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**THE IMPACT OF THE INTER-AMERICAN HUMAN  
RIGHTS SYSTEM ON THE WAR ON DRUGS**

**War on drugs and punishment of drug-related crimes in Latin America:  
Human Rights violations under the Inter-American system**

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## **Introduction**

This work derives from a particular interest in the Latin American continent and in the profound causes that, still at the present moment, make it a complex and controversial environment as far as fundamental human rights and freedoms are concerned. There is a vast literature addressing the problem of drug addiction and trafficking, the interventionist and prohibitionist U.S. policies in this regard and the atrocious crimes that world-famous drug traffickers committed in the name of an incredibly lucrative business. Nevertheless, the impact that militarized counterdrug efforts and tough policies criminalizing any drug-related activity had on the enjoyment of basic human rights by the population is a relatively unexplored topic and it is being addressed and debated only in recent times. The present research, therefore, aims at answering to two questions: how is the regional regime of anti-narcotics policies in contrast with international human rights law, and the Inter-American Convention on Human Rights in particular? And what framework of regulation is provided in this sense by the Inter-American system?

The first part will present how did drug trafficking become an integral branch of transnational organized criminal activities in Latin America, and how did U.S. policies contribute in shaping the global prohibition system; an overview will be then presented on the development of international counterdrug regime through the main regulatory instruments adopted in the second half of the twentieth century. Apart from the achievements that such global regime reached as to progressively build a common legal framework of reference, a particular focus will be made on its unintended consequences concerning drug production, trafficking and consumption, as identified by the United Nations Office on Drugs and Crime, which will be useful as to understand the dynamics addressed in the following sections. . After the contextualization of counterdrug measures on the international level, the Inter-American system of human rights will be presented through the creation, the development and the functioning of the two principal bodies entrusted with the monitoring and the safeguard of fundamental human rights practices among States, namely the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. These institutions will be discussed in relation to the two main treaties promoting human rights and freedoms across the continent: the American Declaration of Rights and Duties of Men and the American Convention on Human Rights.

The second part aims to present human rights violations caused by the counterdrug regulatory framework adopted in Latin American States throughout the last fifty years, holding the American Convention as the reference legal framework.

The first topic discussed will be the punishment of drug-related crimes: many governments adopted tough-on-drugs policies that make an excessive use of criminal law to punish any kind of conduct related to narcotics, classifying even the simple personal consumption as a grave offense, and adopting

consequently severe measures such as arbitrary arrest, unlawful detention and inhumane treatment, which goes to the detriment of individual rights to personal freedom, integrity, health and, in some cases, even life. Then, the impact of the U.S.-led War on Drugs in Latin American States will be addressed in relation to the fundamental provisions of international human rights and humanitarian law, analyzing three main areas of interest. The first one discusses the inadequacy of the militarized approach to anti-drug law enforcement in a complex and unstable context such as the Latin American one. The second aspect regards the increasingly frequent employment of private military contractors in the fight against drug trafficking: a phenomenon emerged as a consequence of globalization and the relative growth of non-State actors in the international scenario. A particular attention will be given to the issue of the accountability for the crimes they commit during counterdrug operations, as the regulatory framework is still quite uncertain. Thirdly, forced crop eradication campaigns will be addressed with regard to the human rights violations they caused in the targeted Andean countries: the situation will be briefly presented as far as Colombia, Bolivia and Peru, the main coca producer countries, are concerned; to conclude, a case brought before the International Court of Justice about the alleged damages that Colombian forces' operations caused to Ecuadorian communities will be discussed.

The third and last part will be dedicated to the ways in which the apparent contrast between anti-drug policies and human rights is addressed in the Inter-American framework. First, the Latin American context will be presented with regard to the peculiarity of its historical and political dynamics, on the one hand, and to the debate that has developed throughout the last decades concerning human rights and drug policies, on the other. Secondly, the achievements, challenges, and shortcomings of the Inter-American human rights system will be analyzed by presenting the activity of both the Court and the Commission with regard to drug-related violations. In particular, the evolving jurisprudence of the Court will be discussed in relation to three judgments concerning unlawful detention and inhumane treatment suffered by individuals accused of drug offenses.

The last section of the present research will discuss two countries that have been chosen as case studies for the particularly significant impact that drug trafficking and the consequent prohibition regime had on their political, social and security dynamics. The first one, Colombia, will be analyzed in relation to the dangerous and unstable situation created by the overlap of two criminal activities: counterinsurgent guerrilla movements and powerful drug traffickers organized in cartels. After providing an overview of the historical and political developments of the last century, the State response to this double threat and the consequent implications for basic human rights and freedoms will be presented, with a particular focus on the State's choice to resort to rightist paramilitary groups as a means to fight drug trafficking. Then, the activity of the Inter-American Court will be discussed through a review of some selected judgments regarding, respectively, violence perpetrated by the paramilitaries and the rights of

indigenous communities in coca-growing areas. The second country, Mexico, will be presented in a similar way: after an overview of the historical development of organized crime throughout the years, the increasingly hard State response will be discussed in relation to its militarized dimension. The dual influence which Mexican government was subjected to, that is external economic and diplomatic U.S. pressure, on the one hand, and internal corruption by criminal groups, on the other, will be then addressed, followed by a discussion on the impact that the War on Drugs had on the civilian population and its enjoyment of rights and freedom. To conclude, two cases brought before the Inter-American Court will be presented as a demonstration of the international concern caused by the inadequacy of flawed, weak and corrupted State mechanisms with regard to human rights protection.

## Part I

# THE WAR ON DRUGS IN LATIN AMERICA AND THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

## **Chapter 1. Political and legal framework of the War on Drugs**

### **1.1. Politics, drugs and crime: the development of illicit drug trade and the U.S. War on Drugs**

The first chapter of the present work aims at providing an overview of what kind of phenomenon drug trafficking is, how it affects Latin American countries in particular and how it triggered a collective response from the global community, with the United States leading this process and engaging in the so-called “War on Drugs”. The concept of Transnational Organized Crime, as defined according to the Palermo Convention (2000), will be briefly discussed in relation with drug trafficking and its impact on the countries involved, from the economic, political and social point of view. Latin America provides a suitable scenario for such an analysis, given the long lasting consequences of drug-related activities that overturned standard economic variables in the region with their extraordinary profitability, undermined political stability fostering violence and corruption and caused massive violations of Human Rights (HR). An overview will be then provided on the main phases of drug global prohibition system’s development, with a particular focus on the first legal provisions on the international level and on the contribution in this regard of the State that coined the expression “War on Drugs”, and made counter-narcotics intervention a real foreign policy priority, namely the United States. As a conclusion, the two case-studies of the present work, Colombia and Mexico, will be briefly analyzed from the perspective of their engagement in drug trafficking activities in the last decades, providing a first explanation of the severe impact that such crimes had on their economic and political stability and, in the interest of the present work, on the protection of fundamental Human Rights.

#### **1.1.1. Transnational Organized Crime and Drug Trafficking**

One of the most dangerous consequences of globalization has been the elimination of borders in a wide range of contexts, including the dissemination of organized crime, which has indeed acquired a new,



transnational dimension. Organized crime has now reached global, macro-economic proportions, with its activities spreading across different countries and continents, penetrating into all the sectors of legal economic and political governance, undermining their functioning and legitimacy. The fact that it manifests in many forms and involves conspicuous amounts of money gives organized crime the power to hinder the social and economic development, as well as the democratic structures and institutions, of almost every country with which it comes into contact; the transnational nature acquired in the last decades amplifies this multidimensionality, allowing the development of criminal networks beyond national boundaries, overcoming practically any geographical, linguistic or cultural obstacle<sup>1</sup>, exploiting precisely those open borders, free markets and technological advances that are the most relevant results of globalization in bringing benefits to the world's people.<sup>2</sup>

The first effort made by the international community to provide a global response to this new challenge was the United Nations Convention against Transnational Organized Crime (UNTOC), also known as the Palermo Convention, from the name of the Italian town where it was signed in December 2000; it represented an attempt to create a cross-border mechanism of law enforcement, capable of hindering these criminal operations and the consequent phenomena of oppression, violence, injustice and human rights violations.

In order to ensure a broader applicability of its principles, also in light of the constant emergence of new types of crime on the global scene, the UNTOC does not contain an exact definition of transnational organized crime (TOC), neither a list of criminal activities that might constitute it. What it does provide is a definition of organized criminal group, meaning “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 or offences* established in accordance with this Convention, in order to obtain, directly or indirectly, a *financial or other material benefit*”<sup>3</sup>; the more relevant aspects of this definition are, therefore, the gravity of the offences committed by criminal groups and their profit-driven nature. Since the Convention covers transnational criminal activities, it can be implicitly inferred that it refers to offences with international implications, namely taking place in more than one State, or planned in one but committed in another, or controlled by groups operating at the international level, and so forth. The large scope of this definition aims at encompassing all the aspects of such a complex phenomenon, in order to lay the foundations for a stronger, global cooperation on all the issues of common concern,

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<sup>1</sup> Source: UNODC - United Nations Office on Drugs and Crime, *Organized Crime*. Available at: <https://www.unodc.org/unodc/it/organized-crime/index.html> [Accessed 17 Jun. 2017].

<sup>2</sup> UNTOC - United Nations Convention against Transnational Organized Crime (adopted 15 Nov. 2000, entered into force 29 Sep. 2003), foreword by Secretary General Kofi Annan.

<sup>3</sup> UNTOC - United Nations Convention against Transnational Organized Crime (2000), Art. 2(a).

which highlights the importance of the Palermo Convention as a historic commitment to fight organized crime by the international community, as well as the role of the United Nations in supporting such a commitment (UNODC).

A definition of TOC can be also provided by referring to it as a *threat* to national security<sup>4</sup> and to the stability of the international order. The cross-border evolution of organized criminal groups enlarged the territorial reach of their activities, increased the scale of their operations and, as a consequence, dramatically augmented their destructiveness with regard to States' integrity and stability. Changes in global economy, as a matter of fact, loosened the capability of governments to control flows of money, goods and services, allowing criminal groups to position themselves in the new markets, creating a number of illicit activities; the high profitability of these operations quickly created such an accumulation of wealth and power that the State's economic development was severely overturned. A good example of this phenomenon is provided by Latin-American countries, where the income of narco-business activities was so high in the last decades that it surpassed and altered standard economic variables (Rensselaer, 1999).

The severe impact of TOC on national economies is also constituted by more latent kinds of threats; for example, the apparently positive effects of money re-investment in legitimate business by criminal groups (boosting employment, stimulating local commerce and industrial development and creating new opportunities for poor people) often go hand in hand with a sharp increase in violence and corruption and with a weakening of law enforcement mechanisms. Again, the spending activities of Latin-American narco-traffickers and their consequences on the political and economic stability of these countries constitute an example of this phenomenon. Moreover, TOC groups tend to displace their economic activities abroad, causing, which, in the long run, the dependence of national economy on illegal exports, undermining the country's capability to produce competitive tradable goods without having to rely on criminal businesses (Rensselaer, 1999).

In addition to these economic factors, TOC can be also seen as a political threat, since it can reinforce separatist tendencies and stimulate the emergence of extremisms, undermining the legitimacy and the integrity of the State; this frequently happens when the national government is weak and cannot ensure national cohesion, which makes criminal groups appear as the most viable alternative to re-establishing order and stability. The overlapping of drug cartels activity and FARC insurgency in Colombia in the nineties, due to the latter's deep engagement in drug trade, is an emblem of how illicit businesses

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<sup>4</sup> In the Presidential Decision Directive / NSC-42 (21 Oct. 1995), U.S. President Clinton stated the following: "International organized criminal enterprises, therefore, are not only a law enforcement problem, they are a *threat to national security*".

Available at: <https://fas.org/irp/offdocs/pdd/pdd-42.pdf> [Accessed 17 Jun. 2017]

constitute a serious threat to national political stability; even though TOC groups are not necessarily against democratic and legitimate governmental institutions<sup>5</sup>, as long as the latter do not interfere with the running of their businesses, they frequently use corruption as a means to obtain a certain degree of influence over political institutions and leaders (Rensselaer, 1999).

Although a universal, comprehensive definition of TOC is not provided, it can be inferred that the central elements constituting this phenomenon are: the gravity of the offences caused by criminal activities; their international and cross-border dimension, considering the countries where they take place, where they are planned and / or controlled, where they have some kind of impact and so on; the achievement of a direct or indirect material benefit as their primary objective; their impact on national economies, which are severely altered by the extraordinary profitability of TOC operations, and on national political institutions, which are undermined in their effectiveness and legitimacy, especially concerning weak and decentralized governments, where social standards and public trust are already partially eroded, which undoubtedly facilitate the penetration of criminal activities..

Considering this explanation of the concept of TOC, it can be affirmed that drug trafficking, defined as “a global illicit trade involving the cultivation, manufacture, distribution and sale of substances which are subject to drug prohibition laws”<sup>6</sup>, constitutes one of the most diffused and profitable of these criminal activities, entailing cross-border flows of hundreds of tons of illegal substances and billions of dollars every year, with a severe impact on the political and economic systems of the countries involved in such processes. Although narcotics are just one of the many commodities constituting TOC businesses, there is a number of elements that make them and the related trafficking *sui generis* in some aspects. First of all, they have both therapeutic and addiction-forming characteristics (Vogler and Fouladvand, 2016), but the abuse of the latter properties by a small minority of world population, together with the exponential growth of their production, consumption and trafficking in the last decades of the twentieth century, triggered the process of prohibition, militarization and conflict that constitutes one of the central issues analyzed by the present work. Secondly, drugs have a considerably high level of *lootability*, namely the ease with which they can be extracted and transported by unskilled workers, individually or in small teams (Ballentine and Sherman, 2003), as well as a low degree of *obstructability*, that is to say that the methods through which they can be trafficked have virtually no limits (Inkster and Comolli, 2012).

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<sup>5</sup> This aspect of TOC political agenda has often been mentioned as a significant difference between organized criminal groups and terrorists, which, on the other hand, seek the overthrowing of national governments as their primary objective.

<sup>6</sup> Source: UNODC - United Nations Office on Drugs and Crime, *Drug Trafficking*. Available at: <https://www.unodc.org/unodc/en/drug-trafficking/index.html> [Accessed 18 Jun. 2017].

Another relevant aspect of drug market is the fact that the majority of drugs are illegal in most States, which is why the prohibitionist approach has been adopted throughout the last century, with all the consequences that will be discussed in the following chapters, first and foremost the formation of an underground black market (Jenner, 2014); apart from its illegality, which allows extraordinary profit margins, drug trafficking is also characterized by massive accumulations of capital escaping State control, by high degrees of violence employed against central State agents and society in general and by the ability of traffickers to combine rudimentary guerrilla methods with sophisticated communication and transportation technologies (Hartlyn, 1993).

### **1.1.2. The role of U.S. in shaping the global prohibition system**

The first phenomenon giving rise to a wider consumption of stimulant substances, derivatives of opium, cannabis and coca leaves, was the breakdown of traditional hierarchies due to colonization during the Age of Discovery (15th - 17th century), which contributed to the diffusion of a practice previously exclusive of certain *élites* (Inkster and Comolli, 2012). Opiates and coca-based products were then significantly diffused in the developed Western world throughout the 19th century, when technological advances in chemistry allowed the production of cocaine, heroin and morphine, new substances that were more effective from the medical point of view, but also more addictive; governments started being concerned about the circulation of these new products, and introduced the first regulatory measures with the dual aim of protecting national pharmaceutical industries and safeguarding citizens' health. The unintended consequence was the emergence of an illicit market that fulfilled the ever-increasing demand (Inkster and Comolli, 2012), and of different groups and organisations that dealt with drug smuggling and other criminal activities, among which there were the first transnational cartels. Organised criminal groups acquired increasing power and authority throughout the 19th century, up until they seized the whole international narcotics trade, thanks to the opening of new markets caused by the end of the Cold War and the technological advances that made air travel less expensive and communication more effective and rapid.

The evolution of prohibition through the various Conventions and legal provisions will be object of discussion of the following chapter; however, it is important to stress that the US approach markedly focused on criminalization and supply reduction was evident since the First International Opium Conference (Le Hague, 1912), during which the first international drug control treaty, namely the International Opium Convention, was signed. The Convention entered into force globally when it was incorporated in the Treaty of Versailles in 1919; although the U.S. refused to join the League of Nations, it kept exercising a strong influence over drug control issues, and pressured the newly created organization to convene a new conference. The second International Opium Conference was held in

Geneva in 1925 and established a Permanent Central Opium Board, to which signatory States were obliged to provide reports on drug trade on a regular basis. The Convention was then reinforced by the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (Geneva, 1931), which divided drugs in two groups subjected to different degrees of regulations and foreshadowed the drug scheduling system developed in the following years, and by the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs (Geneva, 1936), which required States to create specific agencies to investigate drug trafficking and was not signed by the U.S. for being too weak in criminalizing all the activities related to non-medical and non-scientific use (Inkster and Comolli, 2012).

This first phase of legal provisions aiming at stemming drug trafficking was based on two interconnected principles: the above mentioned *supply-centred* approach, according to which the reduction of the scale of illicit drug market by cutting sources of supply is the most efficient way to deal with drug-related problems, and a prohibition-oriented approach, which tends to the criminalization of drug consumption and, above all, production, with inevitable economic, political and social consequences for producer States (Bewley-Taylor, 2012).

It is undeniable that U.S. domestic approach, that criminalizes the recreational use of certain substances also from a moral point of view, was successful in its internationalisation and, therefore, significantly contributed in shaping the global drug prohibition treaty system. The so-called *Americanization* of the global war on drugs is grounded in both the expansion of U.S. Drug Enforcement Administration (DEA) and the modernization of U.S. foreign police's enforcement capabilities (Bartilow and Eom, 2009), whose combination led to a generalized expansion of U.S. drug enforcement operations abroad, particularly in Latin American countries.

As we have seen, drugs-related issues have been object of public scrutiny since the beginning of 20th century, in many countries among which U.S. soon assumed a preeminent role in promoting the fight against narcotics; it was in the last decades, nevertheless, that the rhetoric shifted towards the so-called *securitization* process, that is, drugs started to be treated as a matter of national security (Vorobyeva, 2015). President Nixon, in his Special Message to the Congress on Drug Abuse Prevention and Control (1971), was the first to use the term “war” in referring to measures to stem drug abuse and trafficking<sup>7</sup>;

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<sup>7</sup> In his Special Message to the Congress on Drug Abuse Prevention and Control (17 Jun. 1971), U.S. President Nixon stated the following: “The problem has assumed the dimensions of a *national emergency*. [...] To wage an effective *war* against heroin addiction, we must have international cooperation. In order to secure such cooperation, I am initiating a worldwide escalation in our existing programs for the control of narcotics traffic, and I am proposing a number of new steps for this purpose”. The term “war” was first used in relation to heroin, at that time considered the most addictive and socially destructive drug.

Available at: <http://www.presidency.ucsb.edu/ws/?pid=3048> [Accessed 19 Jun. 2017].

on the same occasion, he declared drug abuse as the main public enemy for U.S.<sup>8</sup> and, as such, it had to be fought by building a strong international cooperation and by reinforcing national commitment to control narcotics trafficking. The Nixon administration also provided for a more coherent and focused national policy (Inkster and Comolli, 2012) on drug enforcement, whose most significant outcome was the establishment of DEA in 1973, an unified anti-drug command which replaced various organisation that previously existed, in order to deal with narcotics with a more coordinated and centralized approach.

The real securitization of counter-narcotics took place during the Reagan administration, remarkably when the President defined drug trafficking as a national security threat<sup>9</sup> that required a decisive and global response (Vorobyeva, 2015), putting together the national issue of domestic public security with the international dimension of drug smuggling and trafficking (Labate and Cavnar, 2016). While Nixon had stressed the importance of dealing with both supply and demand sides<sup>10</sup> of the problem, Reagan markedly shifted the focus towards a supply-management agenda, triggering a security mechanism of massive eradications and incarcerations (Inkster and Comolli, 2012) whose severe impact on the targeted countries will be discussed throughout the present work.

That moment marked the beginning of a new phase of *militarization* of U.S. aid to foreign countries, particularly the Latin-American ones, where drug trafficking organizations (DTOs) were gaining ever-increasing power in a dangerous combination with local insurgents and terrorists, which persuaded U.S. government to pay more attention to the region. Military interventions, presidential summits held both in the U.S. and in the targeted countries, the institution of special military anti-drug groups and a clear increase in anti-narcotics funding sharply intensified U.S. commitment to anti-drug policies in the Americas (Rodrigues and Labate, 2016), of which a good example is provided by the text of the so-called *Andean Regional Initiative*. Launched in 1989 under the Bush administration, it was a multi-year plan of funds' allocation to curb drug production directly at the source and to empower Latin-American

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<sup>8</sup> In his Remarks About an Intensified Program for Drug Abuse Prevention and Control (17 Jun. 1971), Nixon declared that “America's *public enemy number one* in the United States is drug abuse. In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive”.

Available at: <http://www.presidency.ucsb.edu/ws/?pid=3047> [Accessed 19 Jun. 2017]

<sup>9</sup> In the National Security Decision Directive / NSDD-221 (8 Apr. 1986), U.S. President Reagan declared the following: “While the domestic effects of drugs are a serious societal problem for the United States and require the continued aggressive pursuit of law enforcement, health care, and demand reduction programs, the *national security threat* posed by the drug trade is particularly serious outside U.S. borders.”

Available at: <https://fas.org/irp/offdocs/nsdd/nsdd-221.pdf> [Accessed 19 Jun. 2017]

<sup>10</sup> Special Message to the Congress on Drug Abuse Prevention and Control (17 Jun. 1971): “We are taking steps under the Comprehensive Drug Act to deal with the supply side of the equation and I am recommending additional steps to be taken now. But we must also deal with demand. We must rehabilitate the drug user if we are to eliminate drug abuse and all the antisocial activities that flow from drug abuse.”

Available at: <http://www.presidency.ucsb.edu/ws/?pid=3048> [Accessed 19 Jun. 2017].

military and police forces to carry out counterdrug initiatives (Youngers and Rosin, 2005); the initiative marked the U.S. prioritization of drug trafficking over other international threats<sup>11</sup>, representing an official governmental position in this regard (Vorobyeva, 2015) and making explicit the necessity of “a comprehensive drug control strategy [that] must include programs for effectively attacking international production and trafficking” (ONDCP, 1989) through a cooperative international effort.

The nature and the consequences of U.S. military aid will be analyzed in the following chapters; this brief overview of the development of the war on drugs as a priority for U.S. political agenda was intended to provide an explanation of its primary role in shaping the global prohibition system in this context. The deep involvement of one of the most powerful countries in the world in the fight against illicit drug production, consumption and trade entailed some remarkable achievements in the reduction of these phenomena, but also had some unintended consequences that were clearly indicated by the United Nations Office on Drugs and Crime (UNODC) and will be presented at the end of the following section. Nevertheless, U.S. militarization and criminalization policies on targeted States, which are frequently said to have failed to take into account the structural roots of drugs problems in social and economic dynamics and realities of these countries, focusing exclusively on the concepts of supply reduction, national security and external threat, implied what is commonly referred to as “collateral damage” (Youngers and Rosin, 2005).

Even though short-term achievements have been reached, by intercepting the smugglers, eradicating the crops and so forth, drug production has not suffered the drastic reduction that was expected, rather there has been what is commonly called the “balloon-effect”, that is, the quick replacement of drug lords, cartels and crop cultivations once they have been arrested, suppressed or eradicated in a certain area (Youngers and Rosin, 2005). Instead, the most evident effect of U.S. strategy has been a sharp increase in criminality and political violence and corruption in Latin-American States, as well as the weakening of citizen security, local governments and judiciary and police forces; in other words, there seems to be a strong interrelation between drug enforcement and violent crime in States that have been targeted by U.S. anti-narcotics foreign policy (Bartilow and Eom, 2009), which are frequently suffering from endemic poverty and injustice due to internal factors (Youngers and Rosin, 2005).

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<sup>11</sup> The text of the *Andean Regional Initiative* (5 Sep. 1989) states that: “The source of the most dangerous drugs threatening our nation is principally international. Few foreign threats are more costly to the U.S. economy. None does more damage to our national values and institutions or destroys more American lives. While most international threats are potential, the damage and violence caused by the drug trade are actual and pervasive. Drugs are a major threat to our national security.”

Available at: <https://www.ncjrs.gov/pdffiles1/ondcp/119466.pdf> [Accessed 19 Jun. 2017]



In order to fully understand the deep implications that drug-related phenomena have on these States and their stability and legitimacy, two countries in which U.S. has been particularly active and engaged - Mexico and Colombia - have been chosen as case-studies for the present work.

### **1.1.3. Presentation of the case-studies: Colombia and Mexico**

The impact that the War on Drugs had on Latin-American States is complex and heterogeneous: it depends on endogenous factors, such as the economic development, the political stability and the governmental legitimacy of a certain country, as well as on external variables, for example the intensity of U.S. foreign aid or the role that the concerned State plays in the global drug trafficking system. The two case-studies of the present work are represented by two States that are emblematic of the complex and long-term consequences that drug trafficking had on the region: Colombia, as the cocaine producer State *par excellence*, whose decentralized geography and diffused political violence provided a fertile environment for the development of powerful drug cartels (Inkster and Comolli, 2012), and where drug trade created a common ground for the latter and for insurgent and paramilitary groups against the legitimate government; and Mexico, as the most important transit point for global trafficking, whose militarization in an attempt to combat drug trafficking made police and military forces even more corrupted and powerful and posed the risk of the emergence of a “parallel State”, dominated by cartels with the complicity of these authorities and, according to many, of some U.S. officers themselves, especially concerning the operations at the border between the two countries. As it will be presented throughout this analysis, both States witnessed dramatic Human Rights violations due to drug-related phenomena, with the civil population as the most severely hit victim.

Colombia and Mexico are also deeply interconnected with regard to their evolution as drug producers and traffickers, since the U.S. pressure on marijuana production in the latter shifted production to the former in the 1970s, while the decline of the main Colombian cartels twenty years after allowed the Mexicans to take full control of the business (Inkster and Comolli, 2012). Moreover, both countries were targeted with those U.S. regional security policies that were already mentioned<sup>12</sup> as a demonstration of its international commitment to anti-drug enforcement in the region: two examples are Plan Colombia (1999), which combined counter-narcotics initiatives with an attempt to end Colombian internal armed conflict and restore national security; and the *Mérida Initiative* (2007), a security cooperation agreement with which Mexican government conceded U.S. armed forces, intelligence and the DEA far-reaching competences on national territory, in a shared-responsibility perspective in fighting drug trafficking (Peterke and Wolf, 2016).

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<sup>12</sup> See §1.1.2. of the present work with regard to the Andean Regional Initiative.



The conclusive part of the present work will be dedicated to the presentation and analysis of the impact that the War on Drugs had and is still having on these two States from a political and economic point of view, especially concerning drug-related crimes and Human Rights violations; this paragraph aims at providing a brief overview of how their role in the drug trafficking scenario began to develop.

#### *1.1.3.1. Colombia: the overlapping of drug trafficking and paramilitary insurgency*

As mentioned above, Colombia acquired a central role in drug production when eradication programs shifted marijuana cultivations from Mexico to its Eastern coast in the late 1970s; nevertheless, the most profitable business was provided by the neighbour States of Bolivia and Peru, that served as the major sources of coca leaves: during the 1980s, Colombia finally emerged as the world's leading cocaine producer, with the two main family-based and vertically integrated cartels of Medellín and Cali controlling this billion-dollar industry (Ramírez Lemus *et alii*, 2005). In order to resist the repeated attempts of these criminal networks to penetrate Colombia's legal and judiciary systems in search of political power, the Betancur government declared a "total war" against the cartels, which led to a series of brutal attacks against and assassinations of public figures such as journalists, judges and politicians. This diffused violence was the price to pay for the relatively prosperous economic situation generated by the cartels, which financed various construction projects that constituted the main source of employment for the local population (Inkster and Comolli, 2012).

The death of Escobar (1993) and the arrest of the five main leaders of the Cali cartel (1995) soon led to the formal dismantlement of the two main Colombian criminal networks, which, nevertheless, did not cause the decline of drug trafficking in the country; on the contrary, it started a new phase of the War on Drugs, with the market controlled by smaller organizations (the so-called *boutique* cartels), more flexible and specialized than the previous ones. Their different structure soon led to a shift of the control of drug supply routes to the Mexican cartels (Inkster and Comolli, 2012); at the same time, their minor capacity to operate transnationally led to an enormous expansion of local coca production, with a consequent increase in eradication and fumigation campaigns: as a matter of fact, the government's strategy to combat local crime was now focused against the coca cultivations, which meant directly targeting the peasant producers (Ramírez Lemus *et alii*, 2005).

In this context, the above-mentioned Plan Colombia was designed in parallel to the emergence of another serious threat posed to the stability and the security of Colombian State: the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) that, together with the *Ejército del Pueblo* (EP), formed a left-wing insurgent movement aroused by a dangerous mixture of political dissatisfaction and economic difficulties. Taking advantage of the sharp growth in coca production in Colombia towards the

beginning of the 21st century, FARC became increasingly engaged in all the aspects of drug trade, in order to raise its revenues and enlarge its forces and weaponries (Inkster and Comolli, 2012). The superiority of advanced and evolved insurgents in relation to national security forces, which lacked the adequate resources and training to face such a challenge, led the Colombian authorities to rely on right-wing rural militias reunited under the name of *Autodefensas Unidas de Colombia* (AUC); paradoxically, these forces were themselves implicated in drug trafficking and many other criminal activities (Inkster and Comolli, 2012). Although U.S. assistance was initially focused on counter-narcotics, the boundary between the latter and counter-insurgency emergencies soon became blurred and, particularly in the aftermath of September 11, U.S. engaged in a unified campaign against both drug trafficking activities and terrorist insurgencies (Ramírez Lemus *et alii*, 2005). The War on Drugs conducted in Colombia consisted of massive eradication and fumigation campaigns (which sometimes had transborder effects, as a specific chapter will address later<sup>13</sup>) and considerable military aid, also involving the establishment of paramilitary organizations and the use of private military contractors that established a structural relationship with the armed forces. The combination of these operations and initiatives gave rise to a variety of massive human rights violations that will be object of discussion in the following chapters, and left the country in a situation of severe political and economic instability, even after the conclusion of this thirty-year narcotics-enabled conflict (Inkster and Comolli, 2012).

#### *1.1.3.2. Mexico: the militarization of counterdrug efforts*

The involvement of Mexico in illicit drug trafficking, first mainly for the U.S. market, dates back to the 1910s, to expand in the 1930s thanks to the growth in opium and marijuana consumption which, from that period through the 1970s, made Mexican criminal organizations relevant suppliers of marijuana and heroin for their largest neighbour State and for the international market in general. Then, the rupture of the so-called “French connection”, that delivered opium from Turkey to U.S. passing through the city of Marseilles, gave Mexico an even more relevant role in this regard, with a remarkable growth in heroin supply for the U.S. market; throughout this period, the processing and smuggling of the narcotics was controlled by a dozen of illegal organizations identified with family names (Smith, 1999). They maintained quite low political profiles and mainly dealt with local farmers who supplied the crops, without the international orientation that was typical of the Colombian cartels; nevertheless, the Nixon administration in 1969 launched two operations of border-crossings control that proved to be ineffective and time-consuming. Then, in 1975 *Operation Condor* was launched in order to eradicate opium poppy

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<sup>13</sup> See §4.3.3.4 on ICJ case Aerial Herbicide Spraying (Ecuador v. Colombia)

and dismantle illegal organizations in cooperation with Mexican government, which led to a series of important traffickers' arrests; nevertheless, an unintended consequence of this campaign was the concentration of the Mexican drug industry, which led to the strengthening of the traffickers who survived the operation and to their re-organization under fewer and more powerful cartels, relying on methods such as violence and bribery, with dangerous consequences for Mexican social stability and security (Smith, 1999).

Another turning point was the U.S. effort to block Florida as an entrance for Colombian cocaine (Freeman and Sierra, 2005), which led Colombian traffickers to turn to Mexico as a new partner in drug smuggling across the U.S. border, in which Mexican cartels had a long-time experience and, geographically speaking, a particularly favourable position. Moreover, the decline of the main Colombian cartels in the 1990s empowered their Mexican counterparts (Inkster and Comolli, 2012), who took the control of the cocaine business, growing in power and sophistication. In the first years of the 21st century, Mexico's three largest cartels (Sinaloa, La Familia and the Gulf) aligned under what was called *La Nueva Generación* and formed a separate block from all the other smaller cartels.

The new role played by Mexico in drug trafficking and the consequent increase in U.S. military intervention had a severe impact on the country's stability, partly due to the decentralization and corruption of its police forces and the lack of strong security institutions. Frequent infiltrations by the cartels in local and State police impeded federal investigations over drug trafficking manoeuvres, as well as a radical and effective police reform. The unintended consequence of the approach adopted by the governments of Presidents Fox and Calderón, who tried to break the cartels into entities too small and weak to threaten State's stability, was a more difficult management and predictability of criminal operations, together with an increase in violence and corruption (Inkster and Comolli, 2012).

Concerned about this decline, U.S. government decided to provide further assistance in the form of the already mentioned *Mérida Initiative* (2007), a cooperative programme of funding and training for Mexican military personnel; the latter acquired an increasingly autonomous and relevant role in the federal police forces (a phenomenon commonly referred to as *militarization*) and was accountable for the perpetration of many Human Rights abuses, that in some cases were voluntarily ignored by U.S. authorities in order to obtain drug-related information (Freeman and Sierra, 2005). It can be said that the peculiar and intertwined relation between U.S. and Mexico is complex and tense, and made these nations' response to drug-related phenomena more complicated; at the same time, it constituted an obstacle for democracy and Human Rights protection and consolidation in Mexico, and increased the power of the military well beyond the control of the civilian sectors (Freeman and Sierra, 2005), also causing a growing scepticism of the civil society towards the regime, alienating it from its own leadership and dangerously undermining social cohesion (Smith, 1999).

## **1.2. The global prohibition regime and its evolution through legal instruments**

This section will address the development of the global drug prohibition regime through the analysis of the three main international Conventions regulating it, which can be also intended as the legal instruments legitimating the War on Drugs. A particular focus will be made on the increasingly prohibitionist approach of the three documents and on the ever more stringent provisions to be adopted by the States in order to criminalize illegal drug consumption, trade and production; this peculiar development reflected the worrisome situation given by the emergence of drug trafficking as a global organized crime, in the hands of increasingly powerful groups. As a conclusion, an overview of what the global prohibition system has achieved so far will be given, mainly based on the World Drug Reports provided by the United Nations Office on Drugs and Crime, with a particular attention to the unintended consequences that this regime had on the security, the compliance with the rule of law and the protection of Human Rights in the States concerned.

### **1.2.1. The Single Convention on Narcotic Substances, 1961**

The 1961 Convention replaced the previous international agreements that, since the beginning of the century, had constituted a fragmented attempt to form a common legal infrastructure of drugs prohibition; the results had been quite disappointing, with many States refusing to adhere, a lack of commonly agreed definitions on the subject and, above all, the absence of an obligation for signatory States to enact specific domestic legal provision to criminalize drug production, consumption and trading. The 1961 Convention represented the first real effort to constitute a global drug prohibition regime, with a significant international intervention in the domestic affairs of States<sup>14</sup>, and responded to an urgent necessity of systematization and simplification of the previous instruments (Vogler and Fouladvand, 2016). It is important to understand the moralist basis on which the Convention was built, due to the fact that, in the aftermath of World War II, drug abuse was mainly confined to some marginalized social groups<sup>15</sup>.

Moreover, the Convention constituted a great compromise between divergent interests: on the opposite sides, States that produced the organic raw materials were concerned about excessively stringent

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<sup>14</sup> See the obligations for State parties envisaged by art. 4, regarding administrative and legislative measures, cited below.

<sup>15</sup> The United Nations Single Convention on Narcotic Substances (signed 30 Mar. 1961, entered into force 13 Dec. 1964) states in its *Preamble* that: “[...] addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind.”

controls that would have affected their industry and trade, and did not share the Western morality against socio-cultural organic drug use, since it was an essential part of their tradition; on the other hand, manufacturing States, primarily Western industrialized nations, advocated stricter controls on drug production and trafficking, concerned by the effects of drug abuse among their citizens. Nevertheless, being also the main producers of synthetic narcotics, they did not accept any restriction on medical research on such substances, which would have undermined their commercial and pharmaceutical revenues (Sinha, 2001). Given the disparity between these two groups' economic power and political influence, negotiations in the end led to a prohibitionist and sharply supply-oriented approach that provided little effort in order to reduce demand (Vogler and Fouladvand, 2016), but required strong control measures on supply and trade of agricultural products from which narcotics were derived, which inevitably placed a major burden on the first group of countries (Jelsma, 2011). As it will be presented at the end of this section, the UNODC 2008 World Drug Report described the lack of detailed regulation of demand for illicit drugs as the main reason why related public health issues have been disregarded for a long time (UNODC, 2008).

More than a hundred substances were categorised into four schedules envisaging different degrees of restriction, following the scheme contained in 1931 Geneva Convention<sup>16</sup>; furthermore, according to Article 4 (*General Obligations*) States were required to “take legislative and administrative measures as may be necessary: a) To give effect to and carry out the provisions of this Convention within their own territories; b) To co-operate with other States in the execution of the provisions of this Convention; and c) Subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs”<sup>17</sup>.

The above-mentioned article represents a first, significant reference to domestic provisions to be enacted by signatory States. The latter were also required to provide to the Board (INCB)<sup>18</sup> and to the Secretary General annual reports on the working of the Convention in their own territory, laws and regulations promulgated to give effect to the Convention, details on the governmental authorities responsible of issuing import and export authorizations<sup>19</sup>; moreover, the Board required detailed estimates on the

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<sup>16</sup> See §1.1.2 on the first phase of prohibition development.

<sup>17</sup> UN Single Convention on Narcotic Substances (1961), Art. 4 - *General Obligations*.

<sup>18</sup> The International Narcotics Control Board (INCB) is the independent and quasi-judicial control organ for the implementation of the United Nations drug conventions. It was established in 1969 under the Single Convention, but it has its predecessors back in the time of the first treaties under the League of Nations system; in fact, it combines the former Permanent Central Opium Board (PCOB) and Drug Supervisory Body (DSB).

Source: INCB - *Mandate and Functions*. Available at: <http://www.incb.org/incb/en/about/mandate-functions.html> [Accessed 21 Jun. 2017].

<sup>19</sup> UN Single Convention on Narcotic Substances (1961), Art. 18.1 - *Information to be furnished by Parties to the Secretary-General*.

quantities of drugs to be consumed for medical and scientific purposes or to be held in stock, on the geographical areas where opium poppy was cultivated, on the industrial establishment manufacturing synthetic drugs and so forth<sup>20</sup>. These provisions aimed at collecting data multilaterally, in order to monitor specific national situations with regard to drug production, trade and consumption.

The prohibitionist approach of the Convention and the predominance given to penal aspects is evident in the criminalization of all drug-related activities, which should be considered as criminal offences and be punished accordingly, preferably by imprisonment “or other penalties of deprivation of liberty”<sup>21</sup>. In other words, the Convention required parties to develop increasingly punitive domestic criminal legislation with regards to drug issues (Sinha, 2001). On the contrary, drug consumption is only addressed by Article 38 in quite a generalized manner, providing a list of measures to be taken in order to prevent drug abuse and for the “early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved”<sup>22</sup>.

The Single Convention represented a significant turning-point in the way of dealing with drug-related problems by the international community, consolidating decades of fragmented provisions into one key document administered by the United Nations (Sinha, 2001) with the considerably high number of 140 signatory States; although U.S. representatives initially showed disappointment for the not sufficiently stringent character of the provisions, the Convention turned out to be an efficient weapon in the hands of the government in the initial phase of the War on Drugs that would be launched by President Nixon in the following decade (Vogler and Fouladvand, 2016).

### **1.2.2. The UN Convention on Psychotropic Substances, 1971**

The subsequent instrument for a global drug-prohibition regime was the Convention on Psychotropic Substances that, from the previous approach primarily focused on plant-based substances, aimed at controlling the manufactured and synthetic drugs that were widely and increasingly produced and marketed in Europe and North America (Vogler and Fouladvand, 2016), such as LSD and amphetamines, in order to bring them into the prohibition system.

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<sup>20</sup> Ibid., Art. 19.1 - *Estimates of Drug Requirements*.

<sup>21</sup> Ibid., Art. 36(a) - *Penal Provisions*: “Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment *particularly by imprisonment* or other penalties of deprivation of liberty.”

<sup>22</sup> UN Single Convention on Narcotic Substances (1961), Art. 38.1 - *Measures against the abuse of drugs*.

At a first glance, the structure of the Convention seems quite similar to that of the previous one, envisaging the INCB administrative authority and categorizing drugs into four schedules with different levels of control, requiring reporting activities from the State parties to the Board on drug production, consumption and circulation<sup>23</sup>, arrangements and cooperation on illicit trafficking<sup>24</sup> and adequate penal provisions enabled at the domestic level<sup>25</sup>. Moreover, the Convention shared with its predecessor the assumption that controlling drug supply was the key answer to abuse-generated problems (Spillane and McAllister, 2003).

Nevertheless, a fundamental difference between the two Conventions lies in the fact that the influence of multinational pharmaceutical industries during the negotiations imposed a much weaker control system when it came to establish new restrictions on manufactured drugs (Sinha, 2001). As a matter of fact, licit trade and illicit traffic were defined in order to favour the free circulation of pharmaceutical substances, so as to limit the damage suffered by manufacturing countries' industries (Spillane and McAllister, 2003).

This less stringent control regime is also demonstrated by the fact that the Psychotropic Convention directly contravenes its predecessor by reversing the presumption of illegality of the substances described in the text: while the Single Convention stated that organic drugs were deemed to be illegal unless States could prove that they were not liable to be abused<sup>26</sup> (Vogler and Fouladvand, 2016), the 1971 Convention required the demonstration of a particular addictive potential for a substance to be declared unlawful<sup>27</sup> (Spillane and McAllister, 2003). The responsibility to determine whether a certain drug posed sufficiently consistent threats as to be declared illegal was attributed to the World Health Organisation, which had to submit every substance not yet under international control to a scrupulous examination and evaluation under Article 2 (Vogler and Fouladvand, 2016).

It is interesting to notice that the opposite interests that had already emerged during the 1961 negotiations still existed, but the positions had been completely reversed: while the manufacturing group put pressure for looser and national controls, in an attempt to weaken the supranational UN position

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<sup>23</sup> UN Convention on Psychotropic Substances (1971), Art. 16 - *Reports to be furnished by the Parties*.

<sup>24</sup> *Ibid.*, Art. 21 - Action against the illicit traffic.

<sup>25</sup> *Ibid.*, Art. 22 - Penal provisions.

<sup>26</sup> UN Single Convention on Narcotic Substances (1961), Art. 2.9(a) - *Substances under control*: "Parties are *not* required to apply the provisions of this Convention to drugs which are commonly used in industry for other than medical or scientific purposes, provided that: a) They ensure by appropriate methods of denaturing or by other means that the drugs so used are not liable to be abused or have ill effects [...]"

<sup>27</sup> UN Convention on Psychotropic Substances (1971), Art. 2.4 - *Scope of control of substances* states that, in order to make recommendations on control measures, the WHO must find that a certain substance is capable of producing a state of dependence or disturbing the nervous system, or is it likely to be abused "so as to constitute a public health and social problem".

with the justification of an excessive financial burden caused by too strict regulations, States producers of organic materials on the contrary pushed for more stringent controls, like those that had been accepted under the previous Convention (Sinha, 2001).

This reversal of positions, resulting in a more concrete and limited approach to prohibition in the 1971 Convention, can be inferred also from a brief analysis of two similar sentences contained in the respective Preambles of the two documents: the Preamble of the Single Convention recognizes that “*addiction to narcotic drugs* constitutes a serious evil for the individual and is fraught with social and economic danger to mankind<sup>28</sup>”, using a terminology that potentially refers to any existing drug or substance capable of causing addiction; on the other hand, the Psychotropic Convention mentions the concern caused by “the public health and social problems resulting from the abuse of *certain* psychotropic substances<sup>29</sup>”, in an attempt to limit the restrictions applied to the new synthetic drugs that constituted a profitable business for manufacturing countries (Sinha, 2001).

It is worth to remark that the 1971 Convention was signed in the same year of President Nixon’s Special Message to the Congress on Drug Abuse Prevention and Control, which, as already pointed out<sup>30</sup>, marked the beginning of the so-called War on Drugs and of the *securitization*<sup>31</sup> process.

### **1.2.3. The UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988**

Throughout the 1980s, demand for cannabis, cocaine and heroin grew exponentially and the dimensions reached by drug trafficking, now a multi-billion business in the hands of powerful criminal groups (Jelsma, 2011), were so worrisome that it could no longer be considered as a moral concern, but rather as a challenge to national and international security, as declared by U.S. President Reagan in his Directive in 1986<sup>32</sup>. The following year, during the UN Conference on Drug Abuse and Illicit Trafficking, State parties declared themselves aware of the threat posed by drug abuse and committed to “vigorous international actions against drug abuse and illicit trafficking” (UNODC, 1987) as a priority<sup>33</sup>. Moreover, it was affirmed that an effective action against drug abuse, illicit production and trafficking

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<sup>28</sup> UN Single Convention on Narcotic Substances (1961), *Preamble*.

<sup>29</sup> UN Convention on Psychotropic Substances (1971), *Preamble*.

<sup>30</sup> See §1.1.2 of the present work on Nixon and the War on Drugs.

<sup>31</sup> See §1.1.2, with regard to the securitization of narcotics in the U.S.

<sup>32</sup> See §1.1.2 on Reagan’s NSDD-221 on *Narcotics and National Security*.

<sup>33</sup> In the preamble of the Declaration of the International Conference on Drug Abuse and Illicit Trafficking (1987), States declared to be “concerned at the human suffering, loss of life, social disruption, especially the effect on youth who are the wealth of nations, brought about by drug abuse worldwide” and “aware of its effects on State’s economic, social, political and cultural structures, and its *threat to their sovereignty and security*”, and to commit themselves to “vigorous international actions against drug abuse and illicit trafficking as an important goal of their [our] policies”.



would be led by the international community as a collective responsibility, but at the same time taking into consideration the specificities of every concerned State<sup>34</sup>. The importance of the adherence to the previous Conventions was reaffirmed, but the finalization of a further legal instrument was declared urgent in order to complement those that already existed at the time<sup>35</sup>. The text of the Trafficking Convention was therefore drafted in that occasion, and finalized and adopted in December 1988.

The preamble of the Convention explicitly identified, for the first time, illicit drug trafficking as “an international criminal activity, the suppression of which demands urgent attention and the highest priority” and linked it with “other related organized criminal activities which undermine the legitimate economies and threaten the stability, security and sovereignty of States<sup>36</sup>”. This approach made the Convention an instrument deeply intertwined with international criminal law, with the aim of reducing drug trafficking through its criminalization and punishment (Sinha, 2001). Moreover, from the already mentioned supply-centred approach the focus shifted towards illicit demand for drugs, considered one of the root causes of the problem<sup>37</sup>.

Article 3, relative to *offences and sanctions*, provides a harsher punishment framework; illicit cultivation, production, possession, purchase and trafficking of drugs are declared criminal offences under domestic law<sup>38</sup> and liable to “imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation<sup>39</sup>”. While rehabilitation, social reintegration, after-care, education and treatment were presented as alternatives to conviction or punishment in the previous documents, the Trafficking Convention declares that such provisions might generally be adopted *in addition* to conviction and punishment<sup>40</sup>, and considered as alternatives only “in appropriate cases of a minor nature<sup>41</sup>”.

Notwithstanding this more draconian approach to drug-related crimes punishment, the Convention of 1988 made the first explicit reference to the necessity to protect human rights, as well as the environment, while conducting eradication operations<sup>42</sup>.

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<sup>34</sup> UNODC Declaration (1987), point 2.

<sup>35</sup> *Ibid.*, point 3.

<sup>36</sup> UN Convention on Illicit Trafficking of narcotic Drugs and Psychotropic Substances (1988), *Preamble*.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*, Art. 3.1.

<sup>39</sup> *Ibid.*, Art. 3.4(a).

<sup>40</sup> *Ibid.*, Art. 3.4(b).

<sup>41</sup> *Ibid.*, Art. 3.4(c).

<sup>42</sup> *Ibid.*, Art. 14.2 - *Measures to eradicate illicit cultivation of narcotic plants*: “Each Party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as opium poppy, coca bush and cannabis plants, cultivated illicitly in its territory. The measures adopted shall *respect fundamental human rights* and shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment.”

The Trafficking Convention emerged in a period of sharp increase in the scale of drug trafficking phenomenon, which did not leave any room for compromises taking into account the specific interests of organic producers or pharmaceutical industries, thus represented a turning point in UN efforts in drug control and provided a stricter approach to the problem. Nevertheless, it provides the possibility of loophole defections (Vogler and Fouladvand, 2016) by countries that, using their constitutional principles and courts, are potentially capable of circumventing the enforcement obligations contained in the Conventions, if these do not fulfil their own domestic interests. On the other hand, the lack of formal and effective human rights protections in any of the three Conventions gives States the possibility to abuse of interdiction, eradication and criminalization (Vogler and Fouladvand, 2016), undermining the objective of limiting drug trafficking and abuse, at the same time guaranteeing the safeguard of a country's citizens and environment.

#### **1.2.4. Achievements and unintended consequences of the global prohibition regime**

The three Conventions presented throughout this section represent a global effort to establish a collective and common prohibition system that, at the same time, respects the national sovereignty of individual State parties; this inevitably allowed the latter to maintain their constitutional imperatives, which frequently led to defection or resistance to the provisions contained in the documents. Explicit reservations were made, particularly to the Trafficking Convention, which allows the rejection of the jurisdiction of the International Court of Justice in the resolution of disputes (Article 32.4 - *Settlement of Disputes*<sup>43</sup>), conceding a wider autonomy to the single State parties (Vogler and Fouladvand, 2016). Defection can also be carried out with a “softer” mechanism of creative interpretation of the treaties, in order to circumvent them in defense of one's own policy choices and interests. As a matter of fact, this loose enforcement of the legislation by individual States is made possible by the lack of express prohibition of this kind of approaches in any of the international legal instruments (Sinha, 2001). The punitive and prohibitive approach of the Conventions, particularly of the last one, has also been opposed by international organizations such as the International Committee of the Red Cross, in the name of the so-called *harm reduction* approach (Vogler and Fouladvand, 2016), which aims at focusing on drug use as a public health issue in order to limit the negative effects of an excessive criminalization.

If the lack of specificity in certain legal areas of the Conventions led to a loose application of these provisions by some signatory States on one hand, on the other there have also been cases of abuse of the criminalization approach provided by the international regime: disproportionate punishments of drug-

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<sup>43</sup> Art. 32 envisages the resort to the ICJ for decisions or advisory opinions on disputes over the interpretation of the Convention (paragraphs 2 and 3); nevertheless, paragraph 4 states that “each State [...] may declare that it does *not* consider itself bound by paragraphs 2 and 3 of this article”.

related crimes, overpopulation of jails because of drug arrestees and even the application of death penalty (Vogler and Fouladvand, 2016) are some of the consequences of such an abuse and will be object of discussion of the following part.

Although the responsibility for the implementation of the treaties remains primarily in the hands of signatory States, it is undeniable that the three Conventions progressively tightened the global prohibition regime and provided an important framework of reference and uniformity, which is deemed essential to prevent a single State's unilateral act from undermining the achievements of the whole system (UNODC, 2008); moreover, throughout the development of such regime, new international bodies and organizations were developed to oversee the implementation of the Conventions. The work of the already mentioned International Narcotics Control Board (INCB)<sup>44</sup>, an independent quasi-judicial organ in charge of monitoring the implementation of UN Conventions in the drugs field, is complemented by that of the United Nations Office for Drugs and Crime (UNODC), which provides normative assistance to the States for the implementation of international treaties, promotes technical cooperation projects to enhance their capacity to counteract drug-related crimes and represents an important source of information on drugs and crime issues at the global level<sup>45</sup>.

UNODC is also in charge of proving an annual World Drugs Report, which analyzes global drug markets and dynamics in order to understand them in a more comprehensive way, giving information and data about the production, trade and consumption of different substances all over the world. Particularly significant for the scope of the present work is the 2008 Report, which provides an overview of a century of drug controls, evaluating achievements, progresses and weaknesses in this regard.

The Report highlights some positive achievements made by the global drug control regime in the last five decades, in terms of reduced drug production and quasi-total adherence to the Conventions<sup>46</sup>. The tone of the Report gets less optimistic when it comes to global demand, whose measuring is more complex and lacks of reliable and effective instruments in most of the countries involved; nevertheless, information provided by some States, particularly Northern Americans, are quite encouraging in this regard (UNODC, 2008).

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<sup>44</sup> See §1.2.1, note n°17, of the present work on the role of INCB. According to UNODC 2008 Report, the merging of two separate bodies represented a significant step to simplify and streamline the global drug control machinery and make it more efficient.

<sup>45</sup> Source: UNODC - United Nations Office on Drugs and Crime, *About UNODC*.

Available at: <https://www.unodc.org/unodc/en/about-unodc/index.html?ref=menutop> [Accessed 22 Jun. 2017].

<sup>46</sup> According to the Report, 94% of all countries adopted the 1988 Convention, constituting one of the highest rates of adherence ever reached for a UN multilateral instrument (UNODC, 2008).

Although the achieved containment of the drug problem is supported by solid statistical data, this does not mean that the international prohibition regime led to its solution: on the contrary, the Report indicates five main unintended consequences (UNODC, 2008) that such system has implied throughout the last century:

1. The creation of a criminal black market, whose high levels of profitability and competitiveness attract several criminal groups and contribute to the worldwide diffusion of drug trafficking.
2. The policy displacement of resources otherwise allocated to public health sector, due to the consistent law enforcement response required by the expansion of criminal drug-related activities.
3. The so-called “balloon effect”, according to which the tightening of controls over a certain area produces the geographical displacement of the illegal activity to another place, which does not necessarily mean an overall reduction of the phenomenon.
4. The substance displacement, which is a sort of “balloon effect” related to the shift of producers and users to a different drug when the one that they previously dealt with is subjected to more stringent controls<sup>47</sup>.
5. Social exclusion and marginalisation of illicit drug users, a residual of the moralistic approach that was given to drug prohibition since the institution of the first legal instruments<sup>48</sup>, which frequently impedes the fruition of appropriate treatment by these subjects.

As a conclusion, the Report underlines the urgency to modernize the international drug control system in light of the new challenges posed by the 21st century, first and foremost the globalization of “commerce, finance, information, travel, communications, and all kinds of services and consumer patterns” (UNODC, 2008), including those related with criminal activities. Moreover, the focus on criminalization of drug consumption that has been adopted so far should give way to a health-centred approach, in order to guarantee a more efficient protection of Human Rights.

The need to reform the global prohibition system in order to ensure its compliance with Human Rights and the rule of law has been underlined also in the more recent UNODC World Drug Report 2016, which states the urgency for a better understanding of the relations between security, violence, Human Rights and drug trafficking (UNODC, 2016).

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<sup>47</sup> These displacement phenomena have already been highlighted with regards to the displacement of coca and marijuana production between Latin American countries in the second half of the 20th century. See Chapter 1.1.

<sup>48</sup> See §1.2.1 on the moralistic approach given to the 1961 Convention.

## **Chapter 2. The Inter-American System of Human Rights**

### **2.1. The Inter-American Commission on Human Rights**

The Inter-American system has its roots in the Bogotá Declaration of 1948, where the Charter of the OAS was adopted together with the American Declaration on the Rights and Duties of Men; nevertheless, a supervisory body for the provisions therein enshrined was still to be created. Established in 1959 by resolution of the General Assembly of the Organization of American States (OAS), the Inter-American Commission (IACHR) is an independent organ entrusted with the promotion of Human Rights among member States through reporting and investigation activities and the hearing of individual and inter-State examinations. With the adoption of the American Convention on Human Rights, the Commission acquired a peculiar kind of dual jurisdiction, deriving its powers from and operating under both the American Convention on Human Rights and the OAS Charter: in this way, it could retain its powers also *vis à vis* those States who had not ratified the Convention but were OAS parties, ensuring a more widespread practice of Human Rights protection and respect. Apart from this particular nature of the Commission and the process that led to its development, this chapter aims at presenting the two main functions carried out by the Commission: the examination of petitions alleging a Human Rights violation perpetrated by a State party and the presentation of reports concerning the Human Rights situation among Latin American States.

#### **2.1.1. Development, mandate and organization**

The Ninth International Conference of American States held in Bogotá, Colombia, in the spring of 1948 marked a crucial step in the history of the integration between American States, since two fundamental documents were adopted in this framework: the Charter of the Organization of American States (OAS) and the American Declaration of the Rights and Duties of Men, the latter being a Human Rights declaration with a similar purpose and content to the UN Universal Declaration, which was approved six months after (Cerna, 1998). Although it was the first detailed enumeration of rights adopted by an intergovernmental organization, the American Declaration was not intended to be legally binding upon OAS members and there was no concrete elaboration of the rights therein declared until the OAS decided, by resolution in 1959<sup>49</sup>, to establish an Inter-American Commission as a supervisory body with

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<sup>49</sup> In Paragraph II of the Resolution VIII contained in the Declaration of Santiago, Chile, adopted on occasion of the Fifth Meeting of Consultation of Ministers of Foreign Affairs, Aug. 1959, Final Act (Doc. OEA/Ser.C/II.5), States resolved “to create an Inter-American Commission on Human Rights [...] which shall be organized by the Council of

the mandate to promote such rights and the adoption of progressive measures in this regard (Farer, 1998), responding to the exigency that “such rights be protected by a juridical system, so that men will not be driven to the extreme expedient of revolt against tyranny and oppression<sup>50</sup>”. The Commission would be composed of seven members, serving in personal capacity, elected by the General Assembly of OAS from a pool of distinguished persons previously selected by member States, who would be assisted by a staff integrated into the OAS Bureaucracy (Farer, 1998).

The fact that the Commission was created by a resolution of a political body rather than by a treaty is relevant, in that it reveals the reluctance of member States to undertake legally binding obligations on what they still considered as an exclusive matter of domestic jurisdiction; the mandate initially assigned to the Commission was vague and limited to the generalized promotion of Human Rights, without granting it the authority to examine individual complaints alleging their violation. In this first phase, the Commission could therefore be considered as a relatively weak instrument, which was intended to ensure the compliance with rights listed in a Declaration without binding value and, not deriving its powers from a treaty, could be easily abolished by OAS member States (Cerna, 1998). The activity of the Commission was primarily concentrated on the investigation of general situations concerning Human Rights in some States, with a fact-finding investigation methodology carried out by using its authority to hold meetings on the topic and to adopt reports specific to particular countries (Cerna, 1998).

A first turning point in the development of the Commission and its functions was represented by the Second Special Inter-American Conference (Rio de Janeiro, 1965), during which the Commission was given by the OAS explicit authority to investigate individual complaints alleging Human Rights violations<sup>51</sup>, which soon became the most important function carried out by the Commission and will be presented in the next paragraph. This competence complemented the authority to investigate and report on the general Human Rights situation in OAS member States, attributed to it by the first version of the Statute (Farer, 1998).

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the Organization and have the specific functions that the Council assigns to it, shall be charged with furthering respect for such rights”.

Available at: <http://www.oas.org/consejo/MEETINGS%20OF%20CONSULTATION/Actas/Acta%205.pdf> [Accessed 23 Jun. 2017].

<sup>50</sup> Ibid.

<sup>51</sup> The Resolution XXII - *Expanded functions of the Inter-American Commission on Human Rights* of the Second Special Inter-American Conference of Rio de Janeiro, Brazil, Nov. 1965, Final Act (Doc. OEA/Ser.C/I.13), authorized the Commission “to examine communications submitted to it and any other available information, to address to the government of any American state a request for information deemed pertinent by the Commission, and to make recommendations, when it deems this appropriate, with the objective of bringing about more effective observance of fundamental human rights”.

Available at: <http://www.cidh.org/annualrep/76eng/section.1.htm> [Accessed 23 Jun. 2017].

The Commission acquired a significantly improved status with the so-called Protocol of Buenos Aires that, being approved in 1967 and entering into force in 1970, amended the OAS Charter and transformed the Commission into one of the principal organs through which the OAS is intended to achieve its purposes; the general mandate of the Commission was now presented in a specific part as “to promote the observance and protection of Human Rights and to serve as a consultative organ of the Organization in these matters”<sup>52</sup>; being included among the fundamental organs of the Organization, after 1970 the Commission could only be abolished if the OAS Charter was amended accordingly.

Moreover, the same Article established a connection between the Commission and an American Convention on Human Rights, stating “an Inter-American Convention on Human Rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters<sup>53</sup>”. The peculiar interrelation between the Commission and the Convention will be further discussed; it is interesting to note the temporal anomaly according to which the structure and the functions of the Commission are determined by a Convention that entered into force years after the creation of the Commission itself (Cerna, 1998).

The American Convention on Human Rights had been adopted within the Inter-American system in 1969, but was not able to enter into force until 1978, when the number of ratifications required to activate it was finally reached (Farer, 1998); it incorporated under its Statute the pre-existing powers of the Commission, which *de facto* made the latter based on the Convention and, therefore, made it applicable only to those States that had ratified the Convention. To avoid this restriction on its jurisdiction, the Commission drafted a new Statute that created a sort of dual function: as “an organ of the Organization of the American States, created to promote the observance and defense of Human Rights and to serve as consultative organ of the Organization in this matter<sup>54</sup>”, the Commission could exercise its jurisdiction not only over States parties to the Convention by applying the latter, but also over States parties of the OAS that had not ratified the Convention, applying the American Declaration<sup>55</sup>. This peculiar characteristic allows the Commission to continue to exercise its jurisdiction

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<sup>52</sup> *Protocol of Amendment to the Charter of the Organisation of American States*, 27 Feb. 1967, Art. 112. Available at: <http://www.refworld.org/docid/3ae6b363c.html> [Accessed 23 June 2017].

<sup>53</sup> *Ibid.*

<sup>54</sup> Statute of the Inter-American Commission of Human Rights, as amended by Resolution 447 of the OAS General Assembly, La Paz (Bolivia), Oct. 1979. Art. 1.1 - *Nature and Purposes*.

Available at: <http://www.oas.org/en/iachr/mandate/Basics/statuteiachr.asp> [Accessed 23 Jun. 2017].

<sup>55</sup> *Ibid.*, Art. 1.2 - *Nature and Purposes*: “For the purpose of the present Statute, Human Rights are understood to be:

- a. The rights set forth in the American Convention on Human Rights, in relation to the States parties thereto;
- b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member States”.

over all the member States of the Organization, independently from their adherence to the Convention (Cerna, 1998).

### **2.1.2 Examination of individual petitions**

The most relevant function exercised by the Commission as the OAS organ monitoring Human Rights practices is the examination of individual complaints alleging Human Rights violations in one of OAS member States. Article 41 of the Convention enumerates the Commission's functions and powers and generally applies to all OAS members, while its sixth paragraph, relative to the examination of petitions, only refers to the Convention parties ("to take action on petitions and other communications pursuant to its authority under the provisions of Article 44 through 51 of this Convention<sup>56</sup>"). This restriction is compensated by Article 20 of the Commission's Statute, which provides for petitions against States that did not ratify the Convention<sup>57</sup>. It is worth to note the secondary position in which the provision about individual petitions is placed within the Article, which reveals that this procedure was initially considered less effective than specific on-site investigations and the relative reports; it was only in the 1980s, when many States re-acquired a democratic form of government, that the hearing of individual claims by the Commission and the Court started to be considered an efficient and attractive remedy. As a matter of fact, the individual complaint procedure acquired prominence after the establishment of the Inter-American Court of Human Rights in 1979 (Cerna, 1998), which will be discussed in a specific section.

While the procedures governing claims brought before the Commission by States parties to the Convention are listed in Articles 44 to 51 of the latter, those coming from OAS members who did not ratify the Convention are set out in Regulations 51-54 of the Commission; the only relevant difference between these two procedures is the fact that complaints presented under the Convention can be brought before the Inter-American Court, if the Commission deems it necessary and the State concerned has accepted the Court's jurisdiction, while petitions presented under the American Declaration cannot (Cerna, 1998).

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<sup>56</sup> American Convention on Human Rights (1969), Art. 41(f). The mentioned articles 44-51 contain the procedures to which individual petitions are subject and the relative requirements of admissibility and inadmissibility.

<sup>57</sup> Statute of the Inter-American Commission of Human Rights (1979), Art. 20(b): "In relation to those member States of the Organization that are *not* parties to the American Convention on Human Rights, the Commission shall have the following powers [...] b) to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights".



Commission's Regulations<sup>58</sup> state that "any person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission, on their behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights [...]";<sup>59</sup> although the majority of the petitions are presented by the victim of the violation or by a relative or a representative of the latter, there is the possibility for a claim to be presented by persons or groups who have no contact with the victim, which nevertheless implies a more difficult management of the case (Cerna, 1998). Individuals are automatically endowed with the right to bring a petition against a State party to the American Convention or to the whole OAS, from the entry into force of, respectively, the Convention and the Statute of the Commission.

Article 46.1 of the Convention provides the admissibility requirements according to which the Secretariat of the Commission establishes whether a petition is *prima facie* admissible or not; in the first case, the complaint is to be registered and examined following the procedure described in Article 48. The admissibility can also be reversed after the preliminary examination, for example if the Commission declares a case inadmissible even though it had been accepted *prima facie* by the Secretariat (Cerna, 1998).

The most important of the admissibility requirements for a *prima facie* examination is the exhaustion of domestic remedies<sup>60</sup> before the claimant can resort to an international forum, from a perspective that gives the defendant State the possibility to provide redress within its legal system (Cerna, 1989). Nevertheless, if the remedies provided by the concerned States are neither adequate nor effective, because of their unavailability, inaccessibility and so forth, they do not have to satisfy the exhaustion requirement<sup>61</sup> (Cerna, 1998). The second requirement is commonly known as the "six-months rule" and requests that "the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment"<sup>62</sup>; while this requirement is easily applicable when the claimant has exhausted domestic remedies, it is rendered more

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<sup>58</sup> A very similar content is presented by the American Convention on Human Rights (1969), Art. 44: "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party".

<sup>59</sup> Rules of Procedure of the Inter-American Commission on Human Rights, Art. 23 - *Presentation of Petitions*. Available at: <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp> [Accessed 24 Jun. 2017].

<sup>60</sup> ACHR (1969), Art. 46.1(a) requires that "the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law".

<sup>61</sup> ACHR (1969) enumerates the cases in which the admissibility requirement of the exhaustion of domestic remedies is *not* applicable in Art. 46.2.

<sup>62</sup> *Ibid.*, Art. 46.1(b).

complicated if this did not happen for some reason: in this case, the Commission applies the more flexible criterion of a “reasonable period of time<sup>63</sup>”, considering the specificity of each case. Moreover, the rule allows the bringing of a claim concerning a violation that took place more than six months before, but whose effects still involve a continuous breach (Cerna, 1998). Another admissibility requirement is that “the subject of the petition or communication is not pending in another international proceeding for settlement<sup>64</sup>”, in order to avoid the risk of a conflict of jurisdiction. Since this possibility mainly exists between the Commission and the Human Rights Committee, the two Secretariats instituted a process of periodic consultation and exchange of information regarding pending cases (Cerna, 1998). The last, more formal requirement concerns the data of the individual, group of individuals or legal entity bringing the petition before the Commission, which must be clearly provided<sup>65</sup>.

The following article supplements the above-listed requirements of admissibility by enumerating the cases in which the Commission must consider inadmissible any petition or communication, among which the lack of a concrete violation, a groundless statement made by the claimant, a petition substantially equivalent to one previously studied by an international organ and, obviously, the failed fulfilment of the requirements indicated in Article 46<sup>66</sup>. In an Advisory Opinion, the Court explained the relation between the two Articles by stating that the inadmissibility as grounded in Article 47 can be established for a petition previously declared *prima facie* admissible under Article 46.

Another important function carried out by the Commission is its competence to request precautionary (or provisional) measures to be adopted by the Court “in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons<sup>67</sup>”, on behalf of victims of Human Rights violations who are threatened by an imminent danger (Cerna, 1998); this provision is to be read from a viewpoint that considers the protection of the individual as a priority, and the Commission as the principal body entrusted with its implementation. On the other hand, in order to provide the possibility for defendant States and for petitioners to correct inaccuracies or shortages in the Commission’s decisions, Article 54 of the Commission Regulations allows both parts to “invoke new facts or legal

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<sup>63</sup> Rules of Procedure of the Inter-American Commission on Human Rights, Art. 36 - *Statute of Limitations of Petitions*, Par. 2: “In those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case”.

<sup>64</sup> ACHR (1969), Art. 46.1(c).

<sup>65</sup> *Ibid.*, (1969), Art. 46.1(d).

<sup>66</sup> *Ibid.*, Art. 47.

<sup>67</sup> *Ibid.*, Art. 63.2. See also the Rules of Procedure of the Inter-American Commission on Human Rights, Art. 76 - *Provisional Measures*: “The Commission may request that the Court adopt provisional measures in cases of extreme seriousness and urgency, when it becomes necessary to avoid irreparable damage to persons. In taking its decision, the Commission shall take into account the position of the beneficiaries and their representatives”.

arguments which have not been previously considered<sup>68</sup> in order for the concerned decision to be reconsidered.

The Inter-American system also envisages the possibility of inter-State complaints; this provision requires a specific declaration that a State party recognizes the competence of the Commission “to receive and examine communications in which a State party alleges that another State party has committed a violation of a Human Right set forth in this Convention<sup>69</sup>”; inter-State communications can be therefore considered only if both the prosecutor and the defendant States previously recognized this competence of the Commission<sup>70</sup>. Given the peculiar sensitivity of this kind of complaints, States are likely to choose to resort to them only if their interests are directly involved, which is why the inter-State communication procedure has been used in a very reduced number of cases (Cerna, 1998).

### **2.1.3. Preparation of country and annual reports**

Another important function carried out by the Commission is the preparation of reports on the Human Rights situation in particular countries and in Latin America in general, as stated in both the American Convention and the Commission’s Statute<sup>71</sup>; these activities have been largely carried out by the Commission throughout the years, allowing it to help develop an Inter-American Human Rights law (Medina Quiroga, 1988) and to implement its function of protection and promoter of Human Rights in the OAS area.

There is no formal criteria for the undertaking a general inquiry on the situation of Human Rights in a certain country, since it was deemed that their adoption would have led to disputes over their application; on the contrary, a certain degree of informality in the investigation procedure helped in overcoming the obstacles posed by governments in order to hinder the Commission’s authority in this regard, and supported the role of the Commission as a fact-finding, rather than accusatory, body acting on behalf of the OAS political organs (Farer, 1998). The examination is set into motion exclusively by a Commission’s decision, usually based on individual petitions received alleging violations of Human Rights in a certain territory, or on a request made by an organ of the OAS or, less frequently, by the concerned government itself (Medina Quiroga, 1998).

Country reports usually follow a standard pattern: they provide background information on the reasons for investigating in a certain country, followed by a separate study of each right regarding which the

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<sup>68</sup> Regulations of the Inter-American Commission on Human Rights, Art. 54 - *Request for Reconsideration*. Available at: <http://hrlibrary.umn.edu/oasinstr/zoas5cmr.htm> [Accessed 25 Jun. 2017].

<sup>69</sup> ACHR (1969), Art. 45.1.

<sup>70</sup> *Ibid.*, Art. 45.2.

<sup>71</sup> *Ibid.*, Art. 41(c), and Statute of the Inter-American Commission on Human Rights, art. 18(c): “[...] to prepare such studies or reports as it considers advisable in the performance of its duties”.

Commission has received communications. The actual situation is then examined, with evidence gathered during the observation *in loco* and the description of cases involving Human Rights violations; as a conclusion, the report provides a general evaluation of the situation in the country and makes recommendations in this regard (Medina Quiroga, 1988). The content of the latter varies according to the specificities of the context, and they can involve the request to the State to take preventive measures against the occurrence of serious violations in the future, or the calling upon to investigate past violations and punish those who are found responsible (Medina Quiroga, 1998). Throughout the years, also thanks to a certain degree of flexibility and versatility, country reports proved to be an efficient instrument to expose a particularly worrisome situation concerning Human Rights in the American continent, with the purpose not only to document specific cases of violations, but also to give notice to reticent governments that the Commission will not cease to demand compliance with certain international Human Rights standards and obligations (Medina Quiroga, 1998).

As already mentioned, the investigating function of the Commission was initially deemed to be the most efficacious in providing assistance to the victims of Human Rights violations, more than the processing of individual petitions (Cerna, 1998); this is due to the fact that the role of the Commission developed in an age of gross and systematic Human Rights violations perpetrated by dictatorial regimes, and it was considered that the documentation of such violations before OAS political organs would have encouraged the latter to undertake action in this regard, much more effectively than the mere examination of individual petitions would have done (Medina Quiroga, 1998). Although the concerned government must give its consent for the *in loco* investigation to take place, and has the possibility to make observations in the drafting phase of the report<sup>72</sup> and to defend itself during its presentation, the main institutional recipient of the latter is the OAS General Assembly. The involvement of OAS political organs in determining, on the basis of a Commission's report, whether the Human Rights situation in a country requires to undertake specific actions (Cerna, 1998), allowed gross and systematic violations to be brought before a wide, varied and international public (Medina Quiroga, 1998).

Once a year, the Commission is also called to "submit an annual report to the General Assembly of the Organization of American States<sup>73</sup>"; the report is presented to the political organs of the OAS and constitutes an important link between them and the Commission. It usually provides a description of the Commission's activity during the last year and an overview of the situation of Human Rights in the various countries, which is basically a short version of what would constitute a country report (Medina

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<sup>72</sup> Regulations of the Inter-American Commission on Human Rights, Art. 62 - *Report on Human Rights in a State*, Par. a) "after the draft report has been approved by the Commission, it shall be transmitted to the government of the member state in question so that it may make any observations it deems pertinent".

<sup>73</sup> ACHR (1969), Art. 41(g).

Quiroga, 1998); moreover, it reports the information provided by OAS member States on the progresses achieved in implementing the Convention and the Declaration, and it describes thematic and geographic areas where steps are needed the most (Medina Quiroga, 1988).

The reporting activity of the Commission proved to be an important instrument for the organ to carry out its functions by combining its various powers in order to achieve different objectives and to monitor situations of continuous and severe Human Rights violations perpetrated against a State's population, amounting to more than mere individual and isolated episodes; not only it contributed in making the Latin American political actors more sensitive towards Human Rights topics, it also allowed the identification of critical factors underlying such violations in certain countries, which is essential in order to reverse a particularly alarming situation (Medina Quiroga, 1998).

## **2.2. The American Convention on Human Rights**

The Convention represents a landmark achievement in the protection of Human Rights in the American continent, since it constitutes the legal basis for the functioning of the two principal organs entrusted with this mission, namely the Commission and the Court, and it is a binding treaty whose obligations overlap with those contained in the American Declaration of Rights and Duties of Men. This section will first present the main aspects concerning the adoption of the Convention, its structure and its basic content; then, the categories of rights protected will be discussed together with the restriction clauses to which they are exposed, with a particular focus on those rights whose application has been frequently hindered by drug laws and international treaties. To conclude, there will be a comparison between the Convention and the Declaration, signed 21 years before, with a brief presentation of the differences existing between the two founding instruments of the American Human Rights protection system.

### **2.2.1. Main content and structure**

The first explicit reference to the American Convention on Human Rights (ACHR), as mentioned in the previous section, was made in the Protocol of Amendments to the OAS Charter, also known as the Protocol of Buenos Aires (1967), where it was stated that the Commission would be the responsible organ for the promotion of Human Rights, while “an inter-American Convention on Human Rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters<sup>74</sup>”. At that time, while discussing the drafting of the Convention, both the Commission and the OAS Committee on Juridico-Political Affairs had to take into consideration the

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<sup>74</sup> *Protocol of Amendment to the Charter of the Organisation of American States*, 27 Feb. 1967, Art. 112. Available at: <http://www.refworld.org/docid/3ae6b363c.html> [Accessed 27 June 2017].

parallel activity of the United Nations, which at the end of 1966 had adopted the two Covenants on Human Rights: the question was whether there was the risk of a conflict between the provisions contained in such documents and the American Convention, or the coexistence between the universal and the regional systems of Human Rights was possible and advisable; the majority of the States opted for the second view (Medina Quiroga, 1988). The Convention was approved during the Inter-American Specialized Conference on Human Rights, held in San José (Costa Rica) in November 1969, and signed by twelve of the nineteen present delegations on the 22nd of that month. The American Convention on Human Rights was endowed with a double function: one was institutional, in that it established a Commission and a Court as the two competent organs “with respect to matters relating to the fulfilment of the commitments made by the States parties to this Convention<sup>75</sup>”, detailing their functioning and competences in Part VII and VIII respectively; the other was substantive and consisted in the enumeration of rights to be respected, which were similar, but not identical, to those listed in the American Declaration (Farer, 1998). As mentioned in the previous paragraph, the entry into force of the Convention represented a substantive change in the status of the Inter-American Commission on Human Rights, which, despite having been constituted ten years before the Convention was adopted, had henceforth its competences and functions enumerated in such document and could apply it to the contracting parties, while the American Declaration continued to be valid for non-Convention party States (Harris, 1998).

The first part of the Convention enumerates State obligations in relation to the rights protected, which will be further discussed in the next paragraph; States have a general obligation “to respect rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination [...]”<sup>76</sup> and to adopt specific legislative or other measures to give effect to and ensure the exercise of the rights and freedoms referred to in the Convention<sup>77</sup>; this latter obligations shows that the Convention is not meant to be self-executing, since the incorporation of its provisions into national law requires further steps instead of being automatic (Harris, 1998).

After the enumeration of civil and political rights, the means of protection of such rights and freedoms are addressed in the second part of the Convention, where the competences and functioning of the Commission and the Court are described in detail. The third part, lastly, enumerates basic and transitory provisions, like signature and ratification of the Convention, election of the organs’ members and so forth. The next paragraph of this section is intended to provide an overview of the rights protected by

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<sup>75</sup> ACHR (1969), Art. 33.

<sup>76</sup> Ibid., Art. 1 - *Obligations to respect rights*.

<sup>77</sup> Ibid., Art. 2 - *Domestic legal effects*.

the Convention, with a particular focus on those that have been particularly hindered by the War on Drugs.

## **2.2.2. The rights protected and the possible restrictions to their application**

### *2.2.2.1. Interpretation of the Convention and applicable restrictions*

The first aspect worth to focus on is the category of rights protected by the Convention: although it was intended to constitute a regional instrument of Human Rights to be applied in harmony with the universal system provided by the Universal Declaration and the UN Covenants, only one of the two groups enumerated by the latter documents is detailed in the American Convention, namely social and political rights. Economic, social and cultural rights, on the contrary, are addressed with a very generally worded obligation (Harris, 1998) in the only article constituting the chapter specifically dedicated to these rights, stating that “the States parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of *the rights implicit in the economic, social, educational, scientific, and cultural standards* set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires<sup>78</sup>”. This means that the general obligation to respect the rights and freedoms recognized in the Convention, envisaged by Article 1, only regards civil and political rights, while for the other category States are just required to achieve their progressive realization (Medina Quiroga, 1988).

Being a treaty, the Convention must be interpreted according to the rules of international law on treaty interpretation, according to which a treaty must be interpreted in the light of its object and purpose<sup>79</sup>; in this case, being the protection of Human Rights the principal aim of the Convention, whenever an uncertainty as to its meaning emerges, it must be interpreted in the way that guarantees the best protection to the rights therein contained (Harris, 1998). There are some specific principles that the Court and the Commission use when interpreting the Convention, the most important of which is that of proportionality, to be applied when a restriction on a certain right or freedom is made necessary by the circumstances. There is also a peculiarity in the interpretation of certain terms included in the Convention, which have an autonomous meaning that do not refer back to national legislation. Finally, although the Convention does not envisage any rule of binding precedent, when interpreting it the Court

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<sup>78</sup> ACHR (1969), Art. 26 - *Progressive development*.

<sup>79</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 Jan. 1980), Art. 31 - *General Rule of Interpretation*, par. 1: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*”.

and the Commission follow their own earlier decisions as a custom. It is important to point out that both these bodies do not act as a court of appeal from national courts on the interpretation and application of national law (Harris, 1998), instead they look for breaches of the Convention to be identified in a decision taken by such national courts.

Since not every Human Right can be understood as absolute, there is a possibility for States to subject their exercise to domestic regulation, which can lead to the application of restrictions; this can be done only with a specific law setting this possibility forth and “for reasons of general interest<sup>80</sup>”, like public safety or national security, which is intended to protect Human Rights from arbitrary restrictions (Medina Quiroga, 1988). The possibility to restrict the application of some of the rights enshrined in the Convention is based on three fundamental rules: first, that the restriction must be set forth by laws (as provided by the above-mentioned Article 30 of the Convention), that is, on instruments emanating from the legislature through a specific and controlled procedure in the general interest of the people, which prevents restrictions based on mere executive decrees; secondly, the grounds for the restriction must be those enshrined in the Convention, such as national security and public safety, order, health etc., which can be described as "half-empty containers" to be given a specific interpretation and content by national and regional judicial authorities (Medina Quiroga, 1988); thirdly, the restrictions must be only those necessary in a democratic society, as stated in the specific Article addressing restrictions regarding interpretation<sup>81</sup>.

The Convention also envisages the possibility to temporarily suspend the exercise of certain Human Rights under specific circumstances of emergency endangering the integrity, independence and stability of the Nation; the vagueness of the formulation “independence or security of a State Party” used in Article 27 can represent a danger when applied to the American context, where extreme national security concepts have prevailed in certain periods of the past century and led to diffused abuses: this represents a good instance of the riskiness of an excessively vague wording in the complex political framework of Latin America, and the consequently strong necessity of supervision by the regional Human Rights organs (Medina Quiroga, 1988). According to the Convention, the suspension can be made only to the extent which is strictly necessary to deal with the situation and in no case should

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<sup>80</sup> ACHR (1969), Art. 30 - *Scope of restrictions*: “The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted *for reasons of general interest* and in accordance with the purpose for which such restrictions have been established”.

<sup>81</sup> Ibid., Art. 29 - *Restrictions regarding Interpretation*, Par. c): "No provision of this Convention shall be interpreted as [...] precluding other rights or guarantees that are inherent in the human personality or *derived from representative democracy as a form of government*".



involve any discrimination or violation of principles of international law<sup>82</sup>, and requires the immediate communication to the other States parties; moreover, it cannot be applied to certain rights, which are enumerated in the second paragraph of Article 27<sup>83</sup>. Despite these strict requirements for a State to suspend a certain right, the possibility to derogate has been widely used by Latin American States throughout the years: the abuse of the declaration of the state of siege as to give the State broader powers for an indefinite or prolonged time period and the suspension of constitutional guarantees under emergency situations have been identified, indeed, as one of the main causes of systematic HR violations (Medina Quiroga, 1988), especially in a context where the transition from authoritarian to democratic regimes left numerous unsolved issues concerning amnesties, transitional justice, electoral monitoring and State responsibility, which somehow made the work of OAS bodies more complicated and sensitive (Fitzpatrick, 1998). This worrisome situation is worsened by the lack of a detailed definition of “State of emergency” in the ACHR, which would have to encompass a broad range of different contexts (Burgogue-Larsen and Úbeda de Torres, 2011). The concerns about HR violations under states of emergency increased throughout the last decades of the 20<sup>th</sup> century, with a significant contribution given by the Commission’s annual and country reports, which guide and foster international pressure to moderate emergency-related abuses, and the Court’s advisory opinions, such as the one stating that the State is always legally constrained to provide judicial guarantees and the rule of law<sup>84</sup> as non-derogable rights (Fitzpatrick, 1998). A restrictive interpretation of Article 27 of the Convention by the Court and the Commission is fundamental in order to protect civilians from HR abuses in alleged cases of emergency (Burgogue-Larsen and Úbeda de Torres, 2011). Even though the democratization process of Latin American States relatively diminished the declaration of state of

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<sup>82</sup> Ibid., Art. 27 - *Suspension of the guarantees*, Par. 1: “In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination [...]”.

<sup>83</sup> Ibid., Art. 27, Par. 2: “The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from *Ex Post Facto* Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights”. The *travaux préparatoires* do not contain any indication on the criteria used to select the non-derogable rights, but the list seems to include the basic rights, or the rights whose suspension would not significantly contribute as to handle the emergency situation (Medina Quiroga, 1988).

<sup>84</sup> IACtHR Advisory Opinion *Judicial Guarantees in State of Emergency*: “[...] it must also be understood that the declaration of a state of emergency --whatever its breadth or denomination in internal law-- cannot entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires the States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency”. OC-9/87 (6 Oct. 1987), Ser. A No. 9.

emergency and traditional *golpes* as the most worrisome phenomena in the region, emergency-related HR challenges continue to exist and require a constant and multilateral cooperation between OAS political and judicial bodies and UN Human Rights monitors (Fitzpatrick, 1998).

#### 2.2.2.2. *International Humanitarian Law as a means to interpret the Convention*

Given the particularly violent situations that have developed in the American context in the last century, which led the Inter-American Court and Commission to frequently deal with cases related to armed conflict, an important issue to be considered is how these bodies have dealt with the application of International Humanitarian Law (IHL) in their jurisprudence. As a matter of fact, while the Inter-American system achieved extraordinary results in the progressive development of Human Rights concerning issues such as State responsibility for private actors' activity and reparations for victims of violations, the same cannot be said for IHL debate, to which the Inter-American institutions did not participate so actively (Gurmendi Dulkenberg, 2017).

The apparent lack of specialization on IHL can be addressed through a brief overview of the Court's and the Commission's evolution in dealing with this set of norms, whose relationship with International Human Rights Law (IHRL) has been widely discussed by numerous international and regional bodies, with the prevailing tendency to interpret the former as *lex specialis* of the latter, that is, humanitarian norms are used to give content to Human Rights provisions in the context of armed conflicts (Gurmendi Dunkelberg, 2017). *La Tablada* was the first case brought before the IACHR dealing with HR violations during an internal armed conflict, precisely in a 30-hour battle between national Argentine armed forces and a group of armed attackers on military barracks in 1997. The surviving attackers alleged violations by State agents before the Commission, which in its report declared to be competent to apply IHL directly (Zegveld, 1998). The reason for such an important decision was that the Convention did not envisage specific provisions as to regulate situations of conflict and to govern the means and methods of warfare, so IHL would provide a useful tool for the Commission to respond to such situations (Zegveld, 1998). In order to build its legal competence to apply IHL, the IACHR stated that "where there are differences between legal standards governing the same or comparable rights in the American Convention and a humanitarian law instrument, the Commission is duty bound to give legal effort to the provisions of that treaty with the higher standards applicable to the rights or freedoms in question. If that higher standard is a rule of humanitarian law, the Commission should apply it<sup>85</sup>". In

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<sup>85</sup> IACHR, *Case of Juan Carlos Abella v. Argentina ('La Tablada')*, Case 11.137, Report No. 55/97, 18 November 1997.

other words, the IACHR chose a favourable approach to IHL as the latter better served the attackers' right to life (Gurmendi Dunkelberg, 2017); in the mentioned case and others similar, IHL was interpreted as a source of "authoritative guidance" for cases involving HR violations in the context of armed conflicts; moreover, it was stated that these situations required the application of both IHRL and IHL, since the principles enshrined in the common Article 3 of the Geneva Conventions, addressing the minimum norms to be applied by parties to a non-international armed conflict, substantially overlapped with HR treaties (Moir, 2003). This tendency was reiterated in the IACHR Third Report on the Situation of Human Rights in Colombia (1999), applying the above-mentioned *lex specialis* approach, namely reading the rights protected by the ACHR in the light of IHL (Gurmendi Dunkelberg, 2017).

The first time the Court dealt with HR in armed conflicts marked a new, less supportive approach to the application of IHL in the Inter-American context, which did not follow the somewhat unconvincing and "audacious" legal arguments used by the Commission: in *Las Palmeras v. Colombia* (2000), a case brought before the Court following the extrajudicial execution of six civilians by officers of the Colombian police, the judicial body rejected the approach adopted by the Commission in 1997, stating that IHL was to be analyzed in the light of its compatibility with the ACHR, and not the other way around, distancing itself from the previously followed *lex specialis* doctrine (Gurmendi Dunkelberg, 2017): in other words, the Court stated that it was competent to apply IHL indirectly, only as a means to interpret and apply the principles enshrined in the Convention (Moir, 2003), since its competence was to determine the compatibility of a conduct with the ACHR, and not with the Geneva Conventions (Martin, 2001). This change of tendency with respect to that followed by the Commission can be better understood in the light of the separate opinions of Judge Cançado Trindade, who expressly opted for a *lex protector* approach, stating that IHL and IHRL could be applied simultaneously as they protect the same fundamental rights: if a State's conduct was to be examined in light of IHL, therefore, it was not because the latter represented a *lex specialis* with respect to IHRL, but rather because it responded to the same general obligation of guarantee as IHRL. Even though it was not intended to do so, Judge Cançado Trindade's tenure led the Court to basically refrain from directly applying IHL to its case law in the first years of the 21st century, except for the mere referral to the general obligation of guarantee common to the ACHR and the Geneva Conventions (Gurmendi Dunkelberg, 2017).

As the issue of terrorism increasingly emerged on the international scenario post-September 11, more expertise was needed to deal with IHL issues; in its Report on Terrorism and Human Rights, the Commission reiterated the *lex specialis* doctrine to be applied as to interpret and apply HR instruments in situations of armed conflicts, providing an analysis of six fundamental rights enshrined in the ACHR

from the humanitarian perspective<sup>86</sup>. It cannot be said with absolute certainty that this perseverance in the Commission's line directly influenced that of the Court but, when the latter examined the *Serrano Cruz Sisters v. El Salvador* case in 2004, the doctrine it applied seemed more in favour of the *lex specialis* approach, stating that it was competent to use humanitarian law indirectly, to interpret the provisions enshrined in the ACHR (Gurmendi Dunkelberg, 2017). This line of reasoning did not change substantially until two, more recent cases renewed the Court's interest in the application of IHL: in *Santo Domingo v. Colombia* and *Crux Sánchez v. Peru*, respectively involving the detonation of a bomb placed by the Colombian Air Force in Santo Domingo (2012) and the extrajudicial execution of members of a Peruvian terrorist group (2015), the Court directly applied IHL to interpret conventional rights, aligning itself with the rest of the international community. It is unclear whether these two cases represent the beginning of a new phase to be consolidated or rather are to be considered as two isolated episodes; what emerges from this spotted evolution of the relationship between the Inter-American HR system and IHL is that the latter has been basically accepted by the Commission and the Court as a means to occasionally interpret ACHR provisions according to the *lex specialis* doctrine, even though the Court showed a tendency towards the alternative approach of *lex protector* under the influence of the veteran Judge Cançado Trindade (Gurmendi Dunkelberg, 2017). The direct application of IHL in cases of violations under an armed conflict was promoted by the Commission since *La Tablada* case and initially rejected by the Court (as demonstrated in *Las Palmeras*), which only in recent times started to follow this approach; nevertheless, the indirect use of IHL principles to interpret the provisions enshrined in the Convention seems the preferred and the most easily applicable reasoning; this does not mean that both HR bodies are prevented from considering IHL in all circumstances: the norms governing armed conflict are relevant, especially if they serve as a tool of interpretation of HR provisions, and IHL remains fundamental for the effective protection of HR in the Americas (Moir, 2003).

### 2.2.2.3. *Rights affected by counterdrug policies*

Some of the rights enumerated in the first part of the Convention are particularly significant in the perspective of the present work, since their protection has been frequently and severely compromised by the drug policies enacted by national governments or by the U.S. in the form of foreign interventions, which have been discussed in the initial sections. The first one is the right to life; according to Article 4,

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<sup>86</sup> These rights were life, liberty and security, humane treatment, due process and fair trial, freedom of expression and the obligation to respect and ensure (Gurmendi Dunkelberg, 2017).

paragraph 1: “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life<sup>87</sup>”; an obvious restriction to this right regards those States that have not abolished the death penalty, which nevertheless may impose it “only for the most serious crimes<sup>88</sup>” and with the possibility for the individual “to apply for amnesty, pardon, or commutation<sup>89</sup>”. Even though almost the resort to death penalty to punish drug-related crimes has been eliminated in almost all American States, right to life is often hindered by drug policies in the region, as will be discussed in the following sections.

The same can be said for the right to personal liberty, according to which “no one shall be subject to arbitrary arrest or imprisonment<sup>90</sup>”, and the right to fair trial, which provides a hearing for every individual “in the substantiation of any accusation of a criminal nature made against him<sup>91</sup>” and the right to be presumed innocent until proven otherwise<sup>92</sup>. The reality shows a very different scenario, with arbitrary detention and mass incarceration as impressive examples of Human Rights violations in the implementation of drug laws (Boiteux *et alii*, 2014). Remaining in the domain of imprisonment, the war on drugs led to several violations of the right to humane treatment for people who were in jail for drug crimes, while the Convention states that “no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person<sup>93</sup>”. Finally, the right to property has frequently been violated by the intensive eradication campaigns launched by governments in order to hinder drug production by destroying raw resources, and the farmers involved have not been granted with a just compensation, as envisaged by the Convention<sup>94</sup>.

Some differences exist between the Convention and the American Declaration, regarding the rights covered, the contracting parties and the wording used, and they will be briefly discussed in the next and last paragraph of the present section.

### **2.2.3. Relation with the American Declaration of Rights and Duties of Men**

Together with the American Convention, which has been presented throughout this section, the other founding instrument of the Inter-American system for the protection of Human Rights is the American

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<sup>87</sup> Ibid., Art. 4 - *Right to Life*, Par. 1.

<sup>88</sup> Ibid., Art. 4, Par. 2.

<sup>89</sup> Ibid., Art. 4, Par. 6.

<sup>90</sup> Ibid., Art. 7 - *Right to Personal Liberty*, Par. 3.

<sup>91</sup> Ibid., Art. 8 - *Right to a Fair Trial*, Par. 1.

<sup>92</sup> Ibid., Art. 8, Par. 2.

<sup>93</sup> Ibid., Art. 5 - *Right to Humane Treatment*, Par. 2.

<sup>94</sup> Ibid., Art. 21 - *Right to Property*, Par. 2.

Declaration of Rights and Duties of Men; they are overlapping and pursue the same objective, even though they refer to different groups of States (respectively, States signatories of the Convention and all OAS members) and are slightly different in some aspects, which will be briefly presented in the lines below.

First and foremost, the American Declaration was not intended to be legally binding, even though it has indirectly acquired this status by virtue of the Human Rights obligations referred to in the OAS Charter and defined by the Declaration itself (Harris, 1998). Moreover, while the Convention contains specific suspension and restriction clauses for the rights it covers, which have been presented in the previous paragraph, the Declaration instead uses a very general wording in enumerating them and does not make any reference to the possibility of a derogation, even though some kind of limitation is evidently needed in certain cases<sup>95</sup> (Harris, 1998).

Finally, the Declaration contains a detailed list of economic, social and cultural rights, which the Convention only mentions in a very general way in its Article 26; among these, the most important for the scope of the present work is the right to health<sup>96</sup>, since the prohibitionist approach in implementing national drug laws and international treaties frequently posed unnecessary limits to the access to essential medications, which denied the full enjoyment of this right for people who were accused, or even only suspected, of drug offences (Boiteux *et alii*, 2014). Other rights to be deemed important in this framework and protected by the Declaration are the right to fair trial<sup>97</sup>, right to property<sup>98</sup>, right to protection from arbitrary arrest<sup>99</sup> and right to due process<sup>100</sup>: the wording used to enumerate them is very similar to that of the Convention, although, as mentioned above, less specific.

The adoption of the Convention 21 years after the Bogotá International Conference of American States, where the Declaration was signed, meant to supplement the latter with a binding treaty on the same subject: taking into consideration both similarities and differences that exist between these two instruments, and the important connecting function carried out by the Commission, which promotes the observance of Human Rights under both documents, it can be seen that they provided a solid legal basis

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<sup>95</sup> For example, Art. 1 - *Right to life* of the American Declaration of Rights and Duties of Men (1948) states that “every human being has the right to life, liberty and the security of his person”, without any further specification on the possible limitations to the implementation of such right, even though they can occur in case of self defense or in States that still envisage the death penalty.

<sup>96</sup> American Declaration of Rights and Duties of Men (1948), Art. 11 - *Right to health*: “Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources”.

<sup>97</sup> *Ibid.*, Art. 18 - Right to a fair trial.

<sup>98</sup> *Ibid.*, Art. 23 - Right to property.

<sup>99</sup> *Ibid.*, Art. 25 - Right to protection from arbitrary arrest.

<sup>100</sup> *Ibid.*, Art. 26 - Right to due process of law.

to protect such rights in a continent that historically presents a significant set of problems in this regard. The tight interrelation between the two instruments is clearly expressed by the last paragraph of Article 29, Convention, according to which “no provision of this Convention shall be interpreted as [...] excluding or limiting the effect that the American Declaration of the Rights and Duties of Men and other international acts of the same nature may have<sup>101</sup>”.

## **2.3. The Inter-American Court of Human Rights**

Among the principal organs and treaties constituting the Inter-American system of Human Rights, the Court was the last to be established; together with the Commission, it is competent with respect to the fulfilment of commitments made by State Parties concerning Human Rights in the respective countries. This section will present its relation with the other components of the system and the two kinds of jurisdiction it is endowed with, with a particular focus on the broad reach that its work has on OAS member States. The jurisprudence of the Inter-American Court of Human Rights (IACtHR) will be the object of discussion of the following chapters of the present work, in relation to the impact of drug policies and the War on Drugs.

### **2.3.1. Functions and principles of treaty interpretation**

#### *2.3.1.1. Function, structure and jurisdiction*

Although a first reference to the creation of an Inter-American Court that could guarantee the rights of American citizens was made during the Ninth International Conference of American States (Bogotá, 1948), the Inter-American Juridical Committee stated that the preparation of its draft statute was premature for lack of substantive law on topics regarding Human Rights: a Convention establishing legal obligations to be enforced by the Court was therefore to be adopted before the establishment of the judicial organ. Article 33 of the Convention envisages the Court as one of the competent organs “with respect to matters relating to the fulfilment of the commitments made by the States parties to this Convention<sup>102</sup>”, together with the Inter-American Commission on Human Rights. The Statute of the Court was approved during the Ninth Regular Session of the OAS General Assembly in La Paz (October 1979, Resolution No. 448), one month after its official installation in its seat in San José.

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<sup>101</sup> ACHR (1969), Art. 29 - *Restrictions regarding interpretation*, Par. d).

<sup>102</sup> *Ibid.*, Art. 33.

The general function of the Court is stated in the first Article of its Statute, according to which “the Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights. The Court exercises its functions in accordance with the provisions of the aforementioned Convention and the present Statute<sup>103</sup>”. According to this provision, the Court clearly appears an organ of the Convention that only applies within the framework of that treaty (Medina Quiroga, 1988); nevertheless, as the judicial organ of the Inter-American system of Human Rights, it envisages a considerable role for the OAS political bodies and for its member States in general, which include countries that are not parties to the Convention (Cançado Trindade, 1998). This extended jurisdiction can be observed in a series of provisions contained in the Statute of the Court or the Convention, the most important of which is given by Article 64, paragraph 1, of the Convention, stating that “the member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of Human Rights in the American states”: the Court is therefore endowed with an important advisory function regarding the interpretation of treaties others than the Convention, at the request of *any* OAS member State.

Moreover, both Court’s Statute and budget are to be approved by the OAS General Assembly<sup>104</sup>, in which States that did not ratify the Convention have the right to vote; all these States can also initiate an amendment thereto<sup>105</sup> and the judges composing the Court can be nationals of any OAS member State, although only States parties to the Convention can propose candidates and elect seven among them<sup>106</sup> (Medina Quiroga, 1988).

Apart from the seven elected judges, who serve for a term of six years and can be re-elected only once<sup>107</sup>, *ad hoc* judges can be appointed by State parties to a case where no judge of its nationality is sitting<sup>108</sup>; moreover, “no two judges may be nationals of the same state<sup>109</sup>”, which constitutes an effort

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<sup>103</sup> Statute of the Inter-American Court of Human Rights, adopted by Resolution 448 of the OAS General Assembly, La Paz (Bolivia), Oct. 1979. Art. 1- *Nature and Legal Organization*.

Available at: <http://www.corteidh.or.cr/index.php/en/about-us/estatuto> [Accessed 28 Jun. 2017].

<sup>104</sup> ACHR (1969), Art. 60, and Statute of the Inter-American Court of Human Rights (1979), Art. 26.1 - *Budget, Financial system*.

<sup>105</sup> Statute of the Inter-American Court of Human Rights (1979), Art. 31 - *Amendments to the Statute*.

<sup>106</sup> ACHR (1969), Artt. 52 - 53.

<sup>107</sup> *Ibid.*, Art. 54.1.

<sup>108</sup> *Ibid.*, Art. 55: “2. If one of the judges called upon to hear a case should be a national of one of the States parties to the case, any other State Party in the case may appoint a person of its choice to serve on the Court as an *ad hoc* judge. 3. If among the judges called upon to hear a case none is a national of any of the States parties to the case, each of the latter may appoint an *ad hoc* judge”.

<sup>109</sup> *Ibid.*, Art. 52.2.



to achieve an equitable representation of the geographic areas and types of legal systems of the region (Harris, 1998).

The Court has two types of jurisdiction that will be presented below: on the one hand, contentious jurisdiction empowers it to adjudicate on controversies relative to the interpretation and application of the Convention by a State party; on the other, advisory jurisdiction allows the Court to render opinions on the interpretation of the Convention or other treaties concerning Human Rights, as the request of an OAS organ or member State. The greater part of the Court's jurisprudence has developed through the exercise of the latter power, which, although without leading to the formulation of binding opinions, allows it to reach a broader range of States and to deal with the concerned issues in a more conceptual way, permitting a more rapid development of the law (Davidson, 1992).

### *2.3.1.2. Principles applied to the interpretation of the Convention*

A central issue to be addressed for any judicial institution is how it chooses to interpret the legal documents it refers to; in more than one occasion the Court made clear that its approach is mainly based on the Vienna Convention on the Law of Treaties, first and foremost on the Article referring to the interpretation of treaties "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"<sup>110</sup>. According to this approach to the interpretation of the Convention, the text should be generally given the primacy, while at the same time considering the context and the object of the treaty: while it is true that the literal approach ensures a certain degree of objectivity to its interpretation, the identification of its purpose and object is also an important tool for an appropriate reading of the document, although it can be more problematic and ambiguous. The most common way to identify the object and the scope of a treaty is the analysis of its preamble and of external factors that have influenced its origins and its writing (Davidson, 1992).

Vienna Convention also provides an additional way to interpret a treaty, using "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion"<sup>111</sup>; these can be used to confirm the meaning resulting from the application of the previous Article, namely referring to the text and to the object and purpose of the treaty, or to determine it if the latter approach led to ambiguous or unreasonable results. The most commonly used among these supplementary means have been the *travaux préparatoires*, in order to confirm the meaning previously given by the textual approach (Davidson, 1992).

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<sup>110</sup> VCLT (1969), Art. 31 - General rule of Interpretation, Par. 1.

<sup>111</sup> Ibid., Art. 32 - Supplementary means of interpretation.

The last principle of interpretation to be considered relevant in this context is that of effectiveness, which ensures that a treaty is interpreted as to be made most effective and useful in pursuing its objective; the reason why there is no specific reference to this principle in Vienna Convention is that it was deemed to be subsumed to the concept of “good faith” expressed in Article 31.

Finally, the interpretation of the Convention by the Court is also based on some restrictions enumerated in Article 29 of the Convention itself, according to which its provisions shall never be interpreted as to suppress the exercise of the rights contained therein or in other treaties to which member States are parties, or to hinder the application of the American Declaration<sup>112</sup>, as already mentioned at the end of the previous paragraph.

### **2.3.2. Contentious jurisdiction**

The first kind of jurisdiction the Court is endowed with allows it to decide on cases concerning the interpretation and application of the Convention in its member States; this is not an automatic process, in that it can be exercised only with respect to States that have previously accepted it or recognize it thereto<sup>113</sup>. Moreover, a State that has not accepted the jurisdiction of the Court may be called upon to do so by the Commission in a specific case, although it is not obliged to accept it<sup>114</sup>. The second restriction applied to contentious jurisdiction is that the Court can examine a case only after the Commission has completed its procedures relative to individual or inter-State communications<sup>115</sup>; this implies, even though there is no provision specifying it, that only States which have participated in the procedure before the Commission can bring the case before the Court, as if these were two different stages of the same mechanism (Medina Quiroga, 1988).

A case before the Court can be brought only by States parties to the Convention and by the Commission itself<sup>116</sup>, which nevertheless cannot be considered a party to the case. It has the right to bring a case before the Court in order to represent the general interest of the Inter-American community, but it also has the duty to be present in any case handled by the Court<sup>117</sup>. This was originally due to the fact that

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<sup>112</sup> ACHR (1969), Art. 29 - *Restrictions regarding interpretation*.

<sup>113</sup> *Ibid.*, art. 62.3: “The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, *provided that the States Parties to the case recognize or have recognized such jurisdiction*, whether by special declaration [...] or by a special agreement”.

<sup>114</sup> Regulations of the Inter-American Commission on Human Rights, Art. 50 - *Referral of the case to the Court*, Par. 3: “If the State Party has not accepted the Court's jurisdiction, the Commission may call upon that State to make use of the option referred to in Article 62, paragraph 2 of the Convention to recognize the Court's jurisdiction in the specific case that is the subject of the report”.

<sup>115</sup> ACHR (1969), Art. 61.2. See §2.1.2 on the examination of individual petitions by the Commission, whose procedures are addressed by the Convention, Artt. 48-50.

<sup>116</sup> *Ibid.*, Art. 61.1.

<sup>117</sup> *Ibid.*, Art. 57: “The Commission shall appear in all cases before the Court”.

individuals had not the right to be directly heard before the Court as an international tribunal; even though the Commission does not represent the petitioner before the Court in the legal sense, it offers him/her the opportunity to make his/her views known before the Court through its appearance during the case (Medina Quiroga, 1988), for instance by offering him/her “the opportunity of making observations in writing on the request submitted to the Court<sup>118</sup>”. Nevertheless, the reformed Rules of Procedure of the Court (2001) provided individuals with the right to participate directly in all the stages of the procedure (*locus standi in judicio*).

Provisional measures that may be requested by the Commission in cases of extreme gravity and urgency<sup>119</sup> can be considered a type of contentious jurisdiction and, therefore, are subject to the same limitations of prior acceptance of the Court’s jurisdiction and exhaustion of the procedures before the Commission; the decision on the measures to be taken is left to the Court (Medina Quiroga, 1988).

The ordinary way of ending a case is by means of a judgment of the Court, which must provide reasons to justify it; the judgment cannot be subject to appeal, but any of the parties has the possibility to require the Court to interpret it “in case of disagreement as to the meaning or scope of the judgment<sup>120</sup>”. If a violation of a Right protected by the Convention has been found, the Court has the power to require a compensation for the injured party and the remedy of the situation that led to the breach<sup>121</sup>.

States parties are under the international obligation to comply with the Court’s judgment in the case to which they are parties<sup>122</sup>; the second Paragraph of the same Article is relevant in that it attributes to the Court’s judgment the same force as a judgment handed down by a national court, stating that “that part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the State”. In case a State refuses to comply with its international obligations, the OAS General Assembly must be informed by the Court through its annual report, with “any pertinent recommendations<sup>123</sup>”: since there is no specific reference to actions to be taken against recalcitrant States, the Assembly takes this decision in its capacity as the supreme organ of the Organization, and it is more likely to take concrete measures in case of gross and systematic violations (Medina Quiroga, 1988).

Although contentious jurisdiction has been scarcely used by the Court if compared with the advisory one, and it is subject to the limitations discussed throughout the present paragraph, it constitutes a powerful instrument through which the Court can address Human Rights violations: not only it

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<sup>118</sup> Regulations of the Inter-American Commission on Human Rights, Art. 75 - *Notification of the Petitioner*.

<sup>119</sup> See §2.1.2 on the examination of individual petitions by the Commission.

<sup>120</sup> ACHR (1969), Art. 67.

<sup>121</sup> *Ibid.*, Art. 63.1.

<sup>122</sup> *Ibid.*, Art. 68.1.

<sup>123</sup> *Ibid.*, Art. 65.

envisages the formulation of binding judgments for the States parties to a case, but the moral authority of the Court as an international tribunal interpreting Human Rights treaties also affects those States that do not participate directly in the contention (Medina Quiroga, 1988), providing significant guidelines for State practice when dealing with Human Rights issues (Davidson, 1992).

### 2.3.3. Advisory Jurisdiction

The Court has also the power to render advisory opinions at the request of OAS member States and OAS organs, with regards to the interpretation of the Convention or “other treaties concerning the protection of Human Rights in the American States”<sup>124</sup>; differently from contentious cases, the advisory function of the Court does not envisage complainants and respondents, nor formal charges or sanctions against a State: all the Court does is give a judicial interpretation of a provision embodied in a treaty regarding the protection of Human Rights in OAS member States. The Court is not obliged to give its opinion if it deems that the request exceeds the limits of its jurisdiction (Medina Quiroga, 1988), and performs this function as an organ of the OAS, which significantly expand the reach of this power. A broad interpretation of Article 64, Convention, allows the Court to apply the advisory jurisdiction also to interpret the American Declaration, although it is not formally a treaty, giving it a significant role in safeguarding Human Rights in those States not yet parties to the Convention (Medina Quiroga, 1988). The same Article also envisages the provision of a Court’s opinion regarding the compatibility of a State’s domestic law with Human Rights international instruments<sup>125</sup>.

An important matter upon which the Court has elaborated advisory opinions are the exceptions applicable to the requirement of exhaustion of local remedies in order to access the Commission<sup>126</sup> and, consequently and potentially, the Court itself: such a requirement is to be interpreted in favour of the alleged victims of the violation and at the same time safeguarding the institutional structure of the Convention system, in order to guarantee a full redress to the claimant<sup>127</sup> (Davidson, 1992). The

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<sup>124</sup> Ibid., Art. 64.1.

<sup>125</sup> Ibid., Art. 64.2.

<sup>126</sup> See §2.1.2 on the admissibility requirements to submit individual petitions to the Commission.

<sup>127</sup> This approach adopted by the Court was particularly evident in the case *Viviana Gallardo et al. vs Costa Rica*: the government of Costa Rica was accused for the murder of a citizen and the wounding of two others in prison perpetrated by a member of the National Civil Guard, and it requested the waiver of the requirement of exhaustion of local remedies (ACHR, Art. 46, Par. 1.a) and of exhaustion of procedures before the Commission (ACHR, Art. 61, Par. 2) in order to enable the Court “to consider the case immediately and without any procedural obstacle”. Although the legitimacy of State’s concerns on the speed of judicial processes was recognized by the Court, in its advisory opinion it stated that the priority was to be given to the safeguard of the victims’ interests and to the integrity of the Convention system. Source: *Gallardo et al. v. Costa Rica* (1984), IACtHR Advisory Opinion No. G 101/81 (Ser. A). Available at: [http://hrlibrary.umn.edu/iachr/b\\_11\\_11a.htm](http://hrlibrary.umn.edu/iachr/b_11_11a.htm) [Accessed 30 Jun. 2017].

advisory function of the Court endows it with a very extensive jurisdiction; the fact that its opinions are not binding should not constitute a major obstacle, since its authority as an International tribunal holds also in these cases and allows an important clarification and systematization of the Inter-American catalogue of Human Rights (Medina Quiroga, 1988), especially in a framework of gross and diffused violations.

## Part II

# HUMAN RIGHTS VIOLATIONS IN THE CONTEXT OF THE WAR ON DRUGS

### **Chapter 3. Punishment of drug-related crimes and its effect on Human Rights**

#### **3.1. Prohibition and its consequences**

The global prohibition paradigm used by the majority of world's countries to deal with drug-related issues involved an ever-increasing use of criminal law in order to punish conducts such as consumption, sale and use. This, in turn, had significant implications on the capacity of national governments and courts to establish a fair and objective distinction between different degrees of dangerousness of such conducts and of subjects' involvement in these.

This section will first describe the process of criminalization as led by the three main international treaties, already presented throughout the present work, and by the U.S. offensive approach to a "war" against a common enemy to be defeated with all the necessary means, with the utopistic objective of a "drug-free society". Then, an overview will be provided on how is the increase in criminal penalties and pre-trial detention for drug-related crimes in contradiction with the principles of necessity, reasonableness and proportionality enshrined in various international and regional treaties, including the American Convention on Human Rights<sup>128</sup>.

##### **3.1.1. Criminalization of drug use, sale and possession**

As it was presented in the previous chapters, the legal basis of prohibition as the dominant approach to deal with drug trafficking and consumption is constituted by three international treaties adopted during the second half of the 20th century: the Single Convention on Narcotic Drugs, the Convention on Psychotropic Substances and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This international legal framework, together with the spread of U.S. "War on Drugs"

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<sup>128</sup> With regard to this aspect, consider especially Art. 8 - *Right to a Fair Trial* and Art. 25 - *Right to Judicial Protection* of the American Convention on Human Rights (1969), providing limits to State's punitive power in favour of judicial guarantees and proportionality.

policies<sup>129</sup>, made prohibition the dominant policy on drugs control worldwide: as a result, various countries adapted their legislation to the prohibitions envisaged by the Conventions, thereto including criminal provisions related to punishment of drug consumption, sale and possession, in order to reduce them. This process is commonly referred to as *criminalization* and implies a tendency to use criminal law systematically, as a fundamental instrument for combating drugs-related phenomena, which directly contradicts the principle that criminal sanctions involving the privation of liberty should only be used as a last resort, that is, when all other types of controls have failed (C.E.D.D., 2012). Moreover, the most worrisome consequence of criminalization is the risk to which it exposes the basic constitutional rights, first and foremost the judicial guarantees and the proportionality of punishments, which will be discussed below.

The war on drugs as launched by President Nixon<sup>130</sup> created a sort of moral crusade against drug sale and use, which led to the adoption of various national laws criminalizing personal consumption, although the Conventions did not envisage an obligation to do so for signatory States; the mechanisms set in motion by this penalization of drug users pushed aside Human Rights considerations (C.E.L.S., 2015), especially concerning the conditions of those who are arbitrarily arrested for being suspected of drug-related crimes and the health of ill people who cannot legally access a medication for it is considered an illegal drug. In various countries, even the act of taking drugs in public areas is charged as a crime against public health in the form of retail drug dealing (*narcomenudeo*) and subject to detention, while the cultivation of cannabis for personal use is treated as a trafficking crime, even though it could be an important possibility to avoid the participation in the illegal market for such users. This punitive approach has little effect on the local market of illegal substances but, on the contrary, significantly affects health and Human Rights protection (C.E.L.S., 2015), which is particularly true considering that the Conventions forming the legal basis of global prohibition regime do not envisage formal provisions for the safeguard of such rights, creating the possibility of abuses and violations. The risk of Human Rights breaches is fostered by the process of *militarization* that went in parallel with the criminalization of drug-related issues and led to an increasing role of military forces in dealing with the latter; the participation of armed forces, instead of civilian police which is under the scrutiny of the legislature, in investigations on matters of internal security, such as drug trafficking, often caused abuses and violations of fundamental rights of the citizens, as the following paragraph will discuss (IACHR, 2009). It is important to underline that tough-on-crime policies definitely tend to affect people who belong to

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<sup>129</sup> The process of spread of a particular country's strategy, in this case U.S. zero-tolerance policy towards drugs as a public enemy, to the point that it becomes an international issue and modifies national legislation of various countries, has been referred to as "globalized localism" (C.E.D.D., 2012).

<sup>130</sup> See §1.1.2. on the role of U.S. in shaping the global prohibition system.

the most vulnerable social sectors and have a minimum, or null, responsibility in the trafficking chain (C.E.L.S., 2015).

A tendency has been identified to use criminal law disproportionately to punish drug-related conducts, to the point that any person who is minimally associated with controlled substances can be potentially sanctioned with criminal penalties and pre-trial detention, which contradicts the principles of proportionality and reasonableness of punishments and legislation (C.E.L.S., 2015). The “classic” framework of criminal law has been subordinated to the necessities dictated by the war against a common enemy, which has led to the deterioration of its liberal aspects in favour of a much more authoritative approach and attributed a stigma of social dangerousness to drug users, independently of the gravity of their behaviour (Zaffaroni, 2009); drug-related conduct have been identified as crimes against public health, which has been reflected in the legislation of many American countries; the resort to criminal prohibition, nevertheless, created a wide illegal drug market in the hands of powerful organized criminal groups that use violence to maintain their control on the business and whose activities had a tremendous effect on national security, stability and prosperity. In other words, drug trafficking tends to be associated with a widespread violence that is *de facto* an indirect product of prohibitionist policies, rather than a consequence of drug consumption and sale themselves (C.E.D.D., 2012).

Criminal drug legislation in Latin American countries presents an upward tendency to use an ever-larger number of verbs and definitions to describe a criminal offense; this multiplication of conducts to be criminalized by national law represents a significant legislative deficiency, creating a sort of technical and bureaucratic “monster” (Zaffaroni, 2009) that the courts cannot manage efficiently, which goes to the detriment of the accused person. This increase of the conducts considered as criminal, as well as that of the articles describing them, constitutes an attempt to cover all the possible offenses without leaving any hole in the prohibition regime (Zaffaroni, 2009).

Another upward trend concerns penalties for drug crimes, whose minimum and maximum length sharply and constantly increased in the last decades; a study carried out by *Colectivo de Estudios, Drogas y Derecho* showed that in some countries, like Bolivia and Peru, drug crimes are considered as the most serious offences contemplated by national legislation and are punished with the highest penalty allowed by the legal system (C.E.D.D., 2012).

The lack of correspondence between the gravity of drug-related crimes and their punishment led to a significant degree of disproportionality, which will be the object of discussion of the following paragraph, in contradiction with the principles of rationality of the penalty and humanity of the treatments; this is why the disproportionate use of criminal law to punish possession, consumption or sale of illegal drugs can be considered a threat to Human Rights (C.E.L.S., 2015).



### 3.1.2. Disproportionate punishment of drug-related crimes

Proportionality is a fundamental rule of law principle aimed at the protection of individuals from inhuman treatment and unfair punishment, and it is recognized in various international and regional Human Rights treaties and in national constitutions and criminal codes; a proportionate punishment is established by taking into consideration the gravity of the damage caused by the concerned conduct to the society or other individuals (Lai, 2012). According to this principle, the rights and freedoms of an individual shall be only limited to in so far as it is appropriate and necessary in order to achieve a legitimate objective, which in this case would be the basic aim of the UN Conventions, that is, improving people's health and wellbeing. Even in such treaties, which in the previous paragraphs have been described as the legal basis of the global prohibition regime, the necessity to establish different types of penalties proportionately to the damage caused by a certain conduct is clearly exposed: for example, the 1988 Trafficking Convention envisages alternative measures to conviction or punishment "in appropriate cases of a minor nature<sup>131</sup>", implying that not every drug-related behaviour should be dealt with by applying indiscriminately criminal law sanctions. Nevertheless, State practice in the last decades adopted severe measures of punishment even for minor crimes, in contrast with principles of proportionality and appropriateness, which contributed to prisons' overcrowding and courts' saturation (Lai, 2012).

The similarity between the maximum penalties established by national criminal law and the sanctions envisaged for drug-related crimes discussed above *de facto* demonstrates that the principle of proportionality is not respected in the treatment of drug-related conducts in Latin American countries, which significantly hinders the respect of Human Rights and basic criminal guarantees (C.E.D.D., 2012). This has been explicitly denounced in a UNODC declaration on drug control and Human Rights perspectives, stating that "too often, law enforcement and criminal justice systems themselves perpetrate Human Rights abuses and exclude and marginalize from society those who most need treatment and rehabilitation. [...] Effective drug control cannot exist without fair criminal justice and successful crime prevention. Human Rights offer guidance on the delicate balance between the protection of fundamental freedoms and the protection of public health, morals and security. It sets out the broad responsibilities of the State to respect, protect and fulfil the health and wellbeing of its peoples and specific due process guarantees, such as for those suspected or accused of a criminal offence<sup>132</sup>".

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<sup>131</sup> UN Convention on Illicit Trafficking of narcotic Drugs and Psychotropic Substances (1988), Art. 3 - *Offences and Sanctions*, Par. 4(c).

<sup>132</sup> UNODC - United Nations Office on Drugs and Crime: "Drug control, crime prevention and criminal justice: a Human Rights perspective - Note by the Executive Director" (3 Mar. 2010). Available at: 56

An efficient tool to verify this lack of proportionality when dealing with drug crimes is the comparison between the punishment of the latter and that of other crimes; for a study published in 2012<sup>133</sup>, *Colectivo de Estudios, Drogas y Derecho* chose to carry out this analysis in relation to murder, rape and aggravated robbery, whose direct effects on both society and other individuals are undoubtedly more severe and detrimental than those of drug trafficking. For this reason, the driving principle of the study was that the closer the penalty for drug-related crimes is to the penalty for murder, the greater the disproportionality with which legal systems deal with these crimes (C.E.D.D., 2012).

The results showed that five of the seven countries involved in the study at some point included in their criminal codes longer penalties for the crime of drug trafficking than those established for murder, despite the latter being a crime that harms the social rights *par excellence*, namely life and personal integrity. With regard to rape and aggravated robbery, in all of the countries studied the maximum penalty for drug trafficking is currently equal or (in some cases, much<sup>134</sup>) greater than the corresponding provision for these two crimes (C.E.D.D., 2012).

These data confirm the lack of proportionality<sup>135</sup> in the establishment of penalties for criminal conducts related with drugs, which does not take into account the diverse roles that an individual can play in such crimes and their different degree of involvement and responsibility; moreover, this poor distinction between the gravity of various drug-related conducts and the excessive criminalization of personal consumption particularly affects the more vulnerable classes of society, exacerbating their already precarious and worrisome socio-economic situation that frequently constitutes the very reason for which these people use controlled substances (Lai, 2012). A good example of this mechanism is the frequent

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[https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ\\_Sessions/CCPCJ\\_19/E-CN15-2010-CRP1\\_E-CN7-2010-CRP6/E-CN15-2010-CRP1\\_E-CN7-2010-CRP6.pdf](https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_19/E-CN15-2010-CRP1_E-CN7-2010-CRP6/E-CN15-2010-CRP1_E-CN7-2010-CRP6.pdf) [Accessed 10 Jul. 2017].

<sup>133</sup> C.E.D.D. - Colectivo de Estudios, Drogas y Derechos in 2012 published a study entitled *Addicted to Punishment: the disproportionality of Drug Laws in Latin America* aimed at analysing the development of the criminalization process with regard to drug crimes and conducts Latin America during the last decades, with a particular focus on seven countries: Argentina, Brazil, Bolivia, Colombia, Ecuador, Mexico and Perú.

Available at: <https://www.opensocietyfoundations.org/sites/default/files/addicted-punishment-20130530.pdf> [Accessed 10 Jul. 2017].

<sup>134</sup> The most emblematic country in this regard is Bolivia, that in the 1990s envisaged a maximum penalty for drug trafficking corresponding to more than the double of maximum penalty for murder and rape; in 2012, when the study was carried out, this gap had been reduced, but penalties for drug trafficking were still higher than those punishing the other two crimes. Moreover, in the 1990s Bolivian courts could charge drug traffickers with penalties that were five times higher than those envisaged for aggravated robbery, and this relationship had not changed at the time of the study, 22 years later. Source: C.E.D.D. (2012).

<sup>135</sup> C.E.D.D. explicitly states that this disproportionality between drug trafficking and other crimes is even more worrisome and unsuitable for the protection of Human Rights in countries such as Colombia or Mexico, where murder, rape and robbery are intertwined with a situation of, respectively, armed conflict and deeply-rooted criminal violence. Moreover, these two countries are indicated as emblematic of a general tendency to maximize punishments in the region, since their respective legislations contemplate the highest minimum and maximum penalties for criminal conducts broadly speaking.

detention of the so-called *mulas de drogas*, namely women who get involved in drug trafficking and transport illegal substances in behalf of others in order to earn some money and face a complex economic condition, or who are forced or misled to do so; while they have a very little, or null, decision-making power in the organization of the smuggling process, this different degree of responsibility with respect to drug traffickers is not taken into account by the majority of criminal provisions, as well as the peculiar background circumstances that led to their exploitation in this sense and could be used as a softening factor (Lai, 2012). Finally, it is unlikely that the threat of criminal prosecution have a significant effect on the conduct of the minor players of organized drug trafficking, since it is part of the business that these “small fishes” are periodically sanctioned and replaced.

Apart from being relatively inefficient in the containment of drug-related phenomena, this increasing strictness of criminal provisions therefore implies worrisome social consequences and causes the overcrowding of jails and the burden of criminal courts, which in turn hinders the protection of fundamental rights, freedoms and guarantees, as it will be discussed in the following paragraphs.

### **3.2. Drug policies and Human Rights violations**

The international drug control system envisaged by the three international drug Conventions was frequently found in contradiction with the Human Rights obligations enshrined in international and regional instruments: State’s measures conceived in order to protect public security have been used arbitrarily in the context of the War on Drugs, without taking into consideration Human Rights as a limit on the exercise of such authority; in this framework, drugs were addressed exclusively as a public security issues, without taking into consideration their socio-economic implications (C.E.L.S., 2015). This model of combating drug trafficking not only did not significantly reduce drug production and trade, but on the other hand consolidated an illegal market based on violence and corruption whose negative effect mainly hindered the community, who suffers from mass detention, extrajudicial executions, degrading treatments and eroded judicial guarantees; this worrisome situation, nonetheless, tends to be considered as a collateral damage in order to eliminate the circulation of drugs (C.E.L.S., 2015).

The present section will address fundamental rights that are particularly hindered by the application of tough drug policies, namely the right to personal liberty and due process, which are constantly violated by an excessive use of pre-trial detention, and the right to life and to humane treatment, for which overcrowded prisons and drug-supplier militarized countries in general constitute a threatening environment.

### 3.2.1. Right to personal liberty and due process: pre-trial and arbitrary detention

#### 3.2.1.1. Abuse of pre-trial detention to punish drug-related crimes

The right to personal liberty and the prohibition of arbitrary detention<sup>136</sup> are contained in Art. 7 of the American Convention on Human Rights, which states that the detainee has the right “to be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings<sup>137</sup>”; nevertheless, these provisions are frequently ignored by security forces while carrying out drug control operations that involve mass arrests (C.E.L.S., 2015). The increasing use of incarceration without a judicial order has been fostered by criminal justice policies as a response to domestic security and order challenges; as a result, the legal guarantees on the denial of liberty and the alternatives to prison have been restricted, while the list of punishable conducts and the length of detention terms have been enlarged (IACHR, 2013). According to a report issued by the Inter-American Commission on the use of pre-trial detention, legislative mechanisms in the region have followed three main trends: increasing the number of offenses for which the release from prison is impossible or very difficult to obtain, prohibiting the use of precautionary measures less severe than detention and generally expanding the grounds for pre-trial detention, which *de facto* is often left as the only option<sup>138</sup>. This tendency has been harshly criticized by the Working Group on Arbitrary Detention (WGAD) that, while considering national security concerns as legitimate, pointed out the importance of liberty and judicial guarantees as fundamental Human Rights to be protected and taken into consideration by the State<sup>139</sup>.

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<sup>136</sup> ACHR (1969), Art. 7 - *Right to Personal Liberty*, Par. 3: “No one shall be subject to arbitrary arrest or imprisonment”.

<sup>137</sup> *Ibid.*, Art. 7, Par. 5.

<sup>138</sup> In its 2013 *Report on the use of pre-trial detention in the Americas* the Inter-American Commission on Human Rights indicates that only in the period between 1999 and 2008 there were 11 Latin-American countries adopting reforms and amendments in order to expand the admissibility of pre-trial detention; these were Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Paraguay and Venezuela.

Available at: <http://www.oas.org/en/iachr/pdl/reports/pdfs/report-pd-2013-en.pdf> [Accessed 11-12 Jul. 2017].

<sup>139</sup> UN Working Group on Arbitrary Detention, *Report on Mission to El Salvador* (A/HRC/22/44/Add.2), published 11 Jan. 2013, §123: “The Working Group considers the need to address the problem of insecurity in El Salvador to be a legitimate State concern. The right to security is an important human right, linked to the right to life. At the same time, the right to liberty and the right to not be deprived arbitrarily of one’s liberty are also important human rights of extraordinary value and must be safeguarded. *Public security cannot be achieved without due consideration and respect for the right to liberty and the right to be free from arbitrary arrest or detention*”. Available at:

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/101/63/PDF/G1310163.pdf?OpenElement>

[Accessed 12 Jul. 2017].

### 3.2.1.2. Lack of judicial guarantees and presumption of innocence

Another provision of the American Convention on Human Rights with which drug policies are in contradiction is the right to a fair trial<sup>140</sup> before a competent tribunal; during the judicial proceedings, the individual is also entitled to a number of minimum guarantees, among which the “adequate time and means for the preparation of his defense<sup>141</sup>” and the right “to defend himself personally or to be assisted by legal counsel of his own choosing<sup>142</sup>”. These conditions must be guaranteed to persons in pre-trial detention for being accused of a criminal offense, in order to allow them to exercise their right to defense while being in custody (IACHR, 2013); nevertheless, the possibility to have such right safeguarded is lessened by the conditions in which suspected individuals are kept during pre-trial detention, for instance when they are too poor to rely on a defense counsel, which happens quite frequently, since the majority of persons detained in such conditions for drug-related crimes belong to the humblest social classes and face significant economic difficulties<sup>143</sup>. Moreover, even when they succeed in obtaining an appropriate defense body, lawyers and public defenders are often subjected to “intrusive and even degrading” measures of control when entering to prison<sup>144</sup>. Lastly, pre-trial detainees are frequently held for weeks or even months in police stations that are inadequate for such a long stay<sup>145</sup>, to the point that their well-being, health or safety can be seriously harmed; as held by the WGAD, blatantly inadequate conditions of detention hinder the guarantee of a fair trial and are therefore in violation of Article 8, Paragraph 2 of the American Convention on Human Rights, “even if procedural fair trial guarantees are otherwise scrupulously observed<sup>146</sup>”.

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<sup>140</sup> ACHR (1969), Art. 8 - *Right to a Fair Trial*, Par. 1: “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature”.

<sup>141</sup> *Ibid.*, Art. 8, Par. 2 (c).

<sup>142</sup> *Ibid.*, Art. 8, Par. 2 (d).

<sup>143</sup> This aspect of pre-trial detention in the context of drug policies has been underlined by WGAD, which stated that “criminal and administrative detention for drug control purposes has a disproportionate impact on vulnerable groups”. Source: UN, Working Group on Arbitrary Detention, *Annual Report submitted to the Human Rights Council* (A/HRC/30/36), published 10 Jul. 2015 [online], §58.

Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/154/30/PDF/G1515430.pdf?OpenElement> [Accessed 13 Jul. 2017].

<sup>144</sup> UN Working Group on Arbitrary Detention, *Report on Mission to El Salvador* (A/HRC/22/44/Add.2), §128.

<sup>145</sup> *Ibid.*, §129.

<sup>146</sup> UN Working Group on Arbitrary Detention, *Annual Report submitted to the Human Rights Council* (A/HRC/4/40), published 9 Jan. 2007, §66.

Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/101/21/PDF/G0710121.pdf?OpenElement> [Accessed 13 Jul. 2017].

The right to a fair trial also entails the right of the accused individual to be presumed innocent “so long as his guilt has not been proven<sup>147</sup>”; on the contrary, the necessities dictated by the War on Drugs fostered the consideration of individuals as potential enemies to be punished *a priori*, reversing the *in dubio pro reo* principle of presumption of innocence (Zaffaroni, 2009). In some countries, this led to a mechanism according to which any person linked to drug-related crimes is *a priori* detained as a provisional measure while their judicial situation is resolved (C.E.L.S., 2015); on the contrary, the principle of presumption of innocence demands that the application of a penalty such as conviction may be exclusively based on the existence of a punishable act attributable to the accused person (IACHR, 2013). Presumption of innocence also implies that persons under criminal proceedings should generally be tried in conditions of liberty, being deprived of their freedom only in exceptional cases<sup>148</sup> and only within the limits that are strictly necessary to ensure the efficient development of judicial proceedings, which underlines the precautionary, rather than punitive, nature of pre-trial detention. The reason why such measure should be considered as exceptional and used solely when strictly necessary<sup>149</sup> is that it implies a profound restriction of personal freedom, since it entails incarceration and all the related consequences for the detainee and his family (IACHR, 2013). According to the Commission, the application of pre-trial detention should therefore be restricted by some principles and criteria: *necessity*, in that it should be admissible only if it is considered the only way to pursue a legitimate objective; *proportionality* in relation to the gravity of the crime and the sacrifice that such measure represents for the individual<sup>150</sup>; *reasonableness* of detention period’s length<sup>151</sup>, which is directly related to the maximum legal duration established by national law for this measure (IACHR, 2013). Rapporteurs from the United Nations and the Inter-American Commission ascertain that the excessive use of preventive

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<sup>147</sup> Ibid., Art. 8, Par. 2: “Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law”.

American Declaration of the Rights and Duties of men (1948), Art. 26 - *Right to due process of law*, Par. 1: “Every accused person is presumed to be innocent until proved guilty”.

<sup>148</sup> ACHR (1969), Art. 7 - *Right to Personal Liberty*, Par. 5.

<sup>149</sup> UN Working Group on Arbitrary Detention, *Report on Mission to El Salvador (A/HRC/22/44/Add.2)*, §126: “Use of pre-trial detention is excessive. Detention must be an exceptional precautionary measure used solely when there are no other measures to ensure the presence of the accused at trial or to prevent tampering with the evidence”.

<sup>150</sup> The Commission held that, in light of the principle of proportionality, an innocent person shall not receive an equal or worse treatment than a convicted one, establishing a sharp distinction between pre-trial detention and deprivation of liberty as a result of conviction (IACHR, 2013).

<sup>151</sup> In the case of *Suárez Rosero v. Ecuador*, the Inter-American Court addressed a provision of Ecuadorian Criminal Code according to which persons accused of drug-related crimes were excluded from the legal limits set for the duration of pre-trial detention; the Court stated that this exception was contrary to the Inter-American Human Rights standard, since it “deprives a part of the prison population of a fundamental right, on the basis of the crime of which it is accused and, hence, intrinsically injures everyone in that category”. Source: *Suárez Rosero v. Ecuador*, judgment of 12 Nov. 1997 (Merits).

Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_35\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_35_ing.pdf) [Accessed 12 Jul. 2017].

detention and the consequent overcrowding of prisons are in contrast with the mentioned principles and not only did not succeed in reducing crime and violence but, on the contrary, had a negative impact on the stability and the security of the prison systems, fostering violence and putting the life and the integrity of detainees at risk, without providing adequate measures for their rehabilitation and reintegration in the society (IACHR, 2011).

Overcrowded jails provide a fertile ground for episodes of violence, corruption and arbitrariness, since it deprives inmates of their privacy, impedes the maintenance of basic sanitary and hygienic standards and so forth (IACHR 2013). According to OAS and UN rapporteurs, the level of effective monitoring and supervision by the authorities is inadequate as to impede the surge of riots, brawls and fights among the detainees, as well as the entry of illicit substances and weapons to prisons; moreover, the personnel in charge of security is frequently responsible for an excessive use of force and coercion against the detainees, while such measures should be a last resort used exceptionally and proportionate in order to prevent more serious occurrences (IACHR, 2011). Another dangerous consequence of overcrowding is that detainees are no longer distinguishable and classifiable according to their condition, for instance whether they are pre-tried or convicted persons, which is in breach of the Convention provision envisaging a differentiated treatment according to the presumption of innocence<sup>152</sup> (IACHR, 2013).

State policies that try to counteract drug-related offences through an extended application of pre-trial detention ignore the exceptional and precautionary nature of such measure, not only constituting a HR violation *per se* (of right to personal liberty and fair trial), but also causing in turn the violation of other rights (life and human treatment) that will be discussed in the following paragraph. The excessive use of pre-trial detention has been identified by the Inter-American Commission as one of the main challenges faced by Latin-American States when dealing with the protection of Human Rights for persons deprived of liberty, and is part of a general abuse of criminal laws and penal measures under the international drug control system (IACHR, 2013).

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<sup>152</sup> ACHR (1969), Art. 5 - *Right to Humane Treatment*, Par. 4: “Accused persons shall, save in exceptional circumstances, be *segregated from convicted persons*, and shall be *subject to separate treatment appropriate to their status as unconvicted persons*”.

### **3.2.2. Right to life, humane treatment and personal integrity: extrajudicial killing, torture and mass incarceration**

#### *3.2.2.1. Counterdrug policies as a threat to the right to life*

Drug policies, as mentioned in the previous paragraphs, can even cause the violation of the most fundamental provision enshrined in any Human Rights system (including the Inter-American<sup>153</sup> one), namely the right to life, whose exercise is essential in order to guarantee any other right or freedom (IACHR, 2011). The breaches of this right provoked by the war on drugs take place mainly in the context of overcrowded prisons, where high rates of violence and inhumane conditions seriously put detainees' rights at risk, and militarized counterdrug measures, which cause the abuse of extrajudicial executions by State forces (C.E.L.S., 2015).

The “institutionalized” violation of the right to life, that is, death penalty, is not incompatible with Human Rights instruments such as the Convention, rather it is strictly regulated by them as to be resorted to “only for the most serious crimes<sup>154</sup>” and with the adequate judicial guarantees<sup>155</sup>. At the present moment, the only Latin American country still envisaging the capital punishment as the maximum penalty for drug-related crimes is Cuba, even though there have not been death executions in this regard throughout the last years<sup>156</sup>.

As partially discussed in the previous paragraph, the exercise of the rights of persons deprived of liberty and the frequent death of inmates due to prison violence are serious concerns for OAS member States, which are the guarantors of such rights for the detainees and should therefore prevent their violation with adequate policies. An extended use of pre-trial detention made prisons overcrowded environments, lacking essential services and fostering violent power struggles, riots and corruption; the absence of preventive measures by the competent authorities created self-government mechanisms among the inmates, whose complexity and dangerousness are fostered by the relatively easy infiltration of drugs,

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<sup>153</sup> American Declaration of the Rights and Duties of Men (1948), Art. 1 - *Right to Life*: “Every human being has the right to life, liberty and the security of his person”. American Convention on Human Rights (1969), Art. 4 - *Right to Life*, Par. 1: “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life”.

<sup>154</sup> ACHR (1969), Art. 4 - *Right to Life*, Par. 2: “In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply”.

<sup>155</sup> *Ibid.*, Art. 4, Par. 6: “Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority”.

<sup>156</sup> Cuban Criminal Code (Law n°62 of 29 Dec. 1987), Art. 190, Par. 3.

Available at: [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=242550](http://www.wipo.int/wipolex/en/text.jsp?file_id=242550) [Accessed 14 Jul. 2017].



alcohol and weapons in the detention centres. Moreover, the lack of an adequate separation between prisoners based on basic criteria such as age, sex, procedural status and gravity of the offense<sup>157</sup> increases the risk of violent confrontations among them (IACHR, 2011). In order to regain control over such a chaotic situation, prisons officers make an excessive use of force and perpetrate violent treatments that can lead to the prisoners' death; apart from these extrajudicial executions, the death of a detainee can also occur because the latter could not be provided with urgent medical care, which is one of the basic services that an overcrowded centre cannot adequately provide; suicide is also frequent among inmates who are exposed to psychological pressure and particularly difficult life conditions, especially if these are complemented by a severe drug addiction (IACHR, 2011).

Extrajudicial executions in breach of the right to life are not an exclusive phenomenon of the detention context: they frequently occur during clashes between State military and security forces and criminal groups, which are a daily occurrence due to the militarization of counterdrug actions. The death of thousands of people, not only when directly involved in drug crimes but also as casualties, has been addressed as a collateral damage of a broader fight against a common enemy, which requires an overall militarized approach to security and is put into effect through repressive actions that affect the population indiscriminately. The dangerousness of the excessive involvement of military forces in public security tasks (C.E.L.S., 2015) and its effect on Human Rights will be further discussed in the following chapters.

### *3.2.2.2. Inhumane treatment and conditions in the context of counterdrug efforts*

Overcrowded prisons, abuse of power by military forces entrusted with anti-drug policies and weak State controls can cause a significant harm to the individual, even without causing his/her death; torture and inhumane treatment, indeed, are frequently suffered by people who have been incarcerated for the simple possession of a certain substance and find themselves in unsuitable and violent detention environments, or by those who are associated with drug trafficking and are required to give a confession (C.E.L.S., 2015). The right to a humane treatment is enshrined in the basic international and regional Human Rights instruments; while the American Convention contains an article specifically addressing such right<sup>158</sup>, the Declaration includes it in its provisions regarding the right to protection from arbitrary

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<sup>157</sup> See §3.2.1 of the present work about Art. 5, Par. 4 of the American Convention on Human Rights.

<sup>158</sup> ACHR (1969), Art. 5 - *Right to Humane Treatment*.

“1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person”.

arrest<sup>159</sup> and the right to due process of law<sup>160</sup>; moreover, it is included in the list of non-derogable rights according to the Convention, which prohibits its suspension under any circumstance<sup>161</sup>.

The duty of the State to treat every person humanely and with respect for his/her dignity is particularly relevant with regard to those who are under its custody for having been deprived of their liberty: since detained people find themselves in a situation of particular defenselessness (IACHR, 2011), the State has the obligation to implement the security measures necessary in order to safeguard their physical integrity, and their treatment should not exceed the adversities and restrictions deriving from the very deprivation of liberty. State policies that are tough on drugs, nonetheless, contribute to the creation of a very different scenario, where persons accused or suspected of drug-related crimes suffer violations of individual integrity and inhumane treatment, to the point that in some cases they can be defined as victims of torture.

The definition of torture provided by the Inter-American Convention to prevent and punish Torture entails the fundamental elements of intentionality, severe physical or mental suffering inflicted and specific purpose of the action<sup>162</sup>; nevertheless, the UN Rapporteur on Torture declared that some acts lacking these elements can even so be considered as “cruel, inhuman or degrading treatment or punishment” (IACHR, 2011). According to the Inter-American Commission on Human Rights, the most acts of torture or inhumane treatment suffered by individuals suspected of drug-related crimes are perpetrated in order to obtain confessions or other information for purposes of criminal investigation; with regard to persons deprived of liberty, this usually occurs during the arrest and in the first phase of the detention (IACHR, 2011). Despite being manifestly contrary to the regional Human Rights legal framework, these practices have been somehow legitimated by a certain social acceptance of torture and other degrading treatments, due to a diffused perception of insecurity and to the widespread “zero tolerance” responses of the State to drug-related problems.

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<sup>159</sup> American Declaration of the Rights and Duties of Men (1948), Art. 25 - *Right to protection from arbitrary arrest*, Par. 3: “Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody”.

<sup>160</sup> Ibid., Art. 26 - *Right to due process of law*, Par. 2: “Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment”.

<sup>161</sup> ACHR (1969), Art. 27 - *Suspension of Guarantees*, Par. 2.

<sup>162</sup> Inter-American Convention to prevent and punish Torture (1985), Art. 2: “[...] torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish”.

Torture and similar practices have been also fostered by the tendency of the authorities to attribute probative value to the information obtained by such means during the investigative stage of the proceeding; the use of evidence obtained through extrajudicial statements, without the confirmation of such confessions before a judicial authority, in violation of fundamental rights such as due process and personal integrity, has been declared inadmissible by the Supreme Court of Justice of Mexico, which is a country where this practice is particularly diffused, as it will be discussed in the specific section of the present work (IACHR, 2015)<sup>163</sup>.

Finally, as already mentioned above, humane treatment and personal integrity cannot be guaranteed in overcrowded detention centres that lack the necessary infrastructure and resources as to ensure the respect of the individuals who are confined there. Nevertheless, the majority of Latin American States maintain the vision that public security problems can be addressed efficiently through the deprivation of liberty as a criminal sanction (IACHR, 2011).

A relevant example of mistreatment of a detainee suspected of participation in drug trafficking is the *Tibi v. Ecuador* case<sup>164</sup>, involving the arrest of a French gem merchant by the Quito police force without a court order and his eighteen-months illegal detention for being suspected of such crime. The Inter-American Commission on Human Rights asserted that the circumstances surrounding his arrest and detention and the fact he was tortured several times and through various methods in order to extort his confession violated numerous obligations that the Convention imposes on signatory States. The Inter-American Court of Human Rights confirmed this view, underlining that the preventive imprisonment of an individual constitutes a severe measure that must be restricted to exceptional cases and by principles such as proportionality, presumption of innocence and lawfulness, which was not the case of Mr. Tibi's arrest. The process of capture and detention without sufficient indicia to presume that the alleged victim had perpetrated any crime was declared in breach of the right to personal liberty enshrined in the Convention<sup>165</sup>, and the length of his stay in prison without being sentenced was deemed well beyond a reasonable time; moreover, he was denied the judicial remedies guaranteed by the right to judicial protection<sup>166</sup>, which is considered non derogable. Moreover, Mr. Tibi's numerous problems, including malnutrition, stress and beatings, were declared to be direct result of inhumane prison conditions by the physicians; the unhealthy and degrading conditions of his detention and the acts of violence intentionally committed by agents of the State against him in order to damage his mental and physical

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<sup>163</sup> Supreme Court of Justice of Mexico (SCJN), Amparo in revision 703/2012. Judgment of November 6, 2013.

<sup>164</sup> Source: *Tibi v. Ecuador*, judgment of 7 Sep. 2004 (Preliminary Objections, Merits, Reparations and Costs). Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_114\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_114_ing.pdf) [Accessed 16 Jul. 2017].

<sup>165</sup> ACHR (1969), Art. 7 - *Right to Personal Liberty*.

<sup>166</sup> *Ibid.*, Art. 25 - *Right to Judicial Protection*.

abilities were declared in breach of the right to humane treatment<sup>167</sup>. Finally, the lack of explanation by the State of Mr. Tibi's prolonged detention and the denial of his access to an attorney, as well as the fact that he received no prior and detailed communication regarding the charges against him, were declared in violation of the right to a fair trial<sup>168</sup>.

The case represents a good illustration of how abused criminal law can represent a violation of Human Rights concerning some key issues such as the lawfulness of detention, the detainee's judicial guarantees, his dignity during detention, and the obligations of the State throughout such process (Burgogue - Larsen and Úbeda de Torres, 2011).

To conclude this chapter, a reference should be made to an aspect of the Inter-American Human Rights system that can constitute a shortcoming in the prevention of gross and systematic violations in the context of the War on Drugs: the fact that individuals are not allowed to directly submit a petition to the Court. As already presented throughout this work<sup>169</sup>, the Inter-American Court of Human Rights can only receive petitions by OAS Member States signatories of the Convention that have previously accepted its jurisdiction, or by the Inter-American Commission: thus, the alleged victim of a violation can rely on these two subjects in order to present a case before the Court. Since the relevant State is itself the accused party of the violation and it is very unlikely that it will submit the petition to the Court, individuals principally rely on the mechanism of case presentation to the Court by the Commission, which nonetheless envisages a complex and long-lasting process of duplicative petition hearing that impedes the obtention of a timely relief. Considering that the Court, differently from the Commission, can enter legally binding judgments against a State responsible of Human Rights violations, the complexity of individual access to this organ represents a significant obstacle to the full enjoyment of Human Rights in an already worrisome framework (Barberena, 2015).

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<sup>167</sup> Ibid., Art. 5 - *Right to Humane Treatment*.

<sup>168</sup> Ibid., Art. 8 - *Right to a Fair Trial*.

<sup>169</sup> See §2.3.2 of the present work on the Court's contentious jurisdiction.

## **Chapter 4. The impact of U.S. War on Drugs on International Humanitarian Law and Human Rights**

### **4.1. U.S. counterdrug military aid and law enforcement: the impact on Latin American countries**

The leadership assumed by U.S. in conducting the War on Drugs, which has been commonly referred to as *Americanization* of drug enforcement, contributed to increasing levels of violence and crime in a region that was living an already complex transition towards a democratic regime, in parallel with a poor economic and institutional development. The global drug problem has been treated as an all-out war against an enemy rather than as a social and public health issue (Isacson, 2005) and drug use has been often presented as an imminent threat to be addresses with all possible means, without consideration for its diverse implications, which led to a criminalization and prohibition-led model (Rolls, 2016). The drug problem has been frequently oversimplified and misrepresented by the aggressive internationalization of U.S. enforcement agenda (Bartilow and Eom, 2009), without adequately distinguishing between the harms caused by drug use *per se* and those, much more numerous and severe, provoked by prohibitionist policies (Rolls, 2016). This section will firstly provide an overview of the militarized War on Drugs development in the U.S. and of the exponential growth in the country's engagement in Latin America, mainly in the form of military training, provision of weaponry and economic aid; then, the implications that this relationship has on Human Rights protection in the recipient countries will be addressed, with a particular focus on cases in which U.S. government tolerated, if not contributed to, gross abuses and violations in the name of a superior and total engagement in the so-called "War".

#### **4.1.1. The development of U.S. drug enforcement in Latin America**

Since United States is the country where the term "War on Drugs" was launched and which conducted the relative process of militarization of anti-drug efforts, besides having significantly contributed to the shaping of global drug prohibition regime<sup>170</sup>, it can be useful to provide an overview of how its

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<sup>170</sup> See §1.1.2. of the present work on the role of U.S. in the development of an international drug prohibition system with the relative treaties.

engagement in drug enforcement, particularly concerning Latin American countries, developed throughout the years.

The first federal law enforcements against narcotics date back to the last decade of the nineteenth century, when the first duties and restrictions on opium imports were established; in 1930 the Federal Bureau of Narcotics was created within the Treasury Department and for more than thirty years it was entrusted with investigation tasks on supply countries *in loco*; nevertheless, its presence overseas remained quite modest (Andreas and Nadelmann, 2006).

U.S. role in international crime and law enforcement significantly broadened in the context of the Cold War and the relative anticommunist struggle; the internationalization of such enforcement, as well as that of organized crime itself<sup>171</sup>, was facilitated by technological developments in transportation and telecommunications (Andreas and Nadelmann, 2006). Crime control as a federal responsibility and a national issue emerged in the sixties and as such it was included in the agenda by President Johnson, who laid the ground for the launch of the War on Drugs under President Nixon, who was the first to use the term “war” referring to counternarcotics issues as a public enemy, placing a lot of public attention on the external sources of substances (mainly heroin, cocaine and marijuana) in Latin American countries (Andreas and Nadelmann, 2006).

In the years of the Cold War, counterinsurgency security assistance was undoubtedly the most important sector to which allocating foreign aid national budget resources, therefore drug enforcement was not considered as an absolute priority yet; military transfers during the Cold War were funded under aid programs such as MAP (Military Assistance Program), IMET (International Military Education and Training) and FMF (Foreign Military Financing) in the form of provision of weapons and equipment, training, intelligence sharing and engagement activities, through which Latin American countries were encouraged to adopt counterinsurgency measures (Isacson, 2005); the main drug control program, called INC (International Narcotics Control), was managed by the State Department’s Bureau for International Narcotics Matters. Notwithstanding this initially secondary importance of drug enforcement, especially concerning foreign countries, in 1973 the Nixon administration created the DEA (Drug Enforcement Administration), housed in the Justice Department (Isacson, 2005) and merging all federal drug enforcement personnel and operations (Andreas and Nadelmann, 2006), with the aim of enforcing U.S. laws and regulations on controlled substances that are consumed there but are mainly produced in foreign countries; even though its focus was initially domestic, throughout the years this agency coordinated an ever-increasing series of drug enforcement operations in the Latin American region in

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<sup>171</sup> See §1.1.1. of the present work on the development of Transnational Organized Crime as a cross-border phenomenon throughout the twentieth century.

order to dismantle the activities of Drug Trafficking Organizations, significantly contributing to the internationalization of drug control (Bartilow and Eom, 2009). Finally, the U.S. Southern Command (Southcom), created in 1963 and entrusted with security cooperation for Central and South America, despite being the smallest of military commands, is the most significant U.S. agency in developing military relations in the region and it revealed to be very useful when cultivating contacts with local authorities (Isacson, 2005)

Although Presidents Ford and Carter extended the drug eradication operations and programmes in the Andean regions (Fukumi, 2016), the War on Drugs rhetoric weakened under their administrations. Nonetheless, it was soon revived by President Reagan: with the end of the Cold War, the majority of Latin American countries experienced a democratic transition with a consequent decline in the number of threats perceived by U.S. policymakers in the region (Isacson, 2005); a new justification for the high level of budget expenses allocated to external military interventions was therefore to be found, and it was identified with drugs, which were defined by the President as the new primary threat to national security. This marked the beginning of the militarization phase of drug control, where all State forces and organs had to be mobilized against a common menace, in a policy framework oriented towards the supply control, consisting of three major components: eradication, interdiction and alternative development (Fukumi, 2016). Antidrug military and police assistance started to increase in favour of those Latin American countries that complied with the anti-drug efforts and cooperation requirements, in the framework of the so-called certification system, according to which countries that were not deemed to be collaborative enough in the war against drugs were sanctioned through budget cuts, contrary U.S. votes in international forums, elimination of trade benefits and so forth. Even though many of these countries had not strongly enough democratic institutions and were not ready to attribute so much power to the military, their poor economic situation made the compliance with U.S. criteria a policy priority (Isacson, 2005).

The first truly sharp increase in counterdrug military aid was launched by President Bush by developing the so-called *Andean strategy*, whose central element was represented by the Andean Initiative, a five-year package of aid mostly allocated to Colombian, Peruvian and Bolivian security forces, being these the primary coca suppliers (Isacson, 2005); the emphasis given to supply, rather than demand, control was in fact a direct product of the rhetoric developed under President Reagan, and it enabled the U.S. to assume a more active and militarized role in the region (Fukumi, 2016). Latin American countries experienced a deep change due to the internationalization of U.S. war on drugs; first and foremost, this process encouraged the creation of specialized counterdrug units, which were a novelty for these countries' police agencies; nevertheless, they were diffusely instituted and soon became the main partners of the U.S. military. Secondly, U.S. drug enforcement agents who were transferred to these

countries imported a series of new investigative techniques to combat the phenomenon of drug trafficking (Andreas and Nadelmann, 2006). The counterdrug international mission acquired a new legal basis in 1988 with the introduction of a new section to Title 10 of U.S. Code<sup>172</sup>, specifically envisaging a counterdrug line item to be included in the annual defense budget and making the Pentagon the single lead agency for monitoring illegal drugs transiting to the country by air or sea (Isacson, 2005).

During the nineties, the worldwide budget for INC programme increased of almost 5 times; Clinton administration brought a new emphasis on crop eradication by security forces, on ground or by aerial fumigation, a process that directly involved military units to keep domestic order, notwithstanding the dangerous social unrests and hostilities generated by such campaigns (Isacson, 2005). Crop eradication was then considered easier and less costly; the shift was formalized in a Presidential Decision Directive stating that while interdiction would be a task for U.S. operations, eradication operations would be the main addressee of U.S. counterdrug assistance<sup>173</sup>. Even though the President initially tried to adopt a more sophisticated demand-reduction approach, it was soon evident that the War on Drugs direction was not easy to change, due to the important and diverse interests involved in the process, such as the military industry and the law enforcement institutions, which grew exponentially as a consequence of the “Americanization” of counterdrug regime (Andreas and Nadelmann, 2006). Those years also saw the emergence of the so-called *narco-guerrilla* theory as a new implicit component of the Andean strategy, according to which there is a strong link between drug traffickers and insurgents; this allegation, as the next paragraph will discuss, increased the likelihood of Human Rights violation during counternarcotics and counterinsurgency operations (Youngers, 2001).

The diplomatic pressure exercised through the certification system significantly reduced the power of cartels and the coca production in Peru and Bolivia, to the point that drug trafficking in these countries was no longer considered a stringent problem for U.S. national security at the beginning of the twenty-first century (Fukumi, 2016). The Andean strategy was then broadened by Bush Jr. as to include all the elements that could be considered as indirect threats to U.S. stability: the support in relation to what was henceforth known as the 3Ds (democracy, development and drugs) in the Andean region was the new objective of the strategy; nevertheless, interdiction and crop eradication remained strongly emphasized if compared to alternative development programmes, which mainly consisted of economic assistance, crop substitution and social projects. An emblematic example of U.S. multidimensional approach to

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<sup>172</sup> Section 124 - Detection and monitoring of aerial and maritime transit of illegal drugs was added to Title 10, dedicated to the Armed Forces.

<sup>173</sup> National Security Council and National Security Council Records Management Office, PDD-14: *U.S. Policy on International Counternarcotics in the Western Hemisphere*, (11 Mar. 1993). Available at: <https://clinton.presidentiallibraries.us/items/show/12742> [Accessed 18 Jul. 2017].



drug control abroad is Plan Colombia, a multilateral cooperation programme launched in 1999 to solve not only drug-related issues, but also poverty and counterinsurgency in Colombia, through an attempt of balance between law enforcement and economic and social development (Fukumi, 2016); the plan will be presented more in detail in the section dedicated to this specific country.

Generally speaking, the Andean states have assumed a passive and submissive attitude towards the aggressive U.S. drug enforcement strategy in their own territories, above all for the sake of the economic and security advantages that they could derive from that external aid; the common element between Latin American countries in which U.S. engaged in a drug control programme, indeed, was that they all expected to receive an international funding to carry them out and to face drug-related internal problems (Fukumi, 2016).

The last two decades saw a series of global shifts that eroded the U.S. prohibitionist authority over global drug control regime; first and foremost, some Latin American economies grew, shifting the North-South balance in the continent, and some newly elected leftist governments showed a certain intolerance towards U.S. coercive approach; secondly, even in the U.S. a new domestic activism fostered public debate on drug law reform, spreading the message that drug war is not the only possible policy framework, opening the path for new reforms. These new perspectives were supported by Obama administration, which distanced from the aggressive War on Drugs rhetoric in an attempt to orientate new policy responses towards public health, rather than national security (Rolls, 2016); this allowed a new debate on drug reform, addressing the necessity to focus on Human Rights and public health principles (Global Commission on Drug Policy, 2011). These transformations were driven by an increased awareness of the failure of the militarization and prohibition-led approach that has driven global drug control regime for decades; Latin American countries have *de facto* carried its heaviest burden (Rolls, 2016), with disastrous consequences for their communities and their enjoyment of fundamental Human Rights, as the next paragraph will discuss briefly.

#### **4.1.2. The “collateral damage” of militarization**

##### *4.1.2.1. Inadequacy of the militarized counterdrug approach*

Militarization can be defined as the over-involvement of the armed forces in governance aspects others than external defense (Isacson, 2005); this was undoubtedly the case of the War on Drugs, during which the U.S. intensively relied on Latin American countries’ militaries to eliminate drug crimes as if they were exclusively related to security, without considering their social and economic implications; taking into account that the majority of these countries have been experiencing a democratic regime for less

than fifty years, it can be easily inferred why giving increasing internal power to local militaries can have significant and worrisome consequences for national security, stability and Human Rights protection (Isacson, 2005), severely undermining the legitimacy of recently-created democratic institutions (Rolls, 2016). The militarization process, indeed, was not complemented by a corresponding institutional reform that could consolidate such achievements as democratic mechanisms, civil-military relations, political transparency and so forth; on the contrary, foreign policy decision-making processes were broadly militarized, and so was the U.S. attitude towards the region, with a sharp predominance of military and security priorities over economic, social and development issues. This approach is demonstrated by the disparity in the distribution of U.S. foreign aid, which was allocated in bigger quantities and within a much more rapid time frame to military and police sectors, to the detriment of economic and social aid; this further contributed to reinforce military institutions in Latin American countries, which was something that newborn democracies did not need (Isacson, 2005). In addition, the primacy given to military and security issues is showed by the fact that, although there is a legal framework envisaging restrictions in the provision of military aid for governments that do not comply with certain Human Rights standards, in the practice many exceptions were made in the War on Drugs framework, in order to allow specific training of local forces for drug control activities (Isacson, 2005). Studies carried out in order to identify the criteria according to which U.S. decide to allocate their resources in certain countries, indeed, showed that Human Rights considerations are not as important as expected in comparison with national security and trading interests (Cingranelli and Pasquarello, 1985). Latin American countries were hindered in their capacity to exercise civilian control over the militaries, with consequent tortures, disappearances and extrajudicial executions; this failure of drug control in supporting at the same time democracy and Human Rights in the region has led an ever-increasing community to point at U.S. anti-drug operations as more harmful than drug trade *per se* (Andreas and Nadelmann, 2006). Moreover, even the economic contribution of U.S. was negative in some occasions, first and foremost with regard to the above mentioned certification system, according to which anti-drug aid was denied to certain countries due to poor control performances; another aspect that was often perceived as a failure of U.S. policy is the fact that the majority of efforts were made to address law and security enforcement rather than economic and legal development in the region (Fukumi, 2016).

As cited above, Latin American governments were initially reluctant to accept such an intrusion in their domestic policy and such a power gain by the militaries, fearing that the latter would easily be bribed or corrupted by powerful drug traffickers (Isacson, 2005); notwithstanding these concerns, which are legitimated by the role of the military and the frequency of *golpes de Estado* in these countries' history, the internal role of the military sector sharply increased, as steered by U.S. policies, as a result of strong economic and diplomatic pressures. As a matter of fact, militarization of U.S. aid in order to contain

drug trafficking hindered the balance between civil and military control in the recipient States (Fukumi, 2016).

Furthermore, when the War on Drugs was launched, Latin American countries were not adequately equipped and trained to deal with insurgents and drug dealers and their sophisticated weaponry. In this regard, U.S. aid frequently proved to be unsuitable in a dual sense: on the one hand, it was decided not to sell military equipment to the countries with particularly strong criminal groups, fearing that the latter would seize it; due to this restriction, the concerned countries could not adequately protect themselves from criminal attacks, as it was the case of Colombia with its powerful drug cartels; on the other hand, when U.S. government decided to send its aid to a certain country, in most cases there was not sufficiently trained personnel as to operate the technological equipment received, which therefore did not succeed in supporting drug control operations (Fukumi, 2016).

The over-involvement of the military has been frequently justified by the U.S. as a necessary response to the diffused corruption among local police forces, although the effectiveness of empowering the military in order to circumvent the problem of corruption has not been proved; on the contrary, corruption inevitably accompanied anti-drug efforts and even involved military authorities themselves, with disastrous consequences for Human Rights protection (Youngers, 2001). Corruption and bribery *de facto* reach police as well as military forces and law enforcement officers, including U.S. agencies such as DEA, FBI and CIA, who are likely to be targeted due to the important information they own (Fukumi, 2016).

#### *4.1.2.2. Human Rights violations under the militarized War on Drugs*

Although administrative documents and international agreements on anti-narcotics envisage the compatibility of counterdrug programs with the respect for Human Rights, the War on Drugs has been the scene of the latter's gross and systematic violations, which was fostered by the alleged link between narcotics and insurgents (Youngers, 2001). Bolivia is an emblematic example of local population suffering from abuses, mistreatments, arbitrary detention, excessive use of force perpetrated by the anti-narcotics rural police, the UMOPAR (*Unidades Móviles de Patrullaje Rural*), during the eradication campaigns; the extended power of the government to control coca production acquired a legal basis with Law 1008<sup>174</sup>, issued by the National Congress and pressured by U.S. authorities, which in turn provides economic assistance to all aspects of UMOPAR operations, from the provision of uniforms and

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<sup>174</sup> Law n° 1008 (19 Jul. 1988 - *Ley del Régimen de la Coca y Sustancias Controladas*. Available at: <http://www.dgsc.gob.bo/normativa/leyes/1008.html> [Accessed 20 Jul. 2017].

weaponry to the nourishment of UMOPAR prisoners in jail. Eradication campaigns led to violent protests and social unrests from coca farmers, which were promptly repressed by army and the police, resulting in numerous detention and deaths; this worsened an already tense and complex economic and political situation (Youngers, 2001).

U.S. collusion with and support to paramilitary operations that led to Human Rights abuses seems even more evident when looking at the situation in an other primary coca producer, namely Peru, where the early years of the nineties saw the emergence of an anti-communist death squad known as Grupo Colina, created under the National Intelligence Service (SIN), which was accountable for countless violations. Vladimiro Montesinos, who was the mastermind behind the establishment of the squad and the massacres it perpetrated<sup>175</sup>, as well as the President's top security advisor and SIN chief, was initially considered a sort of U.S. spokesperson in Peru and his ties with CIA were maintained even after his involvement in Human Rights abuses and even in drug trafficking itself were widely known; this was due to the fact that both the Peruvian military and the SIN were considered essential allies in the War on Drugs by the U.S., which provided them with the corresponding support (Youngers, 2001).

Addressing the violations perpetrated by military forces under the "supreme" mandate of the War on Drugs has been further complicated by the fact that U.S. intensively relied on private contractors, whose accountability under international law is all but a simple issue: the problems related to the employment of non-State military and security forces will be discussed in the next paragraphs.

## **4.2. Private Military Security Companies in the War on Drugs**

The globalization process started with the end of the Cold War brought a series of trends, among which the tendency to privatise the use of military and security forces; this is particularly significant with regard to the present work, since U.S. largely relied on the use of private military and security companies (PMSCs) to support their War on Drugs in Latin America (Hobson, 2014). This hindered the application of International Human Rights and Humanitarian Law in complex and unstable contexts, and the violations in which private contractors were frequently involved were not adequately addressed due to the existing gaps in the regulation and accountability in this sense; in other words, two of the fundamental aims of aid programmes, namely the strengthening of the rule of law and the promotion of Human Rights, were significantly jeopardized by the use of PMSCs (Hobson, 2014).

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<sup>175</sup> The most known massacres caused by *Grupo Colina's* activity were Barrios Altos (1991) and La Cantuta (1992), which caused the death of, respectively, fifteen people (including a child) in a Lima neighbourhood and of a professor and nine of his students in a University in the capital city (Youngers, 2001).

This paragraph will briefly present the emergence of PMSCs as core actors of contemporary warfare, as well as the corresponding attempts of the international community to regulate their employment on a global level; then, the issues of State responsibility for the conduct of PMSCs and direct accountability of the latter will be addressed; to conclude, an overview will be provided of the Human Rights that are the most exposed to violations and abuses in contexts where the employment of PMSCs is deemed necessary, particularly in the framework of counterdrug operations.

#### **4.2.1. Emergence of PMSCs and attempts of regulation under international law**

##### *4.2.1.1. A global trend towards privatization of military and security forces*

The use of private agents to perform tasks related to security has been a constant throughout war history, starting with ancient Empires and city-States; mercenarism was particularly in fashion during the Middle Age, providing much more qualified soldiers than the regular ones. With the Peace of Westphalia and the consequent emergence of a centralized nation-State with the related national army, the employment of mercenaries was considered immoral in a certain way, since they represented a challenge to national unity, authority and sovereignty; notwithstanding this shift towards a statist monopoly of military force (Pattison, 2014), private soldiers were diffusely used again throughout the nineteenth and twentieth centuries, for instance during the independence wars of Latin American countries. The phenomenon of the so-called “vagabond mercenaries”, who were mainly employed for specialized training of local authorities<sup>176</sup>, spread out in the second half of the twentieth century and was harshly criticised by the international community, due to their wide autonomy (Perret, 2014) in carrying out tasks traditionally performed by the regular military (Pattison, 2014). The United Nations themselves condemned vagabond mercenaries in the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, adopted through a Resolution of the General Assembly in 1989; by affirming that “the recruitment, use, financing and training of mercenaries should be considered as offences of grave concern to all States<sup>177</sup>”, the Convention reflected the changes generated in the international community by the end of the Cold War: concerns such as drug trafficking and financial terrorism had replaced the threat of communism, and new types of conflicts, asymmetric and

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<sup>176</sup> A famous example of mercenary active in the second half of the twentieth century is Yair Klein, a former lieutenant colonel in the Israeli Army who trained Colombian paramilitary leaders in anti-guerrilla fighting techniques with his private mercenary company; he was then accused of training death squads of drug traffickers and right-wing militias in the country (Perret, 2014).

<sup>177</sup> United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries (A/RES/44/34 adopted 4 Dec. 1989, entered into force 20 Oct. 2001), Preamble.

involving non-State actors, were emerging. Private Military Security Companies (from here on PMSCs), intended as private, for-profit organizations engaged transnationally that are not part of the regular military, but rather offering a service to it and to the hiring State (Pattison, 2014), offered a viable alternative to large national armies, which had ceased to be a suitable model for the new global security environment. In fact, the distinction between the threats represented by mafias, traffickers, insurgents, guerrillas and political violence was more blurred than ever, and the privatization of security required more flexible agents to perform the relative tasks; moreover, PMSCs offered technological expertise and specialization that were made necessary by the new categories of conflict, but that were not available for national armies (Perret, 2014). Finally, private contractors had a certain degree of political attractiveness to governmental leaders, since they represented a possibility to increase the number of troops engaged in a mission without having to send additional regular soldiers to the frontline (Pattison, 2014).

The end of the Cold War, in other words, brought a new liberal perspective that suggested the fragmentation of governmental powers and the privatization and political neutrality of professional armed forces (Perret, 2014); the privatization of military forces, thus, was part of a more general global trend which towards the end of 1980s led businesses to the outsourcing of non-core aspects of their work to private contractors (Pattison, 2014).

#### *4.2.1.2. Non-binding international regulatory instruments*

The UN Convention of 1989 represented the first of a series of attempts aimed at establishing international minimum standards for the regulation of private contractors' activities: the need of a regulatory framework was based on the principle that, due to the specificity of the services they offer and to the dangerousness of the context in which they operate, PMSCs should not be addressed as if they were ordinary, self-regulating commercial commodities (UNHRC, 2010).

The UN Convention had a scarce appeal on the international community, mainly due to the narrow definition of "mercenary" it provided<sup>178</sup>, which complicated the classification of the new non-State actors: the consequence was that subjects whose activity mainly corresponded to the traditional field of

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<sup>178</sup> Ibid., Art. 1: "A mercenary is any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
- (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (d) Is not a member of the armed forces of a party to the conflict; and
- (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces."

mercenaryism, like private contractors, could not be categorized as such, and States retained the right to employ them by integrating them in their own bodies, authorizing them to the use of force. The fact that the actors with the largest military sectors (like China, France, India, Japan, Russia, the U.K. and the U.S.) refused to ratify it made the Convention a scarcely effective instrument as to regulate the phenomenon on the international level.

Another regulatory attempt to address the lack of control on PMSCs is represented by the Montreux Document, a non-binding agreement containing obligations and good practices on the use of private contractors, with the aim of stimulating intergovernmental dialogue on existing international law on the topic (Perret, 2014); the initiative was prepared and supported by the Swiss government and by the International Committee of the Red Cross, and the final document was endorsed by seventeen governments in 2008. It was the first intergovernmental instrument articulating existing Human Rights and Humanitarian Law obligations to be applied with regard to PMSCs; although it primarily focuses on armed conflict situations, the principles therein expressed are also relevant to non-armed conflicts as well<sup>179</sup>. The hard and soft law is examined as relevant to three categories: the contracting State, which hires PMSCs; the territorial State, where PMSCs operate; and the home State, where PMSCs are based. Even though the document is not binding and does not create nor modify any legal obligation, its relevance lies in the fact that it is the first international instrument addressing the activity of PMSCs and its impact on Human Rights and Humanitarian Law, politically recognizing the challenges presented by such a phenomenon. As far as the part presenting the good practices is concerned, it represents a useful tool to identify appropriate ways of carrying out State international obligations and, at the same time, highlights the necessity of adequate domestic legislation as to complement the international legal regime (Huskey, 2012).

Despite its significant contribution, the Montreux Document contains some shortcomings, first and foremost the fact that it envisages the obligation for States to ensure respect of International Humanitarian Law “within their power<sup>180</sup>”: this aspect is in contradiction with the first common Article of Geneva Conventions and their Additional Protocols, namely the main instruments establishing the standards of international law for humanitarian treatment in war, which declare that the respect of principles enshrined therein must be ensured by the contracting States in all circumstances. Secondly, the Document does not include the standard Human Rights language of due diligence and duty to

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<sup>179</sup> Montreux Document (2008), *Field of application*: “The preface to the Montreux Document states that the document was developed with a view to situations of armed conflict. International humanitarian law only applies during armed conflicts. However, the Montreux Document is not strictly confined to armed conflicts. Most of the good practices identified (for example, to establish a licensing regime for PMSCs) are ideally put into place during peacetime”.

<sup>180</sup> *Ibid.*, Part 1 - Pertinent international legal obligations relating to private military and security companies.

protect, for it being too vague, which clearly undermines the protection of such rights in particularly risky contexts where PMSCs are active, such as post-conflict situations. There is a reference to State's oversight of PMSCs' activity abroad, but without specifically addressing Human Rights risks connected with it (Perret, 2014). Lastly, an important shortcoming regards the process of its preparation, throughout which Latin American countries were totally absent, despite being among the most affected by security problems.

The other side of the initiative taken by the Swiss government in order to regulate the use of PMSCs is represented by the International Code of Conduct for Private Security Services Providers (ICoC), a non-State mechanism setting a series of regulatory principles for the private use of force; the ICoC aims at supplementing the Montreux Document on the basis of the recommendations therein contained, and the implementation of the principles it expresses requires State legal oversight. The Code was prepared through a multi-stakeholder process that involved States, business companies and members of the civil society, reflecting a compromise between market-driven interests and the protection of international Human Rights and Humanitarian Law. In this sense, the Code can be considered quite a successful achievement, which gained the support of a significant number of different actors, despite being a soft law instrument and lacking legal value as such; moreover, it provides for the creation of the International Code of Conduct Association, an independent oversight body aimed at monitoring the implementation of the ICoC whose functioning is based on a balanced representative structure and on the certification of member companies. The latter mechanism is particularly important as to ensure that the code of conduct is actually respected by companies rather than merely used for advertising purposes (Perret, 2014).

Lastly, an other attempt of regulatory instrument on the use of PMSCs is the UN Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies, elaborated by the Working Group (WG) on the Use of Mercenaries with the aim of promoting cooperation between States “regarding licensing and regulation of the activities of PMSCs in order to more effectively address any challenges to the full implementation of Human Rights obligations [...], to ensure monitoring of the activities of PMSCs and devise mechanisms to monitor abuses and violations of international Humanitarian and Human Rights law<sup>181</sup>”; while recognizing that the outright banning of the employment of PMSCs was not an option any more, the WG underlined the necessity to establish minimum international standards of regulation for their activities (UNHRC, 2010). The Draft Convention addresses violations that can be perpetrated in situations of conflict, violence or post-

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<sup>181</sup> United Nations Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies (2009), Art. 1 - *Purpose*, Par. 1.



conflict, and those that can be suffered by security guards employed by PMSCs (Perret, 2014), with the aim of strengthening the principle of State responsibility for the use of force<sup>182</sup>; its application is broader than that of the Montreux Document, since it is extended to international organizations and to situations of absence of armed conflict (Huskey, 2012). The Human Rights Council, to which the proposal was submitted in July 2010, established an intergovernmental working group to elaborate a legally binding instrument on the issue of PMSCs and Human Rights; the fact that the seven Western countries therein represented voted against the resolution establishing such working group demonstrated their reluctance to accept a more stringent control on the security industry. As a matter of fact, the Draft Convention considers as “fundamental State functions<sup>183</sup>”, which cannot be outsourced, a list of activities that is much broader than that provided by the Montreux Document, which only prohibited the outsourcing of activities expressly assigned to States by International Humanitarian Law; this restrictive conception of the role of the State undermined consensus around the Convention and, consequently, its function as a potential regulatory instrument. On the other hand, the Draft Convention fails to address direct obligations and responsibilities for PMSCs, with the majority of its provisions directed towards the State (Perret, 2014). Nevertheless, it is relevant in that it explicitly requires States to adapt national legislation to the exigencies created by the phenomenon of PMSCs and to enact domestic measures in order to ensure the respect of international obligations in this context (Huskey, 2012).

The existing regulatory framework concerning the use of PMSCs and its effect on Human Rights and Humanitarian Law protection is limited and lacks of binding provisions capable of effectively preventing violations and abuses in this sense. This is due to the fact that the international legal regime does not provide adequate standards for the regulation of a relatively new phenomenon such as the outsourcing of the use of force to non-State actors (Huskey, 2012), as the next paragraph will discuss.

#### **4.2.2. State obligations and responsibilities concerning the use of PMSCs**

The fact that PMSCs belong to the non-State category of actors implicates a series of problems in the attribution of responsibility for Human Rights and Humanitarian Law violations that are committed during the exercise of their functions. Since States are the actors on which the international system is based and whose obligations have been primarily elaborated and discuss, it is important to get an overview of what these obligations consist of and how can they be applied to the employment of private security contractors.

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<sup>182</sup> Ibid., Par. 1.

<sup>183</sup> Ibid., Art. 2 - *Definitions*, Par. k).

#### 4.2.2.1. Generally applicable obligations

The use of PMSCs mainly concerns three categories of actors, as discussed in the previous paragraph: the territorial State, where their activities take place; the contracting State, which hires them; the home State, where they are incorporated; notwithstanding this important distinction, there are some international obligations that are generally applicable. The first of them is the duty to prevent Human Rights violations, which is enshrined in the main international and regional legal instruments (Perret, 2014). The UN Human Rights Council, in its General Comments on the nature of the general obligations imposed on States parties to the International Covenant on Civil and Political Rights, specifies that the obligation to ensure the rights therein contained to all individuals within their territories<sup>184</sup> concerns acts committed not only by State agents, but also by “private persons or entities that would impair the enjoyment of Covenant rights<sup>185</sup>”. This implies that States have a general obligation to monitor the activities of PMSCs and adequately prevent harms that could be suffered by the individuals as a consequence of these. Concerning Latin America, the first Article of the ACHR on the duty to respect and guarantee the rights therein contained<sup>186</sup> was interpreted by the Inter-American Court as an obligation for States to ensure the compliance with rights and freedom of agents’ use of force; this international responsibility can subsist, even though not entirely, when violations are perpetrated against individuals by paramilitary groups or private contractors for which the State is not directly accountable, as it was the case of the Mapiripán massacre in Colombia<sup>187</sup>.

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<sup>184</sup> International Covenant on Civil and Political Rights (Vol. 999,1-14668 adopted 16 Dec. 1966, entered into force 23 Mar. 1976), Art. 2, Par. 1: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind [...]”.

<sup>185</sup> UN Human Rights Council, General Comments n°31 [80] - The nature of the general legal obligation imposed on States Parties to the Covenant (CCPR/C/21/Rev.1/Add.13), §8.

<sup>186</sup> American Convention on Human Rights (1969), Art. 1 - *Obligation to respect Rights*: “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to *ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms*, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”.

<sup>187</sup> In the case *Mapiripán Massacre v. Colombia*, which saw the torture and murder of 49 civilians at the hands of the right-wing rural militias called Autodefensas Unidas de Colombia, with regard to State responsibility for violations of the rights and freedoms contained in the Convention, the IACtHR stated the following: “Said international responsibility *may also be generated by acts of private individuals not attributable in principle to the State*. The States Party to the Convention have erga omnes obligations to respect protective provisions and to ensure the effectiveness of the rights set forth therein under any circumstances and regarding all persons. *The effect of these obligations of the State goes beyond the relationship between its agents and the persons under its jurisdiction*, as it is also reflected in the positive obligation of the State to take such steps as may be necessary to ensure effective protection of human rights in relations amongst individuals. The State may be found responsible for acts by private individuals in cases in which,

Another significant general obligation for States regarding the activity of PMSCs is the duty to investigate on, prosecute and remedy to Human Rights violations. The ICCPR attributes to the State the responsibility to ensure an effective remedy to the victims and ensure that it is enforced by the competent judicial, administrative or legislative authorities<sup>188</sup>; with regard to this provision, the Human Rights Council commented that the lack of adequate investigation on Human Rights violations and the failure to bring their perpetrators to justice may constitute themselves a separate breach of the Covenant<sup>189</sup>. The Inter-American System of Human Rights also envisages this obligation for the States, which undertake to ensure an effective remedy by a competent authority to victims of violations and abuses<sup>190</sup>.

#### 4.2.2.2. Territorial application: the host State

As far as the use of PMSCs is concerned, the implementation of the above-mentioned provisions can entail some complications and limitations; before briefly examining them, it is important to underline that their application is to be considered extraterritorial with regard to contracting and home States, while it is territorial with regard to the State in whose territory PMSCs are operating. Territorial application of the obligations to prevent, investigate and redress Human Rights violations can be challenged if the host State decides to formally derogate from such obligations using a specific clause, which is included in different Human Rights instruments<sup>191</sup>; although some rights cannot be subject to suspension or derogation, this is not the case for the right to be protected from arbitrary or unlawful detention, which is one of the violations most frequently committed by PMSCs, as it will be discussed below (Bakker, 2011). There is also the possibility that the host State is not able to comply with its obligations due to the absence of the rule of law and the lack of adequate institutional capacities, or to the effective control exercised over national soil by another State, which are *de facto* situations in which the use of PMSCs is normally deemed the most necessary. In the latter case, the Human Rights obligations temporarily pertain to the State that is exercising effective control over the territory; in this regard, the Inter-American system adopted a broader perspective if compared to the European one,

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through actions or omissions by its agents when they are in the position of guarantors, the State does not fulfill these erga omnes obligations embodied in Articles 1(1) and 2 of the Convention". Source: IACtHR, Case of *Mapiripán Massacre v. Colombia*, Judgment of 15 Sep. 2005, Series C n°134, §111.

Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_134\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_134_ing.pdf) [Accessed 26 Jul. 2017].

<sup>188</sup> International Covenant on Civil and Political Rights (1966), Art. 2, Par. 3.

<sup>189</sup> UN Human Rights Council, General Comments n°31 [80] - The nature of the general legal obligation imposed on States Parties to the Covenant, §15 and §18.

<sup>190</sup> ACHR (1969), Art. 25 - *Right to Judicial Protection*.

<sup>191</sup> See §2.2.2. on the restrictions to the application of certain rights envisaged by the ACHR.

evaluating the notion of “effective control” not only on a territorial basis, but also and above all relating it to the acts of the agents exercising such a control in a foreign State (Bakker, 2011). Apart from the mentioned circumstances hindering the compliance with international obligations, the host State is generally responsible for the prevention of Human Rights violations in its territory, in this case perpetrated by private corporations; a useful mechanism to control the functions performed by the latter is the establishment of an authorization system based on these companies’ past performance and accountability or, as an alternative, the requirement of all the necessary information from the contracting State. In the same way, the host State has to immediately withdraw the authorization for PMSCs to operate in its territory if they are involved in Human Rights violations. As far as domestic remedy is concerned, the host State should carry out the adequate and impartial investigations of violations such killings or torture committed by PMSCs in their territory; similarly, it has to provide reparation, mainly in the form of financial compensation, to the victims of these violations. In the practice, as already mentioned, the territorial State will not always be able to comply with these obligations due to a difficult political, economic or institutional situation, which is precisely the most likely reason why PMSCs are employed there; notwithstanding these possible constraints, it is important that States having private contractors operating in their territory are aware of the positive obligations under Human Rights law they are subject to (Bakker, 2011).

#### *4.2.2.3. Extraterritorial application: the home State and the hiring State*

A different issue is to deal with the extraterritorial application of Human Rights obligations, that is, when a non-territorial State (either the State where private contractors are based or the State that hires them) is accountable for the violations committed by non-State actors in the territorial State. Even though the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001, envisage the possibility to consider PMSCs as organs of the home State, to the extent that they are embedded in its armed forces<sup>192</sup>, this has proved to be quite a rare hypothesis in the practice, since PMSCs operate on the basis of punctual and specific contracts rather than being integrated into the national forces (Francioni, 2011). Nevertheless, the Articles also provide a basis for the extraterritorial responsibility of a State when dealing with non-State entities, stating that “the conduct of a person or entity which is not an organ of the State [...] but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the

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<sup>192</sup> ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Art. 4 - *Conduct of organs of a State*.

State under international law, provided the person or entity is acting in that capacity in the particular instance<sup>193</sup>”; this Article was intended to deal with the increasingly widespread phenomenon of non-State organs empowered to exercise governmental authority, and is particularly significant in that it clarifies that the private legal status of PMSCs does not exclude the attribution of their responsibilities to the State (Francioni, 2011). Moreover, according to the Draft Articles the conduct of private persons or entities is attributable to a State if they are “acting on the instructions of, or under the direction or control of, that State in carrying out the conduct<sup>194</sup>”, that is, if the existence of a factual relationship between the State and the entity is proved. The need to demonstrate such a relationship, as well as the last sentence of Article 5, requiring the PMSC acting in its public function capacity at the moment the alleged violation takes place, significantly restrict the possibility of imputation of private acts to a State under ILC Draft Articles.

Even though the home and the hiring State can coincide, if it is not the case a distinct set of complementary obligations arise for the two categories (Francioni, 2011). The Human Rights obligations of the home State are frequently eluded with the argument of territoriality, since it is deemed unable to determine what happens beyond its national jurisdiction and territorial borders; nevertheless, since these States have full control over home-based PMSCs, their duty to prevent and redress violations falls under their jurisdiction and cannot be neglected by simply looking at territorial issues (Francioni, 2011). First of all, therefore, the home State has the duty to control the creation of PMSCs under its jurisdiction by applying a certification system that can ensure their responsible way of operating, with Human Rights and Humanitarian Law provisions included in their mandate. Once these conditionalities have been verified, the activities of PMSCs must be constantly monitored by the home State, even if they take place beyond national boundaries; moreover, if abuses or violations occur, the home State must ensure adequate judicial and civil remedy for the victims as well as sanctions and prosecution for the perpetrators, which is particularly important considering that, as already pointed out, the territorial State is likely to be in a situation that does not allow the provision of such guarantees. In this framework, cooperation and communication between the home State of the PMSCs and that on whose territory they are operating are always necessary and desirable (Francioni, 2011).

Concerning the contracting or hiring State, which is supposed to have a close relationship with the PMSCs it hires (Perret, 2014), it has an important role in the stipulation of a procurement contract based on a responsible behaviour and the respect of international Human Rights and Humanitarian Law obligations. With regard to the duty to prevent, the hiring State must take all the necessary precautions

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<sup>193</sup> Ibid., Art. 5 - Conduct of persons or entities exercising elements of governmental authority.

<sup>194</sup> Ibid., Art. 8 - Conduct directed or controlled by a State.

to avoid violations of fundamental provisions such as the right to life or the prohibition of torture or cruel, inhuman or degrading treatment or punishment at the hands of PMSCs; the Inter-American system provides a rich and detailed jurisprudence in this sense, with references to peculiar situations such as individuals in custody who are subject to interrogatories, massacres committed during armed conflicts and particularly vulnerable persons such as Human Rights defenders (Hoppe, 2011). Concerning the duty to investigate on alleged violations and prosecute and punish the perpetrators, as well as the obligation to legislate with the necessary criminal law provisions to protect fundamental rights, a State hiring PMSCs in contexts where the provisions enshrined in the ACHR can be applied has to ensure that the contractors are prosecuted in case of violations of the latter; again, it is important to consider that the territorial State is frequently hindered in its capacity to provide an effective judicial forum. Similarly, the State contracting PMSCs has to investigate situations involving a violation of rights contained in the ACHR and to restore their enjoyment “as soon as possible<sup>195</sup>”, otherwise the violation can be imputed to the hiring State itself, for having failed in the exercise of due diligence<sup>196</sup> (Hoppe, 2011).

To conclude, it is important to underline that the application of International Human Rights Law (IHRL) can be hindered in all the phases of PMSCs’ employment: the contracting phase, indeed, is regulated mainly by domestic laws and regulation of the hiring and the host State, rather than by international instruments; when PMSCs are operating, on the other hand, IHRL can be hindered by specific derogation clauses adopted by the territorial State or, in the case of ongoing armed conflict, be overcome by International Humanitarian Law (IHL) provisions as *lex specialis*; finally, there is no enforcement

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<sup>195</sup> *Velázquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, Judgment of 29 Jul. 1988, Series C n°4, §176: “The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, *the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction*. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.”

Available at: [http://hrlibrary.umn.edu/iachr/b\\_11\\_12d.htm](http://hrlibrary.umn.edu/iachr/b_11_12d.htm) [Accessed 27 Jul. 2017].

<sup>196</sup> *Ibid.*, §172: “[...] In principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. *An illegal act which violates human rights and which is initially not directly imputable to a State ( for example, because it is the act of a private person or because the person responsible has not been identified ) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.*”

measure to make States comply with the duty to punish or redress IHRL violations in the post-conduct phase (Huskey, 2012).

Having provided an overview of the responsibilities that the three categories of States involved in the employment of private contractors have for Human Rights violations perpetrated during the latter's mandate, it is now necessary to briefly address the issue of responsibilities that are directly accountable to these entities, according to a tendency identifiable in the last decades to reconceptualize Human Rights obligations, shifting them towards private actors (Francioni, 2011), which, as it will be discussed, is all but an easy process.

#### **4.2.3. Accountability of PMSCs under International Human Rights and Humanitarian Law**

The extent to which corporations can be considered subject to obligations under international law is widely debated; if on the one hand the traditional approach considers States and International Organizations as the only subjects of international law, more recent perspectives are challenging this classical view, addressing the issue of new norms on corporate responsibility and elaborating new obligations involving non-State actors (Perret, 2014). The direct application of international law to private actors proved to be more complex than expected, first and foremost because of the rigid inter-State structure of the international legal regime, secondly because of the lack of consistent judicial practice; if norms that bind corporations directly are needed, then corresponding international legal principles that can be generally accepted are to be identified (Francioni, 2011). The current international legal regime, on the contrary, shows some significant gaps as to ensure broad accountability for PMSCs, being fragmented and unclear in the assignment of responsibilities (Huskey, 2012), as this paragraph will discuss.

##### *4.2.3.1. Determination of PMSCs' legal status*

First of all, it is important to underline the difficulties that arise in trying to determine the status of PMSCs under International Humanitarian Law (IHL), which does not provide a solid basis for the determination of PMSCs' status, since its norms are applicable only during an armed conflict, while many situations in which they operate do not fall under this definition (Huskey, 2012). Moreover, since IHL does not foresee a particular status for corporate actors, PMSCs' rights and obligations must be focus on their individual employees and on the possibility to consider them as belonging to an armed group and, therefore, part to a conflict (which in any case is a very unlikely hypothesis), but there is no provision envisaging the prosecution of corporations under IHL (Perret, 2014). Another set of problems

emerges when examining the diverse functions carried out by these bodies, which can belong to the non-combat sphere (by offering a series of products such as transportation management) but also be evidently linked to the warfare field, or fall under an ambiguous category (activities whose governmental nature is uncertain, such as intelligence, training or interrogation of suspects). This complicates the determination of their legal status under IHL, which cannot be defined as unitary, but rather depends on the activities they perform and on the specific context (Kidane, 2010).

IHRL, as already discussed, neither does provide a satisfying framework for the legal definition of PMSCs, since only States are accountable for its breaches; the main argument in opposition to the direct accountability of corporations under IHRL is that this would strip the States of their responsibility to comply with these provisions (Perret, 2014).

Finally, International Criminal Law (ICL), which addresses the most serious crimes concerning the international community, requires that the crimes committed are part of “a plan or policy or as part of a large-scale commission of such crimes<sup>197</sup>”, thus envisaging a nexus to a State party which can be hard to determine when dealing with private contractors. Moreover, the application of ICL requires the cooperation of States in order to enforce the principles enshrined in the Rome Statute in domestic courts, which is not always easy to obtain (Huskey, 2012). This overview demonstrates that international law fails at assign responsibilities to PMSCs for the violations and abuse perpetrated during their activity, due to the lack of subjectivity of non-State actors (Perret, 2014); the status of PMSCs as a unitary entity lacks a specific definition also because it re-emerged as a modern phenomenon after the Cold War, when the marked development of international law had already taken place (Kidane, 2010).

#### *4.2.3.2. Forms of accountability and regulation for PMSCs*

The accountability of PMSCs can be addressed in two possible forms: the first one, namely individual criminal responsibility, would hold members of PMSCs criminally responsible in the State that hosts them and/or employs their services, which is problematic considering that private military contractors, differently from national military personnel, cannot be prosecuted before the martial court; this is due to the difficulties in determining the nature of these actors in conflict situations and in finding an adequate forum as to prosecute them (Kidane, 2010). Moreover, while individual employees of private companies can be pursued and detained as such, there is no possibility to imprison a legal person (Perret, 2014).

The second form of accountability is company civil liability, which in theory allow a faster access to the courts than in criminal proceedings, and are capable of making companies more responsible and aware

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<sup>197</sup> Rome Statute of the International Criminal Court (1998), Art. 8 - *War Crimes*.



from the social point of view (Perret, 2014); nevertheless, civil liability for private military contractors is even more complex as it requires some strict criteria in order to prosecute them for a violation under international law; the first obstacle in a civil suit against a PMSC can be represented by a certain gravity of the injury to be demonstrated; a good example of such a restriction is represented by the Alien Tort Statute (ATS), a section of the U.S. Code used by foreign citizens to seek remedies before U.S. courts for Human Rights violations committed outside the U.S. by civil bodies, according to which “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed *in violation of the law of nations* or a treaty of the United States<sup>198</sup>”. Secondly, international obligations are frequently defined in terms of government accountability, in that the violation must be committed by a public official or with his acquiescence<sup>199</sup>: the claimant must therefore demonstrate the existence of a nexus between the injury and the government conduct, which is not easy when dealing with the activity of private military contractors (Kidane, 2010). Both criminal and civil liability of private corporations, at least up to the present moment, have failed to effectively address the issue of the latter’s responsibility for international law violations (Perret, 2014).

Concerning the regulation of PMSCs, there are mainly two possible paths to follow: on the one hand, PMSCs could be made directly accountable for the illegitimate activities they have performed. This could be achieved by extending the jurisdiction of martial courts as to prosecute private military contractors engaged in international law violations during a conflict; the problem is that the prosecution would take place only after the misconduct has been carried out, therefore not resolving the issue of unlawful combatancy. Another method could be using the engagement contract that PMSCs have to sign as a regulating instrument for their conduct, envisaging direct responsibilities and obligations for them. Nevertheless, it is unlikely that contracts stipulated in such diverse circumstances could reach a uniform structure; moreover, re-negotiation would always be an option in order to better satisfy both parties’ interests, which could neglect the respect of IHL and IHRL provisions (Kidane, 2010).

On the other hand, the activity of PMSCs could be regulated through unitary international legal mechanisms of registration and licensing for private contractors, in order to build new standards in this sense; the problem with this approach is that it looks at private contractors’ industry as if it was a holistic unit, while on the contrary it involves a series of variables on the type of conduct and the circumstances in which it is carried on that must be taken into consideration (Kidane, 2010).

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<sup>198</sup> Alien Tort Statute - ATS (28 U.S. Code, §1350).

Available at: <https://www.law.cornell.edu/uscode/text/28/1350> [Accessed 28 Jul. 2017].

<sup>199</sup> For instance, see the definition of torture under the UN Convention Against Torture (1984), Art. 1.

#### 4.2.3.3. *International initiatives for the emergence of corporate liability*

Although there are some legal contexts in which non-State actors can incur international responsibilities, these do not specifically address IHRL nor IHL violations: the Palermo Convention against Transnational Organized Crime, for instance, states that the liability of legal persons participating in organized crimes shall be established through the appropriate State measures<sup>200</sup>. There are, thus, certain rights and obligations for whose violation private companies as such are accountable, but they do not clearly address the respect for Human Rights, even though there is a “legitimate expectation” of the international community that they comply with certain customary norms, such as refraining from violating such rights (Perret, 2014). Nevertheless, the increasing concern about the lack of responsibility of multinational companies (MNCs) in the context of Human Rights abuses led to a series of soft law initiatives addressing the topic; despite their non-binding nature, their emergence shows a significant shift in the priorities of the international community. The specific topic of PMSCs has been addressed by certain international initiatives such as the International Code of Conduct, which has been discussed in the previous paragraphs<sup>201</sup> and provides a monitoring mechanism that, if adequately complemented by State intervention, can provide a solid support to the soft law on corporate responsibility (Perret, 2014).

Other projects deal more generally with the conduct of MNCs, such as the Guidelines for Multinational Enterprises published by the OECD for the first time in 1976 and then updated throughout the years, providing a list of good practices, principles and standards to which State parties commit in order to promote their respect among private companies (Perret, 2014). The respect for Human Rights of those affected by MNCs’ activity is therein presented as one of OECD General Policies, in that MNCs must avoid infringing any IHRL norm within the context of their business operations and cooperate in the provision of a remedy if a violation occurs<sup>202</sup>; moreover, the 2011 version of the Guidelines introduced a new chapter specifically addressing Human Rights issues, which represented a significant step forward in this framework; nevertheless, the Guidelines fail to envisage penalties for the companies that do not comply with their principles. Another initiative of an international organization to improve MNCs regulation is the UN Global Compact, launched in 2000 and addressing corporate responsibility concerning four main areas: Human Rights, labour, environment and anti-corruption, with the aim of creating a voluntary mechanism of self-regulation. Corporate responsibility with regard to Human Rights is enshrined in the first two Principles of the initiative, according to which “1) Businesses should

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<sup>200</sup> UNTOC - United Nations Convention against Transnational Organized Crime (2000), Art. 10 - *Liability of Legal Persons*.

<sup>201</sup> See §4.2.1 on the international attempts of regulation of PMSCs’ conduct.

<sup>202</sup> OECD Guidelines for Multinational Enterprises (2011), Ch. IV - *Human Rights*.

support and respect the protection of internationally proclaimed Human Rights; and 2) make sure that they are not complicit in Human Rights abuses<sup>203</sup>”. The United Nations also elaborated an analytical guideline known as the “Protect, Respect and Remedy” framework, addressing the corporate responsibility to respect Human Rights and to act with due diligence in this regard<sup>204</sup> and establishing a sharp distinction between the responsibilities and the duties of States and MNCs. While its capacity to bring together several diverse actors involved in issues regarding business and Human Right is undoubtedly significant, on the other hand the framework still lacks a monitoring mechanism (Perret, 2014).

There is no binding legislation concerning PMSCs activity and its impact on Human Rights, and private actors are not directly accountable as such for violations and abuses occurred during their operations; nevertheless, several initiatives show an ever-increasing commitment of the international community to ensure a broader framework of regulation. Since private security is a new phenomenon whose impact can significantly vary according to the context, regional mechanisms of Human Rights protection can represent a good compromise between a global regulation and specific countries’ exigencies (Perret, 2014); the Inter-American Court and Commission developed a consistent jurisprudence with regard to Human Rights violations at the hands of PMSCs, as the Latin American region constitutes a fertile soil for the activity of private security industry, especially concerning specific situations such as the overlapping of counterinsurgency and counterdrug efforts in Colombia or the militarization of the War on Drugs in Mexico, as the final part of the present work will discuss.

#### **4.2.4. Human Rights implications of the employment of PMSCs**

The increasing importance of the role of private contractors stimulates the debate around their mandate as far as its transparency and adaptability to IHRL and IHL are concerned (Francioni, 2011), especially considering the problems that can arise when trying to determine who is accountable for the possible violations and abuses. In addition to the regulatory gap covering PMSCs’ activities and the lack of accountability in this regard (UNHRC, 2010 (a)), which have already been discussed, the situation is further complicated by the fact that, since PMSCs are specialized companies frequently involved in the performance of conflict activities in particularly dangerous zones, where conventional armed forces of

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<sup>203</sup> UN Global Compact - Principles 1 and 2. <https://www.unglobalcompact.org/what-is-gc/mission/principles> [Accessed 29 Jul. 2017].

<sup>204</sup> HRC Protect, Respect and Remedy: a Framework for Business and Human Rights, Ch. III - *The Corporate Responsibility to Respect*.

the State cannot operate, their activity is likely to affect the full enjoyment of fundamental Human Rights (Lenzerini and Francioni, 2011). This paragraph will provide a brief overview of the rights affected by the employment of PMSCs that are of particular interest for the topic of the present work, that is, the War on Drugs.

The first right to be taken into consideration is the right to life, without the respect of which none of the other rights can be guaranteed; the deprivation of life is prohibited unless it is considered non-arbitrary, which occurs mainly in three cases: the first one concerns the execution of a death sentence rendered by a competent tribunal in a country that envisages capital punishment in its legislation, a judicial competence which PMSCs are not endowed with (Lenzerini and Francioni, 2011). The second case of non-arbitrary deprivation of life is legitimate self-defense, which is a right that PMSCs have under IHL when necessary to prevent loss of life and serious injury to themselves or others, inasmuch as they use it for a lawful aim and purpose and according to the principles of necessity and proportionality (Den Dekker and Myjer, 2011). Thirdly, in the event of armed conflict IHL and IHRL can be limited in their application and a lawful combatant may use lethal force without this being considered arbitrary deprivation of life (Lenzerini and Francioni, 2011). Apart from the latter two situations, thus, deprivation of life at the hands of PMSCs is considered unlawful; the most common circumstances in which this occurs are extrajudicial executions, which are a very diffused phenomenon in complex environments such as the militarized war on drugs in Mexico. In these cases, States can be deemed responsible for killings committed by non-State actors only if it fails to carry out an independent and appropriate investigation (Lenzerini and Francioni, 2011). Right to a humane treatment and the prohibition of torture are also exposed to abuses perpetrated by private contractors, despite being *jus cogens* principles that cannot be derogated in any circumstance. Cruel treatments that can be classified as acts of torture can be used as methods of punishment for detainees, or during interrogations carried out by PMSCs in order to obtain certain information<sup>205</sup>; also the disappearance of persons in life-threatening circumstances can be considered inhuman or degrading treatment and, again taking Mexico as an example, it frequently happens in the aftermath of an arbitrary detention (HRW, 2011); arbitrary detention itself constitutes a violation of the right to liberty and security<sup>206</sup>, and the degree of arbitrariness is more likely to be high when the detention is carried out by private contractors (Lenzerini and Francioni, 2011). These unlawful conducts of PMSCs also constitute a violation of the right to physical and mental health, which is expressly addressed by the International Covenant on Economic,

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<sup>205</sup> See §3.2.1 of the present work on arbitrary detention as a Human Right violation.

<sup>206</sup> ACHR (1969), Art. 7 - *Right to Personal Liberty*.

Social and Cultural Rights (ICESCR) and also by the ACHR as physical and mental integrity<sup>207</sup>; interestingly, the UNHRC specifically commented the respect of the right to health as a responsibility of States even in other countries and at hands of third parties<sup>208</sup>, which could be referred to PMSCs (Lenzerini and Francioni, 2011). More specifically addressing the context of counterdrug initiatives, physical integrity intended as right to health can also be hindered by the detrimental substances released and by the pollution caused during forced eradication campaigns (Perret, 2013), which will be the object of the next paragraph; these eradication operations carried out by private contractors can also constitute a violation of the right to property<sup>209</sup>, to which farmers in coca producer States (mainly Bolivia, Colombia and Peru) are particularly exposed.

Finally, it is important to underline that the enjoyment of all the rights mentioned above cannot be ensured without the adequate judicial guarantees which, in fact, are considered non derogable by the ACHR<sup>210</sup> as essential for the protection of the rights therein enshrined (Lenzerini and Francioni, 2011)

The effect on Human Rights of the use of PMSCs and the relative lack of regularization and accountability is particularly evident in Colombia and Mexico, where U.S. counterdrug military intervention intensively relied on the employment of private contractors. This choice significantly influenced the implementation of international law, since the outsourcing of military and security functions to private forces impedes the classification of the two situations as international armed conflicts, thus hindering the application of IHL norms (Perret, 2012). The gross violations in which PMSCs have been involved in the two countries have been considered a collateral damage of the war against drug trafficking and have not been subject neither to strict State control, nor to adequate redress for the victims and punishment for the perpetrators; the topic will be further discussed in the final chapter of the present work.

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<sup>207</sup> Ibid., Art. 5 - *Right to Humane Treatment*, Par. 1: “Every person has the right to have his physical, mental, and moral integrity respected”.

<sup>208</sup> UNHRC. CESCR *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (Art. 12) §39: “To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law”. <http://www.refworld.org/pdfid/4538838d0.pdf> [Accessed 28 Jul. 2017].

<sup>209</sup> American Convention on Human Rights (1969), Art. 21 - *Right to Property*.

<sup>210</sup> Ibid., Art. 27 - *Suspension of Guarantees*, Par. 2.

### **4.3. Forced eradication as a Human Rights violation**

Eradication of illicit crops, mainly opium and coca, may be considered as the most emblematic operation under the supply-oriented approach that U.S. government applied to the War on Drugs, aimed at cutting drug production directly at its primary source; notwithstanding their claimed efficiency, these operations were hindered by the so-called *balloon effect* and by the lack of consensus among local communities, who in many cases were deprived of their only source of livelihood as a result of forced crop eradication, without being provided with adequate compensation or alternatives. The following paragraphs will address the impact of eradication campaigns on the recipient Andean countries, namely Colombia, Bolivia and Peru, from the perspective of social, economic and political development and stability, as well as the different methods of eradication used, the alternative development programmes and the respective shortcomings. Then, the specific situation of each country will be briefly addressed with regard to the political instability and violence fostered by eradication campaigns; eventually, a case presented before the International Court of Justice on the effects of aerial fumigation across the border between Colombia and Ecuador will be discussed.

#### **4.3.1. The impact of eradication campaigns on the recipient countries**

##### *4.3.1.1. Political, economic and social implications*

The counterdrug efforts in Latin American countries have involved the adoption, as already discussed, of approaches that were mainly oriented towards the reduction of drug supply: in this framework, crop eradication campaigns were deemed the most efficient strategy as to halt drugs to their homeland (Fukumi, 2016), cutting the production at its roots by eliminating the raw material in the producer States; eradication programmes, nevertheless, not only proved to be inefficient in pursuing the aim of eliminating illicit cultivation, but had also a series of disastrous effects on the political stability and the economic development of the recipient countries.

Opium poppy and coca cultivations, which are the main target of eradication campaigns, are in fact concentrated in marginal areas characterized by a poor State presence, a very low level of human development, a severe lack of basic services and infrastructures and a high degree of poverty (Mansfield, 2011); these conditions particularly concern the rural communities, for which these cultivations represent a low-risk option of income in a highly complex and dangerous environment; repressive eradication campaigns carried out without considering the poor social and economic context as the main cause of illicit cultivation proved to be inadequate and even counterproductive (Youngers, 2005). Even though farmers do not have their social, political and economic status improved by the

cultivation activity, the latter often constitutes their only source of income, given the numerous constraints that hinder any other livelihood option, such as underdevelopment, scarcity of natural resources and threatening activity of armed State and non-State actors. The indiscriminate State activity aimed at destroying the crops deprive them of this resource without providing viable alternatives for them to survive; the first and more transversal Human Rights violation caused by eradication campaigns lies in the fact that they deprive these poor communities of their primary, if not only, source of subsistence, preventing them from the full enjoyment of economic and social rights such as food, housing and health services<sup>211</sup> (WOLA, 2014).

In other words, eradication is not complemented by adequate, broader development plans for the local communities, which makes them counterproductive and pushes farmers to offset the impact of the campaigns, either by replanting the eradicated crops or by shifting the cultivations to more remote areas, which is commonly referred to as the *balloon effect* (Mansfield, 2011). Moreover, eradication campaigns proved to be quite inconsistent with the objectives declared at the beginning of the War on Drugs, namely supply and demand reduction and price increase: demand for raw products and drugs in Western countries did not diminish and neither did their availability in the illicit market, while their prices have constantly decreased since the 80s (Youngers, 2005).

Considering that drug trafficking represents often one of the most profitable activities for insurgent armed groups, eradication had also some dangerous political effects, exacerbating already existing tensions and creating a climate of instability and hostility towards national governments and authorities, which in many cases implied the support to the activities of guerrilla groups such as FARC in Colombia and *Sendero Luminoso* in Peru, with an anti-imperialist ideology as a basis for a cooperation between coca growers and the insurgents. In Bolivia, eradication caused violent unrests that led to the death of both coca growers and law enforcement officials (Mansfield, 2011) during the frequent disputes between farmers and UMOPAR, in charge of executing eradication, with the emergence of the Marxist Néstor Paz Zamora Commission as a reaction to U.S. military presence in the country (Fukumi, 2016). It is important to take into account that the campaigns are carried out in a broader context of militarization, whose effects on the respect of Human Rights and the rule of law have already been discussed. Not only the high presence of armed illegal actors in the areas of cultivation intensify violence and atrocities

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<sup>211</sup> American Convention on Human Rights (1969), Art. 26 – *Progressive Development and Realization of Economic and Social Rights*: “The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires”.

against the local population, but the anti-drug security forces themselves were responsible of arbitrary detention, extrajudicial executions and torture (WOLA, 2014).

#### 4.3.1.2. *Methods of eradication and Human Rights issues*

Eradication in drug producer countries is mainly carried out as part of U.S. counterdrug strategy through different methods that always imply the involvement of military forces, as a means to protect the personnel of the operations from the attacks of those who want to safeguard the growing sites (Fukumi, 2016). Manual eradication is considered a scarcely favourable option, since it is labour-intensive and requires the physical presence of agents in areas protected by drug traffickers and armed insurgents, which frequently leads to violent episodes and even to the death of people involved in the campaigns. Notwithstanding this high riskiness, which is not complemented by a guaranteed efficiency of the operations, the steepness of some territories does not allow other options but manual eradications; it is the case of the Peruvian Upper Huallaga Valley, where the U.S. engaged in eradication operations with the CORAH (Coca Eradication in the Upper Huallaga Valley) project in the early 1990s and which throughout the years has been the theatre of the murder of various officers in charge of crop destruction, and even of some civilians (Fukumi, 2016).

Aerial fumigation is considered a more viable option, since it allows the eradication of large numbers of fields with a minimum danger for the personnel; nevertheless, its effectiveness is frequently undermined by the *balloon effect* that leads farmers to shift their activities elsewhere, rather than converting to licit cultivations; moreover, its limited precision made chemicals indiscriminately kill both illicit and legal crops, preventing alternative means for living for local population (Fukumi, 2016) and undermining their food safety, which is already precarious (WOLA, 2014). Most importantly, this kind of operations brought health and environmental concerns for the dangerousness of the chemical herbicides sprayed from aircraft, which proved to be harmful to humans, animals and plants<sup>212</sup> (Mansfield, 2011). The right to health, enshrined in both the principal Inter-American Human Rights instruments<sup>213</sup>, is therefore put at risk by these operations; so are the right to property<sup>214</sup> and movement and residence<sup>215</sup>, since many

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<sup>212</sup> This was particularly addressed by the UN Special Rapporteur for the Right to the highest attainable standard of Health, Professor P. Hunt, during a visit along the Colombia-Ecuador border aimed at focusing on the effects of the aerial spraying of glyphosate.

Available at: <https://www1.essex.ac.uk/hrc/documents/practice/PaulHuntEcuadorColumbia2007.pdf> [Accessed 10 Aug. 2017].

<sup>213</sup> The Right to Health is contained in the American Declaration on the Rights and Duties of Men (Art. 11 – *Right to Health*) and in the American Convention on Human Rights (Art. 5 - *Right to Humane Treatment*).

<sup>214</sup> American Convention on Human Rights (1969), Art. 21 – *Right to Property*: “1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.



farmers are forced to leave their house and their properties without receiving just compensation (The Guardian, 2015); the same happened for some indigenous communities, whose territory of residence was destroyed by indiscriminate aerial fumigation campaigns (WOLA, 2014). The phenomenon of forced displacement of indigenous peoples and other rural groups from their homes is particularly evident in the case of Colombia, where the war against drug traffickers combined with the civil conflict led to severe abuses of indigenous' religious, cultural and health rights (Burger and Kapron, 2017).

Notwithstanding the damages caused by chemical eradication and the consequent concerns of the Andean States, the latter could not refuse to carry out the operations because of their economic dependency on the U.S; moreover, U.S. aid was often provided conditionally depending on the country's drug control performance (Fukumi, 2016). The most important case involving massive aerial fumigation was Plan Colombia, which will be specifically addressed in the following paragraphs; Colombia is currently the only Andean country that allows aerial fumigation (WOLA, 2014).

Eradication can also be carried out on a voluntary basis, in order to avoid violent confrontations with the farmers often caused by coercive methods: many farmers participated in voluntary eradication campaigns, for instance under compensation by the Bolivian government during the nineties, and there were no incidents in this regard. Nevertheless, the absence of certainty and guarantees on the success and profitability of legal crops frequently led participants to replant the eradicated bushes in other fields, or to plant new bushes only in order to obtain the financial contribution to destroy them (Fukumi, 2016). In sum, there has been no eradication method that proved to be effective in reducing drug cultivation in the long run and without causing violent confrontations between military forces, the personnel entrusted with crop destruction, insurgent guerrilla groups and civilians; this is due to the absence of viable alternatives that can convince poor Andean farmers to give up on what they consider their only source of income; on the contrary, alternative solutions are frequently jeopardized by eradication programmes themselves (Fukumi, 2016).

#### **4.3.2. Alternative development: a viable option?**

The programmes aimed at cutting drug production directly at the primary source are complemented by alternative development, which U.S. mainly conceive as economic assistance to the areas affected by

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2. No one shall be deprived of his property except upon payment of just compensation, for reasons".

<sup>215</sup> American Convention on Human Rights (1969), Art. 22 – *Right to Movement and Residence*: "1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law. forced displacement

2. Every person has the right to leave any country freely, including his own. border operations".

eradication, supporting the success of primary drug control programmes such as eradication itself. Alternative development usually consists of crop substitution programmes, aimed at introducing legal cultivations to replace coca and opium, and social projects to strengthen the local community and government; notwithstanding its clear objectives of improving the quality of life of the stakeholders, the credibility of alternative development was undermined by the failure of some projects in 1980s, which revealed some significant shortcomings. First of all, the non-favourable macro-economic framework and the budget constraints, the flexibility of drug traffickers and the widespread *balloon effect* driven by the high demand of illicit substances are factors that significantly jeopardize the efficacy of these interventions, as well as that of eradication campaigns *per se* (Mansfield, 2011). Secondly, the process of narcotic certification, which links the provision of U.S. alternative development support to Andean countries' law enforcement performance, had a negative effect in countries that could not perform adequate drug control due to the lack of financial resources, where decertification led to a vicious circle of rejection of funding and development aid by the U.S. and also the international organizations where they play a primary role, such as the International Monetary Fund (Fukumi, 2006). Thirdly, alternative development programmes fail to address the complex development problems that underlie the cultivation of crops for the production of illicit drugs (Mansfield, 2011).

The General Assembly of the United Nations gave a very broad definition of alternative development during its Twentieth Special Session (UNGASS) in 1998, presenting it as a “process to prevent and eliminate the illicit cultivation of plants containing narcotic drugs and psychotropic substances through specifically designed rural development measures in the context of sustained national economic growth and sustainable development efforts in countries taking action against drugs, recognizing the particular socio-cultural characteristics of the target communities and groups, within the framework of a comprehensive and permanent solution to the problem of illicit drugs” (UNGASS, 1998). This lack of clarity and specificity over the role of alternative development in making rural communities abandon illicit cultivations made that, in practice, it acquired different meanings for different organizations, countries and individuals, with some considering it as a mere means to negotiate the elimination of illicit cultivations, while others see it from a development-oriented approach, underlining the need to address the socio-economic and political constraints of the specific contexts; nevertheless, the first perspective usually prevailed and the effectiveness of alternative development was mainly evaluated with regard to the reduction of crops hectares, rather than considering its impact on the levels of human development (Mansfield, 2011).

Crop substitution aims at providing assistance to the farmers affected by eradication campaigns, covering their losses by introducing legal crop cultivations in order to create new, licit markets (Fukumi, 2016). The programmes proved to be quite efficient in identifying alternative crops, but failed to alter

the infrastructural constraints faced by rural communities in the areas of drug crop cultivation (Mansfield, 2011); their efficiency increased throughout the 1990s due to a decreased demand for coca leaves, mainly caused by the crackdown of Colombian major cartels. Notwithstanding these positive achievements, the economic development of Andean countries was never a priority of U.S. foreign policy, and the permanent failure of the market strategy, together with a lack of coordination among the agencies and the officials involved and the negative role of de-certification, caused scepticism among Andean farmers, which contributed to create a hostile environment for alternative development initiatives (Fukumi, 2016).

The other “face” of these programmes is represented by social development programmes, which are conceived to address issues such as health and food security, infrastructure efficiency and government strengthening; these initiatives were more welcomed by the local communities as well as by the Andean governments, but just as crop substitution they were undermined by a lack of coordination among the involved agencies. A good example is represented by a humanitarian mission carried out by U.S. Southern Command in Colombia between 1993 and 1994, aimed at strengthening cooperation between the two countries and at establishing new infrastructures and strategic basis to attack the Cali cartel; the lack of communication between the Command, the U.S. Embassy and the Colombian Ministry of Defense, nonetheless, caused a misunderstanding of the aim of the operation, which was seen by local communities as a military exercise rather than humanitarian support. Moreover, social development programmes require a long and complex process and numerous and diverse resources in order to show some results, while the stakeholders involved tend to perceive it as ineffective (Fukumi, 2016).

The alternative development strategy, in sum, seeks to integrate regional development assistance with anti-drug law enforcement initiatives (Mansfield, 2011), but its efficacy is undermined by various factors, involving both the hostile environment in which the operations must take place (presence of unlawful armed actors, political instability, extreme economic poverty and lack of adequate resources and infrastructures) and the perspective under which alternative development itself is conceived, giving sharp priority to eradication and interdiction campaigns without considering the human and social factors underlying the illicit use of cultivations (Fukumi, 2016). In order to guarantee a better efficiency, the market strategy should be reviewed in order to make alternative productions appear profitable and valid, providing Andean rural communities with the adequate instruments to participate in legal markets in a competitive way, considering and addressing at the same time the severe constraints that prevent local population from the enjoyment of their fundamental rights and of a decent standard of living (Fukumi, 2016).

### **4.3.3. Cases of violence and abuses caused by eradication in coca-producer countries**

Having addressed the controversial impact that forced eradication campaigns have on the recipient countries, it can be useful to briefly present specific situations of violent confrontations and Human Rights abuses existing in Colombia, Peru and Bolivia; the negative effects of eradication even led to a case brought before the International Court of Justice (ICJ) against Colombian government, which will be addressed in the final paragraph of this section<sup>216</sup>.

#### *4.3.3.1. Plan Colombia and internal displacement of indigenous people and rural communities*

One of the major repressive anti-drug U.S. efforts in Colombia was aerial eradication of cocaine crops, to the point that it was declared almost inseparable from U.S. aid itself (Fukumi, 2016). Under Plan Colombia, aerial eradication was mainly carried out in the southern regions, characterized by a high concentration of coca cultivations and by a consequent high rate of violence related to drug industry and to the presence of paramilitary insurgent groups. Even though it was considered a preferable option to the more dangerous and labour-intensive manual eradication, aerial fumigation had some negative effects in the region: first and foremost, it fostered the already significant level of violent confrontation between the government, cartels and guerrilla groups involved in drug trafficking, with the effect of weakening the government rather than strengthening and supporting it; secondly, not being complemented by the provision of adequate alternatives, it caused a worrisome spread of unemployment and caused a severe loss of income to rural populations (Fukumi, 2016). It was just this deprivation of their income possibilities, together with the hostilities and military confrontations derived from eradication campaigns, which forced many people to move from their homes. The phenomenon of internally displaced peoples (IDPs) in Colombia was deeply influenced by counterdrug efforts and mainly targeted ethnic minorities and indigenous groups<sup>217</sup> such as Afro-Colombians, which in most cases, due to the over-burdening of local authorities, have not received the promised financial reparations or an other accommodation, especially when they constituted isolated cases rather than mass displacements (IDMC, 2014). IDPs were forced to abandon their territories because the combination of counterinsurgency measures and coca fumigation operations caused severe harm to their health, their economic subsistence and the environment they inhabited, without providing meaningful or adequate alternatives (IDMC, 2016).

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<sup>216</sup> See §4.3.3.4. of the present work on the ICJ case *Aerial Herbicide Spraying*.

<sup>217</sup> In 2013, indigenous groups in Colombia made up 73% of total mass displacement victims, according to the UN Office of Coordination of Humanitarian Affairs (IDMC, 2014).

Indigenous people constitute a particularly affected and consistent part of IDPs, since their traditional and ancestral lands have acquired an important role in the large-scale production of coca leaves, opium poppy and cannabis crops; the strategic importance of the areas where they are located led to a disproportionate impact of counterdrug measures on these groups (UNHRC, 2010 (b)). Not only they were persecuted for their cultural use of narcotic substances produced with these cultivations in the framework of counterdrug efforts, but they were also victims of drug producers, who either recruited them into the production process under violent and exploitative labour conditions, or, more frequently, forcibly removed them from those territories. Drug producers, in fact, were driven into indigenous peoples' lands by the need to maintain the profitable cocaine industry under control in the context of the War on Drugs (Burger and Kapron, 2017).

Aerial eradication of illegal crops had a severe impact on indigenous' subsistence activities, preventing them from cultivating and harvesting products that are necessary for their nutrition, driving them deeper into poverty; fumigation caused forced migration not only directly, by eliminating people's subsistence patterns, but also indirectly, generating violent conflicts between drug producers and governmental armed forces (Dion and Russler, 2008) and violating a series of rights enshrined in the Declaration (UNDRIP) that UN adopted in 2007 to address indigenous' protection issues. Among these, the right to self-determination and free pursuing of their economic, social and cultural development<sup>218</sup>, the right to life, physical and mental integrity, liberty and security<sup>219</sup> and the right not be forcibly removed from their lands or territories<sup>220</sup> are clearly violated every time an individual belonging to an indigenous community is forced to leave his territory because of violence and abuses derived from crop eradication campaigns. Moreover, such operations jeopardize their right to the highest attainable standard of health<sup>221</sup>, due to the above-mentioned dangerous effect of the chemicals used, the right to preserve their own culture<sup>222</sup>, the right to occupy the land and to use the resources they traditionally owned<sup>223</sup> and to protect and conserve the latter's productive capacities<sup>224</sup> (Burger and Kapron, 2017).

In sum, forced aerial eradication campaigns in Colombia put a particularly vulnerable group into a dramatic situation from the Human Rights perspective, in a broader context of violent confrontations between the government, paramilitary groups and drug traffickers.

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<sup>218</sup> UNDRIP (2007), Art. 3.

<sup>219</sup> Ibid., Art. 7.

<sup>220</sup> Ibid., Art. 10.

<sup>221</sup> Ibid., Art. 24.

<sup>222</sup> Ibid., Art. 8.

<sup>223</sup> Ibid., Art. 26.

<sup>224</sup> Ibid., Art. 29.

#### 4.3.3.2. Militarized eradication, violence and abuses in Bolivia

Due to its complex and unstable political and economic situation, Bolivia has always been particularly dependent on U.S. aid, not only to implement counterdrug operations, but also and above all to obtain financial support and bank loans by multilateral institutions: this is why U.S. could put a significant pressure on the country to make it submit to mid- and long-term eradication plans, notwithstanding the social unrest that this would inevitably provoke. The first militarized eradication operation seeing the direct military presence was Operation *Blast Furnace*, which was launched in 1986 and envisaged aviation and counterinsurgency training, as well as helicopter logistical support, focusing on law enforcement raids against traffickers that, in the practice, resulted in violent attacks against peasants in various villages. *Blast Furnace* was so fiercely opposed by local population that the subsequent operation, called *Snowcap* and launched two years later, could not be publicised by the government (Fukumi, 2016); throughout the years, the continuity with certain dictatorial practices and the well known involvement of high standing political figures in drug trafficking business undermined democratic processes and made the whole U.S. military presence in the country broadly criticised (Salazar Ortuño, 2003).

The militarized approach to drug production and trafficking and to all kind of protest or unrest reached its peak under the corrupt and unstable government of H. Bánzer Suárez and found its clearest expression in *Plan Dignity*, which was developed and implemented in 1997 with strong U.S. support and consisted of eradication, interdiction, alternative social development programmes and prevention of money laundering. The whole State apparatus was involved in the execution of the Plan, and an integrated force (FTC - *Fuerza de Tarea Conjunta*) was created, integrating the army with aerial, armed and police forces and also private contractors (Salazar Ortuño, 2003); among these bodies, the anti-narcotics rural police, called UMOPAR, was the major responsible for episodes of Human Rights abuses such as arbitrary use of force, unlawful detention and extrajudicial killings, which were very frequent in the framework of aggressive coca eradication efforts, strongly resisted by growers especially in the sub-tropical region of Chapare (HRW, 1996). The U.S. weaponry which UMOPAR were equipped with, such as shotguns and automatic rifles but also tear gas and smoke grenades, caused numerous deaths and injuries when deliberately and indiscriminately used to repress riots and to force people out of their homes; moreover, many people were arbitrarily arrested and unlawfully imprisoned on the grounds of alleged criminal offences, and their rights and constitutional guarantees were not safeguarded by government's drug prosecutors since to do so would have opposed them to the UMOPAR (HRW, 1996). Even though the U.S.-supported eradication campaign led to successful results in cutting drug production in Bolivia, this came with a price, first and foremost because farmers were given no choice with regard to the destruction of coca cultivations, which was carried out by force, and were not

provided with the possibility of switching to alternative crops (Faiola, 2001). The economic shock that the programme caused to thousands of poor families in the Chapare not only resulted in a human tragedy for these communities, but also led to an explosion of violent resentment against the lack of adequate alternatives provided and the ever-increasing involvement of military forces in the eradication campaigns, with both peasants and soldiers wounded and killed in various episodes (Pinto Ocampo, 2003). In September 2000, for instance, following the establishment of three military U.S. bases in the Chapare, farmers and coca producers organized a violent blockade of the country's major highway, causing an enormous economic damage to national exports and hindering the refuelling of various cities in the departments of La Paz, Cochabamba and Santa Cruz; around twenty people were killed and more than one hundred were wounded during the blockade against coca eradication and the militarization of the area.

Even though the U.S. did not play a direct role in perpetrating the abuses described in this paragraph, its responsibility in funding, training and equipping UMOPAR is undeniable (HRW, 1996), as well as the backing to governors with past implications in drug-related business, such as Banzer Suárez (Coffin and Bigwood, 2005), and the enormous pressure they exercised over Bolivian government for more stringent counterdrug measures, which led the authorities to neglect the needs and the rights of coca growers.

#### *4.3.3.3. Eradication in Upper Huallaga Valley and the role of Sendero Luminoso in Peru*

As in Colombia, even though in a minor degree, also in Peru coca growers were affected not only by the counterdrug measures carried out by the government, but also by the activity of a subversive group, in this case the communist militant *Sendero Luminoso* ("Shining Path"), which became involved in drug smuggling and trafficking operations in the last two decades of the twentieth century. *Sendero Luminoso* could easily penetrate the Upper Huallaga Valley, where coca growing and drug trafficking activities are primarily located, at the beginning of the 1980s and acquired a role of mediation between weak peasants' organizations and drug traffickers, becoming a source of protection for both against the police, while systematically attacking the officials in charge of crop eradication and substitution (Navarrete Frías and Thuomi, 2005). Meanwhile, in fact, U.S.-backed eradication efforts in the region had begun: the first attempt was represented by *Operation Verde Mar*, which consisted of setting fire to coca plantations in the city of Tingo María, which had become the regional centre of coca production. The operation resulted to be a failure, since the crops were re-planted almost immediately; the U.S. then established the CORAH (Coca Eradication in the Upper Huallaga Valley) project and started eradication programmes in 1983. CORAH workers were frequently subjected to violent attacks by the farmers, who were deprived of their only source of income; moreover, manual eradication methods were not efficient

in completely removing the crops, and had a harmful effect on the soil, which was frequently left unproductive, jeopardizing any attempt of crop substitution (Hutchinson, 2009). Taking into account these negative outcomes and the fact that CORAH workers were supervised and protected by UMOPAR units, whose violent methods have been addressed when presenting its Bolivian equivalent body, it can be inferred why *Sendero Luminoso* and its anti-State orientation were initially welcomed by rural communities as a safeguard against indiscriminate eradication policies, which facilitated the penetration of armed guerrilla practices in the region; in other words, eradication involuntarily created a connection between the local population and the insurgents (Hutchinson, 2009).

If at first the presence of the militant group was a useful source of protection from traffickers and the government's policies, it soon revealed its violent and extremist face, slaughtering, threatening the farmers trying to impose its strict Maoist ideology to the farmers' community, which implied the elimination of the State's presence even by destroying essential infrastructures such as schools, sanitary posts etc., while manifestations of the traditional Andean indigenous culture were not allowed (Navarrete Frías and Thuomi, 2005). Farmers soon organized self-defense armed groups, called *Rondas Campesinas*, to confront *Sendero Luminoso* and to protect inhabitants against its criminal activities and abuses; understanding that farmers' support was necessary in order to defeat the increasingly powerful insurgents, President Fujimori avoided direct confrontation with coca growers and de-penalized their activity, loosening their dependency on the protection of the criminal group; this sort of truce went on throughout the nineties and the government succeeded in significantly weakening *Sendero Luminoso's* influence in the region. Nevertheless, the Maoist guerrilla movement had succeeded in its objective of severely undermining the relationship between farmers and the government (Hutchinson, 2009): once the issue of *Sendero Luminoso* was mostly solved, Fujimori started to promote forced eradication campaigns during the last years of his mandate, which fostered a strong hostility among the *cocaleros*, who were left again deprived of their primary source of subsistence, just as in Colombia and Bolivia. The violent confrontations emerging from the incompatibility between the farmers' necessities and the government's policy aims brought the region into a situation of tension that could only be solved with adequate and efficient alternative development programmes (Navarrete Frías and Thuomi, 2005) and with consideration for the impact that eradication campaigns had on local population and environment (Hutchinson, 2009).

In sum, Peruvian farmers in the Upper Hulluaga Valley were deeply affected by a dual threat: on the one hand, violent and often indiscriminate eradication campaigns that deprived them of their main source of income while not providing adequate instruments for their subsistence, nor for the protection of their fundamental rights; on the other hand, the criminal activities of an anti-State guerrilla group involved in drug trafficking businesses, which benefited from the very eradication programmes that fostered their



alliance with local people (Hutchinson, 2009) and whose presence significantly worsened security conditions in the region (Riding, 1989), constantly intimidating, exploiting and slaughtering local communities.

#### 4.3.3.4. ICJ case: *Aerial Herbicide Spraying (Ecuador v. Colombia)*

On the 31st of March 2008, Ecuador seized the International Court of Justice<sup>225</sup> (ICJ) of a dispute concerning the aerial spraying by the Colombian government of toxic herbicides across its border with Ecuador, in the context of the latter's counterdrug eradication campaigns of illicit crops. While Ecuador claimed that aerial spraying of herbicides caused severe harm to humans, plants and animals inhabiting the area, with a particular damage for indigenous communities, Colombia replied by stressing the importance of those operations in the broader framework of eradication of cocaine trafficking, which was the main source of revenue for FARC insurgents; the decision to resort to the ICJ followed the failure of various efforts to negotiate the end of the fumigations by traditional diplomatic means (ICJ, 2008). Even though the case was eventually removed from the Court's list due to the reach of an agreement between the two parties in September 2013 (Milanovic, 2013), a brief overview of the alleged violations of Human Rights caused by Colombia's fumigation can be interesting as to understand the broad implications of this kind of campaigns.

After having received the application with which Ecuador instituted proceedings against Colombia, the ICJ fixed the terms for the filing of, respectively, a Memorial and a Counter-Memorial; in its document, Ecuador reiterated its strong commitment to "international efforts aimed at the eradication of the scourge of narcotic substances<sup>226</sup>", but it equally highlighted the need to carry out such efforts in the respect of international law. The Memorial contains a detailed description of the harms that aerial spraying of chemical herbicides, glyphosate in particular, caused to humans, plants and animals in the area across the border between Ecuador and Colombia, with a focus on the situation of particularly vulnerable indigenous groups; the first decade of the 21st century brought an intensive use of aerial fumigation under the U.S.-funded Plan Colombia. Colombia is therefore considered responsible for the violation of various Human Rights, which are enumerated in the Memorial, of violation of territorial sovereignty and of failure to prevent transboundary harm. It was also stressed that people living in the

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<sup>225</sup> The Court's jurisdiction was invoked on the basis of Art. 31 of the Pact of Bogotá (American Treaty on Pacific Settlement, 30 apr. 1948), to which Ecuador and Colombia are parties, according to which States parties to the treaty accept the Court's compulsory jurisdiction *ipso facto*. Art. 32 of 1988 UN Trafficking Convention was also invoked, as it states (Par. 2) that disputes that cannot be settled by traditional diplomatic means shall be referred to the ICJ.

<sup>226</sup> Memorial of Ecuador, §1.9. <http://www.icj-cij.org/files/case-related/138/17540.pdf>.

border communities across the boundary with Colombia are among the poorest in the country: any threat to their sources of subsistence, that is the food and income generated by the crops and animals they raise, has a potentially disruptive effect on the quality of their lives<sup>227</sup>. Not only, thus, these people suffered from a range of adverse health effects resulting from the exposure to chemicals, such as severe eye and skin infections, respiratory and gastrointestinal diseases, but they also had their livelihood hindered by the indiscriminate spraying of these products, which contaminated animals and plants used for food production.

With regard to indigenous people, who constitute approximately one third of Ecuadorian population, they are deemed especially vulnerable to aerial fumigation's effect as "not only do they rely on the local plants, animals and water for their physical survival, they rely on them also for their cultural well-being and survival as communities<sup>228</sup>"; the UN Special Rapporteur on the situation of indigenous people had already observed in 2006 the particularly severe impact that aerial spraying of chemicals had on indigenous communities such as the Awá or the Sumac Pamba, which were displaced after fumigation and never returned to their place of origin (UNHRC, 2006). In the Memorial, Ecuador accused Colombia of having violated the provisions of international instruments specifically addressing the situation of indigenous peoples, such as ILO Indigenous and Tribal Peoples Convention (1989), which was the forerunner of the above-mentioned UNDRIP (2007), or Article 27 of ICCPR, on the rights of persons belonging to minorities to "enjoy their own culture, to profess and practise their own religion, or to use their own language<sup>229</sup>"; the special condition of indigenous people in the context of counterdrug eradication is given by the importance of the connection they have with the territory they inhabit and its natural resources, whose preservation is essential<sup>230</sup> for their right to a decent existence and treatment<sup>231</sup>. The damages provoked by the toxic herbicides prevented them from the enjoyment of their traditional lifestyle, forced them to abandon their territories and to compromise their own culture and identity.

As to the harm suffered by affected Ecuadorian population in general, both indigenous and non, the Memorial enumerates a series of rights that are protected by various regional and international instruments and have been violated by the eradication campaigns carried out under Plan Colombia: among these, the right to life and to a decent existence, the right to physical and mental health, the right to food and water, the right to a healthy environment, the right to property, the right to humane treatment. In addition, by causing the deposit of toxic substances on the Ecuadorian soil and their

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<sup>227</sup> Memorial of Ecuador, §6.1.

<sup>228</sup> Memorial of Ecuador, §6.106.

<sup>229</sup> ICCPR, Art. 27.

<sup>230</sup> See ILO Convention N°169, Artt. 13 and 15.

<sup>231</sup> Memorial of Ecuador, §9.25-26.

dispersion in the airspace in dangerous quantities, not only without the direct consent of the concerned State, but despite the latter's consistent objection, Colombia is accused of violation of territorial sovereignty of Ecuador, which is a cornerstone of inter-State law and is also specifically addressed by the 1988 UN Trafficking Convention<sup>232</sup>.

Finally, Colombia failed to take adequate measures to prevent and mitigate the harmful effects of the chemical products employed during eradication campaigns: under international law, in fact, States have the obligation to prevent transboundary harm resulting from activities within their own control; again, Ecuador invoked the UN Trafficking Convention as its Article 14 specifies that States shall adopt appropriate measures to eradicate plants cultivated illicitly in the respect of fundamental Human Rights and of environmental protection<sup>233</sup>.

Curiously, the same Article 14 of 1988 Convention has been used by Colombia to justify the eradication operations in its Counter-Memorial, which was published almost one year after as a response to Ecuadorian government: Colombia, in fact, claimed to act under the obligation, as a signatory to the Trafficking Convention, to cooperate in the fight against drug production and trafficking<sup>234</sup>. The Colombian government largely focused its response on the gravity of the situation due to the overlapping of widespread illicit drug trafficking and armed insurgency against the government, with a worrisome and constant increase in the number of guerrilla members and the quantity of illegal crops in the country, especially in remote areas such as those across the boundary with Ecuador, where drug business was in the hands of illegal armed groups; Plan Colombia succeeded in reversing this trend, and its implementation is necessary as to ensure a secure and peaceful existence to the inhabitants of Colombia and the neighbor countries: in the framework of the Plan, aerial spraying proved to be the most effective method for large-scale eradication. Colombia also highlighted the lack of scientific evidence of significant risk to the health and/or the environment due to the exposure to the spray mixture used during the operations; moreover, the latter were implemented under strict control procedures, in order to minimize any risk connected with them. Finally, the Counter-Memorial states

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<sup>232</sup> UN Trafficking Convention (1988), Art. 2 - *Scope of the Convention*, Par. 2: "The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States".

<sup>233</sup> Ibid., Art. 14 - *Measures to Eradicate Illicit Cultivation of Narcotic Plants*, Par. 2: "Each Party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as opium poppy, coca bush and cannabis plants, cultivated illicitly in its territory. *The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment*".

<sup>234</sup> Memorial of Colombia, §3.64 : <http://www.icj-cij.org/files/case-related/138/17548.pdf>

that “the aerial spraying programme has not violated human rights in Ecuador, or the rights of its indigenous peoples<sup>235</sup>”, nor the principle of State sovereignty.

After the pleadings were filed, the ICJ ordered the submission of, respectively, a Reply by Ecuador and a Rejoinder by Colombia, in which the former reiterated the responsibility of Colombia in violating Human Rights, State sovereignty and in misrepresenting the spray programme, while the latter replied that Ecuador had not substantiated its claims of damage and had made a selective use of documentary evidence. Notwithstanding these points of discord, on the 12th of September 2013 the ICJ was notified through a letter from the Agent of Ecuador that the Parties had reached an agreement three days before, and the government wished therefore to discontinue the proceedings in the case, which was accepted by the Colombian counterpart; the case was therefore removed from the Court’s List. The agreement established a 10-km exclusion zone in which aerial spraying operations would be prohibited, and created a Joint Commission to monitor that such operations outside that area would not cause herbicides to drift into Ecuador; moreover, new operational parameters were set up for Colombia’s spraying programme, and a dispute settlement mechanism was established.

Even though eventually there was no effective decision of the ICJ on the case, it is interesting to note how the effects of herbicide spraying operations that have been addressed throughout this chapter can be a reason of concern for a government, to the point that it chooses to resort to an international forum, and how they can be at the same time considered as the only viable option as to reduce drug trafficking phenomenon in another State.

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<sup>235</sup> Colombia Counter-Memorial, §9.170.

## Part III

# ADDRESSING HUMAN RIGHTS VIOLATIONS UNDER THE INTER-AMERICAN SYSTEM: CHALLENGES, ACHIEVEMENTS AND JURISPRUDENCE

## **Chapter 5. Drug policies in the framework of the Inter-American system of Human Rights**

### **5.1. Drug policies and Human Rights protection: an unsolvable tension?**

Having presented the dynamics of drug trafficking as a part of TOC and the functioning of the Inter-American system of HR, and having then addressed the violations that counterdrug measures can cause on basic rights and freedoms in the context of the War on Drugs, it is now necessary to put these topics together and see how the Inter-American institutions deal with the contrast that apparently exist between HR and certain forms of implementation of drug policies. This chapter will address the Latin American region starting from the peculiar political context of the majority of its States at the moment in which the Inter-American system was created; the endemic problems and the unsolved dynamics that the democratic transition failed to eradicate will be then presented as one of the causes of weak institutions and political instability, which, once U.S.-led counterdrug policies started to spread, provided a fertile ground for an explosion of violence and abuses. This led to the evolution and improvement of the debate on the impact of drug policies in Latin America, which will be briefly addressed; finally, the peculiar relevance that the practice of the Court and the Commission suggested for HR will be discussed through the principles of interpretation applied to the American Convention on Human Rights.

### **5.1.1. Latin America and drug policies: challenges and debates**

#### *5.1.1.1. The complexity of the Latin American context*

Even though the primary aim of the global drug prohibition regime is the health and welfare of mankind, as declared in its main regulatory instruments<sup>236</sup>, counterdrug measures in the practice implied numerous and diverse violations of international Human Rights law, including the right to the highest attainable standard of health, as discussed throughout the present work. The War on Drugs launched by U.S. government created a perspective focused on a common enemy against which it was necessary to concentrate all the energies and the resources: this went to the detriment of the rights, the economic welfare and the civil liberties of the population of targeted countries, which followed the U.S. approach and focused on the repression of the illicit market (Jensema, 2013). The fact that Latin American countries in the second half of the past century experienced a complex transition from authoritarian regimes towards a democratically elected government, which left various unsolved issues, certainly had an influence on their dependence on U.S. policies and aid. The problems inherited by the past regimes that affected democratic governability concerned the safeguard of basic HR, the equality of wealth distribution, the transparency of political processes and, in general, the legitimacy of governmental power: Latin America, despite not being the poorest region in the world, is the most unequal and has a worrisome degree of corruption among the authorities, together with a certain lack of political participation for the most vulnerable sectors of society (Insulza, 2006). A report issued by the OAS General Secretariat in 2013 highlighted the corruption-based nature of the illegal drug economy, indicating that criminal organizations use bribery and collusion with public officials as tools to protect their operations and ensure their impunity. Drugs are considered the illegal business with the highest capacity to penetrate, erode and reconfigure State institutions, and public servants with great responsibilities are frequently tempted by the financial compensation they are offered in exchange for tolerating illegal activities; Latin American countries, with their weak institutions, loose regulations and low levels of judicial independence, offer a great possibility of development to criminal groups involved in illegal drug businesses (OAS General Secretariat, 2013b). The same report showed that there is a substantial difference between the countries for which the drugs are destined and those where they are produced and/or trafficked, in that the latter have weak and poorly structured and coordinated institutions, short on resources and broadly corrupted: this State frailty provides a fertile ground for organized criminal activities, with violence as the main procedure driving drug business (OAS General

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<sup>236</sup> See the Preamble of the UN Single Convention on Narcotic Drugs (1961), in which the parties declared to be “concerned with the health and welfare of mankind”.

Secretariat, 2013a). This difficult situation facilitates abuses and violations from a double perspective: not only it fosters the marginalization of certain categories of citizens (who, as a result, frequently start to use illegal substances) and allows abuses of power by the authorities, but it also increases the dependency on foreign aid, which, in this particular case, led to the acceptance of tough U.S. policies that caused harm in the name of the war on drugs, as seen in the previous chapters.

The militarization of drug policies severely undermined democratic institutions, fostering phenomena such as corruption, arms trafficking, forced displacements and territorial disputes; the involvement of armed insurgent groups in the business of drug trafficking created a violent and unstable environment, with the use of lethal force as the order of the day, and the criminalization of drugs led to disproportionate sentences and abuse of arbitrary detention, which in turn caused the overcrowding of jails and the elimination of judicial guarantees. Eradication campaigns caused severe harm to peasant communities and to the local environment and brought social unrest and political instability (WOLA, 2014), while the frequent employment of private contractors to fight drug-related crimes compromised the control of their operations and the accountability for violations and abuses. On the whole, this impact suggested that the tension between human rights and drug policies is unsolvable, and that the latter necessarily go to the detriment of the former; this caused strong concerns among the Latin American countries, stimulating the debate on the compatibility between counterdrug efforts and the respect of the fundamental rights and freedoms.

#### *5.1.1.2. The evolving debate on drug policies in Latin America and the need for a new approach*

The discussion on the impact of drug policies in Latin America has broadened throughout the first decade of the 21st century, as a result of the “intensity of the violence associated with drug trafficking<sup>237</sup>” as a cause of concern among OAS members. Professionals, non-governmental organizations and OAS institutions carried out various studies and analyses on the topic, such as the report “The Drug Problem in the Americas”, published by the General Secretariat in 2013, addressing the relationship between drugs and public health, security, development, economy etc. In the same year, OAS member States adopted the Declaration of Antigua as an acknowledgment of the problem and of the common responsibility in this regard, and of the role of the State as a “guarantor of peace” (WOLA, 2014). In April 2016, the UN General Assembly released a Declaration in which its members recognized “persistent, new and evolving challenges that should be addressed in conformity with the three international drug control conventions, which allow for sufficient flexibility for States parties to

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<sup>237</sup> OAS (2013). “The Drug Problem in the Americas” - Analytical Report. Preamble.

design and implement national drug policies according to their priorities and needs, consistent with the principle of common and shared responsibility and applicable international law” (UNGASS, 2016): as a matter of fact, while the global drug problem evolved throughout the years, acquiring an ever-increasingly globalized and cross-border dimension, States’ practices show that the prohibition regime has not changed since its initial configuration, which undermined its effectiveness (WOLA, 2014); moreover, even though it allowed some practical achievements, the adoption of U.S.-led policies did not follow a pattern that was specifically adapted to Latin American countries’ needs and problems, as presented in the previous paragraph.

The international drug control regime developed through the three UN Conventions was based on two fundamental assumptions: on the one hand, that the removal of the sources of productions would eventually suppress the wholesale supply of illicit substances (the so-called *supply-side approach*); on the other, that the relationship between the scale of the drug market and the level of harm caused to human health is linear and simple, so a focus on the reduction of the size of the market is sufficient as to achieve the “zero-drugs” objective. Both premises proved to be wrong, since the reality of drug trafficking and consumption is much more complex, with different patterns and dynamics for different contexts; as a matter of fact, this approach did not succeed in reducing the size of the drug market, which on the contrary has grown since the adoption of the UN Single Convention, expanding its routes of distribution; the already mentioned *balloon effect* jeopardized the effects of counterdrug measures in the long run (Trace, 2011). On the other side, the reduction of demand has been mainly carried out through two methods: the “softer”, based on programmes of citizens’ information and education on the health and social risks of drug use, which nevertheless have a marginal and short-lived impact, and the “harder”, that is criminalization, punishment and stigmatization of drug users (Trace, 2011), which has detrimental effects for their health and the enjoyment of their freedom and dignity, as the previous chapters have discussed: the sharp increase of the inmate population caused by counterdrug enforcement policies did not coincide with an improvement in the prison system, which compromised the condition of detainees (OAS General Secretariat, 2013b).

In sum, global prohibition regime in Latin America had the negative effects of fostering an illicit market controlled by violent organized criminal groups, marginalizing vulnerable citizens who already lived in a difficult context of severe poverty and hindering the enjoyment of fundamental HR; above all, the high expenditure destined to counterdrug programmes was misdirected, focusing exclusively on the law enforcement and military side, to the detriment of public health, harm reduction, treatment and rehabilitation (Trace, 2011). The most recent discussions on drug policies addressed the need for a new approach based on harm reduction, that is, the minimization of the negative effects of drug consumption without the elimination of the latter. Such an approach would imply a strong commitment of drug



policies to public health and would reduce the existing tension between drug control and Human Rights obligations, avoiding the stigmatization of drug users and the abuse of detention; moreover, their cost effectiveness has been proved, since they require low expenses but potentially have a substantial impact on the lives of affected persons. Harm reduction as a new major policy goal would thus redefine drugs as a health and social problem, two dimensions that have been neglected (Wodak, 2011). Nevertheless, a truly modernising reform is hindered by the lack of global funding and the institutional interests of some agencies that benefit from their involvement in counterdrug operations, such as DEA; moreover, throughout the years the War on Drugs has established a certain political rhetoric based on “tough” counterdrug measures, and a government opting for riskier and softer policy alternatives is likely to be mocked and delegitimized (Trace, 2011).

In sum, the multilateral debate on drug policies in Latin America evolved in a direction that acknowledged the importance to incorporate HR into the planning, implementation and evaluations of counterdrug programs and policies, focusing on health and social issues, since the traditional approach based on supply reduction and indiscriminate criminalization proved to be ineffective; nonetheless, problems of legitimacy, transparency, political stability and economic development afflicting the region since decades severely hinder such an evolution.

### **5.1.2. The position of Human Rights in the Inter-American system**

#### *5.1.2.1. Universal and regional relevance of Human Rights*

Since the aftermath of WW2, the universal protection of HR acquired ever-increasing importance, and the three regional systems that developed throughout the decades (the African, the European and the Inter-American) enriched the universal regime adding their particularities to its initial uniformity. The World Conference on Human Rights held in Vienna in 1993 reunited an unprecedented number of government delegates and representatives of the international HR communities with the principal aim of renewing the shared commitment to the promotion, protection, renewal and implementation of HR global regime, addressing new challenges and phenomena (Cançado Trindade, 1998b); while acknowledging the common principle of HR as entailing obligations *erga omnes*, the Conference was partly dedicated also to the analysis of specific regional contexts, with the publication of the relative reports. The report on Latin America and the Caribbean reiterated the indissoluble link between HR, democracy and development and the need to provide special guarantees to the most vulnerable groups (World Conference on HR, 1993). The Conference represented an important occasion to reaffirm a common concern with the protection and promotion of a universal culture of HR observance, to be

implemented on the regional level without neglecting the specificities of each geographical area (Cançado Trindade, 1998b).

The practice of the two bodies responsible for the promotion and protection of the fundamental HR among Latin American countries, namely the Court and the Commission, suggests a differentiation of such rights from the others, and so does for the respective treaties. A clear demonstration of this particular consideration of HR lies in the interpretation of the ACHR, which in its Article 29 enumerates a series of restrictions in this regard: it is forbidden to interpret the Convention in a way that limits the enjoyment of the rights recognized therein or in other international treaties, or precludes “other rights and guarantees that are inherent in the human personality”<sup>238</sup>. This means that the ACHR shall be interpreted consistently not only with the principles itself expresses, but also with other international treaties and relevant instruments in this sense: this significantly expands the jurisdiction of the Inter-American bodies when interpreting the key HR instrument of the system, following the perspective of interdependence of these rights, even if they are not all contained within the Convention (Lixinski, 2010).

#### *5.1.2.2. Principles of interpretation applied by the Inter-American Court of Human Rights*

Interpretation of HR treaties as a central issue was addressed by the Court when it endorsed a previous ICJ Advisory Opinion by stating that “an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation” and posing the international protection of HR as the cornerstone of the “evolving American law”<sup>239</sup>; this means that the legal status of an instrument must be considered in connection not with the normative significance it had when it was created, but rather with the evolution of the system it is part of. At the same time, the IACtHR always favoured the teleological method as the general rule of interpretation of international law, as explicitly contained in the Vienna Convention<sup>240</sup>, which takes into consideration of the context, the object and the purpose of the concerned treaty. In light of the teleological interpretation, the IACtHR promoted the idea of a *pro-homine* interpretation of the ACHR and similar treaties, that is, in the way which is the most protective of the individual HR therein enshrined (Lixinski, 2010). This does not mean that the Court systematically refuses other methods of interpretation, such as the literal or the historical ones; nevertheless, the traditional literal interpretation of international law seems inadequate for the peculiar HR context, which requires the guarantee of the effective application of the legal

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<sup>238</sup> ACHR (1969), Art. 29 - Restrictions regarding Interpretation.

<sup>239</sup> IACtHR Advisory Opinion OC-10/89, §37.

<sup>240</sup> See VCLT (1969), Art. 31 - *General Rule of Interpretation*, Par. 1.

instrument as a means to protect the individual. The special nature of HR treaties was explicitly discussed in the *Maripipán Massacre* case, when the Court defined such instruments as “inspired by higher shared values (focusing on protection of the human being)<sup>241</sup>”, to be interpreted “hand in hand with evolving times and current living conditions<sup>242</sup>”; this evolutionary and dynamic interpretation was deemed necessary as to guarantee the choice which is most favourable to HR protection.

In the light of this principle, a phenomenon that Burgorgue-Larsen defined “inter-conventional migration” was put into practice, and the Inter-American HR system expanded its interpretation of HR treaties in light of other instruments, such as IHL, environmental law, the norms on the protection of indigenous and minorities and so forth, drawing parallels between them and the provisions contained in the ACHR (Lixinski, 2010). This normative opening towards legal sources external to the Inter-American system remains in the domain of *pro-homine* interpretation (Burgorgue-Larsen, 2014); following this approach, the Court made it clear in numerous occasions that the HR system is separate from general international law and frequently requires a different treatment, and used it to expand its jurisdiction when deemed necessary (Lixinski, 2010).

The importance of the HR regime as a common framework of commitment for OAS members, as well as a field to confront and address shared challenges, was also sustained by the Commission in its work of HR protection and promotion, carried out through examination of individual petitions, thematic and country rapporteurship, precautionary measures and, of course, the referral of specific cases to the Court (Álvarez-Icaza, 2014).

## **5.2. The Inter-American system of Human Rights dealing with counterdrug policies**

This part will briefly address the evolution of the Inter-American system accordingly to the needs and the dynamics emerging from a transforming context, in which the majority of Latin American States experiences a democratic transition after years under authoritarian regimes. The changes mainly regard a higher degree of transparency in the procedures of the Court and the Commission, a streamlining of the procedures and, above all, an increased participation of the individual claimant in the proceeding concerning alleged violations he/she suffered. As well as these achievements, the main challenges and shortcomings which the two bodies have to cope with will be presented, with a particular focus on domestic compliance with ACHR provisions by member States and on recent developments in the financing mechanisms.

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<sup>241</sup> IACtHR, *Case of Maripipán Massacre v. Colombia*. Judgment of 15 Sep. 2005, Series C N°134, §104.

<sup>242</sup> *Ibid.*, §105.

After this presentation, the activity of both HR bodies will be presented: first, the development and the achievements of the Commission concerning its reporting function as well as its examination of individual petitions; secondly, three cases from the jurisprudence of the Court will be examined as a demonstration of how the protection of fundamental freedoms and rights of the individual was deemed more important than the respect of domestic laws serving State counterdrug policies.

### **5.2.1. Past achievements and challenges for the future**

#### *5.2.1.1. Evolution of the Inter-American Human Rights bodies in a changing context*

Since its foundation with the adoption of the OAS Charter in 1948, the Inter-American system of HR has undergone a substantial transformation with regard to the functioning and the effectiveness of its institutions<sup>243</sup>: the IACHR significantly expanded its powers as the body responsible for HR promotion, monitoring and protection in the region, while the entry into force of the ACHR gave a solid legal basis to the mechanism and the IACtHR developed a broad case-law that acquired a certain relevance on the international level (Cançado Trindade, 1998b). The resort to both the Court and the Commission for the examination of individual petitions has exponentially grown, which shows a higher degree of credibility of these institutions; moreover, their autonomy and independence with respect to the member States' political influence, guaranteed by their composition, is a further element of credibility, efficacy and standing (Insulza, 2006). In 2013 the IACHR proposed a series of reforms of its rules, policies and practices, as a result of a process of consultation on its mechanisms, which mainly consisted of three changes: the decisional process on precautionary measures was made more transparent, the selection of individual petitions to be examined was oriented towards the urgency of the case instead of being based on chronology, and the reasons for including a certain country in its Annual Report were more clearly specified (Álvarez-Icaza, 2014). This evolution towards a major certainty and transparency in the Commission's mechanisms strengthened the perception of its role and legitimacy among the citizens. Moreover, both the Court and the Commission streamlined their procedures to shorten the time lapse between the filing of the petition and the final judgment; this simplification of the procedures was necessary especially as far as victims of crimes such as torture or killing were concerned (Pasqualucci, 2003).

Another important and relatively recent achievement has been the grant of *locus standi in judicio* for individual complainants before the IACtHR: until the Rules of Procedure of the Court were modified in

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<sup>243</sup> Regarding the evolution of the Inter-American system, see §2 of the present work.

2001, victims of alleged HR violations did not have the possibility to defend their rights directly before the Court, and it was the Commission that was endowed with an ambiguous role of participant to any case examined by the Court, even though it did not represent the individual<sup>244</sup>; thanks to the modification, individuals or their representatives are now able to participate directly in all stages of the procedure<sup>245</sup>, which provides the Court with more precise and complete information and allows the Commission to concentrate on its proper and original function of “guardian” of HR (Cançado Trindade, 1998b).

Notwithstanding these achievements, the Inter-American system still has numerous challenges to face and shortcomings to overcome. Before enumerating the most relevant ones, it is important to stress that the context in which its bodies operate has dramatically changed throughout the last decades: the Court and the Commission first dealt with past violations perpetrated by authoritarian regimes, but they soon started to face new abuses and problems typical of the democratic transition which many countries of the region are going through. The sources of HR violations have multiplied and diversified, and addressing them now means encompassing almost every domain of the human activity, with a special attention needed for the reinforcement of public organs, particularly the judicial ones (Cançado Trindade, 1998b); the Court and the Commission shall thus broaden their action as to reach particularly sensitive areas, such as the situation of overcrowded prisons that has already been addressed throughout the present work (Insulza, 2006): this wider scope of action, as the next paragraph will discuss, is not always met by the provision of adequate funding and resources for HR bodies (Cançado Trindade, 1998b).

#### *5.2.1.2. Financing the Inter-American system: recent achievements*

As mentioned above, the Inter-American system also suffered from the disparity between the ever-increasing resort to its mechanisms<sup>246</sup> and the scarce funding, resources and staff available (Insulza, 2006); this disproportion led to a backlog of work to be carried out, which, in turn, hinders the rapidity and efficiency of HR violations’ redress. Moreover, States are not charged for the costs incurred by the

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<sup>244</sup> On the contentious jurisdiction of the Court, see §2.3.2. of the present work.

<sup>245</sup> Rules of Procedure of the IACtHR, Art. 25 - *Participation of the Alleged Victims or their Representatives*, Par. 1. Once notice of the brief submitting a case before the Court has been served, in accordance with Article 39 of the Rules of Procedure, the alleged victims or their representatives may submit their brief containing pleadings, motions, and evidence autonomously and *shall continue to act autonomously throughout the proceedings*”.

<sup>246</sup> IACHR online statistics show that the total number of petitions received by IACHR increased by almost 6 times in the last 20 years, amounting to 435 in 1997 and to 2567 in 2016. Source: IACHR Comparative Statistics. <http://www.oas.org/en/iachr/multimedia/statistics/statistics.html> [Accessed 23 Aug. 2017].

Court or the Commission in carrying out the examination of a case; due to this lack of award for the costs, the Commission can afford to bring a limited number of cases before the Court, which is not in keeping with the HR enforcement spirit at the basis of the Inter-American system, as the merits and the value of a case should take precedence over considerations on its financial burden. Budgetary problems obliged the Court to function on a part-time basis with a limited number of sessions, which is clearly incompatible with the growing amount of cases brought before it (Pasqualucci, 2003).

The Inter-American HR institutions normally rely on financing by the OAS, which allocates part of its budget to fund them, and on annual and voluntary contributions by member States and third parties; aware of the inadequacy of funding, the Commission and the Court agreed in September 2016 on a joint proposal for an adequate and sustainable financing, which would be mainly provided by OAS member States in the form of an annual budget to be allocated to the two bodies, which would guarantee their institutional capacity in accordance with their mandates (IACHR, 2016). Some months after, the OAS General Assembly adopted a resolution with which it established to double the funds allocated to the Inter-American HR system over the next three years<sup>247</sup>, in order to facilitate and stabilize the financial environment in which the two institutions work, supporting and fostering their autonomy to respond to the challenges faced by the member States. Even though the solution adopted is different from that envisaged by the joint proposal, this decision is extraordinarily important as it allows the Court and the Commission not to be dependent on discretionary funds to carry out most of their work (ISHR, 2017); hopefully, this is the first step in a series of improvements in the capacity to promote and protect HR for the Inter-American system, which still suffers from certain shortages and defects, as will be discussed below.

### *5.2.1.3. Shortcomings still to be overcome*

First and foremost, State ratification of the ACHR<sup>248</sup> and acceptance of the Court's compulsory jurisdiction is not universal, which hinders the universal application of HR principles and markedly complicates the functioning of the Commission, which is obliged to apply different criteria depending on whether a State has ratified the Convention, as it was previously discussed in the specific section; moreover, even though a State is a party to the ACHR, it can make reservations to the majority of the rights therein protected, jeopardizing the integrity of the treaty. The lack of ratification by influential

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<sup>247</sup> OAS General Assembly, AG/RES. 2908 (XLVII-O/17), §16.1.

<sup>248</sup> Currently there are 23 States parties to the ACHR, as two (Trinidad and Tobago and Venezuela) of the former 25 that had ratified the treaty subsequently denounced it. Source: OAS - *ACHR: Signatories and Ratifications*. [https://www.oas.org/dil/treaties\\_b-32\\_american\\_convention\\_on\\_human\\_rights\\_sign.htm](https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.htm) [Accessed 23 Aug. 2017].

States such as Canada and the U.S. represents an additional weakening factor for the Convention (Pasqualucci, 2003). The universal ratification of HR treaties by all the States of the American continent would lead to what the IACtHR Judge A. Cançado Trindade defines as a “needed and desirable *jurisdictionalisation*” of the mechanisms of HR protection, which would put into practice the universality of such rights (Cançado Trindade, 1998b).

Another problematic issue is the domestic implementation of the provisions contained in the Convention, the recommendations of the Commission and the judgments of the Court. By ratifying a treaty or accepting the jurisdiction of a Court, States commit themselves to ensure and protect HR norms and to adopt adequate measures to make them effective<sup>249</sup>, as well as to eliminate those domestic laws that are in contravention with HR provisions (Pasqualucci, 2003). National incorporation of the latter would ensure the coincidence between international law and internal public law with regard to HR protection (Cançado Trindade, 1998b). In the practice, however, States frequently fail to comply with their obligation to investigate, prosecute, and punish violations of the rights protected, even though the Court broadly underscored this duty through its jurisprudence<sup>250</sup>, causing a severe damage to the functioning of the system and allowing the persistence of situations of impunity (Insulza, 2006).

Thirdly, the functioning of the system is severely undermined by the failure of OAS political organs to adequately support it, for instance by exerting pressure on the State parties for the implementation of HR provisions. The OAS General Assembly, for instance, may discuss a State’s non-compliance as described in the Court’s Annual Report and adopt adequate and consequent political measures against it, such as political condemnation, pressure upon the responsible government or recommendation to the other members to interrupt diplomatic or economic relationships; while this mechanism has failed to materialize, it would be a powerful instrument in discouraging HR abuses, since many States fear adverse international reputation and know that the condemnation of the situation of HR by a political organ could have far-reaching consequences (Medina Quiroga, 1988); this is another demonstration of how the whole system would benefit from an universal participation of all American states or, at least, from the ratification of ACHR by influent countries like Canada and U.S., which would serve as a model to imitate (Pasqualucci, 2003).

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<sup>249</sup> See ACHR (1969), Art. 2 - *Domestic legal effects*.

<sup>250</sup> The first reference to what was subsequently called the “duty to punish - doctrine” was made by the Court in the *Velásquez Rodríguez* case, when it affirmed that: “The second obligation of the States Parties is to “ensure” the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. [...] As a consequence of this obligation, the States must *prevent, investigate and punish any violation* of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation”. Source: IACtHR, *Velásquez Rodríguez v. Honduras*. Judgment of 29 Jul. 1988, Series C n°4, §166.

#### 5.2.1.4. *The Court and the Commission: towards a tighter cooperation?*

The Inter-American system of HR developed in a context that was very different from that of post-WW2 Europe, as the majority of States were under an authoritarian regime at the moment of its creation and states of emergency, judiciary corruption and weakness and HR abuses were very common among them; despite these differences, the question has been raised as to whether the European example should be followed<sup>251</sup> and the two-tiered system involving a Commission and a Court should come to an end (Pasqualucci, 2003). Nonetheless, the IACHR has a broader mandate in comparison with the former European Commission, which involves spreading of HR awareness among American peoples, making recommendations so that States adopt and implement HR provisions, writing annual and country reports, advising, requesting information etc.: if the IACHR was dissolved, these important contributions to the system would disappear, being inappropriate for a judicial organ such as the Court (Pasqualucci, 2003). It is rather important, therefore, that the two institutions work in synergy in order to create a regional HR regime increasingly universalized, transparent and cooperative.

When the Court was constituted, it particularly needed the support of the Commission in order to carry out its functions, especially concerning the contentious jurisdiction: this was due to the reluctance (mainly for political reasons) of States to present a case before the Court, which made the Commission the most important provider of work; nonetheless, some years were to be waited before the latter resorted to the new judicial organ. The first case in which a certain unwillingness to cooperate could be ascertained was when the case of *Viviana Gallardo* was declared inadmissible by the Commission, which as a matter of fact prevented the Court from considering it and led to its removal from the list (Medina Quiroga, 1988a). A phase of closer cooperation begun when the Commission requested for the second time an advisory opinion of the Court, concerning an important issue: the suspension of special and irregular tribunals created in Guatemala, which imposed death sentences for offences not previously punishable by death. The Court's acceptance of the request marked a turning point in the joint efforts made by the two bodies in order to protect HR (Medina Quiroga, 1988a); since then, advisory opinions of the IACtHR, despite not being binding, had a certain influence on the domestic implementation of HR provisions, having been frequently recalled by States when interpreting the national law and review it according to the ACHR (Pasqualucci, 2003).

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<sup>251</sup> The European Commission of Human Rights as a special tribunal was abolished by Protocol 11 of the European Convention of Human Rights, which instead enlarged the Court and allowed individuals to directly resort to it without the mediation of any organ.



The first contentious cases submitted to the Court in 1986 involved forced disappearances of people in Honduras in a framework of gross and systematic violations: the involvement of the IACtHR offered the victims' relatives the possibility not only to see justice done, but also to be given compensations by the responsible government; the usefulness of the resort to the Court and the consequent issuing of legally binding decisions against States accountable for HR violations then began to be increasingly evident (Medina Quiroga, 1988a). Thanks to its contentious jurisdiction, the IACtHR has gone far in making domestic laws that are in violation of the ACHR repealed or amended, and it was successful also in order monetary reparations for HR violations. On the other hand, its orders to end impunity and implement States' duty to identify, prosecute and punish have been less efficient and States' efforts proved to be minor (Pasqualucci, 2003).

Notwithstanding the above-mentioned shortcomings, it can be said that the Court and the Commission strengthened their cooperation throughout the years, with some significant achievements; it is important to take into account that no other regional HR system had to cope with more constant crises and endemic problems than the Inter-American, given the context in which it has developed (Goldman, 2009). In the framework of the present work, nevertheless, it is necessary to consider the peculiar challenges represented by drugs and the relative HR violations, especially when dealing with judicial guarantees and reparations for the victims, and how should the Court and the Commission proceed to cope with them.

### **5.2.2. The activity of the Commission: evolution and achievements**

As already discussed in a previous chapter, the IACHR had its functions and powers expanded by OAS Resolution XXII, which in 1965 amended its Statute and authorized it to examine communications and complaints alleging HR violations, to request pertinent information to member States and to make appropriate recommendations. The reformed Statute also requested the Commission to pay particular attention to the observance of a series of rights enshrined in the Declaration, among which the right to life, liberty, personal security, fair trial, protection from arbitrary arrest and due process of law (Goldman, 2009), which, as already discussed throughout the previous chapters, are the most exposed to violations in the context of counterdrug measures. The early years of its activity saw the scrutiny of the Commission over worrisome HR situations in countries that, given their alleged sympathies for the communist block, attracted U.S. intervention, such as Cuba, Haiti, Guatemala, the Dominican Republic, Paraguay and Nicaragua. The Commission investigated and published reports concerning HR violations in these countries, and this effort was recognized by OAS members, which in 1967 integrated it among the principal organs of the Organization through the Buenos Aires protocol of amendment of the OAS

Charter (Goldman, 2009). The reporting activity of the Commission went on throughout the 1970s, when many American States suffered from authoritarian and violent regimes; when authorized, country reports resulted from *in loco* visits, which significantly improved the Commission's prestige and visibility. On the other hand, the examination of individual petitions was scarcely used until the 1980s, both because this possibility was not widely known across the region and because governments refused to cooperate with the IACHR in this sense (Goldman, 2009).

The last two decades of the 20th century saw the end of the Cold War and, contemporarily, the end of most authoritarian regimes throughout Latin America; these events coincided on the one hand with a strengthened U.S. support to the work of the Commission and the Court within the OAS political organs; on the other hand, an increasing number of petitions concerning past HR violations started to be submitted to the IACHR. The end of dictatorial and authoritarian regimes did not imply the elimination of structural deficiencies and problems such as police violence, corruption of the judiciary and of the armed forces and marginalization of vulnerable groups, which severely threatened the stability of democratic institutions. Moreover, as already discussed, the expansion of drug trafficking as the most profitable business for TOC in that period and the consequent hardening of U.S. policies towards the region complicated the HR situation in numerous Latin American countries; the Commission reacted by intensifying its investigation and monitoring activities in the most problematic countries, resulting in the publication of important reports (Goldman, 2009). For instance, the situation in Colombia, where the conflict with dissident armed group was overlapping with the war against powerful drug cartels, was addressed in a report where the IACHR recommended the government to stop abusing of the declaration of a state of emergency, to retire from active service personnel of the armed forces patently involved with HR violations and to strengthen the judiciary (IACHR, 1993); despite the complex situation created by the internal conflict, the Colombian government largely cooperated with the IACHR and at least tried to implement its advice (Goldman, 2009). As proved by the Colombian case, country reports can be particularly effective as they refer to a specific country, drawing the attention of OAS political organs and of the public opinion towards its contribution to HR safeguard in the region; nonetheless, IACHR thematic reports also gave a significant contribution in addressing particular HR situations: for the sake of the present work and its focus on rights that are particularly hindered by counterdrug measures, for instance, IACHR reports have proved very useful when discussing specific topics such as the rights of persons deprived of liberty, the use of death penalty and pre-trial detention, indigenous communities and forced displacement.

Another important function of the Commission that emerged during the democratic transition was that of issuing precautionary measures, a mechanism designed to ensure a rapid response by the IACHR in case of imminent risk of severe harm inflicted on individuals in OAS member States, envisaged by

Article 25 of the IACHR Rules of Procedure<sup>252</sup>. Precautionary measures constitute a powerful instrument for the Commission to carry out its core objective of preventing HR violations, and are part of this organ's generic authority to interpret the scope of its own competence and jurisdiction. Even though not every OAS State recognizes them as legally binding, they should be considered as such, under the general obligation for States to respect international HR treaties and to support the regional HR protection system; during the last two decades, the majority of precautionary measures have been issued to deal with situations involving core basic rights, such as life or personal integrity, that were seriously at stake (Rodríguez-Pinzón, 2013). In the case of Colombia, which during the 1990s suffered from endemic violence, the national Constitutional Court declared IACHR precautionary measures binding on the State, which contributed in addressing HR violations concerning particularly vulnerable groups, such as indigenous, HR defenders and internally displaced persons (Goldman, 2009).

The establishment of the Court and the beginning of a phase of closer cooperation with the Commission towards the end of the 20th century led to a sharp increase in the number of petitions received by the latter; notwithstanding the importance of its investigation and reporting activity, the resolution of cases came therefore to be considered the top priority of the Commission, which consolidated existing jurisprudence or explored new topics through its decisions on the merits (Goldman, 2009); an examination of the reports on the merits of cases that the IACHR decided to bring before the Court shows that they largely addressed episodes of violation of judicial guarantees, abuse of pre-trial detention and judicial executions, which sometimes were directly connected with drug policies and drug-related crimes, as the next paragraph will examine more in depth<sup>253</sup>. An alternative to the litigation before the Commission and the Court is the friendly settlement mechanism, which the Commission offers to litigant parties after having declared a petition admissible; as a flexible, voluntary and informal procedure that allows the parties to engage in negotiations even without the direct involvement of the IACHR, the friendly settlement mechanism can represent an attractive option for many litigants and can result in creative solutions allowing substantial reparation to victims of HR abuses (Goldman, 2009).

It is worth to reiterate that, as previously noted, the effective functioning of the Commission has been severely hindered by the lack of adequate human and financial resources: the sharp annual increase in the number of petitions cannot be dealt with by the limited staff of the IACHR, which prevents the principal OAS organ in the area of HR from meeting the legitimate expectations of victims and States that choose to resort to it (Goldman, 2009). This is clearly demonstrated by the data provided by IACHR statistics, showing that the petitions opened by the Commission in the last 10 years frequently

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<sup>252</sup> See §2.1.2. on IACHR mechanism of precautionary measures.

<sup>253</sup> Source: IACHR - Decisions: cases in the Court. <http://www.oas.org/en/iachr/decisions/cases.asp> [Accessed 28 Aug. 2017].

represented less than one third of the total amount received<sup>254</sup>; the same can be said for precautionary measures, which have been largely requested in the last decade, but have been granted in a very limited proportion<sup>255</sup>. Hopefully, the decision recently taken by OAS<sup>256</sup> to double the funding allocated to the Commission and the Court will strengthen these organs and allow them to perform their function at their best.

### 5.2.3. Cases before the Court: unlawful detention for drug-related offences

Numerous cases referred to the Court by the Commission involved violations of individual right to life, liberty, humane treatment and judicial guarantees; the research carried out in the framework of the present work showed that some of these violations were perpetrated in the name of the suspicion of an involvement of the victim in drug-related crimes, and it can be useful to analyze how did the Court cope with the apparent contrast between State counterdrug policies and the protection of individual right and guarantees. The three cases addressed above all ended with a judgment against the State of Ecuador, which is significant in that its domestic law contains provisions that were deemed to create a discriminatory regime of judicial protection to the detriment of people detained for drug-related offences.

#### 5.2.3.1. *Suárez-Rosero v. Ecuador*

The case of *Suárez-Rosero v. Ecuador* was submitted for the Court to rule as to whether Ecuador had violated a series of fundamental HR to the detriment of Rafael Suárez-Rosero, who was detained by Ecuadorian police during a large-scale drug crime operation. According to the witnesses and to the victim himself, Mr. Suárez-Rosero was arrested by "two hooded individuals travelling in an unmarked vehicle" (who were then identified as officers of the National Police of Ecuador) in Quito on June 23, 1992; since he was taken to a cell in the Interpol offices, he never saw who made the report that led to his arrest for drug crimes, never saw an arrest warrant and was not given the possibility to see his family, nor an attorney and was held *incommunicado* for over one month. The victim himself told the

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<sup>254</sup> The most striking data concern the year 2009, when the Commission was able to open only 120 of the 1400 petitions received in total. Source: IACHR Comparative Statistics.

<http://www.oas.org/en/iachr/multimedia/statistics/statistics.html> [Accessed 28 Aug. 2017].

<sup>255</sup> Statistics concerning the period between 2005 and 2016 show that the number of precautionary measures granted by the Commission was always below one sixth of the total amount of measures requested. Source: IACHR Comparative Statistics. <http://www.oas.org/en/iachr/multimedia/statistics/statistics.html> [Accessed 28 Aug. 2017].

<sup>256</sup> See §5.2.1.2. on the funding allocated to IACHR and IACtHR.

Court he was threatened and tortured several times in order to make him confess to his involvement in drug trafficking; moreover, during his stay in a small cell with no ventilation, windows or bed, he caught pneumonia and lost a lot of weight. His wife, who was admitted as one of the witnesses, was allowed to see him after five weeks from the arrest; during this initial period, he was never informed he had the right to a public legal counsel. After he was released from his isolation, he was held in preventive detention for four years, during which he never had the possibility to appear before a court and could have interviews with his attorney only under the surveillance of a policeman. After his release, which took place on April 29, 1996 (two weeks later than what had been established, which according to Ms. Suárez was due to the conduct of the officials in charge) he has lived in constant fear, which was confirmed by his wife, who noticed he was depressed and had sudden mood swings since then.

The arrest took place without a warrant from the competent authority and not *in flagrante delicto*, in connection with the police operation *Ciclón*, carried out to disband an international drug trafficking organization; in this framework, the Ecuadorian State declared that Mr. Suárez-Rosero was tried on a charge of drug trafficking, namely a grave crime against Ecuadorian population, capable of impairing national peace and security. This statement was rejected by the Court as Mr. Suárez-Rosero was irrefutably proven to be just an accessory to such a grave crime.

First of all, the Court held that the lack of arrest warrant or of *in flagrante* condition of the victim at the moment of the arrest and his *incommunicado* detention lasting more than 24 hours were in contradiction with the Ecuadorian Political Constitution, as *incommunicado* detention should be an exceptional measure aimed at preventing any interference with the investigation and must be limited in time and take place within a framework of non-derogable guarantees for the detained person. Moreover, the alternate agent of the State during a public hearing admitted that his arrest had been arbitrary and in violation of Ecuadorian law; *after his arrest, Mr. Suárez-Rosero was not brought before a competent judicial authority in order to be entitled to trial or released without prejudice and was not informed of the charges against him*. For these reasons, the Court found Mr. Suárez-Rosero's arrest and detention in violation of Article 7 of the American Convention on Human Rights (Right to Personal Liberty), which prohibits an individual's arbitrary arrest or imprisonment<sup>257</sup> and requires the resort to competent judicial authorities and courts<sup>258</sup>, as well as Article 25 (Right to Judicial Protection<sup>259</sup>).

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<sup>257</sup> ACHR (1969), Art. 7 - *Right to Personal Liberty*, Par. 2: "No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto".

Par. 3: "No one shall be subject to arbitrary arrest or imprisonment".

<sup>258</sup> *Ibid.*, Par. 5: "Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial".

The prolonged preventive detention of Mr. Suárez-Rosero was also found in violation of Article 8 (Right to a Fair Trial), since the whole proceeding against the victim lasted more than 50 months, which was considered as far exceeding the "reasonable time" criterion envisaged by the ACHR<sup>260</sup>; moreover, the modalities in which Mr. Suárez-Rosero was held in custody violated the guarantees contemplated by the same Article, such as the right to be presumed innocent, to defend himself, to be assisted by legal counsel etc., and the government failed to respond adequately to the detainee's attempt to invoke such judicial guarantees. Finally, the Court considered the *incommunicado* detention and the consequent isolation for 36 days, without having the possibility to communicate with the outside world, in particular with his family, constituted cruel, inhuman and degrading treatment and was thus in breach of Article 5 (Right to Humane Treatment); the same was said about the accommodation he was provided with and the beatings and threats he received during his detention.

The *Suárez-Rosero v. Ecuador* case is also important because it was an occasion for the Court to observe that a national law represented *per se* a violation of the Convention, in that it did not provide persons accused of drug-related crimes with the adequate legal protections. This was the case for Article 114bis of the Ecuadorian Criminal Code, which provides limitations for the length of preventive detention, but denies the application of such a provision for persons accused of drug trafficking under the Law on Narcotic Drugs and Psychotropic Substances; for this reason, the Article containing this exception was deemed in breach of the right to judicial protection that a State must guarantee on the domestic level under the ACHR<sup>261</sup>, since it deprived a part of the prison population of a fundamental right. In sum, the Court found that the State of Ecuador violated the above-mentioned ACHR provisions to the detriment of Mr. Suárez-Rosero and required the State to investigate over the persons responsible for such violations in order to punish them, apart from paying an adequate indemnity to the victim and his family.

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Par. 6: "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful".

<sup>259</sup> ACHR (1969), Art. 25 - *Right to Judicial Protection*, Par. 1: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

<sup>260</sup> ACHR (1969), Art. 8 - *Right to a Fair Trial*, Par. 1: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature".

<sup>261</sup> *Ibid.*, Art. 2 - *Domestic Legal Effects*: Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

The case showed the discriminatory treatment from which persons accused of drug-related crimes can suffer: the witnesses declared that finding an available attorney for a drug case was all but easy, and that their possibilities to communicate with the victim, at least during the first stage of his detention, were even more restricted than usual, being him convicted for a drug-related crime. The Court succeeded in addressing such discriminatory situation by issuing the judgment against the State of Ecuador, notwithstanding its allegations that such a treatment was necessary in the framework of large scale measures against drug trafficking, a serious crime that must be treated likewise severely. An expert witness of criminal law confirmed that at the time of Mr. Suárez-Rosero's arrest, over 40 percent of detained persons were charged with drug-related offenses, which caused prisons' overcrowding and systematic delay in the administration of justice.

#### 5.2.3.2. *Subsequent jurisprudence*

*Suárez-Rosero* was cited numerous times in the Court's judgment over a similar case against the same Ecuadorian State, *Acosta Calderón v. Ecuador*. Mr. Acosta Calderón was a Colombian citizen who was arrested in Ecuador in 1989 under suspicion of drug trafficking and possession of cocaine past; even though the arrest was not considered arbitrary *per se*, as it took place *in flagrante delicto* with the claimant in possession of a substance that could appear as a prohibited drug; nevertheless, the Court confirmed the Commission's allegation of violation of Article 7 ACHR (Right to Personal Liberty) in that investigations were carried out with disregards of the procedural requirements and the constitutional guarantees of the suspect<sup>262</sup>, which made the arrest of Mr. Acosta Calderón arbitrary. The Ecuadorian State was also found in breach of Article 8 ACHR (Right to a Fair Trial) since the processing of the case delayed more than five years despite not being complex, which exceeded the criterion of "reasonable time"; moreover, the principle of presumption of innocence, which constitutes a fundamental judicial guarantee for the person under trial, was also violated by the Ecuadorian anti-drug measures. Pecuniary and non-pecuniary damage provoked to the victim by the detention was considered when the Court established reparations under Article 63 ACHR<sup>263</sup>, on the basis of the time he was detained (which in

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<sup>262</sup> The Commission, the representatives of the victim and the Court considered that the length of Mr. Acosta Calderón's preventive detention (five years and one month) exceeded the maximum established by law; moreover, national Ecuadorian law envisages chemical analyses with which the illegality of the substance in question must be proved, which provides evidence of the alleged crime but, nevertheless, was never performed by the State. Moreover, the victim was not provided with the adequate judicial supervision and assistance, nor he was informed of his right to require consular assistance, being him a citizen of a different State.

<sup>263</sup> ACHR (1969), Art. 63, Par. 1: "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was

total amounted to six years and eight months) and of the negative effects that this period had on his capacity to carry out his farmer activity.

Also in this case the State of Ecuador showed a discriminatory treatment against people submitted to processes for drug-related offences, even though the provisions condemned by the IACtHR with Suárez Rosero had been declared unconstitutional. In fact, in 1997 the Code of Execution of Judgments was amended as to grant the release of the detainees who have been arrested without a warrant, with exception for those detained under the already mentioned Law on Narcotic Drugs and Psychotropic Substances. *Acosta Calderón* therefore represents another case in which the Court ruled not only against HR violations perpetrated by the State, but also against a generally discriminatory regime against the population imprisoned for drug-related offences, which reflected a sort of stigma that has officially been imposed on this sector<sup>264</sup>.

The Court accused Ecuador of perpetrating unlawful detention in the name of the fight against drug trafficking also in the *Chaparro Álvarez and Lapo Íñiguez* case, concerning the detention of the owner and the manager<sup>265</sup> of a factory of ice chests for being deemed to belong to an international criminal organization dedicated to drug trafficking; while the two claimants were detained, the factory was searched since its products were similar to those used to transport illicit drugs seized during the *Rivera* anti-narcotics operation.

The arrests of Mr. Chaparro and Mr. Lapo were deemed arbitrary in breach of Article 7 ACHR because, even though the former was arrested with a warrant, he was not adequately informed of the motives and reasons for his arrest<sup>266</sup>; moreover, the duration of the detention exceeded the permitted legal maximum and the two claimants were not brought promptly before a judge. The right to a fair trial (Article 8 ACHR) of the two men was also violated by the lack of presumption of innocence, the failure to grant them adequate time and means to be defended and the unreasonable time of the criminal proceedings. Moreover, Mr. Chaparro was not informed of his right to require consular assistance, as a national of a State other than Ecuador. Finally, the fact that the victims were held *incommunicado* for more than 24 hours and were detained in degrading and dangerous conditions was held by the Court as a violation of their right to a humane treatment (Article 5 ACHR).

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violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party”.

<sup>264</sup> *Acosta Calderón v. Ecuador*, §44 a).

<sup>265</sup> Mr. Chaparro was arrested with a warrant "issued in the context of a criminal investigation by a competent judge" (*Chaparro Álvarez and Lapo Íñiguez*, §63), so his arrest was not deemed arbitrary in principle, while Mr. Lapo was detained during the search of the factory together with other 12 employees without an order by a competent authority.

<sup>266</sup> *Chaparro Álvarez and Lapo Íñiguez*, §73.



In this case the Court also addressed the violation of an additional right in comparison with the two analyzed above, that is, right to property (Article 21 ACHR), which was considered violated by the unlawful seizure and search of the factory, by the amount charged to Mr. Chaparro for administrative expenses and custody fees and by the irregularities in the return of the property.

Interestingly, during the public hearing held in the case, the representative of the State of Ecuador made a statement in which he regretted the excesses committed by public officials and the "unpleasant situation" experienced by the alleged victims during the domestic proceedings against them for drug trafficking crime, and acknowledged the violations of some of the mentioned ACHR provisions<sup>267</sup>.

As a means to conclude, it is important to remark that in all the cases analyzed above the State was deemed in breach of the first two obligations enshrined in the ACHR: to respect the rights and freedoms recognized therein and to adopt the adequate legislative or other measures as it is necessary to implement them domestically; the jurisprudence of the Court showed indeed that these two provisions are considered the fundamental point of start to develop a solid system of guarantees for all the individuals.

#### *5.2.3.3. Remarks on the relevant jurisprudence*

Throughout the years, both the Court and the Commission have refined their procedures as to increase the role of the individual and speed the processing of cases, mainly by amending their Rules of Procedure (Pasqualucci, 2003). The establishment of the Court, especially since the beginning of a phase of cooperation between it and the Commission, represented a landmark achievement in the regional protection of HR, as an autonomous judicial institution whose main function is ensuring the correct interpretation and application of the ACHR. Despite having been created in the framework of the Convention, and thus having jurisdiction only over those States that ratified the treaty and recognized its authority, the Court exercised an important advisory function over any OAS State that requested it (Cançado Trindade, 1998). Without prejudice to the significance of this "extended" function, the most important task the IACtHR is endowed with is its contentious jurisdiction, namely the adjudication on controversies regarding the application of the ACHR by a State Party. The number of cases referred to the Court by the Commission has increased throughout the years: even though the greater part of its jurisprudence has developed through the former function (Davison, 1992), the latter allows the issuing of binding decisions, which can have a remarkable effect on the concerned State.

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<sup>267</sup> Ibid., §25.

During the last two decades the Court issued numerous decisions concerning violations of the right to life, humane treatment, fair trial, personal liberty, judicial protection and so forth; nevertheless, only in a few cases the State perpetrated such violations explicitly in the name of counterdrug measures, as in the case of Ecuadorian government and its anti-drug trafficking operations. This relatively inconsistent jurisprudence directly referring to abuses committed in the framework of drug policies, despite the detrimental effects that militarization of anti-narcotics efforts and criminalization of drugs had on HR in Latin American countries<sup>268</sup>, can depend on various reasons concerning some structural shortcomings on the Inter-American system itself, which have been addressed in the previous paragraphs.

First of all, the jurisdiction of the Court is limited *per se*, since not only it can reach only those States that have ratified the ACHR, but it also has to be explicitly accepted by them; currently, the IACtHR can issue its binding judgments towards 20 of 35 OAS member States<sup>269</sup>. Moreover, a case can be examined by the Court only after the procedures relative to individual complaints before the Commission have been adequately completed, which is a further restriction to the exercise of this function.

Apart from these procedural obstacles, the Court suffered from the lack of funding and the consequent backlog that have been previously discussed, which hinders the effectiveness and rapidity of the work of both Inter-American HR bodies; moreover, investigations on cases of unlawful and arbitrary detention, such as those presented above, can last several years because of various procedural complications or lack of collaboration by local authorities, which are give up on tough-on-drugs policies. Considering these factors, it can be inferred why the Court's judgments over such cases are still relatively scarce.

Finally, the contexts in which HR violations mainly take place in the framework of the War on Drugs (politically unstable and economically poor countries, with weak and corrupted institutions, frequently depending on U.S. aid) are *per se* a reason for a limited access to the Court: just to provide an example, the victims of extrajudicial executions, especially when perpetrated by non-State actors whose accountability is still uncertain, or of indiscriminate crop eradication campaigns, particularly if belonging to poor and marginal rural communities, find the access to a juridical body more difficult than it can be imagined.

The last chapter of the present analysis, which will be about the HR situation in Colombia and Mexico as the two countries chosen as case studies, will present some more judgments of the IACtHR concerning specific HR violations that took place in the complex context of their fight against drug

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<sup>268</sup> See Part II: Human Rights Violations in the context of the War on Drugs of the present work.

<sup>269</sup> The States that have currently accepted the compulsory jurisdiction of the Court are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay. Source: International Justice Resource Centre - The Inter-American Human Rights System.

<http://www.ijrcenter.org/regional/inter-american-system/> [Accessed 29 Aug. 2017].

trafficking. For the time being, the cases analyzed so far are to deem important in that they show a sharp priority given by the Court to HR protection face to domestic counterdrug policies; moreover, taking the *Suárez-Rosero* case as a starting point, the continuity drawn by the Court with the subsequent judgments can be clearly seen and shows that the body is willing to and capable of creating a substantial jurisprudence addressing HR violations in the anti-narcotics legal framework. It is desirable that a more adequate funding mechanism by the OAS and a stronger cooperation by its member States in accepting the Court's jurisdiction and implementing ACHR provisions will strengthen it and allow it to perform its functions at its better in this sense.

## **Chapter 6. War on Drugs and Human Rights scenarios: Colombia and Mexico**

### **6.1. Colombia: a drug producer State between trafficking and insurgency**

No other State in the world is as associated to drug-related violence as Colombia is; while this is partly due to the widespread media content related to the topic, it is certainly true that half a century of internal conflict between the State and guerrillas, with the underlying phenomenon of drug trafficking, completely subverted the functioning of the State and caused a series of systematic and brutal HR violations, whose principal victims were innocent civilians. This section starts with an historical explanation of how drug trafficking, especially concerning cocaine, became a central business for criminal groups in the country, with the development of powerful drug cartels and the increasing involvement of leftist guerrillas and right-wing paramilitaries in drug-related operations. The impact of these dynamics on State institutions and HR will be then addressed together with the response of Colombian government, with a particular focus on the dependence on U.S. aid and the consequent eradication campaigns such as Plan Colombia. Two IACtHR cases will be then presented as far as paramilitary violence, indigenous' rights and State acquiescence facing gross HR violations are concerned; finally, the present situation after years of negotiations of a peace process between the government and FARC guerrillas will be briefly discussed in relation to the overall impact that the conflict had on the population.

### **6.1.1. Political background and development of drug trafficking**

#### *6.1.1.1. Before drug trafficking: political developments up until 1980s*

Colombia is the country that suffered the most severe impact from the widespread activity of drug traffickers and the consequent ever-increasing levels of violence and abuses against the State and almost every level of society; notwithstanding this undeniably primary role of drugs, an important premise is that the country was characterized by a political background that provided a fertile ground for corruption, violence and instability even before the emergence of powerful criminal groups involved in the drug business. The crisis in Colombia was indeed characterized by a mixture between loose State control over a vast a decentralized territory and intense violence generated by drug traffickers' activity overlapped with that of paramilitary insurgent groups and common criminals (Hartlyn, 1993).

Politically speaking, the existence of two deeply-rooted parties inherited from the 19th century, namely the liberal and the conservative, produced a series of violent turmoil that led to a real ten-year civil war known as *La Violencia* (1948-1958), which resulted in the creation of the National Front as an élite response to the fear of revolutionary forces: the economic and social transformations of the country throughout the following 30 years had this two-party coalition as a political background (Hartlyn, 1993). Notwithstanding the notable expansion of State's technical capacities, the control of the whole Colombian territory was never achieved completely, and its presence in the more remote areas of the country remained limited, which favoured the emergence of radical groups, bribery and anti-State tendencies even before the arrival of drug traffickers (Hartlyn, 1993). Leftist guerrilla groups such as FARC (*Fuerzas Armadas Revolucionarias de Colombia*, Revolutionary Armed Forces of Colombia, coming out radicalized from the period of *La Violencia*), ELN (*Ejército de Liberación Nacional*, National Liberation Army) and M-19 (a revolutionary socialist group) were strengthened during the 1970s as peasant self-defense organizations in response to a weak and exclusionary State (Felbab-Brown, 2010), which went in parallel to a consolidation of Colombian armed forces as an autonomous and corporate body. Contemporarily, the failed attempts of the government to reform the archaic and ineffective judicial system, based on underpaid judges with a significant backlog, caused the perception of such system by emerging criminal and subversive groups as easily subverted (Hartlyn, 1993). In sum, organizational and institutional weakness, together with a strong factionalism and the emergence of guerrilla groups in the marginal regions during the 1970s, provided a fertile background for the growth of drug trafficking as a deeply entrenched phenomenon.

### *6.1.1.2. The emergence and the role of illegal drug businesses and cartels*

It would be too long to expose in detail the complex market dynamics that led to the emergence of Colombia as the world's largest illicit narcotics economy during the 1980s, which has already been exposed partly in the first part of the present work<sup>270</sup>; nonetheless, it is important to clarify the mechanisms that led to the appearance of powerful cartels that achieved the control of the largest drug market in the world.

Towards the end of the 1970s, the growth of two profitable contraband activities, namely coffee and marijuana<sup>271</sup>, generated an "underground economy" (Hartlyn, 1993) that was partially accepted by the government as it generated new wealth; nevertheless, they were soon overshadowed by the emergence of cocaine trafficking as a consequence of the increased demand in the U.S., an activity with extraordinary possibilities of revenue, whose control was heavily concentrated in the hands of few people<sup>272</sup>, but which involved the participation of an increasing number of sectors into the trade, as knowledge of the advantages of coca cultivation over other crops began to spread (Felbab-Brown, 2010). The revenues of drug markets generated a new wealth in Colombia, causing the emergence of what has been ambiguously defined as "emerging classes" (Hartlyn, 1993) and, above all, to the Medellín and Cali cartels, which are still considered two of the largest criminal organizations in history; the cartels soon penetrated almost every sector of politics, economy and society, establishing advanced laboratories and developing sophisticated methods for money laundering (Felbab-Brown, 2010). Even though there is a certain anti-democratic and rightist tendency that can be identified among drug traffickers emerging during the 1980s, they did not begin with a precise political project, since their priority was the protection and conservation of their businesses in the country while expanding them and gaining a degree of social acceptance, which further de-legitimized State authority (Hartlyn, 1993). Notwithstanding the extensive use of violence, drug cartels were able to gain a strong popular support: marginalized and disadvantaged sectors of society could advance in a closed social system thanks to the drug economy, which appeared as a vehicle of wealth redistribution in an otherwise exclusionary environment, and the impact of the economic crisis that hit the country in the early 1980s would have

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<sup>270</sup> See §1.1.3.1. as a presentation of Colombia as a case study.

<sup>271</sup> The possibilities for Colombia to increase its marijuana production were opened by the U.S. suppression campaigns in Jamaica and Mexico, at that time the major suppliers of that substance. The marijuana eradication campaigns carried out by the U.S. in the last years of 1970s persuaded Colombian drug traffickers to shift their focus on cocaine (Felbab-Brown, 2010).

<sup>272</sup> At least in the initial phase of cocaine production, the most labor-intensive part of the operations was still located in the coca producer countries, Bolivia and Peru; this is why cocaine generated proportionally a minor direct employment in Colombia if compared with marijuana, even though the total revenues were significantly higher (Hartlyn, 1993). Nevertheless, once the numerous coca's advantages became widely known, an increasing number of Colombian farmers engaged in the production, which steadily increased domestic cultivation (Felbab-Brown, 2010).

been much worse for many poor people without the employment and the income generated by drug trafficking; moreover, the major traffickers gained solid and diffused popular support by investing in social projects providing accommodation, water, food, transportation, education and so forth. The efforts of drug traffickers to build political capital led some of them to participate even in electoral politics, such as the leader of Medellín cartel Escobar did in 1982 running for the Colombian House of Representatives, or as his partner Lehder founding a neo-fascist political party (Felbab-Brown, 2010). For all these reasons, during the 1980s Colombian institutions, structures and societal groups became increasingly permeated and affected by drug traffickers and their activities (Hartlyn, 1993).

One of the first State actions against drug traffickers was the agreement over the Treaty of Extradition with the U.S. in 1979; even though the attitude of politicians towards the issue was very ambiguous and changed frequently, the extradition of Colombian nationals to the U.S. to face drug-related charges became one of the major contention issues between the government and the cartels and the latter responded violently to any step in that direction, ordering the assassination of numerous journalists, judges and political figures, mainly carried out through paid assassins called *sicarios*, paralyzing the country's judicial system. The favour with which Escobar was remembered after he was killed by Colombian National Police in 1993 is emblematic of the power, not only in the strictly economic sense, that these criminal groups were able to gain notwithstanding the brutality with which they carried out their businesses (Felbab-Brown, 2010).

After the death of Escobar, both Medellín and Cali cartels rapidly declined and were practically dismantled and substituted by smaller *boutique* cartels, while Mexican traffickers gained dominance of drug trade in the hemisphere (Inkster and Comolli, 2012); nevertheless, the solid link that the major drug traffickers had built with guerrilla groups in the meanwhile had not been interrupted.

#### *6.1.1.3. Guerrilla insurgents embracing drug economy: "narco-guerrilla" and the growth of paramilitaries*

The first Colombian paramilitary group supported by drug traffickers was MAS (*Muerte A los Secuestradores*, "Death to Kidnappers"), created in 1981 to defend their interests against leftist guerrilla groups who had kidnapped the daughter of a Medellín trafficker in order to gain the ransom; as a matter of fact, the union of drug traffickers against guerrilla kidnappings marked the effective creation of the Medellín cartel (Bagley, 1988). Notwithstanding this initial contrast, drug cartels and the guerrillas soon discovered the State as a common enemy, which marked the beginning of the so-called *narco-guerrilla* connection; as a matter of fact, both groups could take advantage from the diversion of State resources

from the respective business, and at the same time they could benefit from the support of a nationalist rhetoric which was spreading among the population and resented U.S. “imperialistic” influence in the country (Hartlyn, 1993). The most important link established by Colombian drug traffickers was with FARC, for the success of which, in turn, the participation in the drug economy revealed to be crucial. Originated during *La Violencia*, during the 1960s the guerrilla movement suffered from lack of physical resources and political capital and its activity was limited to isolated rural areas with a very weak State presence, without representing a real threat for the central government. Even though it initially opposed to the social violence brought by drug trafficking, FARC soon realized that siding against the cartels would have caused the loss of the already restricted support it had by the farmers; it thus embraced the illicit drug economy, becoming involved in an increasing number of its components, starting with the imposition of taxes on the *cocaleros*, until participating directly in the cocaine production process in the early 1990s and even taking part in international smuggling operations towards the beginning of the 21st century (Felbab-Brown, 2010). From their point of view, drug traffickers initially benefited from the guerrilla’s presence in drug-growing regions, since they were a source of protection for their activities and of mediation between them and the farmers, and provided them with arms to carry out their tasks; however, the relationship soon deteriorated because of the increasing pressure exercised by the FARC to gain participation in the business, which soon turned into interference. This is the reason why the definition of this unstable and opportunistic link as *narco-guerrilla* can be misleading (Bagley, 1988), as between Colombian cartels and guerrillas there is a mutual and deeply-rooted hostility and mistrust, outside of the business that can benefit both of them (Rangel Suárez, 2000). However, the important element to highlight is that what started as hardly more than a band of peasant fighters turned into one of the most powerful criminal armed groups ever, as a consequence of its ever-growing involvement in the business of drug trafficking; towards the end of the 20th century, drug rents represented about 50% of FARC’s total income, a profit that the group used to increase its fighting capabilities and to expand geographically, to the point that it operated in more than half of the whole national territory. The direct participation in the narcotics economy allowed FARC to acquire greater freedom of action and mobility and integrated it in profitable circles of international weapons smuggling (Felbab-Brown, 2010). What Rangel Suárez has defined as “guerrilla economy” consists of the symbiotic relationship that these groups established with regional economic dynamics, including the cocaine market, which became their primary source of income, despite being complemented by various activities such as extortion, kidnapping, theft and investments in certain sectors of the legal economy. These mechanisms have a direct impact on some economic sectors of the regions in which guerrillas operate but, above all, imply an indirect cost for the overall economy, caused by the pressure they exercise and by the escalation of the armed conflict they foster (Rangel Suárez, 2000). Apart from the economic infiltration, the guerrillas

acquired a remarkable political capital by becoming the protectors of *cocaleros* against abuses by both drug traffickers and the government, the latter trying to carry out crop eradication campaigns; somehow taking on the same tasks that the Medellín cartel accomplished in the bigger urban centres, the FARC also used drug money to provide essential public services in many municipalities. All these reasons for gaining political support were complemented by an underlying nationalism against a weak and corrupted government and U.S. imperialist interventions (Felbab-Brown, 2010). The overlap of these increasingly influential guerrilla groups with the world's most powerful drug traffickers constituted a dual burden to carry for the Colombian State which, despite the deterioration of the relationship between the two parties, still represented their common enemy.

The activity of illegal armed groups in Colombia, nonetheless, did not concern only leftist guerrillas: right-wing paramilitary groups, in fact, also played a role in this multidimensional conflict, collaborating, if not even merging or exchanging the respective functions<sup>273</sup>, with drug cartels and, then, even with the government. In the 1980s, private military groups were all but a new or rare phenomenon in Colombia, and they were frequently employed as a means of protection (*autodefensa*) for peasants, plantation owners etc.; in that period, drug traffickers started to rely on them to protect their business from the activity of leftist guerrilla, as in the above-mentioned case of MAS, and to help in the fight against both FARC and the State (Felbab-Brown, 2010). The collaboration with drug cartels caused an expansion and transformation of paramilitaries as to become an independent force, not only militarily speaking but also from the economic and political points of view, and to organize under the unified umbrella of AUC (*Autodefensas Unidas de Colombia*), with the shared goals of expanding territorially, generating rents from illicit activities and eliminating leftist guerrillas. The dismissal of Medellín and Cali cartels created new opportunities to become an active part in the drug business for these groups - what has been defined as *narcotization* of paramilitaries (Isacson, 2005b) - towards the beginning of 21st century and to directly challenge FARC for the control over coca-producing territories (Ramírez Lemus *et alii*, 2005), especially when relevant drug traffickers entered AUC. Paradoxically, in this same period the government engaged in a complex negotiation process with the group, notwithstanding their well known involvement in the killing, threatening and forced displacement of thousands of HR activists, trade unionists, journalists<sup>274</sup> and inhabitants of the regions under the influence of guerrilla, in search of a support in the fight against drug traffickers and FARC (Romero, 2004); particularly under

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<sup>273</sup> In order to seize part of the drug business, paramilitaries have eliminated independent traffickers from the areas they controlled. Throughout the years, the distinction between the paramilitaries and the narco-traffickers became increasingly blurred (Felbab-Brown, 2010).

<sup>274</sup> Maybe one of the worst implications of paramilitary violence was the fact that civil society actors such as trade unions, universities, HR defenders and even the Church were considered potentially subversive and linked to leftist guerrillas, in the framework of military doctrine against an "internal enemy" (Ramírez Lemus *et alii*, 2005).



the Uribe administration, AUC received military logistical support and advice and a broad toleration for its activities, which in turn allowed its members to avoid punishment for the massacres and extrajudicial killings they were accountable for (Isacson, 2005b). The involvement of paramilitaries in drug businesses and the deepening of their relationship with Colombian military caused a sharp increase of HR violations involving the armed forces (Ramírez Lemus *et alii*, 2005), as the following paragraphs will discuss.

## **6.1.2. Narcotics and insurgency: impact and State response**

### *6.1.2.1. The impact of drug trafficking on State structures and Human Rights*

The overlap of right-wing paramilitary groups, leftist insurgents and drug traffickers caused a dangerous chain-like series of HR violations on all sides of the conflict, together with an authoritarian shift in the political system, an expanded role of the military and several restrictions on democracy and civil rights (Bagley, 1988). Among the weakened State institutions, the most affected by drug trafficking is the judiciary, where underpaid judges with an overload of cases to examine were subjected to threats, corruption and extortion, if not kidnapped or killed; this climate of terror essentially paralysed the system<sup>275</sup>, which caused a major harm to the victims of HR violations and their relatives. Political structures were also deeply influenced by drugs: the factionalized and corrupted nature of Colombian parties seriously exposed them to corruption, and the complete lack of control over the funding resources of the campaigns allowed the entry of drug money into the political process, in a climate of violence revolving around any electoral process. Finally, the military had a controversial relationship with drug crime, since it was undoubtedly endowed with broadened competences and a widened scope of action in order to cope with the increasing internal conflicts; this impeded any civilian oversight over military activities, to the detriment of democracy and HR protection (Hartlyn, 1993).

In 2013 the IACHR issued a report on the various HR violations perpetrated in Colombia in the context of counterinsurgency and counterdrug measures; though it would be too long to examine all of them in the detail, it is important to address the most significant phenomena in the framework of the present research. First of all, forced disappearances have been addressed by both the Court and the Commission as a permanent phenomenon representing a multiple offense in terms of the HR affected, since it implies

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<sup>275</sup> This happened despite the reforming efforts made in the first 1990s to improve Colombian judicial system, such as the creation of a Bill of Rights within the criminal system and of a constitutional jurisdiction to protect HR; moreover, the Public Prosecutor's Office was instituted as a more specialized mechanisms of prosecution of organized crime (Uprimny and Guzmán, 2016).

the deprivation of liberty of a person and the lack of information about his/her conditions; the gravity of this crime has been reinforced by the Inter-American Convention on the Forced Disappearance of Persons (1994), which Colombia has ratified in 2005. Notwithstanding the work of the National Registry of Disappeared Persons, there is still a worrisome uncertainty and lack of information about the number of persons disappeared; what is more, the investigations involving members of the Armed Forces or the National Police were hindered by obstacles posed by these bodies themselves, like documents hidden or crime scene altered (IACHR, 2013b). Forced disappearances in the context of anti-drug and anti-guerrilla efforts are a demonstration of how corrupted governmental institutions and inefficient judicial proceedings cause a significant harm not only to the victims, but also to their relatives who are in search of an adequate reparation; this perverse mechanism was frequently reinforced by the impunity enjoyed by the perpetrators under the government's attempt to find a truce with the parties<sup>276</sup>.

Members of the State security forces and the paramilitary with which they cooperated were also implicated in several extrajudicial executions; the most shocking case was the so-called *false-positives* scandal, when they were found to systematically execute thousands of civilians to make it appear that they were killing more rebel fighters (HRW, 2016), which would bring them financial rewards. The practice was denounced for years by the civil society, with a constant denial from the government until investigators established a link between the bodies of unidentified rebel fighters and persons who were reportedly missing in late 2008 (Colombia Reports, 2017). Extrajudicial executions represent a violation of the right to life, to personal integrity and to personal liberty, which the State has the duty to protect and whose violation must be punished, especially if it involves members of the State security forces; according to the UNHRC, it is not fortuity that cases of extrajudicial executions perpetrated by National Police or the armed forces were judged by military courts (IACHR, 2013b). Moreover, extrajudicial executions also imply an abusive and disproportionate use of force by the security forces, without the State implementing the adequate measures as to protect the civilians in the context of armed confrontations (IACHR, 2013b).

Another phenomenon affecting the rights of the civilians living in conflict zones in Colombia is their forced displacement; IACHR defined internal displacement as a large-scale humanitarian tragedy that has been affecting the country for decades, with a detrimental effect on its inhabitants and their right of freedom of movement, freedom to choose the place of residence, humane treatment, privacy and family life, property, work. As partially addressed when presenting the consequences of eradication campaigns,

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<sup>276</sup> President Uribe, for instance, in 2003 and 2004 issued two bills that allowed quasi-total amnesty for paramilitary leaders (Isacson, 2005b).

indigenous peoples and Afro-descendent communities are particularly affected by forced displacement, as their right to inhabit their ancestral lands and to exploit the resources are violated. Colombian State did not respect its obligations enshrined in the UN Guiding Principles on Internal Displacement, namely to prevent the phenomenon, to protect the persons involved, to provide them with adequate humanitarian aid and to facilitate their resettlement (IACHR, 2013b); the situation of internally displaced people is somehow aggravated by the fact that, not trespassing the national boundaries, they cannot apply for the status of refugees. Forced displacement is a particularly common phenomenon in a context where the seizure of land is so important, from the perspective of both guerrillas, paramilitaries and drug traffickers<sup>277</sup>: because of the widespread violence perpetrated by all the parties to the conflict, millions of persons were forced to flee their residence. As a matter of fact, IACHR identified armed confrontations between paramilitaries, violence associated with drug business, crop fumigation and eradication among the main causes of forced displacement in Colombia (IACHR, 2013b).

Although this is not the appropriate context for a detailed discussion, phenomena such as forced disappearances, extrajudicial killings and internal displacement are interesting topics for the purpose of the present work, since they involve numerous HR violations that are perpetrated by *both* parts of the conflict: not only, on the one hand, the “criminal” side, represented by leftist guerrillas, drug traffickers and right-wing paramilitaries, at the same time united and divided by the common interest in profitable drug-related businesses, in the name of which they commit indiscriminate killings, thefts, kidnappings, expropriations and so forth; but also, on the other hand, the Colombian State itself, whose corruption and collusion with the paramilitaries and its compliance with the crimes they committed, if not its direct involvement in the latter (as it was the case of *false-positives*), contributed to increase HR violations and hindered their redress.

The Colombian authorities also caused harm to the population in the framework of counterdrug and counterinsurgency measures, which have been implemented in a highly repressive, criminalizing and sometimes indiscriminate way: forced crop eradication campaigns, as partly addressed throughout the previous chapters, constitute an appropriate example of these controversial dynamics.

#### *6.1.2.2. Counterinsurgency and eradication: the State responding to organized crime*

Drug policies in Colombia have been characterized by all those factors that, according to the analysis carried out throughout the previous chapters, are likely to hinder the enjoyment of basic rights and

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<sup>277</sup> For instance, when paramilitary groups united under AUC and started their territorial expansion, their intimidating and criminal activity contributed to the displacement of thousands of Colombian peasants (Felbab-Brown, 2010).

freedoms by a part of the population: first, highly repressive and disproportionate measures have been used to punish drug use, as well as the abuse of criminal law as a weapon against illegal drugs, which usually affects the most vulnerable sectors of the population. Secondly, a specific part of these repressive measures consisted of forced eradication of crops, mainly carried out through aerial fumigation: if these methods succeeded in reducing coca cultivation in the short run, they did not jeopardize the potential drug production and, on the other hand, they had negative effects on the communities and the ecosystems of the fumigated areas (Uprimny and Guzmán, 2016). Moreover, drug policies were generally undermined in their effectiveness by the fact that they were carried out with a certain incoherence and uncertainty, without being part of a comprehensive, long-term strategy; phenomena such as the *balloon effect* reduced the impact of policies essentially based on prohibition and supply reduction, and the price increases that should have discouraged the drug market constituted a further incentive to enter this profitable business. Finally, the strong influence of international dynamics made Colombian drug policies a sort of legacy of the U.S. War on Drugs, which significantly reduced national autonomy to develop suitable strategies for the specific domestic necessities. This is why, notwithstanding some significant achievements in the regulation of drug consumption and in the consideration of drugs as a health and social problems, the illegal economy linked to drug trafficking still creates a constant challenge for the Colombian State (Uprimny and Guzmán, 2016).

The first U.S.-funded eradication and interdiction campaign in Colombia was directed towards marijuana cultivations and shipments in the Guajira region in the early 1980s; not only the operations failed to meet its goals, but it involved heavy costs for the local population and it showed that supply-oriented operations needed to be coupled with parallel demand reduction programmes, in order to provide viable economic alternatives to drug trade (Bagley, 1988).

Counterdrug and counterinsurgency measures were initially kept clearly distinct by the Colombian military: overwhelmed by the fight against an ever more powerful FARC, it saw counternarcotics operation as a job for the police, thus avoiding any significant role in such efforts at first (Ramírez Lemus *et alii*, 2005). Another reason to avoid direct participation in anti-drug activities was the fact that the army, in its struggle against guerrillas, increasingly relied on paramilitary groups, which had a well known link with the drug trade itself. Despite this initial reluctance, the Colombian army soon realized that embracing counterdrug policies would allow it to obtain U.S. aid, which was necessary as to defeat guerrillas (Felbab-Brown, 2010): this is why U.S. played an increasingly active role in shaping drug policies to be carried out by the Colombian government throughout the 1990s, and eradication became a

top priority of such policies<sup>278</sup>. It became increasingly clear that cutting the substantial revenues that FARC constantly received from drug trafficking was indispensable as to persuade it to negotiate a stable peace with the government; nonetheless, the lack of alternative livelihood programmes raised a widespread resentment among the *cocaleros* affected by the eradication, which had the unexpected effect of consolidating their support for guerrillas. Since military victory seemed an increasingly remote option, President Pastrana decided to try the road of negotiation and in 1998 started discussions with the FARC about disarmament, creating a demilitarized zone (*zona de despeje*) that immediately became a sort of *de facto* FARC-controlled State; the lack of a coherent plan by both parties led to the failure of negotiations and to the eruption of violence once again in 2002 (Felbab-Brown, 2010). In the meantime, Pastrana had engaged in the design of U.S.-sponsored Plan Colombia, which had been conceived by the Colombian President as a policy of investment for social development and peace construction, but would be soon altered by U.S. necessities and priorities; the Plan had an explicit counterdrug focus, while the counterinsurgency element only emerged the events of 9/11, which persuaded the Bush administration to engage in an unified campaign against both criminal activities in Colombia, sharing both drug and non-drug intelligence with the Latin American country (Ramírez Lemus *et alii*, 2005). Plan Colombia thus emerged in a context of growing counterinsurgency emphasis from the U.S., in parallel with an increasing militarization of Colombia, where the new President Uribe declared the “state of internal unrest” in 2002.

Aerial fumigation campaigns under the Plan were carried out with the supervision of armed forces in charge of protecting spray flights from the attacks of guerrillas, which did not impede some violent confrontations that led to the death of both U.S. and Colombian personnel. Even though fumigation was conducted on an unprecedented scale, its success was doubtful as Colombia remained the world’s largest coca-growing country: not only coca growers exploited the high mobility of the cultivations to move them to more remote areas, but also the operation themselves involved heavy economic costs, which made the financial feasibility of a protracted large-scale fumigation programme highly questionable (Ramírez Lemus *et alii*, 2005). Moreover, Plan Colombia was emblematic of the collateral damage that forced eradication campaigns can bring to rural populations and ecosystems, as already discussed in the previous part: the skepticism of farmers about the actual provision of economic aid by the government led voluntary eradication attempts to a failure; notwithstanding the guarantees given by U.S. State Department, the programme was not implemented as to avoid harm to humans and other crops, rather it was carried out indiscriminately and to the detriment of local communities’ health and

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<sup>278</sup> Under President Samper’s administration, eradication campaigns were carried out constantly and intensively: as an example, more coca crops were eradicated in 1994 than in the preceding four years combined (Felbab-Brown, 2010).

subsistence; last but not least, given the devastating effect that crop fumigation had on the livelihood of *cocaleros*, many of them were forced to abandon their areas of residence<sup>279</sup> and partly engaged in drug businesses themselves (Ramírez Lemus *et alii*, 2005).

In sum, Plan Colombia is a suitable example of the human and environmental costs of forced eradication in the targeted areas: apart from the above-mentioned direct effects of fumigation, government security and armed forces, as well as guerrillas and paramilitaries, have been regularly engaged in massacres, forced disappearances, violations of civil liberties and extrajudicial executions against civilian noncombatant; all the above happened in a context of ever-growing autonomy of the military and its constant invocation of the state of siege powers, which allowed it to increase its presence in the country's political process. Furthermore, the implementation of the Plan also undermined Colombian democratic institutions: fumigation policies were carried out despite being harshly questioned on the legal and constitutional ground by regional governments, civil society, government agencies and even various courts, concerned about the violation of guarantees on public health and security, environmental protection and prior consultation of the affected populations (Ramírez Lemus *et alii*, 2005). Despite all these problematic aspects, Plan Colombia has been heralded as a major success of U.S. anti-narcotics enforcement policies, and has served as a model for similar programmes to be carried out in Mexico and other countries (Hobson, 2014).

### **6.1.3. The Inter-American Court of Human Rights dealing with violations in the Colombian counterdrug context**

Given the overview provided by the previous sections on the situation that drug trafficking and its overlap with insurgent guerrillas created in Colombia, it can be easily inferred why the country has been a fertile ground for gross and systematic HR violations, caused by the sum of multiple factors. To follow, two cases examined by the IACtHR will be briefly presented as to provide a framework of how the judicial body dealt with such violations; the selected judgments first address cases of violence perpetrated by right-wing paramilitaries with the acquiescence of the Colombian authorities; secondly, a case concerning the rights of indigenous people living in coca-growing regions that were targeted by counterdrug operations will be presented.

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<sup>279</sup> While people displaced by political violence have the right to emergency food aid provided by social solidarity networks, families displaced under drug eradication operations have no such right, which increases the situation of poverty and insecurity in which they constantly live (Ramírez Lemus *et alii*, 2005).

### 6.1.3.1. Paramilitary violence and State acquiescence: the case of Mapiripán massacre

The case presented below provides an example of the ambiguous relationship that the Colombian armed forces had with AUC paramilitaries, who were accountable for regular episodes of violence perpetrated in the context of the internal conflict against FARC guerrillas, and the likewise unclear role of the State in carrying out investigations about such episodes, which creates dangerous mechanisms of impunity. The *Mapiripán massacre* case is named after the place where the killing of approximately 49 people<sup>280</sup> was perpetrated by AUC paramilitaries who, as well as members of FARC, sought control of the area due to its strategic location for drug trafficking, planting, processing and trading<sup>281</sup>. The massacre took place between July 15 and 20, 1997: the inhabitants of Mapiripán were kidnapped, killed and dismembered for their alleged sympathy for and collaboration with FARC; moreover, the surviving inhabitants were threatened and intimidated as to cause their abandonment of the area, contributing to the humanitarian crisis of forced internal displacement<sup>282</sup>. The Colombian State acknowledged its international responsibility for the violation of various ACHR provisions, but pointed out that said responsibility did not derive from a State policy, but from irregular actions of its agents instead<sup>283</sup>. The Court declared the State responsible for the violation of Maripipán's inhabitants right to life, humane treatment and personal liberty (Articles 4, 5 and 7 ACHR), as it failed to adequately protect innocent people's fundamental rights against a third party's action: in this case, the private nature of the agents who directly perpetrated the massacre does not eliminate State's responsibility for not providing adequate protection to the victims, all the more so as State agents were proved to be involved in the events<sup>284</sup>. The victims and next of kin had also their right to a fair trial and to judicial protection (Articles 8 and 25 ACHR), since the responsible individuals were not adequately prosecuted by the State and the army failed to cooperate with judicial investigators, miscontrolling the crime scene despite being the first authorities to arrive there<sup>285</sup>. Lastly, the Court judged that children's right to a special protection (Article 19 ACHR) and displaced peoples' right to freedom of movement and residence (Article 22 ACHR) were also violated. As an underlying principle to all the above-mentioned violations there is the State duty to respect rights and freedoms and to ensure their enjoyment by all the persons subject to their

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<sup>280</sup> It was not possible to establish the exact number of victims as their bodies were thrown into a river by the AUC members; moreover, the brutal nature of the murders prevented the authorities from fully identifying the victims (*Mapiripán massacre*, §96).

<sup>281</sup> *Ibid.*, §96.

<sup>282</sup> *Ibid.*, §96.

<sup>283</sup> *Ibid.*, §97.

<sup>284</sup> *Ibid.*, §117.

<sup>285</sup> *Ibid.*, §227.

jurisdiction (Article 1 ACHR) and to adopt the adequate measures to give effect to these provisions (Article 2 ACHR).

This case is particularly significant in that the Court declared the State internationally responsible for acts of private individuals, in principle not attributable to it<sup>286</sup>, which is an important element in the complex framework of private military personnel's accountability<sup>287</sup>: it can be therefore said that, according to the IACtHR jurisprudence, help, complicity or tolerance with private individuals who commit HR violations, even though their activity does not depend directly on the State's directives, make such violations imputable to the State parties (Barón and Velásquez, 2015).

Maripipán massacre was an example of how members of the army contributed to HR violations through collaboration, acquiescence and omissions, sharing intelligence and supplying weapons, munitions and transportation assistance. Though indirectly, the State participated in the massacre not only by facilitating the entry of AUC in the municipality<sup>288</sup>, but also failing to take the necessary measures to prevent an attack that had meticulously planned months before<sup>289</sup>. Similarly, the Court ruled over another case involving a massacre perpetrated by a paramilitary group, in this case against 15 Colombian judicial officers who were investigating HR violations. In *La Rochela massacre* the Colombian State was judged responsible for not having provided effective judicial recourses to the victims, because of the lack of due diligence demonstrated during the officials investigations, which were deemed unreasonably long; moreover, the State was judged guilty for not having adequately protected the investigators notwithstanding the riskiness of their activity. In *La Rochela* State responsibility thus emerged as a consequence of its failure to meet factual positive obligations in relation to the rights enshrined in the ACHR.

#### 6.1.3.2. *Indigenous' rights in coca-growing areas: the case of Operation Genesis*

This IACtHR judgment addressed the HR violations suffered from the Afro-descendant communities inhabiting the territories along the Cacarica River basin as a result of the counterinsurgency *Operation Genesis*, conducted by the State army at the beginning of 1997. The judgment presents a detailed overview of the characteristics of the region, which is described as mainly inhabited by Afro-descendant communities, based on self-subsistence economy and heavily forested: the latter characteristic, together

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<sup>286</sup> Ibid., §111.

<sup>287</sup> see §4.2.2. - State obligations and responsibilities concerning the use of PMSCs of the present work.

<sup>288</sup> The irregular flights with which the paramilitaries landed in the concerned area were not subjected to the legal control measures by the army. Ibid., §96.

<sup>289</sup> The expert HR professional engaged in the judgment clarified that the massacre was carried out by following a regular pattern of operation by the paramilitaries and it was easily foreseeable.



with the position at the border between Central and South America, made it a suitable and advantageous place for drug trafficking and other types of criminal activities, which is why it suffered from the violent presence of AUC, FARC and other guerrilla and paramilitary groups. Representatives of the local communities also claimed to be usually ignored and marginalized by the State, which failed to provide adequate assistance in various sectors, therefore finding themselves in a situation of abandonment and vulnerability<sup>290</sup>.

According to the facts presented, indeed, before the events the area had already been subject to attacks by pro-government paramilitary group, which had murdered several residents and had engaged in armed confrontations against FARC guerrillas. The Operation was carried out by the State army in coordination with AUC paramilitaries as to eliminate guerrillas operating in the area; the impact on the community was devastating, as homes were set on fire and civilians were forced to leave, which led to the forced displacement of around 3500 persons. In the meantime, a violent assassination also occurred: the villager Marino López was hit with a machete, threatened and then killed by two paramilitaries under the accusation of being a member of the guerrilla forces<sup>291</sup>; according to the witnesses, the victim's body was also dismembered and treated disrespectfully by the AUC members. After the events, the majority of displaced people sought refuge in the city of Turbo, where they received very poor accommodations and assistance, with insufficient and inadequate sanitary or educational services; they could begin to return to their lands in 2001, four years after the facts of *Operation Genesis*.

The Court unanimously found the actions in breach of right to life and to humane treatment (Articles 4 and 5 ACHR) in relation to the murder of Mr. López, while the forced displacement was deemed a violation of the right to humane treatment, property and freedom of movement and residence (Articles 5, 21 and 22 ACHR) of the community, since its members lost the possibility to own and manage their ancestral territory and its economic development<sup>292</sup>. In this case, not only paramilitaries were found in breach for an operation that resulted in the displacement of the community, but also the State was considered to have failed in its obligation to ensure humanitarian assistance and safe return to the displaced persons. The rights to a fair trial and to judicial protection (Articles 8 and 25 ACHR) were also violated by the insufficient investigations carried out by the State on AUC and armed forces members, and by its failure to provide an effective remedy to stop the expropriation of collective

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<sup>290</sup> Operation Genesis, §87.

<sup>291</sup> Ibid., §108.

<sup>292</sup> Ibid., §347.

properties<sup>293</sup>. Moreover, the Court gave a special attention to the right to adequate protection (Article 19 ACHR) of the displaced children<sup>294</sup>.

*Operation Genesis* provides a reliable idea of how indigenous people, who are *per se* especially vulnerable for their poor economic situation and their frequent marginalization<sup>295</sup>, are exposed to violence and HR violations at the hands of paramilitary groups, who enjoy State's acquiescence, if not direct cooperation, in the name of defeating the guerrillas as an absolute priority.

The two cases selected for the present work provide an instance on how the Court coped with the extremely complex context of internal conflict and crime within the Colombian State, in which the corruption and the weakness of governmental institution overlapped with armed violence between illegal armed groups of two opposite factions and with crimes related to the profitable drug illegal business. Apart from the extraordinary violence of the acts perpetrated *per se*, the cases significantly highlighted the direct or indirect participation of the State in the commission of HR violations against the civil population: either not investigating adequately on the violations, or cooperating with the paramilitaries through the provision of assistance or the tolerance of their illicit acts, Colombian authorities were responsible of fostering the risky and violent situation in which the population was forced to live, an accountability that acquired a significant position within the jurisprudence of the IACtHR.

#### **6.1.4. Colombia today: a peace process reflecting a long-lasting wound**

It would be too long to present in the detail the long and complex peace process that, formally started in 2012 but grounding its roots in the precedent years, led to the signature of a peace agreement between the Santos' government and FARC; nevertheless, as a means of conclusion of the section, it is important to briefly address the fact that the peace process itself reflected the complex reality created by half a century of internal armed political conflict, not only concerning State institutions and parties but also, and maybe above all, the public opinion. After the failed attempts of a truce during the 1990s, the turning point was the weakening of the FARC caused by the several losses inflicted by the Uribe administration, under a tough approach that denied any compromise prior to the cessation of the

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<sup>293</sup> *Ibid.*, §410.

<sup>294</sup> *Ibid.*, §327.

<sup>295</sup> The peculiar vulnerability of indigenous people is an internationally acknowledged issue, as demonstrated by instruments such as the American Declaration on the Rights of Indigenous People and the UN and ILO Conventions addressing the topic.

hostilities and of the terrorist activities, known by the slogan *seguridad democrática* (democratic security): the militarily weakened guerrillas realized that political bargaining was a more viable way to pursue their objectives than the armed conflict. The peace process, officially started under the Santos administration, was characterized by uncertainty and a continuous succession of advancements and moving backs, due to the aggressive language and methods used by the two parties, their scarce flexibility and the sharp polarization created by the debate (Locatelli and Nocera, 2016), basically concerning the harshness of the sentences against the guerrillas.

The popular referendum on the peace agreement signed in September 2016, which had the basic objectives of ending the conflicts and making FARC abandon both the arms and all their illicit businesses (Goi, 2016a) while returning to the civil life, had an absolutely unexpected negative result, which showed the profound mark that almost 50 years of conflict had left on the Colombian population (Goi, 2016b) and the perplexities raised by the concession of amnesty to FARC members and their participation in politics (Jean-Baptiste, 2017). The agreement was therefore renegotiated in some aspects and the new version was signed in November, basically removing some of the concessions that the previous one made to FARC (reduction of State contribution to the political parties they would eventually create, utilization of the goods in their possession as a compensation to the conflict's victims and so forth); moreover, it was agreed not to incorporate the text into the national Constitution, except for the points concerning IHL (Goi, 2016c). Maybe the most controversial issue about the peace agreement was the concession of special juridical treatment, amnesty and pardon to members of FARC and State agents involved in political crimes during the armed conflict, which was officially integrated in the agreement by the Amnesty law (*Ley de Amnistía*) entered into force on the 30<sup>th</sup> of December after being approved by unanimity in the Congress (Noticias Caracol, 2016). The law includes political crimes such as rebellion, rioting, illegal possession of weapons and murder in combat compatible with IHL, and extinguishes investigative, administrative and disciplinary proceedings for the concerned conduct, providing immunity from the usual operation of the law; its legal basis is explicitly brought back to the Additional Protocol II to the Geneva Conventions, which applies to non-international armed conflicts taking place in the territory of a contracting State between its armed forces and a dissident armed group, and states that “at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained<sup>296</sup>” (Jean-Baptiste, 2017).

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<sup>296</sup> Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) of 8 Jun. 1977, Art. 6 – *Penal Prosecutions*, Par. 5. Available at: 146

Since the law raised some doubts and perplexities among the judges, a governmental decree was issued in February 2017 in order to regulate and clarify some of its points: among the most important, in order to declare the juridical extinction of the concerned crimes, the individuals invoking the amnesty must appear in the official list of persons condemned or processed for political crimes in the context of the armed conflict, and the whole proceeding of application of the amnesty must not last longer than 10 days; most significantly, the law only applies to crimes committed before the peace agreement was signed (El Tiempo, 2017). It is important to highlight the fact that both FARC members and State agents are *not* entitled with the right to amnesty or special juridical treatment if deemed responsible for crimes against humanity, war crimes, extrajudicial executions, taking of hostages, grave deprivation of liberty, torture, sexual violence, forced displacement<sup>297</sup>, basically what is envisaged in the Rome Statute of the International Criminal Court. Given this restriction, a brief analysis of the amnesty law from the point of view of international law shows that it is compatible with it, since it respects Protocol II to Geneva Conventions in strictly applying only to conducts related to participation in hostilities, excluding war or other serious international crimes falling under the ICC jurisprudence and the Rome Statute. On the other hand, the Inter-American legal framework should be analyzed separately, as it considers amnesty inapplicable to a number of serious HR violations that may not be included in the Rome Statute, further restricting its use and expressing its concern about amnesty as a means to impede access to justice for victims and to favour arbitrariness and impunity, which emerges from numerous judgments of the Court (Jean-Baptiste, 2017); nevertheless, the political crimes to which the Colombian amnesty law is intended to be applied seem not to correspond to those considered as serious HR violations under the Inter-American system.

Notwithstanding the lack of evidence of its incompatibility with international law under both the Rome Statute and the Inter-American jurisprudence (Jean-Baptiste, 2017), the amnesty for political crimes committed by FARC members constitutes a controversial issue in that it potentially neglects the right to effective remedy and justice for the victims of gross HR violations perpetrated during the armed conflict, and their relatives; indeed, it raised numerous critics and perplexities among political opponents and civil society organizations expressing their concern for the accountability for HR abuses, which is potentially limited by the amnesty provision; a letter written to President Santos by the representative of Human Rights Watch provides a clear and detailed instance of such concerns,

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[http://www.redcross.org/images/MEDIA\\_CustomProductCatalog/m27740272\\_Additional\\_Protocol\\_II.pdf](http://www.redcross.org/images/MEDIA_CustomProductCatalog/m27740272_Additional_Protocol_II.pdf) [Accessed 26 Sep. 2017].

<sup>297</sup> See Colombian Congress - Law n°1820 (30 Dec. 2016), *por medio de la cual se dictan disposiciones sobre amnistía, indulto y tratamientos penales especiales y otras disposiciones*, Artt. 23 and 47. Available at: <http://es.presidencia.gov.co/normativa/normativa/LEY%201820%20DEL%2030%20DE%20DICIEMBRE%20DE%202016.pdf> [Accessed 21 Sep. 2017].

addressing the vague wording of the bill and its lack of cohesion with Colombian criminal law, among other things (Vivanco, 2016). In this sense, it is essential that the amnesty is coupled with other justice mechanisms, such as the Truth Commission created under the peace agreement as a temporary body appointed for the investigation of past events through the direct engagement with the affected population (Jean-Baptiste, 2017).

The discussion around the amnesty question shows the deep wound left by the conflict, and the "dual" face of the peace agreement which, while maintaining the compensation and the provision of restorative justice for the damages suffered by the victims as a straight priority, on the other hand aims at rapidly restoring the political normality in the country, promoting a stable and long-lasting concord between the parties (Zupi, 2017). It is not clear how will the Court and the Commission balance these two faces of the agreement, the political objectives and the return to normal life achieved by such instrument, on the one hand, and the right to judicial guarantees and protection for the victims, on the other; the Colombian case surely is interesting as it is one of the first in which the Protocol II of the Geneva Conventions is explicitly addressed as a legal basis, which could open the path for a new jurisprudence of the Court using the Geneva Conventions as a tool of interpretation of the ACHR (Jean-Baptiste, 2017).

Before the referendum, President Santos said that the success of the agreement rested on "people's ability to forgive": the unexpected outcome demonstrated that the profound suffering and sense of insecurity that the conflict caused to people still persists, and it can be an obstacle to the peace process as well as legal and political issues (Sengupta, 2016). To make the Colombian society move forward and facilitate the reintegration of previously hostile groups, it is essential that the amnesty law and the other provisions within the framework of the peace agreement are presented to and understood by the people in this sense (Jean-Baptiste, 2017). Today, FARC is ready to legally and openly enter Colombian politics with their own party for which, curiously, they maintained the original acronym (*Fuerza Alternativa Revolucionaria del Común*), which testifies the will to be identified as a revolutionary force, although in a completely different, legal and pacific framework (El Tiempo, 2017).

## **6.2. Mexico: militarization of anti-drug efforts in a transit region**

With Colombia, Mexico is the other emblematic country as far as drug-related violence is concerned, even though the dynamics are quite different from those affecting the Andean State: Mexico, indeed, always had quite a controversial relationship with the criminal cartels and the complex network of crimes and alliances that they created throughout the twentieth century, since its institutions have always

suffered by worrisome degrees of corruption. Another peculiar characteristic of this context is the progressively intensifying influence that the U.S. had on the counterdrug measures to be enacted in its neighbour country, which led to what has been defined the Latin scenario *par excellence* of U.S.-led War on Drugs. Under external and internal sources of pressures, Mexican governments gradually adopted a tough-on-drugs militarized approach that worsened the tension with criminal groups; in this framework, gross and systematic HR violations against civilians have been committed by police and armed forces, with a frequent acquiescence and tolerance by the State itself.

This section will present the historical development of Mexican counterdrug strategy and of its relation with both the U.S. and the cartels; then, the impact of the above mentioned militarization on HR will be addressed according to what has been reported by the IACHR, the UN Special Rapporteurs and other HR-related entities, with a particular focus on crimes such as unlawful detention, torture, forced disappearances, extrajudicial killings and forced internal displacement. Finally, two judgments of the IACtHR will be presented as instances of how the Mexican judicial system and the militarized approach in general were deemed inadequate as to protect civilians' HR in the context of anti-narcotics efforts.

### **6.2.1. Historical and political background of Mexican drug policies**

In order to understand the dynamics lying behind the development of the War on Drugs in Mexico, it is appropriate to draw a brief historical overview on how did the country become a central route for drug trafficking and how did this role shape the relations with its most influential neighbour State, namely the U.S.; furthermore, as a premise it is important to highlight the difference existing between the primary role that Mexico always had in determining its domestic counterdrug policies, and the weak Colombian State constantly at the mercy of criminal and insurgent groups.

#### *6.2.1.1. Public and “grey zone” policies: Mexico between prohibition and acquiescence*

Two paths can be identified in the drug policies implemented by the Mexican authorities throughout the last century: on the one hand, the official government's line towards narcotics, represented by public policies such as agreements, laws and declarations; on the other hand, a sort of "grey zone" policy carried out through private groups loosely connected to formal State organs, making covert agreements and drug-related businesses (Smith, 2016). These policies intersected in a framework of counterdrug efforts that was essentially shaped by two factors: the first, endogenous, is the cultural link historically established between drugs and insanity or criminality; the second, exogenous, is the strong U.S. pressure

in search of ever-tougher provisions to be enacted by the Mexican government against drug trafficking (Smith, 2016).

The estimation of drugs as negative elements associated with criminality, violence and insanity began to spread during the regime of Porfirio Díaz, towards the end of the 19th century; even though these associations did not lead to the legal ban of drugs, they fostered a series of restrictions over their trade and use. In the first decades of the 20th century the U.S. hardened their policies on drugs, starting to shape what would become the international drug prohibition regime with the first acts and conventions: this tougher approach fostered the creation of an illegal drug market along the Mexican border, as to satisfy U.S. demand; in the meantime, a smaller internal market was developing among Mexican cities. The post-revolutionary period led to new regulations that established a separation between the legal and the health dimension of drugs; at the same time, the above-mentioned "grey zone" policies started to develop as secret agreements between officials and traffickers, protecting the increasingly lucrative business. World War II disrupted Asian and Europe traditional heroin routes, which opened further opportunities for Mexican producers; repressive efforts such as *Gran Campaña*, consisting of the manual eradication of poppy plants, were quite ineffective, as well as the attempts of traffickers' imprisonment, due to the widespread corruption and the structure of the legal system, which impeded long-term detention (Smith, 2016). If public anti-drug policies did not work, on the other hand the "grey zone" significantly developed in the post-war period: the Federal Security Ministry (DFS - *Dirección Federal de Seguridad*), an intelligence agency for the investigation on criminal activities, had numerous links with drug smuggling business, and the drug industry developed in various regions through a series of decentralized pacts. The advent of the counterculture in the 1960s fostered drug consumption in the U.S., increasing the demand and transforming Mexican trade: in this period Mexico supplied most part of U.S. market for marijuana and around 15% of that for heroine (Smith, 1999); drug exports grew exponentially and major traffickers emerged on the Mexican scene and took control of the trade, eliminating smaller and less violent smugglers (Smith, 2016). Moreover, the rupture of the "French Connection" heroin route between Turkey and the U.S. in 1972 constituted an opportunity for Mexican producers to significantly expand their exports of the substance (Smith, 1999).

The situation worried U.S. administration, that increasingly pressured the Mexican authorities to harden their policies against drug producers and traffickers; the stop-and-search campaigns launched by Nixon (*Operation Intercept*) were a failure, but they succeeded in convincing Mexican authorities to toughen their policies, which led to the more effective *Operation Condor* in 1975, during which crops were eradicated and relevant traffickers were imprisoned; the campaign was marked by a tight cooperation with U.S. government agencies and by the intense deployment of the Mexican army (Smith, 1999) and had also a heavy impact on the poor and marginalized rural populations inhabiting the concerned zone

(Mercille, 2011). This moment marked the engagement of U.S. policymakers in a series of operative agreements and joint operations aimed at eliminating drug supply at the very source, which would remain a cornerstone of U.S. drug enforcement policy abroad (Lupsha, 1981). *Operation Condor* had an unintended consequence, namely the concentration of the survived traffickers into stronger and more centralized cartels (Smith, 2016); meanwhile, a new penal code was approved envisaging more severe punishments for trafficking charges, and the beginning of Mexico's War on Drugs was approaching.

#### *6.2.1.2. The Mexican War on Drugs and U.S. initiatives in a transforming drug landscape*

During the 1980s, some economic developments represented a turning point for the emergence of Mexico as the main drug transit region; the first was the growing appeal that Mexican cartels represented for Colombian traffickers, in search of new routes for shipping cocaine into the U.S. after the closing of the Caribbean and South Florida passages: Mexico soon became the primary transit route for cocaine and acquired a leading role in the international drug market, which exponentially increased the economic resources of Mexican traffickers (Smith, 1999). Drug landscape was transformed by the arrival of cocaine, and decentralized marijuana smugglers suddenly became part of a complex and wide network of trafficking (Freeman and Sierra, 2005). The ever-growing amount of drug money with which the country was filled fostered corruption in the police, the military and the government itself (Mercille, 2011); at the same time the levels of violence and bribery used by traffickers reached new peaks (Freeman and Sierra, 2005). The growth of Mexico as a transit point was also fostered by the neoliberal reforms that increased commercial flows along the U.S. border and eventually led to the signature of NAFTA agreement in 1994; the promotion of free trade caused higher rates of poverty and unemployment in Mexico, which led many desperate people to take part in the cartels' business as labour force (Mercille, 2011). The straight priority given by U.S. government to the opening of trade created a paradoxical situation in which it simultaneously struggled to create a borderless economy and sought to stop drug flows across the border; in this context, the marked electoral fraud and institutional corruption characterizing Mexico in those years were moved to the background and were not adequately addressed (Freeman and Sierra, 2005). U.S. intelligence began to consider Mexican corruption as a real problem in 1985, when an U.S. agent was killed because of the collusion between drug traffickers and the police, which caused a first crisis of trust between the two countries and marked the beginning of a tougher U.S. anti-drug strategy to be implemented in Mexico, based on training and restructuration of federal police forces and a stronger U.S. control over the Mexican military, whose role in counterdrug policies was significantly improved (Freeman and Sierra, 2005).



When Colombian major cartels were dismantled in the 1990s, Mexican traffickers acquired an even more prominent role and took control of the business, and established direct links with coca producers in Bolivia and Peru; meanwhile, they seized another opportunity by engaging in the fast-growing market of methamphetamines (Smith, 1999). Those were the years of consolidation of the major cartels localized along the U.S. border (Tijuana, Gulf, Sinaloa and Juárez), whose dynasties gradually substituted the Colombian ones; interestingly, this was a period of relative low taxes of violence and murder, as Mexican cartels usually relied on violent means especially under the risk of losing their business and their profits; the election of Fox as the new President and the contemporary decline of cocaine demand in the U.S. reversed this situation (Mazzitelli, 2013).

Meanwhile, as drug trafficking and the relative corruption were far from disappearing, the U.S. presence increased as to foster the creation of special counterdrug units and, above all, to expand the military's mission: the armed forces embraced new law enforcement and intelligence tasks and gradually replaced the police personnel, without doing it in an adequately transparent and accountable way, which negatively affected the HR situation in the country, as it will be presented below (Freeman and Sierra, 2005). Fox and Calderón were the first Mexican Presidents to actively engage against drug trafficking, after the passivity of the approach followed by their predecessors: the first decade of the 21st century implied a series of U.S.-supported campaigns, such as the *Merida Initiative*, in parallel with an increasing spiral of violence and corruption, with the drug cartels continuously transforming, changing their relations within a complex network of alliances, infiltrating in State structures and combating against each other for the control of the business (Inkster and Comolli, 2012).

Since taking office at the end of 2006, Calderón clearly made counterdrug efforts the top priority of his administration, declaring drug violence as a real threat to Mexican State to be fought through a military-red response, and deployed thousands of soldiers and members of federal police to combat the cartels across the country. At the same time, he claimed the necessity of U.S. collaboration in assisting military operations, in combating the flows of arms trafficking and money laundering between the two countries and, of course, in reducing internal demand for illicit substances; moreover, he declared to consider extradition as a major tool to combat the cartels (Cook, 2007). Under Calderón administration, security spending exponentially increased, law enforcement agencies and the federal police forces were militarized; moreover, there was a huge internal purge of the corrupted police and various State agencies, to the point that it was affirmed that the Mexican State was implicated in a dual front, not only against drug traffickers but also, partly, against its own institutions (Morris, 2012). For its part, U.S. assistance promptly arrived in the form of aircraft and communication technologies provided to the Mexican government (Raether, 2012), together with the provision of funding and training; the *Merida Initiative* may be the most emblematic example of this tighter collaboration: a three-year anti-drug assistance

package worth around \$1.5 billion provided to Mexico, with which Bush promised to reduce internal demand for illegal drugs, money laundering and arms trafficking, while Mexico committed to increase its capabilities to fight drug cartels. Though it was partly a consequence of the export of Plan Colombia's sponsored success, the Initiative had different features, in that it implied a much lower law enforcement footprint by the U.S., and it did not envisage the deployment of U.S. troops on the Mexican soil; the training of Mexican forces and the delivery of goods, in fact, essentially took place within the U.S. territory. The plan was developed under a mutual agreement to respect each other's sovereignty and to foster international cooperation, coordination and information exchange. Helicopters and surveillance aircraft for interdiction activities were provided and constituted the most part of the expenditure; moreover, technical advice and training were offered as to strengthen Mexican institutions (Walser, 2008). Apart from its widely debated success in reinforcing regional security (Barry, 2011), the *Merida Initiative* not only represented a shift of paradigm in the U.S.-Mexico relationship, as they mutually recognized a shared responsibility in the fight against drug trade, but it was also an important test of the solidity of the link between the two neighbor countries in a period of rapid improvement of bilateral trade (Walser, 2008). The aggressive national security strategy adopted by Calderón had a turning point in 2012 with the election of Peña Nieto as his successor, who opted for a preventive action attempting at reducing the structural social and economic causes of criminality, while at the same time fighting internal corruption and maintaining the international commitment against drug trafficking and organized crime in general (Mazzitelli, 2013).

#### *6.2.1.3. Mexican drug cartels: an ever-changing and violent network of alliances*

The intensification of the War on Drugs implied a sharp increase in drug-related violence (Freeman, 2006), since a more aggressive and militarized State fostered a brutal reaction by drug traffickers, which engaged in a multi-front war against both the Mexican authorities and the rival organizations (Morris, 2012), frequently relying on violent *sicarios*, private assassins engaged in bloody attacks against rival traffickers, State agents and the civil society (Walser, 2008); the most famous of these groups, *Las Zetas*, acquired so much power and possessed so developed military and intelligence capabilities on its own, that it became an independent player in the drug trafficking scene once the Gulf cartel, its main employer, started to weaken in 2009. Apart from paramilitary groups, drug cartels also rely on other junior partners such as prison and street gangs, whose activity is not always fully controlled (especially when taking place in the U.S. or other foreign countries) and is frequently characterized by high levels of violence and brutality. Interestingly, the use of violence by cartels and gangs can be differentiated according to its motivations: while the former rely on violence primarily to obtain financial gain, the

latter's methods are deeply rooted in endemic problems affecting their marginalized regions of origin, such as lack of education, poverty and unemployment (Inkster and Comolli, 2012). According to the literature that classifies DTOs into different phases, Mexican "traditional" cartels such as Sinaloa and Gulf belong to the second group, exemplified by the Colombian Cali cartel and characterized by a more discriminate and symbolic use of violence (in comparison with the first-phase type, represented by the Medellín cartel), a strong level of corruption of governmental authorities, the essentially hidden and anonymous identity of their leaders and the reliance upon enforcer and operational personnel, as mentioned above. Nevertheless, the level of influence that DTOs have on Mexican politics led some to think about a third phase, in which drug cartels create a sort of parallel State within the legitimate one, seizing political control through infiltration rather than opposition and increasing its relation with various types of gangs. This mechanism was fostered not only by the fragmentation of the major cartels caused by the hard line followed by Calderón, but also by the ever-growing impact of globalization, which increased the importance of non-State groups' activity (Bunker and Sullivan, 2010); the emergence of a criminal enclave within the Mexican State is clearly more likely in a context of chronic institutional weakness and corruption (Inkster and Comolli, 2012).

It would be too long to discuss the complex and ever-changing dynamics behind Mexican drug cartels; what can be said is that the term *cartel* in Mexico acquired a broader meaning if compared with the original one, related to the Colombian cocaine traffickers, to embrace a wider group of criminal organizations involved in various kind of illicit businesses (Mazzitelli, 2013).

Another element worth to highlight is that Mexican cartels showed a noticeable flexibility and capacity to adapt their business choices and their alliances to the circumstances and the convenience: a good example is the alignment of the biggest cartels (Sinaloa, Gulf and La Familia Michoacana) under the *Nueva Federación* block in 2010, after years of fighting each other. This kind of mechanisms shaped an ever-evolving network of complex relationships between criminal groups that deeply affected internal security and hindered the government's capacity to elaborate a coherent counterdrug strategy (Inkster and Comolli, 2012).

### **6.2.2. Militarization of counterdrug efforts and their impact on Human Rights**

Even though it is not afflicted by a powerful combination of insurgency and drug trafficking groups severely undermining its legitimacy, as Colombia is, the Mexican State is affected in its capacity to protect individuals under its jurisdiction from HR violations by a series of shortcomings, concerning its military and judicial systems and the application of a militarized approach to the War on Drugs; international (UNHRC) and regional (IACHR) HR bodies and NGOs such as Human Rights Watch and

*Comisión Mexicana de Defensa y Promoción de los Derechos Humanos* published official reports in which they documented gross and systematic violations perpetrated at the hands of military and police forces and often justified as collateral effects of counterdrug efforts, not without the acquiescence or cooperation of the State itself.

#### *6.2.2.1. Mexican military and judiciary systems: systematic corruption and impunity*

To get a better understanding of the context in which U.S. intervention was integrated, it can be useful to present some features of Mexican police, military and judiciary system; first of all, as an underlying feature to the militarization of Mexican justice and security there is the traditional weakness and fragmentation of Mexican police forces: the lack of effective control by the federal police, which is theoretically the only endowed with jurisdiction over drug trafficking, over the activity of municipal and State police fosters corruption, abuse and ineffectiveness. While Zedillo introduced the militarization of federal police, Fox tried to establish a professional investigative service within the body and, finally, Calderón restructured it; though these efforts improved the police with regard to its training and equipment, the lack of continuity between the different administrations prevented its structural and coherent reform, while its highly susceptibility to corruption continues and traffickers often infiltrate in municipal and State police bodies (Inkster and Comolli, 2012).

Furthermore, it is important to mention that the Mexican military always enjoyed a broad internal autonomy and could take its decisions beyond public scrutiny, which was allowed by the acquiescence by the State in exchange for the promise to stay out of political issues; despite being formally subordinate to civilian control, the military was frequently brought into the civilian sphere. Similarly, military courts had the possibility to rule over almost every HR violation committed by military personnel, which allowed a broad degree of secrecy and impunity. The military justice system, indeed, gave birth to a problematic situation in which the military was sitting in judgment in separate courts which, nevertheless, were not structured to address HR violations against civilians in an impartial and independent way, and their judgements were subject to a very limited revision by civilian tribunals or any other kind of public scrutiny; moreover, what happened during military investigations and trials was practically inaccessible (Freeman and Sierra, 2005). Military jurisdiction was applicable for "crimes and faults against military discipline", which included a broad range of offenses and significantly expanded the scope of cases analyzed by these courts: as a consequence, gross HR abuses against civilians have been brought before these courts instead of being judged by competent civil authorities. It is maybe redundant to say what was the effect of this lack of information, transparency and civilian oversight on the protection of victims of HR abuses (HRW, 2009). A turning point in this sense arrived in 2009, with

an IACtHR decision according to which the Mexican military could not rule over HR abuses against civilians: in *Radilla-Pacheco v. Mexico*, concerning the forced disappearance of a HR activist at the hands of Mexican militaries, the Court ruled that, given the nature of the crime and of the rights violated, military criminal jurisdiction was not competent to investigate on the case: a military court assuming competences over a matter that should have been heard by ordinary jurisdiction was therefore in breach of the victim's right to due process and fair trial<sup>298</sup>; Mexican military code of justice was therefore considered against international standards. In compliance with the IACtHR judgment, in 2011 the Mexican Supreme Court of Justice issued a decision aimed at restricting military courts' jurisdiction and assigning the prosecution of members of the military responsible of HR violations exclusively to civilian, competent and impartial judges (IJRC, 2014); the decision was then implemented in 2014, with a reform of the Code of Military Justice approved by the Mexican Congress according to which the trial of HR violations committed by members of the military against civilians would be exclusive competence of the civilian courts (IACHR, 2014).

What were the causes and the unintended consequences of this increasing reliance on military strategies to face domestic security challenges? First, most part of the literature agree on a dual motivation underlying the militarization of Mexican security: on the one hand, the endogenous necessities given by the inadequacy of national, regional and local police forces' investigative capabilities and by the instability created by DTOs; the fear generated by organized crime even created a quite strong popular support towards the improved role of the military. On the other hand, the exogenous pressure of U.S. which, as already discussed, succeeded in shaping security preference across the Latin American continent (Sotomayor, 2013). As a first consequence, an iron fist approach was implemented without the adequate democratic structures at the basis, which led to the criminalization of drugs and the relative hindering of fundamental HR, which will be addressed below; secondly, the increased role of the military in public security was not complemented by the corresponding steps for its accountability and oversight, so that HR abuses committed during military operations were largely left unpunished. Thirdly, Mexican militarization had a spillover effect across the region, with smaller, more unstable and institutionally weaker countries such as El Salvador, Honduras and Guatemala emulated such policies, with a consequent sharp increase in the murder rate and other devastating effects (Sotomayor, 2013).

In sum, the militarization of security policies in Mexico, started towards the end of the 20th century under U.S. pressure and fully implemented by Calderón's administration, intensified the presence of armed forces in security operations, with a large use of lethal force, arbitrary arrests, disappearances,

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<sup>298</sup> *Radilla-Pacheco v. Mexico*, §273.

torture, patrols, inspections and searches: the lack of incorporation of HR standards in security strategies (WOLA, 2014) had a detrimental effect on the population, as the next paragraph will further address.

#### 6.2.2.2. Criminalization of drugs, pre-trial detention and Human Rights abuses

If HR abuses committed by military forces during counterdrug operations were largely left unpunished, on the contrary Mexico may be the most suitable country to be taken as an instance of abuse of criminal law to prosecute drug-related crimes such as consumption, sale and trafficking<sup>299</sup>. One of the consequences of militarization was, indeed, the so-called *mano dura* (iron fist) approach to drugs; this kind of zero-tolerance policy, which should be implemented with an adequate background of civilian oversight mechanisms, proper training of the employed forces and corresponding social services, was instead carried out through the imposition of harsh penalties even for minor offenses, in a sort of inheritance from pre-democratic practices (Sotomayor, 2013). Until a partial decriminalization was enacted in 2009<sup>300</sup>, detention for being caught consuming drugs in public places were broadly carried out under the accusation of *narcomenudeo* (drug retail), which was much more common than arrests following a proper investigation. According to WOLA reports, less than 2% of the arrests involved three or more people: these data give an idea of how did these operations, mainly involving easily replaceable dealers if not simple consumers, have a small impact on the whole drug trafficking chain (WOLA, 2014).

In a report published in 2015, the IACHR expressed a strong concern about the constitutional reform enacted in Mexico in the area of criminal justice and security in 2008, according to which the practice of *arraigo* (that is, detention without a judicial order, with a warrant and at the request of the Attorney General, for 40 days and renewable for further 40 days) was elevated to constitutional level: Article 16 of the Mexican Constitution, in fact, envisages the possibility for the judicial authorities to issue a restriction order against an individual for offenses of organized crime in case it is necessary for a successful investigation over his/her guilt. Moreover, the same Article envisages detention for being caught immediately after the commission of the drug-related offense (*in quasi-flagrante delicto*), a provision that has been given a broad interpretation as to arrest as many drug consumers and dealers as possible (IACHR, 2015). As pointed out by various civil society organizations and by the UN themselves, such restriction encourages the use of detention as a means of investigation, significantly

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<sup>299</sup> See §3.1.2. - Disproportionate punishment of drug-related crimes of the present work.

<sup>300</sup> In August 2009, a drug policy reform known as *Ley de Narcomenudeo* (“Small-scale drug law”) was enacted as to decriminalize possession of small quantities of narcotics for personal consumption, amending the Federal General Health Law (Mackey, 2014).

hindering the individual right to personal liberty, presumption of innocence and judicial guarantees (IACHR, 2015), and this is why the eradication of the *arraigo* practice from the Mexican Constitution has been solicited by various HR experts and bodies, in that it has been declared in opposition to IHRL (CMDPDH, 2014). The high number of detainees and the consequent overcrowding of prisons, ascertained during *in loco* visits of the IACHR Rapporteur on the Rights of Persons Deprived of Liberty, reflect the excessive use of pre-trial detention in Mexico and the lack of alternative measures; apart from worsening the quality of life of many people, this also represents a financial burden for the State. In the same occasion, it was ascertained that numerous inmates remained in prison without being tried for longer than the Constitution envisages, and in conditions of inconvenient promiscuity (IACHR, 2015). In fact, not only the excessive use of pre-trial detention hinders the judicial guarantees and the right to personal liberty and fair trial of the individuals; the detention conditions were also deemed strongly inadequate and in breach of the detainees' fundamental rights, with some worrisome common patterns such as "overcrowding, corruption, access to basic services, violence between inmates, lack of medical attention, a lack of real opportunities for social reintegration, a lack of differentiated attention for groups of special concern, abuse by prison staff, and lack of effective grievance mechanisms" (IACHR, 2015). Disciplinary sanctions were also applied disproportionately in relation to the violation committed, especially against particularly vulnerable subjects such as women; in general, it was noted that the special needs of peculiar categories such as persons with disabilities, women and migrants were not addressed in the detention context (IACHR, 2015). Lastly, the situation of some individuals deprived of their liberty was even considered by the IACHR as torture and humane and degrading treatment, an opinion shared with the UN Special Rapporteur on Torture, which declared torture and ill-treatment in the moments following detention and before detainees are brought before a judge a "generalized" phenomenon, occurring in a "context of impunity, the aim usually being to inflict punishment or to extract confessions or information" (UNHRC, 2014a). According to UNHRC and IACHR Reports, numerous cases of torture not only involve the active participation of members of the police and the armed forces, but also take place with the tolerance, indifference or complicity of other people involved in the detention process, such as doctors, prosecutors and judges (UNHRC, 2014a), frequently involving acts of sexual violence against female detainees (IACHR, 2015). The first moments of detention, especially in case of *arraigo*, seem to be the most likely to cause acts of torture against persons deprived of liberty, due to the weak safeguards by the authorities and to the lack of prompt investigation, which is a further reason to abolish pre-charge detention (UNHRC, 2014a).

Impunity in cases of torture and unlawful detention has been fostered by peculiar features of Mexican legislation, which does not envisage regulation of incrimination for military or civil superior, nor has adopted measures of prevention and/or reparation. Critical investigations on evidence of mistreatment of

the detainees constantly fail and the Istanbul Protocol, an international set of guidelines assessing the conditions of potential victims of torture, is not adequately followed by State officials, who frequently accept confessions obtained through torture as valid and classify cases of torture as simple “injuries” (HRW, 2011). Moreover, the priority importance given to the punishment of organized crime created a sort of “constitutional emergency” regime based on provisions such as *arraigo*, which exacerbates torture and arbitrary detention. In sum, notwithstanding a partial decriminalization achieved with the 2009 reform, abuses in the practices of pre-trial and *in quasi-flagrante* detention have been permitted by an extraordinary legal framework created under the militarized war on drugs, which on the one hand causes a disproportionate harm to minor drug sellers, users or simply suspected individuals who are punished as if they were drug traffickers, while on the other hand leaves members of the police or armed forces responsible for HR violations unpunished (CMDPDH, 2014).

#### 6.2.2.3. Violence and abuses by Mexican forces during counterdrug operations

As Mexican armed forces were increasingly involved in public security duties, the distinction between their functions and those of the police significantly blurred, which the IACHR considered a worrisome phenomenon with regard to HR violations. As a matter of fact, the armed forces employed in counterdrug operations were responsible of a series of grave HR abuses deriving from a general situation of violence and insecurity, targeting especially vulnerable groups (IACHR, 2015).

A sadly diffused phenomenon is that of forced disappearances which, as already discussed when addressing the phenomenon in Colombia, imply the deprivation of a person's freedom and the refusal to provide information about his/her disappearance, therefore preventing any legal remedy in this sense; differently from common disappearance, the forced type implies the responsibility of public servants. On this point, it is important to highlight the different definitions that the latter term can be given: while the Mexican Federal Criminal Code envisages the participation of a public servant (*servidor público*<sup>301</sup>) in the illegal detention leading to the disappearance, giving thus a narrow definition of the crime, in *Radilla-Pacheco* the IACtHR ruled that the enforced disappearance can also be committed by "people or groups of people that act with the authorization, support or acquiescence of the State"<sup>302</sup>, supporting the vision expressed by the UN Working Group on Enforced or Involuntary Disappearances (HRW, 2011). Forced disappearance usually follows quite a regular pattern: the person is arbitrarily detained by the soldiers or the police without the act being registered and without they being handed over to

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<sup>301</sup> Mexican Federal Criminal Code (1931, last reform in 2012), Art. 215 - *Abuso de autoridad*. [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=264549](http://www.wipo.int/wipolex/en/text.jsp?file_id=264549) [Accessed 5 Sep. 2017].

<sup>302</sup> *Radilla-Pacheco v. Mexico*, §320.



prosecutors; when the relatives seek information on the disappeared person, the authorities deny to have him/her in custody and refuse to open investigations on the matter (HRW, 2011). Despite the lack of exact figures on the number of disappeared persons, it is certainly a large-scale phenomenon; a progress in this sense has been made with the approval of Law on the National Missing and Disappeared Persons Data Registry in 2012, which nevertheless is still to be verified with regard to the transparency and reliability of the information provided (IACHR, 2015). Apart from the lack of appropriate and prompt investigation by the Mexican authorities, the families of the victims themselves contribute to the underrepresentation of cases of disappearances, since they are often afraid to report them. National and international experts observed a rising incidence of the phenomenon coinciding with the expansion of counternarcotics operations, and noticeable omissions and shortcomings in both civil and military investigations on cases of forced disappearances; nevertheless, a tendency has been identified as to downgrade the crime as a minor offense, which hinders its adequate criminalization (HRW, 2011), creating a paradoxical context in which such a severe crime is minimized in its gravity, while at the same time thousands of people are detained and mistreated for consuming drugs in public places.

The second phenomenon worth to address is the arbitrary deprivation of life in the form of extrajudicial executions by members of the police or the armed forces, which is maybe the most emblematic example of the “alarming levels of violence” still affecting the country, with numerous “extremely violent incidents, particularly violations of the right to life” (UNHRC, 2014b): phenomena that the UN Special Rapporteur explicitly related, at least partly, to Mexico’s continued militarization. An extrajudicial execution is an intentional and unlawful killing carried out by security forces, therefore not falling under the domain of legitimate use of lethal force which these bodies are endowed with in certain cases of absolute necessity; on the contrary, under regional (ACHR) and international (ICCPR) instruments it constitutes a violation of basic HR such as life, liberty fair and public trial, as well as the prohibition of torture and inhumane treatment or punishment, and is also implies the State's failure to comply with its duty to prevent, investigate, punish and redress (HRW, 2011). Moreover, extrajudicial killings are in contradiction with the principle of rationality (*razonabilidad*) which the Mexican Supreme Court based on the lawful end, the necessity and the proportionality of the act. The tens of thousands of people killed in violent episodes related to organized crime in Mexico, especially since the War on Drugs has officially begun, were claimed to be mainly members of criminal groups by the government; nevertheless, the investigations carried out by HRW showed that many of these cases were constituted by the killing of civilians at the hands of the authorities, as a consequence of an unjustified use of legal force. In many cases, on the contrary, extrajudicial killings are labeled by security forces as collateral damages of necessary shootouts occurred between State officials and armed criminal groups, as a sort of pre-emptive statement that hinders impartial and thorough investigations on the matter; to support their

assertions, security forces have been also proved to manipulate or destroy evidence of the crime, in an attempt to frame extrajudicial killings as drug-related deaths (HRW, 2011). Moreover, security forces issue official reports on armed confrontations that are accepted by investigators without carrying out further inquiries, which contributes to the widespread judicial impunity of those responsible; in the context of military justice, investigations were carried out in an even more opaque and ineffective way and, in the limited cases in which an officer was sentenced for HR violation, he received an extremely indulgent penalty (HRW, 2011), which is why the reform of the Code of Military Justice that finally came in 2014 was a particularly urgent matter. The UN Special Rapporteur highlighted the need for a consolidated public database with precise data and information on homicides so that a consequent, effective public policy strategy can be implemented (UNHRC, 2014b); at the present moment, the only existing official record on homicides is coordinated by INEGI (National Institute of Statistics, Geography and Informatics), which is not enough specific as far as the specificity of the crimes (CMDPDH, 2014). Interestingly and somewhat paradoxically, according to a survey published by INEGI itself, armed forces are seen by Mexican society as the institution providing the best protection and inspiring the major confidence in the context of threats and violence derived from organized crime (IACHR, 2015): this gives an idea of how a flawed, corrupted and biased judicial system can conceal gross HR violations by State authorities, taking advantage of the generalized atmosphere of fear and insecurity created by the War on Drugs.

Lastly, the internal forced displacement caused by the high levels of violence in the country is also worth to address; accordingly, apart from the generalized climate of insecurity caused by the growth of organized criminal groups, internal displacement was caused by a twofold violence: on the one hand, the indirect one, concerning episodes such as crossfire between drug cartels and armed or police forces which frequently cause casualties among the civil population; on the other hand, violent acts perpetrated directly against civilians, such as extortions, forced payment of protection quotas, kidnappings, forced recruitments and thefts. Three main causes have been identified as to explain this series of worrisome phenomena affecting Mexican population; first of all, the open confrontation against drug cartels under Calderón's militarized approach to counterdrug measures; secondly, the intensification of the fight between cartels for the control of drug trafficking; thirdly, as a consequence of the previous two factors, the fragmentation of criminal groups into minor units involved in smaller crimes (Díaz-Leal, 2014). People forced to displace due to unbearable levels of violence are not provided with the adequate guarantees and mechanisms of protection: once again, crimes committed against them are not adequately investigated and sometimes they are even scared to denounce the causes of their displacement, fearing that the authorities can identify them to the aggressors (IACHR, 2015). Experts have identified two distinct patterns of forced displacement: the first, namely mass displacement,

involve ten or more families and is more easy to document; the second, the most diffused, is known as *goutte-à-goutte* ("drop-by-drop") or dispersed displacement and concerns single households or families abandoning their places of residence without reporting it to the authorities (CMDPDH, 2014). Not only the topic lacks adequate data and serious research, but also it is frequently misperceived and denied by those who should be in charge of investigating in this sense; moreover, a tendency has been underlined as to usually respond to the internal displacement problem without paying attention to the “restorative” aspect of justice, that is, compensation and remedy for the victims (Albuja, 2013).

This brief overview of the most grave and common HR violations perpetrated in the context of Mexican War on Drugs provides an idea of how a flawed judicial system, with corrupted authorities carrying out biased or insufficient investigations, cannot respond to the worrisome consequences of a widespread violence and militarization across the country: these shortcomings have major repercussions on the civilians. The next section will present how the Inter-American Court and Commission dealt with these kinds of violations, in an attempt to overcome the weakness of Mexican justice mechanisms.

### **6.2.3. The Inter-American Court addressing Human Rights abuses by police and military forces**

The two cases presented below aim at showing how the HR violations identified by various HR bodies and NGOs during their reporting activity (forced disappearance and torture in particular) have been addressed by the IACtHR: they represent, indeed, two occasions in which the Commission and, then, the Court have highlighted the importance of the application of legal criteria that are consistent with international human rights standards by the entities related to the administration of justice in Mexico (IACHR). Furthermore, the two cases are interrelated in that in both the Court urged the appropriate legislative reforms as to entrust jurisdiction over HR violations against civilians to the competent civil courts, restricting the military justice system to prosecuting members of the armed forces for the commission of crimes of a strictly military nature (IJRC, 2014). Since, as a matter of fact, the Mexican Code of Military Justice was reformed in 2014, this is an interesting case in which the Court’s jurisprudence succeeded in influencing a country’s institutions.

#### *6.2.3.1. Forced disappearances and inadequate justice system: the case of Radilla-Pacheco*

Rosendo Radilla-Pacheco was a political and social activist resident in the Guerrero Mexican State who participated actively in the political life of his farmers' and coffee growers' community. As he also was a musician and composed *corridos*, a popular Mexican music talking about the peasants' social battles, he was arrested during a control in a military check-point in 1974; given the highly risky and repressive

political environment of that time, his relatives tried to discover his fate without filing a formal complaint<sup>303</sup>. His daughter was able to have a preliminary inquiry open only in 2001, after her criminal complaints before the Public Prosecutor's office was dismissed for lack of sufficient evidence. Investigations were carried out by a Special Prosecutor's Office for HR abuses, created on recommendation of the National Human Rights Commission, but no relevant information was found on the man's disappearance nor on its perpetrators<sup>304</sup>. Meanwhile, the IACHR accepted the petition presented by the National Commission in 2001, notwithstanding the preliminary objection of the State alleging that the petitioners had not exhausted domestic remedies. The case was then submitted to the IACtHR in 2008, thirty-four years after Mr. Radilla-Pacheco's disappearance.

The State was found in breach of Mr. Radilla-Pacheco's right to juridical personality, life, humane treatment and personal liberty (Articles 3, 4, 5 and 7 ACHR); moreover, the act was also found in breach of Article 11 of the Inter-American Convention on the Forced Disappearance of Persons<sup>305</sup>. Moreover, his disappearance also violated his relatives' right to mental and moral integrity and humane treatment (Article 5 ACHR) as they suffered the psychological consequences of the fact and of the relative deprivation of truth and lack of effective resources<sup>306</sup>. The Court also judged that the State was in breach of the family's right to a fair trial and judicial guarantees (Articles 8 and 5 ACHR) and of the right to trial by a competent, ordinary non-military court (Article 9 of the Convention on Forced Disappearances)<sup>307</sup>, since it failed to conduct an effective investigation on the fact and to prosecute the responsible parties since the beginning, when the victim's daughter and wife tried to resort to State Public Prosecutor's Offices. All these violations were committed in breach of Article 1 (obligation to respect rights) and 2 (adoption of necessary measures to give them domestic legal effects) of the ACHR

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<sup>303</sup> Radilla-Pacheco v. Mexico, §131.

<sup>304</sup> Ibid., §208.

<sup>305</sup> Inter-American Convention on the Forced Disappearance of Persons (1994), Art. 11: "Every person deprived of liberty shall be held in an officially recognized place of detention and be brought before a competent judicial authority without delay, in accordance with applicable domestic law.

The States Parties shall establish and maintain official up-to-date registries of their detainees and, in accordance with their domestic law, shall make them available to relatives, judges, attorneys, any other person having a legitimate interest, and other authorities".

<sup>306</sup> Radilla-Pacheco v. Mexico, §165.

<sup>307</sup> Inter-American Convention on the Forced Disappearance of Persons (1994), Art. 9: "Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions. The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties. Privileges, immunities, or special dispensations shall not be admitted in such trials, without prejudice to the provisions set forth in the Vienna Convention on Diplomatic Relations".

and Article 1 (prohibition to practice, permit or tolerate forced disappearances) of the Convention on Forced Disappearances.

The first reason for which this case is significant is that the Court applied the ACHR notwithstanding the State's objection that its adherence to the instrument was signed in 1981, seven years after the alleged facts; the motivation was not a retroactive application of the ACHR, but it was rather based on the fact that the forced disappearance of an individual has a "continuous and permanent nature"<sup>308</sup>, since it continues until the circumstances of the disappearance are known, thus generating an international obligation for the State<sup>309</sup>. The second is that, as already mentioned, it was an occasion for the Court to denounce the inadequacy of military courts to rule over HR violations committed against civilians, stating that military criminal jurisdiction should be applied restrictively and exceptionally, as to protect special juridical interests related to the tasks characteristic of armed forces<sup>310</sup>: it is not, therefore, the competent jurisdiction to investigate, prosecute and punish the authors of a HR violation, which corresponds to the ordinary justice system<sup>311</sup>. Thirdly, as previously discussed, the Court pointed out that the definition of forced disappearance envisaged by the Mexican Federal Criminal Code was too restrictive in interpreting the notion of "State agent" in that it did not refer to people acting with the authorization, support or acquiescence of the State, contradicting an acknowledged international principle<sup>312</sup>.

This case of forced disappearance of an individual is a good instance of how the Court dealt not only with State's inefficiency in investigating and prosecuting HR violations, which goes to the detriment of the victim and his relatives, but also with the inadequacy of Mexican law (in this case, the abuse of military criminal jurisdiction and the provision of Mexican Federal Criminal Code on enforced disappearances). The impressively long time (thirty-five years) passed between the alleged crime and the judgment without any relevant information provided to the victim's family is also emblematic of the tragic situation created by forced disappearances and the inadequate legal framework existing in this sense.

#### 6.2.3.2. *Unlawful detention and inhumane treatment: the case of Cabrera García and Montiel Flores*

This case concerns Teodoro Cabrera García and Rodolfo Montiel Flores, two environmental activists who were arrested in 1999 by members of the Mexican army and found guilty of various crimes based

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<sup>308</sup> Radilla-Pacheco v. Mexico, §17.

<sup>309</sup> Ibid., §24.

<sup>310</sup> Ibid., §272.

<sup>311</sup> Ibid., §273.

<sup>312</sup> Ibid., §321-§322.

on confessions extorted under torture. The arrest occurred during an operation against a drug trafficking gang, during which a farmer was killed. Subsequently after being arrested, the two victims were tortured and transferred to the headquarters of a military battalion, where they confessed the crimes which they were allegedly caught *in flagrante*, namely the possession of marijuana and the carrying of unlicensed and prohibited weapons<sup>313</sup>. They were then judged responsible by the Federal Public Prosecutor's Office and were filed with criminal charges, for which they were detained. They soon filed appeals against their detention, that they deemed unlawful and carried out under torture and inhumane conditions, but given the lack of evidence to prove these allegations the investigation was declared closed. The two victims were released following a series of examinations carried out by physicians, stating that the respective penalties (6 years and 8 months, and 10 years) were incompatible with their state of health<sup>314</sup>. Meanwhile, a complaint was submitted to the IACHR on behalf of the victims: in 2008 the Commission requested the State to carry out an adequate investigation on the violation of the victim's right to humane treatment and on the validity of the criminal case against them. As these recommendations were not adopted by the State, the case was submitted to the Court in 2010, with the Commission alleging violations of the ACHR and of the Inter-American Convention to prevent and punish torture. The Court found unanimously that the victim's right to personal liberty (Article 7 ACHR) was violated by the failure of the State to exercise the due "extreme care" when armed forces are used to control public emergencies<sup>315</sup>, in that the latter "are trained to defeat a legitimate target and not to protect and control civilians, a training that corresponds to police forces<sup>316</sup>": the State was therefore found in breach of its duty to prevent HR violations. Moreover, it did not guarantee that the two arrested people were promptly brought before a judge, despite having the means to allow this<sup>317</sup>. Their right to physical and mental health and moral integrity and the prohibition of torture (Article 5 ACHR) were also violated, since their allegations of torture were not investigated by the the State, even though it had the burden of proof to show that their confessions were made spontaneously<sup>318</sup>. This is linked to the violation of Article 8.3 ACHR (right to a fair trial), stating that "a confession of guilt by the accused shall be valid only if it is made without coercion of any kind", and of the other provisions under the same Article envisaging the right to be heard within a reasonable time by a competent and independent tribunal; similarly, their right to judicial protection (Article 25 ACHR) was violated. For the same reasons the State was declared in breach of Articles 1 (duty to prevent and punish torture), 6 (duty to

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<sup>313</sup> Cabrera García and Montiel Flores v. Mexico, §97.

<sup>314</sup> *Ibid.*, §117.

<sup>315</sup> *Ibid.*, §87.

<sup>316</sup> *Ibid.*, §88.

<sup>317</sup> *Ibid.*, §102.

<sup>318</sup> *Ibid.*, §136.

take effective measures to do so, and to ensure that they) and 8 (duty to investigate and prosecute) of the Inter-American Convention to prevent and punish torture. As broadly stated by the Court throughout its jurisprudence, the State was also in breach of its general obligations to respect rights and give them domestic legal effect (Articles 1 and 2 ACHR).

Making explicit reference to the case of *Radilla-Pacheco*, the Court declared again the inadequacy of military jurisdiction to investigate, prosecute and punish the perpetrators of HR violations in general, not only concerning cases of torture and/or forced disappearances<sup>319</sup>. The case is an important representation of how do Mexican judicial authorities frequently accept confessions obtained under duress and torture without adequately investigating on the alleged mistreatment suffered by the victims, as already mentioned throughout the present section.

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<sup>319</sup> Ibid., §198.

## Concluding Remarks

The dynamics affecting Latin American countries in the context of a widespread organized crime based on drug trafficking and a consequent tough policy response by the State provide a worrisome framework as far as fundamental human rights are concerned. As part of the ever-growing debate on the compatibility between drug policies and fundamental human rights and freedoms, numerous investigations and reporting activities carried out by regional and international human rights bodies and non-governmental organizations show that atrocious human rights practices are taking place not only at the hands of criminal groups, but also under the supervision of State authorities, in the name of a law-enforcement priority against drugs as the main public enemies; moreover, these policy choices do not seem to leave to the expected results as far as drug production, consumption, and trafficking are concerned.

The first part of this thesis provided two useful premises: the first one is that U.S. governments had a fundamental role in the shaping process of the global drug prohibition regime, which was fostered by the economic and diplomatic pressure that it can exercise on unstable and poor countries going through a difficult political transition, as the majority of Latin American States *de facto* was. Some tendencies deriving from the U.S. policies proved to be inadequate to the mentioned regional context and gave rise to unprecedented levels of violence: a good instance is the ever-increasing employment of private contractors in the fight against drug traffickers, which constitute a worrisome phenomenon, since the international legal framework does not provide clear indications as far as their accountability for human rights violations is concerned.

The second premise is that the international regulatory regime thereby presented proved to be effective in providing a uniform legal framework to which States can refer when implementing drug-related policies; nevertheless, it also had some unexpected outcomes, such as the creation of a large illegal market, the stigmatization of drug users, the displacement of resources to the detriment of health and social sectors and the geographic dispersion of drug production, which undoubtedly hindered its effectiveness.

The most emblematic domain in which the State intervenes to fight against drug-related crimes is their punishment: numerous reports and statistics, with the Inter-American Commission as a primary reporting actor, proved that Latin American practices in this sense imply an excessive use of criminal law as a means to reduce the spread of illegal substances, which has a little impact on the drug trafficking chain, but causes a severe harm to the lives of those who are unlawfully detained, tortured and denied basic judicial guarantees for minor crimes or even for the simple consumption. The



detrimental effects of this criminalization process have been confirmed by the jurisprudence of the Inter-American Court, which in several cases denounced the lack of proportionality of counter-narcotics provisions.

Another proof of the relative ineffectiveness of counterdrug measures in relation to the severe damage they provoke to the population lies in forced eradication campaigns, which in the last decades have been launched in the main producer countries with the strong U.S. support in order to cut drug production at its source. As a matter of fact, they have caused a strong harm to rural and indigenous communities, who lost their only source of income without being provided with adequate alternatives, which fostered violent social and political unrests.

Finally, an even more worrisome dynamic showing the direct participation of State authorities in gross and systematic human rights violations in the name of the War on Drugs is represented by Colombia and Mexico, the two case studies analyzed in the last part of this research. In the former the State was forced to cooperate with violent paramilitary groups to fight powerful drug cartels, in the latter police and armed forces were directly involved in atrocious human rights practices, justified by the alleged participation of the victims in organized crimes. The Inter-American Court of Human Rights is currently developing its jurisprudence addressing this kind of phenomena, and it is following a clear pattern of holding the State responsible for not complying with its duty to respect human rights and ensure their implementation on the domestic level.

What conclusions can be drawn by the present work? First of all, the source-oriented approach adopted by U.S. and, consequently, Latin American countries throughout the last century did not achieve the expected goals of sharply reducing drug consumption and production across the continent; what is more, it had a detrimental effect on the targeted countries, given their already complex political and economic situation, with a particularly significant harm inflicted on poor and marginalized people who are not given a valid alternative to drug use and/or sale.

Similarly, the disproportionate punishments suffered by people criminalized for drug-related offenses did not succeed in affecting the drug trafficking and production chain but, on the other hand, they caused thousands of innocent victims of murder, torture, mistreatment, kidnapping, forced displacement, and other gross human rights violations.

As far as the Inter-American system of human rights is concerned, the intense reporting activity of the Commission was very useful in spreading its alarming results and making more people aware of how greatly sponsored tough-on-drug policies affect fundamental rights and freedoms of the civilian population; moreover, the coordination between the Commission and the Court is ever-improving, which is important as to give legally binding value to their decisions. The jurisprudence of the Court shows clear signs of alignment with the alleged victims as the weakest party, on the one hand, and of

condemnation of State practices contrary to international human rights law, on the other. The possibility for the individual claimant to participate in every phase of the proceedings before the Court and the recent decision of OAS General Assembly to double the funding for the Court and the Commission constitute significant achievements for a future improvement of their functioning; nevertheless, there is still a long way to go as to reach the maximum efficiency of the system, as both the institutions suffer from a significant case backlog and States often try to avoid the compliance with their recommendations and, even, decisions.

A new legal framework, based on the efficiency of the regional bodies, on the one hand, and on the will of the States to implement human rights provisions domestically, on the other, must go in parallel with a new approach to drugs, based on harm reduction and on the elimination of the structural, endemic problems that led to its widespread use in the past decades: it is not an easy path to take, given the complex and diversified context represented by the Latin American continent, but the achievements reached in the last 100 years can be sources of optimism. Recent political turning points, such as the conclusion of the fifty-year conflict between FARC and Santos' government in Colombia, or the new, softer approach adopted by the Mexican President Peña Nieto to deal with narcotics, can also be interpreted as signals of a positive change in this sense.

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## Summary

The Latin American context is characterized by a series of complexities from the political, economic and social points of view: in the second half of the past century, the majority of the States experienced a troubled transition towards democracy after years of authoritarian or dictatorial regimes, which left numerous unsolved problems and conflicts concerning the legitimacy of elected governments, the equality of wealth distribution, the transparency of political processes and the full enjoyment of basic rights and freedoms; at the same time, the forcedly rapid integration of many of these States in the world economy and their constant dependence on the most developed countries created a worrisome, unstable and unbalanced economic situation. In this framework of diffused poverty and corruption, exploiting the open borders resulting from globalization, it was easy for an incredibly profitable business such as drug trafficking to emerge as a significant part of transnational organized crime, spreading out and gradually reaching almost every social level and governance area of these States' realities, overcoming their weak and flawed institutions.

The devastating impact that crimes related to drug trafficking had on the lives of thousands of Latin Americans and the safeguard of their fundamental rights is worldwide known, thanks to the intense activity of the media and to the vast existing literature on this topic; the present research, nonetheless, follows a different perspective, since it aims to analyze gross and systematic human rights violations that are perpetrated at the hands of State authorities and armed forces in the name of tough counterdrug operations carried out in the region. This has been done by addressing two main issues: the first one is the existing contrast between anti-narcotic policies implemented by Latin American States and the universally recognized human rights and freedoms, especially concerning those enshrined in the American Convention on Human Rights as the fundamental regulatory tool on the topic at the regional level; the second one is the path followed by the Inter-American Court and Commission as to deal with this tension, providing a regulatory framework that can be deduced from the cases they examined and the opinions and reports they issued throughout the years.

The work follows a tripartite structure: the first part aims at outlining the context, first describing the phenomenon of drug trafficking as a transnationally organized crime and the prohibition regime that was developed throughout the 20<sup>th</sup> century under the U.S. guidance, then presenting the bodies and the legal instruments of the Inter-American human rights system, its functions, and its mechanisms; the second part addresses human rights violations in the framework of counterdrug policies, with a focus on the criminalization of drug-related conducts, the lack of proportionality in the punishment of the latter, the

militarized nature of U.S. enforcement and the impact of the use of private military contractors and of forced crop eradication campaigns; lastly, the third part contextualizes these phenomena in the Latin American region and under the Inter-American human rights system, providing an analysis of the activity of the Court and the Commission, its evolution, achievements and shortcomings, and presenting judgments relative to unlawful punishments for drug crimes in order to identify common trends in the Court's jurisprudence; as a conclusion, Colombia and Mexico are presented as cases of extreme violence related to drug trafficking and the fight carried out by the State against it, and the work of the Inter-American institutions as to deal with this situation is presented through further judicial cases. Within this structure, each chapter tries to answer to a set of more specific questions.

1. *What was the impact of drug trafficking as a transnationally organized crime in Latin America and how was the global drug prohibition regime developed and shaped?*

The concept of transnational organized crime (TOC) is strictly interrelated with that of globalization, since the latter allowed organized criminal activities to spread out, form networks and penetrate into numerous sectors of legal economy and governance, deeply affecting their functioning and legitimacy. The high profitability of cross-border criminal activities alters traditional State's economic variables and severely threatens its stability, frequently going in parallel with a worrisome increase of violence and corruption, fostering the emergence of separatist and extremist political tendencies. The United Nations Convention against Transnational Organized Crime (also known as Palermo Convention) was signed in 2000 as the first effort to create a common mechanism of law enforcement against organized criminal groups, describing them as structures formed by three or more individuals acting in concert for a certain period of time and committing serious crimes and offences in order to obtain direct or indirect benefits. Drug trafficking emerged as a significant part of these highly lucrative businesses, especially in those States which found themselves in a precarious economic situation and were not endowed with stable and resilient democratic institutions, such as Latin American countries, whose development and security have been profoundly impacted by TOC in both the short and the long run and where the activity of powerful drug traffickers has subverted national economic and political systems and has caused ever-growing levels of violence and terror.

The response to the emergence of such a worrisome phenomenon was the shaping of a global prohibition system promoting the strict criminalization of drug-related conducts and based on a supply-centred approach, according to which the reduction of the size of drug market was better achieved by directly cutting sources of supply, which obviously had a significant impact on the producer States. This process had the U.S. as its leading force: the so-called *Americanization* of drug prohibition was quite evident since the first international conferences addressed the issue at the beginning of the 20th century,

but it was in the last decades that the prohibitionist rhetoric gave way to a more concrete and militarized approach that identified drug trafficking as a threat to national security, which led to the exponential growth of U.S. counterdrug enforcement in the form of military aid to Latin American countries<sup>320</sup>. In the meantime, the global prohibition regime was developed through three international Conventions<sup>321</sup> as the legal instruments legitimating the War on Drugs: they aimed to consolidate decades of fragmented provisions into a restricted number of key common documents and represented a difficult compromise between the divergent interest of States producers of raw organic materials, on the one hand, and those which manufactured drugs, on the other. Even though the three regulatory tools established a common prohibition system while respecting the national sovereignty of individual parties and offered an important framework of reference and uniformity, the provisions therein contained did not cause the expected drastic reduction of drug production in the long run. What is more, global prohibition had some unintended consequences including the increase of criminality, corruption, and violence in the target States, the creation of an ever-growing illicit market, the displacement of illegal activities following the so-called *balloon effect*, the diversion of resources from other sectors and the marginalization and criminalization of drug users. These and other consequences of tough-on-drugs policies have been the primary object of the present research.

*2. What are the functions of the main human rights organs of the Inter-American system and how do they apply and interpret the provisions of the American Convention on Human Rights?*

The Inter-American system originated in 1948 in Bogotá, with the adoption of the Charter of the Organization of American States (OAS) and of the American Declaration on the Rights and Duties of Men; nevertheless, the two main organs entrusted with the safeguard of human rights across the continent were created some years later and had the legal basis for their functioning in the American Convention on Human Rights (henceforth ACHR), a binding treaty whose provisions overlap with those contained in the Declaration.

The Inter-American Commission on Human Rights (henceforth IACHR) was created by a Resolution of the OAS General Assembly in 1959 as a supervisory, independent organ that promotes and guarantees the respect of the fundamental rights and freedoms; its function was initially vaguely worded as the generalized promotion of rights through fact-finding and reporting activities. While these functions still

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<sup>320</sup> President Nixon's speech declaring drugs as the "public enemy number one" in 1971 was emblematic of this more tough phase in U.S. counterdrug enforcement policies; Nixon was also the first politician to explicitly use the term "war" when referring to counterdrug efforts, and military interventions abroad sharply increased during the Reagan and Bush administrations.

<sup>321</sup> These were, respectively, the 1961 Single Convention on Narcotic Substances, the 1971 Convention on Psychotropic Substances and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

represent a fundamental tool in the hands of the IACHR as to monitor and address particular situations concerning human rights in certain countries<sup>322</sup>, the most relevant nowadays is the authority to examine individual complaints alleging human rights violations, a function that is carried out following some strict admissibility criteria and can lead to the submission of the case to the Inter-American Court. Interestingly, the ACHR is the founding document of the IACHR and determines its structure and functions, despite having entered into force almost twenty years after the creation of the latter. An important feature of the IACHR is that it is endowed with a dual jurisdiction, which allows it to exercise its powers on every OAS member State, whether it has ratified the Convention or not, through the application, respectively, of the Convention itself or of the American Declaration.

The other organ entrusted with the monitoring of human rights protection among Latin American States is the Inter-American Court of Human Rights (henceforth IACtHR), an autonomous judicial body created in 1979 and exercising its functions within the framework of the Convention. It has two types of jurisdiction: the first is the contentious one, which can be exercised only with respect to States that have formally accepted it and usually ends by means of a binding judgment issued by the Court, constituting a powerful instrument for the latter to develop a jurisprudence that can serve as guidance for State practice when dealing with human rights issues. The second type is the advisory jurisdiction, which can be exercised at the request of OAS member States and organs and does not involve charges or sanctions, being rather a judicial interpretation that the Court gives of a certain provision with regard to its compliance with the ACHR.

The Commission and the Court have the principal aim of monitoring and ensuring the implementation by OAS member States of the provisions enshrined in the Convention, which, differently from the Declaration, is legally binding on its parties. The first principle used by the two bodies as to interpret the ACHR is international law on treaty interpretation, according to which a treaty must be read in light of its object and purpose<sup>323</sup>; secondly, a useful instrument of interpretation of a treaty is the analysis of its *travaux préparatoires* and the circumstances in which it was concluded; lastly, the principle of effectiveness allows the interpretation of the ACHR as to be made most useful in pursuing its objective. In some cases, the Convention has been also interpreted in the light of international humanitarian law (IHL) when human rights violations occurred in situations of armed conflicts; nevertheless, the jurisprudence of the Court shows that IHL has been mainly applied occasionally as a mere principle of interpretation, rather than as a direct tool as to formulate binding judgments. Notably, the Convention

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<sup>322</sup> The reporting activity of the IACHR on specific themes, such as arbitrary detention or forced disappearance, or on countries with particularly worrisome situations, such as Mexico or Colombia, was very useful for the present research.

<sup>323</sup> In this case, the treaty's main object is human rights protection, which means that any uncertainty with regard to its interpretation must be solved in the way that best guarantees the achievement of this objective.



envisages the possibility to restrict and, in specific cases of emergency threatening the integrity of the nation, suspend the exercise of some of the rights contained in the Convention: derogations must respond to strict requirements of proportionality and necessity and cannot be applied to certain fundamental rights such as life and judicial guarantees; notwithstanding these restrictions, Latin American States frequently abused of the vague wording used to describe emergency situations as to expand their powers beyond the normally permitted limits. Many of the most important rights enshrined in the Convention and in the Declaration, such as life, physical and moral integrity, liberty, health and humane treatment have been systematically violated in the framework of counterdrug policies, as addressed in the second part of this research.

### *3. How are counterdrug policies implemented in Latin American States and what is the impact of global prohibition and criminalization on the enjoyment of fundamental rights and freedoms?*

In the legal framework described throughout the previous chapters, Latin American States implemented a number of measures as to deal with the increasingly widespread crimes related to drug trafficking. Under the influence of U.S. and its tough rhetoric describing drugs as the main public enemy threatening the integrity of the State, towards the end of the 20th century national governments started to implement a series of policies that punished drug-related conducts often indiscriminately; this process is commonly referred to as *criminalization* and implies a tendency to the systematic use of criminal law as a means to sanction a broad range of behaviours and activities, from the mere possession for personal use to the trafficking on large-scale markets. The main risk entailed by criminalization was the subordination of fundamental judicial guarantees and constitutional rights to the absolute priority of fighting drug trafficking, to the detriment of the proportionality of punishments: indeed, the legislation of numerous countries was adapted to the prohibitionist regime framed by the three Conventions and many national laws criminalizing even personal consumption were adopted without the parallel implementation of an adequate system of prevention of human rights violations. As demonstrated by studies and statistics, there was a sharply upward tendency in the use of verbs and definitions describing drug-related criminal offences in Latin American legislation, which significantly broadened the range of conducts accountable for criminalization by national courts, together with a constant increase in the minimum and maximum length of penalties for drug crimes, often without a correspondence between the gravity of the conduct and the severity of its punishment. The lack of proportionality is demonstrated by a comparison between the penalties envisaged for drug-related conducts and those assigned for crimes such as murder and rape: such analysis shows that in many countries the former are punished more severely and more frequently than the latter. While this approach had little effect on the scale of illicit drug market, which was barely reduced and managed to safeguard, replace or shift its members and its businesses, it had a

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profound impact on the lives of many individuals who were subjected to unlawful detention and inhumane treatment, or were even killed, for minor crimes of drug sale and consumption.

The increasing strictness of criminal provisions against conducts related to drugs led to the emergence of two main phenomena: on the one hand, the indiscriminate use of pre-trial detention constituted a grave violation of individual rights to personal liberty, fair trial and judicial guarantees, neglecting the important principles of presumption of innocence, proportionality, necessity and reasonableness. Moreover, this led to a noticeable backlog in work of national courts, which hindered their effective functioning, and to the overcrowding of jails, to the detriment of their inmates and their living conditions. On the other hand, counterdrug policies were carried out in breach of two fundamental rights such as humane treatment and life: the reporting activity of the Commission showed that not only many people were arrested and detained in degrading conditions and tortured as to obtain confessions and information, but they also died in prison or were unlawfully killed during anti-narcotics operations. Human rights caused by severe and disproportionate counterdrug measures were object of numerous judgments of the Inter-American Court, which were addressed in a specific section of this work. An aggravating factor for this worrisome scenario is constituted by the increasing role of military forces in matters of internal security and counternarcotics, which increased the levels of violence and arbitrariness and worsened the already chaotic situation caused by the widespread presence of organized crime, as presented in the following chapter.

#### *4. How does U.S. implement its counterdrug policies in Latin America and what are the implications of these militarized law enforcement measures on human rights and humanitarian law?*

The militarized approach to counterdrug efforts in Latin America was launched under the primary influence of the United States, whose engagement in the region exponentially grew in the framework of an all-out war against a common enemy, to be fought and defeated through every possible means. This absolute priority given to the elimination of the drug problem caused an over-simplification that eliminated the distinction between the harm caused by drugs *per se* and that provoked by aggressive prohibitionist and militarized policies.

Drug control was internationalized in the second half of the 20<sup>th</sup> century and it constituted the main justification for U.S. law enforcement efforts abroad after the end of the Cold War: U.S. increasingly provided military and police aid, training, intelligence and personnel to those countries that complied with the anti-drug efforts and cooperation requirements, in a multidimensional policy framework based on crop eradication, trafficking interdiction, and alternative development, with the main objective of

cutting the sources of drug production. The role of U.S. in Latin America had a profound impact on the targeted countries<sup>324</sup>, where specialized counterdrug units were diffusely created and new investigative and military techniques were imported: if on the one hand U.S. aid contributed to the reduction of crop cultivation and drug production in the short run, on the other hand the collateral damage of this militarized and prohibitionist approach was enormous from numerous points of view.

First, the over-involvement of the armed forces in governance aspects others than external defense sharply increased internal violence and promoted an approach to drug-related problems that exclusively considered their security aspects, neglecting their social and economic implications; moreover, the weakness of the newborn democratic institutions was worsened by the increased power given to local militaries, which fostered political instability and corruption. Civilian control over the militaries was widely prevented, and phenomena such as torture, forced disappearances and extrajudicial executions at the hands of the armed forces spread out in Latin American countries, causing more harm than drug-related crimes *per se*. Although it had formally envisaged restrictions and sanctions for those States that did not comply with certain human rights standards, U.S. made many exceptions in this sense, favouring national security and trading interests to the detriment of human rights considerations; this left situations of systematic abuses and violations by local police and armed forces unpunished, frequently with the acquiescence, if not the support, of U.S. in the name of the "supreme" mandate of the War on Drugs.

Secondly, the fact that U.S.-led counterdrug enforcement operations in Latin America frequently relied on the employment of private military security companies (PMSCs) led to serious problems of accountability, being the latter non-State actors whose position in the framework of international human rights and humanitarian law is still unclear: private contractors were involved in numerous violations that were not adequately redressed due to the existing arbitrariness and regulatory gaps in this matter, hindering fundamental human rights and weakening the rule of law. Colombia and Mexico, which have been chosen as the case studies for the present work, constitute a good instance of how the lack of regularization and accountability for the counternarcotics activity of PMSCs deeply affects the full enjoyment of fundamental rights by the civil population.

Thirdly, the eradication of illicit crops in the producer Andean countries, the most emblematic operation within the supply-centred approach adopted by the U.S., hindered the rights of thousands of peasants who were deprived of their only source of livelihood, without being offered any suitable alternative or compensation. Eradication, carried out through different methods and widespread during the 1990s, was hindered in its efficiency by the so-called *balloon effect*, displacing the destroyed cultivations to more

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<sup>324</sup> U.S. counterdrug aid was principally allocated to those Andean countries that cultivated the raw materials for drug production, such as opium and coca leaves: Bolivia, Colombia and Peru were the targets of the Andean Initiative and of other specific programmes of military aid, intelligence training and forced eradication campaigns.

remote and protected areas, without the size of illicit drug market being significantly affected; on the contrary, the social and economic effect of these operations was devastating, especially considering the riskiness and the complexity of the contexts in which they were carried out, characterized by poor State presence, low levels of human development and inadequate infrastructures. Forced eradication campaigns even fostered political turmoil, internal displacement, insurgency and armed violence, as the cases of Colombia, Bolivia and Peru clearly show; moreover, the herbicides used were deemed to cause severe harm to the health of humans, plants and animals inhabiting the targeted areas, which was the object of a contentious case brought before the International Court of Justice. Notwithstanding these problematic aspects of forced eradication, attempts of voluntary eradications, crop substitution and alternative development programmes largely failed, due to the lack of credibility of the initiatives and the severe economic constraints surrounding them.

The aspects of U.S.-led counterdrug interventions in Latin America presented above provide a clear demonstration of the deep impact that drug policies have on the enjoyment of fundamental rights and freedoms, showing how the intervention of the Inter-American system is an absolute necessity.

*5. How deep is the existing tension between drug policies and human rights in the Latin American context and how did the Inter-American system proceed to deal with it?*

While the primary aim of the global prohibition regime is the health and welfare of mankind, as declared in the Preamble to the 1961 Single Convention, there is a sharp contrast between militarized and disproportionate counterdrug measures carried out in Latin America and the safeguard of fundamental rights and freedoms, with the latter jeopardized by the former in many aspects that have been previously discussed. This is partly due to some endemic, unsolved problems left by decades of authoritarian regimes, which make these countries a complex, unstable, and unequal environment and a fertile ground for political turmoil, institutional weakness, bribery, and corruption. The debate around the impact of drug policies on human rights has recently spread out, involving various types of institutions discussing the need for a new approach based on harm reduction<sup>325</sup>, public health, treatment, and rehabilitation, which have been neglected so far in the name of criminalization and punishment of drug users. Notwithstanding the extraordinary relevance that human rights have in the Inter-American system as a common framework of commitment for all its member States, unless the latter opt for a sharp change of direction in the way they deal with drugs, the deep tension between drug policies and rights cannot be solved.

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<sup>325</sup> An approach based on harm reduction would minimize the negative effects of drug consumption without eliminating it, representing an attempt to meet the exigencies of drug addicts and help them to overcome their situation.

In this framework, the role of the Court and the Commission in order to reach a conciliation between the two elements is crucial: the jurisprudence of both shows that they tended to follow a *pro homine* principle, adopting the most protective solution for the individual and his/her rights, referring, if necessary, to instruments others than the ACHR, such as other human rights treaties or humanitarian law, which suggests an interdependence of rights in general. Throughout the last decades, the two bodies underwent a significant evolution towards a more coherent, legitimate and credible system, expanding their powers, streamlining their mechanisms and broadening the role of the individual in the safeguard of basic rights; nonetheless, they still have to overcome a number of shortcomings concerning the lack of adequate funding and resources, the length of proceedings, the limited jurisdiction of the Court, the failure of many States to comply with their obligations and the scarce support provided by the OAS political organs.

If the shift from authoritarian to democratic regimes was an extraordinary conquest for Latin American countries on the one hand, on the other it diversified the domains of potential human rights violations, opening the activity of the Court and the Commission to new, sensitive areas: this makes a tighter cooperation and synergy between them even more necessary. The Commission, on its part, exercised its scrutiny over numerous worrisome human rights situations and succeeded, through its intense reporting activity, in drawing public opinion and attention towards the concerned countries; this work went in parallel with an ever-increasing cooperation with the Court, to which the Commission decided to submit numerous cases concerning unlawful detention and executions and denial of judicial guarantees, frequently perpetrated in the context of counterdrug measures. The Court, therefore, had to cope with the sharp tension between human rights and drug policies: its jurisprudence in this regard, partly analyzed through the present research, showed a strong orientation against those States whose domestic provisions went to the detriment of people accused of drug-related crimes: through *Suárez-Rosero v. Ecuador* and similar cases, the Court condemned the discriminatory treatment and the lack of adequate protection suffered from this category of individuals, which was considered *per se* in breach of the fundamental principles enshrined in the ACHR.

6. *How do Colombia and Mexico represent two suitable cases to analyze the interaction between anti-narcotics policies, drug-related crimes, and human rights violations in the Inter-American jurisprudence?*

This thesis showed that the impact of drug trafficking and the consequent prohibitionist policies had an extraordinary impact on Latin American States in both the short and the long run, and this was due to the overlapping of endogenous characteristics of the region, such as political instability and economic dependence, with external military and law enforcement interventions. Colombia and Mexico are

emblematic of the deep wound left by decades of widespread organized crime and internal violence, in which drug trafficking and counterdrug measures played a crucial role; moreover, both countries were at the core of U.S. regional security policies, which nonetheless did not address the systematic, gross human rights violations perpetrated at the hands of both traffickers and State authorities.

Colombia, the cocaine producer *par excellence*, suffered from more than 50 years of internal armed conflict between a flawed and corrupted government, leftist insurgent movements, right-wing paramilitary groups and powerful drug cartels. Its decentralized geography, institutional weakness, and embedded political violence provided a fertile environment for the development, in the last decades of the 20th century, of an extraordinarily lucrative and widespread network of drug-related criminal activities, which completely subverted the normal functioning of the State and intertwined with paramilitary violence and armed guerrillas. The main victim of the extreme brutality resulting from the overlapping of these factors was the civil population, who throughout the years suffered from a series of abuses such as murders, tortures, arbitrary detention, forced displacements and forced disappearances, mainly at the hands of the paramilitaries. What is more, these crimes were frequently committed with the acquiescence of the State, under the absolute priority of fighting drug traffickers and guerrillas, without it being able to provide adequate protections and remedies to the victims due to its weak and corrupted judiciary system; this was harshly condemned by the IACtHR, whose judgments in this domain show its strong commitment to sanction a State responsible for fostering an already risky, violent and unstable situation. The peace agreement concluded at the end of 2016 between the government and FARC (the most influential insurgent group) left numerous questions open concerning transitional justice and remedy, showing how deeply was the Colombian society affected by half a century of systematic abuses of its fundamental rights and freedoms.

Mexico became the world's most important transit point for drug trafficking towards the end of the 20th century and its counterdrug policies were characterized by three main elements: first, the extraordinarily broadened power of military and police forces; second, the worrisome levels of corruption of State authorities, which always had a controversial relationship with the complex network of criminal groups controlling drug trafficking and other lucrative businesses; third, the increasing influence that the U.S. had on counterdrug measures to be enacted, which made Mexico the most emblematic scenario of the tough policy framework shaped by the War on Drugs. These factors altogether led to numerous, systematic human rights violations against the civil population that have been committed by the police and armed forces with the tolerance of the State: in various cases, the IACtHR urged the necessity to reform and restrict the military justice system, which was widely abused as to avoid punishment for human rights violations carried out during counterdrug operations, and the importance of applying legal criteria that are consistent with international standards.

As mentioned in the introduction, there are two main questions on which the present research was framed. The first one was whether and how much are drug policies enacted by Latin American States in contrast with the fundamental rights and freedoms enshrined in the ACHR and other legal instruments: the answer was that there is a deep tension existing between them and it is barely solvable if States do not change their approach as to deal with the problem of drug-related crimes. The War on Drugs, a tough and militarized policy model based on U.S. perspective and exigencies, not only was less effective than expected at reducing the scale of the drug market, but it also had a devastating impact when applied to the decentralized and unstable reality of Latin American States, fostering high levels of internal violence and indiscriminately punishing any kind of conduct related, even if superficially, to drugs, to the detriment of poor and marginalized levels of society. As demonstrated by the cases of Colombia and Mexico, States were frequently accountable for human rights violations, either when directly perpetrated by their agents, or when left unpunished by flawed and corrupted judiciary systems.

Once the first answer was given, the second question to be addressed was how do the Inter-American human rights bodies provide a regulatory framework to prevent gross human rights violations that systematically occur in the context of the War on Drugs. There is no doubt that the Inter-American system represents a landmark achievement, providing a framework for monitoring and regulating human rights situations across the region: despite some shortcomings, the improved legitimacy and functioning of the Court and the Commission and the increasing cooperation between them offered highly valuable instruments of denunciation and justice to the victims of drug-related violence. The way they deal with human rights violations and abuse through their activity shows a clear alignment of these bodies against States that do not comply with their international obligations and whose practices are contrary to basic standards. Further improvements in this direction are desirable, to be achieved in parallel with a new approach to drugs in the region, based on harm reduction and addressing the social and health dimensions of the problem.

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