

Individualization and Collectivization in Contexts of Organized Criminal Violence

The Case of Mexico's War on Organized Crime

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In 2018, 78,667 people were killed violently in Brazil and 43,089 in Mexico, compared with 29,584 in Afghanistan and 16,905 in Syria—yet only the latter two countries were widely classified as armed conflicts.¹ Most contemporary lethal violence does not occur in war zones, and the levels of lethal violence in non-war settings are often higher than in war zones.² Rates of lethal violence are especially high in Latin America, a region with 8 per cent of the world's population and 33 per cent of the world's homicides.³ A significant proportion of these homicides—estimated to be between a third and a half in the case of Mexico, and two-thirds in El Salvador—are linked to organized crime.⁴ And homicide is only the most visible manifestation of criminal violence, which also has many other repertoires and effects, including sexual violence, forced displacement, extortion, as well as restrictions on access to basic health care and education.⁵

¹ Data from the Global Violent Death database by the Small Arms Survey.

² Nicholas Barnes, 'Criminal Politics: An Integrated Approach to the Study of Organized Crime, Politics, and Violence', *Perspectives on Politics* 15, no. 4 (2017), pp. 967–987, at pp. 970–971; Dennis Rodgers and Robert Muggah, 'Gangs as Non-State Armed Groups: The Central American Case', *Contemporary Security Policy* 30, no. 2 (2009), pp. 301–317, at p. 301; Guillermo Trejo and Sandra Ley, *Votes, Drugs, and Violence: The Political Logic of Criminal Wars in Mexico* (Cambridge: Cambridge University Press, 2020).

³ Caroline O.N. Moser and Cathy McIlwaine, 'Latin American Urban Violence as a Development Concern: Towards a Framework for Violence Reduction', *World Development* 34, no. 1 (2006), pp. 89–112; Robert Muggah and Katherine Aguirre Tobón, *Citizen Security in Latin America: Facts and Figures* (Rio de Janeiro: Igarapé Institute, 2018), p. 2.

⁴ Ana Balcazar Moreno et al., *The War Report 2017: Gang Violence in Colombia, Mexico and El Salvador* (Geneva: Geneva Academy of International Humanitarian Law and Human Rights, 2017), pp. 7, 11.

⁵ Tristan Clavel, 'Extorsión y violencia sexual: el padecimiento oculto de las mujeres', *Insight Crime* 8 (January 2020); IDMC, *New Humanitarian Frontiers: Addressing Criminal Violence in Mexico and Central America* (Geneva: Internal Displacement Monitoring Centre, 2015); Eduardo Ubierna, 'Violencia armada en Latinoamérica: ¿cuáles son los nuevos retos humanitarios?' (Lima: Universidad del Pacífico, 2018).

The use of military force or militarized police has become widespread in such contexts.⁶ Governments in Colombia, Peru, Mexico, El Salvador, and Brazil have essentially treated highly armed organized criminal groups as enemies of the state, and deployed against them levels and means of force more commonly associated with non-international armed conflicts (NIACs). War vocabularies have been used widely by commentators and public authorities to describe and operate in these contexts—‘war on drugs,’ ‘cartel wars,’ ‘national security threats,’ etc.—if often rhetorically and not necessarily to denote the technical category of NIAC. And yet the capacity for coordinated action of non-state armed groups, and the humanitarian toll resulting from either state ‘wars on crime’ or ‘turf wars’ among criminal groups, appears to be at the level or above situations of violence that have been widely classified as NIAC.

In international law, the distinction between NIAC and other forms of organized violence is made on the basis of legal thresholds relating to the intensity of violence and the level of organization of participating non-state armed groups.⁷ When these thresholds are met, at least common Article 3 of the four Geneva Conventions and customary international humanitarian law (IHL) come into effect, as well as the possibility to investigate and prosecute for war crimes. Centrally for our purposes, the threshold for qualification of organized violence as NIAC does not include reference to the motives or proximate goals of non-state armed actors. In principle, situations of violence with unclear or outright pecuniary motives can be qualified as NIAC, which means that militarized criminal organizations can be non-state parties to NIAC.⁸

In the case of Colombia, the International Committee of the Red Cross (ICRC) identified six overlapping NIACs in 2021, five of which involve non-state groups with unclear or inexistent political motives, and only half of which involve state forces.⁹ Aerial bombardment of organized criminal camps has been official policy of Colombian forces since 2016.¹⁰ Less plausibly, the Peruvian government has issued legislation and emergency decrees since 2007 declaring drug trafficking organizations in the VRAEM region (Valley of the rivers Apurímac, Ene and

⁶ Gustavo Flores-Macías and Jessica Zarkin, ‘The Militarization of Law Enforcement: Evidence from Latin America,’ *Perspectives on Politics* 19, no. 2 (2019), pp. 519–538; Juan Albarraçín and Nicholas Barnes, ‘Criminal Violence in Latin America,’ *Latin American Research Review* 55, no. 2 (2020).

⁷ ICRC, *How Is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?* Opinion Paper, March 2008 (Geneva: ICRC, 2008).

⁸ Sandesh Sivakumaran, *The Law of Non-international Armed Conflict* (Oxford: Oxford University Press, 2012), pp. 164–182; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge: CUP, 2010), pp. 117–158.

⁹ CICR, *Retos humanitarios 2022: Colombia*, CICR (Bogotá, 2022), p. 3.

¹⁰ *Ibid.*, p. 3; Revista Semana, ‘Bombardean campamento del “Clan Úsuga” en Chocó,’ *Revista Semana* (Bogotá), 3 November 2015; Ana Balcazar Moreno et al., *The War Report 2017: Gang Violence in Colombia, Mexico, and El Salvador* (Geneva: Geneva Academy, 2018), pp. 2–6.

Mantaro) as ‘hostile groups’ and as such lawful military targets in a context of hostilities.¹¹

In the case of Mexico, legal scholars and international think tanks have been divided as to whether organized violence can be characterized as NIAC for some or all of the time since the ‘war on drugs’ began in 2006. While many experts have argued that it can be, both Mexican authorities and the ICRC are working on the basis of Mexico being a situation of violence that is ‘below the threshold of armed conflict’, and as such regulated not by the ‘hostilities paradigm’ of IHL but rather by the ‘law enforcement paradigm’ of international human rights law (IHRL) in peacetime.¹²

Through a case of study of Mexico’s ongoing war on organized crime in this chapter we show how the qualification of a situation of organized violence as NIAC or as below the NIAC threshold has major implications for how individualization processes operate. Our study serves both to elucidate the normative structure of situations of violence below the NIAC threshold, and to shed light on the assumptions and conditions that enable individualization processes in contexts of armed conflict.

As is well known, when a situation of violence is treated as NIAC, the relatively more permissive IHL norms on the use of force apply, whereas if treated as below the NIAC threshold, the more restrictive norms of IHRL in peacetime apply. As the ICRC has put it, ‘the conduct of hostilities does not prohibit the killing of legitimate targets, provided that, among others, the IHL principles of proportionality and precautions are fulfilled. Under law enforcement, by contrast, lethal force may be used only as a last resort in order to protect life’ at imminent risk.¹³ Under the IHL principle of proportionality, more ‘incidental loss of life’ is permitted than under law enforcement proportionality, which makes lethal force proportional only to unlawful lethal threats.¹⁴

Differences between the two ‘paradigms’ extend beyond the regulation of lethal force. In situations of violence falling below the NIAC threshold, the ICRC protection mandate includes a ‘right of initiative’ which was set out in the Statutes of the International Red Cross and Red Crescent Movement and adopted in 1986 by

¹¹ Alonso Gurmendi, *Conflicto Armado en el Perú* (Universidad del Pacífico, 2019), pp. 149–52. At the end of 2020, the leader of one prominent group in the area was killed in aerial bombardments, along with three others. See Parker Asmann and Laura Ávila, ‘Shining Path Commander’s Death Strikes Blow to Peru Rebel Group’, *Insight Crime*, 31 March, 2021.

¹² Pablo Kalmanovitz and Alejandro Anaya-Muñoz, ‘To Invoke or Not to Invoke: International Humanitarian Law and the “War on Drugs” in Mexico’, 2022, unpublished manuscript; ICRC, ‘ICRC’s Role in Situations of Violence below the Threshold of Armed Conflict’, *International Review of the Red Cross* 96, no. 893 (2014); ICRC and Gloria Gaggioli, *The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms* (Geneva: International Committee of the Red Cross, 2013).

¹³ *Ibid.*, p. iv.

¹⁴ ICRC, *The Use of Force in Law Enforcement Operations* (Geneva: International Committee of the Red Cross, 2022).

states parties to the Geneva Conventions.¹⁵ While such a right of initiative allows the ICRC to propose responses to all kinds of collective violence, the obligation on the ICRC to do so, and the obligation on the relevant authorities to accept any proposal from the ICRC, are both weaker in contexts that do not meet the NIAC thresholds.¹⁶ In fact, 'in this type of situation, the ICRC ensures that it has the consent of the State for its work.'¹⁷ Under IHL, by contrast, states are not free to arbitrarily withhold consent to international humanitarian relief operations, and their consent may in some situations be unnecessary.¹⁸

Underpinning these and other differences in applicable norms are contrasting basic assumptions about the context of the use of force. Whereas hostilities presuppose at least two enemy groups seeking to overcome each other's resistance through large-scale armed force, law enforcement is governed by human rights norms that were conceived to protect individuals from state abuse or negligence. While IHL regulates resort to force among belligerents with the purpose of minimizing the humanitarian toll of their armed confrontation, IHRL regulates resort to force by state authorities narrowly conceived, 'in order to maintain or restore public security, law and order' in mostly peaceful times.¹⁹ IHL implicitly accepts the use of lethal force as a legitimate means to broader ends, while under IHRL the intentional use of lethal force is only a legitimate means to preventing the use of unlawful lethal force.

Organized criminal violence appears to fit neither paradigm. While its intensity and level of organization can potentially meet NIAC qualification thresholds, it is typically not among the objectives of organized crime to develop large-scale armed forces capable of state capture or regional displacement. Instead of armed confrontation with state forces, organized crime prefers to lay low and bribe or co-opt state officials in order to carry on illicit profit-making undisturbed by law enforcement.²⁰ Although in this way essentially different from political insurgencies, the military capabilities of some criminal organizations and the level of violence they

¹⁵ ICRC, 'The International Committee of the Red Cross's (ICRC's) Role in Situations of Violence below the Threshold of Armed Conflict: Policy document, February 2014', *International Review of the Red Cross* 96, no. 893 (2014), pp. 276, 303.

¹⁶ Miriam Bradley, 'Protecting Civilians in War: The ICRC, UNHCR, and Their Limitations in Internal Armed Conflicts' (Oxford: Oxford University Press, 2016) pp. 79–92.

¹⁷ ICRC, 'The International Committee of the Red Cross's (ICRC's) Role in Situations of Violence below the Threshold of Armed Conflict: Policy Document, February 2014' (Geneva), p. 304.

¹⁸ Dapo Akande and Emanuela-Chiara Gillard, 'Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict', *International Law Studies* 92 (2016), pp. 483–511.

¹⁹ ICRC and Gaggioli, *The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*, p. 7.

²⁰ Diego Gambetta, *The Sicilian Mafia* (Cambridge: Harvard University Press, 1993); Benjamin Lessing, 'Logics of Violence in Criminal War', *Journal of Conflict Resolution* 59, no. 8 (2015), pp. 1486–1516; Benjamin Lessing, *Making Peace in Drug Wars* (Cambridge: CUP, 2018); Nicholas Barnes, 'Criminal Politics: An Integrated Approach to the Study of Organized Crime, Politics, and Violence', *Perspectives on Politics* 15, no. 4 (2017), pp. 967–987; Gustavo Duncan, 'Más que plata o plomo: El poder político del narcotráfico en Colombia y México. Bogotá: Debate, 2014', *OPERA* 16, no. 16 (2015), pp. 153–158.

can unleash frequently lead to state responses that defy clear-cut categorizations as either law enforcement or hostilities.²¹

As the editors of this volume note in the Introduction, processes of individualization can be conceptualized as moving away from a collective baseline. In armed conflict, individualization refers to normative trajectories in which collectives become less central and individuals more prominent in state practice, international law, and the ethics of war. The Individualisation of War Project has shown how, relative to the baseline of hostilities prior to the development of the individualization norm complex, norms governing resort to and the conduct of war, as well as accountability for wrongs, have become more individualized. As the volume editors also note, this does not mean that contemporary practices of armed conflict have substituted all collective elements by individualized standards. On the contrary, relative to the more individualized standards of law enforcement in peacetime, contemporary armed conflicts still retain significant collective elements.

In this chapter we take as our baseline the law enforcement paradigm, rather than hostilities in a pre-individualized era. Our goal is to identify and analyse processes of *collectivization* in contexts of large-scale organized criminal violence that are not qualified as NIAC, even though they have comparable intensity and humanitarian protection needs.²² They are, as it were, situations that fall *just below* the NIAC threshold. Its distinctive agents are non-state armed groups that operate in very lucrative illicit markets and seek to protect their business against non-state rivals and state law enforcement—rather than insurgencies driven by political projects and aiming at state capture.²³

By starting from an IHRL baseline, we identify and analyse processes of collectivization through reverse analogy with processes of individualization in armed conflicts. Specifically, we show that when law enforcement tasks are militarized in contexts of organized criminal violence, collective designations tend to become more prominent and normatively important in the domains of protection and liability to harm. We additionally make the normative argument that this kind of collectivization generates problematic legal gaps which leave individuals without

²¹ For further discussion, and an argument for a presumption *against* NIAC qualifications in these contexts, see Pablo Kalmanovitz, 'Can criminal organizations be non-State parties to armed conflict?', *International Review of the Red Cross* No. 923, June 2023.

²² The UN Convention against Transnational Organized Crime defines organized criminal organization as 'a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes ... in order to obtain a financial or other material benefit'. See Pierre Hauck and Sven Peterke, 'Organized Crime and Gang Violence in National and International Law', *International Review of the Red Cross* 92, no. 878 (2010), pp. 407–436. We are interested in more robust forms of organization, which contain considerable coercive arms and are capable of engaging in high-intensity violence, i.e., which come close to meeting the NIAC threshold.

²³ For a characterization of organized crime and its distinctive violent groups, see Kalmanovitz, 'Can criminal organizations be non-State parties to armed conflict?'

adequate protection. While much of what we say may be applicable to other cases in Latin America and beyond, our analysis was generated through a case study of Mexico's war on organized crime, which is precisely a situation of intense collective violence with dire humanitarian needs, which is ostensibly understood by state agents and humanitarian actors to fall below the NIAC threshold.

The chapter proceeds as follows. The first section provides a general discussion of collectivization processes in situations of violence below the NIAC threshold, looking specifically at the domains of protection and liability to harm. The second section discusses collectivization in the Mexican case, with focused discussions on protection and liability. We believe there are also complex and important contrasts in the domain of accountability, but they deserve separate discussion. The third and final section concludes.

1. Collectivization in Contexts of Organized Criminal Violence

In its policy document on situations of violence below the threshold of armed conflict, the ICRC explained that such situations came within its field of action in virtue of three features: violence of considerable intensity, which is 'the work of one or several groups made of a large number of people', and which has 'significant humanitarian consequences.'²⁴ Violence is collective in the sense that it is perpetrated by groups, the members of which 'feel that they belong to the group (shared identity, collective purpose, activities carried out jointly, etc)'.²⁵ Humanitarian consequences result from attacks and threats on the life and physical integrity of populations deserving protection, particularly in cases of 'people in a hostile environment who are not protected from the acts perpetrated against them' by de facto powers.²⁶

Consequences to be addressed by humanitarian actors in areas controlled or disputed by non-state armed groups include physical harm, human trafficking, sexual violence, forced disappearance, forced displacement and migration, torture, arbitrary detention, and more.²⁷ Even though governed by IHRL and domestic law rather than IHL, these 'other situations of violence' can have humanitarian consequences 'even more far-reaching than those of armed conflicts' and as such activate the ICRC's mandate of humanitarian protection.²⁸

²⁴ ICRC, 'ICRC's Role in Situations of Violence below the Threshold of Armed Conflict', pp. 275–277.

²⁵ *Ibid.*, p. 281.

²⁶ *Ibid.*, p. 291.

²⁷ *Ibid.*, p. 290.

²⁸ *Ibid.*, at pp. 288–289.

The militarization of law enforcement in situations of collective violence below the NIAC threshold triggers an important process of collectivization, which is militarization itself. Typically, governments justify resort to their armed forces in law enforcement tasks in terms of collective, even national, security threats, which are said to require exceptional levels of force and social control. Collective threats typically receive collective designations of agency—cartel, gang, organized crime, *mara*—the members of which can in practice come to be treated as state enemies who are liable to attack in virtue of their membership status rather than of posing imminent unlawful threats.

Furthermore, the armed forces have more capacity for coordinated action than any other security body in the state. Military authority has stricter requirements of due obedience, more rigid chain of command structures, and more demanding discipline and training. This rigid construction of authority is meant to diminish individual judgment and agency, to create *esprit de corps*, i.e., a sense of collective agency and unity. In this way, military forces can deploy ‘tactical units’ that coordinate action on a larger scale, for a longer time, and potentially with larger destructive impact than police forces. This higher capacity can have protective effects, as when it deters organized crime from preying on populations, but it can also exacerbate violence and multiply humanitarian needs.

On the other hand, organized criminal violence by definition involves organizations with the capacity to act collectively and deploy violence on a large scale. They can use their considerable resources—violence in particular—to persuade or intimidate populations and public authorities into joining the organization, providing labour or information, not cooperating with other public authorities or rival criminal groups, etc.

Large-scale criminal enterprises are known to seek territorial control in ways instrumental to their illicit business, which includes securing geographic areas for the production, transportation, and distribution of illicit goods or persons. In order to secure territorial control, criminal organizations engage in forms of legitimization that enable them to recruit informants and other forms of local support, exclude rival groups, and rule illicit economies more efficiently. Some criminal organizations have developed forms of governance and public service provision comparable to those provided by political insurgencies and even state authorities, including provision of security, dispute settlement mechanisms, and basic forms of social assistance.²⁹ Conquering and managing territory through the strategic use of coercion and legitimization are of course eminently collective enterprises.

²⁹ Barnes, ‘Criminal Politics: An Integrated Approach to the Study of Organized Crime, Politics, and Violence’; Enrique Desmond Arias, ‘The Impacts of Differential Armed Dominance of Politics in Rio de Janeiro, Brazil’, *Studies in Comparative Development* 48 (2013), pp. 263–284; Vanda Felbab-Brown, ‘Conceptualizing Crime as Competition in State-Making and Designing an Effective Response’, *Brookings* (2010).

1.1 Collective Protection in Contexts of Organized Criminal Violence

In contexts of organized criminal violence, and relative to the law enforcement baseline, we can also identify several processes of collectivization in the domain of protection. Notably, there is the collectivization of the objects of protection. Threats from organized criminal violence can serve to create collectives, as when people flee their homes in response to threats, becoming internally displaced persons (IDPs) or, if they cross an international border, migrants. Furthermore, criminal organizations often target particular collectives. It is widely known that criminal organizations engaged in human trafficking systematically prey on migrants moving from Central America to the United States through Mexico. Migrants are collectives on the move, sometimes moving together as self-designated 'caravans' seeking collective self-protection, and in urgent need of humanitarian protection that state authorities do not always provide.

Membership of particular collectives can also determine the rights and international protections to which individuals are entitled. For example, the status of migrant, displaced person, or more broadly 'victim of human rights violation', are administrative categories in Mexico and many other Latin American countries. However, some countries restrict their definition of IDPs to those fleeing conflict-related violence, and international law offers migrants who do not qualify for refugee status few special rights or protections beyond basic human rights standards.

Consideration of international responses and responsibilities highlights important ways in which collectivization from an IHRL baseline in contexts of organized criminal violence differs from IHL regulation of NIAC. Despite the urgent humanitarian needs and intensity of threat prevalent in these 'other situations of violence', the status of sovereignty remains largely intact. Whereas armed conflicts and international crimes are understood to be grave international concerns, in which the international community has a responsibility to protect civilian populations,³⁰ no equivalent category or responsibility exists in contexts of organized criminal violence. Violence below the threshold of NIAC is in this sense a domestic rather than international issue. This gap has led to a paradoxical legal state of affairs, in which the right to life is nearly absolute *de jure* under IHRL, but there is more scope both for coercive foreign military action and for civilian international humanitarian response to protect the population in contexts regulated by IHL.

Debates about the legitimacy of humanitarian intervention and the 'responsibility to protect' principle have mostly focused on armed conflicts and, to a lesser degree, the commission of international crimes. As is well known, the bar

³⁰ Bradley, 'Protecting Civilians in War'; ICISS, *The Responsibility to Protect* (Ottawa: IDRC, 2001); Jennifer Welsh, 'Norm Contestation and the Responsibility to Protect', *Global Responsibility to Protect* 5, no. 4 (2013), pp. 365–396.

for crimes against humanity is set higher than that for war crimes (which by definition can only occur in contexts of armed conflict), because to constitute a crime against humanity, the acts in question must be committed as part of a widespread and systematic attack. Thus, while forced disappearances, extrajudicial killings, and forced displacement can occur in connection with organized criminal violence and militarized state responses without any implication for the ‘responsibility to protect’, if the same acts constituted war crimes, they could trigger the ‘responsibility to protect’.

In humanitarian emergencies outside of armed conflict, there is also no clear-cut obligation for states to accept external humanitarian assistance. Under IHL, states must not arbitrarily withhold consent to an offer from an impartial humanitarian body to assist the population with relief actions to provide such necessities as food, water, medical supplies, clothing, and means of shelter.³¹ Under IHRL, it could be argued that not only the right to life, but also the rights to adequate food, housing, and health imply that where people cannot realize these rights due to a humanitarian crisis, the state must either meet their basic needs or allow humanitarian agencies to do so. However, the obligation is not as explicit as it is in IHL. Even where a state consents to humanitarian operations in non-IHL contexts, the fact that it does so at its own discretion and not as a matter of obligation means the state has greater latitude to limit the scope of the operations. For the ICRC specifically, working outside of armed conflicts implies significant adaptations from its core mandate, which can generate tensions between the institutional mission to protect individuals from violence and the institutional commitment to neutrality, a principle which for the ICRC is delineated by IHL.³²

Where IHL applies, the ICRC has an obligation to respond, and maintains a commitment to dialogue with all state and non-state parties to conflict, regardless of their motives. Through that dialogue, the ICRC seeks to increase compliance with IHL and hence to reduce the impact of violence on protected persons.³³

By contrast, working in contexts of organized criminal violence where IHL does not apply, the ICRC lacks a normative framework that is applicable to both state and non-state actors, and with which to structure its dialogue. Thus while the ICRC engages in dialogue with the police and other public forces, working to get them to comply with international human rights law or domestic legislation on the use of force, it has begun to distinguish non-state armed groups according to their motives, and to restrict dialogue with those it deems to be economically

³¹ Akande and Gillard, ‘Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict’.

³² Miriam Bradley, ‘From Armed Conflict to Urban Violence: Transformations in the International Committee of the Red Cross, International Humanitarianism, and the Laws of War’, *European Journal of International Relations* 26, no. 4 (2020), pp. 1061–1083.

³³ Bradley, ‘Protecting Civilians in War’, pp. 162–166.

motivated or criminal.³⁴ At the same time, it has expanded the scope of its work to include efforts to prevent young people from joining armed groups and to promote the socio-economic rehabilitation of offenders, goals that would be non-neutral in conflict contexts. In short, when dealing with at least some criminal organizations, the ICRC appears to be implicitly taking the side of the state.³⁵

1.2 Liability to Harm in Contexts of Organized Criminal Violence

The emergence of practices of organized criminal violence has contributed to an outpouring of doctrinal analysis of the conditions under which force, in particular lethal force, can be used in law enforcement operations. This doctrine is grounded on IHRL and on two soft-law instruments which have been widely used by UN human rights bodies: the UN Code of Conduct for Law Enforcement Officials of 1979 and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials of 1990.

On this basis, the ICRC itself has spelled out conditions under which individuals could be liable to harm, in particular lethal force, in the context of law enforcement operations.³⁶ Firearms are permissible 'only where necessary to counter an imminent or grave threat to life or physical integrity, and when less violent means are not or would not be effective.'³⁷ The lowest amount of force necessary to achieve a law enforcement objective is to be applied. Law enforcement proportionality is much narrower than IHL proportionality—the level of force must be weighed directly against the gravity of the unlawful threat, and the anticipated benefit of force should outweigh the anticipated harm, including to the attacker.³⁸

The ICRC has identified several further principles governing the use of force in law enforcement operations, which include the obligation in states to adopt and implement regulations on the use of force by state officials—'legality'—and the obligation to carefully plan operations in order to avoid the use of force and minimize the risk to bystanders—'precaution'.³⁹

However, as the following section on Mexico shows, while these principles are restrictive and highly individualized, in the context of militarized law enforcement against organized crime, violent agents do often identify and distinguish between collectives in quasi-IHL ways. Public authorities are widely documented to target

³⁴ Bradley, 'From Armed Conflict to Urban Violence', p. 1074.

³⁵ *Ibid.*, pp. 1073–1074.

³⁶ ICRC, *The Use of Force in Law Enforcement Operations*.

³⁷ *Ibid.*, p. 4.

³⁸ *Ibid.*

³⁹ ICRC, *The Use of Force in Law Enforcement Operations*, pp. 3–4.

(alleged) members of collectively designated groups—gangs, *maras*, *bandas criminales*, cartels—on the basis of group membership. Either by state forces or rival non-state groups, alleged members of these groups become de facto if not de jure liable to harm in virtue of their status, rather than of their posing imminent threats.

2. The War on Organized Crime in Mexico

Military involvement in law enforcement is not a recent phenomenon in Mexico. The military has participated for decades in interdiction operations and the eradication of illicit crops. At least since the late 1970s, active or retired military officers have been appointed to high command positions in state and municipal police forces, as well as in civilian prosecutorial roles.⁴⁰

But drug-related violence was rare in Mexico before the late 1990s. For decades, illicit business operated peacefully under the supervision of ‘informal government protection networks’ that operated at all levels of government. These networks began to collapse in the early stages of the Mexican transition to democracy, particularly after the 1996 election, when the hegemony of the *Partido Revolucionario Institucional* (PRI) began to fracture in several important states. The dissolution of informal protection networks led first to inter-cartel ‘turf wars’, which led cartels to fund standing militia, and later to the ‘war on drugs’, in which these militias were confronted by the Mexican armed forces.⁴¹

Violence escalated to historically unprecedented levels when President Felipe Calderón (2006–12) put the army and navy at the forefront of his government’s declared objective of ‘direct combat to drug trafficking and other expressions of organized crime.’⁴² Military confrontation of organized crime unleashed a virulent escalation of collective violence that has yet to recede.⁴³ Since the mid-2000s, criminal organizations have fought each other and state forces in ways that have

⁴⁰ Jesús López-González, ‘Civil-Military Relations and the Militarization of Public Security in Mexico, 1989–2010: Challenges to Democracy’, in George Philip and Susana Berrueros (eds), *Mexico’s Struggle for Public Security* (New York: Palgrave Macmillan, 2012).

⁴¹ Guillermo Trejo and Sandra Ley, ‘Why Did Drug Cartels Go to War in Mexico? Subnational Party Alternation, the Breakdown of Criminal Protection, and the Onset of Large-Scale Violence’, *Comparative Political Studies* 51, no. 7 (2018), pp. 900–937. Trejo and Ley estimate conservatively there were 4275 murders perpetrated by drug cartels and their criminal associates between 1995 and 2006, mostly in the context of turf wars (at p. 906).

⁴² Objective 8 of the National Development Plan DOF, *PLAN Nacional de Desarrollo 2013–2018*, Presidency of Mexico (Mexico, 2007).

⁴³ Several security experts have attributed the sharp increase of lethal violence in Mexico after 2006 to Calderón’s aggressive military response to organized criminal violence. See among others Javier Osorio, ‘The Contagion of Drug Violence: Spatiotemporal Dynamics of the Mexican War on Drugs’, *Journal of Conflict Resolution* 59, no. 8 (2015), pp. 202–238; Guillermo Trejo and Sandra Ley, *Votes, Drugs, and Violence* (Cambridge: CUP, 2020), pp. 143–179; Lessing, *Making Peace in Drug Wars*, pp. 202–237.

caused unprecedented numbers of violent deaths, forced disappearance, internal displacement, and other gross human rights violations.

After Calderón, President Enrique Peña Nieto (2012–18) de-escalated the war rhetoric but continued the militarized approach; homicide rates continued to rise, and militarization was gradually normalized in law and practice.⁴⁴ President Andrés Manuel López Obrador (2018–24) gave further powers and tasks to the armed forces—in security and beyond—which he has even called ‘the people in uniform.’⁴⁵ The army and navy continue to be on the streets to this day, if with a less confrontational mandate and often acting through a formally civilian but organically military National Guard.

The humanitarian toll of this violence is above that of many NIACs. Between 2006 and 2020, an estimated 260,000 violent deaths occurred as a consequence of the war on organized crime. At the 2011 peak of lethal violence carried out by the Mexican army, over 1400 yearly killings of ‘aggressors’ were reported by the army itself, which resulted from over one thousand ‘clashes’ (*confrontaciones*) with (alleged) members of organized crime.⁴⁶ The year 2011 also saw a peak in soldier deployment, with over 52,000 troops on the streets, but troop deployment has been above 30,000 every year since the ‘war on drugs’ began in earnest in 2006.⁴⁷ While there is no official IDP count in the country, according to the best available monitoring system, from 2006 to 2020, over 350,000 individuals were and remain internally displaced as a consequence of collective violence in Mexico.⁴⁸ In a country visit in early 2022, the UN Committee against Enforced Disappearance noted that the official registry of cases of disappearance had reached over 95,000 missing persons, over 98 per cent of whom were reported disappeared after 2006.⁴⁹

⁴⁴ Alejandro Anaya-Muñoz and Natalia Saltamacchia, ‘Factors Blocking the Compliance with International Human Rights Norms in Mexico’, in Alejandro Anaya-Muñoz and Barbara Frey (eds), *Mexico’s Human Rights Crisis* (Philadelphia: University of Pennsylvania Press, 2019), pp. 220–224; Kalmanovitz and Anaya-Muñoz, ‘To Invoke or Not to Invoke: International Humanitarian Law and the “War on Drugs” in Mexico’.

⁴⁵ The expression appears in López-Obrador’s National Peace and Security Plan 2018–2024, and often in his morning conferences and media declarations. ‘In substance’, the Plan states, ‘Mexican soldiers and marines were and continue to be people in uniform.’ It is because of their ‘popular character’ that they can be trusted to provide public security Andrés Manuel López-Obrador, *Plan Nacional de Paz y Seguridad 2018–2024*, Partido Morena (Mexico City, 2018). Animal Político, ‘No militarizamos al país, soldados son pueblo uniformado’, *Animal Político* (Mexico), 1 December 2020.

⁴⁶ Javier Trevino-Rangel et al., ‘Deadly Force and Denial: The Military’s Legacy in Mexico’s “War on Drugs”’, *The International Journal of Human Rights* (2021), pp. 567–590, at pp. 4, 9.

⁴⁷ Catalina Pérez Correa, Carlos Silva Forné, and Rodrigo Gutiérrez Rivas, ‘Deadly Forces: Use of Lethal Force by Mexican Security Forces 2007–2015’, in Alejandro Anaya-Muñoz and Barbara Frey (eds), *Mexico’s Human Rights Crisis* (Philadelphia: University of Pennsylvania Press, 2019), pp. 28–29.

⁴⁸ CMDPDH, *Episodios de Desplazamiento Interno Forzado Masivo en México: Informe 2020*, Comisión Mexicana de Defensa y Promoción de los Derechos Humanos (Mexico City, 2021). IDMC uses CMDPDH data for its reports on Mexico. According to its latest report, the number at the end of 2021 was 379,000, see <https://www.internal-displacement.org/countries/mexico>

⁴⁹ CED, *Informe del Comité contra la Desaparición Forzada sobre su Visita a México en virtud del artículo 33 de la Convención* (Geneva: Committee against Enforced Disappearance, 2022).

With these staggering levels of collective violence, it is unsurprising that many have found Mexico's 'war on drugs' to be a case of NIAC, although this conclusion remains contested. Some of the NIAC *indicia* are clearly present, others clearly absent; some have appeared intermittently in time and space, others remain unclear. Multiple law review articles and reports by international think tanks have concluded that Mexico has had a NIAC since the beginning of its 'war on drugs' in 2006, at least in certain areas, for certain periods, and for certain non-state armed groups; others have forcefully challenged these conclusions.⁵⁰ Mexican authorities themselves have taken the negative view and throughout the war on organized crime have formally invoked the law enforcement paradigm. In practice, however, organized crime has been treated as a legal grey zone, regulated neither as war nor as peace, and with collective elements prominent both in practice and normatively in the domains of protection and liability to harm.

2.1 Collective Protection

Despite the massive humanitarian consequences resulting from organized criminal violence in Mexico, and from the militarized response of the state, the efforts of international and national actors to protect those subject to violence have been extremely limited. Many collectives have sought to protect themselves, and local- rather than national- or international-level organizations have led the humanitarian response.

Mexico does not feature in international debates on the use of force for protective purposes. Since 1999, the Security Council has issued seventeen thematic resolutions on the protection of civilians, and the Secretary-General has submitted twenty-three reports on the protection of civilians, but not one of these mentions Mexico.⁵¹ While the protection needs in Mexico are enormous, the category of civilian is not strictly relevant, and the protection of civilians agenda within the

⁵⁰ In favour of a NIAC qualification, see, e.g., Carina Bergal, 'The Mexican Drug War: The Case for a Non-international Armed Conflict Classification', *Fordham International Law Journal* 34 (2011), pp. 1042–1088; Callin Kerr, 'Mexico's Drug War: Is It Really a War?', *Texas Law Review* 54 (2012); Craig Bloom, 'Square Pegs and Round Holes: Mexico, Drugs, and International Law', *Houston Journal of International Law* 34, no. 2 (2012); Leiden University Human Rights Clinic, *The Situation of Drug Related Violence in Mexico from 200 to 2017: A Non-International Armed Conflict?*; Ana Gabriela Rojo Fierro, 'La Guerra contra el Narcotráfico en México ¿Un Conflicto Armado No Internacional no Reconocido?', *Foro Internacional* 60 (2020), pp. 1415–1462. For the negative position, see Patrick Gallahue, 'Mexico's "War on Drugs"—Real or Rhetorical Armed Conflict?', *Journal of International Law of Peace and Armed Conflict* 24, no. 1 (2011), pp. 39–45; Andrea Nill Sánchez, 'Mexico's Drug "War": Drawing a Line between Rhetoric and Reality', *The Yale Journal of International Law* 38 (2013), pp. 467–509; Alejandro Rodiles, 'Law and Violence in the Global South: The Legal Framing of Mexico's "Narco War"', *Journal of Conflict & Security Law* 23, no. 2 (2018), pp. 269–281.

⁵¹ See respectively: 'UN documents for protection of civilians: Security Council resolutions' (Accessed: 8 June 2022), https://www.securitycouncilreport.org/un_documents_type/security-council-resolutions/?ctype=Protection%20of%20Civilians&cbtype=protection-of-civilians; 'UN documents for protection of civilians: Secretary-General's reports' (Accessed: 8 June 2022), <https://www>

UN is explicitly focused on the protection of civilians *in armed conflict*. Nearly every peacekeeping mandate since 1999 has included protection language, but mandating peacekeepers to operate in Mexico seems unthinkable. Implementing the 'responsibility to protect' principle in Mexico appears equally unlikely.

While the Mexican state is under no clear obligation to consent to international humanitarian agencies operating on its territory, many are operational there, assisting migrants and refugees, and sometimes also providing support to victims of criminality and violence more broadly. The United Nations Refugee Agency (UNHCR) and the International Organization for Migration (IOM) have particular mandates for protecting displaced persons and managing migration, respectively, and both are working in Mexico. The regional delegation of the ICRC, covering Central America and Mexico, is based in Mexico City, and from there the ICRC manages activities focused on Mexico itself. These activities include training for the Mexican police and armed forces, and confidential bilateral dialogue to persuade the security forces to comply with international law.⁵² For the most part, however, the efforts of international humanitarian agencies do not match the level of humanitarian need and have only a limited focus on protection from violence. Indeed, in some parts of Mexico characterized by high levels of violence, including some border areas where large numbers of migrants gather or transit through, international actors are most conspicuous by their absence.⁵³

The Calderón and Peña Nieto administrations were reluctant to accept the very existence of IDPs, or to acknowledge that applicability of the UN Guiding Principles on Internal Displacement. Neither government took steps towards developing a coordinated and comprehensive inter-agency response to internal displacement, and in 2015, the Ministry of the Interior argued that displacement as a consequence of violence, insofar as it occurred, was not generalized.⁵⁴

The 2014–18 Program for the Attention of Victims of the Executive Commission for the Support of Victims (CEAV for its initials in Spanish) included among its objectives providing adequate support to IDPs. Remarkably, however, the CEAV reported that individuals could not be registered as victims of human rights violations solely by virtue of being internally displaced. The National Human Rights Commission (CNDH) also found that while some key government agencies implicitly recognized the existence of internal displacement in the country,

[securitycouncilreport.org/un_documents_type/secretary-generals-reports/?ctype=Protection%20of%20Civilians&cbtype=protection-of-civilians](https://www.securitycouncilreport.org/un_documents_type/secretary-generals-reports/?ctype=Protection%20of%20Civilians&cbtype=protection-of-civilians)

⁵² ICRC, *Balance humanitario 2021/2022: Mexico* (Mexico City: CICR, 2022), p. 6.

⁵³ Katrina Burgess and Alba Loureiro, 'Comparing Humanitarian Responses at the US-Mexico Border' (Barcelona, Spain: VI Congreso Internacional de Estudios del Desarrollo, 2022).

⁵⁴ Laura Rubio Díaz-Leal, 'Violence-Induced Internal Displacement in Mexico, the Inter-American Commission on Human Rights, and Official State Responses', in Alejandro Anaya-Muñoz and Barbara Frey (eds), *Mexico's Human Rights Crisis* (Philadelphia: University of Pennsylvania Press, 2019), pp. 55–56.

others explicitly claimed there were not internally displaced populations in Mexico. While the López Obrador government has publicly acknowledged internal displacement as a problem, little appears to have changed in practice.

Given the inadequacy of international and national support, responding to the needs of migrants and the displaced has largely fallen to local-level actors. In some parts of the country, local government authorities have mounted a limited response. However, most state and municipal governments have not recognized internal displacement and therefore have not implemented specific policy responses.⁵⁵ More commonly, local civil society actors, including Church-based organizations, have been the main or only provider of humanitarian support. For example, throughout Mexico, migrant shelters have emerged through a bottom-up process, offering services and solidarity.⁵⁶

With only limited assistance and protection from authorities and official organizations, most of those subject to violence in Mexico must depend primarily on their own protective strategies, and these very often rely on collective action. As already mentioned, since 2018, migrants have often sought safety in numbers by travelling in large caravans. The hope is that this will not only limit harassment and violence, but also that it will give maximum visibility to their situation, with the ultimate goal of pressuring the authorities to offer a better public policy response.⁵⁷

Communal self-defence groups have also been created in response to threats from organized crime directed at local populations, and the failure of the state to protect those populations from organized criminal violence. These groups also highlight a distinction widely made in public discourse between members of organized crime and those who are 'civilian' members of the wider population, whether or not they resort to violence. Despite taking up arms, these self-defence groups are not considered liable to harm, and were even briefly legitimized from 2014 to 2016, with the creation by the government of a 'Rural Defence Force', which allowed vigilantes to operate lawfully.⁵⁸ They are referred to as *civilian* vigilantes, or armed *civilians*, and as such distinguished from cartels and organized crime.⁵⁹

⁵⁵ Ibid., p. 50.

⁵⁶ Burgess and Loureiro, 'Comparing Humanitarian Responses at the US-Mexico Border'; Alejandro Olayo Mendez, 'Humanitarianism from the Ground: Humanitarian Aid to Migrants and Refugees in Mexico' (ed. Oxford Department of International Development, 27 March 2017). <https://www.qeh.ox.ac.uk/blog/humanitarianism-ground-humanitarian-aid-migrants-and-refugees-mexico>

⁵⁷ Valentina Benincasa and Almudena Cortés, 'Humanitarizando la movilidad en México: la migración centroamericana como problema humanitario', *Oñati Socio-Legal Series* 11, no. 3 (2021), pp. 809–832.

⁵⁸ Juan Del Río, 'Do Vigilante Groups Reduce Cartel-Related Violence? An Empirical Assessment of Crime Trends in Michoacán, Mexico', *Studies in Conflict & Terrorism* (2020), pp. 1–25, at p. 2.

⁵⁹ Irene María Álvarez-Rodríguez, 'The Moral Economy of Drug Trafficking: Armed Civilians and Mexico's Violence and Crime', *Latin American Perspectives* 48, no. 1 (2021), pp. 231–244.

2.2 Collective Liability to Harm

Calderón's National Development Plan—the master policy document for his presidency—made public security the government's top priority and set organized crime as the most serious national security threat. As the Plan put it, it was necessary to 'recover the strength of the State and security' through 'direct combat to drug trafficking and other expressions of organized crime', which made involvement of the armed forces necessary 'as keepers of the internal security of the country'.⁶⁰ Throughout his presidency, Calderón mobilized politically the rhetoric of war and widely publicized military victories over drug cartels.

While not equally keen on aggressive militarization, Presidents Peña Nieto and López Obrador continued to use war vocabularies in their master security policy documents. Peña Nieto's Plan claims that large illicit economies have threatened Mexico's national stability, and that a central cause of its 'public security crisis' was the creation of militias linked to organized criminal groups and specialized in the use of violence. The document recognizes that criminal groups have territorial control over large areas in the country, where they have imposed 'social orders' around illicit economies, and sets as one of its goals to regain state control over all national territory.⁶¹

During his presidential campaign, López-Obrador announced a U-turn in security policy, in which instead of a war against drugs, transitional justice mechanisms and 'peacebuilding' (*pacificación*) would be at the heart of security. The campaign proposal included the creation of a high-level Peacebuilding Council as well as the implementation of a Demobilization, Disarmament, and Reintegration (DDR) programme as a response to the 'organizational level, firepower and territorial control' of organized criminal groups, which are understood to be at the level of political insurgencies. Neither of these initiatives has been actually implemented, but President López-Obrador's master security policy document continues to emphasize peacebuilding and the recovery of national territory from criminal control.⁶²

The use of this type of language in such high-level policy documents reflects generalized perceptions of threat from organized criminal organizations. Mexican criminal organizations are known to have the capacity to procure and use large arsenals of high-calibre weapons, including drones, grenade launchers, anti-tank rockets, armour-piercing ammunition, and industrial explosives. In many

⁶⁰ Cited in Anaya-Muñoz and Saltalamacchia, 'Factors Blocking the Compliance with International Human Rights Norms in Mexico', p. 220.

⁶¹ DOF, *PROGRAMA Nacional de Seguridad Pública 2014–2018*, Secretaría de Gobernación (Mexico City, 2014).

⁶² López-Obrador, *Plan Nacional de Paz y Seguridad 2018–2024* (Mexico City, 2018); DOF, *PROGRAMA Sectorial de Seguridad y Protección Ciudadana 2020–2024*, Secretaría de Gobernación (Mexico City, 2020).

areas, their armed capacity surpasses that of local, state, and federal police forces.⁶³ Some of them—notably the Zetas, Sinaloa, and *Jalisco Nueva Generación* cartels—have standing militias at their disposal with weaponry, levels of organization, and command structures that arguably allow them to pursue military objectives in sustained ways.⁶⁴ Mexican cartels are known to compete and fight for territorial control, which has caused forced displacement and created pressing humanitarian needs in populations living in territories under criminal control.⁶⁵

On the other hand, the Mexican armed forces are known to have used armed conflict categories to refer to non-state groups in internal operational documents. A leaked official database recording homicides and casualties connected to organized criminal violence uses the categories of ‘aggressor’ to denote members of organized criminal groups that have (allegedly) attacked public authorities (and been killed as a result); ‘clashes’ to refer to events in which public forces detain, injure, or kill ‘civilians’ (public forces need not first have been under fire themselves); and ‘killed’ or ‘wounded civilian’ to denote non-aggressors who come under state fire.⁶⁶

According to this same database, the use of military lethal force during the first five years of the ‘war on drugs’ (2006–11) followed a logic of state enmity rather than criminal suspicion and capture. Fewer than 3 per cent of recorded ‘clashes’ resulted from operations based on pre-existing military intelligence or criminal investigations; over 30 per cent took place in the context of area patrols without pre-established objectives, and for over 25 per cent there is no information on the context in which lethal force was used.⁶⁷

Most troublingly, military clashes showed a very high rate of killed relative to wounded non-military individuals. In years 2011 and 2012, at the peak of killings reported by the military, there were on average nine and fourteen times more killed than wounded individuals respectively. In the state of Zacatecas in year 2013, the lethality rate was fifty-eight—‘clashes’ left nearly no ‘civilian’ survivors.⁶⁸

⁶³ Bergal, ‘The Mexican Drug War: The Case for a Non-international Armed Conflict Classification’; Carrie Comer and Daniel Mburu, ‘Humanitarian Law at Wits’ End: Does the Violence Arising from the “War on Drugs” in Mexico Meet the International Criminal Court’s Non-International Armed Conflict Threshold?’, in *Yearbook of International Humanitarian Law 2015* (The Hague: T.M.C. Asser Press, 2015).

⁶⁴ Leiden University Human Rights Clinic, *The Situation of Drug Related Violence in Mexico from 2006 to 2017: A Non-International Armed Conflict?*; Bergal, ‘The Mexican Drug War: The Case for a Non-international Armed Conflict Classification’.

⁶⁵ *Ibid.*

⁶⁶ Trevino-Rangel et al., ‘Deadly Force and Denial: The Military’s Legacy in Mexico’s “War on Drugs”’, pp. 6–7. On the history and composition of the database, see Laura Atuesta, Oscar Siordia, and Alejandro Madrazo, ‘The “War on Drugs” in Mexico: (Official) Database of Events between December 2006 and November 2011’, *Journal of Conflict Resolution* 63, no. 7 (2019), pp. 1765–1789.

⁶⁷ Alejandro Madrazo, Calzada Olvera, Rebeca, and Romero Vadillo, ‘La “guerra contra las drogas”: Análisis de los combates de las fuerzas públicas 2006–2011’, *Política y Gobierno XXV*, no. 2 (2018), pp. 379–402, at p. 390.

⁶⁸ Pérez Correa, Silva Forné, and Gutiérrez Rivas, ‘Deadly Forces: Use of Lethal Force by Mexican Security Forces 2007–2015’, pp. 32–38.

Such lethality is hardly to be expected in operations that comply with the strict regulations on the use of lethal force under the law enforcement paradigm. A survey made in 2013 revealed little sympathy in public opinion for those harmed in the context of the 'war on drugs', a lack of sympathy that may be related to the generalized perception that those killed were liable to harm.⁶⁹

Liability to harm based on membership status operates not only in public discourse and military procedures, but also in national criminal legislation. An exceptional criminal law regime has been built in Mexico around the crime of collectively organizing to commit a crime, in a way that in effect enlists domestic criminal law in the 'war' efforts. In a particular version of what criminal legal theorists have called 'enemy criminal law' (*derecho penal del enemigo*, *Feindstrafrecht*), Mexican law permits the preventive detention of alleged members of criminal organizations in virtue of their presumed collective dangerousness.⁷⁰ No specific wrongful act allegedly committed or attempted is necessary for indictment. Furthermore, alleged members of organized criminal groups are liable to 'administrative detention' without judicial order, which is inconsistent with basic human rights but entrenched in Mexico's Constitution. In effect, sheer membership in a criminal organization is a crime under Mexican criminal law. As has happened in the case of global counter-terror efforts, due process protections aimed at individualizing responsibility have been weakened for the sake of 'effectiveness' in the combat of organized criminal groups.

3. Conclusions

Our discussion has identified and analysed collectivization patterns in situations of violence that fall below the NIAC threshold. Very little research has been done on the normative structure of these other forms of violence, and there is still a great deal to understand about Mexico and the Latin American region more broadly. But one finding of our research so far is that, while organized criminal violence can create humanitarian needs comparable to those of NIAC, there is no international legal framework to underpin it, and consequently not the same level of protection mandate. Much of the international legal and institutional apparatus for the protection of individuals or collectives is linked to IHL and restricted to contexts of armed conflict. Sovereignty is more conditional in armed conflict than in contexts of criminal violence. This makes coercive international military action

⁶⁹ Andreas Schedler, 'The Criminal Community of Victims and Perpetrators: Cognitive Foundations of Citizen Detachment From Organized Violence in Mexico', *Human Rights Quarterly* 38 (2016), pp. 1038–1069.

⁷⁰ Günther Jakobs, 'On the Theory of Enemy Criminal Law', in Markus Dubber (ed.), *Foundational Texts in Modern Criminal Law* (Oxford: OUP, 2014); Oscar Gutiérrez Santos, 'La delincuencia organizada a la luz del derecho penal del enemigo', *Dikê: Revista de Investigación en Derecho, Criminología y Consultoría Jurídica* 26 (2019), pp. 367–393.

to protect populations unlikely, and reduces the obligations on states to consent to humanitarian relief operations.

Relatedly, our analysis has shed light on the structure of processes of individualization in armed conflict. Individualization in armed conflict is not a move from regulating hostilities under IHL towards regulating peacetime under IHRL, but something distinct. The NIAC threshold creates a discontinuity in international legal regulation, with a glaring gap in international protection mechanisms. Key dimensions of individualization processes in war, particularly the erosion of the condition of state consent for humanitarian operations, are largely absent from peacetime under IHRL.

While our analysis may initially have appeared to be framed in terms of two opposite baselines—and pointing to two processes moving in opposite directions—in reality the continuum between individualization and collectivization is not linear. Much of the individualization process in armed conflicts is not a move towards peacetime regulation of violence under IHRL; conversely, the collectivization and intensification of violence need not lead to NIAC. And while humanitarian needs may be equally or more severe in situations below the NIAC threshold, only NIACs contain strong international legal mechanism for protection.

Lastly, there is a striking substantive match between the law enforcement paradigm and revisionist just war theory. The case of Mexico illustrates just how difficult in practice it is for military forces to operate under the demanding criteria of revisionist just war theory, even in conditions that may fall below the threshold of NIAC. While the law enforcement paradigm has been formally applicable in Mexico throughout the ‘war on drugs’, the armed forces have shown little will or ability to operate under its restrictive rules. There are deep institutional and political reasons for that, which may also be reasons to be sceptical of the compatibility between the military ethos and the law enforcement paradigm.⁷¹

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