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Regulating "Drug Wars" and Other Gray Zone Conflicts: Formal and Functional Approaches

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Abstract

Academic debate on whether so-called "drug wars" can be classified as "armed conflicts" is more than just semantic. Indeed, the official designation of a situation as an armed conflict carries with it attendant rights and obligations applicable to states and non-state actors alike. The legal regime regulating armed conflicts is referred to as International Humanitarian Law (IHL). Some social scientists fail to understand that the debate on the applicability of IHL to "drug wars" is only marginally influenced by the broader discussions on "new wars" and "fourth generation warfare". This article considers the principal international legal approaches to engaging with ostensibly new types of organized violence. It reviews historical progress with respect to the regulation of so-called "non-international armed conflicts" and considers the track record to date. The paper finds that the "formal approach", based as it is on the cautious development of IHL´s existing legal basis, failed to offer a satisfying degree of legal certainty. The paper also notes how an alternative set of approaches is emerging - referred to here as "functional approaches". The paper shows that this new generation of strategies could potentially complement the formal approach by offering alternative means of effectively regulating "drug wars" and other gray zone conflicts.

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Introduction

The use of metaphor in combating insurgents, criminals and drugs has a long legacy. Former US-President Richard Nixon declared a "war on drugs" more than four decades ago. Since then, the expression is commonly invoked by media to address an array of "iron fist" policies and programs primarily designed to contain and dismantle the illegal drug trade. With its focus typically on "drug cartels", "mafias", "transnational gangs" and "trafficking networks", the war on drugs has also come to be termed a "war on (organized) crime" by policy makers and military strategists across the Western hemisphere.

There are indications that these "wars" are no longer merely rhetorical

There are indications that these "wars" are no longer merely rhetorical. Certain governments have declared organized crime groups as the most serious threats to public order and pursued increasingly militarized actions against them. The resort to paramilitary police units and even the armed forces as part of the "war on crime" has catalyzed dangerous spirals of violence. Owing to the intensity and organization of violence arising from many of Latin American and Caribbean "drug wars", these situations have the potential to be classified as armed conflicts.[1] And yet, some federal level politicians conspicuously avoid terms such as "war" and "armed conflict" when describing their fight against crime since they are conscious of how such language might trigger undesirable legal and political consequences.

It is necessary to understand under which conditions "drug wars" and similar violent conflicts can or should be described in academic writing as "war" or "armed conflict". From a legal point of view, this would imply the applicability of International Humanitarian Law (IHL) on all parties to the conflict. But can IHL satisfactorily resolve the imposition of limits to any of what one might call gray zone conflicts? Some scholars have serious reservations and proposed more problem-oriented approaches aimed at circumventing the legalistic method of determining the existence of an armed conflict on a case-by-case basis. Advocating the use of an overarching framework premised on common principles that promise more predictable and straight-forward implementation, these may be referred to as "functional approaches".

This paper reviews the current legal debate on the regulation of internal asymmetrical conflicts such as "drug wars". It draws attention to the ways these discussions are only marginally influenced by the broader treatment of "new wars" or "fourth generation warfare". Indeed, a key insight from the paper is that more inter-disciplinary research on ways and means of containing transforming forms of organized violence are urgently needed. The paper also considers the extent to

1 See R. Muggah, "Rethinking the Intensity and Organization of Violence in Latin America and the Caribbean", Reinventing Peace, 12 March 2012, available at: http://sites.tufts.edu/reinventingpeace/2012/03/26/disaggregating-lethal-armed-violence/. (accessed 27/07/12)

which the "formal approach" can address these new forms of organized violence. It reviews the historical and contemporary interpretations of so-called "declared war" and "non-international armed conflict", highlighting the so-called "overlap problem" which results from the cumulative applicability of IHL and International Human Rights Law (IHRL). The paper then considers alternative options by presenting three proposals for better coping with complex gray zone conflicts. It concludes by addressing the complementary nature of both formal and functional approaches.

The international regulation of non-international armed conflicts

The term "war" has long been deployed by a variety of actors to call attention to complex situations involving politically-motivated violence. It is often invoked symbolically and stimulates nationalist and populist impulses and emotions. As an academic construct, however, the term is of comparatively limited utility. Indeed, it is often misused and abused in political discourse and scholarly enquiry. "War" is historically a state-centric concept that today seems too narrow for analyzing contemporary settings of protracted armed violence involving neither conventional military confrontations between states (classic state wars) nor mass mobilizations for overthrowing a government and establishing a separate state (classic civil wars). In today´s wars it is not abundantly clear why some armed groups are fighting at all, harboring neither a clear interest in political autonomy nor acquisition of wealth.

Some decades ago, there was a turn in conflict studies away from war to a parallel, if equally convoluted concept, of "armed conflict". In some ways this concept is less politically compromised and more neutral, while also capturing a wider range of settings and contexts in which organized violence is occurring. The debates on "new wars"[2] and "fourth generation warfare (4GW)"[3] show however that the term "war" has not lost its literary appeal.

The international legal architecture has only partially adjusted to the necessity of regulating these seemingly new scenarios. IHL was crafted by sovereign states to address wars between one another. Rules concerning classic civil wars and comparable intrastate armed conflicts were only codified during the latter half of the twentieth century. It was after World War II that states began to substitute the highly

2 M. Kaldor, "Elaborating the "New War" Thesis", in: I. Duyvesteyn and J. Angstrom (eds.), ***Rethinking the Nature of War***, New York: Frank Cass, 2005, p. 210-224; H. Münkler, ***The New Wars***, Oxford: Oxford University Press, 2004.

3 T.X. Hammes, "War Evolves into Fourth Generation", in: T. Teriff, A. Karp and R. Karp (eds.), ***Global Insurgency and the Future of Armed Conflict. Debating Fourth Generation Warfare***. New York: Routledge, 2008, p. 21-44; W.S. Lind, K. Nighengale, J.F. Schmitt, J.W. Sutton and Gary I. Wilson. "The Changing Face of War Into the Fourth Generation", in: id., p. 119-133.

controversial concept of war,[4] by the more modern concept of armed conflict, thus transforming the traditional Law of War, also called ***ius in bello***, into the modern Law of Armed Conflict (LOAC).[5] Nevertheless, IHL´s core conventions still refer to it in a specific case.

The four 1949 Geneva Conventions are the key international treaties regulating the use of military force

Declared war as a special case of an international armed conflict

As is widely known to security and humanitarian experts, the four 1949 Geneva Conventions are the key international treaties regulating the use of military force. They "apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them".[6] Since only states can be parties to the Geneva Conventions, the rule is that their provisions do not extend to armed conflicts between governments and non-state actors, being "non-international armed conflicts". Rather, they refer to "international armed conflicts". "Declared war" is a special case, because no recourse to military force is necessary in order to trigger the applicability of its rules. Instead, an official pronunciation of an ***animus belligerendi*** directed to another state is sufficient. As a result, "enemy civilians", persons that happen to be on the territory of the adversary and in a particular vulnerable situation, enjoy protection against hostile acts on behalf of that state and its population.[7]

Hence, the concept of declared war continues to be recognized by international law as a specific hostile state of mind of a given regime or government. It implies legal consequences provided that the political decision to go to war with another state has been externalized by the competent institutional entity.[8] It is an historic relic of a primarily subjective and ***de jure*** approach to traditional interstate warfare, whose preservation appears to make sense from a humanitarian perspective, even though the 1945 United Nations Charter not only prohibits the use of force between states,

4 See, for an overview: W. Meng, "War", in: R. Bernhardt (ed.), ***Encyclopedia of Public International Law***, vol. IV, Amsterdam: Elsevier, 2000, p. 282 (283 et seq.).

5 In the following, the term „Law of Armed Conflicts" (LOAC) will be used as synonym for IHL. See, however, for different understandings: G. D. Solis, ***The Law of Armed Conflict. International Humanitarian Law in War***. Cambridge: Cambridge University Press 2010, p. 20 et seq.

6 Art. 2, paragraph 1, common to the Geneva Convention relative for the Ameloriation of the Condition of Wounded and Sick in Armed Forces in the Field (1949), 75 U.N.T.S. 31, Geneva Convention for the Ameloriation of the Condition of the Wounded and Shipwrecked Members of Armed Forces at Sea (1949) 74 U.N.T.S. 85, Geneva Convention relative to the Treatment of Prisoners of War (1949), 75 U.N.T.S. 135, Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949), 75 U.N.T.S. 287.

7 C. Greenwood, "The Concept of War in Modern International Law", ***International and Comparative Law Quarterly***, vol. 36 (1987), p. 295.

8 The question which organ is competent to declare war - the head of state, the parliament, etc. - is determined by the constitutional of each individual state.

but even the threat of it.[9] So, while states are not technically allowed to declare war against one another, if they do so, there is no legal void but rather predictable norms that set some limits of any military confrontation. Modern IHL is therefore primarily based on an objective or ***de facto*** approach: It is the use of military force[10] that triggers the applicability of the 1949 Geneva Conventions, "even if the state of war is not recognized" by its parties.

Civil wars and the recognition of non-state actors

In contrast to the historical evolution of the Laws of War designed to regulate (state) wars, civil wars and comparable intrastate armed conflicts between governments and rebels, insurgents or other irregular forces had no conventional basis at all until 1949. For a long time, states were not willing to submit such situations to international norms. Their fear, one that continues to resonate today, was that this could justify external intervention and result in the international recognition of groups deemed to be illegitimate. What is more, states were not particularly interested in being constrained in their prosecution of an internal adversary by international law. Indeed, many wanted the freedom to apply domestic penal or criminal law unencumbered by international rules and procedures.

Nonetheless, traditional international law[11] already distinguished between war, civil war and armed hostilities ***short of war***,[12] albeit based on weakly elaborated and highly controversial concepts. The expression "short of war" referred to crisis situations between sovereign states caused by measures such as "reprisals, armed interventions, blockades and other uses of armed force which did not have the same effect as that produced by a state of war" as a legal condition.[13] In absence of specific rules applicable to civil wars, states had the option of formally recognizing rebels and insurgents as belligerents, thus turning applicable the Law of War.[14] It is therefore necessary to understand, in how far rebellion, insurgency and belligerency were treated as three different concepts.

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9 See Article 2, paragraph 4 of the Charter of the United Nations, 26 June 1945, U.N.I.C.O. XV, 335.

10 A special case, not being considered at hand, is military occupation without armed resistance, see Art. 2, paragraph 2, common the four Geneva Conventions.

11 Generally understood as being marked by the existence of a sovereign right of states to go to war with each other (***ius ad bellum***) that was successively abolished after World War II, culminating in the UN Charter´s prohibition of the use of force (***ius contra bellum***). See for details: I. Brownlie, ***International Law and the Use of Force by States***, Oxford: Clarendon Press 1963.

12 D. Jinks, ***The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts***. Background paper for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, January 27-29, 2003, p. 1.

13 K.J. Partsch, "Armed Conflict", in: R. Bernhardt (ed.), ***Encyclopedia of Public International Law***, Vol. I, Elsevier, Amsterdam 1992, p. (25) 25.

14 A. Cullen, ***The Concept of Non-International Armed Conflict in International Humanitarian Law***, Cambridge, Cambridge University Press 2008, p. 8.

Situations of short-lived insurrection against the state´s authority were commonly referred to as "rebellions" and considered "to be completely beyond the remit of international humanitarian concern."[15] If a government proved to be incapable of suppressing a rebellion and the denial of the existence of a sustained armed struggle became untenable (e.g. when rebels effectively controlled substantial territory), then the rebels could be recognized as insurgents. Even so, such a unilateral act established only a factual relationship between the recognizing state and the non-state actor. It did not create legal rights and duties, unless specifically agreed upon.[16] Hence, recognition of an insurgency conferred no formal status on a non-state party to the conflict and the incumbent government was entitled to treat the insurgents as traitors and common criminals according to its own laws.[17] By putting "their relations with the insurgents on a regular, although clearly provisional basis"[18], foreign states could better protect their nationals as well as certain political and economic interests affected by the armed hostilities.

Any explicit "declaration of war" of a government towards non-state actors may be interpreted as an implicit recognition of a state of belligerency

In contrast to the recognition of insurgency, the recognition of the state of "belligerency" created definite legal rights and obligations. It allowed the ***de jure*** government to bring into effect the laws of (state) war and thus to demand respect for them by the non-state actor. Third states would issue such a declaration in order to turn applicable the law of neutrality.[19] This was usually the case if the belligerents were exercising governmental functions on the part of the territory under its control and if they were capable and willing to abide by international rules.[20]

Since World War II, these conventions have not been applied by states. One may argue that they have lapsed and are no longer part of international customary law.[21] Some scholars maintain that they should "be preserved as a legal option, ready for implementation in suitable instances".[22] As discussed below, one might ask whether a "drug war" scenario offers an appropriate context for revitalizing some elements of this subjective and state-centric approach. Here it shall suffice to state that any

15 Id., p. 9.

16 E.H. Riedel, "Recognition of Insurgency", in: R. Bernhardt (ed.), ***Encyclopedia of Public International Law***, Vol. IV, Elsevier, Amsterdam 2000, p. 171.

17 L. Moir, ***The Law of Internal Armed Conflict***, Cambridge, Cambridge University Press, 2007, p. 5.

18 H. Lauterpacht, ***Recognition in International Law***, Cambridge, Cambridge University Press 1947, p. 270.

19 In international law, neutrality is defined as a specific status of state that has the right "to remain apart from, and not to be adversely affected by, the conflict. On the other hand, there is the duty of non-participation and impartiality". M. Bothe, "The Law of Neutrality", in: D. Fleck (ed.), ***The Handbook of International Humanitarian Law***, 2nd ed., Oxford/New York: Oxford University Press, 2008, p. 571.

20 L. C. Green, ***The contemporary law of armed conflict***, 3rd. ed., Manchester: Manchester University Press, 2008, p. 344.

21 In international law, such abrogative practice is called desuetude. See, for details, M.J. Glennon, "How International Rules Die", ***Georgetown Law Journal***, vol. 93, p. 939-991, 2005.

22 E.H. Riedel, ***supra*** footnote 7, p. 173. See also E.H. Riedel, "Recognition of Belligerency", in: R. Bernhardt (ed.), ***Encyclopedia of Public International Law***, Vol. IV, Elsevier, Amsterdam 2000, p. 170.

explicit "declaration of war" of a government towards non-state actors may be interpreted as an implicit recognition of a state of belligerency. Evidently, this is one reason why state official refrain from using such rhetoric in their public statements. Even if such a step does not necessarily imply the concession of any legal status, they fear to confer a certain degree of political legitimacy to ordinary criminals - a status that may be used by them to camouflage their deeds as "acts of war".[23]

The evolution of the concept of non-international armed conflict

It is therefore no surprise that states have also been reluctant to regulate internal armed conflicts by codifying certain rights and obligations. Specifically, Article 3 common to the 1949 Geneva Conventions was the first international treaty provision that applied to armed conflicts "not of an international character occurring on the territory of the High Contracting Party". This was and remains an unprecedented development, although on closer inspection reveals that its principal contribution is the hardening of the principle of humane treatment with respect to those not taking directly part in the hostilities.[24]

In December 1948, a few months before the adoption of the four 1949 Geneva Conventions, UN member states celebrated the Universal Declaration of Human Rights. Its preamble reminds states of the "scourges of war" and condones rebellion against tyranny and oppression as last resort.[25] The recognition that civilians and fighters ***hors de combat*** also possess certain rights and need to be cared for can be interpreted as an attempt to affirm human rights idea in the specific context of non-international armed conflicts. On the other hand, the "minimum humanitarian charter" enshrined in Article 3 common to the Geneva Conventions resulted in a widespread perception that human rights law is only applicable in times of peace (theory of separation).[26]

It is important to stress that Article 3 does not impose any restrictions concerning the use of certain means and methods of warfare. It lacks prohibitions on weaponry that cause superfluous injuries and does not protect specific civilian assets from being attacked. Instead, states declare that "[t]he application of the preceding provisions shall not affect the legal status of the Parties to conflict".[27] This means that insurgents,

23 J.S. Pictet, *Commentaries on the Geneva Conventions of 12 August 1949. Vol. III: Geneva Convention relative to the Treatment of Prisoners of War*, Geneva: ICRC, 1952, p. 44.

24 This, of course, is a great merit. See for a recent in-depth analysis: J. Pejic, "The Protective Scope of Common Article 3: More Than Meets The Eye", *International Review of the Red Cross*, vol. 93, p. 189-225, 2011.

25 Adopted by UN General Assembly Resolution 217 A (III), 10 December 1948.

26 See for details on this theory: H.-J. Heintze,. "On the Relationship between Human Rights Protection and Humanitarian Law", *International Review of the Red Cross*, Vol. 86 (2004), pp. 789 et seq.

27 Art. 3, paragraph 4, common to the four 1949 Geneva Conventions.

if not formally recognized as belligerents by the incumbent government, can still be suppressed according to the state´s domestic laws. Being strictly of a humanitarian nature, the only recognition of a non-state actor implied by Article 3 concerns the right of the International Committee of the Red Cross (ICRC) and other neutral, impartial and independent humanitarian agencies to offer its services to the parties a non-international armed conflict.

Indeed, the provision neither defines the term "non-international armed conflict" nor stipulates clear criteria that could lend substance to the concept. To be sure, states had other priorities in the wake of World War II and feared lengthy negotiations on this complex and controversial topic. They therefore rejected the ICRC´s proposal to make the Geneva Convention applicable "in all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or war of religion, which may occur in the territory of one or more of the High Contracting Parties".[28] The considerable ambiguity in relation to the material scope of application of the law of non-international armed conflicts was likely welcomed by some governments.[29] It allowed states to deny the existence of an internal armed conflict so long as the situation was not completely out of control.

The ambiguity in relation to the material scope of application of the law of non-international armed conflicts was likely welcomed by some governments

By 1977 states were prepared to make further concessions with regard to defining and regulating non-international armed conflicts. At that time, decolonization wars were coming to an end and many newly independent states had joined the United Nations. Likewise, there was a proliferation of other international platforms including the diplomatic conference on the "Reaffirmation and Development of Humanitarian Law Applicable in Armed Conflicts". One of the major outcomes of this new round of negotiations was the creation of Additional Protocols to the 1949 Geneva Conventions.

The first 1977 Protocol (Protocol I) accounts for and integrates wars "against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination"[30] into the concept of international armed conflict. Formerly these scenarios were treated as specific types of civil war, i.e. non-international armed conflicts.[31] Now "the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol"[32]

28 J. S. Pictet, ***Commentaries on the Geneva Conventions of 12 August 1949. Vol. III: Geneva Convention relative to the Treatment of Prisoners of War***, Geneva: ICRC, 1960, p. 31.

29 D. Fleck, "The Law of Non-International Armed Conflicts", in: D. Fleck (ed.), ***The Handbook of International Humanitarian Law***. Oxford: Oxford University Press, 2008, p. 609.

30 Art. 1, paragraph 4 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of the Victims of International Armed Conflicts, 8 June 1977, 1225 U.N.T.S. 3

31 K.J. Partsch, "Regeln des Humanitären Völkerrechts in nicht internationalen bewaffneten Konflikten - Umfang und Grenzen", in: H. Schötter/B. Hoffmann (eds.), ***Die Genfer Zusatzprotokolle. Kommentare und Analysen***, Bonn, Osang Verlag 1993, p. 122.

32 Art. 96, paragraph 3, lit. b) of Protocol I.

are conceded to an organized liberation movement, provided that its official representation has made a unilateral declaration (addressed to the government of Switzerland as the Protocol´s depository). Interestingly, here we have an inversion of the subjective approach insofar as it is not up to a sovereign state, but to its internal adversary to accept international legal standards. The liberation movement formerly becomes party to the conflict and is afforded with partial legal personality until its end.

Of course, this concession to non-state actors by international policy makers must be understood in historical context. In the 1970s, states were particularly sensitive to the ways in which organized liberation movements represent peoples whose collective (human) right to self-determination has been continuously violated. Although their right to form an own state by waging a war was never explicitly recognized by states, IHL once more deliberately ignores the question of legality and legitimacy of use of force for humanitarian purposes.

Yet, only a very small number of modern armed conflicts were regulated by "internationalizing" wars of independence. Therefore, a second protocol "Relating to the Protection of Victims of Non-International Armed Conflicts" (Protocol II) was approved.[33] It includes just 18 material provisions and focuses on the humane treatment and protection of civilians. It is therefore more specific than Article 3 of the 1949 Geneva Conventions. However, with some exceptions, Protocol II remains silent on prohibitions of certain methods and means of warfare. Even so, it contains, for the first time, a clear definition of non-international armed conflict. According to its Article 1, paragraph 1, of Protocol II presupposes hostilities that:

> "[…]take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol."

Referring to "organized armed groups" instead of insurgents, Protocol II uses a more neutral and contemporary language that extends to a variety of non-state actors, regardless of their motivation. But Protocol II also introduces a very high threshold by conditioning its applicability on a variety of criteria that all need to be demonstrated. *Eibe Riedel* observes that these criteria "formerly had to be met by insurgents if belligerent status was in question".[34] As such, Protocol II still presupposes scenarios resembling classic civil wars.[35]

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33 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to he Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 609.

34 E.H. Riedel, ***supra*** footnote, p. 170.

35 W. Kälin and J. Künzli, ***The Law of International Human Rights Protection***. Oxford: Oxford University Press, 2010, p. 155.

Moreover, states were careful enough to complement these positive criteria by clarifying:

> "The Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature, as not being armed conflicts."[36]

It should be noted that there had long been consensus on the point that unorganized and spontaneous violence could not amount to an armed conflict. And yet there is still no satisfactory answer to the question of at what point a severe situation of organized violence "tips over" into armed conflict.[37] Moreover, Protocol II only "supplements Article 3 common to the Geneva Conventions without modifying its existing conditions or application".[38] As Article 3 lacks specific criteria for its application, it is generally assumed that not all elements of the definition of Protocol II need to be demonstrated in order to affirm the existence of non-international armed conflict and, in particular, that the control of certain part of the territory by the non-state actor is not a constituent requirement.[39] Its minimum threshold is therefore lower than that of Protocol II. ***Karl Josef Partsch*** summarizes these differences noting how there are large-scale civil wars to which Protocol II applies, and there are small-scale civil wars covered by Common Article 3.[40] Whereas Protocol II refers to as classic civil wars, constellations of modern non-international armed conflicts are to be analyzed in the light of this single provision - some of them may be discussed under the "new war"-heading. Ultimately, Article 3 common to the 1949 Geneva Convention continues to provide the principal "black letter" legal basis for determining the existence of a non-international armed conflict. One could even go so far to say that states have "outsourced" the problem of its determination by delegating the discussion on the meaning and content of this vague concept to jurisprudence and legal doctrine.

There had long been consensus on the point that unorganized and spontaneous violence could not amount to an armed conflict

The development of the law of non-international armed conflicts by courts and tribunals

For decades states have been relatively comfortable with the ***status quo*** in relation to the conservative international legal parameters available in relation to intrastate conflicts. This situation has fundamentally changed with the end of the Cold War and, particularly, with the recent establishment of criminal tribunals competent to

36 Art. 1, paragraph 2 of Protocol II.

37 J. Odermatt, "´New Wars´and the International/Non-International Armed Conflict Dichotomy", p. 8. Paper without date available at: http://www.isisc.org/portal/images/stories/PDF/Paper%20Odermatt.pdf (accessed 12/07/12). See also R. Muggah, ***supra*** footnote. 1.

38 Art. 1, paragraph 1, of Protocol II.

39 E. Crawford, "Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts", ***Leiden Journal of International Law***, vol. 20 (2007), p. 448.

40 K.J. Partsch, ***supra*** footnote 12, p. 26.

judge war crimes. The influence of the ***ad hoc*** International Criminal Tribunals for ex-Yugoslavia (ICTY) and Rwanda (ICTR) on the applicability of the international laws of war has been especially far reaching. Both Tribunals led to the creation of the Rome Statute in 1998[41] which now guides the work of the International Criminal Court (ICC). The Statute not only reaffirms the basic distinction between international and non-international armed conflicts, but also much of the jurisprudence of its ***ad hoc*** predecessors. More than 120 states are party to this international treaty - a treaty that needs to be incorporated into domestic juridical systems. As such, International Criminal Law has become a rapidly growing subfield of international law. To a large extent it is built upon the foundations of IHL that now itself is influenced by its "younger brother".

A number of major rulings have dealt with the determination of whether a situation counts as an armed conflict or not. The now famous Tadić decision of the ICTY defined in 1995 that there is an

> "[…] armed conflict whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[42]

The absence of any objective criteria outside AP II for delineating this crucial legal concept required that the judges rely on the dominant doctrine that a non-international armed conflict is constituted by two basis elements, a certain ***intensity*** of the conflict and a certain degree of ***organization*** of the non-state actor(s). The inclusion of the intensity element by reference to "protracted armed violence" into the Rome Statute[43] has provoked a constructive dialogue between legal and academic scholars.[44] The tribunal´s statement that a non-international armed conflict may exclusively involve non-state actors was also widely seen as progressive. Yet it still seems unlikely that states are prepared to formally recognize the expansion of the concept that now covers even subnational conflicts as a special case of "new wars".

There are some indications that better defined objective standards for classifying internal armed conflict situations are emerging. In this respect, it is important to stress that the ICTR also drew from the Tadić formula recalling that it is "termed in the abstract, and whether or not a situation can be described as an ´armed conflict´, meeting the criteria of Common Article 3, is to be determined on a case-by-case basis".[45] Today, the case law generated by these and other ***ad hoc*** tribunals

41 Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 3.

42 ICTY, ***Prosecutor v. Tadic***, Case No. IT-94-I-AR 72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

43 See Art. 8, paragraph 2, f) e of the Rome Statute of the International Criminal Court, 17 July 1998, reprinted in I.L.M. (1998) 1002.

44 G. Werle, ***Principles of International Criminal Law***, The Hague, T.M. Asser Press, 2009, p. 367.

45 ICTR, ***Prosecutor v. Rutaganda***, Case No. ICTR-93-3, Trial Chamber Judgment, 6 December 1999, para. 91.

has grown to an extent still not adequately appreciated by legal scholars. More fundamentally, however, the ICTY has started to sum up its own jurisprudence by setting out possible indicators for determining the two constituent elements of a non-international armed conflict. Criteria for examining the intensity requirement include:

> "[…] the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number of caliber of munitions fired; the number of persons and type of forces taking part in the fighting; the number of casualties; extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of intensity of a conflict."[46]

The emergence of so-called "drugs wars" in Brazil, Jamaica, Mexico and other countries suggests a real, if still inadequately interrogated, link with concepts of non-international armed conflict

However, it is an open question about the extent to which these indicators are appropriate for measuring the intensity either in theory or practice. While not all of them have to be demonstrated, simply relying on quantitative criteria like number of casualties and civilians combat zones seems equally inappropriate. Obviously, what is needed is "convincing combination", but what does it mean in ***concreto***? A core aspiration of the Humanitarian Action in Situations Other than War (HASOW) initiative is to test their merit empirically through a review of both quantitative and qualitative data in a selection of settings.[47]

The same observation may be made with regard to indicators that the ICTY applies to assess the organization requirement. Key metrics include:

> "[…] the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarter; the fact that the group controls certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords."[48]

It is worth recalling that these indicators are hardly new, but have been discussed by scholars for a long time. Yet their presence in a major international legal ruling means that they can be referred to by social scientists and analysts with greater authority. They may also allow more substantiated reflections on the question of the extent to which non-state protagonists of "new wars" may be considered party to an

46 ICTY, ***Prosecutor v. Ramush Haradinaj et al.***, Case No. IT-04-84-T, Trial Chamber Judgment, 3 April 2008, para. 49.

47 See www.hasow.org.

48 ***Id.***, para. 60.

armed conflict. The emergence of so-called "drugs wars" in settings as diverse as Brazil[49], Jamaica[50], Mexico[51] and other countries suggests a real, if still inadequately interrogated, link with concepts of non-international armed conflict.

Even if there were to be more clarification on intensity and organization as criteria for determining whether a non-international armed conflict exists, this would not necessarily resolve the more complicated question of which rules are applicable in such situations. The absence of a more detailed black letter law has encouraged tribunals to draw on the second principal source of international law, i.e. international customary law, to fill critical gaps.[52] As its determination is a complicated process, the general approach has been to analogize to the law of international armed conflict. The tribunals found that many of its rules apply equally to non-international armed conflicts that themselves are often internationalized by a series of factors, such as the indirect participation of third states through certain linkages to non-state actors. As a result, in less than two decades, there is a significant merger between the Law of International Armed Conflict and Non-International Armed Conflicts.

The outcomes of this unification remain to be seen. For their part, Robert Kolb and Richard Hyde have found that: "a neat and clear distinction between the law applicable to the two types of conflict exists today only in two areas: (1) the status of combatants and prisoners of war; and (2) occupied territories. Both of the mentioned concepts do not apply automatically in case of NIAC."[53] In their opinion, the time has come to adopt a new convention that codifies and develops the law applicable in such situations. There is, however, little possibility of such a step taking place in the near term. Meanwhile, Sandesh Sivakumaran observes that research on internal armed conflict has overlooked considerable material that may facilitate the determination of the rules applicable in such situations. For example, he points to unilateral declarations, bilateral agreements between non-state armed groups, and codes of conducts as examples of rule-based behavior.[54] He calls for a shift in the still dominant state-centric formal approach and the inclusion of additional inputs

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49 S. Peterke, "Urban Insurgency, "Drug War" and International Humanitarian Law: The Case of Rio de Janeiro", ***Journal of International Humanitarian Legal Studies***, vol. 1 (2010), pp. 165-187.

50 Amnesty International (ed.), ***Jamaica: A Long Road to Justice? Human Rights Violations under the State of Emergency***. London: AI, 2011.

51 P. Gallahue, "Mexico´s ´War on Drugs´ - Real or Rhetorical Armed Conflict", ***Journal of International Law of Peace and Armed Conflict***, vol. 24 (2011), p 39-45. C. Bergal, "The Mexican Drug War: A Case for a Non-International Armed Conflict", ***Fordham International Law Journal***, vol. 34 (2011), p. 1042-1086.

52 ICTY, ***Prosecutor v. Tadić***, ***supra*** footnote, para. 97; ICTY, ***Prosecutor v. Halilović*** , Judgment, IT-01-48-T, 16 November 2005, para 25.

53 R. Kolb and R. ***Hyde, An Introduction to the International Law of Armed Conflict***, Oxford, Hart Publishing, 2008, p. 259.

54 S. Sivakumaran, "Re-envisaging the International Law of Internal Armed Conflict", ***European Journal of International Law***, vol. 22 (2011), p. 219 (260 et seq.).

emanating from non-state armed groups since it could "inform the content of the rules and give us a better sense of the state of international humanitarian law".[55]

Contributions by human rights courts and quasi-judicial organs

Alongside developments in the laws of war, international law has also been reconfigured by International Human Rights Law (IHRL). Today, the so-called theory of separation has been all but abolished by international courts through their authoritative interpretation of the derogation clauses of the most important treaties on the subject. Hence, states can no longer argue that human rights are exclusively applicable in times of peace. This is a critical, if underappreciated, development. The 1966 International Covenant on Civil and Political Rights permits the suspension of some of its guarantees in situations of "public emergency".[56] Yet, as armed conflicts are not explicitly listed as a particular case of such a state of exception, it was not entirely clear whether they were encompassed by its derogation clause. The 1950 European Convention of Human Rights and 1969 American Convention on Human Rights nevertheless refer to "war" as severest case of a public emergency that threatens the independence or security of a state party.[57] Against this backdrop, the dominant legal doctrine opposed the theory of separation, but had to wait until 1996 for its authorization, when the International Court of Justice (ICJ) stated:

> "The protection of the International Covenant on Civil and Political Rights does not cease in times of armed conflict except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from during times of national emergency."[58]

It has become commonsense that human rights continue to apply in times of armed conflict

Since then, it has become commonsense that human rights continue to apply in times of armed conflict. And while some of its so-called non-derogable guaranties, such as the right to life and the freedom from torture, can never be suspended, other provisions are more subjectively applied in accordance with the respective formal and material criteria established by specific clauses, e.g., the freedom of assembly.

The cumulative applicability of both legal regimes, IHL and IHRL, in turn required parsing out their exact relationship. In 2004, the ICJ confirmed the ***lex specialis***-approach, holding that:

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55 ***Id.***, p. 256.

56 Art. 4, paragraph 1 of International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171.

57 Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221; Article 27 of the American Convention on Human Rights, 22 November 1969, 1144 U.N.T.S. 123.

58 ICJ, ***Legality of the Threat or Use of Nuclear Weapons***, Advisory Opinion of 8 July 1996, ICJ Reports 1996, para. 25.

> "[…] there are thus three possible situations: some rights may be exclusively matters of international humanitarian law, others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights and, as ***lex specialis***, international humanitarian law."[59]

However, the Court did not provide a clear methodological framework for resolving this complex task. Moreover, it is only a general rule and in exceptional cases human rights law may be more specific and therefore prevail. Due to a substantive merger of both legal regimes, some scholars already affirm a (limited) process of fusion between IHL and IHRL.[60]

At the same time, certain regional human rights bodies are increasingly confronted with the challenge of putting the lex specialis-rule into practice. Established to interpret IHRL, they now have to ask in how far they may consult IHL. It is a new challenge and ***Daniel Thürer*** summarizes how the "European Court of Human Rights plays a rather cautious and indirect role in promoting international humanitarian law", whereas the "Inter-American Commission on Human Rights has applied rules of humanitarian law directly."[61] It needs to stressed, however, that such direct application has only occurred once, in the much criticized[62] case of ***La Tablada***, which involved an attack on several Argentinean military barracks by members of the ***Todos por la Patria***-movement.[63] The armed battle lasted almost 30 hours and resulted in the death of 29 people. The Inter-American-Commission held that:

> "Common Article 3 does not apply to riots, mere acts of banditry or an unorganized and short-lived rebellion. Article 3 armed conflicts typically involve armed strife between governmental and organized armed insurgents. It also governs situations where two or more armed factions confront one another without intervention of governmental forces (…). It is important to understand the application of Common Article 3 does not require the existence of large-scale and generalized hostilities or a

59 ICJ, ***Legal Consequences of the Construction of a Wall in the Occupied Palestinean Territory***, Advisory Opinion of July 2004, ICJ ***Reports 2004***, para. 106.

60 A. Orakehelashvili, "The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?" ***European Journal of International Law***, vol. 19 (2008), p. 164.

61 D. Thürer, ***International Humanitarian Law: Theory, Practice, Context***. The Hague, Ail-Pocket 2011, p. 159.

62 See, for example, L. Zegveld, „The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada-Case", ***International Review of the Red Cross***, No. 324 (1998), 505 et seq.

63 Inter-American Commisson on Human Rights, Report No. 55/97, Case No. 11.137, ***Abella v. Argentine***, OEA/SER/L/V/II.97, Doc. 38, October 30, 1997.

Certain scholars hold that contemporary "drug wars" already neatly fit the definition of non-international armed conflicts"

pg 18. "The Turku Declaration has recently been referred to by the Inter-American Court of Human Rights

situation of a civil war in which dissident armed groups exercise control over parts of the national territory."[64]

Meanwhile, the Inter-American Court of Human Rights clarified that the American Convention does not authorize the direct application of the 1949 Geneva Conventions, admitting, however, that they could be used to interpret the substance and scope of human rights in the context of armed conflicts.[65] In its more recent judgments[66] on the use of armed forces to control serious social unrest, the Court indicated that such quasi-military interventions as "mean(s) for controlling social protest, domestic disturbances, internal violence, public emergencies and common crime"[67] hardly justify the suspension of human rights. Hence, it is unlikely that the Court is going to analyze "drug wars" and other gray zone conflicts in the light of IHL. This reserved position reflects the majority opinion in legal doctrine as expressed ***Christian Tomuschat*** who warns that lowering the threshold of non-international armed conflict excessively could result in "favoring banditry and common crime by withdrawing the elements involved from the unrestricted reach of internal police and criminal laws."[68] Others hold that some of the contemporary "drug wars" already neatly fit the definition of non-international armed conflicts.[69]

Yet, state sovereignty continues to be the primary basis of international law influencing its interpretation and implementation. Even so, it is possible to see an incremental process of integration, both, within IHL, where the historic distinction between international and non-international armed conflicts has become less relevant, and between IHL and IHRL.

Considering functional approaches to addressing legal complexity and uncertainty

In contrast to the legalistic method of determining the existence of a non-international armed conflict on a case-by-case basis and the rules applicable thereof, there are also more problem-oriented approaches. Driven by practical considerations rather

64 ***Id.***, para. 152.

65 Inter-American Court of Human Rights, ***Case of Bámaca-Velásquez v. Guatemala***, 25 November 2000, Ser. C. No. 70 para. 208. See also the ***Case of Las Palmeras v. Colombia***, 4 February 2000, Ser. C No. 67: Preliminary Objections.

66 See, for details: L. Burgorgue-Larsen and A. Úbeda de Torres, ""War" in the Jurisprudence of the Inter-American Court of Human Rights, ***Human Rights Quarterly***, vol. 33 (2011), pp. 148-174.

67 Inter-American Court of Human Rights, ***Case of Zambrano-Vélez et al. v. Ecuador***, 4 July 2007, Ser. C No. 166, para. 51. See also the ***Case of Montero-Arangur et al. v. Venezuela***, 5 July 2006, Ser. C. No. 150, para. 78.

68 C. Tomuschat, ***Human Right Between Idealism and Realism***. Oxford: Oxford University Press, 2008, p. 312.

69 C. Bergal, "The Mexican Drug War: A Case for a Non-International Armed Conflict", ***Fordham International Law Journal***, vol. 34 (2011), p. 1042-1086.

than by formal categories, they may be referred to as "functional". Often, their principal focus is the decision-maker´s perspective. According to ***Daniel Thürer*** two methods that have been developed for escaping the necessity to analyze overlapping legal regimes of IHL and IHRL can be distinguished. One he calls the "minimum fundamental standard", the other the "pillar approach".[70] Both advocate the use of an overarching framework premised on common principles for granting more predictable and straight-forward implementation.

The "minimum fundamental standard" approach is derived from a sense that gray zone conflicts falling short of "war" are a fact of life. The approach is also premised on an acknowledgment that little substantive progress has been made to by debating (legalistic) thresholds of applicability and other complex normative characterizations. It also recognizes a gap in "protection" that is due to the suspension of human rights and the apparent inapplicability of IHL in so-called other situations of violence. Proponents of the minimum fundamental standard approach therefore seek to promote basic standards that guarantee a minimum degree of legal security in gray zone conflicts. This would be done by "affirming an irreducible core of humanitarian norms and human rights that must be respected in all situations and at all times".[71]

In fact, academic discussion on precisely such an approach began during the 1980s.[72] It has also generated some concrete results including, for example, the ***Turku Declaration of Minimum Humanitarian Standards*** of 1990.[73] Consisting of 20 provisions, Article 1 of the Declaration stresses how these rules "must be respected whether or not a state of emergency has been proclaimed" and that the "present standards shall not be interpreted as restricting or impairing the provisions of any international humanitarian or human rights instruments". Articles 2 clarifies how the ***Declaration*** applies "to all persons, groups and authorities, irrespective of their legal status and without any adverse discrimination". It thereby undertakes to assuage governments which, as shown above, would otherwise not accept conferring to criminals the status of party to an armed conflict. In addition, Article 19 of the Declaration stipulates that:

> "All person, groups and authorities shall be accountable for observance of the present standards. There shall be individual responsibility for serious violations of international humanitarian law […] States shall ensure that such crimes are prosecuted before national and or international tribunals."

70 D. Thürer,***supra*** footnote 57, p. 140.

71 A. Eide, A. Rosas and T. Meron, "Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards", ***American Journal of International Law***, Vol. 89 (1995), p. 215 (216).

72 See, for example, H.-P. Gasser, "A Measure of Humanity in International Disturbances and Tensions: Proposal for a Code of Conduct", ***International Review of the Red Cross***, no. 262 , 1988, p. 38-58.

73 Turku Declaration of Minimum Humanitarian Standards, ***American Journal of International Law***, vol. 85 (1991), p. 377.

Although many provisions of the Turku Declaration are said to be declaratory of customary international law, it was never formally adopted by the UN Human Rights Commission (today, the UN Human Rights Council). It thus has essentially remained a non-paper aspiring to be "a useful indicator to help governments and non-governmental organizations in determining when to give early warning of violations".[74] The standards, however, have recently been referred to by the Inter-American Court of Human Rights.[75]

The Turku Declaration has recently been referred to by the Inter-American Court of Human Rights

By way of comparison, the so-called "pillar approach" consists of "identifying specific areas of law where there is an operational need to establish norms protecting all persons in all circumstances. These areas may be regarded as legal no-man´s land, between the law as it is and the law as it should or needs to be."[76] At a minimum, the application of the pillar approach requires a firm grasp of the theoretical and practical problems posed by the existing legal framework. Likewise, it demands self-confidence with regard to the design of new rules and principles on the basis of functional, in particular, enforcement considerations. Therefore, this approach tends to concentrate on very specific problems such as procedural principles and safeguards for administrative detention in armed conflicts and other situations of violence.[77]

A recent contribution to the pillar approach is made by Monica Hakimi[78] who focuses on targeting and detention. These are of course of tremendous relevance in the context of "drug wars" in which police units often operate under very extreme conditions. Hakimi ´s intention is to simplify the law on targeting and detaining suspects which often seems marked by legal uncertainty due to the aforementioned need to determine which legal regimes and rules apply. She thus proposes three basic rules to be applied by decisions makers whether there is an armed conflict or not: liberty-security, mitigation, and the mistake principle. Specifically, she notes how

> "the liberty-security principle posits that, in order for targeting or detention to be justifiable, the security benefits must outweigh the costs of individual liberty. The mitigation principle requires states to try to lessen those costs by pursuing reasonable, less intrusive alternatives to contain the threat. The mistake principle demands that states exercise due diligence to reduce mistakes."[79]

74 A. Eide, A. Rosas and T. Meron, ***supra*** footnote 70, p. 215 (217)

75 Inter-American Court of Human Rights, ***Case of Zambrano-Vélez et al. v. Ecuador***, supra footnote, para. 51.

76 D. Thürer, supra footnote 57, p. 142.

77 See, e.g., J. Pejic, "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", ***International Review of the Red Cross***, No. 858 (2005), pp. 375 et seq.

78 M. Hakimi, "A Functional Approach to Targeting and Detention", ***Michigan Law Review***, vol. 110 (2012), pp. 1365-1420.

79 ***Id.***, p. 1369.

With respect to the state´s right to apply lethal force it is assumed that IHRL is in some circumstances too restrictive in addressing terrorists or other highly dangerous criminals, while IHL is more generous provided that the target qualifies as combatant. The use of the liberty-security principle would help to "identify the policy consideration at issue: not whether the person´s conduct is directly linked to hostilities, but whether killing is proportional to the threat he poses."[80] In considering the mitigation and mistake principles, further decisions could be taken in order to judge to necessity and thus legality of a killing of a suspect.

Even this cursory treatment of the functionalist approach highlights a central problem. It runs the risk of being too flexible to ensure just and adequate outcomes. Relying on abstract principles may also entail very subjective decisions of authorities influenced by locally determined political, temporal, spatial and cultural conditions. On the one hand, this might be considered to be a strength of the approach. On the other hand, rather than creating a minimum universal standard that applies at all times and under all circumstances, the deregulation proposed may unintentionally increase legal fragmentation on the level of implementation. Either way, testing such proposals seems to be necessary not only with respect to gauging their practicability, but also better understanding to the wider societal impacts. Even supposing that such principles empirically prove to be reasonable, another practical challenge is convincing law-makers of their authorization.

The "unilateral self-restraint" approach

This paper has shown how positive international law has shifted from a subjective to a more objective approach to the determination of war and armed conflicts. Even so, it seems that some historical customs and practices have been preserved, including those enabling parties to an armed conflict to unilaterally recognize certain rules and obligations. Their revitalization and reform could enrich efforts to mitigate the humanitarian consequences of "drug wars". As the unilateral recognition of certain codes of conduct and even legal standards may also serve to side-step the tricky question of whether an armed conflict is taking place and which specific rules apply, the promotion of self-restraint may also be considered a functional approach.

At first sight, it seems unrealistic to expect a government to recognize organized criminals as insurgents or belligerents. And few people expect mafia associations or drug cartels to voluntarily declare their respect for determinate rights. Without doubt, the conclusion of formal ***ad hoc*** agreements between public authorities and organized crime groups responsible for murders and other cruelties is hardly imaginable. Rather, the state is obliged to prosecute the crimes committed and to hold the perpetrators responsible. However, this does neither exclude efforts to

80 ***Id.***, p. 1399.

mediate between the rivaling actors in a categorical way nor the voluntary adherence to minimum standards.[81] The unilateral recognition of certain obligations, whether in a binding or non-binding manner must always be left on the table as a temporary solution in the interest of alleviating human suffering. Incentives for both state and non-state actors may arise from a mutual expectation of reciprocity and, just as important, greater legitimacy from the public.

Certain "drug wars" both generated and entrenched legitimacy crises for states. This is at least partly because of the ways militarized repression of crime can systematically violate human rights and alienate populations. A prominent example is Jamaica, whose government in 2010 declared a state of emergency in order capture and extradite a drug dealer, "Dudus" Coke. The dealer in question was himself embedded in a poor inner city neighborhood of west Kingston where he had presided as the local ***don***, or kingpin.[82] The question of whether it was justified or not to suspend human rights of the majority in pursuit of a known criminal continues to be hotly debated. Assuming that certain "drug wars" are used by policy makers to justify a state of emergency, even if they still may fall short of being considered armed conflicts, the unilateral recognition of rights and obligations as anticipated in the Turku Declaration of Minimum Humanitarian Standards could be promoted. Their application could, for example, bridge some aspects of the protection gap. The result could generate what Philip Jessup has described a "state of intermediacy" albeit in a different context:[83] a complicated human rights situation, but not necessarily a zone of "lawlessness". By adhering to the ***Declaration***, governments could demonstrate their good faith, thus also preserving their legitimacy.

At first sight, it seems unrealistic to expect a government to recognize organized criminals as insurgents or belligerents

In taking into consideration the possibility to convince adversaries of unilateral self-restraint, it is also possible to avoid an overly state-centric perspective. Neutral non-governmental organizations or certain key individuals enjoying respect and prestige on all sides of the conflict would be key, even if confronted with serious safety and integrity problems. Experiences with such undertakings exist from a variety of complicated conflicts. In El Salvador, for example, the "gang war" has been recently interrupted by a mediated "truce" between its principal leaders who

81 Indeed, mediation is currently ongoing between organized gangs and public authorities in El Salvador, including with support from the Organization of American States (OAS). See OAS, "Secretary General Insulza Confirms That OAS Will Accompany the Process Until Gang Violence Is Ended in El Salvador", 17 July 2012, available at:http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-255/12 (accessed 17/08/12)

82 Sheil, Ross. ***Kingston declares state of emergency after gangs attack police***. In: The Guardian, May 25, 2010. Available at: http://www.guardian.co.uk/world/2010/may/24/gangs-barricade-kingston-jamaica (27/07/2012).

83 P. Jessup, "Should International Law Recognize An Intermediate Status Between Peace and War?" ***American Journal of International Law***, vol. 48 (1954), pp. 98-103.

even announced a partial disarmament campaign.[84] As a result, homicidal violence plummeted to historic lows. Some months on and the truce continues to hold firm with many outsiders now examining the process to divine lessons for the rest of Latin America and the Caribbean. There is little doubt that more inter -disciplinary research is required on conflict mediation and unilateral self-restraint in the gray areas of organized armed violence. This includes exploring new ways and means of undertaking disarmament, demobilization and reintegration and promoting reforms in the security sector.[85] From a legal point of view, a particularly challenging task is to find out what kinds of interventions and obligations may have a realistic chance of compliance and effectiveness with non-state actors.

Concluding reflections

The formal and functional approaches discussed in this paper are not exclusive, but rather complementary. This analysis has shown that the containment and regulation of "drug wars" is complex, but also potentially amenable to new forms of intervention. Legal formalism may sometimes be perceived as an obstacle to finding practical solutions. As such, it may be desirable to agree on certain universal but functional minimum standards that do not need to be negotiated or re-invented in each individual case. If such rules and principles aspire to have practical value, they also have to feature some level of flexibility.

Whether international law and its formalism have failed to arrest the humanitarian consequences of "drug wars" is still not clear. Indeed, it could be argued that they have yet to be genuinely tested and applied. More research has to be undertaken in order to support the work of courts and tribunals that have a crucial role in defending und judging individuals and organizations on transparent grounds that dispose of sufficient legitimacy in practice and theory. It is possible to criticize international law for its dichotomous distinctions between times of armed conflict and peace. However, the problem seems less that this distinction is too rigid, but that the overlap between IHL and IHRL has made necessary complicated legal operations and decisions with limited value for practical considerations.

An unresolved problem relates to the persistent vagueness of the concept of non-international armed conflict. Giving it more substance would not necessarily resolve the overlap problem but could increase legal certainty by giving a safer orientation for governments, intergovernmental organizations and NGOs as well as other actors with regard to the question whether IHL is applicable or not. States have implicitly

84 A. Serrano, "Central America´s Gang Wars: A Truce Leads to an Unusual Peace", WorldTime, August 13, 2012. Available at: http://world.time.com/2012/08/13/central-americas-gang-wars-a-truce-leads-to-an-unusual-peace/?xid=gonewsedit (18/08/12).

85 Such efforts to mitigate the effects of undisciplined violence and use of force shall not be confused with the challenge of conflict solution or pacification.

authorized judicial organs to better define the concept of non-international armed conflict since they themselves were incapable of finding consensus on this point. The result is a new dynamic in the development of IHL due to a healthy dialogue between jurisprudence and social science scholars in which also functional considerations play a role. Yet, the limited utility of its outcomes with regard to mitigating the effects of "drug wars" and other gray zone conflicts has to be recognized.

An unresolved problem relates to the persistent vagueness of the concept of non-international armed conflict

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