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Is Ecuador facing a non-international armed conflict against organized crime groups? Reality, inconsistencies and jurisprudential developments

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Abstract

On 9 January 2024, the president of the Republic of Ecuador decreed a state of exception in which he recognized the existence of a non-international armed conflict (NIAC) involving twenty-two criminal groups. By July 2024, the president had declared four additional states of exception. The Constitutional Court examined the decrees and ruled against the existence of a NIAC. In this context, the objective of this article is to present, contrast and analyze the positions of the president and the Constitutional Court and highlight the most notable jurisprudential developments. This case study is relevant to exploring some of the challenges of classifying armed conflicts involving organized crime. In respect of the position of the president, inconsistencies were identified between the recognition of the armed conflict and the actions taken to confront it. As to the Court's jurisprudence, some notable developments identified include the incorporation of international humanitarian law treaties into the block of constitutionality and the ruling on challenges of contemporary armed conflicts such as spillovers, coalition formation and the participation of criminal groups in armed conflicts.

Keywords: organized crime, contemporary armed conflicts, state of exception, Constitutional Court of Ecuador, block of constitutionality, international humanitarian law.

Introduction

Ecuador is experiencing the impact of organized crime, with the highest levels of violence in its over 200 years of republican history. In this context, on 9 January 2024, the president of the Republic of Ecuador decreed a state of exception in which he recognized the existence of a non-international armed conflict (NIAC) involving twenty-two criminal groups.[1] This was the first time in Ecuadorian history that a president had resorted to this cause to declare a state of exception. By July 2024, the president had declared four additional states of exception based on the NIAC.[2]

The situation in Ecuador must be read in the context of the region. The Latin American experience demonstrates a trend towards combating certain criminal groups using international humanitarian law (IHL) standards, both in situations that could be classified as NIACs and in others in which the facts do not allow such qualification. The governments of Colombia, Peru, Mexico, El Salvador and Brazil have viewed armed organized criminal groups as adversaries of the State and have employed levels of force that are commonly associated with

1 Executive Decree No. 111, 9 January 2024. All decrees issued by the president are available at: https://minka.presidencia.gob.ec/portal/usuarios_externos.jsf or www.registroficial.gob.ec/ (all internet references were accessed in October 2024).

2 Executive Decree Nos 193, 7 March 2024; 250, 30 April 2024; 275, 22 May 2024; and 318, 2 July 2024.

NIACs.[3] Ecuador seems to have moved away from that trend. Although the government has recognized the existence of a NIAC, that recognition has not been consistent with the policy to address the situation because, for example, the authorities have been applying a use of force that is typical of an ordinary regime.

In contrast to the president's position, the Constitutional Court of Ecuador (CCE) analyzed the state of exception decrees and consistently ruled objecting to the recognition of the NIAC.[4] Although it is not common for a constitutional court to assume a role in the qualification of an armed conflict, there are precedents in the region. In fact, the Constitutional Court of Colombia has expressly recognized the existence of an armed conflict in Colombia.[5] The role of the Constitutional Court of Colombia was to recognize the existence of a NIAC when the government refused to do so;[6] to the contrary, the role of the CCE was to rule against the recognition of the NIAC that the president had declared in state of exception decrees.

The existence – or not – of a NIAC and the consequent applicability of IHL is a question that depends exclusively on the facts.[7] Neither a formal declaration of armed conflict nor its recognition by any authority is required.[8] This allows IHL to protect people and property while an armed conflict takes place, regardless of whether the parties to the conflict recognize it as such or not. Just as the existence of a NIAC and the consequent applicability of IHL do not require a formal declaration or recognition, a formal declaration does not convert a situation into a NIAC if the facts do not support such a qualification. The existence of a NIAC depends on the factual verification of two requirements: organization of the armed group and intensity of hostilities.[9] Therefore, neither the pronouncements of the president nor the CCE have the final word regarding the qualification, or not, of the armed conflict in Ecuador.

In this context, the objective of this article is to present, contrast and analyze the positions of the president and the CCE, highlighting the most notable jurisprudential developments. First, the serious situation of violence that Ecuador is experiencing and the legal mechanisms that the authorities have used to confront it will be discussed. Then, the positions of the president and the CCE regarding the recognition of the NIAC will be contrasted and analyzed in light of

3 Pablo Kalmanovitz, "Can Criminal Organizations be Non-State Parties to Armed Conflict?", *International Review of the Red Cross*, Vo. 105, No. 923, 2023, p. 619.

4 CCE, Judgments 1-24-EE/24 (vote of majority), 2-24-EE/24, 5-24-EE/24, 6-24-EE/24 and 7-24-EE/24. Most references will be to Judgment 2-24-EE/24 since it established the precedents that were applied without substantive changes in subsequent judgments. The judgments are available at: https://buscador.corteconstitucional.gob.ec/buscador-externo/principal.

5 See Constitutional Court of Colombia, Sentence No. C-225/95, 1995, available at: www.corteconstitucional.gov.co/relatoria/1995/c-225-95.htm.

6 *Ibid.*

7 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), para. 387.

8 ICTR, *The Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (Chamber I), 2 September 1998, para 603.

9 ICRC Commentary on GC I, above note 7, paras 414–431.

the requirements for NIAC qualification – organization and intensity – and the particular challenges of qualifying a conflict involving organized crime. Finally, the CCE's jurisprudential developments and deficiencies will be discussed.

Panorama of violence and crisis in Ecuador

This section aims to contextualize the serious situation of violence that Ecuador faces because of organized crime, as well as the legal tools that the authorities have used to combat this situation.

Nature and expansion of violence and organized crime

Armed violence linked to organized crime causes severe humanitarian issues. In the Americas, the humanitarian impact extends beyond casualties, with hundreds of thousands of victims displaced from their homes and deprived of essential public services like health and education.[10] As noted above, Ecuador is currently experiencing this impact, with the highest levels of violence in its over 200 years of history as a republic. The situation is complex and, without a doubt, is the result of a confluence of multiple factors: increased presence of local and transnational organized crime, infiltration of organized crime in State institutions, drug trafficking, high homicide and crime rates, and violence within prisons.

Organized crime in Ecuador has evolved significantly in the last three decades. In 2023, the Ecuadorian Organized Crime Observatory published a study of the evolution of organized crime since 1990, divided into five stages.[11] In the first stage (1990–2000), there were lightly structured organizations of a local nature and with limited international insertion, as well as urban gangs such as the Ñetas and the Latin Kings.[12] The second stage (2000–2010) is identified as the "expansion phase". The criminal group known as Los Choneros consolidated and formed alliances with organizations such as the Sinaloa Cartel from Mexico, and groups related to the Revolutionary Armed Forces of Colombia – People's Army (Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, FARC-EP) from Colombia.[13] The third stage (2010–2015) corresponds to a "consolidation phase". Los Choneros maintained a near-monopoly due to the weakening of groups such as the Latin Kings and the Ñetas that reached agreements with the State to be legalized.[14]

The fourth stage (2015–2020) is known as the "weakening phase". Foreign actors such as the Albanian Mafia, the Jalisco Nueva Generación Cartel and groups related to the FARC-EP gained power. Also, the leader of Los Choneros significantly

10 ICRC, "The Humanitarian Impact of Armed Violence on Communities – the Americas Perspective: Interview with Sophie Orr", *International Review of the Red Cross*, Vol. 105, No. 923, 2023, p. 602.
11 Ecuadorian Organized Crime Observatory, *Caracterización del Crimen Organizado*, 2023, p. 7, available at: https://oeco.padf.org/wp-content/uploads/2023/09/Caracterizacion-Crimen-Organizado-Version-corta-V2.pdf.
12 *Ibid.*
13 *Ibid.*
14 *Ibid.*

lost power.[15] Finally, the fifth stage began in 2020 and is identified as a "phase of atomization and violence". During this stage, confrontations between dissident groups and Los Choneros emerged.[16] Among the main criminal organizations currently operating in the country are Los Choneros and Los Lobos. These criminal groups are estimated to have 12,000[17] and 8,000[18] members respectively.

The foreign actors that have the greatest presence and influence in Ecuador include the Mexican cartels of Sinaloa and Jalisco Nueva Generación, dissident groups of the FARC-EP, and the mafias of the Balkans. Some of these groups have been or continue to be parties to armed conflicts in their countries. The Rule of Law in Armed Conflict (RULAC) project of the Geneva Academy has verified the presence of NIACs between the Government of Mexico and, at least, the Jalisco Nueva Generación Cartel and the Sinaloa Cartel, from 2017 to 2019.[19] According to the International Committee of the Red Cross (ICRC), the FARC-EP dissident groups that did not accept the Colombian peace agreement are parties to five of the eight NIACs currently taking place in Colombia.[20]

Organized crime has infiltrated several State institutions in Ecuador. The State Attorney General's Office filed charges of organized crime and related crimes against judges at all levels, prosecutors, lawyers, officials of the Judicial Administrative Body, officials of the National Service for Comprehensive Attention to Adults Deprived of Liberty and Adolescent Offenders (Servicio Nacional de Atención Integral a Personas Adultas Privadas de Libertad y a Adolescentes Infractores, SNAI), National Assembly former members, and police officers. These cases have been named "Metastasis", "Purge", and "Plague".[21] More than a decade ago, Raúl Reyes, the FARC-EP's "number two", was killed in an armed attack by Colombian armed forces in the territory of Ecuador.[22]

15 *Ibid.*

16 *Ibid.*

17 It is estimated that Los Choneros, one of the most prominent criminal gangs in the country, had up to 20,000 members at its peak. Chris Dalby, "GameChangers 2021: No End in Sight for Ecuador's Downward Spiral", *InSight Crime*, 24 December 2021, available at: https://insightcrime.org/news/gamechangers-2021-no-end-sight-ecuador-downward-spiral/; "Los Choneros", *InSight Crime*, 26 September 2023, available at: https://insightcrime.org/es/noticias-crimen-organizado-ecuador/los-choneros/.

18 "Perfil de Ecuador", *InSight Crime*, 20 March 2023, available at: https://insightcrime.org/es/noticias-crimen-organizado-ecuador/ecuador/.

19 Geneva Academy of International Humanitarian Law and Human Rights, "Non-International Armed Conflicts in Mexico", *RULAC*, available at: www.rulac.org/browse/conflicts/non-international-armed-conflict-in-mexico#collapse4accord.

20 ICRC, "El costo humano de los conflictos armados en Colombia", 3 April 2024, available at: https://www.icrc.org/es/document/costo-humano-conflictos-armados-colombia-2024.

21 Ecuador State Attorney General's Office, "Casos de connotación contra la eficiencia de la administración pública", 2024, available at: www.fiscalia.gob.ec/casos-de-connotacion/.

22 Ecuador initiated a process against Colombia at the Inter-American Commission on Human Rights (IACHR). Ecuador stated that on 1 March 2008, the Colombian armed forces bombed a FARC-EP camp located in the town of Angostura, 1,850 metres from the border with Colombia, in a military action called Operation Phoenix. IACHR, Report No. 112/10, Inter-State Petition IP-02, Admissibility, Franklin Guillermo Aisalla Molina (Ecuador–Colombia), OEA/Ser.L/V/II.140, 21 October 2010.

Colombia justified these acts, among others, by alluding to links between Ecuadorian government officials and the Colombian guerrillas.[23]

Probably the most determining factor that explains the violence crisis and the confrontations between criminal groups is drug trafficking. In 2023, Ecuador seized nearly 200 tons of cocaine.[24] That placed Ecuador second in the region (behind only Colombia), and among the world's highest-ranking places, for cocaine seizures.[25] Ecuador is one of the main transit countries through which a large amount of drugs pass worldwide,[26] and this has turned Ecuador into one of the most violent countries in the world. Ecuador ended 2023 with the highest homicide rate per 100,000 inhabitants in Latin America,[27] a rate that had increased by 75% compared to the previous year.[28] Also, in 2023, Ecuador presented the 11th-highest crime ranking in the world in a tie with Syria and closely following Afghanistan and Lebanon, which finished tied in ninth place.[29]

Among the most representative criminal acts of recent years, the murder of presidential candidate Fernando Villavicencio stands out.[30] Likewise, it is notable that, on 9 January 2024, members of a criminal group kidnapped the State television channel TC Televisión.[31] The crime was broadcast live on national television and was classified as a terrorist attack by the authorities.

Violence in prisons has been another constant problem in recent years. According to official data, between 2021 and 2023, 542 violent deaths were recorded inside prisons in Ecuador: 331 in 2021, 144 in 2022, and sixty-seven in 2023.[32] These massacres have been extremely violent, involving multiple decapitations and mutilations.[33] Firearms, explosives and even a drone have been used inside prisons.[34] In 2022, the Inter-American Commission on Human

23 Permanent Council of the Organization of American States, Minutes of the Extraordinary Session of 4 and 5 March 2008, OEA/Ser.G CP/ACTA 1632/08 corr. 1, 4 March 2008.
24 "InSight Crime's 2023 Cocaine Seizure Round-Up", *InSight Crime*, 2024, p. 11, available at: https://insightcrime.org/wp-content/uploads/2023/08/InSight-Crimes-2023-Cocaine-Seizure-Round-Up-March-2024-v3.pdf.
25 *Ibid.*
26 See Global Initiative against Transnational Organized Crime, *Global Organized Crime Index 2023: Ecuador*, 2024, available at: https://ocindex.net/assets/downloads/2023/english/ocindex_profile_ecuador_2023.pdf.
27 "InSight Crime's 2023 Homicide Round-Up", *InSight Crime*, 2024, available at: https://insightcrime.org/wp-content/uploads/2023/08/InSight-Crimes-2023-Homicide-Round-Up-Feb-2024-2.pdf.
28 *Ibid.*, p. 7.
29 Global Initiative against Transnational Organized Crime, *Global Organized Crime Index 2023*, 2024, available at: https://ocindex.net/assets/downloads/2023/english/global-ocindex-report.pdf.
30 Ecuador State Attorney General's Office, "Caso Fernando Villavicencio", available at: www.fiscalia.gob.ec/caso-fernando-villavicencio/.
31 Ecuador State Attorney General's Office, "13 procesados, incluidos 2 adolescentes, por terrorismo: Irrumpieron de forma violenta a un canal de television", Press Release No. 030-DC-2024, January 2024, available at: www.fiscalia.gob.ec/13-procesados-incluidos-2-adolescentes-por-terrorismo-irrumpieron-de-forma-violenta-a-un-canal-de-television/.
32 SNAI, "Estadísticas", available at: www.atencionintegral.gob.ec/estadisticas/.
33 IACHR, *Personas privadas de libertad en Ecuador*, 2022, p. 25, available at: www.oas.org/es/cidh/informes/pdfs/Informe-PPL-Ecuador_VF.pdf.
34 *Ibid.*, p. 16.

Rights (IACHR) identified a high rate of overpopulation, weak institutions, corruption, and poor living conditions, among other issues.[35] In Ecuador, it is well known that the prisons were distributed among the main organized crime groups and that the criminal groups now have control of the prisons.

Use of state of exception decrees and the mobilization of the Armed Forces to combat violence

The Constitution of the Republic of Ecuador gives the president the exclusive competence to issue state of exception decrees in cases of "aggression, international or internal armed conflict,[36] serious internal commotion, public calamity or natural disaster".[37] The state of exception allows the president to suspend or limit the exercise of the following rights: inviolability of domicile, inviolability of correspondence, freedom of transit, freedom of association and assembly, and freedom of information.[38]

Furthermore, through the declaration of a state of exception, the president can take extraordinary measures, including the early collection of taxes, using public funds destined for other purposes, providing for prior censorship of information from social media, establishing all or part of the national territory as a security zone, providing for the use of the Armed Forces and the National Police and calling the entire reserve or part of it to active duty, arranging the necessary mobilization and requisitions, and decreeing national demobilization when normality is restored.[39]

States of exception have become the preferred tool of Ecuador's presidents to combat crime, both inside and outside prisons. Since 2018, thirty-three states of exception have been declared specifically aimed at combating crime inside and/or outside prisons.[40] These decrees were adopted with the main purpose of mobilizing and employing the Armed Forces since, in principle, the Armed Forces are not responsible for controlling internal security (which is dealt with by the National Police[41]) or order within prisons (dealt with by the SNAI). Since January 2024, the president has declared a state of exception six times. In five of those cases, the president, based on the existence of a NIAC, took extraordinary measures aimed at combating crime inside and outside prisons. These states of exception are detailed in Table 1.

35 *Ibid.*
36 The Constitution uses this term to refer to a NIAC.
37 Constitution of the Republic of Ecuador, Registro Oficial No. 449, 20 October 2008, Art. 164.
38 *Ibid.*, Art. 165.
39 *Ibid.*
40 See CCE, Case Nos 1-18-EE, 2-18-EE, 3-18-EE, 1-19-EE, 2-19-EE, 3-19-EE, 4-19-EE, 5-19-EE, 4-20-EE, 6-20-EE, 5-21-EE, 6-21-EE, 7-21-EE, 8-21-EE, 2-22-EE, 3-22-EE, 4- 22-EE, 5-22-EE, 6-22-EE, 7-22-EE, 8-22-EE, 1-23-EE, 3-23-EE, 4-23-EE, 5-23- EE, 6-23-EE, 7-23-EE, 8-23-EE, 1-24-EE, 2-24-EE, 5-24-EE, 6-24-EE and 7-24-EE.
41 Constitution of the Republic of Ecuador, above note 37, Art. 158.

Table 1. *States of exception decreed by the president of Ecuador*

No.	Executive Decree	Date	Description
1	110 and 111	8 and 9 January 2024	Territorial scope: throughout the territory. Temporal scope: sixty days. Causes: serious internal commotion and NIAC. Extraordinary measures: the decree ordered the mobilization and intervention of the Armed Forces and the National Police; suspended the rights to freedom of assembly, inviolability of domicile and inviolability of correspondence; limited the right to freedom of movement with a curfew; declared prisons as security zones; ordered requisitions; and ordered the Armed Forces to apply IHL to combat twenty-two criminal groups.
2	193	7 March 2024	Territorial scope: throughout the territory. Temporal scope: thirty days (extension of the previous state of exception). Causes: serious internal commotion and NIAC. Extraordinary measures: the exceptional measures determined in Decrees 110 and 111 were maintained.
3	250	30 April 2024	Territorial scope: five provinces. Temporal scope: sixty days. Cause: NIAC. Extraordinary measures: the decree ordered the mobilization and

Continued

Table 1.
Continued

No.	Executive Decree	Date	Description
			intervention of the Armed Forces and the National Police and suspended the right to inviolability of domicile.
4	275	22 May 2024	Territorial scope: seven provinces and one canton. Temporal scope: sixty days. Cause: NIAC. Extraordinary measures: the decree suspended the rights to inviolability of domicile and correspondence.
5	318	2 July 2024	Territorial scope: six provinces and one canton. Temporal scope: sixty days. Causes: serious internal commotion and NIAC. Extraordinary measures: the decree ordered the mobilization and intervention of the Armed Forces and the National Police; suspended the rights to freedom of assembly, inviolability of domicile and inviolability of correspondence; and ordered requisitions.

Is there a NIAC in Ecuador?

In response to the growing wave of violence in Ecuador, the president recognized the existence of a NIAC against multiple criminal groups in Executive Decree No. 111 of 9 January 2024. Subsequently, this position was ratified in other state of exception decrees on 7 March, 30 April, 22 May, and 2 July 2024, as well as in Executive Decree No. 218 of 7 April 2024. In six months, the president argued, at different times, that the NIAC involved twenty-two criminal groups (January),[42] three alliances (March),[43] eleven criminal groups (July)[44] and three criminal groups (July).[45]

The CCE ruled on the constitutionality of the state of exception decrees issued by the president.[46] The opinion of the majority of the judges of the CCE, capable of generating precedents in *stricto sensu*, was consistent in stating that the facts invoked by the president did not meet the requirements necessary for the qualification of a NIAC: organization and intensity. This position was expressed in Judgments 1-24-EE/24 of 29 February 2024,[47] 2-24-EE/24 of 21 March 2024, 5-24-EE/24 of 9 May 2024, 6-24-EE/24 of 13 June 2024 and 7-24-EE/24 of 1 August 2024.

As can be seen, there is a clear contradiction of criteria between the president and the CCE regarding the qualification of a NIAC in Ecuador. In this context, the positions of the president and the CCE will be presented, contrasted and analyzed below.

The qualification of a NIAC

Article 3 common to the four Geneva Conventions (common Article 3) refers to armed conflicts "not of an international character", but it does not define NIACs or establish the requirements that must be verified for their qualification. Therefore, it is necessary to consider international jurisprudence as an auxiliary source of international law. The definition of NIAC that is commonly accepted was proposed by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case. In this case, the ICTY considered that a NIAC occurs when there is "protracted armed violence between governmental authorities and organized armed groups or between such groups".[48] To meet this standard, in accordance with other decisions of the ICTY and other international tribunals, two cumulative requirements must be met: organization of the parties and intensity of hostilities.[49] These requirements to qualify a NIAC have become international custom due to their constant practice and acceptance as obligatory.

42 Executive Decree No. 111, 9 January 2024.
43 CCE, Judgment 2-24-EE/24, 21 March 2024, paras 87–91.
44 CCE, Judgment 7-24-EE/24, 1 August 2024, para. 70.
45 *Ibid.*
46 Constitution of the Republic of Ecuador, above note 37, Art. 166.
47 The majority decision in this case was in a concurring vote signed by five judges.
48 ICTY, *The Prosecutor v. Duško Tadić aka "Dule"*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.
49 See ICTY, *The Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Judgment (Trial Chamber I), 3 April 2008, paras 49, 60.

To guide the analysis of the requirements of organization and intensity, international tribunals have proposed various indicative factors.[50] However, it should be noted that such indicative factors do not constitute an exhaustive list of requirements that must necessarily be met. Indeed, as recognized by the ICTY and the International Criminal Tribunal for Rwanda (ICTR), "the determination of the intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis".[51]

The position of the president of Ecuador regarding the definition of NIAC evolved over time. Thus, in his first state of exception decree, he cited a concept according to which a NIAC is a confrontation that requires "a minimum of 100 fatalities in one year and/or a serious impact on the territory … and human security", with the aim of "achiev[ing] objectives that are distinguishable from those of common crime".[52] In subsequent decrees,[53] the president adopted the definition from the international jurisprudence. Regardless of this, in all his decrees, the president tried to justify the requirements of organization and intensity, referring to the indicative factors proposed by international tribunals. For its part, the CCE, in all its judgments, adopted the definition of NIAC from the *Tadić* case and analyzed the compliance with the requirements of organization and intensity, in light of indicative factors proposed by the international tribunals, to conclude that the president did not prove the existence of a NIAC.[54]

Can criminal groups be a party to a NIAC?

The president and the CCE agreed that criminal groups can be parties to NIACs. The president, when recognizing the existence of a NIAC for the first time, identified twenty-two criminal groups as "belligerent armed groups".[55] The president has expressly stated that "the fact that these groups are dedicated to drug trafficking or other criminal activities does not prevent them from being parties to the NIAC".[56]

The president has consistently referred to the situation in Ecuador as a modern armed conflict, stating that the "presence of various types of armed actors, both public and private, in most cases of a transnational nature, constitutes the most relevant characteristic of these conflicts. In them, militias, paramilitaries, armies of warlords, [and] criminal gangs … clash."[57] He has also

50 *Ibid.*
51 ICRC Commentary on GC I, above note 7, para. 461.
52 Executive Decree No. 111, 9 January 2024, p. 7.
53 Executive Decree No. 250, 30 April 2024, pp. 1–2.
54 See CCE, Judgment 2-24-EE/24, 21 March 2024, paras 65–69.
55 Executive Decree No. 111, 9 January 2024, Art. 4 (Águilas, ÁguilasKiller, Ak47, Caballeros Oscuros, ChoneKiller, Choneros, Corvicheros, Cuartel de las Feas, Cubanos, Fatales, Gánster, Kater Piler, Lagartos, Latin Kings, Lobos, Los p.27, Los Tiburones, Mafia 18, Mafia Trébol, Patrones, R7 and Tiguerones).
56 Executive Decree No. 318, 2 July 2024, pp. 24–25.
57 Executive Decree No. 111, 9 January 2024, p. 4.

specifically stated that "organized crime has become a non-belligerent state actor".[58] Likewise, he has argued that "the modern conflicts that threaten Ecuador are fought under asymmetric conditions"[59] and that they are "dynamic, changing and with mutable alliances".[60]

According to the president, modern conflicts "demand modern responses".[61] In this regard, he reasoned that the conflict which Ecuador is experiencing "cannot be conceived restrictively based on the conceptualization of 1949 and the jurisprudence of other countries".[62] For example, the president indicated that the ICTY's jurisprudence "cannot be applied strictly to the country".[63] He also argued that modern conflicts "materialize their own factual conditions … [such as] the violence perpetrated by organized crime groups … which are dramatically different from the classic Ius ad Bellum and Ius in Bellum".[64] However, despite all these claims, the president did not specify the specific regime that would be applicable to modern conflicts involving criminal groups.

The CCE, for its part, was clear when pointing out that "for the qualification of a NIAC, the nature and objectives of the organized armed group are irrelevant"[65] and that "the fact that an armed group does not have political aspirations or that its activity is focused on drug trafficking or other criminal activities does not prevent it from being a party to the conflict within the framework of a NIAC".[66] For the specific case of Ecuador, the CCE considered that "the fact that the activity of the criminal groups identified by the president is focused on drug trafficking and other criminal activities does not prevent them from being a party to the conflict within the framework of a NIAC".[67] To reach its conclusion, the CCE turned to the *Limaj* case in which the ICTY clarified that

> the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organisation of the parties[.] [T]he purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant.[68]

The possibility of criminal groups being parties to NIACs is a topic that has been the subject of extensive debate in doctrine in recent years. As Muggah recognizes, "humanitarian, law enforcement and military experts do not always agree on the criteria that should be applied to determine whether IHL can or should apply to

58 *Ibid.*
59 Executive Decree No. 275, 22 May 2024, p. 6.
60 *Ibid.*, p. 11.
61 *Ibid.*, p. 7.
62 Executive Decree No. 318, 2 July 2024, p. 23.
63 *Ibid.*
64 Executive Decree No. 218, 7 April 2024, p. 10.
65 CCE, Judgment 2-24-EE/24, 21 March 2024, para. 67.
66 *Ibid.*
67 *Ibid.*, para. 93
68 ICTY, *The Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgment (Trial Chamber II), 30 November 2005, para 170.

organized criminal groups".[69] Although there is general agreement that the motivation of the organized armed group is legally irrelevant to the qualification of a NIAC, when trying to classify a potential armed conflict involving criminal groups, multiple challenges arise.

Kalmanovitz emphasizes the difficulty of criminal groups meeting the organization requirement and proposes a "presumption against NIAC qualifications of organized criminal violence".[70] In this regard, the author notes that "[i]f we take responsible command and the ability to comply with IHL norms to be necessary features of non-State armed groups in NIACs, then we should in principle be sceptical of NIAC qualifications of organized criminal violence".[71] Another challenge that arises when analyzing the organization of criminal groups is that they often try to keep their structures, and in some cases their leaders, anonymous. This is clear when, for example, criminal groups try to prevent the State from identifying people who have infiltrated State institutions.

Another challenge has to do with the differentiation between acts that have a direct nexus with the NIAC and those that correspond to ordinary criminal acts. As Padin explains, to analyze the intensity requirement,

> one must only examine those acts that show a level of minimum intensity necessary to be considered as armed confrontations between the identifiable parties, and must dismiss criminal actions (criminal homicides) which cannot be clearly attributed to the confrontation as collateral damage from a particular clash. [This is because] there must be a direct nexus between the violent action and the armed confrontation.[72]

The challenges in categorizing armed conflicts associated with organized crime are exemplified in the case of Ecuador.

Organization of the parties

To justify the level of organization, in general, of the twenty-two criminal groups identified in the first decree, the president affirmed that they had: a command structure; disciplinary rules and mechanisms within their organizations; territorial control (in entire provinces and inside prisons); recruiting capacity; access to weapons, equipment and military training; the ability to plan, coordinate and execute operations of a military nature; and official spokespersons to communicate, negotiate and conclude agreements.[73] However, in a subsequent decree, the president recognized that the organizational structure of the criminal groups was unstable "due to the lack of leadership caused by the arrests or

69 Robert Muggah, "Organized Crime in Armed Conflicts and Other Situations of Violence", *International Review of the Red Cross*, Vol. 105, No. 923, 2023, p. 570.
70 P. Kalmanovitz, above note 3, p. 622.
71 *Ibid*., p. 631.
72 Juan Padin, "Opening Pandora's Box: The Case of Mexico and the Threshold of Non-International Armed Conflicts", *International Review of the Red Cross*, Vol. 105, No. 923, 2023, pp. 793–794.
73 CCE, Judgment 2-24-EE/24, 21 March 2024, para. 94.

escapes of their main leaders".[74] This would result in the "emergence of middle-rank leaders who seek to have complete control by forming new groups to act alone or to reach agreements and alliances that allow them to sustain their criminal organization".[75]

In a hearing before the CCE, the government stated that three criminal groups had a "mixed structure in non-hierarchical criminal networks" and that eight criminal groups were "not structured, since their activity corresponds to common crime".[76] Nothing was argued about the remaining criminal groups that had been considered parties to the NIAC initially. In addition, the authorities accepted that the State was absent in certain territories due to lack of resources, but affirmed that it could easily recover those territories.[77] They also indicated that there were no "sophisticated or well-defined camps since the leaders move throughout the territory".[78] In relation to the "use of uniforms" element of organization, the authorities asserted that certain members of the criminal groups wear black clothing and/or have distinctive tattoos.[79] The authorities maintained that criminal groups exercised influence on local governments and civil organizations.[80] They further indicated that members of the criminal groups used expensive cars and motorcycles and argued that they communicated via disposable contact numbers and encrypted social networks to avoid being identified.[81]

The CCE explained that the organization requirement must necessarily be proven with respect to each of the armed groups, without the possibility of aggregating or confusing the characteristics of the different groups.[82] Regarding the specific case of Ecuador, the CCE noted that the president did not present an individualized analysis regarding the organization of each armed group and, rather, that he sought to aggregate the characteristics of all the identified criminal groups.[83] In addition, the CCE identified contradictions in the president's argument since he indicated that the organizational structure of the criminal groups was unstable, lacked leadership, and was constantly changing due to internal power disputes.[84]

In its latest judgment, the CCE conducted its most in-depth examination of the issue and determined that specific indicative factors were not met: command structure, territorial control, use of uniforms, establishment of military camps, ability to negotiate with third parties, and use of means of communication.[85] In general terms, the CCE concluded that "there are possible

74 *Ibid.*, para. 91.
75 *Ibid.*
76 CCE, Judgment 7-24-EE/24, 1 August 2024, para. 68.
77 *Ibid.*
78 *Ibid.*
79 *Ibid.*
80 *Ibid.*
81 *Ibid.*
82 CCE, Judgment 2-24-EE/24, 21 March 2024, para. 70.
83 *Ibid.*, para. 95.
84 *Ibid.*, para. 96.
85 CCE, Judgment 7-24-EE/24, 1 August 2024, para. 71.

inconsistencies and confusions regarding the identification of 'organized armed groups' and 'organized and common criminal groups'".[86]

In that last ruling, the CCE also sought to explain the indicative factors for assessing the level of organization; however, it fell short in comprehensively analyzing and delineating these criteria. For example, regarding the use of uniforms, the CCE stated that "[t]his indicative factor implies that an organization is fully identifiable by the use of its clothing or insignia that allows for the identification of one's membership in a group".[87] Then, when describing this parameter applied to the Ecuadorian case, the CCE stated that "[i]n the reserved diligence, the competent authorities indicated, without referring to the specific name of any 'organized armed group', that there are individuals who, for example, wear black clothing and others who bear distinctive tattoos".[88] The CCE ultimately concluded in general terms:

> Regarding the indicative factors of the establishment of barracks, use of uniforms, ability to engage in negotiations with third parties, and the use of communication means, this Court observes that only general assertions were presented about their accreditation without linking their configuration to each of the organizations that are allegedly fighting in the NIAC.[89]

The mere reference to the use of tattoos is not a clear parameter that allows for distinguishing between those who participate and those who do not participate in hostilities. In fact, this type of explanation deepens discrimination against those who have tattoos, an aspect that should have been observed by the CCE.

After analyzing the president's decrees and the rulings of the CCE, it is clear that the president's justification was deficient. As the CCE noted in its judgments, the president did not present evidence on each of the criminal groups but inexplicably tried to aggregate the characteristics of multiple criminal groups as if they were all part of the same organized armed group. The deficiencies in the president's position become evident starting from the identification of the parties to the alleged NIAC. As noted above, over the course of six months, the president first referred to twenty-two criminal groups, then to three alliances, and later to eleven or three criminal groups.[90] The fact that the president – relying on reports prepared by the Strategic Intelligence Centre, the Armed Forces and the National Police – was not able to prove the organization of even one of the criminal groups in five attempts is certainly a clear signal to conclude that the organization requirement was not properly met.

Corroborating the thesis of Kalmanovitz, the case of Ecuador demonstrates that proving the organization requirement in NIACs that involve organized crime is complex.[91] In this sense, the fact that the president himself recognized that the

86 *Ibid.*, para. 70.
87 *Ibid.*, para. 56.8.
88 *Ibid.*, para. 69.8.
89 *Ibid.*, para. 71.3.
90 *Ibid.*, para. 70.
91 P. Kalmanovitz, above note 3, p. 622.

organizational structure of the criminal groups was unstable, lacked leadership and was constantly changing due to internal power disputes should not be underestimated. This denotes the lack of a solid command structure, which becomes a clear indication that, in Ecuador, the existence of an armed conflict has not been proven because none of the criminal groups would satisfy the organization requirement. The difficulty of determining the precise structure of each armed group has also been noted. One of the reasons for this could be, in fact, the intention of the criminal groups to remain anonymous.

In any case, the question remains as to what the CCE's position would have been if the president had presented more solid arguments. Perhaps the president's repeated references to the existence of a modern conflict should have been linked to the characteristics of the organization of criminal groups, such as dynamism, horizontal structures, decentralization, the presence of collective leaders and the prominence of middle-rank leaders. In this sense, the possibility remains open for the organization requirement to be met when other indicative factors are present, such as, as occurs in the case of certain criminal groups in Ecuador, access to military-grade weapons, logistical capabilities, and the ability to recruit new members. Not all of the dozens of criminal groups that operate in Ecuador can be seriously considered as organized armed groups, but the most powerful and structured criminal groups should not be automatically discarded. This situation should be the subject of extensive debate in the jurisprudence and the doctrine.

Intensity of hostilities

To justify the intensity requirement, the president argued that the criminal groups were responsible for prison massacres, selective armed attacks, multiple armed attacks, attacks with explosives, and attacks on public officials and infrastructure.[92] According to the president, these acts were not sporadic and were characterized by their intensity, permanence and recurrence.[93] The president also mentioned the territorial control exercised by criminal groups in entire provinces and inside prisons.[94] In one of the decrees, the president referred to three alliances or factions that had been formed, each led by one of the largest and most powerful criminal groups in the country.[95] These alliances were formed "intermittent[ly] for survival", "for territorial positioning" or "for power".[96] The objectives of the factions were linked, essentially, to the protection of leaders, the control of ports, and the permanence of criminal activities such as drug trafficking and illegal mining.[97]

The CCE established that the intensity requirement must be verified for "each confrontation that is intended to be classified as a NIAC", taking into

92 CCE, Judgment 2-24-EE/24, 21 March 2024, para. 97.
93 *Ibid.*, para. 97.
94 *Ibid.*, para. 101.
95 *Ibid.*, para. 87.
96 *Ibid.*, paras 87–90.
97 *Ibid.*

account only the acts that are directly related to the specific conflict.[98] As an exception, the CCE provided for the case of coalitions in which organized armed groups "join efforts to combat the same adversary in a coordinated and sustained manner".[99] In these cases, according to the CCE, it is possible to aggregate the acts of the armed groups that act as a coalition in order to verify whether or not the intensity requirement is met.[100]

For the case of Ecuador, the CCE verified that the president presented information in a general way, attempting to aggregate the acts attributable to multiple criminal groups.[101] The CCE repeatedly noted that the president merely cited isolated cases of criminality that were not even attributed to any specific criminal group.[102] According to the Court, the president did not justify the existence of a coalition in which armed groups "join forces to combat the same adversary in a coordinated and sustained manner".[103] Indeed, the CCE pointed out that the president himself stated that the alliances formed between criminal groups were temporary and adaptable.[104]

Additionally, the CCE considered that the type of territorial control by criminal groups referred to by the president was not relevant for the classification of a high-intensity NIAC.[105] This is because the control exercised by criminal groups had to do only with their prevalence in specific areas for planning and committing criminal acts.[106] Thus, for example, certain groups managed drug distribution in Guayaquil, others in Esmeraldas, in certain prisons, etc.[107] According to the CCE, the relevant type of territorial control is that in which the organized armed group exercises *de facto* functions of the State in a certain territory over which the State has lost control.[108]

As it did for the analysis of organization, in Judgment 7-24-EE/24 the CCE examined some of the indicative factors of intensity: the number of incidents, the duration of the violence, the geographical extent of the violence and the type of weapons used. In this regard, the CCE concluded that: (a) incidents were presented as isolated cases without indicating which criminal group they could be attributed to; (b) the president evoked the incidence of more violent events in 2021 and noted a rise in violence in the first half of 2024, but did not attribute those data to any specific criminal group; (c) the president indicated that there was a local and regional operational dynamic, but did not justify it with respect to any specific criminal group; and (d) data were provided on the seizure of

98 *Ibid.*, para. 70.
99 *Ibid.*
100 *Ibid.*
101 *Ibid.*, para. 98.
102 *Ibid.*
103 *Ibid.*, para. 100.
104 *Ibid.*
105 *Ibid.*, para. 101.
106 *Ibid.*, para. 101.
107 *Ibid.*
108 *Ibid.*

weapons, ammunition, explosives and drones employed in the commission of illegal acts, but those data were not attributed to any specific criminal group.[109]

The difficulty of separating ordinary criminal acts from acts relevant to the qualification of a NIAC has been noted in this case, as evidenced in the president's decrees. The president was not able to differentiate between isolated criminal acts and acts that could have had a direct nexus with the conflicts that were qualified as NIACs. Certainly, there may be many criminal acts that could be easily discarded for the purposes of qualifying a NIAC. Among these acts, crimes committed against local authorities and candidates, robberies, kidnappings, money laundering, corruption, and destruction of civil infrastructure, among other acts that the president cited to justify his decrees, could be included. However, it is more complicated to analyze acts that, despite appearing to be isolated, were committed directly against the Armed Forces and the National Police, such as the use of car bombs, the destruction of police vehicles and infrastructure, and the murders of police officers while they were performing their duties.

At first sight, it could be concluded that some indicative factors of the intensity requirement are met in the case of Ecuador. The use of military equipment by criminal groups, the number of deaths and the duration of violence are probably the most evident. Also, the continuous declaration of states of exception, the use of the Armed Forces and the recognition of the NIAC by the president could be considered indicative factors because these actions demonstrate that the situation of violence has reached a very high level.

However, with a closer and deeper analysis, it will be noted that, as the president identified it, dozens of criminal groups operate in Ecuador independently. The number of deaths may be high, but that could be attributed to the high number of criminal groups, and many of those deaths certainly correspond to the consequences of ordinary and organized crime, but not to confrontations that could be relevant to IHL. Other apparent indicative factors – such as the duration of violence, the declaration of states of exception, the use of the Armed Forces and the recognition of the NIAC – could be explained by the lack of capacity of the State to confront the criminal violence and are not necessarily motivated by hostilities of an intensity proper to a NIAC. In this context, the conclusion and arguments of the CCE regarding the failure to meet the intensity requirement in the case of Ecuador could be considered reasonable.

Inconsistency of the State's actions with the recognition of the NIAC

The Latin American experience reveals a pattern of governments combating certain criminal groups using IHL standards, both in situations that could be classified as NIACs and in others where the facts clearly suggest the opposite. The governments of Colombia, Peru, Mexico, El Salvador and Brazil have considered

109 CCE, Judgment 7-24-EE/24, 1 August 2024, paras 77, 82.

certain criminal groups to be enemies of the State and have used levels of force against them that would be expected in NIACs.[110] As an illustration, in 2015, the Colombian Air Force conducted air strikes against individuals belonging to the drug trafficking group known as the Clan del Golfo, and these acts have subsequently been adopted as part of the government's official policy.[111] While the violence in the Valle de los Ríos Apurímac, Ene y Mantaro region of Peru has not been officially qualified as a NIAC by experts, the government has called drug trafficking organizations in the area "hostile groups" in order to target them under IHL.[112]

Ecuador seems to have moved away from this trend, as the government has recognized the existence of a NIAC but not with the intention of applying IHL against the criminal groups. Although the president has recognized the existence of a NIAC, governmental actions to address the alleged armed conflict suggest the opposite. This section aims to present indicative factors which support the conclusion of previous subsections that there is insufficient evidence to assert that a NIAC is occurring in Ecuador. The statistics and facts provided are merely indicative and should not be interpreted as conclusive.

On 11 March 2024, the president, the Armed Forces and the National Police issued a joint statement in which they reported that, since 9 January 2024, they had carried out 167,575 security operations, including 202 operations against alleged terrorist groups.[113] During these operations, the authorities reported the deaths of fifteen alleged terrorists.[114] In addition, the authorities detained 13,073 people, 280 for terrorism.[115] Arrests notably increased, since official data show that, between January and the end of May 2024, 30,987 people were detained.[116] By the end of July, 43,354 people had been detained.[117] The statistics show that the National Police and the Armed Forces are not addressing the alleged armed conflict using IHL standards.

The figures cited above show that the rate of deceased people compared to those detained in the period 9 January to 11 March (i.e., the first two months since the recognition of the NIAC) was 0.11%. In other words, 871.53 people were arrested for each person who died. Furthermore, the data show that, on average, there was one deceased person for every 11,171.67 operations and, specifically, for every 13.47 operations aimed at fighting terrorism. Clearly, the National Police and the Armed Forces have been acting with a standard of legitimate use of force

110 P. Kalmanovitz, above note 3, p. 619.
111 *Ibid.*
112 *Ibid.*, p. 620.
113 Comunicación Ecuador (official account of the Ecuadorian government), "Conozca los resultados del eje de seguridad, con corte del 9 de enero al 11 de marzo de 2024", *X.com*, 11 March 2024, available at: https://x.com/ComunicacionEc/status/1767299964260995301.
114 *Ibid.*
115 *Ibid.*
116 National Secretary of Planification, "Detenidos-Aprehendidos", *Datos Abiertos*, 2024, available at: https://datosabiertos.gob.ec/dataset/personas-detenidas-aprehendidas/resource/01d3e020-a4bd-4d1c-ab38-e4fbc1fa623c.
117 *Ibid.*

under a human rights approach, at least as a general rule. The low number of deaths compared to the number of arrests and military and police operations is not typical of a NIAC. Although, in the context of an armed conflict, the ideal is to reduce the number of deaths to a minimum, when such a low number is observed, the situation suggests that there is no NIAC due to an insufficient level of intensity.

Another very revealing fact has to do with the choice of the authorities to prosecute detained people for common crimes, including terrorism, and not for war crimes. The initiation of several judicial proceedings against detained persons has been made public and, according to the information available, none of these proceedings is being pursued for war crimes, even though the Ecuadorian Criminal Code typifies these crimes in its Articles 111–139.[118] For example, if acts of terrorism were committed during a NIAC, the corresponding response would be to resort not to the criminal types of terrorism that are applicable in an ordinary situation but to the types of criminal activities covered by Article 126 of the Criminal Code, which establishes that "[t]he person who, during an armed conflict, carries out any form of attack on a protected person with the aim of terrorizing the civilian population will be punished with a prison sentence of ten to thirteen years".[119]

The actions of Ecuadorian prosecutors can be explained by the fact that, in the event of initiating judicial proceedings for the commission of war crimes, in accordance with Article 114 of the Ecuadorian Criminal Code, the existence of a NIAC would have to be proven. Article 114 clearly states that a NIAC can exist "regardless of the formal declaration by the president or the decree of a state of exception throughout the national territory or part of it".[120]

Another point on which the position and actions of the government do not coincide is related to the type of weapons used. IHL prohibits the use of chemical weapons, including tear gas,[121] but the National Police and the Armed Forces have used tear gas in the alleged armed conflict. There are even complaints that it has been used disproportionately when employed near the faces of detained people.[122] The use of tear gas in Ecuador, in this context, can be explained in only two ways. The first scenario is that, being aware that there is no real NIAC in Ecuador, the National Police and the Armed Forces have used means that are proper to address an ordinary situation and that are generally employed to contain riots. The second scenario is that, believing that there is an armed conflict, the National Police and the Armed Forces have deliberately chosen to use weapons prohibited by international law.

118 Ecuadorian Criminal Code, Registro Oficial Suplemento No. 180, 10 February 2014, Arts 111–139.
119 *Ibid.*, Art. 126.
120 *Ibid.*, Art. 114.
121 See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993. This prohibition is also applicable in NIACs as a customary rule.
122 "Abusos militares, otra cara de la guerra contra el narco en Ecuador", *France 24*, 27 February 2024, available at: www.france24.com/es/minuto-a-minuto/20240227-abusos-militares-otra-cara-de-la-guerra-contra-el-narco-en-ecuador.

Also, the way in which detentions have been carried out during the alleged armed conflict is not what would be expected in a NIAC. As indicated above, between January and May 2024, the National Police and the Armed Forces detained 30,987 people. The effective capacity of Ecuador's prisons is 27,714 people, and this has remained practically unchanged since January of this year.[123] This means that, in five months, the number of people detained amounted to 111.8% of the total capacity of Ecuadorian prisons. In addition, it must be taken into account that, for several years, Ecuador had already been facing a very serious problem of prison overcrowding.[124] Considering that, since the beginning of the alleged armed conflict in Ecuador, no new prison or any type of detention centre has been set up, the question arises: where are the detained people?

Between January and 19 April 2024, according to data from the State Attorney General's Office, there were 217 convictions and thirty-eight trials initiated.[125] The progression of the prison population since January of this year shows that it has not changed significantly compared to the number of detentions.[126] After an independent investigation, Human Rights Watch has explained that, apparently, most of the detained people were never brought before a judge or prosecutor but rather were detained for brief periods, outside the legal process, to receive reprisals, beatings or other degrading treatment by members of the National Police and the Armed Forces.[127] In the rest of the cases, the detained people would have been transferred to the country's prisons. At this point it should be noted that, in the state of exception decrees, the president indicated that the alleged armed conflict was also taking place inside prisons that were controlled by criminal groups.

Thus, it is clear that the people who would be members of the organized armed groups and have been detained en masse have not been placed in a special or temporary detention centre. They have been released after short periods of detention and, in a minority of cases, have been located in the country's existing prisons, where the NIAC would also be taking place. The inconsistency lies in the fact that, in any of these scenarios, the State would be massively detaining people who had allegedly participated directly in the NIAC and then returning them to the places where the hostilities were taking place.

In its judgments, the CCE highlighted that the president did not make it clear if he considered that there was one, several, or even twenty-two NIACs.[128] The CCE also noted that the president's motivation was deficient since he did not identify the criminal group that would have committed each act that motivated the states of

123 SNAI, "Estadísticas", 2024, available at: www.atencionintegral.gob.ec/estadisticas/.
124 IACHR, above note 33, para. 112.
125 Human Rights Watch, "Carta al Presidente Noboa sobre "conflicto armado interno" y violaciones de derechos humanos en Ecuador", 22 May 2024, available at: www.hrw.org/es/news/2024/05/22/letter-to-presidente-noboa-sobre-conflicto-armado-interno-y-violaciones-de-derechos#_ftnref16.
126 SNAI, above note 123.
127 Human Rights Watch, above note 125.
128 CCE, Judgment 2-24-EE/24, 21 March 2024, para. 99.

exception.[129] In summary, the CCE concluded that the president limited himself to identifying multiple criminal groups, mentioning isolated acts of violence without attributing them to any specific group, and citing some indicative factors to affirm that the requirements of organization and intensity were met. This is why the position of the CCE was contrary to the position of the president regarding the existence of a NIAC (or multiple NIACs) in Ecuador.

Regardless of the particularities and difficulties of classifying armed conflicts involving organized crime, the CCE's position seems to be reasonable and appropriate for the specific case of Ecuador. Indeed, the situation of Ecuador would seem to be more similar to that of a State in which organized crime exceeds the capacity of the authorities to combat it (such as Haiti) than to that of a State facing specific criminal groups that meet the criterion of organization and that have committed acts sufficient to reach the required level of intensity (as in the case of Colombia). This conclusion is reinforced since multiple authorities of the State, including the government itself, have not applied IHL and have not acted as they would be expected to in a NIAC.

Developments and deficiencies of the judgments of the CCE

New challenges for IHL in contemporary armed conflicts

One of the most interesting contributions of the CCE's judgments is the inclusion and discussion of some of the challenges facing IHL in contemporary armed conflicts. Among other issues, the CCE addressed (1) the possibility of considering organized crime groups as parties to a NIAC, (2) how the requirement of intensity should be analyzed when coalitions are formed, and (3) the definition of spillovers. We will now discuss these issues in turn.

First, there has been extensive debate in recent years about the possibility of criminal groups being parties to NIACs. For example, the *International Review of the Red Cross* dedicated a thematic issue to the subject of organized crime and IHL in 2023.[130] While there is broad consensus that the motivations of organized armed groups are irrelevant to the qualification of a NIAC, several challenges emerge when attempting to classify a potential conflict involving criminal groups.[131] Without a doubt, armed conflicts in which criminal groups participate are examples of the so-called "contemporary" armed conflicts for which, for various reasons, the existing norms do not seem to fit as easily compared to the armed conflicts of the last century for which the standards were created.

The CCE had to expressly address this situation since the president constantly tried to justify his position by indicating that the alleged NIAC was

129 *Ibid.*
130 *International Review of the Red Cross*, Vol. 105, No. 923, 2023, available at: https://international-review.icrc.org/reviews/irrc-no-923-organized-crime.
131 See P. Kalmanovitz, above note 3.

not a traditional conflict but rather a modern one that was radically different from those addressed by the "classical" *ius in bello*.[132] The CCE opted for a clear position as it expressly recognized that criminal groups can be parties to a NIAC since the motivation of the organized armed groups is not relevant to the qualification of the conflict.[133] Also, the CCE analyzed whether the requirements of intensity and organization were met. The CCE carried out the same analysis that would be expected for the qualification of a NIAC without any distinction based on the nature of the criminal groups.

Second, coalition formation was addressed in the ICRC's fifth report on IHL and the challenges of contemporary armed conflicts. The report presents a favourable position in relation to the cumulative analysis of the intensity requirement when there are coalitions, since "it would be unrealistic to expect States to operate under different paradigms – either the law-enforcement or the conduct-of-hostilities paradigm – to respond to the different groups that operate together [and] pool and marshal their military means in order to defeat the State".[134] According to this report, "it might be more realistic to examine the intensity criteria collectively by considering the sum of the military actions carried out by all of [the groups] fighting together".[135]

Some authors have maintained the same position. For example, Redaelli considers that it is possible to "aggregate the intensity when a number of organized [armed non-State actors] fight in the same geographical region, during the same period of time, and against a common enemy".[136] Likewise, Nikolic, de Saint Maurice and Ferraro have suggested that

> the approach of aggregating intensity facilitates determining the applicable law when facts on the ground suggest that a number of different organized armed actors – be they States or non-State armed groups – are operating together by pooling and marshalling military resources with the view to combating the same enemy.[137]

The CCE had to rule on the issue given that the president expressly alleged that multiple alliances had been formed between criminal groups. The position of the CCE was aligned with contemporary trends in favour of conducting an aggregate analysis of the intensity requirement when analyzing cases of coalitions. Indeed, the CCE considered that this type of analysis is possible when two or more

132 Executive Decree No. 218, 7 April 2024, p. 10.
133 CCE, Judgment 2-24-EE/24, 21 March 2024, para. 67.
134 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2019, p. 51.
135 *Ibid.*
136 Chiara Redaelli, "A Common Enemy: Aggregating Intensity in Non-International Armed Conflicts", *Humanitarian Law and Policy Blog*, 22 April 2021, available at: https://blogs.icrc.org/law-and-policy/2021/04/22/common-enemy/.
137 Jelena Nikolic, Tristan Ferraro and Thomas de Saint Maurice, "Aggregated Intensity: Classifying Coalitions of Non-State Armed Groups", *Humanitarian Law and Policy Blog*, 22 April 2021, available at: https://blogs.icrc.org/law-and-policy/2020/10/07/aggregated-intensity-classifying-coalitions-non-state-armed-groups/.

organized armed groups join forces to combat the same adversary in a coordinated and sustained manner.[138] As can be seen, the CCE established three requirements: (1) the coalition's purpose of confronting the same enemy, (2) a level of coordination between the organized armed groups, and (3) the persistence of the coalition over time. With this, the CCE established parameters that allow a coalition that could be relevant for the classification of a NIAC to be differentiated from other types of alliances or relationships that armed groups could have.

Third, the occurrence of spillovers during NIACs was also addressed by the CCE. This issue is attended to in depth in the updated commentary on common Article 3; in this commentary, it is noted that "an existing non-international armed conflict may spill over from the territory of the State in which it began into the territory of a neighbouring State not party to the conflict".[139] In addition, the commentary identifies several challenges that could arise: for example, (a) how far into a neighbouring country can an existing NIAC be considered as spilling over, and (b) is the spilling over of an existing NIAC limited to neighbouring countries?[140]

The CCE defined spillovers in the following way:

> A spillover takes place when hostilities within the framework of a NIAC stop developing exclusively in the territory of a single State and spill over to one or more States with which the State regularly maintains land or sea borders … as long as the armed forces of other States do not intervene.[141]

The need to address this issue arose because the CCE had to interpret the Constitution, which uses the term "internal armed conflict" and not NIAC. In this sense, the CCE clarified that the appropriate term is NIAC since this type of conflict does not necessarily take place in the territory of a single State.[142]

Although the CCE did not carry out a more in-depth analysis of this issue, the fact that it ruled on the matter is an important step for Ecuador. The border with Colombia is particularly vulnerable, and the violence of that country has already been felt on multiple occasions in Ecuador. In 2008, for example, Colombia bombed FARC-EP camps that were located in Ecuadorian territory without the consent of Ecuador.[143] Also in 2018, three Ecuadorian journalists were kidnapped at the border and later murdered by members of the Oliver Sinisterra Front, a dissident group of the FARC-EP.[144]

138 CCE, Judgment 2-24-EE/24, 21 March 2024, paras 70, 100.
139 ICRC Commentary on GC I, above note 7, para. 474.
140 *Ibid*., para. 476.
141 CCE, Judgment 2-24-EE/24, 21 March 2024, fn. 15.
142 *Ibid*.
143 IACHR, above note 22.
144 See IACHR, *Informe final del Equipo de Seguimiento Especial (ESE) para la investigación del secuestro y asesinato de Javier Ortega, Paúl Rivas y Efraín Segarra*, 2019, available at: www.oas.org/es/cidh/expresion/informes/Informe_Final_ESE_MC_Dicc2019.pdf.

Incorporation of IHL into the block of constitutionality

The second relevant point that must be highlighted from the CCE's judgments is related to the implementation of IHL in the legal system of Ecuador. In its Judgment 2-24-EE/24, the CCE established that the Geneva Conventions and Additional Protocol II (AP II) are part of the block of constitutionality.[145] This statement implies that IHL treaties are considered part of the Constitution itself and, therefore, hold the same hierarchical rank. Then, the CCE gave IHL treaties the highest hierarchical rank in the domestic legal system. To justify its position, the Court presented three arguments: (1) the aforementioned treaties contain *ius cogens* norms; (2) IHL and international human rights law (IHRL) have common objectives and a direct relationship; and (3) Ecuador must comply with its obligations under international law.[146]

In subsequent decisions, the CCE expressly made it clear that all IHL international treaties ratified by Ecuador (i.e., those applicable in NIACs and international armed conflicts) are part of the block of constitutionality.[147] In this regard, the Court stated that "the international treaties of international humanitarian law applicable to [international armed conflicts] are also part of the block of constitutionality".[148] The CCE supported this position based on the common objectives and the direct relationship between IHL and IHRL.

The CCE's decision to include IHL treaties in the block of constitutionality is fundamental to ensuring the implementation of IHL in domestic law and making its applicability viable in the event of an armed conflict. If IHL norms were not given the same hierarchical rank as human rights norms, in case of a discrepancy between both regimes, the human rights norm would necessarily be imposed. This is because, according to Articles 424 and 425 of the Ecuadorian Constitution, if they are literally interpreted, the Constitution and human rights treaties would be hierarchically superior norms to the rest of the international treaties, including IHL treaties.[149] According to Article 425, in case of conflict between two norms of different hierarchical ranks, the hierarchically superior norm has to be applied.[150] With the CCE's decision, IHL and human rights have the same hierarchical rank, the maximum possible. Therefore, it is easier for the purposes of domestic law to sustain the simultaneous and complementary application of IHL and human rights in the event of an armed conflict. It is also easier to sustain that, in case of contradiction, IHL prevails due to the *lex specialis* principle.

It should be noted that the decision of the CCE to incorporate IHL into the block of constitutionality is not the first of its kind in the region – the Constitutional Court of Colombia has issued precedents in the same line. The renowned Judgment

145 CCE, Judgment 2-24-EE/24, 21 March 2024, paras 52–64.
146 *Ibid.*
147 CCE, Judgment 5-24-EE/24, 9 May 2024, para 26; CCE, Judgment 6-24-EE/24, 13 June 2024, para. 32.
148 CCE, Judgment 6-24-EE/24, 13 June 2024, para. 32.
149 Constitution of the Republic of Ecuador, above note 37, Arts 424–425.
150 *Ibid.*, Art. 425.

C-225/95, which analyses the nature of AP II, stands out in this regard.[151] This phenomenon requires a detailed and in-depth study aimed at verifying the real impact that the decisions of the high courts of the States of the region to incorporate IHL into their internal legal systems with the highest possible hierarchical rank have had in favour of the effective implementation of IHL.

Open questions and pending doubts

As explained above, the CCE has taken important steps to implement IHL in the Ecuadorian legal system and to highlight its relevance and hierarchical position. However, some issues remain pending resolution. Likewise, reasonable criticisms have arisen against the CCE's decisions.

The CCE considered that IHL treaties are part of the block of constitutionality, but it did not rule on how customary IHL should be implemented. This leaves a void that is particularly relevant for the case of NIACs since, in these scenarios, certain fundamental principles, such as the principle of proportionality, are derived exclusively from international custom. The same question arises regarding international instruments of IHL (other than treaties) – indeed, the CCE's position is that not only treaties but also other human rights instruments, such as the advisory opinions of the Inter-American Court of Human Rights, are part of the block of constitutionality.[152] It is not clear whether or not the CCE's position is the same regarding IHL instruments.

Another important issue that the CCE did not address has to do with the practical interaction between IHL and human rights. Indeed, although the CCE broadly developed the close and direct relationship between these branches of law as a central argument to justify the inclusion of IHL treaties in the block of constitutionality,[153] it did not rule on how they should interact in practice. For this reason, the Court lost the opportunity to guide the president, the Armed Forces and the judges of the country on how to act in the event that, at some point, a true NIAC takes place in Ecuador. The CCE had the option of accepting one of the existing traditional theories (exclusivity, complementarity or integration) or developing a new standard capable of facing the challenges posed by contemporary armed conflicts, and specifically those that have taken place in Latin America, in which the participation of organized crime has been a constant characteristic.[154]

Regarding the requirements for the classification of NIACs, there are deficiencies. As indicated earlier in this article, the CCE should have observed that tattoos are not a definitive criterion for differentiating who has participated in hostilities and that this type of consideration promotes discrimination. In general, the definitions proposed by the Court in Judgment 7-24-EE/24 to give

151 See Constitutional Court of Colombia, above note 5.
152 CCE, Judgment 11-18-CN/19 (same-sex marriage), 12 June 2019.
153 CCE, Judgment 2-24-EE/24, 21 March 2024, paras 57–62.
154 See Hugo Cahueñas and Felipe Idrovo, "La protección integral en la relación DIH-DIDH", *Cálamo Revista de Estudios Jurídicos*, No. 16, 2021.

content to the indicative factors of intensity and organization are unclear, do not use technical language, and have no normative basis. Also, the CCE should have clarified that intensity is quantified as the accumulation of hostilities in respect of each armed group or coalition rather than "each confrontation intended to be classified as a NIAC", in order to avoid the interpretation that isolated events should be considered instead of all the hostilities that are relevant for the qualification of a NIAC.

The CCE's judgments have also been criticized. One of the reasons for such criticisms is that the CCE has limited itself to verifying whether the facts presented by the president allowed the classification of a NIAC.[155] In fact, the CCE did not carry out an exhaustive examination that would have led it to definitely conclude that there is no NIAC taking place in Ecuador. The Court's position is comprehensible since it is not its obligation to carry out an *ex officio* analysis beyond what the president argues in his decrees. However, doubt remains as to whether the CCE, in order to avoid possible violations of human rights, should have been more categorical and affirmed that in Ecuador there is no NIAC, regardless of what the president argued.

The consequence of this is that, if criminal proceedings were initiated and the possible commission of war crimes was investigated, it would be up to first-instance criminal judges to determine if there is a NIAC in Ecuador. The same would occur if a first-instance constitutional judge had to resolve a jurisdictional guarantee (i.e., a constitutional proceeding) in which violations of constitutional rights are alleged to have occurred during the supposed NIAC. In summary, the qualification of the NIAC, for the purposes of the application of domestic law, would be left in the hands of first-instance judges who do not have specific training in IHL or resources at their disposal to examine the facts in depth. The risk that these judges will simply assume, because the president has said so, that a NIAC does exist in Ecuador remains a possibility.

The CCE's judgments have also been criticized because the Court expressly indicated that, in the event of a NIAC, the president could directly use the Armed Forces and appropriate weapons.[156] Thus, the president would not need to declare a state of exception and the CCE would not have to control the constitutionality of such actions. Those who criticize the judgments argue that the CCE may not prevent human rights violations. Based on the decisions of the CCE, the president has deployed, at will, the Armed Forces.[157] In fact, since the beginning of January 2024, the Armed Forces have been mobilized without interruption, inside prisons and throughout the country, both in periods of a state of exception and outside them. In this context, the Ombudsman's Office has verified, between February and March 2024, twenty-four deaths in prisons controlled by the Armed Forces.[158] Some cases correspond to natural deaths and others to violent deaths,

155 CCE, Judgment 2-24-EE/24, 21 March 2024, para. 142.
156 *Ibid.*, para. 80.
157 See Executive Decree No. 218, 7 April 2024.
158 Ecuador Ombudsman's Office, "La Defensoría del Pueblo ante las reiteradas alertas y denuncias de tortura y malos tratos en los centros de privación de libertad exhorta al estado a ejecutar acciones urgentes para la

with signs of torture.[159] Likewise, there are reports of the deaths of prisoners with signs of malnutrition. For its part, Human Rights Watch has identified cases of possible extrajudicial executions, torture, cruel treatment and arbitrary detentions during the supposed NIAC.[160]

Conclusions

New scenarios of violence regularly arise in the world. The presence and evolution of organized crime represent a risk for the classic structure of States. Criminal groups operate transnationally, and they are weakening not only States but also the international legal order. The situation of extreme violence in Ecuador – which nonetheless, according to the CCE, does not constitute an armed conflict – illustrates the need for a debate in the international legal forum. On the one hand, the misuse of IHL and the characterization of the NIAC in the decrees of state of exception issued by the president evidence the need for other legal tools in order to tackle a problem that is breaking the State and society. The position of the president suggests that the existing international legal framework for dealing with transnational organized crime, such as the Palermo Convention and human rights standards that regulate the use of force, could be insufficient to deal with new scenarios of violence. On the other hand, the jurisprudence of the CCE suggests that IHL standards are still useful for qualifying, or not, new scenarios of violence as NIACs.

Multiple factors could have motivated the recognition of a NIAC in Ecuador. However, no reason justifies resorting to a classification as delicate and important as armed conflict when the facts clearly suggest that no such conflict exists. Although, in principle, the Armed Forces and the National Police have not applied IHL, there is a latent risk that, in the future, the authorities will justify their excesses by recognizing an armed conflict. Indeed, in criminal cases opened for possible extrajudicial executions, those responsible could be exonerated based on the alleged existence of a NIAC in which the use of lethal force against members of armed groups would be permitted while they are directly participating in hostilities. Likewise, the reparation of damages to third parties caused by military and police operations could be avoided under the argument that, in an armed conflict, there may be collateral damage. That argument would be questionable in any case because "in conflict as in peace, the party causing injury and benefiting from it should be obliged to assume civil liability to the victims and their survivors".[161] All of this shows that the path chosen by the

garantía y protección de derechos de las personas privadas de libertad", 2024, available at: www.dpe.gob.ec/la-defensoria-del-pueblo-ante-las-reiteradas-alertas-y-denuncias-de-tortura-y-malos-tratos-en-los-centros-de-privacion-de-libertad-exhorta-al-estado-a-ejecutar-acciones-urgentes-para-la-garantia-y-pro/.

159 *Ibid.*

160 Human Rights Watch, above note 125.

161 Michael Reisman, "Compensating Collateral Damage in Elective International Conflict", *Intercultural Human Rights Law Review*, Vol. 8, 2013, p. 18.

president, in addition to being contrary to international law, could have serious consequences for people's rights.

The future of Ecuador depends on various key actions. The use of force during the period of validity of the decrees of state of exception must be controlled by accountability procedures, including the reports from the Ombudsman's Office that the CCE ordered. The State Attorney General's Office should diligently investigate any presumed violation of human rights. The Armed Forces should be trained on the use of force under IHL and IHRL standards. To anticipate the possibility of violence escalating to the threshold of a NIAC, measures such as the dissemination of IHL among criminal groups must be taken. To implement that kind of measure, there should be discussions on how to promote IHL among armed groups when they do not have a clear structure, as is the case with cartels. Finally, the government must consider the severe risks posed by its current security strategy, which is based on the recognition of a NIAC against the country's criminal groups, and adopt the necessary and appropriate steps to mitigate those risks.