

“Grey zones” in international law: areas controlled by the Colombian FARC-EP

“Zonas grises” en derecho internacional: áreas controladas por las FARC-EP de Colombia

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Resumen

Aunque por varios años el Gobierno se ha negado a reconocer al grupo guerrillero FARC-EP como grupo beligerante, o, al menos, como parte de un conflicto armado, forzando así su trato a un grupo terrorista; teniendo en cuenta que los criterios para analizar la configuración de un conflicto armado de carácter no internacional son objetivos, el derecho aplicable para analizar el estatus de las FARC-EP es el derecho internacional humanitario. En este sentido, uno de estos requisitos es el control territorial, y, en este marco, las FARC-EP han logrado dominar a la población y manipular la seguridad tanto interna como externa de varias áreas del país, reemplazando así las funciones del Estado.

El ejemplo más claro de esta sustitución del Estado se dio durante las negociaciones de paz con el gobierno de Pastrana en la zona despejada del Caguán. Así, podría, en principio, considerarse a dicha región como una “república independiente”. Más allá de que la utilización de este término data de 1960, ha sido usado en forma ambigua y las áreas a las cuales ha hecho referencia pocas veces cumplían con los requisitos del derecho internacional. En este sentido, estas áreas grises se caracterizan por ser zonas donde el Estado tiene fuertes limitaciones para ejercer su jurisdicción e imponer su autoridad y que, al mismo tiempo, están dominadas por grupos privados que delimitan su territorio e imponen su voluntad, cometiendo, en la mayoría de los casos, violaciones a los derechos humanos y al derecho internacional humanitario.

Palabras clave: FARC-EP, repúblicas independientes, derecho internacional humanitario, conflicto armado, control territorial.

Abstract

For several years the government has refused to recognize to the guerrilla group FARC-EP as a belligerent group, or, at least, as part of an armed conflict, forcing its treatment to a terrorist group. Nevertheless, bearing in mind that the criteria to analyze the configuration of a non-international armed conflict are objective, the applicable law to study the status of the FARC-EP is the humanitarian international law. In this sense, one of these objective requisites is the territorial control. In the frame of this control, the guerrilla group has managed to dominate the population and manipulate both the internal and external safety of several areas of the country, replacing this way the functions of the State.

The clearest example of this phenomenon happened during the peace negotiations with the Pastrana's government in the demilitarised zone of Caguán. In this sense, it might be possible to consider this area as a "independent republic". In the history of Colombia, beyond that the use of this term dates of 1960, it has been used in ambiguous form and the areas to which it has referred seldom were not fulfilling with the requirements of the international law. In this regards, these grey zones are characterized for being areas where the State has strong limitations to exercise its jurisdiction and to impose its authority and where, at the same time, private groups dominate, delimit its territory and impose its will, committing, in most cases, violations of the human rights and of the humanitarian international law.

Keywords: FARC-EP, independent republics, International Humanitarian Law, armed conflict, territorial control.

Résumé

Bien que depuis plusieurs années, le gouvernement a refusé de reconnaître le groupe de guérilla des FARC-EP comme un groupe belligérant, ou tout au moins dans le cadre d'un conflit armé, forçant son traitement d'un groupe terroriste; considérant que les critères pour l'analyse de la configuration d'un conflit armé ne présentant pas un caractère international sont objectifs, la loi applicable à analyser le statut des FARC-EP est le droit international humanitaire. En ce sens, l'une de ces exigences est le contrôle du territoire, et dans ce contexte, les FARC-EP ont réussi à dominer la population et de manipuler à la fois la sécurité intérieure et extérieure de plusieurs régions du pays, en remplaçant les fonctions de l'État.

L'exemple le plus clair est de remplacer l'état a eu lieu au cours des négociations de paix avec le gouvernement Pastrana dans la zone débarrassée de Caguán. Ainsi, il pourrait, en principe, être considéré dans la région comme une «république indépendante». Au-delà de l'utilisation des dates de terme à partir de 1960, il a été utilisé de façon ambiguë et les zones où il est question rarement satisfait aux exigences du droit international. En ce sens, ces zones grises sont caractérisées comme des zones où l'état a des limites fortes pour exercer sa compétence et d'imposer son autorité et en même temps, sont dominées par des groupes privés qui définissent leur territoire et imposent leur volonté, être engagé, la plupart des cas, les violations des droits de l'homme et du droit international humanitaire.

Mots-clés: FARC-EP, républiques indépendantes, le droit international humanitaire, les conflits armés, le contrôle territorial

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INTRODUCTION

The study does not deal with other forms of territorial control exercised by paramilitary groups: although such groups had wide control in some parts of Colombia’s Magdalena Medio region, it is clear that since they were created, financed and supported by the State, they cannot satisfy the criteria of “independent republics”¹. The so-called “peasant farmer reservation zones” (“zonas de reserva campesina”), created by Law no. 160 of 1994, neither can they be qualified as “independent republics”, nor as remote areas where the government cannot extend its reach. In this case, it would be incorrect to talk about “grey areas”, because the State has exercised executive and judicial control as well in the “peasant farmer reservation zones”. However in these regions the consecutive Colombian governments did not fulfil their functions adequately and allowed certain groups, both from the right and the left wings, to put pressure on local authorities or armed forces and consequently, to commit violent acts contrary to International Humanitarian Law (IHL). However, these circumstances do not allow these regions to be considered as grey zones.

In other papers we have stressed that

the State’s war with the FARC-EP as a terrorist group and not as party to the armed conflict has opened the way to enormous foreign resources in order to eliminate them as terrorists; this dynamic of the ‘war against terrorism’ has kept the Colombian society in suspense. This factor, instead of building a safer society, has caused a myriad of problems of the violation of human rights. (Torres, 2012 p. 269)

This aspect is crucial to analyse whether there have been “independent republics” in Colombia.

1 Christian Gross, in *“Los campesinos de las cordilleras frente a los movimientos guerrilleros y a la droga: ¿actores o víctimas?”* (1992) shows how the Rural Association of Farmers and Stockbreeders of the region of Magdalena Medio (Acdegam) which has brought together stockbreeders, paramilitaries, active military personnel and political leaders, “relies on financial contributions provided by the stockbreeders and some minor settlers. In 1986, under the Barco government, Acdeam was even granted official recognition. Later the region became a kind of anticommunist ‘independent republic’ under military protection. The policy of municipal decentralization has contributed to reinforcing this autonomy”. However, we do not share the conclusions of Gross, who defines territories occupied by paramilitaries as “independent republics”, considering the State support provided for these groups.

To address this problem, one must clarify two sub-questions: on the one hand, whether one can speak of armed conflict in this country and, on the other hand, whether the FARC-EP can be considered as party to the armed conflict (since the present paper focuses on this group). To acquire the status of party to an armed conflict, an illegal armed group must fulfil the following requirements: firstly, as Nieto Loaiza (1998, p. 398) points out there must be a generalized state of hostilities; secondly, the armed conflict between the non-state armed group and the legitimately constituted army (i.e. that of the government) should take place within the State; thirdly, the armed forces of the former must contest the legitimacy of the State's army and therefore do not recognize the authority of the State; fourthly, such a group must possess an organized apparatus which exercises authority with the capacity and logistics indispensable for the control of large numbers of troops within the organization; as Loaiza notes, "it must exercise jurisdiction over the said territory, that is, it must establish a differentiated legal order and a government (a certain form of organized administration)" (1998, p. 398); it exerts territorial control or in other words, it must be present in a defined area of the State's territory where it conducts permanent military actions or in some cases, has its own internal legislation; finally, it "must conduct hostilities under the laws and customs of war, that is, respect IHL" (1998, p. 398).

The Additional Protocol II to the Geneva Conventions is that which provides the definition of "non-international armed conflict", ratified by Colombia in 1994. Under this instrument, there is a "non-international armed conflict" when a State confronts one or several irregular armed forces. Article 1 defines "armed conflicts" as taking place

in the territory of a High Contracting Party [i.e. a State party to the Protocol] between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations [...].

Taking these characteristics into account, one can affirm that in Colombia there has been a non-international armed conflict. In conclusion, the recognition of both the internal armed conflict and the status of the party to the armed conflict are the two qualifications which consecutive Colombian governments have refused to grant Colombian guerrillas. This is the reason why it is easier to call them terrorists.

Furthermore, one cannot separate Colombian terrorism from the problem of the armed conflict. Likewise, the emergence of the guerrillas in the 1960s had its genesis in the peasant movements and in the republics which, whether independent or not, consolidated the organization of guerrilla groups. Similarly, this problem is closely linked in the 1990s to the appearance of paramilitary groups, theoretically with the aim of neutralizing the guerrillas. Therefore, the armed conflict has deteriorated to the extent that paramilitary activity has increased. Paramilitary activity, as the José Alvear Restrepo Lawyers' Collective (*Colectivo de Abogados José Alvear Restrepo*) defined, "is a strategy of counterinsurgency by the State, by which means

it conducts the dirty war against social leaders, popular and labour leaders, human rights advocates and democratic personalities" ("Sentido y Eficacia", 2002).

Due to the actions of guerrillas such as the M-19 and the FARC-EP, in September 1978 the anti-terrorist Law was promulgated which applied the concept of national security (Decree 1923, 6 September 1978). While launching this Security Statute, the executive was not only granted extraordinary powers, but also new offences were created, penalties were increased and military jurisdiction was extended, together with wide censorship of the mass media (Gallón, 1979 p. 133). This was a way to change the assessment of the guerrillas as terrorists rather than as political offenders.

In the debate "insurgent v. terrorist organization", it appears useful to examine how international law qualifies FARC-EP and the "grey zones" effectively controlled by it.

Bartolomé bringing up three great authors, says, "The gray areas". Despite its ambiguity, a gray area can be understood from the employment of this concept by Peter Lupsha, Eric Jean- Marie Guéhenno and the Maisonneuve. Lupsha, eventually creator of the term and rate quoted certain portions of territory passing into the hands of organizations "criminals half, half policies", eroding the legitimacy of government; Guéhenno, meanwhile, indicates that the distinguishing feature of a gray area is that within it the clear distinctions between matters of internal or external security disappear and between criminal and military aspects; Finally, De la Maisonneuve described that way areas "no right" to provide shelter and sanctuary to terrorist and criminal organizations (often interlinked) that evolve in place with impunity, relying in part of on the local population "(2006(Pp.46, 47 y 115).

Firstly, domestic courts and international practice have confirmed the applicability of Additional Protocol II and thus indirectly the existence of zones effectively controlled by FARC-EP with the implied recognition of its insurgent status. Secondly, notwithstanding this national and international practice, States and international organizations continue to qualify FARC-EP as a terrorist organization which raises several questions in respect of the zones controlled by it. In particular, such a qualification could lead to regard its areas as "terrorist safe havens" – a blackmail strategy that has been used in international practice as an argument to legitimise armed intervention by foreign States.

The present paper begins by analysing the characteristics of territorial control taken by a group or an organization. Secondly, since the State has little or no legitimacy in the territory, this legitimacy must be interpreted from two aspects: it is understood on the one hand as "legitimate" which means conforming to the law, especially positive law and, on the other hand, as "justification in the exercise of public authority" (Rüdiger) which is missing when neither rulers are accepted nor their decisions are obeyed.

Another characteristic is that the guerrilla, while dominating the population, manipulates to its will both the internal and external security, thereby replacing the State. Furthermore, FARC-EP conducts countless uncontrolled illegal activities. In

this manner, it succeeds in expanding its strength. The consequences of the State's failure to exercise its power has resulted in several areas having been transformed into dangerous and chaotic zones.

RESEARCH QUESTION

In Colombia, for several decades and in different areas, there have been rumours of municipalities, regions and even departments considered to be as "independent republics". Such "republics" are situated within the State's territory and constitute areas where the State faces numerous difficulties in exercising its jurisdiction and imposing its authority. In these zones the State has allowed, private individuals, actively or by omission, to demarcate their territory, and to impose their own will, to commit acts of violence and consequently to impose their own "laws", while usually violating human rights and International humanitarian law.

These can be assimilated to lawless areas. Here it is important to match Cirino (2003), regarding "*a lawless area is a point on the map to make money, move money, launder money and develop all illegal activities by the demand of territoriality that cause, require a physical space to install containers, laboratories, immigrants, etc. After consolidating this territory, the activities that take place there may be enhanced by the participation of other actors, becoming spaces ideal for bonding between organized crime and terrorism*".

At various times, such areas have served as locations where the State conducted peace negotiations (the case of Caguán) and where certain groups like the *Fuerzas Armadas Revolucionarias de Colombia* (hereinafter FARC-EP) have established an "army", "laws", "prisons", drug laboratories, weapon deposits etc. They have intimidated the population, a phenomenon which, together with the delimitation of their borders and the exercise of their authority within the zone and which has led to the creation of types of "independent republics". It may seem small but over the article on the basis of international law and with a case as clear example is the "Caguan," discusses the existence of such "gray zones" in Colombia.

The notion of "independent republics" has been used in Colombian public discourse to define minor insurgent groups. Although these efforts were contrary to international law, they formed part of the possible claims that Colombian guerrillas had in mind with a view to transforming Colombia into a federal State. In international law, they can be classified as "*de facto* entities", "*de facto* regimes", "separatist" or "*de facto* administrations", and even to "separatist states" or "*de facto* states", whereas international law does not acknowledge the notion of "independent republics". In our view in legal terms the expression "*de facto independent entities*" is the most appropriate for classifying "grey zones", i.e. areas controlled by guerrillas in Colombia. However, these areas gained total or partial "independence", or even "sovereignty" as "independent republics"; as we refer to these concepts as used in public discourse while bearing in mind that such concepts are understood in

international law exclusively in the context of States recognized by the international community.

Taking into account these remarks, one might ask whether there have been “grey zones” or “independent republics” in Colombia.

METODOLOGY

The present paper is a socio-legal study inasmuch as it applies the analytical-deductive method to thoroughly analyse the suggested research question. It has the particularity to be conducted from a European and Latin-American perspective. It applies contextualization, conceptualisation and confirmation of the conclusions as research methods which allows analysing legal sources, scholarship and case law. In addition, it scrutinizes some available on-the-ground experience in order to address the phenomenon of “grey zones” and that of “independent republics” in the Colombian context, under international law.

HISTORY OF “INDEPENDENT REPUBLICS”

Historically Colombia has been affected by numerous conflicts: for the present study, one may start with 1948 – the year when a wave of terror with an undeclared civil war began, unleashed by the death of the liberal presidential candidate Jorge Eliecer Gaitán.

During the government of Mariano Ospina Pérez, 150 000 square kilometres (about 58 000 square miles) of the plains was burnt in the departments of Meta, Arauca and Casanare; during the three years following there was no trade in the plains, local farms and the crops were abandoned, the plains were devastated, and nobody left just as nobody entered. This situation led the people of the plains in the early 1950s to give birth to the liberal guerrilla, known as “guerrilla of the plains”, led by Guadalupe Salcedo. This guerrilla aimed at substituting the “dictatorial and violent State” by a “democratic and popular” one. It started its rebellious actions in 1946 when the conservative party came to power, and continued until 1953 (Amado, 1991).

The rise of Laureano Gómez in 1950 and the retreat of the Liberals in the elections reinforced the partisan character of the administration, whereas the military, like the police, were increasingly used as instruments of the bipartisan war, paradoxically as guardians of the internal order (Perdomo, 2010 p. 32). As a consequence, the conflict worsened.

According to witnesses from the liberal farmers, the conservative police felt free to take over their land and goods. Therefore, whereas *Dirección Liberal* was silently marginalized from power, the rural units of the party appealed to arms and became self-proclaimed as ‘guerrilleros’ (“Especial 100 años,” 2011).

As Archila stressed, during the second part of the century the country was whipping up an atmosphere of intolerance which was reflected also in ideas and religious beliefs. For the sake of attacking 'non-Christians' ideologies, Marxist left wing, liberalism, freemasonry and protestant groups were persecuted. In larger cities, a moral crusade developed which obstructed artistic and intellectual creativity (Archila, 1995)

On June 13th, 1953 the commandant of the military forces, general Rojas Pinilla came to power by a *coupe d'état*, overthrowing president Laureano Gómez with the help of liberals and conservatives. This general served until the end of the presidential term. Although the new president had some legitimacy, in the second half of the 20th century, the farmers revived their aggressiveness and returned to the sterile primary and family struggles, or the religious and political conflicts of the 19th century. The State tried to counteract rebel-activity with strong military repression and to grant rewards to those of the community who identified their enemies among their own neighbours and relatives. It did not take into account that the enemies were in the dominant groups who provoked the tragedy (Fals Borda, 1967 p. 187). The armed group leader Guadalupe Salcedo concluded the peace agreement in Monterrey, department of Casanare on July 22nd, 1953, but was assassinated in 1957.

This situation between 1950 to 1953 led to the formation of the so-called "independent republic" of Tequendama (area near to Bogotá) where Juan de la Cruz Varela commanded the peasants and where violent acts were committed. Varela led a rural movement that included peasants from Pasca, Sylvania, Venecia, Cabrera and San Bernardo in the department of Cundinamarca and from Cunday and Villarrica in the department of Tolima.

It must be stressed that the area concerned, considered as the first precedent of the "independent republics", did not satisfy the criteria for statehood. Some of the areas controlled by insurgent groups in Colombia in which there has been total or partial "independence" and "sovereignty" have been accepted as "independent republics" despite the fact that such expressions are used in public international law only in the context of States recognized by the international community. In fact, Juan de la Cruz Varela and

The peasants of Sumapaz never questioned the legitimacy of the existing public order, but searched for the backing of the government and its agreement, whereas the communist peasants who took up arms declared themselves openly against the two party-systems. Thus, it is more correct to consider the colony of El Davis as a model of the 'independent republics' of Marquetalia, Riochiquito, El Pato and Guayabero (Uribe, 2007 p. 81)

María Victoria Uribe notes that between 1949 and 1950, around 200 armed peasants fought for democracy and the agrarian reform and against North-American imperialism. These peasants settled "in El Davis and together with the liberal guerrillas coming from the municipality of Rioblanco they established a guerrilla enclave" (2007, pp. 78-79). She adds that it was an imitation military detachment

equipped with an organization and operational discipline and it included a rural settlement.

In 1960, the senator Álvaro Gómez Hurtado started to speak about "independent republics". Such "republics" were understood as areas beyond the effective control of the government in the present department of Vichada, the region of Sumapaz and in the municipality of Planadas (department of Tolima). In his speech in the senate, he stressed:

The government tolerates the 'independent republics' while fighting them by a miserable, peripheral action and limiting itself to maintaining the military bases where the daily routine has caused the disintegration of military discipline; the coexistence of the military and civilians has become problematic there because an idle soldier is a disintegrating force. A soldier living simply, without work, in a sterile function without guarding anything, becomes demoralized and disturbs the morale of the Armed Forces. In the past soldiers entered in the army in good or bad conditions, with or without military equipment, without fear of a solitary confinement, with or without weapons, but they waged a war against those who did not recognize the national sovereignty. Today this first government of the Frente Nacional does not follow this trend but tolerates 'independent republics' (Congress Annals No. 265. Senate session, June 25th 1960).

The area of Marquetalia along the path towards Gaitania, in the locality of Planadas (department of Tolima) has been considered as the most well-known "independent republic" (at least by right-wing circles). "Marquetalia is bordered by the departments of Tolima, Huila and Valle de Cauca. The surface area of its territory is perhaps about 800 square kilometres" (Arenas, 2000). This area, where around fifty families were living, was inhospitable as Jacobo Arenas describes: "On the way, during hours you realize that you will not encounter any human habitation" (2000). However, it was inhabited by farmers and liberal guerrillas during the violent 50s who engaged in cultivating the region for agricultural production, constituting an agrarian movement independently of liberals and conservatives and influenced by the policy of the Communist Party, they organized peasant self-defence groups (Medina, 2008 pp. 97-98).

Due to the pressure of Gómez, the Colombian president Guillermo León Valencia "took the decision to exterminate these communist enclaves by fire and sword" (Pizarro Leongómez, 2004), so that the Colombian National Army "deployed all of the helicopters that the Armed Forces had at that time, the Army's specialized counterinsurgency units, intelligence and localization groups created in the School of Lanceros of Tolemaida and finally the T-33 military aircraft" (Pizarro Leongómez, 2004). The military operations with almost 2500 soldiers started on May 27th, 1964. These military actions were very intensive in the villages of El Pato (department of Caquetá), Riochiquito (departament of Cauca), Guayabero (department of Meta), Natagaima, Coyaima and Purificación (department of Tolima) where several newborn organizations were established. In these so-called "independent republics"

there were agrarian movements of organizations whose principal aim was to defend their lands through small armed groups. “The action of the self-defence groups and the national protest movement impeded the Army’s operative units from taking over the region” (Medina, 2008). As the State could not stop such groups, lack of violent repression, an opposite effect occurred which gave rise to its principal opponent for the next five decades, the FARC-EP. This is the iconic group for guerrillas all over the world and even the oldest of the guerrilla fighters who participated in this organization died of natural causes in the southern jungles whereas for fifty years the State could never apprehend him. This guerrilla organization was born after the government’s campaign to annihilate “independent republics” and following the peasant movement’s manifesto in the south of Tolima. For this reason it was said that it was not the FARC-EP “who declared war against the State, but, on the contrary, it was the State that declared war against communist agrarian organizations which were forced to take up arms to defend their life” (Pizarro Leongómez, 2004). At the beginning, this insurgent group had a very simple organization; nowadays it has an entire, complex military structure.²

These “independent republics” were known as such only for a few years, whereas it must be admitted that not all of them complied with the criteria of statehood (under international law). The State smartly let the peasants settle there since these areas were not very populated and since media channels forgot them. Consequently, this scenario served the peasants to consider their independence.

THE “INDEPENDENT REPUBLIC OF CAQUETA”

The demilitarised zone (“zona de distensión” or “zona de despeje”) of Caguán was considered as the “Independent Republic of Cagua” which enjoyed, during three years, a total independence from the Colombian government. This situation occurred under the government of Andrés Pastrana which gave rise to the peace process with the FARC-EP by adopting Resolution 85 of 14 October 1998. This resolution designated a demilitarised area for the organization and recognized its political nature. At that time, the FARC-EP gained control over more than 42.000 square kilometres (around 16200 square miles), including the localities of Uribe, Mesetas, Macarena, Vista Hermosa in the department of Meta and of San Vicente del Caguán in the department

2 The website of this organization stated: “The military structure of the Revolutionary Armed Forces of Colombia (FARC) arose in the mid 1964, after the National Army of Colombia performed a military operation in Marquetalia. As a result, the peasants dispersed and established the bases of their internal structure to finally found the FARC guerrilla. Nowadays, this subversive organization is under command of the Major Central State (EMC by its initials in Spanish), which is the body in charge and directs it, in all its phases. Its pacts, orders and determinations are mandatory for the entire movement and its members. The Major Central State is composed by 25 members and it is the body in charge and gives the directives. It names the Secretary, adjusts the conference’s plans, makes the financial decisions and designates the commanders of the Major Front State and the Major Block State.” Available in: http://www.farc-ejercitodelpueblo.org/Estructura_militar_de_las_FARC.html

of Caquetá, with a population of at least 100.000 people. Legislative, executive and judicial powers in the region were entirely controlled by this group.

The Administrative Tribunal of Caquetá, under the presidency of Justice Baudilio Murcia Guzmán condemned the State for these facts (Act N° 35, July 10th 2003) and the Third Chamber of the Colombian Council of State confirmed it in a recent judgment in which it recognized that Colombian Public Forces (“*Fuerza Pública*”- the army and the police) failed to intervene in the area for more than three years. As the Council of State noted, “public order lay with the mayors of the five municipalities who, with the permission of the Government, created a Civilian Corps for Cohabitation to replace the action of the Public Forces.” As for the judicial system, it moved away from the region and “allegations of abuses committed by the FARC-EP were dealt with by the Ombudsman, in the absence of judges and prosecutors”.

As the judgment points out, in the department of Caquetá during the period of the demilitarised area, between 1998 and 2002, the presence of FARC-EP was strengthened considerably. The illegal organization thus exercised authority over various adjacent municipalities, namely over El Doncello, Puerto Rico, El Paujil, Cartagena del Chairá and the routes linking these localities and leading to San Vicente del Caguán (Numael Barbosa Hernandez y Otra vs. Departamento Administrativo de la Presidencia de la República y otros, 2013).

The Council must stress that although obligations in defence and security matters must begin with the analysis of special conditions of the public order of the country, it cannot follow that the State abandons the citizens and complete communities who charged legitimately constituted institutions with the defence of their life and properties, especially when such abandonment continues over time. In other words, the relativity of the duties related to the security and defence cannot be used by the State as an excuse when it fails – as it occurred in the present case – to comply with these obligations (2013).

In other decisions, both the Council of State and administrative court decisions have invoked common arguments regarding the State’s responsibility for violations committed in the area of the “independent republic of Caguán” on the grounds that the State had failed to guarantee the protection of life, property and other rights of citizens during the period of the demilitarisation (Tito Antonio Gómez Otero vs. Instituto Nacional Penitenciario y Carcelario-INPEC, 2103)³. Similarly, on May 31st, 2013, the Council of State found the Nation, the Ministry of National Defence and the National Army materially responsible for the damage caused to the plaintiff Ismael Díaz Gaitán (Ismael Díaz Gaitán vs. Ministerio de Defensa - Ejército Nacional, 2013).

The Colombian “Public Force”, formed by the Armed Forces and the National Police which exercise the monopoly of the legitimate use of force, was guarding

3 In *Ignacio Araujo Sánchez y otros c. La Nación - Ministerio de Defensa - Ejército Nacional*, Tribunal Administrativo del Caquetá, File 18001-2331-001-2004 May 29th 2008, Judge-Rapporteur Fernando Cuéllar Sánchez, the Tribunal condemned the State’s authorities for the omission of the police to provide protection and surveillance of the plaintiff’s goods.

the outer zone of the demilitarised area especially for two purposes: to keep out paramilitary groups and to prevent guerrillas from expanding their territory. However, neither of these armed forces responsible for ensuring the defence and public order of the country fulfilled its constitutional mission. On the other hand, this structure benefited from the support of the international community which tacitly recognized the legal and illegal acts committed in the demilitarised area. While the State limited its sovereignty in the area concerned and somehow jeopardized the people living there by the fact of the FARC-EP grabbing the power from the State and by subordinating the population. It is only twenty years after the events that the State was held responsible for its own acts and omissions before domestic courts such as the Council of State, which means that the acts of FARC-EP were presumed as legitimate. There was no democracy in that area, the operation of the Colombian government failed and an authoritarian local government was led by the FARC-EP.

The FARC-EP did not enter the area as a separatist movement and the situation was not the result of an agreement concluded between the group and the Pastrana government,⁴ but as a result of a high number of its members having arrived as displaced persons expelled by the Colombian Public Forces or paramilitaries or as a result of the hostilities between the two. It also seems certain that the activities of “government” that was formed by the FARC-EP did not improve the situation of the local population in any way. The demilitarisation of the area ended the day when President Pastrana decided on its cessation on the February 21st, 2002, through several resolutions ordering that the Colombian Public Forces and the government to retake control of the region.

Given the complete failure to overthrow the guerrillas in its own territory, the Colombian government chose to call them terrorists. Therefore, both the European community and the United States included them in an international list of terrorist organizations. The State fought against the extensive power of the FARC-EP and to a lesser extent against that of the ELN⁵ in operations conducted by paramilitary groups and legitimate armed actions conducted by the Armed Forces and the police. However, paramilitaries fought the FARC-EP in clearly illegal operations. A considerable part of the Public Forces (especially the military) committed the same acts, including much more lethal operations, with the aggravating circumstance that they were

4 It is important to stress that Pastrana, while negotiating with the FARC-EP, anticipated the fight against the latter with the help of the United States under the “Plan Colombia”. This plan provided for military assistance for the Colombian State with the aim of cooperation in the fight against drug trafficking, concluded by Bill Clinton from the US and his Colombian counterpart, Andrés Pastrana. It is well known that this “aid” has allowed the sharpening of the social and armed conflict.

5 According to Gloria Patricia Espino-Duque “Scholars reveal that most cases of terrorism committed in 2009 (204 cases) are attributed to the FARC-EP, with a participation of 66 % in the total number of terrorist cases; secondly, it committed ordinary crimes, in sum 34 cases, with a participation of 11 % in the total number of cases; the ELN is supposed to be responsible for 10 acts of terrorism, with a participation of 3 % of the total number of cases; finally, the commission of terrorist acts is attributed to criminal gangs in 3 cases, with a participation of 1 % in all of the terrorist crimes. As a result of terrorist attacks, 155 persons were killed and 569 injured.” (Espino-Duque, 2010 p. 21).

legally protected from the beginning under the Constitution and by legislation. In any event, according to the government, the whole fight is conducted against a terrorist organization, although counter-terrorist operations must be conducted absolutely in accordance with IHL and human rights. The entire situation generates illegal actions committed against the civilian population. As a consequence, the State turns out to be the violator of human rights which is questionable from the point of view of the international community. For its part neither does the State recognize the violation of human rights, nor the fact that illegal actions are conducted against terrorism, nor that it violates IHL since this would entail its condemnation by international tribunals.

If in Colombia there is a non-international armed conflict, it means that there has been and there is continuous and sustained hostility between the legitimate armed forces and another army such as the FARC-EP which uses force in order to overthrow its enemy. Irrespectively of whether a group that takes up arms against the State expressed its commitment to comply with IHL, it is bound to respect the latter. However, whereas the humanization of the conflict is the ultimate goal of IHL and is not being achieved, the obligations enshrined in IHL do still govern the armed conflict (Nieto Loaiza, 1998 pp. 367-368). In any case, while the FARC-EP is called a terrorist organization, the Constitutional Court recognized that "international treaties classify the crimes of terrorism and abduction as crimes susceptible to extradition or prosecution (*"Aut dedere, aut judicare"*), and they are considered in no case as political crimes for which amnesty or pardon may be granted" (Constitutional Court, Sentence C-695 2002). This situation makes it very difficult to talk about an armed conflict and a post-conflict phase without due regard to the likely consequences of the violation of international law that sanctions crimes of a political nature and ordinary crimes⁶. As Botero points out, common Article 3 of the Geneva Conventions of 12th August 1949 is a norm that applies, *ipso iure*, in non-international conflicts. Furthermore, its application is directly enforceable from the very beginning of the armed conflict (p. 158).

The former means that under international humanitarian law, the perpetrators or accomplices of crimes of terrorism and abduction, in any form of their modalities, cannot benefit from amnesty or pardon. Likewise, because of their extreme gravity they cannot be considered as acts related to political crimes because their very nature implies a conduct that is not susceptible of the said benefices (Constitutional Court, Sentence C-695 2002).

6 One must stress that in Colombia, the Criminal Code distinguishes between political crime and ordinary crime, although different governments tried to eliminate political crime as such during the last half century. In this sense, this is the proof that basic laws governing justice, counter-terrorism and security provide the framework in which democracy has been defended and consolidated. As a common element, this kind of special legislation has always been adopted in a state of emergency.

GREY ZONES AS INSURGENT AREAS

As mentioned before, the Colombian Government is still reluctant to define the situation as “armed conflict” or to recognize guerrillas as parties to it and prefers the rhetoric of counter-terrorism. Its main arguments are the practice of FARC-EP to operate in smaller groups, to make more use of essentially civilian support militias, briefly to blur the status of combatants and their interconnection with criminal activities (Planner, 2008 p. 824). Similarly, the geographical zones where guerrillas operate are often characterized as porous or remote areas by the Colombian government, rather than areas under the effective control of an armed group – a criterion of the applicability of Additional Protocol II (AP II).

Certainly lawless areas, have defined characteristics, even with extensive discussion, Cirino and Elizondo (2003) suggest three causes that enable the emergence of lawless areas:

“1. Policies. Weak state institutions, resulting in an inability to maintain the legitimate monopoly of violence and high levels of corruption among state actors.

2. Political-geographical. Border areas, by its distance from production centers have not been connected with these centers, in addition to its inaccessible by the presence of certain geographical conditions, such as the thick jungle vegetation and lack of road and communications infrastructure, the make appropriate spaces for establishment of illegal organizations linked to international crime.

3. Socio-economic. The installation of free zones in these areas, expands the operational capabilities of non-state actors (illegal), and thanks to the economic gains from illegal activities such as smuggling, drug trafficking and money laundering, obtain the necessary resources to sustain its activities. As an example may be the case of the City of Maicao in Guajira Colombiana Colon in Panama and Iquique in northern Chile”. Is arguable that the FARC hold a lawless area, however this can be written to be concluded that it is indeed so.

It is clear that the effective control exercised by an armed group over a certain area has relevance in both IHL and international human rights law (IHRL)⁷. In international armed conflicts, the concept is the key criterion for the application of the law of belligerent occupation (IV Geneva Convention, Art. 42) whereas in non-international armed conflicts, it is one of the defining elements of the material field of application of AP II. The latter applies to armed conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident

⁷ As for the concept of “effective control” under human rights treaties, see *infra*.

armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol” (Geneva Conventions, Protocol I, Art. 1)⁸ Among the objective criteria of the definition (1. parties confronting each other; 2. responsible command; 3. control over a part of the territory; 4. the sustained and concerted character of military operations; 5. ability to implement the Protocol). It has been argued that Colombian guerrilla units satisfy all the conditions of the responsible command and organized structure, the military operations conceived and planned by an organized armed group and the ability to implement AP II (Valencia, 2007 pp. 216-227). It is useful to examine how the criteria of the applicability of AP II have been interpreted and in what measure Colombian armed groups satisfy them.

The Commentary of AP II stresses that “effective control” does not require a minimum geographical extension such as “a non-negligible part of the territory” or a “substantial part of the territory” (Y. Sandoz, C. Swinarski & B. Zimmermann (Eds.), 1987 p. 1352 para. 4465). What counts is the quality of the control: “it must be sufficient to allow sustained and concerted military operations to be carried out and for the Protocol to be applied, i.e., for example, caring for the wounded and the sick, or detaining prisoners and treating them decently” (p. 1352, para. 4466). This functionalist element seems satisfied in cases where guerrilla groups are presented and have at least certain premises in a remote area, usually in or near small villages of a strategic military importance from where they can carry out armed operations.⁹ They have facilities for the training of newly recruited members, for narcotics production and trafficking (International Criminal Court, 2012 para. 44) or detention facilities for hostages even for a very long term (Human Rights Council, 2012 para. 85). In practice, in areas abandoned by the State administration, guerrilla or paramilitary groups will likely impose their influence and “social control” on the local population (Aponte & Orozco, 2006 p. 90). As the Commentary of AP II recognizes, the extent of territory that non-state armed groups can claim to control will be that which escapes the control of the government armed forces (Y. Sandoz, C. Swinarski & B. Zimmermann (Eds.), 1987 pp. 1352-1353, para. 4467).

8 Regarding the Protection of Victims of non-International Armed Conflicts, one may refer to the Additional Protocol II (8th June 1977).

9 This phenomenon is stressed in the Report of the United Nations High Commissioner for Human Rights on the human rights situation in Colombia, UN Doc. E/CN.4/2003/13 (24 February 2003), para. 29; Report of the independent expert on minority issues, Gay McDougall, Mission to Colombia, UN Doc. A/HRC/16/45/Add.1 (25 January 2011), para. 24; it was also observed by the Council of State of Colombia, in *Sociedad Fierro Avila y Compañía, sociedad en comandita*, N° 25000-23-26-000-1993-08632-01(18472) October 29th 2012 Judge-Rapporteur Danilo Rojas Betancourth, para. 37 “Indeed, is a well-known fact that this actions tend to concentrate in small populations, located in areas of the national territory that offer a strategic advantage from the military point of view, and where the armed actors exert a strong presence and have the capacity of perpetrating an armed conflict with great impact”.

Another condition of the applicability of AP II is “some degree of stability” in the control (1987 pp. 1352-1353, para. 4467) – the condition that is the most contested in the case of Colombian armed opposition groups. The very similar criterion of permanence in the case of belligerent occupation is the test of whether the military forces of the invading State not only station themselves in particular locations but that they have also substituted their own authority for that of the government of the occupied State (*Democratic Republic of the Congo v. Uganda*, 2005 p. 230, para. 173; *The Prosecutor v. Thomas Lubanga Dyilo*, 2007 par. 213). On the basis of a civil or military administration established by the occupying power, international tribunals could define the status of a given area occupied territory (*Democratic Republic of the Congo v. Uganda*, 2005 paras. 175-176; *The Prosecutor v. Thomas Lubanga Dyilo*, 2007 paras. 214-220). Some authors claimed that territorial control under AP II has to be of the same intensity as that exercised by States: permanent and stable (Hernández Hoyos, 2000 p. 124; Nieto Loaiza, 1998 p. 363). However, in guerrilla zones, where guerrilla units operate with flexibility and do not establish a formal administration in local communities, it is difficult to talk about a “substitution” of authority and stable control. On the other hand, according to the majority view, no analogy can be made between belligerent occupation and non-international armed conflicts covered by AP II in respect of the stability of the control¹⁰ – the former aiming at inter-State conflicts, the latter regulating armed conflicts between the State’s forces and an insurgent armed group. As most experts have stressed, no State-like territorial domination or physical borders can be expected from a non-state armed group. The Colombian Attorney General’s Office admitted that the territorial control exercised by guerrilla groups is of necessity “porous and even intermittent”¹¹ and it is in that sense that certain authors speak about the “de-territorialisation” of the armed conflict (Burbano & Schlenker, 2005 p. 95). Even the Commentary of AP II, while requiring a certain degree of stability, accepts that “[i]n many conflicts there is considerable movement in the theatre of hostilities; It often happens that territorial control changes hands rapidly” (Y. Sandoz, C. Swinarski & B. Zimmermann (Eds.), 1987 pp. 1352-1353, par. 4467).

Recognizing the porosity of the territorial control exercised by guerrillas, several authors suggest that the “stability” of the control should be interpreted flexibly in the case of AP II, while requiring at least a certain permanent link between the insurgent group and the given area. This presupposes that the non-state armed

10 However, according Sandesh Sivakumaran in “Re-envisioning the International Law of Internal Armed Conflict”, scholars admit that certain general protective provisions and prohibitions contained in the law of belligerent occupation are applicable to internal armed conflicts through comparable provisions or customary international law (pp. 245-248).

11 In Sentence No. C-222/95 May 18th 1995, by the Colombian Constitutional Court (*Corte Constitucional de Colombia*), the views stated of Inspector General of Colombia: “Assuming that Protocol II is made to be applied, then it is necessary to understand that the territorial control which is alluded to is nomadic, that means, a territorial control based on conserving the freedom of circulation of the roadways and on social control *vg.* A territorial control based on the consolidation of a society internally and externally. This implies accepting that the guerrilla’s territorial control is porous and intermittent”.

group has territorial ambitions – it is the case of rural guerrillas, as opposed to urban guerrillas (Aponte & Orozco, 2006 pp. 87-88), and several international organizations recognized this aspiration in the case of the FARC or the ELN (e.g. International Criminal Court, 2012 par. 38; “Third report on,” 1999 Chapter IV, para. 113; Human Rights Council, 2002 pars. 137-139), including the Colombian Attorney General’s Prosecutor’s Office¹² and even the Government (“Letter dated 4”, 2000, pp. 5-6). Furthermore, the fact that guerrillas have not attained the stage of a regular army in their development and that one cannot speak about a state-like administration of their areas does not mean that they do not exert any control. As several UN human rights reports recognized (Human Rights Council, 2010 para. 67; Human Rights Council, 2012 pars. 84-86; Human Rights Council, 2013, par. 85), the guerrillas enforce “social control” in their areas of influence, rather than strictly speaking an “administration”. They impose taxes on the local population, detain hostages, and resort to collective threats, recruitment of child soldiers, obstruction of the freedom of movement of persons and goods and the limitation of other human rights in a systematic manner. In this sense, one can speak about socio-political borders of such guerrilla controlled areas, whereas their physical borders are porous and diffuse and impossible to delineate (Aponte & Orozco, 2006, p. 89). Some authors suggested that territorial control must thus be interpreted in the case of guerrillas in a relative and functional sense: it suffices if the armed group is able to enter and move within the area, to plan and conduct military operations and most importantly, to comply with its obligations under AP II (Hernández Hoyos, 2012, pp. 528-529).

Finally, the Commentary of AP II admits that “it is the ‘sustained and concerted military operations’ which effectively determine control of a territory” (Y. Sandoz, C. Swinarski & B. Zimmermann (Eds.), 1987 p. 1353, par. 4468). This element requires “that the operations are kept going or kept up continuously” and “conceived and planned by organized armed groups” (1987 p. 1353, par. 4469). Beyond the mere physical presence in a given area, be it porous without clearly defined physical borders, a guerrilla unit will exert territorial control if it conducts sustained and concerted military operations in a continuous and intensive manner.¹³ The above mentioned systematic armed activities of guerrillas (hostage taking, recruitment of child soldiers, imposing “war tax”, detention of civilians, collective threats etc.) within a given geographical area certainly satisfy this criterion.

12 The Colombian Constitutional Court (*Corte Constitucional de Colombia*), stated in judgment No. C-225/95, (that “in any case, there is no doubt that the guerrilla warfare in Colombia is still, despite the growing urban infiltration and even despite the growing outlawing of the insurgent groups, a war oriented towards a strategic project of “State substitution”, so it proceeds –in principle, at least- via construction, consolidation and progressive amplification of territorial control. In other words, the guerrilla warfare in Colombia is, predominantly, a war for territorial control and in no case such as that of strategic terrorism, a war for controlling thinking”).

13 To go deeper into the elements of continuity and intensity, one can see the decision of the ICTR, *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Trial Court I, Judgment and Sentence, 27 January 2000, para. 257.

In sum, it must be highlighted that guerrilla groups are able to satisfy the criteria of Article 1 of AP II. Furthermore, in practice they still do control certain zones, although to a lesser extent than in the 1990-2000s and usually in so-called areas of retreat, typically in the periphery and border regions of the country (Human Rights Council, 2010, par. 66). However, the Colombian Government hardly ever admits the existence of such “grey zones” and it justifies the refusal of the recognition of the FARC or ELN as insurgency or belligerent party by the alleged lack of permanent territorial control exercised by these groups (Forero, 2012, pp. 35-36). However, the Ministry of National Defence does admit military operations conducted in so-called “red zones”: these are ongoing operation areas where the security situation is critical, and the objective is to end the violence and to re-establish “territorial control” (“Política integral de,” 2011, p. 26).¹⁴ The Ministry of National Defence estimates that in 2011 6 % of the national territory constituted such “red zones” (“2011-2014: Guía de,” 2011, p. 30), whereas in 2004 this rate was almost 15 % (“Política integral de,” 2011 p. 16). Thus, the Government seems to recognize implicitly the existence of “grey areas”, but it is doubtful whether any legal consequences arise therefrom from the point of view of the application of IHL.

GREY ZONES AS TERRORIST “SAFE HAVENS”?

Guerrilla warfare also creates a legal “grey zone” from the point of view of the application of IHL (Aponte & Orozco, 2006, p. 89)¹⁵: whereas the law applicable depends on the classification of the armed conflict in terms of highly contested categories such as international, non-international, internal or even internationalised armed conflicts. The war by national governments against armed groups defined by them as “terrorist organizations” further complicates the situation. The fact that the Colombian Government and other states like the US (“Foreign terrorist organizations,” 2012) or member states of the European Union (“Council decision,” 2013) define the FARC and the ELN as terrorist organizations raises several questions from the point of view of International law. Firstly, it affects the applicability of IHL: whereas insurgency is governed principally by IHL, especially by AP II, terrorism traditionally entails the application of domestic or international criminal law. One may ask whether there is any contradiction and whether the counter-terrorist methods used by the Colombian government are still governed by IHL (6.1). Secondly, the international community has developed contacts and mechanisms of regular dialogue with insurgent groups, whereas it is doubtful whether similar contact may be maintained with terrorist organizations, including those controlling a territory. A

14 “This means that there still are red zones where the strategies of territorial control and dismantling of illegal armed groups, implemented within the framework of the Democratic Security Policy, are necessary in order to end violence”.

15 Schlenker applies the same concept to the difficulties in distinguishing combatants and non combatants when fighting guerrillas (Burbano & Schlenker, p. 92).

refusal to establish regular contacts with local units of FARC-EP risks contributing to the maintenance of "terrorist safe havens" – an argument that some states have used to legitimise a heightened scrutiny of areas by third states and even armed intervention (6.2). The answers to these select questions reveal that the definition of the FARC-EP as a terrorist organization has many less legal consequences than its insurgent status.

Qualification of terrorism and the applicability of IHL

Several governments tend to define the armed opposition groups active in their territory as terrorists. They often refuse to apply IHL while combating them by resorting to new combat methods (like drones, extraterritorial detention camps etc.). Such legal definitions have been highly debated: it suffices to think about the conflicts between the US and Al-Qaeda, Israel and Hamas, Uganda and the LRA (e.g. Blum, 2011, pp. 266-267; Schondorf, 2011, pp. 13-17). Unlike the preceding examples, where the armed conflict between a state and a terrorist organization takes place outside the state's territory. The war between the Colombian Government and the guerrillas is limited to the territory of the State, constituting principally a non-international armed conflict.

However, the intensity of the conflict might vary geographically and in time and there could be situations not attaining the level of an armed conflict. In that respect, three situations must be distinguished: 1. "sustained and concerted military operations", giving rise to the eventual applicability of AP II; 2. armed conflict under common Article 3 of the Geneva Conventions which applies even in situations not satisfying the criteria of AP II; 3. finally, other sporadic violent situations not considered as armed conflict ("situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature") (Additional Protocol II, Art. 2). As international practice defines, "armed conflict not of an international character" under common article 3 supposes that the non-state "Party" has a minimum level of organization required to enable the entity to carry out its IHL obligations. Furthermore, the level of violence must look like a war, with the use of military material, even in situations not governed by Additional Protocol II ("Terrorism and human rights," 2004, par. 35; Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj, 2008, pars. 38-60). The FARC-EP or the ELN undoubtedly have a strong organization, whereas the Colombian anti-guerrilla operations give rise to the use of military (rather than police) forces, operations, weaponry and material. Thus, the Government's counter-terrorist discourse does not alter the existence of an internal armed conflict. As for the use of counter-terrorist methods, UN reports often recognize the commission of terrorist acts by Colombian guerrilla groups (Human Rights Council, 2003, pars. 38-39; Human Rights Council, 2005, par. 36; Human Rights Council, 2010, par. 68); in such mixed cases, the Special Rapporteur on Terrorism and human rights suggested that "there

should be a balancing of legal military acts versus terrorist acts: only when the preponderance of acts are terrorist acts should the group be considered terrorist” (“Terrorism and human rights,” 2004, par. 37).

Facing the distinction between different types of conflicts, the Colombian Government tends to consider its anti-guerrilla military operations as a “continuum, with the use of pure military force at one end and normal law enforcement activities at the other” (Pfanner, 2008, p. 825) and thus trivializes the application of IHL as a branch of law partially applicable. However, “grey zones” can serve as useful arguments in favour of the primary application of IHL: it is recognized that the Government’s lack of control and a rebel group’s exercise of effective control over a portion of the territory serves as an additional indicator of the existence of an armed conflict (“International humanitarian law,” 2003, p. 6). Furthermore, whenever the forces of the Colombian Army approach “grey zones”, they conduct a military operation against “enemy territory”, preparing for an armed confrontation, rather than for “isolated and sporadic acts”.

Whereas AP II is not deemed to apply to situations of “isolated and sporadic acts”, the Constitutional Court of Colombia concluded that the exigencies laid down in common Article 3 of the 1949 Geneva Conventions are considered as the “minimum” norms applicable in all non-international armed conflicts and even in all violent situations (Constitutional Court, Sentence No. C-225/95, p. 104, par. 25). Thus, based on the peremptory nature of Humanitarian Law under Article 214(2) of the Colombian Constitution, the exigencies of humanitarian treatment derived from IHL shall be maintained in all cases, even in violent situations not amounting to an armed conflict (Constitutional Court, Sentence No. C-225/95, p. 104, par. 25).

Finally, notwithstanding the commission of certain “isolated and sporadic” terrorist acts, the legal applicability of AP II extends to all of the territory of the State: it is in this sense that international human rights bodies regularly confirm the applicability of AP II in Colombia as such (Human Rights Council, 1999, par. 108; Human Rights Council, 2002, par. 63; Human Rights Council, 2003, par. 55; Human Rights Council, 2005, par. 74; “Third report on,” 1999 Chapter IV, par. 20). As the Colombian Red Cross argued, AP II cannot be limited to areas where active hostilities are on-going, but that it should benefit all victims of the civil war all over the country irrespective of their geographical situation. (Constitutional Court, Sentence No. C-225/95, p. 67, par. 3.1).

The risk of “terrorist safe havens”

The U.S. government’s annual terrorism report defines (terrorist) “safe havens” as “ungoverned, under-governed, or ill-governed physical areas where terrorists are able to organize, plan, raise funds, communicate, recruit, train, transit, and operate in relative security because of inadequate governance capacity, political will, or both” (“Country reports on,” 2013 p. 205). Concerning Colombia, the U.S.

specifically refers to the safe havens in Colombia's border regions with Venezuela, Ecuador, Peru, Panama, and Brazil, controlled by terrorist groups, especially the ELN and the FARC-EP (2013, p. 210). Consequently, the U.S. Department of State submits Colombia to a regular review in its annual terrorism reports; the latest 2012 report heavily criticized the weaknesses of the Colombian border security, while acknowledging the outstanding law enforcement cooperation between Colombia and the United States (2013, p. 183). Although the identification of terrorist safe havens in Colombia entails a stronger law enforcement cooperation between the U.S. and Colombia, such a terrorist threat has even served as a *casus belli* for example the 2001 U.S. war in Afghanistan (e.g Bowman & Dale, 2009, p. 1) or for instantaneous military incursions in neighbour States such the "Operation Phoenix" by Colombian forces in March 2008 in Ecuador.¹⁶ Thus, on the one hand, the argument of a terrorist "safe haven" is a potential threat to third States which leads to strengthened international cooperation or, on the contrary, to an armed intervention by the third State. Furthermore, the international community has recognized the obligation of states to deny safe havens to persons suspected of terrorism ("Resolution 1624," 2005, par. 1).

On the other hand, terrorism as such seems to exclude dialogue with the illegal armed group concerned. This may be inferred from the obligation of states "to take all measures as may be necessary and appropriate and in accordance with their obligations under international law to counter incitement of terrorist acts motivated by extremism and intolerance" since dialogue with terrorist groups could be considered as incitement to or at least as a tolerance of their activity (2005, par. 1). In the case of northern Mali, occupied in 2012 by various North African armed groups including Al-Qaeda-linked terrorist groups, the Secretary-General of the UN considered that "while it is my fervent hope that the country can be reunified through negotiations, it is likely that there will ultimately be some terrorists and criminals with whom no dialogue is possible" ("Report of the," 2012, par. 84).

However, humanitarian and human rights organizations have established regular or *ad hoc* contacts with Colombian guerrilla organizations. Through the use of a regular dialogue and onsite visits (Human Rights Council, 2000, par. 14; Human Rights Council, 2001, par. 129), the UN High Commissioner's Office in Colombia could participate in the control of guerrillas, already conducted by humanitarian organizations like the ICRC or *Médicos Sin Fronteras*. Thus, humanitarian and human rights organizations make an effort to conduct a dialogue with guerrillas despite their definition as "terrorist organizations" by governments. UN bodies regularly urged that dialogue and negotiations be initiated between the Colombian Government and illegal armed groups, aimed at overcoming the internal armed conflict and reaching

16 On the 1st March 2008, the Colombian Armed Forces bombarded and invaded a FARC camp near Angostura, in the Lago Agrio Municipality, in Ecuador, 1,850 metres from the Colombian border. This subject is treated in the Inter-American Commission on Human Rights, Report N° 112/10, Inter-State petition IP-02, *Franklin Guillermo Aisalla Molina, Ecuador v Colombia*, Admissibility, 21 October 2010, OEA/Ser.L/V/II.140, Doc. 10.

a lasting peace and giving priority, from the outset, to International Humanitarian Law and Human Rights (Human Rights Council, 2005, par. 142; “Report of the,” 2010 para. 98). Secondly, UN bodies take into account the commitments made by the guerrillas, they reiterate them in UN reports and thus try to enhance the compliance with these undertakings (e.g Human Rights Council, 1999, par. 109; Human Rights Council, 2001, par. 125; Human Rights Council, 2002, par. 161).

In sum, it seems that the Colombian Government’s and other third States’ definition of FARC-EP as terrorists does not prevent international humanitarian and human rights organizations from considering it essentially as a party to an armed conflict and the territories under its effective control as insurgent areas.

CONCLUSIONS

The complexity of the Colombian armed conflict has given rise to ongoing human rights violations and grave breaches of International Humanitarian Law. This complexity, coupled with five decades of internal armed conflict, prevented all initiatives to punish harmful conduct in accordance with international law. Although in Colombia can be promptly let alone transnational clandestine actors (CTA), which are defined by Andreas (2003) “and non-state actors operating beyond national borders in violation of state laws and try to evade efforts of law enforcement “, what is clear is that resemble much to actors like the FARC that control and violate national and international.

Only now has the Colombian State begun to prosecute such crimes, although there are many acts that have remained unpunished. Several cases decided by the Council of State, the highest administrative court in Colombia, concerned acts that had occurred in the so-called “independent republics”. Especially with regard to the Caguán area, the Council of State recently reiterated in several decisions that the Colombian government failed to meet its constitutional obligations and therefore sentenced it to compensation for damages. This does not mean that the Council of State recognized the existence of “independent republics”, but that the government at that time did not comply with the Constitution and the law. However, in the decisions concerning the Caguán area or the “independent republics”, Colombia in fact recognized its international obligations through a national interpretation of international law.

As for the debate “insurgent v. terrorist organization”, it seems that the Colombian Government’s and other third states’ assessment of FARC-EP as terrorist group does not prevent international humanitarian and human rights organizations from considering it essentially as party to an armed conflict and the territories under its effective control as insurgent areas. Nor does it prevent the conduct of peace negotiations in Havana, although it maintains its international isolation and the threat of international sanctions against the leaders of FARC-EP. Even in European “grey areas”, leaders of *de facto* regimes are defined in the home state as terrorists, whereas the international community mediates in status negotiations (e.g. OSCE-

talks about the status of Transnistria or of Nagorno-Karabak). Finally, humanitarian and human rights NGOs and international organizations have an elementary interest in conducting a regular or *ad hoc* dialogue with FARC-EP as far as it controls areas inhabited by civilian population.

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