ELN, paramilitaries, new emerging armed groups and common delinquency. As a result, under that view all of them were terrorists that need to be combated in new ways and under new rules. But it is easy to know that putting all of them in the same sac makes really difficult to accomplish their real understanding. It was more easy to define all them as gangs or terrorist related with the drugs trafficking business than analyze their particular characteristics.

The ex-president Uribe position was clearly influenced by United States and others which understood that new realities and terrorism risks must be face in a different way of which the laws of international humanitarian law and international human rights law proposed. These discourses seem to establish that today's terrorism is not combatable under any existing model or legal framework. Clearly, United States created under the Bush administration their own unfounded rules to combat Al Qaida and Taliban, but completely ignore the existence of an international framework that must be respected.[14]

In Colombia, albeit the government had the same speech, the reality was that at the Defense Department everybody understood that the FARC and the ELN –*guerrillas*- were organized armed groups. Consequently, rules of international humanitarian law were applied to them in combat. But, the public policy of Democratic Security was focus on combating the guerrillas and the demobilization of paramilitaries groups, and paid less attention to other violent actors –existent and emerging ones-. Thus, under a generalized point of view they were all understood as "common delinquency" as criminal gangs, but their structure and modus operandi was not deeply analyzed. Also, the idea of all of them as terrorists domestically created the idea that not law was proper to govern their combat. This situation had the terrible consequence of making people think that those who committed terrorist acts could only be understood as delinquency, never as organized armed groups which are part of the an armed conflict.[15]

14 President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, [online], available in: http://georgewbush-whitehouse.archives.gov/news/releases/2001/11/print/20011113-27.html, (Last visited June 29, 2015).

15 The reality is that "terrorism is more appropriately regarded as but one method of conducting hostilities rather tan as a type of warfare in itself." Elizabeth Wilmschurst (ed.),, International Law and Classification of Conflicts, Oxford University Press.UK. 2012. P. 27

Juan Manuel Santos government has changed its point of view about guerrillas. Now his government recognized FARC and ELN as armed groups which are part of an internal armed conflict. But, he has maintained the same position about BACRIM describing their acts as actions committed by common delinquency.

2. Structure and territorial presence

The emerging groups which appeared after the demobilization of the AUC were at the beginning small concentration of dissidents from the process. But when the highly commanders of the AUC where extradited to United States, the violent episodes began to rise. With this weakness of the general command of the paramilitaries' "military" structure -that was not deactivated by the demobilization process-, the middle-ranking commanders began to fight with each other's. Thus, these middle-ranking commanders moved by the desire of more power and more control over their business, were actors of terrible confrontations. And as it could be expected, our country began to lived again violent clashes and the constantly use of civil society for their purposes. Nowadays, after almost 6 years of confrontations and new alliances between them, the biggest BACRIM armed groups in Colombia are: *Los Rastrojos, Los Urabeños also called Clan Úsuga or Autodefensas Gaitanistas, Los Paisas, ERPAC and Águilas Negras.*[16]

BACRIM groups are present in at least 200 Colombian municipalities *(Municipios)* and 20 territorial departments *(Departamentos*). These structures have a strong presence in urban areas in which they exercise control over illegal economies and perform intelligence work. Nevertheless, they maintain territorial presence and control in rural areas in order to maintain their power over the most important routes for drug trafficking. In these territories they fight for the control of the illegal business and impose different conducts and activities to civilians. They have executed massacres, conducted forced recruitment of minors, produced internal force displacement, done selective killings and confronted directly the national security forces. The national government has used its police's forces against them, but in many cases they used also military forces because of the intensity of the confrontation with this armed groups.[17]

16 Fundación Ideas para la Paz, Narcotráfico: *Génesis de los paramilitares y herencia de bandas criminales,* Informe nro.19, p.21, [online], available in: http://www.ideaspaz.org/images/Info%2019%20dimensiones%20geograficas_final%20web.pdf (Last visited June 29, 2015) "Entre 2013 y 2014, Los Urabeños o 'Clan Úsuga' han cobrado mayor poder, Los Rastrojos se han debilitado y las disidencias del ERPAC (Bloque Meta y Bloque Libertadores del Vichada) se han reacomodado. A esto se suma que se despliegan otras organizaciones de alcance exclusivamente local o regional con bajo perfil. En algunas zonas analizadas por la FIP, las BACRIM han sostenido disputas entre ellas, especialmente en algunos municipios de La Guajira, el Nudo de Paramillo, Nariño y Valle del Cauca". [online], available in: http://www.ideaspaz.org/publications/posts/1053 also see: http://www.eltiempo.com/multimedia/especiales/bandas-criminales-en-colombia/14853835/1, (Last visited June 29, 2015)

17 UN, *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia.* 2013, [online], available in: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/100/91/PDF/G1310091.pdf?OpenElement, (Last visited June 29, 2015)

Despite these new drug-trafficking groups are really related with the paramilitary's structures, there are differences between them and the demobilized groups. The AUC paramilitaries had the goal or at least the "excuse" of being counterinsurgency groups and the drug-trafficking business was a mean to achieve their goal. So, guerrillas were they enemy. The new BACRIM, do not have neither the goal nor the excuse of combating against the guerrillas, so these insurgency groups are not their enemy, they are -as already said- their competition or allies in the illegal drug world.[18] Also, it is important to recognize that these groups do not operate as paramilitaries -in the sense of the word- because they do not operate in coordination or cooperation with the Colombian armed forces against guerrillas. This is a new context, even though in the minds of civilians they are still paramilitaries. It is not weird that the society considers them as paramilitaries because BACRIM groups are still using similar methods and means.

International standards and rules about non-international armed conflict

Generally, States address the question about the recognition of the existence or not of a non-international armed conflict as a political issue. The reality is that at this moment the applicability or not of the international humanitarian law related to non-international armed conflict does not depend of the State recognition or will, because it only depends on the fulfillment of some factual conditions that are describe by the law. Hence, according to international law this is not a political decision but a legal recognition.

But, even though the International Humanitarian Law applies regardless of the State position, State's persistent reluctance–normally based in political interests- to accept its existence generally creates terrible consequences in the internal interpretation and application of the law. The application of International Humanitarian Law as *lex specialis* is itself complicated, so it is terrible that States add more darkness to its interpretation because of political issues.

The idea of analyzing and cover the problem of the existence or not of an armed conflict from a political point of view is not a whim or an unfounded rationality of the States. Traditionally, the international community has analyzed non-international armed conflicts based primarily or exclusively on political reasons, acts or demands. The development of the law of war which applies to non-international armed conflict began base on conflicts that emerged because of political differences. Nevertheless, the new evolving criminality around the world raised many questions to this perspective. The new kind of actors in conflict have been changing during the years, now we have to face new phenomenon such as those criminal structures that are not seeking for a political power but for an economical one. This change is very

18 Media report, [online], available in: http://www.eltiempo.com/politica/justicia/alianza-farc-bacrim-para-pacto-de-no-agresion-/14583036, (Last visited June 29, 2015)

significant because even though they have changed their way of operating, the consequences of intensity of confrontation, damage and territorial control under their command are similar. All these changes are reflected on the difficulty to establish the line between the applicability or not of the International Humanitarian Law in specific scenarios. Today's Mexican situation is a good example of this.[19]

The criteria for the establishment of the existence or not of a non-international armed conflict have not universal acceptance. The existing rules are ambiguous and not well define, but the practice and jurisprudence give us guide to a correct interpretation. This difficulty must not be an excuse to enforce the fulfillment of the specific rules of non-international armed conflict and to deeply analyze the different actors that cause big loses to a Country because of the use of violence.

1. Origins of the non-international armed conflict framework

To have a better understanding about today's non-international armed conflict rules and the behavior of the States before them, it is important to analyze where those rules came from. Especially, it is relevant to review the concept of recognition of belligerence. As Anthony Cullen said in his book *The concept of Non-international Armed Conflict in International Humanitarian Law,* "it is important to view the current concept in the context of its historical evolution".[20] Accordingly, this historical evolution explains why many states deny the existence of an armed conflict -even though the conditions are obvious-, because of the fear of legitimating the actions of the opposite organized armed group and giving them privileges.

The rules of armed conflict began to by subject of international regulation because of the existence of armed confrontations between states. Accordingly, at the beginning, the sources of the international law of war were exclusively related with international armed conflicts. However, because of the great atrocities that began to appear in the internal conflicts, the practice of states began to look forward the application of existing rules of war to this kind of conflict. Here, the States and the international lawyers began to talk about belligerence recognition as a doctrine which extends the applicability of the rules of international armed conflict to those of non-international character.

Similar to this recognition, in traditional international law scholars talk about the insurgency recognition. States used this recognition because of necessity in the context of their difficulty to maintain public order because of the violent actions of armed revolt groups. The consequences of this recognition were not concrete and unique, but it have been understood that under this recognition rebels -now call insurgency- were legal contestants of

19 Some articles about this topic: Craig A. Bloom, Square Pegs and Round Holes: Mexico, Drugs, and International Law, 34 Hous. J. Int'l L. 345, 348 (2012) and Carina Bergal, The Mexican Drug War: The Case for A Non-International Armed Conflict Classification, 34 Fordham Int'l L.J. 1042, 1043-46 (2011).

20 Anthony Cullen, The concept of Non-international Armed Conflict in International Humanitarian Law, Cambridge University Press, New York, 2010. p. 7

the state, and not simple lawbreakers or criminals.[21] However, this act of recognition did not automatically make humanitarian standards applicable. For its application it was necessary an express provision in the act of recognition. Meanwhile, the belligerency recognition demands the application of humanitarian standards immediately.

Belligerence recognition was generally based on four criteria: "first there must exist within the State an armed conflict of a general (as distinguished from a purely local) character; secondly, the insurgents must occupy and administer a substantial portion of national territory; thirdly, they must conduct the hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency".[22]

Thus, this recognition was a political act and not a legal definition. But this doctrine is different to the existing rules of non-international armed conflict, affirmation that seems obvious but apparently not so clear to some states or governments. Furthermore, these two types of recognition gave to rebels some international legitimacy.[23] Now, the rules that apply to non-international armed conflict are neutral about purposes and political interests and also do not create new status to the parties.

2. Geneva Conventions: Common article 3 and II Additional Protocol.

After the World War II and the extreme brutality of the Nazi forces, the international community was unanimous in favor of establishing rules for the protection of the humanity principle under the international law -especially in relation to civilians- during time of war. Thus, the Geneva Conventions appear as an answer to that demand. Within these Conventions appeared the first written humanitarian rules for the non-international armed conflicts, although they are still limited and ambiguous. Hence, the Geneva law introduced common article 3 to regulate non-international armed conflicts. This article is the only one in the fourth Geneva conventions that covert non-international armed conflicts and it is generally said that Common article 3 raises more questions than answers.

The first difficulty of this provision is that it does not define the concept of armed conflict. It only establishes that it applies to those armed confrontations within the territory of a state and determines some minimums obligations to all parties on the confrontation. But the article neither describes nor defines what it means to by party to the conflict. Common article 3 makes only a superficial differentiation between those who are part of the conflict and those who do not because they are not taking active part on the hostilities.

21 *Ibíd,* p. 11

22 Hersh Lauterpacht, Recognition in International Law, (Cambridge: Cambridge University Press, 1947) p. 176.

23 "Among the important consequences of the recognition of belligerency was that rebels who fell into the hands of the lawful government would be treated as prisoners of war rather than criminals." R.R. Baxter, Jus in Bello Interno: the present and the future law, in Law and Civil War in the modern world 518-36 (J.B Moore ed. 1974) p. 519.

About this lack of definition, the International Committee of the Red Cross –ICRC- in its commentary to Common Article 3 stated that: "the scope of application of the Article must be as wide as possible. There can be no drawbacks in this, since the Article in its reduced form, contrary to what might be thought, does not in any way limit the right of a State to put down rebellion, nor does it increase in the slightest the authority of the rebel party. It merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the national legislation of the States in question, long before the Convention was signed.[...] Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with ' armed forces ' on either side engaged in ' hostilities ' -- conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country".[24] This is an important assumption and generally, international jurisprudence has interpreted this article in the same way.

The most important judicial decision about this interpretation is *Prosecutor v. Tadic.* In this decision the International Criminal Tribunal for the Former Yugoslavia-ICTY- define that an armed conflict exists "whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[25] This definition gives a broad interpretation of common article 3 and today it is the most authoritative formulation. The ideas developed in this decision are known as the Tadic formula or test, which establishes two elements for determining the applicability of international humanitarian law to a specific situation: (i) Organization of the parties and (ii) intensity of hostilities.[26] Some will say that duration is also an aspect that may be taken into account and that was proposed in the decision. These aspects or conditions differentiate armed conflicts from what is known as internal disturbances.

But, it is not clear what level of violence is required to determinate the existence of an armed conflict and it is neither answered if an important duration must be alleged. Also, the sufficient evidence or conditions for determining the organization of the parties are not defined or concrete established. Therefore, the application of this test is an exercise case by case. In addition to this test, the Tribunal made this useful precision about the temporal and geographical applicability of international humanitarian law: "the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities".[27] In sum, the *Tadic* decision generated the following advances in the interpretation of Common Article 3: (i) the test based on the intensity and organization of the parties, (ii) the clarity of the possibility of the existence of a non-international armed conflict in which the confrontation is not against the state but between two organized armed groups

24 Jean S. Pictet (ed.), ICRC Commentary to article 3. Conflicts not of an international character on the Fourth Convention, [online], available in: http://www.icrc.org/ihl.nsf/COM/375-590006?OpenDocument, (Last visited June 29, 2015).

25 Prosecutor vs. Tadic decision.Parr.70. [online], available in: http://www.iilj.org/courses/documents/Prosecutorv.Tadic.pdf , (Last visited June 29, 2015).

26 UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, [online], available in: http://www.unhcr.org/refworld/docid/3ae6b3a84.html, (Last visited June 29, 2015).

within the territory of the state, and (iii) the understanding that international humanitarian law applies all time during conflict and in all the territory of the state.

This broad interpretation of Common Article 3 seeks to cover different situations of conflict in which great risks to civilians are generated. "The primary purpose of article 3, is to absolutely insure human treatment of those persons who do not or no longer actively participate in the hostilities when they are in the power of a party to the internal conflict".[28] Accordingly, even the article is not completely clear and does not used the name civilians, its purpose in writing is to condense the existing rules of customary law under which it is prohibited to attack civilians who are not involved in hostilities during a non-international armed conflict.

In addition to common article 3, today some States had ratified the Additional Protocol II to the Geneva Conventions. Colombia is one of them. By express provision of Article 1, Protocol II should be treated as developing and supplementing common Article 3, not as additional requirements for the applicability of this article. That means that it does not amend or change the provisions in the conventions, it only complemented them. Then, the idea of the creation of an additional Protocol was to strengthen and extend the protection that already existed under the conventions, instead of decreasing it in any sense.[29] This Protocol attempts to resolve the ambiguity of common article 3 by defining organized armed groups. For this, it established the following objective qualifications: (i) A responsible command and (ii) a territorial control that enable them to (iii) carry out sustained and concerted military operations and to implement the Protocol. Nevertheless, as it was explained, these qualifications are not necessary for the application of common article 3. Accordingly, all protocol II conflicts are in definition common article 3 conflicts but not all common article 3 conflicts fit within the scope of application of Protocol II.

In consequence, Protocol II does define the parties that must be present in a violent situation to name it as a non-international armed conflict and therefore apply International Humanitarian Law: (i) Forces of the state in one side and (ii) dissident armed forces or organized armed groups on the other. Unlike common article 3, Protocol II does not apply for actions between organized armed groups within the territory of a State, it is necessary to be in front of a confrontation against the state. Hence, the establishment of objective qualifications to be consider an organized armed groups and this last restriction of applicability, clearly limited the threshold of application of the Protocol in comparison with common article 3. Also, additional to the definitions of the parties, the Protocol also talks about civilians and make the differentiation between those who participate directly in the hostilities and those who do not.

27 Prosecutor vs. Tadic decision, Parr.67, [online], available in: http://www.iilj.org/courses/documents/Prosecutorv.Tadic.pdf, (Last visited June 29, 2015).

28 Robert K. Goldman, Characterization and Application of International Humanitarian Law in Non-international and other kinds of armed Conflicts, Supplementary Materials Volume 1, International Humanitarian Law Course, American University, Spring 2013. p. 3

29 Prosecutor vs. Tadic decision. Parr.117, [online], available in: http://www.iilj.org/courses/documents/Prosecutorv.Tadic.pdf, (Last visited June 29, 2015).

Like Common article 3, the Protocol applies when the objective qualifications are fulfill, and as a result its application does not depends on the will or recognition of the parties. The ICRC in its Commentary to the Additional Protocols affirmed: "The threshold where Protocol II becomes applicable is determined by the criteria expressed in Article 1 ' (Material field of application), ' (3) which means that it is intended to apply only to conflicts of a certain degree of intensity. The principle that it will automatically apply is based on humanitarian requirements, for the implementation of rules for the protection of victims should not be dependent on the subjective judgment of the parties".[30]

Then, the analysis of its applicability must focus on the degree of organization of the dissident groups, its control of part of the state's territory and its capacity to plan and carry out concerted and sustainable operations and to impose discipline between its members. This framework does not describe the level of organization that is needed, so it is a matter of interpretation in particular cases.[31]

A very important aspect of the Additional Protocol II is that it gives a more deep protection of the humanity principle and describes more in detail its protections. So, even being more restrictive in its threshold, it is very useful for the protection of civilians and fighters that are no longer involved in hostilities. The application of this rules with common article 3 in a complementary way give wonderful bases for a more pertinent used of the military necessity in respect of the humanity principle.

Finally, after all these explanations, it is clear that the existence of a non-international armed conflict and the applicability of International Humanitarian Law does not depend on the State's recognition of that situation. It is understood that its existence responds to factual matters. Furthermore, it is also evident that the recognition of the existence of an armed conflict of this kind never means standing the legitimacy of the actor who acts against the state. The regulations on non-international armed conflicts are neutral to the reasons, motives or causes of the conflict.

Consequently, the existence and recognition of an internal armed conflict does not change the legal status of the parties to the conflict, as it does in international armed conflicts. Thus, the state where the conflict arises does not lose authority to use its domestic law against the other party and its members. As a result, there is no combatant privilege recognized in the conflict of non- international character and thus the status of prisoner of war does not apply.[32]

30 ICRC, Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. [online], available in: http://www.icrc.org/ihl.nsf/COM/475-760003?OpenDocument, (last visited June 29, 2015)

31 ICRC, Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. [online], available in: http://www.icrc.org/ihl.nsf/COM/475-760004?OpenDocument, (last visited June 29, 2015)

32 Anthony Cullen, supra note 32, at 55-56

Does the BACRIM meet the elements to be considered armed groups?

1. Los Úsuga as a case study

In Colombia different violent groups have generated terrible risks and losses for the society. In the last five years Colombia lost approximately 76,000 people because of homicides.[33] Also, the country was witness of 143 massacres during this time. It is very difficult to identify how many of these homicides were committed by the new drug trafficking armed groups called BACRIM, but it is clear that the regions where they are present are the ones with mayor rates of homicide. As we saw in the second part of this paper, the BACRIM structures can be considered as today's greater risk to Colombia's security policies. In this section, we are going to compare one of those armed structures: *Los Urabeños* or *Clan Úsuga*, with the existing framework for non-international armed conflict to identify a possible applicability of International Humanitarian Law to this situation.

Los *Usuga* also known as the *Los Urabeños, Autodefensas Gaitanistas* or *El Clan Úsuga* is at this moment the most dangerous BACRIM in Colombia. This drug-smuggling armed group was created in 2006 in Urabá-Antioquia by Daniel Rendón Herrera alias "Don Mario". The first members of this group were from the demobilized AUC Elmer Cardenas Block, which was under his brother command Fredy Rendón alias "el Alemán". At the beginning they called their self as Héroes de Castaño, but then as Autodefensas Gaitanistas de Colombia. After waging an intense battle with "Los Paisas" –other BACRIM- to gain control of the major drug export routes through the south of Cordoba and the lower Valle del Cauca, "Don Mario" was captured by police in 2009.

After he was captured, the Usuga brothers –Otoniel and Gionvanni- took control of the group and in 2011 they made an alliance with alias "Mi sangre"-high commander of other BACRIM- and adopted the name by which they are known today: *Los Usuga*. Now, alias Giovanni is death and alias "Mi sangre" was captured, so the responsible command and most visible head is alias Otoniel. In these years, even though the group has suffered attacks from the government, their presence in the country's territory has grown. They are present in many municipalities, especially in Antioquia, Chocó, Cordoba, Sucre, Bolivar, Magdalena, Cesar and Valle del Cauca.

33 Logros de la Política Integral de Seguridad y Defensa para la Prosperidad – PISDP. April 2015, [online], available in: http://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/estudios%20sectoriales/info_estadistica/Logros_Sector_Defensa.pdf, (last visited June 29, 2015)

2. Applicability of common article 3 and Additional Protocol II

Before compering the objective elements or aspects according to which it could be establish the applicability of the International Humanitarian Law for the case of the Usuga's Clan, two clarities must be submitted. First, International Humanitarian Law does not make a restriction on its applicability because of the motives of the confrontation. Generally, neither common article 3 nor protocol II apply to common criminality and purely criminal groups do not constitutes parties to the non-international armed conflict. But nowadays realities are proving that some structures of common criminality are becoming such a threat to the State's public order that requires a detailed study of the extent to which they have passed the barrier of what is understood as party of an armed conflict.[34]

Los Usuga as the others BACRIMs are exclusively criminal groups dedicated to the illegal drug business. They do not have political motivations and were not created as armed groups against the state government or the guerrillas. But the intensity of their violent actions and its organization must be studied to understand if they are still common criminality or they are becoming an organized armed group under the international law. Remember, international humanitarian law does not care if the motives of the confrontation are lawful or unlawful.

The second clarity is that if this Colombian new armed group and others of the BACRIM met the objective qualifications, International humanitarian law applies automatically even if the government does not recognize them as a party. As a result, the application of the Geneva protection rules does not depend on the will or interest of any of the parties. Now, with these two clarities, let's begin the analysis of the objective elements of the Geneva Law. In the first place, this exercise will analyze the intensity and degree of organization of *Los Urabeños* to determinate the applicability of common article 3 based on the *Tadic* test -Organization of the parties, plus intensity-.

2.1 Tadic formula and common article 3

Los Usuga as the other visible BACRIM in Colombia has embroiled in hostilities against other BACRIMs as well as with the security forces of the State. They are not in constant confrontation with the State but they do fight against State's forces seeking to protect their illegal business.[35] In consequence, the confrontation between each other is more frequent

34 Michael N. Schmitt, The Status of Opposition Fighters in a Non-International Armed Conflict. In Non-International Armed Conflict in the Twenty-First Century, Kenneth Watkin and Andrew J. Norris Editors, Naval War College, Newport, Rhode Island, 2012. Vol.88.pg. 122-123.

35 The case of the killing of a soldier by the Usuga members during eradication labors of illegal crops in Briceño- Antioquia days ago is a clear example about it, [online], available in: http://www.elespectador.com/noticias/judicial/confirman-muerte-de-un-soldado-manos-del-clan-usuga-articulo-567310, (Last visited June 19, 2015)

that the confrontation against the State.[36] When they attack the state's officers generally they use ambushes that end on several killings but the motives are usually related with the protection of its illegal activities.[37] Their actions are not impulsive; they use violence as a mean, having the capacity of planning coordinated and concerted attacks to their enemies. They do not always use distinctive cloths but its members recognized their self as part of an organization with tactical strategies and visible responsible commanders. Sometimes they use military cloths for some of their actions especially in rural areas and they are an estimate of 1.800 members.[38] Like most of the BACRIM, unlike the paramilitaries, rarely move in platoons or companies. They generally operate in civilian clothes and camouflage themselves among the civilian population.

From the public information available about this BACRIM it can be said that this armed group have an important degree of organization. The existence of a top leader, finances, military, logistics and other commanders in the organization chart made by the official intelligence agencies are sufficient proofs about the fulfillment of this requirement.[39] Therefore, determining the intensity of the violent actions and confrontation that *Los Usuga* are committing, will allow us to understand if we are in front of organized common delinquency within an ongoing armed conflict or rather in front of a new party of the conflict. "It is important to understand that application of Common article 3 does not require the existence of large-scale and generalized hostilities or a situation comparable to civil war".[40]

In this regard, it could be argued that today the intensity of the confrontation between *Los Usuga* and the Government forces, both police and military forces, is not clear to exceed the threshold level of violence that would qualify it as armed conflict under common article 3. Although, it cannot be hold that there is no casualties or human harm during the operation of this BACRIM, the intensity of the confrontation especially from this illegal group against the State authorities or other parties of the existing armed conflict is not sufficiently intense and it seems to be restricted and limited to the necessity to protect their illegal business like drug trafficking, among others. On the other hand, from the Government authorities the

36 Years ago Clan Usuga waged an armed confrontation against *Los Rastrojos*, another BACRIM for territorial and routes for drug- trafficking. [online], available in: http://colombiareports.com/how-the-urabenos-beat-los-rastrojos/, (Last visited June 19, 2015)

37 As an example the ambush committed against police officers in Puerto Libertador- Córdoba on 2014. [online], available in: http://www.semana.com/nacion/articulo/el-matrimonio-diabolico-entre-las-farc-los-usuga/403466-3, (last visited July, 2015)

38 [online], available in: http://www.semana.com/nacion/articulo/alias-otoniel-jefe-del-clan-usuga-el-hombre-mas-buscado-en-el-pais/412818-3, (Last visited June 19, 2015)

39 About the commanders of the Usuga's Clan capture by the police and their places in the organization chart, [online], available in: http://www.semana.com/nacion/galeria/jefes-caidos-de-la-banda-de-narcotraficantes-los-urabenos/420673-3, (Last visited June 23, 2015)

40 I/A Court H.R, Juan Carlos Abella v. Argentina, Case No. 11.137, ANNUAL REPORT 1997, OEA/Ser.L/V/II.98, Doc. 7 rev (13 April 1998), ("La Tablada" Case), par. 152.

strategy have been to pursuit and to fight *Los Usuga* through an exclusive law enforcement paradigm in which the role of the police forces and criminal law are features.

This assertion was also held by the Office of the Prosecutor of the International Court of Justice whom revising the Colombian situation on the end of 2013 established in this regard that,

> *There is a reasonable basis to believe the Urabeños group is sufficiently organized because, inter alia, its members are well-disciplined; there is a hierarchical structure; effective control is exercised over its members; it exercises control over territory; it has the capacity to recruit and acquire weapons; and it has a significant number of personnel. However, the available information about the intensity of violence between the Urabeños and any of the parties to the existing armed conflict (the Government, FARC and the ELN) indicates that such confrontations are not sufficiently intense for the Urabeños to qualify as a party to the conflict.*[41]

Consequently, because of the today's insufficient intensity of the hostilities in which the Usuga's clan participate, especially against the State, from an interpretation of Common Article 3, it could be argued that today they are not in an armed conflict against the State or any other party of the Colombian non- international armed conflict and therefore they cannot be considered as a "organized armed group" for the application of the International Humanitarian Law. However, it should be warned that the basis of this assertion could rapidly change and therefore the qualification, nature and legal framework applicable to the confrontation against this BACRIM.

2.2 Additional Protocol II of the Geneva Conventions

As it was explained in the third part of this paper, Article 1 of the Additional Protocol II established some objective qualification to determinate if a group could be consider an organized armed group and consequently the existence of a non-international armed conflict. Those objective aspects can be divided on three: (i) existence of a responsible command, (ii) control of territory and (iii) a degree of organization that enables them to plan concerted and sustained military operations and apply the Protocol.

First, in relation with the existence of a responsible command it must be said that it is undeniable the capacity that *Los Usuga* have to maintain a hierarchical command. As was said above they have a top leader and military, finances and logistics commanders. The existence of responsible commanders is so clear that the state's armed forces, prosecutor's office and even foreign prosecutor offices know who the commanders are and some of them

41 ICC- The Office of the Prosecutor, Report on Preliminary Examination Activities 2013, November, 2013. Parr. 129.

have indictments and requests for extradition.[42] Also, another important indication of the existence of these responsible commands is the notorious fact that the communities where they act recognized a specific individual as the leader of the armed group.

Second, in the development of this paper it was shown that *Los Usuga* exercises territorial control in different regions and municipalities of the State. Their main base is at the Gulf of Urabá, near Cordoba and Antioquia departments. From this place they control all activities of the group, from the training of those who are recruited to the execution of attacks. With the time, they have deployed to other areas were they has imposed their control after winning the territory generally in a confrontation with other BACRIM. In those new places, *Los Usuga* generates regional alliances with other small BACRIM and common criminal gangs and grow on members through forced or volunteer recruitment strategies.

Today, they have partial control of many zones of at least nine departments. As a result, these "gangs" are in effective control of significant areas of territory and have a great influence in the civil society. The best proof of their territorial control is the armed strike that they ordered to transporters in retaliation for the death of their leader alias Giovanni. In January of 2012 this BACRIM managed to surprise and horrified the country. The fear of their actions and control over the population, led the transporters and carriers to comply with the strike in 16 municipalities of the 9 departments in which they are present. Transportation was completely paralyzed in these municipalities.[43] Accordingly, these groups seek to occupy Colombian territory not only to be able to conduct their illegal activities, but also to influence the economy of its people and its way of acting and thinking. This social control give them the possibility of win their support or they constrain them to be part directly or indirectly of their hostilities. In consequence, at this point, we can say that *Los Usuga* have a responsible command and a territorial control; let's continue to analyze the third objective qualification or criteria.

This degree of organization has enabled them to plan and execute actions which are concerted and sustained; they have an important control over their actions and use violence as premeditated mean. Their acts are not sporadic or impulsive. This is clearly possible because they have control of areas of the national territory and also a significant control over the population. Finally, because of the existence of responsible commanders and also the training phases, this group has the capacity to apply International Humanitarian Law. To have the capacity is different from actually applying it.

42 Recently a group of prosecutors for the south district of Florida and east district of New York presented jointly with the Colombian President some indictments against the top leaders of the Usuga clan, [online], available in: http://www.semana.com/nacion/articulo/urabenos-ee-uu-ofrece-us5-millones-por-otoniel/432312-3, (Last visited June 23, 2015)

43 Media report: Los Urabeños, un poder subestimado: analistas, [online], available in: http://www.verdadabierta.com/component/content/article/50-rearmados/3774-los-urabenos-un-poder-subestimado-analistas, (Last visited March 7, 2015)

A final question about the applicability of Additional Protocol II could be raised: Does *Los Usuga* plan and execute sustained and concerted military operations against Colombian armed forces or any other armed groups? As was explained above, currently there are several doubts about the purpose of *Los Usuga* to confront directly the State's institutions of armed forces, and because of that it could be argued that the intensity of the armed confrontations do not seems to the sufficient today to exceed the threshold that trigger the application of the International Humanitarian Law between the governmental forces and this BACRIM. Hence the currently debates must be focus on this element because the evolution in this regard could change quickly the fulfillment of it and, as was held above, this will implied several consequences from the legal point of view.

Conclusion

Today it is recognized that the BACRIM are the biggest threat to Colombia's security and thus, a major threat to the rights of its inhabitants. These structures act according to an armed and violent organizational model which they inherited from demobilized paramilitary groups. Hence, their continuous rise is mainly due to the failure of the State in the total deactivation of the military apparatus of the AUC, especially in relation to drug trafficking structures. The great incomes gain through the illegal economies has enabled these armed groups to grow in power and territorial control. Also, their methods based on fear and brutality has allowed them to have important social control in their areas of impact. Consequently, this problem has led the country to live again a great intensity of violence with serious consequences on the effectiveness of compliance with human rights.

As explained, the application of the International Humanitarian Law depends on objective criteria. On one hand, according to the interpretations of common article 3 of the Geneva Conventions an important degree of organization and sufficient intensity is needed to consider the existence of an armed conflict and "organized armed groups". On the other hand, the Additional Protocol II requires that existence of a responsible command, control of territory, and a degree of organization that enables them to plan concerted and sustained military operations and apply the Protocol.

Appling those criteria to the BACRIM groups are no clear or easy. As was showed in the *Los Usuga* case, although the organization requirement could be accomplished there are seriously doubts about the currently level of the intensity of the confrontation and the existence of sustained military operations from this illegal group, especially against the Colombian authorities. It seems that the currently use of force by this organization is limited to protect their illegal business and therefore the threshold of the intensity in the confrontation is not exceeded to hold the existence of an armed conflict between this BACRIM and the State and therefore to trigger the application of International Humanitarian law.

However, as the history of the Colombian armed conflict teaches, the dynamics of the confrontations could change rapidly and therefore the nature, actors and legal framework applicable to the conflict. In this sense, the today's behavior of the BACRIM's in the confrontation against the government authorities could increase easily the level of intensity

and accordingly change a typical fight against a criminal organization to an armed conflict under the International Humanitarian Law. This fundamental change, have at least three mayor consequences that should be thought out carefully. First, the change in the paradigm to use force, passing from a law enforcement to a war model in which the military and the use of lethal force against combatants plays the main role. Second, the possibility to use transitional justice as an eventual strategy to end an armed conflict not only through ordinary criminal law. And finally, the effects that this change of legal framework could have to the rights of the victims of the confrontations. None of those three issues are easy to solve but they are on the essence on the relation between the new drug trafficking armed groups and the applicability of the International Humanitarian Law on Colombia, and this is what is at stake.

Bibliography

Arnson, Cynthia J. The peace process in Colombia with the Autodefensas Unidas de Colombia-AUC, Woodrow Wilson Center Reports on the Americas #13, Woodrow Wilson International Center for Scholars, Washington DC, 2005. p. 2.

Baxter, R.R., Jus in Bello Interno: the present and the future law, in Law and Civil War in the modern world 518-36 (J.B Moore ed. 1974) p. 519.

Bergal, Carina, The Mexican Drug War: The Case for A Non-International Armed Conflict Classification, 34 Fordham Int'l L.J. 1042, 1043-46 (2011).

Bloom, Craig A., Square Pegs and Round Holes: Mexico, Drugs, and International Law, 34 Hous. J. Int'l L. 345, 348 (2012)

Cullen, Anthony, The concept of Non-international Armed Conflict in International Humanitarian Law, Cambridge University Press, New York, 2010.

Giraldo, Jorge Alberto, *et al., Medellin: El complejo camino de la competencia armada, Parapolítica.* La ruta de la expansión paramilitar y los acuerdos políticos. Corporación Nuevo Arco Iris. p. 109- 164

Goldman, Robert K., Characterization and Application of International Humanitarian Law in Non-international and other kinds of armed Conflicts, Supplementary Materials Volume 1, International Humanitarian Law Course, American University, Spring 2013. p. 3

Gomez, Juan Carlos, Twenty-First-Century Challenges: The use of military forces to combat criminal threats. In Non-International Armed Conflict in the Twenty-First Century, Kenneth Watkin and Andrew J. Norris Editors, Naval War College, Newport, Rhode Island, 2012. Vol.88.p. 281.

González Posso, Camilo, *Los grupos narcoparamilitares avanzan,* Sexto informe sobre paramilitarismo INDEPAZ. [online], available in: http://viva.org.co/cajavirtual/svc0278/pdfs/articulo632_278.pdf (Last visited March 7, 2013).

Kerr, Katie, *Making Peace with Criminals: An Economic Approach to Assessing Punishment Options in the Colombian Peace Process.* The University of Miami Inter-American Law Review, Vol. 37, No. 1.p.58 http://www.jstor.org/stable/40176604 (Last visited March 7,2013).

Lauterpacht, Hersh, Recognition in International Law (Cambridge: Cambridge University Press, 1947) p. 176.

Massé, Frédéric, *¿Bandas criminales o neoparamilitares?*, ForeignAffairs Latino America . vol. 11. Nro. 2. p. 45. http://www.revistafal.com/historicopdf/2011/2/bandas.pdf (LastvisitedMarch 7, 2013)

Pecaut, Daniel, and Liliana González, *Presente, pasado y futuro de la violencia en Colombia,* Desarrollo Económico Vol. 36, No. 144 http://www.jstor.org/stable/3467131 (Last visited March 7, 2013)

Pictet, Jean S, (ed.), ICRC Commentary to article 3. Conflicts not of an international character on the Fourth Convention.http://www.icrc.org/ihl.nsf/COM/375-590006?OpenDocument (Last visited March 7, 2013).

Schmitt, Michael N., The Status of Opposition Fighters in a Non-International Armed Conflict. In Non-International Armed Conflict in the Twenty-First Century, Kenneth Watkin and Andrew J. Norris Editors, Naval War College, Newport, Rhode Island, 2012. Vol.88.pg. 122-123.

Spencer, David E., Colombia camino a la recuperación: Seguridad y gobernabilidad 1982-2010, Center for Hemispheric Defense Studies, National Defense University, Washington DC, 2011.p.50.

Wilmschurst, Elizabeth, (ed.). International Law and Classification of Conflicts. Oxford University Press.UK. 2012. P. 27