

COLOMBIAN FUMIGATION OF HERBICIDES AND INTERNATIONAL HUMANITARIAN LAW

LA FUMIGACIÓN DE HERBICIDAS COLOMBIANA Y EL DERECHO HUMANITARIO
INTERNACIONAL

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Abstract: The Colombian Government since 2000 has been using sprayings of herbicides in large scales with the aim of destroying illegal crops of coca and poppy plants. This action has been widely criticized; therefore, there have been several studies related to this matter. In the legal area, this issue has been analyzed mainly from the human rights perspective. Nevertheless, this paper addresses this matter from a completely different standpoint.

This article's main objectives are to analyze the aerial spraying of herbicides as an act of war within the Colombian armed conflict and to critically assess its lawfulness under the rules and principles of the International Humanitarian law.

In other to achieve those objectives this article gives a brief background of the analyzed practice and explains why aerial spraying of herbicides can be considered an act of war. Furthermore, the reality of this practice is compared with the rules and exceptions of the International Humanitarian Law to finally conclude that the fumigations with herbicides are an open violation of the aforementioned law.

Keywords: International Law, Armed Conflict, Human Rights, IHL Principles, Customary International law

Resumen: Las fumigaciones de herbicidas han sido hechas por el Gobierno colombiano desde el año 2000 en gran escala, con el objeto de eliminar los cultivos ilegales de coca y amapola. Esta acción ha sido ampliamente criticada; por tanto, se han hecho varios estudios sobre la materia. En el área legal, esto ha sido analizado sobre todo desde la perspectiva de los derechos humanos. Aquí lo analizaremos desde otra perspectiva.

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El presente estudio tiene como objetivo el de analizar si las aspersiones aéreas de herbicidas pueden ser consideradas un arma de guerra a la luz de un conflicto armado. En tal caso, se verá si dicha actividad violenta las normas del Internacional Humanitario.

Para lograr este objetivo este artículo analiza a fondo qué actos pueden ser considerados de guerra y si las fumigaciones caen dentro de esta categoría. Además, se comparará esto con las reglas y excepciones del Derecho humanitario internacional, para finalmente concluir que las fumigaciones con herbicidas violan abiertamente las normas mencionadas.

Palabras clave: *Derecho Internacional, Conflicto Armado, Derechos humanos, Principios de DIH, Costumbre de Derecho internacional*

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I. INTRODUCTION

The Colombian conflict started in the forties as a result of the political confrontation between liberals and conservatives. Violence in Colombia escalated when the liberal leader Jorge Eliecer Gaitán was gunned down in 1948 (Valencia, 2007, p. 445). This fact together with several government policies, ushered to the emergence of insurgent groups (Valencia, 2007, p. 448).

In the early stages of the armed conflict there were more than eight insurgent groups in Colombia (Tawse-Smith, 2008, p. 273). The most important were *Fuerzas Armadas Revolucionarias de Colombia* (Colombian Revolutionary Armed Forces) commonly known as FARC and the *Ejército de Liberación Nacional* (National Liberation Force) ELN. These guerrillas took up arms against the Colombian government with the aim of obtaining political control of Colombia.

In the eighties the Colombian armed conflict took a whole new direction, for two main reasons: first, because the government recognized *guerrillas* politically and second, because of the drug trafficking expansion. During this period violence increased drastically in Colombia. Guerrilla groups began to finance their activities with money from drug trafficking (Zabana Abdo, 2011, pp. 26-27).

In the nineties the Colombian government intensified efforts to achieve peace for Colombia through diplomatic channels. However, all

peace negotiations between the government and insurgent groups failed (Zabana Abdo, 2011, p. 27). After the failure of all negotiations, President Andrés Pastrana (1998-2002) decided to take more active actions against the armed conflict (Buitrago, 2013, pp. 81-82). Among the new policies adopted by President Pastrana the most important was, the increase of international relations between Colombia and the United States.

As a result United States since 1999 through the bilateral agreement called *Plan Colombia* (Colombian Plan) has been helping Colombia in its fight against guerrillas, terrorism and drug trafficking (Zabana Abdo, 2011, pp. 26-27). In other words the aforementioned plan was created with the aim of contributing to end the Colombian armed conflict.

In the first stage of *Plan Colombia*, President Pastrana had as main objective to achieve peace through negotiations. However his policy also had a strong antinarcotics element that was intended to attack the different phases of drug trafficking business, from the production phase to money laundering (Escobar, 2003, p. 11). Aerial sprayings of herbicides were one of the most important mechanisms used to combat drug trafficking, because sprayings destroy illegal coca and poppy crops. According to the Colombian government, destroying the commodities (leaves and seeds) used to produce cocaine and heroin will reduce the final supply of these drugs (Isacson, 2005, p. 142). Sprayings began to be used on a large scale in 2000 (Esposito, 2010, p. 4).

It can be said that *Plan Colombia*'s second stage began with the arrival in power of President Alvaro Uribe who kept *Plan Colombia* as a governmental policy. For Uribe's government, the main objective of *Plan Colombia* was not getting a negotiated peace but conducted an active fight against drug trafficking. For this reason, in this period the government reinforced the eradication (aerial sprayings) of illicit crops (Escobar, 2003, p. 34), and voluntary eradication (manual eradication by peasants) increased (Escobar, 2003, p. 12).

Following this line of events, in 2004 *Plan Patriota* [Patriot Plan] was launched with the purpose of supporting Colombian armed forces in their battle against guerrillas, in order to retake complete control of the Colombian territory (Isacson, 2005, p. 141). As a result of this plan, fumigations intensified even more, and reached their highest point in 2004 (Isacson, 2005, p. 143).

From 2004 to date, even though fumigations have had low activity periods as a result of neighbouring countries' complaints (such as Ecuador), fumigations had not stopped. However, according to the current President of Colombia, Juan Manuel Santos, aerial sprayings will stop this year due to two reasons: on the one hand, the World Health Organization

and the Colombian Health Minister have consistently proved that glyphosate (chemical used for fumigations) can cause cancer and other diseases to the population. On the other hand, Colombia is now immersed in peace negotiations with the FARC in Habana (Cuba). The effectiveness of these peace agreements is still questioned because among the negotiations, many critical issues have not been solved, among these, the effective compensation to victims and the eradication of illicit crops.

II. AERIAL SPRAYING OF HERBICIDES AND INTERNATIONAL HUMANITARIAN LAW

To place aerial sprayings of herbicides in the context of International Humanitarian Law, this act needs to be considered as an ‘act of war’¹ within the Colombian Armed conflict. This term describes all the military operations that are carried out with the aim of attacking or weakening the opposite party in an armed conflict (Fleck, 2008, p. 57). In order to find out if fumigations are acts of war, we must answer whether the destruction of illegal coca and poppy crops constitute a direct attack against insurgent groups.

To prove the link of Colombian armed groups with drug trafficking and illicit crops is not a complicated task, because this fact has been widely tested. One of the multiple consistent proofs is the report of the Colombian National Police, made after the military operation in which Luis Carlos Úsuga Durango (Front 5 FARC Commander) was killed. Police experts found on Úsuga’s computer strong evidence that Front 5 coordinate activities related with drug trafficking. Besides, data found in that computer shows that about \$281.000.000 USD of FARC’s money comes from drug trafficking (Radio Caracol, 2013a).

The link of illicit crops with guerrilla and paramilitary groups’ finances has been recognised by the parties involved in the conflict. Current President of Colombia Juan Manuel Santos assured publicly, during the Eastern Naval Force installation in July of 2014, that FARC use drug trafficking and criminal mining to finance their activities (El País, 2013a). On the other hand, FARC’s Commander General recognized,

¹ ‘Act of war’ is a term commonly used by the International Humanitarian Law doctrine and the customary international law. This term has no express definition in the treaty law. However, its meaning can be inferred from rules 11 to 14 of the customary international law.

during the last peace negotiations in Habana, that guerrillas are directly linked to illicit crops (El Pais, 2013b).

Proven that the coca and poppy crops have a direct relationship with insurgent groups, fumigations can be defined as acts of war. With them, the Colombian government intends to attack the funding of its enemy. This paper considers fumigations as acts of war; nevertheless, we will consider if fumigations are unlawful attacks under International Humanitarian Law.

III. AERIAL SPRAYINGS CONSTITUTE A VIOLATION OF INTERNATIONAL LAW?

International humanitarian law's purpose is the protection of victims in armed conflict. IHL's rules and protections not only emerge from international treaties, but also from international customary law, unwritten rules that derive from «an accepted general practice» (International Committee of the Red Cross, 2010).

International customary law is particularly important for this essay due to the weakness of treaty law in the regulation of non-international armed Conflicts. Customary law fills the legal loopholes of treaty law and strengthens the protection offered to victims (International Committee of the Red Cross, 2010). «A study published by the ICRC in 2005 shows that the legal framework governing internal armed conflicts is more developed under customary international law, than under treaty law» (International Committee of the Red Cross, 2010, par. 3).

This chapter analyses whether the aerial spraying of herbicides, used as weapon of war by the Colombian government, constitute a violation of international humanitarian law, considering treaty law and customary international law.

III.1. Principle of Distinction

The Principle of Distinction is a fundamental rule of IHL. The principle states that at all times parties on an armed conflict must distinguish between civilians and combatants. Attacks against civilians people and objects are prohibited (Defensoría del Pueblo, 2002, p. 31; Crowe & Weston-Scheuber, 2013, p. 70). This principle is a rule of customary international law. In addition, the Principle of Distinction is recognized by Common Art. 3 and Additional Protocol II of the four Geneva conventions relating to the Protection of Victims of Non-International Armed Conflicts.

The spraying of herbicides in Colombia can be considered a violation of this principle, because when the herbicide is spread through the air, there is no way to ensure that the chemical falls exclusively on illicit plantations. Chemicals sometimes falls directly on the population. This is especially true in rural areas where farmers live near these crops.

Fumigations would be an illegal act of war unless the Rule 6 of the customary international law applied, which states that «civilians are protected against attack unless and for such time as they take a direct part in hostilities» (Henckaerts & Doswald-Beck, 2005, p. 19).

As a result of poverty and pressure from guerrilla groups, many Colombian farmers have become small coca growers. In year 2000, about 60% of coca cultivations in Colombia were grown by non armed people (Defensoría del Pueblo, 2002, p. 5). Can farmers be considered a direct part in hostilities, given that they plant and take care of coca crops, which directly benefit the FARC?

According to ICRC, the acts that constitute direct participation in hostilities are those «acts which by their nature or purpose, are intended to cause actual harm to the enemy» (Henckaerts & Doswald-Beck, 2005, p. 22). Although farmers contribute to the financing of rebel groups, their activity does not fall within this definition, because the peasants' purpose is not to support FARC activities, but growing coca crops as a means of economic sustenance. They use this revenue to support their families (Defensoría del Pueblo, 2002, p. 5). In other words, this activity has not a belligerent end (International Committee of the Red Cross, 2011, p. 44).

The Inter-American Commission on Human Rights, on its third report on human rights in Colombia, mentions that:

«Civilians whose activities merely support the adverse party's war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one of the armed parties [which is the case of Colombian farmers] ..., does not involve acts of violence which pose an immediate threat of actual harm to the adverse party» (International Committee of the Red Cross, 2011, p. 22).

The Distinction Principle requires all the parties engaged in an armed conflict to distinguish between civilians and military objectives, and accordingly, shall direct their actions only against military objectives (McCoubrey, 1998, p. 178). As a general principle, civilian objectives should not be subject to direct attack. In this regard, the Colombian government violates the Principle of Distinction, since herbicide

fumigations do not only destroy illicit coca and poppy crops, but also cause harm to civilians (Escobar, 2003, p. 32).

Article 14 of the Additional Protocol II expressly prohibits attacks against «objects [that are] indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works» (Additional Protocol II, art 14). The Colombian government directly infringes this rule, because the aerial sprayings destroy illegal crops and also legal crops, kill animals for human consumption and contaminate water sources, creating a real risk for the civilian population (Defensoría del Pueblo, 2002, p. 33).

Despite all the above, we must recognize that in an armed conflict not all civilian casualties or civilian property destruction constitute an unlawful act. International Humanitarian Law takes those deaths and destruction of goods as a collateral or incidental damage as long as those are the result of a lawful military operation (Fleck, 2008, p. 249). A military action is considered lawful when it is directed against a military object and when the collateral damage is not excessive (Henckaerts & Doswald-Beck, 2005, p. 29). We will analyse whether fumigation are acts of war according to those requirements.

Military objects are «those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage» (Additional Protocol II, art 52; Henckaerts & Doswald-Beck, 2005, p. 29). Based on this definition we can say that coca and poppy crops can be considered a military objective, as they contribute effectively to military action of the belligerent groups, since they are the main source of funding of those groups, especially FARC. Moreover, destroying the aforementioned crops would weaken the military capability of *guerrillas*, which grants a definite military advantage to the Colombian government.

The first requirement was relatively easy to test; however, the second one requires a deeper analysis, which involves the principle of proportionality. We will analyse this requirement on a separate chapter below.

III.2. Principle of Proportionality

The Principle of Proportionality recognizes the possibility that during an attack incidental damage to civilians or their objects may occur, and establishes that collateral damage must not be excessive in relation to the

military advantage expected to be obtained (Crowe & Weston-Scheuber, 2013, p. 55). However, making a balance between collateral damage and military advantage is quite a difficult task. Because there is no objective test established for this purpose, the decision whether a particular act violates the principle of proportionality depends largely on a subjective analysis (Epps, 2012).

In the Colombian case, collateral damage resulting from the aerial sprayings of herbicides is quite high, given that fumigations have a severe impact on farmers' health, especially those who live near crops. Fumigations also destroy civilian objects that are indispensable to their survival, like crops and animals for consumption (de Geoffroy, 2009, p. 512).

On the contrary, the military advantage of the sprayings is minimal. The reason is that even though fumigations have been performed for over ten years now, it has not been proven that they have substantially reduced the amount of illicit crops in Colombia. By contrast, some analysts such as Lina Escobar assure that the quantity of illicit plantations has increased. This is due to the phenomenon known as "displacement of crops", by which farmers and guerrillas just move the crops to other areas, where they replant the amount needed to compensate the losses (Escobar, 2003, pp. 34-35). It's hard to have accurate data on this topic because numbers in different studies are inconsistent. However, we can take as an example the report of the United Nations Office for Drugs and Crime which ensures that the amount of coca crops increased in 2011 by 3%, going from 62,000 to 64,000 hectares (Radio Caracol, 2013b).

Fumigations are an unlawful act, because even though they are directed against a military objective, they do not comply with the principle of proportionality. The collateral damage is excessive in relation to the military advantage.

Finally, although violation of Principle of Precaution does not constitute a serious breach of international humanitarian law (Lovell & Primoratz, 2012, p. 81). I would like to discuss this principle, which is also violated by the Colombian government.

III.3. Principle of Precaution. Precautions in Attack

The Principle of Precaution involves a positive obligation of the States to take necessary precautions in order to avoid or minimize the effects of military attacks on civilians people and objects (Lovell & Primoratz, 2012, p. 81). This principle is defined in Rule 15 of international customary law, and according to the ICRC can be inferred

from Article 13 of the Additional protocol II, which states that «the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations». This could not be met without taking the appropriate preventive measures in the attacks (Henckaerts & Doswald-Beck, 2005, p. 61).

According to the Colombian Ombudsman Office (*Defensoría del Pueblo*), fumigations «are been executed without taking the essential preventive measures to avoid, control and mitigate the potential damage to the population» (Defensoría del Pueblo, 2002, p. 33) The fact that the sprayings have been taking place for many years (around ten years approximately) without proper precautions been made, demonstrates that the Colombian Government's deliberate violation of this rule.

Another way to prove that preventive measures have not been taken or that they have been insufficient is the annual increase in the amount of displaced Colombians. These people in order of escape from fumigations' effects seek for refuge in Ecuador (Korovkin, 2008, p. 5).

In order to comply with the Principle of Precaution the Colombian government should at least take actions in order to remove and relocate civilian people and object from the vicinity of the crops.

Despite all the above, we must recognize that the Colombian government has been carrying out an efficient humanitarian assistance campaign to support those affected by the sprayings. However, those are not preventive measures, but post-attack campaigns.

IV. CONCLUSION

Based on the research and analysis conducted, we can conclude the following:

Firstly, aerial sprayings of herbicides are acts of war. They are so because they are being used in the context of an armed conflict and because fumigations target coca and poppy crops, which are the direct source of funding for belligerent groups. In other words, fumigations are acts of war because, by using them, the Colombian government seeks to weaken the insurgent groups (conflict counterparties).

Secondly, fumigations constitute a violation of the basic principles of international humanitarian law such as: (i) The Principle of Distinction, given that they directly affect civilian population and civilian objects that are indispensable to their survival. (ii) The Principle of proportionality, because the collateral damage is excessive in relation to the military advantage obtained by the Colombian government. And finally, (iii) the

Principle of Precaution, because no measures have been taken to prevent damaging civilians.

I agree with Jonathan Crowe and Kylie Weston-Scheuber, who argue that when the risk of disproportionate damage to civilians and their property becomes obvious, the specific action—in this case fumigations—must be cancelled or suspended (Crowe & Weston-Scheuber, 2013, p. 77). Therefore, the Colombian government should have stopped fumigations long time ago (not only this year, after ten years of fumigations) until they find a way to prevent the above-discussed side effects.

To improve the situation, the Colombian government should stop aerial fumigation of herbicides at least until they can develop a new herbicide which does not contain glyphosate, which has been proven to be damaging for human health.

If the above is not possible, the Colombian government should stop the aerial spraying and focus efforts on manual or direct eradication, to comply with the Principle of Distinction. Doing this, the collateral damage can be reduced and balanced with the military advantage, as to comply with the Principle of Proportionality.

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