The Applicability of International Humanitarian Law to Situations of Urban Violence: Are cities turning into war zones?

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Sponsored By:
Canadian Red Cross
Croix-Rouge canadienne
LIU INSTITUTE FOR GLOBAL ISSUES

Funded By:
Foreign Affairs and International Trade Canada
Affaires étrangères et Commerce international Canada

ABSTRACT

Growing urbanization, class disparity, lack of legitimate economic opportunity and stifled women's rights have lead to high levels of violence in cities. In some cases, homicide rates are higher than the death tolls experienced in armed conflict. Regular law enforcement and human rights have failed to stop the sufferings of innocent victims, the recruitment of children into gangs, and the rising death tolls. Can international law help regulate these situations? The question addressed herein is if, and to what extent, it is desirable to apply the standards of international humanitarian law (IHL) and/or regional human rights systems to address urban violence. This paper will focus on Latin American cities, and hence the Inter-American System of Human Rights.

This paper will argue that IHL has too many shortcomings to properly address the complex situations existing in cities. To afford protection to individuals engaged in illegal violence would provide their actions with some legitimacy. Moreover, intrastate armed conflict has consistently shown that it is difficulty to promote compliance to IHL by non-state actors. This body of law would likely prove unhelpful for regulating urban violence, and could be detrimental by legitimizing violence and allowing for the killing of "combatants" similar to armed conflict.

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1. INTRODUCTION

According to UN-HABITAT, Rio de Janeiro, Sao Paulo, Mexico City, Lima and Caracas share a particular characteristic: the number of homicides in these cities is the highest in their respective countries.[2] In the last five years, there were over 20,000 gang-related murders in Guatemala.[3] In Brazil alone more than 100 people are killed by guns every day, more than half of that corresponds exclusively to Rio de Janeiro.[4] Under these circumstances, it is not surprising to hear that cities are going through internal urban wars.

Cities have always experienced a degree of violence that radically differs from that of rural areas. This phenomenon is usually rationalized by the higher concentration of people in a relatively limited space.

While cities become larger and the social problems become more complex, the population faces levels of violence beyond what might be considered tolerable in times of peace (if violence is ever tolerable). These urban realities are regulated by applicable laws. However, regular law enforcement and human rights have failed to stop the sufferings of innocent victims, the recruitment of children into gangs, and the rising death tolls. Can international law help regulate these situations?

The question addressed herein is if, and to what extent, it is desirable to apply the standards of international humanitarian law and/or regional human rights systems to address urban violence. For the purposes of this paper the focus of concern will be Latin American cities, and hence the Inter-American System of Human Rights.[5]

This paper will argue that international humanitarian law (IHL) has too many shortcomings to properly address the complex situations existing in cities. Although some particular issues can be regulated similarly to how IHL regulates armed conflict, the logic of this body of law does not permit an analogous application of its general standards and principles in cases of urban violence. Furthermore, the general lack of compliance and enforcement mechanism in IHL would ultimately deliver a useless framework. On the other hand, relying on regional human rights systems to address situations of urban violence (either enforcing IHL or promoting its own standards) would only be efficient in promoting compliance on the side of the State, while leaving the source of the problem largely untouched.

As big as this problem might be, this paper determine that the regulation of how to conduct urban violence would certainly be counterproductive. Applying the legal framework of IHL to situations of urban violence would mean that society has passively accepted the insolvability of this issue. This is similar to the passivity of the international community in further developing *jus ad bellum* and criminalizing international aggression. States and the international community must address urban violence. But instead of trying to regulate the way in which urban violence is conducted, they should try to look for complex policy solutions that address the systemic problems that propitiate this violence, such as poverty, lack of opportunities, violent social models, etc.

[1] The author wishes to thank Ms. Michelle Hassen from the Canadian Red Cross for her comments and edits to the final version of this paper. He also wishes to thank Ms. Arezou Farivar Mohseni for her comments to the draft version of this paper. However, any mistake is the author's only.

[2] United Nations Human Settlements Programme, *Global Report on Human Settlements 2007: Enhancing Urban Safety and Security* (London: Earthscan, 2007) at 55.

[3] *Ibid*. at 14.

[4] *Ibid*. at 13.

[5] The author has plans to further develop this study to include urban centres in the rest of the world.

2. SITUATING URBAN VIOLENCE

'Urban violence' is a rather broad term that encapsulates many different types of violent behaviour. An essential feature of it is that it occurs within urban centers, most notably in the so called slums or poverty belts that surround many cities. Its occurrence is particularly rampant in cities that are experiencing rapid growth.

Each city experiences violence in a different way. The intention here is not to generalize the situation to the point that the phenomenon seems homogeneous throughout Latin America, nor is it to present a self-created narrative of the problem. However, I do need to make identify the common denominator of this violence in order to address it properly, and base our analysis on diverse economic, demographic and sociological studies of the subject.[6]

The kind of violence that is witnessed in urban areas can generally be classified in four distinct but interrelated types: institutional forms of violence (when the perpetrator is the State or vigilante groups), violence of an economical nature (broadly economically motivated crimes performed by individuals or organized criminal groups), social violence (domestic or sexual violence, and occasional quarrels) and economic/social forms of violence (gangs, street children, ethnic violence).[7] It is manifested through a different set of criminal activities, which include murder, physical and psychological abuse, intimidation, armed robbery, petty theft, kidnapping, drug trafficking, etc.[8]

2.1. Scope of the Study

Some initial analysis necessary to properly frame the situation in the legal framework of international humanitarian law.

IHL is a rather broad field of law. The presence and nature of armed conflict determine which laws – if any – apply. Conflicts can be of an international nature or of a non-international nature. The former refers to conflicts between States and under particular circumstances conflicts between States and certain non-state actors.[9] Non-international conflicts are those between a State and a non-state actor which is seeking to overthrow a government that does not have a colonial connotation or does not impose a racist regime.
Before proceeding, we must first define the nature and sources of the law that will be applied to this study. Since urban violence occurs within a city, and never between State-like entities, it will be necessary to focus on the branch of law that actually addresses intrastate conflict, that is, the law of non-international armed conflicts. Accordingly, we will mainly apply Common Article 3 (CA3) of the 1949 Geneva Conventions and the Additional Protocol II (AP II) to the aforementioned conventions, while also looking at the customary international humanitarian law (CIHL, or simply Customary IHL) that is applicable to non-international armed conflicts. Evidently, I kindly ask the reader to ignore, for

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[6] Including*: Global Report on Human Settlements 2007*, *supra* note 1; DFAIT, *Freedom from fear in urban spaces*, online: humansecurity-cities.org <http://www.humansecurity-cities.org/page153.htm>; *Human Security for an Urban Century*, online humansecurity-cities.org <http://humansecurity-cities.org//sites/hscities/files/Human_Security_for_an_Urban_Century.pdf >; etc.

[7] Caroline O.N. Moser & Cathy McIlwaine. *Encounters with violence in Latin America: Urban Poor Perceptions from Colombia and Guatemala* (New York: Routledge, 2004) at 5.

[8] *Ibid.*

[9] Additional Protocol I to the Geneva Conventions establishes that conflicts where one of the parties is peoples "fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination", are considered International Armed Conflicts. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 3 at art. 1.4 [*Additional Protocol I*].

the purposes of the this study, the mandate of AP II regarding its inapplicability to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts".[10]

As stated before, urban violence comprises a fairly large spectrum of types of violence, which also have varied and particular manifestations. Some types of violence, such as domestic abuse, simply cannot be covered by IHL because of the particular relations between the people involved. In the same sense, IHL deals with particular relations that generally resemble some types of urban violence but not others. In other words, this branch of law tries to regulate the actions of individuals, and relates to the exercise of military and humanitarian activities during a conflict between two or more armed groups. The broadness of the definition of "parties to the conflict" in CA3 will help accommodate many actors in urban violence and develop the objectives of this study. However, AP II is more restrictive in what constitutes an "organized armed groups", establishing that they must act "under responsible command, [and] exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations."[11] Evidently, this high threshold of application can hardly be met in situations of urban violence (some might say that even in certain internal armed conflicts[12]), but AP II will be used as a guide to distinguish groups that can meet this definition and be regulated by the laws of non-international armed conflicts.

In situations of urban violence it is possible to identify three types of groups that, to a certain extent, resemble the minimum requirements established in AP II for its application:
(1) State security services: Such as the police or other special government-based security agencies. Since they are governmental institutions, security services operate under responsible command and exercise the jurisdiction of the State. As the government officials in charge of maintaining the security in the country, they are authorized to carry weapons.
(2) Private security services and vigilante groups: The levels of violence in certain cities have propitiated the creation of private security contractors, who do have a command and do try to protect certain areas of private property through the use of weapons. The situation of vigilante groups is less clear, because they often react to particular threats and do not seek to seize territorial control.
(3) Criminal organizations and gangs: Broadly defined as any type of joint criminal enterprise with some level of permanence, they execute violence as a means to secure their illegal activities, which include drug trafficking, human trafficking, prostitution networks, etc. In addition to the economic component, gangs also have social cohesion and some kind of identity feature (often ethnic) that triggers a search for territorial control.

These three types of groups will form the base of the analysis in the following section. The selected IHL norms will be applied to theoretical interactions that could occur between the aforementioned groups.

Just as international humanitarian law is not dependent on the right to wage war,[13] the scope of this study must ignore the diversity of reasons that gives rise to urban violence, and focus on the phenomenon itself.

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[10] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 U.N.T.S. 610 at art. 1.2 [*Additional Protocol II*]
[11] *Ibid.* at art. 1.1.
[12] Laura Perna, *The Formation of the Treaty Law of Non-International Armed Conflicts* (Leiden: Martinus Nijhoff Publishers, 2006) at 103-105.
[13] With the exception of the qualification of whether an internal armed conflict can be considered as an international one according to API. *Additional Protocol I*, *supra* note 9 at art. 1.4.

2.2. Legal Framework

Before entering in the discussion of how IHL would regulate interactions in situations of urban violence, it is necessary to outline the legal framework that generally cover situations of urban violence, and the role of humanitarian actors in this framework.

The type of violence that occurs within cities is usually addressed through national criminal law. Damages to life and goods are treated initially from a criminal perspective. This includes the substantive laws establishing that both the modalities of violence and certain activities related to the violence are crimes, and the procedural laws used to prosecute those crimes. Many countries also criminalize the formation of a joint criminal enterprise or a gang, independently of the crimes they commit. It must be noted that thanks to the action of the international community, most countries have adopted special systems of juvenile justice which work under different procedural rules and often impose lower sentences than regular criminal courts. The legal response from this body of law occurs *post facto*, and works on a long-term concept of prevention.

When the violence is performed by State agents such as the police, these actions enter first in the realm of administrative and disciplinary jurisdictions. It has more to do with the measurement of the consequences versus the objective, taking into account the circumstances in which the violent act occurred. Theoretically, if the violent actions go beyond the necessary response, the individual criminal responsibility of the actor can be compromised under the same premises of normal citizens. Nevertheless, the level of impunity in these situations is extremely high.

In some cases human rights might become the legal framework of application either as national constitutional guarantees or as appeals to international courts and bodies of human rights. While the national approach depends on the existence of a proper constitutional system, the international approach remains limited to cases where the violent actions were performed directly by State agents or by private individuals under the support, encouragement or authorization of the State.

The International Committee of the Red Cross (ICRC) has had a long tradition of promoting the principles of humanity in situations of urban violence that do not amount to a non-international armed conflict.[14] This comes from its mandate to "take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary."[15] The last International Conference of the Red Cross and Red Crescent focused on "four great challenges facing the world today which affect the individual and specifically the most vulnerable",[16] among them "violence, in particular in urban settings".[17] The declaration 'together for humanity' adopted by the Conference recognized the magnitude of the problem and stated:

> Violence in urban areas poses a particular challenge, where problems are often aggravated by rapidly growing populations, poverty and economic inequalities, unemployment, social exclusion and marginalization, insufficient public security and services, and the easy availability of drugs and weapons.
>
> We acknowledge that States are responsible for providing safety and ensuring adequate care and support for the victims of violence, to the extent

[14] Marion Harroff-Tavel, "Action taken by the International Committee of the Red Cross in situations of internal violence" (1993) 294 Int'l Rev. Red Cross 195; Jean-Philippe Lavoyer, "Refugees and internally displaced persons: International humanitarian law and the role of the ICRC" (1995) 305 Int'l Rev. Red Cross 162.

[15] Statutes of the International Committee of the Red Cross, at art 4.2 online: ICRC <http://www.icrc.org/Web/eng/siteeng0.nsf/html/icrc-statutes-080503>.

[16] Together for humanity, 30th International Conference of the Red Cross and Red Crescent, 26-30 November 2007, Doc. 30IC/07/R1/Declaration, at p. 1 online: ICRC <http://www.icrc.org/Web/eng/siteeng0.nsf/html/30-international-conference-resolutions-061207>.

[17] *Ibid.*

> feasible, and for the creation of policies and legal frameworks which aim at prevention and mitigation of violence. Such policies and frameworks may also need to address cases of urban armed violence between organized groups.[18]

While reinforcing ICRC's commitment to work together with States in the prevention and reduction of urban violence, the declaration puts the responsibility of creation of a proper legal framework in the hands of States.

3. DOES INTERNATIONAL HUMANITARIAN LAW PROVIDE THE SOLUTION?

Having established the focus of this paper, I will now move to develop the main premise: is it possible to apply international humanitarian law to situations of urban violence? In my view, the question can be approached from two perspectives. First, can the existing rules of IHL, particularly the laws addressing internal armed conflicts, be applied to urban violence? Second, is there room to create within the general framework of IHL a body of law covering internal violence? This approach will be strictly theoretical and will look at the bases of the system to see if such a creation is feasible.

3.1. Possible Subjects of Interest in the Law of Internal Armed Conflicts

The law of non-international armed conflicts is considerably smaller than the body of law dedicated to international wars. This is mostly due to the fact that States have less motivation to regulate the sort of conflict that might affect their own integrity. Nevertheless, it would not be practical to contrast and compare every single article of AP II with the violent experiences lived in urban settings.

Instead I will focus on four particular subjects which *prima facie* seem to bring interesting ideas to the regulation of urban violence. In each subject, I will briefly revise the applicable law of internal armed conflict and will try to apply its logic to situations of urban violence. The goal of this subsection is to analyze whether the rules of IHL applicable to non-international armed conflicts can be used analogously in cases of urban violence.

3.1.1. Protection of Civilians

In any conflict, the situation of civilians is one of the principal concerns of humanitarian actors. International humanitarian law provides a vast amount of rules concerning the protection of those "[p]ersons taking no active part in the hostilities."[19] The general rules regarding the protection of civilians in internal armed conflicts establish that civilians cannot be the object of an attack either directly against them[20] or of an indiscriminate nature,[21] and that civilians should be affected as little as possible by the attack of a legitimate military objective.[22] When thinking about situations of urban violence, it seems logical and desirable to afford a high level of protection to those individuals that are

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[18] *Ibid.* at p. 3.

[19] *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949*, 75 U.N.T.S. 31 at art. 3 (Evidently, the reader can look for the same content in any of the other three Geneva Conventions of 1949) [*Common Article 3*].

[20] *Additional Protocol II*, *supra* note 10 at art. 4.1. Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: Cambridge University Press, 2005) at rule 1, p. 3 [*Customary IHL*].

[21] *Customary IHL*, *supra* note 20 at rule 11 to 13, p. 37-45.

[22] *Ibid.* at rule 14 & 15, p. 46-55.

not participating in inter-group violence, and to protect regular individuals from the institutional violence of the State or vigilante groups.

However, the application of the law of non-international armed conflicts presents an inherent shortcoming: how is a civilian identified. Customary international humanitarian law applicable to non-international conflicts establish that "[c]ivilians are persons who are not members of the armed forces",[23] however it is acknowledged that there is no clear State practice on the qualification of members of the armed opposition groups as either civilians or combatants.[24] The ambiguity of customary law and the total silence of AP II on the issue render the protection of civilians in such conflicts quite complicated. It has been argued that the whole principle of distinction is totally unsuited for internal armed conflicts and needs to be re-conceptualized for it to be operative.[25]

While the protection of persons not taking a direct part in situations of urban violence is desirable, the issue of identification gets in the way. That is, it would be quite easy to identify the police forces operating in a given city. Meanwhile persons participating in criminal groups are by definition unidentifiable, since wearing uniforms and carrying visible weapons are not compatible with their interest in pursuing criminal activities. The ICRC has acknowledged that in non-international armed conflicts, the obligation of State forces to wear identifiable uniforms can give a considerable advantage to the armed opposition groups.[26] Similarly, affording a different threshold of protection to police forces and the general non-uniformed population would not produce a significant change to the current situation, as police forces are under the human rights obligation not to violate the rights to life and personal integrity of the population.[27]

As a general rule of IHL, a civilian loses his or her protection "for such time as they take a direct part in hostilities",[28] but this does not take into account how to identify those persons that are engaging in direct violence and those who are acting in self-defense.

Paragraph 1 of CA3 and articles 4.2 and 6.2 of the AP II establish the minimum protection accorded to those individuals that do not take part in combat (civilians) or that have ceased (wounded, sick and captured). This includes a general prohibition of: performing acts of violence to the life, health and physical integrity of a person; outrages upon personal dignity; pillaging; taking hostages; and penal prosecutions without procedural guaranties. When transposing this protection to the situations of urban violence, all of the above acts are generally prohibited by national criminal systems (when committed by particulars) and human rights law (when committed by the State or its agents). In this sense, the protection of civilians can hardly be addressed as an absence-of-law. The only difference that the application of IHL would make, is that vigilante groups, criminal groups and gangs could 'legally' (or 'non-illegally') perform acts of violence on each other and on police forces. This ultimately will transform the de-facto battle grounds in city in de-jure wars.

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[23] *Ibid.* at rule 5, p. 17.
[24] *Ibid.* at p. 19.
[25] See Jann K. Kleffner, "From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities – on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years after the Second Hague Peace Conference" (2007) LIV Nethl. Int'l L. Rev 315; see also Stefan Oeter, "Comment: Is the Principle of Distinction Outdated?" in Wolf Heintschel von Heinegg & Volker Epping, eds., International Humanitarian Law Facing New Challenges: Symposium in Honor of Knut Ipsen (Berlin: Springer, 2007).
[26] *Customary IHL*, *supra* note 20 at 21.
[27] OAS, *American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 at arts. 4, 5 & 7.
[28] *Additional Protocol II*, *supra* note 10 at art. 13.3.

3.1.2. Emergency Medical Services and Humanitarian Action

Fast and reliable emergency medical services are a necessity in any city. However, slums commonly have territorial disputes or other situations that endanger access to medical care. This is very similar to what occurs in times of war. Humanitarian action is always dangerous and limited by the accessibility of the battle zone.

International humanitarian law has responded to this challenge by establishing legal obligations for belligerents to provide medical care without discrimination,[29] and to allow humanitarian actors access in the field.[30] In the case of non-international armed conflicts AP II established that all wounded and sick "shall be treated humanely and shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition."[31] Customary IHL also contemplates the obligations to allow and facilitate civilian access to humanitarian relief[32] and to ensure freedom of movements of impartial humanitarian relief personnel.[33]

Through respect and reinforcement of its neutrality, the ICRC has assured its capacity to deliver humanitarian relief to both civilians and combatants in countless conflicts.[34] It has also played a key role in the humanitarian action in situations of urban violence,[35] such as in the current dynamics of Cité-Soleil, Haiti.[36]

However, the IHL approach has limits when confronted with the realities of urban violence. As big as criminal organizations and gangs might be, it would be quite unreasonable to impose an obligation to provide medical care, especially because that would logically require them to have their own medical personnel. Gangs and other criminal groups would not have an incentive to have their own medical staff and first aid equipment unless the medical services of the State are not available to their members. State behaviour of this fashion would constitute adverse treatment and discrimination, which is forbidden by both IHL and IHRL.[37]

However, regulating humanitarian actors and their access to the vulnerable is quite different. It is difficult to imagine a situation where urban criminal groups and gangs would block the action of neutral humanitarian aid agencies. More than a legal obligation, it is a dictate of human consciousness that sick and wounded people should be given proper medical care. This might be one of those rare cases when "if it goes without saying, does it always go better when you say it?"[38]

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[29] *Ibid.* at art. 9; *Customary IHL*, *supra* note 20 at rules 109-110, p. 396-403.
[30] *Additional Protocol II*, *supra* note 10 at art 18; *Customary IHL*, *supra* note 20 at rules 55-56, p. 193-202.
[31] *Additional Protocol II*, *supra* note 10 at arts. 7 &7 and 5.1.a.
[32] *Customary IHL*, supra note 20 at rule 55, p. 193.
[33] *Ibid.* at rule 56, p. 200.
[34] See Harroff-Tavel, *supra* note 14.
[35] "The capacity of the ICRC to implement programmes to prevent violence in mainly urban areas in places like Brazil, El Salvador, Guatemala, Honduras, Jamaica or Haiti is limited. While by no means indifferent to the humanitarian needs of people affected by this type of violence, the ICRC is aware that the limitations on action in such situations probably require a much more integrated and comprehensive approach than it is able to adopt within the bounds of its mandate", *American States: protection of persons in situations of internal disturbances and tensions*, address by the ICRC at the special meeting of the Committee on Juridical and Political Affairs of the Organization of American States on current issues in international humanitarian law, Washington, D.C., 2 February 2006.
[36] Didier Revol, "Hoping for change in Haiti's Cité-Soleil" Red Cross Red Crescent magazine (February 2006) online: Red Cross Red Crescent Movement <http://www.redcross.int/EN/mag/magazine2006_2/10-11.html>.
[37] *Additional Protocol II*, *supra* note 10 at arts. 2.1; *Customary IHL*, supra note 20 at rule 55, p. 193.
[38] R. A. Macdonald, Lessons of Everyday Law/Le droit du quotidien (Montréal & Kingston: McGill-Queen's University Press, 2002) at 33.

For the purposes of urban violence, the application of IHL rules regarding the prompt medical care for wounded and sick would simply be unrealistic. They require a minimum level of medical aid that cannot be satisfied unless the parties have their own medical staff and supplies. And spelling a duty to allow humanitarian actors in the cities would be redundant, since IHRL already imposes an obligation upon the State to ensure that "primary health care, that is, essential health care [is] made available to all individuals and families in the community"[39].

3.1.3 Respect for Children and Protection Against Their Recruitment

One of the most complicated features of urban violence is that most of its actors and victims are minors. The type of violence that urban children suffer, and their level of participation in the violence differs radically from city to city, however the problem mostly turns on social vulnerability and encouragement to perform illegal activities (drug abuse, petty robbery). In countries like El Salvador and Guatemala, children are both perpetrators and victims of the violence due to the increasing phenomena of the *maras* or gangs. Meanwhile, in countries such as Colombia and Brazil, the problem consists of institutional violence against street children, which might or might not be related to gang activity.

The laws of internal armed conflict have created a small but important set of rules regarding the involvement of children both as combatants and possible victims. AP II establishes that "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor be allowed to take part in hostilities."[40] It also extends certain rights such as access to education and family life,[41] which remain valid even if the child has engaged in combat.[42] Customary IHL also provides protection from sexual violence, and access to food and medical care.[43] Although the minimum age for recruitment and participation in combat remains 15 years,[44] the *opinio juris* and practice of States is evolving towards raising the minimum age to 18. It is particularly important that in the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts* States have made the compromise to not compulsorily recruit any person under the age of 18,[45] and in the case that a children joined the army before that age, States have committed to take all necessary measures to keep them away from direct hostilities.[46] Moreover, the Protocol establishes a general prohibition for armed non-state groups to recruit persons under the age of 18 years.[47]

Regarding the situation of child civilians caught in an urban center with high levels of violence, the rights accorded by IHL do not substantially differ from those already established in IHRL. The fact that the most comprehensive instrument dealing with human rights to date is the *Convention on the Rights of Child* and that this instrument has almost universal ratification,[48] shows that the problem is

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[39] *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)*, 14 November 1988, O.A.S.T.S. No. 69 (1988) at art. 10.2.a, 28 I.L.M. 156 (entered into force 16 November 1999); a similar obligation can be found in the universal system, which is described as creating the "conditions which would assure to all medical service and medical attention in the event of sickness", *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, art. 12.2.d, 6 I.L.M. 360 (entered into force 3 January 1976).

[40] *Additional Protocol II*, *supra* note 10 at arts. 3.c.

[41] *Ibid.* at arts. 3.a, 3.b, 3.e.

[42] *Ibid.* at art. 3.d.

[43] *Customary IHL*, supra note 20 at rule 135, p. 481.

[44] *Ibid.* at rule 135, p 484.

[45] *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts*, 25 May 2000, 39 I.L.M. 1285 at art. 2.

[46] *Ibid.* at art. 1.

[47] *Ibid.* at art. 4.

[48] With the known exceptions of the United States and Somalia, and the expectation over Kosovo's recent declaration of independence.

not of absence-of-law. Meanwhile the situation of child soldiers reveals a lower threshold of protection in IHL than in IHRL, for children will be considered as soldiers and thus legitimate object of an attack for "such time as they take a direct part in hostilities."[49]

Probably the issue where IHL can make the best contribution to urban violence is that of child recruitment. The already existent international obligation not to allow minors to participate in combat and the even stricter obligation of not allowing armed opposition groups to enroll persons under the age of 18 in non-international armed conflicts, could establish the base for a general prohibition and criminalization of this practice. However, it must be noted that in international criminal law the "war crime of using, conscripting and enlisting children"[50] uses the 15 years old limit accepted in customary law.[51] The successfully prosecuted cases in the Special Court for Sierra Leone[52] and the forthcoming trial of Thomas Lubanga DyiloDylo in the International Criminal Court[53] are based on this 15 years old standard.

Even if IHL rules for child recruitment were assumed to be applicable to participation in gangs and other criminal organizations, certain aspects of IHL's general framework would make it very difficult to properly adapt them to urban violence. Although the next section will discuss those general incompatibilities, this section will discuss how they relate to the issue of child recruitment. Initially, armed opposition groups experience IHL as a legal restraint, that is, these groups are not conducting themselves illegally so long as they comply with the laws of non-international conflicts and human rights. Imposing a framework in which only children recruitment in gangs and other criminal groups would be illegal, would have to consider that any other type of joint criminal enterprises would not be (as) illegal. In addition, such a framework supposes that there is an interest from gangs and other criminal groups not to include children in their activities. Gangs are in themselves a phenomenon linked to youth and organized crime often relies on children to commit economic and violent crimes.[54] It would be absurd to request these groups to follow legal means, against their own interests, in pursuing an illegal end. Finally, opposition groups often violate the laws of war because of the asymmetry in the conflict. Since the State is bound to comply with IHL, these groups see the violation of international law as a way to compensate the disadvantages in the battle field. In this particular issue, even before the Optional Protocol on Child Recruitment was finalized, agreements with armed opposition groups to stop child recruitment were continuously violated.[55]

3.1.4 Protected Persons and Objects

Besides the generic protection of civilians, the law of internal armed conflicts provide for the protection of particular persons who perform an important humanitarian role in the field. It also provides for the protection of objects and places that are used to perform these functions or which carry a significant value.

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[49] *Additional Protocol II*, *supra* note 10 at art. 13.3.

[50] *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90 at arts. 8.2.b.xxvi & 8.2.e.vii (entered into force 1 July 2002).

[51] International Criminal Court, Assembly of State Parties, First session, *Elements of Crimes*, ICC-ASP/1/3, (2002) at art arts. 8.2.b.xxvi & 8.2.e.vii.

[52] *Prosecutor v. Fofana & Kondewa*, Judgment, Trial Chamber I, 2 August 2007, Case No. SCSL-04-14-T, at para. 182-199; *Prosecutor v. Brima, Kamara & Kanu*, Judgment, Trial Chamber II, 20 June 2007, Case No. SCSL-04-16-T, at paras. 727-728.

[53] For the documents on this case, online: ICC <http://www.icc-cpi.int/cases/RDC/c0106/c0106_doc.html>.

[54] *Global Report on Human Settlements 2007*, *supra* note 2 at 64.

[55] Stuart Maslen, "The use of children as soldiers: the right to kill and be killed?" (1998) The International Journal of Children's Rights 6 Int'l J. Child. Rts. 445 at 449.

In a non-international armed conflict, protected persons include all medical and religious personnel of the armed forces,[56] humanitarian relief personnel,[57] personnel of peacekeeping missions[58] and journalist.[59] The protected objects include medical units and transports;[60] any transport or unit caring the distinctive emblems of the red cross, red crescent, red lion or sun on a white ground[61] or any combinations of symbols featuring the red crystal;[62] places of worship;[63] and buildings dedicated to religion, art, science, education or charitable purposes and historic monuments.[64]

Unquestionably, the aforementioned persons can be endangered by episodes of violence in an urban area. There have certainly been cases where members of peacekeeping operations have lost their lives due to urban violence. But, as was the case with civilians, to afford them protection also means legitimating violence directed at other targets. In any case, the lives and wellbeing of any person in the city is legally protected by the regular laws of the State. Although it would be desirable to afford some higher level of protection to these people, in an urban setting it simply does not make sense.

The protection of places could be an area of interest for urban violence. Establishing that hospitals, schools and places of worship (to say the least) are outside the realm of violence would probably have a positive impact on the lives of citizens. Worship places are traditionally seen as neutral and off-limit, and there is a general belief that it is forbidden to carry weapons in schools and hospitals. But an analogous application of IHL would imply that violence in other places is not forbidden, thus having counterproductive results.

In short, affording special protection in IHL makes sense because there is some degree of violence that can legally be performed to non-protected people and places. Meanwhile, in urban settings, the fundamental premise is that violence against any person or any place is illegal. The idea of a protected person loses validity if the general premise is that nobody should be killed or wounded, hence it is completely unsuitable for situations of urban violence.

3.2. Beyond the Law of Internal Armed Conflicts

The last subsection analyzed four areas of IHL that seem to be analogously applicable to situations of urban violence, but found that none would actually change the situation in general or benefit the victims of this violence.

Analogous application does not exhaust the issue. A point has been made that the law of non-international armed conflicts was indeed an evolution of the law of international conflicts. Now I wish to explore whether it is possible to evolve to a law of internal disturbances within the system of IHL.

As I start to approach the possibility of creating a branch of IHL for internal violence, some general issues related to the structure and conceptualization of this body of law start to reveal certain theoretical incompatibilities. This section will explore the structure of the system in general and how situations of urban violence are so specialized that they would complicate the creation of a regime within IHL to regulate it.

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[56] *Additional Protocol II, supra* note 10 at arts.Art 9; *Customary IHL, supra* note 20 at r 25 & 27.
[57] *Customary IHL, supra* note 20 at ruleR 31.
[58] *Ibid.* at rule 33.
[59] *Ibid.* at rule 34.
[60] *Additional Protocol II, supra* note 10 at art. 11; *Customary IHL, supra* note 20 at rule 32.
[61] *Additional Protocol II, supra* note 10 at art. 12; *Customary IHL, supra* note 20 at rule 30.
[62] *Protocol additional to the Geneva Conventions 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)*, 8 December 2005, 45 I.L.M. 558.
[63] *Additional Protocol II, supra* note 10 at art. 16.
[64] *Customary IHL, supra* note 20 at rules 38-40.

3.2.1. The Nature and Rationale of IHL

There can be several idealizations about the origins of purpose of international humanitarian law. However, it would be more accurate to say that the whole body related to the laws of war was born out of the interest of States to prevent the waste of human lives beyond the necessary. Compliance with these rules was sustained out of pure reciprocity. States would only limit their means and methods of warfare as a way to ensure that the other party would respect them too. Until the 20th century, a breach of the laws of war was punished with a similar breach by the other party to the conflict. It must be said that although pillage and destruction of property has always been a feature of war, until recent times civilian population was rarely the object of military attack.

The issue of the rationale becomes absolutely relevant in the discussion of urban violence, because in armed conflict there is usually an interest by both parties that previously established limits to military action be respected during the conflict. Urban violence is in itself a cumulus of illegal activities directed from individuals of a group towards individuals or groups. In order to set limits to illegitimate action between the protagonists of the violence and from them to non-participants, it would be necessary to accept and acknowledge that a certain level and certain methods of violent behavior is accepted.

In this sense, how can the State ban private violence and regulate it at the same time? It is possible to envisage a framework where violent activities would be regarded as less-illegal or even non-illegal if performed between actors of an urban conflict. However, this raises many philosophical issues on State power and the function of the law. If legitimacy is, as Weber affirms, the monopoly of violence, structuring a framework where legal –or at least non-illegal– forms of violence can be performed by entities outside the State would legitimate the authority of actors in a given space.

3.2.2. IHL, Actors and Compliance

Traditional IHL responded to the realities of the 19th and early 20th century, that is, war between States. Besides the consideration of what is a just or an unjust war, the authority of States to perform war was hardly contested -- it came with the territory. With the explosion of intrastate conflicts, the legal regime usually accorded to international wars was applied to certain types of non-international conflicts. Simultaneously, a particular regime was created for conflicts of a pure non-international nature. The AP II simply adapted the minimum possible norms of international conflicts to conflicts were only one of the parties is formally a State.

In non-international armed conflicts IHL is experienced by armed opposition groups as legal restraints and substantial obligations,[65] meaning that there is a range of prohibitions imposed on them and an obligation to respect humanity in general. There are no rights, but there is recognition of their status and a presumption of non-illegality while complying with the restraints and obligations.

This adaptation has proven highly ineffective as AP II did not envisaged mechanisms of enforcement beyond the existing structures in IHL.[66] Reciprocity becomes a one way street. That is, the State is forced to respect the rules due to its international commitments while dissident armed forces commonly break them or recourse to the asymmetry of the conflict to invoke military necessity.[67]

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[65] Cfr Lisbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press)."

[66] Georges Abi-Saab, " Les Protocoles Additionnels, 15 ans après", in Jean-François Flauss, ed, *Les nouvelles frontières du droit international humanitaire* (Brussels: Bruylant, 2003) at 27

[67] René Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 161).

The simple issue of identifying who is a 'legitimate' actor in non-international conflicts has revolved around the fact that sometimes the use of uniforms is simply impossible or quite counterproductive.

All of these reveal that the system was created to work between States. The continuous difficulty to promote compliance between non-state actors is indicative of its shortcoming. Applying the principles of this body of law, which lacks efficient enforcement mechanism, to create a regime for organizations that willingly operate outside the law is simply illogical.

4. THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

As it has been stated throughout this paper, human rights do not loose their validity during a situation of urban violence. Even when States formally declare a state of emergency, the catalogue of rights that can actually be suspended is short, and the conditions to sustain the suspension are very strict. International courts have stated that the application of IHL does not absolutely suspend the application of human rights. What can regional human rights institutions say about urban violence and applicable laws?

In this section we will briefly address the jurisprudence of the Inter-American System of Human Rights (IACtHR) related to three points that can shed some light on the topic of this paper:

- The practice and jurisprudence of the Inter-American Court and Commission of Human Rights on the relation between IHL and IHRL.
- The jurisprudence on State responsibility for the action of urban militias.
- The opinion of the Court regarding violence inflicted by state officials on street children.

4.1. International Humanitarian Law and Human Rights

The Inter-American System of Human Rights has had a few encounters with this relationship between IHL and IHRL. The Inter-American Commission of Human Rights, which has a greater liberty to apply other treaties to its recommendations and reports, has emphasized that "during situations of internal armed conflict that these two branches of international law most converge and reinforce each other."[68] Moreover, the Commission has always asserted its powers to interpret the American Convention using the rules of IHL.[69]

The Court has been more cautious when speaking of this relationship, but its views have evolved over time. In the case of *Las Palmeras (Colombia)*, the Commission argued for the full application of CA3 to the facts of the Case.[70] Back then, the Court accepted that its material field of jurisdiction was delimitated by the American Convention, and that other treaties can only be included as a matter of interpretation.[71] In the 2004 decision of preliminary exceptions of the *Case of the Serrano-Cruz Sisters (El Salvador)*, the Court insisted on its powers to use IHL in order to give content to the articles of the American Convention,[72] and discussed the complementarity between IHL and IHRL.[73]

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[68] *Juan Carlos Abella v. Argentina (La Tablada)* (1997) Inter-Am. Comm. H.R. No.24/98 at para. 160.

[69] See René Provost, "El Uso del Derecho Internacional Humanitarlo por la Comision Interamericana de Derechos Humanos: Hacia un Derecho Humanitario Regional?" in *Jornadas de derecho internacional:11 al 14 de diciembre de 2001, Ciudad de México, Estados Unidos Mexicanos* (USA: OEA, 2002).

[70] *Case of Las Palmeras (Colombia)* (2000), Inter-Am. Ct. H.R. (Ser. C.) No. 67 at para. 29.

[71] *Ibid.* at para. 33.

[72] *Case of the Serrano-Cruz Sisters (El Salvador)* (2004), Inter-Am. Ct. H.R. (Ser. C.) No. 118 at para.119.

[73] *Ibid.* at para. 116.

However, for the decision of the merits on that case The Court did not use the Geneva Conventions or its Protocols to interpret the Convention.

More recently, in the *Case of Vargas Areco (Paraguay)*, the Court was faced with the execution of a 15 years old soldier who was trying to escape from a base. Although the child was recruited and killed before the State of Paraguay accepted the contentious jurisdiction of the Court, a public acknowledgement of international liability made by Paraguay opened the door for the Court to comment in issues beyond its material jurisdiction. Citing multiple international instruments the Court found that there is a trend to increase the age of recruitment to 18 years old,[74] and that given the international commitments already expressed by Paraguay, the Court ordered the State to adopt in their national laws the mandates of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts.*

4.2. State Responsibility and Urban Militias

Through the jurisprudence of the IACtHR it is not difficult to find cases where the actions that violated the American Convention were not performed by the Government itself. The use of paramilitary groups has been particularly relevant in the internal conflicts in Colombia and Guatemala.[75] The cases regarding the situation in these countries are not entirely relevant for our purposes because they indeed happen in the framework of a conflict and not in urban areas. However, it will be useful to keep in mind the repeated jurisprudence of the Court regarding the extension of the responsibility of the State. In short, for the State to be responsible for the action of such entities "it is enough to prove that there has been support or tolerance by public authorities in the infringement of the rights embodied in the Convention, or omissions that enabled these violations to take place."[76]

Having said that, the Court has indeed dealt with a case where a vigilante patrol performed acts of urban violence in Guatemala City. In the *Case of Paniagua Morales (Guatemala)*, also known as the *Case of the "White Van"*, a group of public officials tortured, killed and disappeared a significant number of persons by kidnapping them in the middle of the street, sometimes during daytime, using a white van. Although the Court did not find that these actions where part of a generalized policy of the government, it emphasized that: "The sole requirement is to demonstrate that the State authorities supported or tolerated infringement of the rights recognized in the Convention."[77]

In this sense, the State is as responsible as the entities that perform such kinds of urban violence if it tolerates it. One important aspect of *Paniagua Morales* is that even though the perpetrators where stopped by the police and taken to criminal trial, the judicial system was unable to act because of coercion and acts of violence against judges.

4.3. The Case of Street Children

The *Case of Villagrán Morales et al. (Guatemala)*, also known as the *Case of the "Street Children"*[78] is considered the paradigmatic cases of the IACtHR regarding the rights of children. This case has a

[74] *Case of Vargas-Areco (Paraguay*) (2006), Inter-Am. Ct. H.R. (Ser. C.) No. 155 at para. 122.
[75] For example: *Case of Blake (Guatemala)* (1998), Inter-Am. Ct. H.R. (Ser. C.) No. 36; Case of the 19 Tradesmen (Colombia) (2004), Inter-Am. Ct. H.R. (Ser. C.) No. 109.
[76] *Case of the "Mapiripán Massacre" (Colombia)* (2005), Inter-Am. Ct. H.R. (Ser. C.) No. 134, at para. 110.
[77] *Case of Paniagua-Morales et al. (the "White Van") (Guatemala)* (1998), Inter-Am. Ct. H.R. (Ser. C.) No. 37 at parr. 91.
[78] *Case of Villagrán Morales et al. ("Street Children") (Guatemala)* (1999), Inter-Am. Ct. H.R. (Ser. C) No. 63.

particular importance in the framework of this paper because it deals with the torture and summary execution of five males, three of them children, in the slums of Guatemala City by members of the national police corps. It is important to notice that in the facts the Court found that "In Guatemala, at the time the events occurred, there was a common pattern of illegal acts perpetrated by State security agents against 'street children'; this practice included threats, arrests, cruel, inhuman and degrading treatment and homicides as a measure to counter juvenile delinquency and vagrancy."[79]

Besides the evident violations of the right to life, personal integrity and personal liberty, the Court also found a violation of article 19 (rights of the child) of the *American Convention on Human Rights* in connection with the *Convention on the Rights of the Child*:

> In the light of Article 19 of the American Convention, the Court wishes to record the particular gravity of the fact that a State Party to this Convention can be charged with having applied or tolerated a systematic practice of violence against at-risk children in its territory. When States violate the rights of at-risk children, such as "street children", in this way, it makes them victims of a double aggression. First, such States do not prevent them from living in misery, thus depriving them of the minimum conditions for a dignified life and preventing them from the "full and harmonious development of their personality", even though every child has the right to harbor a project of life that should be tended and encouraged by the public authorities so that it may develop this project for its personal benefit and that of the society to which it belongs. Second, they violate their physical, mental and moral integrity and even their lives.[80]

The treatment of violence against street children as a systematic violation of both their right to life *latu sensu* and their right to a dignified or decent life ("minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it"[81]) must be understood as a call for a more general appreciation of the problem of street children. In other words, addressing the responsibility of the State for the direct act of violence leaves the causes of the problem unsolved. The disproportionate response of the police agencies should be addressed only as the final fact of a long chain of State omissions. This point is further addressed in the conclusion.

5. CONCLUSION

After reviewing the particular provisions of the law of non-international armed conflicts, the general principles that establish the bases of IHL and the case law of the Inter-American System of Human Rights, it is my conclusion that the application of international humanitarian law to situations of urban violence is both dangerous and undesirable.

The comparison between the actual provisions of CA3, AP II and relevant parts of Customary IHL has shown that the selected issues are not better regulated by IHL. On the contrary, adopting such a stance will open the door for the acceptance of violent lawful behaviors between criminal groups.

By looking at the principles of IHL in general, it was clear that the creation of a new regime for urban violence under the bases of IHL would be absolutely impractical and even counterproductive. The violence that Latin American cities are witnessing in the last decades should not be addressed as an unsolvable fact, but as a systemic problem. Formally regulating violence legitimizes the violence in

[79] Ibid. at para 79.
[80] *Case of Villagrán Morales et al.*, supra note 78 at 191.
[81] *Case of the Yakye Axa Indigenous Community (Paraguay)* (2005), Inter-Am. Ct. H.R. (Ser. C.) No. 125, at paras. 162.

itself and the groups that perform it. In this particular case, regulating violence instead of combating it would end up by perpetuating the misery in the slums and promoting the existence of lawless cities.

Finally, the jurisprudence of the Inter-American System tells the semi-successful stories of the internationalization of local problems. While indeed victims have received many forms or reparation and the State has often accepted its responsibility either directly or indirectly, this does not reflect amelioration on the social and economic problems that cause the violence.
For all of the above, I have to agree with the report of the Secretary-General of the United Nations regarding the consultation process on 'Fundamental standards of humanity':

> "[T]here are no evident substantive legal gaps in the protection of individuals in situations of internal violence. There is also broad-based agreement that there is no need for new standards. Nevertheless, situations of internal violence and non-international armed conflicts, including situations where there is a need to ensure accountability of non-State actors, pose particular challenges to securing practical respect for human rights and international humanitarian law."[82]

Having said that, I believe that international law can play an important role in the promotion of long term solutions. Indeed, cities will benefit from the involvement of the international community on the promotion of social standards, the sustainability of development policies, the struggle against transnational crime, and the implementation of anti-criminal policies. Violence will not be reduced by its regulation.

[82] *Fundamental standards of humanity, Report of the Secretary-General submitted pursuant to Commission resolution 2000/69*, UN ESCOR, 57th sess., Annex, Sgenda Itam 17, UN Doc. E/CN.4/2001/91 (2001) at para. 6.